

OBLIGATIONS OF STATES IN RESPECT OF CLIMATE CHANGE

(REQUEST FOR ADVISORY OPINION)

WRITTEN STATEMENT OF
THE AFRICAN UNION



22 March 2024

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I – PRELIMINARY REMARKS

1. For the third time in its history, the African Union is honoured to intervene in advisory proceedings before the International Court of Justice (the “**Court**”).
2. Seemingly, the stakes of the advisory proceedings in which the African Union has opted to participate keep climbing higher. While the Court’s opinion in the *Chagos Archipelago* case concerned the long-overdue decolonization of a territory, and the Court’s upcoming opinion in the *Occupied Palestinian Territory* proceedings will touch upon one of the most glaring failures of the international community to live up to its ideals, the questions asked by the United Nations General Assembly Resolution 77/276 (“**Resolution 77/276**”) relate to climate change, and thus to the future of humanity as a whole.
3. Advisory Opinions are a prime way for the Court to exercise its role as a principal organ of the United Nations (“**UN**”), and to further strengthen the function and place of international law in global affairs. The General Assembly (“**GA**”) was thus well-advised to seek the guidance of the Court on this issue, and it is the paramount duty and pride of any international organisation to assist in this respect.
4. This is why, in this Written Statement (“**WS**”), the African Union intends to bring an African voice to the proceedings. As explained in detail below, the problem of climate change cannot do without that voice – the voice of those who are, and will be, the most affected by the worsening climate and environmental conditions, but also of those who are the most heavily reliant on the protections offered by international law.
5. As the African Union will establish below, there are clear legal answers to the GA’s questions, and the Court should not shy away from laying down the consequences of past violations of international law by the international community. But to better understand the African Union’s submissions in context, it is first important to highlight the impact of climate change on the African continent (**A**), which explains the Union’s interest in the matter (**B**).

A. THE PROBLEM OF CLIMATE CHANGE IS ONE OF THE MOST PRESSING ISSUES FOR THE INTERNATIONAL COMMUNITY – AND ESPECIALLY FOR THE AFRICAN CONTINENT

6. There is no denying that climate change is one of the most pressing issues facing the international community today. The urgent need to avert catastrophic outcomes finds a periodical reminder in the disasters that are already striking the world, and especially the poorer parts thereof. Floods and storms; fires and droughts – many climate events of the past few decades have been aggravated by the slow build-up of greenhouse gases in the atmosphere, a build-up that remains ongoing, at the risk of decimating humanity.
7. The conclusions of the Intergovernmental Panel on Climate Change (“IPCC”) are unequivocal: if we maintain the *status quo*, the world stands on the brink of surpassing the 1.5°C temperature increase threshold, beyond which the effects of climate change become increasingly irreversible and catastrophic.¹ This alarming trajectory poses existential threats, including more frequent and severe weather events, rising sea levels, and devastating impacts on biodiversity and ecosystems.² Achieving net-zero emissions by mid-century is crucial to limit warming to 1.5°C, although this goal will demand unprecedented transitions in energy, land, urban, and infrastructure systems. Failure to act with urgency not only exacerbates environmental degradation but also amplifies socio-economic disparities, endangering millions of lives, particularly in vulnerable communities and developing nations whose margin of adaptation is narrow.³
8. The African continent is particularly concerned by the dangers of climate change, as confirmed in Chapter 9 of the IPCC Sixth Assessment Report.⁴ The acute vulnerability of African ecosystems and societies to climate variability and change

¹ As established in IPCC, ‘2023: Sections’ in Core Writing Team, H. Lee and J. Romero (eds.), *Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the IPCC* 2023, available at: [IPCC_AR6_SYR_LongerReport.pdf](#) (“IPCC Report 2023”), p. 42.

² *Ibid.*, p. 97.

³ *Ibid.*, pp. 57, 62.

⁴ C.H. Trisos, I.O. Adelekan, E. Totin, A. Ayanlade, J. Efitre, A. Gameda, K. Kalaba, C. Lennard, C. Masao, Y. Mgaya, G. Ngaruiya, D. Olago, N.P. Simpson, and S. Zakieldean, ‘2022: Africa’, in H.-O. Pörtner, D.C. Roberts, M. Tignor, E.S. Poloczanska, K. Mintenbeck, A. Alegría, M. Craig, S. Langsdorf, S. Löschke, V. Möller, A. Okem, B. Rama (eds.), *Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press 2023), pp. 1285–1455, doi:10.1017/9781009325844.011 (“IPCC Africa Chapter”).

stems from multiple sources: for instance, Africans are mostly employed in activities, such as subsistence farming, that are particularly at risk from adverse climate events.⁵ Africans are also disproportionately living in informal settlements, which offer little protection against the ravages of floods and heatwaves.⁶ Meanwhile, the continent's unique biodiversity and natural landscapes are at unprecedented risk of catastrophic collapse due to increased aridity,⁷ while changes in rainfall patterns and temperatures threaten the sustainability of Africa's agriculture, which is a cornerstone for the livelihoods of millions. One could go on, but the crux of the issue is the following: identify any adverse climate impact, and Africa and its peoples (especially its future generations) are fated to bear its burden disproportionately.

9. In a cruel twist of fate, this is so, even though the contribution of Africa to historical emissions of greenhouse gases (“GHGs”) is amongst the lowest, and its countries today hold little responsibility for the continuing deterioration of the climate.⁸ As described by Christopher Trisos – one of the main authors of the IPCC Reports – and his team in the Expert Report filed with this Written Statement, “[m]any African states that have historically contributed among the least to current climate change are disproportionately more vulnerable to climate change impacts.”⁹ This has dramatic consequences: observed average mortality from weather events can be as much as 15 times higher for vulnerable states compared with non-vulnerable ones.¹⁰ The Expert Report particularly stressed that this crisis cannot simply be managed through adaptation, in light notably of the high indebtedness of many African states;¹¹ instead, concrete actions are required from the international community.
10. As such, the dire predictions conveyed by scientists to the international community should serve as a clarion call for urgent and tailored climate action to safeguard the future of the continent. Answering that call, the African Union has taken note of this danger. In a Resolution dated 2019, the Assembly of the Union:

⁵ *Ibid.*, p. 1350.

⁶ *Ibid.*, p. 1360.

⁷ *Ibid.*, pp. 1355 *et seq.*

⁸ *Ibid.*, p. 1294: “The contribution of Africa is among the lowest of historical greenhouse gas (GHGs) emissions responsible for human-induced climate change and it has the lowest per capita GHGs emissions of all regions currently.”

⁹ **Expert Report**, Section II.

¹⁰ **Expert Report**, para. 29.

¹¹ **Expert Report**, Section VII.

REITERATE[D] the need of the multilateral approach of addressing the global challenge of climate change, through the UN Framework Convention on Climate Change and REAFFIRM[ED] Africa’s commitment to implement the Kyoto Protocol and the Paris Agreement, in the best interest of African countries, which are particularly vulnerable to climate change and already adversely affected by the impacts of this phenomenon, while ensuring that African countries are accorded policy space needed to achieve sustainable development;¹²

11. This led the African Union to adopt in 2022 a dedicated Climate Change and Resilient Development Strategy and Action Plan,¹³ which established strong guidelines as to what the continent can, and should do, to contribute to the fight against climate change, while remaining mindful of its legitimate aspirations to enhance the welfare of its peoples. The importance of that plan and of the issue of climate change was further underlined by the ground-breaking *African Leaders Nairobi Declaration on Climate Change and Call to Action* (“**Nairobi Declaration**”), adopted in September 2023, and which, in no unclear terms:

Acknowledge[d] that climate change is the single greatest challenge facing humanity and the single biggest threat to all life on Earth, demanding urgent and concerted action from all nations to lower emissions and reduce the concentration of greenhouse gases in the atmosphere.¹⁴

12. Yet, these African initiatives cannot suffice to avert the climate crisis, as this worldwide danger requires a worldwide answer. And to the extent this crisis is the fruit of a coordination failure, international law has a particular role to play in this matter. For vulnerable, developing States in particular, international law is, as aptly put by Costa Rica in the debates surrounding the adoption of Resolution 77/276,¹⁵ “the first line of defence”.¹⁶
13. The message of the African Union on the climate crisis is clear: while the countries members of the Union contributed little, if at all, to the build-up of greenhouse gases,

¹² **Exhibit AU-1**, Assembly of the Union, Decision On The Katowice Climate Conference (UNFCCC Cop 24) And Africa’s Engagements At The Global Climate Change Conference At COP25/CMP 15 Doc. Assembly/ AU/Dec.723(XXXII), 10–11 February 2019, para. 8. See also AU/Dec.764(XXXIII), and AU/Dec.855(XXXVI).

¹³ **Exhibit AU-2**, African Union Climate Change and Resilient Development Strategy and Action Plan (2022-2032), available at: [AU Climate Change and Resilient Development Strategy and Action Plan](#)

¹⁴ **Exhibit AU-3**, African Union, The African Leaders Nairobi Declaration on Climate Change and Call To Action, 2023, para. 5, available at: [Nairobi Declaration 06092023.pdf.docx \(afdb.org\)](#)

¹⁵ **Dossier No. 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”, 4 April 2023, UN Doc. A/RES/77/276.

¹⁶ **Dossier No. 3**, UNGA, 64th plenary meeting, 29 March 2023, UN Doc. A/77/PV.64, p. 9 (Costa Rica).

they stand to suffer the most from its dire consequences.¹⁷ This is a not vain word: some of these consequences are already present, for everyone to see,¹⁸ and should serve as a harbinger of what awaits the world if the international community does not wake up to the climate emergency.¹⁹ Unfortunately, as the IPCC confirmed a year ago already:

The pace and scale of what has been done so far, and current plans, are insufficient to tackle climate change.²⁰

14. More should be done, if only because international law mandates it. In this context, Resolution 77/276 has asked the Court to opine on two questions, including two sub-questions:

(a) 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?

(b) 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?

15. These are important questions, and the African Union – like the 150 countries that sponsored Resolution 77/276 – is confident that their resolution will contribute substantially to clarifying the state of international law on this issue.

¹⁷ IPCC Report 2023, p. 51; IPCC Africa Chapter, p. 1289.

¹⁸ As noted by UN Secretary-General António Guterres: “those who have contributed the least to the climate crisis are already facing both climate hell and high sea levels.” See **Dossier No. 3**, UNGA, 64th plenary meeting, 29 March 2023, UN Doc. A/77/PV.64.

¹⁹ IPCC Report 2023, pp. 48 and 49.

²⁰ IPCC Press Release, 2023/06/PR, 20 March 2023 available at: [IPCC_AR6_SYR_PressRelease_en.pdf](#).

B. THE INTEREST OF THE AFRICAN UNION IN THESE ADVISORY PROCEEDINGS

16. The African Union, established on 11 July 2000, is a regional agency within the meaning of Article 52 of Chapter VIII of the Charter of the United Nations (the “**Charter**”). The African Union has a membership of fifty-five African States. Pursuant to its Constitutive Act, the African Union is tasked with “promot[ing] and defend[ing] African common positions on issues of interest to the continent and its peoples.”
17. Beyond its long-standing interest in fighting climate change, the African Union has a direct and specific interest in these proceedings, for several, non-exhaustive and cumulative, reasons:
 - a. The African Union is the largest grouping of states in the world, representing more than a quarter of the State Parties to the UN. This substantial representation underscores the African Union’s significant stake in global governance and international law.
 - b. The countries of the African Union, individually or as a group, bear little responsibility in the present climate crisis.²¹ Long afflicted by the brutality of colonization, African States have yet to reach the level of development that Western nations achieved through industrialization processes that significantly contributed to the environmental degradation we witness today. This historical context amplifies the injustice of the climate crisis, where those least responsible face disproportionate burdens.
 - c. The countries of the African Union, individually or as a group, risk being the main victims of the climate crisis, for the following reasons:
 - i. **Poverty**: the pervasive socioeconomic challenges across the continent exacerbate the African peoples’ vulnerability to climate-induced adversities, diminishing resilience and adaptive capacities.²² Many of the solutions designed to avert the worst consequences of climate

²¹ **Exhibit AU-3**, Nairobi Declaration, para. 8.

²² IPCC Report 2023, pp. 50, 51 and 71.

change, or to adapt our lifestyle to the new climate realities, are out of reach for African States.²³

- ii. **Geographical predisposition:** Africa is uniquely susceptible to the impacts of climate change, with phenomena like desertification, droughts, and reduced agricultural productivity being more pronounced here than in many other regions²⁴. Indeed, Africa has the dubious honour of being the only continent cited in Resolution 77/276, as the GA emphasised the role of the United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa;
- iii. **Demographics:** Africa’s demographic profile is characterised by a significant youth population. While this youth demographic can drive innovation and adaptation, it also faces significant risks from climate-induced disruptions to economic systems, education, and employment opportunities. The GA’s second question, focused on the future generations, is of particular interest to the peoples of Africa, which stand to be an increasingly large portion of these future generations.²⁵

In other words, the African Union is one of the best situated actors to represent “those on the front lines, already paying the price for global warming that they did nothing to cause”, and which Secretary-General Guterres cited in the opening lines of its introduction to what became Resolution 77/276.²⁶

18. For these reasons, the African Union believes that it can bring a peculiar and singular voice in these proceedings. In what follows, the African Union will notably stress that:
 - a. **Differentiated obligations** should be a cornerstone of the international community’s response to climate change. This principle acknowledges that while all countries must participate in mitigating climate change, not all bear the same level of responsibility nor possess the same capacity to address the

²³ IPCC Africa Chapter, p. 1301 *et seq.*, and notably the IPCC’s conclusion that “[n]o adaptation response categories were assessed to have high feasibility of implementation” in Africa.

²⁴ *Ibid.*, p. 1298.

²⁵ *Ibid.*, p. 1360.

²⁶ **Dossier No. 3**, UNGA, 64th plenary meeting, 29 March 2023, UN Doc. A/77/PV.64, p. I.

issue. The historical contributions to global greenhouse gas emissions and the varying degrees of economic development across nations necessitate a tailored approach. The African Union will argue for a legal framework that imposes more stringent obligations on historically high emitters and enables developing countries to pursue sustainable development pathways.

- b. The **necessity to keep into account growth and prosperity** for African nations cannot be overstated. The African Union will emphasise that climate change mitigation and adaptation strategies must not stifle the economic potential of its Member-States. Instead, these strategies should be designed in a way that fosters technological transfer, financial support, and capacity-building initiatives, enabling African countries to leapfrog to green technologies and sustainable practices. The African Union will advocate for the integration of climate policies with development objectives to ensure that climate action is synergistic with efforts to eradicate poverty, enhance food security, and improve living standards across the continent. This dual focus on environmental sustainability and economic development is essential for achieving a just transition that leaves no nation behind.
- c. Given the stakes, the Court **cannot confine itself to timid statements or tread a timorous path**, merely echoing the broad range of consensual talking points expressed, year on year out, in the context of multilateral conferences. These proceedings should not merely yield tentative ways forward that fail to recognise the exigency of climate action. Instead, these proceedings are an opportunity for the international community to consider bold ways to tackle climate change and to assist the most vulnerable countries in doing so – including through a recognition of the obligations of those who contributed the most to the crisis to make reparations. Some of the modalities of these reparations have been charted by the African Union and other actors: in the Nairobi Declaration, African Leaders stressed the urgent need for the “operationalization of the Loss & Damage fund as agreed at COP27”²⁷ as well as “concrete, time-bound action on the proposals to reform the multilateral

²⁷ Exhibit AU-3, Nairobi Declaration, para. 22.

financial system”²⁸ – including through debt management and relief, in full cognizance that debt crises in developing nations are “an impediment to investment in development and climate action”.²⁹

19. The African Union is confident that, as always, the Court should prove equal to the task of laying out the law, with a view to a positive impact towards a better, more sustainable world.

²⁸ *Ibid.*, para. 52.

²⁹ *Ibid.*, para. 55.

II – THE COURT HAS JURISDICTION TO GIVE THE ADVISORY OPINION REQUESTED

20. Before delivering any advisory opinion, the Court has first to review whether it has the jurisdiction to answer the questions posed to it, and whether it should exercise its discretion not to.³⁰
21. As explained in this section, there is no doubt that the Court has jurisdiction in these advisory proceedings. That jurisdiction is governed by Article 65 of its Statute, which reads:

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.³¹

22. This provision includes two prerequisites for the validity of a request for an advisory opinion: **(A)** the request must be made by a duly authorised organ; and **(B)** the question put to the Court must be a legal one. As detailed below, both requirements are fulfilled in the present request, giving rise to the Court’s duty to give the requested opinion **(C)**.

A. THE GENERAL ASSEMBLY IS AUTHORISED TO REQUEST THE ADVISORY OPINION

23. According to the Charter, the General Assembly (like the Security Council), “may request the International Court of Justice to give an advisory opinion on any legal question.”³² By contrast with other organs of the UN, this right is not bound by “the scope of [...] activities” of the General Assembly.³³
24. The latter is, in any event, endowed with a very broad competence: under Article 10 of the UN Charter, the GA may discuss “any questions or any matters within the scope of the present Charter”. In turn, Article 13(1) contemplates that the GA would “initiate studies and make recommendations for the purpose of [...] promoting

³⁰ See, e.g., *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, I.C.J. Reports 2019, para. 54 (“**Chagos Advisory Opinion**”) and the jurisprudence cited.

³¹ United Nations, *Statute of the International Court of Justice*, 18 April 1946, Article 65.

³² United Nations, *Charter of the United Nations*, (“**Charter**”), 1 UNTS XVI, Article 96(1).

³³ *Ibid.*, Article 96(2).

- 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”. All these issues are bound to be affected by the all-encompassing climate crisis.
25. Besides, under Article 11 of the Charter, the GA has competence with respect to “questions relating to the maintenance of international peace and security”.³⁴ Given the certain consequences of climate change in terms, e.g., of boundaries and refugees, the question is also relevant for international peace and security.
26. The Court has confirmed many times that these provisions allow the General Assembly to request an advisory opinion under Article 65 of its Statute.³⁵ The Court should therefore consider that the General Assembly validly exercised its powers under Article 96(1) of the UN Charter.

B. THE QUESTIONS HAVE A LEGAL CHARACTER

27. The Court may answer a request for an advisory opinion only if the questions presented to it have a legal character.³⁶
28. That the two questions presented to the Court by the General Assembly are legal in character cannot be doubted. On their face, these questions have been deliberately framed by the General Assembly as pertaining to legal issues. In particular, the focus of both questions is on the “obligations” of States, and the “legal consequences” of the climate crisis.
29. And while it has been suggested, in the debates following the adoption of Resolution 77/276, that the questions presented to the Court lack an undefined “balance”,³⁷ this is irrelevant to their legal character – which remains uncontested.³⁸ Other States have, on the contrary, praised the wording of the consensus resolution as being the balanced result of good faith negotiations between all stakeholders.³⁹ It is also irrelevant that the Resolution’s preamble allegedly refers to issues that are not legal in character:⁴⁰

³⁴ *Ibid.*, Article 11(2).

³⁵ Most recently in *Chagos Advisory Opinion*, para. 56.

³⁶ *Chagos Advisory Opinion*, para. 57.

³⁷ **Dossier No. 3**, UN Doc. A/77/PV.64, p. 12, Ms. Ershadi (Islamic Republic of Iran).

³⁸ See, notably, *Ibid.*, p. 22, Mr. Moon (Republic of Korea).

³⁹ See, e.g., *Ibid.*, p. 2, Mr. Kalsakau (Vanuatu); p. 18, Mr. Ikondere (Uganda); and p. 23, Mr. Hilale (Morocco).

⁴⁰ *Ibid.*, p. 28, Mr. Hill (United States of America).

while the African Union disagrees with this contention, what matters are the questions before the Court, not the remainder of the Resolution, which only serves as context.

30. In other words, these are questions “framed in terms of law and rais[ing] problems of international law”, which “are by their very nature susceptible of a reply based on law.”⁴¹ The Court has therefore jurisdiction to answer them, and there is no need to reformulate the questions.

C. THE COURT’S DUTY TO GIVE THE REQUESTED OPINION

31. Once the Court has established its jurisdiction, it may exercise its discretion not to give the requested opinion, in order to “to protect the integrity of the Court’s judicial function as the principal judicial organ of the United Nations”.⁴² This question lies within the full discretion of the Court, in line with the permissiveness of Article 65 of its Statute.⁴³ The Court has held, however, that it will only exercise its discretion not to render an advisory opinion where there are “compelling reasons” not to.⁴⁴ To date, the Court has never exercised that discretion.⁴⁵
32. In the case at hand, the African Union sees no reason why the Court should use its discretion not to answer the GA’s questions.⁴⁶ Strikingly, during the debates preceding the adoption of the draft resolution by the, all States save one have supported seeking the Court’s opinion on this matter.⁴⁷ As pointed by the delegate from Vietnam:

Never before was a resolution requesting an advisory opinion of the International Court of Justice adopted by consensus (resolution 77/276). Never before was such a resolution co-sponsored by such a large number of States Members of the United Nations. Rarely did such a resolution command so much attention and support worldwide, from communities in Vanuatu to

⁴¹ *Western Sahara*, Advisory Opinion, I.C.J. Reports 1975, p. 12 (“Western Sahara Advisory Opinion”), para. 15.

⁴² *Chagos Advisory Opinion*, para. 64.

⁴³ *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* (First Phase), Advisory Opinion, I.C.J. Reports 1950, p. 65, p. 72.

⁴⁴ *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo*, Advisory Opinion, I.C.J. Reports 2010 (II), p. 403, (“*Kosovo Advisory Opinion*”) para. 30.

⁴⁵ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, p. 136 (“**Wall Advisory Opinion**”), para. 44. See also *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, p. 226 (“**Nuclear Weapons Advisory Opinion**”), para. 14.

⁴⁶ *Ibid.*, para. 16. See also *Kosovo Advisory Opinion*, para. 34.

⁴⁷ With the exception of the United States of America: see **Dossier No. 3**, UN Doc. A/77/PV.64, p. 28, Mr. Hill (United States of America).

victims of the unprecedented floods in Pakistan. Such a phenomenon speaks volumes.⁴⁸

33. The sole dissenting voice had, seemingly, been that of the United States of America, which considered that “launching a judicial process, especially given the broad scope of the questions, will likely accentuate disagreements and not be conducive to advancing ongoing diplomatic and other processes.”⁴⁹
34. Of course, the Court has heard this argument before: this is the same point typically made in several other advisory proceedings, suggesting that the Court’s pronouncements on matters of international law would, somehow, complicate instead of clarifying the existing picture – be it in terms of ongoing negotiations (as in the *Wall Advisory case*, and the pending advisory opinion on *Palestine*), or of an existing bilateral dispute (as in *Chagos*). These objections are generally framed in terms of a fear that the Court’s *legal* findings would impinge upon diplomatic and political considerations.
35. This fear is unfounded. The Court’s jurisprudence has, indeed, rightly stressed at multiple junctures that most of the questions put to it “will have political significance, great or small”,⁵⁰ and that this should not be a bar to its judicial function.⁵¹ The Court has further noted that its judges are also not equipped to determine whether the Advisory Opinion will have detrimental consequences to an ongoing negotiating process, in a context where the General Assembly – by posing the question – implicitly held otherwise.⁵²
36. In the context of the first round of written submissions, some States may also be tempted to argue that the Court should exercise its discretion not to render an opinion in a context where two other courts (the International Tribunal for the Law of the Sea⁵³ and the Inter-American Court of Human Rights⁵⁴) are tasked with answering

⁴⁸ *Ibid.*, p. 16, Mrs. Le (Viet Nam).

⁴⁹ *Ibid.*, p. 28, Mr. Hill (United States of America).

⁵⁰ *Certain expenses of the United Nations (Article 17, para. 2, of the Charter)*, Advisory Opinion, I.C.J. Reports 1962, p. 151, p. 155.

⁵¹ *Nuclear Weapons Advisory Opinion*, para. 13: “Whatever its political aspects, the Court cannot refuse to admit the legal character of a question which invites it to discharge an essentially judicial task, namely, an assessment of the legality of the possible conduct of States with regard to the obligations imposed upon them by international law.”

⁵² *Kosovo Advisory Opinion*, para. 35.

⁵³ *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law*, ITLOS Case No. 31, 12 December 2022.

⁵⁴ IACHR., Request for an Advisory Opinion submitted by Chile and Colombia before the Inter-American Court of Human Rights of January 9, 2023.

comparable questions. Beyond the fact that these cases are pertinent to different and more narrow questions and bodies of applicable law, that argument should stumble on the simple fact that other international courts do not have an exclusive jurisdiction on matters of general international law⁵⁵ – let alone in advisory proceedings. Only the Court has the general competence to render the type of opinion requested by the GA, which goes beyond the interpretation of any single treaty.

37. Finally, the African Union wishes to pre-empt the (all too foreseeable) contention that the Court should refrain from deciding questions that reflect a complex factual background, further complicated in this case by the role of science in these issues. The Court's jurisprudence once again illustrates that these concerns are frequently overblown, especially when the Court is assisted in approaching factual matters by the statements of intervening States.⁵⁶ This is also far from the first case in which the record includes scientific considerations, which the Court is well-equipped to handle.
38. Accordingly, the Court should be assured that the exercise of its jurisdiction to answer the General Assembly's questions is proper and welcome.

⁵⁵ Absent such exclusive jurisdiction, the Court is not prevented to rule on an issue: see *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, Preliminary Objections, Judgment, I.C.J. Reports 1998, p. 275, para. 70.

⁵⁶ *Chagos Advisory Opinion*, paras. 73-74.

III. THE QUESTIONS MUST BE DECIDED IN VIEW OF THE WHOLE *CORPUS* OF INTERNATIONAL LAW, AS WELL AS THE CURRENT SCIENTIFIC CONSENSUS

39. The UN General Assembly requests the Court to render an advisory opinion on “the obligations of States *under international law* to ensure the protection of the climate system and other parts of the environment” and on the “legal consequences under these obligations”.⁵⁷ In answering these questions, the Court is directed to take into account the full range of treaties and rules of international law.
40. It is clear from the formulation of the questions, the *chapeau* of the operative part of the resolution, and the preambular paragraphs, that the law applicable to the advisory proceedings is the entire corpus of international law.
41. In the African Union’s view, in answering these questions, the Court must take into account (A) the whole corpus of international law, which includes the United Nations Framework Convention on Climate Change (“UNFCCC”),⁵⁸ Kyoto Protocol⁵⁹ and Paris Agreement,⁶⁰ principles of general international law, multilateral environmental agreements, human rights treaties, and relevant instruments governing aspects of climate change in the African context; and (B) the current state of scientific knowledge.

A. THE COURT MUST TAKE INTO ACCOUNT THE WHOLE CORPUS OF INTERNATIONAL LAW

42. That the entire corpus of international law is applicable in this case is reflected in three distinct aspects of Resolution 77/276: (i) the text of the questions; (ii) the chapeau of the operative part; and (iii) the preambular paragraphs.
43. *First*, the very questions asked by the General Assembly seek to determine the obligations of States with respect to climate change ‘under international law’. The

⁵⁷ **Dossier No. 2**, Resolution 77/276 (emphasis added).

⁵⁸ **Dossier No. 4**, United Nations Framework Convention on Climate Change, 9 May 1992, 1771 UNTS 107 (“UNFCCC”).

⁵⁹ Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 2303 U.N.T.S 162, Article. 3(1) (“**Kyoto Protocol**”).

⁶⁰ **Dossier No. 16**, Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104 (“**Paris Agreement**”).

absence of further qualifications in this language evidences the wide breadth of the applicable law.

44. *Second*, the chapeau of the operative part refers to certain treaties and rules of general international law to which the Court is requested to have particular regard. The Court is tasked to answer the question:

Having particular regard to the Charter of the United Nations, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the United Nations Framework Convention on Climate Change, the Paris Agreement, the United Nations Convention on the Law of the Sea, the duty of due diligence, the rights recognized in the Universal Declaration of Human Rights, the principle of prevention of significant harm to the environment and the duty to protect and preserve the marine environment.⁶¹

45. These treaties and customary rules form part of the corpus of international law under which the Court is requested to answer the questions. They demonstrate that the Court must not confine itself to the interpretation and application of a select few treaties, such as those related primarily to climate change, as this would be inconsistent with the very formulation of the question in the resolution. Moreover, this list of treaties and rules of international law is not exhaustive, as indicated by the expression ‘having *particular* regard’. The Court is thus called upon to identify the relevant obligations from the entire corpus of international law.
46. *Third*, it is also clear from the four preambular paragraphs of Resolution 77/276 that the Court should identify the relevant obligations from the entire corpus of international law and assess the legal consequences of the conduct causing climate change under international law. The preamble recalls the applicability and importance of other treaties, instruments and rules in answering the questions posed:

Recalling its resolution 77/165 of 14 December 2022 and all its other resolutions and decisions relating to the protection of the global climate for present and future generations of humankind, and its resolution 76/300 of 28 July 2022 on the human right to a clean, healthy and sustainable environment,

⁶¹ **Dossier No. 2**, Resolution 77/276 (emphasis added).

Recalling also its resolution 70/1 of 25 September 2015 entitled “Transforming our world: the 2030 Agenda for Sustainable Development”,

Recalling further Human Rights Council resolution 50/9 of 7 July 2021 and all previous resolutions of the Council on human rights and climate change, and Council resolution 48/13 of 8 October 2021,² as well as the need to ensure gender equality and empowerment of women,

Emphasizing the importance of the Charter of the United Nations, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child, the United Nations Convention on the Law of the Sea, the Vienna Convention for the Protection of the Ozone Layer, the Montreal Protocol on Substances that Deplete the Ozone Layer, the Convention on Biological Diversity and the United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, among other instruments, and of the relevant principles and relevant obligations of customary international law, including those reflected in the Declaration of the United Nations Conference on the Human Environment and the Rio Declaration on Environment and Development, to the conduct of States over time in relation to activities that contribute to climate change and its adverse effects.⁶²

47. The terms ‘among other instruments’ and ‘including’ in the preambular paragraphs make clear that the references listed are not intended to be exhaustive. Indeed, the international law relevant to answer the question goes beyond the UNFCCC and the Paris Agreement, and includes a range of relevant treaties such as the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention)⁶³ and the Convention on Long Range Transboundary Air Pollution.⁶⁴
48. The preambular paragraphs of the resolution enumerate several instruments deemed important by States during the drafting process of the text to answer the questions posed to the Court. The African Union recalls that Resolution 77/276 was adopted by

⁶² **Dossier No. 2**, Resolution 77/276 (emphasis added).

⁶³ **Exhibit AU-4**, African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa, Kampala, 23 October 2009 (“**Kampala Convention**”).

