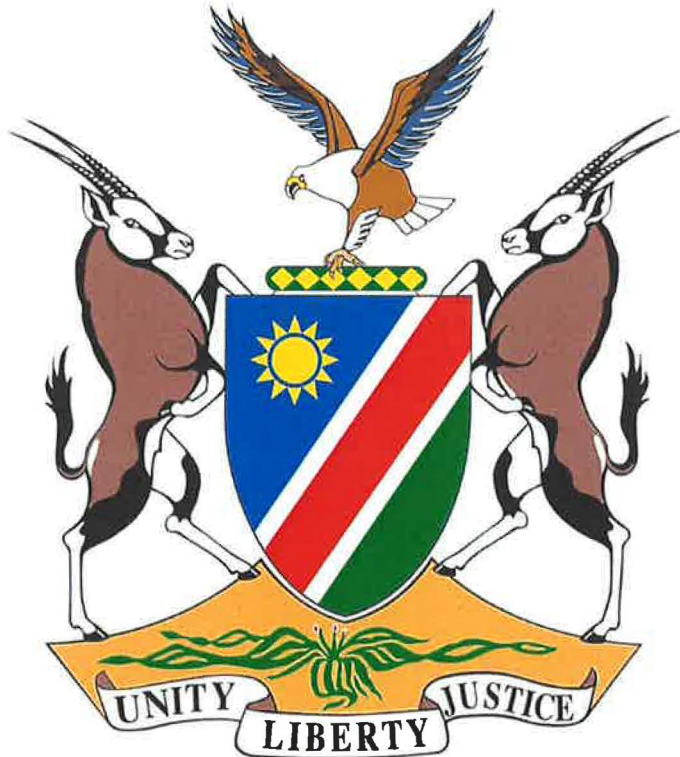


INTERNATIONAL COURT OF JUSTICE

OBLIGATIONS OF STATES IN RESPECT OF CLIMATE CHANGE

(REQUEST FOR ADVISORY OPINION)



**WRITTEN STATEMENT OF
THE REPUBLIC OF NAMIBIA**

19 MARCH 2024

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I. INTRODUCTION

1. The Republic of Namibia (“Namibia”) submits this Written Statement in accordance with the Court’s Orders of 20 April, 4 August, and 15 December 2023 regarding the Request for an Advisory Opinion submitted by the United Nations General Assembly in Resolution 77/276.

2. Namibia has the upmost regard for the International Court of Justice as the highest platform of adjudication in the United Nations system. It is particularly mindful of the contribution of the Court’s 1971 Advisory Opinion to the emergence of Namibia as an independent State in the exercise of the right to self-determination.¹ Through the present proceedings, the Court again has the opportunity to exercise its advisory jurisdiction in response to one of the most existential questions facing humanity: the obligations of States in relation to climate change.

3. The General Assembly has, for the first time in its history, requested by consensus that the Court give an advisory opinion.² The significance of this must not be understated. Never has the international community been so united behind a request for the Court to pronounce on questions of international law. The Court’s advisory jurisdiction has typically been seized in contexts where one or more States oppose, sometimes vigorously, the giving of an advisory opinion by the Court. However, the present request has come to the Court with the universal support of the international community.

¹ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971* (hereinafter “*Namibia Advisory Opinion*”), p. 16.

² UN General Assembly, Resolution 77/276, *Request for an advisory opinion of the International Court of Justice on the obligations of States in respect of climate change*, UN Doc. A/RES/77/276 (4 April 2023) (Dossier No. 2).



4. The consensus on Resolution 77/276 reflects the international community's collective recognition that climate change-induced events are wreaking havoc on the world as we know it. Catastrophic floods are engulfing cities. Wildfires are destroying lives and livelihoods. Unprecedented aridity is depriving millions of the essentials of life. The urgency and severity of these global challenges have compelled nations to set aside their differences in the face of a shared existential threat.

5. The international community, however, has done strikingly little to combat climate change. Global greenhouse gas emissions continue to increase, with records showing an increase of 1.2% from 2021 to 2022.³ Despite undertakings by States to reduce emissions, reported progress has been disappointingly slow, raising concerns about their commitment to tackle the urgent and escalating climate change crisis. Moreover, there is a considerable lack of clarity on the specific content of the legal obligations of States in this field. Ambiguities surrounding the responsibilities of States in combating climate change hinder meaningful global cooperation, contributing to the ongoing challenges in addressing this critical issue.

6. An advisory opinion from the Court on the obligations of States with respect to climate change and the legal consequences thereunder is very much needed. This advisory opinion will serve as critical guidance to help States navigate the intricate web of international legal obligations related to climate action. The opinion has the potential to establish a clear framework for holding States accountable for their commitments and actions, thereby fostering a more effective and coordinated global response to the urgent environmental concerns that affect the planet and its people.

³ UN Environment Programme, *Emissions Gap Report 2023: Broken Record* (2023), p. XVI.



7. The General Assembly is charged by the Charter with “promoting international co-operation in the economic, social, cultural, educational, and health fields, and assisting in the realization of human rights and fundamental freedoms for all”.⁴ Climate change has a direct and significant impact on the protection and enjoyment of these rights and freedoms. Namibia is confident that the Court’s opinion will not only clarify States’ obligations, but will also guide the General Assembly in formulating effective policies and strategies to address the far-reaching consequences of climate change. In doing so, the Court can significantly contribute to the fulfilment of the General Assembly’s mandate and foster a coordinated international response to the urgent challenges that transcend borders and affect the entire global community.

8. The Intergovernmental Panel on Climate Change (“IPCC”), whose scientific work was acknowledged in the Request, has observed:

Climate change is a threat to human well-being and planetary health ... There is a rapidly closing window of opportunity to secure a liveable and sustainable future for all ... The *choices and actions* implemented in this decade will have impacts now and for thousands of years ...⁵

9. These “choices and actions” are regulated by international law. International legal obligations with respect to climate change exist, and are capable of guiding all States, large and small, developed and developing, towards a sustainable future where fundamental human rights are fully respected. While mitigating the effects of climate change is unquestionably governed by international law, the General Assembly, and by extension States, require guidance as to the precise contours of those obligations. In that connection, the Court has on

⁴ UN Charter, Art. 13(1)(b).

⁵ IPCC, *Climate Change 2023 Synthesis Report: Summary for Policymakers* (2023), para. C.1 (emphasis added).



several previous occasions pronounced itself on principles of international environmental law and international human rights law that are relevant to climate change-related obligations. But the Court has never directly applied these principles to elucidate what these obligations are in the specific context of climate change.

10. Namibia is proud to count itself as one of the sponsors of General Assembly Resolution 77/276. It is also proud to have adopted, alongside its fellow African Union States, the Nairobi Declaration on Climate Change and Call to Action of 6 September 2023.⁶ The Declaration recognizes that:

- “Africa is not historically responsible for global warming, but bears the brunt of its effects, impacting lives, livelihoods, and economies”;⁷ and
- “many African countries face disproportionate burdens and risks arising from climate change-related unpredictable weather events and patterns, including prolonged droughts, devastating floods, out-of-season storms, and wildfires, which cause massive humanitarian crisis with detrimental impacts on economies, health, education, peace and security, among other risks”.⁸

11. The Declaration “call[s] upon the global community to act with urgency in reducing emissions, fulfilling its obligations, honouring past promises, and supporting the continent in addressing climate change”.⁹ In particular, the Declaration:

⁶ African Union, *Nairobi Declaration on Climate Change and Call to Action* (6 September 2023).

⁷ *Ibid.*, preambular para. 8.

⁸ *Ibid.*, preambular para. 10.

⁹ *Ibid.*, preambular para. 19.

- “call[s] upon the international community to contribute to ... [i]ncreas[ing] Africa’s renewable generation capacity from 56 Giga Watts (GW) in 2022 to at least 300 GW by 2030, both to address energy poverty and to bolster the global supply of cost-effective clean energy for industry”;¹⁰
- “[c]all[s] for concrete, time-bound action ... to ... [r]e-channel[] ... at least \$100billion of [Special Drawing Rights (“SDRs”)] to Africa”;¹¹ and
- “[p]ropose[s] to establish a new financing architecture that is responsive to Africa’s needs including debt restructuring and relief, and the development of a new Global Climate Finance Charter through UNGA and COP processes by 2025”.¹²

12. Consistent with these objectives, the African Union has adopted a Climate Change and Resilient Development Strategy and Action Plan to “ensur[e] climate justice for Africa through inclusive and equitable participation in climate action and climate-resilient development pathways”.¹³

13. Like many other African States, Namibia views climate change from the perspective of its particular vulnerabilities. Namibia is among the countries that are most exposed to the deleterious effects of climate change, while being at the same time among the lowest emitters of greenhouse gases.¹⁴ In fact, Namibia is the driest

¹⁰ *Ibid.*, para. 49(i).

¹¹ *Ibid.*, para. 52(ii).

¹² *Ibid.*, para. 58.

¹³ African Union, *African Union Climate Change and Resilient Development Strategy and Action Plan (2022-2032)* (28 June 2022), p. 4.

¹⁴ African Development Bank, *Country Focus Report 2023: Namibia* (2023), p. 15.

country in sub-Saharan Africa,¹⁵ and its greenhouse gas emissions are lower than that of all its neighbouring countries.¹⁶

14. Namibia is highly dependent on climate-sensitive natural resource-based sectors, such as agriculture, fisheries, and mining. Furthermore, with the projected rise in temperature and reduced rainfall, the country is highly vulnerable to the impacts of climate change, particularly in the sectors of water resources, marine resources, agriculture, biodiversity, tourism, ecosystems, coastal zones, health, infrastructure, and energy.

15. As Namibia stated during the General Debate of the High-Level Segment of the High-Level Political Forum on Sustainable Development in July 2023:

The negative effects of climate change compounded with other challenges threaten the livelihoods and the very survival of many developing countries. Denying it means sleepwalking into a disaster written in front of our eyes in capital letters. We firmly believe that it is high time to halve greenhouse gas emissions and meet climate financing commitments, including the operationalization of the Loss and Damage Fund.

In the same vein, securing a low-carbon future through green transition is a matter of justice, as poor people and countries are the most affected by climate change.¹⁷

16. Put simply, while climate change might be a mere environmental issue for many developed States, it is an existential threat to Namibia that undermines its people's enjoyment of human rights and their livelihoods. Water scarcity is a

¹⁵ Republic of Namibia, *Namibia's Second Voluntary National Review Report on the Implementation of the Sustainable Development Goals Towards Agenda 2030* (2021), p. 26.

¹⁶ Our World In Data, *Greenhouse gas emissions* (10 June 2020), <https://ourworldindata.org/greenhouse-gas-emissions>.

¹⁷ Republic of Namibia, *Statement on the occasion of the General Debate of the High-Level Segment of the High-Level Political Forum on Sustainable Development* (18 July 2023), paras. 8-9.

primary limiting factor to the country's sustainable development.¹⁸ In Namibia, the consequences of reduced rainfall and higher temperatures extend far beyond inconveniences; they pose immediate threats to basic survival, leading to thirst and starvation. Namibia grapples with the stark reality that the impacts of climate change such as veld fires, floods, droughts, and climate-related disease outbreaks are not abstract future scenarios, but imminent and tangible challenges¹⁹ that directly threaten fundamental human rights and livelihoods.

17. The questions to be answered by the Court as presented in Resolution 77/276 serve as guidance to Namibia for this Written Statement. The primary contribution of this Written Statement is to show how States' climate change obligations arise not just from international environmental law but also from international human rights law. Indeed, the climate emergency gives rise to international legal obligations in a variety of contexts. Particular attention is given in this Written Statement to the right to water in light of the severe water scarcity faced by Namibia that is caused by climate change.

18. The Written Statement is structured as follows. **Section II** briefly explains why the Court has the jurisdiction to give the requested advisory opinion, and why there are no compelling reasons for it to decline to respond to the General Assembly's request. **Section III** highlights the impact of climate change on Namibia, focusing on how it exacerbates water scarcity in an already very arid environment. **Section IV** then addresses Question (a) of the request, which concerns the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from greenhouse gases. **Section V** turns to Question (b) regarding the legal consequences under these

¹⁸ Republic of Namibia, *National Climate Change Strategy and Action Plan, 2013-2020* (2013), p. 36.

¹⁹ Republic of Namibia, *Namibia's Second Voluntary National Review Report on the Implementation of the Sustainable Development Goals Towards Agenda 2030* (2021), p. 49.

obligations for States where they have caused significant harm to the climate system and other parts of the environment. Finally, **Section VI** concludes the Written Statement.

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II. JURISDICTION AND DISCRETION

19. The Court has the jurisdiction to give the requested advisory opinion pursuant to Article 65(1) of its Statute, which provides: “The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request.”²⁰ Article 96(1) of the Charter authorizes the General Assembly to “request the International Court of Justice to give an advisory opinion on any legal question”.²¹

20. The General Assembly requested the Court to give the present advisory opinion by Resolution 77/276 of 29 March 2023. The questions set forth in the General Assembly’s request are undoubtedly legal in nature. Question (a) asks the Court to identify “obligations of States under international law” and Question (b) is directed at the “legal consequences under these obligations for States”.²² As the Court held in its *Chagos Archipelago* advisory opinion, “a request from the General Assembly for an advisory opinion to examine a situation by reference to international law concerns a legal question”.²³ Questions (a) and (b) do exactly that. Indeed, the Court has in the past given advisory opinions identifying “obligations of States under international law” and “legal consequences under these obligations

²⁰ ICJ Statute, Art. 65(1).

²¹ UN Charter, Art. 96(1).

²² UN General Assembly, Resolution 77/276, *Request for an advisory opinion of the International Court of Justice on the obligations of States in respect of climate change*, UN Doc. A/RES/77/276 (4 April 2023) (Dossier No. 2).

