

INTERNATIONAL COURT OF JUSTICE

OBLIGATIONS OF STATES IN RESPECT OF CLIMATE CHANGE

(REQUEST FOR ADVISORY OPINION)

Written Replies

by the Arab Republic of Egypt

to the questions

put by Judges Cleveland, Tladi, Aurescu and

Charlesworth

20 December 2024

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I- Introduction

1. On 29 March 2023, the United Nations General Assembly (hereinafter the “UNGA”) adopted by consensus resolution 77/276 (hereinafter the “Resolution 77/276”) to request the International Court of Justice (hereinafter the “ICJ” or the “Court”) to render an advisory opinion on the following questions:

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

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

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

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

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

2. By order of 15 December 2023, the Court extended the time-limit within which written statements on the questions may be submitted to the Court to 22 March 2024, date on which the Arab Republic of Egypt duly submitted its written statement to the Court.

3. By order of 30 May 2024, the Court extended the time-limit within which States and organizations having presented written statements may submit written comments on the other written statements submitted to the Court, date on which the Arab Republic of Egypt duly submitted its written statement to the Court.
4. By letter dated 15 October 2024, the Court indicated the date for the hearing for States and international organizations participating in the oral proceedings. Egypt participated on 4 December 2024 in the oral proceedings held before the Court for this request for advisory opinion.
5. By letter dated 13 December 2024, the Registrar of the Court transmitted to States and International Organizations participating in the oral proceedings the texts of the questions put by Judges Cleveland, Tladi, Aurescu, and Charlesworth at the end of the public sitting of 13 December 2023. The letter indicated 20 December 2024 as the time-limit within which written replies to the questions can be submitted to the Court [hereinafter the “**Questions**”].
6. Egypt seizes this opportunity to submit its written replies to the Questions.

II- The Questions

A- Question put by Judge Cleveland

“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?”

Egypt’s reply to the question put by Judge Cleveland

- 1- In response to this question, Egypt will first briefly outline the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases, followed by an explanation of how these obligations should translate in States within whose jurisdiction fossil fuels are produced.
- 2- In Egypt’s view, under international law, in order for States to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions

of greenhouse gases, they are required to comply with the obligation of not causing harm to the environment, which includes the climate system.

- 3- This Court in its Nuclear Weapons Advisory Opinion reaffirmed the above by stating that: “the existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment”¹. This was reiterated by the Court in its Gabčíkovo-Nagymaros judgement². Further, in the Pulp Mills case, this Court asserted that the no-harm principle or the principle of prevention is a customary rule³. Egypt submits that the no harm principle entails a State-to-State Duty not to cause transboundary harm to the atmosphere as well as *an erga omnes* obligation⁴ not to cause harm to the climate system.
- 4- The no-harm principle entails a due diligence obligation, which is “an obligation to deploy adequate means, to exercise best possible efforts, to do the utmost, to obtain [a] result”⁵. It is a positive obligation to protect the environment from activities causing significant harm⁶.
- 5- The International Tribunal for the Law of the Sea (hereinafter “**ITLOS**”) further clarified that “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”⁷. It has also emphasized that “the standard of due diligence has to be more severe for the riskier activities”⁸.
- 6- The IPCC has indicated in its report issued in 2023 that fossil fuels amount to the largest share of GHG emissions (from CO₂) in 2019⁹. It further asserted that “if the annual CO₂ emissions between 2020 – 2030 stayed, on average, at the same level as 2019, the resulting cumulative emissions would almost exhaust the remaining carbon

¹ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, para. 29 [hereinafter “*The Nuclear Weapons Advisory Opinion*”]; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, ICJ. Reports 1997, p.7, para. 53, [hereinafter “*Gabčíkovo-Nagymaros Judgement*”].

² *Gabčíkovo-Nagymaros Judgement*, p. 41, para 53.

³ *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010, para. 101 [hereinafter “*Pulp Mills Case*”]; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica Along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, ICJ. Reports 2015, para. 104, [hereinafter “*Certain Activities Carried out by Nicaragua 2015*”].

⁴ *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970*, para. 33.

⁵ *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion*, 1 February 2011, ITLOS Reports 2011, para. 110, [hereinafter “*Responsibilities and Obligations of States in the Area Advisory Opinion*”]

⁶ *Ibid.*

⁷ *Responsibilities and Obligations of States in the Area Advisory Opinion*, para. 117.

⁸ *Ibid.*

⁹ IPCC, 2023: Summary for Policymakers. In: *Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* [Core Writing Team, H. Lee and J. Romero (eds.)], para. A.1.4. IPCC, Geneva, Switzerland, pp. 1-34, doi: 10.59327/IPCC/AR6-9789291691647.001 [hereinafter “*IPCC 2023*”].

budget for 1.5°C (50%), and deplete more than a third of the remaining carbon budget for 2°C (67%). Estimates of future CO₂ emissions from existing fossil fuel infrastructures without additional abatement already exceed the remaining carbon budget for limiting warming to 1.5°C (50%) (high confidence). Projected cumulative future CO₂ emissions over the lifetime of existing and planned fossil fuel infrastructure, if historical operating patterns are maintained and without additional abatement, are approximately equal to the remaining carbon budget for limiting warming to 2°C with a likelihood of 83% (high confidence)¹⁰.

