INTERNATIONAL COURT OF JUSTICE

OBLIGATIONS OF STATES IN RESPECT OF CLIMATE CHANGE

WRITTEN COMMENTS OF THE REPUBLIC OF KENYA

13 AUGUST 2024

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CHAPTER 1
OVERVIEW OF KENYA'S WRITTEN COMMENTS

1.1. The Republic of Kenya ("**Kenya**") submits these Written Comments in accordance with the Court's Order of 30 May 2024 regarding the request for an advisory opinion submitted by the United Nations General Assembly in Resolution 77/276 ("**Request**").[1]

1.2. The Request was by consensus, representing the first time that all Member States of the United Nations ("**UN**") have seized this Court's advisory jurisdiction as one. They did so to seek answers to one of the most urgent and significant legal questions of our time: what are the obligations of States with respect to climate change?

1.3. All Written Statements recognise that climate change is causing widespread destruction across the world. None disagree that climate-related vulnerabilities have been exacerbated in the past decade, particularly in East Africa, over which time there has been a significant increase in droughts in the last decade, further aggravating pre-existing vulnerabilities to famine, desertification, migration risks, and water scarcity.[2] Indeed, in the months since submitting its Written Statement, Kenya has been struck by disastrous flooding that displaced thousands and wreaked havoc on homes and farmland. Other parts of the world, particularly developing States, continue to face climate devastation.

1.4. Paradoxically, those States that have the least capacity—financial and technological—to address the consequences of climate change are suffering the greatest. Ever-increasing loss and damage caused by climate change exacerbates the financial strain on developing States that already have to contend with significant debt burdens. This is equally true for Kenya, where the measures necessary to properly mitigate and adapt to climate change are far beyond its current means, despite it only bearing minimal responsibility for the climate crisis. Kenya

[1] UN General Assembly, Resolution 77/276, *Request for an advisory opinion of the International Court of Justice on the obligations of States in respect of climate change*, UN Doc. A/RES/77/276 (4 April 2023) ("**Request**" or "**Resolution 77/276**").

[2] S. Diop, P. Scheren and A. Niang (eds), CLIMATE CHANGE AND WATER RESOURCES IN AFRICA: PERSPECTIVES AND SOLUTIONS TOWARDS AN IMMINENT WATER CRISIS (2021), *available at* https://yale.idm.oclc.org/login?URL=https://doi.org/10.1007/978-3-030-61225-2; L. C. Campos, D. Olago, and D. Osborn, "Water and the Unsustainable Development Goals" (2022), *available at* https://doi.org/10.14324/111.444/ucloe.000029; M. Gavin, "Climate Change and Regional Instability in the Horn of Africa", *Council on Foreign Relations* (2022), *available at* https://www.cfr.org/report/climate-change-and-regional-instability-horn-africa.

is not alone in its situation. International law must recognize the importance of debt relief for developing States as an appropriate remedy falling broadly within the rubric of satisfaction that would enable indebted countries to take mitigation and adaptation measures.

1.5. Despite States' efforts, global greenhouse gas ("**GHG**") emissions continue to increase, undoing their efforts to protect the climate system.[3] The world has entered uncharted territory as the concentrations of GHGs in the atmosphere are now at levels higher than they have been in the past thousands, or even millions of years.[4] Human activity has dangerously interfered with the climate system, and decisive co-ordinated actions by States to cut GHG emissions are therefore essential for securing a just and safe future for all.

1.6. As Resolution 77/276 intended, the Court's advisory opinion will serve as critical guidance for the General Assembly and States in identifying and fulfilling the legal obligations that make up the international law on climate change. Indeed, this is the first occasion on which the Court has been called to interpret the UN Framework Convention on Climate Change ("**UNFCCC**") and Paris Agreement, and to consider the interplay between human rights law and climate change-induced harms.

1.7. The Paris Agreement was a watershed moment. When the first 175 States Parties came together to sign the Paris Agreement on Earth Day in 2016, it represented a landmark moment in humanity's progress against climate change. States Parties adopted stronger reporting obligations to account for their GHG emissions and agreed to co-operate and jointly combat climate change, while recognizing their common but differentiated responsibilities and respective capabilities ("**CBDR-RC**").

1.8. The monumental achievements of the Paris Agreement have unfortunately not been matched by necessary State action. While States Parties have continued to publish and update nationally determined contributions ("**NDC**"), their commitments are still insufficient to meet the Paris Agreement's temperature goals of holding the increase in the global average

[3] Greenhouse gas emissions increased by 1.2% from 2021 to 2022. United Nations Environment Programme, *Broken Record: Temperatures hit new highs, yet world fails to cut emissions (again)* (2023), *available at* https://wedocs.unep.org/bitstream/handle/20.500.11822/43922/EGR2023.pdf?sequence=3&isAllowed=y. *See also* Chapter 3(II).

[4] Concentrations of carbon dioxide are higher than at any point in the last 2 million years, while methane and nitrous oxide concentrations are at unprecedented levels. *See* Chapter 3(II).

temperature to well-below 2°C and pursuing efforts to limit global warming to 1.5°C above pre-industrial levels.

1.9. Kenya, as a developing State in Africa, is keenly aware of the importance of the environment and sustainable development, as well as the particular vulnerability of developing States to climate change. Kenya aspires to be a regional leader on climate change mitigation and justice: it is the home of the United Nations Environment Programme and its President, Dr. William Samoei Ruto, is the Chair of the African Union's Committee of African Heads of State and Government on Climate Change. Together, African Developing States have pursued a vision of integrated climate justice and development that is founded on co-operation, driven by considerations of equity and fairness, and firmly grounded in existing rules of international law. To that end, Kenya hosted the inaugural Africa Climate Summit in September 2023, where African States adopted the *Nairobi Declaration on Climate Change and Call to Action*, which:

> Acknowledge[s] that climate change is the single greatest challenge facing humanity and the single biggest threat to all life on Earth, demanding urgent and concerted action from all nations to lower emissions and reduce the concentration of greenhouse gases in the atmosphere;
>
> Take[s] Note of the 6th Assessment Report (AR6) of the Intergovernmental Panel on Climate Change (IPCC), stating that the world is not on track to keeping within reach the 1.5°C limit agreed in Paris and that global emissions must be cut by 43% in this decade;
>
> Underscore[s] the IPCC confirmation that Africa is warming faster than the rest of the world and if unabated, climate change will continue to have adverse impacts on African economies and societies, and hamper economic growth and wellbeing;
>
> Recognise[s] that Africa is not historically responsible for global warming, but bears the brunt of its effects, impacting lives, livelihoods, and economies;
>
> Reaffirm[s] the principles set out in the United Nations Framework Convention on Climate Change (UNFCCC) and the Paris Agreement, namely equity, common but differentiated responsibilities and respective capabilities;

1.10. Kenya's Written Comments are informed by that vision and its abiding faith in the Court as the ultimate guardian of the rule of law as reflected in the values that underpin the climate justice regime.

1.11. For the purposes of building on the arguments advanced in its Written Statement and responding to matters raised by the Written Statements of other participants to these proceedings, Kenya's Written Comments will proceed as follows.

1.12. **Chapter 2** addresses the views expressed regarding the applicable law in answering the Questions put to the Court in the Request. In particular, it explains why the treaty regime created by the Montreal Protocol, UNFCCC, the Kyoto Protocol, and the Paris Agreement ("**UN climate regime**") does not create a *lex specialis* that would exclude the operation of other rules of international law such as customary international law and the rules on State responsibility.

1.13. **Chapter 3** provides further arguments as to the importance of the best available science concerning climate change, as contained in the work of the IPCC. Kenya further demonstrates that the best available science unequivocally supports the position taken by the great majority of States in these proceedings that anthropogenic GHG emissions are responsible for global warming, engaging rules of State responsibility.

1.14. **Chapter 4** presents Kenya's further responses with respect to Question (A) and demonstrates that States are obligated to undertake due diligence measures to reduce their GHG emissions and to protect the climate system having regard to the Montreal Protocol, the UNFCCC, and the Paris Agreement, as well as under international human rights law. Each treaty must be read collectively as part of the interrelated treaty system.

1.15. **Chapter 5** presents Kenya's response with respect to Question (B) and analyses States' secondary obligations, including the consequences of breaches of the UNFCCC and Paris Agreement, as well as State responsibility for failures to mitigate climate change by minimizing GHG emissions.

CHAPTER 2
GENERAL OBSERVATIONS

I. Interpretation of the Questions and Applicable Law

2.1. These Written Comments supplement Kenya's Written Statement of 22 March 2024,[5] in the light of the Written Statements of other participants and the Advisory Opinion recently issued by the International Tribunal for the Law of the Sea ("**ITLOS**") in response to the request for an advisory opinion submitted by the Commission of Small Island States on Climate Change and International Law.[6]

A. IDENTIFYING THE GOVERNING LEGAL RULES (QUESTION (A))

2.1. Kenya emphasizes that the Court's opinion must take into account all relevant treaties, such as the UN Convention on the Law of the Sea ("**UNCLOS**"), and the full range of relevant obligations enshrined in other specialized treaty regimes, such as the Montreal Protocol. Of further relevance are the rules of customary international law, including in particular obligations of due diligence in the prevention of transboundary harm and/or harm to the environment, as well as the general duty of co-operation. It is critical that international law's response to climate change, including the UN climate regime, be analysed holistically in light of all relevant rules of international law.

2.2. A minority of participants contend that the UN climate regime would, as *lex specialis*, displace, supersede, or otherwise have priority over other applicable rules of international law, and particularly, the customary international law obligation to act with due diligence to prevent significant transboundary harm.[7] The vast majority of participants reject this approach and refer

[5] Republic of Kenya, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (22 March 2024) (hereinafter "**Written Statement of Kenya**").

[6] *Request Submitted to the Tribunal by the Commission of Small Island States on Climate Change and International Law (Advisory Opinion of 21 May 2024) ITLOS Reports 2024* (hereinafter "**ITLOS Climate Change Advisory Opinion**").

[7] *See, e.g.*, Kingdom of Saudi Arabia, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (21 March 2024), paras. 5.8 and 5.10; United States of America, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (22 March 2024) para. 4.25; Organization of the Petroleum Exporting Countries (OPEC), *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (19 March 2024); Government of Japan, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (22 March 2024), paras. 11-18; State of Kuwait, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate*

to the relevance of States' general obligation to prevent significant transboundary harm,[8] with some noting the general obligation to prevent significant harm to the environment.[9]

2.3. In its Written Statement, Kenya developed detailed submissions on the scope and content of the obligation to prevent significant transboundary harm (the "no-harm" principle).[10] It suffices here to recall that the obligation is one of customary international law, being enshrined in numerous international legal instruments and recognized by this Court as well as other international courts and tribunals.[11] The salient question is whether the UN climate regime, in application of the *lex specialis* principle, displaces this general rule on preventing transboundary harm.

2.4. The principle of *lex specialis* is not applicable to the UN climate regime. As the International Law Commission ("**ILC**") has noted, "[f]or the *lex specialis* principle to apply, it is not enough that the same subject matter is dealt with by two provisions; there must be some actual inconsistency between them, or else a discernible intention that one provision is to

Change (22 March 2024), paras. 61-71; Republic of India, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (21 March 2024) para. 17.

[8] *See, inter alia*, Belize, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (21 March 2024), paras. 31-36; Republic of Singapore, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (20 March 2024), paras. 3.1-3.2; Democratic Republic of the Congo, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (4 March 2024), paras. 126-136; New Zealand, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (22 March 2024), paras. 96-100; United Arab Emirates, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (22 March 2024), paras. 90-102; Republic of Vanuatu, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (21 March 2024), paras. 261-265.

[9] *See, inter alia*, Kingdom of the Netherlands, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (21 March 2024), paras. 3.52-3.75; Republic of Korea, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (22 March 2024), paras. 33-37.

[10] Written Statement of Kenya, paras. 5.3-5.8.

[11] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. 1996*, p. 226 (hereinafter "***Nuclear Weapons* Advisory Opinion**"), at 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"); *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, at pp. 711–712, para. 118; *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 on the River Uruguay (Argentina* v. *Uruguay), I.C.J. Reports 2010*, p. 14, at p. 56, para. 101, 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 other States).

exclude the other".[12] Neither element is present here. To the extent the UN climate regime may supplement general international law with more precise or detailed obligations, there is no normative conflict or inconsistency with the general obligation to prevent transboundary harm or harm to the environment.[13] A wide range of States express agreement with this position.[14]

2.5. The second potential application of the *lex specialis* principle, as formulated by the ILC, is where there is "a discernible intention" that one rule is to exclude the other. The Judgment in *ELSI* held that any discernible intention to exclude the *lex generalis* must be explicit. Though the Chamber of the Court accepted that parties to a treaty could agree not to apply principles of customary international law, the Chamber found "itself unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so".[15] The ILC drew from the Judgment in *ELSI* to conclude that "general rules operate unless their operation has been

[12] ILC, *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (2001) (hereinafter "**ILC, ARSIWA, with commentaries**"), Art. 55, Commentary (4).

[13] *See generally* Written Statement of Kenya, Chapter 5; *infra*, Chapter 4.

[14] *See, inter alia*, Swiss Confederation, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (21 March 2024), para. 68; New Zealand, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (22 March 2024), para. 86; Cook Islands, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (20 March 2024), para. 135; Arab Republic of Egypt, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (22 March 2024), para. 71; Republic of Costa Rica, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (March 2024), para. 32; Federated States of Micronesia, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (15 March 2024), paras. 53-62; Republic of Chile, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (21 March 2024), paras. 33-34; Kingdom of Spain, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (March 2024), paras. 5-10; Republic of Mauritius, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (22 March 2024), paras. 193-196; Republic of Sierra Leone, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (15 March 2024), paras. 3.2-3.4; Commission of Small Island States (COSIS), *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (22 March 2024) (hereinafter "**Written Statement of COSIS**"), paras. 80-86; International Union for Conservation of Nature (IUCN), *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (19 March 2024), paras. 597-599. *Cf.* People's Republic of China, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (22 March 2024), paras. 127-129 (submitting that the "no-harm" rule is limited to transboundary harm but not applicable to obligations to prevent climate change).

[15] *Elettronica Sicula S.p.A. (United States of America v. Italy), Judgment, I.C.J. Reports 1989*, p. 15, at p. 42, para. 50. *See also Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America), Judgment of 30 March 2023, I.C.J. Reports 2023*, para. 207; *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, para. 51 (Tribunal recognizing the application of the *lex specialis* principle but rejecting that the Southern Bluefin Tuna Convention between the parties took priority over the provisions of UNCLOS concerning the conservation and utilization of marine resources).

expressly excluded",[16] observing that "[i]t is in the nature of general law to apply generally, *i.e.* inasmuch as it has not been specifically excluded. It cannot plausibly be claimed that these parts of the law—'important principles' as the Court put it—have validity only insofar as they have been 'incorporated' into the relevant regimes".[17]

2.6. For this reason, any discernible intention to exclude general international law must meet a high threshold. In *Dispute Regarding Navigational and Related Rights*, the Court concluded that it could disregard the possible application of customary law in the presence of a treaty that "completely define[d] the rules applicable" to the subject-matter of that dispute.[18] Thus, in *Construction of a Road in Costa Rica along the San Juan River*, the Court concluded that a treaty that contained "limited obligations concerning notification or consultation in specific situations does not exclude any other procedural obligations with regard to transboundary harm which may exist in treaty or customary international law".[19] The *lex specialis* principle requires that any special regime include "specific provisions"[20] to displace general international law.

2.7. Finally, in the ITLOS Climate Change Advisory Opinion,[21] the Tribunal rejected the argument that the Paris Agreement is *lex specialis* as to UNCLOS. Instead, ITLOS concluded that the former, as the "primary legal instrument addressing the global problem of climate change", is "relevant in interpreting and applying [UNCLOS]" and "should be applied in such a way as to not frustrate the very goal of the Convention".[22] Consistent with the approach followed by ITLOS, Kenya respectfully submits that the *lex specialis* principle is inapplicable in respect of the UN climate regime and other international obligations relevant to the prevention of harm to the global climate system.

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[16] 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), p. 43, para. 184 (emphasis added).

[17] *Ibid*.

[18] *Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua), Judgment, I.C.J. Reports 2009*, p. 213, at p. 233, para. 36.

[19] *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, at p. 708, para. 108.

[20] *Reineccius & Others* v. *Bank for International Settlements*, PCA Case No. 2000-04, Partial Award (22 November 2002), para. 175.

[21] ITLOS Climate Change Advisory Opinion.

[22] *Ibid.*, paras. 222-224.

B. LEGAL CONSEQUENCES: PRIMARY AND SECONDARY RULES (QUESTION (B))

2.10. In its Written Statement, Kenya observed that Question (B) concerns both the primary rules derived from international law under Question (A) and secondary rules associated with the regime of international responsibility. Furthermore, Question (B) asks the Court to determine consequences for both "acts and omissions", thus including any failure by States to prevent harm to the climate system and other connected parts of the environment.[23]

2.11. The majority of participants have endorsed this position, indicating that the general applicable framework is the regime of international responsibility as codified in the ILC's Articles on the Responsibility of States for Internationally Wrongful Acts ("**ARSIWA**"),[24] recognized as customary international law.[25] Naturally, the conditions for international responsibility must be still met in respect of harm caused to the global climate system—the conduct of States in this regard must be in breach of an international obligation.

2.12. In the Request, the General Assembly made express reference to any such acts or omissions causing "significant harm to the climate system and other parts of the environment", drawing specific attention to the harms suffered by specially affected or "particularly vulnerable" States, such as small island developing States due to their unique "geographical circumstances", and to "[p]eoples and individuals of the present and future generations". In this respect, Kenya relies on the observations of the ILC in regard to the relatively low threshold for "significant" harm to exist:

> It is to be understood that "significant" is something more than "detectable" but need not be at the level of "serious" or "substantial". The harm must lead to a real detrimental effect on matters such as, for example, human health, industry, property, environment or agriculture in other States. Such detrimental effects

[23] Written Statement of Kenya, para. 2.7.

[24] ILC, ARSIWA, with commentaries.

[25] *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. 138, para. 177; *Gabčikovo-Nagymaros Project (Hungary v. Slovakia), Judgment, I.C.J. Reports 1997*, p. 7 (hereinafter "***Gabčikovo-Nagymaros***"), at pp. 38-39, para. 47; *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.195, para. 140.

> must be susceptible of being measured by factual and objective standards.[26]

2.13. Like Kenya,[27] a significant number of participants, largely developing and less-developed States, communicated to the Court their specific vulnerability to the adverse effects of climate change, reporting distressing accounts of drought, deforestation, the emergence of related diseases, and increases of infant and adult mortality.[28] Kenya respectfully submits that the Court should take due account of these factual vulnerabilities when addressing the legal consequences of States' conduct, including in determining the threshold at which "significant" harm has been caused to States, individuals, and/or peoples.

[26] ILC, *Draft articles on Prevention of Transboundary Harm from Hazardous Activities* (2001) (hereinafter "**ILC, Draft Articles on Prevention of Transboundary Harm**"), Art. 2, Commentary (4).

[27] Written Statement of Kenya, paras. 3.21-3.31.

[28] *See*, *inter alia*, Federated States of Micronesia, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (15 March 2024), paras. 23-35; Republic of Mauritius, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (22 March 2024), paras. 20-34; Democratic Republic of the Congo, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (4 March 2024), paras. 104-108 (about the whole of Africa), paras. 109-115 (about its individual vulnerability); Republic of Vanuatu, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (21 March 2024), paras. 125-128; Belize, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (21 March 2024), paras. 5-11; People's Republic of Bangladesh, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (22 March 2024), paras. 45-71; Tuvalu, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (21 March 2024), paras. 25-53; United Arab Emirates, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (22 March 2024), paras. 21-32; Republic of Namibia, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (19 March 2024), paras. 26-38. On small island developing States in general, see Written Statement of COSIS, paras. 51-55.

CHAPTER 3
THE BEST AVAILABLE SCIENCE IS CLEAR THAT ANTHROPOGENIC GHG EMISSIONS CAUSE HARM TO THE CLIMATE SYSTEM

3.1. Kenya observes that close engagement with the global scientific community's current understanding of climate change (hereinafter the "**best available science**") is critical to answering the Questions put to the Court. The relationship between legal norms and the best available science is symbiotic and mutually reinforcing. The best available science has, and continues to, guide and inform the practice of States in protecting "*the climate system and other parts of the environment*" by controlling anthropogenic GHG emissions.[29] This Chapter serves as a reference point for the arguments made in Chapter 4 and Chapter 5. To this end, this Chapter proceeds as follows.

a. **Section I** begins by explaining why the work of the IPCC represents the best available science.

b. **Section II** clarifies the nature of the harm to the climate system caused by anthropogenic GHG emissions and explains the interaction between GHG emissions and air pollution.

c. **Section III** addresses the nature and effect of historical GHG emissions, relevant to the CBDR-RC principle.

d. **Section IV** considers the best available science on States' current progress on mitigation and adaptation measures, which are crucial for considering what the obligations discussed in the Questions require of States.

e. **Section V** presents the loss and damage Kenya is suffering from climate change and places it in the context of the special vulnerability of Africa.