²³ *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion*, I.C.J. Reports 2019 (hereinafter “*Chagos Advisory Opinion*”), para. 58.



for States”, such as in its *Chagos Archipelago* opinion,²⁴ as well as in its *Construction of a Wall* opinion.²⁵

21. While the Court retains the discretion to decline to respond to a request for an advisory opinion, it has consistently held that such requests, “in principle, should not be refused”.²⁶ The Court has furthermore repeatedly affirmed that “only ‘compelling reasons’ may lead the Court to refuse its opinion in response to a request falling within its jurisdiction”.²⁷ Indeed, in its well-known and settled practice, the Court has never found such compelling reasons to exist and thus has never exercised its discretion to decline to respond to a request for an advisory opinion.

22. The Court’s predecessor did so only once—in the *Eastern Carelia* case—but the circumstances there were entirely different. As the Permanent Court noted, “[a]nswering the question [posed] would be substantially equivalent to deciding the dispute between the parties”, one of which—Russia—had not consented to the Permanent Court’s jurisdiction.²⁸ It was for this reason, grounded in the cornerstone principle of consent, that the Permanent Court declined to give the opinion requested.

23. The questions set forth in Resolution 77/276, by contrast, do not require the Court to adjudicate a pending dispute between States, and answering them would

²⁴ *Ibid.*, para. 183.

²⁵ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)* (hereinafter “*Wall Advisory Opinion*”), para. 163.

²⁶ *Chagos Advisory Opinion*, para. 65; *Accordance with international law of the unilateral declaration of independence in respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010*, para. 30; *Wall Advisory Opinion*, para. 44.

²⁷ *Chagos Advisory Opinion*, para. 65. See also *Accordance with international law of the unilateral declaration of independence in respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010*, para. 30; *Wall Advisory Opinion*, para. 44.

²⁸ *Status of Eastern Carelia, Advisory Opinion, P.C.I.J. Series B No. 5*, p. 29.



not contravene or circumvent the principle of consent. The General Assembly's questions, instead, request that the Court identify certain international legal obligations and the legal consequences thereunder. The *Eastern Carelia* doctrine therefore has no relevance in the case at hand. Indeed, the present Request has been put forth by consensus of all UN Member States; the Court is not being asked to rule on a bilateral dispute in disguise.

24. Other arguments that have been made in the past to try to dissuade the Court from responding to requests for advisory opinions are similarly inapplicable. It has, for example, been argued that an advisory opinion should not be given if doing so would impede a political, negotiated solution.²⁹ Political negotiations over climate change, however, have not been able to solve the climate change crisis. No fewer than 28 Conferences of Parties under the United Nations Framework Convention on Climate Change ("UNFCCC") have taken place over the span of almost 30 years; however, legally binding emissions targets have not been agreed upon. Meanwhile, greenhouse gas emissions are higher than they have ever been, and the IPCC has reported that climate change has already led to "irreversible impacts as natural and human systems are pushed beyond their ability to adapt".³⁰

25. This is the first time that the General Assembly has requested an advisory opinion by consensus. It is thus of paramount importance that the Court gives the advisory opinion as requested. As the Court has recognized, "it should be left to the requesting organ ... to determine 'whether it needs the opinion for the proper performance of its functions'".³¹ A unified General Assembly has, by consensus, determined that it would benefit from the guidance of the United Nations' principal

²⁹ *Wall Advisory Opinion*, para. 51.

³⁰ IPCC, *Climate Change 2022: Impacts, Adaptation and Vulnerability* (2022) (Dossier No. 76), p. 9.

³¹ *Chagos Advisory Opinion*, para. 76.



judicial organ on matters of international law. In the face of this uniform view, the only compelling reasons that exist are those in favour of giving the opinion.

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III. THE IMPACTS OF CLIMATE CHANGE ON NAMIBIA

26. Namibia's arid climate and high water evaporation rate make it the driest country in sub-Saharan Africa.³² Its aridity is largely the result of the northward flowing Benguela current, which brings cold air to the western shores of the country through a high-pressure system, thereby suppressing rainfall.³³ The high evaporation rate is the consequence of high solar radiation, low humidity, and high temperatures.³⁴ Over most of the country, potential evaporation is at least five times greater than average rainfall.³⁵ Namibia thus faces persistent droughts and water scarcity.³⁶

27. Climate change is exacerbating the water crisis in Namibia. The IPCC has found that mean annual temperatures over southern Africa increased by between 1.04°C and 1.44°C over the period 1961-2015.³⁷ Even if global warming is maintained at 2°C above pre-industrial levels, the mean annual temperature in the region is projected to be 2.3°C warmer than the 1994-2005 average.³⁸ Namibia in particular is prone to extreme heat events, which can have direct impacts on the lives and livelihoods of the population.³⁹ These higher temperatures will inevitably lead to higher evaporation rates and thus even less water for the already very dry country.

³² Republic of Namibia, *Namibia's Second Voluntary National Review Report on the Implementation of the Sustainable Development Goals Towards Agenda 2030* (2021), p. 26.

³³ World Bank Group, *Climate Risk Country Profile: Namibia* (2021), p. 5.

³⁴ *Ibid.*, p. 6.

³⁵ *Ibid.*

³⁶ *Ibid.*, p. 2.

³⁷ IPCC, *Climate Change 2022: Impacts, Adaptation and Vulnerability* (2022) (Dossier No. 76), p. 1328.

³⁸ *Ibid.*

³⁹ World Bank Group, *Climate Risk Country Profile: Namibia* (2021), p. 4.



28. At the same time, climate change is reducing rainfall in Namibia. Studies have confirmed that the frequency of dry spells and agricultural drought in the region has increased over the period 1961-2016.⁴⁰ Climate change is expected to increase drought frequency, intensity, and duration.⁴¹ In fact, total precipitation rates in the country are predicted to decrease by as much as 19% by the 2080s, with reductions in the dry season reaching as high as 65%.⁴² This will have a disastrous impact on the country.

29. Acting pursuant to Article 26 of the Namibian Constitution, Namibia's Head of State has already declared national states of emergency on two occasions in response to national disasters caused by drought affecting all regions of Namibia: once in 2016⁴³ and again in 2019.⁴⁴ Even outside of these states of emergency, droughts have been extensive: the 2013 drought, for example, affected approximately 37% of the country's population.⁴⁵

30. Extreme droughts are likely to continue into the future, alongside increasingly frequent heat waves and wildfires.⁴⁶ The Namibia 2022/23 Vulnerability Assessment and Analysis found:

The negative impacts of the drought are numerous, and these include loss of livestock, loss of income, migration of

⁴⁰ IPCC, *Climate Change 2022: Impacts, Adaptation and Vulnerability* (2022) (Dossier No. 76), p. 1328.

⁴¹ *Ibid.*

⁴² World Bank Group, *Climate Risk Country Profile: Namibia* (2021), p. 11.

⁴³ Republic of Namibia, Government Gazette, *Proclamation by the President of the Republic of Namibia: Declaration of State of Emergency: National Disaster (Drought): Namibian Constitution*, No. 6056 (28 June 2016).

⁴⁴ Republic of Namibia, Government Gazette, *Proclamation by the President of the Republic of Namibia: Declaration of State of Emergency: National Disaster (Drought): Namibian Constitution*, No. 6900 (6 May 2019).

⁴⁵ World Bank Group, *Climate Risk Country Profile: Namibia* (2021), p. 12.

⁴⁶ *Ibid.*, p. 14.

farmers within and outside the regions looking for water and pasture for livestock, decreasing water level, depletion of grazing land, soil degradation, and loss of livelihood.⁴⁷

31. The hydrological ecosystem in Namibia continues to be adversely affected and impacted by climate change. The IPCC reports that river flows have decreased across southern Africa.⁴⁸ Changes in the amplitude, timing, and frequency of extreme droughts will affect lake levels, rates of river discharge, and runoff and groundwater recharge.⁴⁹ Lake surface temperatures will rise, and will have adverse consequences for biodiversity, water quality, and circulation patterns.⁵⁰

32. The adverse impacts of climate change on the people and environment of Namibia is undeniable. Climate change is reducing water availability and increasing the severity of water scarcity across southern Africa.⁵¹ The IPCC projects that, by 2050, up to 921 million additional people in sub-Saharan Africa could be exposed to climate change-related water stress, while up to 459 million could experience reduced exposure.⁵²

33. In parallel, climate change is also increasing the severity and frequency of floods in certain parts of Namibia. Flooding is an annually recurring event in the country that worsens every year, with the northern and northeastern regions being most significantly affected.⁵³ Documented flood events in the country have

⁴⁷ Namibia Vulnerability Assessment Committee, *Namibia 2022/23 Vulnerability Assessment and Analysis Findings* (2023), p. 5.

⁴⁸ IPCC, *Climate Change 2022: Impacts, Adaptation and Vulnerability* (2022) (Dossier No. 76), p. 1342.

⁴⁹ *Ibid.*, p. 1345.

⁵⁰ *Ibid.*

⁵¹ *Ibid.*, p. 1346.

⁵² *Ibid.*, p. 1344.

⁵³ World Bank Group, *Climate Risk Country Profile: Namibia* (2021), p. 12.



affected over one million people, including displacing populations, and are estimated to cause potential economic damage up to approximately USD 100 million per year.⁵⁴ Flooding has not only damaged infrastructure and crops, but has also restricted access to health care and schools.⁵⁵

34. Namibia has already taken many steps to adapt to the impacts of climate change, such as by establishing nationwide monitoring of groundwater use, promoting crop varieties that are adapted to climate change, and supporting agroforestry interventions to ensure food security.⁵⁶ However, given its extremely dry climate, Namibia remains “one of the climate change vulnerability hotspots in the southern Africa region”.⁵⁷ Beyond its aridity, Namibia’s particular vulnerability arises from its reliance on dams, ephemeral rivers, and aquifers for its water supply, as Namibia’s interior lacks perennial rivers, such that the country is reliant on rainfall as its natural water source.⁵⁸ As climate change reduces rainfall and increases temperatures and evaporation rates, the water supply in Namibia is rapidly dwindling as well.

35. The consequences are predictable: water scarcity, desertification, and land degradation.⁵⁹ The reduction in rainfall is causing loss of land suitable for rain-fed agriculture and livestock grazing, which, in turn, is causing sharp declines in crop

⁵⁴ *Ibid.*, p. 13.

⁵⁵ *Ibid.*

⁵⁶ See Republic of Namibia, *First Adaptation Communication: Namibia’s Climate Change Adaptation Communication to the United Nations Framework Convention on Climate Change (UNFCCC)* (2021), § 3.2.

⁵⁷ *Ibid.*, p. 8.

⁵⁸ *Ibid.*, p. 9.

⁵⁹ *Ibid.*, p. 8.



productivity⁶⁰ and widespread livestock losses,⁶¹ thereby degrading food security.⁶² This is critical, as agriculture is a key sector of Namibia's economy.⁶³ Agriculture is not only the largest employer, but essential for livelihoods and food security: over two-thirds of households practice subsistence agriculture.⁶⁴ The poor and rural populations of Namibia are particularly vulnerable to the impacts of climate change because they largely lead climate-dependent livelihoods.⁶⁵ It has been projected that the region will suffer a 21% decline in food availability by 2050.⁶⁶

36. All these impacts are harming the health of the Namibian population. The main causes of death in children under the age of five years in the country are diarrhoea, lack of sufficient nutrition, malaria, and acute respiratory infections—all of which are linked to the climate.⁶⁷ It is widely accepted that climate change is

⁶⁰ Reid, H., Sahlén, L., Stage, J. & MacGregor, J., "Climate change impacts on Namibia's natural resources and economy", *Climate Policy* (2008), p. 13.

⁶¹ Keja-Kaereho, C. & Tjizu, B. R., "Climate Change and Global Warming in Namibia: Environmental Disasters vs. Human Life and the Economy. Management and Economics Research Journal", Vol. 5(1) (2019), p. 3.

⁶² Republic of Namibia, *Namibia's Climate Change Adaptation Communication to the United Nations Framework Convention on Climate Change (UNFCCC)* (2021), p. 4. See also Reid, H., Sahlén, L., Stage, J. & MacGregor, J., "Climate change impacts on Namibia's natural resources and economy", *Climate Policy* (2008), p. 13.

⁶³ Republic of Namibia, *Namibia's Climate Change Adaptation Communication to the United Nations Framework Convention on Climate Change (UNFCCC)* (2021), p. 11.

⁶⁴ Republic of Namibia, *Namibia's Climate Change Adaptation Communication to the United Nations Framework Convention on Climate Change (UNFCCC)* (2021), p. 11. See also Reid, H., Sahlén, L., Stage, J. & MacGregor, J., "Climate change impacts on Namibia's natural resources and economy", *Climate Policy* (2008), p. 7.

⁶⁵ Republic of Namibia, *Namibia's Climate Change Adaptation Communication to the United Nations Framework Convention on Climate Change (UNFCCC)* (2021), p. 8.

⁶⁶ Kotir, J. H., "Climate change and variability in Sub-Saharan Africa: a review of current and future trends and impacts on agriculture and food security", *Environ Dev Sustain*, Vol. 13, 587-605 (2011), p. 598.

