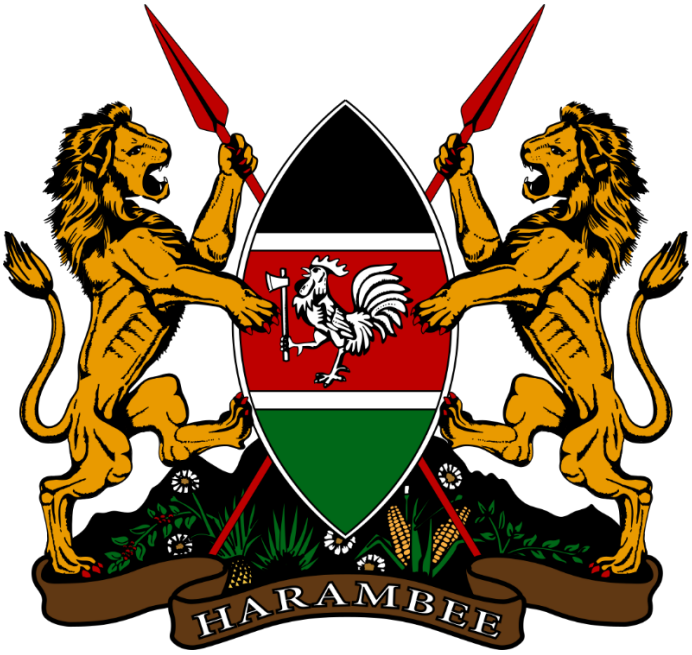
INTERNATIONAL COURT OF JUSTICE

OBLIGATIONS OF STATES IN RESPECT OF CLIMATE CHANGE

WRITTEN STATEMENT OF THE REPUBLIC OF KENYA



22 MARCH 2024

Table of Contents

CHAPTER 1
INTRODUCTION

1.1 The Republic of Kenya ("**Kenya**") respectfully submits this Written Statement pursuant to Orders of the International Court of Justice ("**Court**") dated 20 April 2023, 4 August 2023 and 15 December 2023, in response to the questions asked in the request for an advisory opinion adopted by consensus in General Assembly Resolution 77/276 of 4 April 2023 ("**Request**").

1.2 Both the draft resolution for the Request, which was endorsed by a group of 18 States led by the Republic of Vanuatu,[1] and its adoption, are a significant step in the efforts to effectively address climate change.[2] Indeed, the Request was the outcome of more than a decade of efforts, principally from Small Island Developing States ("**SIDS**"),[3] and the Resolution comes at a critical moment for the global climate. Despite 28 meetings of the Conference of the Parties ("**COP**") of the United Nations Framework Convention on Climate Change ("**UNFCCC**"), more must be done by the international community to combat climate change. The past year recorded the largest concentration of atmospheric carbon dioxide in history, with levels rising to more than double the annual averages registered over the preceding decade.[4]

---

[1] The other proponents of the draft resolution included Costa Rica, Sierra Leone, Angola, Germany, Mozambique, Liechtenstein, Samoa, Federated States of Micronesia, Bangladesh, Morocco, Singapore, Uganda, New Zealand, Vietnam, Romania and Portugal.

[2] *See* M. Fitzmaurice & A. Rydberg, "Using International Law to Address the Effects of Climate Change, A Matter for the International Court of Justice" (2023) 4(1) *Yearbook of International Disaster Law Online*, *available at* https://brill.com/view/title/64201, p. 282 ("An initiative for an AO started already in 2011" by Palau and the Marshall Islands).

[3] *See* V. Lamm, "The Obligations of the States in Respect of Climate Change Before the International Court of Justice" (2023) 20 *Journal of Environmental Law*, *available at* https://doi.org/10.1093/jel/eqad033, pp. 1-2 (*citing to* M. Fitzmaurice & A. Viktoria Rydberg, "Using International Law to Address the Effects of Climate Change: A Matter for the International Court of Justice" (2023) 4(1) *Yearbook of International Disaster Law*, *available at* https://brill.com/view/title/64201, pp. 281, 282).

[4] *See, e.g.*, P. Brown, "CO2 readings from Mauna Loa show failure to combat climate change", *The Guardian* (24 November 2023), *available at* https://www.theguardian.com/news/2023/nov/24/co2-readings-from-mauna-loa-show-failure-to-combat-climate-change. *See also* UN OHCHR, *Press Release: Fossil Fuels at the Heart of the Planetary Environmental Crisis: UN Experts* (30 November 2023) ("This year [2023] records were broken with global CO2-equivalent emissions reaching 57.4 gigatons and close to 90 days with global temperature increases exceeding 1.5°C in recent months.").

1.3 Even though Kenya and other African States are among the lowest contributors to anthropogenic greenhouse gas ("**GHG**") emissions, they have been forced to bear the brunt of the impacts of climate change.[5] The impacts of climate change have had more pronounced consequences for developing States which often lack the resources and technology to mitigate its effects. As Kenya explained in the Open Debate on Climate and Security in Africa before the UN Security Council, "for every heatwave in a wealthy city, there are biblical floods elsewhere".[6] The result has been that the "effects of carbon dioxide and other greenhouse gases are felt most by those who have benefited least from their production".[7] Indeed, "East Africa is experiencing its worst drought in over 40 years, contributing to crisis levels of hunger."[8]

1.4 Climate change is thus deadly and costly, and "those least responsible for causing it are being hardest hit", principally in the Global South and Africa.[9] The result is humanitarian catastrophe.[10] As shown below, the disproportionate effects of climate change must be taken into

---

[5] *See, e.g.*, M.A. Tigre & M. Wewerinke-Singh, "Beyond the North–South Divide: Litigation's Role in Resolving Climate Change Loss and Damage Claims" (2023) 32(3) *REICEL*, *available at* https://doi.org/10.1111/reel.12517, § 2, p. 441; E. Strazzante *et al.*, "Global North and Global South: How Climate Change Uncovers Global Inequalities", *Generation Climate Europe* (27 October 2021), *available at* https://gceurope.org/global-north-and-global-south-how-climate-change-uncovers-global-inequalities/ (the Global North is most responsible for the climate crisis, but its impacts are more widely felt in the Global South); African Union, *The African Leaders Declaration on Climate Change and Call to Action* (September 2023) (hereinafter "**Nairobi Declaration**"), *available at* https://www.afdb.org/sites/default/files/2023/09/08/the_african_leaders_nairobi_declaration_on_climate_change-rev-eng.pdf, paras. 7-8, 10.

[6] UN Security Council, High Level Open Debate on Climate and Security in Africa, *Statement by Mr. Martin Kimani, Permanent Representative of the Republic of Kenya* (12 October 2022), *available at* kenya_statement-_high_level_debate_on_climate_and_security_in_africa_-_october_12_2022.pdf (un.int), p. 2.

[7] G. Monbiot, "Never mind aid, never mind loans: what poor nations are owed as reparations", *The Guardian* (5 November 2021), *available at* https://www.theguardian.com/commentisfree/2021/nov/05/the-climate-crisis-is-just-another-form-of-global-oppression-by-the-rich-world.

[8] OXFAM, *Climate Finance Shadow Report* (2023), *available at* https://oxfamilibrary.openrepository.com/bitstream/handle/10546/621500/bp-climate-finance-shadow-report-050623-en.pdf?sequence=19, p. 2.

[9] *See* OXFAM, *Climate Finance Shadow Report* (2020), *available at* https://policy-practice.oxfam.org/resources/climate-finance-shadow-report-2020-assessing-progress-towards-the-100-billion-c-621066/, p. 2; Nairobi Declaration, paras. 7-8, 10.

[10] *See, e.g.,* J. Hewson & G. Smith, "Kenya's worst drought in decades creates humanitarian crisis", *PBS* (14 January 2022), *available at* https://www.pbs.org/newshour/show/kenyas-worst-drought-in-decades-creates-humanitarian-crisis.

account, including in connection with the obligations of States to render assistance to developing States.

1.5 Kenya and other African States not only bear the brunt of the deleterious effects of climate change, they are "the mineral sourcing key to its global solutions".[11] Kenya is home to some of the "world's most important biodiversity hotspots".[12] It hosts over 7,000 species of plants and trees; 25,000 species of animals, and multiple environments and ecosystems, including deserts, grasslands, savannahs, swamps, mountains (including two of the highest mountains in Africa), forests, tropical beaches along 300 miles long of coastline, and lakes, including Lake Victoria, Africa's largest lake.[13]

1.6 Kenya's capital city of Nairobi is the headquarters of the UN Environment Programme. Kenya is thus a hub for conservation and international environmental policy, and a key voice on matters of climate change in Africa and the world. It has taken major and decisive steps to contribute to the adaptation and building of climate change resilience and hence, providing regional and continental leadership.[14] Kenya "has committed to a 100% use of renewables for electricity by 2030", and has already achieved close to 90% reliance on renewable energy.[15] It has more than 50 parks and reserves, covering around 10% of the country's territory. Kenya hosted the first Africa Climate Summit in September 2023. The Constitution of Kenya establishes

[11] UN Security Council, High Level Open Debate on Climate and Security in Africa, *Statement by Mr. Martin Kimani, Permanent Representative of the Republic of Kenya* (12 October 2022), *available at* kenya_statement-_high_level_debate_on_climate_and_security_in_africa_-_october_12_2022.pdf (un.int), p. 3.

[12] S. Addison, "Kenya's role in leading climate change discussions across Africa", *IFAW* (12 April 2023), *available at* https://www.ifaw.org/international/people/opinions/kenya-climate-change-discussions-africa.

[13] Kenya Wildlife Service, "Priority Ecosystems and Species", *available at* https://www.kws.go.ke/content/priority-ecosystems-and-species (last accessed: 10 March 2024).

[14] *See, e.g.*, The World Bank Group, *Climate Risk Country Profile: Kenya* (2021), *available at* https://climateknowledgeportal.worldbank.org/sites/default/files/2021-05/15724-WB_Kenya%20Country%20Profile-WEB.pdf (hereinafter "**Climate Risk Country Profile: Kenya (2021)**"), pp. 21-22.

[15] UN Security Council, High Level Open Debate on Climate and Security in Africa, *Statement by Mr. Martin Kimani, Permanent Representative of the Republic of Kenya* (12 October 2022), *available at* kenya_statement-_high_level_debate_on_climate_and_security_in_africa_-_october_12_2022.pdf (un.int), p. 3.

multiple obligations to protect the environment, including "work[ing] to achieve and maintain a tree cover of at least ten per cent of the land area of Kenya".[16] In 2023, President Dr. William Ruto directed that the country increases its tree cover to 30% by 2032, launching a 15 billion tree campaign.[17]

1.7 Kenya is deeply proud of its legacy as a home to environmental defenders, including the renowned late environmental activist Professor Wangarĩ Muta Maathai, whose Green Belt Movement inspired the United Nation to plant 11 billion trees. Professor Maathai, the first African woman awarded a Nobel Peace Prize, is a symbol of Kenya's global leadership on issues of land stewardship and environmental justice.[18]

1.8 Kenya presents this Written Statement in furtherance of its leadership in the fight against climate change. This Statement is divided as follows:

- *Chapter 2* provides a general introduction to the questions, interpreting its terms and stressing the importance of customary international law, general principles of law and scientific evidence for addressing them.

- *Chapter 3* summarizes the scientific evidence on the negative effects of climate change in the climate system. It also describes how States that contribute the least to climate change are the most affected by it, and how, notwithstanding Kenya's leadership in combatting climate change, it needs international support to mitigate and adapt to climate change.

[16] The Constitution of the Republic of Kenya (2010) (hereinafter "**Constitution of Kenya**"), *available at* https://kdc.go.ke/wp-content/uploads/2021/12/Constitution-of-Kenya-2010-min.pdf, Art. 69(1)(b).

[17] B. Njeru, "President William Ruto's 13-point agriculture, climate change plan", *The Sunday Standard* (2023), *available at* https://www.standardmedia.co.ke/national/article/2001458604/rutos-13-point-agriculture-climate-change-plan.

[18] K. Ighobor, "Wangari Maathai, the woman of trees, dies", *Africa Renewal Online*, *available at* https://www.un.org/africarenewal/web-features/wangari-maathai-woman-trees-dies.

- *Chapter 4* shows that the Court has jurisdiction to respond the questions posed in the Request, and that there are no compelling reasons to decline such jurisdiction.

- *Chapter 5* addresses question (a). It explains the multiple obligations of States concerning the minimization of anthropogenic GHG emissions in proportion to their responsibilities and capabilities, under custom, general principles and treaties, including the UNFCCC, the Paris Agreement, the United Nations Convention on the Law of the Sea ("**UNCLOS**") and human rights treaties.

- *Chapter 6* addresses question (b). It demonstrates that causing significant harm through GHG emissions, or failure to prevent such harm, entails State responsibility and a duty to phase out fossil fuels, contribute to loss and damage ("**L&D**") funds and forego climate change loans.

- Finally, *Chapter 7* presents Kenya's conclusions.

CHAPTER 2
GENERAL OBSERVATIONS

I. Interpretation of the Questions and applicable law

2.1 On 30 November 2022, the draft resolution "*Request for an advisory opinion of the International Court of Justice on the obligations of States in respect of climate change*" was transmitted to all UN member States by the Core Group of States, comprised by Bangladesh, Costa Rica, Federated States of Micronesia, Morocco, Mozambique, New Zealand, Portugal, Samoa, Sierra Leone, Singapore, Uganda, Vanuatu, and Vietnam. On 29 March 2023, the UNGA adopted by consensus Resolution A/RES/77/276, requesting the Court to provide an Advisory Opinion on "the obligations of States in respect of climate change". The request presents the following two questions:

> 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,
>
> 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?

2.2 Kenya submits that it is important and useful to consider the following general comments before addressing its views on the answers to the questions.

A. INTERPRETATION OF QUESTION (A)

2.3 Question (a) concerns primary rules of international law, which determine the content of international obligations.[19] By requesting the Court's opinion on the "obligations [to] ensure the protection of the climate system", Question (a) focuses on obligations to mitigate the effects of climate change, specifically of anthropogenic GHG emissions.

2.4 This Question and the Request in general seek the Court's guidance regarding States' obligations to ensure the protection "of the climate system" and of "other parts of the environment". Although the Request does not define "climate system", under Article 31(3)(c) of the Vienna Convention on the Law of Treaties ("**VCLT**"), the phrase can be interpreted by reference to Article 1(3) of the UNFCCC. That Article defines the "climate system" as "the totality of the atmosphere, hydrosphere, biosphere and geosphere and their interactions".[20] Therefore, Kenya submits that, under the *pari materia* principle and particularly in light of the reference to the UNFCCC contained in the Question,[21] the Court should adopt the UNFCCC's definition of

[19] *See, e.g.*, ILC, *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (2001) (hereinafter "**ILC, DARSIWA, with commentaries**"), General Commentaries (1-4) (discussing the distinction between primary and secondary obligations).

[20] United Nations Framework Convention on Climate Change (9 May 1992), 1771 UNTS 107 (Dossier No. 4) (hereinafter "**UNFCCC**"), Art. 1(3).

[21] *See, e.g.*, R. Gardiner, TREATY INTERPRETATION (2nd Ed., OUP, 2017), p. 323 ("Courts and tribunals, national and international, appear to have no hesitation over using provisions in treaties other than the one being applied as aids to interpretation where the same, similar, or different term sheds light on the meaning under consideration").

"climate system". The scope of environmental harms that the Court is tasked with considering thus extends beyond national borders and encompasses not just the totality of the Earth's surface areas but also the harms caused to the interlocking climate system.

2.5 Question (a) also asks the Court to set out the obligations of States with respect to "future generations". This entails clarifying the status, scope and implications of the principle of intergenerational equity, as confirmed by the reference in Question (b) to "future generations". The Court is requested to clarify the obligations owed towards such generations and the legal consequences deriving from States' acts and omissions which could adversely affect them. The question also implies the need to rule on the sustainable use of the climate system.

2.6 Finally, the reference to "future generations" requires the Court to look beyond States' obligations *vis-à-vis* other States, and to consider a broader set of obligations, including those owed to present and future individuals. Given the impact of climate change on human rights, Kenya submits that these considerations are key in the present proceeding. In fact, the inclusion of individuals alongside States confirmed by Question (b), which explicitly asks the Court to clarify the legal consequences of significant harm to "[p]eoples" *and* to "individuals". Kenya therefore submits that international human rights law is also a central aspect of Question (a).

B. INTERPRETATION OF QUESTION (B)

2.7 Question (b) requests that the Court clarify the "legal consequences" associated with harm caused to the environment in light of the obligations set out in the answer to Question (a). Thus, Question (b) concerns both primary rules that derive from the obligations established under Question (a), and secondary rules of international law, particularly those codified in the Articles on State Responsibility of the International Law Commission ("**ILC Articles on State Responsibility**"). Moreover, because Question (b) concerns the legal consequences arising from both "acts and omissions", it encompasses failures by States to *prevent* harm to the climate system and other parts of the environment. Implicit in this question is a recognition that a failure to act to curb anthropogenic GHG emissions may amount to a violation of international law.

C. APPLICABLE LAW

2.8 The international legal regime governing climate change lies at the intersection of general principles of international law, international environmental law, the law of the sea, and international human rights law. As such, all relevant rules and principles that exist at the time the Court renders its Opinion should be considered.[22] Although the *chapeau* of the Request indicates that the Court should pay "particular regard" to the enumerated instruments and rules of international law, the Court is not limited to analysing only those instruments and rules. As noted by the International Law Commission ("**ILC**") in its report on "Fragmentation of International Law," a tribunal "must always interpret and apply [an international law] instrument in the context of its relationship to its normative environment".[23]

2.9 This broad approach is particularly important in the context of environmental law and climate change. The rules governing these matters are constantly evolving to reflect scientific consensus and the global community's increasing understanding of the harm to the climate system resulting from anthropogenic GHG emissions. For instance, in *Gabčikovo-Nagymaros*, the Court observed that "owing to *new scientific insights* and to a growing awareness of the risks for mankind […] *new norms have to be taken into consideration*" and "*new standards given proper weight*".[24]

2.10 Indeed, the legal regime surrounding a particular treaty sheds light on it. In *Pulp Mills*, the Court relied on contemporary rules of international environmental law to interpret and apply the

---

[22] *See, e.g.*, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16, at p. 31, para. 53 (observing that treaties must be "interpreted and applied within the framework of the *entire legal system* prevailing *at the time of the interpretation*") (emphasis added). *See also Indus Waters Kishenganga Arbitration (The Islamic Republic of Pakistan* v. *The Republic of India)*, PCA Case No. 2011-01, Partial Award (18 February 2013), paras. 452, 459 ("principles of international environmental law must be taken into account even when […] interpreting treaties concluded before the development of that body of law").

[23] ILC, *Report of the Study Group of the International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UN Doc. A/CN.4/L.682 (2006) (hereinafter "**ILC Fragmentation Report**"), para. 423 (emphasis omitted).

[24] *Gabčikovo-Nagymaros Project (Hungary v. Slovakia), Judgment, I.C.J. Reports 1997*, p. 7 (hereinafter "***Gabčikovo-Nagymaros***"), at p. 78, para. 140 (emphasis added).

1975 Statute of the River Uruguay.[25] The Court has also indicated that the legal system can complement a treaty. In *Certain Activities (Costa Rica v. Nicaragua)*, the Court acknowledged that "the fact that the 1858 Treaty [of Limits between Costa Rica and Nicaragua] may contain limited obligations […] *does not exclude* any other procedural obligations with regard to *transboundary harm which may exist in treaty or customary international law*".[26]

2.11 Although the Court is asked to issue a *legal* Advisory Opinion, the Request necessarily requires that it consider scientific evidence. As demonstrated in Chapter 3 *infra*, the scientific understanding of climate change has evolved. The resulting advances demonstrate both the extent and consequences of climate change, specifically the effects of GHG emissions.[27]

2.12 Thus, science provides crucial factual evidence that helps clarify the content of States' obligations concerning climate change, and the "legal consequences" of their acts and omissions. As noted by the former President of the Court, "the law is not an island unto itself"; its application is "influenced by scientific and technological changes".[28] The Court is able and equipped to assess this evidence and has experience doing so.[29] Therefore, in the following Chapter, Kenya presents

---

[25] *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010*, p. 14 (hereinafter "***Pulp Mills***"), at p. 46, paras. 65-66.

[26] *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*, p. 665 (hereinafter "***Certain Activities Carried Out by Nicaragua and Construction of a Road in Costa Rica***"), at p. 708, para. 108 (emphasis added). According to the ILC, for the integration of customary international law into the interpretation of a particular treaty, it is "immaterial whether or not a tribunal expressly chooses to invoke" Article 31(3)(c) of the VCLT. *See* ILC Fragmentation Report, para. 468.

[27] *See, e.g.*, IPCC, *Summary for Policymakers* (2021) *in Climate Change 2021: The Physical Science Basis—Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, *available at* https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_SPM.pdf (Dossier No. 75), p. 8, para. A.2 (noting that the consequences and scale of human-driven climate change were largely unknown until recently and concluding that "[t]he scale of recent changes across the climate system as a whole – and the present state of many aspects of the climate system – are unprecedented over many centuries to many thousands of years").

[28] UN General Assembly, 73rd Session, 25th and 26th Meeting, *Presiding over More Scientific, Technological Cases, International Court of Justice Ensures Competency through Experts, Its President Tells Sixth Committee*, UN Doc. GA/L/3583 (26 October 2018).

[29] *See ibid*. As outlined in the Statute's Article 50, the Court is permitted to appoint its own experts to fully appreciate the scientific issues raised. *See Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua) and Land Boundary in the Northern Part of Isla Portillos (Costa Rica v. Nicaragua)*, Orders of 31 May

a summary of the scientific evidence demonstrating that anthropogenic GHG emissions have had deleterious effects on the climate system and are threatening human well-being, especially in developing countries like Kenya.

2016 and of 16 June 2016 (the Court appointing its own expert). *See also Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Reparations, Judgment, I.C.J. Reports 2022*, p. 13 (hereinafter "***Armed Activities (Reparations)* (2022)**"), at p. 127, para. 366 (considering the report of the Court-appointed expert to assess environmental damage). The Court has also taken steps to use *experts fantômes* more frequently. *See, e.g.*, G. Gaja, "Assessing Expert Evidence in the ICJ" (2016) *15(3) The Law & Practice International Courts and Tribunals*, *available at* https://doi.org/10.1163/15718034-12341331, pp. 411-412.

CHAPTER 3
ANTHROPOGENIC GHG EMISSIONS ARE AN EXISTENTIAL THREAT TO HUMANKIND

3.1 This Chapter addresses the best available scientific evidence on the effects of climate change on the climate system. Particular attention is given to the authoritative findings of the Intergovernmental Panel on Climate Change ("**IPCC**") and peer-reviewed scientific publications. The IPCC was established through the UN Environment Programme in 1988. It consults extensively with the governments of 195 UN member States and is tasked with assessing climate change science.[30] The IPCC works with the world's most respected scientists in the field, and its reports reflect scientific consensus regarding the causes and effects of climate change. The findings of the IPCC are open to review by experts and governments of all UN Member States.[31]

3.2 The IPCC's reports, including its most recent one, conclude with "high confidence" that anthropogenic GHG emissions are the principal driver of climate change, which has had unprecedented adverse effects on the environment and people globally.[32] The IPCC's authors receive guidance on the language to be used in relation to "confidence levels", ranging from "very low" to "very high".[33] "High confidence" is an assessment standard as to the quality of scientific evidence, and denotes widespread scientific agreement supported by robust research—that is, evidence from multiple, consistent, and independent lines of high-quality research.[34]

---

[30] IPCC, "About the IPCC", *available at* https://www.ipcc.ch/about/ (last accessed: 16 February 2024).

[31] *Ibid.*

[32] IPCC, *Summary for Policymakers* (2014) in *Climate Change 2014: Synthesis Report— Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change*, *available at* https://www.ipcc.ch/site/assets/uploads/2018/02/AR5_SYR_FINAL_SPM.pdf, p. 2 (hereinafter "**IPCC, *Summary for Policymakers* (2014)**") ("Warming of the climate system is unequivocal").

[33] M. Mastrandrea *et al.*, "The IPCC AR5 Guidance Note on Consistent Treatment of Uncertainties: a Common Approach across the Working Groups" (2011) 108 *Climate Change* 675-691, *available at* https://doi.org/10.1007/s10584-011-0178-6, p. 680.

[34] K. J. Mach *et al.*, "Unleashing Expert Judgment in Assessment" (2017) 44 *Global Environmental Change* 1-14, *available at* https://doi.org/10.1016/j.gloenvcha.2017.02.005, p. 4.

3.3 The Chapter then presents the scientific evidence confirming the deleterious effects of climate change on Kenya's natural environment, focusing on its harmful effects to Kenya's biodiverse ecosystems, the livelihoods of its inhabitants, and its cultural heritage.

I. Anthropogenic GHG emissions pose a grave threat to all States and humanity as a whole

3.4 There is a direct, linear relationship between emissions of GHGs and global warming, and between global warming and the destruction of the climate system.[35] Indeed, the IPCC has concluded that "[h]uman 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."[36]

3.5 The highest contributions to anthropogenic GHG emissions result from the burning of fossil fuels—including coal, petroleum, and natural gas—to generate electricity, as well as to power internal combustion engines in transportation.[37] Other significant sources of GHG emissions include industrial processes such as the production of cement and steel, and the burning of waste and biomass for fuel. The IPCC estimates that the burning of fossil fuels and biomass is responsible for 81% to 91% of all anthropogenic carbon dioxide emissions.[38]

---

[35] IPCC, *Summary for Policymakers (2023)* in *Climate Change 2023: Synthesis Report—Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (Dossier No. 78) (hereinafter "**IPCC, *Summary for Policymakers* (2023)**"), *available at* https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_SPM.pdf, pp. 4-5.