I. The IPCC's Work Represents the Best Available Science

3.2. There is broad consensus among participants that the best available science is found in the work of the IPCC.[30] It is accepted as the foremost authority on climate change science, and

[29] This will be explored in Chapter 4(I)(A).

[30] *See, e.g.*, Republic of Albania, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (22 March 2024), para. 50; Republic of Chile, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (22 March 2024), para. 31, Dominican Republic, *Written*

its findings have been referred to in detail across the Written Statements. Accordingly, the IPCC reports "deserve particular consideration" and ought to be the primary resource from which the Court draws its conclusions regarding the physical science basis of climate change.[31] Kenya refers as well to other IPCC reports that are not included in the Dossier, such as the IPCC's latest Synthesis Report ("***Synthesis Report (2023)***"),[32] and other core reports that analyse the cause and effect of climate change.[33]

3.3. The IPCC, as an intergovernmental panel, does not create new science but provides an authoritative assessment of the current state of the best available science. Such an assessment is achieved through a participatory process led by States and in extensive consultation with qualified scientific experts across relevant disciplines.[34] The IPCC's mandate is to advance the study of the "state of knowledge of the science of … climatic change", climate change's "social and economic impact", and "possible response strategies".[35] It is open to review by experts and governments of all UN Member States, and major decisions of the IPCC are made by vote at

Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change (22 March 2024), para. 2.3. The vast majority of written statements also draw heavily on the IPCC's work.

[31] ITLOS Climate Change Advisory Opinion, para. 208.

[32] Every five to seven years the IPCC completes one assessment cycle. The *Synthesis Report (2023)* includes content from the three Working Group Assessment Reports and the three Special Reports below. *See* IPCC, "Decision No. IPCC/XLI-4: Future Work of the IPCC", *available at* https://www.ipcc.ch/site/assets/uploads/2024/04/p41_decisions_future.pdf.

[33] The IPCC reports relied on by Kenya but not included in the Dossier are: 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 ("**IPCC, *Climate Change 2022: Adaptation and Vulnerability Report***"); IPCC, *Global Warming of 1.5°C: An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty* (2018), *available at* https://www.ipcc.ch/sr15/ ("**IPCC, *Global Warming of 1.5°C Special Report (2018)***"); IPCC, *Climate Change 2022: Mitigation of Climate Change. Working Group III Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (2022), *available at* https://www.ipcc.ch/report/ar6/wg3/downloads/report/IPCC_AR6_WGIII_Chapter02.pdf ("**IPCC, *Climate Change 2022: Mitigation Report***").

[34] The IPCC's use of expressions of "*high*" or "*very high*" confidence indicate support by multiple consistent lines of independent and high-quality scientific evidence. *See* 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.

[35] UN General Assembly, Resolution 43/53, *Protection of global climate for present and future generations of mankind*, UN Doc. A/RES/4353 (6 December 1988), paras. 7, 10. The IPCC was established by the UNEP and the WMO in 1988 via WMO Executive Council (EC-XL) Resolution No. 4 (1988) and UNEP Governing Council (GC) Decision 15.3 (1988). The IPCC's mandate was then clarified and endorsed by the UN General Assembly in Resolution 43/53.

plenary sessions.[36] As ITLOS recently stated, the IPCC's reports are "authoritative assessments of the scientific knowledge on climate change" and they "provide important findings in relation to the changes of the Earth's climate that have occurred over time and their causes".[37] ITLOS concluded that "the best available science is found in the works of the IPCC which reflect the scientific consensus …the assessments of the IPCC relating to climate-related risks and climate change mitigation deserve particular consideration".[38]

3.4. Furthermore, the IPCC's conclusions, insofar as they address the relevant provisions of the UNFCCC and Paris Agreement, also give rise to subsequent practice of States Parties relevant to the interpretation of those treaties.[39] The IPCC's membership matches that of the UNFCCC and Paris Agreement, and the publication of its reports is in fulfilment of its mandate created, *inter alia*, through the framework established by those treaties.[40] The original mandate of the IPCC also included the study of "elements for inclusion in a possible future international convention on climate".[41] Furthermore, the IPCC's publications are also consistently relied upon by treaty bodies to define and implement legal concepts contained in those treaties.[42]

3.5. For instance, the CMA in a 2019 decision confirmed that, in conducting national inventory reports of anthropogenic GHG emissions and removals, "the definitions of the GHG inventory principles shall be as provided in the … 2006 IPCC Guidelines" and that "Each Party

[36] *See* IPCC, "Principles Governing IPCC Work" (approved at its 14th session in Vienna on 1 October 1993, and as amended in its 37th session in Batumi on 14 October 2023), *available at* https://www.ipcc.ch/site/assets/uploads/2018/09/ipcc-principles.pdf. *See also* ITLOS Climate Change Advisory Opinion paras. 48-49.

[37] ITLOS Climate Change Advisory Opinion, paras. 51, 53.

[38] *Ibid.*, para. 208.

[39] Pursuant to Vienna Convention on the Law of Treaties (23 May 1969), 1155 UNTS 331 (hereinafter "**Vienna Convention 1969**"), Art. 31(3)(b).

[40] See, for example, 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. 38 ("The assessment is undertaken within the context of the evolving international landscape, in particular, developments in the [UNFCCC] process, including the outcomes of the Kyoto Protocol and the adoption of the Paris Agreement").

[41] UN General Assembly, Resolution 43/53, *Protection of global climate for present and future generations of mankind*, UN Doc. A/RES/4353 (6 December 1988), para. 10(e).

[42] *Whaling in the Antarctic (Australia v Japan: New Zealand Intervening), Judgment, I.C.J. Reports 2014*, p. 226, at para. 46. *See also* ILC, *Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties* (2018), Conclusion 11, which concludes that decisions of a Conference of States Parties can constitute subsequent practice under Articles 31 and 32 of the Vienna Convention 1969. All decisions of the COP and CMA (due to the absence of rules agreed by States Parties) are made by consensus.

shall use the 100-year time-horizon global warming potential … values from the IPCC Fifth Assessment Report".[43] It also decided that "Each Party shall report on the following sectors: energy, industrial processes and product use, agriculture, LULUCF and waste, according to the IPCC guidelines referred to …".[44] Similarly, the CMA in another 2019 decision clarified that compliance with article 4(8) of the Paris Agreement (the duty of transparency) includes use of IPCC methodologies in NDCs.[45]

3.6. Recognising that the IPCC's work gives rise to, and refers to, subsequent practice of States Parties to the UNFCCC and Paris Agreement also ensures internal consistency in international climate change law. These treaties rely on factual components that necessarily evolve in tandem with the best available science. For example, a core element of the Questions is the concept of the "climate system", a term drawn from the UNFCCC whose stated aim is to prevent increases in GHG concentration from causing "dangerous anthropogenic interference with the climate system".[46] The UNFCCC defines the "climate system" as being the "totality of the atmosphere, hydrosphere, biosphere and geosphere and their interactions".[47] While the cryosphere is not expressly mentioned by the UNFCCC, it forms part of the IPCC's definition and is unanimously accepted by States Parties to be a crucial part of the climate system.[48] This acceptance is demonstrated by the reliance of the States participants in these proceedings on the IPCC's definition of the climate system.[49] Other findings of the IPCC relevant to the legal obligations in the Questions will be analysed in Chapters 4 and 5.

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[43] Paris Agreement, Conference of the Parties, 1st Session, *Decisions adopted by the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement Decision*, UN Doc. FCCC/PA/CMA/2018/3 (2 – 15 December 2018), Annex, paras. 17, 37.

[44] *Ibid.*, para.50.

[45] UNFCCC, Conference of the Parties, 24th Session, *Preparations for the implementation of the Paris Agreement and the first session of the Conference of the Parties serving as the meeting of the Parties to the Paris* Agreement, UN Doc. FCCC/CP/2018/L.22 (2 – 14 December 2018), para. 7; *id.*, Annex I, para. 5(d).

[46] United Nations Framework Convention on Climate Change (9 May 1992), 1771 UNTS 107 (Dossier No. 4) (hereinafter "**UNFCCC**"), Art. 2.

[47] *Ibid.*, Art. 1(3).

[48] 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. 682 (defining the cryosphere as the "components of the Earth system … that are frozen, including snow cover, glaciers, ice sheets, ice shelves, icebergs, … permafrost and seasonally frozen ground").

[49] Republic of Vanuatu, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (21 March 2024), para. 148.

II. The Harm Caused to the Climate System Is the Increase in GHG Concentration in the Atmosphere

3.8. Like Kenya, the overwhelming majority of participants consider that, based on the best available science, the emission of anthropogenic GHGs by States causes harm to the climate system. However, certain participants put forward a different interpretation of the best available science.

3.9. The Republic of India for example, has argued that climate change and pollution of the environment are two separate phenomena, such that the customary norms regarding transboundary pollution do not apply.[50] However, any such distinction between the adverse effects of climate change and the pollution of the environment is artificial, and finds no basis in the best available science. As the IPCC has confirmed, substances that cause transboundary air pollution can also be GHGs and *vice versa*.

3.10. Additionally, the Nordic States question whether the obligation of States to act with due diligence to prevent transboundary harm may be transposed to the global regime for the prevention of climate change because "there is no generally accepted standard, scientific or legal, for determination of the effects of a specific act of anthropogenic emissions on the climate system and other parts of the environment".[51] However, the best available science shows that GHG emissions (whether by one State or by many) increase the concentration of GHGs in the atmosphere. There is universal scientific acceptance that increased atmospheric concentration of GHGs contributes to global warming and thus harms the climate system, triggering the operation of the customary obligations analysed in Chapter 4.

3.11. Before addressing those misconceptions, it is pertinent to recall the following core propositions underpinning the physical science basis of climate change, none of which are disputed by participants:

a. Climate change, as a term of art in international law, is "a change of climate which is attributed directly or indirectly to human activity that alters the composition of

[50] Republic of India, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (21 March 2024), para. 17.

[51] Governments of Denmark, Finland, Iceland, Norway, and Sweden, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (21 March 2024), para. 71.

the global atmosphere and which is in addition to natural climate variability observed over comparable time periods".[52]

b. The causes of climate change, according to the UNFCCC, are those human activities "that alter the composition of the global atmosphere".[53] It is accepted that increases in GHG concentration in the atmosphere lead to "dangerous anthropogenic interference with the climate system".[54]

c. GHGs are "those gaseous constituents of the atmosphere, both natural and anthropogenic, that absorb and re-emit infrared radiation".[55] The primary GHGs, per the IPCC, are water vapour (H_2O),[56] carbon dioxide (CO_2), nitrous oxide (N_2O), methane (CH_4), and ozone (O_3).[57] The IPCC's definition also includes man-made GHGs, namely, sulphur hexafluoride (SF_6), hydrofluorocarbons ("**HFCs**"), chlorofluorocarbons ("**CFCs**"), and perfluorocarbons ("**PFCs**").[58] CFCs and PFCs are also ozone-depleting and are regulated by the Montreal Protocol.[59] The Montreal Protocol's importance to States' obligations under international law to protect the climate system will be returned to in Chapter 4.

d. Fifth, the climate is a global system driven by solar energy absorbed by the Earth and re-radiated as heat. Some of this heat is trapped by the atmosphere, stabilizing the Earth's temperature, which is vital for life. However, increased GHG concentrations trap more heat, gradually raising the Earth's global mean surface temperature ("**GMST**"). The increase in the GMST relative to a historical baseline

[52] UNFCCC, Art. 1(2). Article 1 of the Paris Agreement adopts the definitions contained in Article 1 of the UNFCCC. The term "climate" (which is not defined in the UNFCCC) is defined by the IPCC as the "statistical description in terms of the mean and variability of relevant quantities over a period of time ranging from months to thousands or millions of years". *See* IPCC, *Climate Change 2023: Synthesis Report*, Annex I, Glossary, p. 121.

[53] UNFCCC, Art. 1(2).

[54] *Ibid.*, Art. 2.

[55] *Ibid.*, Art. 1(5).

[56] Water vapor accounts for 75% of the terrestrial greenhouse effect but its residence time in the atmosphere is 8 to 10 days and so is not considered problematic compared to the other GHGs whose residence time can be measured in years or decades. *See* IPCC, *Physical Science Basis Report (2021)*, p. 179.

[57] IPCC, *Climate Change 2023: Synthesis Report*, Annex I, Glossary, p. 124.

[58] *Ibid.*

[59] Montreal Protocol (adopted 16 September 1987, entered into force 1 January 1989) 1522 UNTS 3; The treaty is a protocol to the Vienna Convention for the Protection of the Ozone Layer 1985 (adopted 22 March 1985, entered into force 22 September 1988) 1513 UNTS 293.

is, and will be referred to below as, "**global warming**".[60] The degree to which GHGs contribute to global warming depends on their chemical properties and residence time in the atmosphere. Due to both their quantities emitted and their residence times,[61] carbon dioxide, methane, and nitrous oxide are considered the three most important GHGs.[62]

3.12. As described above, there exists a significant overlap between air pollution and the emission of GHGs. The IPCC defines "air pollution" as the degradation of air quality with harmful effects on health or the environment due to substances like gases and aerosols.[63] In fact, the IPCC also notes that GHGs and air pollutants often come from the same sources, and mitigation strategies for GHGs typically also reduce air pollutants like black carbon and nitrogen oxides.[64] State activities that cause transboundary pollution often involve GHG emissions and *vice versa*. Any GHG mitigation strategies also reduce the need for investment in air pollution reduction.[65] The emission of GHGs and air pollution are indissociable, and any attempt to create a legal distinction between them is without basis in law or in fact.

3.13. Moving then to the adverse effects or harms caused by climate change, the IPCC's Synthesis Report (2023) concludes that "human activities, principally through emissions of greenhouse gases, have unequivocally caused global warming".[66] Further, the "observed

[60] IPCC, *Climate Change Synthesis Report (2023)*, Glossary, p. 124.

[61] Carbon dioxide can have residence times ranging from years to thousands of years, while nitrous oxide remains in the atmosphere for an average of 116 years. Methane, on the other hand, is short-lived and remains in the atmosphere for only 9 years on average. *See* IPCC, *Physical Science Basis Report (2021)*, p. 713. CFCs, by contrast, have shorter residence times but can be up to hundreds of times more potent than carbon dioxide.

[62] IPCC, *Physical Science Basis Report (2021)*, p. 713. The Global Warming potential of aggregated GHGs is expressed by the IPCC in terms of their carbon dioxide equivalent emissions ("**CO_2-eq**"), with a time potential (*i.e.,* residence in the atmosphere) aggregated as 100 years. This standard is also known as GWP100 which, besides being deployed in the IPCC's *Synthesis Report (2023)*, is also the agreed-upon accounting method for States' nationally determined contributions in the Paris Rulebook. These GHGs' potential is often measured by the gigaton or megaton ("**$GtCO_2$**" or "**$GtCO_2$-eq**" and "**$MtCO_2$**" or "**$MtCO_2$-eq**") for States' emissions and in tons for per capita emissions ("**tCO_2**" or "**tCO_2-eq**"). IPCC, *Climate Change Synthesis Report (2023)*, Glossary, p. 122. A gigaton is one billion tons whereas a megaton is one million tons.

[63] IPCC, *Special Report: Global Warming of 1*.5ºC (2018) (Dossier No. 72), p. 542 (defining air pollution as "degradation of air quality with negative effects on human health or the … environment due to the introduction … into the atmosphere of substances (gases, aerosols) which have … harmful effect").

[64] *Ibid.*, p. 464 ("GHGs and air pollutants are typically emitted by the same sources. Hence, mitigation strategies that reduce GHGs or the use of fossil fuels typically also reduce the emissions of pollutants"). Black carbon (also known as soot) is an aerosol (not a gas) that is formed from the incomplete combustion of fossil fuels or biomass. While it only remains in the atmosphere for days or weeks it still retains a significant warming effect. *See id.*, p. 543.

[65] IPCC, *Special Report: Global Warming of 1*.5ºC (2018) (Dossier No. 72), p. 67.

[66] IPCC, *Climate Change 2023: Synthesis Report*, p. 42.

increases in well-mixed GHG concentrations since around 1750 are unequivocally caused by GHG emissions from human activities" during this period.[67] The result is that GMST was 1.09°C higher in 2011 to 2020 than in 1850 to 1900.[68] The IPCC's "best estimate" is that anthropogenic GMST increases amount to 1.07°C after accounting for cooling factors (0.0°C to 0.8°C) and natural variability (-0.2°C to +0.2°C).[69] Each of the last four decades has been successively warmer than any decade that preceded it since 1850.[70]

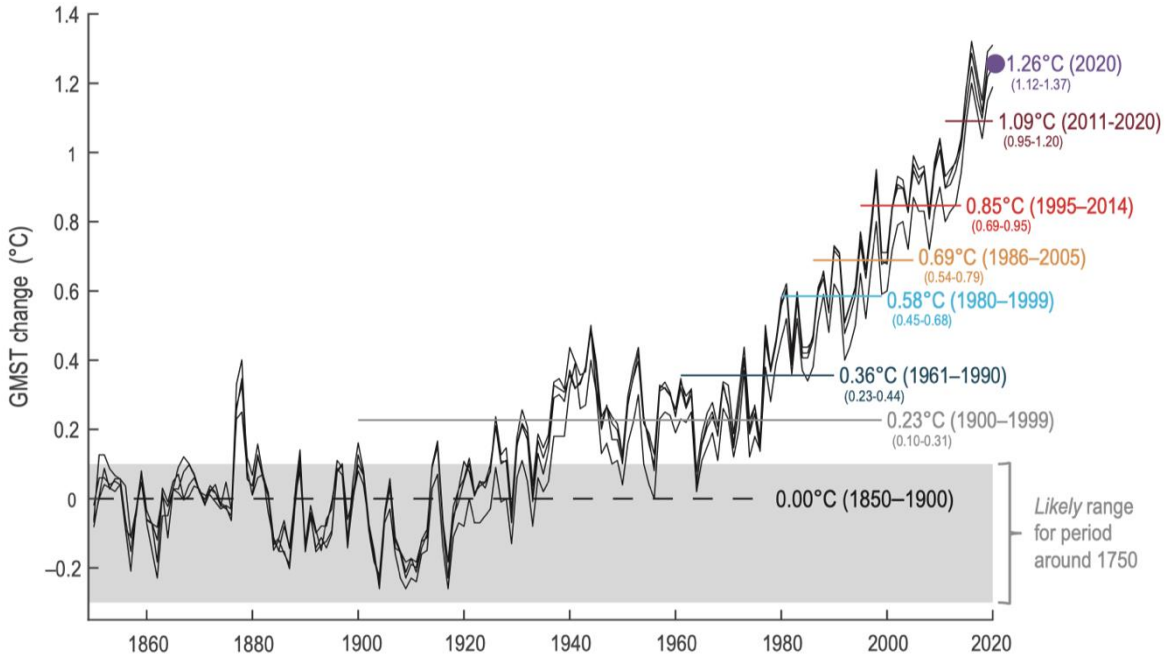

Figure 1: Observed GMST change relative to 1850 to 1900 using four datasets[71]

3.14. The measures of atmospheric GHG concentration reported by the IPCC point to the same conclusion. In 2019, atmospheric carbon dioxide concentrations reached 409.4 ± 0.4 ppm, a level higher than at any time in the last 2 million years; concentrations of methane (1866.3 ± 3.3 ppb) and nitrous oxide (332.1 ± 0.4 ppb) have also reached "*unprecedented levels*" (very

[67] *Ibid.*, p. 42.

[68] *Ibid.*, pp. 42-44. The period from 1850 to 1900 is taken by the IPCC as its baseline for assessing global warming, as it is "the earliest period of reliable observations with sufficient geographic coverage". *See ibid.*, p. 124 (definition of "[g]lobal warming").

[69] *Ibid.*, p. 42.

[70] IPCC, *Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (2021) (hereinafter "**IPCC, *Climate Change 2021: The Physical Science Basis***"), *available at* https://www.ipcc.ch/report/ar6/wg1/chapter/chapter-5/, p. 325.