⁶⁷ Republic of Namibia, *Namibia's Climate Change Adaptation Communication to the United Nations Framework Convention on Climate Change (UNFCCC)* (2021), p. 14.



exacerbating the causes of infant (and adult) mortality, and is poised to worsen in the future.⁶⁸ It is also predicted that epidemics of water and vector borne diseases may increase due to climate change in Namibia.⁶⁹

37. Namibia is a hotspot for remarkable biodiversity, and biodiversity benefits the Namibian people through consumptive uses such as food, fuel, and medicine, as well as non-consumptive uses such as ecosystem services and tourism,⁷⁰ the last of which is a significant contributor to Namibia's gross domestic product ("GDP"). The integrity of Namibia's natural ecosystem is threatened by climate change, resulting in the loss of biodiversity and reduced tourism revenues for the country. Similarly, as sea water temperature rises, Namibia's marine fisheries are threatened with depletion of stock, which causes a corresponding reduction to the country's GDP.⁷¹

38. In sum, climate change has had, and will continue to have, a disproportionately large negative impact on Namibia, despite Namibia being one of the world's lowest contributors of greenhouse gas emissions. The country's total greenhouse gas emissions constitute 0.02% of global emissions,⁷² a negligible and almost imperceptible amount. This demonstrates the manifest inequity of the current global situation whereby a country that has done almost nothing to contribute to climate change is now bearing a grossly disproportionate human and economic burden in dealing with its multiple deleterious effects.

⁶⁸ *Ibid.*

⁶⁹ World Bank Group, *Climate Risk Country Profile: Namibia* (2021), p. 4.

⁷⁰ Republic of Namibia, *National Policy on Climate Change for Namibia* (2011), p. 5.

⁷¹ *Ibid.*

⁷² European Commission, Emissions Database for Global Atmospheric Research, *GHG emissions of all world countries: 2023 report* (2023), available at https://edgar.jrc.ec.europa.eu/report_2023.



IV. QUESTION (A)

39. Question (a) of the Request, which follows a multi-paragraph preamble, states as follows:

What are the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for present and future generations?⁷³

40. The question asks the Court to identify “the obligations of States under international law” with respect to climate change. The broad reference to “international law” includes not just conventional law, but also customary law and general principles of law. It further includes not just obligations under international environmental law, but also under international human rights law. In short, the question encompasses all international legal obligations that States have to ensure the protection of the climate system and other parts of the environment from greenhouse gas emissions.

41. This is a broad request, but the Court should fully respect the General Assembly’s broad formulation by identifying *all* of the relevant obligations of States under international law. Some but not all of these sources are identified in preambular paragraphs 5 to 7 of Resolution 77/276. Only by addressing the full breadth of the request can the Court meaningfully assist States in meeting their climate change obligations under international law.

42. Importantly, the breadth of the question enables the Court to assess the obligations of States in a systemically integrated manner. Systemic integration

⁷³ UN General Assembly, Resolution 77/276, *Request for an advisory opinion of the International Court of Justice on the obligations of States in respect of climate change*, UN Doc. A/RES/77/276 (4 April 2023) (Dossier No. 2).



requires that the Court interpret environmental law obligations in light of human rights obligations and vice versa. Although the sources of obligations under these two areas of international law may be disparate, they are all elements of the same system of international law, and thus must be interpreted coherently. This holistic approach is crucial for a comprehensive understanding of the intricate interplay between environmental preservation and the safeguarding of human rights. It reinforces the idea that addressing the global challenge of climate change requires an interdisciplinary and interconnected legal framework, ensuring that States fulfil their responsibilities not in isolation but as part of a unified commitment to protect the planet and its inhabitants.

43. In the context of treaty law, Article 31(3)(c) of the Vienna Convention on the Law of Treaties enshrines this approach of coherent interpretation by providing that, in interpreting treaties, “[t]here shall be taken into account, together with the context ... any relevant rules of international law applicable in the relations between the parties”.⁷⁴ The Court has not only recognized the totality of Article 31 to be reflective of customary international law,⁷⁵ but has also specifically applied Article 31(3)(c) in the past.⁷⁶ In fact, since its *Namibia* advisory opinion, the Court has affirmed that “[a]n international instrument has to be interpreted and applied within

⁷⁴ Vienna Convention on the Law of Treaties (adopted 22 May 1969, opened for signature 23 May 1969, entered into force 27 January 1980), Art. 31(3)(c).

⁷⁵ *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010 (hereinafter “*Pulp Mills*”), para. 65; *Maritime Dispute (Peru v. Chile)*, Judgment, I.C.J. Reports 2014, para. 57; *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, Preliminary Objections, I.C.J. Reports 2016, para. 33.

⁷⁶ *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Merits, Judgment, I.C.J. Reports 2003, paras. 40-41; *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, I.C.J. Reports 2008, paras. 112-114; *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, Preliminary Objections, Judgment, I.C.J. Reports 2017, para. 89.



the framework of the entire legal system prevailing at the time of the interpretation”.⁷⁷

44. The importance of systemic integration of international environmental law and international human rights law has long been recognized in Africa. Article 24 of the 1981 African Charter on Human and Peoples’ Rights (“ACHPR”) enshrines “the right to a general satisfactory environment”.⁷⁸ The first preambular paragraph of the 1991 Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa (“the Bamako Convention”) notes that its Parties are “[m]indful of the growing threat to human health and the environment posed by ... hazardous wastes”.⁷⁹ And in its landmark 2002 decision in *SERAC v. Nigeria*, the African Commission on Human and Peoples’ Rights (“ACmHPR”) stated:

[A] clean and safe environment ... is closely linked to economic and social rights in so far as the environment affects the quality of life and safety of the individual.⁸⁰

45. Systemic integration between international environmental law and international human rights law has further been endorsed on the international plane. The Paris Agreement, for example, provides that State Parties “should, when taking action to address climate change, respect, promote and consider their respective

⁷⁷ *Namibia Advisory Opinion*, para. 53.

⁷⁸ African Charter on Human and Peoples’ Rights (adopted 27 June 1981, entered into force 21 October 1986), Art. 24.

⁷⁹ Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa (adopted 30 January 1991, entered into force 22 April 1998), preambular para. 1.

⁸⁰ ACmHPR, *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, Communication No. 155/96, Decision (27 October 2001), para. 51.



obligations on human rights”.⁸¹ Similarly, the General Assembly, the Human Rights Council, and the Human Rights Committee have all recognized the linkages between international environmental law and international human rights law in the context of climate change.⁸² No fewer than 27 UN Special Rapporteurs and Independent Experts issued a statement in 2014 to the UNFCCC State Parties stating that “[a] safe, clean, healthy and sustainable environment is indispensable to the full enjoyment of human rights”.⁸³ And the UN Special Rapporteurs on Human Rights and Climate Change, Toxics and Human Rights, Human Rights and the Environment, and the Right to Development expressly endorsed the need for systemic integration when interpreting climate change obligations in *amicus curiae* submissions last year.⁸⁴

46. In view of the above, Namibia’s response to Question (a) is straightforward: all States have the international legal obligation (in addition to the moral obligation) to minimize their greenhouse gas emissions. At a minimum, all States are obligated to take the necessary measures to hold the increase in the global average temperature to, at most, 1.5°C above pre-industrial levels. Moreover,

⁸¹ Paris Agreement to the United Nations Framework Convention on Climate Change (adopted 12 December 2015, entered into force 4 November 2016) (Dossier No. 16) (hereinafter “Paris Agreement”), preambular paragraph 11.

⁸² See, e.g., UN Human Rights Council, *Human rights and the global water crisis: water pollution, water scarcity and water-related disasters*, UN Doc. A/HRC/46/28 (19 January 2021) (Dossier No. 315); UN General Assembly, *Human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, UN Doc. A/74/161 (15 July 2019) (Dossier No. 312); UN Human Rights Committee, *General Comment No. 36*, para. 62 (Dossier No. 299).

⁸³ UN OHCHR, *A new climate change agreement must include human rights protections for all* (17 October 2014), p. 1.

⁸⁴ ITLOS, *Request for an advisory opinion submitted by the Commission of Small Island States on climate change and international law*, Amicus brief submitted to the International Tribunal for the Law of the Sea by the UN Special Rapporteurs on Human Rights & Climate Change (Ian Fry), Toxics & Human Rights (Marcos Orellana), and Human Rights & the Environment (David Boyd) (30 May 2023), § III(c); IACtHR, *Advisory Opinion on Climate Emergency and Human Rights*, Amicus brief submitted by the UN Special Rapporteurs on Toxics and Human Rights (Marcos Orellana), Human Rights and the Environment (David Boyd), and the Right to Development (Surya Deva) (22 November 2023), § IV(d).



States must do so in accordance with the prevention, precautionary, and Common But Differentiated Responsibilities (“CBDR”) principles.

47. The remainder of this section examines the sources of these legal obligations, as they stem from international environmental law (**Section IV.A**) and international human rights law (**Section IV.B**). Both conventional and customary law, including general international law, are discussed in these two sections.

A. Obligations under International Environmental Law

48. States’ obligations with respect to climate change primarily arise from three fundamental and foundational principles: the prevention principle (**Section IV.A.1**), the precautionary principle (**Section IV.A.2**), and the CBDR principle (**Section IV.A.3**). As explained below, these principles operate to oblige States to minimize their greenhouse gas emissions, and to take the necessary measures to hold the increase in the global average temperature to, at most, 1.5°C above pre-industrial levels.

1. The Prevention Principle

49. In the *Pulp Mills* case, the Court recognized as customary the obligation of every State “to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant



damage to the environment of another State”⁸⁵—widely known as the prevention principle.⁸⁶

50. This principle has been codified, albeit with slightly different formulations, in a number of international instruments, including the Stockholm Declaration,⁸⁷ the Rio Declaration,⁸⁸ the International Law Commission’s (“ILC”) Articles on Prevention of Transboundary Harm from Hazardous Activities (“ILC Articles on Prevention”),⁸⁹ the UNFCCC,⁹⁰ and the Convention on Biological Diversity (“CBD”).⁹¹ Its status in customary international law is thus universally accepted.

⁸⁵ *Pulp Mills*, para. 101. See also *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Reports 1996 (hereinafter “*Nuclear Weapons Advisory Opinion*”), para. 29; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment*, I.C.J. Reports 1997 (hereinafter “*Gabčíkovo-Nagymaros Project*”), para. 140; *Certain Activities/Construction of a Road*, Judgment, para. 104; *Trail Smelter (United States/Canada)*, Awards (16 April 1938 and 11 March 1941), 3 RIAA 1905.

⁸⁶ See also United Nations Framework Convention on Climate Change (adopted 9 May 1992, opened for signature 4 June 1992, entered into force 21 March 1994) (Dossier No. 4) (hereinafter “UNFCCC”), preamble; Convention on Biological Diversity (opened for signature 5 June 1992, entered into force 29 December 1993) (Dossier No. 19) (hereinafter “CBD”), Art. 3.

⁸⁷ Stockholm Declaration of the United Nations Conference on the Human Environment (1972), principle 21 (“States have ... the responsibility 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.”).

⁸⁸ Rio Declaration on Environment and Development (1992) (Dossier No. 137), principle 2 (“States have ... the responsibility 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.”).

⁸⁹ ILC, Articles on Prevention of Transboundary Harm from Hazardous Activities (2001), Art. 3 (“The State of origin shall take all appropriate measures to prevent significant transboundary harm or at any event to minimize the risk thereof.”). The ILC Articles on Prevention are not legally binding *per se*, but they have been repeatedly commended by the General Assembly to the attention of Governments. See, e.g., UN General Assembly, Resolution 62/68 (6 December 2007) (Dossier No. 98), para. 3; UN General Assembly, Resolution 68/114 (16 December 2013), para. 1; UN General Assembly, Resolution 77/106 (7 December 2022), para. 1.

⁹⁰ UNFCCC, preamble (“States have ... the responsibility 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”).

⁹¹ CBD, Art. 3 (“States have ... the responsibility 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.”).

51. The Court in the *Pulp Mills* case observed that the prevention principle “has its origins in the due diligence that is required of a State in its territory”—namely, “every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States”.⁹² This obligation of due diligence in turn originates in the foundational Roman principle *sic utere tuo ut alienum non laedas*.

52. The prevention principle is also part and parcel of international environmental law in Africa. The African Convention on the Conservation of Nature and Natural Resources (“African Nature Convention”) enshrines as one of its objectives “to enhance environmental protection”,⁹³ and specifies that Parties must “adopt and implement all measures necessary to achieve the objectives of this Convention, *in particular through preventive measures*”.⁹⁴ Similarly, the Bamako Convention requires its Parties to “adopt and implement *the preventive ... approach to pollution problems*”.⁹⁵

53. The prevention principle, both under general international law and regional international law in Africa, encompasses a procedural obligation. As the Court held in the *Pulp Mills* case, in exercising the requisite due diligence, “it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context”.⁹⁶ The Court further explained in the *Certain Activities in the Border Area* case:

⁹² *Pulp Mills*, para. 101 (citing *Corfu Channel (United Kingdom v. Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 22).

⁹³ African Convention on the Conservation of Nature and Natural Resources (adopted 11 July 2003, entered into force 23 July 2016), Art. II(1).

⁹⁴ *Ibid.*, Art. IV (emphasis added).

⁹⁵ Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa (adopted 30 January 1991, entered into force 22 April 1998), Art. 4(3)(f) (emphasis added).

⁹⁶ *Pulp Mills*, para. 204.



“Although the Court’s statement in the *Pulp Mills* case refers to industrial activities, the underlying principle applies generally to proposed activities which may have a significant adverse impact in a transboundary context.”⁹⁷ The Court thus concluded:

[T]o fulfil its obligation to exercise due diligence in preventing significant transboundary environmental harm, a State must, before embarking on an activity having the potential adversely to affect the environment of another State, ascertain if there is a risk of significant transboundary harm, which would trigger the requirement to carry out an environmental impact assessment.⁹⁸

54. This same obligation has been reflected in Guideline 4 of the ILC’s Guidelines on the Protection of the Atmosphere,⁹⁹ and has been referred to in the ILC’s commentaries to Principle 7 of its Draft Principles on Protection of the Environment in relation to Armed Conflicts.¹⁰⁰ It was further recognized by the ACmHPR in *SERAC v. Nigeria*, where the Commission held that States must:

⁹⁷ *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, I.C.J. Reports 2015 (hereinafter “*Certain Activities Carried out by Nicaragua*”), para. 104.

