World's Youth for Climate Justice

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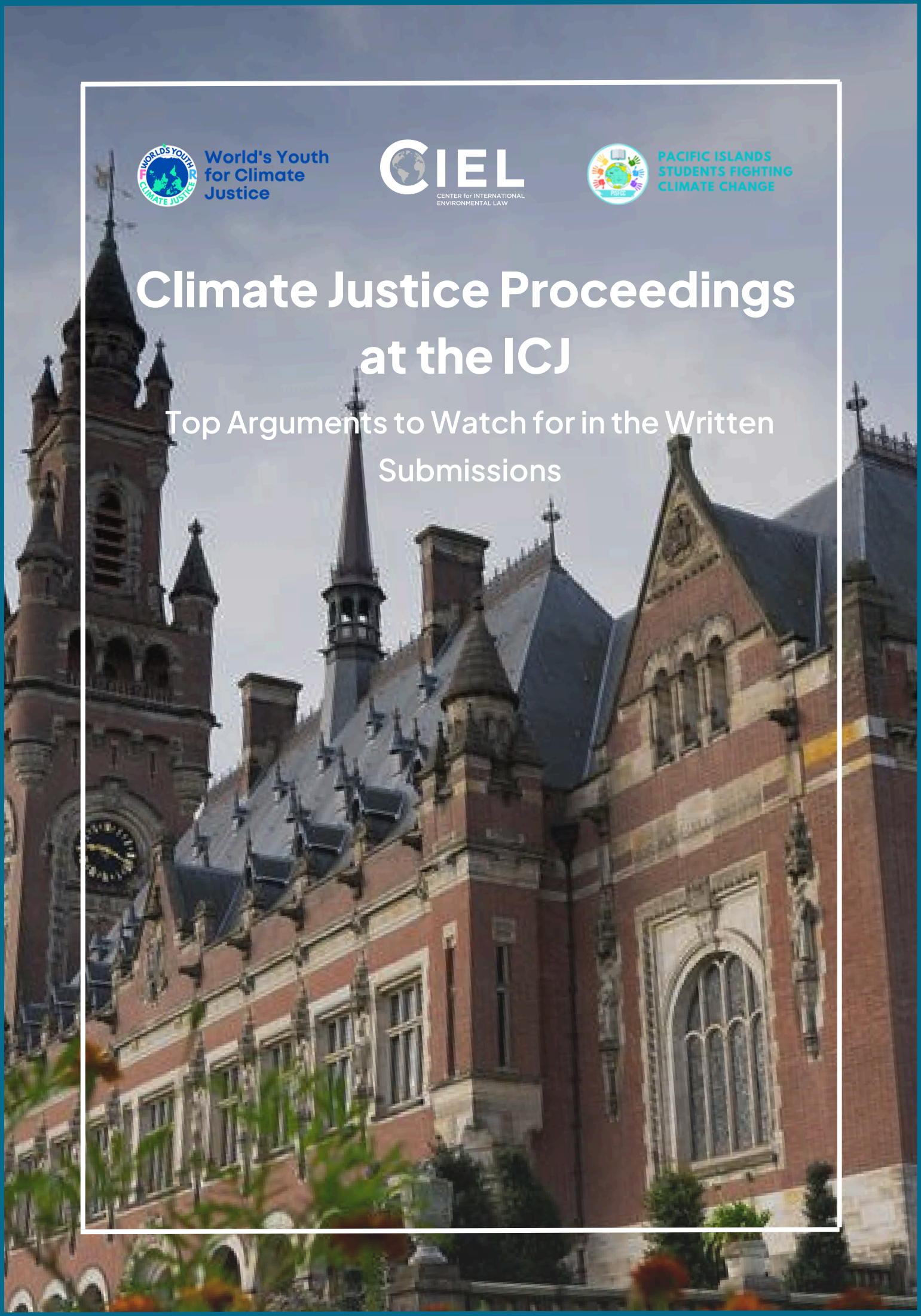
PACIFIC ISLANDS STUDENTS FIGHTING CLIMATE CHANGE

Climate Justice Proceedings at the ICJ

Top Arguments to Watch for in the Written Submissions



Introduction

On 29 March 2023, the United Nations General Assembly adopted by consensus a resolution requesting the International Court of Justice (ICJ) to issue an Advisory Opinion (AO) on States' obligations in respect of climate change. The ICJ has now, for the first time in history, the mandate to clarify the legal obligations of States with regard to climate change under multiple sources of international law. The significance of this process cannot be overstated.

An unprecedented number of States and international organizations have participated in the proceedings, with the Court receiving a record 91 initial written submissions and 62 in the subsequent comments phase, when States and international organizations that provided initial input could comment on one another's written statements. Following the completion of the written phase, the Court held two weeks of oral hearings, from 2 to 13 December 2024, in which a record ninety-eight States and twelve international organizations expressed their intention to participate.

This brief unpacks some of the key arguments addressed in the written submissions, presenting select excerpts to provide a snapshot of critical legal questions at the heart of the ICJ AO. It presents key contrasting positions of major polluters and the vast majority of participants, especially concerning issues that have crucial implications for climate justice. The brief is by no means comprehensive; it offers but a glimpse into the complex terrain of arguments submitted by countries across the world and international organizations on the issue of State obligations in relation to climate change. The written submissions cited or particular quotes included are by no means exhaustive - other submissions addressed the same but could not all be included for space reasons. The aim is to provide insight into how countries and international organizations plan to build – or threaten to undermine – a safe and healthy world for present and future generations.

The following legal questions have been considered:

Acknowledgments

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Argument to Watch For

What international law governs State obligations in relation to climate change?

Why does this issue matter?

One of the most critical issues at the heart of the proceedings is the question of what law governs the obligations of States in relation to climate change: whether the UN climate regime (essentially the UN Framework Convention on Climate Change (UNFCCC), the Kyoto Protocol, and the Paris Agreement) is the only or primary relevant source of obligations or whether multiple sources of international law define what States must do and refrain from doing when it comes to climate change.

International bodies and courts, including the International Tribunal for the Law of the Sea (ITLOS) in its climate advisory opinion issued in May 2024, have repeatedly confirmed that States have multiple, concurrent duties to protect the climate system, including but not limited to those contained in the UN climate regime. The climate regime is an important part of the legal framework for addressing climate change, but it is not the only or main source of legal obligations. The climate agreements did not create State duties to prevent significant transboundary environmental harm such as that caused by greenhouse gas (GHG) emissions and ensuing changes to the climate system, or the duty to prevent foreseeable adverse effects on human rights, such as those resulting from the climate crisis. Rather, the climate agreements *were created in* response to those duties, to articulate some of the ways States would cooperate to uphold them. Indeed the text of the UNFCCC and Paris Agreement reflect the fact that they were written against the backdrop of these environmental and human rights laws and principles, building upon and incorporating them, not displacing or erasing them.

Climate change affects nearly every aspect of human life, ecology, and international relations, so no one treaty or regime can address all legal obligations relevant to it. Various legal frameworks, such as the law of State responsibility, customary and conventional international environmental and human rights law, and the law of the sea, among others, are needed to prevent, minimize and remedy climate-related harm. Limiting the law that the Court considers to climate treaties would ignore multiple areas that are not substantively or fully addressed by the climate regime, including: remedy and reparation, the prevention of transboundary harm, human rights, ocean protection, and corporate accountability. These topics are addressed by long-standing legal frameworks that pre-date and continue to apply alongside the climate treaties. Treating the UN climate regime as a lens through which all other international law must be read or by which all other law may be limited, would misconstrue the status of the climate agreements and the questions before the Court. The ICJ was not asked to interpret what legal obligations the UN climate treaties impose, but rather what are the obligations of States under international law, writ large, to ensure protection of the climate system. Moreover, restricting the Court's analysis to the climate regime would disregard the legal obligations that applied (for decades) prior to the adoption of the UNFCCC and the State conduct that breached them.

What are big polluters arguing?

Some States argue that the answer to the question before the Court lies exclusively in the climate regime, and that the Paris Agreement, in particular, is essentially *lex specialis*[1] or the only source of legal obligations to protect the climate system under international law. Others acknowledge that some international laws apply beyond the climate agreements, but contend that the Paris Agreement is the *primary source* of climate obligations through which other law must be interpreted and by which other law may be limited.

- The **United States** essentially asserts a *lex specialis* argument contending that States' international legal obligations in respect of climate change are found primarily in the UN climate change regime, and the Paris Agreement in particular. [para 3.46 of its written statement]. Where there are conflicts between the UNFCCC and Paris Agreement, the Paris Agreement prevails. [para 3.3 of its written statement]. To the extent other international law sources, such as customary international law, are relevant, "such obligations would be satisfied in the climate change context by States' implementation of their obligations under the climate change-specific treaties they have negotiated and joined." [para. 4.1 of its written statement].
- **Saudi Arabia** [para. 1.9 of its written comment, para. 1.15 of its written statement], **OPEC** [paras. 15, 17 of its written statement], **Japan** [para. 11 of its written statement], and **Kuwait** [para. 3 of its written statement] also advance arguments that the climate regime is *lex specialis*.
- Others, such as **Brazil,** argue that the answer to the first question "lies in the multilateral climate change regime, centered in the UNFCCC and its Paris Agreement … The importance of the Kyoto Protocol must also be stressed by the Court." [para. 10 of its written statement].
- The **joint Nordic (Denmark, Sweden, Finland, Iceland, and Norway)** written submission postulates that "the Paris Agreement consensus prevails over other instruments of the UN climate change regime in case of norm conflict." [para. 52 of their written statement]. "The UN climate change regime, and the Paris Agreement in particular, as the most recent consensus with near universal participation, is a key interpretive factor in any process seeking to determine the possible existence and scope of obligations relative to that same issue under other instruments. These include, *inter alia*, UNCLOS and various human rights instruments." [para. 61 of their written statement]. "[T]he constructive approach to combatting climate change is within the international legal framework of the UN climate change regime." [para. 63 of their written statement].
- The **United Kingdom (UK)** and **European Union** written submissions also signal the particular significance of Paris [paras. 4.3, 29 of the UK written statement; para. 59 of the EU written statement], and a number of States, including **Canada**, which argue that the climate regime is the principal source of obligations [paras. 10-11, 22-23 of its written statement],aver that other legal sources are to be read in light of the climate treaties.

[1] Lex specialis refers to the principle that more specialized law applies over general law, when the two conflict. But the principle does not apply in the context of climate-related obligations because: (1) there is no incompatibility of norms or conflict between sets of norms, and (2) there is no explicit language in the UN climate agreements expressly abrogating, displacing, or preempting application of certain laws, or establishing the exclusivity of specific agreements. Based on this, the climate treaties do not automatically preempt other relevant legal norms. In fact, the preambular provisions of the climate treaties reference other legal regimes, indicating an acknowledgment of concurrent duties of States. Additionally, declarations made by some State parties upon ratification, acceptance, approval, or accession to the UNFCCC and the Paris Agreement reinforced the understanding that the agreements do not derogate from public international law. Finally, international norms outside of the climate regime have already been applied by, inter-alia, domestic Courts, UN human rights bodies and mandates, the European Court of Human Rights, and the International Tribunal for the Law of the Sea in relation to conduct contributing to the climate crisis.
[2] However, Brazil's submission does reference international environmental law, customary international law, and the law of State Responsibility. If the submission and comments are read together, while the focus is very much on the climate treaties – Brazil insists that they cannot be read in vacuum, and should build on norms and principles spanning the vast corpus of international law.