[71] Figure 1 is sourced from IPCC, *Climate Change 2021: The Physical Science Basis*, p. 191.

high confidence).[72] The year 2019 also saw global net anthropogenic GHG emissions of 59 ± 6.6 GtCO2-eq, representing a 12% increase from 2010 levels and a 54% increase from 1990 (high confidence).[73] The world's average annual GHG emissions from 2010 to 2019 were "higher than in any previous decade on record" although the rate of growth in GHG emissions from 2010 to 2019 (1.3% per year) had slowed compared to 2000 to 2009 (2.1% per year) (high confidence).[74]

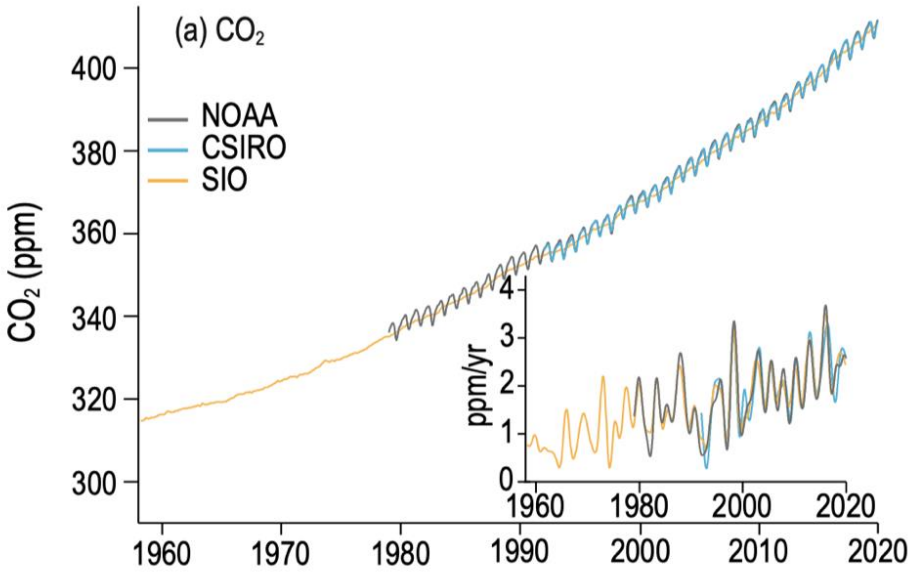

Figure 2: Modern direct measurements of well-mixed carbon dioxide in the atmosphere[75]

3.15. In view of the above, it cannot be argued that this Court lacks a scientific framework for determining the effect of a specific act of anthropogenic GHG emissions on the climate system. The increase in atmospheric GHG concentration compromises the stability and integrity of the climate system, which in turn makes a range of harms more probable or even virtually certain.[76] The emission of GHGs (whether by one State or many) increases their concentration in the atmosphere in the same way that the emission of polluting substances by multiple riparian States increases the concentration of pollution in a river. A determination of whether emissions have exceeded dangerous levels is dependent on findings drawn from the

[72] IPCC, *Climate Change 2021: The Physical Science Basis*, p. 303.

[73] IPCC, *Climate Change 2023: Synthesis Report*, p. 44.

[74] *Ibid.*

[75] Figure 2 is sourced from IPCC, *Climate Change 2021: The Physical Science Basis*, p. 303.

[76] This analysis was approved by ITLOS in the ITLOS Climate Change Advisory Opinion at paras. 54-66, 175-179.

best available science.[77] Accordingly, States that emit excessive GHGs into the atmosphere increase the severity of global warming along with the risk of harm to other States and are in breach of the obligation to act with due diligence to prevent significant transboundary harm or harm to the environment.

III. Climate Change Is a Manifestation of Historical and Present Injustice

3.16. Historical GHG emissions are highly pertinent to the Request.[78] GHGs, by their very nature, can remain well-mixed in the atmosphere for centuries, all the while contributing to global warming. Around 58% of cumulative net carbon dioxide emissions occurred from 1850 to 1989, while 42% were emitted between 1990 and 2019.[79] The IPCC confirms that 57% of historical carbon dioxide emissions from 1850 to 2019 were emitted by developed States.[80] Africa, by contrast, has contributed 3%.[81]

3.17. Similarly, at present 41% of the world's population live in States emitting less than 3 tCO_2-eq (tonnes of carbon dioxide equivalent) per capita, compared to the global average of 6.9 tCO_2-eq.[82] Developing States and small island developing States have per capita GHG emissions of 1.7 and 4.6 tCO_2-eq respectively.[83] The 10% of households with the highest per capita emissions contribute 34-45% of global consumption-based household GHG emissions,

[77] ITLOS Climate Change Advisory Opinion paras. 54-66, 175-179.

[78] *See, e.g.*, Argentine Republic, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (22 March 2024), para. 39; Republic of Costa Rica, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (March 2024), paras. 60-61; Republic of Colombia, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (21 March 2024), para. 3.54; Saint Lucia, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (21 March 2024), para. 88; Democratic Republic of Timor-Leste, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (22 March 2024), paras. 228-232, 130, 138; Islamic Republic of Pakistan, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (22 March 2024), paras. 32-46; Federated States of Micronesia, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (15 March 2024), para. 67.

[79] IPCC, *Climate Change 2023: Synthesis Report*, p. 44.

[80] IPCC, *Climate Change 2022: Mitigation Report*, p. 233. This figure does not include carbon dioxide emissions from land use, land use change, and forestry ("**LULUCF**"). Including LULUCF carbon dioxide emissions, developed States are responsible for 45% of total carbon dioxide emissions from 1850 to 2019. LULUCF emissions tend to be higher in developing States.

[81] IPCC, *Climate Change 2022: Mitigation Report*, p. 233.

[82] IPCC, *Climate Change 2023: Synthesis Report*, p. 44.

[83] *Ibid.*

while the bottom 50% of households contribute a mere 13-15%.[84] On a per capita basis, developing States bear the least responsibility for GHG emissions.

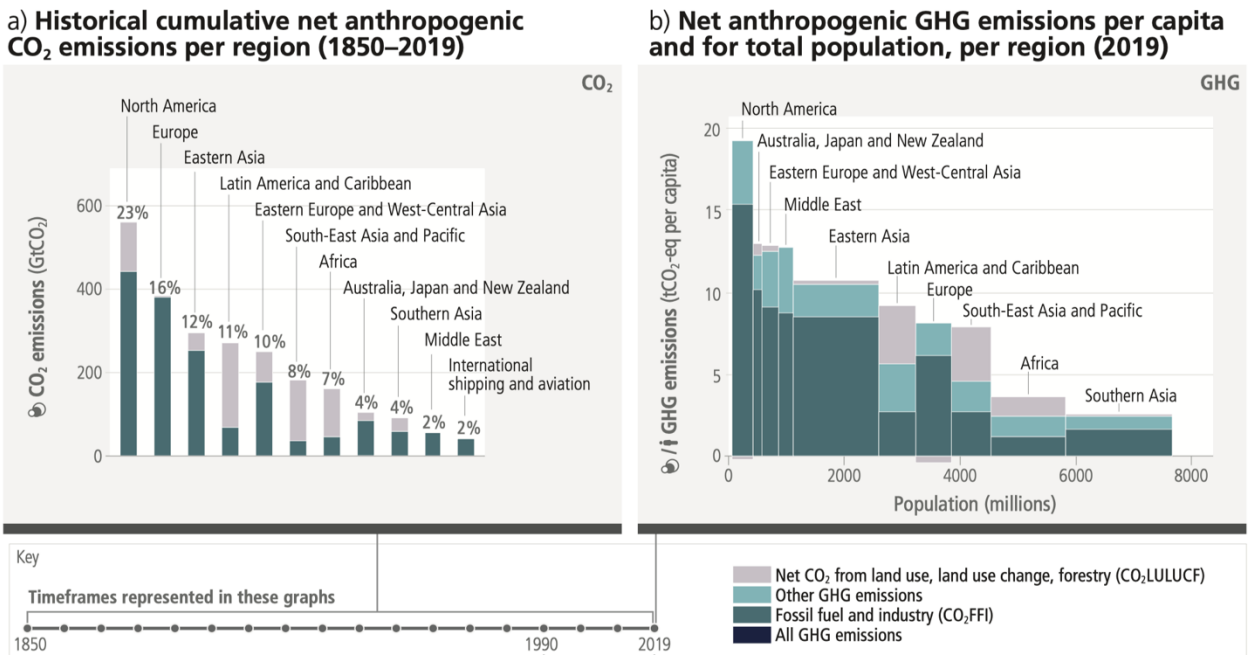

Figure 3: Historical cumulative and per capita anthropogenic carbon dioxide and GHG emissions per region[85]

3.18. Historical GHG emissions continue to perpetuate inequality. Developing States that are least responsible for GHG emissions bear the brunt of climate change's adverse effects.[86] In the present advisory proceedings, it is virtually only developing States—lacking the financial and technological capacity to act alone against the adverse effects of climate change—that have communicated to the Court their specific vulnerability to climate change's effects.[87] Paradoxically, those same developing States must *increase* their GHG emissions to meet the needs of their populations, eradicate poverty, and pursue development. This inequality is exacerbated by developed States "outsourcing" their GHG emissions to developing States,[88] making some of them the largest emitters of GHGs.[89] Kenya, too, is forced to grapple with this

[84] *Ibid.*

[85] Figure 3 is sourced from IPCC, *Climate Change 2023: Synthesis Report*, p. 45. *See also* IPCC, *Climate Change 2022: Mitigation Report* p. 235, Figure 2.10.

[86] IPCC, *Climate Change 2022: Adaptation and Vulnerability Report*, p. 145.

[87] *See supra*, para. 2.13.

[88] IPCC, *Climate Change 2022: Mitigation Report*, p. 239.

[89] *Ibid.*, p. 242.

reality. As reported in its most recent NDC, Kenya's GHG emissions increased by 65.2% from 1995 to 2015, with emissions projected to increase to 143 $MtCO_2$-eq as it pursues its Vision 2030 development agenda.[90]

3.19. The best available science recognises that historical GHG emissions and vulnerability to climate change are intertwined with the history of colonialism.[91] Several participants highlight that the brutal legacy of colonialism is closely linked to the climate crisis.[92] Colonised States, including Kenya, were subjected to ruthless resource extraction that ignored local needs and wrought severe environmental damage.[93] This legacy, along with the economic devastation it left behind, has been recognized by the IPCC as an obstacle to colonised States' climate change mitigation efforts.[94] Adopting mitigation technologies is continually hampered by high costs, balance of payments constraints, and vulnerability to external shocks.[95] Kenya thus questions whether former colonies could be said to have "contributed" to historical GHG emissions at all prior to regaining sovereignty over their natural resources.[96] Former colonial States cannot be held responsible for the internationally wrongful acts of their colonial

[90] Republic of Kenya, *Kenya's Updated Nationally Determined Contribution (NDC)*, p. 4.

[91] IPCC, *Climate Change 2022: Adaptation and Vulnerability Report*, p. 1197.

[92] *See, e.g.*, African Union, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (22 March 2024), para. 17(b); Federative Republic of Brazil, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (21 March 2024), para. 81; Burkina Faso, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (20 March 2024), para. 258; Republic of Ecuador, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (22 March 2024), para. 1.27; Republic of India, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (21 March 2024) paras. 71-72; Republic of Kiribati, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (22 March 2024), paras. 152-153; Republic of Madagascar, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (20 March 2024), para. 85; Melanesian Spearhead Group, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (22 March 2024), para. 251; Saint Lucia, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (21 March 2024), para. 93; Solomon Islands, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (22 March 2024), para. 173; Democratic Republic of Timor-Leste, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (22 March 2024), para. 238.

[93] *See, e.g.*, Kameri-Mbote & Cullet, "Law, Colonialism and Environmental Management in Africa" (1997) 6(1) Review of European Community and International Environmental Law 23, *available at* https://ielrc.org/content/a9701.pdf; Martin Shanguhyia, *Population, Tradition and Environmental Control in Colonial Kenya* (Boydell & Brewer, 2015).

[94] IPCC, *Climate Change 2022: Adaptation and Vulnerability Report*, p. 1197.

[95] IPCC, *Climate Change 2022: Mitigation Report*, p. 1683.

[96] African Union, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (22 March 2024), para. 232; Antigua and Barbuda, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (22 March 2024), paras. 535, 591.

predecessors.[97] As Kenya reaffirmed in the Nairobi Declaration, Africa's responsibility for climate change is effectively nil.

3.20. The historical and continuous dimension of climate change is of the utmost relevance to identifying and interpreting the obligations raised in the Request. As explained in Chapter 4, historical GHG emissions are particularly relevant to the CBDR-RC principle, legal obligations owed to present and future generations, as well as obligations of technology transfer and financial assistance embodied in the UNFCCC and Paris Agreement.

IV. Mitigation Requires Urgent Action, Financial Assistance, and Technology Transfer to Developing States

3.21. As identified in many written statements, the two main responses to climate change, which also form the subject of States' legal obligations in treaty and custom, are "**mitigation**" and "**adaptation**".[98] The assessment of States' progress in mitigating the adverse effects of climate change in light of best available science is an important foundation for States' obligations to protect the climate system. In what follows, Kenya presents a closer examination of the action required, according to the best available science, to avoid significant harm to the climate system. Adaptation measures and their limits are the focus of Chapter 3(V).

3.22. The primary benchmark of mitigation measures is the Paris Agreement, which sets the goal of holding the increase in GMST to "well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels" ("**Temperature Targets**" with each target being hereinafter "**1.5°C**" and "**2°C**", respectively).[99] The IPCC has calculated that historical GHG emissions from 1850 to 2019

[97] Antigua and Barbuda, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (22 March 2024), paras. 535, 591. *See also* ILC, *Second Report on succession of States in respect of State responsibility by Pavel Šturma, Special Rapporteur*, UN Doc. A/CN.4/719, 6 April 2018, draft Articles 6 and 9(1)(c) and paras. 124, 130; James Crawford, STATE RESPONSIBILITY (Cambridge University Press, 2013), pp. 446-447.

[98] Mitigation is defined by the IPCC as human intervention to reduce GHG emissions or enhance GHG sinks. IPCC, *Climate Change 2023: Synthesis Report*, Annex I, p. 128. GHG sinks are those "process[es], activit[ies] or mechanism[s] which remove[] a greenhouse gas, an aerosol or a precursor to a greenhouse gas from the atmosphere", and include forests and oceans. *Ibid*. Adaptation is the "process of adjustment to actual or expected climate and its effects, in order to moderate harm or exploit beneficial opportunities". *Id.*, Annex I, p. 120. Adaptation can take place in human or natural systems, which can be mutually reinforcing.

[99] Paris Agreement (12 December 2015) (Dossier No. 16) (hereinafter "**Paris Agreement**"), Art. 2(1)(a).

amount to 2400 ± 240 $GtCO_2$.[100] The total amount of GHGs that can be mixed into the atmosphere while keeping global warming within the Temperature Targets is the "**Carbon Budget**".[101] By the IPCC's calculations, historical emissions have used up four-fifths of the available Carbon Budget (*i.e.*, 2900 $GtCO_2$) reflecting a 50% probability of limiting global warming to 1.5°C, or two thirds of the Carbon Budget (3550 $GtCO_2$) for a 67% probability of limiting to 2°C.[102]

3.23. States have made progress towards meeting the Temperature Targets, for example, by developing renewable energy technologies (which now account for 30% of the world's electricity supply)[103] as well as national laws and policies on climate change mitigation (estimated to have resulted in 5.9 $GtCO_2$-eq less emissions in 2016).[104] There is thus clear consensus among States that mitigation of GHG emissions is imperative. However, there still remains a substantial "emissions gap" between global GHG emissions for 2030 associated with the implementation of States' NDCs and "pathways"[105] that limit global warming to 1.5°C or 2°C.[106]

3.24. Modelled pathways consistent with States' NDCs prior to COP26 until 2030, *assuming no increase in ambition*, would lead to a median global warming of 2.8°C by 2100.[107] This makes it "likely" that global warming will exceed 1.5°C during the 21st century.[108] Thus, to act in accordance with modelled pathways that limit warming to 1.5°C, "immediate action" by States and "deep, rapid, and sustained global GHG emissions reductions this decade" are

[100] IPCC, *Climate Change 2022: Mitigation Report*, p. 231.

[101] *Ibid.*, p. 7.

[102] *Ibid.*, p. 231.

[103] *See* H. Ritchie and P. Rosado, "30% of the world's electricity came from renewable sources in 2030", *Our World in Data*, *available at* https://ourworldindata.org/data-insights/renewable-electricity-2023.

[104] IPCC, *Climate Change 2022: Mitigation Report*, p. 1480.

[105] Pathways are defined by the IPCC as the "*temporal evolution of natural and/or human systems towards a future state. Pathway concepts range from sets of quantitative and qualitative scenarios or narratives of potential futures to solution-oriented decision-making processes to achieve desirable societal goals. Pathway approaches typically focus on biophysical, techno-economic and/or socio-behavioural trajectories and involve various dynamics, goals, and actors across different scales*". IPCC, *Climate Change 2023: Synthesis Report*, Annex I, p. 127.

[106] IPCC, *Climate Change 2023: Synthesis Report*, p. 57.

[107] *Ibid.*

[108] *Ibid.*

required.[109] ITLOS shares this view.[110] There is also a large "implementation gap" between measures outlined in States' NDCs and policies pursued at the domestic level.[111] Without strengthening of policies by States, global warming is projected to be 3.2°C by 2100.[112]

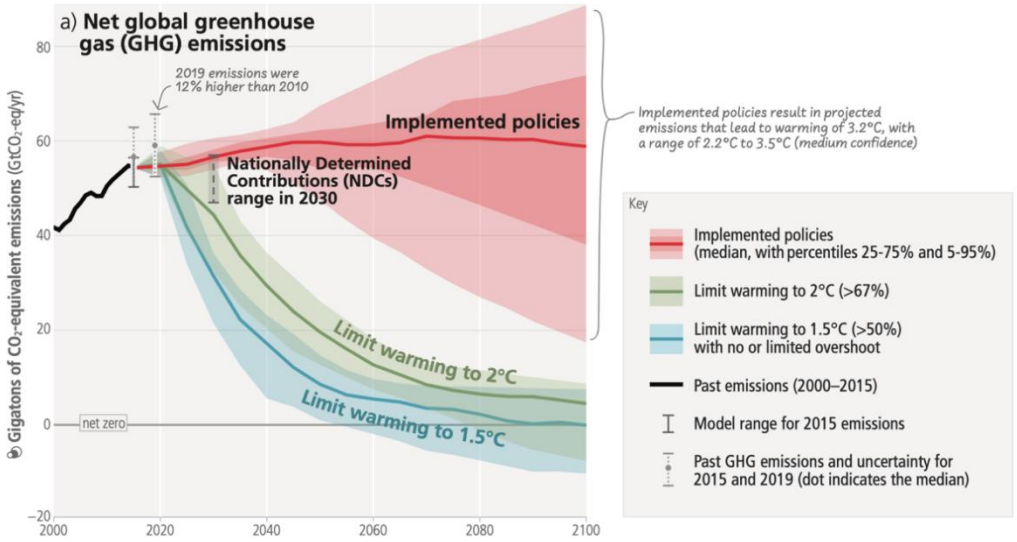

Figure 4: Modelled GHG reduction pathways versus States commitments in NDCs[113]

3.25. While the emissions gap has decreased due to increased commitments in States' NDCs,[114] the IPCC considers it "*likely*" that limiting global warming to even 2°C requires an "*unprecedented acceleration*" in GHG emissions reductions.[115] By comparison, the projected cumulative future carbon dioxide emissions of existing and planned fossil fuel infrastructure, without additional abatement, will exceed the cumulative net carbon dioxide emissions allowed for in pathways limiting global warming to 1.5°C.[116] Continued investments in high-emitting infrastructure add further barriers to the acceleration required to meet the Temperature Targets.[117]

[109] *Ibid.*, p. 92.

[110] ITLOS Climate Change Advisory Opinion, paras. 63, 65.

[111] IPCC, *Climate Change 2023: Synthesis Report*, p. 57.

[112] *Ibid.*, p. 68.

[113] Figure four is sourced from IPCC, *Climate Change 2023: Synthesis Report*, p. 22.

[114] IPCC, *Climate Change 2022: Mitigation Report*, p. 14.

[115] *Ibid.*, p. 15.

[116] *Ibid.*, pp. 265-267.

[117] *Ibid.*, p 15; *see also ibid.*, p. 629, Box 6.3.

