

EMPOWERING INTERNATIONAL LAW TO ADDRESS CLAIMS FOR CLIMATE
REPARATIONS

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TABLE OF CONTENTS

I. Introduction 484

II. Climate Harms 486

 A. Devastating Impacts 486

 B. Disparate Contributions 489

III. Deflecting Claims for Climate Reparations in the UN Climate Regime 490

 A. Addressing “Loss and Damage” in the UN Climate Regime 490

 B. Loss and Damage in the 2015 Paris Agreement 492

 C. Funding Loss and Damage 492

 D. Setting Loss and Damage in the Context of Climate Finance 493

 E. Beyond the UN Climate Regime 495

IV. Distorting Claims for Climate Reparations in International Judicial Proceedings 496

 A. The 2015 Paris Agreement 497

 B. Customary International Law: Harm Prevention 500

V. Reclaiming and Empowering International Law 501

VI. Conclusion 505

I. INTRODUCTION

A fundamental and widely recognized inequity at the core of the existential climate crisis facing the planet today is that those who have contributed the least to climate change are also the most affected. The United States, European Union-28, Russia, Japan, and Canada, according to some accounts, are together responsible for 85 percent of global greenhouse gases (GHG) emissions thus far.¹ Yet it is the climate vulnerable—least developed countries, low lying, and small island states among others—that are at the frontlines of climate impacts. There is widespread scientific and diplomatic consensus on the multiple causes and devastating impacts of climate change but so far justice for vulnerable states has proven elusive.

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¹ Jason Hickel, *Quantifying National Responsibility for Climate Breakdown: An Equality-Based Attribution Approach for Carbon Dioxide Emissions in Excess of the Planetary Boundary*, 4 LANCET: PLANETARY HEALTH E399 (2020).

States on the frontlines of climate impacts² have advanced claims for climate justice in the United Nations (UN) climate regime, as well as more recently in the International Court of Justice (ICJ). Their claims have taken different forms across negotiating and dispute settlement fora but across these fora international legal doctrine has presented a formidable challenge.

This Article focuses on the claims of vulnerable states for climate justice—and reparations within that broader claim—against major emitting states.³ It explores their claims in the UN climate regime—comprising the 1992 UN Framework Convention on Climate Change (UNFCCC),⁴ the 1997 Kyoto Protocol,⁵ and the 2015 Paris Agreement⁶—for the last three decades, as well as more recently before the ICJ. It traces the arc of the legal narrative that major emitters have deployed to avoid claims for reparations from vulnerable states. It tests and challenges that narrative and the formalistic vision of international law in which the narrative is embedded, and offers an alternative purpose-driven, progressive, and emancipatory approach to international law that is better tailored to address global existential challenges and deliver the glimmerings of climate justice.

This Article uses the categories of “major-emitting states”⁷ and “vulnerable states”⁸ because these better reflect the politics of climate justice and reparations compared to the categories of “developed” and “developing” states,⁹ given some developing states have emerged as major emitters. There are neither multilaterally agreed lists or definitions of states in these categories, nor are these watertight categories. Major emitters, such as India, have low per capita emissions and significant vulnerability concerns, given their relative lack of development. Further, these categories do not lend themselves to legal proceedings aimed at

² The term “vulnerable states” refers to countries that fit the IPCC’s definition of vulnerability as “[t]he propensity or predisposition to be adversely affected . . . [and] encompasses a variety of concepts and elements including sensitivity or susceptibility to harm and lack of capacity to cope and adapt.” See Christopher B. Field et al., *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*, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, Summary for Policymakers, 5 (2014), at https://www.ipcc.ch/pdf/assessment-report/ar5/wg2/ar5_wgII_spm_en.pdf [hereinafter IPCC]. The 1992 UNFCCC’s 19th preambular recital identifies “low-lying and other small island countries, countries with low-lying coastal, arid and semi-arid areas or areas liable to floods, drought and desertification, and developing countries with fragile mountainous ecosystems” as particularly vulnerable to the adverse effects of climate change. United Nations Framework Convention on Climate Change, May 9, 1992, 1771 UNTS 107 [hereinafter UNFCCC].

³ Claims by individuals and civil society groups against fossil fuel companies, as well as their own and other states in national courts are beyond the scope of this paper.

⁴ UNFCCC, *supra* note 2.

⁵ Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 2303 UNTS 162.

⁶ Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, TIAS No. 16-1104.

⁷ The term “major emitters” refers to the top ten countries by emissions—China, the United States, India, European Union, Russia, Japan, Brazil, Indonesia, Iran, and Canada. See Johannes Friedrich, Mengpin Ge, Andrew Pickens & Leandro Vigna, *This Interactive Chart Shows Changes in the World’s Top 10 Emitters*, WORLD RESOURCES INST. (Mar. 2, 2023), at <https://www.wri.org/insights/interactive-chart-shows-changes-worlds-top-10-emitters>.

⁸ See note 2 *supra*.

⁹ The terms “developed” and “developing” are used in this Article when discussing decision or treaty provisions that use these terms.

securing reparations,¹⁰ which turn on the satisfaction of specific legal requirements and differ from state to state.¹¹ These broad categories nevertheless offer a useful framework to understand the politics—and legal arguments shaped by these politics—surrounding climate justice.

Part II of this Article sets out the compelling case that vulnerable states have for climate justice and reparations. It outlines the extent of current and future climate harms for vulnerable states, and their limited contribution to climate change. Part III examines the efforts by vulnerable states to advance claims for climate justice and reparations in the UN climate regime. This part finds that the UN climate regime has allowed major emitting states to deflect such claims by basing treatment of issues relating to loss and damage on “cooperation and facilitation” and excluding consideration of “compensation and liability.” It finds that there is limited “cooperation and facilitation,” however, and that the available support is radically inadequate. This has led vulnerable states to seek accountability and redress for climate harms elsewhere. In their submissions in the proceedings for the ICJ’s advisory opinion on climate change, vulnerable states have sought to engage the law of state responsibility to establish their claims for climate justice and reparation. Part IV explores contestations over a key element of state responsibility—“an internationally wrongful act”—and challenges the limited and limiting account of international law that enables major emitting states to distort compelling claims for reparations from vulnerable states. Part V argues for an approach that reclaims and empowers international law to address the civilizational challenges we face. Part VI concludes.

II. CLIMATE HARMS

A. Devastating Impacts

There is an incontrovertible record of scientific consensus that climate change caused by human conduct is occurring with devastating impacts for people and the planet. Global surface temperatures are already at 1.1°C¹²–1.28°C¹³ above 1850–1900, and each of the last four decades has been warmer than any decade before it since 1850.¹⁴ 2024 was the warmest

¹⁰ The term “reparations” is defined in Article 31 of the Draft Articles on Responsibility of States for Internationally Wrongful Act. See Report of the Int’l Law Comm’n on the Work of Its Fifty-Third Session, at 26, 91, UN Doc. A/56/10 (2001) [hereinafter ARSIWA] (“The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.”). Beyond the context of state responsibility, there is an extensive literature on the definition and scope of the term “reparations” across multiple contexts. For an early discussion in the climate context, see Maxine Burkett, *Climate Reparations*, 10 MELB. J. INT’L L. 509 (2009). Antony Anghie, *The Injustices of Reparations*, 119 AJIL 423 (2025) (this issue), uses the term broadly as “duty to remedy a wrong” which captures the popular understanding and use of the term. This Article uses the term both in this broad sense, as well as in specific contexts as defined in ARSIWA, *supra* note 10.

¹¹ See Steven Ratner, *Reparations for Colonialism beyond Legal Responsibility*, 119 AJIL 484 (2025) (this issue).

¹² Hoesung Lee et al., *Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, IPCC, Summary for Policymakers, at A.1 (2023), at https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_SPM.pdf [hereinafter *Climate Change 2023*, SPM, IPCC].

¹³ National Aeronautics and Space Administration, *Global Temperature*, at <https://climate.nasa.gov/vital-signs/global-temperature/?intent=121>.

¹⁴ Valérie Masson-Delmotte et al., *Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, IPCC, Summary for

year on record with temperature exceeding 1.5°C above pre-industrial level for the first time.¹⁵ Human influence has warmed the atmosphere, ocean, and land.¹⁶ It has driven global retreat of glaciers,¹⁷ decrease in Arctic Sea ice,¹⁸ warming of the upper ocean,¹⁹ global acidification of surface open ocean,²⁰ sea level rise,²¹ and increased the frequency and intensity of heatwaves.²²

Such climate change has caused widespread adverse, even irreversible impacts, and loss and damage to nature and people.²³ Adverse impacts for human populations and natural systems are unevenly distributed across regions, and while physical exposure is an important aspect of vulnerability, lack of adaptive capacity is crucial in determining the extent of vulnerability.²⁴ The Intergovernmental Panel on Climate Change (IPCC) identified a list of “[g]lobal hotspots of high human vulnerability” that includes West, Central, and East Africa, South Asia, Central and South America, small island developing states, and the Arctic,²⁵ and it records that “[v]ulnerable communities who have historically contributed the least to current climate change are disproportionately affected.”²⁶ Millions have been exposed to “acute food insecurity and reduced water security” with the largest impacts observed in Africa, Asia, Central and South America, small islands, and the Arctic.²⁷ There is climate-induced displacement across the world, but with the small island states “disproportionately affected.”²⁸

People who are development-constrained, poor, face governance challenges, and lack access to basic services and resources are far more vulnerable to climate hazards²⁹—a further devastating inequity. The IPCC finds, tellingly, that between 2010 and 2020 “human mortality from floods, droughts and storms was fifteen times higher in highly vulnerable regions.”³⁰ Such vulnerability is exacerbated by “inequity and marginalization linked to

Polymakers, at A.1.2 (2021), at https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_SPM.pdf [hereinafter *Climate Change 2021, SPM, IPCC*].

¹⁵ World Meteorological Organization Press Release, WMO Confirms 2024 as Warmest Year on Record at About 1.55°C Above Pre-Industrial Level (Jan. 10, 2025), at <https://wmo.int/news/media-centre/wmo-confirms-2024-warmest-year-record-about-155degc-above-pre-industrial-level>.

¹⁶ *Climate Change 2021, SPM, IPCC, supra* note 14, at A.1.

¹⁷ *Id.* at A.1.5.

¹⁸ *Id.*

¹⁹ *Id.* at A.1.6.

²⁰ *Id.*

²¹ *Id.* at A.1.7.

²² *Id.* at A.3.1.

²³ Hans-O. Pörtner et al., *Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, IPCC, Summary for Policymakers, at B.1 (2022), at https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_SummaryForPolicymakers.pdf [hereinafter *Climate Change 2022: Impacts, SPM, IPCC*].