Australia elaborates "[o]ther international treaties or customary rules, which were not negotiated or did not develop in order to address the threat posed by climate change, should not be interpreted as operating inconsistently with, or as going beyond, the UNFCCC and Paris Agreement." [para. 2.62 of its written statement].

- To illustrate such a restrictive interpretation, the **United Arab Emirates** posits that in the context of climate change, the UN climate change regime informs and gives content to the no harm principle under general international law. [paras. 99-102 of its written statement]. **China** makes similar arguments regarding the scope of the obligations under international human rights law being limited to those under the UNFCCC regime. [para. 123 of its written statement].

What climate justice requires

A **majority of States have strongly asserted that multiple sources of law govern State obligations in relation to climate change** [3]**.**

- In its written comment, **Chile** observes, "[t]he fact that the *lex specialis* view was only supported by twelve out of ninety-one submissions is also very telling of the lack of support for this interpretation." [para. 73 of its written comments]. **Vanuatu** submits that "[t]he large majority of the Written Statements confirm the need, expressed in the request, for the Court to consider the entire corpus of of international law in its response to the questions put to it. Crucially, the Court is the only international jurisdiction with a general competence over all areas of international law which allows it to provide such an answer." [para. 77 of its written comments].
- In relation to the law applicable to the first question before the Court, **Namibia** posits that the "broad reference to 'international law' includes not just conventional law, but also customary law and general principles of law. It further includes not just obligations under international environmental law, but also under international human rights law." [para. 40 of its written statement]. **Slovenia** considers that the first question "refers to international law without any further qualification or restrictions and, virtually, includes all sources of international law", encompassing but not limited to those mentioned in the UNGA resolution (*the request to the ICJ*) [paras. 9-10 of its written statement].
- **Liechtenstein**, highlighting the adverse impacts of the climate crisis on the full enjoyment of human rights, asserts that "the obligations of States with respect to the protection of the climate system and other parts of the environment from anthropogenic emissions of GHGs should be interpreted in a manner that integrates international human rights and international environmental law." [para. 25-26 of its written statement].

[3] Including but not at all limited to: Albania (paras. 63-64, 99 of its written statement); Antigua and Barbuda (para. 230 of its written statement); Argentina (paras. 33-34 of its written statement); Bahamas (para. 83 of its written statement); Chile (para. 33 of its written statement); Colombia (paras. 3.2-3.72 of its written statement); Cook Islands (paras. 132-137 of its written statement); Costa Rica (paras. 32-36 of its written statement); Dominican Republic (paras. 4.1, 4.6, 4.8 of its written statement); Ecuador (paras. 3.2-3.3, 3.15, 3.23, 3.66-3.67, 3.98 of its written statement); Egypt (para. 68, 71 of its written statement); Grenada (paras. 19, 37 of its written statement); Kenya (para. 2.8 of its written statement); Madagascar (para. 17 of its written statement); Marshall Islands (part A, paras. 103, 124 of its written statement); Mauritius (para. 219 of its written statement); Melanesian Spearhead Group (MSG) (paras. 231-232 of its written statement); Namibia (para. 40 of its written statement); the Netherlands (paras. 3.2, 3.22-3.23, 4.3-4.6, 4.15-4.17, 4.24 of its written statement); Organisation of African, Caribbean and Pacific States (OACPS) (paras. 59-60 of its written statement); Peru (paras. 68-71 of its written statement); Philippines (section V (A), para. 49 of its written statement); Portugal (para. 39 of its written statement); Sierra Leone (paras. 3.5-3.6 of its written statement); Singapore (paras. 3.1, 3.27, 3.44, 3.73 of its written statement); Solomon Islands (paras. 53-55 of its written statement); St. Lucia (para. 39 of its written statement); Thailand (para. 5 of its written statement); Uruguay (paras. 81-83 of its written statement); and Vietnam (para. 15 of its written statement).

The rules of interpretation establishing the relationship between the climate agreements and the wider corpus of applicable international law affirm that States have concurrent climate duties.

- The **African Union** reasons that "[t]he relationship between the various legal instruments of international law must be seen as one of mutual supportiveness and complementarity … especially given the nature of climate change, and the questions posed by the UN General Assembly which are all-encompassing. Consequently, the principle of systemic integration must guide the Court … But this conclusion does not deprive each obligation of its autonomous application and its specific requirements." [para. 30 of its written comments].
- On why States have concurrent duties under international law alongside the climate regime, the **Melanesian Spearhead Group (MSG)** explains, "Indeed, the text of the UN Climate Regime confirms that it is not intended to operate as *lex specialis*. The preamble of the UNFCCC, for example, expressly recalls the prevention principle as operable in the context of conduct under States' jurisdiction or control that contributes to climate change. Likewise, the preamble of the Paris Agreement confirms the applicability of human rights law to the context of climate change. … More generally, the UN Climate Regime cannot operate as *lex specialis* because the nature of obligations under the UN Climate Regime differs from the nature of obligations under other relevant sources of international law, both in terms of temporal scope (*ratione temporis*) and subject matter (*ratione materiae*)." [paras. 44-45 of its written comments].

Climate change jurisprudence affirms concurrent duties under international law.

- **Kiribati** highlights, "From the perspective of rules and treaties other than those of the climate change regime, the formal application of human rights treaties and the United Nations Convention on the Law of the Sea (UNCLOS) to govern the relevant conduct (i.e., anthropogenic emissions of greenhouse gases from a State) has been specifically confirmed by the European Court of Human Rights, the Human Rights Committee, and the International Tribunal on the Law of the Sea (ITLOS) as well as the current proceedings under the InterAmerican Court of Human Rights." [para. 58 of its written comments]. **Sri Lanka** also notes this point on jurisprudence. [para. 11 of its written comments]. As **Chile** points out, ITLOS rejected the argument that the climate regime is *lex specialis*. [para. 71 of its written comments].

In clarifying what laws govern States' legal obligations in relation to climate change, the ICJ should ensure the breadth of applicable legal sources is fit for purpose–that is, capable of addressing the full range of relevant conduct and adverse effects of climate change, as well as the complexity of legal issues arising in the climate context. Reliance on the entire breadth of relevant customary and conventional international law, including but not limited to, international human rights law, environmental law, climate law, and the law of the sea, will be critical to advance climate justice.

Argument to Watch For

What binding obligations do the climate treaties contain?

Why does this issue matter?

Some major polluters are not only trying to restrict the universe of applicable law to the UN climate treaties, and more specifically the Paris Agreement; they are also trying to narrow the interpretation of that limited universe to effectively read out any meaningful binding obligations at all or minimize those it contains.

Accurately interpreting what the UN climate treaties (UNFCCC, Kyoto Protocol, and the Paris Agreement) require of States is critical to answering the questions before the ICJ. Compliance with those binding treaties is required, but not sufficient to safeguard human rights and the environment. In the face of escalating climate harm, some major polluting countries contend not only that the Court should look principally or exclusively to the Paris Agreement for State obligations to protect the climate system, and that the Paris Agreement takes primacy over the UNFCCC, but that Paris actually requires very little of Parties at all, given that it is structured around States' voluntary national emissions reduction targets. They assert a diluted reading of the climate treaties as containing little to no substantive requirements for protection of the climate system or mitigation of GHG emissions.

To accept some major polluters' positions would be to interpret the procedural requirements of the Paris Agreement as its only binding provisions with respect to protection of the climate system; the rest would be merely aspirational or hortatory. However, this interpretation overlooks the overarching objective of the UNFCCC, the ultimate goal of which is to prevent dangerous anthropogenic interference with the climate system, and the purpose of its Paris Agreement, which is explicitly linked to and designed to enhance the implementation of the Convention. The Paris Agreement aims to strengthen the response to climate change by holding temperature rise to 1.5°C. A narrow construction of the climate treaties also selectively ignores language in the treaties that explicitly binds developed countries to undertake adaptation measures and provide finance to developing countries for climate action, among other provisions.
The climate treaties are not the only or even the principal source of obligations related to the climate crisis, but they are a critical part of the normative landscape and must be interpreted correctly. A diluted reading of the treaties would transform them from a regime aimed at protecting people and the planet, into a regime that shields polluters from accountability.

What are big polluters arguing?

Some States have argued that the climate treaties do not impose any binding obligations to undertake mitigation or adaptation measures, and dilute or ignore obligations to assist developing countries.

- On mitigation, according to the **United States**, the Paris Agreement requires only that States formulate, publish, and report on their nationally determined contribution (NDC),

the target each country sets for itself to reduce its national emissions, but deliberately does not require State parties to *achieve* their NDCs. [paras. 3.16-3.17 of its written statement]. The United States further contends that nothing in the Paris Agreement provides any legal standard to judge the sufficiency of a Party's NDC. [para. 3.15 of its written comments].

- Echoing the United States, the **joint Nordic countries (Denmark, Sweden, Finland, Iceland, and Norway)** argue that "the core obligations under the UN climate change regime, including the Paris Agreement, are procedural in nature." [para. 53 of their written statement].
- In line with the United States, **the Organization of Petroleum Exporting Countries (OPEC)** argues that "[a]s to the content of these NDCs under the Paris Agreement, they were explicitly referred to as 'contributions' and not 'commitments' or 'obligations'. … They are not to be read as self-standing obligations as a general rule in international law." [para. 66 of its written statement]. **Saudi Arabia** extends a similar argument that Paris does not impose obligations on States to undertake mitigation measures [para. 4.62 of its written statement], and neither does the UNFCCC. [para. 4.10 of its written statement].
- The **United States** also maintains that the Paris Agreement's adaptation provisions are not legally binding, except for article 7.9, which mandates States to engage in adaptation planning. [para. 3.19 of its written statement].

Additionally some major polluters have argued against or questioned differentiation under the climate regime and the application of the principles of equity and common but differentiated responsibilities and respective capabilities (CBDR-RC).

- According to **the European Union**, CBDR-RC has normative status under Paris, but it considers that there is a divergence of views on both the scope of the principle and how it relates to State obligations to protect the climate system. [para. 185 of its written statement].
- **Switzerland** posits that the 1992 categorisation of "developed" and "developing" countries in the UNFCCC is no longer justified, as a number of major countries categorised as "developing" are now some of the largest CO2 emitters and fall within the group of high-income countries. [para. 50 of its written statement]. The **United States** [para 3.26 of its written statement] and **Germany** [paras 59, 80-81 of its written statement] have taken similar positions.

Some States have sought to bolster the restrictive reading outlined above with the notion that the Paris Agreement was not adopted pursuant to the UNFCCC and does not need to be read in light of the Convention.

- For example, the **United States** asserts that the Paris Agreement is not subordinate to the UNFCCC and need not even be read in light of the Convention's terms. [para. 3.8 of its written comments].

What climate justice requires

Many States argue that the climate treaties contain binding mitigation and adaptation obligations for all Parties, and the obligation for developed countries to support

developing countries.

