

# INTER-AMERICAN COURT OF HUMAN RIGHTS

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## Advisory Opinion on the Climate Emergency and Human Rights

### *Written Opinion of the Republic of Vanuatu*



18 December 2023

## TABLE OF CONTENTS

<b>I.</b>	<b>OVERVIEW.....</b>	<b>1</b>
<b>II.</b>	<b>INTRODUCTION.....</b>	<b>1</b>
<b>III.</b>	<b>THE RELEVANT CONDUCT OF STATES TO BE ANALYZED BY THE COURT.....</b>	<b>2</b>
	A. Overview.....	2
	B. Human-induced climate change has caused widespread loss and damage to people and nature.....	2
	C. The Relevant Conduct of States in relation to loss and damage.....	7
<b>IV.</b>	<b>OBLIGATIONS UNDER INTERNATIONAL HUMAN RIGHTS LAW GOVERNING THE RELEVANT CONDUCT.....</b>	<b>12</b>
	A. Overview.....	12
	B. The right to life.....	15
	C. The right to a healthy environment.....	17
	D. The right of Indigenous and tribal people to existence and survival.....	19
	E. The right of self-determination.....	20
<b>V.</b>	<b>THE RELEVANT CONDUCT CONSTITUTES A <i>PRIMA FACIE</i> BREACH OF INTERNATIONAL HUMAN RIGHTS LAW .....</b>	<b>23</b>
	A. Nature of the breach.....	23
	B. Loss and damage resulting from the Relevant Conduct amounts, in principle, of the human right to life.....	23
	C. Loss and damage resulting from the Relevant Conduct amounts, in principle, of the right to a clean, healthy and sustainable environment.....	24
	D. Loss and damage resulting from the Relevant Conduct amounts, in principle, of the right of existence and survival of Indigenous and tribal peoples protect Article 21 of the American Convention.....	24
	E. Loss and damage resulting from the Relevant Conduct amounts, in principle, of the right of self-determination of peoples .....	26

<b>VI.</b>	<b>LEGAL CONSEQUENCES OF THE BREACH WITH RESPECT TO PEOPLES AND INDIVIDUALS AFFECTED IN THEIR HUMAN RIGHTS BY LOSS AND DAMAGE.....</b>	<b>28</b>
A.	Overview.....	29
B.	Cessation of the Relevant Conduct.....	29
C.	Reparation for the Relevant Conduct.....	31
D.	Additional legal consequences of the Relevant Conduct.....	35
<b>VII.</b>	<b>CONCLUSIONS.....</b>	<b>35</b>

## I. Overview

1. The Republic of Vanuatu (“**Vanuatu**”) submits this written opinion to the Inter-American Court of Human Rights (the “**Court**”) in the proceedings concerning the Advisory Opinion Request made by Chile and Colombia regarding obligations of States under the American Convention on Human Rights and international law in the face of the climate emergency (the “**Advisory Proceedings**”). This written opinion analyzes two specific questions put to the Court, namely questions A.2B and F.2 from the perspective of international law. It reaches the following three overall conclusions: States which have caused significant and/or catastrophic harm to the climate system, including loss and damage, have breached international law; States have further breached international law as a result of their insufficient responses to the adverse impacts to climate change, including as regards individuals and peoples affected by displacement; and States have breached international law by failing to provide effective remedies and redress for the loss and damage suffered by individuals and peoples from climate change impacts.

## II. Introduction

2. The situation of many States within the inter-American regional system, particularly small island developing States, is similar to that of Vanuatu. Many States all over the world “whose existence is on the line” are particularly vulnerable to the adverse effects of climate change that they have not caused.<sup>1</sup>
3. For the purposes of this submission, Vanuatu will focus on the human rights principles that “*should inspire the actions of mitigation, adaptation and response to the losses and damage resulting from the climate emergency in the affected communities,*” particularly on the loss and damage component of this question (Question A.2B) and the ways in which States should “*act, both individually and collectively, to guarantee the right to redress for the damage caused by their acts and omissions in relation to the climate emergency, taking into account considerations of equity, justice and sustainability*” (Question F.2).
4. The submission therefore identifies relevant human rights principles, with a focus on loss and damage, and then analyzes the legal consequences of such loss and damage, both under inter-American regional jurisprudence and the relevant rules and principles of international law, and the need for effective remedies regarding the same.
5. The submission is organized as follows: it begins with a characterization of loss and damage and the conduct of States relating to it, which is most relevant from the perspective of international human rights law (**Section III**); it then identifies the human rights, individual and collective, that govern the relevant conduct of States (**Section IV**); the following section establishes that “loss and damage,” when seen from the perspective of international human rights law, amounts to a breach of the obligations to respect, protect and fulfil human rights

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<sup>1</sup> Written Statement of Belize, Request for an Advisor Opinion Submitted by the Commission of Small Island States on Climate Change and International Law (16 June 2023) ITLOS Case No. 31 [https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2023/20230616\\_Case-No.-312022\\_opinion-21.pdf](https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2023/20230616_Case-No.-312022_opinion-21.pdf) paras 15-16.

(Section V); the submission then specifies the legal consequences of such breach (Section VI); the last section summarizes the conclusions of the analysis (Section VII).

### III. The Relevant Conduct of States to be Analyzed by the Court

#### A. Overview

6. In order to answer questions A.2B and F.2 put to the Court, it is first necessary to characterize the term “loss and damage” and clarify which State conduct is most relevant to loss and damage in the present context. This Section explains that loss and damage is a terminology used to describe the harm to individuals, peoples, and the environment effectively resulting from climate change. The conduct of States relevant to loss and damage includes, without limitation (i) conduct – acts and omissions – that has resulted over time in significant harm to the climate system, (ii) conduct involving responses (or a failure to respond) to the adverse effects of climate change, and which exposes individuals and peoples to violations of their human rights, including in the context of displacement, and (iii) conduct – acts and omissions – resulting in a lack of redress for human rights violations connected with loss and damage. Conduct (i), (ii), and (iii) is together referred to as the “**Relevant Conduct**.”

#### B. *Human-induced climate change has caused widespread loss and damage to people and nature*

7. There is a scientific consensus, expressed *inter alia* in the reports of the Intergovernmental Panel on Climate Change (“IPCC”) that climate change has caused widespread loss and damage. This is compellingly stated in the Summary for Policymakers of volume II of the IPCC’s Sixth Assessment Report: “*Human-induced climate change, including more frequent and intense extreme events, has caused widespread adverse impacts and related losses and damages to nature and people, beyond natural climate variability.*”<sup>2</sup> It must be recalled that Summaries for Policymakers are not only an expression of a scientific consensus but they are also approved line by line by all governments of the Panel.<sup>3</sup> This is therefore both a scientific and a State consensus.
8. Some loss and damage is “*irreversible for centuries to millennia, especially changes in the ocean, ice sheets and global sea level.*”<sup>4</sup> Changes are irreversible on centennial to millennial

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<sup>2</sup> IPCC, *Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, Summary for Policymakers, statement SPM.B.1, available at: [https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC\\_AR6\\_WGII\\_SummaryForPolicymakers.pdf](https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_SummaryForPolicymakers.pdf)

<sup>3</sup> IPCC, Appendix A to the Principles Governing IPCC Work: Procedures for the preparation, review, acceptance, adoption, approval and publication of IPCC Reports, section 4.4, available at: <https://www.ipcc.ch/site/assets/uploads/2018/09/ipcc-principles-appendix-a-final.pdf>

<sup>4</sup> IPCC, *Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, Summary for Policymakers, statement B.5, available at: [https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC\\_AR6\\_WGI\\_SPM.pdf](https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_SPM.pdf).

time scales in global ocean temperature (very high confidence), deep-ocean acidification (very high confidence) and deoxygenation.<sup>5</sup>

9. Importantly, the IPCC has confirmed that there is a fundamental question of climate justice at the heart of loss and damage given that those most affected by it are also those who have contributed the least to the problem. Indeed, according to the IPCC, “[v]ulnerable communities who have historically contributed the least to current climate change are disproportionately affected (high confidence)” by such “widespread adverse impacts and related losses and damages to nature and people.”<sup>6</sup>
10. For context, other relevant components of the scientific consensus on the loss and damage caused by climate change include the following:

Global warming has already exceeded 1°C,<sup>7</sup> and the resulting scale of changes in the climate system are unprecedented over many centuries to many thousands of years;<sup>8</sup>

Climate and weather extremes and their adverse impacts on people and nature will continue to increase with every additional increment of rising temperatures;<sup>9</sup>

Global sea level has risen faster since 1900 than over any preceding century in at least the last 3000 years,<sup>10</sup> driven by human influence,<sup>11</sup> and it will

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<sup>5</sup> IPCC, *Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, Summary for Policymakers, statement B.5.1, available at: [https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC\\_AR6\\_WGI\\_SPM.pdf](https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_SPM.pdf)

<sup>6</sup> IPCC, *Synthesis Report of the IPCC Sixth Assessment Report (AR6)*, Summary for Policymakers, statement A.2, available at: <https://www.ipcc.ch/report/sixth-assessment-report-cycle/>

<sup>7</sup> IPCC, 2018: *Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty*, Summary for Policymakers, statement A.1, available at: [https://www.ipcc.ch/site/assets/uploads/sites/2/2022/06/SPM\\_version\\_report\\_LR.pdf](https://www.ipcc.ch/site/assets/uploads/sites/2/2022/06/SPM_version_report_LR.pdf); IPCC, *Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, Summary for Policymakers, statement A.1, available at: [https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC\\_AR6\\_WGI\\_SPM.pdf](https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_SPM.pdf).

<sup>8</sup> IPCC, *Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, Summary for Policymakers, statement A.2, available at: [https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC\\_AR6\\_WGI\\_SPM.pdf](https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_SPM.pdf).

<sup>9</sup> IPCC, *Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change*, Summary for Policymakers, statement 2, available at: [https://www.ipcc.ch/site/assets/uploads/2018/02/AR5\\_SYR\\_FINAL\\_SPM.pdf](https://www.ipcc.ch/site/assets/uploads/2018/02/AR5_SYR_FINAL_SPM.pdf); IPCC, *Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, Summary for Policymakers, statement B.2, available at: [https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC\\_AR6\\_WGI\\_SPM.pdf](https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_SPM.pdf); *Glasgow Climate Pact*, Decision 1/CMA.3, FCCC/PA/CMA/2021/10/Add.1, paragraph 6, available at: [https://unfccc.int/sites/default/files/resource/cma2021\\_10a01E.pdf?download](https://unfccc.int/sites/default/files/resource/cma2021_10a01E.pdf?download)

<sup>10</sup> IPCC, *Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, Summary for Policymakers, statement A.2.4, available at: [https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC\\_AR6\\_WGI\\_SPM.pdf](https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_SPM.pdf)

<sup>11</sup> IPCC, *Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, Summary for Policymakers, statement A.1.7, available at: [https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC\\_AR6\\_WGI\\_SPM.pdf](https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_SPM.pdf)

continue to rise over the 21st century;<sup>12</sup>

The risks associated with such sea level rise are exacerbated for small islands, low-lying coastal areas and deltas,<sup>13</sup> with resulting damage and adaptation costs of several percentage points of gross domestic product;<sup>14</sup>

Without urgent and significant increase in mitigation efforts beyond those in place today, warming by the end of the 21st century will lead to severe, widespread and irreversible impacts globally,<sup>15</sup> and it will slow down economic growth, make poverty reduction more difficult, further erode food security, and prolong existing and create new poverty traps;<sup>16</sup> and

Countries must urgently increase the level of ambition and action in relation to climate change mitigation, adaptation and finance in this critical decade to address the gaps in the implementation of the goals of the Paris Agreement.<sup>17</sup>

11. Loss and damage is recognized in the Paris Agreement.<sup>18</sup> Article 8 of the Paris Agreement states that the parties “*recognize the importance of averting, minimizing and addressing loss and damage associated with the adverse effects of climate change, including extreme weather events and slow onset events, and the role of sustainable development in reducing the risk of loss and damage.*” While the decision of the Conference of the Parties of the United Nations Framework Convention on Climate Change (“UNFCCC”) accompanying the Paris Agreement noted that Article 8 “*does not involve or provide a basis for any liability or compensation,*”<sup>19</sup> that statement effectively confirms that loss and damage has occurred. For the rest, the operation of the paragraph is, at best, an interpretive aid for Article 8, and for Article 8 only. It is clearly not relevant to interpret, let alone limit, the rights of States, peoples and individuals under other parts of the Paris Agreement, the UNFCCC, other treaties (including human rights treaties), general international law or other relevant laws.

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<sup>12</sup> IPCC, *Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, Summary for Policymakers, statement B.5.3, available at: [https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC\\_AR6\\_WGI\\_SPM.pdf](https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_SPM.pdf)

<sup>13</sup> IPCC, 2018: *Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty*, Summary for Policymakers, statement B.2.3, available at: [https://www.ipcc.ch/site/assets/uploads/sites/2/2022/06/SPM\\_version\\_report\\_LR.pdf](https://www.ipcc.ch/site/assets/uploads/sites/2/2022/06/SPM_version_report_LR.pdf)

<sup>14</sup> IPCC, *Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part A: Global and Sectoral Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change*, Summary for Policymakers, at page 17, available at: [https://www.ipcc.ch/site/assets/uploads/2018/02/ar5\\_wgII\\_spm\\_en.pdf](https://www.ipcc.ch/site/assets/uploads/2018/02/ar5_wgII_spm_en.pdf)

<sup>15</sup> IPCC, *Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change*, Summary for Policymakers, statement 3.2, available at: [https://www.ipcc.ch/site/assets/uploads/2018/02/AR5\\_SYR\\_FINAL\\_SPM.pdf](https://www.ipcc.ch/site/assets/uploads/2018/02/AR5_SYR_FINAL_SPM.pdf)

<sup>16</sup> IPCC, *Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part A: Global and Sectoral Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change*, Summary for Policymakers, at page 20, available at: [https://www.ipcc.ch/site/assets/uploads/2018/02/ar5\\_wgII\\_spm\\_en.pdf](https://www.ipcc.ch/site/assets/uploads/2018/02/ar5_wgII_spm_en.pdf)

<sup>17</sup> *Glasgow Climate Pact*, Decision 1/CMA.3, FCCC/ PA/CMA/2021/10/Add.1, paragraph 5, available at: [https://unfccc.int/sites/default/files/resource/cma2021\\_10a01E.pdf?download](https://unfccc.int/sites/default/files/resource/cma2021_10a01E.pdf?download); United Nations Environment Programme (2021), *Emissions Gap Report 2021: The Heat Is On – A World of Climate Promises Not Yet Delivered*, Executive Summary, Conclusions 6 and 7, available at: <https://wedocs.unep.org/handle/20.500.11822/36990;jsessionid=2EE25CE2E8AF3B2BD73700D7A61DDBF5>

<sup>18</sup> “The Paris Agreement”, Decision 1/CP.21, 12 December 2015, FCCC/CP/2015/10/Add.1, 21, Annex, Article 8.

