# OBLIGATIONS OF STATES IN RESPECT OF CLIMATE CHANGE

(REQUEST FOR ADVISORY OPINION)

THE AFRICAN UNION'S
ANSWERS TO THE
QUESTIONS FROM THE
COURT

20 December 2024

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# I – PRELIMINARY REMARKS

1. Following its participation in the written and oral phases of these advisory proceedings before the International Court of Justice (the "**Court**"),[1] the African Union is honoured to be given a further chance to assist the Court, by answering four questions posed by its distinguished members.

2. In its Written Statement, the African Union stressed that these proceedings, important as they are on the global stage, have an existential character for African states and peoples[2] – which stand amongst those most affected by climate change, despite contributing the least to it.[3] In its Written Comments, the African Union was encouraged to see a convergence of views amongst a majority of states in how to approach the questions posed by the General Assembly in Resolution 77/276.[4] Nonetheless, it noted with concern that a minority of participants have urged the Court – mistakenly – to exercise undue restraint and refrain from providing the clear, concrete, and authoritative answers that the questions demand.[5]

3. The African Union's participation in the oral proceedings was thus driven by a single, overriding goal: to underscore the central importance of climate justice for this Advisory Opinion[6] This principle, the African Union argued, is not merely aspirational but can and must be operationalized – most notably through initiatives such as debt cancellation or relief for the world's most vulnerable states.[7]

4. Against that background, the African Union views all four questions posed by the Court as striking at the core of the matter. Each deserves answers that will meaningfully assist the Court in rendering its Advisory Opinion. The present submission seeks to provide such answers.

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1 All abbreviations and acronyms in these Answers are carried over from the Written Statement of the African Union, dated 22 March 2024 ("**WS**"), and the Written Comments of the African Union, dated 15 August 2024 ("**WC**").

2 See for example **WS**, para. 151.

3 African Union's Expert Report, Dr. Christopher Trisos, "Evidence of Observed Impacts from Human-Induced Climate Change, and Projected Future Impacts on Africa" (22 March 2024), para. 20.

4 See for example **WC**, paras. 3 and 67.

5 *Ibid.*, para.4.

6 Verbatim Record 2024/44, p. 57 (**African Union**).

7 Verbatim Record 2024/44, p. 71 (**African Union**).

# II – THE AFRICAN UNION'S ANSWERS TO THE QUESTIONS

## A. THE FIRST QUESTION

5. The question put by Judge Cleveland is as follows:

> During these proceedings, a number of participants have referred to the production of fossil fuels in the context of climate change, including with respect to subsidies. In your view, what are the specific obligations under international law of States within whose jurisdiction fossil fuels are produced to ensure protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases, if any?

6. Given that fossil fuel production (coal, gas and oil) is the main cause of climate change,[8] the African Union welcomes this opportunity to clarify the obligations of states within whose jurisdiction fossil fuels are produced (hereafter "fossil fuel producing states").

7. In what follows, the African Union submits that these obligations are to be identified and interpreted in light of the guiding principles proposed by the African Union in its oral pleadings, i.e., taking into account (i) differentiation, and (ii) sustainable development as foundational norms of customary international law.[9]

### *1. Differentiation*

8. The duties of all fossil fuel producing states arise from the due diligence duty to protect the climate system and other parts of the environment in light of the best available science.[10] To discharge their duty, States must evaluate the costs and benefits of producing fossil fuels and take reasonable steps to move to renewable sources of energy.[11] The level of diligence expected will vary in accordance with the risk to the

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8 IPCC, Synthesis Report of the IPCC Sixth Assessment Report (AR6), Summary for Policymakers, statement A.1, available at https://www.ipcc.ch/report/sixth-assessment-report-cycle/.

9 Verbatim Record 2024/44, p. 69 (**African Union**), para 22.

10 See for example, Glasgow Climate Pact, para. 6 (the same text was adopted by the Meeting of the Parties of the Paris Agreement in Decision 1/CMA.3, para. 7).

11 See for example, Decision 1/CMA.5 'Outcome of the first global stocktake' (2023), para. 28.

climate system represented by each category of fossil fuel, as well as the level of development of the producing state.[12]

9. There is no unified category of "fossil fuel producing states" under international law. Instead, the principle of Common but Differentiated Responsibilities and Respective Capabilities ("**CBRD-RC**"), as stated in the Paris Agreement, dictates that developed countries must take the lead in phasing out fossil fuels.[13] The African Union reiterates its request that the Court confirms that the CBDR-RC principle has achieved customary status.[14] It is uncontested that developed countries are both the biggest emitters of greenhouse gas emissions and the largest producers of fossil fuels. By virtue of their historical responsibility and current capabilities, they must display a higher level of diligence with the view to phasing out fossil fuels. As UNEP's 2023 *Production Gap Report* notes:

> Not all countries can phase out fossil fuels at the same pace. Countries that have higher financial and institutional capacity and are less dependent on fossil fuel production can transition most rapidly, while those with lower capacity and higher dependence will require greater international support. They will require assistance and finance to pursue alternative development models.[15]

10. As a result, developed countries are under the duty to stop the expansion of fossil fuel projects on their territory. The customary duty to prevent significant harm[16] as well as the treaty obligations set by the Paris Agreement cannot be met by perpetuating reliance on fossil fuels, such as opening new fossil fuel operations. According to the Intergovernmental Panel on Climate Change ("**IPCC**"), CO2 emissions expected to occur over the lifetime of existing fossil fuel infrastructure already exceeds the remaining 1.5°C carbon budget.[17] As a result, the International Energy Agency has

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12 For example, as stated in its decision "it is the view of the Court that it is for each State to determine in its domestic legislation or in the authorization process for the project, the specific content of the environmental impact assessment required in each case, having regard to the nature and magnitude of the proposed development and its likely adverse impact on the environment as well as to the need to exercise due diligence in conducting such an assessment". *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010*, p. 14, para. 205.

13 Paris Agreement, Article 4 (4) .

14 Verbatim Record 2024/44, p. 70 (**African Union**), para. 23.

15 UNEP, Production Gap Report 2023, p. 14.

16 International courts and tribunals recognized the 'no-harm principle' as customary international law. See, e.g., *Trail smelter* (United States v. Canada), III RIAA 1905, 1965 (Perm. Ct. Arb. 1941); *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 ICJ Rep 226, para 29.

17 IPCC, Summary for Policymakers 2023, B.5.

warned that there is "no room for new coal mines, oil and gas fields, or fossil-fuel-burning power plants".[18]

11. The collective acknowledgement of this situation is reflected in the commitment of the COP "to a fair and accelerated process of phasing down unabated coal power",[19] reiterated by the African Union in its Nairobi Declaration.[20] Moreover, domestic courts worldwide have found the expansion of fossil fuel projects in developed countries to be incompatible with the protection of the climate, including on the basis of the net zero objective of the Paris Agreement.[21] Finally, this duty is confirmed by the emerging consensus among human rights treaty bodies that developed countries should phase out fossil fuels in order to minimise their human rights impacts.[22]

12. The duty to exercise due diligence to prevent significant harm includes a duty to assess, as well as continuously monitor, environmental harm from Greenhouse gas ("**GHG**") emissions linked to fossil fuel production, through in particular, impact assessments.[23] Impact assessments should include an evaluation of scope of emissions of fossil fuel projects which attributes GHG emissions from the burning of fossil fuels to the exporter of the product. This is necessary to fully account for climate impacts, as acknowledged by domestic courts.[24] In addition, they should take into consideration the human rights impacts of fossil fuel exploitation on local communities.[25]

13. Reasonable steps to act with due diligence includes discontinuing financial incentives and investments in favour of fossil fuels. The IPCC has found that fossil fuel subsidy

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18 IEA, Net Zero by 2050: A Roadmap for the Global Energy Sector (2021)

19 Decision 1/CP.26, 'Glasgow Climate Pact', para 20; Decision 1/CP.27, Sharm-el-Sheikh Implementation plan, para. 13.

20 Nairobi Declaration, para. 19.

21 *Gloucester Resources Limited v. Minister for Planning* [2019] NSWLEC 7 (Australia), para 525-6; *Friends of the Earth v. West Cumbria Mining* [2024] EWHC 2349 (Admin) (United Kingdom).