²⁴ *Id.* at B.2.

²⁵ *Id.* at B.2.4.

²⁶ *Climate Change 2023, SPM, IPCC, supra* note 12, at A.2; see also *Climate Change 2022: Impacts, SPM, IPCC, supra* note 23, at B.1.

²⁷ *Climate Change 2022: Impacts, SPM, IPCC, supra* note 23, at B.1.3.

²⁸ *Id.* at B.1.7.

²⁹ *Id.* at B.2.4.

³⁰ *Id.*

gender, ethnicity, low income or combinations thereof . . . especially for many Indigenous Peoples and local communities.”³¹

Even in this landscape of acute impacts for vulnerable states, the effects on small island states are catastrophic. Small islands states, mostly remote, surrounded by rapidly rising seas, with comparatively small land areas, and limited global connectivity, are particularly vulnerable and suffer from amplified climate risks.³² These risks include “tropical cyclones (TCs), storm surges, droughts, changing precipitation patterns, sea level rise (SLR), coral bleaching and invasive species, all of which are already detectable across both natural and human systems.”³³ Intense tropical cyclones, in particular, have devastated small island states, threatening human life and destroying building and infrastructure.³⁴

A host of internationally protected rights are at risk from such climate impacts.³⁵ Human rights treaty bodies³⁶ and special procedures mandate holders have cautioned that climate harms threaten the enjoyment of human rights to life,³⁷ health, food,³⁸ water and sanitation,³⁹ and adequate housing,⁴⁰ and that it has particularly severe consequences for women,⁴¹ children,⁴² vulnerable and marginalized groups including migrants,⁴³ Indigenous communities,⁴⁴ the internally displaced,⁴⁵ and those living in extreme poverty.⁴⁶

³¹ *Id.*

³² Donovan Campbell et al., *Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, IPCC, Chapter 15: Small Islands, 15.3 (2022), at <https://www.ipcc.ch/report/ar6/wg2/chapter/chapter-15>.

³³ *Id.*, Exec. Summary.

³⁴ *Id.*

³⁵ There is a vast literature on human rights and climate change. For an overview, see John H. Knox, *Human Rights*, in OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 784 (Lavanya Rajamani & Jacqueline Peel eds., 2d ed. 2021); Lavanya Rajamani, *Climate Change*, in INTERNATIONAL HUMAN RIGHTS LAW 644 (Daniel Moeckli, Sangeeta Shah & Sandesh Sivakumaren eds., 4th ed. 2022).

³⁶ See, e.g., UN Human Rights Office of the High Commissioner (OHCHR), Five UN Human Rights Treaty Bodies Issue a Joint Statement on Human Rights and Climate Change (Sept. 16, 2019), at <https://www.ohchr.org/en/statements-and-speeches/2019/09/five-un-human-rights-treaty-bodies-issue-joint-statement-human>.

³⁷ UN Human Rights Committee (UNHRC), General Comment No. 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life, UN Doc. CCPR/C/GC/36 (Sept. 3, 2019).

³⁸ UN General Assembly (UNGA), Interim Report of the Special Rapporteur on the Right to Food, UN Doc. A/70/287 (Aug. 5, 2015).

³⁹ UN Committee on Economic, Social and Cultural Rights, Climate Change and the International Covenant on Economic, Social and Cultural Rights, UN Doc. E/C.12/2018/1 (Oct. 31, 2018).

⁴⁰ UNGA, Guidelines for the Implementation of the Right to Adequate Housing, UN Doc. A/HRC/43/43 (Dec. 26, 2019).

⁴¹ UN Commission on the Elimination of Discrimination Against Women, General Recommendation No. 37 (2018) on the Gender-Related Dimensions of Disaster Risk Reduction in the Context of Climate Change, UN Doc. CEDAW/C/GC/37 (Mar. 13, 2018).

⁴² UN Commission 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, UN Doc. CRC/C/GC/26 (Aug. 22, 2023).

⁴³ UNGA, Report of the Special Rapporteur on the Human Rights of Migrants, UN Doc. A/67/299 (Aug. 13, 2012).

⁴⁴ UNHRC, Report of the Special Rapporteur on the Rights of Indigenous Peoples, UN Doc. A/HRC/36/46 (Sept. 15, 2017).

⁴⁵ UNHRC, Report of the Special Rapporteur on the Human Rights of Internally Displaced Persons, Chaloka Beyani, UN Doc. A/HRC/16/43 (Dec. 20, 2010); UNGA, Protection of and Assistance to Internally Displaced Persons, UN Doc. A/66/285 (Aug. 9, 2011).

⁴⁶ UNHRC, Climate Change and Poverty – Report of the Special Rapporteur on Extreme Poverty and Human Rights, UN Doc. A/HRC/41/39 (July 17, 2019).

And, much worse is to come.⁴⁷ Entire island nations, their culture, traditions, identities, will likely be swallowed up by the rising seas in the decades ahead as GHG emissions continue to rise,⁴⁸ states' mitigation ambition remains insufficient,⁴⁹ and the world continues to warm at an alarming pace.⁵⁰ At the levels of predicted temperature rise, there will be grave, pervasive, and irreversible changes, crossing many natural tipping points, the impacts of which will be faced primarily by vulnerable states.

B. Disparate Contributions

Yet these highly vulnerable states and peoples on the frontlines of climate impacts, have done little to cause climate change. There are many ways of parsing the historical emissions data (resulting in differing rankings for countries in terms of contributions), but across all of them, the majority of historical emissions have come from industrialized countries,⁵¹ as acknowledged in the UNFCCC preamble. The United States leads in historical emissions among industrialized countries, accounting for a quarter.⁵² However, emissions in developing countries such as China, India, and Brazil have grown rapidly, with China's total CO₂ emissions exceeding those of the advanced economies combined in 2020, and is now also above the world per capita average.⁵³ There is variance among major emitting developing countries; per capita emissions are still low for India and Brazil⁵⁴ that continue to struggle with energy poverty and developmental challenges. The shift in emissions profiles of large developing countries, especially China, has influenced their positions in the UN climate negotiations and judicial proceedings. China and India too, as we shall see, are beginning to instrumentalize narrow technical interpretations of relevant international legal norms to pre-empt claims for climate reparations. There is tellingly limited overlap between the IPCC's identified hotspots of vulnerability and the top ten major emitters that collectively account for two-thirds of current global GHG emissions.⁵⁵

⁴⁷ *Climate Change 2022: Impacts*, SPM, IPCC, *supra* note 23, at B.4.5.

⁴⁸ *Climate Change 2022: Mitigation of Climate Change*, IPCC, Summary for Policymakers, at B.1 (Priyadarshi Shukla et al. eds., 2022) [hereinafter *Climate Change 2022: Mitigation*, SPM, IPCC].

⁴⁹ UNFCCC, Technical Dialogue of the First Global Stocktake – Synthesis Report by the Co-facilitators on the Technical Dialogue, at 13, para. 80, UN Doc. FCCC/SB/2023/9 (Sept. 8, 2023) [hereinafter UNFCCC, *Technical Dialogue – Synthesis Report*]; see also UNFCCC, Nationally Determined Contributions Under the Paris Agreement – Synthesis Report by the Secretariat, at 5–6, UN Doc. FCCC/PA/CMA/2024/10 (Oct. 28, 2024) [hereinafter UNFCCC NDCs Synthesis Report].

⁵⁰ UNFCCC NDCs Synthesis Report, *supra* note 49, at 30–31, para. 147; see generally UNEP, Emissions Gap Report (2024), at <https://www.unep.org/resources/emissions-gap-report-2024>.

⁵¹ See, e.g., Matthew Jones et al., *National Contributions to Climate Change Due to Historical Emissions of Carbon Dioxide, Methane, and Nitrous Oxide Since 1850*, 10 SCI. DATA (2023), at <https://www.nature.com/articles/s41597-023-02041-1>; Ragnhild Skeie et al., *Perspective Has a Strong Effect on the Calculation of Historical Contributions to Global Warming*, 12 ENVTL. RSCH. LETTERS (2017), at <https://iopscience.iop.org/article/10.1088/1748-9326/aa5b0a>; H. Damon Matthews et al., *National Contributions to Observed Global Warming*, 9 ENVTL. RSCH. LETTERS (2014), at <https://iopscience.iop.org/article/10.1088/1748-9326/9/1/014010/meta>; Ting Wei et al., *Developed and Developing World Responsibilities for Historical Climate Change and CO₂ Mitigation*, 109 PROC. NAT'L ACAD. SCI. 12911 (2012).

⁵² Hannah Ritchie & Max Roser, *CO₂ Emissions: How Much CO₂ Does the World Emit? Which Countries Emit the Most?*, OUR WORLD IN DATA (Jan. 2024), at <https://ourworldindata.org/co2-emissions>.

⁵³ IEA, *The Changing Landscape of Global Emissions* (2023), at <https://www.iea.org/reports/co2-emissions-in-2023/the-changing-landscape-of-global-emissions>.

⁵⁴ *Id.*

⁵⁵ Friedrich, *supra* note 7.

All available evidence thus underscores the fact that vulnerable states are facing significant climate harms that they have played little part in causing, either historically or currently, that the acts causing the harm continue at pace, and that the resulting emissions are likely to escalate the harm in future.⁵⁶ Vulnerable states thus have a compelling moral case for reparations—at its most basic that those who have caused the harm remedy the situation and make amends.

Yet, international law has thus far lent itself to systematic efforts by major emitting states to deny and dismantle claims for climate reparations. As a first port of call, vulnerable states sought to address their claims for reparations in the UN climate negotiations.

III. DEFLECTING CLAIMS FOR CLIMATE REPARATIONS IN THE UN CLIMATE REGIME

A. Addressing “Loss and Damage” in the UN Climate Regime

Given the significant and escalating climate harms that impact vulnerable states, unsurprisingly the issue of “loss and damage” has underpinned the UN climate negotiations from its start.⁵⁷ The term “loss and damage” is not defined in the UNFCCC, Kyoto Protocol, or Paris Agreement, and only finds explicit mention in the Paris Agreement. But it has acquired distinct meaning in the climate negotiations. The term “loss and damage” refers to the impacts of climate change that have negative effects on human and natural systems.⁵⁸ “Loss” is associated with negative impacts for which reparation or restoration is impossible, such as disappearance of islands, and “damage” with negative impacts for which reparation or restoration is possible, such as destruction of roads.⁵⁹

In the negotiations for the UNFCCC, the Alliance of Small Island States (AOSIS) tabled a proposal in 1991 for an insurance mechanism to compensate vulnerable small island and low-lying coastal developing countries for loss and damage resulting from sea level rise.⁶⁰ Although the UNFCCC does not include a compensation mechanism, it recognizes the

⁵⁶ Current warming levels are determined by the cumulative CO₂ emitted since the industrial revolution. See Myles R. Allen et al., *Warming Caused by Cumulative Carbon Emissions Towards the Trillionth Tonne*, 458 NATURE 1163 (2009), at <https://www.nature.com/articles/nature08019>. However, for slowly responding processes, such as ice-sheet and glacier mass loss, the time it takes to reach a particular global warming level and the emission pathway it took matters, whereas for others such as seasonal and annual mean and extreme surface air temperatures, the emission pathway matters less. Valérie Masson-Delmotte et al., *Climate Change 2021: The Physical Science Basis*, IPCC, Technical Summary, TS 1.3.2 (2021), at https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_TS.pdf.