3.26. As such, rapid and deep reductions to States' GHG emissions are required to avoid the worst of global warming.[118] Reductions will have to be of such a magnitude that States achieve a net of zero GHG emissions, *i.e*., state where anthropogenic GHG emissions are balanced by anthropogenic GHG removals ("**Net Zero**").[119] A state where the balance of GHG removals exceeds that of GHG emissions is "**Net Negative**".[120] Global Net Zero carbon dioxide emissions by 2050 is a requirement of those modelled pathways where global warming is limited to 1.5°C;[121] many of these pathways continue to Net Negative later in the century (effectively reversing global warming). Reaching and sustaining global Net Zero GHG emissions results in a gradual decline in global warming.[122] All modelled pathways that limit warming to 1.5°C or 2°C involve "rapid, deep and, in most cases, immediate [GHG] emission reductions" in all sectors.[123] According to the best available science, an immediate transition to Net Zero is required to achieve the Temperature Targets and avert dangerous interference with the climate system.[124]

V. Adaptation Measures Are Critical to Meet Loss and Damage and Address the Special Vulnerability of African States

3.27. Adaptation to the effects of climate change is of utmost importance. Not only does it feature heavily in States' treaty obligations under the UNFCCC and Paris Agreement, but it is also necessary to meet the rapidly escalating loss and damage suffered by States.

3.28. Climate change is causing widespread damage to States beyond that attributable to natural climate variability.[125] 3.3 to 3.6 billion people live in areas that are highly vulnerable to climate change.[126] African States are particularly vulnerable, as recognised in the

[118] ITLOS Climate Change Advisory Opinion, paras. 63, 65.

[119] IPCC, *Climate Change 2023: Synthesis Report*, Annex I, p. 127.

[120] The quantification of Net Zero and Net Negative, of course, depends on the specific GHG emission metric chosen and the time horizon chosen for that metric.

[121] IPCC, *Climate Change 2022: Mitigation Report*, p. 19.

[122] *Ibid.*

[123] *Ibid.*, p. 22.

[124] ITLOS' analysis of the best available science points to the same conclusion. ITLOS Climate Change Advisory Opinion paras. 63-66, 208-213.

[125] IPCC, *Climate Change 2023: Synthesis Report*, pp. 42-44; IPCC, *Climate Change 2022: Adaptation and Vulnerability Report*, p. 9.

[126] IPCC, *Climate Change 2022: Adaptation and Vulnerability Report*, p. 12.

UNFCCC.[127] As global warming worsens, adaptation becomes difficult or impossible as "hard" adaptation limits are exceeded.[128]

3.29. As an African developing State, Kenya is acutely vulnerable to climate change. Climate change distorts Kenya's patterns of precipitation and contributes heavily to intense wet spells and "more frequent and intense floods",[129] which has devastating effects on communities.[130] Since its first written statement, Kenya has been struck by brutal flooding caused by above-average rainfall and the devastating impact of Cyclone Hidaya, the largest recorded tropical storm to hit the area.[131]

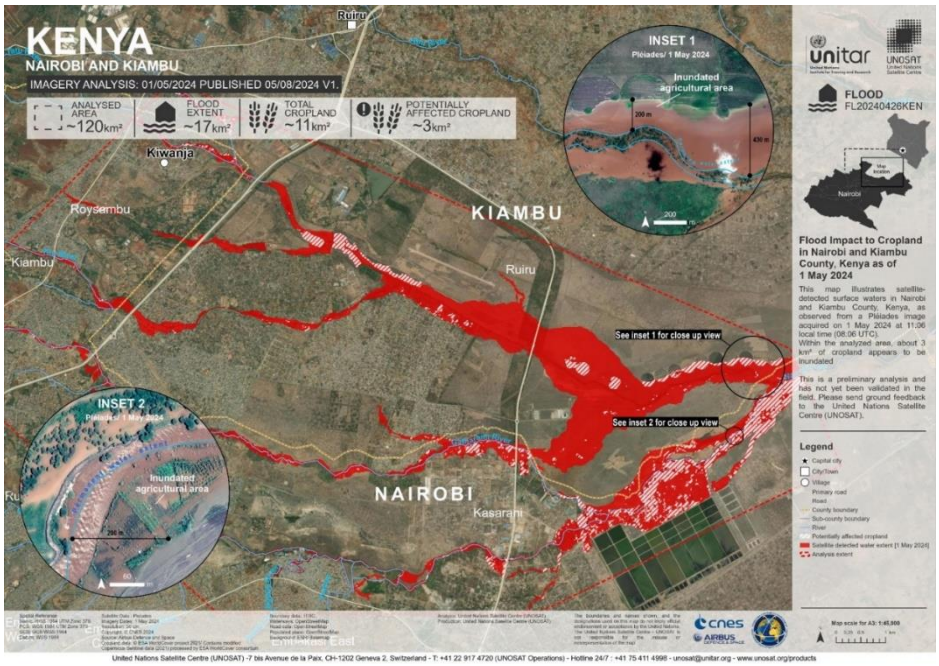

Figure 5: Satellite imagery of flooding near Nairobi in May 2024[132]

[127] UNFCCC, Art. 4(1)(e).

[128] IPCC, *Climate Change 2022: Adaptation and Vulnerability Report*, p. 26.

[129] *Ibid.*, p. 1342.

[130] *Ibid.*, p. 1208.

[131] See, RAMMB-CIRA Satellite Library, "Tropical Cyclone Hidaya" (last accessed on 5 July 2024), *available at* https://satlib.cira.colostate.edu/event/tropical-cyclone-hidaya/.

[132] Figure 5 is sourced from R. Davies, "Flooding in Kenya – March to May 2024", *Emergency Management Service*, *available at* https://global-flood.emergency.copernicus.eu/news/168-flooding-in-kenya-march-to-may-2024/; United Nations Satellite Centre (UNOSAT), "Flood Impact to Cropland in Nairobi and Kiambu County, Kenya as of 1 May 2024", *available at* https://unosat.org/products/3836.

3.30. The 2024 flooding caused serious loss of life and property, with approximately 228 people killed and tens of thousands displaced from their homes.[133] The urgency and immediacy of the risks from climate change cannot be overemphasized. They are not abstract or diffuse; they are occurring at this moment and impacting States that have contributed next-to-nothing to the problem. Mitigation and adaptation action is urgently required.

Figure 6: Flooding strands residents in Nairobi (photo credit: New York Times)[134]

3.31. Developing States cannot act alone against climate change. Kenya, like most vulnerable States, is in great need of strengthened adaptation measures which are "the highest priority for Kenya, not only through preventing further losses and damage, but underpinning infrastructure and economic development".[135] Adaptation costs in Kenya through 2030 are projected to amount to US$62 billion. Kenya's budgetary capacity can only cover 10% of that amount.[136] Enhancing mitigation measures requires US$17 billion through 2030, a total cost of which

[133] Reuters, "Death toll from Kenya floods rises to 228" (5 May 2024), *available at* https://www.reuters.com/world/africa/death-toll-kenya-floods-rises-228-2024-05-05/.

[134] Figure 6 is sourced from A. Latif Dahir and J. Jiménez, "Flooding Inundates Kenya, Killing at Least 32 and Displacing Thousands", *New York Times* (24 April 2024), *available at* https://www.nytimes.com/2024/04/24/world/africa/kenya-flooding-nairobi-photos.html.

[135] Republic of Kenya, *Kenya's Updated Nationally Determined Contribution (NDC)*, p. 14.

[136] *Ibid.*, p. 18.

Kenya can only bear 21%.[137] Even if developing States utilize all available resources, implementing adaptation measures cannot eliminate climate change risks. Institutional capacity remains a significant limiting factor. Despite this, 78% of the funding for Africa-related climate research flowed to institutions in Europe and the United States, with only 14.5% to institutions in Africa.[138] As shown in the sections that follow, co-ordinated action on finance flows, technology transfer, and mitigation measures is critical. The best available science is incontrovertible: pathways to mitigation are outside the capacity of most States, including Kenya, without financial or technological assistance.

[137] Republic of Kenya, *Kenya's Updated Nationally Determined Contribution (NDC)*, p. 8.

[138] IPCC, *Climate Change 2022: Adaptation and Vulnerability Report*, pp. 1298-1299.

CHAPTER 4
STATES' PRIMARY OBLIGATIONS WITH RESPECT TO CLIMATE CHANGE UNDER CUSTOMARY INTERNATIONAL LAW AND TREATIES

4.1. The majority of participants agree that Question (A) requires consideration of legal norms contained in customary international law, treaty law, and human rights instruments. It is important to emphasise at the outset that, contrary to the claims advanced by some participants,[139] the Court is not being asked to create new obligations nor accede to any "subjective views" on the state of international law.[140] Such claims are based on the false premise that the present *corpus juris* is devoid of relevant rules.[141] The Written Statements of several participants, including Kenya, show the opposite. In fact, in giving its advisory opinion, this Court is engaging in its normal judicial function of "ascertaining the existence or otherwise of legal principles and rules".[142]

4.2. **Section I** focuses on obligations of customary international law. In Chapter 2, Kenya showed why there is no *lex specialis* excluding the application of customary international law. Building on that analysis, Kenya addresses the main contention of those participants who reject the applicability of customary norms, including the duty of prevention and the CBDR-RC principle.

4.3. **Section II** addresses obligations to protect the climate system established by treaty, in particular the UNFCCC and Paris Agreement. Certain participants attempt to limit the scope of the legal obligations set out in the two treaties by arguing that they are either not legal in nature or are partly or completely discretionary.[143] These arguments are incorrect and cannot be reconciled with the treaties' object and purpose.

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[139] Republic of India, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (21 March 2024), paras. 4-8; People's Republic of China, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (22 March 2024), para. 11.

[140] Organization of the Petroleum Exporting Countries (OPEC), *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (19 March 2024), para. 23.

[141] *Nuclear Weapons* Advisory Opinion, p. 237, para. 18.

[142] *Ibid.*

[143] State of Kuwait, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (22 March 2024), para. 32; Kingdom of Saudi Arabia, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (21 March 2024), paras. 4.57-4.62.

4.4. Finally, **Section III** addresses arguments concerning human rights obligations. It does not appear disputed that climate change represents a grave threat to human rights, although some question the applicability of human rights treaties to GHG emissions.[144] Kenya demonstrates that such a position is untenable.

I. States are Obligated Under Customary International Law to Minimize Harm Caused by GHG Emissions by Observing Due Diligence in Light of the Best Available Science

A. States Must Not Knowingly Cause Harm To The Climate System Through Excessive GHG Emissions

4.6. The no-harm principle and the customary norms on the prevention of transboundary harm form part of the bedrock of international environmental law.[145] Indeed, the position outlined in Kenya's Written Statement was recently confirmed in ITLOS' Climate Change Advisory Opinion.[146] Briefly, States are under a customary duty to exercise due diligence in preventing significant transboundary environmental harm. Due diligence requires that States use all means at their disposal to prevent the harm in question.[147] The due diligence standard (which must be assessed objectively) is a variable one that is informed by, among other things, the risk of harm involved with the activity, the state of the best available science, and the capacity of the State subject to the due diligence obligation.[148] Giving effect to the prevention principle involves both taking precautionary measures before undertaking an activity that risks causing significant harm to the environment and taking measures to minimise the occurrence of such harm.[149]

[144] Kingdom of Saudi Arabia, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (21 March 2024), paras. 4.97-4.98; People's Republic of China, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (22 March 2024), para. 115; United Kingdom of Great Britain and Northern Ireland, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (18 March 2024), paras. 122-123.

[145] *Nuclear Weapons* Advisory Opinion, p. 242, para. 29.

[146] Written Statement of Kenya, Chapter 5(I).

[147] ITLOS Climate Change Advisory Opinion, para. 233.

[148] *Ibid.*, paras. 206-207, 212-213.

[149] *Ibid.*, para. 242.

4.7. Some participants advance the following arguments to support the position that the norm is inapplicable in the context of climate change:

a. The prevention principle is only intended to apply to sources of environmental pollution that originate from a single source in one State that damage the environment of another State. The harm to the climate system caused by GHG emissions is, however, more than just transboundary in nature and does not fit neatly into the existing customary rule.[150]

b. The cumulative nature of States' GHG emissions means that it is impossible to disentangle the various sources and attribute responsibility for a certain amount of GHG emissions and climate change to a specific State.[151]

c. Global warming and climate change are in large part caused by historical GHG emissions that remain well-mixed in the atmosphere. All States have contributed to this state of affairs since the start of the industrial revolution and continue to do so.[152]

4.8. Kenya provides its responses below.

4.9. Firstly, there is no inherent limit to the nature or scope of the harm covered by the customary rule.[153] For example, it cannot be argued that, if polluting haze from Canada in the *Trail Smelter* arbitration had blown over and caused damage to many other States, those States would not have a cause of action against Canada.[154] The fact that the customary norm has been

[150] United States of America, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (22 March 2024), para. 4.18.

[151] New Zealand, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (22 March 2024), paras. 101-102, United States of America, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (22 March 2024), paras. 4.17-4.20.

[152] New Zealand, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (22 March 2024), para. 102.

[153] The rule is the same one from the *Corfu Channel case, Judgment of April 9th 1949: I.C.J. Reports 1949*, p. 4, but just applied to the specific context of pollution.

[154] This follows from the ruling in *Trail Smelter* itself, which is not confined to bilateral disputes over pollution. *See Trail Smelter Arbitration (United States v. Canada)* (1938 and 1941) 3 R.I.A.A. 1905.

litigated solely in bilateral disputes concerning transboundary (as opposed to global) harm does not mean that the norm is confined to such scenarios.[155]

4.10. More importantly, international courts and tribunals recognize that the scope of the no-harm principle is not confined to direct transboundary harm caused by pollution passing across a State's borders. The Court in its *Nuclear Weapons* advisory opinion stated that there is an obligation on States to "respect the environment of other States or of areas beyond national control".[156] Likewise, ITLOS' Seabed Disputes Chamber in the *Activities in the Area* advisory opinion confirmed that obligations of prevention and due diligence applied to the "*Area*", which includes within it "the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction".[157] Similar propositions are found in both the Stockholm and Rio Declarations, which are widely considered to be reflective of custom.[158]

4.11. Further, the principle of prevention and the duty of due diligence must be interpreted in light of the best available science, which makes clear that when one State, or many States, emits GHG emissions, that increases the concentration of GHGs in the atmosphere (see Chapter 3(II)). Such an increase, especially when reaching certain levels, contributes to climate change, which in turn can cause harm to the environments of other States and areas beyond national jurisdiction.[159]

4.12. A State's awareness of the best available science thus puts it under a *stringent* duty to exercise due diligence with respect to its GHG emissions, which are known with certainty to contribute to harm to the climate system. Permissible levels of GHGs in the atmosphere are determined by the best available science; this continues to evolve with the work of the IPCC. With the temperature goals in the Paris Agreement (*i.e.*, 1.5°C and 2°C) recognized by

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[155] *See, e.g.*, the cases cited in United States of America, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (22 March 2024), para. 4.15.

[156] *Nuclear Weapons* Advisory Opinion, p. 242, para. 29. This holding was reaffirmed in *Gabčikovo-Nagymaros*, para. 53.

[157] *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. 51, paras. 147-148; United Nations Convention on the Law of the Sea (10 December 1982), 1833 UNTS 3 (Dossier No. 45) (hereinafter "**UNCLOS**"), Art. 1(1)(1) (definition of "Area").

[158] 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.

[159] *See supra*, Chapter 3(II). *See also* ITLOS Climate Change Advisory Opinion para. 246.

scientific consensus as the necessary standard for avoiding the worst effects of climate change, States must reduce their GHG emissions in line with pathways that reach Net Zero before the middle of the century.[160]

4.13. It is indisputable that historical GHG emissions cause harm to the climate system. The IPCC is clear that most historical emissions came from developed States, with Africa accounting for only 3% thereof. Since the customary norms of prevention and due diligence are informed by the best available science, they may not impose liability for GHG emissions prior to the 1990s when the IPCC issued its first report on climate change.[161] That, however, does not mean that those norms do not apply to climate change generally—while they focus on States' GHG emissions in the past three decades, their precise content is also informed by historical emissions, consistent with the CBDR-RC principle.

4.14. Any perceived difficulties in attributing the responsibility of States for GHG emissions, or determining questions of standing under the transboundary harm rule do not impugn the existence of the norm itself.[162] Such difficulties may mean that the due diligence obligation with respect to GHG emissions is a collective one, where performance affects all States, but not every State can lay a claim to breach.[163] In the context of pollution to the high seas, for example, while it affects all States, the particular impact of damage on certain coastal States provides them with standing to sue for compensation for breach of the relevant collective obligation.[164] The same may be true with respect to those States particularly affected by climate change.

4.15. In any event, as a fundamental part of due diligence, precaution must be observed even in the face of scientific uncertainty.[165] This is clear in the UNFCCC itself,[166] and has been confirmed by ITLOS.[167] Therefore, the absence of a precise mode for quantifying harm caused

[160] *See supra*, para. 3.26. *See also* IPCC, *Climate Change 2022: Mitigation Report*, p. 23.

[161] This followed the work of the IPCC in its first assessment report and the creation of the UNFCCC.

[162] With respect to causation, see Written Statement of Kenya, Chapter 6(I).

[163] *See, e.g.*, ILC, ARSIWA, with commentaries, Art. 42, Commentary 11.

[164] ILC, ARSIWA, with commentaries, Art. 42, Commentary 12.

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

[166] UNFCCC, Art. 3(3). This provision imposes a mandatory precautionary approach in response to anthropogenic GHG emissions.

[167] ITLOS Climate Change Advisory Opinion, para. 242.

by a State's GHG emissions to the climate system is not an excuse for failing to observe due diligence, particularly in light of the best available science that excess GHG emissions accumulatively damage the climate system.

4.16. Finally, some participants argue that compliance with the UNFCCC and Paris Agreement is sufficient to discharge any customary duty requiring the mitigation of GHG emissions. However, as ITLOS points out, the customary norm is based on the best available science, which is an independent and evolving standard.[168] Furthermore, those States who raise this argument also claim that the obligations within the UNFCCC and Paris Agreement are entirely discretionary.[169] It therefore would not fulfil the customary obligation to simply adopt minimalist NDCs and reporting measures and then claim compliance.[170] On the principled interpretation of the UNFCCC and Paris Agreement given by Kenya in Chapter 4, it would be possible to discharge both obligations at the same time if States Parties are taking measures that are consistent with 1.5°C or 2°C. However, this would be impossible on the "discretionary" approach advocated for by some States.

B. THIS COURT MUST GIVE EFFECT TO CBDR-RC, INCLUDING BY RECOGNISING HISTORICAL GHG EMISSIONS

4.16. The majority of participants accept that CBDR-RC is a foundational principle that informs how States' obligations in respect of climate change are to be discharged. Many participants also recognise the link between historical GHG emissions and CBDR-RC.[171]

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[168] *Ibid.*, paras. 223, 242; *Gabčikovo-Nagymaros*, para. 140.

[169] *See infra* Chapter 4.

[170] Republic of Costa Rica, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (March 2024), para. 91; Republic of Vanuatu, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (21 March 2024), para. 222.

[171] Argentine Republic, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (22 March 2024), para. 39; Federative Republic of Brazil, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (21 March 2024), paras. 12-29; Socialist Republic of Viet Nam, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (22 March 2024), para. 17; Kingdom of Thailand, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (22 March 2024), paras. 18-25; Republic of South Africa, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (22 March 2024), para. 129; Republic of El Salvador, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (22 March 2024), paras. 38-41; Republic of Colombia, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (21 March 2024), paras. 3.42-3.59; Democratic Republic of Timor-Leste, *Written Statement before the ICJ Regarding the Request for an*

4.17. While accepting the existence of the principle, a minority of participants argue either that it is confined to the Paris Agreement,[172] or that CBDR-RC is not designed to give effect to historical GHG emissions. Such arguments, however, are misconceived.

4.18. While the Paris Agreement references the CBDR-RC principle,[173] it would be a mistake to conclude that the principle does not exist outside this context. On the contrary, the CBDR-RC principle has a long pedigree in the history of international environmental law.

4.19. Principle 7 of the Rio Declaration makes clear that the CBDR-RC principle has its origins in the "different contributions to global environmental degradation".[174] The principle also appears in the Preamble of the UNFCCC, where it is linked to historical GHG emissions.[175] The Montreal Protocol's approach to phasing out ozone-depleting substances, under which developed States Parties take the lead and assist developing States, was crafted in light of the CBDR-RC principle. And, in its recent advisory opinion, ITLOS emphasized that UNCLOS States Parties' obligations are determined in accordance with the CBDR principle, whereby those with the greatest capacity bear the greatest responsibility for mitigation.[176] There is, therefore, no support for the contention that the CBDR-RC principle is confined to the Paris Agreement. On the contrary, recognition of the impact of historical GHG emissions is precisely within the scope of the principle.