<sup>19</sup> “The Paris Agreement”, Decision 1/CP.21, 12 December 2015, FCCC/CP/2015/10/Add.1, 21, Annex, Article 8(3).

Several small island developing States, including Vanuatu, expressly reserved their rights under general international law when ratifying the Paris Agreement.<sup>20</sup> The declaration entered by the Government of Vanuatu in pertinent part reads:

“Whereas the Government of the Republic of Vanuatu declares its understanding that ratification of the Paris Agreement shall in no way constitute a renunciation of any rights under any other laws, including international law, and the communication depositing the Republic’s instrument of ratification shall include a declaration to this effect for international record;”<sup>21</sup>

12. The consensus of States on loss and damage as a fact, rather than a mere risk, is further stated in General Assembly Resolution 77/276, adopted by consensus of the General Assembly with 132 co-sponsors.<sup>22</sup> Preambular paragraph 9:

*“Not[es] with utmost concern* the scientific consensus, expressed, inter alia, in the reports of the Intergovernmental Panel on Climate Change, including that [ ... ] human-induced climate change, including more frequent and intense extreme events, **has caused widespread adverse impacts and related losses and damages to nature and people**” (emphasis added).

13. Thus characterized, loss and damage is the embodiment of climate injustice. Yet, the level of injustice can only be grasped if a human face is added. In the everyday life of the Indigenous people of Vanuatu (known as the Ni-Vanuatu), much like for other peoples at the forefront of loss and damage, the “widespread adverse impacts and related losses and damages to nature and people” have a very concrete meaning:

Ni-Vanuatu people have personal experiences with a changing climate, which range from slow-onset changes, such as sea level rise, saltwater intrusion, longer dry periods and increasing temperatures, to extreme

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<sup>20</sup> See Status of Ratification of the Paris Agreement, available at: [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XXVII-7-d&chapter=27&clang=en#EndDec](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&clang=en#EndDec).

<sup>21</sup> Vanuatu’s declaration can be found here at the “Declaration” section at the end of the Status of Ratification: [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XXVII-7-d&chapter=27&clang=en#EndDec](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&clang=en#EndDec).

<sup>22</sup> Co-sponsors: Algeria, Andorra, Angola, Antigua and Barbuda, Australia, Austria, Azerbaijan, Bahamas, Bangladesh, Barbados, Belgium, Belize, Bulgaria, Cabo Verde, Canada, Chile, Colombia, Costa Rica, Croatia, Cyprus, Czechia, Denmark, Djibouti, Dominican Republic, Eritrea, Estonia, Fiji, Finland, France, Gabon, Gambia, Georgia, Germany, Ghana, Greece, Guinea-Bissau, Guyana, Hungary, Iceland, Ireland, Italy, Jamaica, Kiribati, Latvia, Lebanon, Libya, Liechtenstein, Lithuania, Luxembourg, Madagascar, Maldives, Malta, Marshall Islands, Mauritania, Mauritius, Mexico, Micronesia (Federated States of), Monaco, Montenegro, Morocco, Mozambique, Myanmar, Namibia, Nauru, Nepal, Netherlands, New Zealand, North Macedonia, Norway, Palau, Panama, Papua New Guinea, Portugal, Republic of Moldova, Romania, Rwanda, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Samoa, Serbia, Seychelles, Sierra Leone, Singapore, Slovakia, Slovenia, Solomon Islands, Spain, Sri Lanka, Suriname, Sweden, Switzerland, Timor-Leste, Togo, Tonga, Trinidad and Tobago, Tunisia, Tuvalu, Uganda, Ukraine, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, Vanuatu, Viet Nam and State of Palestine. *Additional co-sponsors:* Afghanistan, Armenia, Bolivia (Plurinational State of), Bosnia And Herzegovina, Botswana, Burundi, Dominica, Ecuador, El Salvador, Equatorial Guinea, Haiti, Indonesia, Israel, Japan, Kyrgyzstan, Malaysia, Mali, Mongolia, Niger, Peru, Philippines, Poland, Republic Of Korea, San Marino, Tajikistan, Thailand, Uruguay.



weather events, such as more intense cyclones, heavy downpours and flooding;<sup>23</sup>

Climate change impacts affect an interconnected and complex system that is centered on the critical relationships between Pacific Islanders and their environment;<sup>24</sup>

For example, one Ni-Vanuatu said that due to climate change, ‘I am more concerned about sea level rise which is washing away our land, which our forefathers have inherited over many generations and with it being washed away, it means our family’s access to equitable land for gardening is limited’;<sup>25</sup>

A Ni-Vanuatu from Ambrym explained that the destruction of yam, a traditional root crop and staple food in Vanuatu, due to increased climate variability not only involves physical losses but also leads to a loss of ‘rituals, rites, and customs of the yam’, violating Vanuatu’s social fabric, culture and traditions, agency, identities and food security;<sup>26</sup>

These and other impacts of climate change on the Ni-Vanuatu’s human rights are producing cascading implications on numerous other interconnected human rights and can transcend across generations.<sup>27</sup>

14. This is but a glimpse into the vast human suffering behind the somewhat dry words “loss and damage.” In this submission, Vanuatu has deliberately refrained from fleshing them out with exclusive reference to individuals and communities in Vanuatu. Instead, this submission takes as a starting point that many peoples are, like the Ni-Vanuatu, at the forefront of the human suffering resulting from the conduct driving climate change. As the IPCC notes in the Summary for Policymakers of its 2023 Synthesis Report:

“Regions and people with considerable development constraints have high vulnerability to climatic hazards. Increasing weather and climate extreme events have exposed millions of people to acute food insecurity and reduced water security, with the largest adverse impacts observed in many locations and/or communities in Africa, Asia, Central and South America, LDCs, Small Islands and the Arctic, and globally for Indigenous Peoples, small-scale food producers and low-income households. Between 2010 and 2020, human mortality from floods, droughts and storms was 15 times higher in

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<sup>23</sup> McNamara et al, ‘Using a human rights lens to understand and address loss and damage’ (2023) 13 *Nature Climate Change* 1334, 1335, available at: <https://www.nature.com/articles/s41558-023-01831-0>.

<sup>24</sup> McNamara et al, ‘Using a human rights lens to understand and address loss and damage’ (2023) 13 *Nature Climate Change* 1334, 1338, available at: <https://www.nature.com/articles/s41558-023-01831-0>.

<sup>25</sup> McNamara et al, ‘Using a human rights lens to understand and address loss and damage’ (2023) 13 *Nature Climate Change* 1334, 1335, available at: <https://www.nature.com/articles/s41558-023-01831-0>.

<sup>26</sup> McNamara et al, ‘Using a human rights lens to understand and address loss and damage’ (2023) 13 *Nature Climate Change* 1334, 1335, available at: <https://www.nature.com/articles/s41558-023-01831-0>.

<sup>27</sup> McNamara et al, ‘Using a human rights lens to understand and address loss and damage’ (2023) 13 *Nature Climate Change* 1334, 1335, available at: <https://www.nature.com/articles/s41558-023-01831-0>.

highly vulnerable regions, compared to regions with very low vulnerability.  
(*high confidence*)”<sup>28</sup>

15. It is this concrete reality, at the level of individuals and peoples of the present and future generations, that must be had in mind when determining the conduct of States that relates to it and, most importantly, the legal consequences resulting from such conduct.

C. *The Relevant Conduct of States in relation to loss and damage*

16. States can breach their obligations to respect, protect, and fulfil human rights in different contexts, including as a result of (i) conduct – acts and omissions – that has resulted over time in significant harm to the climate system, (ii) conduct involving responses (or a failure to respond) to the adverse effects of climate change, and which exposes individuals and peoples to violations of their human rights, including in the context of displacement, and (iii) conduct – acts and omissions – resulting in a lack of redress for human rights violations connected with loss and damage—all such acts and omissions hereafter referred to as the “**Relevant Conduct.**” Vanuatu will refer to each dimension of this overall Relevant Conduct as the “**Contribution Conduct,**” the “**Adverse Impacts Conduct,**” and the “**Failure to Redress Conduct,**” as applicable.
17. The acts and omissions of certain States have resulted over time in a level of anthropogenic greenhouse gas emissions from activities within their jurisdiction or control which have interfered with the climate system and other parts of the environment to an extent which amounts to significant harm to the latter. The responsibility of a State for contributing to climate change and its adverse effects does not require the acts or omissions of that State to be the *only* cause of climate change or its adverse impacts, or that such State’s acts or omissions are even its *main* cause. Some obligations, including the duty of due diligence, the obligation to prevent significant harm to the environment, the duty to protect and preserve the marine environment, and the obligations to respect, protect, and fulfil human rights are breached if a State causes harm which is “significant.” “Catastrophic” harm, in the form of climate change and its adverse effects, is not required. It is the contribution to the problem rather than the sole responsibility for causing the entire problem with triggers the responsibility of the State.
18. Specifically, it is the acts and omissions of particular States that have caused not only significant harm, but also catastrophic harm to the climate system and other parts of the environment in the form of climate change and its adverse effects, including loss and damage. In the 2022 edition of the *Emissions Gap Report* of the United Nations Environment Programme (UNEP), the contributions of the main emitters are stated both for the year 2020 and for the period from 1990 to 2020. According to this report, seven G20 members (China, US, EU27, India, Indonesia, Brazil, and Russia) and international transport (shipping and aviation) contributed, by themselves, more than half (> 50 per cent) of all GHG emissions in 2020. Although the lock-down caused by the COVID-19 pandemic led to a small decrease

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<sup>28</sup> IPCC, *Synthesis Report of the IPCC Sixth Assessment Report (AR6)*, Summary for Policymakers, March 2023, statement A.2.2, available at: [https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC\\_AR6\\_SYR\\_SPM.pdf](https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_SPM.pdf).

in emissions as compared to 2019, the emissions from these major emitters rebounded in 2021:

“Eight major emitters – seven G20 members and international transport – contributed more than 55 per cent of total global GHG emissions in 2020: China, the United States of America, the European Union (27), India, Indonesia, Brazil, the Russian Federation, and international transport (figure 2.2). The G20 as a whole contributed 75 per cent of the total. Collectively, the emissions of the top eight fell from 32.8 GtCO<sub>2</sub>e in 2019 to 31.5 GtCO<sub>2</sub>e in 2020 (a change of -3.8 per cent) [...] For most major emitters, including China, India, the Russian Federation, Brazil and Indonesia, GHG emissions (excluding LULUCF) rebounded in 2021, exceeding pre-pandemic 2019 levels”.<sup>29</sup>

19. A 2023 study by Jones *et al.*<sup>30</sup> focusing on emissions of three major greenhouse gases, namely carbon dioxide (CO<sub>2</sub>), methane (CH<sub>4</sub>) and nitrous oxide (N<sub>2</sub>O), from fossil fuel sources and land sources, in the period between 1851 and 2021, shows the cumulative greenhouse gas emissions for certain major emitters and some groups of States. The major emitters individuated are the United States of America (USA), China (CHN), the Russian Federation (RUS), Brazil (BRA), India (IND) and Indonesia (IDN). Some groups of countries are also individuated, including the European Union without the United Kingdom (EU27).
20. The 2023 study by Jones *et al.* also estimates the share of global warming (the increase in global mean surface temperature (GMST)) caused by the greenhouse gas emissions of specific States and groups of States. The threshold for a State to be included is of a contribution of at least 3 per cent the observed change in temperature. The result—indicating the percent of warming, and the actual warming contributed (in fractions of degrees Celsius) appears here:<sup>31</sup>

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<sup>29</sup> UNEP, *Emissions Gap Report* (2022), page 7, available at: <https://www.unep.org/resources/emissions-gap-report-2022>.

<sup>30</sup> M. W. Jones et al., ‘National contributions to climate change due to historical emissions of carbon dioxide, methane and nitrous oxide since 1850’, *www.nature.com/scientificdata* (2023) 10:155, available at: <https://doi.org/10.1038/s41597-023-02041-1>.

<sup>31</sup> M. W. Jones et al., ‘National contributions to climate change due to historical emissions of carbon dioxide, methane and nitrous oxide since 1850’, *www.nature.com/scientificdata* (2023) 10:155 page 16, available at: <https://doi.org/10.1038/s41597-023-02041-1>.

**Table 1: Share of global warming caused by the GHG emissions of specific States and groups of States**

Gas	Source	Country or Grouping	°C	%
CO <sub>2</sub> CH <sub>4</sub> N <sub>2</sub> O	Total	GLOBAL	1.61	
		NONANNEX	0.86	53.5
		ANNEXI	0.72	44.8
		OECD	0.64	39.8
		ANNEXII	0.55	33.8
		LMDC	0.46	28.6
		BASIC	0.37	23.0
		USA	0.28	17.3
		China	0.20	12.3
		EIT	0.18	11.2
		EU27	0.17	10.4
		LDC	0.10	6.2
		Russia	0.10	6.1
		Brazil	0.08	4.9
		India	0.08	4.8
		Indonesia	0.06	3.4

21. The United States of America has caused 17.3 per cent of the observed increase in temperature (an increase of 0.28 °C). China has caused 12.3 per cent of the increase in temperature (an increase of 0.2 °C). The 38 members of the Organization for Economic Cooperation and Development (**OECD**), taken together, have caused almost 40 per cent of the entire increase in temperature (an increase of 0.64 °C)—more than six times the combined contribution of all 47 Least Developed Countries (**LDCs**) taken together.
22. The Court can examine this aspect of the Relevant Conduct in relation to (i) a particular State having displayed it (such as a larger emitter of greenhouse gases, and therefore, a significant contributor to the climate change and/or its adverse impacts); (ii) the specific group of States whose emissions, taken together, have caused climate change and its adverse effects; or (iii) the overall conduct as such, whose conformity, in principle, with international law can be assessed pursuant to the obligations described herein.
23. The climate justice dimension of this aspect of the Relevant Conduct is manifest. The individual contributions of States to causing climate change are well-established<sup>32</sup> and highly unequal. In the Summary for Policymakers of volume III of its Sixth Assessment Report, the IPCC concluded that:

“Historical contributions to cumulative net anthropogenic CO<sub>2</sub> emissions between 1850 and 2019 vary substantially across regions in terms of total magnitude [ ... ]

<sup>32</sup> E.g., UNEP, *Emissions Gap Report* (2022) ; M. W. Jones et al, ‘National contributions to climate change due to historical emissions of carbon dioxide, methane and nitrous oxide since 1850’, *www.nature.com/scientificdata* (2023) 10:155, available at: <https://doi.org/10.1038/s41597-023-02041-1>

**LDCs contributed less than 0.4% of historical cumulative CO<sub>2</sub>-FFI [fossil fuel and industrial] emissions between 1850 and 2019, while SIDS contributed 0.5%.”<sup>33</sup> (emphasis added)**

24. Despite their lack of significant contribution to climate change, LDCs and SIDS are disproportionately impacted by loss and damage. In the Summary for Policymakers of the IPCC’s 2023 Synthesis Report of the Sixth Assessment Report, the conclusion is formulated as follows:

“Widespread and rapid changes in the atmosphere, ocean, cryosphere and biosphere have occurred. Human-caused climate change is already affecting many weather and climate extremes in every region across the globe. This **has led to widespread adverse impacts and related losses and damages to nature and people (high confidence). Vulnerable communities who have historically contributed the least to current climate change are disproportionately affected (high confidence)**” (emphasis added)<sup>34</sup>

25. Regarding the Contribution Conduct, examples of relevant acts and omissions of States that have resulted over time in significant harm to the climate system include (i) providing subsidies to the use and exploitation of fossil fuels, (ii) adopting laws, rules, or regulations with respect to energy policy including the granting licenses with respect to fossil fuel exploitation, or selling fossil fuels, and (iii) the failure to take measures to limit greenhouse gas emissions below the threshold of the Contribution Conduct.
26. In the case of the Contribution Conduct, an individual State breaches its international legal obligations defined herein at the moment when the level of greenhouse gas emissions of such State reaches a threshold when such emissions start to cause significant harm to the climate system and other parts of the environment. Upon hitting such threshold, the conduct in the aggregate becomes wrongful as a “composite act” as defined by Article 15 of the ARSIWA, with the breach extending over the “entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.”<sup>35</sup> It is therefore possible that certain States may face attributable conduct extending back in time decades or more.
27. The actions or omissions of a group of States, taken together, which cause not only significant harm to the climate system but catastrophic harm, also amounts to a composite act in breach of the relevant rules of international law described herein. In this case, the rules in Article 15 (Breach of a composite act) and in Article 47 (Plurality of responsible States) would operate together for purposes of a group breach. These States contributing to catastrophic harm are responsible both *individually* for their significant harm, and

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<sup>33</sup> IPCC, *Climate Change 2022: Mitigation of Climate Change. Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, Summary for Policymakers, statements B.3.1 and B.3.2, available at [https://www.ipcc.ch/report/ar6/wg3/downloads/report/IPCC\\_AR6\\_WGIII\\_SummaryForPolicymakers.pdf](https://www.ipcc.ch/report/ar6/wg3/downloads/report/IPCC_AR6_WGIII_SummaryForPolicymakers.pdf).

