

CR 2024/51

International Court  
of Justice

Cour internationale  
de Justice

THE HAGUE

LA HAYE

YEAR 2024

*Public sitting*

*held on Thursday 12 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)*

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VERBATIM RECORD

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ANNÉE 2024

*Audience publique*

*tenue le jeudi 12 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)*

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COMPTE RENDU

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

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*Présents :* M. Salam, président  
M<sup>me</sup> Sebutinde, vice-présidente  
MM. Tomka  
Abraham  
Yusuf  
M<sup>me</sup> Xue  
MM. Bhandari  
Iwasawa  
Nolte  
M<sup>me</sup> Charlesworth  
MM. Brant  
Gómez Robledo  
M<sup>me</sup> Cleveland  
MM. Aureescu  
Tladi, juges  
  
M. Gautier, greffier

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M. Abdulal Aljasm, doctorant à l'Université Jean Moulin Lyon 3.

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

The Court meets this morning to hear Thailand, Timor-Leste, Tonga, Tuvalu and the Comoros on the questions submitted by the United Nations General Assembly. Each of the delegations has been allocated 30 minutes for its presentation. The Court will observe a short break after the presentation of Tonga.

I shall now give the floor to Ms Suphanvasa Chotikajan Tang, speaking on behalf of Thailand.

Ms TANG:

### **I. GENERAL REMARKS**

1. Good morning. Mr President, Madam Vice-President, Members of the Court, it is an honour for me to appear before you on behalf of the Kingdom of Thailand.

2. Today, we will highlight three factors to be taken into account in States' obligations of due diligence in respect of climate change. But before addressing the legal questions, we wish to first offer some brief observations on the importance of these proceedings to Thailand and the international community, which in turn bears on the Court's role and approach here.

#### **A. Importance of these advisory proceedings to Thailand and the international community**

3. In addressing the Court today, our interest is not just theoretical; it is *practical, immediate*, and above all, deeply *personal*.

4. Our people was borne out of the fertile soil that is now Thailand. Our ancestors said: "In the water, there is fish; in the fields, there is rice". These words have connected generations of Thai people, as they encapsulate how nature nourishes and nurtures us. My own grandfather was also a rice farmer. After rice seeds have germinated, our farmers transplant these seedlings by hand, one by one, into flooded fields, where fish also thrive. This back-breaking labour alone, however, would not turn seedlings into harvest without nature's blessings. Through rain-making rituals, our ancestors prayed that there would be no droughts or floods, no heat waves or cold snaps.

5. Yet, no prayer can protect our children from the changes that are threatening to leave our waters still, our paddy fields barren. We, too, are experiencing rising temperatures and extreme

weather<sup>1</sup>. Meanwhile, rising sea levels loom large over a tropical coastal nation such as ours, especially 24 coastal provinces and low-lying areas like Bangkok<sup>2</sup>.

6. But we stand before you today not solely out of the concern for our own future. At the core of Thailand's cultural and social fabric is the understanding that everything is interdependent and interconnected. So too are our ecosystems. And the suffering caused by climate change is a reality shared across countries and continents. No State, regardless of its contribution to emissions, is or will stay immune. After all, nature does not know of "nationality", "legal personality" or "State responsibility".

7. Does it mean that international law and these proceedings are futile, because climate change is just *too* complex, because the Court's advisory opinion is not binding, or because all these are just words?

8. Not so. In Thailand's view, it is because climate change is an interconnected challenge, that the solution must come from addressing it — not just on our own, but together, in the language of international law.

9. Action, indeed, speaks louder than words; yet words are the seeds of action. And the seeds have already been sown. From *Trail Smelter* to *Pulp Mills*, from Stockholm to Paris, many have germinated as legal obligations applicable to climate change, as we have heard in the past days.

10. And here, in this Great Hall, we also find the climate for these seedlings to thrive: the *trust* that international law — international *justice* — can rise to the challenge of climate change. That trust is why all 193 United Nations Member States have seised the Court *as one* in seeking the Court's advice. That trust is why more than 100 States and international organizations — including many from Asia and Africa — have decided to speak.

### **B. The Court's role and general approach in these advisory proceedings**

11. That brings us to the Court's role and general approach in these proceedings. In our view, it is now the charge of the Court to *transplant* these seedlings firmly into the field, so that we may turn them into action — and so that our children's generation may reap the harvest. To do so, in

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<sup>1</sup> See e.g. Thailand's Fourth Biennial Update Report (2022), XVII.

<sup>2</sup> *Ibid.*

approaching the questions, the Court is invited to (1) consider all voices, (2) clarify the existing law and (3) connect theory to practice.

### **1. The Court should consider the voices of all members of the international community.**

12. *First*, Thailand appreciates the colossal task before the Court in the face of practical constraints. In your consideration of the voices of *all* States — the primary makers as well as subjects of international law — you are reaffirming that international justice is not the privilege of the few, but a right accessible to all States.

13. While all States are affected by climate change, every State is impacted differently. International law must reflect that diversity as well. As the late Vice-President Weeramantry said, international law must “draw upon the world’s diversity of cultures in harmonizing development and environmental protection”<sup>3</sup>. We, too, wish to offer our experience in doing so — from our agrarian roots to our ongoing green transition.

### **2. The Court should clarify and consolidate existing legal rules relevant to climate change**

14. *Second*, while the Court need not — and should not — venture into uncharted legal territory of *lex ferenda*, the interventions so far have demonstrated the need for clarity on what the law currently is. We say “*the law*”, not “*the laws*”. In our view, this is because we see the existing rules of international law relevant to climate change as an *interconnected* whole. For this reason, where possible, the Court should systematically integrate and construe these relevant rules harmoniously, so as to give rise to a single set of compatible obligations<sup>4</sup>.

15. We agree with the majority of Participants<sup>5</sup> that the United Nations climate change treaty régime neither “modifies [nor] limits the obligation” under the law of the sea<sup>6</sup>, international

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<sup>3</sup> *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Reports 1997, separate opinion of Vice-President Weeramantry, pp. 96-98, subheading (d) on p. 96.

<sup>4</sup> See Study Group of the International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* (2006) A/CN.4/L.682 and Add.1, 8; see also ILC Guidelines on the Protection of the Atmosphere (2021), pp. 39, 43-44, Guideline 9; 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. 136.

<sup>5</sup> See e.g. CR 2024/35, pp. 147-149, paras. 2-14 (Zimmermann); CR 2024/39, pp. 21-24, paras. 1-7 (Sarvarian); CR 2024/39, pp. 58-59, paras. 9-14 (Aboulmagd); CR 2024/45, pp. 10-11, paras. 7-12 (Pérez Galena); CR 2024/46, pp. 34-36, paras. 17-22 (Hallum); CR 2024/49, pp. 59-62, paras. 1-12 (Jalloh).

<sup>6</sup> *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*, Advisory Opinion of 21 May 2024, ITLOS 81, para. 224.

environmental law and international human rights law<sup>7</sup>. Rather, the climate change treaties should be interpreted and applied in light of these pre-existing obligations, and vice versa.

### **3. The Court should give practical guidance on the legal obligations in respect of climate change**

16. *Finally*, it is not enough to just unify and restate the law. Rather, “[t]he task of the law is to convert . . . wisdom into practical terms”<sup>8</sup> — that is, concrete legal obligations that are applicable and *actionable* in addressing climate change. Thailand also aims to offer a practitioner’s perspective, informed by our experiences as both a developing nation and an active participant in global climate governance. With that I turn to the question on which the Court’s advice is sought.

## **II. OBLIGATIONS OF STATES IN RESPECT OF CLIMATE CHANGE**

17. Mr President, Members of the Court, Thailand aligns itself with the emerging consensus so far that, as greenhouse gas emissions pollute the environment<sup>9</sup> and threaten the full enjoyment of human rights<sup>10</sup>, States *do* have legal obligations to ensure the protection of the climate system, through mitigation, adaptation and co-operation. Again, these legal obligations come from the climate change treaties, but also other rules of international law<sup>11</sup>.

18. In particular, we reaffirm that these obligations are duties of due diligence — that is, of conduct, not of result<sup>12</sup>.

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<sup>7</sup> See Statement on Human Rights and Climate Change, joint statement by Committee on the Elimination of Discrimination Against Women, Committee on Economic, Social and Cultural Rights, Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, Committee on the Rights of the Child, and Committee on the Rights of Persons with Disabilities, 14 May 2020, UN doc. HRI/2019/1.

<sup>8</sup> *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*, Advisory Opinion of 21 May 2024, ITLOS, para. 103.

<sup>9</sup> See 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, paras. 159-170.

<sup>10</sup> See *Daniel Billy and others v. Australia (Torres Strait Islanders Petition)* [2019] CCPR/C/135/D/3624/2019, para. 8.3. See also Human Rights Committee, General Comment No. 36, Article 6: Right to Life, CCPR/C/GC36, para. 26.

<sup>11</sup> 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. 224; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996 (I), p. 241, para. 27; *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010 (I), p. 56, para. 101; Statement on Human Rights and Climate Change, joint statement by Committee on the Elimination of Discrimination Against Women, Committee on Economic, Social and Cultural Rights, Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, Committee on the Rights of the Child, and Committee on the Rights of Persons with Disabilities, 14 May 2020, UN doc. HRI/2019/1.

<sup>12</sup> *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010 (I), p. 56, para. 101.

19. Thailand concurs that, whereas States are allowed a level of discretion in determining what climate change measures are necessary, the standard is “stringent” and “objective”<sup>13</sup>. As one key factor, a State’s climate policy should be effectively designed and implemented in light of the best available science. Discretion is not a license for *inaction* — for example, if a State does not quantify its remaining carbon budget altogether<sup>14</sup>.

20. At the same time, it is important for States to also consider other factors in their objective assessment<sup>15</sup>, because the climate change measures involve harmonizing different interests. The Court could provide helpful guidance as to these relevant factors, including how they may translate into practice. Here, we will focus on how States should take into account three interconnected sets of interests, to ensure (a) equity in each State; (b) equity across States; and (c) equity across generations.

### A. Equity in each State

21. To begin, Thailand invites the Court to consider *just transition* — an evolving concept that has gained significant recognition in international climate law but not yet received adequate attention in the interventions so far<sup>16</sup>.

22. The concept of “just transition” was adopted at COP16 in 2010<sup>17</sup>, and was incorporated into the preamble of the Paris Agreement as “the imperatives of a just transition of the workforce and the creation of decent work and quality jobs in accordance with nationally defined development priorities”.

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<sup>13</sup> 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, paras. 241-243, 256-258.

<sup>14</sup> European Court of Human Rights, *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, Judgment of 9 April 2024, para. 572.

<sup>15</sup> See 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. 207.

<sup>16</sup> See e.g. CR 2024/37, p. 32, para. 7 (Figueiredo Machado); CR 2024/40, p. 18, para. 6 (Vázquez-Bermúdez); CR 2024/44, p. 45, para. 3 (Usham); CR 2024/, p. 39, para. 11 (Deza Ferreccio). See also African Union Written Statement, para. 18 (b); Albania Written Statement, para. 7; Antigua and Barbuda Written Statement, para. 482; Argentina Written Statement, para. 44; Egypt Written Statement, para. 137; IUCN Written Statement, paras. 17-20; MSG Written Statement, para. 333; Tonga Written Statement, para. 202; Tuvalu Written Statement, paras. 7, 105; UAE Written Statement, para. 40; Mauritius Written Comment, para. 70; Samoa Written Comment, para. 149; Saudi Arabia Written Comment, para. 2.18.

<sup>17</sup> UNFCCC, “Decision 1/CP.16, The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention”, 15 March 2011, UN doc. FCCC/CP/2010/7/Add.1 section I. A shared vision for long-term cooperative action, para. 10; *ibid.*, section E. Economic and social consequences of response measures, recital 4.



23. While this preambular reference does not create legal obligations as such, it should be taken into account in interpreting the Paris Agreement’s provisions. More broadly, the concept of “just transition” may provide guidance on what it means to consider *national* circumstances and capacities in relation to the obligation of due diligence.

24. So far, many Participants have talked about their *international* dimension, such as CBDR-RC. Indeed, although the preamble to the Paris Agreement focused on labour *within* a State, in the parties’ subsequent practice, the concept is expanding to *international* dimensions of “just transition” beyond labour<sup>18</sup>. We will come to that shortly. But we believe it is important to start with the “national” — equity within every State.

25. To put it simply, while every State should transition to a green economy, no one should be left behind. This means creating new and better work opportunities — decent work — for workers and vulnerable communities affected by the shift. We will also have to ensure that they can benefit from these new economic opportunities, which calls for measures that support and empower them.

26. In this sense, the concept of just transition is a reminder that every State should address climate change while respecting socio-economic rights — such as the right to work and adequate standard of living. Considering just transition in the obligation of due diligence, therefore, aligns not only with the Paris Agreement, but also with international human rights and labour laws<sup>19</sup>.

27. Neglecting these socio-economic dimensions might exacerbate inequalities and brew resistance to climate policies — or even multilateralism and international law itself.

28. For developing countries in particular, achieving a just transition is a significant challenge due to limited resources and capacities. These States require conducive conditions to implement necessary changes without compromising their development goals<sup>20</sup>. This brings us to the *international* dimension of just transition.

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<sup>18</sup> See Written Submission of the ITUC and the ITF (<https://www.ituc-csi.org/ituc-itf-submission-to-the-icj>).

<sup>19</sup> International Labour Organization, *Guidelines for a Just Transition towards Environmentally Sustainable Economies and Societies for All*, 2015; Office of the High Commissioner for Human Rights and International Labour Organization, *Human Rights and a Just Transition*. See also Vilja Johansson, “Just Transition as an Evolving Concept in International Climate Law”, *Journal of Environmental Law*, Volume 35, Issue 2, July 2023, pp. 229-249.

<sup>20</sup> “Supporting the conditions for a just transition internationally”, adopted 4 November 2021 at the COP26; see also Vilja Johansson, “Just Transition as an Evolving Concept in International Climate Law”, *Journal of Environmental Law*, Volume 35, Issue 2, July 2023, at p. 241.

## B. Equity across States

29. Turning, then, to equity across States, Thailand also invites the Court to clarify the role played by the principle of CBDR-RC in States' obligation of due diligence in respect of climate change.

30. In our view, the principle acknowledges that, while all States bear the obligation of mitigation, adaptation and co-operation, the specific conduct required of each State must take into account "different national circumstances"<sup>21</sup>, capacities and levels of development.

31. Although the phrase "common but differentiated responsibilities and respective capabilities" was first explicitly articulated *as such* in the climate change treaties<sup>22</sup>, the underlying principle clearly animates the duty of due diligence, which accounts for the States' capacities and national circumstances. This principle is also reflected in other treaty obligations, such as the obligations of due diligence under UNCLOS<sup>23</sup>.

32. To be clear, CBDR-RC is, again, not an excuse for inaction. Even among non-Annex I States, each must contribute to the extent permitted by its own capabilities and national circumstances — with the appropriate international assistance.

33. That brings us to another aspect of CBDR-RC. The principle not only guides the mitigation and adaptation measures required, but also shapes the obligation to co-operate. This means that States have an obligation to provide assistance on mitigation and adaptation to developing countries particularly vulnerable to the effects of climate change. This includes, for example, scientific, technological, and financial support and assistance<sup>24</sup>.

34. This is also aligned with the principle of international co-operation in the UN Charter<sup>25</sup>, the Friendly Relations Declaration<sup>26</sup>, human rights treaties<sup>27</sup> and the ILC's Draft Articles on the

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<sup>21</sup> Paris Agreement, Article 4 (3)-(4).

<sup>22</sup> UNFCCC, Article 3 (1).

<sup>23</sup> 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, paras. 225-229, 249, 326.

<sup>24</sup> See e.g. UNFCCC, Articles 4 (3), 5 (b), 6 (a) (iv); Paris Agreement, Articles 9, 10 and 11; UNCLOS, Article 202 and Part XIV.

<sup>25</sup> UN Charter, Articles 55, 56.

<sup>26</sup> Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, UN doc. A/RES/2625(XXV).

<sup>27</sup> Statement on Human Rights and Climate Change, joint statement by Committee on the Elimination of Discrimination Against Women, Committee on Economic, Social and Cultural Rights, Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, Committee on the Rights of the Child, and Committee on

Protection of persons in the event of disasters<sup>28</sup>. Similarly, Article 2, paragraph 1, of the International Covenant on Economic, Social and Cultural Rights emphasizes *every* State’s duty to take steps to achieve the full realization of those rights “individually and through international assistance and co-operation, especially economic and technical, *to the maximum of its available resources*”. As confirmed by the French delegate at the time, this reference to the States’ “resources” means “countries with substantial resources should lend their assistance internationally”<sup>29</sup>.

35. As ITLOS observed, this assistance to developing States is “a means of addressing an inequitable situation” because those States who have contributed less to emissions suffer more severely from their effects<sup>30</sup>. International support is thus crucial in ensuring that developing countries can achieve their “highest possible ambition” in a just and inclusive way. Above all else, amidst the interdependent causes and effects of climate change, by helping others, we are helping ourselves and our children.

36. To illustrate how these concepts operate in practice, we would like to offer our recent experiences with sustainable rice production and regional water co-operation.

37. While rice has been at the core of Thai people’s culture and livelihood, we also began to realize that traditional methods, requiring the continuous flooding of paddy fields, have led to greenhouse gas emissions.

38. But just as technological advances have unlocked the door to modernization leading to climate change, technology is also the key to closing the floodgates and mitigating that impact. There are now green farming technologies like Alternate Wetting and Drying and Laser Land Levelling, which not only significantly reduce emissions and conserve water, but also enhance farming efficiencies and farmers’ profits.

39. So, in 2018, we launched the Thai Rice Nationally Appropriate Mitigation Action, or the “NAMA” project, with the development agency GIZ and funded primarily by Germany, the

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the Rights of Persons with Disabilities, 14 May 2020, UN doc. HRI/2019/1.

<sup>28</sup> International Law Commission, “Draft articles on the protection of persons in the event of disasters”, *Yearbook of the International Law Commission*, 2016, Vol. II, Part Two, pp. 36-29, draft Articles 7-8.

<sup>29</sup> Human Rights Commission, “Summary Record of the Two Hundred and Thirty-Third Meeting”, 2 July 1951, UN doc. E/CN.4/SR.233, 7 UN ESCOR C.4, 8.

<sup>30</sup> 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. 327.

United Kingdom, Denmark and the European Commission. Through this partnership, completed in August, we were able to bring those innovative practices to Thai rice farmers.

40. Our farmers care deeply about nature, are among the first to feel its impacts. But many of them are smallholders with limited access to finance and already heavily in debt<sup>31</sup>.

41. With our partners' support, we established financial mechanisms to lower financial barriers and cover initial costs of implementing sustainable practices without imposing prohibitive upfront expenses on the farmers.

42. Through this international co-operation, the Thai Rice NAMA project — and now its successor project funded by the Green Climate Fund<sup>32</sup> — provided precisely the support our farmers needed for a just transition to sustainable practices. This partnership has allowed us and our partners to share our common but differentiated responsibilities according to our respective capacities, and without compromising socio-economic rights and development goals.

43. At the same time, Thailand reaffirms that every State shares the obligation to co-operate according to its capacities. In particular, we believe regional co-operation is vital, especially among developing countries, to address the pressing need for adaptation.

44. A case in point is our ongoing co-operation in the regional water legal framework under the Mekong River Commission, which unites us with our neighbours — Cambodia, Laos and Viet Nam — in managing our shared water resources and focusing on adaptation measures.