[36] IPCC, *Climate Change 2023: Synthesis Report—Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate* (2023) (hereinafter "**IPCC, *Climate Change 2023: Synthesis Report***"), *available at* https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_FullVolume.pdf, p. 4, paras. A.1, A.1.3 (also noting that "[o]bserved increases in well-mixed GHG concentrations since around 1750 are unequivocally caused by GHG emissions from human activities over this period").

[37] J. G. Canadell *et al*., "Global Carbon and Other Biogeochemical Cycles and Feedbacks" (2021) *in Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, *available at* https://www.ipcc.ch/report/ar6/wg1/chapter/chapter-5/, pp. 676, 687.

[38] *Id.*, p. 676.

3.6 Specifically, burning fossil fuels releases carbon dioxide into the atmosphere, which disrupts the balance of incoming and outgoing radiation that determines the Earth's temperature.[39] The vast majority of anthropogenic GHG emissions have been produced in the industrial era that began in the 19th century, and which remains the dominant global model for production to this day. As the IPCC has noted, "[i]t is unequivocal that human influence has warmed the atmosphere, ocean and land",[40] with most GHG emissions resulting from human activity produced in recent decades.[41] Industrial processes, including the generation of energy or heat, the production of goods and services, and transportation, all consume fossil fuels and, in so doing, contribute to GHG emissions.[42]

3.7 In addition to this impact on the atmosphere, global warming caused by GHG emissions damages the "physical and chemical characteristics of the ocean[s]"[43] and the hydrosphere, which also encompasses water bodies like rivers and lakes, and the global precipitation cycle. For instance, warmer air holds more water vapor, increasing the severity of droughts, but also leading to higher rainstorms and extreme flooding in coastal communities, including those of Kenya.[44]

---

[39] D. Fahey *et al.* "Physical Drivers of Climate Change" (2017) *in Climate Science Special Report: Fourth National Climate Assessment, U.S. Global Change Research Program*, *available at* https://science2017.globalchange.gov/downloads/CSSR_Ch2_Physical_Drivers.pdf, p. 74.

[40] IPCC, *Summary for Policymakers* (2023), p. 5.

[41] J. G. Canadell *et al*., "Global Carbon and Other Biogeochemical Cycles and Feedbacks" (2021) *in Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, *available at* https://www.ipcc.ch/report/ar6/wg1/chapter/chapter-5/, p. 676.

[42] *Id*., p. 687. *See also* H. Ritchie *et al.*, "Emissions by sector: where do greenhouse gases come from," *Our World in Data* (2020, updated 2024), *available at* https://ourworldindata.org/emissions-by-sector.

[43] IPCC, *Climate Change 2022: Impacts, Adaptation and Vulnerability—Working Group II Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (2022), *available at* https://report.ipcc.ch/ar6/wg2/IPCC_AR6_WGII_FullReport.pdf, p. 381.

[44] H. Douville *et al.*, "Water Cycle Changes" (2021) *in Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change available at* https://www.ipcc.ch/report/ar6/wg1/chapter/chapter-8/, pp. 1079-1092, 1155. S*ee also* Nairobi Declaration, para. 12.

3.8 The impact of global warming in the oceans is of particular significance.[45] The oceans cover more than 70% of the Earth and are a key source of survival for humankind.[46] They also play a critical role in moderating climate change by serving as "carbon sinks" that absorb approximately 30% of carbon dioxide emissions, mitigating excess heat.[47] Climate change disrupts oceanic circulation patterns and undermines the ability of the oceans to provide this crucial moderating effect.[48]

3.9 Global warming also affects the oceans through changes to currents and ocean waves.[49] Increasing heat storage in the oceans also leads to thermal expansion and drives ice sheet melting. Ice sheet melt and thermal expansion are both key causes of sea-level rise, which disrupts the marine environment through fish stock migration and coral bleaching.[50] This also leads to ocean acidification, which affects key components of the global food chain[51] and decreases dissolved

[45] *See, e.g.*, Nairobi Declaration, para. 17.

[46] IPCC, *Special Report of the Intergovernmental Panel on Climate Change: The Ocean and Cryosphere in a Changing Climate* (2019) (Dossier No. 74), *available at* https://www.ipcc.ch/srocc/download/#pub-full, p. 5 *et seq*.

[47] R. Schubert *et al.*, "The Future Oceans – Warming Up, Rising High, Turning Sour", *German Advisory Council on Global Change (WBGU)* (January 2006), *available at* https://www.eldis.org/document/A23384, pp. 3, 5. *See also* N. Gruber *et al.*, "The Oceanic Sink for Anthropogenic CO2 from 1994 to 2007" (2019) 363 *Science* 1193-1199; United Nations Environment Programme, *Blue Carbon: The Role of Healthy Oceans in Binding Carbon, a Rapid Response Assessment* (2009), *available at* https://ccom.unh.edu/sites/default/files/publications/Nellemann_2010_BlueCarbon_book.pdf, pp. 6-7, 27; D. Freestone, "Climate Change and the Oceans" (2009) 3(4) *Carbon and Climate Law Review*, *available at* http://www.jstor.org/stable/24323659, p. 383. However, the carbon sunk in the ocean also leads to acidification.

[48] J. D. Müller *et al.*, "Decadal Trends in the Oceanic Storage of Anthropogenic Carbon From 1994 to 2014" (2023) *4 AGU Advances*, *available at* https://agupubs.onlinelibrary.wiley.com/doi/10.1029/2023AV000875, pp. 1, 3.

[49] United Nations, *The Impacts of Climate Change and Related Changes in the Atmosphere on the Oceans: a Technical Abstract of the First Global Integrated Marine Assessment* (2017), *available at* https://www.uncclearn.org/wp-content/uploads/library/technical_abstract_on_the_impacts_of_climate_change_and_related_changes_in_the_atmosphere_on_the_ocean.pdf, p. 3.

[50] *See, e.g*., C. Redgwell, "UNCLOS and Climate Change" (2012) 106 *Proceedings of the Annual Meeting (American Society of International Law)*, *available at* doi:10.5305/procannmeetasil.106.0406, pp. 406 ("on the global scale, climate change is expected to lead to changes in the distribution of species, including invasive species but also migratory species (with consequences for fisheries management and marine protected areas), and to relationships between predator and prey. Loss of Arctic sea ice threatens biodiversity across an entire biome, with the related pressure of ocean acidification resulting from higher concentrations of carbon dioxide in the atmosphere.").

[51] United Nations, *The Impacts of Climate Change and Related Changes in the Atmosphere on the Oceans: a Technical Abstract of the First Global Integrated Marine Assessment* (2017), *available at* https://www.uncclearn.org/wp-

oxygen in the ocean, forcing species to migrate to surface levels where they are more prone to dangers like overfishing.[52] The IPCC concluded with "high confidence" that the level of ocean acidification is "unprecedented for at least the last 65 million years" because the "ocean has absorbed about 30% of the anthropogenic carbon dioxide".[53] Warming of the oceans also increases stratification, which reduces nutrients in the upper surface layers of the water,[54] leading to direct and fatal consequences for the climate system and humankind.

3.10 The geosphere, comprised, *inter alia*, of terrestrial systems that make up the Earth's surface and interior, is impacted by climate change as well. By exacerbating global warming, GHG emissions have led to "desertification and exacerbated land degradation, particularly in low lying coastal areas, river deltas, drylands and in permafrost areas".[55] Also, the IPCC has concluded with "high confidence" that sea-level rise, caused by ocean warming, has eroded and salinized the Earth.

3.11 The biosphere, *i.e.*, life on Earth, is also at the mercy of global warming. GHG emissions and their consequences have substantially altered the Earth's ecosystems and created irreversible losses in terrestrial, freshwater, cryospheric, coastal and open ocean ecosystems.[56] Water quality is endangered by increasing temperatures and changing water levels, which introduce hazards including micro-organisms and unsafe chemicals in the drinking water that supports human, animal, and plant life.[57] Global warming threatens biodiversity in ecosystems from warm-water

---

content/uploads/library/technical_abstract_on_the_impacts_of_climate_change_and_related_changes_in_the_atmosphere_on_the_ocean.pdf, paras. 14, 23.

[52] *See, e.g.*, IPCC, *Climate Change 2023: Synthesis Report*, pp. 46, 50, 73 (Figure C2).

[53] IPCC, *Special Report: Global Warming of 1.5*ºC (2018) (Dossier No. 72), *available at* https://www.ipcc.ch/sr15/, p. 178.

[54] United Nations, *The Impacts of Climate Change and Related Changes in the Atmosphere on the Oceans: A Technical Abstract of the First Global Integrated Marine Assessment* (2017), *available at* https://www.uncclearn.org/wpcontent/uploads/library/technical_abstract_on_the_impacts_of_climate_change_and_related_changes_in_the_atmosphere_on_the_ocean.pdf, para. 16.

[55] IPCC, *Climate Change 2023: Synthesis Report*, p. 46.

[56] *Ibid.*

[57] UN Human Rights Council, *Report of the Independent Expert on the Issue of Human Rights Obligations related to Access to Safe Drinking Water and Sanitation, Catarina de Albuquerque*, UN Doc. A/HRC/15/31/Add.1 (1 July 2010), pp. 3, 16; M. A. Caretta *et al.*, "Water" (2022) *in Climate Change 2022: Impacts, Adaptation and Vulnerability.*

coral reefs to icy Arctic regions.[58] The consequences for human life on Earth are grave: a 2021 study found that 37% of human deaths related to heat exposure between 1991 and 2018 were attributable to human-driven climate change,[59] and approximately 3.3 to 3.6 billion people are highly vulnerable to climate change.[60]

3.12 The scientific evidence thus establishes that GHG emissions are significantly altering every component of the climate system in ways that make it dangerous to all living species, including human life. Scientists have warned the public of the impacts of rising global temperatures for decades.[61] However, GHG emissions are warming and destroying the existing climate system at an accelerating rate. The following table shows that since the 1880s, the global average temperature has increased by approximately 1°C, with a steep increase marking the turn of the present century.

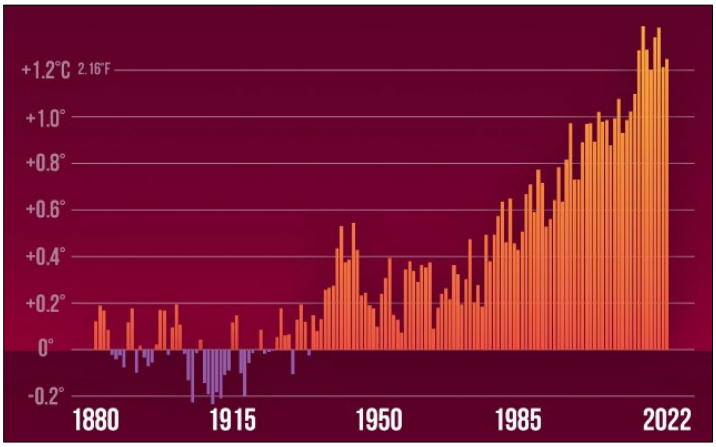
Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, *available at* https://www.ipcc.ch/report/ar6/wg2/chapter/chapter-4/, pp. 586-587.

[58] IPCC, *Climate Change 2023: Synthesis Report*, pp. 76-77, 98.

[59] A. M. Vicedo-Cabrera *et al.*, "The burden of heat-related mortality attributable to recent human-induced climate change" (2021) 11 *Nature Climate Change* 492-500, *available at* https://doi.org/10.1038/s41558-021-01058-x, Abstract.

[60] IPCC, *Summary for Policymakers* (2023), para. A.2.2. *See also* IACtHR, Advisory Opinion on Climate Emergency and Human Rights*, Amicus Curiae from UN Special Rapporteurs on Toxics and Human Rights, Human Rights and the Environment, and the Right to Development* (23 November 2023) (hereinafter "**Amicus Curiae from UN Special Rapporteurs to IACtHR**"), para. 25.

[61] IPCC, *Summary for Policymakers* (2014), p. 2.



Source: World Bank, *Climate Change Knowledge Portal*

3.13 From 1850 to 1980—that is, in the span of 130 years—global temperature rose by only 0.4ºC. In contrast, during a period of less than one third of that time, between 1980 and 2020, the global temperature almost doubled, increasing by 0.8 ºC.[62] Indeed, 42% of all GHGs released since 1850 were emitted in the period between 1990 and 2019.[63] Global annual emissions of carbon dioxide have resulted in rising atmospheric concentrations of carbon dioxide that have reached their highest recorded levels in human history.[64]

3.14 We have not yet experienced the full consequences of present GHG emissions, which will only be felt in the decades and centuries to come.[65] Even if GHG emissions are halted immediately, some of their impacts on the climate system will continue to grow more severe in the coming years. The IPCC observes that it is virtually certain that sea levels will continue to rise throughout this century, leading to more severe and more frequent extreme weather events that threaten coastal

[62] R. Lindsey & L. Dahlman, "Climate Change: Global Temperature", *Climate.gov* (18 January 2023), *available at* https://www.climate.gov/news-features/understanding-climate/climate-change-global-temperature.

[63] IPCC, *Summary for Policymakers* (2023), p. 4, para. A.1.3.

[64] J. G. Canadell *et al*., "Global Carbon and Other Biogeochemical Cycles and Feedbacks" (2021) *in Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, *available at* https://www.ipcc.ch/report/ar6/wg1/chapter/chapter-5/, p. 676.

[65] K. Zickfeld & T. Herrington, "The time lag between a carbon dioxide emission and maximum warming increases with the size of the emission" (2015) 10(3) *Environ. Res. Lett.*, *available at* doi 10.1088/1748-9326/10/3/031001, p. 2.

ecosystems, communities, and infrastructure.[66] This trend of rising sea levels will continue after the present century with elevated sea levels persisting for millennia.[67] According to scientific projections, "twenty-first century global average warming will substantially exceed the Last Glacial Maximum".[68]

3.15 The IPCC has adopted the concept of a "carbon budget" to estimate the carbon dioxide emissions that remain available before a certain threshold of catastrophic or irreversible harm to the global climate system is caused by climate change.[69] The IPCC's examination of the scientific consensus concludes that the Earth is close to exhausting its remaining carbon budget of 400 billion tons of carbon dioxide.[70]

3.16 The IPCC has also concluded that if global temperatures rise above 1.5°C above pre-industrial levels, the risk of catastrophic effects of climate change moves from "moderate" to "high",[71] and the severity of such effects becomes even more pronounced at 2°C above pre-industrial levels. Indeed, a 2ºC warming risks activating feedback loops that increase the likelihood of an irreversible cascade effect, resulting in a "Hothouse Earth," which places the very habitability of Earth at stake.[72] Kenya finds highly persuasive the IPCC's conclusion that it is imperative to achieve "net zero GHG emissions",[73] which requires both a drastic and rapid reduction of

[66] IPCC, *Climate Change 2023: Synthesis Report*, p. 77.

[67] B. Fox-Kempter, "Ocean, Cryosphere and Sea Level Change" (2021) *in Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, *available at* https://www.ipcc.ch/report/ar6/wg1/chapter/chapter-9/, pp. 1217, 1313.

[68] The World Bank Group, Climate Knowledge Portal "What is Climate Change?", *available at* https://climateknowledgeportal.worldbank.org/overview (last accessed: 8 March 2024).

[69] IPCC, *Climate Change 2023: Synthesis Report*, pp. 82-85. *See also* IPCC, *Summary for Policymakers* (2023), pp. 19-20.

[70] IPCC, *Climate Change 2023: Synthesis Report*, p. 82.

[71] IPCC, *Summary for Policymakers* (2023), p. 15.

[72] W. Steffen *et al.*, "Trajectories of the earth system in the Anthropocene" (2018) 33 *Proceedings of the National Academy of Sciences* 8252-8259, *available at* https://doi.org/10.1073/pnas.1810141115, p. 8254.

[73] IPCC, *Summary for Policymakers* (2023), pp. 19-20.

emissions, as well as carbon dioxide removal ("**CDR**") from the atmosphere, to prevent the global carbon budget from being exhausted.

3.17 If net zero emissions cannot be achieved, the resulting climate change will cause irreparable harm to the global climate system and bring catastrophic adverse impacts to all States. Weather events and associated natural disasters will become more extreme and unpredictable. This is beyond the ongoing climate crisis. The IPCC concludes with "high confidence" that "hundreds of local losses of species have been driven by increases in the magnitude of heat extremes".[74] Vulnerable ecosystems—including coral reefs, rainforests, and Arctic permafrost—are at risk of crossing tipping points into irreversible collapse.

II. Developing States bear the brunt of the effects of climate change

3.18 The consequences of climate change are disproportionate. A small group of developed countries in the global North emits the largest share of GHGs,[75] and countries that contribute the least to GHG emissions suffer the most from their effects. The IPCC concluded in its most recent report that GHG emissions have had "widespread adverse impacts and [caused] related losses and damages to nature and people", affecting most drastically and disproportionately vulnerable States that have historically contributed the least to current climate change,[76] including Kenya.

3.19 As further developed in Chapter 5.V.A-C *infra*, adverse climate impacts have also disproportionately affected communities working in climate-exposed sectors such as agriculture, forestry, fisheries, and energy, and have destroyed the livelihoods and health of individuals, with adverse effects on gender and social equity.[77] Kenya also draws attention to the plight of SIDS.

---

[74] *Id.*, p. 5, para. A.2.3.

[75] S. Dhakal *et al.*, "Emissions Trends and Drivers" (2022) *in Climate Change 2022: Mitigation of Climate Change. Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, *available at* https://www.ipcc.ch/report/ar6/wg3/downloads/report/IPCC_AR6_WGIII_Chapter02.pdf, p. 218.

[76] IPCC, *Summary for Policymakers* (2023), paras. A.1, A.2, A.2.6.

[77] *Id.*, para. A.2.6.

By mid-century, unavoidable sea-level rise through the collapse of polar ice caps may put SIDS at risk of becoming largely inundated and uninhabitable, with severe risks for coastal ecosystems, people and infrastructure. [78] By the end of the century, these same States may be fully submerged. For some States, the effects of unmitigated climate change are thus nothing short of apocalyptic.[79]

3.20 Such vulnerability threatens the long-term political stability of States, with disproportionate adverse effects for those in Africa, Asia, and Central and South America. The IPCC has highlighted the particular vulnerability of Least Developed Countries ("**LDCs**"), SIDS, and the Arctic, and predicted that global effects will be felt most acutely by indigenous peoples, small-scale food producers, and low-income households.[80] The vulnerability of developing States is not merely geographical; it is a reflection of their relative lack of resources, infrastructure, and technical capacity required to adopt effective mitigation or preventive measures.

III. Kenya has been gravely impacted by climate change

3.21 GHG emissions from emitting States, particularly those in the Global North, have distorted Kenya's climate with devastating consequences.[81] Kenya's GHG emissions were effectively nil

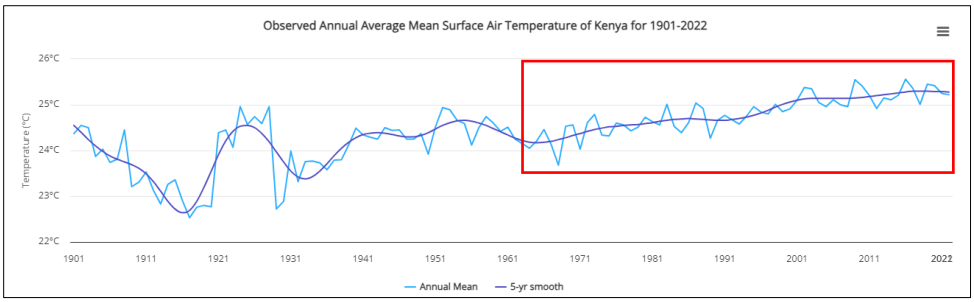
[78] C. Storlazzi *et al.*, "Most atolls will be uninhabitable by the mid-21st century because of sea-level rise exacerbating wave-driven flooding" (2018) 4(4) *Science Advances*, *available at* DOI: 10.1126/sciadv.aap9741; M. Mycoo *et al.*, "Small Islands" (2022) *in Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, *available at* https://www.ipcc.ch/report/ar6/wg2/chapter/chapter-15/, p. 2099. *See also* CCAC, *SIDS and SLCPs: The disproportionate climate risk faced by Small Island Developing States* (10 April 2023), *available at* https://www.ccacoalition.org/news/sids-and-slcps-disproportionate-climate-risk-faced-small-island-developing-states.

[79] *See further* M. Mycoo *et al.*, "Small Islands" (2022) *in Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, *available at* https://www.ipcc.ch/report/ar6/wg2/chapter/chapter-15/, pp. 2045-2063.

[80] IPCC, *Climate Change 2023: Synthesis Report*, pp. 48-50. *See also* IPCC, *Summary for Policymakers* (2023), pp. 5-6, 26; IPCC, *Climate Change 2022: Impacts, Adaptation and Vulnerability—Working Group II Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (2022), *available at* https://report.ipcc.ch/ar6/wg2/IPCC_AR6_WGII_FullReport.pdf, pp. 1185, 2045-2047.

[81] Recent studies confirm the transboundary harms caused by climate change in Kenya, specifically. *See, e.g.*, A. Anisimov & A.K. Magnan, "The Global Transboundary Climate Risk Report, 2023" (2003) *The Institute for Sustainable Development and International Relations & Adaptation Without Borders*, *available at* https://www.iddri.org/en/publications-and-events/report/global-transboundary-climate-risk-report-2023; S. Talebian

before 1950 and, at present, it has contributed less than 0.1% of historic GHG emissions.[82] However, Kenya is experiencing global warming's full effects. Its temperature has increased by more than 1°C, as the red frame of the Table below illustrates.[83]



Source: World Bank, *Climate Change Knowledge Portal*, *Kenya*[84]

3.22 Current data show that Kenya's surface temperature is expected to increase 1 to 1.5°C by 2030–a dramatic temperature rise in less than 6 years.[85]

3.23 Like the rest of the African continent, Kenya is among the most vulnerable countries to climate change.[86] Droughts and floods are increasing in frequency, duration and intensity, causing

---

et al., "Assessing Future Cross-border Impacts Using Shared socioeconomic pathways" (2021) 32 *Climate Risk Management Davis*, *available at* https://doi.org/10.1016/j.crm.2021.100311.

[82] Ministry of Environment and Forestry of the Republic of Kenya, *Updated Nationally Determined Contribution* (2020), *available at* https://faolex.fao.org/docs/pdf/KEN210108.pdf (hereinafter "**Kenya's Updated Nationally Determined Contribution**"), p. 1. *See also* Our World in Data, "Kenya: What share of global CO2 emissions are emitted by the country?" (2023), *available at* https://ourworldindata.org/co2/country/kenya.

[83] Over 70% of natural disasters in Kenya are attributable to extreme climatic events—principally to droughts, which destroy crops and livestock, ignite forest fires, damage fisheries, and compromise water and hydropower generation, and floods, which generate land degradation and soil erosion that impacts agricultural lands and infrastructure, and causes human casualties. Also, heavy rains, soil erosion and sea level rise are grave threats to Kenyan biodiversity, water resources and population. Climate Risk Country Profile: Kenya (2021), pp. 10-11. *See also* Republic of Kenya, *Second National Communication to the United National Framework Convention on Climate Change* (2015), *available at* https://unfccc.int/sites/default/files/resource/Kennc2.pdf; Republic of Kenya, *Kenya National Adaptation Plan 2015–2030* (July 2016), *available at* https://www4.unfccc.int/sites/NAPC/Documents%20NAP/Kenya_NAP_Final.pdf, Chapter 3.

[84] Climate Risk Country Profile: Kenya (2021), p. 6.

[85] Kenya's Updated Nationally Determined Contribution, p. 3.

[86] *See, e.g.*, Climate Risk Country Profile: Kenya (2021), p. 3; Kenya's Updated Nationally Determined Contribution, p. 2. *See also* Ministry of Environment and Forestry (Government of Kenya) & UNDP-Kenya, *Scoping Report on Rising Water Levels in Kenya's Rift Valley Lakes, Turkwel Gorge Dam and Lake Victoria* (2021), *available at*

severe damage to Kenya's economy and its people's livelihoods, creating humanitarian crises and retarding its development:

- The 2011 drought in East Africa caused US$11 billion in damage in Kenya, with 3.4 million Kenyans rendered food insecure and 500,000 deprived of access to water.[87] The destruction brought by the drought led to the involuntary mass displacement of hundreds of thousands of people, severely straining resources for Kenya and its East African neighbours. Scientific evidence links that drought to human-induced climate change.[88]

- Catastrophic flooding in 2018 displaced 230,000 people in Kenya, including 150,000 children, and caused untold damage in the form of inundated farmlands, drowned livestock and closure of over 700 schools.[89]

- Human-induced climate change increased drought severity in the Horn of Africa in October-December 2022, causing harvest failures, poor pasture conditions, livestock losses, decreases surface water availability, 4.35 million people in need of humanitarian assistance, and at least 180,000 refugees crossing into Kenya and Ethiopia.[90] With

https://tinyurl.com/mrh3wtmr, p. 2 (establishing the causes and socio-economic impacts of rising water levels of Lake Victoria and the Rift Valley Lakes in Kenya and noting that "the rising lake water levels and accompanying flooding had stirred panic and anxiety among the surrounding communities where the floodwaters have left trails of destruction and rendering hundreds of families' homeless. There has been consequential loss of crops, farmland and pasture. The wildlife was not spared either as the loss of grazing land drove them to higher grounds where displaced families had also sought refuge and hence leading to human-wildlife conflict").

[87] Kenya's Updated Nationally Determined Contribution, p. 3.

[88] *See* F.C. Lott, "Can the 2011 East African drought be attributed to human-induced climate change?" (2013) 40(6) *Geophysical Research Letters*, *available at* https://doi.org/10.1002/grl.50235, pp. 1177-1178, 1180.