- **Vanuatu** notes that "the UNFCCC and the Paris Agreement contain binding GHG mitigation obligations for Parties." This is supported by binding NDC procedural obligations, which indicate binding substantive obligations requiring Parties to pursue domestic measures. [paras. 408-409 of its written statement]. According to **Ecuador**, the UNFCCC includes binding obligations for "developed countries to adopt and implement national policies and measures to mitigate climate change by reducing GHG emissions and protecting and enhancing sinks and reservoirs." [para. 3.74 of its written statement].
- "For **Colombia**, the principle of the highest possible ambition, which aligns with the duty of due diligence in international law, essentially requires that Parties deploy their best efforts in setting their national mitigation targets and in pursuing domestic measures to achieve them." [bold format added] [para. 3.38 of its written statement].
- **Vanuatu** argues that "[t]he UNFCCC and the Paris Agreement contain binding obligations for all Parties in relation to adaptation." [para. 419 of its written statement].
- On support to developing countries, **Singapore** posits that the UNFCCC and the Paris Agreement oblige developed countries to provide financial resources to assist developing countries with adaptation and mitigation. [para. 3.38 of its written statement].
- On support provisions, the **Cook Islands** contend that "States have an obligation to support, assist and finance the use and implementation of traditional knowledge in adaptation actions under the Paris Agreement." [para. 251 of its written statement].
- On the importance of support, the **African Union** underscores the "direct link between the extent of support provided to developing countries and the level of effective implementation of the UNFCCC and the Paris Agreement by developed countries." [para. 145 of its written statement].
- In line with the positions above, **Antigua and Barbuda** also asserts that the UNFCCC and Paris Agreement impose specific obligations on States related to GHG emissions including to take mitigation and adaptation measures, and to provide financial support for those measures. [paras. 151-170 of its written statement]. **The Philippines** similarly outlines, in a clearly laid out table, the specific obligations of States under the climate treaties in relation to mitigation, adaptation, and financial support. [table at para. 102 of its written statement]

A few States have argued that the principles of equity and CBDR-RC together constitute one of the fundamental pillars of the climate agreements.

- According to the **African Union**, differentiated obligations should be a cornerstone of differentiated obligations should be a cornerstone of the international response to climate change: "[W]hile all countries must participate in mitigating climate change, not all bear the same level of responsibility nor the same capacity to address the issue. The historical contributions to global greenhouse gas emissions and the varying degrees of economic development across nations necessitate a tailored approach." [para. 18 of its written statement]. The African Union argues the existing framework should be interpreted as one that imposes "more stringent obligations on historically high emitters and enables developing countries to pursue sustainable development pathways." [para. 18 of its written statement].

Similarly, **Brazil** explains that "[d]ifferentiation in favor of developing states remains, as it always was, the linchpin, the very heart of the climate change international legal regime." [para. 12 of its written statement].

- **Kenya** points out that while a minority of participants argue that CBDR-RC "is not designed to give effect to historical GHG emissions," such arguments are misconceived. Kenya clarifies that "while the Paris Agreement references the CBDR-RC principle, it would be a mistake to conclude that the principle does not exist outside this context. On the contrary, the CBDR-RC principle has a long pedigree in the history of international environmental law." [paras. 4.17-4.18 of its written comments].

As several States recognize, the Paris Agreement was adopted under the UNFCCC and must be interpreted in light of it and consistent with its object and purpose.

- For example, **Brazil** asserts that "the UNFCCC has a foundational role in the climate change regime, insofar as both the Kyoto Protocol and the Paris Agreement are clearly established on the basis of that Convention. The treaties that were adopted under the UNFCCC must be interpreted in light of it." [para. 22 of its written comment].

The ICJ should ensure robust interpretation and application of all relevant applicable law to unlock requisite climate ambition. In a world where the 2024 Emissions Gap report makes clear that the continuation of current policies will put us on the catastrophic path of 3°C temperature rise, the ICJ's clarification of what the climate treaties require as binding obligations is vital.

Argument to Watch For

Does the long-standing duty to prevent significant transboundary environmental harm apply to GHG emissions and climate change?

Why does this issue matter?

Greenhouse gases (GHGs) do not stop at national borders and climate impacts are not felt only in the States responsible for the emissions that cause them. International law is both necessary and equipped to address global problems such as climate change. One of the long-standing principles of customary international law – reconfirmed by the ICJ, as well as numerous other tribunals – is the duty of a State not to cause, or allow activities within its jurisdiction or control to cause, significant environmental harm to other States or areas beyond national jurisdiction. Since at least the 1941 *Trail Smelter* arbitration[4], the duty to prevent significant transboundary environmental harm has been reiterated time and again, including in the Stockholm and Rio Declarations[5], in numerous multilateral environmental agreements, including the UNFCCC[6], and by international courts[7]. This duty requires States to take measures to prevent and minimize harm to the environment of other States or the global commons, for example by implementing and enforcing appropriate rules and measures to avoid activities that pose a risk of such harm, and to remedy the harm if it is not prevented[8].

Some States have questioned whether this principle applies in the context of climate change, which results from multiple sources and has diffuse impacts. But neither the number of sources of planet-warming pollution nor the widespread nature of its adverse effects renders the transboundary harm principle inapplicable. It would be unreasonable to hold that an isolated instance of cross-border pollution is unlawful, but a proliferation of such instances is not. Moreover, the sources of GHG emissions causing climate change are neither unknowable nor uncontrollable. It is beyond dispute that fossil fuel production and use generates the majority of anthropogenic GHGs, and it is well within States' power to restrict that conduct. The anthropogenic GHG emissions causing climate change are inherently transboundary in nature, and thus the climate change-related harm that results is transboundary harm. Any determination that such emissions are not subject to the prevention principle would render the principle meaningless and undermine decades of law designed to ensure that States do not knowingly harm others.

[**4**] *Trail Smelter* Arbitration (U.S. v. Can.), 3 R.I.A.A. 1905 (1941), at 1905-82.
[**5**] Stockholm Declaration on the Human Environment, 11 I.L.M. 1416, principle 21 (1972); Rio Declaration on Environment and Development, 31 I.L.M. 874, at principle 2 (1992).
[**6**] United Nations Framework Convention on Climate Change, pmbl., May 9, 1992, 1771 U.N.T.S. 107 (entered into force Mar. 21, 1994); *see also* Stockholm Convention on Persistent Organic Pollutants, pmbl., May 22, 2001, 2256 U.N.T.S. 119 (entered into force May 17, 2004); United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, pmbl., June 17, 1994, 1954 U.N.T.S. 3 (entered into force Dec. 26, 1996); United Nations Convention on the Law of the Sea, art. 194(2), Dec. 10, 1982, 1833 U.N.T.S. 3 (entered into force Nov. 16, 1994).
[**7**] *Dispute over the Status and Use of the Waters of the Silala (Chile v. Bol.)*, Judgement, 2002 I.C.J. Rep. 614 (Dec. 1), at para. 99; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgement, 2015 I.C.J. Rep. 665 (Dec. 16), at paras. 104, 118; *Pulp Mills on the River Uruguay (Arg. v. Uru.)*, Judgement, 2010 I.C.J. 14 (Apr. 20), at para. 101; *Case Concerning the Gabčíkovo-Nagymaros Project (Hung. v. Slovk.)*, Judgement, 1997 I.C.J. 7 (Sept. 25), at para. 53; *Nuclear Weapons Advisory Opinion*, at para. 29; *IACtHR, Advisory Opinion OC-23/17*, paras. 95-103; *Award in the Arbitration regarding the Iron Rhine ("Ijzeren Rijn") Railway between the Kingdom of Belgium and the Kingdom of the Netherlands*, decision of 24 May 2005, 27 R.I.A.A. 35, at para. 222.
[**8**] Colombia, written statement, paras. 3.16-3.18 (Mar. 11, 2024).

What are big polluters arguing?

Some States insist that the duty to prevent significant transboundary environmental harm does not apply to greenhouse gas emissions or climate change.

- **New Zealand** asserts, "[t]here is no established norm of customary law specific to transboundary harm caused by climate change" [para. 96 of its written statement; *see also* para. 103] while **the United Kingdom** points out that "this rule of CIL [customary international law] has no application in the context of protecting the climate system from anthropogenic GHG emissions." [para. 34 of its written comments]. **Saudi Arabia** contends that "environmental law principles, including the principle of prevention of significant transboundary harm (also referred to as the 'no-harm' principle) … do not address climate change" as "the environmental impacts that these principles seek to address are not characterized by the global nature and complex chain of events associated with climate change and the cumulative impact of anthropogenic emissions of greenhouse gases." [para. 4.53 of its written comments (citing to written statement of **Australia**, paras. 4.10-4.11; written statement of **China**, paras. 127-128; written statement of **Denmark, Finland, Iceland, Norway, and Sweden**, paras. 64-76; written statement of **India**, paras. 9-18; written statement of **New Zealand**, paras. 96-107; written statement of the **United States**, paras. 4.15-4.28)].
- In their joint submission, **Denmark, Finland, Iceland, Norway, and Sweden** note that "the standard has been developed on the basis of State practice relating to direct and manifested injury in bilateral affairs, and that it has never been applied outside that context to cases of alleged injury to natural systems or other more abstract elements that *might* in turn lead to consequences somewhere on the planet." [para. 70 of their written statement].

Some States elaborate that climate change is not like the "point source" pollution to which the transboundary harm principle has traditionally been applied.

- The **United States** argues that "[p]ast instances in which the Court or other international tribunals have identified a customary international law obligation to use due diligence to prevent or at least minimize significant transboundary environmental harm have involved transboundary environmental harm (hypothetical or alleged) that could be traced to specific, identifiable 'point' sources … These examples are unlike the challenge posed by anthropogenic global warming, which results from the varied and diffuse activities that emit GHGs over a long period of time." [para. 4.15 of its written statement; see also para. 128 of China's written statement]. **Singapore** notes that "[u]nlike other examples of significant transboundary environmental harm, which typically involve discharges of harmful substances into the territory of neighbouring States or shared resources, each instance of anthropogenic emission of GHG may not on its own cause significant deleterious effects, especially when GHG naturally exist in the Earth's atmosphere. Instead, the harm in this context is caused by the cumulative impact of global anthropogenic GHG emissions." [para. 3.15 of its written statement].
- **India** posits that "environmental pollution and climate change must not be conflated. … The best available science has not qualified 'heat' and 'carbon dioxide' as environment pollutants. … India contends that, while addressing the questions, the Court, in the

exercise of its judicial function, may consider that climate change issues cannot be treated as pollution of the environment. Therefore, climate change cannot be dealt like the trounsbandary [sic] harm on environment, but is dealt with under a distinct regime of UNFCCC and its two instruments." [para. 17 of its written statement].

- Similarly, **Saudi Arabia** points out: "Obligations related to climate change and anthropogenic greenhouse gas emissions differ from obligations related to significant transboundary environmental harm, as climate change is characterized by a cumulative and complex chain of events from anthropogenic emissions of greenhouse gases and to physical impact that may result therefrom." [para. 4.55 of its written comments].

What climate justice requires

Several States point out that the duty to prevent significant transboundary harm is applicable in relation to climate change.

- **Spain** points out that "[t]he obligation to prevent damage caused by climate change forms part of general customary law." [para. 8 of its written statement]. **Saint Lucia** similarly considers that the principle of prevention of transboundary harm and its more recent iteration – the duty to prevent "significant harm to the environment" – should be considered a legal obligation in relation to climate change, entailing the obligation of due diligence which extends to "areas beyond national jurisdiction and those areas such as the global commons that have no connection to State sovereignty." [para. 66 of its written statement].
- **Kenya** counters the argument made in other submissions that "climate change and pollution of the environment are two separate phenomena, such that the customary norms regarding transboundary pollution do not apply" emphasizing that "any such distinction between the adverse effects of climate change and the pollution of the environment is artificial, and finds no basis in the best available science. As the IPCC has confirmed, substances that cause transboundary air pollution can also be GHGs and *vice versa*." [para. 3.9 of **Kenya**'s written comments].
- The **Melanesian Spearhead Group (MSG)** "notes that States have been bound since at least the 19th century by the duty of due diligence, which requires them to not allow their territory to be used in a way that causes significant harm to other States. This duty became more specific in relation to environmental protection over the 20th century, for example through the Trail Smelter arbitration which affirmed no State has the right to use its territory to cause serious injury to another State by air pollution. Therefore, continuing to allow high GHG emissions after the risks became scientifically understood, especially from the 1960s onwards, constitutes a clear breach of due diligence by major emitting States." [para. 298 of its written statement].