⁵⁷ See generally Erin Roberts & Saleemul Huq, *Coming Full Circle: The History of Loss and Damage Under the UNFCCC*, 8 INT’L J. GLOB. WARMING 141 (2015); Julia Dehm, *Climate Change, “Slow Violence” and the Indefinite Deferral of Responsibility for “Loss And Damage,”* 29 GRIFFITH L. REV. 220 (2020); Patrick Toussaint, *Loss and Damage, Climate Victims, and International Climate Law: Looking Back, Looking Forward*, 13 TRANSNAT’L ENVTL. L. 134 (2023); Danielle Falzon et al., *Tactical Opposition: Obstructing Loss and Damage Finance in the United Nations Climate Negotiations*, 23 GLOB. ENVTL. POL. 95 (2023).

⁵⁸ UNFCCC, A Literature Review on the Topics in the Context of Thematic Area 2 of the Work Programme on Loss and Damage: a Range of Approaches to Address Loss and Damage Associated with the Adverse Effects of Climate Change, UN Doc. FCCC/SBI/2012/INF.14 (2012).

⁵⁹ *Id.*

⁶⁰ UNFCCC, Negotiation of a Framework Convention on Climate Change. Elements Related to Mechanisms. Vanuatu: Draft Annex Relating to Article 23 (Insurance) for Inclusion in the Revised Single Text on Elements Relating to Mechanisms (A/AC.237/WG.II/Misc.13) Submitted by the Co-chairmen of Working Group II, UN Doc. A/AC.237/WG.II/CRP.8 (Dec. 17, 1991). See for a discussion of the current relevance of this proposal, Toussaint, *supra* note 57.

specific needs and concerns of developing countries arising from the adverse effects of climate change, and requires parties to take actions to meet these needs.⁶¹ In the first decade of the climate negotiations, however, parties focused on mitigation, and it took considerable negotiating prowess from vulnerable countries to bring the issue of adaptation and then loss and damage forward. The term “loss and damage” first appeared in the 2007 Bali Action Plan,⁶² followed in 2010 by the launch of a work program on loss and damage,⁶³ and in 2012 by the establishment of institutional arrangements for loss and damage.⁶⁴ In their submissions for these institutional arrangements, many vulnerable countries stressed the crucial importance of “redress” and “compensation” for climate harms. AOSIS sought “redress for loss and damage that is unavoidable and unrecoverable,” and proposed a “rehabilitation and/or compensat[ory]” component to the proposed mechanism.⁶⁵ The Africa group⁶⁶ and Bolivia, Ecuador, China, El Salvador, Guatemala, Thailand, Philippines, and Nicaragua⁶⁷ echoed the AOSIS proposal and asked also for “compensation for lost development opportunities.”⁶⁸

The United States, amongst other major emitters, rejected such calls, arguing that compensation would place “a monetary value on the lives, livelihoods and assets of the most vulnerable countries and populations” and that the international community did not have “the capacity to make a normative judgment, on a centralized basis, of what gets valued and what does not.”⁶⁹ Displaying concern for vulnerable communities, they argued that such “centralized decision about valuation would very likely result in undervaluing poorer communities, cheaper land, and subsistence livelihoods.”⁷⁰ The 2013 Warsaw International Mechanism on Loss and Damage established at the end of this process did not contain a compensatory component.⁷¹

⁶¹ UNFCCC, *supra* note 2, Art. 4(8); pmb. Rec. 19.

⁶² UNFCCC Dec. 1/CP.13, Bali Action Plan, para. 1(c)(iii), UN Doc. FCCC/CP/2007/6/Add.1 (Mar. 14, 2008).

⁶³ UNFCCC Dec. 1/CP.16, The Cancun Agreements: Outcome of the Work of the Ad Hoc Working Group on Long-term Cooperative Action Under the Convention, para. 26, UN Doc. FCCC/CP/2010/7/Add.1 (Mar. 15, 2011).

⁶⁴ UNFCCC Dec. 3/CP.18, Approaches to Address Loss and Damage Associated with Climate Change Impacts in Developing Countries That Are Particularly Vulnerable to the Adverse Effects of Climate Change to Enhance Adaptive Capacity, UN Doc. FCCC/CP/2012/8/Add.1 (Feb. 28, 2013).

⁶⁵ Submission of Nauru on Behalf of The Alliance of Small Island States (Nov. 12, 2013), at https://unfccc.int/files/adaptation/application/pdf/aosis_submission_on_loss_and_damage_november_12_2013.pdf.

⁶⁶ Submission by the Kingdom of Swaziland on Behalf of African Group (2012), at https://unfccc.int/sites/default/files/africa_group_submission_on_loss_and_damage%5B1%5D.pdf.

⁶⁷ UNFCCC, Views and Information from Parties and Relevant Organizations on the Possible Elements to Be Included in the Recommendations on Loss and Damage in Accordance with Decision 1/CP.16, UN Doc. FCCC/SBI/2012/MISC.14/Add.1 (Nov. 19, 2012), at <https://unfccc.int/resource/docs/2012/sbi/eng/misc14a01.pdf>.

⁶⁸ Submission by the Kingdom of Swaziland, *supra* note 66, at 4.

⁶⁹ UNFCCC, Views and Information from Parties and Relevant Organizations on the Possible Elements to Be Included in the Recommendations on Loss and Damage in Accordance with Decision 1/CP.16, UN Doc. FCCC/SBI/2012/MISC.14/Add.1, *supra* note 67, at 34.

⁷⁰ UNFCCC, Submission by the United States of America (Nov. 16, 2012), at https://unfccc.int/files/adaptation/cancun_adaptation_framework/loss_and_damage/application/pdf/usa_submission_on_loss_and_damage_nov_16_2012.pdf.

⁷¹ UNFCCC Dec. 2/CP.19, Warsaw International Mechanism on Loss and Damage Associated with Climate Change Impacts, UN Doc. FCCC/CP/2013/10/Add.1 (Jan. 31, 2014) [hereinafter Warsaw International

A key related issue at the time was whether loss and damage should be addressed as part of adaptation or as a distinct issue. While vulnerable countries believe that loss and damage engages issues of liability and compensation, major emitting states preferred to keep loss and damage contained within the less contentious and more limiting adaptation framework. The decision establishing the Warsaw International Mechanism recognized that loss and damage “in some cases involves more than, that which can be reduced by adaptation”⁷² leaving the door open for subsequent distinct treatment of loss and damage. Such distinct treatment is first seen, twenty-five years into the climate negotiations, in the Paris Agreement.

B. Loss and Damage in the 2015 Paris Agreement

The Paris Agreement addresses “loss and damage” in its free-standing Article 8, separating loss and damage from adaptation, as vulnerable countries had sought. The United States, however, conditioned its acceptance of this article on the inclusion of text in the Conference of Parties (COP) decision accompanying the Paris Agreement stating that “Article 8 . . . does not involve or provide a basis for any liability or compensation.”⁷³ Arguably this paragraph is not legally consequential, given that it features in a non-legally binding COP decision, the decision was adopted under the UNFCCC rather than the Paris Agreement, and the exclusion of liability and compensation is limited to Article 8.⁷⁴ Regardless, the language and content of Article 8, a product of careful negotiation between radically divergent positions, is anodyne, and does not lend itself to claims of liability and compensation. The explicit focus, basis, and approach of Article 8 is “cooperation and facilitation” “to enhance understanding, action and support” relating to loss and damage.⁷⁵

C. Funding Loss and Damage

The next milestone in the treatment of “loss and damage” in the climate negotiations is the 2022 decision on funding arrangements.⁷⁶ Parties agreed on “the urgent and immediate need” for financial resources to assist vulnerable developing countries in responding to loss and damage.⁷⁷ Although hailed as a “historic” decision⁷⁸ acknowledging climate inequities,

Mechanism]; see generally Elisa Calliari, O. Serdeczny & L. Vanhala, *Making Sense of the Politics in the Climate Change Loss and Damage Debate*, 64 GLOB. ENVTL. CHANGE 102133 (2020).

⁷² Warsaw International Mechanism, *supra* note 71, pmbl.

⁷³ UNFCCC Dec. 1/CP.21, Adoption of the Paris Agreement, para. 51, UN Doc. FCCC/CP/2015/10/Add.1 (Jan. 29, 2016).

⁷⁴ See M.J. Mace & Roda Verheyen, *Loss, Damage and Responsibility After COP21: All Options Open for the Paris Agreement*, 25 REV. EUR., COMP. & INT’L ENVTL. L. 197 (2016); Christina Voigt, *State Responsibility for Damages Associated with Climate Change*, in RESEARCH HANDBOOK ON CLIMATE CHANGE LAW AND LOSS & DAMAGE 166 (Meinhard Doelle & Sara L. Seck eds., 2021).

⁷⁵ UNFCCC Dec. 1/CP.21, *supra* note 73, at 28.

⁷⁶ UNFCCC Dec. 2/CP.27 and 2/CMA.4, Funding Arrangements for Responding to Loss and Damage Associated with the Adverse Effects of Climate Change, Including a Focus on Addressing Loss and Damage, UN Doc. FCCC/PA/CMA/2022/10/Add.1 (Mar. 17, 2023).

⁷⁷ *Id.* The funding arrangements were operationalized at COP-28 in the UAE. See UNFCCC Decision 1/CP.28 and 5/CMA.5, Operationalization of the New Funding Arrangements, Including a Fund, for Responding to Loss and Damage Referred to in Paragraphs 2–3 of Decisions 2/CP.27 and 2/CMA.4, UN Doc. FCCC/CP/2023/11/Add.1 (Mar. 15, 2024).