⁶⁴ Convention on Long-range Transboundary Air Pollution. Geneva, 13 November 1979, United Nations, Treaty Series, vol. 1302, p. 217 (“**Convention on long-range transboundary air pollution**”).

consensus and co-sponsored by 132 States.⁶⁵ This indicates that all UN Member States support – or at least do not oppose – the premise that the UN General Assembly was acting within its competence when it adopted the resolution. Indeed, States have commended the language of the resolution as representing the outcome of balanced and careful negotiations among stakeholders,⁶⁶ and reflecting the united voice of the General Assembly in recognising the importance of fighting climate change.⁶⁷ Consequently, there is no basis to disregard the preambular paragraphs, which form part of the resolution, as warranting consideration when identifying States’ obligations.

49. It is thus the view of the African Union that ‘international law’ as a system – which encompasses climate change law, environmental law, human rights law, and the law of the sea – offers a more complete answer to the question of States’ obligations to protect the climate from significant harm for present and future generations, and the consequences of those obligations.

1. *UNFCCC, Kyoto Protocol, and Paris Agreement*

50. The UNFCCC, the Kyoto Protocol, and the Paris Agreement, form part of the corpus of international law and are both relevant and applicable to the determination of States’ obligations and the assessment of the legal consequences under those obligations. In the preambular paragraphs of Resolution 77/276, the General Assembly invoked these instruments as part of the corpus of international law applicable to the conduct of States which have caused significant harm to the world’s climate, and more specifically ‘as expressions of the determination to address decisively the threat posed by climate change’:

⁶⁵ As seen in **Dossier No. 3**, the Resolution’s co-sponsors included: Algeria, Andorra, Angola, Antigua and Barbuda, Australia, Austria, Azerbaijan, Bahamas, Bangladesh, Barbados, Belgium, Belize, Bulgaria, Cabo Verde, Canada, Chile, Colombia, Costa Rica, Croatia, Cyprus, Czechia, Denmark, Djibouti, Dominican Republic, Eritrea, Estonia, Fiji, Finland, France, Gabon, Gambia, Georgia, Germany, Ghana, Greece, Guinea-Bissau, Guyana, Hungary, Iceland, Ireland, Italy, Jamaica, Kiribati, Latvia, Lebanon, Libya, Liechtenstein, Lithuania, Luxembourg, Madagascar, Maldives, Malta, Marshall Islands, Mauritania, Mauritius, Mexico, Micronesia (Federated States of), Monaco, Montenegro, Morocco, Mozambique, Myanmar, Namibia, Nauru, Nepal, Netherlands, New Zealand, North Macedonia, Norway, Palau, Panama, Papua New Guinea, Portugal, Republic of Moldova, Romania, Rwanda, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Samoa, Serbia, Seychelles, Sierra Leone, Singapore, Slovakia, Slovenia, Solomon Islands, Spain, Sri Lanka, Suriname, Sweden, Switzerland, Timor-Leste, Togo, Tonga, Trinidad and Tobago, Tunisia, Tuvalu, Uganda, Ukraine, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, Vanuatu, Viet Nam and State of Palestine. Additional co-sponsors: Afghanistan, Armenia, Bolivia (Plurinational State of), Bosnia And Herzegovina, Botswana, Burundi, Dominica, Ecuador, El Salvador, Equatorial Guinea, Haiti, Indonesia, Israel, Japan, Kyrgyzstan, Malaysia, Mali, Mongolia, Niger, Peru, Philippines, Poland, Republic Of Korea, San Marino, Tajikistan, Thailand, Uruguay.

⁶⁶ See, e.g., **Dossier No. 3**, UN Doc. A/77/PV.64, p. 2, Mr. Kalsakau (Vanuatu); p. 18, Mr. Ikondere (Uganda); and p. 23, Mr. Hilale (Morocco).

⁶⁷ *Ibid.*, p. 19, Mr. Feruță (Romania).

Recalling the United Nations Framework Convention on Climate Change, the Kyoto Protocol and the Paris Agreement, as expressions of the determination to address decisively the threat posed by climate change, urging all parties to fully implement them, and noting with concern the significant gap both between the aggregate effect of States' current nationally determined contributions and the emission reductions required to hold the increase in the global average temperature to well below 2 degrees Celsius above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5 degrees Celsius above pre-industrial levels, and between current levels of adaptation and levels needed to respond to the adverse effects of climate change.

51. The UNFCCC and the Paris Agreement contain rules that specifically address aspects of the conduct to be evaluated by the Court, such as mitigation, adaptation, loss and damage, finance, technology transfer and capacity-building. The Paris Agreement is to be understood and interpreted in light of the principles and obligations of the UNFCCC. Of particular relevance to the determination of States' obligations is Article 2(1)(a) of the Paris Agreement, which sets the temperature goal, and Article 4(1), which identifies the longer-term goal of reaching net zero.
52. Equally relevant are the key principles of international environmental law set out in the UNFCCC and the Paris Agreement, namely, equity, and common but differentiated responsibilities and respective capabilities ("**CBDR-RC**"), which have likewise been invoked in the preamble of the resolution. These principles bear particular importance for the interpretation by the Court of States' obligations. While the principle of CBDR-RC emphasises global solidarity by recognising that all States, regardless of size or development status, have a degree of responsibility to address environmental problems, it also acknowledges that developed countries have made a larger historical contribution to global environmental problems, through their own process of industrialisation. This very same process has bestowed on them possess greater financial and technological resources to enable them to address global environmental problems.
53. As explained earlier, while these instruments related to climate change are relevant in answering the questions, the Court must determine the obligations under the whole corpus of international law, and must not be confined to the interpretation and application of this selection of treaties.

2. Principles of general international law

54. The question's *chapeau* makes clear that the applicable law is not limited to treaties, but also concerns the requirements under principles of general international law:

Having particular regard to [...] the duty of due diligence, [...] the principle of prevention of significant harm to the environment and the duty to protect and preserve the marine environment.

55. The duty of due diligence requires States to exercise to avoid causing significant environmental harm or risk thereof in another state or in areas beyond their national jurisdictions.⁶⁸ Obligations of conduct and 'due diligence' are closely linked,⁶⁹ in that due diligence is "an obligation to deploy adequate means, to exercise best possible efforts, to do the utmost, to obtain this result."⁷⁰ When complementing treaty obligations, such as those found in the UNFCCC and the Paris Agreement, the duty of due diligence emphasises the level of diligence required under the treaty obligation, and sets a rigorous, continuous, and evolving standard for assessing compliance or breach with the obligation. The duty of due diligence is thus applicable and forms part of the corpus of international law under which the Court is requested to answer the questions.
56. Furthermore, the principle of prevention of significant harm to the environment is equally relevant and applicable. It is now well-established that GHG emissions have caused significant harm to the climate system itself as well as – directly and indirectly (through the adverse effects of climate change) – also to other parts of the environment. Prevention of transboundary harm is widely recognised as a rule of customary

⁶⁸ Jorge E. Viñuales, "Due Diligence in International Environmental Law: A Fine-grained Cartography" in Heike Krieger (ed.) et al. *Due Diligence in the International Legal Order* (2020), p. 121. There is ample support for the customary grounding of this duty. The Court itself has referenced the following judgments in support for this duty in its judgment in *Dispute over the Status and Use of the Waters of the Silala (Chile v. Bolivia)*, Judgment, I.C.J. Reports 2022, p. 614, para. 99 ("*Chile v. Bolivia case*"); *Corfu Channel (United Kingdom v. Albania)*, Merits, Judgment, I.C.J. Reports 1949, p. 22, ("*Corfu Channel case*"); *Nuclear Weapons Advisory Opinion*, para. 29; *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010 (I), para. 101 ("*Pulp Mills case*"); *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 (II), p. 706 ("**Certain Activities**"), para. 104.

⁶⁹ *Responsibilities and obligations of States with respect to activities in the Area*, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, p. 10, para. 111 ("**ITLOS Advisory Opinion 2011**"); drawing on *Pulp Mills case*, para. 187.

⁷⁰ Lavanya Rajamani, "Due Diligence in International Climate Change Law" in Heike Krieger (ed.) et al. *Due Diligence in the International Legal Order* (2020), p. 164, citing *ibid.*, *ITLOS Advisory Opinion 2011*, para. 110.

international law,⁷¹ and is reflected in Principle 2 of the Rio Declaration⁷² as well as Principle 21 of the Stockholm Declaration.⁷³ The Court itself has stated that “the existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control *is now part of the corpus of international law relating to the environment.*”⁷⁴

57. Finally, the duty to protect and preserve the marine environment is a rule of customary international law⁷⁵ that has been codified in Article 192 of the United Nations Convention on the Law of the Sea (“UNCLOS”).⁷⁶ In addition, the duty to ‘protect the atmosphere’ from degradation by exercising due diligence, as codified by the ILC,⁷⁷ is equally relevant and applicable to the question of climate change.⁷⁸

58. These principles of general international law cited in the question’s *chapeau* form part of the entire corpus of international law which the Court is requested to apply when determining the obligations of States with respect to climate change – though, again, they are not exhaustive, and the Court must answer the questions taking into account the entire corpus of international law.

3. Multilateral environmental agreements

59. Aside from climate treaties, the resolution makes references to a number of multilateral environmental agreements, including UNCLOS, the Vienna Convention for the Protection of the Ozone Layer, the Montreal Protocol on Substances that Deplete the Ozone Layer, the Convention on Biological Diversity and the United Nations Convention to Combat Desertification in Those Countries Experiencing

⁷¹ There is substantial support for anchoring the prevention principle in customary international law: *Nuclear Weapons Advisory Opinion*, paras. 27-29; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I. C. J. Reports 1997, p. 7, para. 140 (“**Gabčíkovo-Nagymaros Project**”); *Pulp Mills case*, para. 101; *Certain Activities*, para. 104; *Chile v. Bolivia case*, paras. 83 and 99.

⁷² **Dossier No. I37**, Rio Declaration on Environment and Development, 13 June 1992, UN Doc. A/CONF.151/26 (“Rio Declaration”).

⁷³ **Dossier No. I36**, Declaration of the United Nations Conference on the Human Environment, Stockholm, 16 June 1972, UN Doc. A/CONF.48/14/Rev.1 (“**Stockholm Declaration**”).

⁷⁴ *Nuclear Weapons Advisory Opinion*, pp. 241–242, para. 29 (emphasis added).

⁷⁵ The Court has recognised the obligation to protect and preserve the marine environment as a rule of customary international law in *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Judgment, I.C.J. Reports 2022, p. 266, para. 95.

⁷⁶ United Nations Convention on the Law of the Sea, 10 December 1982, 1833 UNTS 396.

⁷⁷ ILC, Draft Guidelines on the Protection of the Atmosphere (2021), Official Records of the General Assembly, Seventy-sixth Session, Supplement No. 10, UN Doc A/76/10, guideline 3.

⁷⁸ *Ibid.*, Commentary to Article I, para. 12.

Serious Drought and/or Desertification, Particularly in Africa, which are relevant to the identification and clarification of States' specific obligations.

60. These treaties are achieved wide ratification, often even universal endorsement, to the extent that some of their obligations, as in the case of Article 192 of UNCLOS mentioned above, are considered customary international law. In addition, they have often given rise to a rich body of subsequent agreement and practice, including in the form of decisions adopted by Conferences of State Parties by consensus, that ought to be taken into account when interpreting treaties.⁷⁹

4. *Human rights instruments*

61. The General Assembly explicitly referred to the to the Universal Declaration of Human Rights (“**UDHR**”), the International Covenant on Civil and Political Rights (“**ICCPR**”) and the International Covenant on Economic, Social and Cultural Rights (“**ICESCR**”) as applicable and relevant to the determination of the questions, as together they constitute the fundamental rights and freedoms recognised internationally. The rights recognised in the UDHR form part of general international law,⁸⁰ and the ICCPR and the ICESCR are considered the foundational multilateral human rights treaties.
62. There is an unmistakable connection between all States' obligations with respect to the environment and their obligations with respect to human rights, while the adverse effects of climate change have a range of implications, both direct and indirect, on the full enjoyment of human rights. This link has been recognised in numerous instruments, including in those referenced in the preambular paragraphs of the resolution.⁸¹ The impacted rights include the rights to life, self-determination, development, food, health, water and sanitation and housing.⁸² The UN General

⁷⁹ United Nations, *Vienna Convention on the Law of Treaties*, United Nations, Treaty Series, vol. 1155, p. 331, 23 May 1969, (“**VCLT**”), Article 31(3); ILC, ‘Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties’, Yearbook of the International Law Commission, 2018, vol. II, Part Two, conclusion II.

⁸⁰ The customary grounding of such rights is suggested or explicitly asserted in: Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970, p. 3, paras. 33-34; United States Diplomatic and Consular Staff in Tehran (USA v Iran), I.C.J. Reports 1980, p. 3, para. 91.

⁸¹ See, e.g., **Dossier No. 275**, Human Rights Council (“**HRC**”), Resolution 50/9, 14 July 2022, ‘Human rights and climate change’, and all previous resolutions of the Council on human rights and climate change.

⁸² See, e.g., UN Office of the High Commissioner ‘Key messages on human rights and climate change’, November 2023, available at: [KeyMessages on HR CC.pdf \(ohchr.org\)](#); UN Office of the High Commissioner ‘Open letter from the United Nations High Commissioner for Human Rights on integrating human rights in climate action’,

Assembly has, in particular, recognised the impact of climate change on the enjoyment of a clean, healthy, and sustainable environment.⁸³

63. In this context, climate action requires a rights-based approach: global efforts to mitigate and adapt to climate change should be guided by relevant human rights norms and principles including the rights to participation and information, transparency, accountability, equity, and non-discrimination.
64. In addition to the instruments cited in Resolution 77/276, there is an extensive body of interpretive materials of the human rights treaties, such as case law and practice, which are equally relevant to the identification and clarification of States' specific obligations. The work of regional courts, human rights treaty bodies and special procedures on the connection between human rights and climate change, for example, should guide the Court in their interpretation of the obligations under the relevant treaties.
65. The African Union recalls that, in practice, the Court has taken such decisions into account. In *Ahmadou Sadio Diallo*, the Court referred to the Human Rights Committee's "considerable body of interpretive case law", built up in particular by its views on individual communications and its General Comments.⁸⁴ For the Court, "great weight" should be ascribed to the interpretation adopted by these bodies – which have been specifically created to interpret the treaty in question – in order to achieve the "necessary clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled".⁸⁵

5. African regional instruments

66. In considering rules and instruments beyond those explicitly cited in Resolution 77/296, the Court should also have particular regard to African regional instruments, which form part of the corpus of international law, and which are relevant to the

available at : [OpenLetterHC21Nov2018.pdf \(ohchr.org\)](#); **Dossier No. 265**, HRC, Resolution 10/4, 25 March 2009, 'Human Rights and Climate Change'; and **Dossier No. 156**, UNFCCC, Decision I/CP.16: The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention, 29 November 2010, FCCC/CP/2010/7/Add.1 ("**Cancun Agreements**").

⁸³ **Dossier No. 260**, UN General Assembly Resolution 76/300 of 28 July 2022, UN Doc A/RES/76/300 ("UNGA Resolution 76/300").

⁸⁴ *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment, ICJ Reports 2010, p. 639, ("*Ahmadou Sadio Diallo*"), para. 66.

⁸⁵ *Ibid.*, paras. 66-67.

interpretation and clarification of States' specific obligations. These include: (i) human rights instruments and decisions of the relevant human rights treaty bodies; (ii) regional conventions; and (iii) declarations, decisions and other instruments which form part of the practice of the African region and shed light on the impacts, vulnerabilities, priorities and values of the African continent related to climate change.

67. *First*, amongst the relevant human rights instruments of the African region, the African Charter on Human and Peoples' Rights, ratified by 54 Member-States of the African Union,⁸⁶ forms part of the corpus of international relevant to determine States' obligations with respect to climate change. The African Charter sets out a wide spectrum of human rights,⁸⁷ including the right to health enshrined, in particular, in Article 16:

Every individual shall have the right to enjoy the best attainable state of physical and mental health.

State Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.

68. The African Charter goes further than other international human rights treaties by providing for the right to a healthy environment. According to Article 24:

All peoples shall have the right to a general satisfactory environment favorable to their development.

69. Other human rights instruments include the Protocol to the African Charter on the Rights of Women in Africa ("**Maputo Protocol**"), adopted in 2003, which states that women "shall have the right to live in a healthy and sustainable environment" and "the right to fully enjoy their right to sustainable development,"⁸⁸ as well as the African Charter on the Rights and Welfare of the Child ("**ACRWC**"), which focuses on children's rights in Africa and covers the whole spectrum of civil, political, social

⁸⁶ **Exhibit AU-5**, African Charter on Human and Peoples' Rights, (Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986) ("**ACHPR**")

⁸⁷ **Exhibit AU-5**, ACHPR. Other rights include the right to property (Article 14), the right to life and physical integrity (Article 4), the right to culture (Article 17), the right to family (Article 18), the right to self-determination (Article 20), the right to free disposal of wealth and natural resources (Article 21), the right to development (Article 22).

⁸⁸ **Exhibit AU-6**, Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa ("**Maputo Protocol**"). African Union; 11 July 2003, Articles 18 and 19.

and cultural rights which can be adversely affected by climate change.⁸⁹ Article 14(1) of the ACRWC, specifically, provides that “every child shall have the right to enjoy the best attainable state of physical, mental and spiritual health”, while Article 14(2)(c) urges States to ensure the provision of adequate nutrition and safe drinking water for children.

70. The resolutions and decisions of the African Commission on Human and Peoples’ Rights (“**African Commission**”), as well as the decisions of the African Court on Human and Peoples’ Rights (“**African Court**”) connecting human rights and climate change should guide the Court in their interpretation of States’ obligations under the African Charter to ensure the protection of the climate system and other parts of the environment. The African Commission receives communications concerning alleged violations of the African Charter,⁹⁰ while the African Court settles disputes and provides advisory opinions on the African Charter’s interpretation and application and any relevant human rights instrument ratified by States parties.⁹¹ Both treaty bodies have been established to, *inter alia*, protect and promote human and peoples’ rights under the Charter and to interpret the Charter.⁹² The African Union recalls that “great weight” should be ascribed to the interpretation adopted by these bodies, including as it relates to the environment.⁹³
71. The African Commission has passed several resolutions recognising the need to take proactive steps to safeguard the rights of African People in relation to climate change and its impacts. These include Resolution 153 on Climate Change and Human Rights and the Need to Study its Impact in Africa (2009),⁹⁴ Resolution 271 on Climate

⁸⁹ **Exhibit AU-7**, African Charter on the Rights and Welfare of the Child, 11 July 1990, entered into force 29 November 1999, OAU Doc. CAB/LEG/24.9/49 (1990).

⁹⁰ **Exhibit AU-5**, ACHPR, Article 45.

⁹¹ **Exhibit AU-8**, Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights, 10 July 1998, entered into force 25 January 2004, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III) (“African Court Protocol”), Article 3.

⁹² **Exhibit AU-8**, African Court Protocol, Article 3.

⁹³ See relevant climate decisions: Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights (CESR) v. Nigeria 2002 (“SERAC v. Nigeria”), in which the Commission elaborates on the content of the right to a healthy environment; African Commission on Human and Peoples’ Rights v. Republic of Kenya 2017, No. 006/212 (“Ogiek”); African Commission on Human and Peoples’ Rights, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on Behalf of Endorois Welfare Council v Kenya*, 276/2003.

⁹⁴ **Exhibit AU-9**, ACHPR, Resolution 153 (XLVI) 2009, ‘Resolution on Climate Change and Human Rights and the Need to Study its impact in Africa’, 25 November 2009.

- Change in Africa (2014),⁹⁵ Resolution 342 on Climate Change and Human Rights in Africa (2016),⁹⁶ Resolution 417 on the Human Rights Impacts of Extreme Weather in Eastern and Southern Africa due to Climate Change (2019),⁹⁷ and Resolution 491 on Climate Change and Forced Displacement in Africa (2021).⁹⁸ Resolution 342, in particular, notes that the implementation of the UNFCCC and the Paris Agreement should adequately reflect the African perspective on human and peoples' rights, especially the rights of vulnerable populations, including children, women, older persons and persons with disabilities, indigenous communities and other minorities.⁹⁹
72. The regional human rights normative framework reflected in the referenced instruments sheds light on the human rights affected in the context of harm to the climate system in Africa. These rights, as interpreted by the relevant treaty bodies, can serve as a basis of interpretation of human rights under international treaties, and for informing and advancing a human rights-centred approach to climate action.
73. While the human rights enshrined in these instruments are owed to African individuals and peoples by African Member-States, with its associated decisions measuring African States' compliance with its obligations to respect and protect the human rights, the African Union recalls that African States are the least responsible for climate change and those most vulnerable to its adverse effects. In this context, African States are unable to effectively protect human rights related to climate change if action from developed countries is not taken and will thus necessarily be held accountable for breaches of their human rights obligations under regional human rights instruments.
74. *Second*, regional conventions and other such instruments which relate to climate change in Africa are equally of great relevance to the interpretation and clarification of States' specific obligations.

⁹⁵ **Exhibit AU-IO**, ACHPR, Resolution 271(LV) 2014 on Climate Change in Africa at its 55th Ordinary session in 2014.

⁹⁶ **Exhibit AU-II**, ACHPR, Resolution 342(LVIII) 2016, 'Resolution on Climate Change and Human Rights', 6 to 20 April 2016.

⁹⁷ **Exhibit AU-I2**, ACHPR, Resolution 417 (LXIV) 2016, 'Resolution on the Human Rights Impact of Extreme Weather in Eastern and Southern Africa due to Climate Change', 14 May 2019.

⁹⁸ **Exhibit AU-I3**, ACHPR, Resolution 491 (LXIX) 2021, 'Resolution on Climate Change and Forced Displacement in Africa', 5 December 2021.

⁹⁹ **Exhibit AU-II**, ACHPR, Resolution 342(LVIII) 2016, 'Resolution on Climate Change and Human Rights', 6 to 20 April 2016, para. 7.

75. The Kampala Convention,¹⁰⁰ for instance, links displacement to “natural or human-made disasters”,¹⁰¹ and explicitly refers to the need for States to take “measures to protect and assist persons who have been internally displaced due to natural or human made disasters, including climate change”.¹⁰²
76. In addition, the African Convention on the Conservation of Nature and Natural Resources, (“**Conservation Convention**”) which was revised in 2003, emphasises the right to a satisfactory environment in the African Charter as a key principle, and references the rights of future generations in the climate change context.¹⁰³ The Conservation Convention makes several references to future generations. Its preamble considers the environmental and natural resources of Africa “irreplaceable”, which is significant when bearing in mind the potential threat and long-term consequences that the exploitation of these resources may have on the climate system. Article 6 specifically calls on States to take measures in key areas which are vital in addressing the impacts of climate change including the prevention of land and soil degradation, protection and conservation of vegetation cover. Article 4 also calls on States to take preventative conservation measures in the interest of present and future generations. As such, the Conservation Convention should be taken into account by the Court in answering the questions posed by the UN General Assembly.
77. *Third*, the following declarations, decisions and other instruments are also particularly relevant in the interpretation of the obligations of States with respect to climate change. These include the African Leaders Nairobi Declaration on Climate Change and Call to Action, adopted in September 2023, which serves as a basis for Africa’s common position in the global climate change process;¹⁰⁴ the African Union Climate Change and Resilient Development Strategy and Action Plan (2022-2032), which defines the main priorities, interventions and actions to address climate change in Africa;¹⁰⁵ Agenda 2063, Africa’s development blueprint to achieve inclusive and

¹⁰⁰ **Exhibit AU-4**, Kampala Convention.

¹⁰¹ *Ibid.*, Article I(k).

¹⁰² *Ibid.*, Article 5.

¹⁰³ **Exhibit AU-I4**, Revised African Convention on the Conservation of Nature and Natural Resources, 11 July 2003 (Assembly/AU/Dec.9 (II) - Doc EX/CL/50 (III), OXIO 615.

¹⁰⁴ **Exhibit AU-3**, Nairobi Declaration.

¹⁰⁵ **Exhibit AU-2**, African Union Climate Change and Resilient Development Strategy and Action Plan (2022-2032).

sustainable socio-economic development;¹⁰⁶ as well as the Kampala Ministerial Declaration on Migration Environment and Climate Change,¹⁰⁷ the first regional policy framework that addresses human mobility in the context of climate change in Africa.

78. Decisions of the Assembly of the African Union, including the following recent decisions, are also particularly relevant: “Decision on the Report of the Coordinator of the Committee of African Heads of State and Government on Climate Change (“CAHOSCC”),¹⁰⁸ “Declaration on Accelerating the Path to Achieving the Goals and Targets of the Programme of Action for the Implementation of the Sendai Framework for Disaster Risk Reduction 2015-2030 in Africa”,¹⁰⁹ “Decision on Annual Report of the Union and its Organs including the Specific Thematic Issues by the Heads Of States, Champions” which includes the ”Report of the Champion of the African Heads of State and Government on Climate Change (CAHOSCC)”,¹¹⁰ “Decision on the Report of the Peace and Security Council on its Activities and the State of Peace and Security in Africa”,¹¹¹ and “Decision on the Report of Committee of African Heads of State and Government on Climate Change (CAHOSCC)”.¹¹²
79. For the reasons the African Union explains above, the applicable law in determining the obligations of States with respect to climate change is the whole corpus of international law, which includes treaties, customary law, and general rules of international law.
80. Moreover, the multiple rules applicable to the protection of the climate system and other parts of the environment are to be interpreted in light of the principle of systemic

¹⁰⁶ **Exhibit AU-15**, African Union Commission (2015b). Agenda 2063. 'The Africa We Want. A Shared Strategic Framework for Inclusive Growth and Sustainable development'.

¹⁰⁷ **Exhibit AU-16**, Kampala Ministerial Declaration on Migration Environment and Climate Change, 29 July 2022.

¹⁰⁸ **Exhibit AU-17**, Assembly/AU/Dec.855(XXXVI), Decisions, Declarations and Resolution of the Thirty-Six Ordinary Session of the Assembly of the Union - February 19, 2023, Addis Ababa, Ethiopia.

¹⁰⁹ **Exhibit AU-18**, Assembly/AU/Decl.4(XXXVI), Decisions, Declarations and Resolution of the Thirty-Six Ordinary Session of the Assembly of the Union - February 19, 2023, Addis Ababa Ethiopia.

¹¹⁰ **Exhibit AU-19**, Assembly/AU/Dec. 819(XXXV), Decisions, Declarations and Resolution of the Thirty-Fifth Ordinary Session of the Assembly of the Union - February 06, 2022 Addis Ababa Ethiopia.

¹¹¹ **Exhibit AU-20**, Assembly/AU/Dec. 753(XXXIII), Decisions, Declarations and Resolution of the Thirty-Third Ordinary Session of the Assembly of the Union - February 09, 2020 to February 10, 2020 Addis Ababa Ethiopia.

¹¹² **Exhibit AU-21**, Assembly/AU/Dec. 764(XXXIII), Decisions, Declarations and Resolution of the Thirty-Third Ordinary Session of the Assembly of the Union - February 09, 2020 to February 10, 2020 Addis Ababa Ethiopia.

integration¹¹³ and can only be understood so as to give rise to “a single set of compatible obligations”.¹¹⁴

B. THE COURT MUST TAKE INTO ACCOUNT THE CURRENT STATE OF SCIENTIFIC KNOWLEDGE

81. In responding to the questions posed by the General Assembly, the Court should also take into account the best available scientific knowledge on climate change, as well as the best available practices and techniques for addressing climate change.
82. These advisory proceedings address 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. These obligations are necessarily of a continuing and evolving nature, and the steps that States must take to comply with them depend on the circumstances at any given time, including the state of scientific knowledge. Determining the measures capable of – or necessary for – the protection of the climate system can be addressed only in light of scientific evidence.
83. In the preambular paragraph of the resolution, the UN General Assembly recalls the scientific consensus on the harmful implications of States’ conduct for the climate system and other parts of the environment, reflected, *inter alia*, in the reports of the Intergovernmental Panel on Climate Change (IPCC), particularly in the Summaries for Policymakers, which are approved by consensus by all 195 member States of the IPCC. The IPCC reports not only reflect a scientific consensus but also a consensus amongst States on the science of climate change:

Noting with utmost concern the scientific consensus, expressed, *inter alia*, in the reports of the Intergovernmental Panel on Climate Change, including that anthropogenic emissions of greenhouses gases are unequivocally the dominant cause of the global warming observed since the mid-20th century, that human-induced climate change, including more frequent and intense extreme events, has caused widespread adverse impacts and related losses and damages to nature and people, beyond natural climate variability, and

¹¹³ VCLT, Article 31(3)(c).

¹¹⁴ ILC, Study Group, Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, A/CN.4/L.682 and Add.I* (2006), conclusions 4 and 17.

that across sectors and regions the most vulnerable people and systems are observed to be disproportionately affected¹¹⁵

84. In the *Gabčíkovo-Nagymaros* case, the Court held that the treaty between Hungary and Czechoslovakia imposed on the parties “a continuing – and thus necessarily evolving – obligation” to maintain the quality of the water and to protect nature.¹¹⁶ The “continuing and thus necessarily evolving” nature of the obligation meant that, in dealing with environmental risks, “current standards must be taken into account”.¹¹⁷ The Court further held that in light of new scientific knowledge and a growing awareness of the risks of human interventions in the environment, “new norms and standards have been developed”, which “must be taken into consideration” not only when States consider new activities but also when they pursue activities which began in the past.¹¹⁸
85. The African Union considers this approach to be equally applicable in the present proceedings. In its interpretation of the legal obligations related to climate change, the Court must be guided by the current state of scientific knowledge.

¹¹⁵ See reports of the IPCC: IPCC, Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, Summary for Policymakers, (“IPCC, Climate Change 2022”), statement SPM.B.I available at: https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_SummaryForPolicymakers.pdf. More recently, the IPCC noted: “Human activities, principally through emissions of greenhouse gases, have unequivocally caused global warming, with global surface temperature reaching 1.1°C above 1850–1900 in 2011–2020”, IPCC, Synthesis Report of the IPCC Sixth Assessment Report (AR6), Summary for Policymakers, March 2023 (“IPCC, Synthesis Report 2023”), statement A.I, available at: [IPCC_AR6_SYR_SPM.pdf](https://www.ipcc.ch/report/ar6/syr/summary-for-policymakers/). This Summary also concludes that: “Widespread and rapid changes in the atmosphere, ocean, cryosphere and biosphere have occurred. Human-caused climate change is already affecting many weather and climate extremes in every region across the globe. This has led to widespread adverse impacts and related losses and damages to nature and people ... Vulnerable communities who have historically contributed the least to current climate change are disproportionately affected”, IPCC, Synthesis Report 2023, statement A.2.

¹¹⁶ *Gabčíkovo-Nagymaros Project*, para. 140.