22 Joint Statement on Human Rights and Climate Change (2019), para. 3; Concluding observations on the eighth periodic report of Australia, 25 July 2018, CEDAW/C/AUS/CO/8, para. 30(c); Concluding observations on the tenth periodic report of Norway, 2 March 2023, CEDAW/ C/NOR/CO/10, paras. 48(b)-(c) and 49(a)-(b); Concluding observations on the combined fifth and sixth periodic reports of Azerbaijan, 22 February 2023, CRC/C/AZE/CO/5-6, para. 14(c); UN Special Rapporteurs, "Statement: Fossils fuels at the heart of the planetary environmental crisis: UN experts" (30 November 2023).

23 Paris Agreement, Article 4(2) and 7 (9). See also B Mayer, 'Climate Assessment as an Emerging Obligation under Customary International Law' (2019) 68(2) International and Comparative Law Quarterly 271-308.

24 *Gray v. Minister for Planning and Ors* [2006] 152 LGERA 258 (Australia); *KEPCO Bylong Australia v. Independent Planning Commission and Bylong Valley Protection Alliance* [2020] NSWLEC 179 (Australia); *Greenpeace Nordic and Nature & Youth v. Energy Ministry*, Application no. 23-099330TVI-TOSL/05, [2024] Oslo District Court (Norway); *Finch v. Surrey County Council* [2024] UKSC 20 (United Kingdom).

25 *Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights (CESR) v. Nigeria* 2002; *Gbemre v. Shell Petroleum Development Company of Nigeria Ltd. and Others* (2005) FHC/B/CS/53/05.

removal is projected to reduce global emissions,[26] and the COP has committed to "phase out of inefficient fossil fuel subsidies".[27] Developed States are under a duty to take the lead in phasing out fossil fuel subsidies, as well as diverting investments towards sustainable sources of energy.[28] Reform of fossil fuel subsidies need to consider domestic contexts, including the social costs for vulnerable and poor populations in developing countries.[29]

14. Further, the duty to prevent environmental harm requires vigilance vis-à-vis the activities of private operators.[30] On the African continent, two thirds of the projected new gas and oil production are carried out and financed by foreign companies, most of them headquartered in developed countries,[31] just as the vast majority of institutional investors backing fossil fuel expansion in Africa.[32] As a result, states where fossil fuel producing companies are headquartered should regulate their activities to ensure they do not produce harm to the climate or to human rights.[33]

15. In addition, developed countries are under a duty to support developing countries to decarbonise and diversify their economy.[34] The level of due diligence required of fossil fuel producing developing states is conditional upon receiving assistance to move away from fossil fuel production used for internal demand as well as exports. Developed countries should offer "support towards a just transition", including by "providing targeted support to the poorest and most vulnerable in line with national circumstances", as called for by the Nairobi Declaration.[35] Moreover, Article 9 of the Paris Agreement obliges developed countries, to "provide financial resources to assist developing countries with adaptation and mitigation".[36]

16. Finally, the obligations of fossil fuel producing states extend to their duties under the law of State responsibility to cease wrongful conduct and guarantee its non-recurrence, which means, *inter alia*, halting the expansion of fossil fuel projects and rapidly

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26 IPCC, *Summary for Policy-Makers* (2023), para. C.6.4.
27 Glasgow Climate Pact, para 20; Sharm-el-Sheikh Implementation plan, para. 13
28 Joint Statement on Human Rights and Climate Change (2019), para. 3.
29 'In Africa, governments cut back on fuel subsidies' (*Le Monde*, 13 October 2023).
30 Verbatim Record 2024/44, p. 68 (**African Union**), para. 21.
31 Heffa Schuecking et al., *Who is Financing Fossil Fuel Expansion In Africa?* (2022), p 15.
32 *Ibid.*, p. 41
33 Joint Statement on Human Rights and Climate Change (2019), para. 3.
34 Paris Agreement, Article 4 (5).
35 Nairobi Declaration, para. 19(iii).
36 Paris Agreement, Article 9; UNFCCC, Article 4 (3).

phasing out fossil fuels. In application of the polluter-pays principle,[37] developed countries producing fossil fuels are under a duty to repair and compensate for the damage suffered.[38]

### *2. Sustainable development*

17. The duties of fossil fuel producing states in developing countries need to be interpreted in light of the principle of sustainable development, that is, in light of the "need to reconcile economic development with protection of the environment".[39] The African Union reiterates its request for the Court to recognize the right to sustainable development as a customary norm of international law. [40]

18. The customary right to permanent sovereignty over natural resources,[41] the right and duty to promote sustainable development under the UNFCCC,[42] and the objective of the Paris Agreement to fight climate change in the "context of sustainable development and efforts to eradicate poverty",[43] all point to the same obligation: developing countries have a duty to develop in a sustainable manner, that can be carried out by producing fossil fuels to meet internal demand and grow economically.

19. Developing countries must take into account their commitment to contribute to Sustainable Development Goal 7 on universal access to affordable energy by 2030, including to the 600 million lacking access to electricity and 970 million lacking access to clean cooking in Africa.[44] Africa accounts for less than 3% of the world's energy-related CO2 emissions to date and has the lowest emissions per capita of any region.[45] Even if Africa were to increase its use of fossil fuels, including gas, this would bring its share of global emissions to "a mere 3.5%",[46] while reducing extreme poverty levels.

20. As such, in application of the principle of sustainable development, the duties of fossil fuel producing developing states will vary depending on the economic and social benefits arising from energy production. This remains compatible with the recognition

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37 Rio Declaration on Environment and Development (1992), Principle 16. See Written Statement of **Switzerland**, para 78.
38 Paris Agreement, Article 4(4), UNFCC, Article 4(3
39 *Gabčíkovo-Nagymaros Project* (Hungary/Slovakia), Judgment, I.C.J. Reports 1997, para. 140.
40 Verbatim Record 2024/44, p. 70 (African Union), para. 23.
41 African Union, Written statement, para 198.
42 UNFCCC, Article 3(4).
43 Paris Agreement, Article 2(1)
44 IEA, Africa Energy Outlook 2022, p. 16.
45 IEA, Africa Energy Outlook 2022, p. 15
46 IEA, Africa Energy Outlook 2022, p. 17.

that all States will progressively need to move away from their reliance on fossil fuel and diversify their energy mix and economic policies.