- 7- The United Nations Environment Programme indicated in its 2024 Emissions Gap Report “No more hot air ... please!”, that “fossil fuel CO₂ emissions account for approximately 68 per cent of current GHG emissions. These emissions are driven by the combustion of coal, oil and gas in the energy sector, as well as industrial processes associated with the manufacture of metals, cement and other materials”¹¹.
- 8- In light of the above, and in light of the obligation of States to mitigate climate change under the climate change treaty framework (the UNFCCC¹², the Kyoto Protocol¹³, and the Paris Agreement¹⁴), States within whose jurisdiction fossil fuels are produced are required, in compliance with their due diligence obligation, to protect the environment by taking all possible measures to prevent the occurrence of significant harm to the climate system.
- 9- Egypt submits that when assessing the efficacy of the mitigation measures adopted by States, the Court should conduct its assessment based on the principles of the UNFCCC and the Paris Agreement (Equity and CBDR) and on objective of the UNFCCC stipulated in its article 2, as well as the temperature goal of the Paris Agreement in its article 2. 1 (a). Particular attention should also be given to scientific knowledge and technological advances specially in developed countries, which further require of them a stricter compliance with the due diligence obligation in light of their higher capabilities.
- 10- Measures that should be taken in States within whose jurisdiction fossil fuels are produced start firstly by reducing GHG emissions resulting from fossil fuels to

¹⁰ IPCC 2023, para. B.5.3

¹¹ United Nations Environment Programme (2024). Emissions Gap Report 2024: No more hot air ... please! With a massive gap between rhetoric and reality, countries draft new climate commitments, para. 2.2, Nairobi. <https://doi.org/10.59117/20.500.11822/46404>.

¹² The United Nations Framework Convention adopted in 1992, entered into force in 1994, 198 States are parties to this Convention [hereinafter the “UNFCCC”], available at: https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXVII7&chapter=27&Temp=mtdsg3&clang=_en

¹³ A Kyoto Protocol to the United Nations Framework Convention on Climate Change, adopted in 11 December 1997, entered into force in 16 February 2005, ratified by 192 States, can be accessed through: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-a&chapter=27&clang=_en

¹⁴ The Paris Agreement, adopted 12 December 2015, entered into force 4 November 2015, ratified by 195 States, can be accessed through: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&clang=_en

- effectively mitigate climate change. As indicated by the IPCC in its 2023 report, “rapid and far-reaching transitions across all sectors and systems are necessary to achieve deep and sustained emissions reductions and secure a liveable and sustainable future for all”¹⁵, and it further demonstrates that “net zero CO₂ energy systems entail: a substantial reduction in overall fossil fuel uses, minimal use of unabated fossil fuels”¹⁶.
- 11-To this end, in COP28 decision 1/CMA.5, Parties agreed to “transition away from fossil fuels in energy systems, in a just, orderly, and equitable manner, accelerating action in this critical decade, so as to achieve net zero by 2050 in keeping with science”¹⁷.
- 12-Second, States within whose jurisdiction fossil fuels are produced are required to comply with their due diligence obligation in that it also encompasses both the principle of prevention and the precautionary principle. In this regard, and as noted by this Court in its *Gabcikovo Nagymoros* case that it was “mindful that, in the field of environmental protection, vigilance and prevention are required on account of the often-irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage”¹⁸.
- 13-This is further asserted by the precautionary principle, found in principle 15 of the Rio Declaration¹⁹, which is, as indicated by the International Tribunal for the Law of the Sea, “an integral part of the general obligation of due diligence”²⁰. The Tribunal stated that “this obligation [of due diligence] requires States ‘to take all appropriate measures to prevent damage ... [and] applies in situations where scientific evidence concerning the scope and potential negative impact of the activity in question is insufficient but where there are plausible indications of potential risks”²¹.
- 14-When it comes to fossil fuels, their adverse impact on the climate is not an uncertainty but an established, proven scientific fact. As indicated plainly on the official page of the United Nations, “since the 1880s, human activities have been the main driver of climate change, primarily due to the burning of fossil fuels like coal, oil and gas. Burning fossil fuels generates greenhouse gas emissions that act like a blanket wrapped around the Earth, trapping the sun’s heat and raising temperatures”²². Further, it is indicated in the

¹⁵ IPCC 2023, para. C.3.

¹⁶ IPCC 2023, para. C.3.2, “In this context, ‘unabated fossil fuels’ refers to fossil fuels produced and used without interventions that substantially reduce the amount of GHG emitted throughout the life cycle; for example, capturing 90% or more CO₂ from power plants, or 50–80% of fugitive methane emissions from energy supply”, see more: IPCC 2023.

¹⁷ Report of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement on its fifth session, held in the United Arab Emirates from 30 November to 13 December 2023, Decision 1/CMA.5, can be accessed through: <https://unfccc.int/documents/637073>

¹⁸ *Gabcikovo-Nagymoros Judgment*, para. 140.

¹⁹ UN Conference on Environment and Development, ‘Rio Declaration on Environment and Development’ (14 June 1992) UN Doc A/CONF.151/26 (Vol. I), available at: <https://www.un.org/en/development/>

²⁰ *Responsibilities and Obligations of States in the Area Advisory Opinion*, para 131.

²¹ *Ibid.*

²² “Global Issues: Climate Change”, can be accessed through: <https://www.un.org/en/global-issues/climate-change>

part dedicated to climate driven food and water insecurity that “global warming of 1.1°C above pre-industrial levels has been caused by over a century of burning fossil fuels and unequal, unsustainable energy and land use. This has led to an increase in the frequency and intensity of extreme weather events, which have caused dangerous impacts on nature and people worldwide”²³.

15-The intrinsic link between fossil fuels and climate change presupposes a commensurately higher standard of due diligence for States within whose jurisdiction fossil fuels are produced. This can be further translated into the obligation to adopt appropriate rules and regulations with regard to the fossil fuel industry within their jurisdiction or control to reduce GHG emissions. As indicated by the IPCC “regulatory and economic instruments could support deep emissions reductions if scaled up and applied more widely (high confidence). Scaling up and enhancing the use of regulatory instruments can improve mitigation outcomes in sectoral applications, consistent with national circumstances”.²⁴

16-ITLOS addressed this point, finding that the due diligence obligation “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”²⁵.