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*

IV. QUESTION (A): OBLIGATIONS OF STATES UNDER INTERNATIONAL LAW TO ENSURE THE PROTECTION OF THE CLIMATE SYSTEM AND OTHER PARTS OF THE ENVIRONMENT FROM ANTHROPOGENIC GHG EMISSIONS FOR STATES AND FOR PRESENT AND FUTURE GENERATIONS

A. THE QUESTION

86. The first question formulated by the UN General Assembly in the operative part of Resolution 77/276 reads 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?

87. As explained in the previous section, the question is not restricted to the law applicable to climate change, but rather is interested in the duties of States “to ensure the protection of the climate system and other parts of the environment”. The question thus calls for an identification of the obligations of States under all sources of international law. Such duties should be owed not only to other States, but also to individuals, including future generations.
88. The question further pertains to the climate system as defined in Article 1 of the UNFCCC, as well as other parts of the environment, such as the marine environment and biodiversity. In particular, the question refers to the protection of the climate system “from anthropogenic emissions of greenhouse gases”. ‘Greenhouse gases’ are defined as follows in the IPCC Glossary:

Gaseous constituents of the *atmosphere*, both natural and *anthropogenic*, that absorb and emit radiation at specific wavelengths within the spectrum of radiation emitted by the Earth’s surface, by the atmosphere itself, and by clouds. This property causes the *greenhouse effect*. Water vapour (H₂O), *carbon dioxide* (CO₂), *nitrous oxide* (N₂O), *methane* (CH₄) and *ozone* (O₃) are the primary GHGs in the Earth’s atmosphere. Human-made GHGs include *sulphur hexafluoride* (SF₆), *hydrofluorocarbons* (HFCs), *chlorofluorocarbons*

(CFCs) and *perfluorocarbons (PFCs)*; several of these are also O₃-depleting (and are regulated under the *Montreal Protocol*).¹¹⁹

For their part, ‘anthropogenic emissions’ are described as follows:

Emissions of greenhouse gases (GHGs), precursors of GHGs and aerosols caused by human activities. These activities include the burning of fossil fuels, deforestation, land use and land use changes (LULUC), livestock production, fertilisation, waste management, and industrial processes.¹²⁰

89. Against this background, the African Union has identified four interrelated sets of obligations, which include: the general obligations of States to prevent climate change (B), the treaty obligations of states in this respect (C), the specific obligations of States to protect the environment (D), and the obligations deriving from human and peoples’ rights (E). This list does not aim to be exhaustive, and the identification of these obligations does not preclude the existence of other additional duties not covered here for the sake of brevity.

B. GENERAL OBLIGATIONS OF STATES TO PREVENT CLIMATE CHANGE

1. *Significant harm to the environment, including the climate system, is prohibited under international law*

90. States are under a duty to ensure that activities under their jurisdiction or control do not create significant harm to the environment, including the climate system. The duty is fundamental to fulfilling the purposes of the UN, including building “friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples”.¹²¹
91. The prohibition against transboundary harm protects the fundamental rights of sovereign States to territorial integrity and to be free from external interference.¹²² Consecrated in Principle 21 of the 1972 Stockholm Declaration on the Human

¹¹⁹ IPCC Glossary, italics original, available at <https://apps.ipcc.ch/glossary/> (emphasis added).

¹²⁰ *Ibid.*

¹²¹ Charter, Article I(2).

¹²² *Trail Smelter*, p. 1920.

Environment,¹²³ it was recognised as general international law by the Court in 1996.¹²⁴ The principle reads as follows:

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and 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.

92. Principle 21 aims to protect the environment as a whole and thus applies extensively to environmental harm irrespective of its nature or location, in two major ways:

- a. *First*, it prohibits harm to the climate system. Indeed, the prevention principle is concerned with damage to the ‘environment’ in general, including its natural systems.¹²⁵ The underlying rationale of harm anticipation and environmental protection ought to apply to the most serious form of interference with the environment – climate change – which threatens the survival of states and human civilisation.

This finds evidence in the fact that the principle is referenced in the preamble of the UNFCCC,¹²⁶ and thus has been explicitly accepted since 1992 to be the fundamental duty underpinning the international climate treaty regime. Moreover, climate change falls under a general duty to protect the atmosphere from degradation, as codified by the International Law Commission.¹²⁷

- b. *Second*, this duty applies to the impacts of climate change, namely transboundary, often long-range, harm caused to the territory of other States by anthropogenic emissions of GHGs – for instance in causing rising sea-levels or threatening biological diversity, and harm to areas beyond national jurisdiction – such as to the high seas and deep seabed.

¹²³ **Dossier No. I36**, Stockholm Declaration.

¹²⁴ *Nuclear Weapons Advisory Opinion*, para. 29. See also *Gabčikovo-Nagymaros Project*, para. 140; *Pulp Mills case*, para. 101; *Certain Activities*, para. 104; *Chile v. Bolivia case*, paras. 83 and 99.

¹²⁵ Institut de droit international, ‘Harm Prevention Rules Applicable to the Global Commons’ (2023), p.120.

¹²⁶ **Dossier No. 4**, UNFCCC, Preamble.

¹²⁷ ILC, Guidelines on the Protection of the Atmosphere (2021), Official Records of the General Assembly, Seventy-sixth Session, Supplement No. 10 (A/76/10), Guideline 3 (‘States have the obligation to protect the atmosphere by exercising due diligence in taking appropriate measures, in accordance with applicable rules of international law, to prevent, reduce or control atmospheric pollution and atmospheric degradation’).

93. The duty to prevent environmental harm is thus applicable to the “unprecedented challenge of civilizational proportions”¹²⁸ of the climate crisis, which poses serious threats to human well-being and planetary integrity and represents a high probability of disastrous harm.¹²⁹ The harm, and risk thereof, has been scientifically evidenced, with very high risk of irreversible damage if global warming reaches 1.5°C above pre-industrial levels,¹³⁰ increasing in intensity and frequency with every additional increment of global warming.¹³¹ The cumulative nature of harm, i.e., low impact damage that accumulates over time and creates significant harm, is not an obstacle to defining obligations because minor contributions to climate change do not relieve a State from its responsibility for cumulative harm.
94. Significant harm to the climate system and other parts of the environment resulting from GHG emissions is thus prohibited under general international law.
2. *States are under an obligation to take all the necessary measures and use their best efforts to prevent harm from GHG emissions*
95. The principle of prevention has its origins in the “due diligence required of a State in its territory”¹³² – one of the key principles highlighted by Resolution 77/276 as applicable in these proceedings. The duty is thus not only one of restraint (i.e., harm avoidance), but also a positive obligation that requires States to take the necessary measures and exercise their best possible efforts¹³³ to reduce GHG emissions.
96. Due diligence is a “variable concept” that “may not easily be described in precise terms”.¹³⁴ However, a number of core obligations define the contours of the due diligence standard, as it requires States to:
- a. *Take such measures and rules necessary in light of scientific evidence, such as, e.g., adopting and implementing national legislative and other measures to*

¹²⁸ **Dossier No. 2**, Resolution 77/276, preamble.

¹²⁹ ILC, ‘Draft Articles on Prevention of Transboundary Harm from Hazardous Activities (with Commentaries)’ (2001) Yearbook of the International Law Commission (vol II, part 2) 148, Article 1.

¹³⁰ IPCC, *Special Report: Global Warming at 1.5°C, Summary for Policymakers*, 2018, (“IPCC Report, Global Warming of 1.5°C (2018)”) statement A.3, available at <https://www.ipcc.ch/sr15/chapter/spm/>.

¹³¹ IPCC, Synthesis Report 2023, statement B.2.

¹³² *Pulp Mills case*, para. 101. See also *ITLOS Advisory Opinion 2011*, para. 111; *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, Advisory Opinion, 2 April 2015, ITLOS Reports 2015, p. 4 (“**ITLOS Advisory Opinion 2015**”), para. 125; *Certain Activities*, paras. 104 and 153; *South China Sea Arbitration*, Award, PCA Case No 2013-19, Award, 12 July 2016 (“**South China Sea Arbitration**”), para. 944.

¹³³ *ITLOS Advisory Opinion 2011*, para. 110.

¹³⁴ *Ibid.*, para. 117.

reduce GHG emissions.¹³⁵ The obligation arose as soon as the risk of climate change had been evidenced, including pursuant to Article 4(2)(a) of the UNFCCC, and is of a continuing character so as to remain in line with the best scientific knowledge at a given moment.

- b. *Take into account international rules and standards.*¹³⁶ At present, this means taking into account internationally-agreed objectives in emitting sectors that, though not covered by the Paris Agreement, have recently aligned themselves with its objectives, such the 2023 IMO Strategy on Reduction of GHG Emissions from Ships,¹³⁷ and the ICAO's long-term goal of net-zero carbon dioxide.¹³⁸
- c. *Carry out impact assessments* as appropriate,¹³⁹ which includes *environmental and social impact assessments* before a State engages in or permit an activity that may have severe adverse impacts on the climate system or other parts of the environment (e.g., new oil and gas licenses), as well as *strategic impact assessments* in relation to climate and related policies. While the specific content of impact assessments is regulated nationally,¹⁴⁰ GHG emissions must be included.¹⁴¹
- d. *Cooperate internationally in good faith,*¹⁴² with the purpose of, e.g., finding agreements at intergovernmental meetings,¹⁴³ engaging with competent

¹³⁵ **Dossier No. 4**, UNFCCC, Preamble: 'Recognizing that States should enact effective environmental legislation, that environmental standards, management objectives and priorities should reflect the environmental and developmental context to which they apply and that standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries'. See also **Dossier No. 137**, Rio Declaration on Environment and Development, 13 June 1992, UN Doc. A/CONF.151/26 ("Rio Declaration"), Principle II; ILC, 'Draft Articles on Prevention of Transboundary Harm from Hazardous Activities (with Commentaries)' (2001) Yearbook of the International Law Commission (vol II, part 2) 148, Article 5.

¹³⁶ *Gabčíkovo-Nagymaros Project*, para. 140 ('current standards must be taken into consideration'); *Pulp Mills case*, paras. 197 and 225.

¹³⁷ International Maritime Organisation, Resolution MEPC.337(80) '2030 IMO Strategy on Reduction of GHG Emissions from Ships', July 2023.

¹³⁸ International Civil Aviation Organisation, Resolution A41-21, 'Consolidated statement of continuing ICAO policies and practices related to environmental protection - Climate change'.

¹³⁹ As a requirement under general international law. See *Pulp Mills case*, para. 204; *Certain Activities*, para. 101; and *ITLOS Advisory Opinion 2011*, paras. 145–48 (considering that the Court's 'reasoning in a transboundary context may also apply to activities with an impact on the environment in an area beyond the limits of national jurisdiction'); ILC, 'Draft Guidelines on the Protection of the Atmosphere', Guideline 4; African Commission on Human & Peoples' Rights, *Social and Economic Rights Action Center (SERAC) v Nigeria*, para. 53 (to discharge the duties under Article 16 and 24).

¹⁴⁰ *Pulp Mills case*, para. 205.

¹⁴¹ See B Mayer, 'Climate Assessment as an Emerging Obligation under Customary International Law' (2019) 68(2) *International and Comparative Law Quarterly* 271-308.

¹⁴² **Dossier No. 137**, Rio Declaration, Principles 7 and 27; ILC, Guidelines on the Protection of the Atmosphere (2021), Official Records of the General Assembly, Seventy-sixth Session, Supplement No. 10 (A/76/10), Article 4.

¹⁴³ *ITLOS Advisory Opinion 2015*, para. 210.

international institutions,¹⁴⁴ as well as notifying and consulting¹⁴⁵ with States when granting authorisations for major projects or planning for high emitting sectors in a way that is “exceptionally prospective and inclusive” given the high level of risk represented by climate change.¹⁴⁶

- e. *exercising a level of vigilance in their enforcement and administrative control applicable to public and private operators.*¹⁴⁷

97. The margin of national discretion is also restricted by several important parameters:

- a. *First*, the degree of care should be appropriate and proportional to the level of risk that the harm represents. The more hazardous the activity, the higher the duty of care will be.¹⁴⁸ In light of the high probability of disastrous harm from climate change, the standard of due diligence has now become particularly stringent (while allowing for differentiated circumstances). Climate change is already affecting many weather and climate extremes across the planet.¹⁴⁹ The threat of irreversible harm is imminent, and the window of opportunity to mitigate climate harms is narrowing extremely rapidly.¹⁵⁰ The risk of exponential harm, especially as climate tipping points are about to lead to large, accelerating, irreversible and largely unpredictable harm,¹⁵¹ requires mitigating climate change as soon as possible.

The resulting degree of care is to be evaluated on the basis of the objectives agreed upon by the international community, reflecting the best available

¹⁴⁴ *ITLOS Advisory Opinion 2011*, para. 124.

¹⁴⁵ **Dossier No. 137**, Rio Declaration, Principle 19.

¹⁴⁶ Convention on Environmental Impact Assessment in a Transboundary Context, Implementation Committee, ‘Findings and Recommendations Further to a Committee Initiative concerning the United Kingdom of Great Britain and Northern Ireland (EIA/IC/CI/5)’, in ‘Report of the Implementation Committee on Its Thirty-Fifth Session’ (2016) ECE/MP.EIA/IC/2016/, para. 66.

¹⁴⁷ ILC, ‘Draft Articles on Prevention of Transboundary Harm from Hazardous Activities (with Commentaries)’ (2001) Yearbook of the International Law Commission (vol II, part 2) 148, commentary to Article. 12, para. 2 ; *Gabčíkovo-Nagyymaros Project*, paras. 112 and 140; *Pulp Mills case*, paras. 197 and 204-5; *ITLOS Advisory Opinion 2011*, paras. 142–44.

¹⁴⁸ *Alabama Claims (United States v. Great Britain)*, (1871) 29 RIAA 125, at 129; *ITLOS Advisory Opinion 2011*, para. 117; ILC, ‘Draft Articles on Prevention of Transboundary Harm from Hazardous Activities (with Commentaries)’ (2001) Yearbook of the International Law Commission (vol II, part 2) 148, commentary to Article. 3, para. 18.

¹⁴⁹ IPCC, Synthesis Report 2023, statement A.3.

¹⁵⁰ IPCC, Synthesis Report 2023, statement B.5 (‘Many changes due to past and future greenhouse gas emissions are irreversible for centuries to millennia, especially changes in the ocean, ice sheets and global sea level’); UNFCCC, ‘Decision I/CMA.5, Outcome of the first global stocktake’, U.N Doc. FCCC/PA/CMA/2023/L.17 (13 December 2023), (“**Decision I/CMA.5 ‘Outcome of the first global stocktake’ (2023)**”), para. 25 (‘the carbon budget consistent with achieving the Paris Agreement temperature goal is now small and being rapidly depleted’).

¹⁵¹ IPCC, Synthesis Report 2023, statement C.3.2: “The probability of low-likelihood, high-impact outcomes increases with higher global warming levels . . . Abrupt responses and tipping points of the climate system, such as strongly increased Antarctic ice-sheet melt and forest dieback, cannot be ruled out”.

science at a given moment, such as the UNFCCC’s objective to “achieve [...] stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system”,¹⁵² as well as the higher (and more specific) objective of the Paris Agreement to keeping global temperatures “well below 2°C” while also committing its Parties to “pursue efforts to limit the temperature increase to 1.5° C”.¹⁵³ The Paris Agreement’s due diligence standard thus mandates the decarbonisation of the global economy as fast as possible.

- b. *Second*, advances in scientific understanding and technological capabilities increase the degree of care required over time¹⁵⁴ in relation to climate damage. In other words, the level of due diligence expected in 1992, at the time of the adoption of the UNFCCC, is vastly different from that required today: this is because scientific knowledge has greatly consolidated with each new IPCC report, while our abilities to reduce GHG emissions have greatly expanded.
- c. *Third*, and finally, the precautionary principle is an “integral part of the general obligation of due diligence”.¹⁵⁵ As a result, the absence of full scientific knowledge cannot justify having postponed action for several decades, and at the very least not since the adoption of the UNFCCC in 1992.¹⁵⁶ Moreover, the application of the precautionary principle today dictates caution in the context of new technologies such as carbon capture and storage and other forms of climate geoengineering.¹⁵⁷

98. In sum, States are responsible for historical, present and future emissions if they failed to prevent and mitigate the risk of causing climate change. The applicability of the legal obligation to act, as well as the level of care required, is delimited by the knowledge of harm, the understanding of the gravity of the risk, and the state capacity to prevent it. As a consequence, the legal obligation relating to the adequacy of measures to address climate change arises at different times for different States.

¹⁵² **Dossier No. 4**, UNFCCC, Article 2.

¹⁵³ **Dossier No. 16**, Paris Agreement, Article 2.

¹⁵⁴ *Ibid.*

¹⁵⁵ *ITLOS Advisory Opinion 2011*, para. 131.

¹⁵⁶ **Dossier No. 4**, UNFCCC, Article 3(3); **Dossier No. 137**, Rio Declaration, Principle 15.

¹⁵⁷ E.g., Conference of the parties to the Convention on Biological Diversity, Decision XI/20 ‘Climate-related geoengineering’ (2012), 5 December 2012, UNEP/CBD/COP/DEC/XI/20, para. 10.

99. The customary duty to prevent and the adjoining due diligence standard should thus “inform” the scope of the relevant treaty obligations.¹⁵⁸

3. *Parties to the Paris Agreement are under an obligation to urgently make deep reductions to GHG emissions in line with 1.5 °C pathways*

100. Under the Paris Agreement, States are under a collective duty to make reductions to GHG emissions in line with 1.5°C pathways. Article 2(1)(a) of the Paris Agreement sets a global temperature goal, requiring States to:

hol[d] 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 change.¹⁵⁹

101. The objective has been universally accepted as the standard against which the entire international community, including sub-national and non-state actors, should be working. The objective to hold temperature below 1.5°C is expressed as an aspirational one (“pursuing efforts”), but in the last decade since the adoption of the Paris Agreement, scientific evidence has shown that the level of harm to be expected in a 2°C world is too high¹⁶⁰ to be acceptable under international law. As a result, the international community in the context of the COP 28 has consensually recognised the “need for deep, rapid and sustained reductions in greenhouse gas emissions in line with 1.5 °C pathways”.¹⁶¹ The 1.5°C objective is therefore the objective against which the level of due diligence ought to be judged at present.

102. In order to meet their treaty obligations, Parties must collectively enhance their climate ambitions. At present, current GHG emission reductions fall worryingly short of the objectives of the Paris Agreement: fully implementing the Nationally Determined Contributions (“NDCs”) made under the Paris Agreement would put the world on track for limiting temperature rise to 2.9°C above pre-industrial levels this century.¹⁶²

¹⁵⁸ *South China Sea Arbitration*, para. 941.

¹⁵⁹ **Dossier No. I6**, Paris Agreement, Article 2(1)(a).

¹⁶⁰ **IPCC Report 2023**, pp. 69-71; See also, IPCC Report, *Global Warming of 1.5°C* (2018), pp. 3, 7-24.

¹⁶¹ Decision I/CMA.5 ‘Outcome of the first global stocktake’ (2023), para. 28.

¹⁶² United Nations Environment Programme, *Emissions Gap Report 2023: Broken Record. Temperatures reach new highs, yet world fails to cut emissions (again)* (November 2023) (“UNEP *Emissions Gap Report 2023: Broken Record*”).

103. Individually, State Parties design their climate response in a self-determined manner, based on their unique national circumstances and capacities. The main obligation of result under the Paris Agreement takes the form of a procedural duty to ‘prepare, communicate and maintain’ an NDC.¹⁶³ While there is no obligation of result to implement those NDCs, parties are obliged to pursue adequate measures.¹⁶⁴
104. In addition, parties are under two complementing duties of conduct pursuant to Article 4(3):
- a. *First*, each Party’s NDC needs to represent **a progression** beyond the previous NDC. Progression sets a minimum level of action below which regression is not allowed, and requires that each Party raises ambition as high as possible. The adequacy of the level of ambition of an NDC needs to be understood in light of the long-term low GHG emission development strategies in order to ‘reach global peaking of greenhouse gas emissions as soon as possible’,¹⁶⁵ keeping in mind that the timeframe to prevent catastrophic climate change is extremely short and requires bold and immediate action.¹⁶⁶
 - b. *Second*, NDCs should reflect the party’s **‘highest possible ambition’**, in accordance with CBDR-RC, in the light of different national circumstances. As a result, Parties are expected to continuously monitor their actions in light of evolving circumstances, including political, economic, social and technological circumstances, to ensure that their level of ambition is the highest that can reasonably be expected.
105. In relation to the conduct to be adopted to mitigate climate change, States are further under an obligation to reduce sources of anthropogenic GHG emissions.¹⁶⁷ States have the discretion to decide how to proceed, as both the UNFCCC and Paris Agreement focus on the collective objective of climate mitigation, rather than on the sources of climate change. This flexibility is, however, constrained, in two ways.

¹⁶³ **Dossier No. 16**, Paris Agreement, Article 4(2).

¹⁶⁴ *Ibid.*, Article 4(2).

¹⁶⁵ *Ibid.*, Article 4(1).

¹⁶⁶ Decision I/CMA.5 ‘Outcome of the first global stocktake’ (2023), para. 24: ‘rapidly narrowing window’.

¹⁶⁷ **Dossier No. 16**, Paris Agreement, Article 4(1). Under Article 5(1), Parties are also meant to reduce emissions through carbon sinks, an obligation addressed *infra*, p. 70.

- a. *First*, States are under treaty obligations to reduce emissions of specific GHGs, namely hydrofluorocarbons for Parties to the Kigali Amendment under the Montreal Protocol on Substances that Deplete the Ozone Layer,¹⁶⁸ and black carbon for Parties to the Gothenburg Protocol¹⁶⁹ to the Convention on Long Range Transboundary Air Pollution.¹⁷⁰
- b. *Second*, the duty to reduce GHGs does not make fossil fuel production and use *per se* unlawful. Fossil fuels arise from activities that have defined our civilisation, and often remain central to economic development and human well-being. The texts of the UNFCCC and the Paris Agreement do not mention fossil fuels and the project of a Treaty on non-fossil fuel proliferation has not received support as a viable legal response.

106. Yet, climate change is closely linked to the overreliance of industrialised countries on fossil fuels. As a result, the use of fossil fuels is increasingly becoming unjustifiable for states with the means to transition to less polluting forms of energy. This is reflected in the commitment of the global community “to a fair and accelerated process of phasing down unabated coal power and phase out of inefficient fossil fuel subsidies”.¹⁷¹

107. States therefore have a due diligence duty to urgently phase out fossil fuels and ensure a ‘just transition’ to sustainable energy sources.¹⁷² Guidance is to be found in the landmark decision 1/CMA.5 adopted at COP 28, concluding the first global stocktake assessing collective progress. It called on Parties to contribute to global efforts in eight areas, including by transitioning away from fossil fuels in energy systems, tripling renewable energy capacity, and phasing out inefficient fossil fuel subsidies that do not address energy poverty or just transitions.¹⁷³ States are now under an obligation

¹⁶⁸ United Nations Environment Programme, Decision XXVIII/1, ‘Further amendment of the Montreal Protocol’, 14 October 2016, Doc. UNEP/OzL.Pro.28/CRP/10; United Nations Environment Programme, Decision XXVIII/2, ‘Decision related to the amendment phasing down hydrofluorocarbons’, 14 October 2016, Doc. UNEP/OzL.Pro.28/CRP/10.

¹⁶⁹ Protocol to Abate Acidification, Eutrophication and Ground-level Ozone to the Convention on Long-range Transboundary Air Pollution, Amendment, ECE/EB.AIR/114, Article 3.1

¹⁷⁰ Convention on Long Range Transboundary Air Pollution.

¹⁷¹ **Dossier No. 163**, Decision I/CP.26, ‘Glasgow Climate Pact’ (“**Glasgow Climate Pact**”), para. 20; **Dossier No. 167**, Decision I/CP.27, ‘Sharm el-Sheikh Implementation Plan’, para. 13.

¹⁷² **Exhibit AU-3**, Nairobi Declaration, para. 19(iii).

¹⁷³ Decision I/CMA.5 ‘Outcome of the first global stocktake’ (2023), para. 28.

pursuant to the Paris Agreement to be informed by this decision when updating or enhancing their next NDCs due in 2025.¹⁷⁴

108. In conclusion, States Parties to the Paris Agreement are under a collective and individual obligation to urgently make deep reductions to GHG emissions under their jurisdiction, including by phasing out fossil fuels. Over time, these reductions ought to become increasingly ambitious and represent a progression, in order to meet the Paris Agreement’s target of limiting global warming to 1.5°C.

4. *States are under a duty to allocate the burden of emissions reductions asymmetrically and fairly, in line with the principle of common but differentiated responsibilities and respective capabilities*

109. Developed country Parties are expected to “take the lead” in reducing GHGs.¹⁷⁵ The principle of common but differentiated responsibilities and respective capabilities is the building block of international climate law.¹⁷⁶ It is justified by the serious harm caused by historical emissions – as acknowledged by the COP, “historical cumulative net carbon dioxide emissions already account for about four fifths of the total carbon budget for a 50 per cent probability of limiting global warming to 1.5 °C”.¹⁷⁷ Africa contributed very little to these emissions, and reducing GHGs today severely limits its ability to industrialise.

110. A higher standard of due diligence applies in respect of States with significant total emissions or very high *per capita* emissions (past or current), given the greater burden that their emissions place on the global climate system, as well as to States with higher capacities to take high ambitious mitigation action. Conversely, the principle of differentiation acknowledges that the same effort with fewer resources will produce lesser outcomes. Moreover, further differentiation applies as a result of the qualifier “in the light of different national circumstances”, found in the Paris Agreement.¹⁷⁸ A spectrum of factors, such as past, current and projected emissions, but also financial

¹⁷⁴ **Dossier No. I6**, Paris Agreement, Article 4(9).

¹⁷⁵ *Ibid.*, Article 4(4).

¹⁷⁶ **Dossier No. 4**, UNFCCC, Preamble, Article 3(1), and 4; **Dossier No. I6**, Paris Agreement, Articles 2(2) and 4(2).

¹⁷⁷ Decision I/CMA.5 ‘Outcome of the first global stocktake’ (2023), para. 25.

¹⁷⁸ **Dossier No. I6**, Paris Agreement, Article 2(2).

and technical capabilities, demographic criteria, as well as abatement costs and opportunity costs, ought to be taken into account.

111. Various provisions of the Paris Agreement demonstrate that the international community has agreed to an asymmetrical allocation of the burden of emissions reductions, as between developed and developing countries, consistent with the principle of CBDR-RC. Indeed, the text of the Paris Agreement shows that this asymmetrical balance of rights and obligations shall contribute to achieving the Agreement's temperature goal, with explicit recognition that "higher ambition"¹⁷⁹ on the part of developing Parties is possible only with "enhanced support"¹⁸⁰ from developed Parties. In particular, Article 4(4) provides that while developed States are required to "tak[e] the lead by undertaking economy-wide absolute emission reduction targets", developing countries are "encouraged to move over time towards economy-wide reduction or limitation targets in the light of different national circumstances". Article 4 acknowledges the practical reality that developing countries will take longer to reach 'peak' emissions; and that what is 'possible' for developing countries in terms of GHG emission reductions is necessarily less than what is possible for developed countries.
112. As a result, States are under a duty to allocate the burden of GHG reduction equitably. The UNFCCC unquestionably acknowledged that 'the largest share of historical and current global emissions of greenhouse gases has originated in developed countries, that *per capita* emissions in developing countries are still relatively low and that the share of global emissions originating in developing countries will grow to meet their social and development needs'.¹⁸¹ In other words, African States have not enjoyed the economic benefits resulting from the high levels of industrialisation in the developed States, which have caused the climate crisis. They cannot now be expected to pay the same price as developed countries to address the climate crisis, especially as they are already diverting funding away from economic, social and cultural policies to respond to the climate emergency. Indeed, African countries are already spending between 2

¹⁷⁹ *Ibid.*, Article 4(2) and (3).

¹⁸⁰ *Ibid.*, Article 4(5).

¹⁸¹ **Dossier No. 4**, UNFCCC, Preamble.

and 9% of their GDP on climate adaptation, which “represents more than other forms of expenditure in public services such as healthcare and education”.¹⁸²

113. And yet, the collective level of ambition in NDCs submitted by developed countries pursuant to the Paris Agreement still falls short of their ‘fair share’ of the global effort to limit global warming to 1.5°C.¹⁸³ Conversely, the African continent is fully committed to contributing meaningfully to decarbonisation.¹⁸⁴ While pursuant to Article 4(4), only developed country Parties are under an obligation to ‘undertake absolute economy-wide emission reduction targets’, most developing country Parties have committed to economy-wide emission reduction targets.¹⁸⁵ In addition, some NDCs of African States are amongst the most ambitious globally.¹⁸⁶

114. In sum, the burden of GHG reduction must be allocated equitably: States most responsible for climate change have been, and remain, under a duty to acknowledge their responsibility for the enormous cost of the impact of climate change on those most affected but least responsible. Developed countries are bound to continue taking the lead in climate mitigation.

115. In doing so, developed countries must respect, and support, the right of African States to work towards sustained economic growth and sustainable development in order to eradicate poverty. Indeed, the UNFCCC provides that Parties have a “right to, and should, promote sustainable development”;¹⁸⁷ a right further elaborated below.¹⁸⁸

5. Due diligence can only be discharged by taking future generations into account

116. The principle of intergenerational equity requires the fair allocation of emission reduction burdens over time, dictating that present generations forego some advantages for the benefit of future generations. Pursuant to Article 3(1) of the

¹⁸² UN Economic Commission for Africa, ‘Africa Spending More than its Fair Share for Climate Adaptation, A New Study Reveals’ (2017), available at: <[¹⁸³ Oxfam, ‘Are G20 Countries Doing Their Fair Share of Global Climate Mitigation?: Comparing ambition and fair shares assessments of G20 countries’ Nationally Determined Contributions \(2023\): <<https://policy-practice.oxfam.org/resources/are-g20-countries-doing-their-fair-share-of-global-climate-mitigation-comparing-621540>>.](https://archive.uneca.org/stories/africa-spending-more-its-fair-share-climate-adaptation-new-study-reveals#:~:text=EconomicCommissionForAfrica-Africaspendingmorethanitsfairshare,adaptation.anewstudyreveals&text=Itshowsthatpublicexpenditure,oftheirtotalneedspresently>”.</p></div><div data-bbox=)

¹⁸⁴ **Exhibit AU-3**, Nairobi Declaration, para. 15.

¹⁸⁵ *Nationally determined contributions under the Paris Agreement. Synthesis report by the secretariat*, FCCC/PA/CMA/2022/4 (2022), para. 4(b), noting that 80% of all Parties have communicated economy-wide targets.

¹⁸⁶ See Climate Action Tracker: <<https://climateactiontracker.org/countries/>>.

¹⁸⁷ **Dossier No. 4**, UNFCCC, Article 3(4).