### *3. Conclusion*

21. To conclude, the reality of fossil fuel production, exploitation and financing means that the obligations of fossil fuel producing states vastly align with that of developed countries. This convergence highlights the shared responsibility under international law to address the environmental and social impacts of fossil fuel production. Climate justice, as reflected in key international legal frameworks, must therefore once again guide the Court in its identification of the obligations of fossil fuel producing states.[47]

## B. THE SECOND QUESTION

22. The question put by Judge Tladi is as follows:

> In their written and oral pleadings, participants have generally engaged in an interpretation of the various paragraphs of Article 4 of the Paris Agreement. Many participants have, on the basis of this interpretation, come to the conclusion that, to the extent that Article 4 imposes any obligations in respect of Nationally Determined Contributions, these are procedural obligations. Participants coming to this conclusion have, in general, relied on the ordinary meaning of the words, context and sometimes some elements in Article 31 (3) of the Vienna Convention on the Law of Treaties. I would like to know from the participants whether, according to them, "the object and purpose" of the Paris Agreement, and the object and purpose of the climate change treaty framework in general, has any effect on this interpretation and if so, what effect does it have?

23. This question goes straight to what the African Union has identified in its written submissions: the effort by some states and participants to dilute the principles at stake and steer the Court's answers towards vague, uncontroversial conclusions that avoid meaningful accountability.

24. Instead, it is clear that the object and purpose of the relevant instruments underscore that Article 4 of the Paris Agreement is a key part of the obligations of states in respect of climate change, and should be given significant weight in the Court's answers to the General Assembly's questions.

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[47] Verbatim Record 2024/44, p. 67 (**African Union**), para. 16.

25. Before answering this question, however, it is important to stress that an interpretation which seeks to limit Article 4 of the Paris Agreement to mere procedural obligations is neither universally shared, nor consistent with the treaty's broader framework. Be it in their written submissions,[48] or during the oral phase of the proceedings,[49] many states and participants have stressed the centrality of this provision to the overriding goal of fighting climate change, [50] and read it as encompassing binding mitigation measures that reflect each state's duty of care.[51]

*1. Object and purpose of the Paris Agreement*

26. In accordance with Article 31(3) of the Vienna Convention on the Law of Treaties ("**VCLT**"), any good faith interpretation of the Paris Agreement, based on the ordinary meaning of its terms and in their context, must first and foremost, take into account its object and purpose as per Article 31 (1) VCLT.

27. Traditionally, the object and purpose of an international instrument such as the Paris Agreement is found in (i) its preamble, which provides context for the treaty's aims and guiding principles; and (ii) any provision that explicitly defines the treaty's objectives, such as Article 2 and 4(1) of the Paris Agreement.[52]

28. The **Preamble** of the Paris Agreement reaffirms the urgent need for global cooperation to combat climate change. It explicitly references key principles that underscore its object and purpose, including sustainable development, intergenerational equity, and the importance of limiting global temperature increases to protect humanity and ecosystems. It also underlines the need to steer and assess actions "on the basis of the best available scientific knowledge".

29. **Article 2 of the Paris Agreement** explicitly articulates the Paris Agreement's aims, notably:

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48 See, e.g., the Written Statements of **Colombia**, para. 3.35; **Netherlands**, para. 3.14.

49 Verbatim record CR 2024/36, p. 62 (**Bahamas**), para. 20 ("These NDCs are not an aspirational wish list, or a purely discretionary decision, or an unguided exercise. Their setting is a matter of concrete, binding obligations.").

50 Written Statements of **Australia**, para. 2.18, and USA, para. 3.9, describing Article 4 as "the heart" of the Paris Agreement and the "UN climate change regime". See also **WS**, para. 131; Written Statement of the **Seychelles**, para. 70 ("Article 4.2, known as the key provision of the treaty"); **Vanuatu**, para. 409; Verbatim Record 2024/41, p. 10 (**France**), para. 12.

51 Written Statement of **China**, para. 50; **Seychelles**, para. 96 ("These are concrete obligations, not merely platonic ones, which are consistent with the climate change risks"); **Vanuatu**, para. 409.

52 Other participants have also focused on these provisions as reflecting the Paris Agreement's object and purpose. For Article 2, see, e.g., Verbatim record CR 2024/36, p. 62 (**Bahamas**), para. 21. For Article 4(1), see, e.g., Written Statement of the **United Kingdom**, paras. 19-20; **Latvia**, para. 29.

a. Holding the increase in global average temperature well below 2°C above pre-industrial levels, and pursuing efforts to limit the temperature increase to 1.5°C;

b. Enhancing the ability to adapt to adverse impacts of climate change and foster climate resilience; and

c. Aligning financial flows with low greenhouse gas emissions and climate-resilient development.

These objectives reflect the Paris Agreement's comprehensive and dynamic[53] approach to addressing climate change.

30. **Article 4(1) of the Paris Agreement**, meanwhile, builds on the goals laid out in Article 2, by:

a. Repeating "the long-term temperature goal set out in Article 2";

31. Requiring states to pursue the "global peaking of greenhouse gas emissions as soon as possible", while acknowledging differentiated timelines for individual countries;

a. Calling for rapid emission reductions thereafter, guided by the best available science; and

b. Reaffirming the Agreement's commitment to equity, sustainable development, and poverty eradication.

32. Together, these provisions underscore that the Paris Agreement's object and purpose cannot be satisfied by a narrow, procedural reading of Article 4 as it clearly also imposes substantive obligations.

33. To summarise, several key elements that define the Paris Agreement's object and purpose reflect substantive obligations of conduct such as:

a. Advancing the framework established by the UNFCCC;

[53] Written Statement of the **IUCN**, para. 134 ("The references to CBDR-RC in the Preamble and Articles 2(2) and 4(3) indicate that the Paris Agreement should be implemented in a manner that is not static, but open to change. Its general, principled character allows the Parties' obligations to respond to evolving understandings of accountability for temperature increases and changing political, social and economic circumstances for holding them to 1.5oC. Responsibilities, capabilities and national circumstances differ significantly and are in flux. Thus, they should be taken into account in a dynamic fashion.")

b. Operationalizing a temperature goal that requires significant and substantive commitments from states;

c. Encouraging a progressive and differentiated approach, allowing obligations to evolve; and

d. Orient each state's actions in light of the best available scientific evidence.

*2. Object and purpose of the UNFCCC*

34. In accordance with Article 31(3) of the VCLT, the Paris Agreement operates within the broader framework of the UNFCCC, whose object and purpose it explicitly seeks to advance. This connection is evident in the Paris Agreement's Preamble and substantive provisions, which frequently reference the UNFCCC. In turn, Article 2 of the UNFCCC specifies that the object and purpose of this instrument extends to "any related legal instruments that the Conference of the Parties may adopt". Moreover, Article 4 of the Paris Agreement echoes and builds upon Articles 4(1)(b) and 4(2)(a) of the UNFCCC, which provide for the obligation of developing and developed state Parties to adopt and implement national policies, programmes and measures to mitigate climate change.[54] The UNFCCC is thus of utmost relevance to the interpretation of the Paris Agreement.

35. The UNFCCC, in its Preamble and Article 2, emphasizes the stabilization of greenhouse gas concentrations to prevent dangerous anthropogenic interference with the climate system. It hinges upon the dangers represented to "anthropogenic interference with the climate system" – dangers that have only become more concrete as time passes. The treaty further identifies common but differentiated responsibilities ("**CBDR**") and respective capabilities as guiding principles, alongside the need for sustainable development.[55]

36. The Paris Agreement must therefore be interpreted in light of the UNFCCC's foundational aim: to ensure effective, equitable, and science-based international cooperation to combat climate change.

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[54] Written Statement of **Ecuador**, para. 3.80.

[55] As explained by the African Union in its submissions, CBDR and sustainable developments are principles that are now part of customary international law: see Verbatim Record 2024/44, p. 69 (**African Union**), paras. 22-23.