45. In light of our experiences, we invite the Court to highlight how the obligations of co-operation and assistance facilitate developed and developing States in fulfilling their obligation of due diligence to their “highest possible ambition[s]”. In this regard, we join the call for developed States to better fulfil their financial obligations, among others, under the Paris Agreement, particularly through the Loss and Damage Fund<sup>33</sup>. At the same time, developing States can also

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<sup>31</sup> NAMA Facility, “Thailand Low-Emission Rice (Thai Rice) Mid-term Evaluation and Learning Exercise (ELE) Report & Management Response”, May 2022; Kerstin Linne, Juejan Tangtermthong, Rishika Das Roy, “Mid-term Evaluation and Learning Exercise of the Thai Rice NAMA Support Project: NAMA Support Project Evaluation and Learning Exercises for the NAMA Facility”, November 2021.

<sup>32</sup> “Transforming Thailand’s Rice Sector Toward Low Emissions”, *The Nation Thailand*, 25 April 2024.

<sup>33</sup> See e.g. CR 2024/41, p. 49, para. 22 (Joseph); CR 2024/45, p. 12, para. 7 (Ascensio); CR 2024/47, p. 34, para. 27 (Lefeber).

effectively fulfil their obligations of mitigation and adaptation by co-operation, including on a regional level.

46. Mr President, Members of the Court, I now request that you call upon my Co-Agent, Mr Songchai Chaipatiyut, to address the third set of interests: equity across generations. Thank you.

The PRESIDENT: I thank Ms Suphanvasa Chotikajan Tang. Je passe maintenant la parole à M. Songchai Chaipatiyut. Vous avez la parole.

M. CHAIPATIYUT :

1. Monsieur le président, Madame la vice-présidente, Mesdames et Messieurs les Membres de la Cour, c'est un privilège pour moi de m'adresser à vous au nom du Royaume de Thaïlande.

### C. Équité entre les générations

2. Le changement climatique a des effets néfastes qui s'étendent sur plusieurs générations. Il est temps que le droit international réponde à cette préoccupation pour l'humanité en assurant l'équité entre les générations présentes et futures — ou « les générations à venir »<sup>34</sup>. C'est, en effet, la raison d'être du principe d'*équité intergénérationnelle*.

3. Les générations futures ont été une composante essentielle des instruments et des traités relatifs à l'environnement. La déclaration de Stockholm reconnaît « le *devoir* solennel de protéger et d'améliorer l'environnement pour les générations futures »<sup>35</sup>. Dans le même esprit, 20 ans plus tard, la déclaration de Rio affirme que « [l]e droit au développement doit être réalisé de façon à satisfaire *équitablement* les besoins relatifs au développement et à l'environnement des générations présentes et futures »<sup>36</sup>. La convention-cadre souligne également que les États doivent « préserver le système climatique *dans l'intérêt* des générations présentes et futures »<sup>37</sup>. L'accord de Paris va encore plus

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<sup>34</sup> *Licéité de la menace ou de l'emploi d'armes nucléaires, avis consultatif, C.I.J. Recueil 1996 (I)*, p. 242, par. 29.

<sup>35</sup> Déclaration de Stockholm sur l'environnement humain, rapport de la conférence des Nations Unies sur l'environnement humain, Stockholm, 5-16 juin 1972, résolutions adoptées par la conférence, Nations Unies, publication No. E.73.II.A.14, principe 1 (les italiques sont de nous).

<sup>36</sup> Déclaration de Rio sur l'environnement et le développement, conférence des Nations Unies sur l'environnement et le développement, Rio de Janeiro, 3-14 juin 1992, vol. I, résolutions adoptées par la conférence (publication des Nations Unies, No. E.93.I.8 et rectificatif), résolution 1, annexe I, principe 3 (les italiques sont de nous).

<sup>37</sup> Convention-cadre des Nations Unies sur les changements climatiques (CCNUCC), 9 mai 1992 (entrée en vigueur le 21 mars 1994), Nations Unies, art. 3, par. 1 (les italiques sont de nous).

loin en affirmant explicitement pour la première fois que les actions climatiques doivent prendre en compte « l'équité entre les générations »<sup>38</sup>.

4. Nous devons maintenant agir de manière responsable pour préserver les besoins et les intérêts des générations futures, car elles risquent de subir des dommages environnementaux encore plus graves ou irréversibles en raison de notre conduite actuelle. Pour cette raison, tenir compte des besoins et des intérêts des générations futures est également conforme à l'approche de précaution, que cette Cour a reconnue comme pouvant « se révéler pertinente pour interpréter et appliquer » des accords environnementaux<sup>39</sup>.

5. En septembre dernier, la communauté internationale a unanimement réaffirmé l'urgence d'une action climatique pour les générations futures à travers le pacte pour l'avenir<sup>40</sup> et la déclaration sur les générations futures<sup>41</sup> adoptés lors du sommet de l'avenir des Nations Unies. Bien que ces documents relèvent du droit souple, ils sèment cependant une graine qui pourrait germer en une reconnaissance que les intérêts des générations futures ne sont pas seulement de nature philosophique ou politique, mais qu'ils peuvent également constituer des intérêts *d'ordre juridique* — que « de nombreuses juridictions nationales ... s'efforcent ... de préserver »<sup>42</sup>.

6. Cela dit, les besoins et les intérêts sont distincts des droits. À cet égard, une question reste en suspens : les générations futures ont-elles des droits humains qu'elles pourraient opposer à leur propre État, ou même contre des États tiers, en vertu du droit international, en cas de violation des droits humains et des obligations en matière de changement climatique ?

7. Nous notons à cet égard l'émergence des litiges climatiques devant les juridictions nationales et régionales — avec des résultats mitigés — appelant les gouvernements à prendre des mesures positives pour atténuer les impacts du changement climatique et reconnaissant l'obligation des États de protéger les droits des générations futures<sup>43</sup>.

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<sup>38</sup> Accord de Paris, adopté à Paris lors de la 21<sup>e</sup> Conférence des Parties à la CCNUCC, le 12 décembre 2015 (entré en vigueur le 4 novembre 2016), Nations Unies, FCCC/CP/2015/10/Add.1, préambule, al. 11.

<sup>39</sup> *Usines de pâte à papier sur le fleuve Uruguay (Argentine c. Uruguay)*, arrêt, C.I.J. Recueil 2010 (I), p. 71, par. 164.

<sup>40</sup> A/RES/79/1.

<sup>41</sup> *Ibid.*, annexe II, principes directeurs, par. 18.

<sup>42</sup> *Ibid.*, annexe II, préambule, al. 5.

<sup>43</sup> Setzer et Higham, « Tendances mondiales des litiges liés au changement climatique : Aperçu 2024 »; Lin et Peel, *Litigating Climate Change in the Global South* (Oxford University Press, 2024).

8. À l'heure actuelle, bien que le droit international permette à des individus d'intenter des actions contre des États dans des circonstances limitées dans le cadre du régime des droits humains, cela est réservé uniquement à la génération présente. La Thaïlande observe les défis pratiques qui subsistent, qu'il s'agisse de définir le concept des générations futures ou les droits pouvant être conférés à une telle catégorie d'individus. Toutefois, nous observons également les évolutions rapides dans ce domaine du droit international<sup>44</sup>. Pour sa part, la Thaïlande, en tant que membre du Conseil des droits de l'homme des Nations Unies 2025-2027, s'engage non seulement à relever les défis actuels en matière de droits humains, mais aussi à intégrer les questions relatives aux droits humains pour les générations futures<sup>45</sup>.

9. La Thaïlande invite donc la Cour à confirmer que les États devraient être guidés par les besoins et les intérêts des générations futures comme facteurs clés dans l'exercice de leurs obligations de diligence raisonnable en matière de changement climatique. La Cour pourrait, le cas échéant, clarifier la *lex lata* concernant les générations futures et le principe d'équité intergénérationnelle. Cette clarification constituera une base constructive pour les négociations futures entre États, en vue de mieux prendre en compte les impacts intergénérationnels du changement climatique.

### III. CONCLUSION

10. Monsieur le président, Madame la vice-présidente, Mesdames et Messieurs de la Cour, pour conclure, nous soulignons que les obligations des États en matière de changement climatique doivent, avant tout, être ancrées dans l'équité — dépliée en trois dimensions : équité au sein de chaque État, entre États et entre les générations. Ces dimensions de l'équité tissent ensemble le tissu d'un avenir durable.

11. Les graines ont été semées et cultivées dans un climat de confiance envers le droit international. Le moment est maintenant venu pour la Cour de les transplanter fermement — en offrant des orientations pratiques, en clarifiant le droit, et en accueillant les voix de la communauté internationale qui s'est tournée vers la Cour pour obtenir des conseils. Il revient bien entendu à nous

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<sup>44</sup> Voir, par exemple, Comité des droits de l'enfant, observation générale n° 26, CRC/C/GC/26, par. 11 ; Sandy Liebenberg *et al.*, « Principes de Maastricht sur les droits humains des générations futures ».

<sup>45</sup> Candidature de la Thaïlande au Conseil des droits de l'homme (CDH), « Avancer les droits de l'homme : créer une réelle différence ».

tous de transformer ces graines en récolte pour nos enfants de demain, grâce à nos actions d'aujourd'hui.

12. Je vous remercie.

The PRESIDENT: Je remercie les représentants de la Thaïlande pour leur présentation. I now invite the delegation of Timor-Leste to make its oral statement and I call upon Ms Elizabeth Exposto to take the floor.

Ms EXPOSTO:

## I. INTRODUCTION

1. Mr President, Members of the Court, it is an honour to appear before the Court in this momentous proceeding for the first time on behalf of the Democratic Republic of Timor-Leste.

2. Timor-Leste has deep respect for international law. After centuries of colonization and 24 years of military occupation, international law played a crucial role in our achievement of sovereignty and fulfilment of our right to self-determination.

3. For the Timorese people, international law is not merely a set of abstract principles — it is a vital foundation of our sovereignty and rights.

4. The Timorese view international law as a critical bulwark against oppression and coercion, ensuring fairness and justice in a world marked by power imbalances. For small nations like ours, it provides a level playing field where even the smallest of nations can stand as equals with the largest.

5. Our belief in international law was reaffirmed after Timor-Leste initiated a compulsory conciliation under the United Nations Convention on the Law of the Sea which resolved our protracted dispute with Australia over our maritime boundaries and sovereign rights.

6. Timor-Leste's faith in international law is further demonstrated in our co-sponsorship of the resolution requesting this advisory opinion<sup>46</sup>.

7. Climate change is undeniably one of the most critical challenges of our time.

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<sup>46</sup> United Nations General Assembly, *Report of the International Court of Justice*, UN doc. A/77/PV.64, 29 March 2023, p. 4, <https://www.icj-cij.org/sites/default/files/case-related/187/187-20230630-req-03-00-en.pdf>.



8. As a small island developing State (SIDS) located in south-east Asia within the Wallacea biodiversity hotspot and at the heart of the “Coral Triangle”, Timor-Leste recognizes the profound implications for future generations if immediate and decisive action is not taken<sup>47</sup>.

9. Timor-Leste is ranked the 28th most vulnerable country to climate change<sup>48</sup>. Timor-Leste’s written pleadings comprehensively detail the effects of climate change on our nation.

10. Since achieving independence in 2002, we have built our country from the ground up. And while Timor-Leste has made significant development progress, the battle to pull our people out of extreme poverty continues daily. Over 48 per cent of Timor-Leste’s population is considered multidimensionally poor<sup>49</sup>.

11. For us, development is not a luxury but a necessity — a matter of survival for our people.

12. Timor-Leste believes that the climate crisis cannot be considered in isolation from the problems of global poverty and inequality. With over four billion people living in extreme poverty and over two billion people experiencing food insecurity, the global economic system has been organized against the interests of the people of least developed countries (LDCs).

13. The climate crisis that we face today is the result of the historical and ongoing actions of industrialized nations, which have reaped the benefits of rapid economic growth, powered by colonial exploitation and carbon-intensive industries and practices. These nations, representing only a fraction of the global population, are overwhelmingly responsible for the climate crisis.

14. And yet, the impacts of climate change do not respect borders. While LDCs and SIDS have historically contributed the least to the problem, we are bearing its gravest consequences.

15. While all nations share a common duty to combat climate change, their responsibilities must reflect historical contributions to the problem and their respective capacities to address it. This is why the principle of common but differentiated responsibilities and respective capabilities in fighting climate change is so fundamental.

16. As an LDC with constrained resources, we are heavily reliant on the petroleum sector which we utilize to support socio-economic development. However, our emissions remain at an

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<sup>47</sup> United Nations, *Climate Change*, <https://www.un.org/en/global-issues/climate-change>.

<sup>48</sup> *Timor-Leste: ND-GAIN Index*, <https://gain-new.crc.nd.edu/country/timor-leste>.

<sup>49</sup> United Nations Development Program, *Briefing note for countries on the 2023 Multidimensional Poverty Index: Timor-Leste* (Report, 2023), p. 2, <https://hdr.undp.org/sites/default/files/Country-Profiles/MPI/TLS.pdf>.

extremely low level, being just 0.003 per cent of global emissions<sup>50</sup>. The transition to a low-carbon future is necessary, but its costs cannot be disproportionately borne by the most vulnerable. Climate justice demands that nations like mine should be allowed the opportunity to build a sustainable future. Industrialized countries must leave what little remains of the carbon budget for developing States, in particular LDCs and SIDS, to pursue our sustainable and inclusive economic development.

17. It is imperative that the climate response does not deny LDCs their right to development and to develop their natural resources, in accordance with the principles of self-determination and permanent sovereignty over natural resources.

18. It would be a cruel injustice for the people of Timor-Leste, who fought so hard to secure sovereignty over its seas from Australia, including the allocation of resource rights in the Timor Sea, to not gain the socio-economic benefits of those resources.

19. Such a burden would effectively deny many Timorese access to basic health and education, while simultaneously limiting job opportunities for our youth in what is already a fragile national context.

20. The legacy of historic injustices continues into the present. Climate justice cannot be achieved without accounting for the inequality arising from colonial rule and the actions of developed and high-emitting States. This Court has the opportunity to affirm that the global climate response must be fair, inclusive and just. Timor-Leste hopes and trusts the Court will consider the vulnerabilities of SIDS and LDCs, and empower them to change the lives of their people using their available resources.

21. Mr President, Members of the Court, I thank you for your attention and kindly request that you invite His Excellency Ambassador Adão Barbosa to continue Timor-Leste's statement.

The PRESIDENT: I thank Ms Elizabeth Exposto. I now give the floor to His Excellency Mr Adão Soares Barbosa.

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<sup>50</sup> Government of Timor-Leste, *Nationally Determined Contribution Timor-Leste 2022 — 2030*, p. 1, [https://unfccc.int/sites/default/files/NDC/2022-11/Timor\\_Leste%20Updated%20NDC %202022\\_2030.pdf](https://unfccc.int/sites/default/files/NDC/2022-11/Timor_Leste%20Updated%20NDC%202022_2030.pdf).

Mr BARBOSA:

## II. CLIMATE FINANCING

1. Mr President, Members of the Court, it is an honour to appear before the Court in these extraordinary advisory proceedings in my position as Special Envoy and Ambassador-at-Large for Climate Affairs of Timor-Leste.

2. As Ms Exposto stated, Timor-Leste, like many of the other developing States that have come before the Court these past two weeks, has contributed little to climate change yet we are bearing the brunt of climate change impacts. Climate change profoundly threatens our environment and our economy, and even more importantly, it threatens our children and their futures.

3. As we have heard throughout these proceedings<sup>51</sup>, developed States are failing to fulfil their mandated obligations under Article 4 of the UNFCCC and Article 9 of the Paris Agreement to provide climate-related financial assistance to developing States.

4. From 2020 to 2024, developed country parties failed to meet their commitment to provide US\$100 billion per year in climate financing to developing States. At COP29 in Baku, parties set a new US\$300 billion finance goal for developed country parties to take the lead to mobilize climate finance to developing States. This amount is barely an increase over the previous US\$100 billion 2020 goal when inflation is taken into account, and it is still merely about mobilizing from a range of sources rather than directly contributing to the finance. The LDC Group, of which Timor-Leste is a member, called the outcome “a staggering betrayal of the world’s most vulnerable”<sup>52</sup>.

“Despite its clear legal financing obligations for developed States, the UNFCCC regime has not delivered climate action, climate finance, nor climate justice. As Parties from the LDC Group stated in our closing press release on the finance outcome from COP29: Powerful nations have shown no leadership, no ambition, and no regard for the lives of billions of people on the frontlines of the climate crisis . . . The voices of our 1.1 billion people have been ignored . . . our pleas were met with indifference . . . This outright dismissal erodes the fragile trust that underpins these negotiations and mocks the spirit of global solidarity.”

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<sup>51</sup> See for example, CR 2024/35, p. 111, para. 3 (Vanuatu), pp. 131-132, paras. 18-21 (Albania); CR 2024/36, p. 57, para. 21 (Bahamas), p. 74, para. 11 (Bangladesh); CR 2024/40, p. 66, para. 13 (Fiji); CR 2024/41, p. 25, para. 26 (Sierra Leone) p. 4, para. 32 (Ghana); CR 2024/42, pp. 49-50, paras. 22-26 (India), p. 65, para. 19 (Indonesia); CR 2024/43, p. 16, para. 5 (Jamaica), p. 30, para. 7 (Kenya); CR 2024/44, p. 49, para. 9 (Maldives).

<sup>52</sup> LDC Climate Change, “COP29: A Staggering Betrayal of the World’s Most Vulnerable”. 24 November 2024, [https://www ldc-climate.org/press\\_release/cop29-a-staggering-betrayal-of-the-worlds-most-vulnerable/](https://www ldc-climate.org/press_release/cop29-a-staggering-betrayal-of-the-worlds-most-vulnerable/).

5. Developed States are also not delivering on their obligations of redress to address the loss and damage caused by their climate inaction. The Fund for responding to loss and damage operationalized at COP28 falls far short of what developing States need to address loss and damage. The amount pledged by developed States to the Fund to date is a tiny fraction of the close to US\$1 trillion per year that is estimated to be needed to address the irreversible economic and non-economic losses faced by developing States. Moreover, the voluntary nature of the Loss and Damage Fund provides no certainty or continuity of funds for developing States.

6. A mandatory loss and damage reparations scheme would provide consistent, effective, and adequate funds to cover the loss and damage experienced by vulnerable States<sup>53</sup>.

7. Debt forgiveness is also required to enable developing countries to address the burdens of climate change mitigation, adaptation, and loss and damage for climate change that they did not cause. LDCs and SIDS currently spend more than twice as much to service their debts as they receive to fight the climate crisis<sup>54</sup>.

8. Developing States have already paid a high price for the climate crisis. We cannot continue to be “short-changed” at the expense of our poverty alleviation and sustainable development. We cannot ask SIDS and LDCs to use the resources needed for their socio-economic development to finance climate change response, especially when their contribution is so negligible.

9. Mr President, Members of the Court, thank you for your attention. I now ask that the Court please invite Mr Eran Sthoeger to continue Timor-Leste’s submissions.

The PRESIDENT: I thank Mr Barbossa. I now give the floor to Mr Eran Sthoeger.