[89] Kenya's Updated Nationally Determined Contribution, p. 3.

[90] World Weather Attribution, "Human-induced climate change increased drought severity in Horn of Africa Human-induced climate change increased drought severity in Horn of Africa" (2023), *available at* https://www.worldweatherattribution.org/human-induced-climate-change-increased-drought-severity-in-southern-horn-of-africa/.

continued warming, the Horn of Africa region will likely experience more drying, leading to further detrimental effects.[91]

- Unexpected floods in October-December 2023 hit already vulnerable communities, destroying thousands of homes in at least 33 of Kenya's 47 counties, killing more than 70 people, and displacing over a million people in Kenya and Somalia alone.[92]

3.24 Climate change will continue to threaten Kenya. *First*, Kenya's agricultural sector provides nearly 80% of the country's jobs and supports over 80% of its rural population.[93] Agriculture and livestock are highly vulnerable to seasonal rains,[94] which are directly impacted by human-driven climate change. Also, global warming "will likely alter the mix and distribution of agriculture and livestock pests", and "the increased incidence of droughts, coupled with reduced rainfall projections for the arid and semi-arid regions, is expected to reduce yields in key crops" in Kenya.[95] Indeed, research concludes that climate change "is expected to increase the risk and intensity of flood events […] while also furthering drought likelihoods for some areas across Kenya".[96]

---

[91] *See, e.g.*, A. J. Baxter *et al.*, "Reversed Holocene temperature–moisture relationship in the Horn of Africa" (2023) 620 *Nature* 336, *available at* https://doi.org/10.1038/s41586-023-06272-5, Abstract (noting that "[i]n the Horn of Africa, more frequent drought conditions in recent decades contrast with climate models projecting precipitation to increase with rising temperature.").

[92] World Weather Attribution, "Compounding natural hazards and high vulnerability led to severe impacts from Horn of Africa flooding exacerbated by climate change and Indian Ocean Dipole" (7 December 2023), *available at* https://www.worldweatherattribution.org/climate-change-indian-ocean-dipole-compounding-natural-hazards-and-high-vulnerability-increased-severity-of-flooding-in-the-horn-of-africa/; "From drought to deluge: Kenyan villagers reel from floods", *Al Jazeera* (23 November 2023)*, available at* https://www.aljazeera.com/gallery/2023/11/23/from-drought-to-deluge-kenyan-villagers-reel-from-floods.

[93] Climate Risk Country Profile: Kenya (2021), p. 14.

[94] *Id.*, p. 15.

[95] *Ibid*.

[96] *Id.*, p. 11. *See also* IPCC, *Climate Change 2022: Impacts, Adaptation and Vulnerability—Working Group II Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (2022), *available at* https://report.ipcc.ch/ar6/wg2/IPCC_AR6_WGII_FullReport.pdf, pp. 1320-1329.

3.25 *Second*, water resources, which are critical to human survival, are already scarce in Kenya. Available water resources in Kenya have been below the accepted international threshold of 1,000 m^3 per capita since 1992. [97] However, due to climate change and global warming, water resources in the country are expected to fall from approximately 586 m^3 per capita in 2010, to *293 m^3 by 2050*.[98] East Africa will experience increased hydrological variability, with more intense floods and droughts. This exacerbates the fact that many already lack access to basic water supply and sanitation infrastructure.[99] In Kenya's urban settings there is an association between food and water insecurity that is mutually reinforcing and associated with social unrest. GHG emissions in the global North cause variable rainfall, salinization and general contamination of freshwater aquifers, all of which exacerbates and compromises the availability of water in Kenya.[100]

3.26 *Third*, sea-level rise is an acute risk for Kenya. The most vulnerable areas of the country to sea-level rise and flooding are "key tourism areas, cities, ports and infrastructure".[101] For instance, the city of Mombasa, Kenya's second largest city and a regional touristic and economic hub, will be 17% submerged with a sea-level rise of only 0.3 meters, "with a larger area rendered uninhabitable or unusable for agriculture because of water logging and salt stress".[102]

---

[97] Climate Risk Country Profile: Kenya (2021), p. 16; J. Liu *et al.*, "Water scarcity assessments in the past, present, and future" (2017) 5(6) *Earth's Future, available at* https://doi.org/10.1002/2016EF000518, p. 547.

[98] Climate Risk Country Profile: Kenya (2021), p. 16 (emphasis added).

[99] B. Fox-Kempter, "Ocean, Cryosphere and Sea Level Change" (2021) *in Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate* Change, *available at* https://www.ipcc.ch/report/ar6/wg1/chapter/chapter-9, pp. 1346-1347.

[100] Republic of Kenya, *National Climate Change Action Plan*, 2013–2017 (2013), *available at* https://cdkn.org/wp-content/uploads/2013/03/Kenya-National-Climate-Change-Action-Plan.pdf, pp. 33-34, 39, 49-50; Climate Risk Country Profile: Kenya (2021), pp. 16-17.

[101] Climate Risk Country Profile: Kenya (2021), p. 18. *See also* Republic of Kenya, *Second National Communication to the United National Framework Convention on Climate Change* (2015), *available at* https://unfccc.int/sites/default/files/resource/Kennc2.pdf.

[102] C.B. Auwor *et al*., "Climate change and coastal cities: the case of Mombasa, Kenya" (2008) 20(1) *International Institute for Environment and Development*, *available at* https://journals.sagepub.com/doi/10.1177/0956247808089158, p. 231.

3.27 The effects of rising sea levels go far beyond the cities that they risk inundating. More than 822 km^2 of coastal heritage is exposed to harms caused by rising sea level.[103] Also, physical damage to port cities and tourist destinations like Mombasa threatens to destabilize the economy across Kenya. And, in addition to the risks of submersion and associated destruction of crops and livestock, which sustains Kenya's economy, sea-level rise erodes soil and contaminates water resources, which compounds water scarcity in Kenya and the threat to human health that it poses.[104]

3.28 Relatedly, Kenya is also home to several of the most notable glaciers on the African continent, which are under severe threat from climate change-induced heat increases and are on course to vanish within decades. The Lewis Glacier on Mount Kenya lost approximately 90% of its volume in the period from 1934 to 2010 and will be deglaciated by the 2030s, becoming the first entire mountain range to lose glaciers due to anthropogenic climate change.[105] As glaciers shrink, they become even more prone to accelerated melting.[106] Other glaciers on the Rwenzori Mountains and Mount Kilimanjaro, which are situated just across the border in Tanzania and are tightly connected to Kenya's water systems, are also seeing substantial reductions in size.[107]

---

[103] M. I. Vousdoukas *et al.*, "African heritage sites threatened as sea-level rise accelerates" (2022) 12(3) *Nature Climate Change* 256, *available at* https://doi.org/10.1038/s41558-022-01280-1, p. 258.

[104] *See, e.g.*, Climate Risk Country Profile: Kenya (2021), pp. 18-19.

[105] World Meteorological Organization, *State of Climate Change in Africa 2020* (2021), *available at* https://library.wmo.int/records/item/57682-state-of-the-climate-in-africa-2020, p. 9; R. Prinz *et al.*, "Seventy-six years of mean mass balance rates derived from recent and re-evaluated ice volume measurements on tropical Lewis Glacier, Mount Kenya" (2011) 38(20) *Geophysical Research Letters*, *available at* https://doi.org/10.1029/2011GL049208, Abstract, p. 3.

[106] R. Prinz *et al.*, "Mapping the Loss of Mt. Kenya's Glaciers: An Example of the Challenges of Satellite Monitoring of Very Small Glaciers" (2018) 8(5) *Geosciences*, *available at* 10.3390/geosciences8050174, p. 10.

[107] *See* World Meteorological Organization, *State of Climate Change in Africa 2020* (2021), *available at* https://library.wmo.int/records/item/57682-state-of-the-climate-in-africa-2020, p. 9; R. Taylor *et al.*, "Recent glacial recession in the Rwenzori Mountains of East Africa due to rising air temperature" (2006) 33 *Geophysical Research Letters*, *available at* https://agupubs.onlinelibrary.wiley.com/doi/epdf/10.1029/2006GL025962. *See also* N.J. Cullen *et al.*, "A century of ice retreat on Kilimanjaro: the mapping reloaded" (2013) 7 *The Cryosphere* 419-431, *available at* https://tc.copernicus.org/articles/7/419/2013/tc-7-419-2013.pdf; S. Wang & L. Zhou, "Integrated impacts of climate change on glacier tourism" (2019) 10(2) *Advances in Climate Change Research*, *available at* https://doi.org/10.1016/j.accre.2019.06.006; R. Ranasinghe *et al.*, "Climate Change Information for Regional Impact and for Risk Assessment" (2021) *in Climate Change 2021: The Physical Science Basis. Contribution of Working*

3.29 *Fourth*, Kenya's energy system is critically endangered by climate change. Warming temperatures increase not only the demand for air conditioning and cooling systems, but also the intensity and frequency of extreme weather events, including floods and heavy rains, which damage energy infrastructure.[108] Likewise, sea-level rise and storms compromise hydropower and other energy infrastructure in coastal areas.[109]

3.30 Kenya's energy is also at risk due to the melting of glaciers, as previously mentioned. Approximately 60% of Kenya's hydropower relies on stable river flow supplied by its glaciers. [110] Thus, their melting severely impairs the operation of Kenya's hydropower plants, and the well-being, security, and health of its population. Future levels of rainfall, evaporation and runoff will have a substantial impact on hydropower and irrigation production.[111] Heavy rainfall events and drought cause major disruption to businesses in cities and rural areas alike because of hydroelectric load shedding, water supply disruption and flooding.[112]

3.31 Each year, climate change claims 3-5% of Kenya's GDP[113] and the lives of thousands of Kenyans.[114] Unless urgent global action is taken, Kenya will continue to face increasingly severe

---

Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, *available at* https://www.ipcc.ch/report/ar6/wg1/chapter/chapter-12/, p. 1795.

[108] Ministry of Foreign Affairs of The Republic of Kenya, "Climate Change Profile, Kenya" (2018), *available at* https://reliefweb.int/sites/reliefweb.int/files/resources/Kenya_2.pdf, p. 4.

[109] IEA, "Climate impacts on African hydropower" (June 2020), *available at* https://www.iea.org/reports/climate-impacts-on-african-hydropower, pp. 2, 24-26.

[110] Kenya's Updated Nationally Determined Contribution, p. 3.

[111] Climate Risk Country Profile: Kenya (2021), pp. 10, 17; K.E. Gannon *et al.*, "Business experience of floods and drought-related water and electricity supply disruption in three cities in sub-Saharan Africa during the 2015/2016 El Niño" (2018) 1 *Global Sustainability* 1–15, *available at* https://doi.org/10.1017/sus.2018.14, pp. 10-12.

[112] K. E. Gannon *et al.*, "Business experience of floods and drought-related water and electricity supply disruption in three cities in sub-Saharan Africa during the 2015/2016 El Niño" (2018) 1 *Global Sustainability* 1–15, *available at* https://doi.org/10.1017/sus.2018.14, pp. 10-12.

[113] Kenya's Updated Nationally Determined Contribution, p. 1.

[114] *See* A. Kofi Amegah *et al.*, "Temperature-related morbidity and mortality in Sub-Saharan Africa: A systematic review of the empirical evidence" (2016) 91 *Environmental International*, *available at* 10.1016/j.envint.2016.02.027, pp. 133-149.

harms as a consequence of other States' behaviour. As noted by the World Bank, temperatures in Kenya "are projected to continue rising by 1.7°C by the 2050s *and by approximately 3.5°C at the end of the century.*"[115] Notwithstanding the gravity of this crisis, Kenya remains resilient and ready to meet this challenge head-on, with the support of coordinated global action.

IV. Kenya needs international support to meet its ambitious and urgent climate change goals

3.32 Preservation and respect for the climate system is a bedrock of Kenya's environmental policies. Its Constitution, approved by referendum and in force since 27 August 2010, is innovative in that it provides a legal foundation for the domestic implementation of climate change actions through various provisions in its Bill of Rights.[116] It establishes respect for the environment as a guiding principle for the State.[117] The Constitution also codifies the country's determination to sustain the environment "for the benefit of future generations".[118] Notably, Kenya has established in its international investment treaties provisions to protect the environment. For instance, it has excluded all concessions on natural resources from treaty protection.[119] It has also excluded the application of rules on expropriation to bona fide regulatory measures that aim to protect the environment,[120] and has recognized that encouragement, establishment, acquisition, or expansion of foreign investment does not require the relaxation, waiver or derogation of measures aimed at protecting the environment.[121]

---

[115] Climate Risk Country Profile: Kenya (2021), p. 9 (emphasis added).

[116] Constitution of Kenya, Chapter 4.

[117] *Id.*, Preamble.

[118] *Ibid*.

[119] *See, e.g.*, Agreement between the Government of the Republic of Kenya and the Government of the United Arab Emirates on the Promotion and Protection of Investments (23 November 2014), Art. 1(1)(a)(v).

[120] *See, e.g.*, Investment Agreement for the COMESA Common Investment Area (Burundi, Comoros, Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia and Zimbabwe) (23 May 2007), Art. 17.

[121] *See* Agreement between the Government of Japan and the Government of the Republic of Kenya for the Promotion and Protection of Investment (28 August 2016), Art. 22; Agreement on the Promotion and Protection of Investments between the Government of the Republic of Finland and the Government of the Republic of Kenya (1 September

3.33 In pursuance of both its international obligations and to safeguard the fundamental rights guaranteed under its Constitution, Kenya's Parliament enacted the Climate Change Act in 2016, which it amended in 2022. In general, this Act outlines a strategy for low-carbon and climate-resilient development as well as a specific, strong institutional framework for such purposes.[122] Human health, development, and equality are at the core of Kenya's comprehensive fight against climate change.[123] The Climate Change Act obligates the government to formulate a National Climate Change Action Plan ("**NCCAP**") every five years.[124]

3.34 In this vein, Kenya has committed to an updated, ambitious goal to reduce GHG emissions by 30%, by 2030, relative to the business-as-usual scenario.[125] Several core mitigation measures are proposed to meet this target; of priority are the scaling up of renewable energy, the enhancement of energy and resource efficiency,[126] low carbon transportation systems, and "climate smart" agriculture.[127] Kenya has already made great strides in overcoming its energy

2008), Preamble; Agreement on the Promotion and Protection of Investments between the Government of the Republic of Korea and the Government of the Republic of Kenya (8 July 2014), Preamble.

[122] Republic of Kenya, The Climate Change Act, Act No. 11 of 2016 (13 May 2016), *available at* http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/ClimateChangeActNo11of2016.pdf. *See also* Climate Risk Country Profile: Kenya (2021), p. 25. Such institutions include the Climate Change Directorate and the Disaster Risk Management Authority. These work at the national and sub-national levels to implement measures of mitigation and adaptation, including monitoring the reduction of greenhouse gas emissions, addressing vulnerabilities exacerbated by climate change, and strengthening the country's social and economic structures against vulnerability. *Id.*, p. 13.

[123] Ministry of Environment and Natural Resources of the Republic of Kenya, *Kenya National Adaptation Plan, 2015–2030* (July 2016), *available at* https://www4.unfccc.int/sites/NAPC/Documents%20NAP/Kenya_NAP_Final.pdf, pp. 26-35; Climate Risk Country Profile: Kenya (2021), p. 25.

[124] The first NCCAP was published in 2013, and the second NCCAP was published in 2018. Though the NCCAPs are published in pursuance of the Climate Change Act, they also contain detailed analysis of Kenya's NDC and technical reports on adopted mitigation measures as well as adaptation measures. Together, these form a core element of Kenya's "Vision 2030," an overarching action plan that aims to achieve Kenya's climate objectives in tandem with poverty reduction.

[125] Kenya's Updated Nationally Determined Contribution, p. 1.

[126] *See also* Constitution of Kenya, Art. 69(1)(b).

[127] Kenya's Updated Nationally Determined Contribution, p. 8.

crisis while developing more sustainable energy infrastructure. As mentioned, close to 90% of Kenya's energy now comes from clean sources.[128]

3.35 Kenya is prioritizing adaptation measures because it is already confronting climate change-induced loss and damage.[129] Such measures include enhancing adaptive capacity and climate resilience across all economic sectors, adopting comprehensive climate risk management tools, enhancing the generation and use of climate change information in policy decision-making, enhancing the uptake of adaptation technology, and addressing residual climate change loss and damage that is impacting productive sectors of the economy.[130]

3.36 Kenya is committed to a more sustainable future based on environmental protection, but it cannot protect itself from climate change alone. Kenya has received only a third of the annual amount needed to meet its targets under its Nationally Determined Contributions ("**NDCs**"), under the Paris Agreement.[131] According to the latest calculations, Kenya will require more than US$60 billion for its NDCs to be accomplished.[132] This is *more than half of Kenya's GDP*, and it requires international support for at least 87% of the budget.[133] Kenya looks forward to continuing

[128] S. J. Chemengich & D.O. Masara, "The State of Renewable Energy in Kenya with a Focus on the Future of Hydropower" (2022) 5(1) *Africa Environmental Review* 246-260, *available at* http://ojs.uoeld.ac.ke/index.php/aerj/article/view/55/185, p. 248.

[129] Kenya's Updated Nationally Determined Contribution, p. 14.

[130] *Ibid.*

[131] The Republic of Kenya, *The Landscape of Climate Finance in Kenya on the road to implementing Kenya's NDC* (2021), *available at* https://www.climatepolicyinitiative.org/wp-content/uploads/2021/03/The-Landscape-of-Climate-Finance-in-Kenya.pdf, p. 7.

[132] *Id.*, p. 15 ("The total cost of implementing the mitigation and adaptation actions in the updated NDC is estimated at USD 62 Billion"). Kenya's GDP is around US$113 billion. *See* The World Bank, "GDP—Kenya", *available at* https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?locations=KE (last accessed: 8 March 2024).

[133] The Republic of Kenya, *The Landscape of Climate Finance in Kenya on the road to implementing Kenya's NDC*, *available at* https://www.climatepolicyinitiative.org/wp-content/uploads/2021/03/The-Landscape-of-Climate-Finance-in-Kenya.pdf, p. 15.

partnerships and coordinated global action to mitigate the harms of anthropogenic climate change and ensure a habitable future on Earth.[134]

[134] For instance, with the support from the World Bank and the Governments of Denmark and Sweden, Kenya developed the Financing Locally Led Climate Action Program. This seeks to foster solutions to climate change harms by the communities most affected through partnerships between local governments and their citizens, assessing climate risks and identifying socially inclusive solutions tailored to local needs. *See, e.g.*, M. Arnold & N. Soikan, "Kenya moves to locally led climate action", *World Bank Blogs* (27 October 2021), *available at* https://blogs.worldbank.org/nasikiliza/kenya-moves-locally-led-climate-action.

CHAPTER 4
THE COURT HAS ADVISORY JURISDICTION AND THERE ARE NO COMPELLING REASONS FOR IT TO DECLINE TO EXERCISE JURISDICTION

4.1 Pursuant to the Court's settled practice, it must establish its jurisdiction to render the requested opinion and decide whether there exist any reasons to decline doing so.[135] Kenya submits that, *first*, the conditions for the Court to render its opinion are readily satisfied; and *second*, that the unprecedented global implications of the Request and the universal importance of the legal questions posed are such that no compelling reasons exist for the Court to decline the Request.

I. The Court has advisory jurisdiction because the UNGA is authorized to request the Advisory Opinion and the Questions are legal in nature

4.2 The Court's advisory jurisdiction derives from Article 65(1) of its Statute which provides that it "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". In essence, there are two conditions for the Court's advisory jurisdiction: *first*, the request for an advisory opinion must be made by a duly authorized organ under the UN Charter; and *second*, the questions posed to the Court must be legal in nature.

4.3 Article 96(1) of the Charter authorizes the UNGA to request an advisory opinion on "any legal question." The Questions referred to the Court in Resolution 77/267 are plainly legal in nature. They request that the Court provide its opinion on the *obligations* of States to protect the climate system and other parts of the environment from anthropogenic GHG emissions, and the *legal consequences* of causing serious harm to the climate system and other parts of the

[135] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019*, p. 95 (hereinafter "***Chagos* Advisory Opinion**"), at p. 111, para. 54; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. 1996*, p. 226 (hereinafter "***Nuclear Weapons* Advisory Opinion**"), at p. 232.

environment. The Questions thus seek the determination of "obligations" of a legal nature, and the "legal consequences" deriving from the breach of such obligations.

4.4 The legal nature of the Questions is confirmed by the fact that Resolution 77/267 asks the Court to answer them having "particular regard" to specified legal instruments and rules, namely: the Charter of the United Nations ("**UN Charter**"), the International Covenant on Civil and Political Rights ("**ICCPR**"), the International Covenant on Economic, Social and Cultural Rights ("**ICESCR**"), the UNFCCC, the Paris Agreement, the UNCLOS, the duty of due diligence, the rights recognized in the Universal Declaration of Human Rights ("**UDHR**"), the principle of prevention of significant harm to the environment, and the duty to protect and preserve the marine environment.

4.5 The Court explained in the *Nuclear Weapons* Advisory Opinion that the subject of a request for an advisory opinion by the UNGA need not fall within the UNGA's competences and responsibilities,[136] and as it described recently, the determination of the potential usefulness of the advisory opinion is a matter for the requesting organ, not the Court, to decide.[137] However, the need for the Court to exercise jurisdiction with respect to the Questions is underscored by the fact that the Court's opinion will provide the UNGA with significant assistance in discharging its core competencies and responsibilities.

4.6 As Article 1(3) of the Charter makes clear, the UN's purposes include achieving international cooperation on "solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for

[136] *Nuclear Weapons* Advisory Opinion, pp. 233-234, paras. 12-13.

[137] *Chagos* Advisory Opinion, p. 115, para. 76; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010*, p. 403 (hereinafter "***Kosovo* Advisory Opinion**"), at p. 417, para. 34; *Nuclear Weapons* Advisory Opinion, p. 237, para. 16; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *Advisory Opinion, I.C.J. Reports 2004*, p. 136 (hereinafter "***Wall* Advisory Opinion**"), at p. 163, para. 62; *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 12, at p. 37, para. 73.

fundamental freedoms".[138] The Request unambiguously raises questions falling within this broad mandate.

4.7 Furthermore, the UN Charter bestows upon the UNGA multiple competences and responsibilities that implicate climate change and its effects. Under Articles 13(2) and 55, the UNGA has the responsibility to promote "higher standards of living", "conditions of economic and social progress and development", "solutions of international economic, social, health, and related problems", and the "universal respect for, and observance of, human rights and fundamental freedoms". Moreover, under Article 13 of the UN Charter, the UNGA "shall initiate studies and make recommendations for the purpose of […] promoting international co-operation in the economic, social" and "health fields, and assisting in the realization of human rights and fundamental freedoms". Further, under Article 11, the UNGA may "discuss *any questions* relating to the maintenance of international peace and security".[139]

4.8 As noted by the President of the Court, climate change is the "existential threat of our times".[140] Chapter 3.I-II *supra* described the scientific evidence showing that climate change threatens every aspect of human life, including international peace and security, human rights, global health, and economic and social development.[141] Climate change is arguably the most

[138] United Nations, *Charter of the United Nations* (24 October 1945) 1 UNTS XVI (hereinafter "**UN Charter**"), Art. 1(3).

[139] *Id*., Art.11(2) (emphasis added). *See also* UN Security Council, *With Climate Crisis Generating Growing Threats to Global Peace, Security Council Must Ramp Up Efforts, Lessen Risk of Conflicts, Speakers Stress in Open Debate*, UN Doc. SC/15318 (13 June 2023) ("With the climate crisis generating an increasing threat to global peace and security, the Security Council must ramp up its efforts to protect the Organization's peace operations around the world and lessen the risk of conflicts emanating from rising sea levels, droughts, floods and other climate-related events, briefers, ministers and delegates told the 15-nation organ.").

[140] N. Salam, "Reflections on International Law in Changing Times" (2019) *Harvard International Law Journal*, *available at* https://journals.law.harvard.edu/ilj/wp-content/uploads/sites/84/1_Salam_60.2.pdf (hereinafter "**N. Salam, "Reflections on International Law in Changing Times**"), p. 205.

[141] *See* IPCC, *Press Release*: *Climate change: a threat to human wellbeing and health of the planet. Taking action now can secure our future*, Doc No. 2022/08/PR (28 February 2022), *available at* https://www.ipcc.ch/2022/02/28/pr-wgii-ar6/; UN Human Rights Council, Resolution 41/21, *Human Rights and Climate Change*, UN Doc. A/HR/RES/41/21 (12 July 2019) (Dossier No. 272), p. 2 ("Emphasizing that the adverse effects of climate change have a range of implications, which can increase with greater global warming, both direct and indirect, for the effective enjoyment of human rights"); UN Security Council, *With Climate Crisis Generating Growing Threats to Global*

pressing global problem facing the international community, and directly implicates international law's ability to safeguard the human rights of present and future generations. It is not an exaggeration to point out that the very existence of certain UN Member States *qua* States is under threat if this problem is not addressed.[142] Thus, climate change concerns all the aforementioned competences and responsibilities of the UNGA.

4.9 Indeed, the UNGA has assumed a leadership role in combatting climate change. As early as 1949, the UNGA endorsed the UN Economic and Social Council's decision to hold the first United Nations Conference on the Human Environment.[143] In 1987, the UNGA "gave real impetus to environmental issues" by adopting the "Environmental Perspective to the Year 2000 and Beyond," in Resolutions 42/186 and 42/187.[144] These resolutions "underlined the relationship between environment and development" and "introduced the notion of sustainable development".[145] Moreover, on 6 December 1988, the UNGA adopted Resolution 43/53 on the "Protection of global climate for present and future generations".[146] This recognized the grave effects of climate change on the environment and requested actions from UN organs and Governments to combat climate change.[147] Since that time, the UNGA has been integral to the negotiation, conclusion, and implementation of numerous legal instruments which have been adopted to combat climate change, including the Rio Declaration of 1992, the UNFCCC and it's

Peace, Security Council Must Ramp Up Efforts, Lessen Risk of Conflicts, Speakers Stress in Open Debate, UN Doc. SC/15318 (13 June 2023).