¹⁸⁸ *Infra*, p. 77 *et seq.*

UNFCCC, Parties “should protect the climate system for the benefit of present and future generations of humankind”.¹⁸⁹

117. The principle of intergenerational equity finds place in environmental law by means of references to future generations in several treaties,¹⁹⁰ in addition to national constitutions and domestic case law.¹⁹¹ The ICJ acknowledged in the *Nuclear Weapons Advisory Opinion* the great significance it attaches to the protection of the environment for future generations: “the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn”.¹⁹² The Court reiterated this concern in the *Gabčíkovo-Nagymaros Project* case, when acknowledging the risks posed by new technologies:

Owing to new scientific insights and to a growing awareness of the risks for mankind – for present and future generations – of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades.¹⁹³

118. As recognised by judges of the Court, the rights of future generations “have woven themselves into international law through major treaties, through juristic opinion and through general principles of law recognized by civilized nations”¹⁹⁴ and “it can hardly be doubted that the acknowledgment of inter-generational equity forms part of conventional wisdom in international environmental law”.¹⁹⁵

119. It has therefore become necessary to recognise the consequences of the principle of intragenerational equity on state conduct in light of the climate emergency. Indeed, by delaying the adoption of necessary measures, weakening existing green policies, and depleting the remaining ‘carbon budget’, States are creating imminent risks that

¹⁸⁹ See also **Dossier No. 4**, UNFCCC, Preamble, and **Dossier No. 16**, Paris Agreement, Preamble; ILC, Guidelines on the Protection of the Atmosphere (2021), Official Records of the General Assembly, Seventy-sixth Session, Supplement No. 10 (A/76/10), Guideline 6 (‘the atmosphere should be utilized in an equitable and reasonable manner, taking fully into account the interests of present and future generations’).

¹⁹⁰ E.g., United Nations Convention on Biological Diversity, June 1992, 1760 UNTS 69, (“Convention on Biological Diversity”), Preamble and Article 2; United Nations Convention to Combat Desertification in Those countries Experiencing Serious Drought and/or Desertification Particularly in Africa, 1954 UNTS 3, 33 ILM 1328 (1994), (2000) ATS 18, (“UNCCD”), Preamble. See also Report of the World Commission on Environment and Development, *Our Common Future*, p. 43; UN General Assembly Resolution 70/1 of 25 September 2015, ‘Transforming our world: the 2030 Agenda for Sustainable Development’, UN Doc. A/RES/70/1 (21 October 2015).

¹⁹¹ For a detailed review, see Edith Brown Weiss, ‘Intergenerational Equity’ Max Planck Encyclopedias of International Law (2021).

¹⁹² *Nuclear Weapons Advisory Opinion*, para. 29.

¹⁹³ *Gabčíkovo-Nagymaros Project*, para. 140.

¹⁹⁴ *Ibid.*, dissenting opinion of Judge Weeramantry, p. 455.

¹⁹⁵ *Gabčíkovo-Nagymaros Project*, Separate opinion, Judge Cançado Trindade, para. 122.

will make it impossible to recover lost mitigation opportunities. This, in turn, will bar children and future generations from living in a healthy and sustainable environment.

120. In addition, States have positive obligations to take steps to ensure the full enjoyment by children of rights protected by the Convention on the Rights of the Child,¹⁹⁶ as well as regionally by the African Charter on the Rights and Welfare of the Child.¹⁹⁷ Under the Convention on the Rights of the Child, States are under a duty to take positive measures to ensure that children are protected from foreseeable premature or unnatural death related to climate change¹⁹⁸ and to guarantee the right to health by taking into consideration ‘the dangers and risks of environmental pollution’.¹⁹⁹
121. As a result, States are under a due diligence duty to take future generations, including children, into account in their climate mitigation policies and associated measures. This can be done, for instance, by undertaking long-term strategic impact assessments, aligning NDCs with long-term low GHGs development strategies, and applying the precautionary principle.
122. The onus of respecting the rights of children and future generations is on developed countries taking the lead due to their historical and current emissions,²⁰⁰ and also to protect the vastly young population of developing countries. Delaying decarbonisation by shifting the burdens and costs to future generations, with policies often misaligned with a State’s own net zero targets, would fail to uphold its obligations under the Convention on the Rights of the Child and customary international law.

C. TREATY OBLIGATIONS OF STATES IN RELATION TO CLIMATE CHANGE IMPACTS

123. As discussed in Chapter III and in this chapter, the UNFCCC and the Paris Agreement constitute an important part of the whole corpus of international law related to addressing climate change. The UNFCCC and the Paris Agreement consolidate the States’ consensus on achieving an ambitious temperature goal that

¹⁹⁶ Convention on the Rights of the Child, New York, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3 (“Convention on the Rights of the Child”). This is the most widely ratified treaty globally.

¹⁹⁷ **Exhibit AU-7**, African Charter on the Rights and Welfare of the Child, adopted 1 July 1990, OAU Doc. CAB/LEG/24.9/49 (1990).

¹⁹⁸ **Dossier No. 302A.I**, Committee on the Rights of the Child, *General comment No. 26 (2023) on children’s rights and the environment, with a special focus on climate change*, CRC/C/GC/26 (2023), para. 20.

¹⁹⁹ Convention on the Rights of the Child, Article 24.

²⁰⁰ **Dossier No. 302A.I**, Committee on the Rights of the Child, *General comment No. 26*, paras. 91-3.

would avoid the worst impacts of climate change. They set: (i) binding obligations on GHGs *mitigation*, establishing, as also discussed previously in this chapter, a standard of due diligence for States in relation to addressing climate harms; (ii) binding obligations on Parties to take measures to *adapt* to the adverse effects of climate change; and (iii) design a framework for *supporting* for developing countries to effectively implement their obligations. The UNFCCC and the Paris Agreement, however, do not directly address the human rights obligations related to the impacts of climate change, and they do not fully address liability and compensation in relation to loss and damage arising from climate harms.

124. As a result of these treaty commitments, States have: a duty to cooperate in respect of climate change (1); a duty to reduce GHG emissions (2); duties to adapt to climate change (3); and certain obligations related to finance, technology transfer and capacity-building, and to recognise loss and damage (4).

1. *The duty to co-operate*

125. The duty to co-operate, as a primary rule, is an obligation of conduct.²⁰¹ In some contexts, it may also constitute an obligation “to achieve a precise result”.²⁰² It is recognised in the UN Charter as both a purpose of the United Nations Organisation (Article 1(3)) and a principle governing the relations between State Members and the Organisation itself (Article 2(5)). It is also recognised as a rule of general international law²⁰³ and detailed in the 1970 Friendly Relations Declaration.²⁰⁴ Since the 1970s, international cooperation has grown in the legal relations related to the protection of the environment, such as regarding the marine environment, species, ecosystems and biodiversity, the atmosphere, the climate system, and other parts of the environment.

²⁰¹ *North Sea Continental Shelf*, Judgment, I.C.J. Reports 1969, p. 3 (“**North Sea Continental Shelf**”), para. 85; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, I.C.J. Reports 2002, p. 303, para. 244; *Gabčíkovo-Nagymaros Project*, para. 141.

²⁰² *Nuclear Weapons Advisory Opinion*, para. 99.

²⁰³ *Corfu Channel Case*, pp. 22-23; *North Sea Continental Shelf*, paras. 83-87; *Nuclear Weapons Advisory Opinion*, paras. 98-103; *Pulp Mills*, paras. 90-122, 132-150; *Certain Activities*, p. 665, para. 104; *MOX Plant (Ireland v. United Kingdom)*, Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001, p. 95, para. 82; *Land Reclamation in and around the Straits of Johor (Malaysia v. Singapore)*, Order of 10 September 2003, ITLOS Reports 2003, p. 4, para. 92; *Delimitation of the maritime boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire)*, Order of 25 April 2016, ITLOS Reports 2016, p. 11, para. 73; *ITLOS Advisory Opinion 2015*, para. 140; *South China Sea Arbitration*, paras. 946, 984-985; *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Judgment, I.C.J. Reports 2018, p. 507, paras. 86-87, and 165-167.

²⁰⁴ UN General Assembly Resolution 2625 (XXV), ‘Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations’, 24 October 1970, Annex.

The 1992 Rio Declaration on Environment and Development,²⁰⁵ which is recalled in preambular paragraph 5 of Resolution 77/276, specifically mentions the duty to cooperate at the transboundary (Principles 18 and 19) and global levels (Principles 7 and 27). The UNFCCC also recognises in its preamble the necessity of cooperation in solving transboundary environmental problems, and the principles of equity and CBDR-RC.²⁰⁶

126. The duty to co-operate as an obligation of conduct, demands, specifically, first, notification and consultation when an activity or an accident may have important consequences on other States²⁰⁷ and, second, the duty not to impede the outcome of a cooperative process by unilateral action taken while the process is ongoing.²⁰⁸
127. In the context of the present proceedings, this is of particular relevance, as the continued performance of the conduct at stake would result in raising high GHG emissions,²⁰⁹ resulting in an increased “likelihood of abrupt and/or irreversible changes”, as well as of “the probability of low-likelihood outcomes associated with potentially very large adverse impacts”.²¹⁰ Accordingly, and since the conduct at stake relates to activities that may cause significant harm to the environment of other States, states are obliged to co-operate.²¹¹
128. The African Union has placed the duty to co-operate at the core of its climate action. In particular, the recent African Union Climate Change and Resilient Development Strategy and Action Plan (2022-2032) provides a detailed outline for “a harmonized and coordinated approach to respond to climate change, setting out common principles, priorities, and action areas for enhanced climate cooperation”.²¹²
129. Despite States’ obligation to co-operate in the response to climate change, recent data shows that GHG emissions are increasing, as reported by the UNFCCC’s 2022

²⁰⁵ **Dossier No. 137**, Rio Declaration.

²⁰⁶ **Dossier No. 4**, UNFCCC, Preamble, para. 6: “Acknowledging that the global nature of climate change calls for the widest possible cooperation by all countries [...] in accordance with their common but differentiated responsibilities and respective capabilities and their social and economic conditions”, available at <https://unfccc.int/resource/docs/convkp/conveng.pdf>.

²⁰⁷ *Corfu Channel*, p. 22; **Dossier No. 137**, Rio Declaration, Principles 18 and 19; *Certain Activities*, paras. 104, 108 and 168.

²⁰⁸ *Pulp Mills*, para. 144.

²⁰⁹ IPCC, Synthesis Report 2023, statement C.2 (“Delayed mitigation and adaptation action would lock-in high-emissions infrastructure, raise risks of stranded assets and cost-escalation, reduce feasibility, and increase losses and damages”).

²¹⁰ *Ibid.*, statement B.3.

²¹¹ *Corfu Channel*, para. 22; **Dossier No. 137**, Rio Declaration, Principles 18 and 19; *Certain Activities*, paras. 104, 108 and 168.

²¹² **Exhibit AU-2**, African Union Climate Change and Resilient Development Strategy and Action Plan (2022-2032), p. 4, 13, 14 and 24.

Nationally Determined Contributions (NDCs) Synthesis Report.²¹³ Due to the states' delays and inactivity, as noted by the Summary for policymakers of the IPCC's Synthesis Report of 2023, "continued emissions will further affect all major climate system components" and "with every additional increment of global warming, changes in extremes continue to become larger".²¹⁴ Moreover, global low-carbon transformations are needed to deliver cuts amounting to 42 per cent of the predicted 2030 GHG emissions, required for a 1.5°C pathway.²¹⁵ According to the UNEP Production Gap Report (2023), major GHG emitters are however aiming to increase their production of fossil fuels to levels that, in 2030, "are 460%, 29%, and 82% higher for coal, oil, and gas, respectively, than the median 1.5°C-consistent pathways".²¹⁶ This disconnect between governments' fossil fuel production plans and their climate promises shows that, in the ongoing process of responding globally to the climate emergency, a State's unilateral action may impermissibly defeat the cooperative conduct to reduce GHG emissions, contributing instead to increase the level of interference with the climate system.

2. *Obligations to mitigate climate change by reducing GHGs*

130. States parties to the UNFCCC and the Paris Agreement are under binding GHG mitigation obligations. As regards the former, all States have been under the obligations to formulate and "implement" national and regional programmes to mitigate climate change and facilitate adaptation to climate change. In addition, each developed country, listed in Annex I, has been under the duty to take policies and measures on GHG mitigation "with the aim of returning individually or jointly" to their 1990 levels of GHGs.²¹⁷ In order to implement the latter obligation, States have therefore been required to exercise due diligence, and best possible efforts to reach such level. Moreover, Parties to the Kyoto Protocol were under specific quantified emission limitation and reduction commitments pursuant to Annex B.²¹⁸

²¹³ According to the report, "the total global GHG emission level in 2030 [...] is estimated to be 10.6 (3.6–17.5) per cent above the 2010 level" see 'Nationally determined contributions under the Paris Agreement: Synthesis report by the secretariat', 26 October 2022, FCCC/PA/CMA/2022/4, 7, para. 13, available at: https://unfccc.int/sites/default/files/resource/cma2022_04.pdf.

²¹⁴ IPCC, Synthesis Report 2023, statement B.1.3.

²¹⁵ UNEP *Emissions Gap Report 2023*: Broken Record, p. 30.

²¹⁶ UNEP, Production Gap Report 2023: Phasing down or phasing up? Top fossil fuel producers plan even more extraction despite climate promises, pp. 4-5.

²¹⁷ **Dossier No. 4**, UNFCCC, Article. 4.2(a), (b).

²¹⁸ Kyoto Protocol, Article. 3(1).

131. As set out above,²¹⁹ the main obligation of Parties to the Paris Agreement is found in Article 4(2) that reads as follows:

Each Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve. Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions.

132. Article 4(2) sets the binding procedural obligation to communicate an NDC as well as the binding substantive obligation to pursue domestic measures with the aim of achieving the objectives of the NDC. Achieving the NDC objectives through domestic measures is an obligation to exercise best efforts, and must be implemented in accordance with due diligence. Article 4(2) should be read in conjunction (and in the context of) Article 3, which provides that Parties' efforts to reduce emissions should represent their "highest possible ambition" and "represent a progression over time".

133. The expectation of "progression" is combined with the expectation that NDCs will show States' "common but differentiated responsibilities [...] in the light of different national circumstances",²²⁰ as well as "leadership" from developed countries.²²¹ These expectations qualify the procedural obligation of Article 4(2) to "prepare, communicate and maintain" NDCs, both substantively and qualitatively. States Parties must take them into account in designing and implementing their NDCs. As regards the obligation of conduct under Article 4.2, these expectations should also drive and qualify State's adoption of domestic measures with the aim of meeting the objectives of the NDCs, thus defining the level of exercise of due diligence.

134. The African Union is particularly vulnerable to the impacts of climate change and its mitigation capacities are limited.²²² It therefore relies on the leadership from developed countries in the implementation of their GHG mitigation obligations. As recognised in the African Union Climate Change and Resilient Development Strategy and Action Plan (2022-2032), the African Continent's "peculiar vulnerability is caused by the effects of multiple stressors – notably by low adaptation and mitigation

²¹⁹ *Supra*, p. 41.

²²⁰ **Dossier No. I6**, Paris Agreement, Article 4.3.

²²¹ **Dossier No. I6**, Paris Agreement, Article 4.4.

²²² **Expert Report**, Sections III and VII.

capacities, fuelled by scant finance and investments.”²²³ The African Union has thus included mitigation actions among its priorities, as they will be required as part of the region’s climate response, especially considering that “continent has an immense mitigation potential due to its vast land mass, forests, agricultural systems and oceans”, which “if fully unlocked, can attract substantial resource inflows to fund adaptation and resilience-building”.²²⁴

3. *Obligation to adapt to the impacts of climate change*

135. All Parties to the UNFCCC and to the Paris Agreement are under binding obligations in relation to adaptation. Article 4(1) of the UNFCCC reads that:

[a]ll Parties, taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives, and circumstances, shall: [...]

(b) Formulate, implement, publish and regularly update national and, where appropriate, regional programmes containing measures to mitigate climate change by addressing anthropogenic emissions by sources and removals by sinks of all greenhouse gases not controlled by the Montreal Protocol, and measures to facilitate adequate adaptation to climate change.

136. Article 7(9) of the Paris Agreement strengthens the obligation of States Parties to engage in adaptation planning and implementation, and enumerates possible plans, regulations, and/or contributions that Parties may take. According to the *chapeau* of Article 7(9), “[e]ach Party shall, as appropriate, engage in adaptation planning processes and the implementation of actions, including the development or enhancement of relevant plans, policies and/or contributions, which may include [...].” This constitutes a binding obligation, and States can implement it “as appropriate”, given the contextual national differences.²²⁵

137. The obligation to adapt to climate change impacts is also set under Article 2(1)(b) of the Paris Agreement which clarifies that one of the purposes of the Paris Agreement is the following:

²²³ **Exhibit AU-2**, African Union, African Union Climate Change and Resilient Development Strategy and Action Plan (2022-2032), p. 12.

²²⁴ **Exhibit AU-2**, African Union, African Union Climate Change and Resilient Development Strategy and Action Plan (2022-2032), p. 25.

²²⁵ NDCs may include adaptation components and they are present in 80% of the most recent NDCs, see “Nationally determined contributions under the Paris Agreement: Synthesis report by the secretariat”, 26 October 2022, FCCC/PA/CMA/2022/4, 7, para. 28, available at: <https://unfccc.int/documents/619180>

Increasing the ability to adapt to the adverse impacts of climate change and foster climate resilience and low greenhouse gas emissions development, in a manner that does not threaten food protection.

138. States Parties to the Paris Agreement have “recognize[d]” the direct link between mitigation and adaptation. According to Article 7(4), “greater levels of mitigation can reduce the need for additional adaptation efforts, and that greater adaptation needs can involve greater adaptation costs.” This correlation implies that if States Parties do not exercise due diligence with regard to GHG mitigation obligations, there could be higher demands on them both with regard to adaptation efforts and costs. Moreover, such higher costs should not be borne entirely by developing countries. The role of international cooperation on adaptation efforts is important under both Articles 4(1)(e) and 4(4) of the UNFCCC and Article 7(6) of the Paris Agreement. On the basis of States’ “common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances”, Article 4(1)(e) of the UNFCCC sets the obligation of all States Parties to:

Cooperate in preparing for adaptation to the impacts of climate change; develop and elaborate appropriate and integrated plans for coastal zone management, water resources and agriculture, and for the protection and rehabilitation of areas, particularly in Africa, affected by drought and desertification, as well as floods;

UNFCCC Article 4(4) adds that:

The developed country Parties and other developed Parties shall also assist the developing country Parties that are particularly vulnerable to the adverse effects of climate change in meeting costs of adaptation to those adverse effects.

139. Similarly, Article 7(6) of the Paris Agreement emphasises the “importance of support for international cooperation on adaptation efforts”, and “of taking into account the needs of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change”.²²⁶ The latter provision of the Paris Agreement provisions should be read in light of – and in conjunction with – the UNFCCC. The combination of these provisions identifies an obligation on developed

²²⁶ Emphasis added. This provision also enhances Article 4(8) of the UNFCCC.

country Parties to assist particularly vulnerable developing country Parties in meeting the costs of adaptation to those adverse effects.

140. The African Union has stressed the need for “greater focus on adaptation, including financing for adaptation” in Africa.²²⁷ According to the African Union Climate Change and Resilient Development Strategy and Action Plan (2022-2032):

Historical emissions have caused a global average warming of at least 1°C highlighting the need to enhance adaptation action today. African countries are already undertaking actions to adapt to the impacts of climate change, but these *efforts need to be intensified as the impacts of climate change increase*.²²⁸

The Strategy defines the main parameters and priorities in building African resilient capacities for adaptation. To increase adaptation efforts, the Africa Adaptation Initiative (“AAI”)²²⁹ was developed in 2015, in response to a specific mandate from the African Heads of State and Government, the African Ministerial Conference on the Environment and the African Group of Negotiators. The AAI’s overall purpose is to enhance concrete adaptation action and address loss and damage on the African Continent in the context of the implementation of NDCs, the African Union’s 2063 Agenda and the Sustainable Development Goals.²³⁰ In this respect, the Nairobi Declaration enshrines the African Leaders’ commitment to build “effective partnership between Africa and other regions, to meet the needs for financial, technical and technological support, and knowledge sharing for climate change adaptation”.²³¹

141. In a context of climate emergency, the IPCC has warned that “[d]elayed mitigation and adaptation action would lock-in high-emissions infrastructure, raise risks of stranded assets and cost-escalation, reduce feasibility, and increase losses and damages”.²³² Across sectors and regions the most vulnerable people and systems are

²²⁷ **Exhibit AU-2**, African Union, African Union Climate Change and Resilient Development Strategy and Action Plan (2022-2032), Foreword by H. E. Hon. Uhuru Kenyatta, CGH, President of the Republic of Kenya and Coordinator (2022-2024), Committee of the African Heads of State and Government on Climate Change (CAHOSCC), p. 3.

²²⁸ *Ibid.*, p. 72 (emphasis added).

²²⁹ For more details, Africa Adaptation Initiative, at <https://africaadaptationinitiative.org/about/>.

²³⁰ **Exhibit AU-2**, African Union, African Union Climate Change and Resilient Development Strategy and Action Plan (2022-2032), p. 72.

²³¹ **Exhibit AU-3**, Nairobi Declaration, para. 11, p. 4.

²³² IPCC, Synthesis Report 2023, statement C.2 (emphasis added).

bound to be disproportionately affected.²³³ By way of example, in *Billy v Australia*, the Human Rights Committee found that Australia's failure to adopt timely adequate climate adaptation measures to protect the Indigenous claimants' collective entitlement to maintain their traditional way of life and to transmit to their children and future generations their culture and traditions and use of land and sea resources constituted a breach of Article 27 of the ICCPR.²³⁴ Adaptation efforts by developed countries can reduce such vulnerability.

4. Obligations related to finance, technology transfer and capacity-building and recognition of loss and damage

142. The preambular paragraph 11 of Resolution 77/276 stresses the urgency of scaling up action and support to enhance adaptive capacity in developing countries that are particularly vulnerable to the adverse effects of climate change. It reads:

Emphasizing the urgency of **scaling up action and support, including finance, capacity-building and technology transfer**, to enhance adaptive capacity and to implement collaborative approaches for effectively responding to the adverse effects of climate change, as well as for averting, **minimizing and addressing loss and damage** associated with those effects in developing countries that are particularly vulnerable to these effects,²³⁵

143. This paragraph reflects the agreement reached by States at the 26th Conference of the Parties of the UNFCCC, held in Glasgow, United Kingdom. According to the Glasgow Climate Pact, paragraphs 6 and 39:

Emphasizes the urgency of scaling up action and support, including finance, capacity-building and technology transfer, to enhance adaptive capacity, strengthen resilience and reduce vulnerability to climate change in line with the best available science, taking into account the priorities and needs of developing country Parties.²³⁶

Reiterates the urgency of scaling up action and support, as appropriate, including finance, technology transfer and capacity-building, for implementing approaches to averting, minimizing and addressing loss and

²³³ IPCC, Climate Change 2022, statement SPM.B.I.

²³⁴ Views adopted by the Committee under Article 5 (4) of the Optional Protocol, concerning communication No. 3624/2019, Human Rights Committee CCPR/C/135/D/3624/2019, 22 Sept. 2022 ("*Billy v. Australia*"), para. 8.14.

²³⁵ **Dossier No. 2**, Resolution 77/276 (emphasis added).

²³⁶ **Dossier No. 163**, Glasgow Climate Pact, para. 6 (the same text was adopted by the Meeting of the Parties of the Paris Agreement in Decision I/CMA.3, para. 7).

damage associated with the adverse effects of climate change in developing country Parties that are particularly vulnerable to these effects.²³⁷

a. Obligations related to finance, technology transfer, and capacity-building

144. Both the UNFCCC and the Paris Agreement include provisions to support States Parties in implementing their obligations. Article 9 of the Paris Agreement obliges developed countries, “in continuation of their existing obligations under the Convention”, to provide financial resources to assist developing countries with adaptation and mitigation. More specifically, the obligations for developed countries are identified under Article 4(3) of the UNFCCC. The latter establishes the following two obligations for developed country Parties and other developed Parties included in Annex II: *first*, they “shall provide new and additional financial resources to meet the agreed full costs incurred by developing countries” in complying with their reporting obligations; *second*, they:

shall also provide such financial resources, including for the transfer of technology, needed by developing country Parties to meet the agreed, full, incremental costs of implementing measures that are covered by paragraph 1 of this Article and that are agreed between a developing country Party and the international entity or entities referred to in Article 11 in accordance with that Article.

145. The provisions under both the UNFCCC and the Paris Agreement demonstrate that there is a direct link between the extent of support provided to developing countries and the level of effective implementation of the UNFCCC and the Paris Agreement by developed countries. According to Article 4(7) of the UNFCCC:

The extent to which developing country Parties will effectively implement their commitments under the Convention will depend on the effective implementation by developed country Parties of their commitments under the Convention related to financial resources and transfer of technology and will take fully into account that economic and social development and poverty eradication are the first and overwhelming priorities of the developing country Parties.

146. Article 4(7) of the UNFCCC is strengthened by two provisions under the Paris Agreement: *first*, Article 3 recognises the “need to support developing country Parties

²³⁷

Dossier No. I63, Glasgow Climate Pact, para. 39 (the same text was adopted by the Meeting of the Parties of the Paris Agreement in Decision I/CMA.3, para. 63).

for the effective implementation of this Agreement”; and, *second*, Article 4(5) emphasises that ‘enhanced support for developing country Parties will allow for higher ambition in their actions.’

147. Financial supports remain however below the actual needs of developing countries. The IPCC Summary for Policymakers of *Climate Change 2022: Mitigation of Climate Change*, has concluded (with high confidence) that “[p]rogress on the alignment of financial flows towards the goals of the Paris Agreement remains slow and tracked climate finance flows are distributed unevenly across regions and sectors”.²³⁸ According to the First Report on the Determination of the Needs of Developing Country Parties, prepared by the UNFCCC Standing Committee on Finance, developed on the basis of NDCs submitted until May 2021, the estimated need is equal to USD 5,817.5–5,888.6 trillion up until 2030.²³⁹ The 2021 Glasgow Climate Pact however recognises that financial support is minimal compared to the latter estimate, as it states “with deep regret that the goal of developed country Parties to mobilise jointly USD 100 billion per year by 2020 in the context of meaningful mitigation actions and transparency on implementation has not yet been met.”²⁴⁰

148. In the context of a climate emergency, in a critical decade, there is political consensus that:

Countries must urgently increase the level of ambition and action in relation to climate change mitigation, adaptation and finance in this critical decade to address the gaps in the implementation of the goals of the Paris Agreement.²⁴¹

149. The implementation by developed countries of the obligation to significantly scale up finance, technology transfer and capacity building helps the process of strengthening the resilience of injured, specially affected and particularly vulnerable countries to the adverse impacts of climate change, resulting from the conduct at stake. The UNFCCC requires, in its Article 4(8), States Parties to “give full consideration to what

²³⁸ See IPCC, *Climate Change 2022*, para. B.5.

²³⁹ UNFCCC, Executive summary by the Standing Committee on Finance of the first report on the determination of the needs of developing country Parties related to implementing the Convention and the Paris Agreement, p. 5, available at: https://unfccc.int/sites/default/files/resource/5+307_2%20-%20UNFCCC%20First%20NDR%20summary%20-%20V6.pdf.

²⁴⁰ **Dossier No. I63**, Glasgow Climate Pact, para. 44.

²⁴¹ **Dossier No. I63**, Glasgow Climate Pact, para. 5; UNEP (2021), *Emissions Gap Report 2021: The Heat Is On – A World of Climate Promises Not Yet Delivered*, Executive Summary, Conclusions 6 and 7, available at: <https://wedocs.unep.org/handle/20.500.11822/36990?sessionid=2EE25CE2E8AF3B2BD73700D7A61DDBF5>.

actions are necessary under the Convention, including *actions related to funding, insurance and the transfer of technology, to meet the specific needs and concerns of developing country Parties arising from the adverse effects of climate change..[.]*”, especially on, “small island countries”, “countries with low-lying coastal areas” and “countries with areas prone to natural disasters”.²⁴² Article 7(6) of the Paris Agreement also notes that:

Parties recognize the importance of support for and international cooperation on adaptation efforts and the importance of taking into account the needs of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change.²⁴³

150. The Paris Agreement further recognises the importance of “continuous and enhanced international support” to be given with respect to specific adaptation actions.²⁴⁴ This provision of support goes under five-yearly collective assessments of progress (termed Global Stocktake).²⁴⁵ Support related to adaptation efforts has been however inadequate so far. According to the 2023 UN Synthesis Report by the Co-Facilitators of the Technical Dialogue of the First Global Stocktake, “[a]ssessment of collective progress on adaptation has revealed an *urgent need to rapidly scale up finance for adaptation, to meet the growing needs and priorities of developing countries.*”²⁴⁶ Moreover, the 2022 Sharm-el-Sheik Implementation Plan also “urges developed country Parties to *urgently and significantly scale up their provision of climate finance, technology transfer and capacity-building for adaptation* so as to respond to the needs of developing country Parties as part of a global effort.”²⁴⁷
151. The African Continent is strongly affected by the adverse impacts of climate change and has limited capacity to adapt to them. Many cost-effective pathways for adaptation on the African continent have limited feasibility of implementation due to

²⁴² **Dossier No. 4**, UNFCCC, Article. 4(8) (emphasis added).

²⁴³ **Dossier No. I6**, Paris Agreement, Article. 7(6).

²⁴⁴ **Dossier No. I6**, Paris Agreement, Article. 7(13).

²⁴⁵ **Dossier No. I6**, Paris Agreement, Article. 7(14).

²⁴⁶ Technical dialogue of the first global stocktake, Synthesis report by the co-facilitators on the technical dialogue, FCCC/SB/2023/9 (8 September 2023), available at: <https://unfccc.int/documents/631600> (emphasis added).

²⁴⁷ **Dossier No. I67**, Decision I/CP.27, Sharm-el-Sheik Implementation Plan, FCCC/CP/2022/10/Add.I (17 March 2023), para. 19 (emphasis added).

financial and institutional barriers.²⁴⁸ According to the IPCC Sixth Assessment Report:

*the capacity for African ecosystems to adapt to changing environmental conditions is limited by a range of factors, from heat tolerance to land availability. Adaptation across human settlements and food systems are further constrained by insufficient planning and affordability. Integrated development planning and increasing finance flows can improve African climate change adaptation.*²⁴⁹

152. To improve African climate change adaptation and respond to the needs of the African countries and people, the African Union has therefore called for an urgent action from the international community. In 2023, the African Leaders, in the Nairobi Declaration, have asked the international community to:

support the continent in addressing climate change, specifically to: a. Accelerate all efforts to reduce emissions to align with goals set forth in the Paris Agreement; b. Honor the commitment to provide \$100 billion in annual climate finance, as promised 14 years ago at the Copenhagen conference [...].²⁵⁰

The African leaders also called for a “comprehensive and systemic response to the incipient debt crisis outside of default frameworks to create the fiscal space that all developing countries’ need to finance development and climate action”.²⁵¹ Given the vulnerability of the African Continent to climate change and the urgency of receiving financial support, they also proposed “to establish a new financing architecture that is responsive to Africa’s needs including debt restructuring and relief [...]”.²⁵² The scaling up and provision of such support is a way of enhancing the resilience of injured, specially affected and particularly vulnerable States, such as African countries, to the adverse impacts resulting from the conduct at stake.

b. On “[a]verting, minimizing, and addressing loss and damage” and the human right to a remedy

153. In 2022, the IPCC, in its Summary for Policymakers of Climate Change 2022: Impacts, Adaptation and Vulnerability, concluded that climate change, driven by human

²⁴⁸ See IPCC Africa Chapter, p. 1289, 1301, 2022.