<sup>34</sup> IPCC, *Synthesis Report of the IPCC Sixth Assessment Report (AR6)*, Summary for Policymakers, statement A.2, available at: <https://www.ipcc.ch/report/sixth-assessment-report-cycle/>.

<sup>35</sup> Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Yearbook of the International Law Commission, 2001, vol. II, Part Two, as corrected, art 15(2).

*collectively* for their catastrophic harm to the climate system, namely climate change and its adverse effects, including loss and damage.

28. A State is responsible for its breaches even if there are other States that are also responsible for the wrongful act. In such a case, an injured State “can hold each responsible State to account for the wrongful conduct as a whole”<sup>36</sup> and “each State is separately responsible for conduct attributable to it.”<sup>37</sup>
29. States may also be in breach of their international obligations with respect to the second aspect of the Relevant Conduct, the Adverse Impacts Conduct. These breaches occur where a State’s responses (or failure to respond) to climate change impacts result in human rights violations, including in the context of displacement. One example is a State returning to another State an individual in breach of the principle of *non-refoulement* and/or in breach of the obligation not to extradite, deport or otherwise transfer pursuant to article 6 of the ICCPR, which exposes that individual to a “real risk of irreparable harm” connected with climate change impacts.<sup>38</sup> Other examples relate to adaptation. In the *Daniel Billy* decision, the UN Human Rights Committee concluded that Australia was in breach of its obligations under articles 17 and 27 of the ICCPR due to its delay in implementing adaptation measures to protect members of the Indigenous community in the Torres Strait Islands facing devastating impacts from climate change, including environmental degradation, loss of resources, salinification of their territories caused by flooding or seawater ingress, the decline of nutritionally and culturally important marine species and associated coral bleaching and ocean, and the impairment of their ability to maintain their culture from climate change impacts.<sup>39</sup> The Indigenous authors also advised the Committee of the risk of displacement “within the next 10 years unless urgent and significant action is taken to enable the islands to withstand expected sea-level rise.”<sup>40</sup> The *Daniel Billy* decision affirms that a State’s failure to protect individuals or peoples against climate displacement and other forms of loss and damage may constitute a violation of internationally protected human rights.
30. States may also be in breach of their international obligations with respect to the third aspect of the Relevant Conduct, the Failure to Redress. Individuals and peoples injured from loss and damage from the adverse impacts of climate change are entitled to access an effective remedy, including reparation and as guided by the Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (UNGA Res. 60/147).<sup>41</sup> This includes the need for adequately funded mechanisms for loss and damage

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<sup>36</sup> Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Yearbook of the International Law Commission, 2001, vol. II, Part Two, as corrected, art 47, comment (2).

<sup>37</sup> Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Yearbook of the International Law Commission, 2001, vol. II, Part Two, as corrected, art 47, comment (3).

<sup>38</sup> UN Human Rights Committee ‘Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2728/2016’ (*Teitiota v. New Zealand*) (23 Sept 2020) UN Doc CCPR/C/127/D/2728/2016 para 8.5.

<sup>39</sup> UN Human Rights Committee ‘Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3624/2019’ (22 Sept 2022) UN Doc CCPR/C/135/D/3624/2019 (*Billy v. Australia*) paras 8.12, 8.14.

<sup>40</sup> UN Human Rights Committee ‘Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3624/2019’ (22 Sept 2022) UN Doc CCPR/C/135/D/3624/2019 (*Billy v. Australia*) para 5.3.

<sup>41</sup> OHCHR, Human Rights and Loss and Damage: Key Messages, principle 2, available at: <https://www.ohchr.org/sites/default/files/documents/issues/climatechange/information-materials/2023-key-messages-hr-loss-damage.pdf>



that can materially and substantially advance the rights of those impacted by climate change, and providing injured parties access to justice and effective remedies.<sup>42</sup> For example, the failure to provide effective remedies and reparation to an individual who was subject to deportation in violation of the principle of *non-refoulement* would constitute a separate breach of the responsible State’s human rights obligations. This Court has affirmed that access to justice is a peremptory norm of international law.<sup>43</sup>

#### IV. Obligations under International Human Rights Law Governing the Relevant Conduct

##### A. Overview

31. International human rights law governs the Relevant Conduct. Several important principles and treaties, including the Charter of the United Nations (the “**UN Charter**”),<sup>44</sup> the Charter of the Organization of American States (“**OAS Charter**”),<sup>45</sup> the American Declaration on Rights and Duties of Man (the “**American Declaration**”),<sup>46</sup> the Universal Declaration of Human Rights,<sup>47</sup> the right of peoples to self-determination<sup>48</sup> and the 1966 International Covenants on Civil and Political Rights (“**ICCPR**”)<sup>49</sup> and on Economic, Social and Cultural Rights (“**ICESCR**”),<sup>50</sup> the American Convention on Human Rights (the “**ACHR**” or the “**American Convention**”)<sup>51</sup> and the rights protected by general and/or customary international law, among others, are directly applicable to the Relevant Conduct. The specific relevance of human rights in governing the Relevant Conduct has been confirmed by a stream of resolutions adopted over a period of 15 years by the Human Rights Council on

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<sup>42</sup> OHCHR, Human Rights and Loss and Damage: Key Messages, principle 2, available at: <https://www.ohchr.org/sites/default/files/documents/issues/climatechange/information-materials/2023-key-messages-hr-loss-damage.pdf>

<sup>43</sup> *The Environment and Human Rights*, Advisory Opinion OC-23/17, Inter-Am. Ct. H.R. (Nov. 15, 2017) para 233.

<sup>44</sup> Charter of the United Nations, 26 June 1945, 1 UNTS XVI.

<sup>45</sup> Charter of the Organisation of American States (adopted 30 April 1948, entered into force 13 December 1951) (1951) 119 UNTS 48.

<sup>46</sup> American Declaration of the Rights and Duties of Man, OAS Rex XXX adopted by the Ninth International Conference of American States (1948) reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System OEA/Ser L V/II.82 Doc 6 Rev 1 at 17 (1992). This Court has affirmed that certain provisions of the American Declaration “represent customary norms of general principles of international law” and has a “regulatory and binding nature” for Members States of the OAS, which is currently a central rule of the inter-American *corpus iuris* that reflects the minimum standard of protection of human rights in the American continent.” The Obligations in Matters of Human Rights of a State that Has Denounced the American Convention on Human Rights and the Charter of the Organization of American States, Advisory Opinion OC-26/20, Inter-Am. Ct. H.R. (Nov. 9, 2020) [Advisory Opinion OC-26/20] para 96.

<sup>47</sup> Universal Declaration of Human Rights, General Assembly Resolution 217 A(III) (adopted 10 December 1948) UN Doc A/810 at 71 (1948). The customary grounding of the rights referenced in the Universal Declaration of Human Rights is suggested or explicitly asserted in: *Barcelona Traction, Light and Power Company, Limited*, Judgment, I.C.J. Reports 1970, p. 3, paras 33-34; *United States Diplomatic and Consular Staff in Tehran (USA v Iran)*, I.C.J. Reports 1980, p. 3, para 91.

<sup>48</sup> *Case Concerning East Timor* (Portugal v. Australia) (1995) para 29, available at: <https://www.icj-cij.org/public/files/case-related/84/084-19950630-JUD-01-00-EN.pdf>; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) (2019) para 144, available at: <https://www.icj-cij.org/public/files/case-related/169/169-20190225-ADV-01-00-EN.pdf>.

<sup>49</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

<sup>50</sup> International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).

<sup>51</sup> American Convention on Human Rights (adopted 22 November 1969, entered into force 21 October 1986) OAU Doc CAB/LEG/67/3 rev 5, 21 ILM 58 (1982).

human rights and climate change,<sup>52</sup> as well as by the work of human rights treaty bodies<sup>53</sup> and special procedures.<sup>54</sup>

32. Resolution 3/2021: “Climate Emergency: Scope of Inter-American Human Rights Obligations,” adopted by the Inter-American Commission on Human Rights on 31 December 2021 (the “**Climate Emergency Resolution**”), affirms that the human rights obligations of States are intertwined with international environmental law “in the contexts of polluting activities within their jurisdiction, or under their control, so that they do not cause serious harm to their environment or that of other countries or areas outside the limits of national jurisdiction.”<sup>55</sup> Accordingly, States also have a human rights obligation “within their jurisdiction, to regulate and supervise activities that may significantly affect the environment inside or outside their territory.”<sup>56</sup> In its advisory opinion related to the environment and human rights, this Court affirmed that “States may be held responsible for any significant damage caused to persons outside their borders by activities originating in their territory or under their effective control or authority.”<sup>57</sup> The UN Committee on the Rights of the Child explicitly endorsed and built upon this reasoning in *Chiara Sacchi et. al. v. Argentina, Brazil, France, and Germany*, where it confirmed that the respondent States owed human rights obligations to the child authors (including authors located in Palau and

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<sup>52</sup> See, e.g., UN Human Rights Council ‘Human rights and climate change’ (March 2008) UN Doc A/HRC/RES/7/23; UN Human Rights Council ‘Human rights and climate change’ (14 July 2022) UN Doc A/HRC/RES/50/9; see also OHCHR ‘Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights’ (15 Jan 2009) UN Doc A/HRC/10/61; OHCHR ‘Panel discussion on climate change’s negative impact on the full and effective enjoyment of human rights by people in vulnerable situations’ (27 Dec 2022) UN Doc A/HRC/52/48.

<sup>53</sup> See, e.g., UN Committee on the Rights of the Child ‘General comment No. 26 (2023) on children’s rights and the environment with a special focus on climate change’ (22 Aug 2023) UN Doc CRC/C/GC/26; UN Committee on Economic, Social and Cultural Rights ‘General comment No. 26 (2022) on land and economic, social and cultural rights’ (24 January 2023) UN Doc E/C.12/GC/26; UN Committee on the Elimination of Discrimination against Women ‘General recommendation No. 37 (2018) on gender-related dimensions of disaster risk reduction in a changing climate’ (13 March 2018) UN Doc CEDAW/C/GC/37; UN Human Rights Committee ‘Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2728/2016’ (*Teitiota v. New Zealand*) (23 Sept 2020) UN Doc CCPR/C/127/D/2728/2016; UN Committee on the Rights of the Child ‘Decision adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communication No. 104/2019’ (*Sacchi v. Argentina*) (11 Nov 2021) UN Doc CRC/C/88/D/104/2019; UN Human Rights Committee ‘Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3624/2019’ (22 Sept 2022) UN Doc CCPR/C/135/D/3624/2019 (*Billy v. Australia*).

<sup>54</sup> See, e.g., Ian Fry, ‘Exploring approaches to enhance climate change legislation, supporting climate change litigation and advancing the principle of intergenerational justice’ (28 July 2023) UN Doc A/78/255; E. Tendayi Achiume, ‘Ecological crisis, climate justice and racial justice’ (25 Oct 2022) UN Doc A/77/549; Philip Alston, ‘Climate change and poverty’ (17 July 2019) UN Doc A/HRC/41/39; David Boyd, ‘Safe climate’ (15 July 2019) UN Doc A/74/161; Victoria Tauli-Corpuz, ‘Impacts of climate change and climate finance on indigenous peoples’ rights’ (1 Nov 2017) UN Doc A/HRC/36/46.

<sup>55</sup> Inter-Am. Comm. H.R., Climate Emergency: Scope of Inter-American Human Rights Obligations, Resolution 3/2021 (31 December 2021) principles 39-41, available at: [https://www.oas.org/en/iachr/decisions/pdf/2021/resolucion\\_3-21\\_ENG.pdf](https://www.oas.org/en/iachr/decisions/pdf/2021/resolucion_3-21_ENG.pdf).

<sup>56</sup> Inter-Am. Comm. H.R., Climate Emergency: Scope of Inter-American Human Rights Obligations, Resolution 3/2021 (31 December 2021) principle 40, available at: [https://www.oas.org/en/iachr/decisions/pdf/2021/resolucion\\_3-21\\_ENG.pdf](https://www.oas.org/en/iachr/decisions/pdf/2021/resolucion_3-21_ENG.pdf).