[142] *See, e.g.*, ITLOS, Case 31, Doc No. ITLOS/PV.23/C31/12/Rev.1, Verbatim Record (12 September 2023), p.m., p. 22:14-21 (Philips) ("rising sea levels are causing coastline erosion and, in some cases, the submergence of entire islands that many call home").

[143] *See* P. Jackson, "From Stockholm to Kyoto: A Brief History of Climate Change" (2007) XLIV(2) *Green our World*, *available at* https://www.un.org/en/chronicle/article/stockholm-kyoto-brief-history-climate-change (hereinafter "**P. Jackson, 'From Stockholm to Kyoto'**").

[144] UN General Assembly, Resolution 42/186, *Environmental Perspective to the Year 2000 and Beyond*, UN Doc. A/RES/42/186 (11 December 1987) (Dossier No. 192); UN General Assembly, Resolution 42/187, *Report of the World Commission on Environment and Development*, UN Doc. A/RES/42/187 (11 December 1987).

[145] P. Jackson, "From Stockholm to Kyoto."

[146] UN General Assembly, Resolution 43/53, *Protection of Global Climate for Present and Future Generations of Mankind*, UN Doc. A/RES/43/53 (6 December 1988) (Dossier No. 104).

[147] *Id.*, paras. 7, 9-13. *See also* P. Jackson, "From Stockholm to Kyoto".

the Kyoto Protocol, and the Paris Agreement. The UNGA's adoption of Resolution 77/276 requesting the present Advisory Opinion reflects the continuation of the UNGA's decades-long effort to address climate change.

4.10 In sum, the Court has jurisdiction to address the Questions and issue the requested Advisory Opinion. The Questions are legal in nature and fall squarely within the UNGA's competences and responsibilities. The Court's answer will provide significant assistance to the UNGA in its efforts to combat climate change.

II. There are no compelling reasons that justify declining to exercise jurisdiction

4.11 Once advisory jurisdiction has been established, there is a clear presumption in favour of issuing an advisory opinion. The Court has repeatedly held that its answer to a request for an advisory opinion "in principle, should not be refused" and that "only 'compelling reasons' may lead [it] to refuse its opinion in response to a request falling within its jurisdiction".[148] Since the entry into force of the UN Charter, the Court has never made use of its discretionary power to decline a request for an advisory opinion. [149]

4.12 Assuming, *arguendo*, objections to this Court's exercise of its jurisdiction were to be made, Kenya submits they would not provide compelling reasons to decline to render an opinion. *First*, as discussed in Chapters 1, 2.I.B-C and 4.I *supra*, the Questions are clear and capable of being met with a legal answer. In any event, this Court has confirmed that it "may give an advisory opinion on any legal question, abstract or otherwise".[150]

---

[148] *Chagos* Advisory Opinion, at p. 113, para. 65; *Kosovo* Advisory Opinion, p. 416, para. 30; *Wall* Advisory Opinion, p. 136, at pp. 156-157, para. 44.

[149] The Permanent Court of International Justice did so on only one occasion. *See Status of Eastern Carelia, Advisory Opinion, 1923, P.C.I.J., Series B, No. 5.*

[150] *Admission of a State to Membership in the United Nations (Charter, Art. 4), Advisory Opinion, I.C.J. Reports 1948,* p. 57, at p. 61.

4.13 *Second*, the Questions are not political in nature. That there may be political implications to a request does not mean that discretion should be exercised. In fact, the Court has observed, "in situations in which political considerations are prominent it may be particularly necessary for an international organization to obtain an advisory opinion from the Court as to the legal principles applicable with respect to the matter under debate".[151] Addressing this Request would further global understanding of climate change harms and their pressing concern for the UNGA, as repeatedly affirmed in multiple resolutions, including Resolutions 44/228 on the United Nations Conference on Environment and Development, and 44/207 on the protection of the global climate for present and future generations, among others.

4.14 *Third*, the Questions do not relate to any bilateral disputes and hence the do not circumvent the principle of State consent.[152] That different States might adopt divergent positions in respect to the legal questions put to the Court does not mean that the Court would be making pronouncements on any pending dispute.[153] On the contrary, the adoption of the Request by consensus demonstrates that States are seeking clarity on the present state of international law for, *inter alia*, the benefit of avoiding future disputes.

4.15 *Finally*, the fact that the International Tribunal for the Law of the Sea[154] ("**ITLOS**") and the Inter-American Court of Human Rights ("**IACtHR**"),[155] have been seised with requests for advisory opinions relating to discrete questions of international law relating to climate change is

---

[151] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980*, p. 73, at p. 87, para. 33; *Nuclear Weapons* Advisory Opinion, pp. 233-234, para. 13.

[152] *See Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 12, at pp. 16-17, paras. 32-33. *See also Chagos* Advisory Opinion, pp. 117-118, paras. 85-87 (dismissing the argument that the question addressed a territorial dispute between Mauritius and the United Kingdom). *See similarly Wall* Advisory Opinion, p. 136; *Kosovo* Advisory Opinion, p. 403.

[153] *Chagos* Advisory Opinion, pp. 114-118, paras. 71-88.

[154] *See* ITLOS, *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law* (12 December 2023), *available at* https://www.itlos.org/fileadmin/itlos/documents/cases/31/Request_for_Advisory_Opinion_COSIS_12.12.22.pdf.

[155] *See* IACtHR, *Request for an Advisory Opinion on Climate Emergency and Human Rights to the Inter-American Court of Human Rights from the Republic of Colombia and the Republic of Chile* (9 January 2023), *available at* https://www.corteidh.or.cr/docs/opiniones/soc_1_2023_en.pdf.

no obstacle for the Court to exercise its advisory jurisdiction. The Questions referred to the Court are broader than those addressed in the other proceedings. In any event, overlapping referrals are no reason for the Court, as the principal judicial organ of the UN, to refuse to answer an otherwise well-founded request by the UNGA. In fact, the other advisory proceedings confirm the consensus among States that judicial clarity concerning international law and climate change is needed.

4.16 In conclusion, there are no compelling reasons for the Court to decline to exercise jurisdiction. To the contrary, there are compelling reasons for the Court to accede to the UNGA's request and answer the Questions fully and completely.

CHAPTER 5
QUESTION (A): STATES MUST MINIMIZE ANTHROPOGENIC GHG EMISSIONS IN PROPORTION TO THEIR RESPONSIBILITIES AND CAPABILITIES

5.1 This Chapter addresses the legal obligations of States concerning climate change. The first part of this Chapter discusses the obligations established under custom and general principles of international law, which, besides creating free-standing obligations, shed light on and complement the obligations codified in treaties. The second part discusses climate change-related obligations, as codified in international treaties, in particular, those referenced in the Request—the UNFCCC, the Paris Agreement, the UNCLOS and relevant human rights treaties.

I. States must prevent harm caused by GHG emissions and must observe due diligence and precaution when emitting or allowing emission of GHGs

5.2 Under general international law, States are impeded to cause harm through GHG emissions. For that purpose, States must observe due diligence and precaution when emitting or authorizing the emission of GHGs. They must also conduct Environmental Impact Assessments ("**EIA**") for activities that emit GHGs. Finally, States have an obligation to cooperate to combat climate change. These obligations are discussed in detail below.

A. STATES MUST CAUSE NO HARM TO THE CLIMATE SYSTEM THROUGH GHG EMISSIONS

5.3 Under the "no-harm" principle, States must ensure that activities within their territory cause no transboundary harm, *and* they must prevent such activities from doing so.[156] The "no-harm" principle was established in *Trail Smelter (USA v. Canada)* where the tribunal ruled that "no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes

[156] *See, e.g.*, *The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)*, PCA Case No. 2013-19, Award (12 July 2016) (hereinafter "***South China Sea* Award**"), para. 941 ("The corpus of international law relating to the environment […] requires that States 'ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control.'").

in or to the territory of another or the properties or persons therein".[157] The "customary nature of the no-harm principle is now firmly established."[158] This rule is also enshrined in numerous international legal instruments.[159]

5.4 The "no-harm" principle entails not only a duty not to cause harm, but also a duty to *prevent* harm.[160] Also, this principle applies to harm to *any area* outside the State's jurisdiction or control, not only on neighbouring States.[161]

5.5 Preventing transboundary harm requires regulating the conduct of private actors.[162] This is "all the more relevant [for] climate change" because GHG emissions from private, non-State actors

---

[157] *Trail smelter (United States v. Canada)* (16 April 1938 & 11 March 1941), *3 Reports of International Arbitration Awards* 1905-1982, p. 1965. Shortly afterwards, in *Corfu Chanel,* the Court recognized that this principle was already a "general and well recognized principle" of international law, ruling that "every State" has an "obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States." *Corfu Channel case, Judgment of April 9th, 1949, I.C.J. Reports 1949,* p. 4, at p. 22.

[158] S. Malejan-Dubois, "The No-Harm Principle as the Foundation of International Climate Law" *in* B. Mayer & A. Zahar (eds.), DEBATING CLIMATE LAW (2021), p. 16 (hereinafter "**S. Malejan-Dubois, 'The No-Harm Principle'**"), p. 15. *See also Nuclear Weapons* Advisory Opinion, pp. 241-242, para. 29 ("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").

[159] *See, e.g.*, UNFCCC, Preamble; Convention on Long-Range Transboundary Air Pollution (1979); United Nations Convention on the Law of the Sea (10 December 1982), 1833 UNTS 3 (Dossier No. 45) (hereinafter "**UNCLOS**"), Art. 194(2); Vienna Convention for the Protection of the Ozone Layer (22 March 1985), 1513 UNTS 293 (Dossier No. 25); Convention on Biological Diversity (5 June 1992), 1760 UNTS 79 (Dossier No. 19), Art. 3; Declaration of the United Nations Conference on the Human Environment (1973) (Dossier No. 136) (hereinafter "**Stockholm Declaration**"), Principle 21; Rio Declaration on Environment and Development Rio Declaration (1993) (Dossier No. 137) (hereinafter "**Rio Declaration**"), Principle 2.

[160] *Dispute over the Status and Use of the Waters of the Silala (Chile v. Bolivia), Judgment, I.C.J. Reports 2022*, p. 614, at p. 648, para. 99 (citing *Pulp Mills*, which acknowledged the "due diligence" principle, and noted that "under customary international law" States are "obliged, in utilizing the international watercourse, to take all appropriate measures to prevent the causing of significant harm to the other Party").

[161] *See, e.g.*, ILC, *Draft articles on Prevention of Transboundary Harm from Hazardous Activities* (2001) (hereinafter "**ILC, Draft Articles on Prevention of Transboundary Harm**"), Art. 2(c); *South China Sea* Award, para. 941.

[162] *See, e.g.*, ITLOS, Case No. 31, Request for an advisory opinion submitted by the Commission of Small Island States on climate change and international law, *Amicus brief submitted to the International Tribunal for the Law of the Sea by the UN Special Rapporteurs on Human Rights & Climate Change (Ian Fry), Toxics & Human Rights (Marcos Orellana), and Human Rights & the Environment (David Boyd)* (30 May 2023) (hereinafter "**Amicus brief from UN Special Rapporteurs to ITLOS**"), paras. 76, 88.

are responsible for a "very large part of global GHG emissions."[163] It has been shown that nearly two-thirds of the major industrial GHG emissions (from fossil fuel use, methane leaks, and cement manufacture) are produced by just 90 corporations.[164] From 1986 to 2010, GHG emissions from the top 20 largest investor, and State-owned companies contributed to 19.6% of the total rise in carbon dioxide.[165]

5.6 The "no-harm" principle is critical in the context of climate change. As noted by the President of the Court, climate change "is a global challenge par excellence in that it does not respect international borders".[166] Also, as discussed in Chapter 3.I *supra*, it is firmly established that climate change causes significant harm to the climate system. The IPCC concluded with "high confidence" that "[h]uman-induced climate change […] has caused widespread adverse impacts and related losses and damages to nature and people, beyond natural climate variability".[167]

5.7 The *Urgenda v. Netherlands* case before Dutch courts illustrates the importance of the principle. The Supreme Court of the Netherlands acknowledged the significant transboundary harm caused by GHG emissions, and, invoking the "no-harm" principle of international law, ordered the Netherlands to reduce its GHG emissions.[168] However, simple *reduction* of GHG

[163] S. Malejan-Dubois, The No-Harm Principle", p. 16. *See also* UN OHCHR, *Press Release: Fossil fuels at the heart of the planetary environmental crisis: UN experts* (30 November 2023), *available at* https://www.ohchr.org/en/press-releases/2023/11/fossils-fuels-heart-planetary-environmental-crisis-un-experts.

[164] R. Heede, "Tracing anthropogenic carbon dioxide and methane emissions to fossil fuel and cement producers, 1854–2010" (2014) 122 *Climatic Change* 229-241, *available at* https://doi.org/10.1007/s10584-013-0986-y, p. 238.

[165] B. Ekwurzel *et al.*, "The rise in global atmospheric CO2, surface temperature, and sea level from emissions traced to major carbon producers" (2017) 144 *Climate Change* 579-590, *available at* DOI 10.1007/s10584-017-1978-0, p. 583.

[166] N. Salam, "Reflections on International Law in Changing Times", p. 205.

[167] IPCC, *Summary for Policymakers Headline Statements* (28 February 2022), *available at* https://www.ipcc.ch/report/ar6/wg2/resources/spm-headline-statements/ (also affirming that climate change "has led to some irreversible impacts as natural and human systems are pushed beyond their ability to adapt"), p. 1.

[168] *State of the Netherlands v. Urgenda Foundation*, Supreme Court of the Netherlands, Judgment (13 January 2020) (English), *available at* https://climatecasechart.com/non-us-case/urgenda-foundation-v-kingdom-of-the-netherlands/, p. 3, paras. 5.7.5, 8.3.4.

emissions is not sufficient. Considering the relevant legal[169] and scientific developments, States are obligated to *minimize* GHG emissions, not only reduce them.

5.8 In conclusion, the "no-harm" principle entails that States—especially high-GHG-emitting developed States—must minimize their GHG emissions, and neither emit nor permit the emission of GHGs that cause significant harm to the climate system.

B. STATES MUST OBSERVE DUE DILIGENCE AND PRECAUTION WHEN EMITTING OR AUTHORIZING THE EMISSION OF GHGS, AND MUST CONDUCT ENVIRONMENTAL IMPACT ASSESSMENTS FOR ACTIVITIES THAT EMIT GHGS

5.9 In addition to the "no-harm" rule, States also have an obligation to act with due diligence.[170] Due diligence is a "general obligation" applicable to the protection of the climate system from GHG emissions.[171]

5.10 Due diligence requires States to use "*all the means* at [their] disposal in order to avoid" the emission of GHGs that causes "significant damage to the environment."[172] This mandates deploying *at least* "adequate means, [exercising] best possible efforts and [doing] the utmost" to ensure, or to avoid, harm to the climate system.[173] The duty entails formulating, implementing,

[169] ILC, Draft Articles on Prevention of Transboundary Harm, Art. 3 (States should "take all appropriate measures to prevent significant transboundary harm or at any event to *minimize* the risk thereof") (emphasis added). *See also* UNFCCC, Principle 3 ("The Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effect."); Rio Declaration, Principle 15.

[170] *Pulp Mills*, pp. 55-56, para. 101.

[171] S. Malejan-Dubois, "The No-Harm Principle", pp. 18-19.

[172] *Pulp Mills*, pp. 55-56, para. 101 (emphasis added).

[173] *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area (Advisory Opinion of 1 February 2011) ITLOS Reports 2011* (hereinafter "***The Area* ITLOS Advisory Opinion**"), p. 41, para. 110. *See also Certain Activities Carried Out by Nicaragua and Construction of a Road in Costa Rica*, p. 706, para. 104; *Pulp Mills*, pp. 55-56, para. 101.

and enforcing policies to avoid such harm,[174] and is codified in numerous multilateral instruments relating to environmental protection.[175]

5.11 As observed by ITLOS in *The Area* Advisory Opinion, "the standard of due diligence has to be more severe for riskier activities".[176] This higher standard is applicable to the emission of GHGs because they have a *high risk* of contributing to climate change, which, in turn, has a *high risk* of producing significant harm to the climate system.[177]

5.12 States are further obligated to observe the "precautionary approach" with respect to GHG emissions.[178] This approach has been recognized by ITLOS as an "integral part" of the obligation of due diligence,[179] and requires that precaution and due diligence must be observed even "where scientific evidence concerning the scope and potential negative impact" of activities or projects are "insufficient but where there [is] plausible indications of potential risks".[180] In fact, the ILC has clarified that the obligation of due diligence is by definition engaged when there is knowledge

[174] ILC, Draft Articles on Prevention of Transboundary Harm, Art. 3.

[175] UNCLOS, Art. 194(1); Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (1972), Arts. I, II and VII(2); Vienna Convention for the Protection of the Ozone Layer (22 March 1985), 1513 UNTS 293 (Dossier No. 25), Art. 2; Convention on the Regulation of Antarctic Mineral Resource Activities (2 June 1988), Art. 7(5); Convention on Environmental Impact Assessment in a Transboundary Context (1991), Art. 2(1); Convention on the Protection and Use of Transboundary Watercourses and International Lakes (17 March 1992), Art. 2(1).

[176] *The Area* ITLOS Advisory Opinion, p. 44, para. 117.

[177] *See supra* Chapter 3.I.

[178] This approach is an "integral part" of the obligation of due diligence. *See, e.g.*, *The Area* ITLOS Advisory Opinion, p. 46, para. 131 (observing that the precautionary approach is applicable "even outside the scope of the Regulations" governing activities in the Area). *See also*, in this vein, *Southern Bluefin Tuna Cases (New Zealand v Japan; Australia v Japan), Provisional Measures* [1999] ITLOS cases Nos. 3 and 4, Order of 27 August 1999, paras. 77-80; *MOX Plant (Ireland v. United Kingdom) Provisional Measures,* ITLOS Reports 2001, Order on Provisional Measures (3 December 2001), p. 95, para. 71; *Land Reclamation in and Around the Straits of Johor (Malaysia v. Singapore)*, *Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003*, p. 10, para. 74.

[179] *The Area* ITLOS Advisory Opinion, p. 46, para. 131.

[180] *Ibid*.

or awareness of a significant risk of harm; measures to prevent harm must accordingly be taken before harm is caused.[181]

5.13 Therefore, while the evidence linking anthropogenic GHG emissions to climate change is already conclusive, any gap in knowledge regarding particular activities or substances cannot be invoked as a justification to ignore the requirements of due diligence.

5.14 Finally, due diligence entails a duty to carry out EIAs for activities with potentially harmful effects, including GHG-emitting activities.[182] The particular scope and content required for an EIA depends on the activity or project under consideration[183] and the internal laws of each State.[184] Pursuant to the due diligence principle and the precautionary approach, States must deploy their best available resources, methods, and tools to achieve the best possible understanding of the impact an activity is likely to have on the climate system.[185] This obligation includes an associated

[181] ILC, *Draft articles on prevention of transboundary harm from hazardous activities*, *with commentaries* (2001), Art. 1, Commentaries (1-2), (14). *See also* J. Brunnée, "International Environmental Law and Climate Change: Reflections on Structural Challenges in a 'Kaleidoscopic' World" (2020) 33 *Georgetown Envtl L Rev* 113, *available at* https://hdl.handle.net/1807/129062, pp. 119-121.

[182] *Pulp Mills*, pp. 82-83, para. 204 (ruling that "due diligence, and the duty of vigilance and prevention which it implies, would not be considered to have been exercised" if a State planning an activity with potential transboundary harm "did not undertake an environmental impact assessment on the potential effects of such works"). The Court had occasion to reaffirm and elaborate on several procedural obligations acknowledged in *Pulp Mills*, including the duty to conduct EIAs, in *Certain Activities Carried Out by Nicaragua and Construction of a Road in Costa Rica*.

[183] *See, e.g.*, UNEP, *Environmental Impact Assessment and Strategic Environmental Assessment: Towards an Integrated Approach*, UN Doc. UNEP/ETB/2006/1 (2004), p. 44.

[184] *Pulp Mills*, p. 83, para. 205. *See also Certain Activities Carried Out by Nicaragua and Construction of a Road in Costa Rica*, p. 706, para. 104; ILC, *Draft articles on prevention of transboundary harm from hazardous activities*, *with commentaries* (2001), Art. 7, Commentary (9).

[185] B. Mayer, INTERNATIONAL LAW OBLIGATIONS ON CLIMATE CHANGE MITIGATION (OUP, 2022), pp. 303-305. *See also* Amicus Curiae from UN Special Rapporteurs to IACtHR, paras. 120, 122.

duty to consult with any interested member of the public to assess the climate change impacts of the proposed activity,[186] and monitoring the communities facing environmental threats.[187]

5.15 Private entities face consequences under international law when failing to conduct EIAs required by domestic law. For instance, in *Cortec Mining v. Kenya*, an ICSID tribunal ruled that "Claimants' failure to obtain an EIA licence […] concerning the environmental issues involved in the proposed removal of 130 million tonnes of material" from the Mrima Hill mine in Kenya, "constituted violations of Kenyan law *that, in terms of international law, warrant the proportionate response of a denial of treaty protection under the BIT and the ICSID Convention*".[188]

5.16 In sum, States must observe due diligence when emitting GHG emissions or permitting such emissions, even in the absence of scientific certainty regarding the specific effects of the GHG-emitting activity. States must further conduct or require EIAs for such activities before authorizing them, and while the activities are being undertaken. Private entities face consequences under international law when failing to conduct EIAs under these terms and any other conditions established in the legislation of the countries where its activities are or would be conducted.

[186] B. Mayer, INTERNATIONAL LAW OBLIGATIONS ON CLIMATE CHANGE MITIGATION (OUP, 2022), p. 305.

[187] *The Social and Economic Rights Action Center, et al. v. Nigeria*, African Commission on Human and Peoples' Rights, Judgment (27 May 2002), *available at* https://www.escr-net.org/sites/default/files/serac.pdf (hereinafter "***SERAC v. Nigeria***"), para. 53.

[188] *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya*, ICSID Case No. ARB/15/29, Award (22 October 2018), para. 365 (emphasis added). Similarly, in *Red Eagle v. Colombia*, an ICSID tribunal ruled that, since the claimant had not obtained an environmental permit to conduct mining activities, it had no property rights subject to protection under international law, and dismissed the case, including the expropriation claim. *Red Eagle Exploration Limited v. Republic of Colombia*, ICSID Case No. ARB/18/12, Award (28 February 2024), para. 399.

C. STATES MUST COOPERATE TO COMBAT CLIMATE CHANGE

5.17 Cooperation is a defining feature of international law. The UN Charter enshrines "international co-operation in solving international problems of an economic, social, cultural, or humanitarian character" as one of its pillars.[189]

5.18 Similarly, international environmental law is grounded on international cooperation.[190] Regional and international cooperation are critical for the effective protection of the climate system.[191] As noted in *Pulp Mills*, "it is by co-operating that the States […] can jointly manage the risks of damage to the environment that might be created [so] as to prevent" it.[192] UN Human Rights Experts recently reiterated that "strong international cooperation" is required to "successfully phase out fossil fuels" and thus combat climate change effectively.[193]

5.19 Given resource asymmetries, international cooperation in the context of climate change is not simply a matter of joint pronouncements and shared reduction targets. The evidence is clear: poverty and limited financing undermine adaptive capacity, particularly in rapidly growing African cities.[194] The Global South requires financial assistance from developed countries, as

---

[189] UN Charter, Art. 1(3). *See also id.*, Art. 56.

[190] *See, e.g.*, C. Leb, "Implementation of the general duty to cooperate" *in* S.C. McCaffrey *et al.* (eds.) RESEARCH HANDBOOK ON INTERNATIONAL WATER LAW (2019), p. 96.

[191] *See, e.g.*, *id*, pp. 96-99. *See also* D. Shapovalova, "In Defence of the Principle of Common but Differentiated Responsibilities and Respective Capabilities" *in* B. Mayer & A. Zahar (eds.), DEBATING CLIMATE LAW (2021), (hereinafter "**D. Shapovalova, 'CBDR-RC'**") p. 67 ("international cooperation [is] crucial for the success of global climate action").

[192] *Pulp Mills*, p. 49, para. 77. This principle has been applied in multiple environmental law cases. *See, e.g.*, *MOX Plant (Ireland v. United Kingdom) Provisional Measures, ITLOS Reports 2001, Order on Provisional Measures* (3 December 2001), para. 82; *South China Sea* Award, pp. 376-377, para. 946.

[193] UN OHCHR, *Fossil fuels at the heart of the planetary environmental crisis: UN experts* (30 November 2023), *available at* https://www.ohchr.org/en/press-releases/2023/11/fossils-fuels-heart-planetary-environmental-crisis-un-experts.

[194] IPCC, *Climate Change and Land: an IPCC special report on climate change, desertification, land degradation, sustainable land management, food security, and greenhouse gas fluxes in terrestrial ecosystems* (2019) (Dossier No. 73); IPCC, *Climate Change 2022: Impacts, Adaptation and Vulnerability—Working Group II Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (2022), *available at* https://report.ipcc.ch/ar6/wg2/IPCC_AR6_WGII_FullReport.pdf, § 9.1.2, p. 1294.

developing States often lack "financial and technical capacity to comply" with international environmental law obligations.[195]

5.20 While countries in the Global North have contributed disproportionately to GHG emissions and are obligated to marshal meaningful resources towards combating climate change, developing States are not passive recipients. As seen, States like Kenya, which are on the frontlines of climate change, and navigating recent droughts, food shortages, and other humanitarian challenges, can offer global leadership and knowledge on resiliency strategies in the face of climate change.