⁷⁸ See, e.g., Fiona Harvey, Nina Lakhani, Oliver Milman & Adam Morton, *COP27 Agrees Historic “Loss and Damage” Fund for Climate Impact in Developing Countries*, GUARDIAN (Nov. 20, 2022), at

the fraught negotiations and the decision text signals a more limited win for vulnerable states. The issue was included in the agenda for the 2022 Sharm-el-Sheik conference only after parties agreed that “its outcomes would be based on cooperation and facilitation and would not involve liability or compensation.”⁷⁹ This understanding is reiterated in the 2023 decision operationalizing the funding arrangements for loss and damage.⁸⁰ In addition to these express threshold exclusions of “compensation and liability,” the content of these 2022 and 2023 decisions blur the basis for compensation and liability. Crucially, they obfuscate who is responsible to pay, to whom, and on what basis.

The decision establishing the fund does not specify who is responsible for paying, merely directing that efforts are made to consider “identifying and expanding the sources of funding.”⁸¹ The subsequent decisions operationalizing the fund “urge” developed countries to “continue to provide support” and “encourage” other parties to voluntarily provide support.⁸² Even this cautious reference to developed countries providing support is caveated in a footnote that reads: “[t]his paragraph is without prejudice to any future funding arrangements, any positions of Parties in current or future negotiations, or understandings and interpretations of the Convention and the Paris Agreement.”⁸³ Regarding who is eligible to receive funding, these decisions identify “developing countries particularly vulnerable to the adverse effects of climate change” as beneficiaries of support.⁸⁴ Neither are the terms “developed countries” and “developing countries particularly vulnerable to the adverse effects of climate change” defined, nor is there a list of countries in each category, leaving states to identify themselves as one or the other. The basis on which such “assistance” is provided to “developing countries particularly vulnerable to climate change” is “cooperation and facilitation.”⁸⁵

D. Setting Loss and Damage in the Context of Climate Finance

Moreover, the broader context of climate finance suggests the need to temper expectations of the loss and damage fund. The UN climate regime has thus far only offered targeted and partial support to vulnerable developing countries. The overall pot of climate finance is a fraction of estimated need, and only a small proportion of it goes toward meeting adaptation or loss and damage needs of vulnerable countries, the rest going toward mitigation.

The Paris Agreement obliges developed countries to provide financial resources to developing countries “in continuation of their existing obligations under the Convention,”⁸⁶

<https://www.theguardian.com/environment/2022/nov/20/cop27-agrees-to-historic-loss-and-damage-fund-to-compensate-developing-countries-for-climate-impacts>.

⁷⁹ See Dec. 2/CP.27 and Dec. 2/CMA.4, *supra* note 76, pmbl. Rec. 8, read with UNFCCC, Report of the Conference of the Parties on Its Twenty-Seventh Session, Held in Sharm El-Sheikh from 6 to 20 November 2022, para. 7(b), UN Doc. FCCC/CP/2022/10 (Mar. 17, 2023).

⁸⁰ Dec. 1/CP.28 and Dec. 5/CMA.5, *supra* note 77, pmbl. Rec. 5.

⁸¹ Dec. 2/CMA.4, *supra* note 76, para. 5(c).

⁸² Dec. 1/CP.28 & Dec. 5/CMA.5, *supra* note 77, para. 12.

⁸³ See Dec. 1/CP.28 & Dec. 5/CMA.5, *supra* note 77, Annex I – Governing Instrument of the Fund, para. 54, footnote.

⁸⁴ Dec. 1/CP.28 & Dec. 5/CMA.5, *supra* note 77, pmbl. Recs. 2–3; Annex I (paras. 2–3, 42, 46, 60(a)); Annex II (paras. 1, 22).

⁸⁵ See above.

⁸⁶ Paris Agreement, *supra* note 6, Art. 9.1, read with UNFCCC, *supra* note 2, Arts. 4.3–4.4.

and to lead in “mobilizing climate finance from a wide variety of sources”⁸⁷ An earlier agreement to mobilize US\$100 billion per year by 2020,⁸⁸ was finally achieved in 2022.⁸⁹ In Baku in 2024, parties set a goal of US\$300 billion per year by 2035,⁹⁰ and called on “all actors” to scale up financing to at least US\$1.3trillion per year by 2030.⁹¹ This is far short of the estimated need and widens the net of those expected to scale up finance to developing countries. The IPCC estimates the estimated need to be between US\$1.6 trillion to US\$3.8 trillion annually until 2030,⁹² and the UN Standing Committee on Finance estimates the need to be US\$ 28.2 trillion.⁹³ The IPCC also found that the flow of finance is three to six times below what is needed to reach the Paris Agreement’s temperature goal.⁹⁴

Of the climate finance available, only an estimated 20–25 percent flows to adaptation, with the majority flowing to mitigation.⁹⁵ The dedicated funds under the UN climate regime—the Special Climate Change Fund (SCCF), Least Developed Countries (LDC) Fund, and Adaptation Fund (AF)—channel part of the available finance for adaptation, with a significant proportion dedicated to assisting vulnerable countries prepare national adaptation plans,⁹⁶ with less available for implementing adaptation and addressing loss and damage. Even the 2024 Baku decision by parties “to pursue efforts to at least triple annual outflows” from those Funds from 2022 levels by 2030,⁹⁷ will not make a significant dent in meeting the estimated need.

Yet, the climate harms already being faced by vulnerable states at 1.1°C–1.3°C of temperature rise, is extensive and existential, and their need for support is significant. Global costs of extreme weather attributable to climate change in the last twenty years have been estimated as US\$143 billion per year,⁹⁸ and the broader costs of loss and damage are

⁸⁷ Paris Agreement, *supra* note 6, Art. 9.3.

⁸⁸ UNFCCC Dec. 2/CP.15, Copenhagen Accord, at 4, 7, para. 8, UN Doc. FCCC/CP/2009/11/Add.1 (Mar. 30, 2010); Dec. 1/CP.21, *supra* note 73, paras. 53, 114.

⁸⁹ Organisation for Economic Cooperation and Development (OECD), *Climate Finance Provided and Mobilised by Developed Countries in 2013–2022* (May 29, 2024), at https://www.oecd.org/en/publications/climate-finance-provided-and-mobilised-by-developed-countries-in-2013-2022_19150727-en.html.

⁹⁰ UNFCCC Dec.-/CMA.6, New Collective Quantified Goal on Climate Finance (Advance Unedited Version), at 2, para. 8 (2024), at https://unfccc.int/sites/default/files/resource/CMA_11%28a%29_NCQG.pdf?download.

⁹¹ *Id.* at 2, para. 7.

⁹² Valérie Masson-Delmotte et al., *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*, IPCC, Summary for Policy Makers, at 154 (2018).

⁹³ UNFCCC Standing Committee on Finance, First Report on the Determination of the Needs of Developing Country Parties Related to Implementing the Convention and the Paris Agreement (2021), at https://unfccc.int/sites/default/files/resource/54307_2%20-%20UNFCCC%20First%20NDR%20technical%20report%20-%20web%20%28004%29.pdf.

⁹⁴ *Climate Change 2022: Mitigation*, SPM, IPCC, *supra* note 48, at E.5.1.

⁹⁵ UNFCCC Standing Committee on Finance, Fourth (2020) Biennial Assessment and Overview of Climate Finance Flows, at 85 (2021), at https://unfccc.int/sites/default/files/resource/54307_1%20-%20UNFCCC%20BA%202020%20-%20Report%20-%20V4.pdf.

⁹⁶ UNFCCC, Climate Change, Introduction to Climate Finance, at <https://unfccc.int/topics/introduction-to-climate-finance>.

⁹⁷ UNFCCC Dec.-/CMA.6, *supra* note 90, para. 16.

⁹⁸ Rebecca Newman & Ilan Noy, *The Global Costs of Extreme Weather That Are Attributable to Climate Change*, 14 NATURE COMM. (Sept. 2023), at <https://www.nature.com/articles/s41467-023-41888-1>.

estimated to rise to US\$425 billion in 2020 and US\$671 billion in 2030.⁹⁹ The loss and damage fund has thus far attracted pledges of about US\$741 million.¹⁰⁰ The 2023 UAE Consensus acknowledged that there are “significant gaps, including finance, that remain” in responding to loss and damage.¹⁰¹

E. Beyond the UN Climate Regime

As a result of three decades of impassioned advocacy from vulnerable states, the issue of “loss and damage” is addressed in a binding treaty, and there are dedicated institutional mechanisms to address it, including a fund. However, the issue is addressed on the basis of “cooperation and facilitation” rather than “compensation and liability,” it is not anchored in a binding obligation to provide support, and what is available is a fraction of estimated needed.

Many vulnerable island states entered declarations when ratifying the Paris Agreement to clarify that their ratification did not “constitute a renunciation of any rights under international law concerning State responsibility for the adverse effects of climate change” and that “no provision in the Paris Agreement can be interpreted as derogating from principles of general international law or any claims or rights concerning compensation due to the impacts of climate change.”¹⁰² There is ample support for the position that the treaties comprising the UN climate regime do not preclude the operation of general international law. On the contrary, general international law complements and strengthens the obligations in these treaties.¹⁰³

It is in this context and fueled by a frustration with the glacial and unsatisfactory treatment of this issue in the UN climate negotiations that vulnerable states, led by Vanuatu, convinced the General Assembly to approach the ICJ.¹⁰⁴ Since many major emitters, in particular the United States, China, and Russia,¹⁰⁵ have not consented to the compulsory jurisdiction of the Court, a contentious case is not an option, itself an indication of the limits of international law in the climate context. In his statement to the General Assembly,

⁹⁹ Julie-Anne Richards, Liane Schalatek, Leia Achampong & Heidi White, *The Loss and Damage Finance Landscape*, HEINRICH BÖLL STIFTUNG (2023), at <https://us.boell.org/en/2023/05/11/loss-and-damage-finance-landscape>, updating the widely cited study by Anil Markandya & Mikel González-Eguino, *Integrated Assessment for Identifying Climate Finance Needs for Loss and Damage: A Critical Review*, in *LOSS AND DAMAGE FROM CLIMATE CHANGE: CLIMATE RISK MANAGEMENT, POLICY AND GOVERNANCE* 343 (Reinhard Mechler et al. eds., 2018), at https://link.springer.com/chapter/10.1007/978-3-319-72026-5_14.

¹⁰⁰ UNFCCC, Climate Change, Pledges to the Fund for Loss and Damage, at <https://unfccc.int/topics/climate-finance/funds-entities-bodies/fund-for-responding-to-loss-and-damage/pledges-to-the-fund-for-responding-to-loss-and-damage>.