Advisory Opinion on Climate Change (22 March 2024), paras. 128-145; Republic of Costa Rica, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (March 2024), paras. 61-64; Republic of Singapore, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (20 March 2024), para. 3.33; Republic of India, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (21 March 2024), para. 25; Republic of Indonesia, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (22 March 2024), paras. 65, 67; State of Kuwait, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (22 March 2024), para. 14(2); Saint Lucia, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (21 March 2024), para. 58; Islamic Republic of Pakistan, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (22 March 2024), paras. 40-46; Federated States of Micronesia, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (15 March 2024), para. 67.

[172] Germany, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (20 March 2024), para. 79.

[173] Paris Agreement, Art. 2(2).

[174] Rio Declaration, Principle 7.

[175] UNFCCC, Preamble.

[176] ITLOS Climate Change Advisory Opinion, paras. 225-229.

II. States Parties' Obligations to Protect the Climate System Contained in Climate Change Treaties

4.20. Participants universally agree on the importance of the UNFCCC and Paris Agreement in addressing climate change. However, some participants question the legal nature of the commitments/obligations contained in those treaties. The core argument is that the UNFCCC and the Paris Agreement, whether in respect of NDCs,[177] the Temperature Targets,[178] or financial assistance,[179] either do not create legal obligations or create obligations that are wholly or partially discretionary. Such a position contradicts the object and purpose of those instruments and are premised on two fundamental errors.

4.21. The first is that they ignore the broader context of international climate change law—the Paris Agreement essentially represents the culmination of developments from the Montreal Protocol and the UNFCCC.[180] The Montreal Protocol, the UNFCCC, and Paris Agreement (*i.e.*, the UN climate regime) must therefore be interpreted consistently with each other.[181] The terms of the Montreal Protocol and UNFCCC thus shed light on the proper interpretation of the Paris Agreement.[182] ITLOS took the same view with respect to the UN climate regime and

[177] State of Kuwait, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (22 March 2024), paras. 35-38.

[178] *Ibid.*, paras. 31-32; New Zealand, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (22 March 2024), paras. 49, 52.

[179] Germany, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (20 March 2024), para. 28; Government of Japan, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (22 March 2024), paras. 44-45.

[180] The Montreal Protocol achieved universal ratification in October 2022 with the accession of the State of Palestine to the treaty. The UNFCCC has been ratified by 197 States and the European Union. The Paris Agreement has been ratified by 194 States and the European Union.

[181] *See* Burkina Faso, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (20 March 2024), para. 67; Cook Islands, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (20 March 2024), para. 133; Arab Republic of Egypt, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (22 March 2024), para. 72; Republic of El Salvador, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (22 March 2024), para. 27; Republic of Indonesia, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (22 March 2024), para. 46; International Union for Conservation of Nature (IUCN), *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (19 March 2024), para. 156; Federated States of Micronesia, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (15 March 2024), para. 42; Kingdom of the Netherlands, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (21 March 2024), para. 3.20; Republic of Seychelles, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (22 March 2024), para. 97.

[182] The identity of contracting parties also renders the Montreal Protocol and UNFCCC "relevant rules" for interpreting the Paris Agreement pursuant to Vienna Convention 1969, Art. 31. *See also* 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), pp. 95-96, paras. 470-471.

UNCLOS.[183] To ignore this approach would be to proceed on a siloed and artificial exercise in treaty interpretation.[184]

4.22. The second error comes from a conceptual confusion around the rigid dichotomy of obligations of conduct and result.[185] Besides being of questionable pedigree in international law, the dichotomy obscures the proper interpretation of the obligations in question. The text of the Paris Agreement creates "**goal-oriented obligations**" whereby targets are established by States Parties and used to measure their progress towards the treaty's ultimate goal. These include the Temperature Targets, the ambition of NDCs, and assistance to developing or vulnerable States. Those obligations do not permit States Parties to ignore or work against the treaty's aims. Instead, they must progressively realise the Paris Agreement's objectives, consistent with their highest possible ambition and in light of their respective capabilities.

A. CORE FEATURES OF THE UN CLIMATE REGIME

1. The Montreal Protocol's Contribution to International Climate Change Law

4.23. The importance of the Montreal Protocol has been recognised by many participants, and it has a direct bearing on a proper interpretation of the Paris Agreement.[186] The Montreal

[183] ITLOS Climate Change Advisory Opinion, para. 135.

[184] Treaty interpretation must take place "within the framework of the entire legal system prevailing at the time of the interpretation". *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. This necessarily includes the entire corpus of international environmental law. *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.

[185] J. Crawford, Special Rapporteur on State Responsibility, *Second report on State responsibility* (hereinafter "**Second State Responsibility Report**"), *available at* https://legal.un.org/ilc/documentation/english/a_cn4_498.pdf, para. 59.

[186] United Arab Emirates, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (22 March 2024), para. 133; Australia, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (22 March 2024), Chapter 3(B)(a); African Union, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (22 March 2024), para. 105; Antigua and Barbuda, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (22 March 2024), para. 148; Commonwealth of the Bahamas, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (22 March 2024), para. 84; Barbados, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (22 March 2024), paras. 180, 290; Burkina Faso, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (20 March 2024), paras. 67, 104; Republic of Colombia, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (21 March 2024), para. 3.49; Cook Islands, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (20 March 2024), para. 133; Written Statement of COSIS, para. 119; Republic of Costa Rica, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (March 2024), para. 34; Democratic

Protocol heavily influenced the design of the UNFCCC,[187] and several of its key innovations are now core parts of the UN climate regime. Like its successors, the Montreal Protocol was motivated by developments in the best available science which revealed that CFCs and other substances were dangerously depleting the Earth's ozone layer.[188] The Montreal Protocol committed States Parties to reducing, and eventually phasing out, these ozone-depleting substances pursuant to an agreed timetable, coupled with reporting obligations and periodic review of commitments in light of the best available science.[189] These measures were in service

Republic of the Congo, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (4 March 2024), para. 238; Republic of Ecuador, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (22 March 2024), para. 3.45; Arab Republic of Egypt, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (22 March 2024), para. 72; Republic of El Salvador, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (22 March 2024), para. 27; European Union, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (March 2024), para. 169; Grenada, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (21 March 2024), para. 19; Republic of Indonesia, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (22 March 2024), para. 46; Islamic Republic of Iran, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (22 March 2024), para. 63; International Union for Conservation of Nature (IUCN), *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (19 March 2024), para. 156; Mexico, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (March 2024), para. 55; Federated States of Micronesia, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (15 March 2024), para. 42; Kingdom of the Netherlands, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (21 March 2024), para. 3.20; New Zealand, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (22 March 2024),para. 3.2.2; Republic of Seychelles, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (22 March 2024), para. 97; Republic of Sierra Leone, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (15 March 2024), para. 3.39; Kingdom of Tonga, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (15 March 2024), para. 164; United Kingdom of Great Britain and Northern Ireland, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (18 March 2024), Chapter III(3)(D); United States of America, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (22 March 2024), para. 3.47; Oriental Republic of Uruguay, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (22 March 2024), para. 141.

[187] S. Oberthür, C. Dupont, and Y. Matsumoto, "Managing Policy Contradictions Between the Montreal and Kyoto Protocols" *in* C. Oberthür and O. Stokke (eds.) MANAGING INSTITUTIONAL COMPLEXITY: REGIME INTERPLAY AND GLOBAL ENVIRONMENTAL CHANGE (2011), *available at* https://doi.org/10.7551/mitpress/8577.003.0008, p. 215.

[188] Montreal Protocol on Substances that Deplete the Ozone Layer to the Vienna Convention for the Protection of the Ozone Layer (16 September 1987), 1522 UNTS 29 (hereinafter "**Montreal Protocol**"), Preamble ("Aware that measures taken to protect the ozone layer from depletion should be based on relevant scientific knowledge, taking into account technical and economic consideration").

[189] *Ibid.*, Arts. 2-4, 6-7. The Montreal Protocol's commitments can be strengthened either by amendment to the treaty itself (to add new ozone-depleting substances) or by an "adjustment" to increase the stringency of controls on a substance already regulated by the convention. Amendments are taken under Article 9 of the Vienna Convention for the Protection of the Ozone Layer (22 March 1985), 1513 UNTS 293 (Dossier No. 25) (hereinafter "**Vienna Convention 1985**"). Adjustments take place pursuant to Montreal Protocol, Article 2(9).

of the treaty's aim of controlling "equitably total global emissions" of ozone-depleting substances "with the ultimate objective of their elimination".[190]

4.24. Importantly, the Montreal Protocol's provisions were crafted in light of CBDR-RC.[191] Its phase-out provisions apply differently to developing States whose "consumption of the controlled substances is less than 0.3 kilograms per capita".[192] Developing States were also provided with an additional ten-year transition period to implement their commitments,[193] with allowances for production and consumption to meet "basic domestic needs".[194] States Parties' initial commitments were gradually ramped up by subsequent amendments and adjustments to the treaty that broadened its scope (by including additional substances such as HFCs) and accelerated phase-out efforts in line with its objects and purpose.[195] The Montreal Protocol's differentiated and principled approach to protecting the climate system contributed enormously to its success.[196] The treaty's inclusion of HFCs alone will save an estimated 80 $GtCO_2$-eq by 2050 and avoid up to 0.5°C of global warming by 2100.[197]

[190] Montreal Protocol, Preamble ("Determined to protect the ozone layer by taking precautionary measures to control equitably total global emissions of substances that deplete it, with the ultimate objective of their elimination on the basis of developments in scientific knowledge, taking into account technical and economic considerations").

[191] *Ibid.*, Preamble ("Acknowledging that special provision is required to meet the needs of developing countries for these substances …" and "Considering the importance of promoting international co-operation in the research and development of science ... bearing in mind the particular needs of developing countries"). *See also ibid.*, Art. 5.

[192] *Ibid.*, Art. 5(1).

[193] *Ibid.*, Art. 5(1). This is subject to the caveat that the State's consumption of controlled substances does not exceed 0.3 kilograms per capita.

[194] *Ibid.*, Arts. 2(1)-2(4), 5.

[195] Montreal Protocol, Conference of the Parties, 28th Session, *Decision XXVIII/1: Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer*, UN Doc. UNEP/OzL.Pro.28/12 (10-15 October 2016). *See also* Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer (15 October 2016), UN Doc. C.N.872.2016.TREATIES-XXVII (hereinafter "**Kigali Amendment**").

[196] Another core feature of the Montreal Protocol's framework was the flexibility given to States Parties in implementing the agreed-upon control measures. *See, e.g.*, Montreal Protocol, Conference of the Parties, 28th Session, *Decision XXVIII/2: Decision related to the amendment phasing down hydrofluorocarbons*, UN Doc. UNEP/OzL.Pro.28/12 (10-15 October 2016), paras. 13-14.

[197] S. Anderson and N. Sherman, "The importance of finding the path forward to climate-safe refrigeration and air conditioning: thinking outside the box and without limits" (2015) 5 *Journal of Environmental Studies and Sciences*, 176-185, *available at* https://link.springer.com/article/10.1007/s13412-015-0230-3.

4.25. The Montreal Protocol recognises that developing States Parties are unable to reach its ultimate aim without assistance. In another important manifestation of CBDR-RC,[198] Article 10 provides for the establishment "of a mechanism for the purposes of providing financial and technical cooperation, including the transfer of technologies".[199] This is supplemented by a corresponding obligation under Article 10A on States Parties to "take every practicable step … to ensure … the best available environmentally safe substitutes and related technologies are expeditiously transferred" to Article 5 parties on "fair and most favourable conditions".[200] Articles 10 and 10A led to the creation of the Montreal Protocol's Multilateral Fund, which is governed by an executive committee with equal membership from developed and developing States Parties. Notably, its establishment was not a part of the Montreal Protocol's original text but was progressively realised via decisions of the States Parties.

4.26. Several key aspects of the Montreal Protocol reflect an understanding of what CBDR-RC entails. Differentiation must in part concretely reflect States' contribution to historic pollution and any understanding of due diligence must be grounded in a historical context as well as reflecting those States' capacity to undertake adaptation and mitigation measures today. Provisions on technology and financial transfer must be realistic, fair and equitable, and capable over time of assisting the State Parties in realising their mitigation and adaptation targets in light of the treaty's objects and purpose.

2. The UNFCCC and the Kyoto Protocol

4.27. The UNFCCC (together with the Kyoto Protocol) and the decisions of States Parties under these instruments have continued to develop the techniques pioneered by the Montreal Protocol. While all States Parties are subject to general mitigation and reporting obligations,[201] developed States must take the lead and adopt binding GHG reduction targets pursuant to an agreed timetable.[202]

[198] These two crucial amendments, known as the London Amendment (1990), were adopted at the 2nd meeting of the parties to the Montreal Protocol held at London (27-29 June 1990).

[199] Montreal Protocol, Art. 10.

[200] *Ibid.*, Art. 10A.

[201] UNFCCC, Art. 4.

[202] *Ibid.*, Art 4(2).

4.28. CBDR-RC and equity are at the core of the UNFCCC. States Parties are obligated to take them into account in implementing the treaty to "achieve the objective of the Convention".[203] The UNFCCC also provides that the "specific needs and special circumstances" of developing States Parties "especially those that are particularly vulnerable to the adverse effects of climate change … should be given full consideration".[204] CBDR-RC heavily informs the GHG mitigation commitments, which were differentiated according to whether States Parties were listed in the annexes (either Annex I or Annex II) or not (*i.e.*, Non-Annex I Parties).[205]

4.29. Some participants have argued that the Annex/Non-Annex categories remain in effect.[206] But this categorization has not been retained by the Paris Agreement, which differentiates States Parties based on whether they are "*developed*" or "*developing*".[207] While not defined in the text, applying ordinary rules of treaty interpretation, as well as CBDR-RC, the meaning of "*developed*" and "*developing*" should be determined, *inter alia*, by reference to States Parties' level of development and capacity to mitigate GHG emissions.[208] This better reflects the treaty's object of progressively ambitious commitments, which will increasingly apply to developing States as their capacity to mitigate GHG emissions grows.[209] Freezing the position adopted in the late 1990s by relying on the Annex/Non-Annex categories would mean that certain States with very high levels of development and capacity would not be subject to obligations consistent with CBDR-RC.[210]

[203] *Ibid.*, Art. 3.

[204] *Ibid.*, Art. 3(2).

[205] *See also ibid.*, Arts. 4(6) and 4(8).

[206] Argentine Republic, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (22 March 2024), para. 40; State of Kuwait, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (22 March 2024), paras. 22-26.

[207] The text of the Paris Agreement does not refer to the UNFCCC's Annexes at all.

[208] The notion of CBDR-RC is expressly included in the Paris Agreement. Paris Agreements, Preamble, Arts. 2(2), 4(3), 4(19).

[209] New Zealand, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (22 March 2024), para. 47.

[210] This interpretation best aligns with the UNFCCC's objects and purpose. Consider, for example, that Brunei Darussalam, Kuwait, Qatar, Saudi Arabia, Singapore, and the United Arab Emirates, who now have some of the highest rates of development and GDP per capita in the world were classed as developing Non-Annex States Parties at the time of the drafting of the UNFCCC.

4.30. Furthermore, the specific mitigation commitments for Annex I Parties in Article 4(2) have been fully discharged,[211] as Annex I States Parties successfully returned emissions to 1990 levels by the year 2000.[212] The obligations on Annex I Parties in the Kyoto Protocol have also been exhausted. By the end of the Protocol's first reporting period (2008-2012), the collective emissions of the Annex I States Parties was 22.5% below 1990 levels,[213] fulfilling the goal to reduce overall GHG emissions to 5% below 1990 levels for that period. The Kyoto Protocol's second reporting period concluded on 9 September 2023,[214] and its third reporting period is still being negotiated. The Annex/Non-Annex categories are only relevant if and when the Kyoto Protocol's third reporting period is agreed. They have no place in the Paris Agreement.

4.31. The UNFCCC's open-ended mitigation and reporting obligations, however, continue to bind States Parties.[215] In addition to formulating and implementing national mitigation policies, States Parties must continue to periodically update and publish to the COP national GHG inventories.[216] Reporting under the UNFCCC is now virtually coextensive with the Paris Agreement's obligations to publish NDCs. Decisions of the COP have harmonised the reporting standards for both,[217] and some States Parties have submitted their most recent

[211] The targets established in Article 4(2)(b) of the UNFCCC were reached in the year 2000.

[212] UNFCCC, Arts. 4.2(a), 4.2(b). This is due to the GHG emission reductions experienced by the States Parties classed as "*economies in transition*" who saw a collapse in their economies following the dissolution of the Soviet Union. GHG emissions for the remaining Annex I States Parties rose by 9% during that period. As the obligation under Article 4(2) is one of result, how the result came about is not determinative. *See* UNFCCC Subsidiary Body for Implementation, *National Communications from Parties Included in Annex I to the Convention: Compilation and Synthesis of Third National Communications*, UN Doc. FCCC/SBI/2003/7 (16 May 2023), para. 11. *See also* UNFCCC Subsidiary Body for Implementation, *National greenhouse gas inventory data for the period 1990–2012*, UN Doc. FCCC/SBI/2014/20 (17 November 2014), p. 8.

[213] UNFCCC, Conference of the Parties, 11th Session, *Annual compilation and accounting report for Annex B Parties under the Kyoto Protocol for 2015*, UN Doc. FCCC/KP/CMP/2015/6 (25 November 2015), para. 24.

[214] Kyoto Protocol, Conference of the Parties, 17th Session, *Report of the Conference of the Parties*, UN Doc. FCCC/KP/CMP/2022/9/Add.1 (17 March 2023), Decision 1/CMP.17. *See also* United Nations Climate Change, "True-up period reporting and review process for the second commitment period of the Kyoto Protocol", *available at* https://unfccc.int/process-and-meetings/transparency-and-reporting/reporting-and-review-under-the-kyoto-protocol/second-commitment-period/true-up-period-reporting-and-review-process-for-the-second-commitment-period-of-the-kyoto-protocol (last accessed 31 July 2024).

[215] UNFCCC, Art. 4(1).

[216] This is the case for gases not controlled by the Montreal Protocol. The inventory and steps taken to implement the UNFCCC must be communicated to the COP under Article 12(1).

[217] UNFCCC, Conference of the Parties, 24th Session, *Report of the Conference of the* Parties, UN Doc. FCCC/CP/2018/10/Add.1 (19 March 2019), Decision 1/CP.24, para. 42.

national GHG inventories together with their updated NDCs.[218] Additionally, the IPCC's guidelines (adopted by the CMA) for NDCs also includes Montreal Protocol gases,[219] and a CMA synthesis report found that a significant portion of NDCs also covered HFCs, PFCs, and sulphur hexafluoride.[220] This is further evidence of States Parties' intention to treat the UN climate regime as an integrated whole.

3. Adaptation Assistance to Developing States and the Special Vulnerability of Africa

4.32. Adaptation measures, along with financial and technological assistance to developing States, is a core feature of the UN climate regime. The UNFCCC imposes mandatory obligations to formulate, implement, and regularly update adaptation policies,[221] and to assist developing States Parties that are particularly vulnerable to climate change.[222] The UNFCCC also establishes categories of States exhibiting particular vulnerability according to the factors listed in Article 4(8).[223] African States, according to such factors, are particularly vulnerable to climate change and thus require heightened attention with respect to adaptation, financial assistance, and technology transfer. Kenya notes the mandatory obligation whereby States Parties "shall … co-operate in preparing for adaptation … and for protection and rehabilitation of areas, particularly in Africa, affected by drought and desertification, as well as floods". The

[218] Australia, for example, submitted its national GHG inventory for 2023 together with its updated NDC, *available at* https://unfccc.int/ghg-inventories-annex-i-parties/2023?gad_source=1 (2023).

[219] *See* Paris Agreement, Art. 4(8) (providing that NDCs must contain sufficient information for "clarity, transparency and understanding" per Decision 1/CP.21). *See also* UNFCCC, Conference of the Parties, 21st Session, *Adoption of the Paris Agreement*, UN Doc. FCCC/CP/2015/10/Add.1 (30 November – 13 December 2015), Decision 1/CP.21, para. 27. *See also* Decision 4/CMA.1, UN Doc. FCCC/PA/CMA/2018/3/Add.1 (15 December 2018), Annex I, para. 3(b), providing that this must be in accordance with IPCC Guidelines. The relevant guidelines are the IPCC's 2006 Guidelines for National Greenhouse Gas Inventories (as amended by the 2019 refinement adopted by IPCC at its 49th Session in Kyoto on 12 May 2019). IPCC, *Guidelines for National Greenhouse Inventories* (2006), *available at* https://www.ipcc-nggip.iges.or.jp/public/2006gl/; IPCC, 49th Session, *Decisions Adopted by the Panel* (8-12 May 2019), *available at* https://www.ipcc.ch/site/assets/uploads/2019/05/IPCC-49_decisions_adopted.pdf, Decision IPCC-XLIX-9. Chapter 8 of the 2019 Refinement lists the GHGs that ought to be included, which also include several Montreal Protocol gases such as HFCs, PFCs, and sulphur hexafluoride.