5.21 Ultimately, all States must cooperate to combat climate change. As noted by the President of the Court, "there is no solution to climate change but through greater international cooperation."[196] Furthermore, pursuant to the principle of common but differentiated responsibilities and respective capabilities ("**CBDR-RC**"), discussed in the following section, developed States must contribute the most to discharging this duty. The historic and present inequalities of climate change discussed in Chapter 3.II-III *supra*, require developed States to, among other actions, honour their commitment to provide US$100 billion in annual climate finance,[197] and provide debt-free technical and financial assistance to developing countries, particularly from the Global South, to develop adaptation and mitigation measures.[198] They must also make financial contributions to fund L&D and assist with adaptation measures.[199]

---

[195] J. Razzaque, "Access to Remedies in Environmental Matters and the North-South Divide" *in* S. Alam *et al.* (eds.), INTERNATIONAL ENVIRONMENTAL LAW AND THE GLOBAL SOUTH (2015), *available at* https://doi.org/10.1017/CBO9781107295414.029, p. 588.

[196] N. Salam, "Reflections on International Law in Changing Times", p. 205.

[197] Copenhagen Climate Change Conference, *Copenhagen Accord*, Decision No. 2/CP.15, UN Doc. FCCC/CP/2009/11/Add. (2009), p. 7; Nairobi Declaration, para. 19(ii).

[198] *See, e.g.*, Nairobi Declaration, para. 52.v-vi.

[199] *See, e.g.*, *id.*, paras. 40, 42, 44, 63; Amicus Curiae from UN Special Rapporteurs to IACtHR, paras. 119, 137 (noting that "major historic and current emitters of greenhouse gases [must] provide greater financial contributions to ongoing mitigation, adaptation and loss and damage obligations" and that "mitigation burdens, as well as the resourcing and financing of climate mitigation, adaptation and loss and damages, must, should reflect these historic and ongoing responsibilities and capabilities").

II. The obligations of States concerning climate change must take into account the equitable principles of CBDR-RC and intergenerational equity

5.22 The principle of equity in international law is comprised of two subsidiary principles: CBDR-RC and intergenerational equity. Both principles are particularly relevant for States' obligations concerning climate change.

A. INTERNATIONAL LAW OBLIGATIONS CONCERNING CLIMATE CHANGE MUST GIVE EFFECT TO THE CBDR-RC PRINCIPLE

5.23 The principle of CBDR-RC is the "cornerstone [of the] international climate change regime".[200] It establishes different obligations based on States' differing socioeconomic circumstances, vulnerabilities to climate change, and historical contributions to GHG emissions.[201]

5.24 CBDR-RC is based in equity[202] and is incorporated in treaties as diverse as the 1919 Versailles Peace Treaty that ended World War I,[203] the 1947 General Agreement on Trade and Tariffs[204] and the 1982 UNCLOS.[205] CBDR-RC is particularly pertinent to climate change. As seen, the *most vulnerable* and *least responsible* have borne and will continue to bear the brunt of climate change. Few challenges could be more common than climate change; few responsibilities

[200] D. Shapovalova, "CBDR-RC", p. 63.

[201] UNFCCC, Preamble; E. Hey & S. Paulini, "Common but Differentiated Responsibilities" (2021) *MPIL*, para. 1.

[202] D. Shapovalova, "CBDR-RC", p. 63.

[203] Treaty of Peace with Germany (Treaty of Versailles) (28 June 1919), Art. 405(3) (Constitution of the International Labour Organization (11 April 1919), Art. 19(3) ("in framing any Convention or Recommendation of general application" concerning labour, due regard shall be given to "climatic conditions, the imperfect development of industrial organization, or other special circumstances" that "make the industrial conditions" of a State "substantially different")).

[204] General Agreement on Trade and Tariffs (30 October 1947), Art. XVIII(1)-(5) (acknowledged the special position of developing countries). Since then, the international trade regime requires providing technical assistance and capacity building to developing countries and allows the duty of reciprocity in mutual trade concessions to be relaxed for them. *See, e.g.*, E. Hey & S. Paulini, "Common but Differentiated Responsibilities" (2021) *MPIL*, para. 2.

[205] UNCLOS, Preamble ("bearing in mind" the "special interests and needs of developing countries, whether coastal or land-locked," for the achievement of UNCLOS' goals); *id*., Arts. 61(3), 62, 148 (participation of developing States in activities in the Area); *id.*, Art. 202 (scientific and technical assistance to developing States); *id.*, Art. 203 (preferential treatment for developing States).

more differentially distributed than redress for GHG emissions. Accordingly, as discussed in Chapter 5.III *infra*, the UNFCCC and the Paris Agreement establish the relevance of CBDR-RC in the context of climate change.

5.25 CBDR-RC is a *legal principle* with *general normative* implications.[206] In fact, "it is generally agreed that [CBDR-RC] can be used to guide judicial reasoning and the interpretation of" other rules.[207] In *Urgenda v. Netherlands*, which concerned the violation of human rights established in the European Convention on Human Rights ("**ECHR**"), the Supreme Court of the Netherlands imported CBDR-RC and ruled that the Netherlands, as a developed State, had breached the claimants' rights under the ECHR.[208] Similarly, in *Greenpeace v. Norway*, the Norwegian Court of Appeals, invoking the CBDR-RC principle, held that Norway's responsibility to reduce GHG emissions under the Paris Agreement must be strengthened.[209]

B. STATES MUST STRIVE TO PROTECT THE CLIMATE SYSTEM AND OTHER PARTS OF THE ENVIRONMENT FOR FUTURE GENERATIONS, NOT ONLY FOR THE USE OF THE PRESENT GENERATIONS

5.26 The interests of future generations have guided the evolution of international law. The very UN system was conceived with the express purpose of "sav[ing] *succeeding generations* from the scourge of war".[210] The consideration for future generations derives from the principle of intergenerational justice, which stems from the general principle of equity.[211] In the context of

---

[206] E. Hey & S. Paulini, "Common but Differentiated Responsibilities" (2021) *MPIL*, para. 19.

[207] D. Shapovalova, "CBDR-RC", p. 71.

[208] *State of the Netherlands v. Urgenda Foundation*, Supreme Court of the Netherlands, Judgment (13 January 2020 (English)), paras. 5.7.2-5.7.3, 7.1, 8.3.5, *available at* https://climatecasechart.com/non-us-case/urgenda-foundation-v-kingdom-of-the-netherlands/. *See also State of the Netherlands v. Urgenda Foundation*, Hague District Court, Judgment (24 June 2015), para. 4.79, *available at* https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2015/20150624_2015-HAZA-C0900456689_decision-1.pdf. *See also State of the Netherlands v. Urgenda Foundation*, Hague Court of Appeals (9 October 2018), para. 76.

[209] *Natur og Ungdom v. Norway*, Bogarting Court of Appeal (23 January 2020), *available at* https://elaw.org/resource/no_arcticoil_appealsdecision_23jan2020, pp. 24, 27. *See also* D. Shapovalova, "CBDR-RC", p. 74.

[210] UN Charter, Preamble (emphasis added).

[211] *See* Amicus Curiae from UN Special Rapporteurs to IACtHR, para. 130; *Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment, I.C.J. Reports 1993,* p. 38, Separate Opinion of Judge Weeramantry, paras. 74-

climate change, "while the present generation has a right to use the Earth and its natural resources to meet its own needs, it must pass the Earth on to future generations in a condition no worse than that in which it was received".[212] As Judge Weeramantry observed in the *Nuclear Weapons* Advisory Opinion, "no one generation is entitled [to inflict] damage on succeeding generations".[213]

5.27 Climate change impedes the ability of future generations to enjoy a healthy climate system. According to the most recent IPCC Report, the impacts of climate change that future generations will borne stand to be much more severe than the harms currently experienced.[214] Even today, children are among the most vulnerable groups, and face disproportionate risks of climate change, such as flooding, heat stress, water scarcity, poverty, and hunger.[215] The IPCC has observed that *not even* "[w]arming of 1.5°C [is] 'safe'"; this temperature *will pose* "significant risks to natural and human systems".[216]

102, 240, 243 (noting that equity could provide a basis for considering future generations); UNFCCC, Art. 3; *Waweru, Mwangi (joining) and ors (joining) v. Kenya,* High Court of Kenya, Case No. 118 of 2004, App No 118/04, ILDC 880 (KE 2006) (2 March 2006), *available at* https://opil.ouplaw.com/display/10.1093/law:ildc/880ke06.case.1/law-ildc-880ke06?prd=OPIL, paras. 60-62.

[212] E. B. Weiss, "Intergenerational Equity" (2021) *MPIL*, paras. 6. *See also Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case, I.C.J. Reports 1995*, p. 288, (hereinafter "***Request for Examination of Nuclear Tests***"), Dissenting Opinion of Judge Sir. Geoffrey Palmer, para. 114 (*citing* the passage of Prof. E. B. Weiss, opining that "each generation is both a custodian or trustee of the planet for future generations and a beneficiary of its fruits" and "[t]his imposes obligations upon us to care for the planet and gives us certain rights to use it").

[213] *Nuclear Weapons* Advisory Opinion*,* Dissenting Opinion of Judge Weeramantry, p. 455.

[214] IPCC, *Climate Change 2023: Synthesis Report*, § 3.1.

[215] *See, e.g.*, *id.*, Figure 4.3; IPCC Sixth Assessment Report, "FAQ 3: How will climate change affect the lives of today's children tomorrow, if no immediate action is taken?" (June 2023), *available at* https://www.ipcc.ch/report/ar6/wg2/about/frequently-asked-questions/keyfaq3/ ("children aged ten or younger in the year 2020 are projected to experience a nearly four-fold increase in extreme events under 1.5°C of global warming by 2100, and a five-fold increase under 3°C warming. Such increases in exposure would not be experienced by a person aged 55 in the year 2020 in their remaining lifetime under any warming scenario.").

[216] IPCC, *Special Report: Global Warming of 1.5*ºC (2018) (Dossier No. 72), *available at* https://www.ipcc.ch/sr15/, p. 44.

5.28 International environmental and climate change law have long been concerned with the impacts of GHG-emissions on future generations,[217] since the 1972 Stockholm Declaration on the Human Environment[218] and the 1992 Rio Declaration,[219] to virtually all multilateral environmental agreements currently in force.[220] Notably, Article 3 of the UNFCCC makes clear that "[t]he Parties should protect the climate system for the benefit of present and *future generations*".[221] The Paris Agreement states that parties "should, when taking action to address climate change, respect intergenerational equity".[222]

5.29 These considerations have shaped judicial outcomes. *Wawareu et al. v. Kenya*, which concerned the contamination of a river, is an important example. The High Court of Nairobi held that Kenya was "under an obligation to approve sustainable development [that] meets the needs of the present generation without compromising the ability of future generations to meet their

[217] International Convention for the Regulation of Whaling (1946), Preamble; Convention Concerning the Protection of the World Cultural and Natural Heritage (1946), Art. 4; Convention on International Trade in Endangered Species of Wild Fauna and Flora (3 March 1973), Preamble; Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) (25 June 1998), Art. 1; Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazú Agreement) (27 September 2018), Arts. 1 and 3. *See also* E. B. Weiss, "Intergenerational Equity" (2021) *MPIL*, paras. 25-28 (citing to multiple legal instruments since 1911 that reflect this concern and noting that there are "hundreds of other legal instruments, many of which reference the interests of future generations"); *Pulp Mills*, Separate Opinion of Judge Cançado Trindade, para. 122 ("[n]owadays, in 2010, it can hardly be doubted that the acknowledgement of inter-generational equity forms part of conventional wisdom in International Environmental Law.").

[218] UN General Assembly, *Report of the United Nations World Commission on Environment and Development*, UN Doc. A/42/427 (4 August 1987), para. 27 ("Humanity has the ability to make development sustainable to ensure that it meets the needs of the present without compromising the ability of future generations to meet their own needs").

[219] Rio Declaration, Art. 3 (the right to development must be fulfilled "so as to equitably meet developmental and environmental needs of present and future generations").

[220] *See for instance* UNFCCC, Preamble; Convention on Biological Diversity (5 June 1992), 1760 UNTS 79 (Dossier No. 19), Preamble; United Nations Convention to Combat Desertification (14 October 1994), 1954 UNTS 3 (Dossier No. 17), Preamble; Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management (1997), Arts. 1(ii), 4(vi)-(vii), 11(vi)-(vii). *See also, in general,* UNESCO Declaration on the Responsibilities of the Present Generations towards Future Generations (12 November 1997).

[221] UNFCCC, Art. 3(1) (emphasis added).

[222] Paris Agreement (12 December 2015) (Dossier No. 16) (hereinafter "**Paris Agreement**"), Preamble.

needs".[223] Also, after considering international law,[224] the High Court affirmed that "intergenerational equity *obligates* the present generation *to ensure* that health, diversity and productivity of natural resources are maintained or enhanced for the benefit of future generations".[225] In *Neubauer v. Germany*, the Federal Constitutional Court of Germany similarly ordered the State to update and reduce its GHG emissions, owing to the impacts of climate change on future generations.[226]

5.30 Multiple judges of the Court have considered the impact of States' measures on future generations.[227] In the *Nuclear Weapons* Advisory Opinion, Judge Weeramantry opined that the full Court "must […] pay due recognition to the rights of future generations".[228] The moment is ripe, and the circumstances sufficiently dire, to pay this right its due recognition.

5.31 Put simply, the rights of future generations should be used as an interpretative principle to provide content for legal obligations concerning climate change. In that vein, the Court should affirm the obligation of States to preserve and protect the climate system so that future generations

[223] *Waweru, Mwangi (joining) and ors (joining) v. Kenya*, High Court of Kenya, Case No. 118 of 2004, App No 118/04, ILDC 880 (KE 2006) (2 March 2006), para. 57.

[224] *Id*., paras. 33-39 (considering the Rio Declaration, the Stockholm Declaration and the African Charter on Human and People's Rights).

[225] *Id.*, para. 62 (emphasis added).

[226] *Neubauer, et al. v. Germany*, Federal Constitutional Court of Germany, Order (2021), pp. 1-2, paras. 1, 2(b)(e), 4, 146, 148, 197, 199(a), 205, 229.

[227] *See Request for Examination of Nuclear Tests*, Dissenting Opinion of Judge Sir. Geoffrey Palmer, p. 381, at pp. 419-420, para. 114; *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), Judgment, I.C.J. Reports 2014*, p. 226, Separate Opinion of Judge Cançado Trindade, p. 31, para. 47 ("inter-generational equity marks presence nowadays in a wide range of instruments of international environmental law, and indeed of contemporary public international law").

[228] *Nuclear Weapons* Advisory Opinion*,* Dissenting Opinion of Judge Weeramantry, p. 455.

can access,[229] use and enjoy it, "in a condition no worse than that in which [the generation living today] received" its environment.[230]

* * *

5.32 In conclusion, under customary international law, States must not cause and must prevent transboundary harm inflicted by climate-change. This entails observing due diligence and conducting EIAs on GHG-emitting activities to minimize those emissions. Also, States must cooperate to protect the climate system from climate change. While observing these obligations, high-GHG-emitting States must provide technical assistance to vulnerable developing States and observe the principle of CBDR-RC and consider impacts on future generations while observing these obligations.

5.33 As seen, customary international law and general principles of law not only imposes specific obligations on States. It also sheds light on and complements treaties. Therefore, the following sections discuss treaties related to climate change, and interpret them in light of customary international law, starting with the UNFCCC and the Paris Agreement, and then moving to the UNCLOS and human rights treaties.

III. The UNFCC and the Paris Agreement obligate States to minimize GHG emissions to limit global temperature increase to less than 1.5 ºC above pre-industrial levels

5.34 The impact of GHG emissions on the climate system is the focus and concern of the climate-change law that emerged from the UNFCC. Indeed, the objective of the UNFCC is the "stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system".[231] As among the most widely ratified international conventions, the UNFCC is broadly applicable and, as such, key to

[229] UN General Assembly, *Report of the United Nations Secretary-General on Intergenerational Solidarity and the Needs of Future Generations*, UN Doc. A/68/322 (15 August 2013), para. 18.

[230] E.B. Weiss, "Intergenerational Equity" (2021) *MPIL*, para. 6.

[231] UNFCCC, Art. 2.

coordinated global action.[232] The Kyoto Protocol operationalized the UNFCCC's focus on individual State-level emissions reporting and targets by "establishing quantified emission limitation[s] and reduction obligation[s]" for States listed in the Annex I of UNFCCC, *i.e.*, developed countries.[233]

5.35 Although the UNFCCC was a landmark development in the legal fight against climate change, the 2015 Paris Agreement, "signal[ed] a tectonic shift" in the international regulation of climate change,[234] in that it established more concrete obligations. There are *three* elements of the Paris Agreement that Kenya considers key.

5.36 *First*, the Paris Agreement emphasizes limiting global warming. Article 2 of the Paris Agreement states the objective of the instrument: to hold "the increase in global average temperature to *well below* 2°C above pre-industrial levels *and* pursuing efforts to limit [its increase] to 1.5C."[235] This provides a quantifiable benchmark against which success can be measured.

5.37 *Second*, the Paris Agreement establishes specific obligations to accomplish this goal. Article 3 provides that "all Parties *are to* undertake and communicate *ambitious* efforts […] with the view of achieving" the objective set out in Article 2.[236] Such efforts "will represent a *progression* over time".[237] For such purpose, "[e]ach Party *shall* prepare, communicate and maintain" successive and progressive NDCs with the aim of achieving the objective established in

[232] United Nations, "Parties to the United Nations Framework Convention on Climate Change", *available at* https://unfccc.int/process/parties-non-party-stakeholders/parties-convention-and-observer-states.

[233] D. Shapovalova, "CBDR-RC", p. 65; Kyoto Protocol to the UNFCCC (11 December 1997), 2303 UNTS 162 (Dossier No. 11), Art. 3(1).

[234] *Ibid. See also* N. Salam, "Reflections on International Law in Changing Times", p. 205 (noting that the "Paris Agreement was a milestone in international efforts to fight climate change").

[235] Paris Agreement, Art. 2(1)(a)-(c) (emphasis added). It also establishes the objective of increasing the ability to adapt to climate change, and "[m]aking finance flows consistent with a pathway towards low greenhouse gas emissions".

[236] *Id.*, Art. 3 (emphasis added).

[237] *Ibid.* (emphasis added).

Article 2.[238] Finally, under Article 13, Parties have the obligation to regularly report on their anthropogenic emissions by sources and removals by sinks, including information "necessary to track progress made in implementing and achieving its [NDCs]".[239] The obligations in the UNFCCC and the Paris Agreement thus confirm States' duty to mitigate climate change.

5.38 *Third*, the Paris Agreement adopts two elements that, in Kenya's view, are critical to climate justice: CBDR-RC and L&D.[240] Concerning CBDR-RC, the Paris Agreement shifts away from the binary distinction of "developed" and "developing" States adopted in the UNFCCC and the Kyoto Protocol, endorsing instead an approach based on "dynamic differentiation", which acknowledges the specific national circumstances, capacities, and vulnerabilities of each State.[241] This must be reflected in States' NDCs.[242] This more nuanced framing of the CBDR-RC principle codified in the Paris Agreement creates space for States to both receive and provide support for combating and adapting to climate change.

5.39 Article 8 of the Paris Agreement acknowledges the importance of addressing L&D caused by climate change.[243] For that purpose, it institutionalizes a mechanism to fund payment for climate-change L&D.[244] The operation of this fund, and in general the necessity of addressing the

---

[238] *Id.*, Art. 4(2) (emphasis added). *See also id.*, Art. 5(2) (concerning conservation of carbon stocks).

[239] *Id.*, Art. 13(7)(b).

[240] *See e.g.* F. Sultana, "Critical Climate Justice" (2022) 188(1) *The Geographical Journal* 118, *available at* https://doi.org/10.1111/geoj.12417, p. 118 (defining climate justice as "the way in which 'climate change impacts people differently, unevenly, and disproportionately, as well as redressing the resultant injustices in fair and equitable ways'").

[241] S. Jolly, "Principle of CBDR-RC: Its Interpretation and Implementation Through NDCS in the Context of Sustainable Development" (2021) 11(3) *Washington Journal of Environmental Law & Policy*, *available at* https://digitalcommons.law.uw.edu/wjelp/vol11/iss3/3, p. 321. *See also* D. Shapovalova, "CBDR-RC", pp. 68-70.

[242] Paris Agreement, Art. 4(3).

[243] *Id.*, Art. 8(1)-(5).

[244] *Id.*, Art. 8(2) ("the Warsaw International Mechanism for Loss and Damage [("**WIM**")] associated with Climate Change Impacts shall be subject to the authority and guidance of the Conference of the Parties serving as the meeting of the Parties to this Agreement and may be enhanced and strengthened, as determined by the Conference of the Parties serving as the meeting of the Parties to this Agreement."). The WIM aims "to advance knowledge gathering, coordination and support to address L&D associated with the adverse effects of climate change." E. Calliari *et al.*, "Article 8: Loss & Damage" *in* G. van Calster & L. Reins (eds.) A COMMENTARY ON THE PARIS AGREEMENT ON

L&D caused by GHG emissions of the Global North, is a cornerstone of international justice of critical importance to Kenya. Like other Global South States, Kenya has limited financial capacity to address L&D resulting from climate change; by contrast, many developed States that are less vulnerable to climate change have nonetheless profited from the industrialization made possible by their GHG emissions. This asymmetry is precisely what a competently managed and sufficiently funded L&D fund would be responsible for resolving. The principle of L&D and its legal consequences beyond the Paris Agreement are discussed in more detail in Chapter 6 *infra*, concerning Question (b).

5.40 Although the UNFCCC and the Paris Agreement represent significant legal developments in the fight against climate change, they have failed to protect the climate system from the harmful effects of GHG emissions.[245] These emissions are destroying the climate system, and the 1.5°C benchmark is rapidly being reached: a third of the days in 2023 experienced temperatures higher than that, and two days of 2023 experienced globally averaged temperatures above even 2°C.[246]

5.41 To address this urgent situation, the UNFCCC and the Paris Agreement must be interpreted in light of the customary rules of "no-harm" and due diligence, and the CBDR-RC principle. This entails that States must minimize their GHG emissions to limit global warming to an increase of *below* 1.5°C as compared with pre-industrial levels.[247] Also, States' NDCs must reflect this objective and be updated accordingly. Currently, the submitted updated NDCs in aggregate are insufficient to meet this objective as only a handful of the submissions are ambitious enough to be

---

CLIMATE CHANGE (2021), *available at* https://www.researchgate.net/publication/352933920_Article_8_Loss_And_Damage (hereinafter "**E. Calliari *et al*., 'Article 8: Loss & Damage'**"), para. 8.05.

[245] *See, e.g.*, S. Malejan-Dubois, "The No-Harm Principle", p. 19 ("the commitments to reduce emissions pursuant to the climate treaties have been insufficient to 'prevent dangerous anthropogenic interference with the climate system'.").

[246] *See, e.g.*, Copernicus, "Copernicus: 2023 is the hottest year on record, with global temperatures close to the 1.5°C limit" (9 January 2024), *available at* https://climate.copernicus.eu/copernicus-2023-hottest-year-record.

[247] *See, e.g.*, ITLOS, Case 31, Doc No. ITLOS/PV.23/C31/12/Rev.1, Verbatim Record (18 September 2023), a.m., p. 15:11-12 (Okowa) ("due diligence standard requires States Parties to reduce their greenhouse gas emissions such as to bring global average temperatures below the 1.5ºC 10 standard.").

in line with its achievement.[248] As seen, Kenya has taken the lead in this direction—although it has contributed less than 0.1% of global emissions, it nonetheless updated its NDC in 2020 to set a more ambitious target for reduction of emissions.[249] Moreover, pursuant to CBDR-RC, it is the "[w]ealthy States and high emitters" that "should lead the phase out of fossil fuels".[250]

IV. Under UNCLOS, States are obligated to protect and preserve the marine environment from the deleterious effects of GHG emissions

5.42 Oceans are both key for climate balance, *and* highly vulnerable to climate change. Indeed, "climate change and the ocean are inextricably linked".[251] Thus, the obligations concerning the protection and preservation of the oceans are critical, not only to protect the oceans from climate change, but also to preserve their status as carbon sinks. In this vein, UNCLOS is the "most central global legal instrument with regard to the protection of the marine environment".[252] UNCLOS was concluded in part to "promote [the] protection and preservation of" the marine environment.[253]

---

[248] *See* UNFCCC, *Draft report of the Subsidiary Body for Scientific and Technological Advice on its fifty-ninth session*, UN Doc. FCCC/SBSTA/2023/L.9 (30 November-6 December 2023); UN Climate Change, *Technical dialogue of the first global stocktake: Synthesis report by the co-facilitators on the technical dialogue*, UN Doc. FCCC/SB/2023/9 (8 September 2023), para. 99; Climate Action Tracker, "The Cat Thermometer", *available at* https://climateactiontracker.org/global/cat-thermometer/ (noting that the "current level of government action is insufficient with temperatures continuing to rise into the next century").

[249] The World Bank Group, *Country Climate and Development Report: Kenya* (2023), *available at* https://openknowledge.worldbank.org/entities/publication/b59c453d-c2cb-421d-909d-7c05cb0d4580, p. 16; Kenya's Updated Nationally Determined Contribution, p. 12.

[250] UN OHCHR, *Fossil fuels at the heart of the planetary environmental crisis: UN experts* (30 November 2023), *available at* https://www.ohchr.org/en/press-releases/2023/11/fossils-fuels-heart-planetary-environmental-crisis-un-experts. *See also* Amicus Curiae from UN Special Rapporteurs to IACtHR, para. 150.