Many States also emphasize that the fact that more than one State may cause or contribute to the harm does not mean that no one is responsible.

- Relevant to transboundary harm, is the understanding that GHG emissions collectively have contributed to current levels of warming and associated harm. **Uruguay** acknowledges the diffuse nature of climate harm and the several historical and concurrent causes, including the acts and omissions of several States. However, it submits that under international law these difficulties "cannot preclude the legal

consequences for the States which have caused significant harm to the climate system and other parts of the environment," highlighting that the collective nature of the causation of climate change does not displace individual responsibility. [paras. 169-174 of its written statement].

- **Switzerland** also clearly lays out that "[O]n the one hand, there is a direct causality between the conduct of the largest emitters and the damage caused by the scale of emissions for which they are responsible. On the other hand, in environmental matters in particular, the Court recognises that damage may be 'due to several concurrent causes.' In this case, collective causality applies, giving rise to both individual and collective obligations." [para. 29 of its written statement].

The ICJ should reaffirm the principle of prevention as customary international law and clarify that it applies to greenhouse gas emissions causing climate change, and not merely to point-source pollution stemming from immediately neighboring states. The climate crisis knows no borders. Exempting environmental harm caused by greenhouse gas emissions and climate change would deviate from the Court's jurisprudence, and severely undermine this long-standing principle.

Argument to Watch For

Does international human rights law impose obligations on States in relation to climate change and GHG emissions?

Why does this issue matter?

Anthropogenic climate change has affected, is affecting, and will continue to affect the full range of human rights on a global scale for generations to come[9]. The climate-human rights nexus has been reaffirmed by numerous UN and regional human rights bodies and experts, including, among others, the UN Human Rights Committee, the Committee on the Rights of the Child, the Inter-American Commission on Human Rights, the European Court of Human Rights, and multiple domestic jurisdictions around the world. Under human rights law, States must protect people from foreseeable harm to their rights, including the harm caused by anthropogenic climate change[10]. That human rights law does not expressly address climate change is of no consequence; it does not name every threat to human rights, but sets out what States must do in the face of any foreseeable threat to rights that is within their jurisdiction and control. This entails taking all necessary measures to mitigate and regulate conduct that contributes to climate change, such as the emission of greenhouse gases and the obstruction of climate action[11]. States' obligations under international human rights law are separate and distinct from, though complementary to, their obligations under the UN climate change agreements[12]. Therefore, complying with the UNFCCC and Paris Agreement does not necessarily satisfy a State's obligations under human rights law.

While the UN climate agreements set out some State obligations to other States and the international community, international human rights law sets out States' obligations vis-à-vis individuals and Peoples. The human rights regime speaks to what States must do to respect and protect rights from the adverse impacts of climate change, and imposes obligations on States to provide effective remedies when rights are violated. In that way, international human rights law provides an avenue for individuals and Peoples to compel State measures to prevent, mitigate, and adapt to climate change, and to seek justice for the impacts of climate change on their rights, and those of future generations. The UN climate agreements provide no such avenues for remedy, nor do they displace or eliminate the availability of such remedy under human rights law. Given the significant human rights impacts of climate change, this body of law cannot be ignored in clarifying States' obligations.

[**9**] *See, e.g.*, UN General Assembly, Resolution 76/300, The human right to a clean, healthy and sustainable environment, UN Doc. A/RES/76/300, pp. 2-3, at preamble (July 28, 2022); UN Human Rights Treaty Bodies' joint statement on human rights and climate change, para. 3 (Sept. 16, 2019); IPCC, *Summary for Policymakers* in *Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, pp. 1-34, paras. A2ff., B2ff (Core Writing Team, H. Lee & J. Romero (eds.), 2023).
[**10**] *See, e.g.*, Center for International Environmental Law (CIEL), Obligations of States in Respect of Climate Change (Request for Advisory Opinion): Written Statement Submitted by the Center for International Environmental Law (CIEL), Memo on the Legal Consequences for States of Internationally Wrongful Acts Causing Harm to the Climate System, paras. 109ff and, in particular, para. 113 (Mar. 2024), https://www.ciel.org/wp-content/uploads/2024/02/Amicus-Brief-ICJ-Defining-States-Climate-Obligations.pdf).
[**11**] *Ibid., para. 117.*
[**12**] Center for International Environmental Law (CIEL), Obligations of States in Respect of Climate Change (Request for Advisory Opinion): Written Statement Submitted by the Center for International Environmental Law (CIEL), Memo on Applicable Law, para. 8 (Mar. 2024), https://www.ciel.org/wp-content/uploads/2024/02/Amicus-Brief-ICJ-Defining-States-Climate-Obligations.pdf).

What are big polluters arguing?

Some States argue that because human rights law does not expressly address climate change it does not apply; they have no human rights-based obligations to reduce greenhouse gas emissions; and individuals cannot assert a right to protection against climate change.

- The **United Kingdom** argues that "[i]nternational human rights treaties do not contain obligations concerning anthropogenic emissions of GHGs." [para. 122 of its written statement]. **Saudi Arabia** proclaims that such treaties "simply do not deal with the obligations of States under international law to ensure the protection of the climate system from anthropogenic greenhouse gas emissions." [para. 4.97 of its written statement]. According to **China**, "the indirect adverse effects of anthropogenic GHG emissions on human rights cannot be legally defined as a violation of human rights." [para. 125 of its written statement]. While the **United States** recognizes that "anthropogenic climate change can adversely affect the enjoyment of human rights," it denies that States have obligations under human rights law to mitigate anthropogenic GHG emissions and to ensure the protection of the climate system from such emissions. [para. 4.39 of its written statement]. **New Zealand** [para. 113 of its written statement], **Australia** [para 3.58 of its written statement], and **Canada** [para. 27 of its written statement] submit similar arguments.
- Furthermore, **Switzerland** advances the argument "that it is not currently possible to infer an *individually justiciable right to protection against climate change* from human rights treaties." [para. 62 of its written statement].

What climate justice requires

Other States strongly assert that States have obligations under human rights law to prevent, minimize, and redress the impacts of climate change on rights.

- Many States stress that climate change adversely affects all human rights. **Kenya** avers that "[t]he effects of GHG emissions violate human rights and impair their fulfilment." [para. 5.51 of its written statement]. Similarly, **Vanuatu** argues that "climate change affects essentially **all** human rights," their submission illustrating in more detail how certain rights are engaged by climate change, including among others, the right to self-determination, and the right to a clean, healthy and sustainable environment as it relates to other rights and existing international law [paras. 342, 288-307, 378-396 of its written statement]. **Leichtenstein** elucidates that the "[e]ffects of climate change have and will continue to directly impact other human rights as well, including the rights to life; housing; a clean, healthy and sustainable environment; food; water; livelihood; and to participate in cultural life, including the right to access and enjoy cultural heritage, acknowledging that these rights are threatened by many other factors as well among them violent conflicts, natural disasters, deforestation, pollution, poverty and discrimination." [para. 34 & 35-71 of its written statement]. **Portugal** also "recognises that environmental degradation can and does affect, both directly and indirectly, the enjoyment of a broad range of human rights, and that the severity of the threat of climate change facing the international community makes it imperative to take urgent action to

effectively address such threat." [para. 73 of its written statement]. As such, according to the **Melanesian Spearhead Group (MSG)**, "the full catalogue of international human rights give rise to State obligations to ensure the protection of the climate system and other parts of the environment." [para. 252 of its written statement].

- **Cook Islands** argues that the impacts of climate change not only make clear that human rights, and the obligations of States they entail, are indivisible, interdependent and interrelated, but that many, if not most of States' obligations at international law, are indivisible, interdependent and interrelated too, especially when it comes to climate change. Their submission references Professor Margaret Young on how the global problem of climate change demands that the international community strive to understand the relationships, connections and tensions between the different norms and legal orders that are implicated by climate change: "Different areas of legal specialization are involved—including, but not limited to, trade, environmental law, and human rights, and we need to work to understand how norms and legal orders fit together." [para. 145 of their written statement].
- The wide-ranging rights affected are protected under multiple sources of international law and give rise to corresponding State obligations. **Costa Rica** explains that "those who have contributed the least to the environmental crisis are the most affected by it" and that "specific human rights, both civil and political as well as economic, social and cultural, are concerned by the consequences of climate change." [paras. 66-67 of its written statement]. Further, the corresponding "obligations of States in relation to the link between human rights and climate change are governed by a dense network of global and regional treaties, as well as customary international law," including an "autonomous human right to a clean, healthy and sustainable environment." [paras. 75, 82 of its written statement]. **Ecuador** similarly argues that the many rights negatively affected by climate change are "recognized under different sources of international law, including under customary international law as reflected in the Universal Declaration of Human Rights" [para. 3.97 of its written statement], and States must comply with international human rights law "when implementing their climate change commitments." [para. 3.100 of its written statement].
- Several States echo the **African Union** in arguing that, "[h]uman rights obligations in the context of climate change comprise negative obligations to 'respect' human rights (by refraining from interfering with the enjoyment of rights), as well [sic] positive obligations to 'protect' (to take steps to prevent third parties from interference), and 'fulfil' (to take appropriate legislative, administrative, judicial, budgetary measures)" [para. 193 of its written statement] — duties which "extend to all areas of governance, as well as to third-party conduct under state jurisdiction and control." [**MSG**, para. 256 of its written statement]. The **European Union** "submits that human rights obligations in relation to climate change are obligations of conduct and due diligence, entailing a duty to prevent human rights violations, and a duty of care, with regard to the conduct of private operators, entailing both positive and negative obligations." [para. 269 of its written statement]. The **Organisation of African, Caribbean and Pacific States (OACPS)** posits that "States have the duty to adopt far-reaching and immediate mitigation and adaptation measures to avoid violating specific human rights, which are impaired by the conduct responsible for climate change." [para. 120 of its written statement].
- According to the **MSG,** States that have failed to uphold their obligations "are responsible for providing a remedy to victims of resultant human rights violations." [para. 256 of its written statement]. **Egypt** argues that "States' conduct that contributes to climate

change can also amount to a breach of human rights obligations (such as the obligation to take all necessary measures to protect against serious risks to human life). The responsibility of the State is automatically engaged when it breaches such obligations. Moreover, a victim's right to remedy under international human rights law is a substantive right guaranteed in both human rights treaties as well as customary international law." [para. 334 of its written statement]. **Namibia** asserts that "[s]ince, however, the obligation to minimize greenhouse gas emissions also arises from international human rights law, this means that the obligation is also owed towards individuals. As a result, the individuals themselves, as well as NGOs representing their interests, have the right to invoke the responsibility of States that fail to comply with the obligation." [para. 150 of its written statement].

The ICJ should confirm that the climate crisis affects the realization of human rights and, as such, States have duties under international human rights law to prevent, minimize, and remedy human rights violations due to climate change. Climate change is the greatest human rights crisis of our time and mandates commensurate climate ambition.

Argument to Watch For

Do legal rights and corresponding obligations extend to future generations?