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<sup>53</sup> See for example Antigua & Barbuda, Written Statement, 22 March 2024, [489]-[494]. See for example the written statements of the following States and international organizations: Antigua & Barbuda [115], Australia [2.45]-[2.46], Bahamas [210], Bangladesh [141], Costa Rica [122], France [230], Ghana [28], Korea [49], Madagascar [80]-[81], Marshall Islands [74], [82], Singapore [4.8], Solomon Islands [247], Timor-Leste [371], Tonga [307]-[308], [312], and United Arab Emirates [85].

<sup>54</sup> International Institute for Environment and Development, “World’s least developed countries spend twice as much servicing debts as they receive in climate finance”, 16 October 2024, <https://www.iied.org/worlds-least-developed-countries-spend-twice-much-servicing-debts-they-receive-climate-finance>.

Mr STHOEGER:

### III. OBLIGATIONS OF STATES AND LEGAL CONSEQUENCES

1. Mr President, Madam Vice-President, Members of the Court, it is an honour to appear before you today on behalf of Timor-Leste.

2. Timor-Leste has already presented the Court with its full position in its written pleadings. At this juncture, as we inch closer to the end of the oral hearings, it is becoming clear that certain critical issues continue to divide the Participants. Timor-Leste will make observations on some of these issues in the hope of assisting the Court.

3. Mr President, I will start with the divisive issue of the applicable law. For Timor-Leste, applicable law is not about choosing one law to the exclusion of the other. It is about finding rules that provide a legal framework that directly addresses a factual and legal question. In other words, what rules are most relevant and useful, at the very least as a starting point for the Court's inquiry; as opposed to rules that are complementary, or relevant in a less direct way.

4. There are, it seems, some assertions that are not contentious, with which Timor-Leste generally agrees. *First*, the vast majority of States are of the view that the Court should strive to harmonize the obligations of States across different régimes so to ensure systematic integration<sup>55</sup>, as also reflected in Article 31 (3) (c) of the Vienna Convention on the Law of Treaties.

5. *Second*, there also seems to be agreement that the UNFCCC and the Paris Agreement (or the "climate change treaties")<sup>56</sup> contain rules that are specifically tailored to address climate change<sup>57</sup>.

6. And *third*, States rejecting the *lex specialis* argument do so mainly based on the assertion that it only applies when the special rules are in conflict, inconsistent with or modify the more general rules of international law<sup>58</sup>.

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<sup>55</sup> E.g. CR 2024/36, [6(b)] 42 (Australia); CR 2024/38, [16] [18] 13 (Canada); CR 2024/41, [6] 9 (France); CR 2024/41, [24] 58 (Guatemala); CR 2024/45, [7]-[13] 10-11 (Mexico); CR 2024/46, [17]-[22] 34-36 (New Zealand); CR 2024/47, [1]-[14] 46-50 (Democratic Republic of the Congo).

<sup>56</sup> United Nations Framework Convention on Climate Change, opened for signature 9 May 1992, *UNTS*, Vol. 1771, p. 107 (entered into force 21 March 1994); Paris Agreement, opened for signature 22 April 2016, *UNTS*, Vol. 1155, p. 46 (entered into force 4 November 2016).

<sup>57</sup> E.g. CR 2024/36, [7] 68 (Bangladesh); CR 2024/38, [5] 42, [9] 43, [11] 43, [12] 44 (Colombia); [11] 44, [4] 46 (Denmark, Finland, Iceland, Norway and Sweden); CR 2024/39, [4] 67 (El Salvador); CR 2024/35, [10]-[13] 142 (Germany); 2024/41, [22] 58 (Guatemala); CR 2024/36, [4] 27, [7] 29, [10] 29 (Saudi Arabia); CR 2024/45, [10] 33 (Myanmar); CR 2024/47, [14] 40 (Peru); CR 2024/40, [8] 18 (Ecuador).

<sup>58</sup> E.g. CR 2024/36, [11] 69 (Bangladesh); CR 2024/37, [5] 10 (Belize); CR 2024/38, [12] 44 (Colombia);

7. With that in mind, you will recall that last week Belize took you to a river, which I will now take you back to. “The river flows through various States — States A, B, C and D. States A and B have, to varying but significant degrees, each dumped quantities of a metal pollutant in the river”<sup>59</sup>. This causes significant transboundary harm to States C and D. “[R]eplace the ‘metal pollutant’ with ‘greenhouse gases’, and the ‘river’ with ‘atmosphere’”, Belize says, and apply the rule on transboundary harm<sup>60</sup>.

8. I will not get into the question of whether damage caused by a pollutant is comparable to greenhouse gas emissions in terms of causality. Rather, Mr President, let me add something to this scenario to make it more analogous to the law governing climate change. Imagine if States A, B, C and D came together and concluded a treaty. The treaty contains both procedural and substantive obligations specifically addressing the introduction of this metal pollutant in the river. Furthermore, the States convene annually to monitor compliance and advance the implementation of the régime. In this scenario it would seem counter-intuitive to take the view that the treaty does not play a central role in assessing the obligations of the parties. While the treaty does not necessarily replace customary international law, it surely is the latest expression of the States’ consent and must be given its due weight. This, Timor-Leste submits, is a more accurate frame of reference.

9. Here too, the climate change treaties address the specific threat of greenhouse gas emissions. Their rules are discussed and reviewed regularly.

10. The rules in the climate change treaties are both procedural and substantive as Timor-Leste explained at length in its written submissions<sup>61</sup>. These are obligations with respect to mitigation, adaptation and transfer of finances and technology.

11. With respect to mitigation, this includes an obligation of conduct — a due diligence obligation — to pursue necessary domestic mitigation measures, under Article 4 (2) of the Paris Agreement in order to prevent harm caused by greenhouse gas emissions<sup>62</sup>. As other due diligence

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CR 2024/39, [5] 12 (Costa Rica); CR 2024/40, [10] 19 (Ecuador); CR 2024/39, [13] 59 (Egypt); CR 2024/45, [51] 48 (Namibia); CR 2024/46, [8]-[9] 16 (Nauru); CR 2024/46, [30] 63 (Pakistan).

<sup>59</sup> CR 2024/37, [2] 12 (Belize).

<sup>60</sup> *Ibid.*, [4] 13 (Belize).

<sup>61</sup> Timor-Leste, Written statement, 22 March 2024, Chapter VI.

<sup>62</sup> Lavanya Rajamani, “Interpreting the Paris Agreement in its Normative Environment” (2024) *Current Legal Problems*, Vol. 77 (1).

standards, it evolves with time and circumstances. This has been noted by a diverse group of States during the written and oral proceedings, including the Bahamas<sup>63</sup>, Cameroon<sup>64</sup>, Colombia<sup>65</sup>, Japan<sup>66</sup>, and the Marshall Islands<sup>67</sup>, to name a few<sup>68</sup>.

12. The pre-existing and more general rules of customary international law, such as the prevention rule, as well as human rights treaties, the United Nations Convention on the Law of the Sea (UNCLOS) and the Convention on Biodiversity, serve as interpretive tools to complement and enhance the régime. They are, in this way, integral to the régime.

13. Mr President, the existence of one single mitigation obligation for States, which is properly informed and interpreted in light of other obligations, is the proper exercise of harmonization, as pointed out by The Gambia yesterday<sup>69</sup> and Thailand just now.

14. The International Tribunal for the Law of the Sea (ITLOS) in its recent Advisory Opinion, recognized the role of the climate change treaties as part of a systematic approach. When interpreting the obligations under UNCLOS, the Tribunal found the “relevant external rules” in the climate change treaties<sup>70</sup>. The Tribunal referred to “the UNFCCC and the Paris Agreement, as the primary legal instruments addressing the global problem of climate change”<sup>71</sup>.

15. This is similar to the approach taken by this Court in the *Nuclear Weapons* Advisory Opinion. In that instance, where self-defence was at issue, the Court approached the matter through the rules on the use of force. As the Court found, environmental treaties do not<sup>72</sup> “deprive a State of

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<sup>63</sup> Bahamas, Written comments, 15 August 2024, [49]; CR 2024/36, [11]-[12] 60 (Bahamas).

<sup>64</sup> Cameroon, Written comments, 15 August 2024, [31].

<sup>65</sup> Colombia, Written comments, 15 August 2024, [3.27]; CR 2024/48 (Colombia).

<sup>66</sup> Japan, Written comments, 15 August 2024, [35]-[46]; CR 2024/45, [8]-[13] 51-53 (Japan)

<sup>67</sup> Marshall Islands, Written comments, 15 August 2024, [15].

<sup>68</sup> See also Australia, Written comments, 15 August 2024, [2.27]; CR 2024/36, [15] 44 (Australia); Colombia, Written comments, 15 August 2024, [3.27]; CR 2024/48 (Colombia); CR 2024/41, [38]-[41] 61 (Guatemala); Mauritius, Written comments, 15 August 2024, [36]-[44]; Written comments, 15 August 2024, [32]; CR 2024/45, [4]-[13] 12-13 (Mexico); CR 2024/39 [9] 46 (Denmark, Finland, Iceland, Norway and Sweden); CR 2024/40, [26]-[27] 45 (United States of America); CR 2024/40, [14] 9 (United Arab Emirates); CR 2024/49, (Seychelles).

<sup>69</sup> CR 2024/49 (Gambia).

<sup>70</sup> ITLOS, *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*, Case No. 31, Advisory Opinion of 21 May 2024, para. 137.

<sup>71</sup> *Ibid.*, para. 222.

<sup>72</sup> *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I) p. 242, para. 30.*

the exercise of its right of self-defence under international law because of its obligations to protect the environment”.

16. In that case, environmental considerations were surely integral, but not the governing law.

17. This approach correctly balances the obligations of States under the different régimes. And while others may disagree, the propositions some Participants have made surely cannot stand and I will mention a few.

18. *First*, that the relevant obligations are found in the climate change treaties exclusively<sup>73</sup>. Such a position treats the treaties as a self-contained régime and does not harmonize States’ obligations.

19. *Second*, some call on the Court to apply the “entire corpus of international law”<sup>74</sup>. Now, surely not all States’ obligations are relevant to the questions before the Court. Such an approach does not provide any guidance as to what laws are in fact relevant.

20. *Third*, that the climate change treaties only contain procedural obligations, and the substantive obligations are found elsewhere<sup>75</sup>. As just discussed, the Paris Agreement contains a substantive obligation of due diligence.

21. *Fourth*, some States say that the climate change treaties, customary international law, and other treaties exist in parallel and separately<sup>76</sup>. Of course, if they were not separate obligations, we would not need to harmonize them. But these States maintain that the standard of conduct under other bodies of law, is different or more stringent than that in the climate change treaties, and ask you to apply that standard<sup>77</sup>.

22. Respectfully, this proposition is the opposite of systematic integration. Harmonization strives to identify “a single set of compatible obligations”, in the words of the International Law

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<sup>73</sup> CR 2024/38, [8] 29-30, [9] 30 (China); CR 2024/36, [4] [7] [9] 27, [7] 29, [10] 29-30, [11] 30 (Saudi Arabia).

<sup>74</sup> CR 2024/37, [17] 23 (Bolivia), [4] 44 (Burkina Faso); CR 2024/39, [9] 58 (Egypt); CR 2024/41, [3] 33 (Ghana); CR 2024/42, [7] 38 (Solomon Islands).

<sup>75</sup> E.g. CR 2024/36, [6] 17 (Antigua and Barbuda); CR 2024/36, [7] 68 (Bangladesh); Nauru, Written Statement, 22 March 2024, [30]-[31].

<sup>76</sup> E.g. CR 2024/37, [6] 11 (Belize); CR 2024/46, [13]-[16] 18-19 (Nauru); CR 2024/46, [30]-[33] 63 (Pakistan).

<sup>77</sup> E.g. CR 2024/40, [4]-[5] 35 (Spain); CR 2024/41, [5]-[6] 20-21 (Sierra Leone); CR 2024/46, [13] 11 (Nauru); CR 2024/46, [17]-[18] 59-60 (Pakistan); CR 2024/43, [32] 38 (Kenya); CR 2024/45, [12]-[17] 41-42 (Namibia).



Commission's Study Group on fragmentation<sup>78</sup>, not inconsistent and divergent standards of conduct of due diligence under separate régimes.

23. Moreover, several of the States that take this position, assert that the *lex specialis* rule applies when the specific régime conflicts, is inconsistent with, or modifies the more general rule<sup>79</sup>. Inconsistency or conflict includes a situation where one rule is more onerous and/or protective than the other. This is confirmed by the Court's treatment of the more protective right to life vis-à-vis the rules of international humanitarian law in the *Nuclear Weapons* Advisory Opinion<sup>80</sup>. Accordingly, arguing for an inconsistency between two standards of due diligence leads to the application of *lex specialis*, the very result these States want to avoid.

24. Finally, it is without question that the procedural and substantive rules agreed have not succeeded in averting the climate crisis as of date. But that does not mean they do not exist. It means that States need to, *first*, comply with their obligations and, *second*, agree on better rules that adapt to the evolving best available science. The Court could find that, in implementation of their duty to co-operate, States are under an obligation to negotiate new agreements in good faith to meet the greatest challenge of our time<sup>81</sup>.

25. Mr President, I turn briefly to the treatment of the principle of common but differentiated responsibilities and respective capabilities, or CBDR-RC, in the ITLOS Advisory Opinion.

26. The Tribunal found that UNCLOS "contains some elements common to this principle"<sup>82</sup>. *Some*, but not all. As noted in Timor-Leste's written comments<sup>83</sup>, ITLOS only acknowledged half of the CBDR-RC principle as it is understood in the climate change context. While the Tribunal considered the relevance of the present capabilities of States, it did not consider the normative relevance of climate justice and historic emissions as an aspect of CBDR-RC<sup>84</sup>.

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<sup>78</sup> *Fragmentation of International Law: Difficulties arising from the diversification and expansion of international law*, Report of the Study Group of the International Law Commission, UN doc. A/CN.4/L.702 (18 July 2006), p. 8.

<sup>79</sup> E.g. CR 2024/46, [8]-[9] 16-17 (Nauru); CR 2024/46, [30] 63 (Pakistan); CR 2024/40, [10] 19 (Ecuador).

<sup>80</sup> *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 240, para. 25.

<sup>81</sup> CR 2024/40, [7] 29 (Ecuador).

<sup>82</sup> ITLOS, *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*, Case No 33, Advisory Opinion of 21 May 2024, para. 229; Timor-Leste, Written Comments, 15 August 2024, [83]-[95].

<sup>83</sup> *Ibid.*

<sup>84</sup> United Nations Framework Convention on Climate Change, opened for signature 9 May 1992, *UNTS*, Vol. 1771, p. 107 (entered into force 21 March 1994); Paris Agreement, opened for signature 22 April 2016, *UNTS*, Vol. 1155, p. 146

27. More broadly, UNFCCC Article 4(10) states that the climate change treaties' implementation shall take into account the position of States with economies that are "highly dependent on income generated from the production, processing and export, and/or consumption of fossil fuels". And it is important to remember that all treaty parties to the climate change treaties, and all States participating in these proceedings, agreed to this language. Article 4(1) of the Paris Agreement also acknowledges that certain developing States will experience an increase in their emissions in the near term.

28. CBDR-RC as one author puts it, "acquired distinctive content and character in the climate change regime"<sup>85</sup>. These aspects of CBDR-RC — only found in the climate change treaties — are critical and protect least developed countries (LDCs) and small island developing States (SIDS) entirely dependent on their energy sector to stay afloat. Timor-Leste is such a State, as Côte d'Ivoire acknowledged last week.<sup>86</sup> As Guatemala said, CBDR-RC should not be diluted<sup>87</sup>.

29. Mr President, allow me to make one point on the issue of causation, specifically on the role of causation with respect to the rule on transboundary harm.

30. Causation is usually a matter of the secondary rules of international law. With respect to the rule on transboundary harm, however, causation is a matter of primary law. To prove a breach of the substantive rule on transboundary harm, one must show that there is direct causal link between the acts or omissions of a specific State and specific damage to another State. Otherwise, there is no wrongful act. Your jurisprudence confirms this<sup>88</sup>.

31. In practice causation can only be determined on a case-by-case basis. But known difficulties in proving causation in the case of greenhouse gas emissions may diminish the

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(entered into force 4 November 2016); United Nations Conference on Environment and Development, Rio Declaration on Environment and Development, UN doc. A/CONF.151/26 (Vol. I) (12 August 1992); CR 2024/41, [8] 34 (Ghana), [31]-[32] 60 (Guatemala); CR 2024/40, [18] 25 (Ecuador).

<sup>85</sup> Lavanya Rajamani, "Interpreting the Paris Agreement in its Normative Environment" (2024), *Current Legal Problems*, Vol. 77 (1); Lavanya Rajamani, "National 'fair share' in reducing greenhouse gas emissions within the principled framework of international environmental law", *Climate Policy* (2021), Vol. 21 (8), p. 985.

<sup>86</sup> CR 2024/39 (Côte d'Ivoire).

<sup>87</sup> CR 2024/41, [29] 59 (Guatemala).

<sup>88</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007 (I), [462]; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Compensation, Judgment, I.C.J. Reports 2018 (I), [34]; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Reparations, Judgment, I.C.J. Reports 2022(I), [349].

effectiveness of transboundary harm in holding States accountable, as a matter of principle, not just in assessing damages.

32. Mr President, the last point I would like to address is a point Guatemala made last week, that the questions before you pertain to all forms of greenhouse gas emissions from all sources<sup>89</sup>. Much of the focus in these proceedings, has been on the energy sector, which contributes 34 per cent of global emissions<sup>90</sup>. What of the other 66 per cent? According to the IPCC, these come from the industry sector (24 per cent); agriculture, forestry and land use (22 per cent); transport (15 per cent); and buildings (about 5 per cent)<sup>91</sup>.

33. The IPCC notes that mitigation policies adopted by States remain “limited for emissions from agriculture”<sup>92</sup>. This is despite the fact that livestock is believed to be responsible for up to 28 per cent of greenhouse gas emissions, including the vast majority of methane emissions<sup>93</sup>. It is also the main driver of deforestation<sup>94</sup>.

34. Solutions to the climate crisis, as the IPCC asserts, must be cross sector<sup>95</sup>. Likewise, the Court’s opinion in these proceedings would equally apply across all sectors, and to all forms of greenhouse gas emissions.

35. Mr President, to conclude, human activities will result in greenhouse gas emissions. The current excess of emissions is due to human consumption, and much like development and wealth, consumption is not equal among States and people.

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<sup>89</sup> CR 2024/41, [13] 56 (Guatemala).

<sup>90</sup> Intergovernmental Panel on Climate Change, ‘2022: Emissions Trends and Drivers’ in *2022: Climate Change 2022: Mitigation of Climate Change. Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 2022) 218 <[https://www.ipcc.ch/report/ar6/wg3/downloads/report/IPCC\\_AR6\\_WGIII\\_Chapter02.pdf](https://www.ipcc.ch/report/ar6/wg3/downloads/report/IPCC_AR6_WGIII_Chapter02.pdf)>.

<sup>91</sup> *Ibid.*; see also Bahamas, Written Statement, 22 March 2024, [18]; Timor-Leste, Written Comments, 15 August 2024, [76]; Saudi Arabia, Written Comments, 15 August 2024 [1.4].

<sup>92</sup> Intergovernmental Panel on Climate Change, *Climate Change 2023 Synthesis Report* (Cambridge University Press, 2023) 52-55 <[https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC\\_AR6\\_SYR\\_LongerReport.pdf](https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_LongerReport.pdf)>.