17- States are therefore under an obligation to regulate the conduct of public and private entities operating within their jurisdiction or under their control. In this regard, Egypt deems it important to mention a few recent courts’ judgements that shed light on what States within whose jurisdiction fossil fuels are produced are required to do:

a- In the Gloucester Resources Limited Case, the Australian Court upheld the decision of the government not to grant a licence for the development of a coal mine indicating that “the exploitation of the coal resource (...) would not be a sustainable use and would cause substantial environmental and social harm”²⁶, and that the project will cause air pollution. The Court further rejected the argument that claimed “that the increase in GHG emissions associated with the project would not necessarily cause the carbon budget to be exceeded, because (...) reductions in GHG emissions by other sources (...) or increases in removals of GHGs by sinks (...) could

²³ *Ibid.*

²⁴ IPCC 2023, C.6.4.

²⁵ *Request for Advisory Opinion submitted by the Sub Regional Fisheries Commission, Advisory Opinion, 2 April 2015, ITLOS Reports 2015*, [hereinafter “*SRFC Advisory Opinion*”], para. 131; Pulp Mills Case, para. 197.

²⁶ Gloucester Resources Limited v. Minister of Planning, Land and Environment Court, New South Wales, Australia, 8 February 2019, para. 696, [hereinafter the “*Gloucester Resources Limited Case*”], can be accessed through:

https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2019/20190208_2019-NSWLEC-7-234-LEGRA-257_decision.pdf

balance the increase in GHG emissions associated with the project”²⁷. The Court considered this argument as “speculative and hypothetical”²⁸.

b- *Held v. the State of Montana*: Montana Supreme Court upheld on 18 December 2024²⁹ the decision of a US District Court ruling in favour of the young plaintiffs challenging the constitutionality of the provisions of the Montana Environment Policy Act (MEPA) which does not allow the State and State agencies which are responsible for authorizing fossil fuel activities from “considering the impacts of greenhouse gas emissions or climate change [beyond state borders] in their environmental reviews”, as well as the fossil-fuel provisions of this Act³⁰. The US District Court considered that “by prohibiting analysis of GHG emissions and corresponding impacts to the climate, as well as how additional GHG emissions will contribute to climate change or be consistent with the Montana Constitution, the [Act] violates Youth Plaintiffs’ right to a clean and healthful environment and is unconstitutional on its face”³¹. The Supreme Court found that: “Montanans’ right to a clean and healthful environment was violated by the MEPA Limitation, which precluded an analysis of GHG emissions in environmental assessments and environmental impact statements during MEPA review”³². The Court decided that these provisions are unconstitutional.

18-It is however crucial to stress that when determining the measures to be taken in fulfilment of States’ obligation to comply with the no-harm principle and the due diligence obligation due consideration should be given to the principles of equity and of common but differentiated responsibilities and respective capabilities (hereinafter “CBDR-RC”).

19-Both the UNFCCC and the Paris Agreement recognize that States have differing responsibilities and capabilities when addressing climate change. This is in recognition of the varying historical contributions to GHG emissions by States, as well as their current economic development level, capabilities and capacities. Another principle which should be taken into consideration when determining the responsibilities of

²⁷ *Gloucester Resources Limited Case*, para. 529.

²⁸ *Id.*, para. 530

²⁹ *Held v. State of Montana*, Supreme Court of the State of Montana ruling issued on 18 December 2024 [hereinafter “Montana Supreme Court in *Held v. Montana*”], can be accessed through: https://climatecasechart.com/wp-content/uploads/case-documents/2024/20241218_docket-DA-23-0575_opinion.pdf

³⁰ *Held v. State of Montana*, order by Montana First Judicial District Court Lewis and Clark County, August 14, 2023, [hereinafter “*Held v. Montana*”], can be accessed through: https://climatecasechart.com/wp-content/uploads/case-documents/2023/20230814_docket-CDV-2020-307_order.pdf

³¹ *Held v. Montana*.

³² *Montana Supreme Court in Held v. Montana*

fossil fuel producing States should be the principle of equity, also explicitly referenced in both the UNFCCC and the Paris Agreement.

20-The European Court of Human Rights explicitly acknowledged these differentiated responsibilities in a recent judgement, where it stated that: “while climate change is undoubtedly a global phenomenon which should be addressed at the global level by the community of States, the global climate regime established under the UNFCCC rests on the principle of common but differentiated responsibilities and respective capabilities of States (Article 3 §1). This principle has been reaffirmed in the Paris Agreement (Article 2 §2) and endorsed in the Glasgow Climate Pact (...) as well as in the Sharm el-Sheikh Implementation Plan (...). It follows, therefore, that each State has its own share of responsibilities to take measures to tackle climate change and that the taking of those measures is determined by the State’s own capabilities rather than by any specific action (or omission) of any other State (...)”³³.

21- As for the principle of equity, and in order to uphold it, a central consideration should be the extent of economic dependence of a State on the production of fossil fuels. Many developing countries rely heavily on fossil fuel revenue to support their economic development and their efforts to eradicate poverty and ensure social welfare for their citizens. For these countries, transitioning away from fossil fuels represents a significant challenge as it would result in loss of revenue, and reduced resources for development. The case is quite different for developed countries which have industrialized over decades using fossil fuels, have succeeded in diversifying their economies and are hence less reliant on fossil fuel production and exports for national income. They furthermore have greater financial and technological capacity to transition away from fossil fuels.

22-And while the fundamental obligations under international law to protect the environment apply to all States, the extent and manner of these obligations must differ in light of the principles of equity and CBDR-RC requiring a higher standard of due diligence being applied to developed countries within whose jurisdiction fossil fuels are produced. Developed countries who are less dependent on fossil fuel revenue for economic development are thus required to “take the lead by undertaking economy-wide absolute emission reduction targets”³⁴, while developing countries are

³³ *Case of Verein Klimaseniorinnen Schweiz and others v. Switzerland*, ECtHR Application no. 53600/20, Judgment of the Grand Chamber (9 April 2024), para. 442.

³⁴ Article 4.4. of the Paris Agreement.

“encouraged to move over time towards economy-wide emission reduction or limitation targets in the light of different national circumstances”³⁵.

B- Question put by Judge Tladi

“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 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?”