²⁴⁹ *Ibid.*, p. 1401, 2022.

²⁵⁰ **Exhibit AU-3**, Nairobi Declaration, para. 19.

²⁵¹ *Ibid.*, para. 51.

²⁵² *Ibid.*, para. 58.

activity, has caused widespread adverse impacts and related loss and damage to nature and people. It states:

Human-induced climate change, including more frequent and intense extreme events, **has caused widespread adverse impacts and related losses and damages to nature and people**, beyond natural climate variability. ... The rise in weather and climate extremes has led to some irreversible impacts as natural and human systems are pushed beyond their ability to adapt.²⁵³

154. In its 2023 Synthesis Report, the IPCC further concluded, with high confidence, that loss and damage is unavoidable, even if GHG emissions are now limited. It reads as follow:

Limiting global surface temperature does not prevent continued changes in climate system components that have multi-decadal or longer timescales of response (high confidence). Sea level rise is unavoidable for centuries to millennia due to continuing deep ocean warming and ice sheet melt, and sea levels will remain elevated for thousands of years (high confidence).²⁵⁴

155. The Paris Agreement acknowledges, in its Article 8(1), that harm, in the form of loss and damage, has already occurred and that some further harm is irreversible. According to Article 8(1):

Parties recognize the importance of averting, minimizing and addressing loss and damage associated with the adverse effects of climate change, including extreme weather events and slow onset events, and the role of sustainable development in reducing the risk of loss and damage.

156. The rest of Article 8 recommends ('Parties should') that Parties enhance "understanding, action and support" on a "cooperative and facilitative basis with respect to loss and damage associated with the adverse effects of climate change."²⁵⁵ It then adds examples of areas of cooperation and facilitation.

157. Although the Paris Agreement explicitly declines to address liability and compensation in relation to loss and damage occurring from climate harms, there are other key sources of obligations that are interconnected (but outside) the UNFCCC and the Paris Agreement, such as human rights obligations. As previously discussed

²⁵³ IPCC, Climate Change 2022, statement B.I.

²⁵⁴ IPCC, Synthesis Report 2023, statement B.3.1.

²⁵⁵ **Dossier No. I6**, Paris Agreement, Article 8(3).

in this Chapter, human rights protection and the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases are strictly connected. As noted by the Office of the High Commissioner for Human Rights in its *Key Messages on Human Rights and Loss and Damage*:

Human rights law requires urgent action to prevent climate change related violations of human rights and establish guarantees of non-repetition. It further requires that harms caused by climate change are remedied [...] Under human rights law, the actors responsible for climate change related harms (primarily States and businesses) should be accountable for remedying them.²⁵⁶

Moreover, it clarifies that: “Persons in vulnerable situations may have reduced adaptive capacity making them particularly at-risk from human rights harms caused by climate change”.²⁵⁷ It then include a non-exhaustive list of five categories of individual and collective rights that calls for particular attention in the context of loss and damage: women and persons with diverse gender identity; children; indigenous peoples; migrants; and persons with disabilities.²⁵⁸

158. In its Report of 26 July 2022, the Special Rapporteur on the Promotion and Protection of Human Rights in the Context of Climate Change clarified that “climate change has already harmed human physical and mental health” and that “in all regions, health impacts often undermine efforts for inclusive development”.²⁵⁹ Moreover, for the Special Rapporteur, “from a human rights perspective, loss and damage are closely related to the right to remedy and the principle of reparations, including restitution, compensation and rehabilitation”.²⁶⁰ Moreover, the Committee on the Rights of the Child, in its 2023 General Comment No. 26, stated that, “through a human rights lens, the adverse impacts of climate change have led to significant losses and damages, in particular for those in the developing world”²⁶¹ and advised States “to take note that, from a human rights perspective, loss and damage are closely related to the right to

²⁵⁶ Office of the High Commissioner for Human Rights, *Key Messages on Human Rights and Loss and Damage*, November 2023, Key message I, available at: [KeyMessages_on_HR_CC.pdf\(ohchr.org\)](#) (emphasis added).

²⁵⁷ *Ibid.*

²⁵⁸ *Ibid.*

²⁵⁹ **Dossier No. 320**, Report of the Special Rapporteur on the Promotion and Protection of Human Rights in the Context of Climate Change, Ian Fry, 26 July 2022, A/77/226, paras. 26-28.

²⁶⁰ *Ibid.*, para. 26 (emphasis added).

²⁶¹ **Dossier No. 302A.I**, Committee on the Rights of the Child, *General Comment No 26 on children’s rights and the environment, with a special focus on climate change* (22 August 2023), CRC/C/GC/26, para. I04.

remedy and the principle of reparations, including restitution, compensation and rehabilitation”.²⁶²

159. In 2023, the UN Special Rapporteur on the Promotion and Protection of Human Rights in the Context of Climate Change clarified what is asked from States in relation to loss and damage and human rights.²⁶³ It states the overall need in the following terms “[a] significant omission in most climate change legislation is any reference to loss and damage and how it can be addressed”.²⁶⁴ Specifically, the Report identifies the following forms of redress:

With respect to loss and damage, new climate change legislation should:

(a) Support processes for international cooperation on loss and damage based on the principle of solidarity entailing a duty of assistance without expectation of reciprocity;

(b) Create provisions for compensation, liability and reparations to ensure that major greenhouse gas polluters – countries and corporations alike – pay for the harm they are causing. This should include domestic and transnational liability;

(c) Ensure that individuals are granted freedom of movement and given full legal rights as though they were refugees if they are displaced across international borders as a consequence of climate change;

(d) Develop affordable insurance and risk-pooling mechanisms to assist the most vulnerable

(e) Create mechanisms to assess, quantify and compensate for loss and damage for economic and non-economic losses, including human rights impacts;

(f) Support the establishment of an international mechanism for processing loss and damage claims in an expedited manner.²⁶⁵

160. Irrespective of the level of diligence that one or more States may demonstrate in the future, the lack of diligence in the past has already caused both significant harm to the environment, including the climate system, and contributed to climate change,

²⁶² UN Human Rights Committee, *General comment no. 31: The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13, para. 106.

²⁶³ **Dossier No. 32IA**, Report of the Special Rapporteur on the Promotion and Protection of Human Rights in the Context of Climate Change, Ian Fry (28 July 2023), A/78/255.

²⁶⁴ *Ibid.*, para. 15.

²⁶⁵ *Ibid.*, para. 72.

causing loss and damage. Loss and damage that has occurred in the past or that is irreversible can be “minimised” and “addressed” and the States whose acts and omissions have caused significant harm to the climate system and other parts of the environment knew or ought to have known, based on scientific evidence, that their conduct could have such consequences. The UN Human Rights Committee’s views in *Billy v Australia* show how State responsibility can arise from a State’s failure to protect human rights against the adverse impacts of climate change and trigger the obligation to provide an effective remedy, including “full reparation”, to the victims.²⁶⁶

161. The African Continent is already facing the reality of loss of territory and maritime spaces, and a threat to their peoples’ rights and survival. The loss and damage experienced by African peoples and individuals, including through sea-level rise, extreme weather events and other impacts which render their territory uninhabitable, is a result of the conduct at stake.²⁶⁷ In the context of the UNFCCC, the establishment of the Loss and Damage Fund by States Parties to the UNFCCC reflects a consensus among States of the need to support vulnerable countries. States Parties agreed on:

the urgent and immediate need for new, additional, predictable and adequate financial resources to assist developing countries that are particularly vulnerable to the adverse effects of climate change in responding to economic and non-economic loss and damage associated with the adverse effects of climate change, including extreme weather events and slow onset events, especially in the context of ongoing and ex post (including rehabilitation, recovery and reconstruction) action.²⁶⁸

162. The ongoing harm caused by the conduct at stake to vulnerable countries, like those members of the African Union, has forced developing countries to invest in responding and adapting to climate change, and averting, minimising and addressing loss and damage. The African Union’s position has focused, among others, on the need to “doubl[e] adaptation financ[ing] by 2025” and to clarify “support arrangements to

²⁶⁶ Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3624/2019, Human Rights Committee CCPR/C/135/D/3624/2019, 22 Sept. 2022 (“*Billy v. Australia*”), para. 11. In the same paragraph, the Committee also adds that: “Accordingly, the State party is obligated, inter alia, to provide adequate compensation to the authors for the harm that they have suffered; engage in meaningful consultations with the authors’ communities in order to conduct needs assessments; continue its implementation of measures necessary to secure the communities’ continued safe existence on their respective islands; and monitor and review the effectiveness of the measures implemented and resolve any deficiencies as soon as practicable” (emphasis added). Further, the State party must “take steps to prevent similar violations” in future.

²⁶⁷ As demonstrated in **Expert Report**, Section V.

²⁶⁸ Decision 2/CP.27, Funding arrangements for responding to loss and damage associated with the adverse effects of climate change, including a focus on addressing loss and damage FCCC/CP/2022/10/Add.1 (17 March 2023).

address loss and damage”.²⁶⁹ The African Group of Negotiators on Climate Change has emphasised the importance of “the global goal for adaptation”,²⁷⁰ with adaptation financing to match estimated costs. The African Union Climate Change and Resilient Development Strategy and Action Plan (2022-2032) has therefore been designed to enhance the “African Continent’s capacity to respond to climate impacts through the mobilization of domestic and international financial resources, enhancing access to technology and innovation, and developing safety nets for loss and damage”.²⁷¹

163. As discussed in detail in Chapter V of this Written Statement, States engaging in the conduct at stake are under the obligation to provide countries vulnerable to the impacts of climate change, such as the countries of the African Union, both reparation and compensation, with adequate climate finance, technology transfer and capacity-building to allow them to adapt to the adverse effects caused by the conduct at stake, and to avert, address and minimise loss and damage arising from it.

D. OBLIGATIONS OF STATES TO PROTECT THE ENVIRONMENT FROM CLIMATE HARMS AND TO CONSERVE CARBON SINKS

164. The triple crisis facing the planet, including climate change but also biodiversity loss and pollution, can only be solved in an integrated and holistic manner. The relationship between the climate system and “other parts of the environment” is therefore central to mitigating the climate crisis based on two, connected, realities:

- a. *First*, the environment ought to be protected from climate harms: the Paris Agreement recognises ‘the importance of ensuring the integrity of all ecosystems, including oceans, and the protection of biodiversity’.²⁷²
- b. *Second*, the contribution of the environment to climate mitigation and adaptation ought to be fully acknowledged: pursuant to the Paris Agreement,

²⁶⁹ See United Nations Economic Commission for Africa, “African Group of Negotiators consolidate Common Draft Position in lead up to COP 27”, available at <https://www.uneca.org/stories/african-group-of-negotiators-consolidate-common-draft-position-in-lead-up-to-cop-27>; See also **Exhibit AU-3**, Nairobi Declaration, para. 12.

²⁷⁰ See Africa Renewal, “Africa’s chief climate negotiator: We must have tangible and actionable climate decisions for a successful COP27”, available at: [African Group of Negotiators consolidate Common Draft Position in lead up to COP 27 | United Nations Economic Commission for Africa \(uneca.org\)](#)

²⁷¹ **Exhibit AU-2**, African Union, African Union Climate Change and Resilient Development Strategy and Action Plan (2022-2032), p. 2 and, in more detail, pp. 62-63 (section 4.3.2, “Safety Mechanisms to Reduce Loss and Damage”).

²⁷² **Dossier No. I6**, Paris Agreement, Preamble.

Parties should ‘take action to conserve and enhance, as appropriate, sinks and reservoirs of greenhouse gases [...], including forests’.²⁷³

165. As a result, compliance with multilateral environment agreements (“MEAs”) protecting the environment is crucial. The full implementation of MEAs will also ensure the “promotion of the human right to a clean, healthy and sustainable environment”.²⁷⁴

166. The African Union has identified three main obligations arising from MEAs to protect and enhance carbon sinks, as well as to protect the environment from climate harms. While MEAs do not necessarily always reference climate change in their text, their contribution to ensuring the protection of the climate system is evidenced in application of the principle of systemic interpretation, including in light of subsequent agreement and practice.

1. *States have a duty to protect and preserve the marine environment*

167. Anthropogenic GHG emissions have caused, and continue to cause, ocean acidification, increased ocean temperatures, deoxygenation and sea level rise, with severe consequences for ocean ecosystems and biodiversity generally.²⁷⁵ At the same time, oceans are the greatest carbon sinks, having absorbed 90% of the heat generated by GHGs and taken 30% of carbon emissions to date.²⁷⁶

168. The position of the African Union on the obligations of States to ensure the protection of the climate system and other parts of the environment under UNCLOS²⁷⁷ were elaborated at length in the written submission of the African Union in the context of the *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law* before the International Tribunal

²⁷³ *Ibid.*, Article 5(I). See also **Dossier No. 4**, UNFCCC, Preamble (recognising the ‘role and importance in terrestrial and marine ecosystems of sinks and reservoirs of greenhouse gases’).

²⁷⁴ **Dossier No. 260**, UNGA Resolution 76/300, para. 3.

²⁷⁵ IPCC, *Special Report on the Ocean and Cryosphere in a Changing Climate: Summary for Policy-makers* (2019), available at: <<https://www.ipcc.ch/srocc/chapter/summary-for-policymakers/>>, statements A.2 and A.4-6.

²⁷⁶ UNFCCC, SBSTA, *Ocean and Climate Change Dialogue to Consider how to Strengthen Adaptation and Mitigation Action* (2021), available at: <https://unfccc.int/sites/default/files/resource/SBSTA_Ocean_Dialogue_SummaryReport.pdf>, para. 29.

²⁷⁷ UNCLOS.

- for the Law of the Sea (“ITLOS”). The African Union would therefore respectfully refer the Court to that submission for a detailed presentation of its position.²⁷⁸
169. Put concisely, Article 192 of UNCLOS provides that States must *protect* and *preserve* the marine environment, including its living resources. This entails both a positive obligation to take active measures, and a negative obligation not to degrade the marine environment. It applies to the marine environment as a whole, irrespective of the location of harm. The obligation in Article 192 is differentiated among States, according to their geographical differences, and to each State’s national circumstances in line with the principle of CBDR-RC.²⁷⁹ Given the significant impacts of climate change on the marine environment, States can only fulfil their duties by reducing their GHG emissions.
170. In addition, Article 194(1) creates obligations to take all necessary measures to ‘prevent’, ‘reduce’ and ‘control’ marine pollution resulting from ‘any source’, thus including GHG emissions.²⁸⁰ Reasonable measures can vary and need to be assessed on the basis of the due diligence standard. In this context, differentiation applies, as States must use “the best practicable means at their disposal and in accordance with their capabilities”.²⁸¹
171. Overall, compliance with Article 194(1) requires that States collectively reduce their GHG emissions. Emission reductions consistent with the 1.5°C temperature level are necessary to achieve a higher degree of ‘control’ over pollution of the marine environment and lesser deleterious effects.²⁸²
172. The duty to protect the marine environment also needs to be understood in light of applicable international standards which include: i) the recently adopted *Agreement under UNCLOS on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction*, one of its main principles referencing explicitly

²⁷⁸ See Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law, ITLOS Case No. 31, 12 December 2022, Written submission by the African Union available at: < https://www.itlos.org/fileadmin/itlos/documents/cases/31/written_statements/2/C31-WS-2-7-African_Union.pdf >.

²⁷⁹ *Ibid.*, Written submission by the African Union, paras. 248-249.

²⁸⁰ *Ibid.*, Written submission by the African Union, para. 277.

²⁸¹ UNCLOS, Article 194(1).

²⁸² Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law, ITLOS Case No. 31, 12 December 2022, Written submission by the African Union, para. 21.

climate change and ocean acidification²⁸³; ii) the work of relevant international organisations, such as International Maritime Organisation Strategy on Reduction of GHG Emissions from Ships²⁸⁴; and iii) the rules of regional treaties on the marine environment, such as the Nairobi Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Western Indian Ocean Region and its *Climate Change Strategy for the Marine and Coastal Environment*.²⁸⁵

2. States have an obligation to conserve, protect and sustainably use biological diversity and its components

173. The climate and biodiversity crises are intrinsically linked: climate change is a major driver of biodiversity loss,²⁸⁶ while biodiversity and ecosystem services contribute significantly to climate mitigation and adaptation. In this context, Africa's biodiversity is of outmost importance: its 'vast forests, especially the Congo Basin rainforest are the largest carbon sinks globally, and the important ecosystem services provided by Africa's vast savannahs, Miombo woodlands, peatlands, mangroves, and coral reefs' make a significant contribution to reduce GHGs.²⁸⁷

174. Under the Convention on Biological Diversity ("CBD"), States have an obligation to conserve, protect and sustainably use biological diversity and its components.²⁸⁸ The duty applies inter alia to "processes and activities, regardless of where their effects occur, carried out under its jurisdiction or control, within the area of its national jurisdiction or beyond the limits of national jurisdiction".²⁸⁹

175. Under the CBD, States have the duty, in accordance with "particular conditions and capabilities," to develop national plans and to integrate these objectives into

²⁸³ *Agreement under UNCLOS on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction*, adopted June 2023, not yet in force, Article 7 (h) ("an approach that builds ecosystem resilience, including to adverse effects of climate change and ocean acidification, and also maintains and restores ecosystem integrity, including the carbon cycling services that underpin the role of the ocean in climate").

²⁸⁴ International Maritime Organisation, Resolution MEPC.337(80) '2030 IMO Strategy on Reduction of GHG Emissions from Ships' (July 2023).

²⁸⁵ Nairobi Convention (2016), *Climate Change Strategy for the Nairobi Convention*. Nairobi Convention. Pp 63 available at: < https://wedocs.unep.org/bitstream/handle/20.500.11822/25676/annex8_climate_strategy.pdf?sequence=1&isAllowed=y>.

²⁸⁶ IPBES, *Global Assessment Report on Biodiversity and Ecosystem Services: Summary for Policy-Makers*, 2019, available at: < <https://zenodo.org/records/3553579>>, statement B.2 ("Climate change is a direct driver that is increasingly exacerbating the impact of other drivers on nature and human well-being").

²⁸⁷ **Exhibit AU-3**, Nairobi Declaration, para. 16.

²⁸⁸ Convention on Biological Diversity, Article 1.

²⁸⁹ *Ibid.*, Article 4.

policies.²⁹⁰ For the parties to the Revised African Convention on the Conservation of Nature and Natural Resources, this must be done “with due regard to ethical and traditional values as well as scientific knowledge in the interest of present and future generations”.²⁹¹

176. The duty to conserve, protect and sustainably use biological diversity in the context of climate change is evidenced by the CBD’s detailed programme of work and the adoption of multiple COP decisions.²⁹² The duty, in particular, needs to be understood in light of target 8 of the Kunming-Montreal Global Biodiversity Framework that reads as follows:²⁹³

Minimize the impact of climate change and ocean acidification on biodiversity and increase its resilience through mitigation, adaptation, and disaster risk reduction actions, including through nature-based solution and/or ecosystem-based approaches, while minimizing negative and fostering positive impacts of climate action on biodiversity.

Pursuant to target 8, States are expected to take action to reduce GHG emissions through, *inter alia*, nature-based solutions and ecosystem-based mitigation.

177. Moreover, in order to contribute to the Paris temperature goal, States have agreed to “enhanced efforts towards halting and reversing deforestation and forest degradation by 2030”.²⁹⁴ In doing so, States should pay due regard to the first ever UN Strategic Plan for Forests adopted in 2017 that sets six global forest goals.²⁹⁵

178. In order to enable developing countries to meet their obligations, developed countries are under an obligation, pursuant to Article 20 of the CBD, to “provide new and additional financial resources to enable developing country Parties to meet the agreed full incremental costs to them of implementing measures which fulfil the obligations of the Convention”.

²⁹⁰ *Ibid.*, Article 6 (a) and (b).

²⁹¹ **Exhibit AU-I4**, Revised African Convention on the Conservation of Nature and Natural Resources, Article IV.

²⁹² CBD, List of decisions on climate change and biodiversity, available at: < <https://www.cbd.int/climate/decision.shtml> >.

²⁹³ Kunming-Montreal Global Biodiversity Framework, Decision 15/4, U.N Doc. CBD/COP/COP/DEC/15/4 (2022).

²⁹⁴ Decision I/CMA.5, Outcome of the first global stocktake, para. 33.

²⁹⁵ UN General Assembly Resolution 71/285 of 27 April 2017, ‘United Nations strategic plan for forests 2017–2030’, UN Doc. R A/RES/71/285 (1 May 2017), ‘UN Strategic Plan for Forests 2017-2030’.

3. States have an obligation to prevent land degradation, including desertification

179. Land is simultaneously a source (through agriculture, forestry and other land uses) and a sink of GHGs. Changing climate exacerbates land degradation through drought, desertification and other extreme weather events. Land degradation is the single greatest cause of terrestrial biodiversity loss. In turn land-based ecosystems absorb around 30% of GHG emissions.²⁹⁶
180. States have an obligation to prevent land degradation, including desertification, arising from the Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, particularly in Africa.²⁹⁷ It is complemented by target 15.3 of the Sustainable Development Goals that aims to achieve a “land degradation-neutral world”.²⁹⁸
181. The UNCCD combats desertification as the most serious form of land degradation and is a critical tool to address “social problems such as poverty, poor health and nutrition, lack of food security, and those arising from migration, displacement of persons and demographic dynamics”.²⁹⁹ It pursues environmental and socio-economic objectives on an equal footing. The UNCCD imposes a duty on parties to pursue “long-term integrated strategies that focus simultaneously, in affected areas, on improved productivity of land, and the rehabilitation, conservation and sustainable management of land and water resources, leading to improved living conditions, in particular at the community level”.³⁰⁰ Article 5 UNCCD obliges the affected country parties to take concrete action at the national level, including through legislation and policies.
182. The UNCCD is directly relevant to the identification of obligations of States in relation to climate change. Indeed, it explicitly recognises its synergies with the UNFCCC, encouraging coordination with other multilateral environmental agreements, including on climate.³⁰¹ Its future strategic framework aims inter alia to “generate

²⁹⁶ *Global Land Outlook 2 (2022), Summary for Decision Makers*, available at: < <https://www.unccd.int/resources/global-land-outlook/glo2-summary-decision-makers>>, statement 4 (on the ‘feedback loops between land degradation, climate change, and biodiversity loss’).

²⁹⁷ **Dossier No. 4**, UNCCD, p. 3.

²⁹⁸ UN General Assembly Resolution 70/I of 25 September 2015, ‘*Transforming our world: the 2030 Agenda for Sustainable Development*’, UN Doc. A/RES/70/I (21 October 2015).

²⁹⁹ **Dossier No. 4**, UNCCD, Preamble.

³⁰⁰ **Dossier No. 4**, UNCCD, Article 2.

³⁰¹ *Ibid.*, Article 8.

global environmental benefits” by ensuring that “sustainable land management and the combating of desertification/land degradation contribute to the conservation and sustainable use of biodiversity and addressing climate change”.³⁰² In addition, Decision 8/COP.15 invited “Parties to explore complementarities between land degradation neutrality targets, Nationally Determined Contributions, and National Biodiversity Strategies and Action Plans”.³⁰³

183. The UNCCD is of crucial importance for the African continent. Indeed, “Africa is the driest of the world’s continents, with 45% of its land mass consisting of drylands and 50% of the population living in arid, semi-arid, dry, sub-humid and hyper-arid areas”.³⁰⁴ At the same time, Africa holds 65% of the world’s uncultivated arable land and more than 60% of its working population is engaged in agriculture.³⁰⁵ Launched in 2007 by the African Union and implemented by 22 African countries, the African-led Great Green Wall initiative aims to restore 100 million hectares of currently degraded land, sequester 250 million tons of carbon and create 10 million green jobs by 2030.

184. However, progress on fighting desertification has been slowed due to the lack of multilateral funding, which remains minimal compared to that of other environmental treaties. According to UNCCD Article 20, both developed and developing country parties agreed, “taking into account their capabilities”, to “make every effort to ensure that adequate financial resources are available”.³⁰⁶ Affected developing country parties “undertake to mobilize adequate financial resources for the implementation of their national action programmes”.³⁰⁷ In return, developed country parties “undertake [...] to mobilize substantial financial resources [...] in order to support the implementation” of anti-desertification programmes.³⁰⁸

³⁰² UNCCD, Decision 7/COP.13, ‘*The future strategic framework of the Convention*’, UN Doc. ICCD/COP(13)/21/Add.1, (“UNCCD, Decision 7”), strategic objective 4.

³⁰³ UNCCD, Decision 8/COP.15, ‘*Promotion and strengthening of relationships with other relevant conventions and international organizations, institutions and agencies*’, (2022), UN Doc. ICCD/COP(15)/23/Add.1, para. 2.

³⁰⁴ **Exhibit AU-2**, *African Union Climate Change and Resilient Development Strategy and Action Plan (2022-32)*, p. 10.

³⁰⁵ African Development Bank Group, *Feed Africa Strategy*, 2019 available at: <https://www.afdb.org/fileadmin/uploads/afdb/Documents/Generic-Documents/Brochure_Feed_Africa_-En.pdf>.

³⁰⁶ **Dossier No. 4**, UNFCCC, Article 20(1).

³⁰⁷ *Ibid.*, Article 20(3).

³⁰⁸ *Ibid.*, Article 20(2)(a).

185. In implementing the Convention, Parties are under an obligation to “give priority to affected African country Parties, in the light of the particular situation prevailing in that region”.³⁰⁹ The Implementation Annex on Africa provides that developed country Parties will provide financial and technological assistance, allocate “significant resources and/or increase resources”, and assist in capacity building.³¹⁰ However, to protect soil from climate impacts and enhance its ability to act as carbon sinks, significant more support is needed.
186. In sum, obligations of States to “ensure the protection of other parts of the environment” are fundamental to protect the environment from climate harms. In addition, because “other parts of the environment” contribute to the stability of the climate system, environmental duties can only be fulfilled by taking measures to mitigate and adapt to climate change. Therefore, obligations arising from MEAs create a duty on their Parties to collectively and urgently reduce their GHG emissions.
187. In this respect, developed country Parties should take the lead. African countries express their highest level of concern for the protection of their natural environment but have limited resources to implement their duties in the most ambitious possible, constrained by a lack of funding, technological and expert capabilities.

E. HUMAN RIGHTS OBLIGATIONS IN THE CONTEXT OF CLIMATE CHANGE

188. Climate change is set to negatively threaten the enjoyment of virtually all human rights, including the right to life, to private and family life, to health, to an adequate standard of living, to culture, to food and water.³¹¹ In addition, climate change response measures — e.g., those constraining access to and use of natural resources or relying on new technologies — may hinder the enjoyment of human rights
189. The connection between human rights and the environment dates back from the Stockholm Declaration that acknowledged “the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being”.³¹² In relation to climate change, the preamble of the

³⁰⁹ *Ibid.*, Article 7.

³¹⁰ *Ibid.*, Implementation **Expert Report**, Article 5.

³¹¹ See e.g., OHCHR, *Frequently Asked Questions on Human Rights and Climate Change. Factsheet no.38* (2021).

³¹² **Dossier No. I36**, Stockholm Declaration, principle I.

Paris Agreement recognises that “[p]arties, should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights [...]”.³¹³ In the same vein, the important concept of “climate justice” put forward in the Paris Agreement³¹⁴ emphasises that, often, the poorest and most marginalised people and communities are the ones most vulnerable to climate change.

190. A certain level of environmental protection is necessary for the protection of the integrity of human beings. This is even more important in relation to climate harm given that a stable climate system is an essential condition sustaining life on Earth. It logically follows that because human rights require States to take measures to protect human rights and because climate change impacts the enjoyment of human rights, then States are under a duty to protect the climate system under human rights law. A failure to take measures to prevent foreseeable harm to human rights caused by climate change, or to regulate activities contributing to such harm, could constitute a violation of States’ human rights obligations.

191. The interpretation of human rights obligations in the context of environmental degradation is well-established. Human rights courts and bodies have consistently interpreted existing human rights in the context of environmental degradation as creating a positive obligation to take preventive measures to ensure that industrial or technological activities,³¹⁵ as well as natural disasters,³¹⁶ do not adversely affect the enjoyment of specific human rights.

192. In addition, the right to a clean, healthy and sustainable environment, recently recognised in the landmark GA resolution,³¹⁷ is acknowledged to be “related to other rights and existing international law”³¹⁸ – in other words, to support an evaluation of

³¹³ **Dossier No. I6**, Paris Agreement, Preamble.

³¹⁴ *Ibid.*

³¹⁵ See e.g., the right to enjoy one’s own culture (Ilmari Lämsman et al. v Finland, Communication No. 511/1992, UN Doc. CCPR/C/52/D/511/1992 (1994), paras. 9.4–9.5), the right to property (Mayagna (Sumo) Awas Tingni Community v Nicaragua, Judgment of 31 August 2001, IAmCtHR Series C No. 79, para. 153), the right to private and family life (Lopez Ostra v Spain, Application no. 16798/90, ECtHR, Judgment of 9 December 1994, para. 51), the right to life (Öneriyildiz v Turkey, Application no. 48939/99, ECtHR, Judgment of 30 November 2004, para. 71, Inter-American Court of Human Rights, Advisory opinion OC-23/17 of 15 November 2017 on the environment and human rights, series A, No. 23 (“IACHR, Environment and Human Rights”), para. 64), and the right to personal integrity (IACHR, Environment and Human Rights, para. 64).

³¹⁶ ECtHR, *Budayeva and others v Russia*, Judgment (29 September 2008), para. 137; ILC, ‘Draft Articles on the Protection of Persons in the Event of Disasters (with Commentaries)’ (2016) Yearbook of the International Law Commission (vol. II, part 2), Article 9.

³¹⁷ **Dossier No. 260**, UNGA Resolution 76/300, ‘The human right to a clean, healthy and sustainable environment’ (28 July 2022). See also, **Dossier No. 279**, HRC, Resolution 48/13, 8 October 2021, “Human Rights and the Environment”.