¹⁰¹ UNFCCC Dec. 1/CMA.5, Outcome of the First Global Stocktake, UN Doc. FCCC/PA/CMA/2023/16/Add.1, 2, para. 128 (Mar. 15, 2024) [hereinafter UAE Consensus].

¹⁰² Tuvalu, see also, Vanuatu, Solomon Islands, Philippines, Niue, Nauru, FSM, Marshall Islands, Cook Islands, etc., at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&clang=_en. Similar declarations were entered by these states while ratifying the 1992 UNFCCC and 1997 Kyoto Protocol.

¹⁰³ Sandrine Maljean-Dubois, *The No-Harm Principle as the Foundation of International Climate Law*, in *DEBATING CLIMATE LAW* 15 (Benoit Mayer & Alexander Zahar eds., 2021); see also Lavanya Rajamani, *Interpreting the Paris Agreement in its Normative Environment*, 77 *CURRENT LEGAL PROBS.* (Sept. 2024), at <https://academic.oup.com/clp/advance-article/doi/10.1093/clp/cuae011/7750781>.

¹⁰⁴ See generally *Special Issue: International Climate Litigation*, 32 *REV. EUR., COMPAR. & INT’L ENVTL. L.* 173 (2023).

¹⁰⁵ See ICJ, *Declarations Recognizing the Jurisdiction of the Court as Compulsory*, at <https://www.icj-cij.org/declarations>.

Vanuatu's Prime Minister Alatoi Ishmael Kalsakau Maau'koro noted that while the UNFCCC and Paris Agreement have provided "an invaluable platform for cooperation and action on climate change," the level of ambition is still far adequate, and thus the need for an ICJ advisory opinion "to clarify the rights and obligations of States under international law in relation to the adverse effects of climate change" and "importantly to achieve climate justice."¹⁰⁶

Is the faith in international law, especially the law of state responsibility, to "achieve climate justice" justified? The next part explores contestations over a crucial element of state responsibility for the adverse effects of climate change—the existence (or lack thereof) of an internationally wrongful act.

IV. DISTORTING CLAIMS FOR CLIMATE REPARATIONS IN INTERNATIONAL JUDICIAL PROCEEDINGS

The starting point for the engagement of state responsibility is an "internationally wrongful act."¹⁰⁷ An internationally wrongful act consists of conduct that is "attributable to the State under international law" and constitutes "a breach of an international legal obligation" in force for that state at that time.¹⁰⁸ And, if this can be established, legal consequences flow, and the "responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act."¹⁰⁹ These elements of state responsibility for climate harms have been extensively discussed in the literature,¹¹⁰ and will not be rehearsed here. This part focuses on the existence (or lack thereof) of an internationally wrongful act—a crucial precondition to the engagement of responsibility—to illustrate the extent to which formalistic approaches to international law lend themselves to dismantling claims for climate reparations.

An internationally wrongful act arises from the breach of an international legal obligation, whether such an obligation is contained in a treaty or is part of customary international law. In relation to climate harms, the Paris Agreement, and the customary international law principle of harm prevention are the most directly relevant. Most major emitters—whether developed or developing—argue that the UN climate regime (and particularly the Paris Agreement) is the principal source of climate-related obligations for states and that customary international law, particularly the harm prevention principle,¹¹¹ is not applicable to climate change. In their telling, because the Paris Agreement's procedural obligations have

¹⁰⁶ Government of Vanuatu Press Release, Statement by the Prime Minister Hon. Alatoi Ishmael Kalsakau Maau'koro at the United Nations General Assembly 29 March 2023, at <https://pmo.gov.vu/en/public-information/press-release/1015-statement-by-the-prime-minister-hon-alatoi-ishmael-kalsakau-maau-koro-at-the-united-nation-general-assembly-29-march-2023.html>; see generally, Margaretha Wewerinke-Singh & Diana Hinge Salili, *Between Negotiations and Litigation: Vanuatu's Perspective on Loss and Damage from Climate Change*, 20 CLIMATE POL'Y 684 (2020); see also Toussaint, *supra* note 57.

¹⁰⁷ ARSIWA, *supra* note 10, Arts. 1–2, at 32–34.

¹⁰⁸ *Id.*, Commentary to Art. 2, at 34–36; Art. 13, at 57–59.

¹⁰⁹ *Id.* Art. 31(1), at 91.

¹¹⁰ See, e.g., Voigt, *supra* note 74, at 166; Benoit Mayer, *Climate Change Reparations and the Law and Practice of State Responsibility*, 7 ASIAN J. INT'L L. 185 (2017) (and references therein).

¹¹¹ This Article characterizes the customary principle as the "harm prevention" rather than "no harm" principle. Harm prevention, as Jutta Brunnée notes, reflects a shift in emphasis in the traditional "no harm" rule tailored to the environmental context. See Jutta Brunnée, *Harm Prevention*, in THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 269, 272 (Lavanya Rajamani & Jacqueline Peel, eds., 2d ed. 2021).

not been breached, and the harm prevention principle is not engaged, notwithstanding past and continuing harmful emissions of GHGs from major emitters, no internationally wrongful act has occurred. This two-step argument leads them to the conclusion that state responsibility is not engaged, claims for reparation are baseless, and that diplomatic processes, and the UN climate regime, premised on “cooperation and facilitation,” will ultimately deliver a safe climate. Each of these steps in the argument is presented, contextualized and tested below.

A. *The 2015 Paris Agreement*

The 2015 Paris Agreement, with 196 parties, is the international community’s dedicated legal response to the climate crisis. The “purpose” of this Agreement is to limit global average temperature to “well below 2°C” and “pursue efforts” toward 1.5°C above pre-industrial levels.¹¹² In order to achieve this goal, the Agreement requires parties to achieve a balance between GHG emissions by sources and removals by sinks¹¹³—popularly characterized as “net zero”—in the second half of this century. Toward this end, the Paris Agreement requires parties to communicate a “nationally determined contribution” (NDC)¹¹⁴ every five years,¹¹⁵ accompanied by *ex-ante* information,¹¹⁶ and to account for it *ex-post*.¹¹⁷ Parties’ contributions are neither internationally negotiated nor subject to obligations of result. Parties are obliged to *submit* NDCs but not to *achieve* their targets.¹¹⁸ Parties are obliged, however, to participate in an ambition cycle, which comprises several elements. Parties are to provide information to track progress in implementing and achieving their NDCs.¹¹⁹ Such information flows into a “global stocktake” scheduled every five years,¹²⁰ and into a facilitative implementation and compliance process.¹²¹ Although parties’ contributions are nationally determined, there is a normative expectation that every successive NDC represents a “progression” on the previous, and their “highest possible ambition” and differentiated responsibility.¹²² Developed countries are also expected to advance NDCs that

¹¹² Paris Agreement, *supra* note 6, Art. 2.1.

¹¹³ *Id.* Art. 4.1.

¹¹⁴ *Id.* Art. 4.2.

¹¹⁵ *Id.* Art. 4.9.

¹¹⁶ *Id.* Art. 4.8.

¹¹⁷ *Id.* Art. 4.13.

¹¹⁸ See further for a discussion of the legal character of the Paris Agreement provisions, Lavanya Rajamani, *Ambition and Differentiation in the 2015 Paris Agreement: Interpretative Possibilities and Underlying Politics*, 65 INT’L COMP. L. Q. 493 (2016); Daniel Bodansky, *The Legal Character of the Paris Agreement*, 25 REV. EUR., COMP. & INT’L ENVTL. L. 142 (2016); Ralph Bodle & Sebastian Oberthür, *Legal Form of the Paris Agreement and Nature of its Obligations*, in THE PARIS AGREEMENT ON CLIMATE CHANGE: ANALYSIS AND COMMENTARY 91 (Daniel Klein et al. eds., 2017).

¹¹⁹ Paris Agreement, *supra* note 6, Art. 13.7(b); UNFCCC Dec. 18/CMA.1, Modalities, Procedures and Guidelines for the Transparency Framework for Action and Support Referred to in Article 13 of the Paris Agreement, UN Doc. FCCC/PA/CMA/2018/3/Add.2, 18 (Mar. 19, 2019).

¹²⁰ Paris Agreement, *supra* note 6, Art. 14; UNFCCC Dec. 19/CMA.1, Matters Relating to Article 14 of the Paris Agreement and Paragraphs 99–101 of Decision 1/CP.21, UN Doc. FCCC/PA/CMA/2018/3/Add.2, 53 (Mar. 19, 2019).

¹²¹ Paris Agreement, *supra* note 6, Art. 15; UNFCCC Dec. 20/CMA.1, Modalities and Procedures for the Effective Operation of the Committee to Facilitate Implementation and Promote Compliance Referred to in Article 15, Paragraph 2, of the Paris Agreement, 59, UN Doc. FCCC/PA/CMA/2018/3/Add.2 (Mar. 19, 2019).

¹²² Paris Agreement, *supra* note 6, Art. 4.3.

reflect their leadership.¹²³ Developed countries carefully circumscribed obligations to provide financial support under the UNFCCC are continued under the Paris Agreement.¹²⁴

Although there are profound differences between them in their interpretations of the Paris Agreement—in particular on differentiation between states—there is remarkable unity among the major emitters that the Paris Agreement, characterized as the product of “engaged, protracted negotiations and careful compromise between States”¹²⁵ and “embodying the clearest, most specific, and most current expression of states’ consent to be bound by international law in respect of climate change,”¹²⁶ is the last word on the obligations of states to avert climate harms. China in its submissions to the International Tribunal for the Law of the Sea (ITLOS), stressed the primacy of the UN climate regime in order to argue that if states meet their obligations under this regime they also satisfy their obligations to protect and preserve the marine environment under Part XII of the United Nations Convention on the Law of the Sea (UNCLOS).¹²⁷ India in a similar vein argued that the UN climate regime deals with “issues arising from and pertaining to climate change, with the customary law principle of CBDR-RC as its cornerstone,” and since the question is “to determine the obligation of States Parties to the UNCLOS in relation to climate change” . . . “the question should be addressed within the UNFCCC framework.”¹²⁸ Crucially, China argued, citing Article 55 of the Articles on State Responsibility,¹²⁹ that because the UN climate regime is “fundamental and primary” (i.e., *lex specialis*) in addressing climate change, state responsibility for internationally wrongful acts “cannot be resorted to.”¹³⁰ Most major emitters have also adopted this position in their submissions to the ICJ for the advisory opinion on climate change. The United States argues that “ongoing diplomatic efforts” in the UN climate regime and especially the Paris Agreement, offer “the best means for achieving the international community’s shared climate goals and protecting the climate system for the benefit of present and future generations.”¹³¹

¹²³ *Id.* Art. 4.4.