Egypt’s written reply to the question put by Judge Tladi

- 1- In replying to this question, Egypt will address each of its elements separately (the procedural nature of Article 4, Article 31 (3) of the Vienna Convention on the Law of Treaties, and whether the object and purpose of the climate change treaty framework has any effect on considering Article 4 a procedural obligation) followed by an elaboration on how these elements are interconnected.
- 2- We first submit that article 4 of the Paris Agreement³⁶ stands as an article of procedural nature, independently of the “object and purpose of the Paris Agreement” or a reference to article 31 (3) of the Vienna Convention on the Law of Treaties (hereinafter the “VCLT”)³⁷. This is because the single legal obligation (indicated by the use of “shall” under paragraphs 2, 8, 9) of States’ Parties under article 4.2 of the Paris Agreement is to “prepare, communicate and maintain successive nationally determined contributions that it [a State Party] intends to achieve”.

³⁵ Article 4.4. of the Paris Agreement.

³⁶ The Paris Agreement, adopted 12 December 2015, entered into force 4 November 2015, ratified by 195 States, can be accessed through: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&clang=_en

³⁷ Vienna Convention on the Law of Treaties, adopted on 23 May 1969, entered into force on 27 January 1980, [*hereinafter the “VCLT”*]

- 3- Meanwhile, absent from article 4 are any clear non-procedural legal obligations. Indeed, in support of this interpretation, the subsequent para 3 of article 4 requires no more than that NDCs should “reflect the highest possible ambition” which cannot be seen as imposing a precise, specific, quantifiable quantum of reduction per NDC, but rather leaves this to the discretion of each party, which is consistent with and a reflection of the “nationally determined” nature of the Paris Agreement and its bottom-up approach. The obligation imposed on States Parties is therefore to submit NDCs and to report on the progress of their delivery. This is further indicated in paragraph 2 of Article 4 which reads: “Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions”³⁸, meaning the objectives of the contributions that the Parties determine at their discretion, and without a clear legal obligation as to their content.
- 4- In light of this reading of the provisions of article 4, it cannot reasonably be assumed that the “objective and purpose” of the Paris Agreement identified under article 2 “holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change”³⁹ can be achieved merely through preparing, communicating and maintaining successive NDCs as per article 4 of the Paris Agreement, and hence our submission that other rules of international law need to inform the obligations of States in relation to the protection of the environment, such as the no-harm principle and the due diligence obligation, which explains why a reference to article 31 (3) of the VCLT was made.
- 5- In accordance with article 31 (3) paragraph (c) of the VCLT, the rule of systemic integration permits the concurrent application of international rules from different instruments and sources⁴⁰ when they are compatible and address the same issue⁴¹. They ought therefore to “be interpreted as to give rise to a single set of compatible obligations”⁴². This Court has further confirmed the same when it observed in its advisory opinion on the presence of South Africa in Namibia that: “an international

³⁸ Article 4 of the Paris Agreement

³⁹ Article 2 of the Paris Agreement

⁴⁰ Written Statement of Vanuatu, para. 227; M. Koskenniemi et al., *Fragmentation of international law: difficulties arising from the diversification and expansion of international law*, Report of the Study Group of the International Law Commission, UN Doc. A/CN.4/L.682, 13 April 2006, para 414, [hereinafter “*M. Koskenniemi, Fragmentation of International Law*”]

⁴¹ *M. Koskenniemi, Fragmentation of International Law*, p.8.

⁴² *Ibid.*

instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation”⁴³.

- 6- As previously indicated under Egypt’s written submissions, the climate change treaty framework which includes the Paris Agreement cannot solely address climate change, in particular due to the “Nationally Determined” nature of the “Contributions” of parties and the consequent blurring of the mandatory and non-mandatory provisions within the Agreement on mitigation, adaptation and provision of climate finance. Indeed, a close examination of the Paris Agreement demonstrates that the main legal obligation of Parties is to report. Mainly, to submit NDCs and to report on progress of their delivery. Hence, while there is wide agreement that the Paris Agreement is deemed an international legal treaty according to the definition of the VCLT, there continues to be serious debate and divergent views and interpretations, including within the ongoing UNFCCC negotiating process, as to whether the provisions of the Paris Agreement impose specific legal obligations on Parties to mitigate, adapt, and provide climate finance and support, beyond the obligation “to report”.
- 7- The assertion that the legal obligations under the Paris Agreement cannot alone suffice to achieve its temperature goal in article 2 is further supported by the recent finding of the European Court of Human Rights (hereinafter the “**ECtHR**”) in its judgement rendered on 9 April 2024, in the *Verein Klimaseniorinnen Schweiz and others v. Switzerland* case, where the ECtHR recognized the adverse effects of climate change on the enjoyment of human rights, ⁴⁴ and found that policies for net-zero emissions and carbon budgets “can hardly be compensated for by reliance on the State’s NDC under the Paris Agreement”,⁴⁵ as suggested by the Swiss government. This, in our view, represents further affirmation that the obligations of States in respect of climate change go beyond the central obligation under the climate change treaty framework (submitting a Party’s NDC).
- 8- It is equally important here to recall the recent advisory opinion rendered by the International Tribunal for the Law of the Sea (“**ITLOS**”), unanimously, where it emphasized that the obligations under UNCLOS for the protection of the marine environment from pollution caused by anthropogenic GHG emissions would not be satisfied if States simply complied with the Paris Agreement,⁴⁶ and that article 194 (1)

⁴³ 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., para. 53.

⁴⁴ *Case of Verein Klimaseniorinnen Schweiz and others v. Switzerland*, ECtHR Application no. 53600/20, Judgment of the Grand Chamber (9 April 2024), paras. 410,411, 413, 542.

⁴⁵ *Id.*, para. 571.

⁴⁶ Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law, ITLOS, 21 May 2024, Case No. 31, para.223.

UNCLOS imposed an obligation on them to take measures to reduce their emissions. ITLOS further indicated that the relationship between UNCLOS and the Paris Agreement is a relationship of complementarity⁴⁷.

C- Question put by Judge Aurescu

“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?”