³¹⁸ **Dossier No. 260**, UNGA Resolution 76/300, para. 2.

existing rights in the context of environmental degradation. The African continent, in particular, has been at the forefront globally in recognising the right to a clean and healthy environment. Notably, the African Charter was the world's first regional human rights treaty to recognise the right to a clean and healthy environment,³¹⁹ and the Maputo Protocol recognises specifically women's rights to a healthy environment and sustainable development.³²⁰

193. Human rights obligations in the context of climate change comprise negative obligations to 'respect' human rights (by refraining from interfering with the enjoyment of rights), as well positive obligations to 'protect' (to take steps to prevent third parties from interference), and 'fulfil' (to take appropriate legislative, administrative, judicial, budgetary measures).

194. The extent to which these obligations dictate mitigating climate change depend on three elements: i) the scope of the treaty, ii) benefits of mitigation for the enjoyment of the right and iii) its consequences for the enjoyment of other rights (for instance, if it means that funding has to be diverted from other human rights action plans).

195. The content of States' positive obligations under human rights law is informed by their obligations under international environmental law.³²¹ In turn, the human duties of States "inform their relevant obligations under international environmental law".³²² The most appropriate, and fairest, way of ensuring the fulfilment of human rights duties is to enhance climate protection by revising all NDCs, in line with the principle of common but differentiated responsibilities.

196. Three further elements should inform the Court's answer to the questions.

- a. *First*, African States have very little control over the causes of climate change and cannot without significant mitigation action of developed countries secure a safe climate and sustainable environment for their citizens. As a result, the

³¹⁹ **Exhibit AU-5**, ACHPR, Article 24. See also, African Commission on Human & Peoples' Rights, *Social and Economic Rights Action Center (SERAC) v Nigeria*.

³²⁰ **Exhibit AU-6**, Maputo Protocol, Articles 18 and 19.

³²¹ E.g., **Dossier No. 299**, Human Rights Committee, *General comment No. 36*, 3 September 2019, UN Doc. CCPR/C/GC/36; **Dossier No. 302A.I**, Committee on the Rights of the Child, *General comment No. 26 (2023) on children's rights and the environment, with a special focus on climate change*, 31 August 2023, UN Doc CRC/C/GC/26 (2023), para. 69.

³²² **Dossier No. 302A.I**, Committee on the Rights of the Child, *General comment No. 26 (2023) on children's rights and the environment, with a special focus on climate change*, 31 August 2023, UN Doc CRC/C/GC/26 (2023), para. 69.

onus of human rights duties in relation to climate mitigation needs to be on developed countries, including, as appropriate, in an extraterritorial context.

- b. *Second*, and relatedly, the African Union wishes to emphasise the importance of the duty of States to ‘protect’ from human rights harms involving businesses within their territory and/or jurisdiction,³²³ including in relation to contributions to climate change.³²⁴ Failure to regulate or mitigate the emissions of private actors can result in human rights violations. Moreover, while the responsibility to respect the obligations of international law is incumbent primarily on States, the private sector, including multinational companies, share the responsibility to respect human rights, independently of the capacity or the determination of states to protect human rights.³²⁵
- c. *Third*, States have a heightened duty to protect those in vulnerable situations from climate impacts.³²⁶ They are required to ensure that their actions do not disproportionately impact vulnerable communities, such as Indigenous peoples, women, children, older persons and persons with disabilities, who are often most exposed to and most affected by sudden and slow-onset forms of climate disruption, while generally being the most able to offer innovative solutions to the climate crisis.

197. Against this background, the African Union starts by presenting two fundamental rights of peoples – self-determination and development – before moving to identifying several human rights duties of particular importance for African States to ensure the protection of the climate system.

³²³ UN Guiding Principles on Business and Human Rights, UN Doc. HR/PUB/11/04 (2011). See also African Commission on Human and Peoples’ Rights, *State Reporting Guidelines and Principles on Articles 21 and 24 of the African Charter Relating to Extractive Industries, Human Rights and the Environment* (2018).

³²⁴ Working Group on the issue of human rights and transnational corporations and other business enterprises, ‘Information note on climate change and the Guiding Principles on Business and Human Rights’ (2023) paras. 7-8, available at: <<https://www.ohchr.org/sites/default/files/documents/issues/business/workinggroupbusiness/Information-Note-Climate-Change-and-UNGPs.pdf>>.

³²⁵ African Court, *Ligue Ivoirienne des Droits de l’Homme (LIDHO) And Others v. Republic of Côte d’Ivoire*, Application 041/2016, Judgment, 6 September 2023, para. 142 (in application of the UN Guiding Principles on Business and Human Rights).

³²⁶ In application of the general right to non-discrimination (see UDHR, Article 2; ICCPR, Article 2(1); ICESCR, Article 2(2)) and as acknowledged in relation to environmental harm: see *Framework Principles on Human Rights and the Environment*, UN Doc A/HRC/37/59 (2018), annex, para. 14.

1. *All peoples have the right to self-determination*

198. Self-determination is a fundamental principle of international law.³²⁷ Every State has the duty to respect the right of peoples to “freely determine their political status and freely pursue their economic, social and cultural development”.³²⁸ The right is central to determining the international law applicable to the climate crisis in relation to two aspects.

- a. *First*, States are under a duty to respect the right to permanent sovereignty over natural resources. The right emerged from the affirmation of the rights to self-determination and to economic development of newly independent States.³²⁹ A central component of Stockholm Principle 21, it acknowledges that “the rights of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned”.³³⁰ It is reaffirmed in the UNFCCC,³³¹ and a central tenet of African regional legal systems.³³²

The right to permanent sovereignty gives African peoples the fundamental right to use the resources of the continent – including fossil fuels and critical minerals – in such a way as to foster economic development and end extreme poverty.

- b. *Second*, the right to self-determination can be violated by climate impacts that are preventing peoples from choosing their own means of subsistence, to determine their political states and pursue their development.³³³ Climate change endangers the habitability and existence of low-lying island States,³³⁴ including the six African Small Island Developing States that are highly

³²⁷ Charter, Article I; ICESR and ICCPR, Article 2; United Nations Declaration on the Rights of Indigenous Peoples, 2 October 2007, UN Doc A/RES/61/295, Article 3. See also **Exhibit AU-5**, ACHPR, Article 20(1).

³²⁸ ICESR, Article I.

³²⁹ UN General Assembly Resolution 1314 (XIII) of 12 December 1958, (recognising that the concept is a ‘basic constituent of the right to self-determination’), UN Doc E/CN.4/Sub.2/404/Rev. I.

³³⁰ UN General Assembly Resolution 1803 (XVII) of 14 December 1962, *‘Permanent sovereignty over natural resources’*.

³³¹ **Dossier No. 4**, UNFCCC, Preamble.

³³² **Exhibit AU-5**, ACHPR, Article 21(1); **Exhibit AU-14**, Revised African Convention on Conservation, Preamble.

³³³ ICCPR and ICESCR, Article I(2).

³³⁴ **Dossier No. 283**, Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General, *Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights*, 15 January 2009, UN Doc A/HRC/10/61, para. 40.

vulnerable to climate change. It also threatens to deprive Indigenous peoples, including those living in developing countries, of their traditional territories and sources of livelihood.³³⁵

States are under a duty to ‘refrain’ from taking action that would deprive peoples of their right to self-determination and disrupt the territorial integrity of another State.³³⁶ Moreover, they have the duty to cooperate “in the economic, social and cultural fields as well as in the field of science and technology”³³⁷ and in the “promotion of economic growth throughout the world, especially that of the developing countries”³³⁸ to address and avert threats to the right to self-determination.

2. *States are under a duty to ensure the enjoyment of the right to sustainable development*

199. The UN Charter calls on States to promote “conditions of economic and social progress and development”.³³⁹ The right to development gives humans and peoples the right to enjoy “economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised”.³⁴⁰ Regionally, the African Charter on Human and Peoples’ Rights is the first binding instrument to specifically provide for the right to development, as a collective right of peoples,³⁴¹ while the Revised African Convention on the conservation of nature and natural resources protects “the right of all peoples to a satisfactory environment favourable to their development”.³⁴²

200. The right to development is central to the State obligation to ensure the protection of the climate system. The UNFCCC provides that Parties have a “right to, and should,

³³⁵ **Dossier No. 337**, HRC, *Report of the Special Rapporteur on the Rights of Indigenous Peoples*, 1 November 2017, UN Doc A/HRC/36/46, paras. 40–43.

³³⁶ UN General Assembly, *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*, 24 October 1970, UN Doc A/RES/2625(XXV) (‘principle of equal rights and self-determination of peoples’), pp. 123–124.

³³⁷ *Ibid.* (‘duty of States to cooperate with one another in accordance with the Charter’), p. 123.

³³⁸ *Ibid.*

³³⁹ Charter, Article 55.

³⁴⁰ UN General Assembly Resolution 41/128, ‘Declaration on the Right to Development’ of 4 December 1986, UN Doc. A/RES/41/128, Article I.

³⁴¹ **Exhibit AU-5**, ACHPR, Article 22.

³⁴² **Exhibit AU-14**, Revised African Convention on the Conservation of Nature and Natural Resources, Article III(I).

- promote sustainable development”.³⁴³ Similarly, the objective of the Paris Agreement is to “strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty”.³⁴⁴ In the 2030 Agenda for Sustainable Development, combating climate change is recognised as instrumental to secure sustainable, inclusive and equitable development that benefits all persons.³⁴⁵
201. The right to development is to be understood in light of the well-established concept of sustainable development,³⁴⁶ and thus needs to be fulfilled so as to “enable economic development to proceed in a sustainable manner”.³⁴⁷ The combination of the three pillars of sustainable development (economic, environmental and social)³⁴⁸ is reflected in the 2030 Agenda for Sustainable Development.³⁴⁹ Yet, their achievement is acknowledged to be “in peril”,³⁵⁰ which threatens the fulfilment of the right to development.
202. Moreover, the right to development is to be interpreted in light of the international community’s objective to eradicate poverty. Indeed, eradicating poverty is an “indispensable requirement for sustainable development”.³⁵¹ World-wide, over a billion people still live in poverty without access to basic needs such as food, water, energy, health care, sanitation, and education. One in ten people still live below the extreme poverty line (USD \$1.90 a day). Despite significant progress, Africa is particularly affected by this problem, with 40% of its people living in poverty.³⁵²
203. The main obligation that emerges from the right to development is that States are under a duty to “co-operate with each other”³⁵³ and to individually and collectively “formulate international development policies with a view to facilitating the full

³⁴³ **Dossier No. 4**, UNFCCC, Article 3(4).

³⁴⁴ **Dossier No. I6**, Paris Agreement, Article 2(I). See also Preamble.

³⁴⁵ UN General Assembly Resolution 70/I of 25 September 2015, ‘Transforming our world: the 2030 Agenda for Sustainable Development’, UN Doc. A/RES/70/I (21 October 2015), Sustainable Development Goal 13.

³⁴⁶ *Gabčíkovo-Nagymaros Project*, para. 140.

³⁴⁷ **Dossier No. 4**, UNFCCC, Article 2.

³⁴⁸ *Ibid.*, Principle 4.

³⁴⁹ UN General Assembly Resolution 70/I of 25 September 2015, ‘Transforming our world: the 2030 Agenda for Sustainable Development’, UN Doc. A/RES/70/I (21 October 2015), para. 2.

³⁵⁰ UN General Assembly, *Political Declaration of the High Level Political Forum on Sustainable Development Convened under the Auspices of the General Assembly in September 2023*, 15 September 2023, UN Doc A/HLPF/2023/L.I (2023), para. 8.

³⁵¹ **Dossier No. I37**, Rio Declaration, Principle 5.

³⁵² UN Economic Commission for Africa, ‘Poverty, Inequality and Social Policy’, 7 September 2021 available at: < <https://www.uneca.org/poverty-inequality-and-social-policy>>.

³⁵³ UN General Assembly Resolution 41/I28, ‘Declaration on the Right to Development’ of 4 December 1986, UN Doc A_RES_41_I28, Article 3(3).

realization of the right to development”.³⁵⁴ Cooperation can take different forms, including support for the realisation of economic, social and cultural rights (described below) and for more equitable global terms of trade (to enable products from Africa to compete on fair terms³⁵⁵) is necessary.

3. States must take appropriate measures to protect the right to life

204. Environmental degradation, including climate change, can compromise the effective enjoyment of the right to life.³⁵⁶ Severe environmental degradation has been acknowledged to adversely affect an individual’s well-being and lead to a violation of the right to life,³⁵⁷ even if it does not result in a loss of life.³⁵⁸
205. The highest level of ambition to mitigate climate change is required by the obligation of states to protect the right to life, including under the ICCPR³⁵⁹ and the African Charter.³⁶⁰ States have a duty to protect their citizens from foreseeable harm: this includes harm caused by climate change, a “real and reasonably foreseeable risk”, as acknowledged by States when signing the treaties recognising climate change as a “common concern of humankind”.
206. As a result, States must take appropriate measures to protect persons against deprivation of life. This includes a duty to ensure, to prevent and avoid acts that could cause deprivation of life in territories outside the limits of their jurisdiction.³⁶¹ The 2017 advisory opinion of the Inter-American Court of Human Rights accepted that individuals whose rights are affected by transboundary environmental harm can be deemed under the effective control of the state of origin. And while a causal link is needed “between the act that originated in its territory and the infringement of the

³⁵⁴ *Ibid.*, Article 4.1.

³⁵⁵ **Exhibit AU-3**, Nairobi Declaration, para. 49 (iv).

³⁵⁶ **Dossier No. 299**, Human Rights Committee, *General comment No. 36*, 3 September 2019, UN Doc. CCPR/C/GC/36, para. 62. See also, Human Rights Committee, *Portillo Cáceres v Paraguay* (HRC, 9 August 2019, Comm No. 2751/2016), CCPR/C/126/D/ 2751/2016 (“*Portillo Cáceres et al. v. Paraguay*”), para. 7.4; IACHR, *Environment and Human Rights*, para. 47 and IACHR, *Kawas Fernández v. Honduras*, judgment of 3 April 2009, series C, No. 196, para. 148; African Commission on Human and Peoples’ Rights, *General Comment No. 3* on the African Charter on Human and Peoples’ Rights: The Right to Life (Article 4), 18 November 2015, para. 3; and ECtHR, *Cordella and others v. Italy* (application Nos. 54414/13 and 54264/15), judgment of 24 January 2019, para. 157.

³⁵⁷ ECtHR, *M. Özel and others v. Turkey* (application Nos. I4350/05, I5245/05 and I6051/05), judgment of 17 November 2015, paras. 170–171 and 200, ECtHR *Budayeva and others v. Russia*, Judgment of 20 March 2008, paras. 128–130, 133 and 159, and ECtHR, *Öneriyıldız v. Turkey* (application No. 48939/99), Judgment of 30 November 2004, paras. 71, 89–90 and 118.

³⁵⁸ *Portillo Cáceres v Paraguay*, para. 7.3.

³⁵⁹ ICCPR, Article 6.

³⁶⁰ **Exhibit AU-5**, ACHPR, Article 24 and Article 4.

³⁶¹ **Dossier No. 299**, Human Rights Committee, *General comment No. 36*, 3 September 2019, UN Doc. CCPR/C/GC/36, para. 22.

human rights of persons outside its territory”,³⁶² the ability of a State to regulate activities that are the source of emissions entails that this the State has effective control over GHG emissions. The collective nature of the causation of climate change does not absolve any State of its individual responsibility arising from the harm that the emissions originating within its territory may cause.

4. *States are under a duty to take steps to progressively achieve the full realisation of economic, social and cultural rights*

207. States have positive obligations to take steps to ensure the full enjoyment of economic, social and cultural rights. The obligation found in ICESCR Article 2(1) can be divided into four subsidiary obligations:

- a. *the obligation to take steps through all appropriate means, including legislative measures;*
- b. *the obligation to take steps with a view to progressively achieving the full realisation of economic, social and cultural rights:* While a long-term perspective to the realisation of economic, social and cultural rights is important, States Parties, in order not to render the Covenant provisions devoid of any meaning, must at all times guarantee the minimum core obligations.³⁶³ Climate change does not only threaten the progressive realisation of these rights but also represents risk of regression that threatens the satisfaction of the minimum essential levels of each of the rights set out in the Covenant. Any failure by a State to guarantee these essential prerequisites for an adequate and dignified life automatically amounts to a violation of the Covenant.
- c. *the obligation to dedicate the maximum of all available resources.*³⁶⁴ The costs of climate losses and damages are generally much higher than that of climate

³⁶² IACHR, *Environment and Human Rights*, para. 101.

³⁶³ UN Economic and Social Council, *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, UN Committee on Economic, Social and Cultural Rights (“CESCR”), 14 December 1990, UN Doc E/1991/23, (“**CESCR, General Comment No. 3**”), para. 10.

³⁶⁴ Committee on the Elimination of Discrimination Against Women, Committee on Economic, Social and Cultural Rights, Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, Committee on the Rights of the Child, Committee on the Rights of Persons with Disabilities, *Joint Statement on Human Rights and Climate Change* (16 September 2019), para. 7 (‘in order to meet their ‘highest level of ambition’, states must ‘dedicate the *maximum available resources* to the adoption of measures aiming at mitigating climate change’).

mitigation.³⁶⁵ As such, and although climate mitigation itself requires major redeployment of resources (which could affect the fulfilment of other human rights), the existential risk posed by climate change requires an urgent redeployment of financial resources to avoid catastrophic harm.

- d. *an obligation to seek and a right to receive assistance from the international community.* States' duties are owed "not only to their own populations, but also to populations outside their territories, consistent with articles 55 and 56 of the United Nations Charter".³⁶⁶ The reference to "maximum available resources" does not only include national funding, but also resources that may be obtained through international co-operation. If States cannot meet their obligations due to resource limitations, other, more developed States, or the international community in general, are under an obligation to provide assistance.³⁶⁷

208. States have an extraterritorial obligation to respect, protect and fulfil economic, social and cultural rights. States are *inter alia* required to take steps to prevent and redress infringements of economic, social and cultural rights that occur outside their territories due to the activities of private actors.³⁶⁸ This is a central duty in the climate context as a total of ninety "carbon majors" (fossil-fuel and cement companies) are the primary cause of 63% of cumulative industrial emission from 1751 to 2010.³⁶⁹ This duty thus requires State parties to adopt legislative and other appropriate measures to protect against violations linked to business activities, as well as to provide victims of corporate abuses with access to effective remedies.³⁷⁰

209. In addition, the extra-territorial scope of the obligations requires that "international measures to deal with the debt crisis should take full account of the need to protect

³⁶⁵ See *The Economics of Climate Change: The Stern Review* (2006).

³⁶⁶ CESCR, *Statement on the Obligations of States Parties Regarding the Corporate Sector and Economic, Social and Cultural Rights*, UN Doc. E/C.12/2011/1 (2011) ("CESCR, Statement"), para. 5. See also, 'Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox: Mapping Report', 30 December 2013, UN Doc A/HRC/25/53, para. 63 ('most of the sources reviewed [...] do indicate that States have obligations to protect human rights, particularly economic, social and cultural rights, from the extraterritorial environmental effects of actions taken within their territory').

³⁶⁷ CESCR, *General Comment No. 3*, paras. 13-14.

³⁶⁸ CESCR, *Statement*, paras. 1-5.

³⁶⁹ Richard Heede, 'Tracing Anthropogenic Carbon Dioxide and Methane Emissions to Fossil Fuel and Cement Producers: 1854 – 2010' (2014) 122 *Climatic Change* 229.

³⁷⁰ CESCR, *General Comment No. 24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities*, 10 August 2017, UN Doc E/C.12/GC/24 (2017) ("CESCR, **General Comment No. 24**"), para. 14; See also, CESCR, *Statement*, para. 5.

economic, social and cultural rights”.³⁷¹ The current proposals to reform the multilateral financial system³⁷² are therefore central to ensuring the protection of ESC rights.

210. Two economic, social and cultural rights have particular significance for the African continent: the right to health and the right to culture. First, and importantly, the **right to health** is negatively impacted by climate change in different ways: directly through changes in weather patterns, such as heatwaves and storms; indirectly through the disturbance of natural systems, (e.g., by multiplying disease vectors) or human systems (e.g., by affecting nutrition and water).³⁷³ The climate emergency further threatens the mental health and the well-being of individuals, especially the youth and the vulnerable, exposed as they are to the loss of their homes and loved ones, and to life-threatening situations.

211. The right to everyone to the enjoyment of the highest attainable standard of physical and mental health is well-established in international law,³⁷⁴ and the UNFCCC and Paris Agreement recognise the relationship.³⁷⁵ States are under an obligation to achieve the full realisation of the right, including those necessary in relation to “a wide range of socio-economic factors that promote conditions in which people can lead a healthy life” including “a healthy environment”.³⁷⁶ Interpreted in combination with the right to a clean environment, the right to health gives rise to international environmental duties: in *Social and Economic Rights Action Center (“SERAC”) v Nigeria*, Articles 16 and 24 of the African Charter were interpreted to require scientific monitoring, environmental and social impact assessments, sharing of information, and participation opportunities.³⁷⁷

³⁷¹ CESCR, *General Comment No. 2 International technical assistance measures (Art. 22 of the Covenant)*, 2 February 1990, UN Doc E/1990/23, para. 9.

³⁷² See **Exhibit AU-3**, Nairobi Declaration, paras. 52-53.

³⁷³ UNFCCC Subsidiary Body for Scientific and Technological Advice, ‘Human Health and Adaptation: Understanding Climate Impacts on Health and Opportunities for Action. Synthesis Paper by the Secretariat’, 3 March 2017, UN Doc FCCC/SBSTA/2017/2 (2017), para. 15.

³⁷⁴ UDHR, Article 25; ICCPR, Article 12; Convention on the Rights of the Child, Article 24.

³⁷⁵ **Dossier No. 4**, UNFCCC, Article 4(f) (with a view to minimizing adverse effects [of climate change] ... on public health and on the quality of the environment); **Dossier No. 16**, Paris Agreement, Preamble. See also HRC, ‘Outcome of the panel discussion, submitted to the 32nd session of the Human Rights Council’, 19 April 2016, UN Doc A/HRC/32/24 (2016).

³⁷⁶ CESCR, *General Comment No 14: The Right to the Highest Attainable Standard of Health*, 11 August 2000, UN Doc E/C.12/2000/4, paras 4 and 15.

³⁷⁷ African Commission on Human & Peoples’ Rights, *Social and Economic Rights Action Center (SERAC) v Nigeria*, para. 53.

212. Second, the right to participate in one own’s culture³⁷⁸ is of particular importance for the African continent. It is a recognised “enabler of sustainable development”³⁷⁹ which is threatened by the climate emergency. In the words of the Special Rapporteur in the field of cultural rights:

The climate emergency is the greatest of many contemporary threats to cultures and cultural rights around the world. The damage that it can and will do is fast growing, widespread, long-term and potentially existential. It can wipe out centuries of human cultural achievement and render ongoing cultural practices virtually impossible in the future. Climate change impacts pose a threat to meaningful spaces for cultural interactions, including natural spaces, and to the continuity of ways of life.³⁸⁰

213. In the African context, the threat of climate change to culture includes: i) risks of degradation and destruction of protected natural and cultural sites recognised of international importance by the World Heritage Convention and Ramsar Convention on Wetlands³⁸¹; and ii) risks to the rights of Indigenous peoples whose cultural identity is defined by their relationship to land, resources, and nature.³⁸²

5. *States have the duty to promote meaningful participation, secure access to information and ensure access to effective remedies in the context of the climate crisis*

214. The three pillars of environmental law – right to information, public participation, and access to justice³⁸³ – are critical in the context of the climate crisis, to facilitate political feasibility and ensure that the benefits and costs of the transition are shared

³⁷⁸ UDHR, Article 27 (1); ICESCR, Article 15(1)(a). See also International Convention on the Elimination of All Forms of Racial Discrimination (1965), Article 5(e)(vi); Convention on the Elimination of All Forms of Discrimination against Women (1979), Article 13 (c); Convention on the Rights of the Child (1989) Article 31; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990), Articles 43(1)(g) and 45(1)(d); and Convention on the Rights of Persons with Disabilities (2006), Article 30; **Exhibit AU-5**, ACHPR, Article 17(2).

³⁷⁹ UN General Assembly, *Political Declaration of the High Level Political Forum on Sustainable Development Convened under the Auspices of the General Assembly in September 2023*, 15 September 2023, UN Doc A/HLPF/2023/L.I (2023), para. 16.

³⁸⁰ *Report of the Special Rapporteur in the field of cultural rights*, 10 August 2020, UN Doc A/75/298 (2020), para. 24.

³⁸¹ Convention concerning the Protection of the World Cultural and Natural Heritage, adopted 16 November 1972, UNTS 1037 (p.151); Convention on wetlands of international importance especially as waterfowl habitat, adopted 2 February 1971, UNTS 996 (p.245). See MI Voudoukas, J. Clarke, R. Ranasinghe, et al. ‘African Heritage Sites Threatened as Sea-level Rise Accelerates’ (2022) 12 Nature Climate Change 256–262.

³⁸² African Commission on Human and People’s Rights, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on Behalf of Endorois Welfare Council v Kenya*, 276/2003, paras. 239–51; *Kenya: Mission Working Group Indigenous Populations/Communities*, 2010. See also United Nations Declaration on the Rights of Indigenous Peoples, Articles 20 and 33.

³⁸³ **Dossier No. I37**, Rio Declaration, Principle 10.

equitably.³⁸⁴ This is particularly important given the most vulnerable, such as women, tend to be the ones that can contribute solutions the most.

215. Building upon the general human right to information,³⁸⁵ a broad corpus of international law confirms that States have a duty to promote participation in the context of the climate crisis. The right to participation is entrenched in the UNFCCC³⁸⁶ and the Paris Agreement,³⁸⁷ and has been consistently manifested through regional practice.³⁸⁸ In particular, the right to environment cannot be protected without providing affordable, effective and timely access to information as well as offering meaningful opportunities for individuals to be heard and to participate.³⁸⁹ Given the global nature of climate impacts that extends the scope of the persons affected or likely to be affected, the right to participation needs to be understood as widely as possible.

216. Additionally, the human right to an effective remedy, both in its treaty³⁹⁰ and customary form, is central to ensuring that victims of human rights violations associated with climate change have access to institutions and procedures affording them a fair hearing as well as compensation. As the global wave of climate litigation evidences,³⁹¹ the right to access to justice, as protected under Rio Principle 10, is increasingly relied upon to hold governments and corporations accountable and prevent further harm.

217. To conclude, States are under a collective duty to ensure that their climate mitigation policies are compatible with human rights duties under treaty and customary law. This includes a duty to reduce emissions of GHGs in line with UNFCCC and Paris commitments to avoid a level of climate change threatening the enjoyment of human

³⁸⁴ **Exhibit AU-3**, Nairobi Declaration, para. 45.

³⁸⁵ UDHR, Article 19; ICCPR, Article 19(2); **Exhibit AU-5**, ACHPR, Article 9.

³⁸⁶ **Dossier No. 4**, UNFCCC, Article 6.

³⁸⁷ **Dossier No. 16**, Paris Agreement, Article 12. See also, Decision I/CMA.5 'Outcome of the first global stocktake', para. 9.

³⁸⁸ UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, adopted 25 June 1998, United Nations, Treaty Series, vol. 2161, p. 447; Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean, adopted 4 March 2018, United Nations, Treaty Series, vol. 3397C.N.195.2018.TREATIES-XXVII.18; **Exhibit AU-14**, Revised African Convention on the Conservation of Nature and Natural Resources.

³⁸⁹ *Framework Principles on Human Rights and the Environment*, UN Doc A/HRC/37/59 (2018), Principles 7 and 9; African Commission on Human & Peoples' Rights, *Social and Economic Rights Action Center (SERAC) v Nigeria*, para. 53.

³⁹⁰ UDHR, Article 8; ICCPR, Article 2(3); CESCR, *General Comment No. 3*; **Exhibit AU-5**, ACHPR, Articles I(1), 2I and 26.

³⁹¹ See e.g., J Setzer and C Higham, *Global Trends in Climate Change Litigation: 2023 Snapshot* (London: Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science).

rights, including, but not limited to, the right to life, health, and culture. Given that climate change is a common concern of humankind, human rights duties are owed to the international community as a whole and thus extend, as appropriate, extra-territorially.

F. CONCLUSION

218. To conclude, the African Union identified a rich body of law applicable to ensure the protection of the climate system, including an obligation to take all the necessary measures and use their best efforts to prevent harm from GHG emissions. Treaties duties create clear obligations in relation to mitigation and adaptation. The African Union wishes to emphasise the duties of developed countries in relation to finance, technology transfer, and capacity-building, and to address losses and damages. It is now urgent in light of scientific evidence, and required under international law, that States make deep reductions in line with 1.5 °C pathways.
219. Moreover, States are under obligations to protect specific parts of the environment, including the marine environment, biological diversity, and land, both to protect them from climate harms, and to conserve carbon sinks that contribute to climate mitigation.
220. Finally, States are under the duty to protect human and peoples' rights from climate impacts, including the right to self-determination, the right to sustainable development and the right to life. Moreover, they have the duty to take steps to progressively achieve the full realisation of economic, social and cultural rights, including the right to health and the right to culture.
221. In relation to all these obligations, the international community has a duty to allocate the burden of obligations asymmetrically and fairly in application of the CBRC-RC principle. Developed countries should take the lead and support for African countries is needed to help them fulfil their duties adequately and ambitiously.

V. QUESTION (B): LEGAL CONSEQUENCES UNDER THOSE OBLIGATIONS OF THE CONDUCT OF STATES WHICH HAS CAUSED CLIMATE CHANGE AND ITS IMPACTS

A. THE QUESTION

222. The second question formulated by the UN General Assembly in Resolution 77/276 reads as follows:

(b) 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?

223. In the structure of the questions asked by Resolution 77/276, the clarification of Question (A) is a necessary step in a process that first defines the obligations governing the conduct of States, then evaluates that conduct in the light of such obligations, and ultimately derives from such assessment the legal consequences. The GA specifically requested the Court to determine the “legal consequences” arising for certain States, namely those which have displayed a certain conduct (“acts and omissions” whereby States “have caused significant harm to the climate system and other parts of the environment”), and this “with respect to” to the States, peoples and individuals contemplated in sub-paragraphs (i) and (ii) of Question (B).

224. The African continent is on the receiving end of the adverse effects of climate change, with States, peoples and individuals falling squarely under the categories of victims of climate injustice described in sub-paragraphs (i) and (ii) of Question (B). The term “victim” is apposite here from a climate justice perspective due to the massive and

disproportionate impacts of climate change on the African Continent, and the negligible contribution of African States to GHG emissions causing climate change.