[251] T. Kantai *et al*, "Summary of the Third Session of the Intergovernmental Conference (IGC) on the Conservation and Sustainable Use of Marine Biodiversity of Areas Beyond National Jurisdiction: 19-30 August 2019" (2019) 25 *Earth Negotiations Bulletin* 3, p. 3.

[252] J. Schäli, "The Protection of the Marine Environment from Land-based Sources of Plastic Pollution in International Law" *in* THE MITIGATION OF MARINE PLASTIC POLLUTION IN INTERNATIONAL LAW FACTS, POLICY AND LEGAL IMPLICATIONS (Brill, 2022), p. 143.

[253] UNCLOS, Preamble. This purpose is reiterated at the preamble of Annex VI of the Convention concerning the Resolution on Development of National Marine Science, Technology and Ocean Service Infrastructures.

5.43 Although UNCLOS makes no explicit reference to climate change, its provisions apply to the deleterious effects caused by GHG emissions. Article 1(4) of UNCLOS establishes that the "introduction by man, directly or indirectly, of substances of *energy* into the marine environment […] which results or is likely to result in […] deleterious effects" constitutes "pollution to the marine environment".[254] GHG emissions are "energy" that is absorbed and sequestrated by the oceans, leading to climate change impacts and thus to "deleterious effects" to the marine environment.[255] There is broad agreement among UNCLOS Parties in this respect.[256] Therefore, GHG emissions constitute pollution of the marine environment that UNCLOS requires to be combatted.

5.44 UNCLOS establishes in Part XII multiple obligations for the protection and preservation of the marine environment.[257] *First*, Article 192 establishes an *erga omnes* obligation[258] "to *protect and preserve* the marine environment".[259] Thus, *all* States have an obligation to protect and

[254] *Id.*, Art. 1(4) (emphasis added).

[255] United Nations, *The Impacts of Climate Change and Related Changes in the Atmosphere on the Oceans: a Technical Abstract of the First Global Integrated Marine Assessment* (2017), p. 3, para. 8. *See also* UN General Assembly, Resolution 70/235, *Oceans and the Law of the Sea*, UN Doc. A/RES/70/235 (23 December 2015), para. 256; R. Barnes (2022) "An Advisory Opinion on Climate Change Obligations Under International Law: A Realistic Prospect?", 53(2-3) *Ocean Development & International Law*, 180-213, pp. 205-206 ("there appears to be a high degree of consensus on the causes and effects on the oceans of climate change").

[256] *See, e.g.*, J. Chowdhury, "At Historic ITLOS Hearings, States Stake Out Positions on Climate Duties and Ocean Protection", *CIEL* (28 September 2023), *available at* https://www.ciel.org/at-historic-itlos-hearings-states-stake-out-positions-on-climate-duties-and-ocean-protection/ ("Most delegations […] agreed that under UNCLOS, greenhouse gas emissions clearly qualify as a form of marine pollution, which States are required to prevent, reduce, and control.").

[257] Part XII of UNCLOS was drafted "in line with the language and spirit" of the Principles of the 1972 Stockholm Declaration, which establishes in its Principle 1 the "duty to protect and preserve the marine environment." *See* Stockholm Declaration, Principle 7.

[258] *See* M. Nordquist *et al.*, VIRGINIA COMMENTARY TO UNCLOS (Vol. IV, 1991) (hereinafter "**Virginia Commentary**"), p. 39, para. 198.8. *See also id.*, p. 34, para. 192.2 (observing that this Article "could be extended [even] to international organizations which become parties to the Convention").

[259] UNCLOS, Art. 192 (emphasis added). This Article represents "the first explicit statement, in a global treaty, of the *general obligation* to protect and preserve the marine environment." Virginia Commentary, p. 40, para. 198.8.

preserve the marine environment from GHG emissions.[260] This general obligation "is further detailed in the subsequent provisions of Part XII [and] other international agreements".[261]

5.45 *Second*, Article 194 establishes a strict due diligence obligation on States to take "*all measures* […] necessary to prevent, reduce and control pollution of the marine environment from any source",[262] including from GHG emissions. Article 194 incorporates CBDR-RC. It provides that States must use "the best practicable means at their disposal", and in "accordance with their capabilities", to comply with this obligation.[263] Furthermore, under Article 31(3)(c) of the VCLT, the Paris Agreement and the rules of customary international law must be taken into account in interpreting this obligation. Thus, Article 194(1) of UNCLOS entails that States must implement "all measures", in accordance with their capabilities to ensure that global average temperature is limited to *well below* 2°C above pre-industrial levels, while aiming to limit such increase to 1.5°C above pre-industrial levels, *and lower*.[264]

---

[260] *South China Sea* Award, p. 373, para. 940.

[261] *Id.*, p. 374, para. 942.

[262] UNCLOS, Art. 194(1) (emphasis added).

[263] *Ibid.*

[264] *See, e.g.*, Republic of Bangladesh, *Written Statement before ITLOS Regarding the Request for an Advisory Opinion on Climate Change* (16 June 2023), *available at* https://www.itlos.org/fileadmin/itlos/documents/cases/31/written_statements/1/C31-WS-1-21-Bangladesh.pdf, para. 28 ("under Article 194" of UNCLOS, States must "adopt measures limiting average global temperature rise to within 1.5ºC of pre-industrial levels."). *See also* ITLOS, Case 31, Doc No. ITLOS/PV.23/C31/12/Rev.1, Verbatim Record (18 September 2023), a.m., p. 15:4-12 (Okowa) ("the 1.5ºC standard must […] function as the absolute minimum of what is required of States Parties under articles 194 and 192 of UNCLOS […] Mozambique further submits that the 1.5ºC standard is the start, but not the end point, of the scope of States Parties' obligations under UNCLOS […] UNCLOS' due diligence standard requires States to reduce their greenhouse gas emissions such as to bring global average temperatures below the 1.5ºC standard"); *id.*, Verbatim Record (19 September 2023), a.m., p. 24:21-22 (Tladi) (States must "adopt necessary measures, individually and collectively, to limit the increase in global average temperatures to under 1.5°C above pre-industrial levels"). *See also id.*, p. 27:33-37 (Tladi); p. 31:6-10 (Jalloh) ("To meet the obligations imposed by article 194, paragraph 1, State Parties must […] reduce their emissions to reach the common goal of a maximum of 1.5ºC warming."). Verbatim records *available at* https://www.itlos.org/en/main/cases/list-of-cases/request-for-an-advisory-opinion-submitted-by-the-commission-of-small-island-states-on-climate-change-and-international-law-request-for-advisory-opinion-submitted-to-the-tribunal/.

5.46 *Third*, beyond the general duty of cooperation explained in Section I.C *supra*, Article 197 of UNCLOS codifies the fundamental principle of cooperation.[265] States must cooperate on a global or regional basis to "formulat[e] and elaborate[e] international rules, standards and recommended practices and procedures" to protect and preserve the marine environment.[266] Interpreted in accordance with Article 31(3)(c) of the VCLT, Article 197 requires that State Parties to UNCLOS must ensure not only that they cooperate to comply with their reporting duties under the Paris Agreement, but that such reports integrate "ambitious" and "progressive" plans to reduce GHG emissions. Such plans must strive to limit global warming to below 1.5°C above pre-industrial levels.

5.47 *Fourth*, Articles 204-206 of UNCLOS set out obligations of vigilance, assessment and reporting concerning the protection and preservation of the marine environment. These rules are applicable to GHG emissions. Under Article 204 of UNCLOS, States must "as far as practicable" endeavour to "observe, measure, evaluate and analyse [the] risks or effects of pollution of the marine environment", and thus of climate change.[267] Importantly, they must "keep under surveillance the effects of any activities which they permit or in which they engage in order to determine whether these activities are likely to pollute the marine environment".[268] States must also publish or provide reports with the results of these activities.[269]

5.48 Under Article 206 of UNCLOS, States must, "as far as practicable", conduct and report the results of EIAs on activities which may cause significant and harmful changes to the marine environment, when they "have reasonable grounds for believing" that activities "may cause

---

[265] *MOX Plant (Ireland v. United Kingdom)*, *Provisional Measures*, *Order of 3 December 2001, ITLOS Reports 2001*, p. 95, at para. 82 ("the duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention and general international law"); *South China Sea* Award, pp. 376-377, para. 946.

[266] UNCLOS, Art. 197.

[267] *Id.*, Art. 204(1).

[268] *Id.*, Art. 204(2).

[269] *Id.*, Art. 205.

substantial pollution" or "significant and harmful changes to the marine environment".[270] As seen in Chapter 3.I *supra*, GHG emissions cause substantial pollution and significant changes to the marine environment. Thus, this obligation covers activities that emit GHGs.

5.49 *Fifth*, these obligations are complemented by Articles 207-212 of UNCLOS, which require States to adopt laws and regulations to prevent, reduce, and control pollution of the marine environment from or through the atmosphere.[271] This includes "human-caused green-house gases".[272] When interpreted in tandem with the Paris Agreement, the UNFCCC, and customary international law, these provisions entail a duty to (i) adopt national laws to reduce, prevent, and control GHG emissions;[273] (ii) take other measures for such purposes, including "recommendations, guidelines, scientific and technical advice, capacity-building programs, cooperation programs, certification schemes, [and] codes of conduct"[274]; (iii) endeavour to establish standards, rules, practices and procedures to prevent, control, reduce and monitor GHG emissions,[275] and (iv) use best efforts to harmonize GHG emissions' policies and cooperate on "substantive rules of law as well as […] the enforcement of national laws".[276]

5.50 Kenya agrees with the view expressed by other States that each obligation to protect and preserve the marine environment entails a corresponding sovereign right to adopt the measures necessary to comply with such obligations.[277] Otherwise, these obligations would be ineffective.

---

[270] *Id.*, Art. 206.

[271] Virginia Commentary, p. 127, para. 207.1 (Article 207).

[272] A. Proells (ed.), THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A COMMENTARY (2017) (hereinafter "**A. Proells, Commentary to UNCLOS**"), Commentary to Article 212 (Professor Wacht).

[273] *See, e.g.*, UNCLOS, Arts. 207(1), 212(1).

[274] A. Proells, Commentary to UNCLOS, p. 1385, para. 10.

[275] UNCLOS, Arts. 207(4), 212(3).

[276] A. Proells, Commentary to UNCLOS, p. 1386.

[277] *See, e.g.*, Sierra Leone, *Written Statement before ITLOS Regarding the Request for an Advisory Opinion on Climate Change* (16 June 2023), para. 52, 75, 82; Mozambique, *Written Statement before ITLOS Regarding the Request for an Advisory Opinion on Climate Change* (16 June 2023), paras. 3.6, 3.43, 3.49, 3.87.a-f. This reasoning also finds support in Article 204(2) which, by establishing a duty of surveillance of the effects of activities acknowledges the

V. The obligations of States to protect and preserve the environment must take account of the human rights of people from Africa and the Global South impacted by GHG emissions

5.51 The effects of GHG emissions violate human rights and impair their fulfilment. Thus, under well-established rules of interpretation, including systematic integration and harmonization,[278] human rights law must be taken into account when assessing States' obligations concerning GHG emissions.[279] In Advisory Opinion OC-23/17 on *Climate Change and Human Rights*, the IACtHR agreed and observed that the obligation of States to prevent such harm extends to persons outside their territory.[280]

5.52 Indeed, GHG emissions from the Global North violate and impair human rights in the Global South, especially in Africa.[281] Based on the IACtHR's Advisory Opinion OC 23/17, the Committee on the Rights of the Child concluded in *Sacchi et. al v. Argentina* that States have extraterritorial responsibilities concerning climate change.[282] The Committee found that a State can be held responsible for the negative impacts of its GHG emissions on the rights of children

right of States to "permit" or "engage" in such activities. Likewise, Article 56(1)(b)(iii) of UNCLOS establishes that coastal States *have jurisdiction* in their EEZ with respect to "the protection and preservation of the marine environment." UNCLOS, Art. 56(1)(b)(iii) (emphasis added).

[278] *See, e.g.*, Vienna Convention on the Law of Treaties (23 May 1969), 1155 UNTS 331, Art. 31(3)(c) (systemic integration and harmonization); Amicus brief from UN Special Rapporteurs to ITLOS, paras. 24, 26, 97.

[279] *See, e.g.*, UN OHCHR, *Fossil fuels at the heart of the planetary environmental crisis: UN experts* (30 November 2023), *available at* https://www.ohchr.org/en/press-releases/2023/11/fossils-fuels-heart-planetary-environmental-crisis-un-experts (noting that "coal, oil and gas literally fuel the climate emergency, which is already preventing the full enjoyment of a range of human rights" and that "tremendous negative impacts [of fossil fuels] on human rights are felt throughout their life cycle from exploration and extraction to combustion and contamination").

[280] IACtHR, *Advisory Opinion OC-23/17 of November 15, 2017 requested by the Republic of Colombia*, *available at* https://www.corteidh.or.cr/docs/opiniones/seriea_23_ing.pdf, paras. 140, 156-170, 180, 209-210. The Court endorsed the duty to prevent significant environmental damage; the precautionary principle in absence of scientific certainty; the duty to conduct EIAs, and the duty to cooperation for the protection of the environment.

[281] *See* Amicus Curiae from UN Special Rapporteurs to IACtHR, paras. 23, 181; *SERAC v. Nigeria*, para. 68 (noting that "[i]nternational law and human rights must be responsive to African circumstances.").

[282] UN Committee on the Rights of the Child, *Decision Adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, Concerning Communication No. 104/2019*, UN Doc. CRC/C/88/D/104/2019 (11 November 2021), para. 4.3.

both within and outside its territory.[283] Furthermore, CBDR-RC requires taking into account the responsibility of high-GHG-emitting developed States for violations of human rights in the Global South, and for hindering the ability of developing States to protect such rights.[284]

5.53 Multiple human rights are impaired by GHG emissions.[285] Kenya addresses the most pressing examples below.

A. RIGHT TO LIFE

5.54 The right to life is one of the most sensitive and critical rights threatened by climate change.[286] This right is widely recognized, including in Article 3 of the UDHR[287] and Article 6 of the ICCPR.[288] The right is a "prerequisite for the enjoyment of all other human rights"[289] and climate change is one "the most pressing and serious threats to the ability of present and future generations to enjoy the right to life".[290]

---

[283] *Ibid.*

[284] *See supra* Chapter 5.II.A.

[285] *See, e.g.*, Amicus Curiae from UN Special Rapporteurs to IACtHR, paras. 55-56 ("Many UN Special Rapporteurs have documented how the climate emergency violates and further threatens this full range of human rights", including the "life, health, food, development, self-determination, water and sanitation, work, adequate housing and freedom from violence, sexual exploitation, trafficking and slavery", etc.).

[286] *See, e.g.*, UN Human Rights Committee, *Views Adopted by the Committee under Article 5 (4) of the Optional Protocol, Concerning Communication No. 3624/2019*, UN Doc. CCPR/C/135/D/3624/2019 (27 June-27 July 2022) (finding that Australia breached the right to life, among others, of the indigenous Torres Strait Islanders due to its inaction on climate change and acknowledging the vulnerability of these peoples to climate change since they reside in small, low-lying islands with limited options for safe relocation).

[287] UN General Assembly, *Universal Declaration of Human Rights*, UN Doc. A/RES/217(III) (10 December 1948) (Dossier No. 257) (hereinafter "**UDHR**"), Art. 3.

[288] International Covenant on Civil and Political Rights (16 December 1966), 189 UNTS 137 (Dossier No. 49) (hereinafter "**ICCPR**"), Art. 6 ("Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.").

[289] UN Human Rights Committee, General Comment No. 36, *Article 6: Right to Life*, UN Doc. CCPR/C/GC/36 (3 September 2019) (Dossier No. 299), para. 2.

[290] *Id*., para. 62.

5.55 Over the last 50 years, at least two million people have died because of extreme weather caused by climate change.[291] According to the World Health Organization ("**WHO**"), "exposure to excessive heat" caused by global warming results in "wide ranging physiological impacts, which often amplify existing conditions and result in premature death and disability".[292] The WHO projects that climate change will cost 250,000 lives annually.[293]

5.56 Indeed, the observed increase in mortality in Kenya, along with other developing countries in Africa, is associated with extreme temperatures caused by climate change.[294] The greatest mortality increase is observed in children and the elderly.[295]

5.57 The ways in which climate change threatens human life go far beyond extreme heat, and include droughts, floods, and the spread of diseases.[296] All are being experienced in Kenya.

B. RIGHT TO WATER

5.58 The right to water is essential for humankind, and critical for Kenyans. The right to water derives from the right to an adequate standard of living codified at Article 11(1) of the ICESCR and is widely recognized by human rights treaties.[297] This right protects "sufficient, safe,

[291] UN News, "Extreme weather caused two million deaths, cost $4 trillion over last 50 years" (22 May 2023), *available at* https://news.un.org/en/story/2023/05/1136897.

[292] WHO, "Heat and Health" (1 June 2018), *available at* https://www.who.int/news-room/fact-sheets/detail/climate-change-heat-and-health.

[293] WHO, "Climate Change: Overview", *available at* https://www.who.int/health-topics/climate-change#tab=tab_1 (last accessed: 1 March 2024) (due to malaria, malnutrition, diarrhea, and heat stress).

[294] IPCC, "Africa" (2022) *in Climate Change 2022: Impacts, Adaptation and Vulnerability*, *available* https://www.ipcc.ch/report/ar6/wg2/chapter/chapter-9/, p. 1318.

[295] *Ibid.*

[296] *See, e.g.*, UN OHCHR, *Submission of the Office of the High Commissioner for Human Rights to the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change* (2015), *available at* https://www.ohchr.org/sites/default/files/Documents/Issues/ClimateChange/COP21.pdf, p. 14.

[297] *See, e.g.*, Convention on the Elimination of All Forms of Discrimination Against Women (18 December 1979), 1249 UNTS 13 (Dossier No. 65), Art. 14(2)(h); Convention on the Rights of the Child (20 November 1989), 1577 UNTS 3 (Dossier No. 57), Art. 24(2)(c); Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention) (12 August 1949), 75 UNTS 135, Arts. 20, 26, 29 and 46; Protocol Additional to the Geneva

acceptable, physically accessible and affordable water for personal and domestic uses".[298] Climate change directly threatens them all.[299]

5.59 As noted by the UN Special Rapporteurs on Toxics and Human Rights, Human Rights and the Environment, and the Right to Development, "[r]oughly half of the world's population now experiences severe water scarcity for at least part of the year due to climatic and non-climatic drivers".[300] The IPCC concluded that human-driven droughts led to water scarcity for 2 million people in China, and to water shortages and famine in Eastern and Southern Africa.[301] It also warned that a 2°C warming scenario will expose between 0.9 and 3.9 billion people to increased water stress.[302] African leaders have noted that extreme weather events and changes in water cycle patterns have resulted in about 400 million people in Africa having no access to clean drinking water and 700 million without good sanitation.[303]

5.60 Climate change is not only reducing available water. It is also threatening the safety of water available for human consumption, through contamination by floods and salinization through

Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (8 June 1977), 1125 UNTS 3, Arts. 54 and 55.

[298] UN Committee on Economic, Social and Cultural Rights, General Comment No. 15, *The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)*, UN Doc. E/C.12/2002/11 (2002) (Dossier No. 294), para. 2.

[299] *See, e.g.*, P. Arrojo Agudo, Special Rapporteur on the human rights to safe drinking water and sanitation, *Special Thematic Report 1: Outlining the impacts of climate change on water and sanitation around the world* (January 2022), *available at* https://www.ohchr.org/sites/default/files/2022-01/climate-change-1-friendlyversion.pdf.

[300] Amicus Curiae from UN Special Rapporteurs to IACtHR, para. 26.

[301] M. A. Caretta *et al.*, "Water" (2022) *in Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, *available at* https://www.ipcc.ch/report/ar6/wg2/chapter/chapter-4/, p. 580.

[302] *Id*., p. 558.

[303] Nairobi Declaration, para. 12.

sea-level rise.[304] In turn, this exacerbates the transmission of water-borne diseases.[305] Moreover, the scarcity of water has rendered it more expensive and less affordable.[306]

5.61 The right to water is particularly pressing and urgent in Kenya, where, as seen in Chapter 3.III *supra*, water resources have been historically scarce. Climate change has gravely exacerbated this scarcity. Severe droughts have affected Africa disproportionately, with more than 300 drought events recorded over the past 100 years, accounting for 44% of droughts globally.[307] Indigenous pastoralists in Kenya are especially impacted because climate change is negatively affecting water supplies, grazing opportunities and livestock herds, and increasing competition, conflict and insecurity.[308]

C. RIGHT TO FOOD

5.62 Under Article 25 of the UDHR, "[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food".[309] Article 11 of

[304] UN Water, "Water and Climate Change – Facts and Figures", *available at* https://www.unwater.org/water-facts/water-and-climate-change (last accessed: 14 February 2024).

[305] M.A. Caretta *et al.*, "Water" (2022) *in Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate* Change, *available at* https://www.ipcc.ch/report/ar6/wg2/chapter/chapter-4/, p. 583.

[306] P. Arrojo Agudo, Special Rapporteur on the Human Rights to Safe Drinking Water and Sanitation, *Special Thematic Report 1: Outlining the Impacts of Climate Change on Water and Sanitation around the World* (January 2022), *available at* https://www.ohchr.org/sites/default/files/2022-01/climate-change-1-friendlyversion.pdf, p. 3.

[307] United Nations Convention to Combat Desertification, *Drought in Numbers (2022)—Restoration for Readiness and Resilience*, *available at* https://www.unccd.int/sites/default/files/2022-06/Drought%20in%20Numbers%20%28English%29.pdf, p. 12. *See also ibid*. (noting that floods have increased considerably in Europe, and noting that this has caused US$27.8 billion in losses).

[308] "There is no time left: climate change, environmental threats, and human rights in Turkana County, Kenya", *Human Rights Watch* (15 October 2015), *available at* https://www.hrw.org/report/2015/10/16/there-no-time-left/climate-change-environmental-threats-and-human-rights-turkana. *See also* J. Mokku, "Climate change destroys the livelihoods of Kenyan pastoralists", *Africa Renewal* (4 January 2023), *available at* https://www.un.org/africarenewal/magazine/january-2023/climate-change-destroys-livelihoods-kenyan-pastoralists.

[309] UDHR, Art. 25(1).

ICESCR similarly enshrines "the fundamental right of everyone to be free from hunger".[310] States must "ensure an equitable distribution of world food supplies in relation to need", individually and though international cooperation.[311]

5.63 The right to food has special significance in the African context. In the seminal *SERAC v. Nigeria* case, the African Commission on Human and Peoples' Rights ("**African Commission**") observed that the "African Charter and international law require and bind [States] to protect and improve existing food sources and to ensure access to adequate food for all citizens".[312] The African Commission also noted that pursuant to this obligation, States "should not destroy or contaminate food sources",[313] and should implement scientific monitoring of communities that face environmental threats, including to their food.[314]

5.64 Climate change imperils the right to food in numerous ways.[315] For instance, fish stocks have decreased from the acidification and stratification of oceans,[316] which undermines food production.[317] Sea-level rise has compromised irrigation needed for agricultural production through salinization of water in coastal areas.[318] As a result of extreme weather events, food

[310] International Covenant on Economic, Social and Cultural Rights (16 December 1966), 993 UNTS 3 (Dossier No. 52) (hereinafter "**ICESCR**"), Art. 11(2).

[311] *Ibid.*

[312] *SERAC v. Nigeria*, para. 65.

[313] *Ibid*.

[314] *Id*., para. 53 (according to the African Commission, States should order "or at least permitting independent scientific monitoring of threatened environments, requiring and publicizing environmental and social impact studies prior to any major industrial development, undertaking appropriate monitoring and providing information to those communities exposed to hazardous materials and activities and providing meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities.").

[315] Amicus Curiae from UN Special Rapporteurs to IACtHR, para. 68.

[316] UN General Assembly, *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, UN Doc. A/74/161 (15 July 2019) (Dossier No. 312), para. 12.

[317] IPCC, *Climate Change 2023: Synthesis Report*, pp. 46, 50.

[318] *See, e.g.*, J. Fortin, "Storms, Rising Seas and Salty Drinking Water Threaten Lower Louisiana", *New York Times* (15 November 2023), *available at* https://www.nytimes.com/2023/11/15/us/louisiana-saltwater-climate.html. *See also*

scarcity has become more pronounced in Kenya, where 14 counties are now listed as facing levels of food insecurity that are at least "acute".[319] During times of food scarcity, increased competition for access to food guarantees that the most vulnerable Kenyans will be first to go hungry.[320]

5.65 The impact of climate change on the right to food is particularly severe in developing countries like Kenya, where agriculture is a principal food source. Earlier this year, the IPCC noted that "increasing temperatures and extreme events change the seasonal timing of key biological events such as flowering, when animals emerge from hibernation, or annual migration, causing mismatches with important seasonal food sources" and has led to "climate-caused local population extinctions and shifts in vegetation zones".[321] Many households in Kenya rely on stable weather patterns to reliably produce crops for their own subsistence. Consequently, disruptions to the climate system, including droughts, floods, and other extreme weather events, can destroy farms, which function not only as sources of livelihood but as food sources as well.[322] No fewer than 23.8 million of people in the Horn of Africa face hunger because of prolonged and severe droughts.[323]

D. RIGHT TO SELF-DETERMINATION

5.66 Besides impairing access to life, water, and food, climate change has also compromised the right to self-determination. This is also a pressing concern for humankind and for Kenya specifically. Protection of the right to self-determination is a critical facet of States' obligations to

---

K. Tully, "The Invisible Flood: The Chemistry, Ecology, and Social Implications of Coastal Saltwater Intrusion", 69(5) *BioScience* (May 2019), *available at* https://doi.org/10.1093/biosci/biz027, pp. 368–378.