Egypt’s reply to the question put by Judge Aurescu

- 1- As Egypt has previously indicated under its written statement, climate change has adverse impact effects on all aspects of human life. In response to the question, we will briefly outline impacts of climate change on human rights.
- 2- According to the most recent report of the Special Rapporteur on the promotion and protection of human rights in the context of climate change “around the globe, many people are being denied the right to life as a consequence of climate change. This is due to direct impacts such as floods, droughts, storm surges, heat stress, hurricanes, typhoons and cyclones”⁴⁸. The Cancun Agreements adopted in 2010 stated that “the adverse effects of climate change have a range of direct and indirect implications for the effective enjoyment of human rights”⁴⁹.
- 3- The Independent Expert on “*the issue of human rights obligations relating to the enjoyment of a safe clean, healthy and sustainable environment*”, in his report submitted to the Human Rights Council stated that: “environmental degradation can and does adversely affect the enjoyment of a broad range of human rights, including rights to life, health, food and water”⁵⁰.

⁴⁷ *Ibid.*

⁴⁸ Report of the Special Rapporteur on the promotion and protection of human rights in the context of climate change, Ian Fry, A/78/225, 28 July 2023, available at: <https://www.ohchr.org/en/documents/thematic-reports/a78255-report-special-rapporteur-promotion-and-protection-human-rights>

⁴⁹ 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”, FCCC/CP/2010/7/Add.1, 15 March 2011.

⁵⁰ UNHRC, ‘Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment’, Preliminary Report, John H. Knox, 2012, A/hrc/22/43, p. 12.

- 4- Although none of the human rights treaties explicitly includes a right to a healthy environment, this does not preclude the application of human rights law to the environment, for the reason that it is now undoubtedly clear that climate change interferes with the enjoyment of human rights⁵¹. There are general obligations under international human rights law that States are required to abide by, namely the obligation to respect, to protect and to fulfil human rights⁵².
- 5- First, States must adopt effective mitigation and adaptation measures to protect the right to life and prevent loss of life in accordance with, among others, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant of Economic Social and Cultural Rights and the Convention on the Rights of the Child.
- 6- The African Commission on Human and Peoples' Rights has interpreted the right to life as requiring 'preventive steps to preserve and protect the natural environment'⁵³, and found a violation of the right to life resulting from unacceptable levels of environmental degradation⁵⁴. A State's responsibility under international human rights law can also arise for failing to regulate or control the conduct of private persons to prevent violations of the right to life resulting from climate change
- 7- States' positive obligations to protect, respect and ensure human rights intersect with obligations arising under international environmental law, including due diligence and the precautionary principle⁵⁵. The standard of diligence and care required is one of 'reasonableness', namely to "do all that could be reasonably expected of them to avoid a real and immediate risk to life"⁵⁶. This language indicates that "the standard of care may differ from one State to another", with the result that States' common but differentiated responsibilities and respective capabilities may be considered as part of an assessment of whether or not the State has met the standard of "reasonableness"⁵⁷.
- 8- Second, the right to a clean, healthy and sustainable environment can be achieved through the right to development. In this regard, States must implement effective

⁵¹ Part III Climate Change – Principles and Emerging Norms Concepts in International Law, Ch.11 Human Rights Principles and Climate Change, John H. Knox, from the Oxford Handbook of International Climate Change Law, Cinnamon P. Carlame, Kevin R. Gray, Richard Tarasofsky, Oxford Scholarly Authorities on International Law, 24 March 2016, [hereinafter "*Human Rights Principles and Climate Change*"]

⁵² "The Foundation of International Human Rights Law", Universal Declaration of Human Rights, available at: [https://www.un.org/en/about-us/udhr/foundation-of-international-human-rights-law#:~:text=The%20obligation%20to%20respect%20means,groups%20against%20human%20rights%20abuse;Albers, J. H. \(2018\). Human Rights and Climate Change: Protecting the Right to Life of Individuals of Present and Future Generations. Security and Human Rights, 28\(1-4\), 113-144. https://doi.org/10.1163/18750230-02801009](https://www.un.org/en/about-us/udhr/foundation-of-international-human-rights-law#:~:text=The%20obligation%20to%20respect%20means,groups%20against%20human%20rights%20abuse;Albers, J. H. (2018). Human Rights and Climate Change: Protecting the Right to Life of Individuals of Present and Future Generations. Security and Human Rights, 28(1-4), 113-144. https://doi.org/10.1163/18750230-02801009).

⁵³ *General Comment No. 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4)*, adopted during the 57th Ordinary Session of the ACHPR (4–18 November 2015, para 3.

⁵⁴ 155/96 : Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) / Nigeria., para 46.

⁵⁵ *Tatar C. Roumanie*, Application no 67021/01 (ECtHR, 5 July 2007).

⁵⁶ *Osman v. United Kingdom*, (87/1997/871/1083), ECtHR, 28 October 1998, paras 115–16.

⁵⁷ Wewerinke-Singh, Margaretha. *State Responsibility, Climate Change and Human Rights Under International Law*. Oxford,: Hart Publishing, 2018, p. 110.

mitigation measures, and provide necessary finance to developing countries to mitigate and adapt to climate change.

9- This right to development, and in particular economic development, is to be pursued in light of and in conformity with the concept of sustainable development, as indicated by the Court in the *Gabcikovo-Nagymaros* case where it emphasized that the “need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development”⁵⁸. This is also central and has been reiterated in the UNFCCC⁵⁹, and the Paris Agreement.⁶⁰

10- In the report of the Secretary General and the United Nations High Commissioner for Human Rights, on the right to development, it was indicated that: “the adverse impacts of climate change pose visible challenges and obstacles for States, particularly developing countries, to achieving sustainable development”⁶¹. It was further indicated that: “the poorest people in developing countries, who contributed least to climate change, are most vulnerable to its adverse impacts”⁶².