<sup>57</sup> *The Environment and Human Rights*, Advisory Opinion OC-23/17, Inter-Am. Ct. H.R. (Nov. 15, 2017) para 103 (emphasis added).



the Marshall Islands) based on the respondent States' ability "to regulate activities that are the source of [carbon] emissions and to enforce such regulations".<sup>58</sup>

33. For purposes of this submission, Vanuatu will address the obligations arising in relation to the Relevant Conduct from the perspective of three specific human rights: (i) the right to life, (ii) the right to a healthy environment, and (iii) the right of Indigenous and tribal peoples to their existence and survival protected by Article 21 of the American Convention. In addition, (iv) the fundamental right of self-determination of all peoples, including peoples comprising States and Indigenous Peoples, is also addressed in this submission. This focus is only due to the need to keep the submission within reasonable bounds, and it must not be understood as implying any limitation regarding the relevance of any other international legal obligations that may have been or continue to be breached on account of the Relevant Conduct.
34. This Court has previously observed that in interpreting rights under the American Convention with respect to the environment, the Court "*must take international law on environmental protection into consideration when defining the meaning and scope of the obligations assumed by the States under the American Convention.*"<sup>59</sup> The Court also takes "*other relevant conventions*" into account "*in order to make a harmonious interpretation of the international legal obligations cited.*"<sup>60</sup> The Court further considers "*applicable obligations and the relevant jurisprudence and decisions, as well as the resolutions, ruling and declarations on the issue that have been adopted at the international level.*"<sup>61</sup> This Court has expressly recognized an "*undeniable relationship*" between the protection of the environment and the realization of other human rights in the context of adverse climate change impacts.<sup>62</sup> Therefore, the following analysis incorporates relevant international decisions and judgments as applicable.
35. This Court has made similar conclusions when interpreting the rights of Indigenous and tribal peoples under the American Convention, observing that its case law "*repeatedly recognized the indigenous peoples' right to property in relation to their traditional territories and the duty of protection derived from Article 21 of the American Convention, in light of the provisions of ILO Convention 169 [and] the United Nations Declaration on the Rights of Indigenous Peoples*" as well as rights recognized by States "*in their domestic laws or in other international instruments and decisions*" as a "*corpus juris that defines the obligations of the States Parties to the American Convention*" with respect to Indigenous and tribal peoples' rights.<sup>63</sup> Therefore, the following analysis incorporates relevant international decisions and judgments as applicable.

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<sup>58</sup> UN Committee on the Rights of the Child 'Decision adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communication No. 104/2019' (*Sacchi v. Argentina*) (11 Nov 2021) UN Doc CRC/C/88/D/104/2019 para 109.

<sup>59</sup> *The Environment and Human Rights*, Advisory Opinion OC-23/17, Inter-Am. Ct. H.R. (Nov. 15, 2017) para 44.

<sup>60</sup> *The Environment and Human Rights*, Advisory Opinion OC-23/17, Inter-Am. Ct. H.R. (Nov. 15, 2017) para 44.

<sup>61</sup> *The Environment and Human Rights*, Advisory Opinion OC-23/17, Inter-Am. Ct. H.R. (Nov. 15, 2017) para 44.

<sup>62</sup> *The Environment and Human Rights*, Advisory Opinion OC-23/17, Inter-Am. Ct. H.R. (Nov. 15, 2017) para 47.

<sup>63</sup> *Garifuna Community of Triunfo de la Cruz and its Members v. Honduras*, Merits, Reparations and Costs, 2018 Inter-Am Ct. H.R. (ser. C) No. 305 (Oct. 8, 2015) para 116.

36. It is critical to stress that the obligations of States in the context of the Relevant Conduct are colored by principles of equity and common but differentiated responsibilities and respective capabilities (CBDRRC).<sup>64</sup> In essence, high-income States with high historical emissions have more exacting international obligations than low-income States with insignificant or lower historical emissions. This is illustrated by the *Daniel Billy* decision, where the UN Human Rights Committee, in establishing human rights violations, found relevant the fact that “the State party is and has been in recent decades among the countries in which large amounts of greenhouse gas emissions have been produced. The Committee notes that the State party ranks high on world economic and human development indicators.”<sup>65</sup> CBDRRC is further operationalized in the UNFCCC and the Paris Agreement, which oblige developed States to provide developing States with adequate climate finance, technology transfer and capacity-building for mitigation, adaptation and addressing loss and damage.<sup>66</sup>
37. International human rights law reinforces and complements these differentiated obligations. For example, Article 1(3) of the UN Charter and Article 2(1) of the ICESCR impose obligations of international assistance and cooperation in the promotion of human rights on all States, with Article 2(1) of the ICESCR imposing an obligation on all States to use “the maximum of its available resources” towards the “full realization of the rights recognized” in the ICESCR.<sup>67</sup> On account of limited resources and the debilitating impacts of the loss and damage itself, low-income, climate-vulnerable States may have an obligation to seek international cooperation and assistance, including climate finance, technology transfer and capacity-building from other States. Developed States have distinct human rights obligations to provide such means of support to developing States.<sup>68</sup> As set out in section VI, additional obligations arise for States that have breached their international obligations through the Relevant Conduct.

## B. *The right to life*

38. The right to life is impacted by the Relevant Conduct relating to loss and damage. The right to life is “the supreme right from which no derogation is permitted, even in situations of armed conflict and other public emergencies that threaten the life of the nation.”<sup>69</sup> The right to life also includes the right of individuals to enjoy a life with dignity and to be free from acts or omissions that would cause their unnatural or premature death.<sup>70</sup> The obligation to protect the right to life extends to “reasonably foreseeable threats and life threatening situations” that could produce a loss of life. Such threats “may include adverse climate

<sup>64</sup> See e.g. Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights, UN Doc A/HRC/10/61 (15 January 2009) 28.

<sup>65</sup> UN Human Rights Committee ‘Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3624/2019’ (22 Sept 2022) UN Doc CCPR/C/135/D/3624/2019 (*Billy v. Australia*) para 7.8

<sup>66</sup> United Nations Framework Convention on Climate Change, 9 May 1992, 1771 UNTS 107, Article 4; “The Paris Agreement”, Decision 1/CP.21, 12 December 2015, FCCC/CP/2015/10/Add.1, 21, Annex, Articles 7, 8, 9.

<sup>67</sup> UN Charter art 1(3); ICESCR art 2(1).

<sup>68</sup> See e.g. UN Committee on the Elimination of Discrimination Against Women (CEDAW) General Comment No. 37 “Gender in the context of climate change” (15 March 2018) UN Doc. CEDAW/C/GC/37.

<sup>69</sup> UN Human Rights Committee General Comment No. 36 “The right to life” (3 Sept 2019) UN Doc. CCPR/C/GC/36 para 2.

<sup>70</sup> UN Human Rights Committee ‘Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3624/2019’ (22 Sept 2022) UN Doc CCPR/C/135/D/3624/2019 (*Billy v. Australia*) para 8.3.

change impacts” and other forms of environmental degradation that pose threats to present and future generations to enjoy the right to life.<sup>71</sup>

39. This Court has specifically affirmed “that the right to life in the American Convention is essential because the realization of the other rights depends on its protection.”<sup>72</sup> Therefore “States are obliged to ensure the creation of the necessary conditions for the full enjoyment and exercise of this right.”<sup>73</sup>
40. The right to life imposes a duty on a State to take positive measures to protect the right to life.<sup>74</sup> This includes a duty to prevent arbitrary deprivation of life.<sup>75</sup> This positive obligation also imposes a “due diligence obligation to take reasonable, positive measures that do not impose disproportionate burdens on them” in response to reasonably foreseeable threats to life originating from private persons or other entities whose conduct is not attributable to the State.<sup>76</sup>
41. With respect to the obligation to provide a decent or dignified life, this Court has included environmental protection as a condition for a decent life.<sup>77</sup> In the context of ensuring the rights to life and to personal integrity in relation to the negative impacts of environmental damage, this Court has asserted that Article 1(1) of the American Convention imposes an obligation of restraint. States must refrain from (i) any practice or activity that denies or restricts access, in equal conditions, to the requisites of a dignified life, such as adequate food and water, and (ii) unlawfully polluting the environment in a way that has a negative impact on the conditions that permit a dignified life for the individual.<sup>78</sup>
42. This Court has also asserted a second obligation, an “obligation to ensure rights,” meaning that States must take appropriate steps to protect and preserve the rights to life and to integrity.<sup>79</sup>
43. In the *Daniel Billy* decision, the UN Human Rights Committee affirmed that human rights jurisprudence has established that “environmental degradation can compromise effective enjoyment of the right to life and that severe environmental degradation can adversely affect an individual’s well-being and lead to a violation of the right to life.”<sup>80</sup> The “risk of an entire

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<sup>71</sup> UN Human Rights Committee ‘Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3624/2019’ (22 Sept 2022) UN Doc CCPR/C/135/D/3624/2019 (*Billy v. Australia*) para 8.3.

<sup>72</sup> *The Environment and Human Rights*, Advisory Opinion OC-23/17, Inter-Am. Ct. H.R. (Nov. 15, 2017) para 108.

<sup>73</sup> *The Environment and Human Rights*, Advisory Opinion OC-23/17, Inter-Am. Ct. H.R. (Nov. 15, 2017) para 108.

<sup>74</sup> *The Environment and Human Rights*, Advisory Opinion OC-23/17, Inter-Am. Ct. H.R. (Nov. 15, 2017) para 108.

<sup>75</sup> UN Human Rights Committee General Comment No. 36 “The right to life” (3 Sept 2019) UN Doc. CCPR/C/GC/36 para 11.

<sup>76</sup> UN Human Rights Committee General Comment No. 36 “The right to life” (3 Sept 2019) UN Doc. CCPR/C/GC/36 para 21.

<sup>77</sup> *The Environment and Human Rights*, Advisory Opinion OC-23/17, Inter-Am. Ct. H.R. (Nov. 15, 2017) para 109.

<sup>78</sup> *The Environment and Human Rights*, Advisory Opinion OC-23/17, Inter-Am. Ct. H.R. (Nov. 15, 2017) para 117.

<sup>79</sup> *The Environment and Human Rights*, Advisory Opinion OC-23/17, Inter-Am. Ct. H.R. (Nov. 15, 2017) para 118.

<sup>80</sup> UN Human Rights Committee ‘Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3624/2019’ (22 Sept 2022) UN Doc CCPR/C/135/D/3624/2019 (*Billy v. Australia*) para 8.6.

country's becoming submerged under water" is an "extreme risk" that could lead to conditions "incompatible with a right to life with dignity" even before the risk is realized.<sup>81</sup>

44. The Contribution Conduct of States (the first component of the Relevant Conduct) is producing loss and damage through the creation of environmental and planetary conditions that may be "incompatible with a right to life with dignity," and which are threatening catastrophic impacts on human life amounting to breaches of international obligations to protect and promote the right to life.
45. The Adverse Impacts Conduct (the second component of the Relevant Conduct) breaches States' obligations under international human rights law where they fail to discharge their obligations to protect life from the adverse impacts of climate change. Further, individuals and peoples who are displaced from the adverse impacts of climate change may find themselves in conditions that are not compatible with the right to life, triggering the international responsibility of one or more States that have engaged in the Relevant Conduct.
46. Having breached international legal obligations as part of the first two components the Relevant Conduct, States are further breaching international obligations in the third component, through their Failure to Redress Conduct by failing to provide full reparation and effective remedies, including structural remedies.

C. *The right to a healthy environment*

47. The Relevant Conduct relating to loss and damage constitutes a breach of the right to a healthy environment.
48. The right to a clean, healthy and sustainable environment was first recognized in the 1972 Stockholm Declaration<sup>82</sup> and affirmed in the 1992 Rio Declaration.<sup>83</sup> More recently, the UN General Assembly<sup>84</sup> and the UN Human Rights Council<sup>85</sup> have recognized the right to a clean, healthy and sustainable environment as a universal human right. Reference has been made to the right by judges of this Court.<sup>86</sup>

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<sup>81</sup> UN Human Rights Committee 'Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3624/2019' (22 Sept 2022) Un Doc CCPR/C/135/D/3624/2019 (*Billy v. Australia*) para 8.6.

<sup>82</sup> Declaration of the United Nations Conference of the Human Environment, Stockholm, 16 June 1972, principle 1: "[Humanity] has the fundamental right to freedom, equality and adequate conditions of life, *in an environment of a quality that permits a life of dignity and well-being*, and... bears a solemn responsibility to protect and improve the environment for present and future generations." (emphasis added).

<sup>83</sup> Rio Declaration on Environment and Development, 31 ILM 874 (12 August 1992), principle 1: "[Human beings] are entitled to a *healthy and productive life in harmony with nature*" (emphasis added), see also the Preamble (which reaffirms the Stockholm Declaration and recognizes "the integral and interdependent nature of the Earth, our home").

<sup>84</sup> UNGA, *The human right to a clean, healthy and sustainable environment*, GA res 76/300, adopted 28 July 2022, A/RES/76/300.

<sup>85</sup> UN Human Rights Council, *The human right to a clean, healthy and sustainable environment*, HRC Res 48/13, adopted 8 October 2021.

<sup>86</sup> *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Separate Opinion of Judge Cançado Trindade, I.C.J. Reports 2010, pp. 178, 184, 194, paras. 117, 132, 159 (references to "right to a healthy environment"); see *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Separate Opinion of Vice-President Weeramantry, I.C.J. Reports 1997, pp. 89-90 (references to "right to environmental protection" and "right to the protection of the environment").

49. The right to a clean, healthy and sustainable environment includes a safe climate, clean air, safe and sufficient water, adequate sanitation, healthy and sustainably produced food, non-toxic environments, in which to live, work, study, and play, and healthy biodiversity and ecosystems.<sup>87</sup>
50. Vanuatu submits that the right to a healthy environment is part of customary international law.<sup>88</sup> In the alternative and without prejudice to the recognition of a customary international law basis for the right to a healthy environment, Vanuatu submits that the right to a healthy environment can be understood as a right founded in other existing human rights such as the right to life, the right to health, cultural rights, privacy and home rights, various children's rights, and rights to an adequate standard of living, including the rights to housing, food, and water.
51. This Court has concluded that the right to a healthy environment, in addition to being expressly established by Article 11 of the Protocol of San Salvador, is also among the economic, social, and cultural rights protected by Article 26 of the American Convention because the norm protects the rights derived from a variety of provisions contained in the OAS Charter, the American Declaration, and those resulting from the interpretation of the American Convention in accord with the criteria established in Article 29.<sup>89</sup>
52. This Court has concluded that the right to a healthy environment has both an individual as well as a collective dimension. The individual dimension protects against violations that may have a "direct and an indirect impact on the individual" due to the connectivity with other rights, such as the rights to health, personal integrity, and life. The collective dimension of the right to a healthy environment reflects a "universal value that is owed to both present and future generations."<sup>90</sup>
53. This Court has further concluded that the right to a healthy environment "protects the components of the environment, such as forests, rivers and seas, as legal interests in themselves, even in the absence of the certainty or evidence of a risk to individuals." This means that the right to a healthy environment, as understood by this Court, "protects nature and the environment . . . because of their importance to the other living organisms with which we share the planet that also merit protection in their own right."<sup>91</sup>
54. The Climate Emergency Resolution has affirmed that the right to a healthy environment is "part of the set of rights that States must guarantee and protect by reason of their obligations at the national and regional levels,"<sup>92</sup> which also involves an obligation to "cooperate in good

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<sup>87</sup> David Boyd, *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment* (8 Jan 2019) UN Doc A/HRC/43/53 para 2.

<sup>88</sup> William Schabas, *The Customary International Law of Human Rights* (OUP 2021) 335 ("there is compelling evidence for a human right to a safe, clean, healthy, and sustainable environment under customary international law").

<sup>89</sup> *The Environment and Human Rights*, Advisory Opinion OC-23/17, Inter-Am. Ct. H.R. (Nov. 15, 2017) para 57.