### *3. The interpretation of Article 4*

37. Viewed through the lens of the object and purpose of both the Paris Agreement and the UNFCCC, Article 4 is far more than a procedural mechanism – it imposes binding obligations of conduct that require states to undertake substantive efforts toward mitigation.[56] This is reflected in its various subparagraphs, which "must, like any other legal text, be read as a whole".[57]

38. Article 4(1)'s opening language directly ties this central provision to the long-term temperature goal set out in Article 2,[58] and therefore to the Agreement's object and purpose. In essence, Article 4(1) operationalizes the Agreement's overarching aims through the commitments set out in the rest of the article. This is further confirmed by Article 3 of the Paris Agreement, which obliges states to "undertake and communicate ambitious efforts as defined in Articles 4, 7, 9, 10, 11 and 13 with the view to achieving the purpose of this Agreement as set out in Article 2".[59] The term "undertakes" is particularly important, as it implies an obligation of conduct.[60]

39. Article 4(2) then contains two categories of commitments corresponding to the provision's two sentences. The first obliges states to "prepare, communicate, and maintain" Nationally Determined Contributions ("**NDCs**") with the aim of achieving the Agreement's objectives.[61] The second obliges states to "pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions."[62]

40. Article 4(3), in turn, reinforces the principle of progression, mandating that NDCs reflect each state's "highest possible ambition" and represent a clear advancement beyond previous contributions.[63] The notions of progression and "highest possible

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56 **WS**, para. 132 ("Article 4(2) sets the binding procedural obligation to communicate an NDC as well as the binding substantive obligation to pursue domestic measures with the aim of achieving the objectives of the NDC"); Written Statement of the **Seychelles**, para. 71.

57 *Admissibility of Hearings of Petitioners by the Committee on South West Africa*, Advisory Opinion, 1 June 1956, Separate Opinion of Sir Hersch Lauterpacht, p. 44.

58 **WS**, para. 51. Written Statement of **Singapore**, paras. 3.35(a) ("while paragraph 2 gives Parties discretion in the specific domestic mitigation measures they implement, they must nevertheless pursue these measures with the aim of achieving the objectives of their NDCs. A Party that takes no steps or fails to take reasonable steps to do so violates Article 4(2)."") and 4.7; **IUCN**, para. 148 ("If a Party takes no measure, this would violate that provision."). See also Written Comments of **Mauritius**, para. 42.

59 Written Statement of **Singapore**, para. 35(a); **Timor-Leste**, paras. 110-116.

60 Written Statement of **Tonga**, paras. 149-152.

61 **WS**, para. 132.

62 Written Statements of the **European Union**, para. 154; **Tonga**, paras. 147-148; **Vanuatu**, para. 409. Verbatim Record 2024/48, p. 47 (**United Kingdom**), para. 18.

63 Written Statement of **China**, para. 49.

ambition" function together and are interconnected,[64] aligning with the Paris Agreement's goal of fostering a dynamic and adaptive climate regime. Article 4(3) further refers to the key principle of CBDR, which demand substantive action from all states, albeit differentiated based on their circumstances and capabilities.[65] Both principles – progression and CBDR – echo the Paris Agreement's object and purpose, and function in a self-reinforcing manner.[66]

41. Against the weight of these provisions, the claim that Article 4 is predominantly, if not entirely, procedural stems from a misreading of the provision and a failure to adhere to a holistic approach to treaty interpretation, which requires consideration of both the context and the instrument's object and purpose.

42. In particular, this claims ignores the second sentence of Article 4(2), which provides for an obligation to undertake measures "with the aim of achieving the objectives",[67] an obligation that must be given full weight.[68] Many states have rightly pointed out that this entails an obligation of due diligence,[69] the standard of which must be assessed in light of each state's duty of care, informed by three key consideration:

    a. "the best available science".[70] As stressed by the African Union in its written submissions and its expert report,[71] science does indicate that the dangers and risks are enormous,[72] necessitating a high standard of care.[73]

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64 Written Statement of the **Seychelles**, para. 75; **European Union**, para. 149.

65 **WS**, paras. 104(b), 131-133. Written Statements of **Egypt**, paras. 145-149.

66 C. Voigt & F. Ferreira, "Dynamic Differentiation': The Principles of CBDR-RC, Progression and Highest Possible Ambition in the Paris Agreement' (2016) 5 *Transnational Law* 2, 285-303, p. 303 ("Given the important role that differentiation has to play, it can be stated safely that the Paris Agreement has succeeded in using differentiation as a means for enhancing ambition, as opposed to stalemating it. Rather than setting countries apart, differentiation could become a tool for bringing countries closer together in serving the purpose of the Agreement.")

67 Written Comments of the **IUCN**, para. 20 (commenting that "This obligation is critical to the good functioning of the Paris Agreement. States' domestic mitigation measures must be calibrated to achieving the objectives of NDCs"); **Kenya**, paras. 4.51-4.52 ("Without any link to the progressive attainment of the treaty's objects and purposes, NDCs would be of limited relevance to the Paris Agreement.")

68 Written Statements of the **IUCN**, para. 148 ("The achievement of the NDC itself does not become legally binding, but a State must pursue measures that are coherent with the purpose of the NDC and rationally related to it."); **Colombia**, para. 3.30.

69 **WS**, para. 133. See also Written Statements of **Ecuador**, para. 3.80; the **European Union**, para. 159; **United Kingdom**, paras. 22 and 23; **Singapore**, para. 4.7; **Seychelles**, paras. 76-78; **Timor-Leste**, para. 119. Written Comments of **Colombia**, para. 3.30 ("the fact that Article 4(2) is an obligation of conduct does not imply that States are exempt from sanctions if their domestic mitigation measures fall short of their objectives. Instead, while external circumstances beyond the State's control may be factored, such conduct will be assessed against the due diligence standard, including the obligation to demonstrate progression over time.").

70 **WS**, para. 96, citing in particular *Responsibilities and obligations of States with respect to activities in the Area*, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, p. 10, para. 117: "'due diligence' is a variable concept. It may change over time as measures considered sufficiently diligent at a certain moment may become not diligent enough in light, for instance, of new scientific or technological knowledge."

71 **WS**, Expert Report of Dr. Trisos.

72 Written Statement of the **Seychelles**, paras. 81-85.

73 Written Statements of the **IUCN**, para. 136; **Solomon Islands**, paras. 80-82. Verbatim Record 2024/41, p. 11 (**France**), para. 15.

b. The key principle of progressive development, as embodied in Articles 3 and 4(3)'s reference to each state's "highest possible ambition".[74]

c. The principle of CBDR,[75] which finds echo in Article 4(4)'s call for the leadership of developed countries.

These three considerations – science, progression, and CBDR – are integral to achieving the Paris Agreement's and the UNFCCC's object and purpose: fostering science-based, progressive, and differentiated efforts aimed at reaching the long-term temperature goal.

43. These considerations are also relevant for the parties' obligations under the first sentence of Article 4(2): they will inform what NDCs states should prepare, communicate, and maintain, in light of their particular situation and the principle of progression and "highest possible ambition".[76] In other words, these considerations "import substantive and qualitative elements into what on the face of it appears to be a purely procedural obligation."[77]

44. Consequently, reducing Article 4 to a procedural formality, particularly for developed countries, not only misrepresents its intent but also undermines the overarching goals of the Paris Agreement and the climate change treaty framework. Failing to recognize the existent substantive obligations of this article risks weakening the collective effort to combat climate change.