11- Developed countries, in particular, have thus an obligation to provide the necessary and needed finance support to developing countries to be able to mitigate climate change and adapt to its adverse impacts, to be able to sustainably develop⁶³.

12- In this regard, Egypt would like to highlight that sustainable development should be understood as comprising the principle of intergenerational equity which entails the preservation of natural resources for future generations⁶⁴, as well as the principle of equitable use or intrageneration equity which entails that the use of natural resources should be sustainable, meaning that it should take into account the needs of other States, in view of conserving and developing these resources⁶⁵.

⁵⁸ *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, ICJ. Reports 1997, para. 140.

⁵⁹ The United Nations Framework Convention adopted in 1992, entered into force in 1994, 198 States are parties to this Convention, UNFCCC, Article 3 (4), [hereinafter the “UNFCCC”], available at: https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXVII7&chapter=27&Temp=mtdsg3&clang=_en

⁶⁰ The Paris Agreement, adopted 12 December 2015, entered into force 4 November 2015, ratified by 195 States, Paris Agreement, Article 2(1). See also Preamble, can be accessed through:

https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&clang=_en

⁶¹ Report of the Secretary-General and the United Nations High Commissioner for Human Rights, Right to development, A/HRC/36/23, Thirty-sixth session, Annual Report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary General, 26 July 2017, available at:

<https://documents.un.org/doc/undoc/gen/g17/223/63/pdf/g1722363.pdf?token=Gd8Pwucp8HAX4KiEBa&fe=true>

⁶² Report of the Secretary-General and the United Nations High Commissioner for Human Rights, Right to development, A/HRC/36/23, Thirty-sixth session, Annual Report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary General, 26 July 2017, available at:

<https://documents.un.org/doc/undoc/gen/g17/223/63/pdf/g1722363.pdf?token=Gd8Pwucp8HAX4KiEBa&fe=true>

⁶³ “Poor and Vulnerable Countries Need Support to Adapt to Climate Change”, IMF Blog, March 23, 2022, available at: <https://www.imf.org/en/Blogs/Articles/2022/03/23/blog032322-poor-and-vulnerable-countris-need-support-to-adapt-to-climate-change>

⁶⁴ Chapter 6, Cambridge: Cambridge University Press, [hereinafter “*General Principles and Rules in Principles of International Environmental Law*”].

⁶⁵ *Request for Advisory Opinion submitted by the Sub Regional Fisheries Commission, Advisory Opinion*, 2 April 2015, ITLOS Reports 2015, para. 190 [hereinafter “*SRFC Advisory Opinion*”]

- 13-Third, States also have an obligation to protect human rights from the activities of private actors within their jurisdiction, or control, causing significant harm to the climate system in order to protect the right to a healthy, clean and sustainable environment.
- 14-Under international law, the due diligence obligation “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”⁶⁶
- 15-According to the Guiding Principles on Business and Human Rights, “States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations”⁶⁷. In this regard, private actors should “avoid causing or contributing to adverse human rights impacts through their own activities”⁶⁸, and “seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations”⁶⁹. This includes the emission of GHGs activities⁷⁰.
- 16- In light of this, Egypt submits that a State is under the obligation, through its rules, policies and regulations, to regulate the conduct of and to penalize private entities operating under its jurisdiction⁷¹ for their polluting activities⁷², as failure by States to implement adequate mitigation laws will allow private operators to “remain business as usual in emitting GHGs”⁷³.

⁶⁶ *SRFC Advisory Opinion*, para. 131; *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, *I.C.J. Reports 2010*, para. 197.

⁶⁷ “Guiding Principles on Business and Human Rights, Implementing the United Nations “Protect, Respect and Remedy” Framework”, United Nations Human Rights Office of the High Commissioner, endorsed by the Human Rights Council in its resolution 17/4 of 16 June 2011, available at:

https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinessshr_en.pdf

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ “Frequently asked questions on human rights and climate change”, United Nations Human Rights Office of the High Commissioner, Fact Sheet No. 38, 8 September 2021.

⁷¹ *Maljean-Dubois S. The No-Harm Principle as the Foundation of International Climate Law. In: Mayer B, Zahar A, eds. Debating Climate Law. Cambridge University Press; 2021:15-28*; Riccardo Pisillo-Mazzeschi, The Due Diligence Rule and the Nature of the International Responsibility of States, 35 GERMAN Y.B. INT'L L. 9 (1992).

⁷² *Riccardo, the Due Diligence Rule.*

⁷³ Tsang, Vanessa S.W., "Establishing State Responsibility in Mitigating Climate Change under Customary International Law" (2021). LL.M. Essays & Theses. 1:https://scholarship.law.columbia.edu/llm_essays_theses/1

D- Question put by Judge Charlesworth

“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 provisions 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?”

Egypt’s written Reply to the question put by Judge Charlesworth

- 1- First and foremost, in order to comprehensively answer this question, Egypt respectfully refers the honorable judge to Egypt’s written comments as well as its oral statement with regard to the applicable law in answering the two questions submitted to the Court in this advisory opinion.
- 2- As outlined in Egypt’s submissions, we argued for the application of the whole corpus of international law which includes the application of the relevant Articles on Responsibility of States for Internationally Wrongful Acts⁷⁴ (hereinafter “**ARSIWA**”). since the climate change treaty framework (the UNFCCC⁷⁵ and its Paris Agreement⁷⁶) is not a self-contained regime.
- 3- Egypt submits that for a regime to be self-contained *vis-à-vis* the customary international law of state responsibility it needs to have a “special set of (secondary) rules concerning breach and reactions to breach”⁷⁷. The commentary to article 55 ARSIWA clarifies that the general law of State responsibility is excluded “where and to

⁷⁴ Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries, 2001, “text adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission’s report covering the work of that session (A/56/10)”, [hereinafter “**ARSIWA**”]

⁷⁵ The United Nations Framework Convention adopted in 1992, entered into force in 1994, 198 States are parties to this Convention [hereinafter the “**UNFCCC**”], available at: https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXVII7&chapter=27&Temp=mtdsg3&clang=_en