<sup>90</sup> *The Environment and Human Rights*, Advisory Opinion OC-23/17, Inter-Am. Ct. H.R. (Nov. 15, 2017) para 59.

<sup>91</sup> *The Environment and Human Rights*, Advisory Opinion OC-23/17, Inter-Am. Ct. H.R. (Nov. 15, 2017) para 62.

<sup>92</sup> Inter-Am. Comm. H.R., *Climate Emergency: Scope of Inter-American Human Rights Obligations*, Resolution 3/2021 (31 December 2021) principle 8, available at: [https://www.oas.org/en/iachr/decisions/pdf/2021/resolucion\\_3-21\\_ENG.pdf](https://www.oas.org/en/iachr/decisions/pdf/2021/resolucion_3-21_ENG.pdf).

faith in order to prevent pollution of the planet” by “reducing their emissions to ensure a safe climate that enables the exercise of rights.”<sup>93</sup>

55. The obligations to protect the right to a healthy environment captures all three dimensions of the Relevant Conduct that is causing losses and damages. The Contribution Conduct is increasingly leading to widescale environmental degradation that infringes upon the individual and collective dimension of the right to a healthy environment. The Contribution Conduct is also impacting ecosystems and nature in irreversible and dramatic ways.
56. Through their actions and omissions, States are also breaching obligations imposed by the right to a healthy environment in their Adverse Impacts Conduct due to their failure to protect individual and peoples from the consequences of climate change, including their failure to protect against displacement from damage to the environment caused by greenhouse gas emissions.
57. In their Failure to Redress Conduct, States are failing to provide effective remedies and full reparation to injured parties from such State breaches of the right to a healthy environment, including structural remedies designed to repair and restore the natural environment and climate system as applicable.

D. *The right of Indigenous and tribal peoples to existence and survival*

58. The rights of Indigenous and tribal peoples to their existence and survival protected by Article 21 of the American Convention are impacted by the Relevant Conduct relating to loss and damage.
59. This Court has articulated an “inextricable connection” between Indigenous and tribal peoples with their territory and the “natural resources that lie on and within the land” which requires protection under Article 21 of the American Convention.<sup>94</sup> As stated in the *Saramaka* and *Sarayaku* decisions, this protection for Indigenous and tribal peoples is needed to “guarantee their very survival”<sup>95</sup> and to “ensure that they can continue their traditional way of living, and that their distinctive cultural identity, social structure, economic system, customs, beliefs and traditions are respected, guaranteed and protected by the State.”<sup>96</sup> This Court has subsequently reaffirmed the link between lands, territories, and resources with culture and with Indigenous and tribal existence and survival in *Garífuna Community of Triunfo de la Cruz and its Members v. Honduras*,<sup>97</sup> *Xucuru Indigenous People*

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<sup>93</sup> Inter-Am. Comm. H.R., Climate Emergency: Scope of Inter-American Human Rights Obligations, Resolution 3/2021 (31 December 2021) principle 11, available at: [https://www.oas.org/en/iachr/decisions/pdf/2021/resolucion\\_3-21\\_ENG.pdf](https://www.oas.org/en/iachr/decisions/pdf/2021/resolucion_3-21_ENG.pdf).

<sup>94</sup> *Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations, and Costs*. Judgment of Nov. 28, 2007. Inter-Am. Ct. H.R. Series C No. 172, para. 122; see also Dave-Inder Comar, *Existence and Survival: A Dimension of Indigenous Self-Determination in the Context of Climate Change Impacts* (2023) 0 *Arctic Yearbook* 1-17.

<sup>95</sup> *Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations, and Costs*. Judgment of Nov. 28, 2007. Inter-Am. Ct. H.R. Series C No. 172 para. 122.

<sup>96</sup> *Kichwa Indigenous People of Sarayaku v. Ecuador*, Merits and Reparations. Judgment of June 27, 2012. Inter-Am. Ct. H.R. Series C No. 245 para 146.

<sup>97</sup> *Garífuna Community of Triunfo de la Cruz and its Members v. Honduras*. Judgement of October 8, 2015. Inter-Am. Ct. H.R. Series C No. 305 paras 100-103.

*and its Members v. Brazil*,<sup>98</sup> and in its 2017 advisory opinion related to the environment and human rights.<sup>99</sup>

60. States are therefore obligated to implement “special measures” to protect the full guarantee of rights that are protected under Article 21 of the American Convention for Indigenous and tribal peoples,<sup>100</sup> including a right to the lands, territories, and resources that they have traditionally occupied<sup>101</sup> so as to ensure their existence and survival in accordance with their traditions and customs.<sup>102</sup>
61. The Contribution Conduct is in breach of the obligation under Article 21 of the American Convention to protect the existence and survival of Indigenous and tribal peoples and to “guarantee the right to effectively control their territory without outside interference.”<sup>103</sup> The Contribution Conduct is severing the connection between Indigenous and tribal peoples to their lands, territories, and resources—threatening their existence and survival, leading to loss and damage for Indigenous and tribal peoples and communities.
62. The Adverse Impacts Conduct is also in breach of the obligation to protect the existence and survival of Indigenous and tribal peoples. States are failing to undertake the “special measures” needed to promote and protect the connection between Indigenous and tribal peoples with their land, territories, and resources, thereby threatening displacement of Indigenous peoples, tribal peoples, and individuals from their historic lands, territories, and resources.
63. The Failure to Redress Conduct constitutes a breach of the obligations imposed by international law to provide full reparation and effective remedies to injured individuals and peoples, which for the purposes of Article 21 obligations, requires access to remedies to protect and vindicate the existence and survival of Indigenous and tribal peoples and the continued relationship between Indigenous and tribal peoples with their lands, territories, and resources.

E. *The right of self-determination*

64. Self-determination is a chief purpose of the UN Charter,<sup>104</sup> wherein it is described as a

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<sup>98</sup> *Xucuru Indigenous People and its Members v. Brazil*. Judgment of February 5, 2018. Inter-Am. Ct. H.R. Series C No. 346 para 115.

<sup>99</sup> *The Environment and Human Rights*, Advisory Opinion OC-23/17, Inter-Am. Ct. H.R. (Nov. 15, 2017) para 48.

<sup>100</sup> *Saramaka People v. Suriname, Preliminary Objections*, Merits, Reparations, and Costs. Judgment of Nov. 28, 2007. Inter-Am. Ct. H.R. Series C No. 172 paras 84-86; *The Environment and Human Rights*, Advisory Opinion OC-23/17, Inter-Am. Ct. H.R. (Nov. 15, 2017) para 48 (describing the obligation as one of “positive measures”).

<sup>101</sup> *Saramaka People v. Suriname, Preliminary Objections*, Merits, Reparations, and Costs. Judgment of Nov. 28, 2007. Inter-Am. Ct. H.R. Series C No. 172 para 91; *Kichwa Indigenous People of Sarayaku v. Ecuador*, Merits and Reparations. Judgment of June 27, 2012. Inter-Am. Ct. H.R. Series C No. 245 para 171.

<sup>102</sup> *Saramaka People v. Suriname, Preliminary Objections*, Merits, Reparations, and Costs. Judgment of Nov. 28, 2007. Inter-Am. Ct. H.R. Series C No. 172 para 103; *Garifuna* para 102; *Xucuru Indigenous People and its Members v. Brazil*. Judgment of February 5, 2018. Inter-Am. Ct. H.R. Series C No. 346 para 115.

<sup>103</sup> *Saramaka People v. Suriname, Preliminary Objections*, Merits, Reparations, and Costs. Judgment of Nov. 28, 2007. Inter-Am. Ct. H.R. Series C No. 172 para 115.

<sup>104</sup> UN Charter, art. 1(2) (as a purpose of the UN being “[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples...”) and art. 55 (referring to the goal of the UN, in the fields of social and economic development and respect for human rights, to create the “conditions of stability and well-being which

principle and as a right.<sup>105</sup> Since this recognition, it has found expression in several key UN General Assembly resolutions,<sup>106</sup> and in international and regional human rights treaties.<sup>107</sup>

65. The right of self-determination is, “One of the essential principles of contemporary international law.”<sup>108</sup>
66. The right of self-determination is a “fundamental human right.”<sup>109</sup>
67. The right of self-determination carries obligations *erga omnes*.<sup>110</sup>
68. The right of self-determination is recognized by a variety of international legal sources as constituting a peremptory norm of international law (*jus cogens*).<sup>111</sup>
69. The right of self-determination imposes a positive obligation on States “to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples.”<sup>112</sup>
70. Self-determination is also protected as a human right under common Article 1 of the International Covenant on Civil and Political Rights and the International Covenant on

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are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples”.

<sup>105</sup> The French version of these provisions refers to respect for the “right” of self-determination, the “*principe de l’égalité de droits des peuples et leur droit à disposer d’eux-mêmes*”).

<sup>106</sup> See e.g., *Declaration on the Granting of Independence to Colonial Countries and Peoples*, G.A. Res. 1514 (XV), U.N. GAOR, 15<sup>th</sup> Sess., Supp. no. 2, at 66, U.N. Doc. A/3805 (14 December 1960) (GA Res 1514 (XV)); *Resolution on Permanent Sovereignty over Natural Resources*, GA Res 1803 (XVII), UN GAOR, 17<sup>th</sup> sess, 1194<sup>th</sup> plen mtg, UN Doc A/RES/1803(XVII) (14 December 1962); *Declaration on Principles of International Law concerning Friendly Relations and Co-Operation among States in accordance with the Charter of the United Nations*, GA Res 2625 (XXV), 25<sup>th</sup> sess, 1883<sup>rd</sup> plen mtg, Agenda Item 85, UN Doc A/RES/2625(XXV) (24 October 1970) annex (‘*Friendly Relations Declaration*’).

<sup>107</sup> ICCPR, art. 1; ICESCR, art. 1; African Charter of Human and Peoples Rights (adopted 1 June 1991, entered into force 21 Oct 1986) 1520 UNTS 217 art. 20.

<sup>108</sup> *Case Concerning East Timor* (Portugal v. Australia) (1995) para 29, accessible at: <https://www.icj-cij.org/public/files/case-related/84/084-19950630-JUD-01-00-EN.pdf>.

<sup>109</sup> *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) (2019) para 144, accessible at: <https://www.icj-cij.org/public/files/case-related/169/169-20190225-ADV-01-00-EN.pdf>.

<sup>110</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) (2004) paras 155-156, accessible at: <https://www.icj-cij.org/public/files/case-related/131/131-20040709-ADV-01-00-EN.pdf>; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) (2019) para 180, accessible at: <https://www.icj-cij.org/public/files/case-related/169/169-20190225-ADV-01-00-EN.pdf>.

<sup>111</sup> Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, *Yearbook of the ILC* (2001), Volume II, Part II, Report of the Commission to the General Assembly on the Work of its Fifty-Third Session, document A/CN.4/SER.A/2001/Add.1 (Part 2), p. 85, para. 5 of commentary to Article 26 (Compliance with peremptory norms): “Those peremptory norms that are clearly accepted and recognized include ... the right to self-determination”. See also *Chagos Archipelago*, Separate Opinion of Judge Robinson, I.C.J. Rep. 2019 (July 9), p. 317, at para. 71(a); Dire Tladi, “Fourth Report of the Special Rapporteur on Peremptory Norms of General International Law (Jus Cogens)”, 31 January 2019, UN Doc A/CN.4/727, p. 48–52, paras. 108–115; Marcelo G Kohen, “Self-Determination” in Jorge E Viñuales (ed), *The UN Friendly Relations Declaration at 50 An Assessment of the Fundamental Principles of International Law* (Cambridge University Press, 2020) 151, 153.

<sup>112</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) (2004) para 156, accessible at: <https://www.icj-cij.org/public/files/case-related/131/131-20040709-ADV-01-00-EN.pdf> (citing to Friendly Relations Declaration Principle V; UN Committee on the Elimination of all forms of Racial Discrimination ‘General Recommendation 21, the right to self-determination’ 48<sup>th</sup> session (1996) U.N. Doc. A/51/18, annex VIII para 3.



Economic, Social and Cultural Rights (“**Common Article 1**”). Paragraph 1 of Common Article 1 protects a right of peoples to “freely determine their political status and freely pursue their economic, social and cultural development.” Paragraph 2 of Common Article 1 protects a right of peoples to the free disposition of natural wealth and resources. A people may not “be deprived of its own means of subsistence.” Paragraph 3 of Common Article 1 imposes a positive obligation on States to “promote the realization of the right of self-determination.”<sup>113</sup>

71. Modern formulations of self-determination emphasize that it is a continuing, ongoing, perpetual right of a peoples to freely determine their internal and external status so as to perfect their political, economic, cultural, and social development.<sup>114</sup>
72. “Peoples” under international law include peoples under colonial rule, peoples under some kinds of foreign occupation, peoples comprising States, and Indigenous Peoples.<sup>115</sup>
73. Each or all of these categories of peoples may include peoples vulnerable to climate change impacts — what we can call “climate vulnerable peoples.” States at risk of losing their territory such as Vanuatu, but also other small island, low-lying, and/or climate-vulnerable States, are rightly considered climate vulnerable on account of the loss and damage they have suffered from the Relevant Conduct.
74. Self-determination imposes an obligation to protect the territory and resources of climate vulnerable peoples. In *Western Sahara*, the International Court of Justice recognized that peoples have a legal tie to their territory and resources, even in the absence of formal sovereignty.<sup>116</sup> In addition, self-determination protects a people’s permanent sovereignty over its natural resources.<sup>117</sup> The human right of self-determination also protects resources

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<sup>113</sup> See also UN Human Rights Committee ‘CCPR General Comment No. 12: Article 1 (Right to Self-determination), The Right to Self-determination of Peoples’ (13 March 1984)

<sup>114</sup> Final Act of the Conference on Security and Co-operation in Europe, *concluded* 1 August 1975, *reprinted* in 14 Int’l L. Materials 1292 Principle VIII, para 2, accessible at: <https://www.osce.org/files/f/documents/5/c/39501.pdf>; Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (CUP 1995) 285; Natalie Jones, ‘Self-Determination and the Right of Peoples to Participate in International Law-Making’ (2021) 00 *British YIL* 0, 13.

<sup>115</sup> GA res 1514 (XV), UN GAOR, UN Doc A/RES/1514(XV) (14 December 1960), para. 2; ICCPR, art. 1(1) and ICESCR, art 1(1). *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) (2004) paras 118, 122, accessible at: <https://www.icj-cij.org/public/files/case-related/131/131-20040709-ADV-01-00-EN.pdf> (confirming that the Palestinian people had the right to self-determination). See further the examples of state practice referred to in: Robert McCorquodale, “Group Rights” in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (Oxford University Press, 3<sup>rd</sup> ed, 2018) 350 (“For example, when East and West Germany were united into one state in 1990, it was expressly stated in a treaty signed by four of the five permanent members of the UN that this was done as part of the exercise of the right of self-determination by the German people [Treaty on the Final Settlement With Respect to Germany (1990) 29 *ILM* 1186]. The right of self-determination was also referred to in the context of the dissolution of the USSR and Yugoslavia [eg the terms of the European Community’s Declaration on Yugoslavia and its Declaration on the Guidelines on Recognition of New States in Eastern Europe and the Society Union (16 December 1991), (1992) 31 *ILM* 1486]”); see also <sup>115</sup> United Nations Declaration on the Rights of Indigenous Peoples, UNGA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Agenda Item 68, Supp No 49, UN Doc A/RES/61/295 (2 October 2007) annex (‘United Nations Declaration on the Rights of Indigenous Peoples’) (UNDRIP) arts 3 (affirming that Indigenous Peoples “have the right to self-determination”).