¹²⁴ *Id.* Arts. 9.1, 9.3.

¹²⁵ Obligations of States in Respect of Climate Change, Request for an Advisory Opinion, Written Statement of Australia, para. 2.62 (ICJ Mar. 22, 2024), at <https://www.icj-cij.org/sites/default/files/case-related/187/187-20240326-wri-02-00-en.pdf> [hereinafter Written Statement of Australia for ICJ Advisory Opinion].

¹²⁶ Obligations of States in Respect of Climate Change, Request for an Advisory Opinion, Written Statement of the United States of America, para. 1.3 (Mar. 22, 2024), at <https://www.icj-cij.org/sites/default/files/case-related/187/187-20240322-wri-06-00-en.pdf> [hereinafter Written Statement of United States for ICJ Advisory Opinion].

¹²⁷ Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law – Public Sitting Held on Friday, 15 September 2023, at ITLOS – Verbatim Record, ITLOS/PV.23/C31/10/Rev.1, at 30, China (2023), at https://www.itlos.org/fileadmin/itlos/documents/cases/31/Oral_proceedings/verbatim_records_rev/ITLOS_PV23_C31_10_Rev.1_E.pdf [hereinafter ITLOS Climate Change Advisory Opinion Submission]; United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 UNTS 397.

¹²⁸ Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law, Written Statement by the Republic of India, at 5 (ITLOS), at https://www.itlos.org/fileadmin/itlos/documents/cases/31/written_statements/3/C31-WS-3-4-India.pdf.

¹²⁹ ARSIWA, *supra* note 2, Art. 55, at 140.

¹³⁰ ITLOS Climate Change Advisory Opinion Submission, *supra* note 127, at 30, China.

¹³¹ Obligations of States in Respect of Climate Change, Request for an Advisory Opinion, Written Comments of the United States of America, para. 1.7 (ICJ Aug. 15, 2024), at <https://www.icj-cij.org/sites/default/files/case-related/187/187-20240815-wri-09-00-en.pdf>.

This step of the argument—that the Paris Agreement is *lex specialis* and occupies the field on climate protection—has been canvassed before the ITLOS and ICJ. The ITLOS rejected this view holding that while the UNFCCC and the Paris Agreement, in particular the Paris Agreement’s temperature goal and timeline for emissions pathways are relevant in interpreting and applying the Convention, the Paris Agreement is not *lex specialis* to the UNCLOS, and the obligations under the Convention would not be satisfied simply by complying with the Paris Agreement.¹³² It remains to be seen what the ICJ will opine on this issue, but the approach taken by ITLOS offers the glimmerings of a holistic, purpose-driven vision of international law. The interpretative approach taken by ITLOS underscores the importance, in line with the argument advanced here, of interpreting treaties in their normative environment. While the opinion that the Paris Agreement is not *lex specialis* to the UNCLOS, would also be supported by a straightforward application of the rules of treaty interpretation, ITLOS goes further and incorporates the Paris Agreement benchmarks—the temperature goal and timeline for emissions pathways—in shaping the standard of due diligence required of states.

In any case, if the logic presented by the major emitters is accepted, the primacy of the UN climate regime, and the Paris Agreement in particular means that an internationally wrongful act must be based on the obligations in the Paris Agreement. Yet those obligations are primarily procedural (as for instance submission of an NDC) with some substantive obligations (such as undertaking domestic mitigation measures) linked to obligations of conduct (and associated due diligence) and good faith normative expectations. There are no obligations of result for GHG mitigation, provision of support for loss or damage, or transfer of finance to vulnerable developing countries. On these, the Paris Agreement defers to national circumstances, self-selected targets and goals, and self-justified determinations of fairness, ambition, and progression. Fundamentally, the design logic of the Paris Agreement is premised on “national determination” and privileges national autonomy over centralized prescriptive regulation.¹³³ In a provision emblematic of the centrality of national determination to the consensus underpinning the Paris Agreement, the 2023 UAE Consensus “reaffirms the nationally determined nature of nationally determined contributions”¹³⁴

The carefully negotiated discretionary language, use of choice auxiliary verbs, and profusion of caveats around each of the core obligations in the Paris Agreement¹³⁵ makes it challenging to identify an international legal obligation that lends itself to assessments of compliance or non-compliance and thus breach. The obligations most likely to lend themselves to such assessments are those that the Paris Agreement’s Implementation and Compliance Committee can initiate consideration on.¹³⁶ These are binding procedural

¹³² Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law, Advisory Opinion, paras. 222–24 (ITLOS May 21, 2024), at https://www.itlos.org/fileadmin/itlos/documents/cases/31/Advisory_Opinion/C31_Adv_Op_21.05.2024_orig.pdf.

¹³³ See generally Rajamani, *supra* note 103 (for a discussion of the primacy of national determination in the Paris Agreement).

¹³⁴ UAE Consensus, *supra* note 101, para. 39.

¹³⁵ Lavanya Rajamani, *The 2015 Paris Agreement: Interplay Between Hard, Soft and Non-Obligations*, 28 J. ENVTL. L. 337 (2016).

¹³⁶ UNFCCC Dec. 20/CMA.1, *supra* note 121, Annex, para. 22 (a)(i)–(iv).

obligations to submit an NDC,¹³⁷ report,¹³⁸ and participate in the “facilitative, multilateral consideration of progress.”¹³⁹ Even if a breach of these binding procedural obligations were found, the conduct that needs to end is the specific conduct that constitutes a breach of the relevant obligation.¹⁴⁰ And, the reparation due would be based on the injury caused by the internationally wrongful act.¹⁴¹ The relevant internationally wrongful act is not excessive GHG emissions but the breach of procedural obligations. This breach would need to end, and reparation would be due for the (limited) injury caused by this breach.

B. Customary International Law: Harm Prevention

The harm prevention principle imposes a responsibility on states “to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.”¹⁴² The principle of harm prevention is a binding customary rule,¹⁴³ which imposes on states an obligation of conduct (rather than of result) subject to the exercise of “due diligence.”¹⁴⁴

Many major emitters argue that the harm prevention principle cannot be extended to the climate context. The United States argues that activities that emit GHGs differ from the point source activities or pollution at issue in the harm prevention principle.¹⁴⁵ India similarly argues that environmental pollution and climate change differ along “temporal and spatial scales,” and must not be conflated.¹⁴⁶ China adds that the issue of climate change differs from transboundary harm due to its global, historical, and cumulative nature.¹⁴⁷ Australia notes that extending the principle to climate change would be inconsistent with the established approach to determining the existence and content of customary rules and fail to

¹³⁷ Paris Agreement, *supra* note 6, Art. 4.

¹³⁸ *Id.* Arts. 13(7), 13(9), 9(7), 9(5).

¹³⁹ *Id.* Art. 13(11).

¹⁴⁰ ARSIWA, *supra* note 2, Art. 30, at 88, 89, paras. 1–2, 5.

¹⁴¹ *Id.* Art. 31, at 91.

¹⁴² Rep. of the UN Conf. on the Hum. Env’t, Stockholm, 5–16 June 1972, Declaration of the United Nations Conference on the Human Environment, at 3, Prin. 21, at 5, UN Doc. A/CONF/48/14/Rev.1 (1973); Rep. of the UN Conf. on Env’t and Dev., Rio de Janeiro, 3–14 June 1992, Annex I – Rio Declaration on Environment and Development, Prin. 2, UN Doc. A/CONF.151/26 (Vol. I) (1992).

¹⁴³ See Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 ICJ Rep. 226 (July 8); Gabčíkovo-Nagymaros Project (Hung./Slovk.), Judgment, 1997 ICJ Rep. 7 (Sept. 25); Case Concerning Pulp Mills on the River Uruguay (Arg. v. Uru.), Judgment, 2010 ICJ Rep. 14, (Apr. 20); Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.), Judgment, 2015 ICJ Rep. 665, (Dec. 16); see also Int’l Law Comm’n, Rep. on the Work of Its Fifty-Third Session, Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, at 146, 149, UN Doc. A/56/10 (2001) [hereinafter Draft Articles on Transboundary Harm].

¹⁴⁴ See Draft Articles on Transboundary Harm, *supra* note 143; see generally Brunnée, *supra* note 111, at 269. For an extended discussion of the standard of due diligence for climate change, see Rajamani, *supra* note 103; see also Benoit Mayer, *Customary Obligations, in* INTERNATIONAL LAW OBLIGATIONS ON CLIMATE CHANGE MITIGATION, Ch. III (2022).

¹⁴⁵ Written Statement of United States for ICJ Advisory Opinion, *supra* note 126, paras. 4.16–4.19.

¹⁴⁶ Obligations of States in Respect of Climate Change, Request for an Advisory Opinion, Written Statement of India, para. 17 (ICJ Mar. 21, 2024), at <https://www.icj-cij.org/sites/default/files/case-related/187/187-20240321-wri-05-00-en.pdf>.

¹⁴⁷ Obligations of States in Respect of Climate Change, Request for an Advisory Opinion, Written Statement of China, para. 128 (ICJ Mar. 22, 2024), at <https://www.icj-cij.org/sites/default/files/case-related/187/187-20240322-wri-19-00-en.pdf>.

account for the unique features of the climate challenge, which is addressed in the climate treaty regime.¹⁴⁸

The International Law Commission also notes that while in the context of “transboundary atmospheric pollution” the harm prevention principle is “firmly established” as custom, this is “still somewhat unsettled” for global atmospheric degradation.¹⁴⁹

While there are admittedly differences between the archetypal cases of transboundary environmental harm that led to the emergence of the harm prevention principle and the global commons issue of climate change, the fact that this principle is applicable to and can be adapted to the climate context is evident from the explicit reference to it in the preamble to the UNFCCC.¹⁵⁰ Further, at its core the harm prevention principle imposes obligations of conduct subject to due diligence requirements, which in the context of climate change, the Paris Agreement also does. The harm prevention principle strengthens the obligations in the Paris Agreement rather than displaces it.

Nevertheless, a finding that the harm prevention principle either does not apply to climate change, i.e., “global atmospheric degradation,” because it is fundamentally different in character to transboundary harm, or that even if it applies, it has not yet attained the status of a custom, would be fatal to a claim for reparation that would need to be premised on a breach of an international obligation.

Some major emitters argue that even if the customary harm prevention principle is engaged by climate change, and represents custom, it operates as *lex generalis* while the climate treaties operate as *lex specialis*, and the principle “is applied subsidiarily to the norms of climate treaties.”¹⁵¹ Others, even while questioning its applicability to climate change, note that compliance with Parties’ obligations under the UN climate regime should be understood as satisfying a general due diligence standard under customary law.¹⁵² As the United States notes, “[i]t is those diplomatic efforts that provide the best means for protecting the climate system for the benefit of present and future generations.”¹⁵³ Again, for the major emitters all roads lead to the UN climate treaties.