⁹⁸ *Ibid.*

⁹⁹ ILC, Guidelines on the Protection of the Atmosphere (2021), guideline 4 (“States have the obligation to ensure that an environmental impact assessment is undertaken of proposed activities under their jurisdiction or control which are likely to cause significant adverse impact on the atmosphere in terms of atmospheric pollution or atmospheric degradation.”). The ILC’s Guidelines on the Protection of the Atmosphere are not legally binding *per se*, but they have been taken note of by the General Assembly. See UN, General Assembly, Resolution 76/112 (9 December 2021), para. 4.

¹⁰⁰ ILC, Draft Principles on Protection of the Environment in relation to Armed Conflicts, with commentaries (2022), p. 116 (“The phrase ‘shall consider the [environmental] impact’ corresponds to the standard formulation used by the Security Council in the mandates of peace operations, which explicitly tasks the operations to consider the environmental impact of their operations. Such operations are expected to ... ensure that environmental impact assessments are routinely implemented.”).



order[] or at least permit[] independent scientific monitoring of threatened environments, requiring and publicising environmental and social impact studies prior to any major industrial development, undertaking appropriate monitoring and providing information to those communities exposed to hazardous materials and activities and providing meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities.¹⁰¹

55. In the context of climate change in particular, environmental impact assessments must take into account not just potential impacts in the immediate future, but also those that may unfold in the long run. This is because climate change is a phenomenon where the source of the problem (the emission of greenhouse gases) could potentially not have a concrete impact until many years, decades, or even centuries later. As a result, it is essential that environmental impact assessments consider implications far beyond the time horizon of just a few years.

56. Importantly, the Court's articulation of the prevention principle in the *Pulp Mills* and *Certain Activities in the Border Area* cases recognizes that not every minor impact by one State on another State's environment constitutes a violation of international law. States are required to ascertain if there is a risk of "significant" transboundary harm,¹⁰² which triggers the requirement to carry out the environmental impact assessment and activates the obligation not to "caus[e] significant damage to the environment of another State".¹⁰³ Along the same lines,

¹⁰¹ ACmHPR, *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, Communication No. 155/96, Decision (27 October 2001), para. 53.

¹⁰² *Certain Activities Carried out by Nicaragua*, para. 104.

¹⁰³ *Pulp Mills*, para. 101.



the ACmHPR in *SERAC v. Nigeria* spoke of environmental impact studies prior to any “major” industrial development.¹⁰⁴

57. Greenhouse gas emissions unquestionably cause “significant” damage to the environment of other States through climate change. The science is clear. The IPCC has observed with high confidence that climate change has already been responsible for “increases in the frequency and intensity of climate and weather extremes, including hot extremes on land and in the ocean, heavy precipitation events, drought and fire weather”.¹⁰⁵ This, in turn, has “caused substantial damages, and increasingly irreversible losses, in terrestrial, freshwater and coastal and open ocean marine ecosystems”.¹⁰⁶ The Panel has furthermore noted:

Widespread deterioration of ecosystem structure and function, resilience and natural adaptive capacity, as well as shifts in seasonal timing have occurred due to climate change (*high confidence*), with adverse socioeconomic consequences (*high confidence*). Approximately half of the species assessed globally have shifted polewards or, on land, also to higher elevations (*very high confidence*). Hundreds of local losses of species have been driven by increases in the magnitude of heat extremes (*high confidence*), as well as mass mortality events on land and in the ocean (*very high confidence*) and loss of kelp forests (*high confidence*).¹⁰⁷

58. There is thus no question that the “significance” threshold has been exceeded in the context of greenhouse gas emissions-induced climate change. States are therefore obligated to carry out an environmental impact assessment for any planned activities on their territories that will emit greenhouse gases. And

¹⁰⁴ ACmHPR, *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, Communication No. 155/96, Decision (27 October 2001), para. 53.

¹⁰⁵ IPCC, *Climate Change 2022: Impacts, Adaptation and Vulnerability* (2022) (Dossier No. 76), p. 9.

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*



every State is moreover obligated, pursuant to the customary prevention principle, “to use all the means at its disposal in order to avoid” such activities.¹⁰⁸

59. This does not mean that States are obliged to prohibit any and all greenhouse gas emissions whatsoever. Rather, States must use all the means at their disposal to avoid activities that emit greenhouse gases. States thus must, for example, pursue and prioritize renewable technologies over those that produce greenhouse gases. States must also constantly explore alternatives to activities that would otherwise produce greenhouse gases on their territories. Put simply, it is essential, and legally required, for a State to meet its customary obligation under international law “to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State”.¹⁰⁹ The Inter-American Court of Human Rights in its advisory opinion on the environment and human rights elaborated on this prevention obligation to say that, at a minimum, “[t]he specific measures States must take include the obligations to: (i) regulate; (ii) supervise and monitor; (iii) require and approve environmental impact assessments; (iv) establish contingency plans, and (v) mitigate, when environmental damage has occurred”.¹¹⁰

60. Importantly, the prevention principle requires States to do more than just *reduce* greenhouse gas emissions. A reduction in emissions is required, but it is not sufficient. Considering the current trajectory of global warming, States must do more.

¹⁰⁸ *Pulp Mills*, para. 101.

¹⁰⁹ *Ibid.* See also *Nuclear Weapons Advisory Opinion*, para. 29; *Gabčíkovo-Nagymaros Project*, para. 140; *Certain Activities/Construction of a Road*, Judgment, para. 104.

¹¹⁰ IACtHR, *The Environment and Human Rights*, Advisory Opinion OC-23/17, para. 145.



61. Pursuant to the prevention principle, States have **the obligation to minimize greenhouse gas emissions**, an established concept in international law. Article 3 of the ILC Articles on Prevention requires States to “take all appropriate measures to prevent significant transboundary harm or at any event to *minimize* the risk thereof”.¹¹¹ And Article 4(1) of the Paris Agreement enshrines the aim “to reach global peaking of greenhouse gas emissions *as soon as possible*”, and “to undertake *rapid* reductions thereafter”.¹¹² Greenhouse gas emissions have caused and are continuing to cause significant environmental harm, so the prevention principle requires their minimization, not simply their reduction. States can take a wide variety of measures to meet this obligation, such as directly prohibiting or restricting greenhouse gas emissions, and establishing financial and fiscal incentives for low-carbon activities.

2. The Precautionary Principle

62. The obligation to minimize greenhouse gas emissions is consistent with the precautionary principle, which the Court is invited to recognize as part of customary international law. The principle is best reflected in Principle 15 of the Rio Declaration, which provides:

In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.¹¹³

¹¹¹ ILC, Articles on Prevention of Transboundary Harm from Hazardous Activities (2001), Art. 3 (emphasis added).

¹¹² Paris Agreement, Art. 4(1) (emphasis added).

¹¹³ Rio Declaration on Environment and Development (1992) (Dossier No. 137), principle 15.



63. Like the prevention principle, the precautionary principle has been adopted in numerous international instruments, including the UNFCCC,¹¹⁴ the CBD,¹¹⁵ the United Nations Fish Stocks Agreement,¹¹⁶ and the Stockholm Convention on Persistent Organic Pollutants.¹¹⁷ It has further been recognized by the Human Rights Committee in its General Comment No. 36¹¹⁸ and by the Committee on Economic, Social and Cultural Rights (“CESCR”) in its General Comment No. 25.¹¹⁹

¹¹⁴UNFCCC, Art. 3(3) (“The Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures, taking into account that policies and measures to deal with climate change should be cost-effective so as to ensure global benefits at the lowest possible cost.”)

¹¹⁵ CBD, preamble (“where there is a threat of significant reduction or loss of biological diversity, lack of full scientific certainty should not be used as a reason for postponing measures to avoid or minimize such a threat”).

¹¹⁶ Agreement on the implementation of the provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the conservation and management of straddling fish stocks and highly migratory fish stocks (opened for signature 4 August 1995, entered into force 11 December 2001) (Dossier No. 47), Art. 6 (“1. States shall apply the precautionary approach widely to conservation, management and exploitation of straddling fish stocks and highly migratory fish stocks in order to protect the living marine resources and preserve the marine environment. 2. States shall be more cautious when information is uncertain, unreliable or inadequate. The absence of adequate scientific information shall not be used as a reason for postponing or failing to take conservation and management measures.”).

¹¹⁷ Stockholm Convention on Persistent Organic Pollutants (opened for signature 23 May 2001, entered into force 17 May 2004), Art. 1 (“Mindful of the precautionary approach as set forth in Principle 15 of the Rio Declaration on Environment and Development, the objective of this Convention is to protect human health and the environment from persistent organic pollutants.”).

¹¹⁸ UN Human Rights Committee, *General Comment No. 36* (2019), para. 62 (“States parties should therefore ensure sustainable use of natural resources, develop and implement substantive environmental standards, conduct environmental impact assessments and consult with relevant States about activities likely to have a significant impact on the environment, provide notification to other States concerned about natural disasters and emergencies and cooperate with them, provide appropriate access to information on environmental hazards and pay due regard to the precautionary approach.”).

¹¹⁹ UN CESCR, *General Comment No. 25* (2020), para. 56 (“Participation also includes the right to information and participation in controlling the risks involved in particular scientific processes and its applications. In this context, the precautionary principle plays an important role. This principle demands that, in the absence of full scientific certainty, when an action or policy may lead to



64. The principle constitutes a core element of international environmental law in Africa. The African Nature Convention states that, in pursuing the objective “to enhance environmental protection”,¹²⁰ Parties must “adopt and implement all measures necessary to achieve the objectives of this Convention” not only through “preventive measures”, but also through “the application of the precautionary principle”.¹²¹ The Bamako Convention similarly requires its Parties to “implement the precautionary principle to pollution prevention”.¹²²

65. The Court has also recognized the principle, but in less certain terms. In the *Pulp Mills* case, the Court observed: “The Court considers that while a precautionary approach may be relevant in the interpretation and application of the provisions of the Statute [of the River Uruguay], it does not follow that it operates as a reversal of the burden of proof.”¹²³

66. Here, in the context of climate change, the Court is not asked to opine on the burden of proof relating to climate change obligations. Rather, the Court is requested to recognize that, today, the precautionary principle generally applies to climate change obligations, such that, in view of the threats of serious and

unacceptable harm to the public or the environment, actions will be taken to avoid or diminish that harm.”).

¹²⁰ African Convention on the Conservation of Nature and Natural Resources (adopted 11 July 2003, entered into force 23 July 2016), Art. II(1).

¹²¹ *Ibid.*, Art. IV.

¹²² Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa (adopted 30 January 1991, entered into force 22 April 1998), Art. 4(3)(f).

¹²³ The Court held in the *Pulp Mills* case: “[T]he Court considers that while a precautionary approach may be relevant in the interpretation and application of the provisions of the Statute, it does not follow that it operates as a reversal of the burden of proof.” *Pulp Mills*, para. 164. The Court has not, however, recognized the precautionary principle as part of customary international law.

irreversible damage, scientific uncertainty should dictate in favour of taking a precautionary approach.

67. The science proving that greenhouse gas emissions are causing climate change and that climate change causes catastrophic impacts around the world is firmly established. However, there is “scientific uncertainty” with regards to quantifying the extent to which a certain amount of greenhouse gas emissions will lead to a certain degree of global warming, and also with regards to identifying the levels of warming at which irreversible impacts will occur.

68. The state of scientific knowledge can progress. In 2001, for example, the IPCC observed:

The vague evidence provided by the present state of research ... suggests that large-scale discontinuities are unlikely below a 2°C warming but relatively plausible for a sustained warming of 8-10°C. The relatively small set of investigations discussed above lead to the conclusion that a warming range of 4-5°C seems to represent a critical disturbance regime where macro-discontinuities may start to emerge.¹²⁴

69. Today, however, the IPCC considers that, even with a mere increase of 1.1°C above pre-industrial levels, there is a moderate risk of tipping points being irreversibly crossed, such as mass loss from the Antarctic and Greenland ice sheets which could substantially raise global sea levels.¹²⁵ Still, there is uncertainty in this regard. The Organisation for Economic Co-operation and Development (“OECD”) has found evidence that certain tipping points have *already* been crossed.¹²⁶

¹²⁴ IPCC, *Climate Change 2001: Impacts, Adaptation, and Vulnerability* (2001), p. 952.

¹²⁵ IPCC, *Climate Change 2022: Impacts, Adaptation and Vulnerability* (2022) (Dossier No. 76), p. 70.

¹²⁶ OECD, *Climate Tipping Points: Insights for Effective Policy Action* (2022), p. 11.



70. The precautionary principle dictates that, in view of such uncertainty, States must assume the worst and act accordingly. In practical terms, this means that States must take immediate and substantial measures to minimize their greenhouse gas emissions forthwith.

71. Namibia is cognizant of its obligations, and the obligations of States around the world, under the Paris Agreement in this regard. Article 2(1)(a) of the Agreement provides in relevant part:

This Agreement ... aims to strengthen the global response to the threat of climate change, ... including by: (a) Holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change¹²⁷

72. Namibia recognizes that these two targets—1.5°C and 2°C above pre-industrial levels—are set forth as “aim[s]” in the Paris Convention. However, these “aim[s]” are intrinsically linked to the obligation of every State under the prevention principle “to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State”.¹²⁸ In other words, the Parties to the Paris Agreement have agreed that allowing global warming to exceed 1.5°C above pre-industrial levels would, at a minimum, cause significant damage to the global environment. It is thus an international legal obligation for States, again at a minimum, to use all the means at their disposal to ensure that global warming does not exceed 1.5°C above pre-industrial levels. This goal must be

¹²⁷ Paris Agreement, Art. 2(1)(a).