<sup>116</sup> *Western Sahara* (Advisory Opinion) (1975) paras 149-152 accessible at: <https://www.icj-cij.org/sites/default/files/case-related/61/061-19751016-ADV-01-00-EN.pdf>.

<sup>117</sup> Nico J. Schrijver, ‘Fifty Years Permanent Sovereignty over Natural Resources: the 1962 UN Declaration as the Opinion Iuris Communis’ in M. Bungenberg and S. Hobe (eds), *Permanent Sovereignty over Natural Resources* (Springer 2015) 16-

and subsistence in Common Article 1 of the ICCPR and ICESCR.<sup>118</sup> States are obligated to *respect* the right to self-determination by refraining from any conduct that causes or allows significant harm to the climate system and other parts of the environment and, by extension, to the right of self-determination. States are obligated to *promote and further realize* the right of self-determination by taking positive measures—adopting and implementing laws, policies and initiatives and engaging in international cooperation with other States—to address and avert the threats posed by the Relevant Conduct to the climate system and other parts of the environment, and thus to the right of self-determination.

75. The destructive consequences of the Contribution Conduct are leading to widescale infringements on the right of self-determination. These consequences include the loss of territory and resources, and adverse and negative interference with the political, economic, social, and cultural development of climate vulnerable peoples and States.
76. The Adverse Impacts Conduct breaches obligations of self-determination where States fail to protect peoples from the consequences of the Contribution Conduct or fail to promote and further realize the self-determination of peoples from adverse climate change impacts, including in the context of displacement.
77. The Failure to Redress Conduct breaches international obligations where States deny peoples effective remedies and reparation for the breaches of self-determination caused by other dimensions of the Relevant Conduct, including structural remedies that will preserve the self-determination of such injured peoples, their connection to their territory and resources, and their ability to choose the internal and external status and pursue their economic, cultural, and social development.

## **V. The Relevant Conduct Constitutes a *Prima Facie* Breach of International Human Rights Law**

### **A. *Nature of the breach***

78. A breach of an international obligation takes place when an act or omission attributable to that State is not in conformity with what is required of it by that obligation.<sup>119</sup>
79. As discussed earlier, the acts and omissions of States in their Contribution Conduct, Adverse Impacts Conduct, and Failure to Redress Conduct are attributable to them and breach a variety of international legal obligations.

### **B. *Loss and damage resulting from the Relevant Conduct amounts, in principle, to a breach of the human right to life***

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17; see also *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* (2005) para 244, accessible at: <https://www.icj-cij.org/sites/default/files/case-related/116/116-20051219-JUD-01-00-EN.pdf>

<sup>118</sup> In addition to common article 1, both article 47 of the ICCPR and article 25 of the ICESCR recognize that, “Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.”

<sup>119</sup> Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Yearbook of the International Law Commission, 2001, vol. II, Part Two, as corrected, art 2; art 2 comment (4).

80. The Relevant Conduct is, in principle, a breach of the right to life. The Contribution Conduct is altering the climate system in catastrophic ways, leading to threats to human life. The IPCC has concluded that, “Climate-related illnesses, premature deaths, malnutrition in all its forms, and threats to mental health and well-being are increasing.”<sup>120</sup> Threats to life will emerge from infectious disease, malnutrition, and extreme events such as heatwaves, floods, and storms. Similarly, the acts and omissions of States in their Adverse Impacts Conduct, and in responding—or not responding—to adverse climate change impacts, including in the context of displacement, are in breach of the right to life. Finally, by failing to provide effective remedies to those individuals facing threats to their lives on account of climate change impacts, States are in breach of further international legal obligations related to effective remedies.
- C. *Loss and damage resulting from the Relevant Conduct amounts, in principle, to a breach of the right to a clean, healthy and sustainable environment*
81. The Contribution Conduct is in breach of the right to a healthy environment. In August 2023, the First Judicial District Court of Lewis and Clark County in the U.S. state of Montana ruled that, “Anthropogenic climate change is impacting, degrading, and depleting Montana’s environment and natural resources” through “increasing temperatures, changing precipitation patterns, increasing droughts and aridification, increasing extreme weather events, increasing severity and intensity of wildfires, and increasing glacial melt and loss.”<sup>121</sup> On account of the harms suffered by the plaintiffs, including emotional and psychological harms, laws that prohibited the state of Montana from considering greenhouse gas emissions and climate impacts for any project or proposal violated the constitutional protection of a “clean and healthful environment” provided in Montana’s constitution.<sup>122</sup> The court expressly recognized that a right to a clean and healthful environment “includes climate as part of the environmental life-support system.”<sup>123</sup>
82. The failure of States to protect environmental conditions from climate change impacts amounts to breach of the right to a healthy environment. Further, States’ failure to comply with their international legal obligations to provide effective remedies and full reparation to injured parties from the breaches of the right to a healthy environment, including structural remedies designed to restore and repair the environment and the climate system, violates the obligation to provide an effective remedy.
- D. *Loss and damage resulting from the Relevant Conduct amounts, in principle, to a breach of the right of existence and survival of Indigenous and tribal peoples protected by Article 21 of the American Convention*

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<sup>120</sup> IPCC, *Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, Chapter 7 (Health, Wellbeing and the Changing Structures of Communities) 1044-1047 (2022), available at: [https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC\\_AR6\\_WGII\\_Chapter07.pdf](https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_Chapter07.pdf)

<sup>121</sup> *Held et al. v. Montana et al.*, Cause No. CDV-2020-307 (Montana First Judicial Dist. Ct., Aug 14, 2023), Findings of Fact, Conclusions of Law, and Order, page 35, para 140.

<sup>122</sup> *Held et al. v. Montana et al.*, Cause No. CDV-2020-307 (Montana First Judicial Dist. Ct., Aug 14, 2023), Findings of Fact, Conclusions of Law, and Order, page 99, paras 55-56.

<sup>123</sup> *Held et al. v. Montana et al.*, Cause No. CDV-2020-307 (Montana First Judicial Dist. Ct., Aug 14, 2023), Findings of Fact, Conclusions of Law, and Order, page 102, para 7.

83. The Contribution Conduct amounts to a breach of the right of existence and survival of Indigenous and tribal peoples protected under Article 21 of the American Convention. The IPCC has concluded that the adverse impacts of climate change will produce “reduced food and water security” with the “largest impacts observed in many locations and/or communities in Africa, Asia, Central and South America, Small Islands, and the Arctic.”<sup>124</sup> These “losses of food production” have “increased malnutrition in many communities” especially for “Indigenous Peoples” and other marginalized groups such as “children, elderly people and pregnant women.”<sup>125</sup> The loss of ecosystems from climate change will have “cascading and long-term impacts on peoples globally, especially for Indigenous Peoples and local communities who are directly dependent on ecosystems, to meet basic needs.”<sup>126</sup> In the language of international law, the IPCC essentially describes a divorcing between Indigenous and tribal peoples and their resources and subsistence which will threaten their existence and survival.
84. Members of Indigenous Peoples have sought relief from the Inter-American Commission on Human Rights with respect to the loss of rights protected by the American Declaration and the American Convention. This includes a petition filed in 2005 by Sheila Watt-Cloutier and a petition filed in 2013 by members of the Arctic Athabaskan Indigenous Peoples. These petitions describe threats to the human rights of Indigenous Peoples from land loss, loss of resources, and threats to culture, as well as the existential risks presented to them from climate change impacts.<sup>127</sup>
85. States’ failure to implement “special measures” to protect the existence and survival of Indigenous and tribal peoples and their related rights to traditional lands, territories, and resources protected by Article 21, constitutes a breach of obligations under this provision. The failure to prevent displacement of Indigenous and tribal peoples from their historic lands, territories, and resources also breaches these obligations. In the *Daniel Billy* decision, the UN Human Rights Committee held that the delay in implementing adaptation measures such as seawalls amounted to a breach of the human rights of the Indigenous authors who

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<sup>124</sup> IPCC, *Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, Summary for Policymakers, statement B.1.3, available at: [https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC\\_AR6\\_WGII\\_SummaryForPolicymakers.pdf](https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_SummaryForPolicymakers.pdf)

<sup>125</sup> IPCC, *Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, Summary for Policymakers, statement B.1.3, available at: [https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC\\_AR6\\_WGII\\_SummaryForPolicymakers.pdf](https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_SummaryForPolicymakers.pdf)

<sup>126</sup> IPCC, *Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, Summary for Policymakers, statement B.2.1, available at: [https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC\\_AR6\\_WGII\\_SummaryForPolicymakers.pdf](https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_SummaryForPolicymakers.pdf)

<sup>127</sup> The Arctic Athabaskan Council on Behalf of All Arctic Athabaskan Peoples of the Arctic Regions of Canada and the United States, ‘Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations of the Rights of Arctic Athabaskan Peoples Resulting from Rapid Arctic Warming and Melting Caused by Emissions of Black Carbon By Canada’, 23 April 2013, accessible at: [https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2013/20130423\\_5082\\_petition.pdf](https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2013/20130423_5082_petition.pdf); Sheila Watt-Cloutier, with the support of the Inuit Circumpolar Conference, ‘Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States’, 7 December 2005, accessible at: [https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2005/20051208\\_na\\_petition.pdf](https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2005/20051208_na_petition.pdf). See also Complaint submitted by Five Tribes in Louisiana and Alaska, ‘Rights of Indigenous People in Addressing Climate-Forced Displacement’ (15 Jan 2020) submitted to Human Rights Council Special Procedures accessible at: [https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2020/20200116\\_USA-162020\\_complaint-1.pdf](https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2020/20200116_USA-162020_complaint-1.pdf).

were suffering from environmental degradation, loss of territory and resources, and the threat of eventual displacement.<sup>128</sup>

86. Finally, States are not providing effective remedies and full reparation to injured parties from the breaches described herein, constituting breaches of international law. This would include structural remedies designed to ensure the continued existence and survival of Indigenous and tribal peoples and their connection to their lands, territories, and resources.
- E. *Loss and damage resulting from the Relevant Conduct amounts, in principle, to a breach of the right of self-determination of peoples*
87. Loss and damage resulting from the Relevant Conduct amounts to a breach of the right of self-determination of peoples. These breaches are taking place across a variety of “dimensions” of self-determination.
88. First, the Relevant Conduct is in breach of the **territorial and resource dimension** of self-determination, which protects the legal tie between peoples to their territory and resources as recognized by *Western Sahara*. According to the IPCC, partial losses of territory and resources—for example, from land degradation or desertification—are already affecting peoples<sup>129</sup> and their development pathways.<sup>130</sup> Essential resources, such as marine fish stocks and water, are being impacted by climate change<sup>131</sup> which will lead to increasing food and water insecurity<sup>132</sup> particularly for peoples in small islands and in regions dependent on glacier and snow-melt.<sup>133</sup> Climate change impacts have already caused and will threaten territorial loss, particularly from sea-level rise. Island States have described in legal proceedings that sea-level rise will cause them “significant harm” and will present an “existential threat,” which includes the possibility of becoming uninhabitable or fully submerged by 2100.<sup>134</sup> Indigenous Peoples, including Indigenous communities in the United States and in Australia, have also formally alleged the threats to their territory, as well as to

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<sup>128</sup> UN Human Rights Committee ‘Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3624/2019’ (22 Sept 2022) Un Doc CCPR/C/135/D/3624/2019 (*Billy v. Australia*) paras 8.12, 8.14.

<sup>129</sup> IPCC, *Climate Change and Land: an IPCC special report on climate change, desertification, land degradation, sustainable land management, food security, and greenhouse gas fluxes in terrestrial ecosystems* (IPCC 2019) Summary for Policy Makers, statement A.1.5, available at: [https://www.ipcc.ch/site/assets/uploads/sites/4/2022/11/SRCCL\\_SPM.pdf](https://www.ipcc.ch/site/assets/uploads/sites/4/2022/11/SRCCL_SPM.pdf).

<sup>130</sup> IPCC, *Climate Change and Land: an IPCC special report on climate change, desertification, land degradation, sustainable land management, food security, and greenhouse gas fluxes in terrestrial ecosystems* (IPCC 2019) Summary for Policy Makers, statement A.6, available at: [https://www.ipcc.ch/site/assets/uploads/sites/4/2022/11/SRCCL\\_SPM.pdf](https://www.ipcc.ch/site/assets/uploads/sites/4/2022/11/SRCCL_SPM.pdf); Natalie Jones ‘Prospects for invoking the law of self-determination in international climate litigation’ (2023) 32 RECIEL 250, 253.

<sup>131</sup> IPCC, *Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, Summary for Policymakers, statement B.5.3, available at: [https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC\\_AR6\\_WGII\\_SummaryForPolicymakers.pdf](https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_SummaryForPolicymakers.pdf)

<sup>132</sup> IPCC, *Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, Summary for Policymakers, statement B.1.3, available at: [https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC\\_AR6\\_WGII\\_SummaryForPolicymakers.pdf](https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_SummaryForPolicymakers.pdf)

<sup>133</sup> IPCC, *Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, Summary for Policymakers, statement C.3.4, available at: [https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC\\_AR6\\_WGII\\_SummaryForPolicymakers.pdf](https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_SummaryForPolicymakers.pdf)

<sup>134</sup> Written Statement of the Commission of Small Island States on Climate Change and International Law (Vol 1) *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law* (16 June 2023) ITLOS Case No. 31 para 95 (a), available at: [https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2023/20230616\\_Case-No.-312022\\_opinion-3.pdf](https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2023/20230616_Case-No.-312022_opinion-3.pdf).



their resources from sea-level rise.<sup>135</sup> Loss of territory and resources is a result of the Contribution Conduct, and therefore a breach of self-determination of impacted peoples.