[319] The World Bank Group, *Country Climate and Development Report: Kenya* (2023), *available at* https://openknowledge.worldbank.org/entities/publication/b59c453d-c2cb-421d-909d-7c05cb0d4580, p. 11 (citing Kenya Food Security Act (2017)).

[320] *Id.*, pp. 11, 15.

[321] IPCC, "Overarching Frequently Asked Questions and Answers" (16 June 2023), *available at* https://www.ipcc.ch/report/ar6/wg2/downloads/faqs/IPCC_AR6_WGII_Overaching_OutreachFAQ2.pdf, pp. 1-2.

[322] *Id.*, p. 16.

[323] Oxfam, *Joint Statement: NGOs Call out Climate Injustice and Urge Global Donors to Fully Fund the Humanitarian Response in the Horn of Arica Now* (22 May 2023), *available at* https://www.oxfam.org/en/press-releases/joint-statement-ngos-call-out-climate-injustice-and-urge-global-donors-fully-fund.

protect the climate system. Under Article 1 of the UDHR and Common Article 1 of the ICCPR and the ICESCR, this right entitles people to "freely" (i) "determine their political status", (ii) "pursue their economic, social and cultural development", and (iii) "dispose of their natural wealth and resources", for their own ends,[324] and not to be deprived of their own means of subsistence.[325] The protection of self-determination is an *erga omnes* obligation.[326]

5.67 Climate change jeopardizes every aspect of self-determination.[327] Its effects are already impairing economic industries and cultural activities that sustain the economies and livelihoods of States, including through harmful effects on agriculture, fishing, tourism, hydropower and outdoor labour productivity.[328] These industries are critical for many Kenyans. The pressing need for development, particularly in developing countries like Kenya and SIDS, is thus hindered by climate change.[329]

5.68 More fundamentally, climate change risks depriving certain peoples of statehood through the destruction or disappearance of physical territory, which endangers the foundation of this right and the ability to exercise it fully. The IPCC found that "[i]n high emissions scenarios, low-lying island states may face the long-term risk of becoming uninhabitable, creating the potential for a new phenomenon of climate-induced statelessness".[330] This threat is most pressing for SIDS and

[324] ICCPR and ICESCR, Common Art. 1(2).

[325] *Ibid.*

[326] *Chagos* Advisory Opinion, p. 139, para. 180; *East Timor (Portugal v. Australia), Judgment, I.C.J. Reports 1995*, p. 90, at p. 102, para. 29. *See also Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium v. Spain), Second Phase, Judgment, I.C.J. Reports 1970*, p. 3, at p. 32, para. 33.

[327] *See, e.g.*, Amicus Curiae from UN Special Rapporteurs to IACtHR, paras. 83-92.

[328] IPCC, *Climate Change 2023: Synthesis Report*, p. 16.

[329] *See e.g.* M. Dell *et al.*, "Temperature Shocks and Economic Growth: Evidence From the Last Half Century", (2012) 4 *Am. Econ. Journal: Macroeconomics* 66, *available at* https://scholar.harvard.edu/files/dell/files/aej_temperature.pdf, pp. 87-88; S. Dasgupta *et al.*, "Effects of climate change on combined labour productivity and supply: an empirical, multi-model study" (2021) 5 *Lancet* 455, *available at* https://doi.org/10.1016/S2542-5196(21)00170-4.

[330] G. Cissé *et al.*, "Health, Wellbeing and the Changing Structure of Communities" (2022) *in Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate*, *available at* https://www.ipcc.ch/report/ar6/wg2/chapter/chapter-7/, p. 1100.

other States that have contributed the least to climate change. For instance, in less than 80 years, 95% of the territory of Tuvalu "will be flooded by routine high tides".[331] In general, "low-lying islands will be severely negatively affected and uninhabitable, necessitating the relocation of their populations within the next 50 years".[332] While the international legal system can take steps to protect the right to self-determination of peoples who find their physical land disappearing into rising seas, including by fixing maritime delineations as the ILC has recommended, the full enjoyment of the right to self-determination is sabotaged by the loss of territory–a foreseeable consequence of climate change.

E. RIGHT TO CULTURAL LIFE

5.69 The right to cultural life is recognized in the UDHR[333] and codified in the ICESCR.[334] It protects "culture as a living process, historical, dynamic and evolving, with a past, a present and a future".[335] This right protects the access to, and enjoyment of, cultural heritage,[336] which States must protect under international law, principally under the Convention concerning the Protection

[331] Tuvalu Coastal Adaptation Project, "Tuvalu unveils Long-Term Adaptation Plan at COP27, a vision for a safe, climate-resilient future" (14 November 2022), *available at* https://tcap.tv/news/2022/11/14/tuvalu-presents-long-term-adaptation-plan-ltap.

[332] A. Heslin, "Climate Migration and Cultural Preservation: The Case of the Marshallese Diaspora, Loss and Damage from Climate Change" *in* R. Mechler *et al.* (eds.) CLIMATE RISK MANAGEMENT, POLICY AND GOVERNANCE (2018), p. 383.

[333] UDHR, Art. 27(1) (establishing that "[e]veryone has the right freely to participate in the cultural life of the community"); *id.*, Art. 22 (protecting "the right … to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality"). *See also* ICCPR, Art. 27 ("minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language").

[334] ICESCR, Art. 15(1). *See also* UNESCO, "The Right to Education of Minorities" (2023), *available at* https://unesdoc.unesco.org/ark:/48223/pf0000385259 (establishing that under the ICESCR, States must "facilitate the acceptability of education by taking positive measures to ensure that education is culturally appropriate for minorities and indigenous peoples'"); UN OHCHR, General Comment 13, *The Right to Education (Art. 13)*, UN Doc. E/C.12/1999/10 (8 December 1999).

[335] UN CESCR, General Comment No. 21, *Right of everyone to take part in cultural life*, UN Doc. E/C.12/GC/21 (21 December 2009), para. 11.

[336] *Id.*, paras. 11-13; UN Human Rights Council, *Report of the Independent Expert in the Field of Cultural Rights*, UN Doc. A/HRC/17/38 (21 March 2011), paras. 33-36.

of the World Cultural and Natural Heritage ("**UNESCO Convention**").[337] The right to cultural life is particularly relevant for Kenya, given its extraordinary cultural wealth.

5.70 The right to cultural life, and cultural heritage in general, are jeopardized by climate change. UNESCO concluded that, since 2007, 125 World Heritage sites, including 79 of natural or mixed cultural and natural heritage, have been harmed by climate change.[338] Climate change has also caused melting and retreat of glaciers, loss of biodiversity, coral bleaching, and coastal erosion, all of which negatively impact natural cultural heritage.[339]

5.71 Climate change-caused damage to cultural heritage is growing more severe. A study published in 2021 found that all the natural and cultural sites in Kenya that are listed in the World Heritage List have already "exhibited forms of deterioration" from natural phenomena derived caused by climate change.[340]

5.72 Intangible components of culture, including oral traditions, performing arts, social practices, rituals, festive events, traditional craftsmanship, and knowledge and practices concerning nature and the universe,[341] also enjoy international protection. In *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, the IACtHR considered the relation of communities with

[337] Convention Concerning the Protection of the World Cultural and Natural Heritage (16 November 1972), Art. 4 (establishing that States must "ensur[e] the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage […] situated on its territory"); *id.*, Art. 5 ("ensure that effective and active measures are taken for the protection, conservation and presentation of the cultural and natural heritage situated on its territory"); *id.*, Art. 6(3) (protect all cultural heritage sites and "not […] take any deliberate measures which might damage" them).

[338] UNESCO World Heritage Centre, *Climate Change and World Heritage: Report on Predicting and Managing the Impacts of Climate Change on World Heritage and Strategy to assist States Parties to Implement Appropriate Management Responses*, World Heritage Report No. 22 (2007), *available at* https://whc.unesco.org/document/8977, p. 26.

[339] *Ibid.*

[340] A. Chemeli *et al.*, "Climate Change and Immovable Cultural Heritage in Kenya: Impact and Response Strategies" *in* W. Leal Filho *et al*. (eds.) (2021) *Handbook of Climate Change Management*, *available at* https://doi.org/10.1007/978-3-030-22759-3_91-1, p. 14.

[341] Convention Concerning the Protection of the World Cultural and Natural Heritage (16 November 1972), Art. 2.

the land as necessary to "preserve their cultural legacy and transmit it to future generations".[342] The right of minorities and indigenous peoples to enjoy, profess and practice their own culture is a critical component of the right to a cultural life.[343] However, this has also been harmed by climate change. Extreme weather has compromised daily rituals and the opportunity to practice and transmit intangible culture knowledge and practices, including through festivals, song and dance, traditional medicine, religious site holidays, crafts, agricultural practices, storytelling, and rituals.[344]

F. RIGHT TO A CLEAN, HEALTHY AND SUSTAINABLE ENVIRONMENT

5.73 The fulfilment of human rights also requires a healthy environment, which is protected by international law.[345] The right to a clean, healthy and sustainable environment is codified in Article 24 of the African Charter on Human and Peoples' Rights ("**African Charter**"), which "uniquely provides that '[a]ll peoples shall have the right to a general satisfactory environment favourable to their development'".[346] Similarly, the IACtHR has recognized an autonomous environmental right under Article 26 of the American Convention on Human Rights, which protects the right to progressive development.[347] The UN Human Rights Council and the UN General Assembly have

[342] *The Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, IACtHR, Petition No. 11577, Series C No. 79, Judgment (31 August 2001), para. 149. *See also id.*, Joint Separate Opinion of Judges Cançado Trindade, Pacheco-Gómez, and Abreu-Burelli, para. 10 (noting that "we relate ourselves […] in time, with other generations (past and future), in respect of which we have obligation").

[343] UN Human Rights Committee, General Comment No. 23, *The Rights of Minorities (Art. 27)*, UN Doc. CCPR/C/21/Rev.1/Add.5 (8 April 1994), para. 1.

[344] UN General Assembly, *Report of Special Rapporteur Karima Bennoune in the field of cultural rights*, UN Doc. A/75/298 (10 August 2020) (Dossier No. 326), paras. 33-34.

[345] UN General Assembly, Resolution 76/300, *The human right to a clean, healthy and sustainable environment*, UN Doc. A/RES/76/300 (28 July 2022) (Dossier No. 260) ("*Affirming* the importance of a clean, healthy and sustainable environment for the enjoyment of all human rights") (emphasis in original).

[346] Y. Suredi & M. Fall, "Climate Change Litigation before the African Human Rights System: Prospects and Pitfalls", (2023) *JHRP*, *available at* https://doi.org/10.1093/jhuman/huad024, p. 2.

[347] *Case of the Indigenous Communities Members of the Lhaka Honhat (Our Land) Association v. Argentina*, IACtHR, Judgment (6 February 2020), paras. 10, 370.

recognized a free-standing environmental right.[348] In this same vein, the 1972 Stockholm Declaration recognized a "fundamental right to freedom, equality and adequate conditions of life" that requires "an environment of a quality that permits a life of dignity and well-being".[349]

5.74 In *SERAC v. Nigeria*, the African Commission clarified that the right to a generally satisfactory environment "requires the state to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources".[350] Similarly, in Advisory Opinion OC-23/17, the IACtHR stated that "the right to a healthy environment constitutes a universal value that is owed to both present and future generations".[351]

5.75 The right to a healthy environment is threatened by climate change, which plainly impairs access to a safe climate, clean food and water, and a non-toxic environment that can sustain life, including healthy biodiverse ecosystems.

G. RIGHT TO LIVELIHOOD

5.76 The right to livelihood is codified in Articles 7 and 11 of the ICESCR. These provisions protect "the enjoyment of just and favourable conditions of work" and adequate standards of living, including food, clothing, housing, and the continuous improvement of living conditions.[352]

5.77 Climate change has impaired access to livelihood for significant portions of humankind, especially among communities in the Global South that have "limited resources to confront

[348] *See, e.g.*, UN General Assembly, Resolution 76/300, *The human right to a clean, healthy and sustainable environment*, UN Doc. A/RES/76/300 (28 July 2022) (Dossier No. 260); UN Human Rights Council, Resolution 48/13, *The human right to a clean, healthy and sustainable environment*, UN Doc. A/HRC/RES/48/13 (8 October 2021) (Dossier No. 279).

[349] Stockholm Declaration, Principle 1.

[350] *SERAC v. Nigeria*, para. 52.

[351] IACtHR, *Advisory Opinion OC-23/17, The Environment and Human Rights* (15 November 2019), para. 59.

[352] ICESCR, Arts. 7, 11.

disasters, and [whose] livelihoods depend directly on increasingly threatened ecosystem goods and services".[353] As seen, international cooperation and financial assistance from developed and high-GHG-emitting countries to developing States, like Kenya, is critical. Human-driven warming temperatures, natural disasters, and sea-level rise are amongst the main challenges faced thus far.[354] These threats will compound over time.

H. RIGHT TO HOME, PRIVACY AND FAMILY LIFE

5.78 Article 17 of the ICCPR protects the right to home, privacy, and family life against any arbitrary or unlawful interference, or unlawful attacks on the honour or reputation of a human.[355]

5.79 Human rights case law has linked violations of this right to degradation of the environment. For instance, in *López Ostra v. Spain*, the ECtHR found that Spain contravened the right to private and family life by failing to achieve a fair balance between a town's economic interests and human rights, where a waste treatment plant damaged the applicant's health and created a nuisance.[356] In *Tătar v. Romania*, the ECtHR again found a violation of the right to private and family life caused by the State's failure to protect citizens from the risk of pollution from the spill of polluted water

[353] The World Bank, *Groundswell – Preparing for Internal Climate Migration* (2018), *available at* https://www.worldbank.org/en/news/infographic/2018/03/19/groundswell---preparing-for-internal-climate-migration, p. 21.

[354] J. Birkmann *et al*., "Poverty, Livelihoods and Sustainable Development" (2022) *in Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, *available at* https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_Chapter08.pdf, pp. 1177-1179, 1204-1209. *See* IPCC, *Climate Change 2014: Synthesis Report—Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (2014), *available at* https://www.ipcc.ch/site/assets/uploads/2018/02/AR5_SYR_FINAL_SPM.pdf.

[355] ICCPR, Art. 17(1).

[356] *López Ostra v. Spain*, ECtHR, Application No. 16798/90, Judgment (9 December 1994), paras. 51, 58. Similarly, in *Budayeva v. Russia*, the ECtHR found Russia in breach of the right to life given its failure to warn the population of the town of Tyrnauz to evacuate the area after it was hit by mudslides that resulted in the death of the applicant's husband and injuries to her son. *See Case of Budayeva and others v. Russia*, ECtHR, Application Nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, Judgment (20 March 2008), para. 195 *et seq.*

from a gold ore extraction site.[357] The court acknowledged that the pollution "may affect" individuals who are "likely to be exposed" to its effects.[358]

5.80 Based on these precedents, developed countries from the Global North may be held accountable, and are liable, for the impacts that their GHG-emitting activities have on the environments of people from the Global South, particularly in Africa.

* * *

5.81 In conclusion, States must ensure the protection of the climate system from GHG emissions. Under *customary international law*, they must cause no harm to the climate system. They must also prevent any harm to it, by observing due diligence, conducting EIAs over GHG-emitting activities, and cooperating to combat climate change. Given the demonstrated impacts of GHGs on the climate system, these obligations require minimizing GHG emissions.

5.82 Under *treaty law* as interpreted in light of the entire international legal regime, States must strive to limit global warming to below 1.5°C pre-industrial levels. They must observe all their obligations to protect and preserve the marine environment under UNCLOS, towards that goal. The human rights of people under their jurisdiction and control, and in developing low-GHG-emitting countries, must be respected by all States, including the rights to life, to water, to food, to self-determination, to cultural life, to a clean, healthy and sustainable environment, to livelihood, and to home, privacy and family life.

5.83 The principle of CBDR-RD is applicable to the obligations to ensure protection of the climate system from GHG emissions. States must also strive to conserve the climate system for future generations.

---

[357] *Tătar v. Romania*, ECtHR, Application No. 67021/01), Judgment (27 January 2009), paras. 107, 113, 119.

[358] *Ibid*.

5.84 The next Chapter discusses the urgent need for accountability applicable to these obligations. It addresses the "legal consequences" that arise from causing significant harm to the climate system through GHG emissions, highlighting the role of compensation for climate-change L&D and the possibility for both States and individuals to invoke State responsibility.

CHAPTER 6
QUESTION (B): CAUSING OR FAILING TO PREVENT SIGNIFICANT HARM TO THE CLIMATE SYSTEM ENTAILS STATE RESPONSIBILITY, AMONG OTHER CONSEQUENCES

6.85 Question (b) concerns the "legal consequences" for States where they, by their acts or omissions "have caused significant harm to the climate system and other parts of the environment". Kenya submits that State responsibility is a key consequence of said acts or omissions, and that such consequences arise when States fail to prevent such harm. Furthermore, Kenya submits that State responsibility include the duty to cease such acts or omissions and to provide reparation, principally through compensation, as well as assurances of non-repetition.

6.86 Kenya submits as well that both States and individuals are entitled to invoke the responsibility of a State for unlawful GHG emission. It also submits that, notwithstanding State responsibility, States that have caused significant harm to the climate system must phase out fossil fuels, contribute to L&D funds, and forego climate change loans.

I. Unlawful GHG emissions entail State responsibility, including the duty to compensate for loss and damage

6.87 State responsibility is a key legal consequence of acts or omissions of States that cause or fail to prevent significant harm to the climate system. As seen, States have a general obligation not to cause harm to the climate system. Thus, "where they, by their acts and omissions, have caused significant harm" to that system, as Question (b) suggests, State responsibility arises.[359]

6.88 Though the Question as posed by the General Assembly presupposes the existence of climate change-related harm, it bears recalling that under the standard regime of international

[359] *See* ILC, *Articles on Responsibility of States for Internationally Wrongful Acts* (2001) (hereinafter "**ILC, ARSIWA**"), Arts. 2, 28 (establishing that State responsibility is a "legal consequence" entailed by "an internationally wrongful act", which comprises of "an action or omission […] attributable to the State [that] constitutes a breach of an international obligation").

responsibility, the existence of harm, damage or injury is not a condition to engage responsibility, unless its existence is a prerequisite for establishing a breach of an international obligation.[360]

6.89 In that vein, State responsibility also arises when States fail to prevent harm.[361] The duty to prevent significant harm to the climate system comprises multiple procedural obligations. These include cooperating regionally and internationally to further adaptation and mitigation measures to climate change; providing financial and technical assistance to developing States for such purposes; adequately regulating GHG-emitting activities to minimize GHG emissions; limiting global warming to below 1.5°C; and conducting EIAs for activities with the potential to emit GHGs.[362]

6.90 Thus, State responsibility is an immediate and critical legal consequence of acts or omissions that cause or fail to prevent significant harm to the climate system. However, Kenya emphasizes that the finding of State responsibility and its legal consequences, including the duty of reparation, depend on the circumstances of each case.[363] Proceeding from that understanding, Kenya focuses on general issues of State responsibility that, in its view, are applicable to States which cause or fail to prevent significant harm to the climate system, starting with the duty to cease the wrongful act committed.

---

[360] *See* ILC, DARSIWA, with commentaries, Art. 31, Commentary (6) ("In some cases what matters is the failure to take necessary precautions to prevent harm even if in the event no harm occurs […] In each case the primary obligation will determine what is required. Hence, Article 12 defines a breach of an international obligation as a failure to conform with an obligation.").

[361] *See ibid*; *Dispute over the Status and Use of the Waters of the Silala (Chile v. Bolivia), Judgment, I.C.J. Reports 2022*, p. 614, at p. 648, para. 99, citing to *Pulp Mills* that acknowledged the "due diligence" principle. *See also id.*, p. 648, para. 97 (noting that "under customary international law", States are "obliged, in utilizing the international watercourse, to take all appropriate measures to prevent the causing of significant harm to the other Party").

[362] *See, e.g.*, S. Malejan-Dubois, "The No-Harm Principle", pp. 16, 20-21. *See also* Amicus brief from UN Special Rapporteurs to ITLOS, para. 95.

[363] *See, e.g.*, *Armed Activities (Reparations)* (2022), paras. 102, 117, 126, 147, 156, 181, 193, 206, 225, 258, 275, 365, 387, 392, 396, 401 (considering the specific and "exceptional" circumstances of the case for the determination of reparation, and for interests and costs of the proceedings).

A. STATES HAVE AN OBLIGATION TO CEASE ACTS AND OMISSIONS THAT HARM THE CLIMATE SYSTEM OR THAT FAIL TO PREVENT SUCH HARM

6.91 The Court has observed that "the obligation of a State responsible for an internationally wrongful act to put an end to that act is well established in general international law".[364] Thus, a State in breach "is under an obligation", *inter alia*, to "to cease [a breach that] is continuing".[365] The specific means of cessation depend on the circumstances of each case. In the climate change context, it could entail ceasing the operation of an activity that emits GHGs or conducting proper EIAs on such activities, and providing means to capture GHG emissions that harm the climate system.

B. STATES MUST MAKE FULL REPARATION OF THE SIGNIFICANT HARM THEY CAUSE OR FAIL TO PREVENT

6.92 Besides ceasing its wrongful act, States that have failed to prevent significant harm, or have caused such harm, have an obligation of reparation. It is well established that "a State which bears responsibility for an internationally wrongful act is under an obligation to make full reparation for the injury caused by that act".[366] Every form of reparation must "as far as possible […] benefit all those who suffered injury resulting from [the] internationally wrongful acts".[367] This is particularly

---

[364] *Wall* Advisory Opinion, para. 150 (*citing to Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 149; *United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, p. 44, para. 95; *Haya de la Torre. Judgment, I.C.J. Reports 1951*, p. 82).

[365] ILC, ARSIWA, Art. 30(a). *See also Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99, at p. 153, para. 137.

[366] *Armed Activities (Reparations)* (2022), p. 28, para. 69 (*citing to Factory at Chorzów, Jurisdiction, 1927, P.C.I.J., Series A, No. 9,* p. 21*; Gabčikovo-Nagymaros*, p. 81, para. 152; *Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment, I.C.J. Reports 2004*, p. 59, para. 119). *See also Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Compensation, Judgment, I.C.J. Reports 2018*, p. 15 (hereinafter "***Certain Activities Carried Out by Nicaragua (Compensation)***"), at p. 26, para. 30; *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010 (II)*, p. 639, at p. 691, para. 161.

[367] *Armed Activities (Reparations)* (2022), p. 50, para. 102 (*citing to Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Compensation, Judgment, I.C.J. Reports 2012 (I)*, p. 324 (hereinafter "***Diallo (Compensation)***"), at p. 344, para. 57).

relevant in the context of climate change, which impacts multiple actors, including States and individuals.

6.93 Reparation must be "full", and can be made through restitution, compensation, or satisfaction, "either singly or in combination".[368] In its 1997 resolution concerning "Responsibility and Liability under International Law for Environmental Damage", the *Institut de Droit International* encouraged States to "provide for a broad concept of reparation, including cessation of the activity concerned, restitution, compensation and, if necessary, satisfaction."[369]

6.94 Restitution is "the first of the forms of reparation available"[370] and must be ordered where a return to the *status quo ante* is possible.[371] States must provide restitution for the effects of GHG that may be redressed, for instance, through reforestation of lost natural resources, wetland restoration, funding for preservation of vulnerable biodiversity before extinction occurs, reconstruction of infrastructure damaged or destroyed, and investments in healthcare for communities impacted by pollution (to the extent that these health problems are curable or reversible).

6.95 Regrettably, the impacts of climate change make it largely impossible to return to the *status quo ante*.[372] Thus, reparation in the context of climate change must prominently take the form of compensation, as discussed below.[373]

---

[368] ILC, ARSIWA, Art. 34; *Armed Activities (Reparations)* (2022), p. 50, para. 101.

[369] Institut de Droit International, *Responsibility and Liability under International Law for Environmental Damage* (1997), *available at* https://www.idi-iil.org/app/uploads/2017/06/1997_str_03_en.pdf, Art. 24.

[370] ILC, DARSIWA, with commentaries, Art. 35, Commentary (1).

[371] ILC, ARSIWA, Art. 35 (restitution consists of the "re-establish[ment] [of] the situation which existed before the wrongful act was committed"); *Pulp Mills*, p. 103, para. 273.

[372] *See, e.g.*, A. Venn, "Legal Claims for Reparation of Loss and Damage" *in* B. Mayer & A. Zahar (eds.), DEBATING CLIMATE LAW (2021), p. 345.

[373] *Pulp Mills*, pp. 103-104, para. 273 ("where restitution is materially impossible or involves a burden out of all proportion to the benefit deriving from it, reparation takes the form of compensation or satisfaction, or even both") (citing *Gabčikovo-Nagymaros,* p. 81, para. 152; *Wall* Advisory Opinion, p. 198, paras. 152-153; *Application of the*

C. STATES MUST COMPENSATE FOR LOSS AND DAMAGE TO THE CLIMATE SYSTEM THAT THEY CAUSE OR FAIL TO PREVENT

6.96 Compensation for L&D resulting from GHG emissions is a critical component of State responsibility concerning climate change.[374]

6.97 In 1991, Vanuatu proposed negotiating compensation for L&D.[375] Although it involved "offer[ing] incentives to the industrialized developed countries to limit their CO2 emissions",[376] high-GHG-emitting States rejected the proposal.[377] Article 8 of the Paris Agreement codified the "importance of averting, minimizing and addressing" L&D associated with the adverse effects of climate change.[378] However, the instrument adopting the Paris Agreement established that "Article 8 of the Agreement does not involve or provide a basis for any liability or compensation".[379] Thus, compensation for climate change L&D remains an urgent, pending issue.