⁷⁶ The Paris Agreement, adopted 12 December 2015, entered into force 4 November 2015, ratified by 195 States, can be accessed through: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&clang=_en

⁷⁷International Law Commission (ILC), ‘Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law’, (2006) 2(2) *Yearbook of the International Law Commission*, at para. 12 [hereinafter “*ILC, Conclusions of the work of the Study Group on the Fragmentation of International Law*”]

the extent that the conditions for the existence of an internationally wrongful act or its legal consequences are determined by special rules of international law”.⁷⁸ For instance, this Court indicated in *United States Diplomatic and Consular Staff in Tehran*: “the rules of diplomatic law, in short, constitute a self-contained regime which, on the one hand, lays down the receiving State’s obligations regarding the facilities, privileges and immunities to be accorded to diplomatic missions and, on the other foresees their possible abuse by members of the mission and specifies the means at the disposal of the receiving States to counter any such abuse”⁷⁹.

4- On the contrary, the climate change treaty framework lacks such specific rules concerning the conditions for determining the existence of a breach, and the legal consequences of such a breach, which would qualify it as a self-contained regime that displaces the customary international law of State responsibility. Indeed, the only article addressing compliance within the Paris Agreement is Article 15 which establishes a mechanism to facilitate implementation and promote compliance. Paragraph 2 of article 15 explicitly states that this mechanism shall consist of a committee that shall be expert-based and *facilitative* in nature and function in a manner that is transparent, *non-adversarial* and *non-punitive*. Therefore, despite the presence of a compliance mechanism by virtue of this article, the reality as explicitly stated within the article and later confirmed in the negotiations finalizing the “Paris Agreement Work Program” demonstrates that the committee was not intended to enforce implementation and certainly not to penalize non-compliance, which is consistent with the nationally determined, bottom-up nature of the Paris Agreement and further disputing the validity of the claim that the Agreement can be deemed the cornerstone of the legal regime governing state responsibility regarding climate change.

5- Egypt thus submits that the UNFCCC and its Paris Agreement do not contain any rules on State responsibility. Article 14 of the UNFCCC (dispute settlement), articles 15 and 24 of the Paris Agreement (compliance mechanism and dispute settlement respectively) do not constitute a regime on State responsibility. Also, these articles do not exclude the application of the general principles of State responsibility because there is no “inconsistency between them, or else a discernible intention that one provision is to exclude the other”⁸⁰.

⁷⁸ Commentary, Article 55 of ARSIWA, p. 140.

⁷⁹ *United States Diplomatic and Consular Staff in Tehran, Judgment*, I. C. J. Reports 1980, para. 86.

⁸⁰ Commentary 4, Article 55 of ARSIWA.

- 6- Egypt submits that the declarations made by some States upon ratifying or acceding to the UNFCCC⁸¹ and its Paris Agreement⁸² to the effect that no provisions 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, are a further indication of the applicability of the law of State responsibility to breaches of obligations as a consequence of climate change, under international law and the climate change treaty framework, and reflects the anticipation of those States making the declarations and indeed their apprehension, that a future claim could be made that the responsibility of States is limited to the obligations contained in the Paris Agreement, to the exclusion of obligations emanating from international law. This apprehension is now evidently justified by claims alleging exactly what those countries making declarations had anticipated.
- 7- It is also worth noting that despite the time gap between the adoption of the UNFCCC in 1992 and its Paris Agreement in 2015 (23 years), and despite the fact that the above-mentioned declarations made upon the ratification of the UNFCCC were reiterated again upon ratification of the Paris Agreement (with a slight change of language), no State has objected to these declarations, nor has deposited any declaration to the contrary. In Egypt's view, this can be construed as an acceptance by States Parties of this interpretation and that it reflects the correct legal understanding of the limits of the UNFCCC and its Paris Agreement.
- 8- Egypt further submits that as indicated by the International Tribunal for the Law of the Sea: "if a State fails to comply with [its] obligations, international responsibility would be engaged for that State"⁸³. The European Court of Human Rights, found: "that each State has its own share of responsibilities to take measures to tackle climate change and that the taking of those measures is determined by the State's own capabilities rather than by any specific action (or omission) of any other State (...) The Court considers that a respondent State should not evade its responsibility by pointing to the responsibility of other States, whether Contracting Parties to the Convention or not (...). This position is consistent with the Court's approach in cases involving a

⁸¹ Declaration made by Fiji, Kiribati, Nauru, Papa New Guinea, Tuvalu, upon signature, separately, can be accessed here: https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXVII-7&chapter=27&Temp=mtdsg3&clang=en

⁸² Declaration made by Cook Islands, similar declaration with slight difference were made by the Federated States of Micronesia, Nauru, Niue, the Philippines, Solomon Islands, and Tuvalu, can be accessed through: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&clang=en

⁸³ Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law, ITLOS, 21 May 2024, Case No. 31, para.223, 286, can be accessed through: https://www.itlos.org/fileadmin/itlos/documents/cases/31/Advisory_Opinion/C31_Adv_Op_21.05.2024_orig.pdf

concurrent responsibility of States for alleged breaches of Convention rights, where each State can be held accountable for its share of the responsibility for the breach in question. It is also consistent with the principles of international law relating to the plurality of responsible States, according to which the responsibility of each State is determined individually, on the basis of its own conduct and by reference to its own international obligations. (...)”⁸⁴.

9- Egypt submits that the above-mentioned recent courts’ decisions is a further indication that the UNFCCC and its Paris Agreement are not a self – contained regimes.

10- Lastly, and in the same vein, Egypt would like to highlight that the few States claiming that article 8 of the Paris Agreement, as well as paragraph 51 of COP decision 1/CP.21⁸⁵ regarding loss and damage exclude the applicability of the general law on State responsibility does not stand. First, there is no express exclusion of the law of State responsibility in either article 8 or in the above-mentioned COP decision⁸⁶. Second, “compensation” mentioned in paragraph 51 of the COP decision is not the only form of reparation provided for in ARSIWA⁸⁷. Third, Article 8 read together with paragraph 51 of the COP decision 1/CP.21 demonstrates that States Parties did not intend to exclude the application of the principles of State responsibility.