## C. THE THIRD QUESTION

45. The question put by Judge Aurescu is as follows:

> Some participants have argued, during the written and/or oral stages of the proceedings, that there exists the right to a clean, healthy and sustainable environment in international law. Could you please develop what is, in your view, the legal content of this right and its relation with the other human rights which you consider relevant for this advisory opinion?

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74 Written Statement of **Colombia**, para. 3.39. Verbatim Record 2024/41, p. 11 (**France**), paras. 13-14 ("l'interprétation de ces obligations doit refléter l'ambition des États en la matière, ce qui exige un niveau élevé de diligence dans leur mise en œuvre").

75 Written Comments of **Mauritius**, paras. 48-49. Verbatim Record 2024/41, p. 12 (**France**), para. 17.

76 **WS**, para. 133.

77 Written Statement of **Vanuatu**, para. 411.

46. All life depends on a safe, clean, healthy and sustainable environment. First recognized in the 1972 Stockholm Declaration,[78] and reiterated in the 1992 Rio Declaration,[79] the right to a clean, healthy, and sustainable environment has recently been acknowledged as a universal human right by the UN General Assembly ("**UNGA**")[80] and the UN Human Rights Council ("**HRC**").[81] The judges of this Court have also referred to the right.[82]

47. As regards its legal foundations, as argued by the African Union in its written statement, the African continent, in particular, has been at the forefront globally in recognizing the right to a clean, healthy and sustainable environment.[83] The African Charter was indeed the world's first regional human rights treaty to recognize it.[84] According to its Article 24: 'All peoples shall have the right to a general satisfactory environment favorable to their development.' Similarly, the 2003 Protocol to the African Charter on the Rights of Women in Africa states that women 'shall have the right to live in a healthy and sustainable environment'.[85]

48. The African Union submits that the right to a clean, healthy and sustainable environment finds recognition in treaties and it is also consolidating in customary international law.[86] The latter outcome is demonstrated by: (i) the adoption of the resolutions by the UNGA and UN HRC that recognize the right to a sustainable, healthy, and clean environment (with no states voting against either resolution);[87] (ii) statements made by various States discussing the right during the Universal Periodic

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78 Report of the UN Conference on the Human Environment, Stockholm, 5–16 June 1972, A/CONF.48/14/Rev.1 (Stockholm Declaration), principle 1.

79 Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992, vol. I, Resolutions Adopted by the Conference (UN publication, Sales No. E.93.I.8 and corrigendum) (Rio Declaration).

80 The human right to a clean, healthy and sustainable environment, UNGA Resolution 76/300, adopted 28 July 2022, A/RES/76/300.

81 The human right to a clean, healthy and sustainable environment, HRC Resolution 48/13, adopted 8 October 2021, A/HRC/RES/48/13.

82 *Pulp Mills on the River Uruguay* (Argentina v. Uruguay), Separate Opinion of Judge Cançado Trindade, I.C.J. Reports 2010), pp. 178, 184, 194, paras. 117, 132, 159 (references to "right to a healthy environment"); see *Gabčíkovo-Nagymaros Project* (Hungary/Slovakia), Separate Opinion of Vice-President Weeramantry, I.C.J. Reports 1997, pp. 89-90 (references to "right to environmental protection" and "right to the protection of the environment").

83 **WS**, paras. 68, 69 and 192.

84 African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) CAB/LEG/67/3 rev. 5, ILM 58.

85 Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, African Union, 11 July 2003, Articles 18 and 19.

86 William Schabas, *The Customary International Law of Human Rights* (Oxford University Press, 2021), p. 335.

87 The human right to a clean, healthy and sustainable environment, Human Rights Council Resolution 48/13, adopted 8 October 2021, A/HRC/RES/48/13 (adopted with 43 votes in favour, 4 abstentions, 0 votes against); The human right to a clean, healthy and sustainable environment, UNGA Resolution 76/300, adopted 28 July 2022, A/RES/76/300 (adopted with 161 votes in favour, 8 abstentions, 0 votes against).

Review process;[88] (iii) the presence of the right in numerous significant human rights treaties;[89] (iv) the recognition of the right to a clean, healthy and sustainable environment in States' national constitutions,[90] legislation, court decisions and regional treaties;[91] and (v) the recognition of the right to a clean, healthy and sustainable environment in an increasing number of national courts' decisions.[92]

49. As regards its legal content, the right to a clean, healthy and sustainable environment constitutes an autonomous right.[93] The right (i) entails substantive obligations to ensure protection of clean air, a safe climate, healthy and sustainably produced food, safe water, adequate sanitation, non-toxic environments in which to live, work and play, and healthy ecosystems and biodiversity;[94] and (ii) entails procedural obligations, including the right to access environmental information, public participation in environmental decision-making and access to environmental justice.[95]

50. Moreover, the right to a clean, healthy and sustainable environment has both a collective and an individual dimension.

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88 William Schabas, *The Customary International Law of Human Rights* (Oxford University Press, 2021) 333-334, fn. 35.

89 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights : Protocol of San Salvador (adopted 17 Nov. 1988; entered into force on 16 Nov. 1999), art. 11 ("Everyone shall have the right to live in a healthy environment and to have access to basic public services."), see also Advisory Opinion OC-23/17, IACtHR Series A No. 23, 15 November 2017, para. 57; Arab Charter on Human Rights (2004), art. 38; see also ASEAN Human Rights Declaration, Association of Southeast Asian Nations (ASEAN), 18 November 2012, art. 28(f); and American Declaration on the Rights of Indigenous Peoples, 15 June 2016, AG/RES.2888 (XLVI-O/16), art. 19(1), see further arts. 19(2)-(4). See also Committee on the Rights of the Child, General Comment No. 26 on children's rights and the environment, with a special focus on climate change, CRC/C/GC/26 (22 August 2023), paras. 23, 31, 37, 61, 71.

90 Report of the special Rapporteur on the right to a clean, healthy and sustainable environment, "Good Practices", A/HRC/43/53, Annex II. As of December 2019, 156 UN Member States recognized the right in law. Subsequent legal developments in Antigua and Barbuda, Belize, Canada, Dominica, the Federated States of Micronesia, Grenada, Oman and Saint Lucia increased the total to 164 UN Member States that recognize the right in law.

91 See Astrid Puentes, 'Overview of the implementation of the human right to a clean, healthy and sustainable environment', A/79/270, 2 August 2024; UNEP, "Joint statement of United Nations entities on the right to healthy environment" (UNEP, 8 March 2021); David Boyd, Right to a healthy environment: good practices, A/HRC/43/53, 30 December 2019., paras. 10-11, see Annex II.

92 See, e.g., *Demanda Generaciones Futuras v. Minambiente*, Supreme Court of Colombia, STC4360-2018, Decision of 5 April 2018 (Colombia); *Leghari v. Federation of Pakistan*, High Court at Lahore, W.P. No. 25501/201, Decision of Apr. 4, 2015 (Pakistan); *PSB et al. v.* Brazil, Supreme Court of Brazil, ADPF 708, Decision of 1 July 2022 (Brazil); *Held v. Montana* CDV-2020-307, Montana First Judicial District Court, WL 1997864, decision of 14 August 2023. See also NYU Law's Right to a Healthy Environment (R2HE) Toolkit - UN Environment Programme, see https://www.r2heinfo.com.

93 Advisory Opinion OC-23/17 ('The Environment and Human Rights'), IACtHR Series A No. 23, 15 November 2017, para. 62; *Walter Brenes Soto v. Costa Rican Institute of Fisheries* and *Aquaculture and Others*, Supreme Court of Justice (Costa Rica), Resolución No 00912 - 2023, case 17- 008322-1027-CA, 21 June 2023.