<sup>93</sup> Melina Lima, “The Ignored Impact of the Livestock Sector on Climate Change: An Analysis from the Perspective of International Law” (2024) *German Law Journal*, pp. 3-4.

<sup>94</sup> Food and Agriculture Organization, “COP26: Agricultural expansion drives almost 90 percent of global deforestation” (6 November 2021), available at <<https://www.fao.org/newsroom/detail/cop26-agricultural-expansion-drives-almost-90-percent-of-global-deforestation/en>>.

<sup>95</sup> Intergovernmental Panel on Climate Change, *Climate Change 2023 Synthesis Report* (Cambridge University Press, 2023) 106 <[https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC\\_AR6\\_SYR\\_LongerReport.pdf](https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_LongerReport.pdf)>.

36. Change in consumption habits are required of all of us, but predominantly from those that have — and continue to — consume more than their fair share. LDCs and SIDS like Timor-Leste, on the other hand, have extremely low per capita emissions<sup>96</sup>. Timor-Leste recalls, in this context, the distinction it made in its written submissions between subsistence pollution being that necessary for survival; and luxury pollution; and the necessity to narrow the gap between the two<sup>97</sup>.

37. Mr President, Madam Vice-President, Members of the Court, thank you for your kind attention. This concludes Timor-Leste's submissions.

The PRESIDENT: I thank the representatives of Timor-Leste for their presentation. I now invite the delegation of Tonga to make its oral statement and I call upon Ms Linda Simiki Folaumoetu'i to take the floor.

Ms FOLAUMOETU'I I:

## I. INTRODUCTION

1. Mr President, Madam Vice-President, Members of the Court, *Mālō ho 'omou Laumalie!*

2. It is an honour to appear before the Court in these historic advisory proceedings as a representative of the Kingdom of Tonga, in my position as Attorney General. I am accompanied by our legal counsel, Ms Gitanjali Bajaj.

3. We thank our youth, the Pacific Island Students Fighting Climate Change, for bringing this important issue forward, and the Republic of Vanuatu for leading this initiative at the regional and global level.

4. We are guided by the words of the United Nations Secretary-General, Mr António Guterres, at the opening of the 53rd Pacific Island Forum Leaders Meeting in Tonga, where he urged Pacific Islands to “make your voices heard and heard loudly, because the world needs your leadership”<sup>98</sup>.

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<sup>96</sup> Timor-Leste, Written Statement, 22 March 2024, [331]; Timor-Leste, Written Comments, 15 August 2024, [68].

<sup>97</sup> *Ibid.*

<sup>98</sup> United Nations News, “‘The world needs your leadership’, Guterres tells Pacific Islands Forum” (25 Aug. 2024), available at <https://news.un.org/en/story/2024/08/1153541>.

5. We stand here in solidarity with 27 small island developing States (SIDS), including 14 Pacific island States making submissions in these proceedings on issues that threaten the very existence of our nations, our people and future generations to come.

6. The Kingdom of Tonga has existed with its people, its language, and its culture and traditions being passed from generation to generation. The very existence of this small island, and its surrounding ocean, has been the heritage of the Tongan people, encompassing their home and identity as Tongans<sup>99</sup>.

7. In the early 1800s, a time where colonialism was prevalent, Tonga struggled to maintain its identity as a sovereign nation<sup>100</sup>. The founder of modern Tonga, His Late Majesty George Tupou I, recognized that, to preserve the sovereignty and territorial integrity of the Kingdom, global recognition by other independent States was vital<sup>101</sup>. This led to Tonga signing its first formal treaty, the Convention of Peace and Friendship between France and Tonga in 1855<sup>102</sup>, which was followed by subsequent treaties with Germany, Great Britain and the United States. Since then, the Kingdom of Tonga has maintained its sovereignty, with generations taking pride in their identity as Tongans.

8. I bring this piece of history before this honourable Court to illustrate the important role international law has played in levelling the playing field for Tonga and in protecting and preserving the sovereignty and territorial integrity of vulnerable islands like my home, Tonga, and its people.

9. Today, I stand before you, once again seeking a solution under international law to protect and preserve the Kingdom of Tonga due to the existential threat caused by climate change and its impacts. We are living in unprecedented times, with increasing global emissions, extreme weather events and rising sea levels putting a strain on our country and its resources. Despite Tonga's negligible contribution to the climate crisis, it is now the third-most vulnerable nation in the world to the effects of climate change<sup>103</sup>.

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<sup>99</sup> Tonga Written Statement, para. 257.

<sup>100</sup> Sione Lātūfeku, *Church and State in Tonga: The Wesleyan Methodist missionaries and political development, 1822-1875* (book, 1974), University Press of Hawaii.

<sup>101</sup> Ministry of Foreign Affairs and the Attorney General's Office Government of the Kingdom of Tonga, *Tonga Treaty Collection: Tonga's Collection of Treaties, Agreements, and Arrangements (First Edition)*, Foreword (treaty collection, 2023).

<sup>102</sup> Signed at Nuku'alofa 9 January 1855 (effective 9 January 1855).

<sup>103</sup> World Risk Index, *WorldRiskReport 2021* (report, 2021), available at [https://weltrisikobericht.de/wp-content/uploads/2021/09/WorldRiskReport\\_2021\\_Online.pdf](https://weltrisikobericht.de/wp-content/uploads/2021/09/WorldRiskReport_2021_Online.pdf) ; United Nations Climate Change, "Tonga Climate Change Trust Fund – Tonga" (2023), available at <https://unfccc.int/climate-action/momentum-for-change/activity-database/tonga>

10. In 2022, the Pacific Island Forum Leaders declared that “the Pacific is facing a Climate Emergency that threatens the livelihoods, security and wellbeing of its people and ecosystems”<sup>104</sup>. The IPCC’s Sixth Assessment Report in 2023 also observed that small island States are “disproportionately affected” by climate change, in particular when contrasted with our negligible contributions to the crisis<sup>105</sup>.

11. Tonga is one of the world’s most exposed countries to climate change<sup>106</sup>. Each year, Tonga grapples with the intensifying consequences of climate change, threatening and impacting our economy, our food security and our population’s wellbeing. In recent years, Tonga has suffered increasingly severe storms, causing widespread damage to basic public infrastructure, livelihoods and living facilities<sup>107</sup>. In 2018, Tropical Cyclone Gita impacted 80 per cent of Tonga’s population through the destruction of buildings, crops and infrastructure, resulting in US\$165 million in damage, being approximately one third of Tonga’s GDP<sup>108</sup>.

12. There have been witness statements in Tonga’s written submission, which provides an insight into the lived reality of our people:

(a) Firstly, ‘Etimoni Palu stated:

“In the 25 years that I have been operating PSF, I have seen a progression of the weather getting worse and sea temperatures getting warmer . . . Over the course of the last 20 years, I can see that sea temperatures are about 2-3°C warmer than what they used to be. I am certain that this has had an impact on our catch rate. For example, our catch rate is 30-40 percent lower than what it used to be when I first started PSF.”<sup>109</sup>

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climate-change-trust-fund.

<sup>104</sup> Aleisha Orr and Shuba Krishnan, “Pacific leaders will declare a ‘climate emergency’. This is what it looks like across the region” (16 July 2022), SBS News, available at: <https://www.sbs.com.au/news/article/pacific-leaders-will-declare-a-climate-emergency-this-is-what-it-looks-like-across-the-region/5gsvgem4h>.

<sup>105</sup> Intergovernmental Panel on Climate Change, *Climate Change 2023 Synthesis Report* (2023), 6, available at [https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC\\_AR6\\_SYR\\_LongerReport.pdf](https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_LongerReport.pdf); Written Comment of COSIS, para. 33.

<sup>106</sup> See Tonga being rated 3<sup>rd</sup> most-exposed nation to the effects of climate change in World Risk Index, *WorldRiskReport 2021* (report, 2021), available at: [https://weltrisikobericht.de/wp-content/uploads/2021/09/WorldRiskReport\\_2021\\_Online.pdf](https://weltrisikobericht.de/wp-content/uploads/2021/09/WorldRiskReport_2021_Online.pdf).

<sup>107</sup> Tonga Written Statement, [70].

<sup>108</sup> United Nations, *Surging seas in a warming world: The latest science on present-day impacts and future projections of sea-level rise* (report, 26 August 2024), 13, available at [https://www.un.org/sites/un2.un.org/files/slr\\_technical\\_brief\\_26\\_aug\\_2024.pdf](https://www.un.org/sites/un2.un.org/files/slr_technical_brief_26_aug_2024.pdf).

<sup>109</sup> Tonga Written Statement, Witness Statement of ‘Etimoni Palu, [8].

(b) Secondly, Sioka Noa stated:

“In the decades that I have been fishing or involved in fishing in Kolonga, I have noticed changes in the species of fish available. In the early 1990s, it was possible to catch various fish and marine species, especially when the tides were low, and the seas are calm . . . However, in the last five to 10 years I have seen a decrease in the catch. The perfect conditions for fishing or calm seas are hard to come by.”<sup>110</sup>

(c) And thirdly, in Pulu Ma'u's statement, he stated: “Tongan people share a deep connection to the land that they and their ancestors grew up in. When they are forced to leave that place, they risk losing a sense of belonging, cultural identity and heritage.”<sup>111</sup>

13. We are here today because we as a State face a collective action problem. We are united by the crisis that we face, but divided in how we should address it.

14. Despite, or perhaps because of, our vulnerability to climate change, SIDS are at the forefront of climate action globally<sup>112</sup>. In Tonga, we have developed an ambitious climate change policy<sup>113</sup>, accompanied by a national climate change fund to support mitigation and adaptation projects<sup>114</sup>.

15. In the Pacific, we have championed the Pacific Island Forum's (PIF) Framework for Resilient Development in the Pacific and, during our term as Chair, we have launched the Pacific Resilience Facility. This is the first Pacific-owned and Pacific-led climate financing solution<sup>115</sup>.

16. During the United Nations General Assembly this year, the Leaders of the Alliance of Small Island States (AOSIS) endorsed the Declaration on Sea Level Rise and Statehood 2024<sup>116</sup>.

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<sup>110</sup> Tonga Written Statement, Witness Statement of Sioka Noa, [5]-[6].

<sup>111</sup> Tonga Written Statement, Witness Statement of Pulu Ma'u, [9].

<sup>112</sup> United Nations Development Programme, “Small Island Developing States are on the frontlines of climate change – here's why” (Explainers, 30 April 2024), available at: <https://climatepromise.undp.org/news-and-stories/small-island-developing-states-are-frontlines-climate-change-heres-why>.

<sup>113</sup> Government of Tonga, “Tonga Climate Change Policy – A Resilient Tonga by 2035” (policy report, February 2016), available at: <https://policy.asiapacificenergy.org/sites/default/files/Tonga%20Climate%20Change%20Policy-%20A%20Resilient%20Tonga%20by%202035.pdf>.

<sup>114</sup> Government of Tonga, *Tonga Climate Change Fund Act (2021), Act 5 of 2021* (statute, 2021), available at: <https://natlex.ilo.org/dyn/natlex2/natlex2/files/download/113928/TON113928.pdf>; Government of Tonga, *Tonga Climate Change Fund Regulations (2024), Regulation 5* (statute, 2024), available at: [https://ago.gov.to/cms/images/LEGISLATION/SUBORDINATE/2024/2024-0037/TongaClimateChangeFundRegulations2024\\_1.pdf](https://ago.gov.to/cms/images/LEGISLATION/SUBORDINATE/2024/2024-0037/TongaClimateChangeFundRegulations2024_1.pdf); UN Climate Change, *Tonga Climate Change Trust Fund – Tonga* (online, 2023), available at: <https://unfccc.int/climate-action/momentum-for-change/activity-database/tonga-climate-change-trust-fund>.

<sup>115</sup> Pacific Islands Forum, “Pacific Resilience Facility – Fact Sheet” (online, 2024), available at: [https://forumsec.org/sites/default/files/2024-09/PRF%20FACT%20SHEET\\_0.pdf](https://forumsec.org/sites/default/files/2024-09/PRF%20FACT%20SHEET_0.pdf).

<sup>116</sup> Alliance of Small Island States (AOSIS), “Declaration on Sea-Level Rise and Statehood” (declaration, 23

Also, most recently, the Commonwealth Heads of Government, at its 2024 Annual Meeting in Samoa, adopted the Apia Commonwealth Ocean Declaration for One Resilient Common Future<sup>117</sup>.

17. While there is a global collective action problem, there is no regional collective action problem. But we cannot act alone.

18. Tonga, together with the other 27 SIDS taking part in these proceedings, calls upon this Court to clarify the obligations of all States under international law in respect of climate change. States need to take collective, transformational and co-operative action to mitigate climate change for the benefit for both present and future generations, and this Court's advisory opinion can play an instrumental role in achieving this. To echo Mr Guterres' recent declaration at COP29: "The future of humanity is at stake. Action cannot be optional."<sup>118</sup>

19. Mr President, Madam Vice-President, Members of the Court, please consider this appearance as a last and final resort in the hope that an advisory opinion will drive all States to meet and exceed the commitments made in order to alter the detrimental course in which we are heading. Commitments need to be transformational for all our sake, and for the sake of my country, the Kingdom of Tonga, the People of Tonga and the Future Generations of Tonga.

20. In Tonga, our motto is "*Koe 'Otua mo Tonga ko hoku Tofi 'a*", meaning "God and Tonga are my heritage". However, the inconvenient truth of climate change is that it forces us to reckon with the real and existential threat that our home, as we know it, may no longer exist for the future generations of the Kingdom of Tonga.

21. Mr President, Madam Vice-President, Members of the Court, that concludes my part of Tonga's submission. I kindly request that you invite our counsel, Ms Gitanjali Bajaj, to continue Tonga's submission. I thank you for your kind attention. *Malo 'Aupito, Faka'apa'apa Atu!*

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September 2024), adopted by the Heads of State and Government of the Alliance of Small Island States in New York, available at: <https://www.aosis.org/aosis-leaders-declaration-on-sea-level-rise-and-statehood/>.

<sup>117</sup> Commonwealth Heads of Government, "Apia Commonwealth Ocean Declaration for One Resilient Common Future" (declaration, 26 October 2024), adopted at the Commonwealth Heads of Government Meeting in Apia, available at: <https://production-new-commonwealth-files.s3.eu-west-2.amazonaws.com/s3fs-public/2024-11/apia-commonwealth-ocean-declaration.pdf?VersionId=ILG2G1O4G7Nwp28YME7kl80jjWBwmHCN>.

<sup>118</sup> Antonio Guterres, "Remarks at COP29 High-Level Event on the stocktake of 'Integrity Matters'" (speech, 14 November 2024), available at: <https://www.un.org/sg/en/content/sg/statement/2024-11-14/secretary-generals-remarks-cop29-high-level-event-the-stocktake-of-integrity-matters-delivered>.



The PRESIDENT: I thank Ms Linda Simiki Folaumoetu'i. I now give the floor to Ms Gitanjali Bajaj.

Ms BAJAJ:

## II. OBLIGATIONS OF STATES

1. Mr President, Madam Vice-President, honourable Members of the Court: *Malo ho'omou Laumalie*. It is a great honour to appear before you today on behalf of the Kingdom of Tonga.

2. The Court has just heard from the Attorney General on the need for both individual and collective transformative action to combat the climate crisis and change the course in which humanity is heading.

3. As we near the end of these historic oral proceedings, Tonga does not propose to restate its position on each legal issue. Instead, I will use Tonga's remaining time to focus on three key submissions, inviting this Court to:

- *first*, reflect in its findings the principle of common but differentiated responsibilities and respective capabilities (CBDR-RC);
- *second*, confirm the scope of the duty to co-operate as agreed to and operationalized by the parties to the climate change treaties; and
- *third*, affirm the presumption of continuity of statehood and preservation of maritime zones in the face of climate change-related sea-level rise.

4. Your Excellencies, as a preliminary matter, Tonga wishes to briefly clarify its position on the applicable law<sup>119</sup>. Tonga agrees with those Participants that support “systemic integration” or “harmonious interpretation” in accordance with Article 31 (3) (c) of the Vienna Convention on the Law of Treaties<sup>120</sup>. Tonga submits that systemic integration applies across the “relevant rules of international law” which include the climate change treaties and other instruments such as human rights treaties and the Convention on the Law of the Sea.

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<sup>119</sup> Written Statement of the Kingdom of Tonga, 22 March 2024, Chapter V.

<sup>120</sup> CR 2024/36, p. 42, para. 6 (b) (Australia); p. 69, para. 10 (Bangladesh); CR 2024/37, p. 22, para. 14 (Bolivia); p. 36, para. 12 (Brazil); CR 2024/39, p. 59, para. 13, p. 64, para. 31 (Egypt); p. 49, paras. 29-30 (joint submission of Denmark, Finland, Iceland, Norway and Sweden).

5. Mr President, Madam Vice-President, Members of the Court, I turn now to Tonga's first submission, that the principle of CBDR-RC is the appropriate normative background against which this Court must make its findings<sup>121</sup>.

6. From the outset of the negotiations of the UNFCCC, States have acknowledged the different positions and capabilities of developed and developing States<sup>122</sup>. Indeed, as Timor-Leste just observed, the principle of CBDR-RC has “acquired distinctive content and character in the climate change regime”<sup>123</sup>. In these oral proceedings thus far, 38 States have cited the principle of CBDR-RC as being relevant to the determination of the content of State obligations in respect of the question before this Court<sup>124</sup>. Many more States have referenced it in their written statements<sup>125</sup>. Tonga agrees with this position.

7. In accordance with the principle of CBDR-RC, not every State bears common responsibility for the climate crisis nor common capacity to address its causes and effects. Small island developing States (SIDS) such as Tonga have made only a marginal contribution to the climate crisis, yet now —

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<sup>121</sup> CR 2024/39, p. 68, para. 11 (El Salvador).

<sup>122</sup> Intergovernmental Negotiating Committee for a Framework Convention on Climate Change, “Report of the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change on the work of its first session”, UN doc. A/AC.237/6 (Report, 4 to 14 February 1991) p.12, para.46, available at: <https://unfccc.int/documents/852>; Intergovernmental Negotiating Committee for a Framework Convention on Climate Change, “Compilation of Texts Related to Principles, Submitted by the Bureau of Working Group I”, UN doc. A/AC.237/Misc.6 (13 August 1991) First Session, Part I.E.7, available at: <https://unfccc.int/documents/886>.

<sup>123</sup> Lavanya Rajamani, “Interpreting the Paris Agreement in its Normative Environment” (Journal Article, 8 September 2024), Vol. 77 (1), *Current Legal Problems*, 167, 185, available at: <https://academic.oup.com/clp/article/77/1/167/7750781>; Lavanya Rajamani, “National ‘fair shares’ in reducing greenhouse gas emissions within the principled framework of international environmental law” (Journal Article, 7 September 2021), *Climate Policy*, Vol. 21 (8), 983, 985, available at: <https://www.tandfonline.com/doi/full/10.1080/14693062.2021.1970504>.