225. In order to assess the legal consequences owed by States which, “by their acts and omissions, have caused significant harm to the climate system and other parts of the environment” to African States, peoples and individuals, the African Union submits that the Court first has to assess the existence and nature of a breach of one or more of the obligations examined in Chapter IV as well as of other relevant obligations. Such an assessment requires clarification of the conduct of States in question and its consistency with their obligations in the light of the general international law of State responsibility codified in the ILC Draft Articles on State Responsibility for Internationally Wrongful Acts (“**ARSIWA**”).³⁹² The assessment concerns an abstract conduct, whichever State displays it, much like in the *Advisory Opinion on the Legality of Nuclear Weapons*, where the Court observed:

it is the clear position of the Court that to contend that it should not deal with a question couched in abstract terms is ‘a mere affirmation devoid of any justification’, and that ‘the Court may give an advisory opinion on any legal question, abstract or otherwise’.³⁹³

226. It is therefore important to begin by clarifying the African Union’s understanding of the conduct to be assessed, its attributability to a State, and its consistency with primary rules of obligation, as required by Article 2 of ARSIWA.

B. THE CONDUCT IDENTIFIED IN QUESTION (B) IN THE LIGHT OF THE GENERAL INTERNATIONAL LAW OF STATE RESPONSIBILITY

227. Question (B) concerns the conduct of an individual State or a group thereof “where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment”. The terminology is much more specific than the terms used in Question (A) (“anthropogenic emissions of greenhouse gases”), which encompasses any human activities resulting in GHG emissions. By contrast, Question (B) introduces a threshold. Only “acts and omissions” of States of a certain

³⁹² ILC, ‘Articles on Responsibility of States for Internationally Wrongful Acts, With Commentaries’ (2001) UN Doc A/56/10, as corrected (“**ARSIWA Commentary**”).

³⁹³ *Nuclear Weapons Advisory Opinion*, p. 14.

magnitude, namely those that “have caused significant harm” to the climate system as a part of the wider environment are concerned.

228. It is well established that anthropogenic GHG emissions have interfered with the climate system and other parts of the environment. The Summary for Policymakers of the most recent Synthesis Report from the IPCC states indeed that:

Human activities, principally through emissions of greenhouse gases, have unequivocally caused global warming, with global surface temperature reaching 1.1°C above 1850–1900 in 2011–2020. Global greenhouse gas emissions have continued to increase, with unequal historical and ongoing contributions arising from unsustainable energy use, land use and land-use change, lifestyles and patterns of consumption and production across regions, between and within countries, and among individuals.³⁹⁴

The level of interference has clearly gone beyond the limits of what amounts to “significant” harm, given that climate change has resulted in adverse effects which are nothing short of catastrophic, particularly in Africa (see Chapter I, the Expert Report, and this Chapter). Importantly, however, Question (B) does not refer to causing “climate change” but only to causing “significant harm to the climate system and other parts of the environment”, which is a lower threshold than causing catastrophic harm in the form of climate change.

229. The conduct causing such interference consists of both “acts and omissions” of States, including the omission to act or to act sufficiently to prevent the significant interference with the climate system. This is relevant for the regulation by a State of its sources of GHG emission, such as the activities from companies under its jurisdiction. This understanding is confirmed by preambular paragraph 5 of Resolution 77/276, which refers to the “conduct of States over time in relation to activities that contribute to climate change and its adverse effects” (emphasis added), whether such activities are carried out by the State itself or by third parties.

230. These acts and omissions are attributable to the State in accordance with the customary international law rules of attribution codified in the ARSIWA.³⁹⁵ The

³⁹⁴ IPCC, Synthesis Report 2023, statement A.I.

³⁹⁵ On the recognition of the customary nature of attribution rules, see e.g., *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion, ICJ Reports 1999, p. 62, para. 62; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, ICJ Reports 2005, p. 168, para. 213 (“Armed Activities”); *United States*

commentary to the ARSIWA makes clear that attributable conduct can take the form of both acts and omissions:

one of the essential conditions for the international responsibility of a State is that the conduct in question is attributable to the State under international law. Chapter II defines the circumstances in which such attribution is justified, *i.e.* when conduct consisting of an act or omission or a series of acts or omissions is to be considered as the conduct of the State³⁹⁶

The main attribution route is provided by the rule codified in Article 4 of ARSIWA regarding the acts and omissions of State “organs”. Whereas the anthropogenic GHG emissions may come from either the State itself or non-State actors, e.g., companies, operating under the State jurisdiction, the very fact of massive cumulative GHG emissions is evidence that States failed (omitted) to regulate the relevant activities sufficiently. Such failure is an omission of the only entity with the power to regulate within the territory or jurisdiction of a State, namely the territorial State itself. The locus of the omission or failure to act is well established. The 2023 Emissions Gap Report from the United Nations Environment Programme concludes that whereas developed countries “accounted for 76 per cent of global emissions [...] least developed countries accounted for 3.8 per cent of global emissions, while small island developing States contributed less than 1 per cent”.³⁹⁷

231. The conduct itself is, in principle, inconsistent with the obligations identified in Chapter IV. The specific requirements of each of those obligations have been examined in that chapter at the level of the primary rule of obligation. From the perspective of secondary rules of State responsibility, the conduct is a breach arising from a “composite act” in the meaning of the rule codified in Article 15 of ARSIWA. A “composite act” is defined by Article 15(1) of ARSIWA as “a series of actions or omissions defined in aggregate as wrongful”.³⁹⁸ The composite nature of the conduct

- *Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R, Report of the Panel, 10 November 2004, para. 6.128; *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, Report of the Appellate Body, 11 March 2011, para. 311, footnote 222; *Jan de Nul N.V., Dredging International N.V. v. Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, para. 156; *Ortiz Construcciones y Proyectos S.A. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/17/1, Award, 29 April 2020, para. 155.

³⁹⁶ ARSIWA Commentary, para. I.

³⁹⁷ UNEP Emissions Gap Report 2023: *Broken Record*, p. 6.

³⁹⁸ ARSIWA Commentary, Article 15. For examples of a breach resulting from a composite act, see e.g., *Gemplus S.A., SLP S.A., Gemplus Industrial S.A. de C.V. v. The United Mexican States* and *Talsud S.A. v. The United Mexican States*, ICSID Cases No. ARB(AF)/04/3 and ARB(AF)/04/4, Award, 16 June 2010, paras. 12-44; *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The*

is important for three main reasons. *First*, the ILC commentary to Article 15 clarifies that composite acts concern an “aggregate of conduct and not individual acts”.³⁹⁹ The question asked by the GA to the Court thus pertains to the legal consequences of this aggregate conduct which has unfolded over time. *Second*, when the breach arises from a composite act, the acts and omissions forming the aggregate do not need, in and of themselves, to be unlawful. The very composite nature of the act means that the first acts and omissions in the series are not themselves unlawful, as the illegality arises later when the aggregate is considered as a whole.⁴⁰⁰ *Third*, according to Article 15(2) of ARSIWA, once the aggregate becomes unlawful, “the breach extends over the entire period starting with the first of the actions or omissions of the series and last for as long as these actions or omissions are repeated and remain not in conformity with the international obligation”.⁴⁰¹

232. Given their historically negligible emissions and, in most cases, their colonial past (with the ensuing reallocation of any responsibility to the colonial power), none of the African countries can be said to have displayed the violative conduct, particularly if the situation is considered in the light of the CBDR-RC principle. As noted earlier in this section, African countries, peoples and individuals are on the receiving end of climate injustice.

C. LEGAL CONSEQUENCES OF THE CONDUCT IDENTIFIED IN QUESTION (B) UNDER GENERAL INTERNATIONAL LAW OF STATE RESPONSIBILITY

1. *African States, peoples and individuals have suffered from climate change*

233. As explained in Chapter I and as described in the Expert Report, the conduct identified in Question (B) has resulted in disproportionate impacts on African countries as well as on African peoples and individuals. The African continent is the

Government of Mongolia, UNCITRAL Arbitration, Award on Jurisdiction and Liability, 28 April 2011, paras. 495-500; *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, para. 516; ECtHR, *El-Masri v. The Former Yugoslav Republic of Macedonia*, Application No. 39630/09, Judgment, 13 December 2012, para. 97; *Duzgit Integrity Arbitration (Republic of Malta v. Democratic Republic of Sao Tome and Principe)*, PCA Case No. 2014-07, Award on Reparation, 18 December 2019, para. 86.

³⁹⁹

Ibid., Article 15, para. 2.

⁴⁰⁰

Ibid., Article 15, para. 8.

⁴⁰¹

Ibid.

most vulnerable to the adverse effects of climate change.⁴⁰² It has carried a disproportionate burden, with central development sectors already undergoing extensive impacts.⁴⁰³ The following factors played a role in rendering the continent more and more vulnerable to the effects of climate change: a high level of economic reliance on climate-affected agriculture; a pre-disposition to high temperatures; and high existing levels of poverty and under-development. The region also includes six small island developing States (“SIDS”)⁴⁰⁴ – well recognised as particularly vulnerable to the adverse effects of climate change.⁴⁰⁵

234. The text of Resolution 77/276, in its preambular paragraph 9, took note of the scientific consensus on the impacts of human-induced climate change, as it states:

Noting with utmost concern the scientific consensus, expressed, inter alia, in the reports of the Intergovernmental Panel on Climate Change, including that [...] human-induced climate change, including more frequent and intense extreme events, has caused widespread adverse impacts and related losses and damages to nature and people⁴⁰⁶

235. The IPCC’s 2022 *Summary for Policymakers* also concluded that:

Human-induced climate change, including more frequent and intense extreme events, has caused widespread adverse impacts and related losses and damages to nature and people, beyond natural climate variability. Some development and adaptation efforts have reduced vulnerability. Across sectors and regions the most vulnerable people and systems are observed to be disproportionately affected. The rise in weather and climate extremes has led to some irreversible impacts as natural and human systems are pushed beyond their ability to adapt.⁴⁰⁷

236. Previous IPCC statements⁴⁰⁸ specifically referred to the situation of “low-lying developing countries and small island states [which] are expected to face very high

⁴⁰² United Nations Environment Programme, “Responding to climate change”, available at: <https://www.unep.org/regions/africa/regional-initiatives/responding-climate-change>. See also, UNFCCC, “United Nations Fact Sheet on Climate Change”, available at: https://unfccc.int/files/press/backgrounders/application/pdf/factsheet_africa.pdf.

⁴⁰³ See IPCC Africa Chapter, pp. 1289, 2022.

⁴⁰⁴ Specifically, Cabo Verde, the Comoros, Guinea-Bissau, Mauritius, Saõ Tomé and Príncipe, and the Seychelles. See United Nations Economic Commission for Africa, “African small island developing states”, available at [African small island developing states | United Nations Economic Commission for Africa \(uneca.org\)](https://www.uneca.org/africa-small-island-developing-states).

⁴⁰⁵ UNFCCC, “Climate Change: Small island developing States”, 1st ed. (Climate Change Secretariat (UNFCCC), 2005), available at: https://unfccc.int/resource/docs/publications/cc_sids.pdf.

⁴⁰⁶ **Dossier No. 2**, Resolution 77/276.

⁴⁰⁷ IPCC, *Climate Change 2022*, statement SPM.B.I (emphasis added); see also IPCC, Synthesis Report 2023, statement A.2.

⁴⁰⁸ See, by way of example, IPCC, *Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part A: Global and Sectoral Aspects*. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change, Summary for Policymakers, (“IPCC,

impacts that, in some cases, could have associated damage and adaptation costs of several percentage points of GDP”.⁴⁰⁹

237. As discussed in Chapter IV, State Parties to the Paris Agreement have acknowledged that loss and damage associated with the adverse effects of climate change is already happening. According to Article 8(1):

Parties recognize the importance of averting, minimizing and addressing loss and damage associated with the adverse effects of climate change, including extreme weather events and slow onset events, and the role of sustainable development in reducing the risk of loss and damage.⁴¹⁰

238. The clarification of the legal consequences arising from the conduct responsible for significant harm to the climate system and other parts of the environment is requested “with respect to” two categories of entities defined in sub-paragraphs (i) and (ii) of Question (B). As noted at the beginning of this chapter, the term “victim” is apposite to describe, from the perspective of climate justice, the situation of States, peoples and individuals who are on the receiving end of climate change.

a. African States are injured and/or specially affected by or particularly vulnerable to the adverse effects of climate change

239. The category identified in Question (B), sub-paragraph (i) concerns “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”.

240. Thus defined, this category is broad enough to include all the States of the African Union. To fall under this category, a State needs to be “injured” or “specially affected” or “particularly vulnerable” to the “adverse effects of climate change” and, this, by virtue of their “geographical circumstances and level of development”. A State which is impacted (whether “injured”, “specially affected” or “particularly vulnerable”) but not due to its “geographical circumstances and level of development” would not fall under this category. Conversely, a State which has not yet been “injured” or “specially

Climate Change 2014”) at p. 17, available at: https://www.ipcc.ch/site/assets/uploads/2018/02/ar5_wgII_spm_en.pdf; see also IPCC Report, Global Warming of 1.5°C (2018), statement A.1; IPCC, Climate Change 2021, statement A.1; *ibid.*, statement A.2; IPCC: *Climate Change 2014*, statement 3.2.

⁴⁰⁹ IPCC, Climate Change 2014, p. 67.

⁴¹⁰ **Dossier No. I6**, Paris Agreement, Article 8(1) (emphasis added).

affected” but is “particularly vulnerable” to the “adverse effects of climate change” by virtue of its “geographical circumstances and level of development” falls under this category.

241. The terms “injured” and “specially affected” are clearly taken from Article 42 of ARSIWA:

A State is entitled as an *injured State* to invoke the responsibility of another State if the obligation breached is owed to:

(a) that State individually; or

(b) a group of States including that State, or the international community as a whole, and the breach of the obligation:

(i) *specially affects* that State; or

(ii) is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.⁴¹¹

242. The ILC commentary explains that a State is “injured” by the conduct of another State or a group of States in three situations. *First*, a State is injured when an obligation is owed to that State individually. *Second*, a State is also injured when the obligation is owed to “a group of States including that State, or the international community as a whole” and “the breach of the obligations [...] specially affects” that State. The term “specially affected” in Question (B) of Resolution 77/276 refers therefore to a situation of injury arising from certain types of obligations. The ILC Commentary provides the example of pollution of the marine environment, in breach of Article 194 of UNCLOS, affecting every State but especially certain coastal States.⁴¹² The ILC commentary also adds that “the nature or extent of the special impact that a State must have sustained in order to be considered ‘injured’” is to be assessed “on a *case-by-case basis*, having regard to the object and purpose of the primary obligation breached and the facts of each case”.⁴¹³ *Third*, a State is injured when there is a breach of an obligation “of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation”. The

⁴¹¹ ARSIWA, Article 42 (emphasis added).

⁴¹² ARSIWA Commentary, Article 42, para. 12.

⁴¹³ *Ibid.*, para. 12 (emphasis added).

latter obligations derive from treaties “where each party’s performance is effectively conditioned upon and requires the performance of each of the others”.⁴¹⁴ Based on the obligations examined in Chapter IV and, having regard to the conduct defined in Question (B), all three situations are at stake.

243. In addition to “injured” and “specially affected” States, Question (B), sub-paragraph (i) refers to States that are “particularly vulnerable” to the adverse effects of climate change, whether they qualify as injured States or not. The term “vulnerability” is used in both the UNFCCC⁴¹⁵ and the Paris Agreement,⁴¹⁶ as well as more generally in climate science. The IPCC Glossary defines this term as:

The propensity or predisposition to be adversely affected. Vulnerability encompasses a variety of concepts and elements, including sensitivity or susceptibility to harm and lack of capacity to cope and adapt.⁴¹⁷

244. By virtue of “their geographical circumstances and level of development”, African countries have been “injured” or “specially affected” by or are “particularly vulnerable” to the adverse impacts of climate change. In this respect, the IPCC has stated with high confidence that:

Increasing weather and climate extreme events have exposed millions of people to acute food insecurity and reduced water security, with the largest impacts observed in many locations and/or communities in Africa, Asia, Central and South America, Small Islands and the Arctic.⁴¹⁸

Moreover, the situation is likely to further deteriorate. According to the IPCC:

Africa is predicted to suffer disproportionately from higher temperature-related all-cause mortality from global warming, compared to temperate northern hemisphere countries (Carleton et al., 2018). The number of days projected to exceed potentially lethal heat thresholds per year reaches 50–150 days in west Africa at 1.6°C global warming, up to 200 days in west Africa and 100–150 days in central Africa and parts of coastal east Africa at 2.5°C, and over 200 days for parts of west, central and east Africa for >4°C global warming.⁴¹⁹

⁴¹⁴ ARSIWA Commentary, Article 42, para. 13.

⁴¹⁵ **Dossier No. 4**, UNFCCC, Preamble and Articles 3(2) and 4(4).

⁴¹⁶ **Dossier No. 16**, Paris Agreement, Preamble and Articles 6(6), 7(2), 7(6), 9(4), and 11(1).

⁴¹⁷ IPCC Glossary (emphasis added).

⁴¹⁸ IPCC, *Climate Change 2022*, statement B.1.3 (emphasis added).

⁴¹⁹ IPCC, *Climate Change 2022*, p. 1377 (emphasis added).

African countries are highly impacted by climate change due to Africa’s “peculiar vulnerability” to its effects.⁴²⁰ Assessed impacts related to climate change include:

- a. increasing extreme temperature trends across the continent;
- b. land and marine heatwaves;
- c. increases in drought frequency and duration in swathes of southwestern and northern African, with increased heavy rainfall and flooding across the continent; and/or
- d. disappearance of glaciers on Mt. Kenya and Mt. Kilimanjaro.⁴²¹

As a result, African countries are affected by risks related to reduced food production across crop, livestock and fisheries; increases in human mortality and morbidity from heat and infectious diseases (and related loss of labour productivity); and biodiversity loss and ecosystem disruption.⁴²² Other risks include climate-related infrastructure damage; rising conflict risks due to heat and drought; and loss of cultural heritage sights due to sea level rises and coastal erosion.⁴²³ Moreover, the IPCC has also established that the risks associated with sea level rise are even worse for small islands, low-lying coastal areas and deltas,⁴²⁴ which face an “existential threat”,⁴²⁵ due to the increasing damage and costs.⁴²⁶ Thus, it is clearly by virtue of their “geographical circumstances and level of development” that African countries are impacted (“injured” and/or “specially affected” by or “particularly vulnerable to”) by the adverse effects of climate change.

245. African Leaders are acutely aware of their exposure. In the *Nairobi Declaration*, they have recognised that “Africa is not historically responsible for global warming, but bears the brunt of its effect, impacting lives, livelihoods, and economies”⁴²⁷ and:

many African countries face disproportionate burdens and risks arising from climate change-related, unpredictable weather events and patterns, including prolonged droughts, devastating floods, wild/forest fires, which

⁴²⁰ **Exhibit AU-2**, African Union Climate Change and Resilient Development Strategy and Action Plan (2022-2032), p. 12.

⁴²¹ See IPCC Africa Chapter, pp. 1290, 2022.

⁴²² *Ibid.*

⁴²³ *Ibid.*

⁴²⁴ IPCC Report, Global Warming of 1.5°C (2018), statement B.2.3.

⁴²⁵ IPCC, *Climate Change 2022*, statement B.4.5.

⁴²⁶ IPCC, *Climate Change 2014*, at p. 17.

⁴²⁷ **Exhibit AU-3**, Nairobi Declaration, preambular para. 7.

cause massive humanitarian crisis with detrimental impacts on economies, health, education, peace and security, among other risks.⁴²⁸

The Nairobi Declaration explicitly refers to “the IPCC confirmation that Africa is warming faster than the rest of the world”, with African Leaders agreeing that “if unabated, climate change will continue to have adverse impacts on African economies and societies, and hamper growth and wellbeing.”⁴²⁹ It therefore calls upon the global community:

to act with urgency in reducing emissions, fulfilling its obligations, keeping past promises, and supporting the continent in addressing climate change, specifically to:

Accelerate all efforts to reduce emissions to align with goals set forth in the Paris Agreement [...].⁴³⁰

Yet, and this is the heart of the climate justice question, so far such “injury” has not been repaired and the unlawful conduct causing it continues, despite the calls of African and other countries for responsible States to take decisive action. As explained in Chapter IV, such decisive action would *inter alia* consist of: reducing GHG emissions of 45 per cent in eight years compared with emission projections;⁴³¹ “rapid and deep and, in most cases, immediate” GHG emission reductions in all sectors this decade⁴³²; considerable reduction in overall fossil fuel use, minimal use of unabated fossil fuels⁴³³; and of course repairing the consequences of the breach. The African Group of Negotiators on Climate Change has further emphasised the importance of “the global goal for adaptation”,⁴³⁴ with adaptation financing to match estimated costs. A member State of the African Union has also “express[ed] [...] disappointment” that the current climate action plans, presented by countries through their NDCs, “do not

⁴²⁸ *Ibid.*, preambular para. 5 (emphasis added).

⁴²⁹ **Exhibit AU-3**, Nairobi Declaration, preambular para. 4.

⁴³⁰ *Ibid.*, preambular para. 12 (under collective action).

⁴³¹ United Nations Environment Programme, *Emissions Gap Report 2022: The closing window. Climate crisis calls for rapid transformation of societies*, Executive Summary, at p. xvi, available at: https://www.unep.org/resources/emissions-gap-report-2022?gclid=EA1aIQobChMjQ2oxjST_gIVuBoGAB2YvQ5LEAAYASAAEgKv7PD_BwE

⁴³² IPCC, Synthesis Report 2023, statements B.6 and C.2.

⁴³³ *Ibid.*, statement C.3.2.

⁴³⁴ See Africa Renewal, “Africa’s chief climate negotiator: We must have tangible and actionable climate decisions for a successful COP27”, available at: [Africa’s chief climate negotiator: We must have tangible and actionable climate decisions for a successful COP27 | Africa Renewal \(un.org\)](#)

put us on a path to 1.5 degree warming”, but are rather closer to “2.4 degrees”, “equivalent to 3-degree warming for Africa”.⁴³⁵

b. African Peoples and individuals of the present and future generations are affected by the adverse effects of climate change

246. The clarification of the legal consequences arising from the conduct identified in Question (B) is requested also “with respect to ... (ii) Peoples and individuals of the present and future generations affected by the adverse effects of climate change”.

247. Resolution 77/276 is intended to include all individuals: the objective of specifically referring to “peoples” is to ensure that the cultural rights protected under human rights law are taken into account both from an individual as well as collective dimension.”⁴³⁶ The term “peoples” is broad and encompasses indigenous, tribal peoples or “First Nations,”⁴³⁷ as well as people of a State or a people under colonial or foreign rule.⁴³⁸

248. According to the Office of the High Commissioner for Human Rights, “[p]ersons in vulnerable situations may have reduced adaptive capacity making them particularly at-risk from human rights harms caused by climate change”.⁴³⁹ The High Commissioner has added that “States should take action to empower persons at-risk from or experiencing climate change related loss and damage and uphold their rights”. This statement was followed by a clarification of actions needed regarding five (non-exhaustive) categories of individual and collective groups’ rights, namely: women and persons with diverse gender identity; children; Indigenous Peoples; migrants; and persons with disabilities.⁴⁴⁰

⁴³⁵ See Republic of Kenya, “National Statement by Cabinet Secretary, Hon. Keriako Tobiko, EGH, SC during the Opening Session of the Resumed UNEA 5.2 on 1st March 2022”, para. 29, available at: <https://wedocs.unep.org/bitstream/handle/20.500.11822/38641/CS%20UNEA%205.2%20%20NATIONAL%20STATEMENT.pdf?sequence=1&isAllowed=y>

⁴³⁶ Human Rights Committee, *General Comment No. 23 on the Rights of Minorities (Art. 27 of the Covenant)*, UN Doc CCPR/C/21/Rev.1/Add.5 (1994), para. 3.1.

⁴³⁷ See Marcelo Kohén, “Self-determination”, in Jorge E. Viñuales (ed), *The UN Friendly Relations Declaration at 50. An Assessment of the Fundamental Principles of International Law* (Cambridge University Press, 2020), p. 161. Art. 1(3) of the ILO Convention No. 69. See *African Commission on Human and Peoples’ Rights v Republic of Kenya (Ogiek case)*, ACtHPR App 006/2012, Judgment, 26 May 2017, paras. 197–199; UN General Assembly Resolution 61/295: United Nations Declaration on the Rights of Indigenous Peoples, Articles. 3, 4, 46(1).

⁴³⁸ See *Ibid.*, Marcelo Kohén, pp. 159–160; Gudmundur Alfredsson, ‘Peoples’ in *Max Planck Encyclopaedia of Public International Law*.

⁴³⁹ Office of the High Commissioner for Human Rights, *Key Messages on Human Rights and Loss and Damage*, November 2023, Key message 5, available at: [KeyMessages_on_HR_CC.pdf\(ohchr.org\)](#)

⁴⁴⁰ *Ibid.*

249. The reference to “present and future generations” also clarifies that the second category specifically affected by the adverse impacts of climate change includes all right-holders, individual or collective, in present or future generations. Future generations, according to the Human Rights Committee, “have a fundamental right to a stable climate system capable of sustaining human life, based on children’s right to a healthy environment”.⁴⁴¹ The reference to “present and future generations” is thus meant to include children and generations unborn,⁴⁴² consistent with the principle of intergenerational equity.⁴⁴³
250. The use of the terms “affected by” in Resolution 77/276 incorporates the language used by in the human rights community, including by the Committee on the Rights of the Child⁴⁴⁴ and the Office of the High Commissioner for Human Rights.⁴⁴⁵ Also in Chapter IV, human rights are highly affected by climate change, as recognised both by the Human Rights Council,⁴⁴⁶ as well as by the Conference of the Parties to the UNFCCC.⁴⁴⁷
251. The conduct identified in Question (B) has severely affected peoples and individuals in Africa. The IPCC has identified various “key risks” for people in Africa.⁴⁴⁸ Among the adverse effects resulting from the “dangerous anthropogenic interference with the climate system”, the report includes the following ones:

species extinction and ecosystem disruption, loss of food production, reduced economic output and increased poverty, increased disease and loss of human life, increased water and energy insecurity, loss of natural and cultural

⁴⁴¹ Views adopted by the Committee under art. 5 (4) of the Optional Protocol, concerning communication No. 3624/2019, Human Rights Committee CCPR/C/135/D/3624/2019, 18 September 2023, para. 3.7, available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2F135%2FD%2F3624%2F2019&Lang=en

⁴⁴² Maastricht Principles on the Human Rights of Future Generations, Art. I; Edith Brown Weiss, ‘Intergenerational equality’ in *Max Planck Encyclopaedia of Public International Law*; Renan Aratújo and Leonie Koessler, “The Rise of the Constitutional Protection of Future Generations” LPP Working Paper Series N° 7 (2021).

⁴⁴³ **Dossier No. 302A.I**, Committee on the Rights of the Child, *General comment No. 26 (2023) on children’s rights and the environment, with a special focus on climate change*, 31 August 2023, UN Doc CRC/C/GC/26 (2023), para. 11.

⁴⁴⁴ Committee on the Rights of the Child, *Decision adopted by the Committee on the Rights of the Child under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure in respect of Communication No. 104/2019*, 22 September 2021, CRC/C/88/D/104/2019, para. 10.13.

⁴⁴⁵ Office of the High Commissioner for Human Rights, *Key Messages on Human Rights and Loss and Damage*, November 2023, Key messages I, 3 and 4, available at: [KeyMessages on HR CC.pdf \(ohchr.org\)](#)

⁴⁴⁶ **Dossier No. 275A**, HRC, Resolution 53/6, 12 July 2023, “Human rights and climate change”, preamble, paras. 17 and 18. This Resolution is specifically mentioned in the preambular text of Resolution 77/276.

⁴⁴⁷ **Dossier No. 156**, UNFCCC, Cancun Agreements, preamble, para. 7.

⁴⁴⁸ See IPCC Africa Chapter, pp. 1299 and 2022.

heritage and compound extreme events harming human settlements and critical infrastructure.⁴⁴⁹

252. The IPCC has further acknowledged that “[v]ulnerability is highest for the elderly, pregnant women, individuals with underlying conditions, immune-compromised individuals (e.g., from HIV) and young children”.⁴⁵⁰ African Peoples and individuals of the present and future generations are therefore highly affected by the conduct identified in Question (B).

2. *Specific legal consequences arising from the unlawful conduct with respect to African States and peoples and individuals in Africa*

253. As discussed above, breaches of international law create specific legal consequences that are owed to both impacted (injured, specially affected and/or particularly vulnerable) African States generally, and to African peoples and individuals specifically. African States have been and continue to be injured and specially affected by and particularly vulnerable to the adverse effects of climate change, while their historical contribution to GHG emissions that have affected the climate system has been negligible. African peoples and individuals suffer the major brunt of the consequences of climate change and their lives are severally affected daily.

254. Article 28 of ARSIWA clarifies that an international wrongful act of a State triggers specific legal consequences.⁴⁵¹ As such, there is a link between the breach on an international obligation and the legal consequences arising from such a breach, and new legal relations arise from the commission of an international wrongful act by a State.⁴⁵² In the *Wall Advisory Opinion*, the Court explicitly referred to the necessary link between the finding of a violation and the examination of the legal consequences ensuing from such finding. It held that “having concluded” that several violations of international obligations had occurred it now had to “examine the consequences of those violations.”⁴⁵³ The Court then examined the legal consequences of the violations and distinguished between “on the one hand, those arising for Israel and, on the other,

⁴⁴⁹ *Ibid.*

⁴⁵⁰ *Ibid.*, p. 1300 (box 9.1).

⁴⁵¹ ARSIWA Commentary, Article 28, paras. (1) and (2).

⁴⁵² *Ibid.*

⁴⁵³ *Wall Advisory Opinion*, para. 143.

those arising for other States and, where appropriate, for the United Nations.”⁴⁵⁴ Likewise, in the case at hand, legal consequences of the violations of the international legal framework related to climate change can arise for multiple States, as well as for regional and international organizations.

255. Legal consequences are entailed irrespective of the kind of obligation breached, and regardless of whether the obligations breached are owed to one or more States, or to the international community in general. Thus, the legal consequences arising out of the States’ failure to comply with the obligations identified in Chapter IV are owed to injured, specially affected and particularly vulnerable States, and to the international community.

256. Article 28 of ARSIWA also includes the possibility that an internationally wrongful act involves legal consequences in the relations between the State responsible for that act and other subjects of international law, such as persons and entities other than States. This follows, as the commentary clarifies, “from article 1, which covers all international obligations *of* the State and not only those owed *to* other States.”⁴⁵⁵ In the complex situation of climate change, therefore, legal consequences arise not only for States but also for individuals and groups that were injured as a consequence of States’ failure to respect their international law obligations. State responsibility also exists in situations of violations of human rights, or where the primary beneficiary of the obligations that was breached is not a State.⁴⁵⁶ In particular, African peoples and individuals have suffered significant harm from the acts and omissions of responsible States to respect their obligations in relation to climate change and other parts of the environment. As a consequence of the breach, legal consequences also arise for African peoples and individuals, for both present and future generations.⁴⁵⁷

⁴⁵⁴ *Ibid.*, para. 148. See also *Armed Activities*, paras. 165, 220, 250-259 (finding that Uganda’s wrongful actions entailed its international responsibility and then determined the legal consequences of such responsibility, which included Uganda’s obligation to make reparations), and *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment, I.C.J. Reports 2004 (I), p. 59 (“**Avena**”), paras. 115-119 (legal consequences arise from breaches of international law).