94 David Boyd, Right to a healthy environment: good practices, A/HRC/43/53, 30 December 2019, paras. 8-18. These constitutive elements have been affirmed by the Committee on the Rights of the Child, General Comment No. 26 on children's rights and the environment, with a special focus on climate change, CRC/C/GC/26, 22 August 2023, para. 64.

95 See, in the Inter-American context: Advisory Opinion OC-23/17, IACtHR Series A No. 23, 15 November 2017, paras. 211-241; Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (adopted in Aarhus Denmark on 25 June 1998 entered into force 30 October 2001), 2161 UNTS 447, art. 1; Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean, Escazú, Costa Rica, 4 March 2018, art 1.

a. As regards its collective dimension, the right is protective of an essential quality of the natural environment per se that 'constitutes a universal value that is owed to both present and future generations'.[96] Thus, the collective dimension of the right acts in respect of present and future generations and also extraterritorially.[97]

b. The right has also an individual dimension, which identifies an intrinsic relationship with other human rights.[98] A healthy environment is a prerequisite for the enjoyment and exercise of other rights. Therefore, the right to a clean, healthy, and sustainable environment, along with any other rights that cannot be realized or enjoyed without a healthy environment, will be violated concurrently when a behavior compromises the environment's necessary minimum quality.[99]

51. As regards the intrinsic relationship between the right to a clean, healthy, and sustainable environment and other rights (such as the right to life, the right to health, cultural rights, privacy and home rights, various children's rights, and rights to an adequate standard of living, including the rights to housing, food, and water), it has been emphasized by UN Treaty Bodies[100] as well as by regional human rights courts.[101] By way of example, in the case *Social and Economic Rights Centre (SERAC) and Centre for Economic and Social Rights (CESR) v. Nigeria*, the African Commission on Human and Peoples' Rights, stressed "the importance of a clean and

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96 Advisory Opinion OC-23/17 ('The Environment and Human Rights'), IACtHR Series A No. 23, 15 November 2017, para. 59.

97 See *Chiara Sacchi et. al. v. Argentina, Brazil, France, and Germany* (Communication Nos. 104-107/2019), CRC/C/88/D/104/2019, CRC/C/88/D/105/2019, CRC/C/88/D/106/2019, CRC/C/88/D/107/2019, 11 November 2021, paras. 10.5, 10.7; Advisory Opinion OC-23/17, IACtHR Series A No. 23, 15 November 2017, paras. 101, 103, 104.

98 UNGA, The human right to a clean, healthy and sustainable environment, GA res 76/300, adopted 28 July 2022, A/RES/76/300, para. 2. See also Advisory Opinion OC-23/17 ('The Environment and Human Rights'), IACtHR Series A No. 23, 15 November 2017, para. 59.

99 See The human right to a clean, healthy and sustainable environment, Human Rights Council Resolution 48/13, adopted 8 October 2021, A/HRC/RES/48/13, para. 2; UNGA, The human right to a clean, healthy and sustainable environment, GA res 76/300, adopted 28 July 2022, A/RES/76/300, para. 2. See also AA Cançado Trindade, 'The Parallel Evolutions of International Human Rights Protection and Environmental Protection and the Absence of Restrictions upon the Exercise of Recognized Human Rights' (1991) 13 Revista IIIDH 36, p. 54.

100 In relation to the right to health, see Committee on Economic, Social and Cultural Rights, General Comment No. 14: The right to the highest attainable standard of health (article 12), 11 August 2000, E/C.12/2000/4, paras 4 and 11; Human Rights Committee, General Comment No. 36 (Article 6), 3 September 2019, CCPR/C/GC/36, para. 26 and para. 62; Committee on the Rights of the Child, General Comment No. 26 on children's rights and the environment, with a special focus on climate change, 22 August 2023, CCPR/C/GC/26, paras 8 and 14.

101 See Advisory Opinion OC-23/17, IACtHR Series A No. 23, 15 November 2017, para. 59; *Case of the Indigenous Communities of the Lhaka* Honhat *(Our Land) Association v. Argentina*, Judgement, IACtHR (ser. C), 6 February 2020, paras. 243-254; *Case of Di Sarno v. Italy*, European Court of Human Rights, Judgment, Application No. 30765/08 (2012), para. 110.

safe environment that is closely linked to economic and social rights in so far as the environment affects the quality of life and safety of the individual".[102]

52. As affirmed by the UN Special Rapporteur on Human Rights and the Environment, the "failure of States to take adequate steps to address climate change can constitute a violation of the right to a healthy environment".[103] States are under the obligations: (i) to *respect* the right, namely not to cause or allow significant harm to the climate system and other parts of the environment, given that such harm impairs the quality of the environment and climate system required by the right; (ii) to *protect* the right, namely to actively protect the climate system and other parts of the environment from significant harm caused by third parties;[104] and (iii) to *fulfil* the right, namely adopt and implement laws and policies meant to ensure a minimum level of quality of the environment (including the climate system).[105]

53. Furthermore, States have responsibility to indigenous peoples and other traditional communities who rely on their lands for their material and cultural well-being.[106] Therefore, acts and omissions causing significant harm to the climate system also constitute a grave violation of the right to a clean, healthy, and sustainable environment, contributing to unprecedented environmental degradation and associated human rights harms.

54. As is clear from the above, the allegations made by a minority of participants to these proceedings that the right to a clean, healthy and sustainable environment has not yet entered the *corpus* of international law,[107] and that there is currently no common

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102 African Commission on Human and Peoples' Rights, *SERAC and CESR v. Nigeria*, No. 155/96, Decision, 27 October 2001, para. 51.

103 David Boyd, Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, 15 July 2019, A/74/161, see in particular paras. 44; 63. See also The human right to a clean, healthy and sustainable environment, UNGA Resolution 76/300, adopted 28 July 2022, A/RES/76/300.

104 See, with regard to the obligation to protect the right to a healthy environment, *Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina*, Judgement, Inter-American Court of Human Rights (ser. C), 6 February 2020, para. 207

105 David Boyd, Human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, 15 July 2019, A/74/161, para. 65. See John H Knox, Framework principles on human rights and the environment (24 January 2018) A/HRC/37/59 annex, paras. 4-6.

106 John H Knox, Framework principles on human rights and the environment (24 January 2018) A/HRC/37/59 annex, para. 41(d); Advisory Opinion OC-23/17, IACtHR Series A No. 23, 15 November 2017, para. 48.

107 See Verbatim Record CR 2024/34, p. 152 (**Germany**), paras 29-32; Verbatim Record CR 2024/34, p. 33 (**Saudi Arabia**), para 13; Verbatim Record CR 2024/40, p. 47 (**USA**), para 32; Verbatim Record CR 2024/40, p. 57 (**Russia**), para 37; Verbatim Record CR 2024/50, p. 69 (**Serbia**), para 43.

understanding of its content and scope,[108] are entirely unfounded and should be given no merit.

55. To conclude, the African Union submits, in line with the position of a majority of the participants to these proceedings, that the right to a healthy environment is a historical pillar of the international and, in particular, of the African human rights' legal framework.

## D. THE FOURTH QUESTION

56. The question put by Judge Charlesworth is as follows:

> In your understanding, what is the significance of the declarations made by some States on becoming parties to the UNFCCC and the Paris Agreement to the effect that no provision in these agreements may be interpreted as derogating from principles of general international law or any claims or rights concerning compensation or liability due to the adverse effects of climate change?