The tightly constructed legal narrative deployed by major emitters to dismantle claims for reparations by finding no discernible internationally wrongful act is embedded squarely in a formalistic consent-based vision of international law. But there are other approaches to interpreting the UN climate treaties and the customary harm prevention principle that address issues of existential salience to humanity and the planet.

V. RECLAIMING AND EMPOWERING INTERNATIONAL LAW

The United Nations Human Rights Committee in its path-breaking 2022 case *Daniel Billy and Others v. Australia (Torres Strait Islanders Petition)* noted that: “[t]reaties should be

¹⁴⁸ Written Statement of Australia for ICJ Advisory Opinion, *supra* note 125, para. 3.13.

¹⁴⁹ Int’l Law Comm’n, Rep. on the Work of Its Seventy-Second Session, Draft Guidelines on the Protection of the Atmosphere, with Commentaries, at 12, 13 (2021), at 27–28, para. 8, UN Doc. A/76/10.

¹⁵⁰ UNFCCC, *supra* note 2, pmbl. Rec. 8.

¹⁵¹ Obligations of States in Respect of Climate Change, Request for an Advisory Opinion, Written Statement of the Russian Federation, at 8 (ICJ Mar. 21, 2024), at <https://www.icj-cij.org/sites/default/files/case-related/187/187-20240321-wri-12-00-en.pdf>.

¹⁵² Written Statement of United States for ICJ Advisory Opinion, *supra* note 126, para. 4.25, n. 320.

¹⁵³ Written Comments of United States for ICJ Advisory Opinion, *supra* note 131, para. 6.6.

interpreted in the context of their normative environment.”¹⁵⁴ In this vein, the Paris Agreement is to be read, interpreted, and applied not in an atomistic fashion, as many major emitters argue, but rather in the light of its rich normative environment, which includes the customary harm prevention principle, widely ratified treaties, such as the core human rights instruments,¹⁵⁵ other treaties such as the UNCLOS, and a range of principles and standards¹⁵⁶ of differing legal character and gravitas. These norms form an intricate tapestry of interlocking obligations and principles within which the UN climate treaties are set. As with the threads that form a tapestry, norms are woven together to create a rich and vibrant vision for the international community, each norm complementing and strengthening others, and maintaining the perfect tension between them to hold the vision aloft. This approach maps on to and is supported by the interpretative framework of the Vienna Convention on the Law of Treaties (VCLT), as discussed below.

The General Assembly resolution seeking an ICJ advisory opinion rests on this premise. It requests that the ICJ have “particular regard to” the UN Charter, International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the UNFCCC, the Paris Agreement, UNCLOS, the duty of due diligence, the rights recognized in the Universal Declaration of Human Rights, the harm prevention principle and the duty to protect and preserve the marine environment.¹⁵⁷ The use of the language “particular regard to” rather than a formulation limiting the scope to specific instruments, suggests that while these instruments are salient, the entire corpus of international law could be pressed into service, as appropriate.¹⁵⁸

Flowing from this more holistic interpretative approach, the standard of due diligence in customary law, among other norms, strengthens, bolsters, and enhances the obligations under the Paris Agreement and vice versa.¹⁵⁹ Customary and treaty norms reinforce each other in this instance. This is in evidence, for instance, in the *South China Sea Award* where the Arbitral Tribunal held that the harm prevention principle “informs the scope of the general obligation in Article 192” of the UNCLOS.¹⁶⁰

This approach is supported by the interpretative framework of the VCLT, which provides that while interpreting treaties, “[t]here shall be taken into account” “any relevant rules of

¹⁵⁴ UNHRC, Views Adopted by the Committee on 21 July 2022 Under Article 5(4) of the Optional Protocol, Concerning Communication No. 3624/2019, *Daniel Billy and Others v. Australia* (Torres Strait Islanders Petition), UN Doc. CCPR/C/135/D/3624/2019 (Sept. 18, 2023).

¹⁵⁵ See, e.g., GA Res. 217 A(III), Universal Declaration of Human Rights (Dec. 10, 1948); International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171 (74 signatories, 174 Parties); International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 UNTS 3 (71 signatories, 172 Parties); Convention on the Rights of the Child, Nov. 20, 1989, 1577 UNTS 3 (140 signatories, 196 Parties), with ratification statistics as of August 1, 2024; UNCLOS, *supra* note 127.

¹⁵⁶ In the context of grave environmental harm, the ICJ in the *Gabčíkovo-Nagymaros* case noted the need to take new norms and standards into account. *Gabčíkovo-Nagymaros*, *supra* note 143, at 74–75, para. 140.

¹⁵⁷ GA Res. 77/276, Request for an Advisory Opinion of the International Court of Justice on the Obligations of States in Respect of Climate Change (Mar. 29, 2023).

¹⁵⁸ *Id.*, pmbl. Recs. 5–7 (references several treaties, principles, and norms of soft law); see Obligations of States in Respect of Climate Change, Request for an Advisory Opinion, Written Statement of Vanuatu, para. 83 (ICJ Mar. 21, 2024), at <https://www.icj-cij.org/sites/default/files/case-related/187/187-20240321-wri-06-00-en.pdf>.

¹⁵⁹ See also Christina Voigt, *The Power of the Paris Agreement in International Climate Litigation*, 32 REV. EUR., COMP. & INT’L ENVTL. L. 237 (2023); Maljean-Dubois, *supra* note 103.

¹⁶⁰ The South China Sea Arbitration (Phil. v. China), PCA Case No. 2013-19, para. 941 (July 12, 2016); see Maljean-Dubois, *supra* note 103.

international law applicable in the relations between the parties.”¹⁶¹ This provision, according to the International Law Commission, reflects the objective of “systemic integration,”¹⁶² which supports the tapestry of inter-locking obligations and principles approach advanced here. General international law is particularly salient in interpretation when the “treaty rule is unclear or open-textured,”¹⁶³ as is the case with numerous provisions in the UN climate treaties. States such as those of the European Union (EU)¹⁶⁴ and Switzerland¹⁶⁵ endorse this position, but the United States argues that other rules are either inapplicable, irrelevant, general, or trumped by the Paris Agreement.¹⁶⁶ The VCLT interpretative framework signals that rules of international law need to be interpreted compatibly to advance systemic integration in international law.¹⁶⁷ Interpreting the Paris Agreement in its normative environment strengthens such systemic integration.

If the ICJ were to adopt this holistic purpose-driven approach it would find an ongoing internationally wrongful act. A “stringent”¹⁶⁸ standard of due diligence attaches both to the obligations of conduct in the Paris Agreement, specifically in Article 4, as well as to the harm prevention principle.¹⁶⁹ This standard of due diligence is also “objective”¹⁷⁰ as it does not depend on the subjective will and judgment of the State but is based on concrete benchmarks. In its Advisory Opinion on Climate Change, ITLOS noted that, the “content of an obligation of due diligence should be determined objectively under the circumstances, taking into account relevant factors,”¹⁷¹ and that “an obligation of due diligence can be highly demanding.”¹⁷² The relevant factors in the context of climate change include: the best available science;¹⁷³ the object and purpose of the Paris Agreement, especially its temperature

¹⁶¹ Vienna Convention on the Law of Treaties, Art. 31(3)(c), May 23, 1969, 1155 UNTS 331.

¹⁶² Int’l Law Comm’n, Rep. on the Work of Its Fifty-Eighth Session, at 180, para. 17, UN Doc. A/61/10 (2006).

¹⁶³ *Id.* at 180, para. 20(a).

¹⁶⁴ Obligations of States in Respect of Climate Change, Request for an Advisory Opinion, Written Statement of European Union (Mar. 22, 2024), at <https://www.icj-cij.org/sites/default/files/case-related/187/187-20240322-wri-07-00-en.pdf> [hereinafter Written Statement of EU for ICJ Advisory Opinion].

¹⁶⁵ Obligations of States in Respect of Climate Change, Request for an Advisory Opinion, Written Statement of Swiss Confederation, para. 66 (Mar. 18, 2024), at <https://www.icj-cij.org/sites/default/files/case-related/187/187-20240318-wri-02-00-en.pdf>.

¹⁶⁶ See generally Written Statement of United States for ICJ Advisory Opinion, *supra* note 126.

¹⁶⁷ Int’l Law Comm’n, Rep. on the Work of Its Fifty-Eighth Session, *supra* note 162.

¹⁶⁸ By extension from the reasoning of ITLOS, which found a stringent standard of due diligence, given the risks of serious and irreversible harm from GHG emissions to the marine environment. See ITLOS Climate Change Advisory Opinion, *supra* note 132, para. 241.

¹⁶⁹ For a discussion of the benchmarks to concretize the applicable objective, stringent standard of due diligence, see Rajamani, *supra* note 103, and Lavanya Rajamani, *Due Diligence in International Climate Change Law*, in *DUE DILIGENCE IN THE INTERNATIONAL LEGAL ORDER* 163 (Heike Krieger, Anne Peters & Leonhard Kreuzer eds., 2020).

¹⁷⁰ See Obligations of States in Respect of Climate Change, Request for an Advisory Opinion, Written Statement of COSIS, para. 89 (Mar. 22, 2024), at <https://www.icj-cij.org/sites/default/files/case-related/187/187-20240322-wri-09-00-en.pdf>.

¹⁷¹ ITLOS Climate Change Advisory Opinion, *supra* note 132, para. 257.

¹⁷² *Id.*

¹⁷³ UNFCCC, *supra* note 2, pmbl. Rec. 16; Paris Agreement, *supra* note 6, pmbl. Rec. 4, Arts. 4.1, 14.1; UNFCCC Dec. 1/CMA.3, Glasgow Climate Pact, para. 23, UN Doc. FCCC/PA/CMA/2021/10/Add.1, 2 (Mar. 8, 2022); UAE consensus, *supra* note 101, paras. 6, 28(d), 39, 55, 61, 149.

goal;¹⁷⁴ the normative expectation that states contributions will reflect their highest possible ambition;¹⁷⁵ states' human rights obligations;¹⁷⁶ leadership from those with higher capacity and contribution to harm;¹⁷⁷ and the nature and degree of harm suffered in the absence of due diligence.¹⁷⁸ This interpretative approach to the Paris Agreement cannot displace the clear terms of the Paris Agreement, impose obligations where none exist, or replace obligations of conduct with obligations of result. Nevertheless, it is possible to discern a high standard of due diligence that has been breached and continues to be.