⁴⁵⁵ ARSIWA Commentary, Article 28, para. 3.

⁴⁵⁶ *Ibid.*, (“the provisions of Part Two [Content of the International Responsibility of a State] are without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State.”).

⁴⁵⁷ **Dossier No. 2**, Resolution 77/276 recognizes specifically that “climate change is an unprecedented challenge civilizational proportions and that the well-being of present and future generations of humankind depends” on the response to it.

257. Importantly, the legal consequences envisaged within the framework of State responsibility are new obligations of the States that violated international law. They are separate from the underlying primary rules that have been violated.⁴⁵⁸

258. The core legal consequences of a violation of international law are the obligations of the responsible State of cessation and non-repetition of the wrongful act and the obligation to make full reparations for the injuries caused by the internationally wrongful acts themselves.⁴⁵⁹ To be sure, and in conjunction with the specific secondary legal consequences, all States continue to have a duty to perform their underlying primary legal obligations.

a. Continued duty of performance

259. Article 29 of ARSIWA clarifies that the legal consequences of an internationally wrongful act do not affect the continued duty of the responsible States to perform the obligation breached.⁴⁶⁰

260. In the *Gabčíkovo-Nagymaros Project* case, the Court found that, although both parties had failed to comply with their obligations under the treaty, this did not result in its end or termination of the underlying Treaty; the Court held that it would set a precedent with “disturbing implications for treaty relations and the integrity of the rule *pacta sunt servanda*” if it concluded that a treaty in force between States “might be unilaterally set aside on grounds of reciprocal non-compliance.”⁴⁶¹

261. As such, the obligation to perform the obligations that were breached continues even when the breaching State ceases its wrongful conduct and makes full reparation.⁴⁶² All States continue to have a due diligence obligation to adopt and enforce measures as proscribed by the applicable international law framework to ensure the protection of the climate system and other parts of the environment.⁴⁶³ In the present context,

⁴⁵⁸ ARSIWA Commentary, para. 4(b) and (c).

⁴⁵⁹ ECtHR, *Case of Georgia v. Russia (I)*, Application No. 13255/07, Judgment, 31 January 2019, para. 54 (principles of state liability include both the obligation to cease the acts and make full reparation).

⁴⁶⁰ ARSIWA Commentary, para. 2.

⁴⁶¹ *Gabčíkovo-Nagymaros Project*, para. 114.

⁴⁶² It is possible that, in some circumstances the effect of the breach will put an end to the obligation itself. However, this will generally be the injured State’s decision. It is for the injured State to react to the breach. For example, a State that was injured by a material breach of a treaty may decide to terminate that treaty as provided by Article 60 of the VCLT, yet the termination will be without prejudice to any legal relationships that State has with the injuring State prior to the termination, such as the obligation to make reparation.

⁴⁶³ See *Avena*, Separate Opinion of Judge *ad hoc* Sepúlveda, para. 79: “The legal reasoning that compels the need for the cessation and non-repetition of a breach of an international obligation is the continued duty of performance. To extend in time the performance of an illegal act would frustrate the very nature and foundations of the rule of law.”

for example, States continue to have obligations, *inter alia*, to impose tight reduction requirements on high emitting companies and industries, to implement specific treaty obligations, and to respect general international law obligations.

262. Accordingly, States continue to have a duty to apply the existing international framework identified in Chapters III and IV, including all obligations originating from international customary law and the global and regional instruments that protect the climate system and other parts of the environment for present and future generations.⁴⁶⁴

b. States have an obligation of cessation and non-repetition

263. In addition to a continued duty of performance, all States that are responsible for an internationally wrongful act are under an obligation to “cease that act, if it is continuing”, and, “if circumstances so require, offer appropriate assurances and guarantees of non-repetition.”⁴⁶⁵

264. Cessation of the conduct in breach of an international obligation is a fundamental requirement to eliminate the consequences of a wrongful act. Cessation is relevant in all wrongful acts, such as the ones considered here, that extend in time, including those of omissions “since there maybe cessation consisting of abstaining from certain actions.”⁴⁶⁶ Both of the requirements specified in *Rainbow Warrior* are present, and namely that “the wrongful act has a continuing character and the violated rule is still in force.”⁴⁶⁷

265. This obligation, enshrined in Article 30 of ARSIWA, is particularly important in the context of obligations arising from the international legal climate change framework. Resolution 77/276 noted “with concern” the gap that exists between the aggregate effects of current nationally determined contributions of States and the emissions reduction required to hold the increase in the global average temperature to below 2°C as required in the UNFCCC, the Kyoto Protocol, and the Paris Agreement.

⁴⁶⁴ Certain treaties, moreover, may specifically define certain consequences arising from their violations. The reparation system analysed here is residual and based on states responsibility from international law violations, and is in addition to any provisions of each treaty. See ARSIWA, Article 55.

⁴⁶⁵ ARSIWA, Article 30.

⁴⁶⁶ *Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affair*, XX UNRIIA 215, Award, 30 April 1990, para. 113.

⁴⁶⁷ *Ibid.*, para. 114.

c. Obligations of the responsible States are owed to another State, several States as well as the international community

266. Per Article 33 of ARSIWA, obligations of the responsible States “may be owed to another State, to several States, or to the international community as a whole”, depending on the content of the international obligation and the circumstances of the breach, while the general provisions related to reparation are without prejudice to rights arising from a State’s international responsibility “which accrue directly to any person or entity other than a State.”⁴⁶⁸

267. In particular, identifying the State or States to which the obligations of the responsible States are owed depends on the primary rules that establishes the obligation that was breached.⁴⁶⁹ A violation that is “massive and widespread” may affect the international community generally. The conduct of States that violated their obligations related to climate change have caused massive injury to the members of the African Union and to the international community. As a result of this general conduct, States of the African Union, both individually and jointly, are owed reparations.⁴⁷⁰

268. Additionally, obligations of reparation accrue specifically towards individuals and peoples, for example when the obligation is contained in treaty concerning the protection of human rights. In *LaGrand*, the ICJ explicitly recognised that international conventions may create individual rights.⁴⁷¹ Obligations of reparations are owed to individuals and groups of Africa whose rights have been violated. In formulating the question for the Court, Resolution 77/276 specifically recalled the ICCPOR and the ICESCR, which provide for individual human rights. Individuals and groups have rights under these conventions, and these rights’ violation is a wrongful act that creates a duty of reparation.⁴⁷²

⁴⁶⁸ ARSIWA, Commentary, Article 33.

⁴⁶⁹ *Ibid.*, referring to pollution at sea and stating that if it is massive and widespread it could affect the international community or a specific region. Commentary to Article 33, para. (1).

⁴⁷⁰ See *Nuclear Weapons Advisory Opinion* (assessing general conduct of States on threat or use of nuclear weapons in all circumstances).

⁴⁷¹ *LaGrand (Germany v. United States of America)*, Judgment, ICJ Reports 2001, p. 466, para. 77.

⁴⁷² See also **Dossier No. 279**, HRC, Resolution 48/13, 08 October 2021, “Human rights and the environment”, recognizing “the Human Right to a clean, healthy and sustainable environment”.

d. Breaching States have an obligation to make full reparation for the injury caused

269. States that are responsible for an international wrongful act are under an obligation to make full reparation for the injury caused by the act.⁴⁷³ Article 31 of ARSIWA specifically requires “full reparation.”⁴⁷⁴ This is the second general obligation of responsible States and a principle of customary international law. As famously stated in the *Factory at Chorzów* case, a breach of an international engagement “involves an obligation to make reparation in adequate form.”⁴⁷⁵ Such reparation, the Permanent Court of International Justice (“**PCIJ**”) held, “must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.”⁴⁷⁶ Reparations are “the indispensable complement” of a failure to apply international law.⁴⁷⁷

270. Injury is defined expansively and includes “any damage, whether material or moral” cause by the internationally wrongful act.⁴⁷⁸ Reparations are due also in cases where the damage that follows from the breach may be distant, such as “harm to the environment by emissions exceeding the prescribed amount.”⁴⁷⁹

271. The Court adjudicated for the first time a claim for compensation for environmental damage in the *Certain Activities*⁴⁸⁰ case, where it held that it was consistent with the principles of international law, including the principle of full reparation, to find that compensation is due for damage caused to the environment “in and of itself”, and that such compensation is distinct from the expenses incurred by an injured State as a consequence of such damage.⁴⁸¹ The Court found that damage to the environment “and the consequent impairment or loss of the ability of the environment to provide goods and services, is compensable under international law.”⁴⁸² Compensation due for such damage include both “indemnification for the impairment or loss of

⁴⁷³ ARSIWA, Article 31.

⁴⁷⁴ *Ibid.*

⁴⁷⁵ *Factory at Chorzów*, Jurisdiction, Judgment, 26 July 1927, p. 21. See also *Id.*, Merits, Judgment, 13 September 1928, p. 47; *Ahmadou Sadio Diallo*, para. 161; *Avena*, para. 119; *Gabčíkovo-Nagymaros Project*, para. 150, *Certain Activities*, para. 30.

⁴⁷⁶ *Factory at Chorzów*, Merits, Judgment, 13 September 1928, p. 47. See also *Avena*, para. 119, and *Certain Activities*, para. 29.

⁴⁷⁷ *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, Order of 14 April 2014, ITLOS Reports 2014, p. 404, para. 429: “the responsible State is under an obligation to make full reparation for the injury caused by the international wrongful act.”

⁴⁷⁸ ARSIWA, Article 31.

⁴⁷⁹ ARSIWA Commentary to Article 31, para. (8).

⁴⁸⁰ *Certain Activities*, paras. 41-43.

⁴⁸¹ *Ibid.*, para. 41. See also *Armed Activities*, para. 348.

⁴⁸² *Ibid.*

environmental goods and services” in the period preceding the recovery, as well as “the payment for the restoration of the damaged environment.”⁴⁸³

272. Moreover, specific aspects relating to the application of the general rules on reparation and compensation, including the assessment of the required causal nexus, “may vary depending on the primary rule violated and the nature and extent of the injury.”⁴⁸⁴ In *Armed Activities*, the Court also held that “it may be that the damage is attributable to several concurrent causes” including both acts and omissions. The Court also found that it was “possible that several internationally wrongful acts of the same nature, but attributable to different actors, may result in a single injury or in several distinctive injuries.”⁴⁸⁵ The continued emission of GHGs by developed States in violation of international law have produced several kinds of environmental damages, especially felt by least developed countries and small island developing states, including “persistent drought and extreme weather events, land loss and degradation, sea level rise, coastal erosion, ocean acidification and the retreat of mountain glaciers.”⁴⁸⁶

273. The general rules of reparation must be read in the light of the specific circumstances arising from the nature of the environmental harm, as “damage may be due to several concurrent causes.”⁴⁸⁷ In the *Certain Activities* case, the Court held that the “absence or adequate material evidence as to the extent of damage” will not preclude an award of compensation for that damage.⁴⁸⁸ Compensation can be due on the basis of equitable considerations. Indeed, as held in the *Trail Smelter* case:

it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate.⁴⁸⁹

⁴⁸³ *Ibid.*, para. 42.

⁴⁸⁴ *Armed Activities*, para. 93; See also *Certain Activities*, para. 34.

⁴⁸⁵ *Armed Activities*, para. 394.

⁴⁸⁶ **Dossier No. 2**, Resolution 77/276.

⁴⁸⁷ *Certain Activities*, para. 34; *Armed Activities*, para. 349.

⁴⁸⁸ *Certain Activities*, p. 27, citing *Ahmadou Sadio Diallo*, para. 33.

⁴⁸⁹ *Trail Smelter case (United States, Canada)*, III RIAA 1905, Awards of 16 April 1938 and 11 March 1941 (“**Trail Smelter**”), p. 1920, cited in *Certain Activities*, para. 35.

274. In *Armed Activities*, the Court specifically examined this issue, and found that compensation is not to be precluded simply because adequate evidence of the extent of the material damage is not available.⁴⁹⁰ Even if there is uncertainty as to the exact extent of the damage, the Court may “award compensation in the form of a global sum.”⁴⁹¹ A similar approach can be used where “the evidence leaves no doubt that the international wrongful act has caused a substantial injury, but does not allow a precise evaluation of the extent or scale of such injury.”⁴⁹² Consequences of climate change are so vast and overwhelming that there is no need to evaluate precisely the injury, as there is no doubt that a substantial injury has occurred and is specifically adversely affecting African countries and African peoples and individuals.

275. Full reparation of the injuries caused by the violation of international law can take the form of restitution, compensation, and/or satisfaction.⁴⁹³ These can be provided individually or in jointly, and internal law is always irrelevant as a justification for failure to comply with any obligations relating to state responsibility.⁴⁹⁴

e. Restitution

276. Article 35 of ARSIWA provides that States that are responsible for an internationally wrongful act, must provide restitution, which means to re-establish the situation that existed before the wrongful act occurred.⁴⁹⁵ Restitution is preferred unless it is materially impossible, or if it involves a burden that is out of proportion to the benefit deriving from the restitution instead of compensation.

277. The primacy of restitution found its roots in the “obligation to restore”,⁴⁹⁶ which has a broad meaning, and includes all the actions that the responsible States can take to

⁴⁹⁰ *Armed Activities*, para. 360, *Certain Activities*, para. 35.

⁴⁹¹ *Armed Activities*, para. 106.

⁴⁹² *Ibid.*, para. 106. See also see *Certain Activities*, para. 35; *Ahmadou Sadio Diallo*, paras. 21, 24 and 33.

⁴⁹³ ARSIWA, Article 34. See for example African Court, *Beneficiaries of Late Norbert Zongo et al*, African Court on Human and Peoples' Rights, Application No. 013/2011, Judgment, 28 March 2014, para. 29 (“reparation may take several forms”).

⁴⁹⁴ African Court, *Tanganyika Law Society and Reverend Christopher Mtikila v. Republic of Tanzania*, Application Nos. 009/2011 and 011/2011, Judgment, 14 June 2013, para. 108 (quoting article 32) (stating that “the Responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations.”)

⁴⁹⁵ ARSIWA, Article 5.

⁴⁹⁶ *Factory at Chorzów*, Merits, Judgment No. 13, 1928, PCIJ, Series A, No. 17, p. 48.

restore the situation *quo ante*, and eliminate all the legal and material consequences of the wrongful acts.⁴⁹⁷

278. Restitution is particularly important when the obligation is of a continuing character, as is the case of obligations related to the climate system. In particular, providing significant restitution will be important for some of the most important consequences of climate change suffered in Africa, including persistent draught and extreme weather events, land loss and degradation, sea level rise, coastal erosion and ocean acidification. Specifically, actions that can assist with reparation due to African States and people include “finance, capacity-building and technology transfer” for adaptation.⁴⁹⁸ More specifically, developed countries have agreed, but have so far failed, to jointly mobilise USD 100 billion per year by 2020, which could be used to mitigate some of the effects of climate change.⁴⁹⁹

279. In *Certain Activities*, the Court found that natural recovery may not always be enough to return the environment “to the state in which it was before the damage occurred.” In these situations, as in the present case, it is necessary to provide payment for active restoration.⁵⁰⁰

280. The decisions of the United Nations Compensation Commission (“UNCC”), especially those related to F4 claims on environmental damages, are particularly instructive in this instance, as they include decisions awarding specific sums for environmental damage and remedial activities in States that suffered the consequences of Iraq’s invasion of Kuwait, and specifically air, land, and sea pollution.⁵⁰¹ These decisions are helpful to determine restitution mechanisms when, like in the present case, actions

⁴⁹⁷ ARSIWA, Commentary Article 35, para. 5. See *Pulp Mills*, para. 273 (holding that “customary international law provides for restitution as one form of reparation for injury, restitution being the re-establishment of the situation which existed before occurrence of the wrongful act”). See also ECtHR, *Savridin Dzburayev v. Russia*, Application No. 71386/10, Judgment, 25 April 2013, para. 248 (primary aim of the individual measures taken in response to a judgement is to put an end to the breach and make reparations so as to restore the situation existing before the breach), ECtHR *Devydov v. Russia*, Application No. 18967/07, Judgment (merits and just satisfaction), 30 October 2014, para. 25 (stating that “a judgment in which the Court finds a breach imposes on the respondent State a legal obligation to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach”) and ECtHR, *Kudeshkina v. Russia*, Application No. 28727/11, Decision, 17 February 2015, para. 55.

⁴⁹⁸ **Dossier No. 2**, Resolution 77/276, preambular paras. 8, 10 and 11.

⁴⁹⁹ *Ibid.*, preambular para. 12.

⁵⁰⁰ *Certain Activities*, para. 43.

⁵⁰¹ Panel of Commissioners of UNCC in F3 claims found that loss resulting from the use or diversion of Kuwait’s resources to fund the costs of repair the loss and damage arising from Kuwait’s invasion fell “squarely within the types of loss contemplated by Articles 31 and 35 of the ILC”. In Decision on F4 (environmental claims) the Panel found that a loss due to depletion for damage to natural resources was compensable, UN Security Council Resolution 687 (1991) of 8 April 1991, UN Doc S/RES/687; See also, United Nations Compensation Commission, *Report of the secretariat*, 1 September 2001, UN Doc S/ AC.26/2008/R.9.

must be taken to reverse the adverse effect of climate change especially in countries, like those of the African Union, that are particularly vulnerable to these effects.

f. Compensation

281. In addition to restitution, States that are responsible for an internationally wrongful acts are under “an obligation to compensate for the damages that was caused by it, in so far as the damage cannot be made good by restitution.”⁵⁰² Compensation is the most common form of reparation, as held by the Court in the *Gabčíkovo-Nagymaros Project* case: “[i]t is a well-established rule of international law that an injured State is entitled to obtain compensation from the State which has committed an internationally wrongful act for the damage caused by it.”⁵⁰³
282. The injury caused by the adverse effects of climate change cannot be completely repaired by restitution. The effects of continued acts and omissions have been too serious, and there is a consensus that a temperature increase of 1.5 degrees Celsius above pre-industrial levels is inevitable.⁵⁰⁴ Therefore, in addition to measures of restitution, injured States, individuals and people are owed compensation for the loss and damages they suffered because of the widespread adverse impact of human-induced climate change on nature and people.
283. As provided by Article 36 of ARSIWA compensation must cover “any financially assessable damage” including loss of profit in as much as it is established.⁵⁰⁵ There are many methods for assessing environmental damage.⁵⁰⁶ In general, the appropriate categories of damage and principles for assessment depend on the primary obligation that was violated.
284. In *Certain Activities*, a case centred on compensation for environmental damage, the Court found it appropriate to approach the evaluation of environmental damage “from the prospective of the ecosystem as whole” and adopt an “overall assessment of the impairment or loss of environmental goods and service”⁵⁰⁷ rather than focusing on

⁵⁰² ARSIWA, Article 36.

⁵⁰³ *Gabčíkovo-Nagymaros Project*, p. 81, para. 152. See also the statement by PCIJ in *Factory at Chorzów*, Merits, Judgment No. 13, 1928, PCIJ, Series A, No. 17, p. 29, declaring that “[i]t is a principle of international law that the reparation of a wrong may consist in an indemnity.” *Certain Activities*, para. 31; *Pulp Mills*, para. 273. *Armed Activities*, para. 101.

⁵⁰⁴ **Dossier No. 2**, Resolution 77/276, preambular paras. 7 and 10.

⁵⁰⁵ ARSIWA, Article 36, para. (4), see also Commentary of Article 36.

⁵⁰⁶ *Certain Activities*, para. 52.

⁵⁰⁷ *Ibid.*, para. 78.

specific categories of goods and services. Because of the widespread adverse impacts and related losses and damage for both nature and people of man-induced climate change particularly for vulnerable developing countries, an overall assessment based on the ecosystem as a whole would be particularly helpful.

285. Helpful guidance can be provided by many tribunals that have dealt with issues of compensation including the ITLOS, the Iran-US Claims Tribunal, the European Court of Human Rights, the Inter-American Court of Human Rights and the tribunals constituted under the International Convention for Settlement of Investment Disputes.
286. Compensation for pollution costs and environmental damage have a long history of being awarded.⁵⁰⁸ More recently, the United Nations Compensation Commission has assessed compensation arising from Iraq's liability for direct loss, damage "including environmental damage and depletion of natural resources" as a result of Iraq's unlawful invasion and occupation of Iraq.⁵⁰⁹ Decision 7 of the UNCC Governing Council specified the various heads of damage reviewed.⁵¹⁰ The UNCC's approach resulted in billions of dollars being awarded for environmental harm and remedial activities.
287. As held long ago in the *Trial Smelter* arbitration, compensation for environmental damage includes both reimbursement for expenses for preventing or remedying the pollution and for reduction in value of the polluted property.⁵¹¹ Moreover, environmental damage extends beyond clean up and loss property value, biodiversity and other non-use values are as important and "no less real and compensable"⁵¹² Both material and non-material losses are to be included in any compensation.⁵¹³
288. In this context, compensation is due to both African States and African peoples and individuals.

⁵⁰⁸ *Trail Smelter*, p. 1920 (providing compensation to the US for damages to land and property caused by emissions across the border in Canada).

⁵⁰⁹ UN Security Council Resolution 687 (1991) of 8 April 1991, UN Doc S/RES/687, para. 16.

⁵¹⁰ UNCC Governing Council, Decision 7 of 16 March 1992, Criteria for Additional Categories of Claims, UN Doc S/AC.26/1991/7/Rev. I, para. 35.

⁵¹¹ *Trail Smelter*, p. 1920.

⁵¹² ARSIWA Commentary, Article 36, para. 15.

⁵¹³ African Court, *Beneficiaries of Late Norbert Zongo et al*, African Court on Human and Peoples' Rights, Application No. 013/2011, Judgment on Reparations, 5 June 2015, para. 26 (stating that "according to international law, both material and moral damages have to be repaired.")

i. To African States

289. African States are especially affected climate change due to their geographical circumstances and level of economic development, while having significant capacity constrains to confront the many resulting injuries. They are already experiencing persistent drought and extreme weather events, land loss and degradation, sea level rise, coastal erosion, and ocean acidification.⁵¹⁴ As indicated in Resolution 77/267, climate change will also lead to the displacement of affected persons, and further threaten food security, water availability and livelihoods, as well as efforts to eradicate poverty in all its forms and dimensions and achieve sustainable development.⁵¹⁵

290. States that have contributed to GHGs and have omitted to take actions need to provide compensation to States that have been affected by it. Such compensation, as the Court held in *Certain Activities*, can take the form of lump-sum payments to address the “ecosystem as whole.”⁵¹⁶ Compensation is urgently needed to address situations that are already occurring as well as slow-onset events that, as the General Assembly pointed out, “will pose an ever-greater social, cultural, economic and environmental threat.”⁵¹⁷

ii. To Peoples and Individuals

291. Compensation is also due to African peoples and individuals of present and future generation adversely affected by climate change. Question (B)(ii) refers to specific rights holders under international human rights law. These include specific protected groups – such children, women, indigenous and tribal peoples, minorities – as well as individuals in general. Reparations are intended “to benefit all those who suffered injury.”⁵¹⁸

292. The HRC has emphasised that the adverse effects of climate changes can have a range of implications, both direct and indirect for the effective enjoyment of human rights,

⁵¹⁴ **Dossier No. 2**, Resolution 77/276.

⁵¹⁵ *Ibid.*

⁵¹⁶ *Certain Activities*, para. 78.

⁵¹⁷ **Dossier No. 2**, Resolution 77/276. The Resolution also emphasized “the urgency of scaling up action and support, including finance, capacity-building and technology transfer, to enhance adaptive capacity and to implement collaborative approaches for effectively responding to the adverse effects of climate change, as well as for averting, minimizing and addressing loss and damage associated with those effects in developing countries that are particularly vulnerable to these effects”.

⁵¹⁸ *Armed Activities*, para. 102; see also *Ahmadou Sadio Diallo*, para. 57.

including “the right to life, the right to adequate food, the right to the enjoyment of the highest attainable standard of physical and mental health, the right to adequate housing, the right to self-determination, the rights to safe drinking water and sanitation, the right to work and the right to development.”⁵¹⁹

293. In *Armed Activities*, the Court found that in cases involving large groups of victims, compensation has often been awarded as a “global sum” for certain categories of injury based on the available evidence.⁵²⁰

294. The experience of past international claims commissions can be especially instructive when dealing with a multitude of possible individual claims, as in this case. The Eritrea-Ethiopia Claims Commission, for example, explored large number of cases, and found that when injuries affect large number of victims, institutions have adopted a less rigorous standard of proof, and have accordingly reduced the levels of compensation.⁵²¹ The UNCC has also developed specific methodologies including of kinds of claims and heads of damage that allowed for the mass process of individual claims for set amount of compensation.⁵²² The Court should take inspiration from these approaches in the case at hand.

D. CONCLUSION

295. In conclusion, due to their unique geographical characteristics and level of economic development, African States have been and continue to be particularly vulnerable and specially affected by the adverse effects of climate change, while their historical contribution to GHG emissions has been negligible. In other words, the conduct identified in Question (B) disproportionately affects the African continent compared to countries located in the northern hemisphere, putting compounded strains on health, social and economic systems in Africa.

296. The conduct identified in Question (B) has been ongoing at least for well over a century, both when considered as acts and omissions of individual States causing significant harm to the climate system and to the environment, and as acts and omissions of a

⁵¹⁹ **Dossier No. 275**, HRC, Resolution 50/9, 14 July 2022, ‘Human rights and climate change’.

⁵²⁰ *Armed Activities*, para. 107.

⁵²¹ Eritrea-Ethiopia Claims Commission, Final Award, 17 August 2009, XXVI RIAA 503, para. 38; *Armed Activities*, para. 107.

⁵²² UNCC, Decision 7. Detailed methodology for evaluation of E4 claims on 19 March 1999.

specific group of States resulting collectively in a disruption of the climate system, which now far exceeds the threshold of significant harm.

297. The African Union submits that States that have committed these internationally wrongful acts continue to have a duty to comply with the existing international framework, including all obligations under international customary law and the global and regional instruments that protect the climate system and other parts of the environment for present and future generations. In addition to that continued duty of performance, States are under an obligation to cease these wrongful acts, and offer appropriate assurances and guarantees of non-repetition.
298. The African Union further submits that States these internationally wrongful acts entail obligations to make full reparation for the injuries caused. The continued emission of GHGs by developed States in violation of international law have produced environmental damages, which are especially felt by LDCs and SIDS, including in Africa. In particular, such reparation could take the form of financial assistance, capacity-building, and technology transfer for adaptation. Compensation for loss and damages are also owed to injured States, individuals, and Peoples which have been injured due to the widespread adverse impacts of human-induced climate change.

CONCLUSIONS

299. In view of what precedes, the African Union suggests that the Court should answer the General Assembly's questions along the following lines, in view of the entire corpus of international law:⁵²³

a. *Question (A)*: States have multiple obligations to ensure the protection of the climate system, including:

- i. An obligation to take all the necessary measures and use their best efforts to prevent harm from GHG emissions,⁵²⁴ with additional obligations to urgently make deep reductions to such emissions in line with 1.5 °C pathways for the parties to the Paris Agreement;⁵²⁵
- ii. A duty to allocate the burden of emissions reductions asymmetrically and fairly, in line with the principle of common but differentiated responsibilities;⁵²⁶
- iii. Duties related to the ongoing efforts to slow or reverse climate change, including a duty to cooperate,⁵²⁷ to mitigate greenhouse gas emissions,⁵²⁸ and to adapt to climate change impacts;⁵²⁹
- iv. Obligations in terms of finance, technology transfer, and capacity-building,⁵³⁰ and to address losses and damages;⁵³¹
- v. Obligations to protect the environment from climate harm and enhance carbon sinks, including in relation to the marine environment,⁵³² biological diversity,⁵³³ and land;⁵³⁴

⁵²³ See *supra*, Chapter III, p. 16 *et seq.*

⁵²⁴ *Supra*, p. 37 *et seq.*

⁵²⁵ *Supra*, p. 41 *et seq.*

⁵²⁶ *Supra*, p. 44 *et seq.*

⁵²⁷ *Supra*, p. 49 *et seq.*

⁵²⁸ *Supra*, p. 51 *et seq.*

⁵²⁹ *Supra*, p. 53 *et seq.*

⁵³⁰ *Supra*, p. 57 *et seq.*

⁵³¹ *Supra*, p. 60 *et seq.*

⁵³² *Supra*, p. 66 *et seq.*

⁵³³ *Supra*, p. 68 *et seq.*

⁵³⁴ *Supra*, p. 70 *et seq.*

- vi. Multiple obligations pertaining to the human and peoples' rights, including the right to self-determination,⁵³⁵ the right to sustainable development,⁵³⁶ and the right to life;⁵³⁷ and
 - vii. Duties to take steps to progressively achieve the full realisation of economic, social and cultural rights,⁵³⁸ and to promote meaningful participation, secure access to information and ensure access to effective remedies in the context of the climate crisis.⁵³⁹
- b. *Question (B)*: In light of the international law of State responsibility, acts and omissions of individual States over time that have resulted in an interference with the climate system and other parts of the environment, entail consequences with respect not only to the States and Peoples of Africa, but also to future generations.⁵⁴⁰ These consequences include:
- i. A continued duty of performance with respect to the obligations being breached;⁵⁴¹
 - ii. Obligations of cessation and non-repetition;⁵⁴²
 - iii. A duty to make full reparation, including through restitution⁵⁴³ and compensation⁵⁴⁴ to African States and its Peoples and individuals.

These obligations are owed to other States, as well as to the international community as a whole.⁵⁴⁵

300. In providing these answers, the African Union stresses that they perfectly echo and complement the Nairobi Declaration, whose ambitious program to address climate change in a way respectful of the fight against poverty cannot but be found support in the Court's advice to the General Assembly.

⁵³⁵ *Supra*, p. 76 *et seq.*
⁵³⁶ *Supra*, p. 77 *et seq.*
⁵³⁷ *Supra*, p. 79 *et seq.*
⁵³⁸ *Supra*, p. 80 *et seq.*
⁵³⁹ *Supra*, p. 83 *et seq.*
⁵⁴⁰ *Supra*, p. 87 *et seq.*
⁵⁴¹ *Supra*, p. 101 *et seq.*
⁵⁴² *Supra*, p. 102 *et seq.*
⁵⁴³ *Supra*, p. 106 *et seq.*
⁵⁴⁴ *Supra*, p. 108 *et seq.*
⁵⁴⁵ *Supra*, p. 103 *et seq.*

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