<sup>124</sup> CR 2024/35, p. 121, para. 8 (South Africa); CR 2024/36, p. 21, para. 20 (Antigua and Barbuda); p. 61, para. 16 (Bahamas); p. 74, para. 11 (Bangladesh); CR 2024/37, p. 25, para. 27 (Bolivia); p. 34, para. 3 (Brazil); CR 2024/38, p. 31, para. 15 (China); CR 2024/39, p. 48, para. 21 (Norway); p. 68, para. 9 (El Salvador); CR 2024/40, p. 22, para. 2 (Ecuador); p. 55, para. 20 (United Arab Emirates); CR 2024/41, p. 59, para. 29 (Guatemala); p. 34, para. 8 (Ghana); p. 25, para. 23 (Sierra Leone); CR 2024/42, p. 39, para. 9 (Solomon Islands); p. 47, para. 15 (India); p. 55, para. 7 (Iran); p. 67, para. 35 (b) (Indonesia); CR 2024/43, p. 24, para. 8 (Papua New Guinea); p. 30, para. 4 (Kenya); p. 47, para. 22 (Kiribati); p. 55, para. 4 (Kuwait); CR 2024/44, p. 41, para. 13 (Malawi); p. 69, para. 22 (African Union); CR 2024/45, p. 13, para. 16 (Mexico); p. 55, para. 8 (Japan); p. 35, para. 18 (Myanmar); CR 2024/46, p. 25, para. 7 (Nepal); p. 41, para. 3 (Palestine); p. 50, para. 7 (Pakistan); CR 2024/47, p. 32, para. 22 (Netherlands); p. 41, para. 20 (Peru); CR 2024/48, p. 33, para. 28 (Romania); p. 45, para. 19 (United Kingdom); p. 60, para. 11 (Saint Lucia).

<sup>125</sup> See for example the written statements of the following States and international organizations: Argentina, para. 39, Australia, paras. 2.14-2.15, Bahamas, paras. 88, 138, Bangladesh, paras. 127-131, Cameroon, paras. 15-16, Colombia, paras. 3.42-3.59, Cook Islands, para. 137, Costa Rica, paras. 58-64, Democratic Republic of Congo, paras. 191-195, Dominican Republic, para. 4.24, Egypt, paras. 139-151, European Union, paras. 185-220, France, paras. 43-48, Grenada, paras. 23, 43, Japan, paras. 22-31, Kenya, paras. 5.22-5.25, Madagascar, paras. 49-52, Namibia, paras. 74-77, New Zealand, paras. 16, 47, Pakistan, paras. 40-46, Philippines, paras. 92-96, Portugal, paras. 45-50, Romania, paras. 61-76, Saint Vincent and the Grenadines, para. 97, Samoa, paras. 144, 151, Saudi Arabia, paras. 4.49-4.50, Seychelles, para. 151, Sierra Leone, paras. 3.39-3.43, Singapore, paras. 3.31-3.33, Sri Lanka, para. 115, Switzerland, paras. 45-46, Thailand, paras. 18-25, Timor-Leste, paras. 128-145, Tuvalu, para. 109, United Kingdom, paras. 143-147, United States of America, paras. 3.23-3.30, Uruguay, paras. 133-145, Vanuatu, para. 312, and Viet Nam, paras. 16-17.

as the Attorney General has explained — they must face effects they do not have the capacity to respond to or overcome. This Court’s jurisprudence has made clear that “equitable principles”, like that of CBDR-RC, are a “means to an equitable result in a particular case”<sup>126</sup>.

8. It follows that the capacity, capabilities and national circumstances of developing States must be taken into consideration in the fulfilment of their commitments. On the other hand, States that have contributed the most to the climate crisis — and benefited from it — must assume a greater burden now in order to address it, in particular with respect to the provision of financial and technical assistance<sup>127</sup>.

9. Your Excellencies, this takes me to Tonga’s second submission on the duty of every State to co-operate. As we heard from the Attorney General, when it comes to the climate crisis, all States, but in particular specially affected States like the Pacific Islands, are today facing a collective action problem.

10. The duty to co-operate is an uncontroversial principle of international law<sup>128</sup>. Indeed, it is now expressly recorded as a series of positive obligations in the climate change treaties. Its incorporation into the climate régime is uncontested. It is therefore low-hanging fruit for this Court to elaborate on the scope of the duty, especially for those Participants that have argued that the climate change treaties are a self-contained régime.

11. To this end, Tonga emphasizes the following provisions in the Paris Agreement which operationalize the duty to co-operate, while also having regard to the principle of CBDR-RC:

- *first*, Article 9 (1) which requires that developed States *shall* provide financial resources to assist developing States with respect to both mitigation and adaptation;
- *second*, Article 10 (2) and Article 10 (6) which require that parties *shall* strengthen co-operative action, including through financial support to developing States, on technology development and transfer; and

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<sup>126</sup> *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, I.C.J. Reports 1985, pp. 38-39, para. 45; see also for example *Frontier Dispute (Burkina Faso/Republic of Mali)*, Judgment, I.C.J. Reports 1986, para. 28.

<sup>127</sup> See for example Article 9 (1) of the *Paris Agreement*, opened for signature 22 April 2016, 1155 UNTS 146 (entered into force 4 November 2016) (“Paris Agreement”).

<sup>128</sup> See for example, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010 (I), para. 77.

— *third*, Article 13 (9) which requires that developed States *shall* provide information on financial, technology transfer and capacity-building support provided to developing States under Articles 9, 10 and 11.

12. Tonga agrees with the Maldives, a founding member of the Alliance of Small Island States (AOSIS), that these mandatory obligations under the climate change treaties

“form an interlocking scheme, which targets both *the areas* in which developed countries are required to provide support, and *the means* by which support is to be provided— bolstered by provisions to ensure transparency, communication and accountability between States”<sup>129</sup>.

13. Meaningful co-operation in climate finance represents a necessary implementation of the duty to co-operate. There is in fact an explicit interdependency between the fulfilment by developed States of these obligations to provide financial and technical assistance and the ability of developing States to meet their obligations under the climate change treaties<sup>130</sup>. Not only is this expressly articulated in Article 4 (7) of the UNFCCC, it is also illustrative of the fundamental importance of the duty to co-operate to overcome the collective action problem and achieve our climate goals.

14. To quote the Prime Minister of Tonga at COP29: “Tonga strongly reiterates the critical importance of commensurate and timely access to climate finance for SIDS. This is a must and needed now to implement measures that mitigate and adapt to the adverse impacts of climate change.”<sup>131</sup>

15. Mr President, Madam Vice-President, Members of the Court, I turn now to Tonga’s final submission. As the Attorney General described earlier, sea-level rise is already having a devastating impact on Tonga’s agricultural and coastal lands, infrastructure, water supply and indigenous biodiversity<sup>132</sup>. These impacts are being acutely felt across the Pacific region, with the Pacific Island Forum (PIF) describing sea-level rise as a “defining issue that imperils the livelihoods and wellbeing of our peoples”<sup>133</sup>.

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<sup>129</sup> CR 2024/44, p. 47, para. 4 (Maldives: Wells).

<sup>130</sup> Paris Agreement (n. 7), Art. 4 (7).

<sup>131</sup> Prime Minister Hon. Hu'akavameiliku, “Statement of the Kingdom of Tonga” (Speech, 13 November 2024), UNFCCC 29th Session of the Conference of the Parties, available at [https://unfccc.int/sites/default/files/resource/TONGA\\_cop29cmp19cma6\\_HLS\\_ENG.pdf](https://unfccc.int/sites/default/files/resource/TONGA_cop29cmp19cma6_HLS_ENG.pdf).

<sup>132</sup> Tonga Written Statement, paras. 87-88.

<sup>133</sup> Pacific Islands Forum, “Declaration on Preserving Maritime Zones in the Face of Climate Change-related Sea-Level Rise” (declaration, 12 August 2021), available at: <https://forumsec.org/publications/declaration-preserving->

16. In its final submission, Tonga joins with the 25 States and international organizations<sup>134</sup> that have invited this Court to affirm that,

- *first*, under international law there is a presumption of continuity of statehood; and
- *second*, States’ maritime zones, and the rights and entitlements that flow from them, shall continue to apply without reduction, notwithstanding climate change-related sea-level rise.

17. The Court has already heard of the normative practice emerging in this area, driven by PIF’s respective declarations on preserving maritime zones and continuity of statehood, and the AOSIS leaders’ declaration on sea-level rise and statehood. Indeed, El Salvador recognized in its oral submissions that the work of PIF has “caused a chain reaction”<sup>135</sup>.

18. Beyond the Pacific, the International Law Association Committee on International Law and Sea Level Rise in its most recent report recognized broad support for the position adopted by PIF in Asian, African, European and South American States<sup>136</sup>.

19. Tonga submits this is illustrative of strong *opinio juris* not just amongst the Pacific Island States but beyond the Pacific region as demonstrated by the submissions of many Participants in these proceedings.

20. Tonga therefore respectfully invites this Court to affirm the presumption of continuity of statehood and preservation of maritime zones in the face of climate change-related sea-level rise<sup>137</sup>.

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maritime-zones-face-climate-change-related-sea-level-rise.

<sup>134</sup> African Union Written Comments, para. 101; Albania Written Statement, para. 136; Australia Written Statement, para. 1.18; Bahamas Written Statement, paras. 217-226; COSIS Written Statement, paras. 68-75; Colombia Written Comments, para. 1.21; Cook Islands Written Comments, para. 111; Costa Rica Written Statement, paras. 125-128, Written Comments, para. 41; Dominican Republic Written Statements, paras. 4.34-4.42; El Salvador Written Statement, paras. 52-58, Written Comments, paras. 4-12; Kiribati Written Statement, paras. 190-195, Written Comments, para. 41; Liechtenstein Written Statement, paras. 74-77; Mauritius Written Comments, paras. 147-151; Micronesia Written Statement, paras. 114-117; Nauru Written Statement, paras. 12-13, Written Comments, paras. 64-66; Pacific Islands Forum Written Comments, paras. 5-13; PANO Written Comments, para. 19; Saint Vincent and the Grenadines Written Comments, para. 50; Solomon Islands Written Statement, paras. 208-213; Sierra Leone Written Statement, para. 3.91, Written Comments, para. 4.18; Sri Lanka Written Comments, para. 75; Timor-Leste Written Comments, paras. 80-82; Tonga Written Statement, paras. 233-236; Tuvalu Written Comments, paras. 10-12; Vanuatu Written Statement, paras. 582-588, Written Comments, paras. 198-199, 204.

<sup>135</sup> CR 2024/39, p. 71, para. 12 (El Salvador: Bordin).

<sup>136</sup> International Law Association, Committee on International Law and Sea Level Rise, “Final Report of the Athens Conference” (report, 2024), 41-42, available at: [https://www.ila-hq.org/en\\_GB/documents/01-final-report-committee-on-international-law-and-sea-level-rise](https://www.ila-hq.org/en_GB/documents/01-final-report-committee-on-international-law-and-sea-level-rise).

<sup>137</sup> Pacific Islands Forum, “Declaration on Preserving Maritime Zones in the Face of Climate Change-related Sea-Level Rise” (declaration, 12 August 2021), available at: <https://forumsec.org/publications/declaration-preserving-maritime-zones-face-climate-change-related-sea-level-rise>; Pacific Islands Forum, “2023 Declaration on the Continuity of Statehood and the Protection of Persons in the Face of Climate Change-Related Sea-Level Rise” (declaration, 9 December 2023), available at: <https://forumsec.org/publications/2023-declaration-continuity-statehood-and-protection-persons-face-climate-change>.

To do so is consistent with legal stability and certainty, and the core principles of international law of permanent sovereignty over natural resources, territorial integrity and the peremptory right of self-determination.

21. Mr President, Madam Vice-President, and Members of the Court, while this brings me to the close of Tonga's legal submissions, I respectfully conclude Tonga's oral presentation with an extract from a poem read by Tonga's young prince, His Royal Highness Prince Taufa'ahau Manumataongo Tuku'aho, where he addresses the future generations of the "Blue Pacific":

"I hope you get to read this letter from the past. I hope it finds you surrounded by the Blue Oceans. I hope you still have whales and fish and reefs. I hope the trees are still green and the weather is kind and that famine and drought do not burden you for too long.

I hope our society is stronger because our Leaders of today decided to build better now. Our MANA was here before us, and it will remain here long after you. We promise to keep overcoming challenges and praying, over the Blue Pacific that we will pass on to you."<sup>138</sup>

22. Mr President, Madam Vice-President, Members of the Court, thank you for your kind attention. *Malo 'aupito. Faka'apa'apa lahi atu!* ("Thank you very much. With the utmost respect.")

The PRESIDENT: I thank the representatives of Tonga for their presentation. Before I invite the next delegation to take the floor, the Court will observe a break of 10 minutes. The hearing is suspended.

*The Court adjourned from 11.25 a.m. to 11.35 a.m.*

The PRESIDENT: Please be seated. The sitting is resumed. I now invite the next participating delegation, Tuvalu, to address the Court and I give the floor to Her Excellency Eselealofa Apinelu.

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<sup>138</sup> His Royal Highness Prince Taufa'ahau Manumataongo Tuku'aho, Prince of the Kingdom of Tonga, Poem (Speech, 27 August 2024), High-Level Intergenerational Dialogue with the United Nations Secretary-General HE Mr António Guterres, 53rd Leaders Meeting.

Ms APINELU:

## **I. CLIMATE CHANGE IS AN EXISTENTIAL THREAT TO TUVALU**

1. Good morning, Mr President, honourable Members of the Court. It is my great privilege this morning to address you in these proceedings for the first time on behalf of the people and of the government of Tuvalu.

2. As islanders from Tuvalu, we understand that we are not alone in this catastrophic harm we face from climate change. Tuvalu's situation is unique, though, because despite producing less than 0.01 per cent of greenhouse gas emissions<sup>139</sup>, on the current trajectory of GHG emissions, Tuvalu will disappear completely beneath the waves that have been lapping our shores for millennia. I will accordingly focus my intervention on the existential threat that Tuvalu faces due to climate change.

### **A. Projected sea-level rise and climate change**

3. Tuvalu is a small group of coral atolls in the south Pacific Ocean situated halfway between Hawaii and Australia. Tuvalu means "eight standing islands" or *Fenua*. Stretching from north to south are the *Fenuas* or islands of Nanumea, Nanumaga, Niutao, Nui, Nukufetau, Vaitupu, Funafuti (the capital) and Niulakita.

4. Our lands are central to our culture and way of life for centuries. We use the term *Fenua*, which transcends any tangible definition. But it is best described as meaning the island and the islander as one. *Fenua* calls us Tuvaluans, as indigenous people, towards the deepest respect for the land, natural world and its greater laws, from which none of us escape.

5. Climate change endangers the very core of *Fenua*. Sea-level rise is an omnipresent threat. And in fact, while we gather here today in this august Peace Palace, Tuvalu — my country and my home — is expected to be the first country to be completely — *completely* — lost to climate-related sea-level rise. All of the more than 10,000 residents of Tuvalu will be forced to leave their homeland.

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<sup>139</sup> Secretariat of the Pacific Regional Environment Programme (SPREP), Tuvalu State of the Environment Report (2022), p. 84.

6. Since June 2023, oceanographers from the Government of Tuvalu and the Secretariat of the Pacific Community have developed a state-of-the-art 3D model to show sea-level rise on Tuvalu. They used highly localized scientific data<sup>140</sup>.

7. You will see on the screen a video clip of the 3D model. The model shows the extent of inundation on Funafuti, the capital of Tuvalu, in the absence of reclamation and fortification measures. The demonstration is conducted by Naomi Maheu from the Ministry of Foreign Affairs, Labour and Trade<sup>141</sup>.

*[On screen: video recording.]*

### **Transcript of video recording: 3D model excerpt**

*[Transcript provided by Tuvalu.]*

Let me just step back to what a one-in-a-10-year event would have been, prior to sea level rise. It is a very minor event that would only flood parts of the island at high tide. However, as you can see, just 34 cm of sea-level rise on the same disaster scenario means that this event is bigger than a one-in-a-100-year event. So a minor disaster has become an extreme disaster with a very small incremental increase of sea level rise.

### **B. Current impacts of climate change**

8. With the rise in sea level, Tuvalu will likely become uninhabitable long before complete inundation. In fact, sea levels have already risen by 0.1 m over the past 30 years, bringing higher tides and increased flooding<sup>142</sup>. This is about 40 per cent higher than the global average rate in sea-level rise<sup>143</sup>. All of Tuvalu's human settlement, industry and vital infrastructure lie close to the

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<sup>140</sup> United Nations Development Programme (UNDP), Tuvalu Launches World-Class Coastal Hazard Modelling Tool in the Face of Growing Climate Impacts (23 July 2023); Tuvalu Coastal Adaptation Project, Dashboard (Risk), <https://opm.gem.spc.int/tcap/risk>. User-friendly dashboards for Funafuti and Nanumea are available at <https://landscapeknowledge.net/funafuti-map> and <https://landscapeknowledge.net/nanumea-map>; see also M. Wandres et al., "A National-Scale Coastal Flood Hazard Assessment for the Atoll Nation of Tuvalu", *Earth's Future* (1 April 2024), pp. 7, 12; *Tuvalu launches world-class coastal hazard modelling tool in the face of growing climate impacts*, UNDP (23 July 2023), available at <https://www.undp.org/pacific/stories/tuvalu-launches-world-class-coastal-hazard-modelling-tool-face-growing-climate-impacts>.

<sup>141</sup> The demonstration is available at <https://bit.ly/Tuvalu3DModel>.

<sup>142</sup> See NASA, Technical Report, N-SLCT-2023-01, Assessment of Sea Level Rise and Associated Impacts for Tuvalu (June 2023), p. 1; M. Wandres et al., "A National-Scale Coastal Flood Hazard Assessment for the Atoll Nation of Tuvalu", *Earth's Future* (1 April 2024), p. 10.

<sup>143</sup> See NASA, Technical Report, N-SLCT-2023-01, Assessment of Sea Level Rise and Associated Impacts for Tuvalu (June 2023), p. 1; M. Wandres et al., "A National-Scale Coastal Flood Hazard Assessment for the Atoll Nation of Tuvalu", *Earth's Future* (1 April 2024), p. 10.



shoreline. Already today, spring tides — or “king tides” — are increasingly causing year-round inundation as marine water percolates through the porous limestone of our coral atolls<sup>144</sup>.

9. In addition, increasing severe weather events have been destroying our villages and killing our people. In 2015, Cyclone Pam — the strongest cyclone on record to make landfall in the south Pacific — devastated Tuvalu and it cost more than 30 per cent of our GDP, displacing half of the population and completely submerging several islets of Funafuti, our capital<sup>145</sup>.

10. The marine, terrestrial, and coastal ecosystems upon which our food supply depends are also dying — dying in these warmer, more acidic and less oxygenated waters. Declining fish stocks have drastically altered Tuvaluans diet and in recent decades; rice and sugar make up over half of our food consumption<sup>146</sup>. Saltwater intrusion contaminates our farmlands and our underground aquifers, endangering our health, property and livelihoods<sup>147</sup>.

11. Video statements filed with Tuvalu’s written statement illustrate just a number of the catastrophic harms that our people face, which fundamentally interferes with our basic human rights.

12. As shown on the screen, Lina Peleti, a government employee residing in Funafuti, describes how sea-level rise is affecting her home<sup>148</sup>.

*[On screen: video recording.]*

### **Transcript of video recording: Lina Peleti**

*[Transcript provided by Tuvalu.]*

Sooner or later, we won’t have any more space because already the sea is coming into our house, coming under our house. So everybody is trying to move out now from our house. It’s not like home before.

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<sup>144</sup> M. Wandres et al., “A National-Scale Coastal Flood Hazard Assessment for the Atoll Nation of Tuvalu”, *Earth’s Future* (1 April 2024), p. 5.