[220] Paris Agreement, Conference of Parties, 3rd Session, *Nationally determined contributions under the Paris Agreement*, UN Doc. FCCC/PA/CMA/2021/8 (25 October 2021), para. 5(c). Around 90% of NDCs covered carbon dioxide, between 71-90% covered methane and nitrous oxide. Between 41-70% of NDCs covered HFCs while 10-40% covered PFCs and sulphur hexafluoride.

[221] UNFCCC, Art. 4(1)(b).

[222] *Ibid.*, Art. 4(4).

[223] *Ibid.*, Art. 4(8).

heightened consideration given to African States carries over to the relevant obligations under the Paris Agreement, the object of which is to enhance the implementation of the UNFCCC.[224]

4.33. To operationalise finance flows for adaptation measures in the UNFCCC, COP5 in 2001 adopted a work programme focusing specifically on adaptation for "*Least Developed Countries*" (a category under the UNFCCC)[225] and two funds, the Least Developed Countries Fund and the Special Climate Change Fund, dedicated to adaptation measures for developing States Parties.[226] This framework was supplemented by a series of work streams developed to continually strengthen the UNFCCC's adaptation objectives, some of which have now become integrated with the Paris Agreement's own work streams on adaptation.[227] Additional work on financial assistance to developing States is also being carried out by the Global Environment Facility and the Green Climate Fund.[228]

4.34. The UNFCCC also obligates developed States Parties to "take all practicable steps to promote, facilitate and finance" the transfer of both "soft" ("know-how") and "hard" ("technologies") environmentally sound technologies.[229] Technology transfer was further addressed by several COP decisions before being incorporated into the Paris Agreement.[230]

[224] Paris Agreement, Art. 2(1).

[225] *See* UNFCCC, Art. 4(9).

[226] UNFCCC, Conference of Parties, 7th Session, *Action Taken by the Conference of the Parties*, UN Doc. FCCC/CP/2001/13/Add.1 (29 October – 10 November 2001), Decision 5/CP.7, para. 11.

[227] UNFCCC, Conference of Parties, 19th Session, *Action Taken by the Conference of the Parties*, UN Doc. FCCC/CP/2013/10/Add.2/Rev.1 (11 – 23 November 2013), Decision 17/CP.19. *See also* UNFCCC Subsidiary Body for Scientific and Technological Advice, 44th Session, *Nairobi work programme on impacts, vulnerability and adaptation to climate change*, UN Doc. FCCC/SBSTA/2016/L.9 (16 – 26 May 2016), para. 6.

[228] The Global Environment Facility was designated as the interim financial mechanism under the UNFCCC via Decision 3/CP.4, "Review of the financial mechanism". UNFCCC, Conference of Parties, 4th Session, *Action Taken by the Conference of the Parties*, UN Doc. FCCC/CP/1998/16/Add.1. (2 – 14 November 1998), Decision 3/CP.4. The Green Climate Fund was established via Decision 1/CP.16, "The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention". UNFCCC, Conference of the Parties, 16th Session, *Action Taken by the Conference of the Parties,* UN Doc. FCCC/CP/2010/7/Add.1 (29 November – 10 December 2010), para. 102.

[229] UNFCCC, Art. 4(5).

[230] See the establishment of the Technology Mechanism via Decision 1/CP.16 "The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention". UNFCCC, Conference of the Parties, 16th Session, *Action Taken by the Conference of the Parties,* UN Doc. FCCC/CP/2010/7/Add.1 (29 November – 10 December 2010), para. 102. *See also* Paris Agreement, Arts. 10(3) & 10(4).

The equivalent provisions in the Paris Agreement therefore apply to these UNFCCC mechanisms.[231]

4.35. Adaptation in the Paris Agreement is specifically linked to the Temperature Targets.[232] The best available science indicates, however, that at 2°C of global warming, several "hard" adaptation limits will be reached or exceeded, making adaptation for developing States near impossible.[233] The Paris Agreement's provisions thus represent a continuation and strengthening of the UNFCCC on financial assistance and technological transfer.[234] Developed States Parties are under mandatory obligations to "provide financial resources" to assist developing States Parties with mitigation and adaptation measures.[235] Developed States Parties are also obligated to take the lead in "in mobilizing climate finance from a wide variety of sources".[236] Developing States are also guaranteed enhanced access to financial assistance, which includes African States.[237] Despite this, States Parties' goal of US$100 billion per year in financing for climate change has not been met.[238]

B. THE PARIS AGREEMENT CREATES BINDING GOAL-ORIENTED OBLIGATIONS

4.36. Compliance with the Paris Agreement, especially when interpreted in the context of the entire UN climate regime and CBDR-RC and equity, is not a matter of discretion.[239] It is thus incorrect to argue that the Temperature Targets cannot be considered as part of a binding

[231] *See* Paris Agreement, Art. 9(8).

[232] *Ibid.*, Arts. 2(1), 7(1). *See also ibid.*, Arts. 7(7), 7(8), 7(10)-7(12).

[233] IPCC, *Climate Change 2022: Adaptation and Vulnerability Report*, p. 26.

[234] Another goal of the Paris Agreement is to make "*finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development*". Paris Agreement, Art. 2(1)(c). *See also id.*, Art. 4(5), which specifically links assistance to Arts. 9, 10, and 11.

[235] Paris Agreement, Art. 9(1).

[236] *Ibid.*, Art. 9(3).

[237] *Ibid.*, Art. 9(9). *See also ibid.*, Art. 9(4).

[238] J. Gastelumendi and I. Gnittke, "Climate Finance (Article 9)" *in* D. Klen *et al.* (eds.) THE PARIS AGREEMENT ON CLIMATE CHANGE: ANALYSIS AND COMMENTARY (2017), *available at* https://doi.org/10.1093/law/9780198789338.003.0014, p. 252.

[239] *Contra* State of Kuwait, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (22 March 2024), paras. 38-40; Kingdom of Saudi Arabia, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (21 March 2024), paras. 4.57-4.62.

obligation,[240] or that participation in financial assistance is merely voluntary.[241] It is also incorrect to argue that the scope and ambition of States Parties' NDCs are entirely discretionary.[242] The false premise common to these arguments is that if the obligations are not contained in obligations of result, they must be non-binding. As demonstrated below, goal-oriented obligations, which are well-known to international law, operate not according to result, but via the progressive realisation of aims by reference to agreed standards.

4.37. The Paris Agreement has, as its ultimate aim, the attainment of the Temperature Targets, recognising that "this would significantly reduce the risks and impacts of climate change".[243] The fulfilment of obligations in other provisions of the treaty are expressly linked to these Temperature Targets.[244] What is required of States Parties is determined by the best available science.[245]

4.38. The core mitigation obligation of States Parties, which applies both to developing and developed States, is to "prepare, communicate and maintain" successive NDCs that they "intend to achieve". States Parties "shall [also] pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions".[246] As mentioned above, NDCs' accounting of GHG emissions overlaps with existing obligations under the UNFCCC, which are also binding legal obligations.[247]

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[240] New Zealand, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (22 March 2024), para. 52; State of Kuwait, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (22 March 2024), para. 42.

[241] Germany, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (20 March 2024), paras. 27-28; Government of Japan, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (22 March 2024), para. 45.

[242] State of Kuwait, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (22 March 2024), paras. 40-42.

[243] Paris Agreement, Art. 2(1)(a). The Temperature Targets also form part of the Paris Agreement's object and purpose. When Parties perform a treaty in good faith, they refrain from taking action that would frustrate its objects and purpose. New Zealand, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (22 March 2024), paras. 50-51.

[244] Paris Agreement, Arts. 4(1), 7(1).

[245] *Ibid.*, Art. 4(1).

[246] *Ibid.*, Art. 4(2).

[247] L. Rajamani, "Ambition and differentiation in the 2015 Paris Agreement: Interpretative Possibilities and Underlying Politics" (2016) 65(2) *International & Comparative Law Quarterly* 493, *available at* https://doi.org/10.1017/S0020589316000130.

4.39. NDCs must include, at a minimum, "information necessary for clarity, transparency, and understanding" in accordance with Decision 1/CP.21 and other relevant CMA decisions.[248] Each successive NDC must "represent a progression" from the one preceding it and all NDCs must reflect the State's "highest possible ambition" even though the precise content of NDCs is not specified.[249]

4.40. Developed States Parties must also continue to take the lead in adopting economy-wide emissions targets, towards which developing States Parties should also move.[250] The Paris Agreement further obligates developed States Parties to provide support for developing States Parties' mitigation and adaptation efforts.[251] This includes financial assistance and technology transfer.

4.41. These obligations all form part of the goal-oriented obligations created by the Paris Agreement.

1. The Temperature Targets Are a Binding Goal-Oriented Obligation

4.42. It is argued that, in agreeing to the Temperature Targets and Articles 2 and 4 of the Paris Agreement, States Parties did not intend to create binding obligations of result. According to this argument, such alternatives were rejected in the early drafts.[252] It is therefore argued those articles do not "impose specific binding obligations" but are merely "hortatory goals that

[248] Paris Agreement, Art. 4(8); UNFCCC, Conference of the Parties, 21st Session, *Adoption of the Paris Agreement*, UN Doc. FCCC/CP/2015/10/Add.1 (30 November – 13 December 2015), Decision 1/CP.21, para. 27. *See also, e.g.*, Paris Agreement, Conference of the Parties, 3rd Session, *Action Taken by the Conference of the Parties*, UN Doc. FCCC/PA/CMA/2021/10/Add.2 (31 October – 13 November 2021), Decision 5/CMA.3, para. 25 which provides that GWP100 (*see supra*, fn 62) shall be used to estimate GHG emissions.

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

[250] *Ibid.*, Art. 4(4).

[251] *Ibid.*, Art. 9(1).

[252] *See, e.g.*, Kingdom of Saudi Arabia, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (21 March 2024), para. 4.47. *See also* . H. Winkler, "Mitigation (Article 4)" *in* D. Klen *et al.* (eds.) THE PARIS AGREEMENT ON CLIMATE CHANGE: ANALYSIS AND COMMENTARY (2017), *available at* https://doi.org/10.1093/law/9780198789338.003.0014, pp. 142-143.

the Parties are trying to achieve".[253] This interpretation is not tenable. The Paris Agreement's obligations mandate the progressive realisation of the Temperature Targets.[254]

4.43. While the Paris Agreement's *travaux préparatoires* are useful, treaty interpretation is concerned "above all" with the text itself.[255] There is no ambiguity or absurdity created by the plain wording of Articles 2 and 4 that would justify resort to supplementary means of interpretation.[256]

4.44. In any event, the fact that the drafters rejected the Temperature Targets as an obligation of result does not mean that the provisions lack legal effect. Article 2 requires States Parties to aim towards the realization of Temperature Targets.[257] The express linkages between the Temperature Targets and other substantive provisions of the Paris Agreement indicate that those mechanisms are established for the purpose of realising that aim.[258] The binding obligation is thus to work towards achieving the Temperature Targets. States Parties' conduct pursuant to the Paris Agreement must conform to the progressive realisation of that aim. Such an obligation has no less legal force than an obligation of result. Moreover, unlike other provisions in the Paris Agreement, Article 4 (2) uses the mandatory word "*shall*" and applies to each party, thus creating individual obligations.

4.45. Instead of focusing on a distinction between obligations of conduct and result, the usefulness of which has long been questioned by the ILC,[259] the proper focus of interpreting the Paris Agreement should be on an "interpretation and application of the norms themselves, taking into account their context and their object and purpose".[260] Indeed, such a distinction is

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[253] State of Kuwait, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (22 March 2024), para. 32.

[254] United States of America, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (22 March 2024), para. 4.26; Germany, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (20 March 2024), paras. 44, 48-49.

[255] *Territorial Dispute (Libyan Arab Jamahiriya v. Chad), Judgment, I.C.J. Reports 1996*, p. 6, at pp. 19-20, para. 41.

[256] Vienna Convention 1969, Art. 32. Even if Article 32 is relied on to "confirm" the meaning arrived at under Article 31, Kenya submits that this does not invalidate its interpretation. The negotiators were averse to strict obligations of result. When Articles 2 and 4 are read creating a goal-oriented obligation, these concerns fall away.

[257] Paris Agreement, Art. 4(1).

[258] *Ibid.*, Arts. 4(1) & 7(1).

[259] Second State Responsibility Report, paras. 57, 64, 68.

[260] *Ibid.*, para. 77.

particularly obscure where the obligation in question requires the progressive realization of a goal. The means for achieving a goal can exist on a spectrum between those of conduct and those of result.[261] In his separate declaration to the ITLOS climate change advisory opinion, Judge Kittichaisaree rightly observed that:[262]

> "… the binary characterisation of obligations of "conduct" and of "result" should be avoided, since many obligations straddle both categories. The distinction between the obligation of conduct and one of result may be inconclusive if a particular obligation in question "is in truth hybrid, or belongs to a different class for example, obligations of prevention or what the International Court [of Justice] has described as 'obligations of performance'". In some instances, for example articles 207 and 212 of the Convention, the obligations in Part XII require States to undertake specific measures, such as enacting and implementing legislation to prevent marine pollution. In other instances, such as Article 194, States are required to adopt all necessary measures – a threshold substantially higher than best efforts, which has traditionally characterised pure conduct obligations".

4.46. Goal-oriented obligations establish a movement in a specific direction together with obligations to employ procedures or make arrangements so that progress is made. For example, under Article 2(1) of the International Covenant on Economic, Social and Cultural Rights each party "undertakes to take steps, individually and through … co-operation … with a view to achieving progressively the full realization of the rights recognized".[263] While not an obligation of result, this provision cannot be said to lack legal binding force. The Committee on Economic, Social and Cultural Rights shares this interpretation and cautions against over-reliance on the conduct/result dichotomy.[264] Similarly, the Court observed in *Certain Questions of Mutual Assistance in Criminal Matters* that the aspirations in the treaty of friendship between Djibouti and France were "to be achieved by the employment of certain

[261] Second State Responsibility Report, para. 79. Consider also ITLOS Climate Change Advisory Opinion, para. 238 where ITLOS found that the text of article 194 of UNCLOS created an obligation of conduct and result.

[262] ITLOS Climate Change Advisory Opinion, Declaration of Judge Kittichaisaree, para. 22.

[263] International Covenant on Economic, Social and Cultural Rights (16 December 1966), 993 UNTS 3 (Dossier No. 52).

[264] UN Committee on Economic, Social and Cultural Rights, General Comment No. 3, *The Nature of States' Parties Obligations*, UN Doc. E/1991/23 (1990), paras. 1-9.

procedures and institutional arrangements".[265] The Paris Agreement operates in this same way, facilitated by the treaty's "ambition cycle".[266]

4.47. Articles 2 and 4 oblige States Parties to progressively realise the Temperature Targets by, *inter alia*, participating in the Paris Agreement's institutions (for example by updating NDCs in accordance with their highest possible ambition). States are thus under a binding obligation to direct their conduct at the Temperature Targets. This interpretation accords with both the ordinary meaning of Articles 2 and 4, and the Paris Agreement's object and purpose.[267] It also aligns with the rest of the UN climate regime and customary law. While progressive realisation is a core feature of the UNFCCC and Montreal Protocol, due diligence is inherent in the Temperature Targets.

4.48. Construing Articles 2 and 4 as goal-oriented obligations does not mean that any act inconsistent with the Temperature Targets is *ipso facto* a breach of the Paris Agreement. The treaty's text provides flexibility in how its objectives are to be achieved.[268] Similarly, there are multiple possible responses to a State acting inconsistently with meeting the Temperature Targets,[269] especially considering that the Paris Agreement's compliance mechanisms are neither adversarial nor punitive in nature.[270]

4.49. Furthermore, this obligation is informed by CBDR-RC.[271] The Paris Agreement does not explain how CBDR-RC is to be applied in this context, but Kenya considers that, at a

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[265] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France), Judgment, I.C.J. Reports 2008*, p. 177, at p. 216, para. 104.

[266] United States of America, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (22 March 2024), para. 2.53.

[267] Paris Agreement, Preamble, Arts. 2, 3, 4(3). *See also* D. Bodansky, J. Brunnée, and L. Rajamani, INTERNATIONAL CLIMATE CHANGE LAW (2017), p. 235 (noting the "*direction of travel*" of the treaty, with the provisions in Article 4 being "*designed to ensure that the regime as a whole moves towards ever more ambitious and rigorous action*").

[268] H. Winkler, "Mitigation (Article 4)" *in* D. Klen *et al.* (eds.) THE PARIS AGREEMENT ON CLIMATE CHANGE: ANALYSIS AND COMMENTARY (2017), *available at* https://doi.org/10.1093/law/9780198789338.003.0014, pp. 162-163.

[269] Consider, for example, CESCR's view that adjudicating a State's breach of the obligation to progressively realize ICESCR rights required considering, not unlike CBDR-RC, whether a State took necessary steps "*to the maximum of its available resources*": UN Committee on Economic, Social and Cultural Rights, General Comment No. 3, *The Nature of States' Parties Obligations*, UN Doc. E/1991/23 (1990), para. 10.

[270] Paris Agreement, Art. 15(2).

[271] *Ibid.*, Art. 2(2).

minimum, the following criteria must be met. First, where CBDR-RC is used to qualify the performance of an obligation, the State relying on the principle must provide sufficient justification for doing so.[272] Second, CBDR-RC cannot be used to downgrade a State's highest possible ambition or depart from the Temperature Targets. Rather, CBDR-RC may extend the time needed for a State to adopt 1.5°C or 2°C consistent pathways (as its capacity allows).[273] For instance, developing States Parties to the Montreal Protocol were still bound to implement total phase-outs of controlled substances, but were given additional time to do so.[274] Article 4(1) of the Paris Agreement also acknowledges that "*peaking* [of GHGs] *will take longer for developing country Parties*". By contrast, there is no textual support for CBDR-RC reducing the Article 2 and 4 goals.

2. States Parties Are Obligated to Adopt Measures Reasonably Capable of Meeting Their NDCs

4.50. Some participants argue that the preparation of NDCs is within the complete discretion of States Parties.[275] This argument fails for the same reasons set out above in relation to the Temperature Targets. Indeed, States Parties have explicitly decided that the content of NDCs is to be linked to the Temperature Targets, including through the Glasgow Climate Pact at COP26,[276] and the recent Global Stocktake at COP28 in Dubai.[277] This convincingly establishes that NDCs serve the Paris Agreement's ultimate aim.

4.51. There is also independent textual support that States are obligated to take measures reasonably capable of achieving their NDCs. The text of Article 4 in other equally authentic

[272] This flows from the maxim *onus probandi actori incumbit* (he who asserts must prove), which is a general principle of international law within the meaning of Article 38(1)(c) of the Statute of the International Court of Justice. *See, e.g.*, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States), Jurisdiction and Admissibility, I.C.J. Reports 1984*, p. 392, at p. 437, para. 101.

[273] Based on the findings of the IPCC discussed in Chapter 3(I), in many cases this will imply a transition to Net Zero pathways. This is also contemplated by the text of Article 4(1) albeit not in name.

[274] Montreal Protocol, Art. 5.

[275] State of Kuwait, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (22 March 2024), para. 35.

[276] Paris Agreement, Conference of the Parties, 3rd Session, *Action Taken by the Conference of the Parties*, UN Doc. FCCC/PA/CMA/2021/10/Add.1 (31 October – 13 November 2021), Decision 1/CMA.3.

[277] Paris Agreement, Conference of the Parties, 5th Session, *First Global Stocktake*, UN Doc. FCCC/PA/CMA/2023/L.17, Draft Decision -/CMA.5, para. 39.

languages points to this conclusion.[278] The French text of Article 4(2) requires that States "prennent des mesures internes … en vue de réaliser les objectifs", indicating clearly that "measures must reasonably be viewed, at the time when they are pursued, as capable of realizing the objective", *i.e.*, of the NDC.[279] The same is true of the Chinese text「缔约方应采取国内减缓措施，以实现这种贡献的目标」and the Spanish "Las Partes procurarán adoptar medidas de mitigación internas, con el fin de alcanzar los objetivos de esas contribuciones".[280] All its authentic languages show that States Parties must take measures to achieve (or that are reasonably capable of achieving) NDCs that they publish under Article 4.