Why does this issue matter?

The stark failure of States to take meaningful action to meet the 1.5°C temperature target of the Paris Agreement, leading to a worsening climate crisis, poses what may be the greatest threat to the human rights of future generations. Actions taken in the present and the failure to act, will not only affect current generations, but those to come.

Current young people and coming future generations, i.e. those not yet born, will face the consequences of decisions by present generations and live significantly more of their lives in a warming world. Failing to take adequate climate action, or exacerbating climate change through continued expansion and lock-in of fossil fuel production and use and reliance on speculative technologies rather than proven mitigation measures, further curtails the fundamental rights of future generations as it deprives them of political choices[13]. Authoritative bodies have affirmed that the rights of future generations and the principle of intergenerational equity are rooted in multiple sources of international law spanning almost a century[14], and apply in the context of climate change[15]. Thus, States must consider the harms to and rights of future generations in determining appropriate climate action.

What are big polluters arguing?

Some States have argued that legal rights do not extend to future generations.

- **Saudi Arabia** postulates that "'Future generations' is a body of persons too indeterminate to have legal status or standing, or for claims to be made on behalf of such a group." [para. 5.35 of its written comment]. **Russia** argues that "state responsibility in the context of causing harm may only arise vis-à-vis affected States and currently living individuals, rather than 'future generations'. First, the latter cannot act as subjects of law in principle. Second, it is impossible to establish the fact that harm has been caused to individuals who have not yet been born: the harm has simply not yet occurred, and it is impossible to predict it with required accuracy." [pp. 17-18 of its written statement].
- **Germany** alleges that "individual rights of human beings who will only come into existence in the future, but who do not yet exist as of today, cannot be taken into account when considering alleged human rights violations that are claimed to take place now, or that are reasonably foreseeable. Likewise, human beings alive now cannot claim rights on behalf of members of future generations." [para. 101 of its written statement]. Similarly, **Canada** posits that "while international environmental law does acknowledge the notion of 'future generations', international human rights law does not guarantee

[**13**] Center for International Environmental Law (CIEL), Obligations of States in Respect of Climate Change (Request for Advisory Opinion): Written Statement submitted by the Center for International Environmental Law (CIEL), Memorandum on the Rights of Future Generations, para. 3-4 (Mar. 2024), https://www.ciel.org/wp-content/uploads/2024/02/Amicus-Brief-ICJ-Defining-States-Climate-Obligations-Rights-Future-Generations.pdf.
[**14**] The Maastricht Principles on the Human Rights of Future Generations, https://www.rightsoffuturegenerations.org/.
[**15**] See, e.g., Human Rights Council, Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights, U.N. Doc. A/HRC/10/61, para. 90 (Jan. 15, 2009); Neubauer v Germany, 1 BvR 2656/18, p. 38 (Mar. 24, 2021).

rights of future generations but rather seeks to protect and promote individuals' human rights in the present" [para. 29 of its written statement] and **New Zealand** "does not consider that international law currently prescribes any specific legal consequences with respect to future generations, for States who, through their internationally wrongful acts, fail to protect the climate system or other parts of the environment from anthropogenic GHGs." [para. 144 of its written statement].

What climate justice requires

Other States strongly assert that legal rights do extend to future generations, and reinforce the principle of intergenerational equity.

- **The Organisation of African, Caribbean and Pacific States (OACPS)** avers that "... future generations are holders of human rights and that their interests are in any event protected by international law, including in the context of climate change … As such, States hold legal obligations to ensure that their conduct in relation to anthropogenic emissions of greenhouse gases do not violate future generations' rights." [para. 53 of its written comments]. **OACPS** also pointed out the lack of temporal limits on human rights obligations, noting that, "[a]s highlighted in the Maastricht Principles on the Human Rights of Future Generations, neither the Universal Declaration of Human Rights, nor any other human rights instruments, impose a temporal limitation on human rights obligations or limit such rights to the present time." [para. 59 of its written comments].
- **Vanuatu** posits that "...victims of climate injustice includes all holders of human rights, whether individual or collective right-holders, whether in present or future generations. This is consistent with both the specialized writings on the subject, expert clarification efforts and domestic constitutional practice. More recently, the Committee on the Rights of the Child stated plainly that 'The Committee recognizes the principle of intergenerational equity and the interests of future generations'." [para. 613 of its written statement]. **The Philippines** reinforces the long-standing international legal principle of intergenerational equity with its roots in environmental and climate law, recalling how in the Philippines, their Supreme Court has equated the principle of intergenerational equity with the right to a balanced and healthful ecology, holding- "every generation has a responsibility to the next to preserve that rhythm and harmony for the full enjoyment of a balanced and healthful ecology." [para 83-87 of its written statement]. The **African Union** specifies that "[t]he reference to 'present and future generations' [in the questions posed by the Court] ... includes all right-holders, individual or collective, in present or future generations. Future generations, according to the Human Rights Committee, 'have a fundamental right to a stable climate system capable of sustaining human life, based on children's right to a healthy environment.' The reference to 'present and future generations' is thus meant to include children and generations unborn, consistent with the principle of intergenerational equity." [para. 249 of its written statement].
- **Antigua and Barbuda** asserts that "[a]ll people and individuals of present and future generations are beneficiaries of the obligations addressed in Section III (relevant obligations under Question A of the Court), the goals of which are the protection of the environment and of human rights. As beneficiaries of these international obligations, peoples and individuals may have a legal entitlement to two things … The first is an entitlement to invoke the responsibility of the responsible State through treaty-based

mechanisms or domestic avenues that allow for peoples and/or individuals to bring such actions directly … The second aspect of being a beneficiary of international obligations is, in principle, an entitlement to reparations." [text within parentheses has been added] [paras. 580-582 of its written statement]. Similarly, the **International Union for Conservation of Nature (IUCN)** highlights findings of human rights treaty bodies and notes that "[b]ased on the principle of intergenerational equity, claims and requests for the cessation of wrongful acts may also be made on behalf of future generations, not just current ones." [para. 603 of its written statement].

- The **European Union** "invites the Court to find that the principle of equity, as an enforceable legal norm of customary international law, also comprises intergenerational equity. The European Union also invites the Court to clarify the content of the principle of intergenerational equity and its implications in terms of States' obligations under the Paris Agreement and under human rights law." [para. 184 of its written statement].
- **Namibia** asserts that "[t]he right to invoke responsibility belongs not just with individuals of the present generation, but also those of future generations. This is because the impacts of climate change are not bounded by time. Greenhouse gas emissions today could cause the most significant adverse impacts on individuals decades or centuries later. Therefore, future generations must also have the right to invoke the responsibility of States that have breached their climate change obligations, to the same extent that present generations do." [para. 152 of its written statement]. It explains that "[t]he fact that the injury is inflicted on both present and future generations must be taken into account in the making of full reparation. In practice, it means that it is not sufficient to make reparation only with respect to the individuals of the present generation. The injuries inflicted on future generations must also be taken into account, and reparation provided to those individuals as well." [para. 161 of its written statement].

The ICJ should clarify that State obligations with respect to climate change extend to future generations. Doing so is critical to ensuring "both justice and sustainability across an array of timescales including the present, near term and distant future"[16]. Recognition and respect for the rights of future generations requires more urgent and effective action today to curb the drivers of climate change, rapidly reduce greenhouse gas emissions, and enhance resilience, all to minimize the burdens placed on generations yet to come.

[16] Maastricht Principles on the Human Rights of Future Generations, pmbl., para. vi.

Argument to Watch For

What are States' international legal obligations regarding fossil fuels – the primary cause of climate change?

Why does this issue matter?

It is not possible to define State obligations to protect the climate system under international law without addressing State obligations to control the primary cause of climate change: fossil fuels. There is unequivocal evidence that fossil fuels are the overwhelming source of the anthropogenic greenhouse gas (GHG) emissions driving climate change, with coal, oil, and gas accounting for 75% of global emissions [17].

Without effectively tackling fossil fuel production and use, climate change will only worsen, increasing harm and the risk thereof to States, peoples, and individuals. In its most recent report, the Intergovernmental Panel on Climate Change (IPCC) found that to have more than a 50% chance of limiting warming to 1.5°C to avoid some of the most catastrophic and irreversible impacts of climate change, fossil fuel use needs to decrease quickly, with some models showing coal use dropping by up to 100% from 2019 levels by 2050, oil by up to 90%, and gas by up to 85% [18]. In fact, the best available science makes clear that fossil fuel phase out must begin within the next decade. According to the IPCC, action by 2030 will be determinative: "climate resilient development prospects are increasingly limited if current greenhouse gas emissions do not rapidly decline, especially if 1.5°C global warming is exceeded in the near-term (*high confidence*)" [19].

What are big polluters arguing?

Some States insist that they are not duty-bound to decrease their reliance on fossil fuels, or that continued fossil fuel production and use is necessary for development and a just transition.

- **Saudi Arabia** and **Egypt** point to the fact that "neither the UNFCCC, nor the Paris Agreement make the production, and or [sic] use of fossil fuels illegal per se." [para. 4.37 of the written comments of Saudi Arabia (quoting para. 37 of the written statement of Egypt)]. The two States assert "[t]his was clearly intentional — namely to focus on emissions' reduction, rather than on the source of emissions — in acknowledgment of the fact that fossil fuels have been essential to economic growth and development." [para. 4.37 of the written comments of Saudi Arabia (quoting para. 37 of the written statement of Egypt)]. Furthermore, **Saudi Arabia** argues that "States that supply hydrocarbon products internationally therefore have a responsibility to the global community to support global energy markets." [para. 2.24 of its written statement].

[**17**] United Nations, Causes and Effects of Climate Change, https://www.un.org/en/climatechange/science/causes-effects-climate-change (last visited Nov. 30, 2024).
[**18**] IPCC, Climate Change 2022: *Mitigation of Climate Change, Working Group III Contribution to the Sixth Assessment Report of the IPCC, Summary for Policymakers*, para. C.3.2 (P. Shukla et al (eds.), 2022) (see the figures from modeled pathways in the 95th percentile of the range).
[**19**] IPCC, Climate Change 2022: *Impacts, Adaptation and Vulnerability, Working Group II Contribution to the Sixth Assessment Report of the IPCC, Summary for Policymakers*, para. SPM.D.5 ("Societal choices and actions implemented in the next decade determine the extent to which medium- and long-term pathways will deliver higher or lower climate resilient development (high confidence)."), para. SPMD.5.3 (warning that "[a]ny further delay in concerted anticipatory global action on adaptation and mitigation will miss a brief and rapidly closing window of opportunity to secure a liveable and sustainable future for all (*very high confidence*)") (H. Portner et al (eds.), 2022).

- **According to the Organization of the Petroleum Exporting Countries (OPEC),** the development needs of States that are non-Annex I Parties to the UN Framework Convention on Climate Change (UNFCCC), "cannot be fulfilled by a restricted energy mix, relatively small portion of the global energy mix, but rather to exploit all affordable sources possible for an inclusive transition that does not leave even more victims stranded behind." [para. 50 of its written statement].
- **China** posits that developing countries experience "special difficulties in emission reduction in terms of higher costs of green transition due to their economies being highly dependent on fossil fuels." [para. 56 of its written statement]. In fact, China believes that "[a]lthough developing countries increased their emissions ... within reasonable parameters," this has positively contributed to global needs, such as poverty reduction. [para. 17 of its written statement].

What climate justice requires

A number of States point out that climate change actually "exacerbates the challenge of sustainable development." [Melanesian Spearhead Group (MSG), para. 37].