¹²⁸ *Pulp Mills*, para. 101; see also *Nuclear Weapons Advisory Opinion*, para. 29; *Gabčíkovo-Nagymaros Project*, para. 140; *Certain Activities/Construction of a Road*, Judgment, para. 104.



integrated into States' nationally determined contributions submitted pursuant to Article 4 of the Paris Agreement.

73. Critically, this is a *minimum* requirement. As already explained above, the prevention and precautionary principles require States to *minimize* their greenhouse gas emissions. If all States fulfil their obligation in this regard, global warming may not ever reach 1.5°C above pre-industrial levels.

3. The CBDR Principle

74. The CBDR principle is another important principle that must be taken into account. The minimization of greenhouse gas emissions required by the prevention and precautionary principles must be achieved in accordance with the CBDR principle.

75. The CBDR principle is a cornerstone of international environmental law. It has been recognized in many international instruments, including the Stockholm Declaration,¹²⁹ the Rio Declaration,¹³⁰ Part XII of UNCLOS, the UNFCCC,¹³¹ and the Paris Agreement,¹³² and was recently reaffirmed by the African Union States

¹²⁹ Stockholm Declaration of the United Nations Conference on the Human Environment (1972), principle 12 (“Resources should be made available to preserve and improve the environment, taking into account the circumstances and particular requirements of developing countries and any costs which may emanate from their incorporating environmental safeguards into their development planning and the need for making available to them, upon their request, additional international technical and financial assistance for this purpose.”).

¹³⁰ Rio Declaration on Environment and Development (1992) (Dossier No. 137), principle 7 (“In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.”).

¹³¹ UNFCCC, Art. 3(1) (“The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof.”).

¹³² Paris Agreement, Art. 4(3) (“Each Party’s successive nationally determined contribution will represent a progression beyond the Party’s then current nationally determined contribution and

in the Nairobi Declaration on Climate Change and Call to Action.¹³³ In essence, this principle provides that developed countries, having contributed the most to climate change, should bear a greater proportion of the burden in dealing with climate change; and by contrast, developing countries should bear a lesser burden. Consistent with this, mitigation measures must take into account differences in the vulnerabilities of States to climate change. The CBDR principle is thus both a procedural rule of decision-making and a substantive rule of justice.

76. The CBDR principle is of particular importance to Africa and especially to Namibia, which is one of the developing countries that has contributed the least to climate change—as explained above in Sections I and III. Undoubtedly, climate change is a global problem of common concern to all of humanity, and all States must act and cooperate to combat it. But the extent of responsibility should not be the same for States. Those States that have contributed the most to climate change and which have developed their economies the most through activities emitting greenhouse gases should bear a greater share of the burden of dealing with climate change. Conversely, while States that have contributed the least to climate change must also take on a share of the burden, their share should reflect the limited resources available to them, as well as the fact that they are not the primary cause of climate change. That is the crux of the CBDR principle: the need for a fair distribution of responsibilities based on contributions of greenhouse gases.

77. In summary, under international environmental law, all States have the obligation to minimize greenhouse gas emissions—and at a bare minimum, to take the necessary measures to hold the increase in the global average temperature to,

reflect its highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.”).

¹³³ African Union, *Nairobi Declaration on Climate Change and Call to Action* (6 September 2023), preambular para. 9.



at most, 1.5°C above pre-industrial levels—in accordance with the prevention, precautionary, and CBDR principles.

B. Obligations under International Human Rights Law

78. Climate change is not just an environmental issue. It is also a human rights issue.

79. This is recognized in the preamble to the Paris Agreement’s affirmance that States “should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights”.¹³⁴ It is further recognized in the 2014 statement by 27 UN Special Rapporteurs and Independent Experts referenced earlier, which observed that “there can no longer be any doubt that climate change interferes with the enjoyment of human rights recognized and protected by international law”.¹³⁵ And the UN Special Rapporteurs on Human Rights and Climate Change, Toxics and Human Rights, Human Rights and the Environment, and the Right to Development all recently affirmed that the climate crisis impairs the enjoyment of human rights.¹³⁶

80. More broadly, Judge Weeramantry noted in his separate opinion in the *Gabčíkovo-Nagymaros Project* case that:

¹³⁴ Paris Agreement, preamble.

¹³⁵ UN OHCHR, *A new climate change agreement must include human rights protections for all* (17 October 2014).

¹³⁶ ITLOS, *Request for an advisory opinion submitted by the Commission of Small Island States on climate change and international law*, Amicus brief submitted to the International Tribunal for the Law of the Sea by the UN Special Rapporteurs on Human Rights & Climate Change (Ian Fry), Toxics & Human Rights (Marcos Orellana), and Human Rights & the Environment (David Boyd) (30 May 2023), § V(a); IACtHR, *Advisory Opinion on Climate Emergency and Human Rights*, Amicus brief submitted by the UN Special Rapporteurs on Toxics and Human Rights (Marcos Orellana), Human Rights and the Environment (David Boyd), and the Right to Development (Surya Deva) (22 November 2023), § IV.



the protection of the environment is ... a vital part of contemporary human rights doctrine, for it is a *sine qua non* for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments.¹³⁷

81. As explained in this section, States are obligated under international human rights law—just as they are under international environmental law—to minimize greenhouse gas emissions, and to take the necessary measures to hold the increase in the global average temperature to, at most, 1.5°C above pre-industrial levels.

82. The impact of climate change on human rights is multifaceted.¹³⁸ For the purposes of the present submission, three elements are emphasized. First and foremost, and of particular importance to Namibia, climate change threatens the right to water (**Section IV.B.1**). It also threatens the rights to adequate food, the highest attainable standard of health, life, and development (**Section IV.B.2**). Climate change impairs as well the right to a clean, healthy, and sustainable environment (**Section IV.B.3**).

1. The Right to Water

83. The human right to water “entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses”.¹³⁹ It is an integral part of the right to life enshrined in Article 6 of the Namibian

¹³⁷ *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment (25 September 1997), Separate Opinion of Judge Weeramantry, pp. 91-92.

¹³⁸ ITLOS, *Request for an advisory opinion submitted by the Commission of Small Island States on climate change and international law*, Amicus brief submitted to the International Tribunal for the Law of the Sea by the UN Special Rapporteurs on Human Rights & Climate Change (Ian Fry), Toxics & Human Rights (Marcos Orellana), and Human Rights & the Environment (David Boyd) (30 May 2023), § V(c).

¹³⁹ UN CESCR, *General Comment No. 15* (2003), para. 2.



Constitution.¹⁴⁰ It is also inherent in the right to life as codified in Article 4 of the ACHPR, Article 6 of the International Covenant on Civil and Political Rights (“ICCPR”), and Article 3 of the Universal Declaration of Human Rights (“UDHR”)—as explained by the ACmHPR in its General Comment No. 3¹⁴¹ and by the Human Rights Committee in its General Comment No. 36.¹⁴²

84. The right to water is furthermore a crucial component of the right to an adequate standard of living codified in Article 11 of the International Covenant on Economic, Social and Cultural Rights (“ICESCR”) and Article 25(1) of the UDHR, as well as the right to the highest attainable standard of health in Article 16 of the ACHPR and Article 12 of the ICESCR—as explained by the ACmHPR in its jurisprudence¹⁴³ and by the CESCR in its General Comments Nos. 14 and 15.¹⁴⁴

¹⁴⁰ See Ndjodi Ndeunyema, *Re-invigorating ubuntu through water: A human right to water under the Namibian Constitution* (2021).

¹⁴¹ ACmHPR, *General Comment No. 3* (2015), para. 36.

¹⁴² UN Human Rights Committee, *General Comment No. 36* (2019), para. 26. The UDHR, while formally a non-binding declaration, reflects in many respects customary international law. See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, Separate Opinion of Vice-President Ammoun*, p. 76 (“[T]he affirmations of the Declaration ... can bind States on the basis of custom ... because they constituted a codification of customary law ... or because they have acquired the force of custom through a general practice accepted as law”). Many of the rights therein were codified in the ICCPR and the ICESCR, which are also largely reflective of custom, having, respectively, 173 and 171 parties thereto. The Human Rights Committee’s interpretation of the ICCPR is also not binding *per se*, but the Court has recognized that “it should ascribe great weight” to it since “this independent body ... was established specifically to supervise the application of that treaty”. *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010*, para. 66.

¹⁴³ ACmHPR, *Free Legal Assistance Group and Others v. Zaire*, Communications Nos. 25/89, 47/90, 56/91, 100/93, Decision (October 1995), para. 47; ACmHPR, *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v. Sudan*, Communications Nos. 279/03-296/05, Decision (May 2009), paras. 208-212.

¹⁴⁴ UN CESCR, *General Comment No. 14* (2000), para. 11; UN CESCR, *General Comment No. 15* (2003), paras. 3-4. Just as with the Human Rights Committee, the Court should ascribe great weight to the interpretation by the CESCR of the ICESCR since the former is the independent body established specifically to supervise the application of the latter.

85. In its General Comment No. 15 on the Right to Water, the CESCR observes that the right imposes three distinct types of obligations: the obligation to *respect*; the obligation to *protect*; and the obligation to *fulfil*.¹⁴⁵

86. The obligation to *respect* requires that States refrain from interfering directly or indirectly with the enjoyment of the right to water.¹⁴⁶ As the CESCR has explained, this obligation includes “refraining from engaging in any practice or activity that denies or limits equal access to adequate water”.¹⁴⁷

87. The obligation to *protect* requires States to prevent third parties from interfering in any way with the enjoyment of the right to water.¹⁴⁸ The CESCR in General Comment No. 15 makes clear that the term “third parties” encompasses private actors, and the obligation includes, among other things, “adopting the necessary and effective legislative and other measures to restrain ... third parties from denying equal access to adequate water”.¹⁴⁹

88. Finally, the obligation to *fulfil* requires States to facilitate the enjoyment of the right to water, to take steps to ensure there is appropriate education concerning the hygienic use of water, and to provide water where an individual or a group is unable to realize the right by itself.¹⁵⁰ Importantly, the CESCR has observed in General Comment No. 15 that States must “assess[] the impacts of actions that may

¹⁴⁵ UN CESCR, *General Comment No. 15* (2003), para. 20.

¹⁴⁶ *Ibid.*, para. 21.

¹⁴⁷ *Ibid.*

¹⁴⁸ *Ibid.*, para. 23.

¹⁴⁹ *Ibid.*

¹⁵⁰ *Ibid.*, para. 25.



impinge upon water availability and natural-ecosystems watersheds, *such as climate changes*".¹⁵¹

89. Although the CESCRC did not expressly address greenhouse gases or global warming, there is no question that climate change caused by greenhouse gases and global warming severely threatens the realization of the right to water, and especially in Namibia. As explained above in Section III, climate change is reducing rainfall in Namibia, with studies confirming that the frequency of droughts has increased over the last fifty years.¹⁵² Precipitation rates are predicted to continue to decrease over the course of the following decades.¹⁵³ The IPCC has specifically identified southern Africa as a region where water scarcity will be exacerbated due to the effects of climate change.¹⁵⁴

90. In the climate change context, the obligation with respect to the right to water entails, among other things, an adaptation obligation incumbent on the State with respect to its residents. Namibia acknowledges this obligation and is proud to have adopted numerous adaptation measures to meet it.¹⁵⁵ Indeed, cognizant of the particular impact of climate change on the right to water, Namibia has acted in recent years to: provide full support for integrated water resources; establish best practice systems for improving the efficiency of water use, particularly in irrigation; coordinate the use of surface and groundwater resources; artificially

¹⁵¹ *Ibid.*, para. 28.

¹⁵² IPCC, *Climate Change 2022: Impacts, Adaptation and Vulnerability* (2022) (Dossier No. 76), p. 1328.

¹⁵³ World Bank Group, *Climate Risk Country Profile: Namibia* (2021), p. 11.

¹⁵⁴ IPCC, *Climate Change 2022: Impacts, Adaptation and Vulnerability* (2022) (Dossier No. 76), p. 1346; see also African Union, *African Union Climate Change and Resilient Development Strategy and Action Plan (2022-2032)*, p. 10.

¹⁵⁵ See, e.g., Republic of Namibia, *National Climate Change Policy* (2011); Republic of Namibia, *National Climate Change Strategy and Action Plan* (2015); Republic of Namibia, *Intended NDC* (2015); Republic of Namibia, *NDC Update* (2021); Republic of Namibia, *First Adaptation Communication to the UNFCCC* (2021).



increase the recharge rate of groundwater aquifers to reduce evaporation; improve water demand management, particularly at the local level; establish nationwide monitoring and control of groundwater use more strictly; and prioritize seawater desalination.¹⁵⁶

91. These activities, among others, have helped prepare Namibia and its people for the impacts of climate change on water scarcity. However, much more must be done. The reality is that Namibia is in dire need of funding, capacity development, and technology transfer to fully implement all the climate change adaptation projects that it has planned and requires.¹⁵⁷ In terms of funding, Namibia has estimated that it needs approximately USD 1.72 billion from 2021 to 2030 to support its adaptation needs.¹⁵⁸ In addition, the Government is in need of technical capacity in implementing climate finance tracking and monitoring tools.¹⁵⁹ This support should primarily come from developed countries, pursuant to the CBDR principle.

92. On top of Namibia's own adaptation obligations with respect to the right to water, the right also establishes mitigation obligations on all States with respect to climate change. Specifically, the right to water imposes on States the obligation to minimize greenhouse gas emissions—just as the prevention, precautionary, and CBDR principles do under international environmental law.