4.52. Put briefly, obligating States Parties to take measures reasonably capable of achieving their NDCs strengthens the role of NDCs (without imposing an obligation of result) and gives effect to the ambition cycle envisaged by Article 4(3). Without any link to the progressive attainment of the treaty's objects and purposes, NDCs would be of limited relevance to the Paris Agreement. Kenya's interpretation does not entail an obligation of result whereby the contributions outlined in an NDC must be attained. Instead, consistent with CBDR-RC, it is one of conduct to take measures that are reasonably capable of achieving the NDC.

3. States Have a Continuing Obligation to Assist Developing States in Light of Their Particular Vulnerability to Climate Change

4.53. It has also been argued that commitments to the financial mechanisms mentioned in Chapter 4(II)(A)(3) above are purely voluntary and "do not, by and of themselves, constitute legal obligations",[281] or that they represent "good faith efforts to achieve the shared objectives

[278] The UNFCCC and Paris Agreement's official (equally authentic languages) are Arabic, Chinese, English, French, Russian, and Spanish. UNFCCC, Art. 26; Paris Agreement, Art. 29. If a treaty's text across languages discloses a difference in meaning, then the meaning which best reconciles the text having regard to the treaty's objects and purpose shall be adopted. *See* Vienna Convention 1969, Art. 33(4). *See also Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, I.C.J. Reports 1984*, p. 392, at pp. 405-406.

[279] B. Mayer, "Obligations of conduct in the international law on climate change: A defence" (2018) 27 *Review of European, Comparative & International Environmental Law* 130, p. 135.

[280] See also the Russian and Arabic versions of Article 4(2).

[281] Germany, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (20 March 2024), para. 28.

through cooperation".[282] These arguments are undermined by the nature of the goal-oriented obligations contained in the relevant provisions of the Paris Agreement.

4.54. It is clear that the core financial assistance and technology transfer provisions in Articles 9 and 10 of the Paris Agreement establish goal-oriented obligations. Both articles must also be read in the context of the Paris Agreement's ultimate aim and its other substantive provisions.[283] Article 9 imposes a mandatory obligation on developed States Parties who "shall provide financial resources to assist developing country Parties" with mitigation and adaptation.[284] This obligation is buttressed by its own ambition cycle where developed States Parties are to take the lead in mobilising climate finance from "a wide variety of sources, instruments and channels" where such mobilisations should "represent a progression beyond previous efforts".[285] Developed States must also continually review the adequacy of their commitments, which will also be considered together with the Global Stocktake.[286] This builds on the progression envisaged by the UNFCCC in making finance flows consistent with low-GHG-emission pathways.[287] Read together with the UNFCCC, priority financial assistance must be provided to particularly vulnerable States as a matter of binding obligation, including for adaptation in African States vulnerable to droughts and flooding.[288]

4.55. The obligations of developed States Parties, while mandatory, appear collective in nature (by virtue of the lack of the word "each").[289] Although they do not impose individual obligations on developed States Parties, they must co-operate, pursuant to the customary law duty, to ensure that the goals of Articles 9 and 10 are progressively realised.[290] States Parties have themselves agreed to a floor of US$100 billion per year in financial assistance for climate

[282] Government of Japan, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (22 March 2024), para. 45.

[283] Paris Agreement, Arts. 9(1), 9(3), 9(4), 10(1).

[284] *Ibid.*, Art. 9(1).

[285] *Ibid.*, Art. 9(3). *See also ibid.*, Art. 9(2), which provides for voluntary obligations on "Other Parties". The ambition cycle thus contemplates financial assistance from developing States who have the capacity to do so. CBDR-RC is flexible enough to work in both directions and recognise the increased capabilities of a former developing State.

[286] *Ibid.*, Arts. 9(3), 9(5), 9(6).

[287] UNFCCC, Art. 2(1)(c).

[288] Paris Agreement, Art. 9(9); UNFCCC, Art. 4(1)(e).

[289] *Cf.* Paris Agreement, Art. 4(2).

[290] *See also* Written Statement of Kenya, Chapter 5(I)(C).

change.[291] Despite the Global Stocktake finding that this goal has not been met, it continues to be a binding obligation.[292] This is either by virtue of it constituting a binding declaration by States Parties (repeated and treated as binding on several occasions),[293] or being contained in COP/CMA decisions and, as such, relevant to interpreting Articles 9 and 10.[294] Additionally, as the Paris Agreement permits funding from "a wide variety of sources", as a matter of treaty interpretation, this encompasses the cancellation or relief of developing States' sovereign debt held by developed States (see also Chapter 5).[295]

4.56. Given that States Parties, via COP decisions, have expressly linked the UN climate regime's financial assistance and technology transfer frameworks, the above arguments apply equally to the transfer of climate change related technologies to developing States.[296] However, technology transfer under the Paris Agreement is underdeveloped and out of sync with the rest of the UN climate change regime. Unlike the Montreal Protocol, for example, Article 10 of the Paris Agreement does not specify what technologies are to be transferred and on what terms.[297] This is plainly insufficient to overcome the significant obstacles to technology transfer, such as the fact that most intellectual property rights over key technologies are held by developed States.[298] In light of the goal-oriented obligations described above, States Parties are obligated to further substantiate frameworks for technology transfer to developing States. In view of the Montreal Protocol's approach, States Parties must utilise the COP and CMA to agree and specify the terms on which identified technologies shall be made available to developing States.

[291] UNFCCC, Conference of Parties, 15th Session, *Action Taken by the Conference of Parties*, UN Doc. FCCC/CP/2009/11/Add.1 (7 – 19 December 2009), Decision 2/CP.15. Operationalized in UNFCCC, Conference of Parties, 16th Session, *Action Taken by the Conference of Parties*, UN Doc. FCCC/CP/2010/7/Add.1 (29 November – 10 December 2010), Decision 1/CP.16, para. 98.

[292] Federative Republic of Brazil, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (21 March 2024), para. 53.

[293] *Ibid.*, paras. 70-76.

[294] *Whaling in the Antarctic (Australia v Japan: New Zealand Intervening), Judgment, I.C.J. Reports 2014*, p. 226, at para. 46.

[295] Paris Agreement, Art. 9(3).

[296] *Ibid.*, Arts. 10(5), 10(6). *See also* UNFCCC, Conference of Parties, 24th Session, *Action Taken by the Conference of Parties*, UN Doc. FCCC/CP/2018/10/Add.2 (2 – 15 December 2018), Decision 14/CP.24.

[297] *See* Montreal Protocol, Art. 10A.

[298] Republic of Albania, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (22 March 2024), paras. 115-116; Republic of India, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (21 March 2024), para. 58.

All relevant technologies should be the "best available" and "expeditiously transferred" to developing States Parties "under fair and most favourable conditions".[299]

III. International Human Rights Law Imposes Substantive and Procedural Duties on States with Respect to Climate Change-Induced Harms

4.58. Many participants concur that human rights protections are directly applicable to harms caused by climate change and,[300] in the context of the UNFCCC and Paris Agreement, these treaties must be informed by a human-rights-based approach.[301] A large number of participants have also detailed how specific human rights (such as the right to life, the right to a clean and healthy environment, and the right to water) are engaged and imminently threatened by climate change.[302] Kenya reiterates its position in the Written Statement and strongly rejects the suggestion that climate change-induced harms lie outside the scope of human rights treaties.[303] The European Court of Human Rights ("**ECtHR**") has since found, in *KlimaSeniorinnen v.*

[299] *See* Montreal Protocol, Arts. 10A(a-b).

[300] Republic of Albania, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (22 March 2024), para. 99; People's Republic of Bangladesh, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (22 March 2024), paras. 100-123; Republic of Chile, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (22 March 2024) para. 77; Dominican Republic, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (22 March 2024), para. 4.47; Republic of France, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (22 March 2024), para. 167; Germany, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (20 March 2024), paras. 35, 86; Republic of India, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (21 March 2024), paras. 77-79; Republic of the Philippines, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (21 March 2024), para. 106; Governments of Denmark, Finland, Iceland, Norway, and Sweden, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (21 March 2024), para. 78.

[301] Republic of Albania, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (22 March 2024), para. 98; Government of Canada, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (20 March 2024), para. 25; Republic of Latvia, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (19 March 2024), paras. 66-71, Kingdom of the Netherlands, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (21 March 2024), para. 3.25; Commonwealth of the Bahamas, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (22 March 2024), paras. 145-163; Democratic Republic of Timor-Leste, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (22 March 2024), para. 298.

[302] Written Statement of Kenya, Chapter 5(V); Republic of Namibia, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (19 March 2024), §§ IV(B), V(B); Republic of Sierra Leone, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (15 March 2024), Chapter 3(2); Portuguese Republic, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (March 2024), para. 69; Republic of Vanuatu, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (21 March 2024), para. 379.

[303] Written Statement of Kenya, Chapter 5(V).

Switzerland, a violation of the right to private and family life by Switzerland's inadequate climate policies.[304]

4.59. Some participants have argued that the jurisdiction of human rights courts and/or bodies to find violations with respect to GHG emissions must be strictly territorial.[305] While the ECtHR has taken a narrower view on jurisdiction in *KlimaSeniorinnen* and *Duarte Agostinho v. Portugal*, the jurisdictional requirements of each human rights instrument must be interpreted on its own terms.[306] The ICESCR, for instance, does not contain an explicit jurisdictional clause, and Parties must respect the enjoyment of, for example, the right to health in other States and prevent third parties from violating said right.[307] As discussed in Kenya's Written Statement, the IACtHR's advisory opinion no. OC 23/17 and the communication in *Sacchi v. Argentina*, demonstrate that international law can impose extraterritorial responsibility for human rights violations in one State caused by GHG emissions originating from another State.[308]

[304] *Verein KlimaSeniorinnen Schweiz and Others v Switzerland*, ECtHR, Application No. 53600/20, Judgment (9 April 2024), para. 479.

[305] Australia, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (22 March 2024), paras. 3.58-3.64; Government of Canada, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (20 March 2024), para. 28; Governments of Denmark, Finland, Iceland, Norway, and Sweden, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (21 March 2024), para. 86; Germany, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (20 March 2024), paras. 91-93.

[306] *Verein KlimaSeniorinnen Schweiz and Others v Switzerland*, ECtHR, Application No. 53600/20, Judgment (9 April 2024), para. 443; *Duarte Agostinho and Others v. Portugal and 32 Other States*, ECtHR, Application No. 39371/20, Decision (9 April 2024), paras. 208-211.

[307] UN Committee on Economic, Social and Cultural Rights, General Comment No. 14, *The right to the highest attainable standard of health*, UN Doc. E/C.12/2000/4 (2000), para. 39.

[308] Written Statement of Kenya, para. 5.52.

CHAPTER 5
LEGAL CONSEQUENCES

5.1. Question (B) concerns the "legal consequences" for States that, by their acts or omissions, "have caused significant harm to the climate system and other parts of the environment". In its Written Statement, Kenya's key submissions were that such acts and omissions trigger State responsibility, including the duty to compensate for loss and damage, and both States and individuals are entitled to invoke the responsibility of a State for unlawful GHG emissions. [309] Notwithstanding State responsibility, Kenya explained why States responsible for significant harm to the climate system must phase out fossil fuels, contribute to "loss-and-damage" (L&D) funds, and forego climate change loans.[310]

5.2. Kenya also emphasized the importance of giving due attention to equitable considerations and the specific circumstances or particular vulnerabilities common to States with lower levels of development, in particular those whose geographical circumstances make them particularly vulnerable. [311] In what follows, Kenya demonstrates why States disproportionately vulnerable to significant harm should be given priority in respect of potential reparation, or the taking of mitigation or adaptation measures.

I. Acts or Omissions that Cause or Fail to Prevent Significant Harm to the Climate System Entail State Responsibility

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

5.5. Kenya's Written Statement recalled the general obligation of States not to cause harm to the global climate system. State responsibility may also arise when there is a failure to comply with the obligation to prevent such harm.[312] Such obligation is not limited to harm that might be caused by the State or "its organs of government, or of others who have acted under

[309] Written Statement of Kenya, paras. 6.85-6.124.

[310] *Ibid.*, paras. 6.120-6.124.

[311] *Ibid.*, paras. 6.106-6.112.

[312] *Ibid.*, paras. 6.87-6.89.

the direction, instigation or control of those organs".[313] Depending on the case, States may also be responsible for a failure to prevent significant harm to the climate system that has been caused by non-State or private actors. Due diligence requires States to use "*all the means* at [their disposal] to avoid activities that would cause "significant damage to the environment".[314] In connection with private actors, a State is under an "obligation which entails not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as the monitoring of activities undertaken by such operators".[315]

5.6. Many participants in the current proceedings agree that due diligence is an obligation "to deploy adequate means, to exercise best efforts, to do the utmost" to obtain the intended outcome.[316] As ITLOS recently affirmed, the standard of due diligence "may change over time" and depends on the particular circumstances.[317] Factors that impact the scope of the obligation to take action include "scientific and technological information, relevant international rules and standards, the risk of harm and the urgency involved".[318]

5.7. Kenya urges this Court to seek guidance from the IPCC when interpreting the best available science. The conclusions in IPCC reports demonstrate that the severity and likelihood of adverse consequences linked to global temperature increases require a "stringent" standard of due diligence, the implementation of which "may vary according to States' capabilities and sufficient resources". [319] Put differently, all States are under an obligation to act according to their respective capacities. The specific circumstances of a State may require a heightened level of due diligence from those with higher levels of development, historically higher

[313] ILC, ARSIWA, with commentaries, Chapter 2, Commentary 2; *id.*, Arts. 4, 8. In relation to *de facto* State organs, see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 43, at p. 210, para. 406.

[314] *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports* 2010, p. 14, at pp. 55-56, para. 101 (emphasis added). *See also* Written Statement of Kenya, para. 5.10.

[315] *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports* 2010, p. 14, at p. 79, para. 197.

[316] *See, e.g.*, Republic of Korea, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (22 March 2024), para. 10; European Union, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (March 2024), para. 25; Written Statement of COSIS, paras. 89-95. *See also The Area* ITLOS Advisory Opinion, p. 41, para. 110.

[317] ITLOS Climate Change Advisory Opinion, paras. 238-241. *See also supra*, fn 171.

[318] *Ibid.*

[319] ITLOS Climate Change Advisory Opinion, para. 241.

contributions, and/or increased capacity to adapt to and mitigate harm to the climate system. As the ILC has commented in the context of the duty to prevent harm from hazardous materials:

> It is … understood that the degree expected of a State with a well-developed economy and human and material resources and with highly evolved systems and structures of governance is different from States, which are not so well placed. Even in the latter case, vigilance, employment of infrastructure and monitoring of hazardous activities in the territory of the State, which is a natural attribute of any Government, are expected.[320]

5.8. Article 4(3) of the Paris Agreement places all States Parties under an obligation to exercise their best possible efforts, in the form of their "highest possible ambition", to prevent significant harm to the climate system. The concept of "highest possible ambition" serves to reinforce and clarify the obligation to act with due diligence to prevent climate-related harms. That term must be interpreted not as an obligation of result, but a requirement to adopt measures that are sufficient to avert the identified risks and to ensure the effective protection of the rights concerned.[321]

5.9. The obligation to act with the requisite highest possible ambition has also been reflected at the international level, where the UNHRC has found that, to comply with human rights obligations under the ICCPR, States are obliged to design and effectively implement their climate laws through all appropriate and necessary measures.[322]

5.10. Due diligence also requires a State to account for the potential risks at stake, in keeping with the precautionary principle already embodied in the UNFCCC and Paris Agreement.[323] In its *Activities in the Area* advisory opinion, ITLOS endorsed the precautionary approach as "an integral part of the general obligation of due diligence".[324] In its 2024 opinion, ITLOS concluded that States' failure to account for the risks involved in the activities under their jurisdiction or control could itself amount to a breach of the obligation to act with due diligence,

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[320] ILC, Draft Articles on Prevention of Transboundary Harm, Art. 3, Commentary 17.

[321] IACtHR, *Advisory Opinion OC-23/17, The Environment and Human Rights* (15 November 2019), para. 143.

[322] 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).

[323] UNFCCC, Art. 3(3). *See also* C. Voigt, "The Power of the Paris Agreement in International Climate Litigation" (2023) 32(2) *Review of European, Comparative & International Environmental Law* 237-249.

[324] *The Area* ITLOS Advisory Opinion, para. 131.

and that a precautionary approach was required "even if scientific evidence as to the probability and severity of harm" to the environment of their acts or omissions were "insufficient".[325]

5.11. The obligation to take appropriate and effective measures as to identified risks and in keeping with the best available science is not merely theoretical. On 9 April 2024, the ECtHR found that Switzerland violated its human rights obligations by failing to comply with positive obligations concerning climate change. The Court identified critical lacunae in Switzerland's domestic regulatory network, including a failure to quantify, through a carbon budget or otherwise, national GHG emissions limitations. Switzerland was also held to have failed to meet its past GHG emission reduction targets.[326] Similarly, the Dutch Supreme Court in the *Urgenda Foundation v. the Netherlands* case found the Netherlands—as a party to the Paris Agreement that consented to the 1.5°C threshold—to have adopted inadequate regulatory measures to achieve effective emissions reductions pathways. The Dutch Supreme Court held that the conclusions of the IPCC were sufficiently clear that the demanded reductions target of 25 percent by 2020 was "an absolute minimum", and that the burden of proof fell on the State to demonstrate the effectiveness of its measures.[327] These cases both demonstrate the relationship between the use of the best available science and the State's obligation to take appropriate regulatory measures against the adverse effects of climate change.

5.12. Importantly, the precautionary approach requires an objective determination of the *potential* risk based on facts and scientific knowledge. As ITLOS described in respect of Article 206 of the UNCLOS and the discretion of a State thereunder to conduct an environmental impact assessment, "the precautionary approach may restrict the margin of discretion on the part of the State concerned"[328] when faced with a substantial or significant risk of harm. As described *supra* in Chapter 3, where the best available science requires a State to take increasingly strict measures when faced with new scientific or technological knowledge that

[325] ITLOS Climate Change Advisory Opinion, para. 242.

[326] *Verein KlimaSeniorinnen Schweiz and Others v Switzerland*, ECtHR, Application No. 53600/20, Judgment (9 April 2024), para. 573.

[327] *State of the Netherlands v. Urgenda Foundation*, Supreme Court of the Netherlands, Judgment (20 December 2019 (English)), para. 7.5.1.

[328] ITLOS Climate Change Advisory Opinion, para. 361.

demonstrates an increased risk,[329] the responsibility of a State may be engaged for its failure to act with the requisite due diligence to prevent significant harm to the global climate system.

5.13. To conclude, rigorous use of the best available science may, over time, reveal new information relating to climate change that renders harm that was previously qualified as "insignificant" as "significant", thus triggering State responsibility.[330] Such an evolving and fact-based approach to the threshold of significant harm requires an understanding of international climate law as responsive to new scientific advances, and with flexibility to adapt to new circumstances. A fact-based approach to the notion of "significant harm" requires attention to the specific circumstances of specially affected and/or particularly vulnerable States, as acknowledged in the text of Resolution 76/276.

B. STATES MUST MAKE FULL REPARATION FOR THE SIGNIFICANT HARM THEY CAUSE OR FAIL TO PREVENT, AND IN PARTICULAR, MUST COMPENSATE FOR LOSS AND DAMAGE TO THE CLIMATE SYSTEM

1. General Considerations

5.14. In its Written Statement, Kenya demonstrated the applicability of the regime of international responsibility embodied in the ILC ARSIWA, and in particular, surveyed the rules governing cessation and non-repetition (Article 30),[331] reparation and its forms (Articles 31 and 34),[332] restitution (Article 35),[333] financial compensation, including loss and damage (Article 36),[334] and satisfaction (Article 37).[335]

5.15. To recall, Question (B) examines the legal consequences that arise when States have "caused" significant harm to the climate system and other parts of the environment. In its Commentary to the ARSIWA, the ILC does not identify a universally applicable test to

[329] *See The Area* ITLOS Advisory Opinion, p. 43, para. 117.

[330] *See, e.g.*, International Union for Conservation of Nature (IUCN), *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (19 March 2024), para. 555; African Union, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (22 March 2024), para. 83.

[331] Written Statement of Kenya, para. 6.91.

[332] *Ibid.*, paras. 6.92-6.95.

[333] *Ibid.*, paras. 6.94-6.95.

[334] *Ibid.*, paras. 6.96-6.109.