<sup>145</sup> Government of Tuvalu, National Climate Change Policy 2021–2030 (2021), pp. 2, 23; SPREP, Tuvalu State of the Environment Report (2022), p. 92; International Monetary Fund, Tuvalu: Staff Report for the 2023 Article IV Consultation — Debt Sustainability Analysis (21 July 2023); Tuvalu, *Second National Communication of Tuvalu*, UNFCCC (December 2015), pp. 3, 5.

<sup>146</sup> International Organization for Migration (IOM), *Powering Past the Pandemic: Bolstering Tuvalu’s Socioeconomic Resilience in a COVID-19 World* (2021), p. 6; SPREP, Tuvalu State of the Environment Report (2022), p. 32.

<sup>147</sup> SPREP, Tuvalu State of the Environment Report (2022), pp. 34-36, 52, 61; Government of Tuvalu, Tuvalu Second National Communication to the UNFCCC (2022), pp. 31-35.

<sup>148</sup> This video is available at <https://bit.ly/TuvaluElder>.

13. Grace Malie, a young Tuvaluan, explains that her grandfather, a fisherman, can no longer rely on his traditional knowledge to predict where to fish because climate change has disrupted migration patterns<sup>149</sup>.

*[On screen: video recording.]*

**Transcript of video recording: Grace Malie**

*[Transcript provided by Tuvalu.]*

So my grandfather came from a family of fishermen, so they were able to determine from the different changes of the seasons where you could fish from this place, from this place. But because of climate change, you know, the changes completely changed our environment. We cannot rely on this traditional knowledge because of how changed the environment is. It's no longer reliable.

14. Itaia Lausavene, a Tuvaluan farmer, explains that saltwater intrusion from higher sea levels is impeding the growth of *pulaka*<sup>150</sup>. This is a root crop that has been a food staple in Tuvalu for hundreds of years.

*[On screen: video recording.]*

**Transcript of video recording: Itaia Lausavene**

*[Transcript provided by Tuvalu.]*

That's where you see the brackish water coming and also saltwater intrusion. I think it's also invading the swamp taro, our natural swamp, and also the pulaka pits where they are near to the inland pond and also the swamp area. So, you know, we are seeing places where there were floods before during high tides, but now you see floods there. It's not that the floods are coming from coasts, but they're coming from beneath.

15. Tuvalu has taken steps though to seek to address these harms, including launching the Tuvalu Coastal Adaptation Project, this a comprehensive land reclamation initiative<sup>151</sup>, focused on

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<sup>149</sup> This video is available at <https://bit.ly/TuvaluYouth>.

<sup>150</sup> This video is available at <https://bit.ly/TuvaluFarmer>.

<sup>151</sup> See L. Saddington, "The Chronopolitics of Climate Change Adaptation: Land Reclamation in Tuvalu" in *Territory, Politics, Governance* (5 June 2022); "Official handing over of reclaimed land to the Government of Tuvalu (29 Oct. 2024), <https://tcap.tv/news/2024/11/10/official-handing-over-of-reclaimed-land-to-the-government-of-tuvalu/>.

protecting nearly 3,000 m of high-level coastline on Tuvalu's islands with barriers, vegetation and beach replenishment<sup>152</sup>. But this is simply not enough.

### **C. Conclusion**

16. As things stand, Tuvalu cannot survive the catastrophic impacts of climate change. But we are determined to fight for our survival.

17. But to be effective, Tuvalu cannot solve the climate crisis in isolation; instead, action must be taken together.

18. Mr President, honourable Members of the Court, Tuvalu asks that you be a part of the solution to this climate crisis. Together with Antigua and Barbuda, we established the Commission of Small Island States on Climate Change and International Law (COSIS) to seek the clarification of international law in respect of climate change. We helped achieve the unanimous ITLOS advisory opinion delivered on 21 May of this year. We are very confident that, at this critical juncture in our collective history, this Court — this pinnacle Court of the United Nations — will issue a strong advisory opinion to further clarify States' international obligations to combat climate change and to prevent and alleviate the gravest harms suffered by Tuvalu and Tuvaluans before it is too late.

19. Mr President, honourable Members of the Court, Ms Laingane Italeli Talia, Tuvalu's Attorney General, will next address the right of self-determination. Professor Philippa Webb will then conclude with a discussion of the implications of climate change for States' rights of survival and territorial integrity.

20. Thank you sincerely for your time and attention. I now yield the podium to Tuvalu's Attorney General.

The PRESIDENT: I thank Her Excellency Ms Eselealofa Apinelu. I now give the floor to Ms Laingane Italeli Talia.

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<sup>152</sup> TCAP, <https://tcap.tv/>; United Nations Development Programme (UNDP), Concept Design Report: Tuvalu Coastal Adaptation Project (21 May 2021).

Ms ITALELI TALIA:

## II. THE RIGHT TO SELF-DETERMINATION IS IMPLICATED BY CLIMATE CHANGE

1. Mr President, Madam Vice-President, honourable Members of the Court, good morning — or as we say in Tuvaluan: *Talofa*. My name is Laingane Italeli Talia; it is my honour to serve as the Attorney General of Tuvalu and to appear before you on its behalf.

2. My focus today is on States' obligations to promote, respect and protect peoples' fundamental right to self-determination from the existential threat posed by climate change. Simply put, climate change threatens the erasure of the Tuvaluan people's way of life, cultural identity and ancestral lands, recognizing that it is the single greatest threat to us. It cannot be that in the face of such unprecedented and irreversible harm, international law is silent. Indeed, we know that it is not.

### A. The right to self-determination is implicated by climate change

3. I will begin by briefly discussing the contours of the right to self-determination, and in particular, its inextricable link to territorial integrity, before considering how the failure to regulate GHG emissions is impacting this right.

4. The right to self-determination cuts to the very core of the UN Charter and our contemporary human rights system. Article 1 (2) of the UN Charter sets out one of the central purposes of the United Nations as the development of “friendly relations among nations based on respect for the principle of *equal rights and self-determination of peoples*”<sup>153</sup>. The ICCPR and the ICESCR both provide that “[b]y virtue of the right” to self-determination “[a]ll peoples” are entitled to “freely determine their political status and freely pursue their economic, social and cultural development”<sup>154</sup>.

5. The UN General Assembly in the Declaration on the Rights of Indigenous Peoples (UNDRIP) reaffirmed the right to self-determination of indigenous peoples. It recalled the “urgent need to respect and promote the inherent rights of indigenous peoples”, recognizing their “political,

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<sup>153</sup> Charter of the United Nations, Art. 1 (2) (emphasis added).

<sup>154</sup> International Covenant on Civil and Political Rights, *United Nations Treaty Series*, Vol. 999, p. 171 (1966) (“ICCPR”), Art. 1 (1) (emphasis added); International Covenant on Economic, Social, and Cultural Rights, *United Nations Treaty Series*, Vol. 993, p. 3 (1966) (“ICESCR”), Art. 1 (1) (emphasis added).

economic and social structures”, “cultures”, “spiritual traditions”, “histories and philosophies”, especially their rights to their “lands, territories and resources”<sup>155</sup>. And as UNDRIP explains, the rights contained therein, including the right to self-determination, are in no way elective — they “constitute the minimum standards for the *survival*, dignity and well-being” of indigenous peoples<sup>156</sup>.

6. Critically, because the right to self-determination is a necessary predicate to the exercise of many other fundamental rights, the Court, for its part, has also recognized that self-determination is a non-derogable, peremptory norm of international law<sup>157</sup> with a “broad scope of application” extending beyond its historical origins in decolonization<sup>158</sup>. Numerous Participants in these proceedings have pointed this out as well<sup>159</sup>.

7. This brings me to how the right is implicated by the climate crisis. The wide-ranging and catastrophic impacts of climate change — irrefutably established by the best available climate science — leave little doubt that Tuvalu may soon become uninhabitable.

8. In these circumstances, there can be no question that our fundamental right to self-determination is being violated. And in these proceedings, there is unsurprisingly considerable consensus across Participants that climate change is impeding the right to self-determination<sup>160</sup>.

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<sup>155</sup> UNDRIP, Preamble; see also International Labour Organization, Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries, *United Nations Treaty Series*, Vol. 1650, p. 383 (1989), Art. 15 (1).

<sup>156</sup> United Nations General Assembly resolution 61/295, United Nations Declaration of the Rights of Indigenous Peoples, document A/RES/61/295 (13 September 2007), Art. 43 (emphasis added).

<sup>157</sup> See e.g., case concerning *East Timor (Portugal v. Australia)*, *Judgment*, *I.C.J. Reports 1995*, p. 90, para. 29; see also Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, *Yearbook of the International Law Commission*, 2001, Vol. II (Part Two), p. 107, Commentary to Art. 26, para. 5; ILC, Draft Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law (*Jus Cogens*), with Commentaries, document A/77/10 (2022), Conclusions 17, 23, Annex.

<sup>158</sup> *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019 (I)* (“*Chagos Advisory Opinion*”), p. 131, para. 144; see also, e.g., *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)* (“*Wall Advisory Opinion*”), p. 184, para. 122; *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion of 19 July 2024* (“*Palestine Advisory Opinion*”), para. 234.

<sup>159</sup> See Written Statements of Albania, para. 96 (b); Bangladesh, paras. 120-123; Cook Islands, para. 345; Dominican Republic, paras. 4.43-4.46; Kenya, Sec. 5.V; Kiribati, paras. 83-86; Liechtenstein, paras. 74-77; Mauritius, paras. 167-169; Nauru, Sec. V; Philippines, paras. 106 (a)–106 (c); Saint Vincent and the Grenadines, para. 109; Sierra Leone, Sec. II.2.II.D; Solomon Islands, Sec. VII.B; Timor-Leste, Sec. IX.D; Vanuatu, paras. 288-294; African Union, para. 198; OACPS, Sec. III.B.1; COSIS, Sec. 3.A; see also Written Comments of Dominican Republic, Sec. 4.II; Melanesian Spearhead Group Sec. VI.B; Cook Islands, para. 124 (d); Gambia para. 4.11; Vanuatu, paras. 138-139.

<sup>160</sup> See Written Comments of Tuvalu, para. 16.

9. One key reason is that the principle of self-determination is linked to the principle of territorial integrity. This is particularly important to Tuvalu. As Tuvalu's High Commissioner mentioned, climate change is tearing at the sacred fabric of *Fenua*.

10. Recently in the *Chagos* Opinion, the Court recognized this link, concluding that the right to self-determination extends to the "territory as a whole" as the right inherently includes "respect for 'the national unity and territorial integrity of a State or country'"<sup>161</sup>. If Tuvalu cannot survive, the "free and genuine expression" of the Tuvaluan people to determine their political status and future at the core of self-determination will simply be impossible<sup>162</sup>.

11. Another reason is the potential for displacement of the Tuvaluan people. Consistent with its focus on territory, the Court has also found repeatedly that the forced displacement of a people violates their right to self-determination<sup>163</sup>. This includes measures which "contribute to the departure" of a people from their land, and which risk "demographic" alterations<sup>164</sup>, as will take place in Tuvalu as our islands become increasingly uninhabitable.

12. Yet another reason is because the right to self-determination links with natural resources<sup>165</sup>. As Tuvalu explains further in our written submission and comments, our oceans are dying — they are too hot and too acidic for our fish and marine biodiversity to sustain our national economy and our people. The ICCPR and ICESCR set out the right to self-determination in common Article 1 (1), and also made clear in common Article 1 (2) that "[i]n no case may a people be deprived of its own means of subsistence"<sup>166</sup>. Article 55 of the UN Charter likewise draws a connection between self-determination and economic-, social- and health-related conditions<sup>167</sup>. Indeed, the General Assembly found that the Administrating Authority in Nauru had violated the Nauruan people's right to self-determination by rendering large swaths of the territory uninhabitable due to phosphate

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<sup>161</sup> *Chagos* Advisory Opinion, pp. 133-134, paras. 155-160; see also *Palestine* Advisory Opinion, para. 237.

<sup>162</sup> *Palestine* Advisory Opinion, para. 242; *Chagos* Advisory Opinion, p. 137, para. 172.

<sup>163</sup> *Palestine* Advisory Opinion, paras. 239-242; *Wall* Advisory Opinion, p. 184, para. 122; *Chagos* Advisory Opinion, p. 137-139, paras. 172, 174, 177.

<sup>164</sup> *Palestine* Advisory Opinion, para. 239.

<sup>165</sup> *Ibid.*, paras. 240, 242; see Written Statement of Tuvalu, para. 95.

<sup>166</sup> *Palestine* Advisory Opinion, para. 240; ICCPR, Art. 1 (2); ICCPR, Art. 1 (2).

<sup>167</sup> Charter of the United Nations, Art. 55; see also *Palestine* Advisory Opinion, para. 242.

mining<sup>168</sup>. It recommended, in no uncertain terms, that the Authority must “take immediate steps, irrespective of the cost involved, towards restoring the island of Nauru for habitation by the Nauruan people as a sovereign nation”<sup>169</sup>.

**B. Obligations of States to promote, respect and protect the right to self-determination in the context of climate change**

13. In light of the near-certain risk of existential harm to Tuvalu, the question becomes what are States’ specific obligations to promote, respect and protect the Tuvaluan people’s right to self-determination?

14. Two key points are essential to bear in mind in this respect.

15. First, Tuvalu draws attention to the Court’s prior consideration of a question implicating the potential *extinction* of a sovereign State — in the *Nuclear Weapons* case. The Court recognized the exceptional nature of the circumstance of potential extinction. The Court noted that in applying the law, it “cannot lose sight of the fundamental right of every State to survival”, as the fact that “survival is at stake” in turn informs international obligations<sup>170</sup>.

16. Second, self-determination is an *erga omnes* obligation entailing both negative and positive obligations. *All* States must “promote the realization of th[e] right” and “respect it”<sup>171</sup>, according to the Court’s prior jurisprudence. In turn, *all States* can call for compliance with the right.

17. So, what must be done to protect the right?

18. According to the IPCC, the *only* way to prevent catastrophic levels of climate change is for States to implement immediate, rapid and dramatic reductions in GHGs<sup>172</sup>.

19. Importantly, Tuvalu is by no means alone in this call. In fact, it is a point of great consensus among the Participants in these proceedings — consensus that spans all geographic regions and economic strata — that immediate, rapid and dramatic reductions in GHGs are critical<sup>173</sup>.

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<sup>168</sup> United Nations General Assembly resolution 2226 (XXI), Question of the Trust Territory of Nauru, document A/RES/2226 (XX) (20 December 1965).

<sup>169</sup> *Ibid.*, para. 3 (emphasis added).

<sup>170</sup> *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 263, para. 96.

<sup>171</sup> *Palestine Advisory Opinion*, para. 232; *Wall Advisory Opinion*, p. 172, para. 88.

<sup>172</sup> See IPCC, “Summary for Policymakers”, Sixth Assessment Synthesis Report (2023), p. 22 (Table SPM.1); Written Statement of Tuvalu, para. 70; Written Comments of Tuvalu, paras. 2, 5.

<sup>173</sup> Written Statements of Albania, para. 52; Antigua and Barbuda, paras. 45-48; Australia, para. 2.53; the Bahamas, paras. 68-73; Bangladesh, para. 44; Barbados, para. 91; Bolivia, para. 33; Brazil, para. 52; Burkina Faso, para. 83; Canada,

20. Immediate adaptation assistance is also needed<sup>174</sup>. This is especially true for small island States like Tuvalu that will not stay above the rising tides without technical, financial and other assistance with implementing adaptation measures.

21. Mr President, Madam Vice-President, honourable Members of the Court, Tuvalu is facing our greatest challenge in the history of our people. Tuvalu accordingly asks the Court to keep the unprecedented infringement on our people's right to self-determination at the very centre of its critical advisory opinion in order to help chart the pathway forward for our very survival.

22. I now kindly request the Court to ask Professor Philippa Webb to the podium.

The PRESIDENT: I thank Ms Laingane Italeli Talia. I now give the floor to Professor Philippa Webb.

Ms WEBB:

### III. STATES' RIGHTS TO SURVIVAL AND TERRITORIAL INTEGRITY

1. Mr President, Members of the Court, it is a privilege to appear before you on behalf of Tuvalu.

2. I will address the survival of States, linking it to the principles of State continuity, territorial integrity and sovereignty over natural resources. Survival is fundamental to a people's right to self-determination, as you have just heard from the Attorney General<sup>175</sup>. This is relevant to both questions before the Court because the right to survival shapes obligations and entails legal consequences.

3. A State's right to survival is so basic, so obvious that we do not yet have a well-developed jurisprudence on its definition and content. As members of the International Law Commission have

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paras. 6, 17; Chile, paras. 49-50; China, para. 65; Colombia, paras. 2.4-2.6; Costa Rica, para. 124; Democratic Republic of the Congo, para. 37; Denmark et al., paras. 3, 7-8; Dominican Republic, paras. 4.28-4.30; Ecuador, paras. 3.26-3.28, 3.78; Egypt, para. 42; El Salvador, paras. 11-16; France, para. 8; Grenada, para. 26; India, paras. 64, 67; Indonesia, para. 17, fns. 14-15; Kenya, para. 3.16; Kiribati, para. 23; Republic of Korea, paras. 8-9; Liechtenstein, para. 21; Madagascar, para. 29; Marshall Islands, para. 76; Mauritius, Chap. IV.B, secs 6-7; Mexico, paras. 26-27; Federated States of Micronesia, para. 89; Namibia, paras. 60-61; Netherlands, para. 3.12; New Zealand, para. 5; Pakistan, paras. 5, 46; Palau, Annex 3; Peru, paras. 9-10, 81; Philippines, para. 28; Portugal, para. 14; Romania, paras. 7, 37; Saint Lucia, para. 23; Saint Vincent and the Grenadines, para. 48; Samoa, paras. 5-6, 128; Seychelles, para. 92; Sierra Leone, para. 3.38; Singapore, paras. 1.5-1.6; Solomon Islands, para. 62; South Africa, para. 109; Spain, para. 3; Sri Lanka, paras. 26-29; Switzerland, para. 5; Timor-Leste, para. 98; Tonga, para. 271; Tuvalu, para. 68; United Arab Emirates, paras. 9-10; United Kingdom, para. 13.4; United States, para. 2.17, fn. 76; Uruguay, para. 24; Vanuatu, Chap. II, sec. 2.5; Viet Nam, para. 12; African Union, paras. 7, 245; COSIS, paras. 61-62; European Union, para. 145; IUCN, para. 35; Melanesian Spearhead Group, paras. 314-315; OACPS, para. 165; PNAO, para. 11.

<sup>174</sup> See Written Statement of Tuvalu, Chap. II. B-C; Written Comments of Tuvalu, Chap. III.B.

<sup>175</sup> See also CR 2024/41, p. 37, para. 27 (Ghana).



observed, the right to survival is a “postulate that there was no need to state” in its 1949 Draft Declaration on the Rights and Duties of States<sup>176</sup>. A key contribution that the Court’s advisory opinion would make is to explain the right to survival in the context of the existential threat posed by climate change.

4. International law has addressed the disappearance of a State in the context of State succession<sup>177</sup>. But succession is a result of political changes<sup>178</sup>, through processes such as unification or dismemberment. A better analogy for the threat of disappearance faced by States like Tuvalu is the potential annihilation posed by nuclear weapons. Three decades ago, the Court recognized the “fundamental right of every State to survival” in that context<sup>179</sup>. When the very survival of a State is at stake, the Court concluded that it triggers under international law an “extreme circumstance of self-defence”<sup>180</sup>. As you have heard from State after State in these proceedings, climate change threatens catastrophic harm. As you have heard from the representative of Tuvalu, without drastic measures of adaptation, her State is expected to be one of the first to be lost to forces rendering it uninhabitable and eventually submerged. This extreme circumstance triggers all the tools that international law provides for respecting statehood, ensuring territorial integrity and protecting sovereignty over natural resources.