- In **Bangladesh**, "[t]he destruction of agricultural lands and other sources of livelihood due to sea-level rise and flooding also hampers economic development and deprives [the country] of means of subsistence." [para. 122 of its written statement].
- Likewise, **South Africa** explains that the "existing developmental challenges" it and other developing countries face will be exacerbated by climate change, as they will "experience food and water insecurity, increased inequality and poverty, all of which in turn have further negative effects on health and the economy." [para. 26 of its written statement]. Indeed, "[c]limate change is giving rise to a widening inequality gap and driving people deeper into poverty." [para. 26 of its written statement].
- According to **Sierra Leone**, "[c]limate change interferes with the right to development" and it "has the potential to undo the development progress achieved over the past years," as its adverse effects directly undermine the economic, social, cultural, and political development of States. [para. 3.105 of its written statement].
- Of relevance in the sustainable development context, **Liechtenstein** submits how according to UN human rights experts, climate change, and specifically fossil fuels, prevent the full enjoyment of a range of human rights, emphasizing how fossil fuels directly contribute to "biodiversity loss, toxic pollution and water scarcity." [para 23 of its written statement].

Mitigating the adverse effects of climate change on development and other rights requires cessation of the conduct driving GHG emissions – chiefly, production and use of fossil fuels.

- **Tuvalu** explains that it "cannot mitigate the myriad negative effects of climate change without drastic and rapid reductions in GHG emissions in line with a global phaseout of fossil fuels." [para. 61 of its written statement]. The **Democratic Republic of the Congo** (DRC) asserts that States' international obligation to limit the increase in global temperature to 1.5°C in order to significantly reduce the risks and effects of climate change, includes specific obligations regarding the phase out of fossil fuels. [para. 209 of its written statement].

- Even States considered Least Developed Countries (LDCs) and/or Small Island Developing States (SIDS) have made active commitments to phase out fossil fuels despite being on the frontlines of the climate emergency and having contributed the least to anthropogenic GHG emissions. In this context, **Saint Vincent and the Grenadines** offers a powerful quote from their Prime Minister: "if a small resource-challenged nation like St.Vincent and the Grenadines can revolutionise its energy mix and radically reduce our reliance on fossil fuels in a few short years, we find it impossible to accept the dilatory foot- dragging of rich powerful nations that have a real possibility to radically reduce their emissions footprint…as big emitters continue to dither, more frequent and intense hurricanes wash away large swaths of our GDP in a matter of hours". [para 131 of its written statement]. The **Solomon Islands** meanwhile, "is taking steps to be a global leader in the energy transition away from fossil fuels. With appropriate international assistance, Solomons has ambitious goals to transition to 100 percent renewable energy by 2050 and is already on that journey." [para. 18 of its written statement]. Interestingly, in contrast to Saudi Arabia's position that oil and gas producers have a responsibility to keep producing in order to "support" developing countries reliant on fossil fuel imports, Solomon Islands explains that the fact that most of Solomons' current energy is generated using imported fossil fuels "creates a significant financial burden." [para. 17 of its written statement]. In fact, "Solomons has the highest electricity costs in the world, which is not sustainable for most of the population." [para. 17 of its written statement].

States cannot comply with the principle of prevention or achieve the object and purpose of the climate regime without phasing out fossil fuels, so the fact that the UNFCCC and the Paris Agreement do not expressly require the phase out of fossil fuels does not mean that States are not bound to undertake immediate and ambitious measures to that end.

- Countries like **Vanuatu** and **Bangladesh**, among others, invoke the principle of prevention in arguing that States have an obligation to phase out fossil fuels. **Bangladesh** explains that States have an obligation to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control. [para. 88 of its written statement]. Thus in responding to the climate emergency, "international law demands that high-emitter States must embrace a fundamental transition away from fossil fuels and towards "*clean*" forms of energy if they are to avoid the catastrophic transboundary harm resulting from current (and increasing) GHG emissions." [para. 91 of its written statement]. Relatedly, **Vanuatu** points out that the fact that high emitters have demonstrated "delay, low ambition and, in practice, concrete plans to expand the extraction and use of fossil fuels" is "the exact opposite of due diligence required from them by the principle of prevention." [para. 273 of its written statement].
- According to the **MSG**, States are bound under the general international rules governing State responsibility to ensure the cessation and non-repetition of the conduct causing injury to other States. In the context of climate change, cessation "requires responsible State(s) to, at minimum: (1) cease subsidies of fossil fuels; (2) cease authorisations and support for the expansion of fossil fuel production; and (3) cease their failure to appropriately regulate GHG emissions under their jurisdiction and control. These three activities — which are all directly attributable to the State — account, in most cases, for the majority of GHG emissions and thus must be brought to an end in order for a breaching State to satisfy its duty of cessation." [para. 203 of its written comment].

Likewise, assurances and guarantees of non-repetition "must not be mere placations, but concrete measures adopted to ensure non-reoccurrence of the breach, thus, in this context, requiring the immediate phasing out of fossil fuels." [para. 315 of its written statement].

- Furthermore, even though the commitment is not contained in the Paris Agreement's text, during the first global stocktake, which concluded at the 28th UN climate change conference in December 2023, Parties to the Paris Agreement committed to "transitioning away from fossil fuels in energy systems," as **Vanuatu** points out. [para. 145 of its written statement].
- The **African Union (AU)** recognizes that "the duty to reduce GHGs does not make fossil fuel production and use *per se* unlawful." [para. 105(b) of its written statement]. "Yet, climate change is closely linked to the overreliance of industrialised countries on fossil fuels. As a result, the use of fossil fuels is increasingly becoming unjustifiable for states with the means to transition to less polluting forms of energy. This is reflected in the commitment of the global community 'to a fair and accelerated process of phasing down unabated coal power and phase out of inefficient fossil fuel subsidies.'" [para. 106 of its written statement]. Thus, the AU concludes, "States Parties to the Paris Agreement are under a collective and individual obligation to urgently make deep reductions to GHG emissions under their jurisdiction, including by phasing out fossil fuels." [para. 108 of its written statement].

The ICJ should affirm that, because the production and use of fossil fuels are the primary driver of climate change, States' duties to cease conduct causing harm to the climate system and guarantee non-recurrence requires the phase out of fossil fuels in a just and equitable manner. Moreover, continued expansion of fossil fuels cannot be justified in the name of sustainable development given the harm it causes to all rights, including the right to development.

Argument to Watch For

When did States know about the causes and foreseeable consequences of climate change, and what does this mean in terms of legal obligations?

Why does this issue matter?

The critical issue for climate justice is not just whether all States are aware of the causes and effects of climate change—they clearly are. The issue of when States acquired such knowledge and what they did with it, has a direct bearing on their responsibility for remedying the climate-related harms that have occurred and are occurring with increasing frequency and intensity. State knowledge that the generation of significant quantities of greenhouse gas (GHG) emissions over time, principally through the production and use of fossil fuels, would foreseeably lead to injury is relevant both to the State's legal duty to refrain from, prevent, and protect against such conduct, and to the legal consequences it may face for failing to do so.

Ample evidence shows that major emitting States not only were aware of scientific studies revealing the causes of climate change and its harmful consequences, but in fact supported and published such research, for many decades before the climate regime was established. From at least the early 1960s, widely reported scientific studies revealed that fossil fuels were the primary cause of anthropogenic greenhouse gas emissions in the atmosphere, the accumulation of which was changing the climate system, causing an increase in average temperature that, if unchecked, would lead to dangerous levels of global warming and devastating impacts on people and the planet, including excessive heat, sea level rise, extreme weather events, droughts, floods, and other harmful effects. This scientific evidence was not in the exclusive domain of any one State; several major emitting economies were involved in leading research on the greenhouse effect, including the United States, Germany, the USSR and Australia, among others. It is particularly disingenuous for big polluters, such as the United States, to claim that States first became generally aware of the risk that anthropogenic GHG emissions could cause significant global harm only in the late 1980s, when widely published studies, including an advisory report to the President of the US himself, in the mid-1960s clearly tied increasing CO2 levels to humanity's burning of fossil fuels, and warned (with what proved to be devastating accuracy) of the possibility of large temperature increases and potential sea level rise by the year 2000.

Such awareness triggered the duty of States to take necessary measures to prevent significant transboundary environmental harm due to accumulation of GHG emissions, and the consequent infringement of human rights and destruction of ecosystems. That major emitters subsequently not only failed to control the primary source of GHG emissions – fossil fuels – but actively expanded their production and use, constitutes a breach of that duty, which has caused significant harm due to ensuing climate change, giving rise to obligations to cease the breach and repair the injuries caused.

What are big polluters arguing?

Some States have argued that States only knew about the causes and harmful consequences of climate change since the late 1980s or early 1990s, so they cannot be held accountable for any greenhouse gas emitting conduct that predates that time.

- In its written comment, the **United States** observes that knowledge of the causes and consequences of climate change, legally relevant to define State obligations in relation to climate change, dates only from the late 1980s, highlighting how States first became "generally aware in the late 1980s of the risk of significant global harm that could be caused by anthropogenic GHG emissions." [para. 1.5 of its written comment]. **China** similarly argues that the scientific understanding of climate change has been evolving over time and that the "first time" that concern about anthropogenic climate change was expressed "at the global level" was in 1979 at the first World Climate Conference, citing the first report of the IPCC in 1990 as laying the scientific foundation for global climate governance. [para. 12 of its written statement].
- Connecting knowledge to the issue of foreseeability, **Switzerland p**osits: "prior to the 1980s, nobody could have foreseen the causal links, potential damage and the scale of damage that would result from greenhouse gas emissions ... it was the establishment of the IPCC in 1988 and the publication of its First Assessment Report in 1990, followed by the adoption of the UN Framework Convention on Climate Change in 1992, that cemented the scientific consensus. ... From the early 1990s, the objective foreseeability of climate change was therefore a given. The international obligations of states, based on the no-harm rule and in relation to their greenhouse gas emissions, thus exist from this period onwards." [paras. 35-36 of its written statement].

What climate justice requires

Several States present ample evidence that major emitting States have been aware of the causes of climate change and its foreseeable, harmful consequences since at least the 1960s, thus triggering legal obligations, including preventive duties, the breach of which gives rise to legal consequences, including the duties to cease and repair the harm.

- On what States knew regarding the causes and consequences of climate change and when, **Vanuatu** underscores the clear awareness in scientific and political circles of the risks entailed since as early as the 1960s, citing from the expert report of Professor Naomi Oreskes, a leading historian of climate science and policy from Harvard University: "at least from the 1960s, the United States and other States with high cumulative emissions of greenhouse gases (GHGs), including France and the UK, were aware that (i) the release of greenhouse gases into the Earth's atmosphere had the potential to alter the climate system, and (ii) that such interference, if unmitigated, could have catastrophic effects for humans and the environment." [para. 91 of its written comment; paras. 177-178 of its written statement; *see also* paras. 179-192 of its written statement].
- The **Organisation of African, Caribbean and Pacific States (OACPS)** similarly submits that actionable knowledge existed at the highest levels in major polluting States such as the US in the 1960s and 1970s with specific examples to establish the same. [paras. 22-27 of its written statement]. **Kiribati** invites the ICJ to accept that an inquiry into States'

knowledge of the adverse effects of GHG emissions can be traced at least as far back as the 1960s and that, therefore, "restitution and compensation are due to the injured States" since then [paras. 184, 186 of its written statement]. In aligned arguments, the **Melanesian Spearhead Group (MSG)** and **Burkina Faso** reiterate that "[m]ajor emitting States were aware of the adverse impacts of GHG emissions by at least the 1960s, if not earlier." [para. 30 of MSG's written comment; paras. 288-309 of Burkina Faso's written statement]. In fact, according to the **Commission of Small Island States on Climate Change and International Law (COSIS)**, "[t]wenty-four States and international organizations expressly agree in their written statements that the well-established risks of these emissions have been known for at least several decades." [para. 17 of its written comment].