93. This obligation under the right to water arises because greenhouse gas emissions exacerbate climate change, which infringes on the enjoyment of the human right to water, especially in Namibia. The CESCR has affirmed that States

¹⁵⁶ Republic of Namibia, *First Adaptation Communication to the UNFCCC* (2021), pp. 16-17.

¹⁵⁷ *Ibid.*, p. 24.

¹⁵⁸ *Ibid.*, p. 26.

¹⁵⁹ *Ibid.*



have the obligation to respect the enjoyment of the right to water in other countries,¹⁶⁰ and the Court is invited to recognize this as well. Indeed, the Court has already recognized in its *Construction of a Wall* advisory opinion that a State's obligations under the ICESCR may apply extraterritorially.¹⁶¹ Recognizing the extraterritorial applicability of such obligations is essential for promoting global cooperation in addressing the transborder impacts of climate change on human rights, including the right to water.

94. Since people in Namibia and other countries are *already* experiencing water scarcity due to the deleterious effects of greenhouse gas emissions and projections show that the effects will become significantly worse, States, especially those that are the biggest polluters, must *minimize*, not merely *reduce*, their greenhouse gas emissions to ensure the enjoyment of this right. And at a minimum, they must take the necessary measures to hold the increase in the global average temperature to, at most, 1.5°C above pre-industrial levels. This, of course, is consistent with the obligation under international environmental law.

95. The prevention, precautionary, and CBDR principles in international environmental law are equally applicable in the human rights law context.

96. With respect to the prevention principle, the African Nature Convention enshrines the human right of all peoples to a satisfactory environment,¹⁶² while emphasizing—as referenced above—that Parties must “adopt and implement all

¹⁶⁰ UN CESCR, *General Comment No. 15* (2003), para. 31 (“To comply with their international obligations in relation to the right to water, States parties have to respect the enjoyment of the right in other countries. International cooperation requires States parties to refrain from actions that interfere, directly or indirectly, with the enjoyment of the right to water in other countries. Any activities undertaken within the State party’s jurisdiction should not deprive another country of the ability to realize the right to water for persons in its jurisdiction.”).

¹⁶¹ *Wall Advisory Opinion*, para. 112.

¹⁶² African Convention on the Conservation of Nature and Natural Resources (adopted 11 July 2003, entered into force 23 July 2016), Art. IV.



measures necessary to achieve the objectives of this Convention, *in particular through preventive measures*".¹⁶³ Along the same lines, the CESCR has made clear: "Steps should be taken by States parties to *prevent* their own citizens and companies from violating the right to water of individuals and communities in other countries."¹⁶⁴

97. As for the precautionary principle, the African Nature Convention provides that Parties must "adopt and implement all measures necessary to achieve the objectives of this Convention, in particular through ... *the application of the precautionary principle*".¹⁶⁵ Consistent with this, the Inter-American Court of Human Rights has specified that the principle's applicability extends beyond international environmental law into international human rights law as well.¹⁶⁶ And the Court of Justice of the European Union has applied the precautionary principle not just in the context of protecting the environment, but also in the context of protecting human health.¹⁶⁷

98. Finally, with respect to the CBDR principle, the CESCR in its General Comment No. 15 observed that "[t]he economically developed States parties have a special responsibility and interest to assist the poorer developing States in [the

¹⁶³ *Ibid.* (emphasis added).

¹⁶⁴ CESCR, *General Comment No. 15* (2003), para. 33 (emphasis added).

¹⁶⁵ African Convention on the Conservation of Nature and Natural Resources (adopted 11 July 2003, entered into force 23 July 2016), Art. IV (emphasis added).

¹⁶⁶ IACtHR, *The Environment and Human Rights*, Advisory Opinion OC-23/17, para. 180 ("Thus, in the context of the protection of the rights to life and to personal integrity, the Court considers that States must act in keeping with the precautionary principle.").

¹⁶⁷ See, e.g., *Pfizer Animal Health SA v. Council of the European Union*, Case T-13/99, Judgment of the Court of First Instance (Third Chamber) (11 September 2002), para. 114; *Giovanni Pesce and Others v. Presidenza del Consiglio dei Ministri - Dipartimento della Protezione Civile and Others*, Cases C-78/16 and C-79/16, Judgment of the Court (First Chamber) (9 June 2016), para. 47.

realization of the right to water]”.¹⁶⁸ This is analogous to the CBDR principle in international environmental law.

99. In summary, the right to water imposes on all States the same climate change mitigation obligation that international environmental law establishes. All States have the obligation to minimize greenhouse gas emissions—and at a minimum to take the necessary measures to hold the increase in the global average temperature to, at most, 1.5°C above pre-industrial levels—in accordance with the prevention, precautionary, and CBDR principles.

2. The Rights to Food, Health, Life, and Development

100. Climate change implicates other human rights as well, including the right to adequate food, the right to the highest attainable standard of health, the right to life, and the right to development. Each is inextricably linked to the right to water, but each also constitutes an independent human right that imposes climate change obligations on all States. This section addresses each of these four rights in turn.

101. The right to adequate food is part and parcel of the right to life codified in Articles 4 of the ACHPR, as set forth in the ACmHPR’s General Comment No. 3.¹⁶⁹ It is also enshrined in Article 11 of the ICESCR, the first paragraph of which recognizes “the right of everyone to an adequate standard of living for himself and his family, including adequate food”.¹⁷⁰ The second paragraph of the article goes on to provide that the States Parties to the Covenant “recogniz[e] the fundamental right of everyone to be free from hunger”.¹⁷¹

¹⁶⁸ CESCR, *General Comment No. 15* (2003), para. 34.

¹⁶⁹ ACmHPR, *General Comment No. 3* (2015), para. 36.

¹⁷⁰ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1996, entered into force 3 January 1976) (Dossier No. 52) (hereinafter “ICESCR”), Art. 11(1).

¹⁷¹ ICESCR, Art. 11(2).



102. The CESCR elaborated on the right to adequate food in its General Comment No. 12. Unsurprisingly, the contours of the right largely trace those of the right to water. This is because both food and water are necessities for human survival. It is therefore critical that the right to adequate food, just like the right to water, be fully respected by all States. The Committee observed: “The right to adequate food is indivisibly linked to the inherent dignity of the human person and is indispensable for the fulfilment of other human rights enshrined in the International Bill of Human Rights.”¹⁷²

103. Climate change has had, and will continue to have, negative impacts on the realization of the right to adequate food. As explained in Section III above, this is due, first and foremost, to the catastrophic impact of climate change on agriculture, particularly in countries like Namibia. Reduced rainfall and higher evaporation rates hamper the production of crops and degrade otherwise fertile soils.¹⁷³ This directly affects the ability of populations to feed themselves, particularly among the large share of farmers practicing subsistence agriculture in Africa¹⁷⁴—who are common in Namibia, especially among poor and rural populations. Climate change has already led to significant food insecurity in Namibia as well as in other countries that face similar conditions.

104. The right to the highest attainable standard of health is recognized in Article 16(1) of the ACHPR, which provides: “Every individual shall have the right to enjoy the best attainable state of physical and mental health.”¹⁷⁵ The Charter additionally affirms that “States Parties to the present Charter shall take the

¹⁷² CESCR, *General Comment No. 12* (1999), para. 4.

¹⁷³ African Union, *African Union Climate Change and Resilient Development Strategy and Action Plan (2022-2032)*, pp. 11, 19.

¹⁷⁴ *Ibid.*, p. 20.

¹⁷⁵ African Charter on Human and Peoples’ Rights (1981), Art. 16(1).



necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick”.¹⁷⁶

105. Along the same lines, Article 12(1) of the ICESCR provides: “The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”¹⁷⁷ The right can be traced to the UDHR, which states in its Article 25(1): “Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services”¹⁷⁸

106. The ICESCR specifies steps that States Parties must take to achieve the full realization of the right, including: “[t]he provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child”; “[t]he improvement of all aspects of environmental and industrial hygiene”; and “[t]he prevention, treatment and control of epidemic, endemic, occupational and other diseases”.¹⁷⁹

107. Implementation of each of these steps is impacted by climate change. As discussed above in Section III, climate change is directly linked to all of the primary causes of death in children under five years in Namibia. The increasing scarcity of sanitary water resources in the country also undermines environmental hygiene. As elaborated above in Section III, the spread of epidemics in Namibia is expected to increase due to climate change. In short, climate change hampers the realization of the right to the highest attainable standard of health.

¹⁷⁶ *Ibid.*, Art. 16(2).

¹⁷⁷ ICESCR, Art. 12(1).

¹⁷⁸ Universal Declaration of Human Rights (1948), Art. 25(1).

¹⁷⁹ ICESCR, Art. 12(2).

108. The right to life is linked to all of the previously mentioned rights. The right is enshrined in Article 4 of the ACHPR, Article 6(1) of the ICCPR, and Article 3 of the UDHR. It is also the subject of General Comment No. 3 of the ACmHPR and General Comment No. 36 of the Human Rights Committee.

109. The ACmHPR observed in its General Comment No. 3 that the right to life, as “the fulcrum of all other rights”, is “non-derogable, and applies to all persons at all times”.¹⁸⁰ The Commission further noted that the right “should be interpreted broadly”, and that it creates a “positive duty” on States “to protect individuals and groups from real and immediate risks to their lives”.¹⁸¹ Along the same lines, the Human Rights Committee noted in its General Comment No. 36 that “[t]he 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”.¹⁸² The Committee furthermore observed that the right “should not be interpreted narrowly”, as it “concerns the entitlement of individuals to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death”.¹⁸³

110. The right to life has been considered to give rise to the prevention and precautionary principles. The ACmHPR, in its General Comment No. 3, observed that the required actions by States pursuant to this right “include, inter alia, preventive steps to preserve and protect the natural environment”.¹⁸⁴ Similarly, the Inter-American Court of Human Rights has concluded that the right to life requires

¹⁸⁰ ACmHPR, *General Comment No. 3* (2015), para. 1.

¹⁸¹ *Ibid.*, para. 41.

¹⁸² UN Human Rights Committee, *General Comment No. 36* (2019), para. 2.

¹⁸³ *Ibid.*, para. 3.

¹⁸⁴ ACmHPR, *General Comment No. 3* (2015), para. 41.



States to “prevent significant environmental damage within or outside their territory”¹⁸⁵ and “act in accordance with the precautionary principle”.¹⁸⁶

111. The Human Rights Committee’s General Comment No. 36 draws a link between the right to life and climate change. It states:

Environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life. The obligations of States parties under international environmental law should thus inform the content of article 6 of the Covenant, and the obligation of States parties to respect and ensure the right to life should also inform their relevant obligations under international environmental law. Implementation of the obligation to respect and ensure the right to life, and in particular life with dignity, depends, inter alia, on measures taken by States parties to preserve the environment and protect it against harm, pollution and climate change caused by public and private actors.¹⁸⁷

112. Indeed, the World Health Organization estimates there will be 250,000 additional yearly deaths by the 2030s due to climate change.¹⁸⁸ For Namibia in particular, as mentioned above in Section III, climate change is jeopardizing the lives of many of its people, particularly those who are already facing water and food scarcity. Namibia’s vulnerable populations, particularly in rural areas, depend on a moderate climate for their livelihoods. If climate change continues on its current trajectory, their lives will be at risk.

¹⁸⁵ Inter-American Court of Human Rights, *The Environment and Human Rights*, Advisory Opinion OC-23/17 (15 November 2017), operative para. 5.

¹⁸⁶ *Ibid.*, operative para. 6.

¹⁸⁷ UN Human Rights Committee, *General Comment No. 36* (2019), para. 62.

¹⁸⁸ World Health Organization, *Climate Change*, available at <https://www.who.int/news-room/fact-sheets/detail/climate-change-and-health>.



113. Just as with the right to water, States have the obligations to *respect*, *protect*, and *fulfil* the right to adequate food, the right to the highest attainable standard of health, and the right to life. And in view of the fact that climate change has direct negative impacts on all three rights, States are obliged to take action to prevent climate change, once again by minimizing their greenhouse gas emissions. This is the very same obligation that emanates from the right to water, but it is further strengthened by the fact that it derives as well from the rights to adequate food, to the highest attainable standard of health, and to life. This shared obligation emanating from multiple rights underscores the interconnectedness of human rights and emphasizes the reinforced duty of States to address the complex challenges posed by climate change across various aspects of human well-being.

114. The CBDR principle is equally applicable in this context. The production of food, for example, may involve the emission of greenhouse gases regardless of the beneficiary. But if the beneficiary is one who requires the food to survive, then such subsistence emissions should be considered more permissible than luxury emissions geared towards generating food for entertainment.¹⁸⁹ At the same time, even subsistence emissions should be subject to the general obligation of States to minimize greenhouse gas emissions.

115. Finally, climate change also has a deleterious impact on the right to development; a right particularly important to States including Namibia, whose development has been hindered in the past by colonialism and apartheid.

116. The right to development, as a legally binding right under international law, has its origins on the African continent. It was first enshrined in Article 22(1) of the ACHPR, which provides that “[a]ll peoples shall have the right to their

¹⁸⁹ See Henry Shue, “Subsistence Emissions and Luxury Emissions”, *Law & Policy*, Vol. 15, No. 1 (1993).



economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind”.¹⁹⁰

117. Five years later, the General Assembly adopted the Declaration on the Right to Development, which recognised the right as “an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development”.¹⁹¹

118. Climate change infringes on the exercise of this right because it impairs the ability of persons, particularly in developing countries like Namibia, to develop themselves economically, socially, culturally, and politically. This impairment is significant considering that climate change has a disproportionately large impact on developing countries, thereby further widening the gap in development between them and developed countries.