6.98 State responsibility can fill this gap. While the Paris Agreement fell short of imposing a new legal obligation to compensate for L&D, it does not displace the applicability of customary

---

Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I), p. 233, para. 460).

[374] L&D has become the third pillar of climate change, after mitigation and adaptation. *See, e.g.*, E.A. Page & C. Heyward, "Compensating for Climate Change Loss and Damage", (2016) 65(2) *Political Studies* 356-372, *available at* https://doi.org/10.1177/0032321716647401, p. 356. *See also* M. Broberg, "State of Climate Law: The Third Pillar of International Climate Change Law: Explaining 'Loss and Damage' after the Paris Agreement" (2020) 10 *Climate Law* 211-223, *available at* DOI:10.1163/18786561-01002004, p. 223.

[375] *See* INC, *Vanuatu, Draft Annex Relating to Article 23 (Insurance) for inclusion in the revised single text on elements relating to mechanisms*, UN Doc. A/AC.237/WG.II/Misc.13 (17 December 1991) (Vanuatu proposed creating an international insurance pool to respond to loss and damage resulting from sea level rise in small island states).

[376] *See id*., p. 8.

[377] *See, e.g.*, M. Wewerinke-Singh & D. Hinge Salili, "Between negotiations and litigation: Vanuatu's perspective on loss and damage from climate change" (2020) 20(6) *Climate Policy* 681-692, *available at* https://doi.org/10.1080/14693062.2019.1623166, p. 684.

[378] Paris Agreement, Art. 8(1). *See also* J. Rudall, COMPENSATION FOR ENVIRONMENTAL DAMAGE UNDER INTERNATIONAL LAW (Routledge, 2020), pp. 62-63.

[379] UN FCCC, Conference of the Parties, 21st Session, *Adoption of the Paris Agreement*, UN Doc. FCCC/CP/2015/L.9/Rev.1 (30 November – 11 December 2015), para. 52.

international law on State responsibility. States "have emphasized the continued application of international law on State responsibility".[380] Indeed, as the Court reasoned in *Gabčikovo-Nagymaros*, it is "well established that, when a State has committed an internationally wrongful act, its international responsibility is likely to be involved whatever the nature of the obligation it has failed to respect".[381] Thus, responsible States are obligated to compensate for any climate change L&D they caused or failed to prevent, by their acts or omissions. This obligation to make reparation must also apply to non-economic L&D, as shown below.[382]

1. Compensation must cover all L&D caused by climate change

6.99 In its first decision concerning compensation for environmental damage, *Certain Activities (Costa Rica v. Nicaragua)*, the Court held that "it is consistent with the principles of international law governing the consequences of internationally wrongful acts […] to hold that compensation is due for damage caused to the environment, in and of itself".[383] The Court held as well that the "impairment or loss of the ability of the environment to provide goods and services, is [also] compensable",[384] as are the "expenses incurred by an injured State as a consequence" of damage to the environment.[385] These determinations apply to L&D caused by climate change.

---

[380] E. Calliari *et al*., "Article 8: Loss & Damage", para. 8.47; R. Verheyen and Roderick Peter (WWF-UK), *Beyond Adaptation: The legal duty to pay compensation for climate change damage* (November 2008), *WWF-UK Climate Change Programme*, *available at* https://wwfint.awsassets.panda.org/downloads/beyond_adaptation_lowres.pdf, p. 17.

[381] *Gabčikovo-Nagymaros*, p. 38, para. 47. *See also Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Second Phase, Advisory Opinion, ICJ Reports 1950,* p. 221, at p. 228.

[382] ILC, ARSIWA, Art. 36(1). *See also* E. Calliari *et al*., "Article 8: Loss & Damage", para. 8.47.

[383] *Certain Activities Carried Out by Nicaragua (Compensation)*, p. 28, para. 41.

[384] *Id.*, p. 28, para. 42; *Armed Activities (Reparations)* (2022), p. 122, para. 348. *See also* J. Rudall, COMPENSATION FOR ENVIRONMENTAL DAMAGE UNDER INTERNATIONAL LAW (Routledge, 2020), p. 64.

[385] *Certain Activities Carried Out by Nicaragua (Compensation)*, p. 28, para. 41.

6.100 Compensation is applicable to "all damage of any type, material or moral".[386] For instance, in *Diallo*, the Court ordered compensation for psychological damage.[387] In the context of damage to the climate system, the United Nations Compensation Commission found "no justification for the contention that general international law precludes compensation for pure environmental damage" that lacks commercial value.[388]

6.101 Climate change causes significant non-economic loss and damage ("**NELD**"), including psychological harm; destruction of cultural heritage and dislocation of ancestral lands and traditions; and deterioration of vital ecosystems.[389] For instance, pastoralist communities in Kenya's Turkana County are becoming more susceptible to addiction, anxiety and emotional distress because of migration and disruption caused by climate change.[390] In the Lake Chad Basin, climate change is increasing inequality, social conflict, and loss of identity, which erodes the social texture of the community.[391] In Ghana, women and children forced to migrate due to droughts are exposed to debt bondage and slavery.[392]

[386] *Armed Activities (Reparations)* (2022), p. 48, para. 93.

[387] *Diallo (Compensation)*, p. 334, para. 21.

[388] UNCC, *Report and Recommendations Made by the Panel of Commissioners Concerning the Fifth Instalment of "F4" Claims*, UN Doc. S/AC.26/2005/10 (30 June 2005), paras. 58, 82 (deciding that the basis to compensate resources with commercial value would be their market price and for those with no commercial value the basis would be the costs of projects to restore the loss suffered for the harm inflicted to such resources).

[389] *See, e.g.*, K.E. McNamara *et al*., "Exploring climate-driven non-economic loss and damage in the Pacific Islands" (2021) 50 *Current Opinion on Environmental Sustainability* 1-11, *available at* https://www.sciencedirect.com/science/article/pii/S1877343520300531 (observing these NELD and others in the Pacific Islands).

[390] R. Bharadwaj & T. Mitchell, "Living in the shadow of loss and damage: uncovering non-economic impacts" (2023) *IIED*, *available at* https://www.iied.org/21891iied, p. 6.

[391] R. Bharadwaj & C. Shakya, "Loss and damage case studies from the frontline: a resource to support practice and policy" (2021) *IIED*, *available at* iied.org/20551iied, pp. 27-28.

[392] *Id.*, p. 8.

2. The causal link between an internationally wrongful act and climate change L&D should take into account scientific developments

6.102 Advances in the scientific understanding of climate change has clarified the causal links between GHG emissions and climate change L&D. Such evidence can now be assessed to quantify the extent to which anthropogenic GHG emissions contribute to climate change, as well as to calculate how GHG emissions affect the frequency and severity of extreme heat, drought, and precipitation events.[393]

6.103 Regardless, "the causal nexus required" between the breach committed and the damage inflicted "may vary depending on the primary rule violated and the nature and extent of the injury".[394] The Court has acknowledged that even if "the state of science regarding the causal link [is] uncertain", compensation can still be ordered[395] and that "non-material injury can be established even without specific evidence".[396] Similarly, in *Certain Activities (Costa Rica v. Nicaragua)*, the Court observed that while the burden of proof generally lies with claimant, "this general rule may be applied flexibly in certain circumstances", including when the environment has been damaged.[397]

6.104 The fact that many GHG emissions come from private entities is no obstacle to imposing an obligation of compensation on States. A State may be responsible for the effects of the conduct

[393] *See, e.g.*, C.W. Callahan & J.S. Mankin, "National Attribution of Historical Climate Damages" (2022) 172(40) *Climatic Change*, *available at* https://doi.org/10.1007/s10584-022-03387-y, p. 16; M. Burke *et al.*, "Quantifying climate change loss and damage consistent with a social cost of greenhouse gases" (2023) *NBER Working Paper Series*, *available at* https://www.nber.org/system/files/working_papers/w31658/w31658.pdf (providing a framework for linking emissions to damages, and calculating future damages for past emissions, with respect to loss and damage caused by GHG emissions).

[394] *Armed Activities (Reparations)* (2022), p. 48, para. 93.

[395] *Certain Activities Carried Out by Nicaragua (Compensation)*, p. 26, para. 34; *Armed Activities (Reparations)* (2022), pp. 122-123, para. 349.

[396] *Diallo (Compensation)*, p. 334, para. 21.

[397] *Certain Activities Carried Out by Nicaragua (Compensation)*, p. 26, para. 33.

of private parties, if the State failed to take necessary measures to prevent those effects.[398] This is in line with Judge Shahabudeen's Opinion in *Certain Phosphates*, which noted that "it is not possible to conceive [the conduct] of a major industry of a Territory […] [as] being entirely beyond the competence of the legislative, executive and judicial powers of the Territory".[399]

6.105 Compensation owed by a responsible State for climate change L&D cannot be reduced or attenuated by possible concurrent causes of damages, such as GHG emissions from other States.[400] Responsibility may be reduced upon a showing of contributory fault[401] or even rejected in the presence of a concurring cause existent *prior* to the responsible State's measure. However, in principle, the burden of showing these attenuating circumstances is the responsibility of the emitting State.[402]

3. The Court should rely on scientific developments to quantify climate change L&D and adopt a flexible approach with equitable considerations, in line with its judicial practice

6.106 As seen, the scientific evidence enables the quantification of climate change damages in a way that would assist in making whole those injured by the effects of climate change.[403] The Court

---

[398] ILC, DARSIWA, with commentaries, Chapter II, p. 39, Commentary (4). *See also* J. Kulesza, DUE DILIGENCE IN INTERNATIONAL LAW (2016), p. 160-161 (noting even that "[s]hould […] a state have failed to exercise due diligence, it may be held responsible to pay damages").

[399] *Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, Separate Opinion of Judge Shahabuddeen, p. 281.

[400] V. Lanovoy, *Causation in the Law of State Responsibility* (2022) 90 *BYIL*, pp. 87-88, 93-94 (also noting that the ICJ has never reduced nor attenuated reparation owed by a State due to concurrent causes of damage).

[401] ILC, ARSIWA, Art. 39 ("In the determination of reparation, account shall be taken of the contribution to the injury by wil[l]ful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought.").

[402] *Corfu Channel case, Judgment, I.C.J. Reports 1949*, Dissenting Opinion by Judge Azevedo, p. 86 ("The victim has only to prove damage and the chain of causation; and that is enough to involve responsibility, unless the defendant can prove *culpa* in a third party, or in the victim, or *force majeure*; only these can relieve him from responsibility.") (emphasis in original); V. Lanovoy, *Causation in the Law of State Responsibility* (2022) 90 *BYIL*, p. 107 ("the burden of proof should shift to the respondent to show which part of the injury was not caused by its wrongful act").

[403] C.W. Callahan & J.S. Mankin, "National Attribution of Historical Climate Damages" (2022) 172(40) *Climatic Change*, pp. 1-4, 16.

should rely on these scientific developments to establish the damages caused by climate change in specific contentious cases, as it has done in the past.[404]

6.107 In any event, the "absence of adequate evidence as to the extent of material damage will not, in all situations, preclude an award of compensation for that damage."[405] In *Certain Activities (Costa Rica v. Nicaragua)*, the Court cited the following key passage from *Trail Smelter*:

> [w]here the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, 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 [the] acts. In such case […] *it will be enough if the evidence show the extent of the damages as a matter of just and reasonable interference, although the result be only approximate*.[406]

6.108 Critically, in both *Certain Activities (Costa Rica v. Nicaragua)* and in *Armed Activities (DRC v. Uganda)*, the Court held that that compensation for environmental damage must take account of equitable considerations.[407] And, in *Diallo*, the Court determined an otherwise uncertain amount of compensation, by drawing upon "equitable considerations".[408] The Court cited to the *Al-Jedda v. U.K.* decision where, for determining damage, the ECtHR ruled that its "guiding principle is equity, which above all involves flexibility and an objective consideration of what is just, fair and reasonable in all the circumstances of the case, including not only the position of the applicant but the overall context in which the breach occurred".[409]

---

[404] *Certain Activities Carried Out by Nicaragua (Compensation)*, p. 26, paras. 30-34.

[405] *Id*., pp. 26-27, para. 35 (*citing to Diallo (Compensation)*, p. 337, para. 33).

[406] *Ibid* (emphasis added).

[407] *Armed Activities* Judgment (2022), pp. 126-127, paras. 364-365; *Certain Activities Carried Out by Nicaragua (Compensation)*, p. 27, at para. 35.

[408] *Diallo (Compensation)*, p. 337, para. 33.

[409] *Diallo (Compensation)*, pp. 334-335, para. 24 (*citing to Al-Jedda v. United Kingdom*, Application No. 27021/08, Judgment of 7 July 2011, ECHR Reports 2011, para. 114).

6.109 Equitable considerations are key in the climate change context. CBDR-RC is a relevant factor that must be considered when assessing compensation owed for climate change damage. On this basis, high-emitting States should bear the brunt of the responsibility to compensate. Equitable considerations are also crucial for assessing the compensation owed to SIDS and other vulnerable States for L&D caused by climate change.

4. States must provide satisfaction for harm caused to the climate system

6.110 Given the extent of climate change L&D, it is highly unlikely that reparation can be made good or full only by restitution or compensation. Therefore, reparation should also take the form of satisfaction.[410] Although satisfaction "may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality",[411] it can take different forms depending on the circumstances of the case.[412]

6.111 Equitable considerations have consequences for the mechanisms used to make reparations. States should not be left to determine unilaterally how to address L&D driven by climate change, given the imbalance associated with current mechanisms. Much of the financial aid provided by polluting States takes the form of loans that will have to be repaid with interest.[413] Indebted and poor nations are thus forced into a "vicious circle" under which, in order to repay the debt, they

[410] ILC, ARSIWA, Art. 37(1).

[411] *Id.*, Art. 37(2). *See also Armed Activities* Judgment (2022), p. 132, para. 388.

[412] *Armed Activities* Judgment (2022), p. 132, para. 387 (noting that "satisfaction can take an entirely different form", than acknowledgment of the breach, an expression of regret or a formal apology, "depending on the circumstances of the case").

[413] G. Monbiot, "Never mind aid, never mind loans: what poor nations are owed as reparations" (5 November 2021) *The Guardian*, *available at* https://www.theguardian.com/commentisfree/2021/nov/05/the-climate-crisis-is-just-another-form-of-global-oppression-by-the-rich-world ("Highly indebted nations are being encouraged to accumulate more debt to finance their adaptation to the disasters we have caused. It is staggeringly, outrageously unfair.").

must engage in extractive and polluting but income-generating activities, and use public funds that could otherwise be deployed to help to their climate change adaptation and mitigation measures.[414]

6.112 Therefore, other mechanisms to address climate change L&D could be implemented as means of satisfaction, besides compensation. For instance, responsible States could contribute to a global L&D fund that offers grants and other forms of assistance without imposing an obligation to repay. They could also extend and provide grace periods to sovereign debt related to climate change.[415] These means of satisfaction are more appropriate and more consistent with the relevant principles of international law than loans.

* * *

6.113 In summary, although State responsibility and its legal consequences depend on the circumstances of each case, States must provide *full* reparation for significant harm caused or failed to be prevented to the climate system, principally through compensation. To guarantee full reparation, the Court should affirm the relevance of science for evaluating climate change L&D claims. The Court should also affirm its flexible approach to causation, burden of proof, and quantification, and the relevance of equitable considerations, including CBDR-RC. Reparation should include restitution and satisfaction depending on the circumstances of the case and of the injured entity. The obligation of reparation, which reflects the Court's jurisprudence and applicable international law, is a key component of the answer to Question (b) of the Request.

D. STATES MUST PROVIDE ASSURANCES ON NON-REPETITION, IF CIRCUMSTANCES SO REQUIRE

6.114 The Court has observed that, when "circumstances so require," State responsibility entails the obligation to provide assurances of non-repetition of the internationally wrongful act. The

[414] *See* R. Warlenius *et al.*, "Reversing the arrow of arrears: the concept of 'ecological debt' and its value for environmental justice", (2015) 30 *Global Environmental Change* 21-30, *available at* https://doi.org/10.1016/j.gloenvcha.2014.10.014, p. 24. *See also* Nairobi Declaration, paras. 53-55, 58.

[415] *See* Nairobi Declaration, paras. 52(v-vi), 58.

precise threshold at which point that standard is met is unclear. But the Court has noted that the "focus" of these assurances "is on the future" of a legal relationship.[416] As seen, unlawful GHG emissions impair intergenerational justice and threaten future generations. They also hinder future legal relationships of the responsible State, given the L&D caused by climate change. Action taken now to hold States responsible for their emissions can prevent future breakdowns in the international legal order. They can also preserve confidence in the responsible State's ability to meet global challenges. These are special circumstances that merit due consideration when contemplating whether assurances of non-repetition by polluting States are required.

II. States and individuals are entitled to invoke the responsibility of a State for unlawful GHG emissions

6.115 Another important legal consequence deriving from significant harm to the climate system, or failing to prevent such harm, is the legal entitlement of States and individuals to seek redress. Any State injured by climate change has standing to invoke the responsibility of the injuring State.

6.116 This is true even if the relevant acts or omissions affected multiple States, or if the harm was caused (or not prevented) by multiple States. Article 46 of the ILC Articles on State Responsibility establishes that "[w]here several States *are injured* by the same internationally wrongful act, each injured State may separately invoke the responsibility of the State which has committed the internationally wrongful act".[417] Article 47 stresses that "[w]here several States *are responsible* for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act".[418] The commentary to that Article explicitly refers to pollution as a practical application of this rule.[419]

---

[416] ILC, DARSIWA, with commentaries, Art. 30, Commentary (11).

[417] ILC, ARSIWA, Art. 46 (emphasis added).

[418] *Id.*, Art. 47 (emphasis added).

[419] ILC, DARSIWA, with commentaries, Art. 47, Commentary (8) (noting also that, in situations where several States are responsible for the damage, "the responsibility of each participating state is determined individually, on the basis of its own conduct and by reference to its own international obligations"). *See also* M. Fitzmaurice, "Using

6.117 Injury is not required to invoke State responsibility for certain forms of climate change L&D. *Any* State, injured or not, can invoke responsibility for breaches of numerous obligations under Question (a), to the extent that they constitute obligations *erga omnes*.[420] That is the case of the obligations of "no-harm" and due diligence,[421] and all obligations concerning environmental damage of a far-reaching and irreversible nature, like climate change.[422] This is also true for the general obligation to protect and preserve the marine environment under Article 192 of UNCLOS, and for all UNCLOS provisions regarding the protection and preservation of the high seas and the Area,[423] as well as for the duty to protect cultural heritage under the UNESCO Convention; [424] the right to self-determination,[425] and " the principles and rules concerning the basic rights of the human person".[426]

6.118 Any State can invoke responsibility for the breach of these *erga omnes* obligations, even if a similar or identical obligation is owed in tandem to a specific State or group of States, or if the wrongful act in question is in compliance with another obligation (for instance, with the Paris Agreement).[427] However, the *erga omnes* character of an obligation must be determined on a case-

---

International Law to Address the Effects of Climate Change, A Matter for the International Court of Justice" (2023) *Yearbook of International Disaster Law*, *available at* https://brill.com/view/journals/yido/4/1/article-p281_13.xml?ebody=pdf-96202, p. 299.

[420] *See, e.g.*, ILC, ARSIWA, Art. 48.

[421] S. Malejan-Dubois, "The No-Harm Principle", pp. 20-22.

[422] *Gabčikovo-Nagymaros,* Separate Opinion of Vice-President Weeramantry, p. 117 (noting that the application of *inter-partes* principles, like estoppel, "scarcely does justice to rights and obligations of an *erga omnes* character—*least of all in cases involving environmental damage of a far-reaching and irreversible nature*") (emphasis added).

[423] For instance, the ITLOS Chamber found that "each State Party may also be entitled to claim compensation in light of the *erga omnes* character of the obligations relating to the preservation of the environment of the high seas and in the Area". *The Area* ITLOS Advisory Opinion, p. 59, para. 180.

[424] UNESCO, *Convention Concerning the Protection of the World Cultural and Natural Heritage* (16 November 1972), *available at* https://whc.unesco.org/archive/convention-en.pdf, Art. 6.

[425] *Chagos* Advisory Opinion, p. 139, para. 180.

[426] *Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium v. Spain), Second Phase, Judgment, I.C.J. Reports 1970*, p. 3, at p. 32, para. 34.

[427] *See* S. Malejan-Dubois, "The No-Harm Principle", p. 19 ("A state may comply with its conventional commitments while failing to meet its obligation under customary law, whether with regard to the substantial or procedural components of this obligation.").

by-case basis. In any event, any State entitled to invoke responsibility may claim reparation, either for the injured State or for victims of the breach. They may also request the cessation of the internationally wrongful act, and assurances of non-repetition.[428]

6.119 Finally, individuals may invoke State responsibility for significant harm caused (or not prevented) to the climate system, if that harm results, for instance, in a human rights violation. States may bring such claims before the Court on behalf of individuals.[429] Also, the individuals may bring those claims directly to an adjudicative body with competence over claims by individuals against States.

III. Notwithstanding State responsibility, States that have caused significant harm to the climate system must phase out fossil fuels, contribute to L&D funds and forego climate change loans

6.120 As seen, States have an obligation not to cause significant harm to the climate system *and* to prevent such harm. Therefore, there would be no case where an act or omission of State that has caused that harm does not entail State responsibility. However, even when such responsibility is not invoked or found, there are other legal consequences for the State that caused such harm or that failed to prevent it, as discussed below.

6.121 States should implement domestic measures designed specifically to ensure full compliance with the obligations described in Chapter 5 *supra*. The French *Conseil d'État*'s landmark decision in *Grande-Synthe* illustrates this. The court found that the UNFCCC and the Paris Agreement hold France accountable not only for the obligations codified in those

[428] ILC, ARSIWA, Art. 48(2)(a-b).

[429] *See, e.g.*, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Preliminary Objections, Judgment, I.C.J. Reports 2007*, p. 582, at p. 599, para. 39; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Preliminary Objections, Judgment, I.C.J. Reports 2022*, p. 477, at pp. 516-517, paras. 109-112; ILC, *Draft Articles on Diplomatic Protection* (2006), Art. 1.

instruments, but also for the measures that the State implements domestically to comply with those treaties.[430]

6.122 On the basis of the best available scientific evidence, in order to comply fully with the obligations set out under Question (a), high-GHG-emitting States should implement measures to *phase out* fossil fuels. The UN Secretary General recently urged them to do precisely that.[431] This is particularly necessary where States have already caused harm to the climate system, as Question (b) suggests.

6.123 Furthermore, given the importance and urgency of addressing L&D, high-GHG-emitting States, as well as any other State that has caused significant harm to the climate system, *must* contribute to the L&D fund at least in proportion to their contributions to harmful GHG emissions. They must also forego loans on mitigation and adaptation measures, particularly those granted to developing countries.

* * *

6.124 In summary, the Court should affirm that the breach of the obligations addressed in Chapter 5 entails State responsibility, although a definitive finding in that respect depends on the circumstances of each case. High-emitting States that breach their obligations under relevant treaties or general international law concerning protection of the climate system are obligated to, *inter alia*, make full reparation for any L&D caused, or not prevented—principally, but not exclusively, through compensation. States are also obligated to cease their breach, and the context of climate change should be taken into account to order assurances of non-repetition. The Court should maintain a flexible approach when establishing the means of reparation given the diffuse harms caused by GHG emissions. It should also continue to consider scientific research and ensure

[430] Décision du Conseil d'État No. 427301 (*Grande-Synthe*) (19 November 2020). *See also* Y. Nakanishi, "The Rights of and Obligations towards Future Generations", *in* H. Ruiz Fabri *et al.*, REPRESENTING THE ABSENT, p. 256.

[431] Twitter (X), UNSG Antonio Guterres (1 December 2023), *available at* https://x.com/antonioguterres/status/1730547118874464722?s=48&t=jzlJWynT4m6HLgH-EmT4TQ ("1.5°C warming limit is only possible if we ultimately stop burning fossil fuels. Not reduce. Not abate. Phase out.").

that reparations benefit all injured parties. Finally, given the *erga omnes* character of numerous obligations concerning climate change, recourse to seek redress is broadly available.

CHAPTER 7
CONCLUSIONS

7.125 Based on all the forgoing, the Republic of Kenya respectfully requests the Court to:

a) Declare that it has advisory jurisdiction to address the Request and that there are no compelling reasons that justify declining to exercise jurisdiction.

b) Declare that States must minimize anthropogenic GHG emissions in proportion to their responsibilities and capabilities; that they have a duty to cooperate to protect the climate system, and to observe due diligence. This is a duty to take reasonable measures to ensure that harm is not caused to the climate system by the excess emission of GHGs into the atmosphere.

c) Declare that States parties to the Paris Agreement must aim to reduce global temperature increase to less than 1.5 ºC above pre-industrial levels.

d) Declare that States are obligated to protect and preserve the marine environment from the deleterious effects of GHG emissions.

e) States must ensure that climate change induced harms do not violate the human rights of individuals within their territory or under their jurisdiction and must provide remedies when violations of these rights take place.

f) Declare that, while observing these obligations, States must take into account the equitable principles of CBDR-RC and intergenerational equity.

g) Declare that causing harm through GHG emissions, or failure to prevent such harm, entails State responsibility and, consequently, the obligation to cease the relevant breach, make full reparation, particularly through compensation of environmental loss and damage, and to provide assurance of non-repetition. Existing legal principles concerning reparations for environmental damage, as well as principles of equity, are

applicable while assessing the legal consequences of causing harm to the climate system or failing to prevent such harm.

Respectfully submitted,

_____

H.E. Ambassador Margaret Shava
Ambassador of the Republic of Kenya to the Kingdom of the Netherlands