The NDCs of major emitters reflect radically inadequate ambition, as discussed in Part II. UNEP reports “that governments plan to produce, in 2030, 110% more fossil fuels than would be consistent with limiting warming to 1.5°C” and “69% more than would be consistent with limiting warming to 2°C.”¹⁷⁹ And, the International Monetary Fund (IMF) records global fossil fuel subsidies as having reached US\$7 trillion in 2022.¹⁸⁰ Notably, the 2023 UAE Consensus “calls on” Parties to transition away “from fossil fuels in energy systems, in a just, orderly and equitable manner, accelerating action in this critical decade, so as to achieve net zero by 2050.”¹⁸¹

If the standard of due diligence required of states has been breached, and an internationally wrongful act is found, a claim for reparations would flow naturally from it.¹⁸² Although it would be beyond the scope of an advisory opinion for the ICJ to order

¹⁷⁴ Paris Agreement *supra* note 6, Art. 2, and subsequent COP decisions shifting the emphasis to 1.5°C, such as the Glasgow Climate Pact, *supra* note 173, paras. 21–22; UNFCCC Dec. 1/CMA.4, Sharm el-Sheikh Implementation Plan, paras. 8, 15, 23, UN Doc. FCCC/PA/CMA/2022/10/Add.1, 2 (Mar. 17, 2023); UAE Consensus, *supra* note 101, para. 4. The normative weight of 1.5°C has been recognized in national and regional courts including the Brussels Court of Appeal in *VZW Klimaatzaak v. Kingdom of Belgium & Others*, Case 2021/AR/1589, para. 191 (Nov. 30, 2023), and the European Court of Human Rights in *Verein KlimaSeniorinnen Schweiz & Others v. Switzerland*, App. No. 53600/20, para. 436 (Apr. 9, 2024). The 2024 ITLOS Advisory Opinion also underscored the salience of the Paris Agreement’s “temperature goal and the timeline for emission pathways” (Articles 2.1 and 4.1) in informing measures to protect the marine environment. ITLOS Climate Change Advisory Opinion, *supra* note 132, para. 222.

¹⁷⁵ Paris Agreement, *supra* note 6, Art. 4.3; UNFCCC Dec. 4/CMA.1, Further Guidance in Relation to the Mitigation Section of Decision 1/CP.21, Annex I, para. 6, UN Doc. FCCC/PA/CMA/2018/3/Add.1 (Mar 19, 2019); *see generally* Voigt, *supra* note 159.

¹⁷⁶ Paris Agreement, *supra* note 6, pmb. Rec. 11; notes 35–45 *supra*.

¹⁷⁷ *See* UNFCCC, *supra* note 2, Art. 3; Paris Agreement, *supra* note 6, Arts. 2(2), 4(4). *See also* the UNHRC in the *Torres Strait Islanders Petition* case, *supra* note 154, Annex II, para. 5, noting that a “higher standard of due diligence” applies to “States with significant total emissions or very high per capita emissions” given the “greater burden that their emissions place on the global climate system, as well as to States with higher capacities to take high ambitious mitigation action.” *See also* Written Statement of EU for ICJ Advisory Opinion, *supra* note 164, para. 209.

¹⁷⁸ The International Law Commission noted that the standard for due diligence should be “appropriate and proportional to the degree of risk of the transboundary harm.” *See* Draft Articles on Transboundary Harm, *supra* note 143, Art. 3, para. 11. The ITLOS Seabed Mining Advisory Opinion, found the precautionary approach “an integral part of the general obligation of due diligence.” *See* Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, ITLOS Rep. 10, Advisory Opinion, para. 131 (Feb. 1, 2011), at https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/17_adv_op_010211_en.pdf. And, UNFCCC, *supra* note 2, Article 3 underscores the salience of the precautionary approach. The overwhelming scientific evidence of irreversible climate impacts at temperatures above 1.5°C suggests a demanding due diligence standard.

¹⁷⁹ UNEP, Production Gap Report 2023: Phasing Down or Phasing Up?, at 16 (Nov. 8, 2023), at <https://www.unep.org/resources/production-gap-report-2023>.

¹⁸⁰ IMF, *Fossil Fuel Subsidies*, at <https://www.imf.org/en/Topics/climate-change/energy-subsidies>.

¹⁸¹ UAE Consensus, *supra* note 101, para. 28(d) (emphasis removed).

¹⁸² The nature and extent of such reparations is beyond the scope of this Article.

reparations, even the recognition by the ICJ that such a claim could exist would provide vital steer for cases in other courts. National,¹⁸³ regional,¹⁸⁴ and international¹⁸⁵ courts, in the context of rights-based climate litigation¹⁸⁶ have begun to hold states accountable for rights violations stemming from insufficient mitigation or adaptation action that causes or exacerbates climate harms. While these are not state-to-state claims, and no claims for reparations have yet been awarded,¹⁸⁷ the prospects that some compensation might be provided to those on the frontlines of climate impacts would be brighter should the ICJ recognize the compelling claims for climate reparations before it.

VI. CONCLUSION

Vulnerable states, battered by extreme weather events and watching their lands slip away under rising seas, even as major emitters question climate treaties, exploit loopholes and dilute commitments, have a compelling case for climate reparations, i.e., that the harm caused be remedied. Yet their efforts to advance their claims for reparations in the UN climate regime have been thwarted by major emitters who have deflected these claims by basing the treatment of loss and damage on “cooperation and facilitation” and excluding any consideration of “compensation and liability.” And they are seeking to distort such claims in proceedings before the ICJ by arguing for narrow, formalistic interpretations of core obligations that would lead to the counterintuitive finding that no internationally wrongful act had occurred.

Admittedly, an internationally wrongful act and a case for reparation can only be found against individual states, based on a tailored appreciation of the law and facts that applies in that context, and not on the basis of harms to categories of states. There is also a compelling argument to be made, as Steven Ratner has, that international law does not lend itself to resolving issues that are as morally and political fraught as reparations. International law as currently conceived and applied is indeed a limited tool in addressing the grave existential challenge of climate change, yet it is also the only tool that vulnerable states have, and it is for them to reimagine and repurpose it. Beneath the surface of seemingly technical

¹⁸³ See, e.g., *The State of the Netherlands v. Stichting Urgenda*, ECLI:NL:HR:2019:2007, No. 19/00135 (Sup. Ct. Neth. Dec. 20, 2019); *Neubauer et al. v. Germany*, 1BvR 2656/18 (Fed. Const. Ct. Ger. Mar. 24, 2021); *VZW Klimaatzaak v. Kingdom of Belgium and Others*, 2021/AR/1589 (Ct. App. Brussels Nov. 30, 2023); *Asghar Leghari v. Federation of Pakistan*, W.P. No. 25501/2015 (Lahore High Ct. Jan. 25, 2018); *M K Ranjitsinh & Ors. V. Union of India & Ors.*, 2024 INSC 280 (Sup. Ct. India Mar. 21, 2024).

¹⁸⁴ See, e.g., *Verein Klimasenioren Schweiz and Others v. Switzerland*, *supra* note 174.

¹⁸⁵ See, e.g., *Torres Strait Islanders Petition*, *supra* note 154.

¹⁸⁶ There are over 2,600 climate cases in national, regional, and international courts. An estimated 70% of cases have been filed since the Paris Agreement, in part to plug its gaps, and 45% of all cases filed have been before human rights fora. Only thirty-four of these seek monetary damages from defendants, usually oil companies, for the climate harms caused. See Joana Setzer & Catherine Higham, *Global Trends in Climate Change Litigation: 2024 Snapshot*, LONDON SCH. ECON. (June 2024), at <https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2024/06/Global-trends-in-climate-change-litigation-2024-snapshot.pdf>.

¹⁸⁷ Some applicants explicitly include claims for reparations. See, e.g., *Petition to the Inter-American Commission on Human Rights Seeking to Redress Violations of the Rights of Children in Cité Soleil, Haiti* (IACHR Feb. 4, 2021), at <https://climatecasechart.com/non-us-case/petition-to-the-inter-american-commission-on-human-rights-seeking-to-redress-violations-of-the-rights-of-children-in-cite-soleil-haiti>. See generally Margarethe Wewerinke-Singh, *The Rising Tide of Rights: Addressing Climate Loss and Damage Through Rights-Based Litigation*, 12 TRANSNAT'L ENVTL. L. 537 (2023).

interpretational differences of the relevant norms of international law lies a fundamental divide between competing visions of international law—a formalistic approach that envisions international law as limited to that which states expressly consent (or not) to, and a purpose-driven, progressive, and emancipatory approach to international law, advanced in this article, that seeks to address global existential challenges and begin to deliver international (climate) justice. The dissonance between these competing visions of international law, at the root, *inter alia*, of the contestations over climate reparations, has led to a lack of ownership of the climate problem, and created an enduring drag in addressing it. This has not only entrenched a profound sense of unfairness as climate harms ravage vulnerable states; it has also affected the ability of the international community to deliver a climate safe planet. It would take a remarkable leap of legal imagination and political courage for international law to re-orient itself to the challenge of addressing and redressing climate change. It remains to be seen if international law is up to this pressing task.¹⁸⁸

¹⁸⁸ The ICJ delivered its advisory opinion on July 23, 2025 just as this issue was about to print. *Obligations of States in Respect of Climate Change Advisory Opinion* (ICJ July 23, 2025), at <https://www.icj-cij.org/sites/default/files/case-related/187/187-20250723-adv-01-00-en.pdf>. While a full analysis of the ICJ's advisory opinion could not be integrated into this Article, it is worth noting that the ICJ unanimously took the "remarkable leap of legal imagination and political courage" advocated for in this Article. The ICJ interpreted the UNFCCC, Kyoto Protocol, and the Paris Agreement in its rich normative environment, which it understood as including other environmental treaties, UNCLOS, human rights treaties, the customary international law obligations of harm prevention and cooperation, and principles of international environmental law, such as sustainable development, precaution, and equity. It rejected the argument advanced by major emitters that the Paris Agreement operates as *lex specialis* in this field. It also extended the harm prevention principle to apply to global environmental harms. Remarkably, the ICJ laid out a stringent and objective standard of due diligence for states in relation to their actions causing climate harms and noted that breach of this standard by states could constitute an internationally wrongful act for which reparations would be due. In unanimously arriving at this far-reaching opinion on the obligations of states in relation to climate change, the ICJ took a purpose-driven, progressive approach to international law, offered vulnerable states hope that international law could deliver climate justice, and reinforced the continuing salience of international law in addressing civilizational challenges.