119. Importantly, Article 22(2) of the ACHPR specifies that “States shall have the duty, individually or collectively, to ensure the exercise of the right to development”.¹⁹² Along the same lines, Article 3(1) of the General Assembly’s Declaration on the Right to Development provides that “States have the primary responsibility for the creation of national and international conditions favourable to the realization of the right to development”.¹⁹³ These obligations, which the Court is invited to recognise as reflective of customary international law, give rise to the obligation incumbent on States to prevent impairment of the right to development, and thus also to minimize greenhouse gas emissions.

¹⁹⁰ African Charter on Human and Peoples’ Rights (1981), Art. 22(1).

¹⁹¹ UN General Assembly, Resolution 41/128, *Declaration on the Right to Development*, UN Doc. A/RES/41/128 (4 December 1986), Art. 1(1).

¹⁹² African Charter on Human and Peoples’ Rights (1981), Art. 22(2).

¹⁹³ UN General Assembly, Resolution 41/128, *Declaration on the Right to Development*, UN Doc. A/RES/41/128 (4 December 1986), Art. 3(1).



120. Importantly, Article 4(2) of the Declaration further emphasises that “[s]ustained action is required to promote more rapid development of developing countries”, and that “effective international co-operation is essential in providing these countries with appropriate means and facilities to foster their comprehensive development”.¹⁹⁴ As applied to the context of climate change, this is a manifestation of the CBDR principle. It makes clear that developed countries are obliged to assist developing countries in their climate change mitigation efforts.

3. The Right to a Clean, Healthy, and Sustainable Environment

121. Climate change further impacts the right to a clean, healthy, and sustainable environment. This right is of extreme importance to Namibia. Namibia is one of the few countries in the world that has a constitutional duty to maintain the ecosystem, ecological processes, and the country’s biological diversity, and ensure the sustainable use of the natural environment for the benefit of present and future generations—as codified in Article 95(1) of the Namibian Constitution.

122. The right is of tremendous importance to the African continent as a whole. Article 24 of the ACHPR provides: “All peoples shall have the right to a general satisfactory environment favourable to their development.”¹⁹⁵ Consistent with this, Article III(1) of the African Nature Convention enshrines “the right of all peoples to a satisfactory environment favourable to their development”.¹⁹⁶ As the ACmHPR explained in *SERAC v. Nigeria*:

¹⁹⁴ *Ibid.*, Art. 4(2).

¹⁹⁵ African Charter on Human and Peoples’ Rights (1981), Art. 24.

¹⁹⁶ African Convention on the Conservation of Nature and Natural Resources (adopted 11 July 2003, entered into force 23 July 2016), Art. IV (“The Parties shall adopt and implement all measures necessary to achieve the objectives of this Convention, in particular through preventive measures



The right to a general satisfactory environment, as guaranteed under Article 24 of the African Charter or the right to a healthy environment, as it is widely known, therefore imposes clear obligations upon a government. It requires the state to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources.¹⁹⁷

123. In addition, the Human Rights Council in its Resolution 48/13 recognized “the right to a clean, healthy and sustainable environment as a human right that is important for the enjoyment of human rights”.¹⁹⁸ The following year, the General Assembly in its Resolution 76/300 recognized, by a vote of 168 to 0, with 8 abstentions, “the right to a clean, healthy and sustainable environment as a human right”.¹⁹⁹ This Resolution was recalled by the General Assembly, by consensus, in its Resolution 77/276 requesting the present advisory opinion from the Court.²⁰⁰ While these resolutions alone do not *ipso facto* create law, the Court has recognized that “General Assembly resolutions, even if they are not binding, may sometimes have normative value”, and that they can “provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*”.²⁰¹

and the application of the precautionary principle, and with due regard to ethical and traditional values as well as scientific knowledge in the interest of present and future generations.”).

¹⁹⁷ ACmHPR, *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, Communication No. 155/96, Decision (27 October 2001), para. 52.

¹⁹⁸ UN Human Rights Council, Resolution 48/13 (8 October 2021) (Dossier No. 279), para. 1.

¹⁹⁹ UN General Assembly, Resolution 76/300 (28 July 2022) (Dossier No. 260), para. 1; UN, Press Release, *With 161 Votes in Favour, 8 Abstentions, General Assembly Adopts Landmark Resolution Recognizing Clean, Healthy, Sustainable Environment as Human Right* (28 July 2022).

²⁰⁰ UN General Assembly, Resolution 77/276, *Request for an advisory opinion of the International Court of Justice on the obligations of States in respect of climate change*, UN Doc. A/RES/77/276 (4 April 2023) (Dossier No. 2), preamble.

²⁰¹ *Nuclear Weapons Advisory Opinion*, para. 70. See also ILC, Draft Conclusions on Identification of Customary International Law (2018), conclusion 12.

124. Namibia, therefore, submits that the right to a clean, healthy and sustainable environment has now crystallized as a part of international custom, and the Court is invited to recognize it as such.

125. Climate change is jeopardizing the enjoyment of this right, not only by present generations but also future ones. The environment today cannot be considered clean, healthy, or sustainable, as long as greenhouse gas emissions continue to increase, and global warming continues to progress. States must take urgent and decisive action to respect this right, and such action must unequivocally include the minimization of greenhouse gas emissions. It is already unclear whether it is even possible to reverse the damage that has been heretofore caused by anthropogenic greenhouse gas emissions; thus, if the environment is to be sustainable, such emissions must be minimized without further delay to safeguard the right to a clean, healthy, and sustainable environment for current and future generations.

126. To summarize, the very same climate change obligations that exist under international environmental law also exist under international human rights law. The prevention, precautionary, and CBDR principles that are invoked and applied in environmental law apply with equal force in the context of human rights law with respect to the rights to water, to adequate food, to the highest attainable standard of health, to life, and to a clean, healthy, and sustainable environment. They also require the same thing of States: to minimize their greenhouse gas emissions as soon as possible—and at a minimum, to take the necessary measures to hold the increase in the global average temperature to, at most, 1.5°C above pre-industrial levels.



V. QUESTION (B)

127. Question (b) of the Request asks:

What are the legal consequences under these obligations for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment, with respect to:

(i) States, including, in particular, small island developing States, which due to their geographical circumstances and level of development, are injured or specially affected by or are particularly vulnerable to the adverse effects of climate change?

(ii) Peoples and individuals of the present and future generations affected by the adverse effects of climate change?

128. Whereas Question (a) focuses on the legal obligations of States, broadly speaking, Question (b) asks the Court to identify *the legal consequences* for States that have caused, through their positive or negative acts (*i.e.*, acts or omissions), significant harm to the climate system and other parts of the environment. The question is extremely important in the context of the obligation to minimize greenhouse gases, given the fact that many States have already breached, and are currently breaching, this obligation. For these breaching States, as well as the corresponding injured States, it is important to understand not just what the relevant international legal obligations are, but also what must be done in light of the failure to comply with those obligations. Namibia further notes the thrust of the question implicates the consequences in relation to the adverse effects of climate change for peoples and individuals including both present and future generations.

129. **Section V.A** below sets forth the consequences under the law of State responsibility for States that have caused significant harm to the climate system and other parts of the environment. **Section V.B** then explains how the fact that the



obligation to minimize greenhouse gas emissions arises from not just international environmental law but also international human rights law impacts the legal consequences set forth in Section V.A.

A. Consequences under the Law of State Responsibility

130. The legal consequences for States that have caused significant harm to the climate system and other parts of the environment are straightforward.²⁰² The applicable legal framework is set forth in the ILC's Articles on Responsibility of States for Internationally Wrongful Acts ("ILC Articles on State Responsibility"). These Articles largely embody generally accepted rules of customary law and have been treated as such including by this Court in the exercise of its contentious jurisdiction.²⁰³

131. Pursuant to Articles 1 and 2 of the ILC Articles on State Responsibility, any State that breaches one of its international obligations has committed an internationally wrongful act, which entails the international responsibility of the State.²⁰⁴ As a consequence, the State is under the obligations to: cease its breach (**Section V.A.1**);²⁰⁵ and make full reparation for the injury caused by the breach, in particular through compensation (**Section V.A.2**).²⁰⁶ Each of these legal

²⁰² Namibia reiterates that the science is now clear that the emission of greenhouse gases has caused and continues to cause significant harm to the climate system and other parts of the environment.

²⁰³ See UN, *Responsibility of States for internationally wrongful acts: Compilation of decisions of international courts, tribunals and other bodies: Report of the Secretary-General*, UN Doc. A/62/62 (1 February 2007); UN, *Responsibility of States for internationally wrongful acts: Compilation of decisions of international courts, tribunals and other bodies: Report of the Secretary-General*, UN Doc. A/71/80 (21 April 2016); UN, *Responsibility of States for internationally wrongful acts: Compilation of decisions of international courts, tribunals and other bodies: Report of the Secretary-General*, UN Doc. A/77/74 (29 April 2022).

²⁰⁴ ILC, *Articles on Responsibility of States for Internationally Wrongful Acts* (2001) ("ARSIWA"), Arts. 1-2; see *Chagos Advisory Opinion*, para. 177.

²⁰⁵ ARSIWA, Art. 30(a).

²⁰⁶ *Ibid.*, Art. 31.



consequences is discussed below in the context of the obligation to minimize greenhouse gas emissions.

1. The Obligation to Cease the Breach

132. The first legal consequence for a State that is breaching its obligation to minimize greenhouse gas emissions is that it has the obligation to cease that breach, pursuant to Article 30(a) of the ILC Articles on State Responsibility. This is intuitive, but important. States are not relieved of meeting their obligation simply because other States are not meeting it, or because they have not met their obligation in the past. If they are considered to be breaching the obligation to minimize greenhouse gas emissions, they must immediately take steps to cease that breach and come into compliance with the obligation.

133. Namibia recognizes that the economies of many States are entrenched in certain industries that emit large amounts of greenhouse gases. But this does not exempt these States from fulfilling their obligation to minimize greenhouse gas emissions. As explained above in Section IV.A.1, States are not obligated to immediately prohibit all greenhouse gas emissions from their territories. Rather, the obligation is for them to *minimize* such emissions by reference to the need to prevent the global temperature increase from exceeding 1.5 degrees above preindustrial levels.

134. This requires, among many other things, conducting environmental impact assessments of all the relevant activities taking place on their territories to fully comprehend the extent of greenhouse gas emissions, and to design and implement concrete plans to minimize those emissions, including by incentivizing both public and private actors to look to alternative, renewable energy sources. At a minimum, States must take all necessary measures to ensure that the increase in global average temperature from pre-industrial levels does not exceed 1.5°C. The science shows



that this would require, again at a minimum, reducing emissions by 22 gigatonnes of CO₂ equivalent, relative to current unconditional nationally determined contributions.²⁰⁷

2. The Obligation to Make Full Reparation for the Injury Caused, in Particular through Compensation

135. The second legal consequence for States that have breached their obligation to minimize greenhouse gas emissions is that they make full reparation for the injury caused, pursuant to Article 31 of the ILC Articles on State Responsibility.²⁰⁸ The obligation to make full reparation is a cornerstone of the law of State responsibility, and was famously endorsed by the Court's predecessor in the *Factory at Chorzów* case.²⁰⁹

136. Ideally, States would make full reparation exclusively through restitution—that is, restoring the situation that would have existed had the breach never occurred. There are indeed certain steps that States can take to reverse *some* of the effects of greenhouse gas emissions, such as protecting, enhancing, and creating carbon sinks to remove carbon dioxide from the atmosphere. States are encouraged to explore this and other options for attempting to make restitution for the injuries caused by climate change.

137. It is, however, widely recognized that many of the effects of greenhouse gas-induced climate change are irreversible. As a result, it is simply not possible to restore the earth's climate to what it would have been had there never been any anthropogenic greenhouse gases emitted. In this scenario, compensation is the

²⁰⁷ UN Environment Programme, *Emissions Gap Report 2023*, p. 28.

²⁰⁸ ARSIWA, Art. 31.

²⁰⁹ *Factory at Chorzów (Germany v. Poland)*, *Merits, Judgment*, P.C.I.J. Reports Ser. A, No. 17, p. 47.

primary means by which full reparation can be made. As the Court's predecessor held in the *Factory at Chorzów* case:

Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.²¹⁰

138. Consistent with this holding, Article 36(1) of the ILC Articles on State Responsibility provides: “The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.”²¹¹

139. Indeed, where restitution is not possible, compensation must play a central role in reparations on climate change. While it may be difficult to measure with certainty the extent of financial harm that any particular emission of greenhouse gas caused to another State, the science is clear that, collectively, all of the anthropogenic greenhouse gas emissions to date have contributed to disastrous climate change events, resulting in huge financial losses for many States. It is therefore not necessary to trace the precise causal link between a particular greenhouse gas emission and a particular climate change event. States that have generally contributed to greenhouse gas emissions the most should be responsible for compensating States that are suffering the most from the effects of climate change, such as Namibia. This principle of compensation underscores an equitable approach to address the consequences of climate change, and their impact on climate vulnerable nations, consistent with the CBDR principle.

²¹⁰ *Ibid.*, p. 47.

²¹¹ ARSIWA, Art. 36(1).



140. Compensation as a form of reparation is particularly important because, at the present moment, many developing countries that are struggling to adapt to climate change are in fact in need of financing to accomplish their objectives. The financial support provided through compensation can serve as a catalyst for the implementation of crucial climate adaptation measures in these States. As the President of Namibia stated at the General Assembly in September 2023, “developed nations must provide financial ... support to enable developing countries to shift to cleaner energy sources without hampering development”.²¹² And as the Executive Secretary of the UNFCCC stated at the 28th Conference of the Parties to the UNFCCC (“COP28”): “Finance is the great enabler of climate action.”²¹³

141. It is for this reason that the African Union in the Nairobi Declaration on Climate Change and Call to Action emphasized the importance of taking financial measures to support African countries in their adaptation needs. Among other things, the Declaration calls for the “[r]e-channeling of at least \$100billion of SDRs to Africa”,²¹⁴ proposes for consideration “a new SDR issue for climate crisis response of at least the same magnitude as the Covid19 issue (US\$650 billion)”,²¹⁵ and urges for consideration a “global carbon taxation regime ... to provide dedicated, affordable, and accessible finance for climate-positive investments”.²¹⁶

²¹² Republic of Namibia, *Statement by His Excellency Dr. Hage G. Geingob, President of the Republic of Namibia at the 78th Session of the UN General Assembly* (20 September 2023).