#### **A State’s right to survival is inextricably linked with continuing statehood**

5. Mr President, Members of the Court, the right to survival is inextricably linked with the well-established concept of State continuity<sup>181</sup>. Article 6 of the Montevideo Convention provides that recognition of a State is “unconditional and irrevocable”<sup>182</sup>. According to Article 3, a State has a

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<sup>176</sup> Summary Record of the Nineteenth Session, *YILC*, Vol. I, document A/CN.3/SR.19 (1949), p. 137, para. 14; Draft Declaration on Rights and Duties of States with commentaries (1949), para. 49.

<sup>177</sup> See e.g., Vienna Convention on Succession of States in Respect of Treaties, *UNTS*, Vol. 1946, p. 3 (1978); Report of the International Law Commission on the work of its seventy-fifth session, document A/79/10 (2024), Chapter IX, Succession of States in respect of State responsibility.

<sup>178</sup> International Law Association Committee on International Law and Sea Level Rise, Final Report (81st Conference, Athens, 25-28 June 2024), p. 14.

<sup>179</sup> *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)* (“*Nuclear Weapons*”), p. 263, para. 96; see also CR 2024/48, pp. 22-24, paras. 11-13 (Dominican Republic).

<sup>180</sup> *Nuclear Weapons*, p. 263, para. 97.

<sup>181</sup> See CR 2024/39, pp. 72-73, paras. 16-18 (El Salvador).

<sup>182</sup> Montevideo Convention on Rights and Duties of States, *League of Nations Treaty Series*, Vol. 165, p. 19 (1933), Art. 6.

“right to defend its integrity and independence, to provide for its conservation and prosperity”<sup>183</sup>. Article 4 expresses that a State’s rights depend on “the simple fact of its existence as a person under international law”<sup>184</sup>. And Article 5 codifies the principle that “[t]he fundamental rights of states are not susceptible of being affected in any manner whatsoever”<sup>185</sup>.

6. International law protects statehood even as “governments, constitutions, territories and populations change”<sup>186</sup>. The right for the statehood and sovereignty of States to continue despite the impact of climate change was declared by the leaders of the Pacific Island Forum last year<sup>187</sup>. Tuvalu’s Constitution affirms that its statehood will remain in perpetuity notwithstanding any loss to its physical territory<sup>188</sup>.

### **B. The right to survival encompasses territorial integrity and permanent sovereignty over natural resources**

7. In the same way that the right to survival requires State continuity, the right also compels respect for territorial integrity, which encompasses a State’s permanent sovereignty over its natural resources<sup>189</sup>. This is relevant in two ways. First, territorial integrity, a “corollary of the right to self-determination”<sup>190</sup>, is not limited to physical land territory. It must be conceived of as a historical and cultural norm, linked to the vitality, dignity and identity of the people holding the right to self-determination. Action to ensure respect for territorial integrity goes beyond ensuring the maintenance of physical land boundaries. Like other concepts in international law, such as cultural heritage, biodiversity and intellectual property, it covers tangible and intangible assets. Second, as the Court has held, “[b]etween independent States, respect for territorial sovereignty is an essential

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<sup>183</sup> *Ibid.*, Art. 3.

<sup>184</sup> *Ibid.*, Art. 4.

<sup>185</sup> *Ibid.*, Art. 5.

<sup>186</sup> J. Crawford, *The Creation of States in International Law* (Oxford 2007), pp. 667-668.

<sup>187</sup> Pacific Island Forum, *Declaration on the Continuity of Statehood and the Protection of Persons in the Face of Climate Change-related Sea-Level Rise*, 6 August 2023; see also *Written Statement of Pacific Islands Forum*, p. 8; CR 2024/43, p. 26, para. 4 (Papua New Guinea).

<sup>188</sup> Constitution of Tuvalu, Division I, Sec. 2 (1).

<sup>189</sup> *Written Statement of COSIS*, para. 70.

<sup>190</sup> *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019 (I)*, p. 134, para. 160; see also *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion, 19 July 2024* (“*Palestine Advisory Opinion*”), para. 237.

foundation of international relations”<sup>191</sup>. In the context of climate change, this obliges States to prevent and mitigate transboundary environmental harm. It requires that States facilitate adaptation to climate change impacts and these measures should not be limited to the preservation and restoration of coasts and islands, but also to protecting the rights of peoples to self-determination.

8. The multifaceted nature of territorial integrity is reinforced by sovereignty over natural resources<sup>192</sup>. This also goes beyond maintaining physical boundaries; it entails a State’s “possession, use and disposal, over all its wealth, natural resources, and economic activities”<sup>193</sup>. Tuvalu is among the States most affected by the adverse impacts of climate change. Its right to survival depends on the resources within and adjacent to its coastline. The duty to respect sovereignty over natural resources therefore calls for all States to recognize the continuity of sovereign entitlements for small island States, despite changes to the physical geography of their territory due to climate change<sup>194</sup>.

### **C. The obligations of States to respect the right to survival**

9. Mr President, Members of the Court, in the words of Grace Malie, a Tuvaluan climate activist: Tuvalu will “not go quietly into the rising sea”<sup>195</sup>. It has been acting according to the principle of self-preservation<sup>196</sup>. You have heard about its state-of-the-art online dashboard, about its land reclamation activities. Its citizens are exploring a Digital Nation initiative, recreating its land, archiving its culture and digitizing its government<sup>197</sup>.

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<sup>191</sup> *Corfu Channel (United Kingdom v. Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 35; see also UNGA res.2625 (XXV), Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, UN doc. A/RES/2625 (24 Oct. 1970), p. 124.

<sup>192</sup> Written Statement of COSIS, para. 70.

<sup>193</sup> UNGA res. 3281 (XXIX), Charter of Economic Rights and Duties of States, UN doc. A/RES/3281 (12 Dec. 1974), Art. 2 (1); see *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports 2005*, pp. 251-252, para. 244; see also UNGA res. 1803 (XVII), Permanent Sovereignty over Natural Resources, UN doc. A/RES/1803 (14 December 1962), para. 1; UNGA res. 3201, Declaration on the Establishment of a New International Economic Order, UN doc. A/RES/3201 (1 May 1974), para. 4 (e).

<sup>194</sup> Written Statement of COSIS, para. 71.

<sup>195</sup> S. Yeo, *Tuvalu: The disappearing island nation recreating itself in the metaverse* (21 November 2024), BBC, available at <https://www.bbc.com/future/article/20241121-tuvalu-the-pacific-islands-creating-a-digital-nation-in-the-metaverse-due-to-climate-change>.

<sup>196</sup> *Reparations for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, dissenting opinion of Judge Hackworth, pp. 196-197, para. 4; see B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1953) (Annex 4), p. 100.

<sup>197</sup> See Tuvalu, the First Digital Nation, available at <https://www.tuvalu.tv/>.

10. And there are at least three ways in which other States must support the right to survival.

11. First, States must take action to avoid and mitigate harm caused by conduct within their jurisdiction or control that has extraterritorial effects linked to the negative impact of GHG emissions<sup>198</sup>. This engages all the means at a State's disposal<sup>199</sup>. States must employ a precautionary approach<sup>200</sup>, and they must cut these emissions, not at some point in the future, but before it is too late for Tuvalu and its people.

12. Second, Tuvalu endorses the specific adaptation obligations set out by other Participants<sup>201</sup>, including increasing financial contributions to a level necessary to meet the adaptation needs of least developed countries and climate vulnerable States.

13. Third, Tuvalu joins the consensus of over 100 States that respect for sovereignty and territorial integrity requires recognition that maritime baselines remain fixed despite physical changes to the coastline due to sea-level rise<sup>202</sup>. This encompasses the recognition of statehood in perpetuity, as set out in Tuvalu's Constitution.

14. Thank you, Mr President, Members of the Court, for your kind attention. This concludes the pleadings of Tuvalu.

The PRESIDENT: I thank the representatives of Tuvalu for their presentation. J'invite maintenant la délégation du participant suivant, les Comores, à prendre la parole et appelle S. Exc. M. Youssouf Mondoha Assoumani à la barre.

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<sup>198</sup> See *Nuclear Weapons*, pp. 241-242, para. 29; *Corfu Channel (United Kingdom v. Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 22; *Trail Smelter Arbitration (United States, Canada), Award*, 11 March 1941, United Nations, *Reports on International Arbitration Awards (RIAA)*, Vol. III, p. 1965; *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010 (I) ("Pulp Mills")*, pp. 55-56, para. 101; *Declaration of the United Nations Conference on the Human Environment*, UN doc. A/CONF.48/14/Rev.1 (5-16 June 1972), Principle 21, p. 5; *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law, ITLOS, Advisory Opinion of 21 May 2024 ("COSIS Advisory Opinion")*, paras. 186, 246.

<sup>199</sup> *Pulp Mills*, p. 49, para. 77, pp. 55-56, para. 101.

<sup>200</sup> *COSIS Advisory Opinion*, para. 213.

<sup>201</sup> CR 2024/36, p. 74, paras. 9-11, 14-16 (Bangladesh).

<sup>202</sup> Written Statement of COSIS, para. 72. See also CR 2024/44, p. 14, para. 11 (Latvia); Joint Communiqué on the Reaffirmation of Diplomatic Relations Between Tuvalu and the Republic of Latvia (25 September 2024).

M. MONDOHA ASSOUMANI :

## I. INTRODUCTION

1. Monsieur le président, Madame la vice-présidente, Mesdames et Messieurs les juges, c'est un immense honneur que de paraître devant vous ce jour, un honneur d'autant plus grand que c'est la première fois que mon pays, l'Union des Comores, paraît devant votre Cour, la Cour mondiale.

2. Monsieur le président, il faut le dire d'emblée, l'affaire à l'occasion de laquelle mon pays souhaite aujourd'hui faire valoir ses vues est destinée à entrer dans l'histoire de votre Cour. Les faits mis en jeu par cette affaire constituent aussi une source de préoccupation existentielle pour l'Union des Comores.

3. Il n'est pas opportun ici que j'évoque les chiffres et autres statistiques pour étayer l'insigne gravité des effets néfastes du changement climatique, et en particulier vis-à-vis d'un État insulaire en voie de développement comme les Comores. Cela a été déjà fait et bien dit. Toutefois qu'il me soit permis d'indiquer, Monsieur le président, que mon pays se réjouit et vous félicite par la même occasion, pour l'organisation et la tenue d'une rencontre, en date du 26 novembre 2024, avec des scientifiques du Groupe d'experts intergouvernemental sur l'évolution du climat (GIEC). Certainement, les résultats de vos échanges ne manqueront pas d'éclairer l'examen de l'affaire devant vous, sous une lumière faite de données factuelles et faits objectivement établis.

4. En effet, Monsieur le président, je dois dire que mon pays ne comprend pas, et ne pourra jamais comprendre, qu'il puisse subsister des doutes dans l'esprit de certains, des doutes — parfois exprimés ici devant cette noble Cour — sur la nécessité d'une justice climatique qui doit impérativement et définitivement prendre en compte « les communautés vulnérables qui ont historiquement le moins contribué au changement climatique actuel et qui sont touchées de manière disproportionnée ».

5. Monsieur le président, Mesdames et Messieurs les juges, l'impact du changement climatique est sévère et les Comores sont, malheureusement, sur la « ligne de front extrême » de la crise climatique en raison de leur situation géographique et de leurs caractéristiques archipélagiques.

6. L'impact du changement climatique sur notre pays se présente au moins de deux façons. Premièrement, le changement climatique expose les Comores à une augmentation des variations des

précipitations annuelles, à une hausse des températures, à des changements de saisons, ainsi qu'à une augmentation de la fréquence et de la gravité des risques climatiques, notamment les cyclones tropicaux, les sécheresses, les épisodes de fortes pluies et les inondations. Deuxièmement, les Comores sont également vulnérables à l'élévation du niveau de la mer, qui entraîne l'intrusion des eaux salées et l'érosion côtière.

7. L'élévation du niveau de la mer constitue déjà une grave menace pour les Comores. Au cours des 25 dernières années, plus de 90 % des plages des Comores ont déjà disparu, et la poursuite de l'élévation du niveau de la mer devrait entraîner l'inondation de 734 hectares de zones côtières de faible altitude sur les îles.

8. Avec 65 % de notre population qui devrait vivre dans les zones côtières et les terres basses d'ici 2050, notre pays est extrêmement vulnérable à la poursuite de l'élévation du niveau de la mer, ce qui expose les populations côtières à un risque important de déplacement.

9. Les infrastructures et les actifs fixes associés sont et continueront d'être endommagés par ces augmentations. Les projections estiment à 400 millions de dollars américains le coût de la destruction des infrastructures côtières directement causée par le changement climatique.

10. Loin de céder au fatalisme, les Comores, par l'action de son gouvernement, luttent activement contre les effets néfastes de la crise du dérèglement climatique. Comme il manque le temps et l'espace pour l'exhaustivité, j'indiquerai à titre illustratif la mise en œuvre des mesures d'atténuation et d'adaptation, en particulier une grande campagne de reboisement pour protéger les bassins versants intitulée « un Comorien, un arbre » visant à planter 613 000 nouveaux arbres sur 571 hectares de terres à travers le pays. Mais également, en juin 2023, les Comores se sont jointes à dix autres États insulaires et côtiers africains pour adopter ce qu'on appelle la déclaration de Moroni pour l'action océanique et climatique en Afrique. Et d'ailleurs, je profite de l'occasion pour dire que cette déclaration de Moroni a été également entérinée par le sommet du climat qui a eu lieu à Nairobi, au Kenya.

11. Cependant, malgré des efforts nationaux importants, il est très difficile de rassembler les ressources nécessaires pour développer durablement l'économie des Comores tout en prenant des mesures d'atténuation et d'adaptation pour faire face à une crise climatique résultant des émissions

passées et présentes d'autres pays. Les Comores continuent d'éprouver des difficultés à mobiliser des fonds pour le climat en raison de l'inégalité mondiale dans la distribution des ressources.

12. Pourtant, Monsieur le président, il est une évidence à rappeler : les Comores n'ont pratiquement aucune responsabilité dans les émissions de gaz à effet de serre (GES) qui sont à l'origine et constituent la cause principale de tous les défis de ces changements climatiques. Les Comores sont en effet l'un des plus petits contributeurs actuels aux émissions de GES, et leur contribution historique aux émissions est négligeable, pour ne pas dire quasi nulle.

13. Monsieur le président, des questions fondamentales émergent : les États et leurs peuples, rendus vulnérables ou devenus victimes des changements climatiques n'ont-ils pas de droits à faire valoir ? Sont-ils fondés à rechercher l'exécution des obligations internationales vis-à-vis de ceux qui, par leurs actions ou leurs omissions, ont historiquement contribué ou contribuent présentement à la pollution de l'environnement marin par les émissions de GES ? Si la réponse est affirmative, et nous en sommes convaincus, ne devrait-il pas y avoir une réparation à la hauteur du préjudice subi ?

14. Je ne peux m'empêcher de poser ces questions, et bien d'autres, Monsieur le président, Mesdames et Messieurs les juges, alors que je parais devant vous. Afin de développer les réponses juridiques à leur apporter, je vous demande humblement de bien vouloir maintenant appeler successivement M. Guy-Fleury Ntwari et la professeure Kiara Neri à la barre et je vous remercie de votre aimable attention.

Le PRÉSIDENT : Je remercie S. Exc. M. Youssouf Mondoha Assoumani. Je passe maintenant la parole à M. Guy-Fleury Ntwari. Vous avez la parole.

M. NTWARI :

1. Merci, Monsieur le président. Monsieur le président, Madame la vice-présidente, Mesdames et Messieurs les Membres de la Cour, c'est un honneur de paraître devant vous au nom de l'Union des Comores. Monsieur le président, j'exposerai deux points : tout d'abord pourquoi l'Union des Comores considère que le droit du climat n'est pas une *lex specialis*, puis les obligations primaires en matières climatiques issues à la fois du droit du climat et du droit de la mer. À ma suite, la professeure Neri abordera les obligations issues du droit international des droits humains et du droit international général, ainsi que les questions de responsabilité.

## II. LE DROIT DU CLIMAT N'EST PAS UNE *LEX SPECIALIS*

2. Monsieur le président, Mesdames et Messieurs les Membres de la Cour, les règles de droit international concernant le climat ne sont pas les seules règles à avoir une incidence sur le défi mondial que représente le changement climatique. En effet, des obligations peuvent être identifiées dans d'autres corps de règles tels que le droit international général, le droit de la mer ou encore le droit international des droits humains. Ainsi, comme la majorité des participants à la présente procédure, les Comores soutiennent que le droit du climat ne peut pas être qualifié de *lex specialis*.

3. Votre Cour, à deux reprises dans ses avis sur la *Licéité de la menace ou de l'emploi d'armes nucléaires* en 1996 et sur les *Conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé* en 2004, a précisé que l'argument de la *lex specialis* n'était invocable qu'en cas de protection analogue des droits et non pour exclure l'application entière de certaines branches du droit international public. En l'espèce, les obligations des États découlant du droit coutumier ou d'accords portant sur la mer ou les droits humains sont compatibles avec les obligations découlant du climat, plutôt qu'en conflit avec elles. En effet, comme l'a rappelé la Commission du droit international, « [p]our que le principe de la *lex specialis* s'applique, il ne suffit pas que deux dispositions traitent du même sujet, il doit y avoir une véritable contradiction entre ces deux dispositions, ou l'on doit pouvoir à tout le moins discerner dans l'une de ces dispositions l'intention d'exclure l'autre »<sup>203</sup>.

4. À cet égard, les Comores appellent la Cour à procéder à une interprétation systémique des différentes obligations internationales des États, telle que prévue à l'article 31, paragraphe 3, alinéa c), de la convention de Vienne sur le droit des traités, et surtout, à l'instar du Tribunal international du droit de la mer dans son avis consultatif du 21 mai 2024 et de la Cour européenne des droits de l'homme dans l'arrêt *Verein Seniorinnen Schweiz c. Suisse* du 9 avril 2024.

5. Pour conclure sur ce point, les Comores rappellent que le texte même de la demande d'avis consultatif formulée par l'Assemblée générale demande à la Cour d'examiner l'ensemble du corpus du droit international. Il exclut ainsi l'application de la *lex specialis*.

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<sup>203</sup> CDI, Projet d'articles sur la responsabilité de l'État pour fait internationalement illicite (ci-après, « PARE ») et commentaires y relatifs, *Annuaire de la Commission du droit international*, 2001, vol. II, deuxième partie, p. 151.



### III. LE CONTENU DES OBLIGATIONS

6. Monsieur le président, Mesdames et Messieurs les Membres de la Cour, je vais désormais aborder la première question posée à la Cour.

7. Les Comores demandent respectueusement à la Cour de constater que des obligations en la matière sont issues du droit international du climat (*a*), du droit de la mer (*b*), du droit international des droits humains (*c*) ainsi que du droit international général (*d*).

#### ***a*) Les obligations issues du droit du climat**

8. Pour commencer, les Comores estiment que le droit du climat contient des obligations précises énoncées par la convention-cadre des Nations Unies sur les changements climatiques, telle que complétée par l'accord de Paris.