- Tying knowledge to specific prevention obligations, **Mauritius** argues that "the harmful impact of GHG emissions on the climate system was understood and acknowledged at a governmental level from at least the 1960s, at a time when the duty of prevention was also clearly established under international law." [para. 103 of its written comment]. **MSG** also emphasizes that "continuing to allow high GHG emissions after the risks became scientifically understood, especially from the 1960s onwards, constitutes a clear breach of due diligence by major emitting States." [para. 298 of its written statement].
- In terms of the legal relevance of the timeline of when States knew, **Tuvalu** "notes that [several applicable] customary obligations are longstanding and arise out of known risks based on the unequivocal scientific evidence related to the adverse impacts of climate change dating back for several decades. It is, therefore, no excuse to suggest that such obligations have arisen only recently, or in any way that breaches can occur only on a go-forward basis; in this important respect, Tuvalu supports the submissions of at least 17 States and international organizations to that effect. In the words of **Vanuatu**, with respect to the conduct causing climate change, '[t]he basic requirement ... that, for a breach to occur, the relevant obligation must be binding on the State at the time it displays the violative conduct[] is clearly met'." [para. 8 of its written comments (quoting para. 529 of Vanuatu's written statement)].

The ICJ should recognize that what States knew about the causes and foreseeable consequences of climate change and when, has bearing on their legal obligations to take climate action and their legal responsibility for climate harm. Doing so is critical in the face of major polluters' efforts to render their historical contributions to the climate crisis legally irrelevant. Some States unquestionably had relevant scientific knowledge of the risks of harm posed by high GHG emissions for years preceding the adoption of the UNFCCC, meaning that they were under a duty to prevent and minimize such harm. State knowledge in this context triggers legal duties including preventive obligations, a breach of which gives rise to duties of cessation and repair.

Argument to Watch For

Can the harmful consequences of climate change on States, Peoples, or individuals be attributed to the conduct of a particular State or States?

Why does this issue matter?

To hold a State responsible under international law, including under human rights law, for the harmful effects of climate change on any individuals, Peoples, or another State, one must establish a causal relationship between conduct of that State in breach of its international obligation(s) and the harm experienced. Establishing causation – linking relevant conduct to a State, and that conduct to a particular harm – is fundamental to the determination of State responsibility under international law and the enforcement of the legal consequences that flow therefrom.

The conduct of States leading to significant levels of greenhouse gas (GHG) emissions can be linked with climate destruction affecting States, peoples, individuals, and their environments, triggering State responsibility. Scientific evidence demonstrates how conduct attributable to specific States has caused, and is continuing to cause, significant harm to the climate system and other parts of the environment, and in turn, how the changing climate is causing harm to States and/or peoples [20]. Attribution science has continually improved over recent years, substantiating both the links between the sources of emissions and climate change, and the links between climate change and specific events or adverse impacts. In a given case, a "sufficiently direct causal nexus" [21] could be established between a State's wrongful conduct causing climate change (acts and omissions over time that have led to significant GHG emissions), and the harm climate change has caused or is causing to the environment, individuals, communities, and/or States. There is no factual or technical obstacle to linking States' generation and allowance of, or failure to regulate, GHG emissions from sources within their jurisdiction and control, with harm to the climate system and ensuing climate change-related injuries. The fact that multiple States have contributed to climate change does not present a legal barrier to assigning responsibility to an individual State for its breach of its legal duties. Attribution could be made out in a given case or cases involving specific States or groups of States. In sum, because the legal and evidentiary foundations to establish attribution exist, the ICJ can and should clarify the legal consequences that flow from States' failure to protect the climate system.

What are big polluters arguing?

Some States are contesting the possibility of attributing the conduct that has caused climate change to particular States, or attributing the harmful impacts of climate change

[20] See, e.g., Center for International Environmental Law (CIEL), Obligations of States in Respect of Climate Change (Request for Advisory Opinion): Written Statement Submitted by the Center for International Environmental Law (CIEL): Memo on the Legal Consequences for States of Internationally Wrongful Acts Causing Harm to the Climate System, paras. 139ff and, in particular, para. 141 (March 2024), https://www.ciel.org/wp-content/uploads/2024/02/Amicus-Brief-ICJ-Defining-States-Climate-Obligations.pdf.
[21] ICJ, *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Compensation*, Judgment, I.C.J. Reports 2018, p. 15, para. 32.

to particular States, or attributing the harmful impacts of climate change to that State conduct, thus denying their responsibility under international law for the harm incurred as a result of climate change.

- The **United Kingdom** argues that "it is not possible to establish causation linking the GHG emissions of a particular country, or its failure to adopt mitigation measures, with either climate change itself or with a specific climate change impact, such as severe weather events" and that "there is currently no single or agreed scientific methodology to attribute climate change to the emissions of individual States or to attribute extreme events caused by climate change to the GHG emissions of any particular State." [paras. 126, 137.4.3 of its written statement].
- Similar arguments contesting either the possibility of attributing the effects of climate change to a specific State or the possibility of establishing a causal relationship have been put forward by **Russia** [p. 17 of its written statement], **The Netherlands** [para. 5.11 of its written statement], **the United States** [para. 5.10 of its written statement], **China** [paras. 128, 136 of its written statement], and the joint submission made by **Denmark, Finland, Iceland, Norway**, and **Sweden** [para. 107 of their written statement].

What climate justice requires

Several States advance arguments substantiating the causal link between the wrongful conduct attributable to a State or groups of States and harm resulting from climate change.

- As **Vanuatu** affirms, the science is unequivocal: "there is no uncertainty regarding either the cause of climate change, i.e. the Relevant Conduct, and the adverse effects of climate change," whereby the "causal link is incontrovertible given the existing scientific consensus politically endorsed by all States of the IPCC" and "[t]he Relevant Conduct is a conduct of States, i.e. attributable to the State under the customary international law rules." [paras. 494, 562 of its written statement]. Relatedly, **Uruguay** points out that "[t]here are, currently, several attribution studies and techniques which may help determine a causal link between emitters and climate harm ... any alleged difficulties to establish a causal link between a State's conduct and certain environmental harm do not preclude, in principle, the legal consequences for the States that have caused—or contributed to cause—the significant harm." [paras. 173-174 of its written statement].
- Similarly, **Switzerland** acknowledges that "[t]he IPCC has demonstrated the causal link between rising human-made greenhouse gas emissions and climate change ... there is a direct causality between the conduct of the largest emitters and the damage caused by the scale of emissions for which they are responsible." [paras. 27-29 of its written statement]. **Costa Rica** argues that "[t]here is scientific consensus that the dominant cause is ... global warming as a result of anthropogenic emissions of GHG," which "are the product of human conduct in the territories of States. It is for the public organs to regulate human activities within the territory under the jurisdiction or control of States. The attribution to States to acts or omissions responsible for GHG emissions is possible in different manners, following the ARSIWA [Draft Articles on Responsibility of States for Internationally Wrongful Acts]." [paras. 100, 103 of its written statement].
- Citing the IPCC's work, the **Melanesian Spearhead Group (MSG)** dismisses the alleged difficulty of establishing causation noting that "the causal inquiry is far less complex than

some participants suggest and does not pose an insurmountable obstacle" to asserting a duty to make reparations. [para. 199 of its written comments]. As **Antigua and Barbuda** makes clear: "a breaching State will have to do more than point to some uncertainty in climate attribution science'" to displace the presumption that States bear legal responsibility for climate harm [para. 113 of its written comments].

- The **African Union** [paras. 228-230 of its written statement], **the Philippines** [para. 138 of its written statement], the **Organisation of African, Caribbean and Pacific States (OACPS)** [para. 144 of its written statement], and the **MSG** [paras. 296, 312, 340 of its written statement] all argue that the GHG emissions that have caused climate change result from acts and omissions attributable to States, which thus incur international responsibility.

Further, States have pointed out the concurrent responsibility of multiple States for a given harm does not diminish the responsibility of any individual State for breaching its legal obligations.

- **Chile** posits that "[t]he current state of scientific evidence has allowed us to determine not only the amount of current and historic emissions of each country but also the consequences of failure to reduce those emissions in the overall warming levels ... science can quantify not only individual contributions to the global mean surface temperature rise but also the real impact that failure to adopt necessary measures has on the overarching temperature goals. Therefore, while it is not possible to attribute specific climate change-induced events to particular emissions, reasonable inferences can be accomplished by quantifying States' individual contributions to climate change. … Thus, it can be held that all States that have directly contributed with their acts and omissions to harm the climate system could be held liable for compensation for their own contributions to that injury." [paras. 94-102 of its written statement].
- **Antigua and Barbuda** highlights that "damage can arise from several concurrent causes, including the conduct of more than one actor, but 'the fact that damage was the result of concurrent causes is *not* sufficient to exempt [a responsible State] from any obligation to make reparations'." [para. 548 of its written statement]. **Brazil** succinctly states that "[a] State is responsible for its actions or omissions which have caused significant harm to the climate system, when those are attributable to that State. In the present case, the relevant relation of causality involves the link between emissions, concentrations, temperature increase, and damage." [para. 84 of its written statement].

In view of the unequivocal science, the ICJ should affirm that it is possible to establish a legally relevant causal connection, and clarify that, in the context of climate change as in other contexts, the existence of concurrent State contributions to the harm is no bar to individual State responsibility under international law. The fact that multiple actors contribute to climate harm does not mean that none can be held accountable.

Argument to Watch For

Does conduct causing climate harm trigger legal consequences (cessation, guarantees of non-repetition and reparations)?

Why does this issue matter?

Central to law's role in delivering justice is the principle *ubi jus, ibi remedium* - where there is a right, there is a remedy. Addressing the legal consequences of climate-destructive conduct, as framed in the second question to the ICJ, is critical. Accountability and reparations for climate harm are obligations of justice, not acts of charity. Under the law of State responsibility, the establishment of an internationally wrongful act — which entails specific State conduct that breaches obligations under international law — triggers binding secondary obligations. These require cessation of the breach, guarantees of non-repetition, and the provision of full reparation for resulting injuries through restitution, compensation, and/or satisfaction. The framework of State responsibility is unequivocal: the violation of an international obligation carries legal consequences. Yet major polluters attempt to undermine its application, erecting legal barriers to shield themselves from accountability for climate harm. This deliberate assault on State responsibility, particularly reparations, is both legally untenable and morally indefensible.

The actions and omissions of major emitters over many decades — undertaken with full knowledge of their role in the climate crisis — have wrought devastation upon nations and peoples in climate-vulnerable situations. Comprehensive redress is not just vital for justice but essential for preserving a livable future for all. Despite extolling cooperation, high-emitting States have persistently failed to honor their pledges. While solidarity remains important, three decades of unmet promises demand a shift: it is time to ground climate redress in the firm foundation of existing legal obligations.

What are big polluters arguing?