²¹³ UN, Climate Change, “*Finance is the great enabler of climate action*”: Simon Stiell at COP28 Green Climate Fund event (4 December 2023), available at <https://unfccc.int/news/finance-is-the-great-enabler-of-climate-action-simon-stiell-at-cop28-green-climate-fund-event>.

²¹⁴ African Union, *Nairobi Declaration on Climate Change and Call to Action* (6 September 2023), para. 52(ii).

²¹⁵ *Ibid.*, para. 52(iii).

²¹⁶ *Ibid.*, para. 57.



142. Namibia in particular is greatly in need of climate financing. As mentioned above in Section IV.B.1, Namibia has calculated that it requires approximately USD 1.72 billion from 2021 to 2030 to support its adaptation needs.²¹⁷ While Namibia will allocate as much of its own budget to climate change adaptation as it is able, the scale of the challenge necessitates substantial financial assistance, and much of the funds should come from those developed countries that played a significant role in causing the harms through climate change.

143. Such compensation can be given in different forms. A number of different funds have already been established under the auspices of the UNFCCC: the Global Environmental Facility (“GEF”), the Green Climate Fund (“GCF”), the Special Climate Change Fund (“SCCF”), the Least Developed Countries Fund (“LDCF”), the Adaptation Fund (“AF”), and the Loss and Damage Fund. Contributions to these funds can help States fulfil their obligation to make reparation for the injury caused by greenhouse gas emissions.

144. In addition to contributing to such funds, bilateral climate financing directed towards individual victim countries is also possible. Many national development agencies today dedicate a portion of their financing specifically for climate adaptation in developing countries, with much of this financing directed at specific climate change adaptation projects. Such aid programs, however, need to be expanded and replicated to meet current adaptation needs. Importantly, this aid should come in the form of grants rather than loans so as not to burden impacted country with additional debt.²¹⁸

²¹⁷ Republic of Namibia, *First Adaptation Communication to the UNFCCC* (2021), p. 26.

²¹⁸ See African Union, *Nairobi Declaration on Climate Change and Call to Action* (6 September 2023), paras. 54-55.



145. There have also been calls for debt forgiveness for countries that must bear the burden of climate change adaptation costs.²¹⁹ This could also be a form of compensation given by countries that have contributed the most to climate change to those that suffer the most from climate change.

146. Critically, any compensation given should not fully exempt the breaching State of its responsibilities for climate change. The reality is that no amount of money can fully repair the damage that has been done. That said, of what can be done, the provision of sufficient resources, including financial in nature, is central to achieving the necessary adaptation for the negative impacts of climate change. Prioritizing and mobilizing these resources will enhance climate resilience, mitigate risks, and significantly contribute to achieving the Sustainable Development Goals.

**B. Consequences in view of the Human Rights Nature of the
Obligation to Minimize Greenhouse Gases**

147. Having set forth the legal consequences for States which have breached their obligation to minimize greenhouse gas emissions, this section explains how the fact that this obligation arises not just from international environmental law but also international human rights law has concrete implications for the aforementioned legal consequences. The following sections address three such implications: the right to invoke responsibility for breaches lies with both States and individuals (**Section V.B.1**); the injury caused by breaches is inflicted on both the environments of States and the human rights of individuals (**Section V.B.2**);

²¹⁹ See Chetan Hebbale & Johannes Urpelainen, “Debt-for-adaptation swaps: A financial tool to help climate vulnerable nations”, *Brookings* (21 March 2023), available at <https://www.brookings.edu/articles/debt-for-adaptation-swaps-a-financial-tool-to-help-climate-vulnerable-nations>; Larry Elliott & Phillip Inman, “New push for debt relief to help developing world fund climate action”, *The Guardian* (30 November 2023), available at <https://www.theguardian.com/global-development/2023/nov/30/new-push-for-debt-relief-to-help-developing-world-fund-climate-action>.



and reparation should be directed towards both States and individuals (**Section V.B.3**).

1. The Right to Invoke Responsibility for Breaches Lies with Both States and Individuals

148. The fact that the obligation to minimize greenhouse gas emissions arises not just from international environmental law but also international human rights law affects the identity of the holders of the right to invoke responsibility for breaches of that obligation.

149. In the context of international environmental law, the obligation to minimize greenhouse gas emissions is one that is owed only between States. This is because the source of the obligation is the prevention principle, which creates the obligation on every *State* “to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of *another State*”.²²⁰ This includes the regulation of the activities of transnational corporations having their principal place of business registered within the territory of that State, including in their supply chain. Since the obligation under international environmental law is owed by one State to another State, it is only States that can invoke a breach of that obligation, pursuant to Article 42(a) of the ILC Articles on State Responsibility.

150. Since, however, the obligation to minimize greenhouse gas emissions also arises from international human rights law, this means that the obligation is also owed towards individuals. As a result, the individuals themselves, as well as NGOs representing their interests, have the right to invoke the responsibility of States that fail to comply with the obligation. Consistent with this, NGOs have successfully

²²⁰ *Pulp Mills*, para. 101 (emphasis added).



invoked the responsibility of States for breach of their environmental obligations in the *SERAC v. Nigeria* case before the ACmHPR,²²¹ as well as most recently in the *LIDHO v. Côte d'Ivoire* case before the African Court on Human and Peoples' Rights ("ACtHR").²²² Similarly, the European Court of Human Rights ("ECtHR") has heard complaints by individuals against States over the latter's alleged breaches of climate change mitigation obligations.²²³ And many other international adjudicatory bodies, as well as domestic courts, may be seized by individuals as well. Furthermore, while individuals cannot seize the International Court of Justice, States can exercise diplomatic protection on behalf of their nationals to bring cases before the Court.

151. It is thus important that individuals have the right to invoke the responsibility of States for breach of their obligation to minimize greenhouse gas emissions. And States must cease any such breaches, offer appropriate assurances and guarantees of non-repetition, and make full reparation for the injury caused towards those individuals.

152. The right to invoke responsibility belongs not just with individuals of the present generation, but also those of future generations. This is because the impacts of climate change are not bounded by time. Greenhouse gas emissions today could cause the most significant adverse impacts on individuals decades or centuries later. Therefore, future generations must also have the right to invoke the responsibility of States that have breached their climate change obligations, to the same extent that present generations do.

²²¹ ACmHPR, *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, Communication No. 155/96, Decision (27 October 2001).

²²² ACtHR, *Ligue ivoirienne des droits de l'homme (LIDHO) and others v. Republic of Côte d'Ivoire*, Application No. 041/2016, Judgment (5 September 2023).

²²³ ECtHR, *Duarte Agostinho and Others v. Portugal and Others*, Application No. 39371/20.

153. The bottom line is that climate change must be recognized, by this Court and other adjudicatory bodies, as transcending the inter-State plane of legal obligations. It is one that affects not just States but also human rights. As a result, one cannot rely only on States to invoke the responsibility of other States for breaching the obligation. One must also listen to the voices of individual human beings, at a minimum in the form of the right to invoke responsibility.

2. The Injury Caused by Breaches Is Inflicted on Both the Environments of States and the Human Rights of Individuals

154. It follows from the above that, since the obligation to minimize greenhouse gas emissions arises from both international environmental law and international human rights law, the injury caused by breaches is inflicted on both the environments of States and the human rights of individuals.

155. This is a critical fact in the context of assessing the reparation due for a breach. If the obligation to minimize greenhouse gas emissions were to arise solely from the prevention principle in environmental law, that would mean the injury caused by the breach would be ascertained only with respect to the harm caused to the environment of other States. After all, the prevention principle, as articulated in the *Pulp Mills* case, applies only to cases of “significant damage to the environment of another State”.²²⁴

156. However, since the obligation arises also from international human rights law, the relevant injury for any breach must take into account injuries caused to individual victims of climate change. As a result, any reparation for the injury

²²⁴ *Pulp Mills*, para. 101 (emphasis added).



caused must make up not only for harm to the environment, but also harm to these human victims.

157. Furthermore, considering the intergenerational impact of climate change, the injury caused must be understood to be inflicted upon not just present generations, but also future generations. This means that the corresponding reparations, in turn, must be assessed with respect to all injured individuals, both present and future.

3. Reparation Should Be Directed Towards Both States and Individuals

158. Finally, in view of the fact that the injuries caused by breaches of the obligation to minimize greenhouse gas emissions are inflicted not just on States but also on individuals, any reparation assessed must be directed towards both States and individuals.

159. This is important because States should not retain full discretion to expend any compensation they receive in any way they wish. Where the compensation is targeted at remediating the environment of a State, the State can exercise its responsibility to allocate the funds accordingly for that purpose. But where compensation is given to address injuries caused to the human rights of individuals, those funds must go to the individuals in question. It might still be preferable from a logistical standpoint for the State to receive and manage the funds, but ultimately the beneficiaries of any such compensation must be the injured individuals themselves.

160. If it were the case that the obligation to minimize greenhouse gas emissions was owed only between States, then any compensation given for breach of the obligation would fall within the discretion of the recipient State to expend. However, since the obligation is owed also to individual victims, it is critical to



ensure that any compensation provided is directed towards the appropriate injured party.

161. The fact that the injury is inflicted on both present and future generations must be taken into account in the making of full reparation. In practice, it means that it is not sufficient to make reparation only with respect to the individuals of the present generation. The injuries inflicted on future generations must also be taken into account, and reparation provided to those individuals as well. In the context of compensation, such reparation can be made by using trust funds or other financial instruments to ensure that the beneficiaries of the financing are both present and future generations.

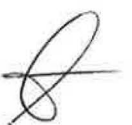


VI. CONCLUSION

162. The General Assembly has, for the first time in its history, requested an advisory opinion from the Court by consensus. The Court must seize this opportunity and give the advisory opinion as requested. The international community would greatly benefit from a clarification of the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases. The Court's opinion will provide much needed guidance by identifying the legal consequences that arise under these obligations for States that have caused significant harm to the climate system and other parts of the environment.

163. The primary obligation of States in this regard, in view of the clarity of the scientific evidence, is to *minimize* their greenhouse gas emissions. This obligation to minimize goes well beyond a mere obligation to *reduce* emissions. Minimization requires a thorough environmental impact assessment of all the activities on a State's territory that emit greenhouse gases, and a serious consideration of alternative options to minimize such emissions. At the very least, States must take the necessary measures to hold the increase in the global average temperature to, at most, 1.5°C above pre-industrial levels, in accordance with the prevention, precautionary, and CBDR principles.

164. This obligation arises not just from international environmental law, but also from international human rights law. Whereas the prevention, precautionary, and CBDR principles all originate from the former, there are analogous principles that emanate from the latter. And in fact, a number of fundamental human rights—including the right to water, the right to adequate food, the right to the highest attainable standard of health, the right to life, and the right to a clean, healthy, and sustainable environment—require that States similarly minimize their greenhouse gas emissions to combat climate change. International environmental law and



international human rights law are thus consistent with another, and reinforce each other through systemic integration.

165. The legal consequences for States that have, in breach of this obligation, caused significant harm to the climate system and other parts of the environment, are straightforward. They must cease the breach and make full reparation for the injury caused. Compensation in particular is an important and appropriate form of reparation, considering that many developed States have reaped tremendous economic benefits through their greenhouse gas emissions, while financing is often the element lacking in climate change adaptation projects in developing countries such as Namibia.

166. The fact that the obligation to minimize greenhouse gas emission arises not just from international environmental law but also from international human rights law is legally significant. This means that it is not just States but also individuals who have the right to invoke the responsibility of States that do not comply with this fundamental mitigation obligation. Moreover, the injury caused by breaches of the obligation should be recognized as being inflicted not just on the environments of States, but also on the human rights of individuals—which carries concrete consequences for any assessment of reparation. Relatedly, any reparation given for injuries caused should be directed towards both States and individuals.

167. In summary, Namibia respectfully requests that the Court:

168. Declare that all States are under the obligation to minimize their greenhouse gas emissions in accordance with the prevention, precautionary, and CBDR principles;

169. Declare that all States are under the obligation to take the necessary measures to hold the increase in the global average temperature to, at most, 1.5°C



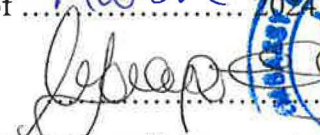
above pre-industrial levels, in accordance with the prevention, precautionary, and CBDR principles;

170. Declare that the aforementioned obligations arise under both international environmental law and international human rights law; and

171. Declare that States that have, through their greenhouse gas emissions, caused significant harm to the climate system and other parts of the environment, are under the obligations to cease the breach and make full reparation for the injury caused, in particular through compensation.

172. Namibia is confident that the Court's advisory opinion will be of significant benefit to the General Assembly as it continues its work to mitigate the effects of climate change. It is Namibia's hope that this Written Statement will aid the Court in its assessment of the factual and legal issues at stake, as well as in its development of the answers to the two questions posed.

Dated at Brussels, Belgium on this 19th Day of March 2024


Dr. Mekondjo Kaapanda-Gilvus



Ambassador of the Republic of Namibia

to the Kingdoms of Belgium and the Netherlands,
the Grand Duchy of Luxembourg
and Mission to the European Union

**ON BEHALF OF THE
GOVERNMENT OF THE
REPUBLIC OF NAMIBIA**