9. Ces instruments ambitionnent de stabiliser les concentrations de gaz à effet de serre dans l'atmosphère à un niveau qui empêche toute perturbation anthropique dangereuse du système climatique et contiennent un objectif général de limiter le réchauffement climatique global à un plafond de 1,5 °C, tiré de l'article 2 de l'accord de Paris. Suivant cette lecture, ils constituent une véritable obligation collective, soutenue par des obligations substantielles de moyens et des obligations procédurales de résultat. Schématiquement, les Comores reconnaissent trois types d'obligations : *tout d'abord*, des obligations de réduction des émissions anthropiques de gaz à effet de serre ; *puis* des obligations d'adaptation et *enfin* des obligations de coopération.

10. *Premièrement*, l'obligation de réduction implique une obligation procédurale pour chaque partie à l'accord de Paris d'établir, de communiquer et d'actualiser sa contribution déterminée au niveau national ainsi qu'une obligation substantielle de prendre des mesures nécessaires afin de la mettre en œuvre. Les contributions nationales doivent, aux termes de l'article 4, paragraphe 3, viser un « niveau d'ambition le plus élevé possible » et une « progression » par rapport aux contributions nationales précédentes. De plus, les mesures adoptées pour réaliser les objectifs des contributions ne relèvent pas de la discrétion absolue des États, mais sont encadrées par l'accord de Paris qui fixe des critères objectifs ainsi qu'un standard de diligence<sup>204</sup>.

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<sup>204</sup> Exposé écrit de la République française, 22 mars 2024, par. 55.

11. Par ailleurs, le niveau de diligence requis s'interprète au gré de l'évolution des connaissances scientifiques et à l'aune du principe des responsabilités communes mais différenciées, et des capacités respectives. Dès lors, il est nécessaire de prendre en considération tant les moyens que les circonstances nationales pour évaluer l'ambition de la diligence des parties.

12. *Deuxièmement*, les accords climatiques prévoient des obligations d'adaptation, notamment l'article 7, paragraphe 9, de l'accord de Paris qui exige des parties qu'elles entreprennent des mesures d'adaptation dans leur ordre national. Il s'agit là aussi d'une obligation de diligence requise.

13. *Troisièmement*, les parties ont des obligations de coopération. Du fait de leur contribution historique au changement climatique et de leurs capacités présentes, tirées d'un développement économique et technologique rendu possible par des décennies d'activités productrices appuyées sur l'émission de CO<sub>2</sub>, les pays développés ont l'obligation, en vertu de l'article 9, paragraphe 1, de l'accord de Paris, de fournir une aide financière aux pays en développement pour qu'ils prennent des mesures d'atténuation et d'adaptation. En outre, selon l'article 9, paragraphe 5, ils doivent aussi communiquer des informations sur l'aide financière octroyée aux pays en développement.

14. Enfin, les Comores demandent respectueusement à la Cour de tenir compte dans l'interprétation des obligations issues du droit du climat des principes qui sous-tendent le système de la convention-cadre, tels que les capacités respectives des États, le principe des responsabilités communes mais différenciées, ainsi que le principe d'équité intergénérationnelle.

#### **b) Les obligations issues du droit de la mer**

15. J'en viens maintenant aux obligations découlant du droit de la mer. L'Union des Comores souscrit entièrement à l'avis consultatif du Tribunal international du droit de la mer du 21 mai 2024 à l'occasion duquel il a identifié et précisé le contenu des obligations consacrées par la convention des Nations Unies sur le droit de la mer — dite convention de Montego Bay — en matière de protection et de préservation du milieu marin, dans un contexte de changements climatiques.

16. Dans la continuité de ce qui a été mentionné en introduction, l'Union des Comores rejoint la lecture résolument intégrée faite par le TIDM du droit de la mer et du droit du climat selon laquelle ces deux corps de règles coexistent et se complètent<sup>205</sup>.

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<sup>205</sup> TIDM, avis consultatif du 21 mai 2024, par. 223.

17. Les Comores demandent respectueusement à la Cour d'adopter une position semblable à celle du Tribunal en ce qui concerne l'interprétation de l'obligation de diligence requise qui découle, entre autres, des articles 194 et 192 de la convention de Montego Bay. L'avis consultatif rendu par le Tribunal précise par ailleurs que les États doivent prendre toutes les mesures nécessaires pour réduire et maîtriser la pollution marine existante résultant des émissions de gaz à effet de serre et, à terme, empêcher toute pollution de ce genre de se produire<sup>206</sup>. Ils doivent également faire tout leur possible « pour que les émissions anthropiques ... relevant de leur juridiction ou de leur contrôle ne causent pas de préjudice à d'autres États et à leur environnement »<sup>207</sup>. Le principe coutumier de prévention ainsi que l'approche de précaution font partie intégrante, selon le Tribunal, de cette obligation.

18. Le Tribunal a également précisé les modalités de mise en œuvre de l'obligation de diligence, qui

« exige qu'un État mette en place un système national, comprenant une législation, des procédures administratives et un mécanisme d'exécution nécessaires pour réglementer les activités en question, et exerce la vigilance appropriée afin que ce système fonctionne efficacement, en vue d'atteindre l'objectif recherché »<sup>208</sup>.

Le TIDM a en outre indiqué que le niveau de diligence doit varier en fonction des circonstances particulières, y compris en fonction des informations scientifiques et technologiques, des règles et des normes internationales pertinentes, du risque de dommage ainsi que l'urgence de la situation dans le temps ; ce qui est également pertinent en matière climatique. Il en résulte que « [l]e niveau de diligence requise doit être plus rigoureux pour les activités les plus risquées »<sup>209</sup>. Le niveau de diligence doit aussi être élevé et renforcé en matière de lutte contre les changements climatiques.

19. Par ailleurs, les Comores approuvent la position du TIDM qui rappelle que les obligations résultant de l'article 194 de la convention de Montego Bay doivent être appliquées en fonction des ressources et des capacités des États<sup>210</sup>. Dès lors, la portée des mesures destinées à réduire les émissions anthropiques de gaz à effet de serre causant une pollution marine est différente selon qu'il

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<sup>206</sup> *Ibid.*, par. 199.

<sup>207</sup> *Ibid.*, par. 258.

<sup>208</sup> *Ibid.*, par. 235.

<sup>209</sup> *Ibid.*, par. 239.

<sup>210</sup> *Ibid.*, par. 241.

s'agit d'États développés ou d'États en développement<sup>211</sup>. S'il est évident que tous les États doivent réaliser des efforts d'atténuation, la reconnaissance du bien-fondé d'une approche différenciée constitue pour l'Union des Comores un point essentiel de l'avis à venir.

20. Monsieur le président, Mesdames et Messieurs les Membres de la Cour, je vous remercie de votre attention et demande respectueusement à la Cour de bien vouloir donner la parole à la professeure Kiara Neri.

Le PRÉSIDENT : Je remercie M. Guy-Fleury Ntwari. Je passe maintenant la parole à la professeure Kiara Neri.

M<sup>me</sup> NERI :

1. Monsieur le président, Mesdames et Messieurs les Membres de la Cour, c'est un privilège pour moi de m'adresser à vous au nom de l'Union des Comores. J'exposerai deux points : tout d'abord les obligations issues du droit international des droits humains et du droit international général, puis les questions de responsabilité.

### **c) Les obligations issues du droit international des droits humains**

2. Tout d'abord, les Comores souhaitent attirer votre attention sur le fait que tous les participants s'accordent à reconnaître, conformément à l'article premier, paragraphe 1, de la convention-cadre, que ces derniers ont des effets néfastes sur la jouissance des droits fondamentaux des générations présentes et futures. Cette lecture est partagée par d'autres organes juridictionnels, comme le TIDM ou la Cour interaméricaine dans son avis consultatif de 2017.

3. Toutefois, certains participants soutiennent que le droit international des droits humains n'impose pas aux États des obligations tendant à assurer la protection du climat. D'autres participants prétendent que le droit du climat ne confère pas de droits aux individus ni aux « générations futures ». Les Comores ne partagent pas cette lecture.

4. En effet, les États se sont engagés dans les dispositions préambulaires de l'accord de Paris à « respecter, promouvoir et prendre en considération leurs obligations respectives concernant les droits de l'Homme » dans les mesures qu'ils adoptent pour faire face aux effets néfastes des

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<sup>211</sup> *Ibid.*, par. 229.

changements climatiques. Les Comores demandent alors respectueusement à la Cour de saisir cette opportunité pour affirmer clairement que les obligations primaires des États au titre du droit international des droits humains s'appliquent de plein droit en matière de changement climatique, sous la forme d'une obligation positive d'adopter des mesures de prévention, d'atténuation, d'adaptation et de réduction des pertes et préjudices.

5. Par ailleurs, les instruments de protection des droits humains tels que les pactes de 1966 exigent des États parties qu'ils respectent et garantissent ces droits à tous les individus se trouvant sur leur territoire, mais également à ceux qui ne sont pas situés sur leur territoire, mais relèvent tout de même de leur juridiction<sup>212</sup>. Les comités conventionnels onusiens tout comme la Cour interaméricaine ont estimé que lorsqu'un dommage transfrontalier porte atteinte à des droits garantis par un traité de protection des droits humains, les personnes se trouvant à l'extérieur du territoire de l'État d'origine sont réputées relever de la juridiction de cet État à deux conditions :

- 1) s'il existe un lien de causalité<sup>213</sup> entre l'acte commis sur le territoire de l'État en question et les violations constatées ;
- 2) si l'État d'origine exerce un contrôle effectif sur les activités qui ont causé le dommage. Cette position est justifiée par le fait que c'est l'État sur le territoire duquel les activités ont été menées qui est en mesure d'éviter qu'elles causent un dommage transfrontière. Dans ce contexte, la juridiction des États émetteurs de gaz à effet de serre s'étend donc aux individus qui subissent les conséquences de ces émissions, notamment les populations des petits États insulaires comme les Comores.

#### **d) Les obligations issues du droit international général**

6. Pour finir sur la première question posée à la Cour, les Comores souhaitent aborder les obligations issues du droit international général.

7. Comme le relève la quasi-totalité des États insulaires<sup>214</sup> dans leurs observations écrites, le changement climatique menace les États vulnérables, mettant en cause leur droit à l'intégrité

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<sup>212</sup> PIDCP, art. 2, par. 1 ; PIDESC, art. 2, par. 1.

<sup>213</sup> Albanie (par. 130) ; Sierra Leone (par. 3.145). Voir *Activités armées sur le territoire du Congo (République démocratique du Congo c. Ouganda)*, réparations, arrêt, C.I.J. Recueil 2022 (I), p. 48, par. 93.

<sup>214</sup> République dominicaine (par. 4.45) ; Nauru (par. 37) ; Singapour (par. 3.81) ; Micronésie (par. 80 et 82) ; Philippines (par. 106) ; Îles Cook (par. 315 et par. 343 et suiv.) ; Sainte-Lucie (par. 39) ; Vanuatu (par. 288) ; Bahamas

territoriale, à la souveraineté permanente sur leurs ressources naturelles, mais également leur droit fondamental à la survie et le droit des peuples à l'autodétermination<sup>215</sup>. Les Comores souscrivent à ce constat et rappellent la position prise par la Commission du droit international : « Si ces États venaient à perdre ces droits contre leur volonté, cela pourrait constituer une violation des “droits inaliénables” qu'ils tirent de leur souveraineté. »<sup>216</sup>

8. En effet, le changement climatique imputable aux États pollueurs menace le « droit fondamental qu'a tout État à la survie »<sup>217</sup> reconnu par cette Cour dans son avis consultatif de 1996, en particulier dans le cas des petits États insulaires pour lesquels la menace de disparaître sous les eaux est une menace existentielle.

9. Les Comores soutiennent que ce droit fondamental à la survie implique la reconnaissance de la continuité de l'État et de ses frontières internationales même en cas de disparition sous les eaux d'une partie de son territoire terrestre, mais il implique également une obligation coutumière corrélative de s'abstenir de tout acte qui menacerait la survie d'un autre État. Les Comores soutiennent que cette obligation impose aux États pollueurs de réduire leurs émissions de gaz à effet de serre menaçant directement le territoire des États insulaires. Cette obligation peut également être déduite du principe d'utilisation non dommageable du territoire<sup>218</sup>.

10. De surcroît, comme l'ont rappelé les représentants de Tuvalu à l'instant, les peuples « ont le droit d'exercer leur droit à l'autodétermination en ce qui concerne leur territoire dans son ensemble » et que ce droit comprend « le respect de l'unité nationale et de l'intégrité territoriale »<sup>219</sup>,

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(par. 154) ; Barbade (par. 201) ; Sri Lanka (par. 94) ; Saint-Vincent-et-les-Grenadines (par. 109) ; Kiribati (par. 110) ; Madagascar (par. 58) ; Tuvalu (par. 74) ; Île Maurice (par. 84) ; Nauru (par. 37) ; Antigua-et-Barbuda (par. 195).

<sup>215</sup> Written Statement of the Commission of Small Island States on Climate Change and International Law, 22 March 2024, par. 68.

<sup>216</sup> CDI, Élévation du niveau de la mer au regard du droit international. Note complémentaire à la première note thématique établie en 2020 par Bogdan Aurescu et Nilüfer Oral, coprésidents du Groupe d'étude sur l'élévation du niveau de la mer au regard du droit international, 13 février 2023, A/CN.4/761, par. 193.

<sup>217</sup> *Licéité de la menace ou de l'emploi d'armes nucléaires, avis consultatif*, C.I.J. Recueil 1996 (I), p. 263, par. 96.

<sup>218</sup> Voir SA, *Fonderie de Trail (Canada c. États-Unis d'Amérique)*, sentence du 11 mars 1941, *Recueil des sentences arbitrales des Nations Unies*, vol. III, p. 1905 et suiv. ; *Détroit de Corfou (Royaume-Uni c. Albanie)*, fond, arrêt, C.I.J. Recueil 1949, p. 22 ; *Licéité de la menace ou de l'emploi d'armes nucléaires, avis consultatif*, C.I.J. Recueil 1996 (I), p. 241-242, par. 29 ; *Usines de pâte à papier sur le fleuve Uruguay (Argentine c. Uruguay)*, arrêt, C.I.J. Recueil 2010 (I), p. 55-56, par. 101 ; *Certaines activités menées par le Nicaragua dans la région frontalière (Costa Rica c. Nicaragua)* et *Construction d'une route au Costa Rica le long du fleuve San Juan (Nicaragua c. Costa Rica)*, arrêt, C.I.J. Recueil 2015 (II), p. 711-712, par. 118 ; TIDM, *Responsabilités et obligations des États qui patronnent des personnes et des entités dans le cadre d'activités dans la Zone*, avis consultatif de la Chambre pour le règlement des différends relatifs aux fonds marins du Tribunal international du droit de la mer, 1 février 2011, par. 121 et suiv.

<sup>219</sup> *Effets juridiques de la séparation de l'archipel des Chagos de Maurice en 1965, avis consultatif*, C.I.J. Recueil 2019 (I), p. 133, par. 155, et p. 134, par. 160 ; *Conséquences juridiques de l'édification d'un mur dans le*

ainsi que le droit à la subsistance en vertu de l'article premier, paragraphe 2, commun aux deux Pactes de 1966<sup>220</sup>. Or, comme le soutient la COSIS dans ses exposés écrits,

« les peuples des petits États insulaires ne peuvent pas avoir de liberté de choix vis-à-vis de leur futur politique, économique, social ou culturel si le changement climatique menace de submerger leur territoire, de le rendre inhabitable ou de menacer l'existence même de l'État »<sup>221</sup>.

11. Dès lors, les Comores demandent respectueusement à la Cour de reconnaître que le droit international général contient également une obligation de réduction des émissions de gaz à effet de serre sur le fondement de l'utilisation non dommageable du territoire, du droit de tout État à la survie et du droit des peuples à l'autodétermination.

#### IV. LA RESPONSABILITÉ DES ÉTATS

12. Monsieur le président, Mesdames et Messieurs les Membres de la Cour, je vais maintenant aborder la deuxième question posée à la Cour par l'Assemblée générale.

13. Les Comores demandent respectueusement à la Cour d'affirmer que le régime général de la responsabilité internationale de l'État s'applique dans le contexte des changements climatiques.

14. Tout d'abord, il y a fait internationalement illicite au sens du Projet d'articles de 2001<sup>222</sup>, lorsque :

- les États n'adoptent pas toutes les mesures nécessaires pour prévenir la pollution atmosphérique et marine due aux émissions anthropiques de gaz à effet de serre provenant d'activités relevant de leur juridiction ou de leur contrôle ;
- ou lorsque les États ne prennent pas toutes les mesures nécessaires pour coopérer à la prévention des dommages résultant de ces émissions.

15. Or, il est scientifiquement établi que les actes ou omissions ont déjà causé des dommages considérables et irréversibles au système climatique et plus spécifiquement au territoire des petits États insulaires comme les Comores. Les Comores estiment que les petits États insulaires sont directement lésés par la violation, par un petit groupe d'États à fortes émissions de leurs obligations

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*territoire palestinien occupé, avis consultatif, C.I.J. Recueil 2004 (I), p. 199, par. 156.*

<sup>220</sup> CDH, observation générale n° 12, art. premier, 1984, par. 5-6.

<sup>221</sup> Written Statement of the Commission of Small Island States on Climate Change and International Law, 22 March 2024, par. 75.

<sup>222</sup> CDI, PARE, art. 1.

internationales. À ce titre, ils peuvent invoquer leur responsabilité sur le fondement de l'article 42 a) du Projet de 2001, mais également sur le fondement de l'article 42 b) dans la mesure où ils sont « spécialement affectés » par la violation d'obligations dues à un groupe d'États dont ils font partie<sup>223</sup> et où les obligations en cause sont des obligations *erga omnes partes*.

16. Par ailleurs, certains participants ont exclu toute responsabilité pour les émissions antérieures à l'entrée en vigueur de la convention-cadre au motif que ces obligations n'existaient pas avant cette date. L'Union des Comores est en désaccord avec cette lecture pour deux raisons. Tout d'abord, les émissions constituent des « faits continus » et « composites » au sens des articles 14 et 15 du Projet d'articles de 2001. Ensuite, si la convention-cadre n'était pas en vigueur avant 1994, tel n'est pas le cas d'autres obligations issues notamment du droit international général et du droit international des droits humains.

17. Par ailleurs, les Comores demandent respectueusement à la Cour de rappeler que le fait qu'il y ait, en matière climatique, une pluralité d'États lésés et une pluralité d'États responsables n'empêche en rien l'établissement de la responsabilité internationale individuelle de l'État.

18. Monsieur le président, Mesdames et Messieurs les Membres de la Cour, les Comores demandent également à la Cour de dire que le mécanisme de pertes et préjudices issu du droit du climat est applicable en même temps que l'est le régime général de responsabilité.

19. Monsieur le président, Mesdames et Messieurs les Membres de la Cour, ceci conclut l'exposé oral des Comores. Je vous remercie de votre attention.

Le PRÉSIDENT : Je remercie les représentants des Comores pour leur présentation, qui conclut l'audience de ce matin. La Cour se réunira à nouveau cet après-midi, à 15 heures, pour entendre l'Uruguay, le Viet Nam, la Zambie, l'Agence des pêches du Forum des îles du Pacifique et l'Alliance des petits États insulaires sur les questions qui lui ont été soumises.

L'audience est levée.

*L'audience est levée à 12 h 40.*

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<sup>223</sup> CDI, commentaire de l'article 42 du PARE, par. 12.