57. An analysis of the terms of the declarations made by several States with respect to the UNFCCC and the Paris Agreement (the "**Declarations**"), as well as the context of the Declarations confirm that the UNFCCC and the Paris Agreement are *not* – contrary to what is argued by a minority of States in these proceedings – a "*lex specialis*" that would exclude rules of general international law.

58. Rather, the Declarations instead underscore that States are subject to obligations arising out of principles of general international law (including the duty of prevention) *in addition to* the UNFCCC and the Paris Agreement,[109] and that they must provide full reparation for any breach in accordance with the rules of general international law, including in accordance with the ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts ("**ARSIWA**").[110]

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[108] See Verbatim Record CR 2024/38, p. 17 (**Canada**), para. 33; Verbatim Record CR 2024/40, p. 47 (**USA**), para 32; Verbatim Record CR 2024/40, p. 57 (**Russia**), para 37.

[109] **WS**, paras. 39 *et seq.*; **WC**, paras. 17-26; Verbatim CR 2024/44, p. 67 (**African Union**), para. 18.

[110] **WC**, para. 67; **WS**, paras. 263-265. See also, e.g., Written Statements of **Portugal**, paras. 108-115; **Tonga**, paras. 297-312; **IUCN**, paras. 546-575; **Singapore**, paras. 4.1-4.2; **Solomon Islands**, paras. 229-233; **Kenya**, paras. 6.85-6.90; **Micronesia**, paras. 120-127; **Switzerland**, paras. 72-73; **Saint Vincent and the Grenadines**, para. 128; **Netherlands**, para. 5.3-5.14; **France**, paras. 179-194; **Timor-Leste**, paras. 354-357; **India**, , paras. 80-88; **Samoa**, paras. 190-193; **Ecuador**, paras. 4.2-4.11; **USA**, paras. 5.1-5.4; **Bangladesh**, paras. 144-145; **Mauritius**, paras. 209-210; **Antigua and Barbuda**, paras. 529-536; **El Salvador**, paras. 49-52; **Brazil**, paras. 77-79; **Thailand**, para. 29; **Bahamas**, paras. 233-235; **Barbados**, , paras. 249-251; **Uruguay**, paras. 155, 160; **DRC**, paras. 252-253; **Kenya**, paras. 6.87-6.90; **Albania**, para. 132; **Marshall Islands**, paras. 55-56.

*1. Context of the Declarations*

59. Between June 1992 and March 1993, five small Pacific Island States, namely, Fiji, Kiribati, Nauru, Papua New Guinea and Tuvalu, made declarations to the UNFCCC which were identical in wording, stating that:

> "[ratification of the UNFCCC] shall in no way constitute a renunciation of any rights under international law concerning state responsibility for the adverse effects of climate change and that no provisions in the convention can be interpreted as derogating from the principles of general international law" (emphasis added).[111]

60. Between April 2016 and March 2017, nine States (Cook Islands, Marshall Islands, Micronesia, Nauru, Niue, Philippines, Solomon Islands, Tuvalu and Vanuatu) made separate declarations to the Paris Agreement. Those declarations were broadly similar in substance while differing slightly in wording from State to State.

61. The Marshall Islands and Vanuatu declared that ratification of the Paris Agreement shall not constitute a renunciation of any rights under any other laws, including international law.[112] Similarly, the Cook Islands, Micronesia, Niue, the Solomon Islands, and Tuvalu stated that ratification shall not constitute renunciation of rights under international law concerning state responsibility for the adverse effects of climate change, and that no provision of the Paris Agreement can be interpreted as derogating from principles of general international law or any claims or rights concerning compensation.[113]

62. Despite some differences in language, the declarations under both the UNFCCC and the Paris Agreement substantively have the same meaning as well as the same object and purpose: that is, to clarify that the UNFCCC and the Paris Agreement do not

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111 Declarations of **Fiji, Kiribati, Nauru, Papua New Guinea,** and **Tuvalu**, accessible here; Daniel Bodansky, Jutta Brunée and Lavanya Rajamani, *International Climate Change Law* (OUP 2017), p. 158.

112 Declarations of the **Marshall Islands** and **Vanuatu**, accessible here.

113 Declarations of the **Cook Islands**, **Micronesia**, **Niue**, **Solomon Islands**, and **Tuvalu**, accessible here. The Declaration of **Nauru**, accessible here, states that: "[…] the ratification of the Agreement shall in no way constitute a renunciation of any rights under international law concerning State responsibility [for] the adverse effects of climate change […] no provisions in the Agreement can be interpreted as derogating from the principles of general international law […] Article 8 and decision 1/CP.21, paragraph 51 in no way limits the ability of Parties to UNFCCC or the Agreement to raise, discuss, or address any present or future concerns regarding the issues of liability and compensation." The Declaration of the **Philippines**, accessible here, states that "[…] its accession to and the implementation of the Paris Agreement shall in no way constitute a renunciation of rights under any local and international laws or treaties, including those concerning State responsibility for loss and damage associated with the adverse effects of climate change […]".

prejudice existing remedial rights, thereby ensuring recourse to remedies under general international law principles separately and in addition to those available under article 4(4) of the UNFCCC.[114]

63. This is further confirmed by the contextual history of the declarations to the UNFCCC.

64. The intention of the UNFCCC was to provide a framework convention on climate change that "represented not an end point, but rather a punctuation mark in an ongoing process of negotiation that continues to this day."[115] In recognition of the need to build on the framework it provided, the UNFCCC was therefore designed to be supplemented by general international law, *not* to condition it.

65. Of particular note, the *travaux préparatoires* in the final stages of negotiations of the UNFCCC show that the Intergovernmental Negotiating Committee considered including operative clauses that expressly conferred on signatory States the obligation to respect the general international law principles of State responsibility and the principle of prevention.[116] When the suggested provisions were removed from the final version of the UNFCCC, several specially-affected States added language in their declarations to confirm that general rules of international including the law on State responsibility still applied.

66. That similar declarations were made in relation to the Paris Agreement, and that no States ever expressed any objections to these declarations as explained *infra*, demonstrates a continuation of the intention for the climate regime's treaty obligations to work in tandem with general international law norms.

67. In contrast, the Court will note that no express provision was ever contemplated and in fact included in the text of either the UNFCCC or the Paris Agreement suggesting that the Parties intended to derogate to general international law principles. As emphasised by Burkina Faso in its submissions:

> […] aucun de[s] participants n'a apporté la preuve d'une dérogation expresse à toutes ces règles du droit international. Aucun n'a apporté la preuve d'une

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114 UNFCCC, Article 4(4): "The developed country Parties and other developed Parties included in Annex II shall also assist the developing country Parties that are particularly vulnerable to the adverse effects of climate change in meeting costs of adaptation to those adverse effects." See Daniel Bodansky, 'The United Nations Framework Convention on Climate Change: a Commentary' (1993) *Yale Journal of International Law*, p. 529.

115 Daniel Bodansky and Lavanya Rajamani, 'Evolution and Governance Architecture of the Climate Change Regime', in Detlef Sprinz and Urs Luterbacher (eds.), *International Relations and Global Climate Change: New Perspectives* (MIT Press, 2nd edn, 2016).

116 Intergovernmental Negotiating Committee for a Framework Convention on Climate Change, *Consolidated Text Based on Proposals Regarding Principles and Commitments, Presented by Delegations*, 27 August 1991, II Principles, pp. 4 and 7.