Major emitters are attacking the foundations for remedy and reparations for climate harm through several strategies. One such strategy is to narrow the applicable law to climate treaties, especially the Paris Agreement, and then misleadingly assert that the climate regime displaces the law of State responsibility and other relevant legal norms. Some climate-destructive States even appear to assert that international cooperation under the climate regime substitutes for legal consequences, despite decades of multilateral efforts failing to provide meaningful redress for those most affected.

- According to **Kuwait**, the climate regime (UNFCCC, Kyoto Protocol, and Paris Agreement), establishes a set of specialized rules to the exclusion of other norms (lex specialis), which "precludes application" of the rules of State responsibility. [para. 86 of its written statement]. If the Court were to still consider these rules applicable, in Kuwait's view they would only apply to breaches of State obligations contained in the climate agreements, excluding "[a]ny attempt to seek compensation more generally in

relation to the adverse effects of climate change." [para. 108 of its written statement]. **China** similarly contends that the law of State responsibility is inapplicable in relation to climate change, pointing to the UNFCCC's "tailor-made solutions to facilitate compliance by States and to effectively address loss and damage." [paras. 134-136, 139 of its written statement]. Along similar lines, reinforcing the primacy of the UN climate change regime, the **United States** makes clear that neither the UNFCCC nor the Paris Agreement contains rules regarding State liability for adverse effects of human-induced climate change, and instead points to the regime's "cooperative, facilitative, and serious approach to 'loss and damage' associated with the adverse effects of climate change." [para. 5.2 of its written comments].

- The **United Kingdom** notes that the second question before the Court on legal consequences is not governed by the secondary rules of State responsibility, but rather by the climate regime. It seeks to drastically limit the scope of the question to identifying, in general terms, the obligations within the climate treaties that apply when States "have caused significant harm to the climate system." [paras. 65-66 of its written comments].
- The arguments of the **United States** would establish a legal vacuum in terms of historical responsibility. The United States denies the relevance of obligations long predating the climate regime, limits applicable law primarily to the Paris Agreement, further reducing the mandatory content of the climate agreements to procedural obligations, and then stresses that "[w]ithout an international legal obligation in force for a State, there can be no internationally wrongful act to which responsibility can attach. No compensation may be awarded for any period prior to the entry into force of an obligation." [paras. 5.4-5.5 of its written comments].
- On the specific question of compensation, **South Korea** submits that "[i]t is noteworthy in this context that the Paris Agreement excluded the issue of compensation from its scope. While Article 8 of the Agreement addresses loss and damage … Article 8 neither involves nor provides a basis for liability or compensation. Instead, the provision calls expressly for a 'cooperative and facilitative' approach, in expectation of actions and remedies through political processes." [para. 48 of its written statement]. **Japan** mirrors this argument [para. 44 of their written statement], and **Iran** similarly posits the primacy of the climate regime and reinforces international cooperation "as the only viable response to address the legal consequences in relation to climate change commitments." [para. 162 of its written statement].

To the extent the law of State responsibility applies, some polluting States attack the elements required to trigger legal consequences, arguing: (1) that breach cannot be made out (i.e. there is no internationally wrongful act, either because the relevant international obligation is inapplicable or not triggered, or because the conduct that contravenes it is not attributable to an individual State or States), *and* (2) that even if a breach is established, climate-related harm cannot be linked to it. They advance a wide range of arguments in support of this position, including lack of sufficient knowledge of the causes and foreseeable consequences of climate change in the past to have triggered preventive duties; purported scientific uncertainties making causality analysis more difficult; and the alleged complexity of singling out specific States when multiple States have contributed to climate harm. (*These lines of argument are multi-layered, and the State positions presented here are but a few examples of a complex terrain of interlocking legal positions being advanced to evade accountability.*)

- In considering the customary international law of State responsibility, the **United States** stressed "some of the challenges of the application of this framework to the profoundly complex and global context of climate change, in which an indeterminate number of actors, causes, and effects collide with a framework designed to assign responsibility explicitly to States." [para. 5.1 of its written comments].
- According to **New Zealand**, given the diffuse and complex nature of climate change, "attribution, causation and contribution are likely to be very difficult and highly contested issues." [para. 140(c) of its written statement]. **France** shares the view that "the questions put to the Court do not concern the possibility that the individual responsibility of one or more States may be engaged with regard to specific facts," emphasizing that establishing a causal link for climate-related damage often proves "particularly complex" [paras. 59-60 of its written comment; *see also* paras. 121-124 of **Kuwait**'s written statement].
- **Switzerland** also cautioned against assigning individual States legal responsibility: "Because it is difficult and complex to determine objectively whether greenhouse gas emissions constitute a breach of the no-harm rule, applying the polluter pays principle in relation to climate change presents challenges for existing international law. Any proportional allocation of damage, in line with the *polluter pays* principle, should therefore be the subject of negotiations between states." [para. 80 of its written statement].

What climate justice requires

A majority of States have argued that: the conduct leading to devastating climate harm was and is in breach of obligations under multiple sources of international law; attribution barriers are not insurmountable; and the law of State responsibility applies, triggering duties to cease harmful conduct, guarantee non-repetition, and provide full reparation for resulting injuries.

Overarching framework

- **The Philippines** submits that State conduct resulting in anthropogenic GHG emissions over time causing climate change, constitute a breach of State obligations under international law, and that "within the wide vista of international law" such breach constitutes an internationally wrongful conduct, triggering legal consequences and affording affected States appropriate legal remedies and claims. The Philippines points to the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) in this context as containing the relevant rules on State responsibility. [paras.138 and 115 of its written statement]. **Vanuatu** has also clearly set forth the overarching framework governing legal consequences as rules of general international law codified in ARSIWA. Such consequences entail cessation, non-repetition, and reparation, including restitution, compensation, and satisfaction. [para. 557 of its written statement].
- The **Democratic Republic of the Congo (DRC)** refutes major polluters' arguments, emphasizing that the UNFCCC and the agreements concluded under it do not relieve States of responsibility under general rules of international law, as noted in the various statements made by Pacific States when the Paris Agreement was adopted or ratified. [paras. 42-44 of its written comments].

Vanuatu and the **Melanesian Spearhead Group (MSG)** also provide a deep legal defense as to why the climate regime does not in fact displace the law of State responsibility. [paras. 151-160 of Vanuatu's written comments; paras. 183-190 of MSG's written comments]. **Costa Rica** considers the law of State responsibility to apply, referencing relevant aspects of the European Court of Human Rights 2024 climate ruling and the climate advisory opinion issued by the International Tribunal for the Law of the Sea. [paras. 28-30 of its written comments]. **Bahamas** takes a similar position noting that even if the Court were to find that climate treaties establish a special regime in relation to liability, that would still not exclude recourse to the ordinary rules of State responsibility for remedy if a State breached other relevant norms such as its prevention obligation under customary international law. [para. 106 of its written comments]. In fact, **53 of the initial written statements** consider ARSIWA applicable in the context of climate change, and 52 of them identify reparation as a core legal consequence. [para. 170 of **Vanuatu**'s written comments].

Cooperation and Responsibility are complementary

- **Costa Rica** rebuts attempts by major emitters to portray cooperation as an alternative to responsibility stating that "[c]ooperation and responsibility are not opposite. As a matter of international relations and international law, both can and must go together. Cooperation is the key element for collective and multilateral responses. Responsibility is the basic tool of international law. There cannot be a legal system if compliance with the law or its disregard does not bear different consequences. Cooperation is the basis for joint action. Legal obligations are individual: each State must comply with them. If not, it bears responsibility." [para. 26 of its written comments].

Surmounting legal barriers

- **Antigua and Barbuda l**ays out a comprehensive defense against the barriers to establishing breach of obligations and attribution outlined by major polluters, concluding that none of these arguments can prevent "either the establishment of responsibility for breach or the triggering of the duty to make reparations for a breach of a climate change-related obligation." [for the full argument see paras. 102-118 of its written comments]. **Antigua and Barbuda** references an observation made by the ICJ in its jurisprudence: "that it would be a 'perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts' in circumstances where 'the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty'." [para. 118 of its written comments]. According to **Antigua and Barbuda**, "the quote is equally applicable to other aspects of the customary rules of State responsibility where degrees of uncertainty may arise." [para. 118 of its written comments].

When legal consequences are triggered under the law of State responsibility, what do cessation, non-repetition, and reparation (restitution, compensation, and satisfaction) look like? Several States have elaborated on forms of remedy, including comprehensive, structural redress that is vital to providing remedy beyond compensation and for both material and non-economic harm.

Cessation and non-repetition

- Among proposed measures to ensure cessation of harmful conduct and guarantees of non-repetition, **Vanuatu** includes, stopping fossil fuel subsidies and undertaking deep and rapid emission reductions. [para. 177 of its written comment]. **Colombia** posits that guarantees of non-repetition should entail "formally committing to timelines for decarbonizing their economies and phasing out fossil fuels, while adopting and enforcing regulations for their private sectors." [para. 4.10 of its written statement]. **MSG** [para. 203 of its written comments], **Cook Islands** [paras. 106(a)-(b) of its written comments], and **Mauritius** [paras. 53-58 of its written comments] support GHG emissions reduction, including in relation to fossil fuels.
- States also stress that the duty of cessation requires urgent, genuine, and substantive action to cease the harmful emissions rather than solutions such as geoengineering, which can aggravate harm. **Kiribati** submits that "[i]t cannot be emphasized enough that the recognition that geoengineering and carbon dioxide removal is not cessation," citing the additional human rights and environmental risks posed by "carbon capture and carbon offsets." [paras. 72-73 of its written comments]. Numerous States echo this stance, including the **Cook Islands** [para. 106(d) of its written comments], **the African Union** [paras. 78-80 of its written comments], the **MSG** [para. 204 of its written comments], and international organizations including the **Organization of African, Caribbean and Pacific States (OACPS)** [para. 166 of its written statement].

Reparations

- In relation to climate reparations, **Vanuatu** makes clear that reparation is not just about monetary compensation, but also structural measures, for instance, support for adaptive capacity; non-monetary redress for the human mobility, including displacement and migration, caused by the adverse effects of climate change; ecosystem restoration; tributes to victims; and recognition of the territories and maritime spaces of Small Island Developing States and their continued statehood and sovereignty despite the effects of climate change. [paras. 195-230 of its written comments].
- For **Albania**, restitution-related measures could include restoring the rights of Indigenous Peoples to their lands, territories, and resources affected by climate change. [para. 136 of its written statement]. As regards compensation, **Albania** submits "*The absence of certainty as to the extent of damage does not necessarily preclude [a court] from awarding an amount that it considers approximately to reflect the value of the impairment or loss of environmental goods and services.*" [para. 139 of their written statement].
- One form of reparation is **satisfaction**, essentially the acknowledgement of wrongdoing. **Sierra Leone** asserts that it, "like many other vulnerable States, has incurred debts in coping with the impacts of climate change. In such circumstances, full reparation requires that satisfaction be made through debt forgiveness." [para. 4.27 of its written comment]. **Kenya** similarly notes that States could "provide grace periods to sovereign debt related to climate change" as a form of satisfaction beyond purely financial compensation. [para. 6.112 of its written statement].

The ICJ should confirm that climate-destructive conduct triggers legal consequences under international law. This would be particularly significant as the issue of legal consequences has not been sufficiently considered yet in legal contexts. In this era of devastating and escalating climate harm, clarification of the law by the ICJ could lay stronger foundations for climate reparations, serving as a lifeline for nations and communities most affected by climate impacts.

Climate Justice Proceedings at the ICJ

Top Arguments to Watch for in the Written Submissions