[335] *Ibid.*, paras. 6.110-112.

determine causation, but rather sets forth a set of general principles that may be relevant.[336] A causal link required to trigger State responsibility normally requires that the wrongful act be a "proximate cause" of the injury or harm resulting from that act.[337] However, causation is not by itself sufficient: any such proximate cause must also be sufficiently "direct"[338] or "foreseeable".[339] The intention of the responsible State to deliberately cause the harm in question may also be taken into account. In the context of environmental damage, where the state of science regarding a causal link may be uncertain, the Court has recognized that these general rules "may be applied flexibly".[340]

5.16. As discussed above in Chapter 3,[341] the best available science is unambiguous: a direct causal link exists between the increase in GHG concentrations in the atmosphere and an increase in global mean temperatures, leading to significant harm to the climate system.[342] Kenya thus submits that further GHG emissions that lead to a global mean temperature increase beyond 1.5°C suffice to link the emitting State through a causal link between its emissions and the significant harm to the climate system. Kenya further recalls that the determination of causation must align with the best available science, including any advances in scientific knowledge that clarify or establish the relevance of new sources of harm.[343]

2. The Obligation of Cessation

5.17. As the IPCC concluded with high confidence, "[d]eep, rapid, and sustained GHG emissions reductions, reaching net zero carbon dioxide emissions and including strong emissions reductions of other GHGs, in particular methane, are necessary to limit warming to 1.5°C … or less than 2°C … by the end of the century".[344] During the twenty-seventh COP, UNFCCC Parties adopted the Sharm el-Sheikh Implementation Plan, which "[r]ecognizes that

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[336] ILC, ARSIWA, with commentaries, Art. 31, Commentary 10.

[337] *Mixed Claims Commission (United States and Germany) (Administrative Decision)* (1923) 7 RIAA 23, p. 30.

[338] UN Security Council, Resolution 687, UN Doc. S/RES/687 (3 April 1991), para. 16.

[339] *Ibid.*

[340] *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 on Compensation, I.C.J. Reports 2018*, p. 16, at p. 26, para. 33. *See also* Written Statement of Kenya, paras. 6.103-6.105.

[341] *Supra*, Chapter 3.

[342] IPCC, *Special Report: Global Warming of 1.5ºC* (2018) (Dossier No. 72), pp. 4-5.

[343] *See supra*, Chapter 3; *see also* Written Statement of Kenya, para. 6.105.

[344] IPCC, *Climate Change 2023: Synthesis Report*, p. 68.

limiting global warming to 1.5°C requires rapid, deep and sustained reductions in global greenhouse gas emissions of 43 per cent by 2030".[345] Many of the participants in the present proceedings, including Kenya, have thus concluded that rapid reductions of GHG emissions are the only means to comply with the obligation of cessation of the wrongful conduct.[346]

5.18. Kenya rejects the suggestion by certain participants that the obligation of cessation could be fulfilled through technological responses to climate change, most prominently geoengineering technologies such as Carbon Dioxide Removal (CDR) and Solar Radiation Modification (SRM).[347] The IPCC has warned that "reliance on [CDR] is a major risk in the ability to limit warming to 1.5°C",[348] and that SRM technologies "face large uncertainties and knowledge gaps as well as substantial risks".[349] The Human Rights Council Advisory Committee likewise recently concluded that "[m]ost geoengineering technologies remain unproven, unavailable and unfeasible at scale", adding that the technologies are considered speculative as their "hypothetical benefits … are still to be practically and scientifically proven".[350] Kenya joins the large number of participants that warn against any attempt to avoid rapid emissions through such speculative technological proposals.[351]

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[345] Paris Agreement, Conference of Parties, 4th Session, *Action Taken by the Conference of the Parties*, UN Doc. FCCC/PA/CMA/2022/10/Add.1 (6 – 20 November 2022), Decision 1/CMA, para. 15. *See also* Paris Agreement, Conference of the Parties, 5th Session, *First Global Stocktake*, UN Doc. FCCC/PA/CMA/2023/L.17, Draft Decision -/CMA.5, para. 28.

[346] *See, e.g.*, Republic of Vanuatu, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (21 March 2024), para. 575; Democratic Republic of the Congo, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (4 March 2024), paras. 254-262; Written Statement of COSIS, para. 174.

[347] *Cf.*, United States of America, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (22 March 2024), paras. 2.18, 3.37; United Arab Emirates, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (22 March 2024), paras. 87, 107; State of Kuwait, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (22 March 2024), paras. 135-136.

[348] IPCC, *Special Report: Global Warming of 1.5ºC* (2018) (Dossier No. 72), pp. 34, 96. *See also* IPCC, *Climate Change 2022: Adaptation and Vulnerability Report*, p. 19.

[349] IPCC, *Special Report: Global Warming of 1.5ºC* (2018) (Dossier No. 72), pp. 12-13.

[350] UN Human Rights Council, *Impact of new technologies intended for climate protection on the enjoyment of human rights*, UN Doc. A/HRC/54/47 (10 August 2023), para. 10. *See also* UN Committee on the Rights of the Child, General Comment No. 26, *Children's Rights and the Environment with a Special Focus on Climate Change*, UN Doc. CRC/C/GC/26, p. 18 ("[m]itigation measures cannot rely on removing greenhouse gases from the atmosphere in the future through unproven technologies. States should prioritize rapid and effective emissions reductions now in order to support children's full enjoyment of their rights in the shortest possible period of time and to avoid irreversible damage to nature").

[351] *See, e.g.*, Republic of Vanuatu, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (21 March 2024), paras. 571-574.

3. Reparation through Restitution: Mitigation and Adaptation

5.19. In its Written Statement, Kenya acknowledged that reparation through restitution is not feasible: the adverse impacts of climate change make it factually impossible to return to the *status quo ante*.[352] That said, the concept of restitution in the law of international responsibility does leave open a number of potential reparatory mechanisms. The Paris Agreement requires adaptation planning processes and the implementation of adaptation actions,[353] and envisages the provision of financial resources,[354] continuous and enhanced international support to developing States for adaptation action,[355] and the mobilization of climate finance from other sources such as private parties.[356] Resolution 77/276 likewise calls for "scaling up action and support, including finance, capacity-building and technology transfer, to enhance adaptive capacity and to implement collaborative approaches" to assist the adaptation actions of injured, specially affected and particularly vulnerable States.[357] This type of support constitutes a form of restitution that is entirely consistent with the law of international responsibility, and under the CBDR-RC principle, owed in particular by historically-high emitters.[358]

4. Reparation through compensation for loss and damage

5.20. In its Written Statement, Kenya explained why compensation for L&D resulting from GHG emissions is the most appropriate and effective mechanism to avert, minimize, and address the adverse effects of climate change.[359]

5.21. Compensation is best achieved through L&D funding arrangements to assist the most vulnerable States and communities. Article 8(3) of the Paris Agreement embodies the

[352] Written Statement of Kenya, para. 6.95.

[353] *Supra*, Chapter 3; Paris Agreement, Arts. 2(1)(b), 7(9), 9(1).

[354] Paris Agreement, Art. 9(1).

[355] *Ibid.*, Art. 17(13) (drawing from the language used in UNFCCC, Conference of the Parties, 21st Session, *Adoption of the Paris Agreement*, UN Doc. FCCC/CP/2015/10/Add.1 (30 November – 13 December 2015), Decision 1/CP.21, para. 53).

[356] Paris Agreement, Art. 9(3).

[357] Resolution 77/276 draws from Decision 1/CP.26, *Glasgow Climate Pact* and the earlier Decision 1/CMA.3. UNFCCC, Conference of Parties, 26th Session, *Action Taken by the Conference of the Parties*, UN Doc. FCCC/CP/2021/12/Add.1 (31 October – 13 November 2021), paras. 6, 39; Paris Agreement, Conference of the Parties, 3rd Session, *Action Taken by the Conference of the Parties*, UN Doc. FCCC/PA/CMA/2021/10/Add.1 (31 October – 13 November 2021), Decision 1/CMA.3, paras. 7, 63.

[358] *See supra* Chapter 3; *see also* Written Statement of Kenya, paras. 5.21-5.25.

[359] *See* Written Statement of Kenya, paras. 6.97-6.109.

importance of enhancing understanding and support with respect to L&D mechanisms. This commitment was substantiated in the 2022 agreement by States Parties to establish new funding arrangements to assist developing States that are particularly vulnerable to the adverse effects of climate change. The 2022 agreement aimed at mobilizing new and additional resources and created the Loss and Damage Fund by Parties to the UNFCCC, given the:

> "urgent and immediate need for new, additional, predictable and adequate financial resources to assist developing countries that are particularly vulnerable to the adverse effects of climate change in responding to economic and non-economic loss and damage associated with the adverse effects of climate change, including extreme weather events and slow onset events, especially in the context of ongoing and ex post (including rehabilitation, recovery and reconstruction) action".[360]

5.22. The funding arrangements were further operationalized during the 2023 COP-28,[361] in which the Governing Instrument of the L&D Fund was approved, and the partis invited "financial contributions with developing country Parties continuing to take the lead to provide financial resources for commencing the operationalization of the Fund".[362]

5.23. The creation of the L&D Fund recognizes States' collective obligation to assist vulnerable States such that they benefit—as both restitution and compensation—from adequate climate finance, technology transfer, and assistance with capacity-building. This in turn allows States to take better adaptation and mitigation measures to cope with the significant risk of harm suffered through the adverse effects of GHG emissions. The urgent need for such funding was reaffirmed in the 2023 "Global Stocktake", which concluded that an "[a]ssessment of collective progress on adaptation has revealed an urgent need to rapidly scale up finance for adaptation, to meet the growing needs and priorities of developing countries".[363] Consistent with the widespread consensus of UNFCCC States Parties, the imperative lies primarily on

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[360] UNFCCC, Conference of Parties, 27th Session, *Action Taken by the Conference of the Parties*, UN Doc. FCCC/CP/2022/10/Add.1 (6 – 20 November 2022), Decision 2/CP.27, para. 2; Paris Agreement, Conference of Parties, 4th Session, *Action Taken by the Conference of the Parties*, UN Doc. FCCC/PA/CMA/2022/10/Add.1 (6 – 20 November 2022), Decision 2/CMA.4, para. 2.

[361] *See* Decision _/CP.28 and _/CMA 5: "Operationalization of the new funding arrangements, including a fund, for responding to loss and damage referred to in paragraphs 2–3 of decisions 2/CP.27 and 2/CMA.4" (13 December 2023), *available at* https://unfccc.int/sites/default/files/resource/cma5_auv_10g_LnDfunding.pdf.

[362] *Ibid.*, paras. 2, 13.

[363] UNFCCC Subsidiary Body for Scientific and Technological Advice, *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. 44.

"developed country Parties to urgently and significantly scale up their provision of climate finance, technology transfer and capacity-building for adaptation so as to respond to the needs of developing country Parties as part of a global effort".[364]

5.24. Despite this urgency, the L&D Fund is still in its early stage and may not disburse funds to vulnerable State for years. Given this, Kenya submits that "debt-for-adaptation swaps", as have been studied by multilateral development banks and particularly the International Monetary Fund, [365] would be another effective mechanism to give effect to the obligation to provide compensation. Debt relief or debt swaps would be consistent with Article 39 of ARSIWA, which provides that reparation shall take into account "the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought". In light of the negligible contribution to cumulative atmospheric GHG concentrations of most developing States,[366] financial arrangements of this nature would also comply with the right to compensation held by injured, specially affected and particularly vulnerable States to the adverse effect of climate change. Moreover, the Court has considerable flexibility where the appropriate remedy is in the form of 'satisfaction'. In Kenya's submission, debt cancellation arrangements specifically undertaken to enable a State to divert resources that would otherwise be used to service debts towards climate mitigation constitutes appropriate satisfaction.

II. States and Individuals Are Entitled to Invoke the Responsibility of a State for Unlawful GHG Emissions

A. CERTAIN OBLIGATIONS TO PREVENT SIGNIFICANT HARM TO THE CLIMATE SYSTEM ARE OBLIGATIONS *ERGA OMNES*

5.24. Many participants in the present proceedings agree with the position endorsed by Kenya that injury is not required for certain forms of climate change loss and damage and that,

[364] UNFCCC, Conference of Parties, 27th Session, *Action Taken by the Conference of the Parties*, UN Doc. FCCC/CP/2022/10/Add.1 (6 – 20 November 2022), Decision 1/CP.27, para. 22.

[365] *See, e.g.*, M. Chamon *et al.*, "Debt-for-Climate Swaps: Analysis, Design and Implementation" (2022) *International Monetary Fund Working Paper Series*, *available at* https://www.imf.org/-/media/Files/Publications/WP/2022/English/wpiea2022162-print-pdf.ashx.

[366] *Supra*, paras. 3.16-3.17. *See also* Written Statement of Kenya, paras. 3.18-3.20.

specifically, the obligations concerning environmental damage of a far-reaching and irreversible nature such as climate change, constitute obligations *erga omnes*.[367]

5.25. Kenya further submits that the obligation to co-operate to prevent significant harm to the climate system caused by GHG emissions is an obligation *erga omnes*, on the basis that it reflects the importance attached to the protection of the climate system as a matter of global common concern, embodied in the UNFCCC and the Paris Agreement. In *Legality of Nuclear Weapons*, the Court distinguished between co-operation as an obligation of conduct and the specific duty to co-operate "to achieve a precise result".[368] As described in Chapter 4, any such obligation to co-operate requires notification and consultation amongst States in relation to disclosing relevant facts in the determination that a risk of significant harm to the climate system exists.[369]

B. LEGAL CONSEQUENCES FOR STATES THAT ARE SPECIALLY AFFECTED BY, OR ARE PARTICULARLY VULNERABLE TO, THE ADVERSE EFFECTS OF CLIMATE CHANGE

5.26. As previously discussed, the scope of the obligation to prevent significant harm to the climate system must be interpreted in consideration of the CBDR-RC principle.[370] The same holds true when evaluating the legal consequences of a State's failure to comply with such obligation. The CBDR-RC principle is relevant to the assessment of whether—to borrow the language of Article 42 of ARSIWA, as did the Assembly in Resolution 77/276—a State is "injured" or "specially affected" by a breach of the obligation to prevent significant harm.[371]

5.27. The best available science shows that developing States bear a disproportionate share of the adverse effects of climate change.[372] Resolution 77/276 uses the language of "injured" and "specially affected" in parallel with a wider category of States that are "particularly

[367] Written Statement of Kenya, para. 6.117. *See also* Democratic Republic of the Congo, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (4 March 2024), paras. 279-281; Republic of Vanuatu, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (21 March 2024), paras. 536 *et seq*.

[368] *Nuclear Weapons* Advisory Opinion, p. 226, para. 99.

[369] Republic of Vanuatu, *Written Statement before the ICJ Regarding the Request for an Advisory Opinion on Climate Change* (21 March 2024), para. 146.

[370] *Supra*, Chapter 4(I)(B). *See also* Written Statement of Kenya, paras. 5.38-5.39.

[371] ILC, ARSIWA, with commentaries, Art. 42, Commentary 7.

[372] *See supra*, Chapter 3; Written Statement of Kenya, Chapter 3(II).

vulnerable" to climate change, for example due to geographical circumstances. Kenya recalls that "vulnerability" is a technical term, defined in the IPCC Glossary as "[t]he propensity or predisposition to be adversely affected. Vulnerability encompasses a variety of concepts and elements including sensitivity or susceptibility to harm and lack of capacity to cope and adapt".[373] It is this definition of vulnerability that serves to clarify the explicit references, in Resolution 77/276, of "geographical circumstances" or "level of development" that might mark out specific States as particularly vulnerable. Particularly vulnerable States—which may be, but need not be, injured or specially affected—face disproportionately higher risks of suffering harms caused by the adverse effects of climate change and are particularly vulnerable to continued breaches of the obligation to take effective mitigation and adaptation measures against future harms.[374]

5.28. To recall, the IPCC has highlighted the manifest injustice suffered by least-developed States (LDCs) and small island developing States, whose historical contributions to cumulative GHG emissions between 1850 and 2019 was less than 0.4% and 0.5%, respectively.[375] As is the case for historically high emitters,[376] these circumstances are relevant to both determining the primary responsibility for climate change and emphasizing the injustice that these States have found themselves facing.

5.29. Question (B) of the Request asks about the legal consequences sustained by "peoples and individuals of the present and future generations affected by the adverse effects of climate change". Kenya's Written Statement showed that all 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; and States may also bring such claims on behalf of individuals.[377] Kenya moreover refers to General Assembly Resolution A/76/L.75, which recognizes that, though all individuals and communities may suffer from the implications of environmental damage, "the consequences are felt most acutely by women and girls and those segments of the population that are already in vulnerable situations, including

[373] IPCC, *Climate Change 2023: Synthesis Report*, Annex I, p. 130.

[374] ILC, ARSIWA, with commentaries, Art. 42, Commentaries 11, 12.

[375] IPCC, *Climate Change 2022: Mitigation Report*, p. 9.

[376] *See supra*, Chapter 3(II).

[377] *See* Written Statement of Kenya, para. 6.119.

indigenous peoples, children, older persons and persons with disabilities".[378] Accordingly, such categories of persons merit particular attention in the context of claims for loss and damage, as they have "reduced adaptive capacity making them particularly at-risk from human rights harms caused by climate change".[379]

5.30. Kenya interprets the reference to "peoples" consistently with the strong international recognition of collective or group rights, such as indigenous peoples, religious, linguistic or cultural, minorities, and communities, including families. To illustrate, the African Charter of Human and Peoples' Rights enshrines the notion of group rights, specifically the rights to equality (Article 19), to self-determination (Article 20), to free disposal of their wealth and natural resources (Article 21), the right to development (Article 22), the right to peace and security (Article 23), and a "generally satisfactory environment" (Article 24). The Assembly's question thus rightly identifies all victims of climate injustice as bearers of rights, whether as individuals or through their membership in a group.

5.31. Moreover, individuals and peoples may invoke international responsibility for unlawful acts that may affect present and future generations. Kenya submits that this is substantiated by the well-established principle of "inter-generational equity", which the Court acknowledged in *Legality of the Threat or Use of Nuclear Weapons*. There, the Court held that the environment is no mere abstraction, but "represents the living space, the quality of life and the very health of human beings, including generations unborn".[380] Based on the principle of inter-generational equity, the rights of future generations may be put at unacceptable risk by certain

[378] 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).

[379] UN OHCHR, *Human Rights and Loss and Damage: Key Messages* (November 2023), *available at* https://www.ohchr.org/sites/default/files/documents/issues/climatechange/information-materials/2023-key-messages-hr-loss-damage.pdf, Key Message 5.

[380] *Nuclear Weapons* Advisory Opinion, para. 29.

acts or omissions, and there is recognition, both at the international[381] and domestic[382] levels, of the admissibility of claims on behalf of present and future generations that are specially affected or particularly vulnerable to a heightened risk of significant harm. States are thus under a further obligation to take all appropriate measures, for example, by amending domestic legislation, to ensure the effective protection of the rights and interests of future generations in the setting of climate policy, pursuant to the right to an effective remedy that is well-established in international environmental law.[383] The rights of future generations can be further secured through enhanced procedural rights of consultation, environmental impact assessment, and participation before activities that may have inter-generational impacts are undertaken.

[381] *See, e.g.*, UN Human Rights Committee, UN Human Rights Committee, *Views Adopted by the Committee under Article 5 (4) of the Optional Protocol, Concerning Communication No. 2728/2016*, UN Doc. CCPR/C/127/D/2728/2016 (23 September 2020), para. 9.4; 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 (22 September 2022), para. 5.8; UN Committee on the Rights of the Child, General Comment No. 26, *Children's Rights and the Environment with a Special Focus on Climate Change*, UN Doc. CRC/C/GC/26, para. 11; *Verein KlimaSeniorinnen Schweiz and Others v Switzerland*, ECtHR, Application No. 53600/20, Judgment (9 April 2024), para. 419.

[382] *See, e.g.*, *Andrea Lozano Barragán, Victoria Alexandra Arenas Sánchez, José Daniel Rodríguez Peña y otros v Presidencia de la República, Ministerios de Ambiente y Desarrollo Sostenible y de Agricultura y Desarrollo Rural y otros*, Sala Cas. Civil CSJ Colombia, No. STC4360-2018 (5 April 2018), 35-39 (also known in English as *Future Generations v Ministry of the Environment*), at paras. 11.1–11.3; *Neubauer et al v. Germany*, German Constitutional Court or *Bundesverfassungsgericht* (29 April 2021), paras. 146, 183.

[383] *See, e.g.*, International Covenant on Civil and Political Rights (16 December 1966), 189 UNTS 137 (Dossier No. 49), Art. 2(3); 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. 29.

Respectfully submitted,

H.E. Anthony Mayo Nguhi
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