89. In addition, the Adverse Impacts Conduct that involves failing to respond to such territorial and resources loss is also a breach of self-determination. Mass displacement is foreseeable from climate change impacts<sup>136</sup> and will threaten the ability of peoples to exist as discrete human collectives particularly once such peoples find themselves subject to the assimilative forces of the legal rules, cultural practices, and social norms of a host country. Loss of status as a “people” under international law—and perhaps such peoples becoming a “minority” under international law—would consequently result in a loss of the rights protected by self-determination, including territorial and resource rights.
90. Finally, the Failure to Redress Conduct, including the failure to provide effective remedies and full reparation to injured peoples on account of such loss and damage, is a further breach of international law.
91. Peoples face loss and damage from infringements on their **cultural self-determination**. For developing countries, a connection between cultural rights and self-determination has historically been a means of attaining their political self-determination and providing a sense of national dignity.<sup>137</sup> In the context of Indigenous Peoples, the UN Expert Mechanism on the Rights of Indigenous Peoples has observed that cultural self-determination is one of the “four main pillars” of the right of self-determination recognized in article 3 of the UNDRIP, with culture acting as a “broad, inclusive concept encompassing all manifestations of human existence” such as language, customs, traditions.<sup>138</sup> Threats to cultural practices from climate change impacts have now been described in detail by Indigenous Peoples in legal petitions before a variety of human rights mechanisms.<sup>139</sup> Climate vulnerable peoples now stand to

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<sup>135</sup> Complaint submitted by Five Tribes in Louisiana and Alaska, ‘Rights of Indigenous People in Addressing Climate-Forced Displacement’ (15 Jan 2020) submitted to Human Rights Council Special Procedures, pages 4, 9, 18-19, 40-42, 46-48, accessible at: [https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2020/20200116\\_USA-162020\\_complaint-1.pdf](https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2020/20200116_USA-162020_complaint-1.pdf); UN Human Rights Committee ‘Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3624/2019’ (22 Sept 2022) Un Doc CCPR/C/135/D/3624/2019 (*Billy v. Australia*) paras 2.3, 2.5, 3.1., 5.3.

<sup>136</sup> Written Statement of the Commission of Small Island States on Climate Change and International Law (Vol 1) *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law* (16 June 2023) ITLOS Case No. 31 para 95 (b), available at: [https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2023/20230616\\_Case-No.-312022\\_opinion-3.pdf](https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2023/20230616_Case-No.-312022_opinion-3.pdf).

<sup>137</sup> Aureliu Critescu, ‘The Right to Self-Determination: Historical and Current Development on the Basis of United Nations Instruments’ (1981) UN Doc E/CN.4/Sub.2/404/Rev.1 para 654.

<sup>138</sup> Report of the Expert Mechanism on the Rights of Indigenous Peoples, “Efforts to implement the United Nations Declaration on the Rights of Indigenous Peoples: indigenous peoples and the right to self-determination” (4 Aug 2021) UN Doc A/HRC/48/75 para 10.

<sup>139</sup> See, e.g., The Arctic Athabaskan Council on Behalf of All Arctic Athabaskan Peoples of the Arctic Regions of Canada and the United States, ‘Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations of the Rights of Arctic Athabaskan Peoples Resulting from Rapid Arctic Warming and Melting Caused by Emissions of Black Carbon By Canada’, 23 April 2013, 42-45, 58-63, accessible at: [https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2013/20130423\\_5082\\_petition.pdf](https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2013/20130423_5082_petition.pdf); Sheila Watt-Cloutier, with the support of the Inuit Circumpolar Conference, ‘Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States’, 7 December 2005, accessible at: 39-49, 51-54, 74-78, accessible at: [https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2005/20051208\\_na\\_petition.pdf](https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2005/20051208_na_petition.pdf); Complaint submitted by Five Tribes in Louisiana and Alaska, ‘Rights of Indigenous People in Addressing Climate-Forced Displacement’ (15 Jan 2020) submitted to Human Rights Council Special Procedures, pages 41-43, accessible at: <https://climatecasechart.com/wp-content/uploads/non-us-case->

lose their culture because of the impacts of climate change, and may be forced to adopt new cultural practices in order to adapt to a warming world—all because of the cultural practices and ways of life in high-emissions, responsible States. Loss of culture is therefore a result of the Contribution Conduct, and a breach of cultural self-determination of impacted peoples.

92. The failure to promote and protect the cultures of impacted peoples amounts to losses and damages from the Adverse Impacts Conduct (as affirmed by the *Daniel Billy* decision), and it is also a breach of cultural self-determination.
93. Finally, the Failure to Redress Conduct, and the failure to provide effective remedies and full reparation for the loss of culture, is also a breach of international law.
94. **Economic self-determination**, defined as a right of peoples to choose their own economic system and pursue their economic development,<sup>140</sup> is adversely impacted by the Relevant Conduct. IPCC Working Group II notes that climate vulnerability “differs substantially among and within regions” and is “driven by patterns of intersecting socioeconomic development, unsustainable ocean and land use, inequity, marginalization, historical and ongoing patterns of inequity such as colonialism, and governance”<sup>141</sup>—thereby explicitly drawing a connection between climate vulnerability and the historical economic legacies and lived economic realities now faced by climate vulnerable peoples. As a general matter, low-income and/or climate vulnerable peoples have not had and currently do not have any control over the amount of warming taking place from the Contribution Conduct, yet their economic destinies are intertwined with the Contribution Conduct. Their economic fates will be determined by the actions of responsible States that have caused and are still causing significant or catastrophic harm to the climate system from the Contribution Conduct. Therefore, the Contribution Conduct amounts to a breach of economic self-determination of climate vulnerable peoples.
95. The Adverse Impacts Conduct that is failing to undertake the appropriate measures to promote and realize the economic development of affected peoples is a second breach of such economic self-determination.
96. Finally, the Failure to Redress Conduct and the failure to provide effective remedies and full reparation for infringements on economic self-determination, is a further breach of international law.

## VI. Legal Consequences of the Breach with Respect to Peoples and Individuals Affected in their Human Rights by Loss and Damage

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[documents/2020/20200116\\_USA-162020\\_complaint-1.pdf](#); UN Human Rights Committee ‘Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3624/2019’ (22 Sept 2022) Un Doc CCPR/C/135/D/3624/2019 (*Billy v. Australia*) paras 2.2, 2.6, 3.1, 3.5, 5.2, 5.3, 5.7.

<sup>140</sup> Aureliu Critescu, ‘The Right to Self-Determination: Historical and Current Development on the Basis of United Nations Instruments’ (1981) UN Doc E/CN.4/Sub.2/404/Rev.1 paras 531-532.

<sup>141</sup> IPCC, *Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, Summary for Policymakers, statement B.2, available at: [https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC\\_AR6\\_WGII\\_SummaryForPolicymakers.pdf](https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_SummaryForPolicymakers.pdf)

A. *Overview*

97. The legal consequences flowing from an internationally wrongful act consist of cessation of the wrongful conduct and full reparation.<sup>142</sup> In addition, serious breaches of obligations owed *erga omnes* and *jus cogens* norms carry further consequences for third States.<sup>143</sup>

B. *Cessation of the Relevant Conduct*

98. Cessation in the context of Contribution Conduct means stopping all conduct that is contributing to significant and/or catastrophic damage to the climate system. Ceasing the Relevant Conduct means immediate and deep reductions of greenhouse gas emissions, consistent with the projections of the IPCC reports<sup>144</sup> and the pathways identified in the Production Gap<sup>145</sup> and Emissions Gap reports of the UNEP.<sup>146</sup> The Inter-American Commission's Climate Emergency Resolution affirms that States should "adopt and implement policies aimed at reducing greenhouse gas emissions that reflect the greatest possible ambition."<sup>147</sup> A specific requirement arising from the obligation of cessation is, moreover, that no new fossil fuel (coal, oil and gas) projects are approved, carried out or supported. According to a 2021 report from the International Energy Agency (IEA), "[b]eyond projects already committed as of 2021, there are no new oil and gas fields

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<sup>142</sup> Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Yearbook of the International Law Commission, 2001, vol. II, Part Two, as corrected, art 28 comment (2); *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, I.C.J. Reports 2012, p. 99, para. 137 ("the State responsible for an internationally wrongful act is under an **obligation to cease that act, if it is continuing. Furthermore, even if the act in question has ended, the State responsible is under an obligation to re-establish, by way of reparation, the situation which existed before the wrongful act was committed**, provided that re-establishment is not materially impossible and that it does not involve a burden for that State out of all proportion to the benefit deriving from restitution instead of compensation.") (emphasis added). The same conclusion was reached, by reference to Arts. 30 and 31 of ARSIWA, by the Grand Chamber of the European Court of Human Rights in *Case of Georgia v. Russia (I)*, ECtHR (Grand Chamber) Application No. 13255/07, Judgment (31 January 2019), para. 54

<sup>143</sup> International Law Commission, 'Draft conclusions on identification and legal consequences of peremptory norms of international law (*jus cogens*), with commentaries' (2022) UN Doc A/77/10, Conclusion 19 ("Particular consequences of serious breaches of peremptory norms of general international law (*jus cogens*)"), available at: [https://legal.un.org/ilc/texts/instruments/english/commentaries/1\\_14\\_2022.pdf](https://legal.un.org/ilc/texts/instruments/english/commentaries/1_14_2022.pdf).

<sup>144</sup> IPCC, *Synthesis Report of the IPCC Sixth Assessment Report* (AR6), Summary for Policymakers, March 2023, statement B.6 ("All global modelled pathways that limit warming to 1.5°C (>50%) with no or limited overshoot, and those that limit warming to 2°C (>67%), involve rapid and deep and, in most cases, immediate greenhouse gas emissions reductions in all sectors this decade"), statement C.2 ("Deep, rapid and sustained mitigation and accelerated implementation of adaptation actions in this decade would reduce projected losses and damages for humans and ecosystems ... and deliver many co-benefits, especially for air quality and health ... Delayed mitigation and adaptation action would lock-in high-emissions infrastructure, raise risks of stranded assets and cost-escalation, reduce feasibility, and increase losses and damages ... Near-term actions involve high up-front investments and potentially disruptive changes that can be lessened by a range of enabling policies"), statement C.3.2 ("Net zero CO<sub>2</sub> energy systems entail: a substantial reduction in overall fossil fuel use, minimal use of unabated fossil fuels"), available at: <https://www.ipcc.ch/report/sixth-assessment-report-cycle/>

<sup>145</sup> UNEP, *Production Gap Report 2023: Phasing down or phasing up? Top fossil fuel producers plan even more extraction despite climate promises* (November 2023), page 27 ("to stay on track to achieve net-zero CO<sub>2</sub> emissions by mid-century and limit long-term warming to 1.5°C, global production of all three fossil fuels needs to decline substantially between now and 2050, in parallel with other key climate mitigation strategies such as reducing fossil fuel demand, increasing renewable energy generation, and reducing methane emissions from all sources, including oil and gas production activities").

<sup>146</sup> UNEP, *Emissions Gap Report 2023 : Broken Record. Temperatures reach new highs, yet world fails to cut emissions (again)* (November 2023).

<sup>147</sup> Inter-Am. Comm. H.R., Climate Emergency: Scope of Inter-American Human Rights Obligations, Resolution 3/2021 (31 December 2021) principle 1, available at: [https://www.oas.org/en/iachr/decisions/pdf/2021/resolucion\\_3-21\\_ENG.pdf](https://www.oas.org/en/iachr/decisions/pdf/2021/resolucion_3-21_ENG.pdf).



approved for development in our [net zero] pathway, and no new coal mines or mine extensions are required.”<sup>148</sup> States must also take measures to ensure a rapid and equitable phase-out of fossil fuels and, in this context, support efforts towards a fossil fuel non-proliferation treaty.<sup>149</sup> Further, cessation requires that States refrain from causing, allowing or facilitating further interference with the Earth’s climate system through geoengineering or other speculative technologies.<sup>150</sup>

99. With respect to Adverse Impacts Conduct, States must restore compliance with their obligations owed to those affected by climate impacts, including persons moving in response to climate change.<sup>151</sup> This includes an obligation to take affirmative measures to the benefit of those who are disproportionately impacted by climate change such as women and girls, children, youth, older persons, persons with disabilities, Indigenous Peoples, members of LGBTQ+ communities, minorities, migrants, rural workers, persons living in poverty, and other vulnerable situations.<sup>152</sup> All of these obligations involve the mobilization of the maximum available resources for the progressive realization of economic, social and cultural rights and the right to a healthy environment.<sup>153</sup> States must cease any conduct that prevents them from implementing or complying with legal obligations outlined by the Inter-American Commission on Human Rights in its report entitled “Human Rights of Migrants, Refugees, Stateless Persons, Victims of Human Trafficking and Internally Displaced Persons: Norms and Standards of the Inter-American Human Rights System” released on 31 December 2015, including, without limitation, the prohibition of slavery, servitude, and human trafficking, the right not to be subjected to cruel, inhuman or degrading punishment or treatment, the principle of *non-refoulement*, and the right to nationality.<sup>154</sup> Resolution 04/19, “Inter-American Principles on the Human Rights of All Migrants, Refugees, Stateless Persons and

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<sup>148</sup> International Energy Agency, *Net Zero by 2050. A Roadmap for the Global Energy Sector* (May 2021), Summary for policymakers, at page 10, available at: [https://iea.blob.core.windows.net/assets/7ebafc81-74ed-412b-9c60-5cc32c8396e4/NetZeroBy2050-ARoadmapfortheGlobalEnergySector-SummaryforPolicyMakers\\_CORR.pdf](https://iea.blob.core.windows.net/assets/7ebafc81-74ed-412b-9c60-5cc32c8396e4/NetZeroBy2050-ARoadmapfortheGlobalEnergySector-SummaryforPolicyMakers_CORR.pdf).

<sup>149</sup> Kingdom of Tonga, the Republic of Fiji, Niue, the Solomon Islands, Tuvalu, and the Republic of Vanuatu, *Port Vila Call for a Just Transition to a Fossil Fuel Free Pacific* (March 2023) available at: <https://static1.squarespace.com/static/5dd3cc5b7fd99372fbb04561/t/6423bbb64f3bbb2785ad3719/1680063415682/Outcome%2BText%2B-%2BPort%2BVila%2BCall%2Bfor%2Ba%2BJust%2BTransition%2Bto%2Ba%2BFossil%2BFuel%2BFree%2BPacific.pdf>.

<sup>150</sup> UN Human Rights Council Advisory Committee ‘Impact of new technologies intended for climate protection on the enjoyment of human rights’ (10 Aug 2023) UN Doc A/HRC/54/47.