11- Egypt further submits that the issue of loss and damage provided for under the UNFCCC, its Paris Agreement and COP decisions is not a substitute for reparation in the form of compensation arising from a breach of international obligations that has caused harm to the environment and the climate system and that caused injury to States. Indeed, in 2015 at the adoption of the Paris Agreement at CoP21 the Parties explicitly agreed, through COP Decision 1/CP.21 that “article 8 [in relation to loss and damage] of the [Paris] Agreement does not involve or provide a basis for any liability or compensation”⁸⁸.

12- Despite this explicit exclusion of any basis for liability or compensation within the Paris Agreement, developed country parties have been consistently cautious when addressing the issue of loss and damage within the UNFCCC negotiations process. Most recently, at COP27 under the Egyptian presidency, several developed country parties

⁸⁴ *Case of Verein Klimaseniorinnen Schweiz and others v. Switzerland*, ECtHR Application no. 53600/20, Judgment of the Grand Chamber (9 April 2024), paras. 442 to 444.

⁸⁵ COP Decision 1/CP. 21, paragraph 51 of this decision states that the Conference of the Parties: “agrees that Article 8 of the [Paris] Agreement does not involve or provide a basis for any liability or compensation”, can be accessed through: <https://unfccc.int/resource/docs/2015/cop21/eng/10a01.pdf>

⁸⁶ See also: ‘Loss and Damage in Paris and State Responsibility’, can be found here:

<https://legalresponse.org/legaladvice/loss-and-damage-in-the-paris-agreement-and-cop-decision-and-state-responsibility/>

⁸⁷ *Ibid.*

⁸⁸ COP Decision 1/CP. 21, paragraph 51 of this decision states that the Conference of the Parties: “agrees that Article 8 of the [Paris] Agreement does not involve or provide a basis for any liability or compensation”, can be accessed through: <https://unfccc.int/resource/docs/2015/cop21/eng/10a01.pdf>

conditioned their acceptance of the decision to include the issue of loss and damage on the COP agenda on an explicit exclusion of liability and compensation, arguing that they do not want “a legal structure that is tied to compensation or liability”⁸⁹. The issue was only resolved through an agreement whereby the COP27 President explicitly announced, for the record, that “the outcome of this agenda item [loss and damage fund] ... do not involve liability or compensation”⁹⁰, after which the decisions on a loss and damage fund were adopted (The Sharm El Sheik Implementation Plan, and Funding arrangements for responding to loss and damage associated with the adverse effects of climate change, including a focus on addressing loss and damage)⁹¹. It is therefore self-contradictory, to say the least, for states to insist on the one hand, on an explicit exclusion of liability and compensation from any discussion of loss and damage within the regime, only to argue that the same regime represents adequate remedy which replaces reparation in the form of compensation, on the other.

13-As rightly put by Vanuatu, “while this contemporaneous consensus-based agreement [in reference to the Conference of the Parties in COP Decision 1/CP.21] is relevant for the interpretation of Article 8, it does not and cannot limit the rights of States under general international law. Several small island States, while ratifying the Paris Agreement entered declarations to this effect”⁹². As Tuvalu has indicated in its written comments, which Egypt concurs with, that the UNFCCC and its Paris Agreement: “would not displace bedrock principles of customary international law applicable to reparation for breaches of international obligations. Customary international law – including the law of State responsibility – is a separate source of law from that of the UNFCCC and the Paris Agreement, and these sources are complementary, not conflicting”⁹³. and this is in line with the declarations made upon the ratification of the UNFCCC and its Paris Agreement “to the effect that no provisions 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”⁹⁴.

14-In addition to the above, Egypt wishes to stress that the relevance of these declarations is not limited to establishing the applicability of ARSIWA, but extends to

⁸⁹ “Contemporary Practice of the United States Relating to International Law”, Cambridge University Press for the American Society of International Law, can be accessed through: <https://www.cambridge.org/core/services/aop-cambridge-core/content/view/0F9F5E4C5F30C5FE00B89B4A4EF4403C/S0002930023000131a.pdf/the-united-states-agrees-to-loss-and-damage-fund-at-cop27.pdf>

⁹⁰ *Ibid.*

⁹¹ Both decisions, 1/CP.27 and 2/CP.27 respectively can be accessed through: <https://unfccc.int/documents/626561>

⁹² Vanuatu Written Statement, p. 210, para. 433.

⁹³ Tuvalu Written Comments, p. 15, para. 39.

⁹⁴ Part of the question put by Judge Charlesworth.

further substantiating the view that the UNFCCC and its Paris Agreement do not preclude the application of principles of general international law. As rightly put by Nauru in its written comments, the declarations made by some States (such as Cook Islands, Fiji, Kiribati, Marshall Islands, the Federated States of Micronesia, Niue, Papua New Guinea, the Philippines, Solomon Islands, Tuvalu, and Vanuatu) upon the ratification of the UNFCCC, and its Paris Agreement “reinforce” the argument sustaining that the climate change treaty framework “does not exclude the application of principles of general international law such as the principle of prevention of transboundary harm”⁹⁵, which is, as indicated in the wording of the United Nations General Assembly Resolution 77/276, and in multiple written and oral statements of States and international organizations, further proof that the whole corpus of international law should be considered when answering the questions submitted to the Court in this advisory opinion.

15-Lastly, Egypt submits that all of this leads to the same conclusion. Namely; that States making these declarations at the time of signing or ratification of the UNFCCC and its Paris Agreement were apprehensive of the possibility of other States claiming in the future that the existence of the climate change treaty framework excludes the application of the general rules of international law. Their caution at the time has now been proven well-founded, as what they anticipated is precisely what is now being claimed by other state parties.

⁹⁵ Written Comments of Nauru, paras. 30 – 31.