> dérogation implicite à ces règles, comme cela est requis par le droit international […].[117]
>
> "[…] aucun des participants qui soutient la doctrine de la *lex specialis* n'a invoqué une disposition de la Convention-cadre des Nations Unies sur les changements climatiques, du Protocole de Kyoto ou de l'Accord de Paris qui exclurait les autres obligations applicables aux émissions anthropiques de gaz à effet de serre, notamment celles relatives aux droits humains, y inclus les droits des peuples, le droit de la mer et le droit de l'environnement. Ceci est bien compréhensible puisque l'Accord de Paris, au lieu de déroger à ces obligations, réaffirme au contraire leur application aux mesures prises pour faire face aux changements climatiques".[118]

### *2. Significance of the Declarations*

68. According to the UN's Guide to Practice on Reservations to Treaties:

> [an interpretive declaration] does not modify treaty obligations. It may only specify or clarify the meaning or scope which its author attributes to a treaty or to certain provisions thereof and may, as appropriate, constitute an element to be taken into account in interpreting the treaty in accordance with the general rule of interpretation of treaties […].[119]

69. It is also generally accepted that approval of, or opposition to, the interpretive declaration by other contracting parties to a treaty shall be taken into account in its interpretation.[120]

70. In light of the above, the African Union submits that the Declarations which essentially clarify that general principles of international law, including rules on state responsibility, apply in addition to the UNFCCC and the Paris Agreement, should be given significant weight by the Court in responding to Questions 1 and 2 of the UNGA Resolution, particularly as they have not been contested by any other States. Rather, the Declarations have in fact been generally accepted by other States.[121]

71. Indeed, the Court will note that no State has ever submitted any interpretative declaration contradicting the terms of the State Declarations, which have been made

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117 Verbatim CR 2024/37, p. 43 (**Burkina Faso**), para. 3. (emphasis added)

118 Written Comments of **Burkina Faso**, para. 27. (emphasis added)

119 Alain Pellet, *Guide to Practice on Reservations to Treaties*, Sixty-third Session [2011] vol II part II UNYBILC, Guideline 4.7.1.

120 *Ibid.*, Guidelines 4.7.2 and 3.6.

121 The position in this regard is that the silence of States, understood as the absence of protest, has legal consequences, through the concepts of acquiescence or tacit consent of States to a factual or legal situation that affects or might affect their rights. See J. Miller and T. Cottier, "Acquiescence" in R Bernhardt (ed), Encyclopedia of Public International Law (vol 7, 1984) 5; E Suy, Les actes juridiques unilateraux en droit international public (1962) 66; M E Villiger, Customary International Law and Treaties (1985) 19.

throughout the evolution of the international law climate regime, starting with the first international agreement (UNFCCC) in 1994, followed by the Kyoto Protocol in 1997[122] and, finally, the Paris Agreement in 2015. This demonstrates a consistent acceptance of, and support for, these declarations.

72. Indeed, a number of parties to these proceedings (including but not limited to some of those who made the Declarations), which are also signatories to the UNFCCC and Paris Agreement, have instead expressly confirmed their agreement with the Declarations.[123]

73. On the basis of the significant support for these Declarations, both historically and in the present proceedings, the Court should therefore interpret the UNFCCC and Paris Agreement in light of the contents of the Declarations that, importantly, were made by specially-affected States.[124]

74. Contrary to the position of a minority of States in these proceedings, arguing that the UNFCCC and the Paris Agreement constitute a "lex specialis", the Declarations reinforce the interpretation that the UNFCCC and Paris Agreement should be supplemented by general principles of international law (including *inter alia*, the principle of prevention, and the general international law principles on State responsibility).

75. As underlined by Professor Mayer:

> "the special rules on climate change contained in the UNFCCC and other regimes do not derogate from general international law."[125]

76. Remedial measures are therefore, similarly *not* limited to those provided under the UNFCCC and Paris Agreement, namely the creation of specialized funds and compliance mechanisms.

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122 The following States made interpretive declarations (accessible here) upon ratification of the Kyoto Protocol: **Cook Islands**, **Niue**, **Kiribati**.

123 See, for example, the Written Statements of **Belize**, p. 19, fn 113-115; **Burkina Faso**, p. 66, para. 119. See also the Written Comments of **Barbados**, para. 34; **Kenya**, para. 4.6, fn. 199; **Nauru**, paras. 27-31, and **Vanuatu**, para. 156. Likewise, the Verbatim records CR 2024/46, p. 8 (**Nauru**), paras. 2, 7, 16, and fns. 4-5; Verbatim CR 2024/45, p. 48 (**Namibia**), paras. 54-55; Verbatim CR 2024/41, p. 34 (**Ghana**), para. 11; Verbatim CR 2024/49 pp. 50-51 (**Seychelles**), para. 7; Verbatim CR 2024/43, p. 49 (**Kiribati**), para. 33 and fn. 75; Verbatim CR 2024/36 p. 82 (**Barbados**), para. 7; Verbatim CR 2024/37, pp. 10-11 (**Belize**), para. 5; Verbatim CR 2024/39, p. 63 (**Egypt**), para. 27.

124 The African Union refers to its position in Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, where it emphasised that :"[a]s the Court has underlined in the *North Sea Continental Shelf Cases*, the practice that is essential to look at when dealing with an issue of international law is the practice of the 'concerned states'. Written Comments of the **African Union** in *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, para. 23.

125 B. Mayer, *The International Law on Climate Change* (CUP 2021), p. 86.

77. Rather, States found to be responsible for harmful conduct are required to provide full reparation in accordance with the law on State responsibility, notably cessation and non-repetition (Article 30 ARSIWA), restitution (Article 35 ARSIWA), compensation (Article 36 ARSIWA) and satisfaction (Article 37 ARSIWA).

78. In sum, the Declarations made by some States on becoming parties to the UNFCCC and the Paris Agreement confirm that *in addition to* the UNFCCC and the Paris Agreement, States are subject to obligations arising out of principles of general international law (including the duty of prevention) and must provide full reparation for any breach in accordance with the rules of general international law, including in accordance with ARISWA. This is not only the position of the African Union,[126] but also the position of the majority of participants to these proceedings.[127]

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[126] **WS**, para. 80, as well as **WC**, paras. 42 *et seq.*: "The Court must take into account the whole corpus of international law".

[127] See e.g., Written Statements of **Vanuatu**, paras. 222 *et seq.*; **Barbados**, para. 197; **Egypt**, para. 74; **Kenya**, para. 5.51; **Sierra Leone**, paras. 3.1 and 3.125; **Mauritius**, para. 123. See also Written Comments of **Ghana**, paras. 3.16-3.20; **Mauritius**, paras. 87-90. Likewise, the Verbatim records CR 2024/51, p. 64 (**Comoros**), para. 4; Verbatim CR 2024/50, p. 38 (**Sri Lanka**), para. 7; Verbatim CR 2024/52, p. 19 (**Viet Nam**), para. 8; Verbatim CR 2024/44, p. 12 (**Latvia**), para. 3; Verbatim CR 2024/49, p. 60 (**The Gambia**), para. 6; Verbatim CR 2024/36, p. 69 (**Bangladesh**), para. 10; Verbatim CR 2024/37, p. 22 (**Bolivia**), para. 14; Verbatim CR 2024/39, p. 49 (**Nordic Countries**), para. 29; Verbatim CR 2024/39, p. 59 (**Egypt**), para. 13; Verbatim CR 2024/41, p. 21 (**Sierra Leone**), para. 7; Verbatim CR 2024/46, p. 32 (**Pacific Islands Forum**), para. 11; Verbatim CR 2024/46, p. 35 (**New Zealand**), para. 19; Verbatim CR 2024/48, p. 64 (**Saint Lucia**), para. 13.