<sup>151</sup> OHCHR, Human Rights and Loss and Damage: Key Messages, principle 5.4, available at: <https://www.ohchr.org/sites/default/files/documents/issues/climatechange/information-materials/2023-key-messages-hr-loss-damage.pdf>

<sup>152</sup> OHCHR, Human Rights and Loss and Damage: Key Messages, principle 1, available at: <https://www.ohchr.org/sites/default/files/documents/issues/climatechange/information-materials/2023-key-messages-hr-loss-damage.pdf>

<sup>153</sup> OHCHR, Human Rights and Loss and Damage: Key Messages, principle 3 (citing to the ICESCR), available at: <https://www.ohchr.org/sites/default/files/documents/issues/climatechange/information-materials/2023-key-messages-hr-loss-damage.pdf>

<sup>154</sup> Inter-Am. Comm. H.R., Human Rights of Migrants, Refugees, Stateless Persons, Victims of Human Trafficking and Internally Displaced Persons: Norms and Standards of the Inter-American Human Rights System (31 December 2015), Doc. 46/16, available at: <https://www.oas.org/en/iachr/reports/pdfs/HumanMobility.pdf>

Victims of Human Trafficking,” adopted by the Inter-American Commission on Human Rights on 7 December 2019, provides further principles related to the same.<sup>155</sup>

100. Regarding the Failure to Redress Conduct, States must cease their acts and omissions that are failing to provide injured parties with effective remedies, access to justice, and full reparation for the conduct that has produced loss and damage. Key elements must include equal and effective access to justice and to an effective remedy; adequate, effective and prompt reparation for harm suffered, in the form of restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition, including as guided by the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (GA res. 60/147); and access to relevant information concerning violations and reparation mechanisms, including through the provision of such information in accessible formats.<sup>156</sup> The Climate Emergency Resolution also affirms that States must ensure “access to effective redress mechanisms, including the accountability of companies and the determination of their criminal, civil or administrative responsibility” and to make “full reparation to the victims” including the “restoration of the environment as a mechanism of integral restitution and guarantee of non-repetition.”<sup>157</sup>
101. Together with the obligation of cessation, another legal consequence contemplated in Article 30(b) of ARSIWA is the provision of assurances and guarantees of non-repetition by the responsible State. This must take the form of concrete measures<sup>158</sup> designed to cease the Relevant Conduct, and reforming domestic laws to ensure the Relevant Conduct does not take place ever again.<sup>159</sup> This includes, without limitation, not only revised nationally determined contributions (NDCs) under the Paris Agreement displaying a much higher level of ambition but also concrete measures at the domestic level making such NDCs binding under domestic law and effectively committing to enforce them.

### C. *Reparation for the Relevant Conduct*

102. Reparation can take the form of restitution, compensation, and satisfaction, either singly or in combination.<sup>160</sup>

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<sup>155</sup> Inter-Am. Comm. H.R., Inter-American Principles on the Human Rights of All Migrants, Refugees, Stateless Persons, and Victims of Human Trafficking, Resolution 04/19 (7 December 2019), available at <https://www.oas.org/en/iachr/decisions/pdf/Resolution-4-19-en.pdf>.

<sup>156</sup> OHCHR, Human Rights and Loss and Damage: Key Messages, principle 2, available at: <https://www.ohchr.org/sites/default/files/documents/issues/climatechange/information-materials/2023-key-messages-hr-loss-damage.pdf>

<sup>157</sup> Inter-Am. Comm. H.R., Climate Emergency: Scope of Inter-American Human Rights Obligations, Resolution 3/2021 (31 December 2021) principle 14, available at: [https://www.oas.org/en/iachr/decisions/pdf/2021/resolucion\\_3-21\\_ENG.pdf](https://www.oas.org/en/iachr/decisions/pdf/2021/resolucion_3-21_ENG.pdf).

<sup>158</sup> Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Yearbook of the International Law Commission, 2001, vol. II, Part Two, as corrected, Article 30, commentary, paragraph 13.

<sup>159</sup> UNGA, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UNGA Res 60/147, UN Doc A/Res/60/147 (21 March 2006) para 23, available at: <https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-and-guidelines-right-remedy-and-reparation>.

<sup>160</sup> Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Yearbook of the International Law Commission, 2001, vol. II, Part Two, as corrected, art 34; *Pulp Mills on the River Uruguay (Argentina v.*

103. Restitution involves the “re-establishment as far as possible of the situation which existed prior to the commission of the internationally wrongful act.”<sup>161</sup> In the context of gross violations of international human rights law, restitution includes “restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one’s place of residence, restoration of employment and return of property.”<sup>162</sup>
104. In its General Comment No. 31, in relation to Article 2(3) of the ICCPR, the UN Human Rights Committee stressed “the need for measures, beyond a victim-specific remedy, to be taken to avoid recurrence of the type of violation in question. Such measures may require changes in the State Party’s laws or practices.”<sup>163</sup> Although this observation was made with an emphasis on the obligation of cessation, it stresses that, in the human rights context, remedies must have both a victim-specific and a structural dimension.
105. A range of victim- and situation-specific remedies have been identified by the UN Human Rights Committee in *Daniel Billy*. The Committee concluded that the respondent State had violated the ICCPR, and it fleshed out the specific legal consequences arising from this breach:

“Having found a violation of articles 17 and 27, the Committee does not deem it necessary to examine the authors’ remaining claims under article 24 (1) of the Covenant. [ ... ] **Pursuant to article 2(3)(a) of the Covenant, the State party is under an obligation to provide the authors with an effective remedy.** This requires it to **make full reparation to individuals whose Covenant rights have been violated.** Accordingly, the State party is obligated, inter alia, **to provide adequate compensation, to the authors for the harm that they have suffered; engage in meaningful consultations with the authors’ communities in order to conduct needs assessments; continue its implementation of measures necessary to secure the communities’ continued safe existence on their respective islands; and monitor and review the effectiveness of the measures implemented and resolve any deficiencies as soon as practicable.** The State party is also under an obligation to take steps to **prevent similar violations in the future**” (emphasis added)<sup>164</sup>

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*Uruguay*), Judgment, I.C.J. Reports 2010, p. 14, para. 273 (“customary international law provides for restitution as one form of reparation for injury, restitution being the re-establishment of the situation which existed before occurrence of the wrongful act. The Court further recalls that, where restitution is materially impossible or involves a burden out of all proportion to the benefit deriving from it, reparation takes the form of compensation or satisfaction, or even both.”).

<sup>161</sup> Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Yearbook of the International Law Commission, 2001, vol. II, Part Two, as corrected, art 35, comment (1)

<sup>162</sup> UNGA, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UNGA Res 60/147, UN Doc A/Res/60/147 (21 March 2006) para 19, available at: <https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-and-guidelines-right-remedy-and-reparation>.

<sup>163</sup> UN Human Rights Committee, *General comment no. 31: The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13, para 17.

<sup>164</sup> UN Human Rights Committee ‘Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3624/2019’ (22 Sept 2022) Un Doc CCPR/C/135/D/3624/2019 (*Billy v. Australia*) paras 10-11.

106. It is not possible for a State or a group of States to either restore the climate system to its previous state or to undo the associated losses caused by the Relevant Conduct. However, restitution is still available with respect to some consequences of the Relevant Conduct. In the context of the Contribution Conduct, restitution must include: (i) remedies designed to repair and restore the elements of the environment that can be restored to their state prior to the damage caused by the Contribution Conduct, (ii) securing and restoring the rights of Indigenous and tribal peoples to their lands, territories and resources, (iii) preserving the continued connection of individuals and peoples to their current territories, resources, and places of residence, and ensuring the respect, protection and fulfilment of the human rights of all individuals who have been displaced by loss and damage from the Contribution Conduct, (iv) engaging in international cooperation to advance human rights in the context of climate change and to ensure that wealthier States with higher historical and present responsibility for the climate crisis provide resources to injured, specifically affected and/or particularly vulnerable States, peoples, communities and individuals, and (v) perpetually recognizing the sovereignty, statehood, territory, and maritime spaces of climate vulnerable peoples and States.
107. Reparations for human rights violations stemming from the Adverse Impacts Conduct must include: (i) adopting policy and legislation to mobilize national resources to address human rights harms caused by the adverse impacts of climate change, (ii) adopting domestic legislation to protect the human rights of peoples displaced from climate change impacts, including migrants entering domestic jurisdictions, and to ensure that all displaced persons are treated with dignity, possess a nationality, and are not returned to territories in which their lives will be put at risk,<sup>165</sup> (iii) non-monetary redress for the human mobility, including displacement and migration, caused by the adverse effects of climate change, and (iv) adopting appropriate domestic measures to finance efforts to address loss and damage including equitable and progressive carbon taxes; wealth taxes; levies on certain sectors, including fossil fuels, aviation, and shipping; and legal and policy measures to increase the accountability of businesses for climate change related harm.<sup>166</sup>
108. Reparation for Failure to Redress Conduct includes: (i) adopting appropriate domestic legislation to ensure that victims of human rights injuries caused by the Contribution Conduct or the Adverse Impacts Conduct have access to effective, prompt, and impartial legal redress mechanisms, including against private enterprises, and that injured parties know about such remedies and have assistance, including assistance of counsel, to access such remedies,<sup>167</sup> (ii) adopting appropriate domestic legislation to ensure that victims of human rights injuries caused by the Contribution Conduct or the Adverse Impacts Conduct have access to international legal processes, possess “legal standing,” and can avail themselves of the remedies provided by this Court or other regional or international human

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<sup>165</sup> OHCHR, Human Rights and Loss and Damage: Key Messages, principle 5.4, available at: <https://www.ohchr.org/sites/default/files/documents/issues/climatechange/information-materials/2023-key-messages-hr-loss-damage.pdf>

<sup>166</sup> OHCHR, Human Rights and Loss and Damage: Key Messages, principle 3, available at: <https://www.ohchr.org/sites/default/files/documents/issues/climatechange/information-materials/2023-key-messages-hr-loss-damage.pdf>

<sup>167</sup> *The Environment and Human Rights*, Advisory Opinion OC-23/17, Inter-Am. Ct. H.R. (Nov. 15, 2017) para 234; <https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-and-guidelines-right-remedy-and-reparation-para-12-14>;

rights mechanisms<sup>168</sup> without prejudice to domestic remedies, (iii) implementing inclusive, transparent, participatory, accountable, and adequately funded mechanisms for loss and damage at the international level, and ensuring that individuals, peoples, and States can access such mechanisms,<sup>169</sup> (iv) ensuring that any judgments, orders, conclusions, or findings from international mechanisms with jurisdiction over issues related to loss and damage may be perfected in any other court or mechanism, including domestic courts.

109. A responsible State is “under an obligation to compensate” for the damages caused by the internationally wrongful act “insofar as such damage is not made good by restitution.”<sup>170</sup> In the case of individuals suffering gross violations of international human rights law, compensation should be provided for (i) physical or mental harm, (ii) lost opportunities, including employment, education and social benefits, (iii) material damages and loss of earnings, including loss of earning potential, (iv) moral damage, and (v) costs required for legal or expert assistance, medicine and medical services, and psychological and social services.<sup>171</sup> In the case of peoples and States, compensation should be provided for loss of territory and resources, loss of biodiversity, economic impacts and damages of the Relevant Conduct on development, and any other economically assessable damage. The material damage caused by the Relevant Conduct can be assessed in economic terms for some aspects of loss, for instance, the costs of relocation of populations from sinking islands. Damage caused by the Relevant Conduct, including to the environment as such, can also be quantified and compensated.<sup>172</sup>
110. If restitution or compensation cannot provide full reparation, then a third form of reparation is satisfaction, which can take the form of “an acknowledgment of breach, an expression of regret, a formal apology or another appropriate modality.”<sup>173</sup> Expressions of regret or formal apologies can contribute to the moral repair of dignity and rights where those have been violated because of loss and damage.<sup>174</sup> Disclosure of the truth or penalizing wrongdoers can

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<sup>168</sup> UNGA, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UNGA Res 60/147, UN Doc A/Res/60/147 (21 March 2006) para 14, available at: <https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-and-guidelines-right-remedy-and-reparation>.

<sup>169</sup> OHCHR, Human Rights and Loss and Damage: Key Messages, principle 2, available at: <https://www.ohchr.org/sites/default/files/documents/issues/climatechange/information-materials/2023-key-messages-hr-loss-damage.pdf>

<sup>170</sup> Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Yearbook of the International Law Commission, 2001, vol. II, Part Two, as corrected, art 36.

<sup>171</sup> UNGA, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UNGA Res 60/147, UN Doc A/Res/60/147 (21 March 2006) para 20, available at: <https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-and-guidelines-right-remedy-and-reparation>.

<sup>172</sup> *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Compensation, Judgment, I.C.J. Reports 2018, p. 15, paras. 34, 41-43.

<sup>173</sup> Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Yearbook of the International Law Commission, 2001, vol. II, Part Two, as corrected, art 37, paras 1, 2.

<sup>174</sup> UNGA, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UNGA Res 60/147, UN Doc A/Res/60/147 (21 March 2006) para 22, available at: <https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-and-guidelines-right-remedy-and-reparation>.



also contribute to redress for victims of human rights violations caused by the Relevant Conduct, both at the victim-specific and at the structural level.

D. *Additional legal consequences of the Relevant Conduct*

111. Serious breaches of obligations owed *erga omnes* contain additional legal consequences for third States. These include (i) an obligation to cooperate to bring to end such a breach, (ii) an obligation not to recognize the illegal situation resulting from the violative act, and (iii) an obligation not to render aid or assistance to the breaching State or States in maintaining the illegal situation. These legal consequences are reflected in Article 41 of ARSIWA and in the case law of the ICJ<sup>175</sup> and other international bodies, including this Court.<sup>176</sup>
112. This Court has affirmed that Article 41 of ARSIWA reflects customary international law and, in addition, that the obligations arising from certain human rights have a peremptory character, including the principle of equality and prohibition of non-discrimination, the principle of *non-refoulement*, and the prohibition to commit or tolerate serious, massive or systematic human rights violations.<sup>177</sup>
113. Of particular note, the obligation of non-recognition of the situation resulting from the breach of the right of existence and survival of Indigenous and tribal peoples protected by Article 21 of the American Convention as well as of the right of peoples to self-determination requires the recognition of the continued enjoyment by the affected peoples of their right to self-determination in the way it has been exercised, including independence and Statehood, and within the limits of their own territory and maritime spaces. Also, the obligation not to render aid or assistance in maintaining the breach calls into question the lawfulness of all newly concluded or future infrastructure (e.g. pipelines) and supply agreements that effectively expand reliance on fossil fuels, contrary to the required cessation of the breach.

VII. **Conclusions**

114. For the reasons discussed herein, Vanuatu urges the Court to consider, recognize, and pronounce the international human rights implications of the Relevant Conduct and the international legal consequences attending the Relevant Conduct.

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<sup>175</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) (2004) para 159, accessible at: <https://www.icj-cij.org/public/files/case-related/131/131-20040709-ADV-01-00-EN.pdf>.

<sup>176</sup> *The Obligations in Matters of Human Rights of a State that has Denounced the American Convention on Human Rights and the Charter of the Organization of American States (Interpretation and Scope of articles 1, 2, 27, 29, 30, 31, 32, 33 to 65 and 78 of the American Convention on Human Rights and 3(l), 17, 45, 53, 106 and 143 of the Charter of the Organization of American States)*, IACtHR, Series A, No. 26, Advisory Opinion No. OC-26/20 (9 November 2020), para 109.

<sup>177</sup> *The Obligations in Matters of Human Rights of a State that has Denounced the American Convention on Human Rights and the Charter of the Organization of American States (Interpretation and Scope of articles 1, 2, 27, 29, 30, 31, 32, 33 to 65 and 78 of the American Convention on Human Rights and 3(l), 17, 45, 53, 106 and 143 of the Charter of the Organization of American States)*, IACtHR, Series A, No. 26, Advisory Opinion No. OC-26/20 (9 November 2020), paragraphs 102-106 (and references therein).

Respectfully submitted by:



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