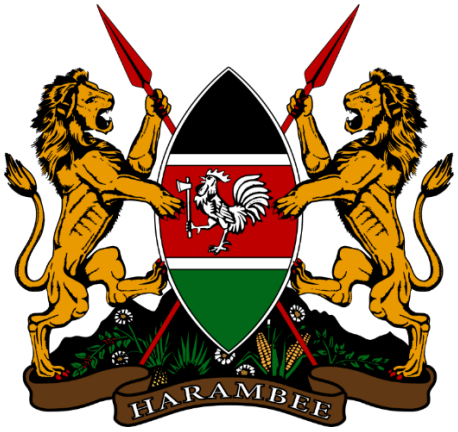

REPUBLIC OF KENYA

INTERNATIONAL COURT OF JUSTICE

Obligations of States in Respect of Climate Change

(Request for Advisory Opinion)

Written Replies of the Republic of Kenya to the Questions Put by Judges Cleveland, Tladi, and Charlesworth

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20 December 2024

CONTENTS

1. Pursuant to the President's direction and the Court's correspondence dated 13 December 2024, the Republic of Kenya hereby submits its written replies to the questions put by (*i*) Judge Cleveland, (*ii*) Judge Tladi, and (*iii*) Judge Charlesworth at the end of the public sitting that day.[1]

I. 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?"

2. Kenya responds to the question put by Judge Cleveland as follows.

3. The combustion of fossil fuels has contributed significantly to anthropogenic emissions of greenhouse gases ("**GHGs**") and climate change. Kenya has already made detailed submissions as to the universal scientific consensus, as embodied in the IPCC's work, that unequivocally establishes a causal link between the increased concentrations of GHGs through anthropogenic emissions and their resulting, and severe, climate-related harms.[2] Against that backdrop of unambiguous causal links, Kenya will focus on the specific obligations binding on the narrower category of States within whose jurisdiction fossil fuels are produced.

4. Before turning to the specific obligations binding on that narrower category of States, Kenya wishes to emphasize that "production" of fossil fuels must be understood in its broad sense not only to refer to the extraction or refinement of fossil fuels, but also to a series of connected actions or omissions which themselves may be in breach of international legal obligations. Such actions include, but are not limited to:

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[1] Kenya acknowledges the significance of the question put by Judge Aurescu in the context of the Court's advisory opinion. This is especially so considering that human rights obligations under, *inter alia*, the International Covenant on Civil and Political Rights and the International Covenant on Economic Social and Cultural Rights were explicitly referenced by the United Nations General Assembly in its request for the advisory opinion. Kenya takes the view that, given the time available and the attention that Judge Aurescu's question deserves, it would be of most assistance to the Court to focus its answers on elaborating issues that were engaged with in its written submissions. Nevertheless, Kenya strongly supports the submissions of other participants that obligations of States in respect of climate change must be informed and guided by States' human rights obligations, particularly the right to a clean, healthy, and sustainable environment under international law.

[2] Written Comments of Kenya, paras. 3.1-3.3, ICJ CR 2024/43 (6 December 2024), paras. 2-7 (Okowa).

a. Subsidies provided by a State for the production or extraction of fossil fuels, and other similar measures including those defined in the Kyoto Protocol.[3]

b. Authorization or regulatory approval by a State for the expansion of fossil fuel production;

c. State legislation, regulation, policies, programmes, and decisions regarding energy policy, and their implementation, that support or sustain fossil fuel production, extraction, and/or consumption.

5. There may be further acts or omissions which are linked to the production/extraction of fossil fuels, and which may also entail the specific responsibility of producing States, but Kenya considers the three activities enumerated above to be the most relevant in respect of determining the lawfulness or unlawfulness of a producing State's contribution to harmful GHG emissions. Though the harms to the climate system may be global in nature, when a State has the ability to regulate the production and extraction of fossil fuels within its jurisdiction, and to enforce such regulations, it exerts effective control over the source of the emissions caused thereby.[4]

A. Identifying States within whose jurisdiction fossil fuels are produced

6. Kenya acknowledges that, aside from the practice under UNFCCC and the Kyoto Protocol which enumerated developed and developing States under different annexes, a category of "fossil fuel-producing States" is insufficiently clear. In the vast majority of States, there is a minimal degree of fossil fuel production, such as coalfields, petroleum deposits, or offshore natural gas. Even if one were to focus on, in the language of Article 4, paragraph 2, of UNFCCC, States "whose economies are highly dependent on the income" generated from fossil fuel production or extraction, or members of a specific international organization such as OPEC, such categories would be relatively artificial, vague, and generate legal fictions.

7. The lack of available elements to categorize with precision "States within whose jurisdiction fossil fuels are produced" does not mean, however, that such States do not bear differentiated responsibilities within the UN climate regime. Kenya prefers instead to revert to

[3] Kyoto Protocol, Article 2(1)(a)(v) (calling for the progressive "reduction or phasing out of market imperfections, fiscal incentives, tax and duty exemptions and subsidies in all greenhouse gas emitting sectors that run counter to the objective of the Convention and apply market instruments").

[4] *Chiara Saachi et al v. Argentina*, CRC Communication No. 104 (2019), at para. 10.9.

the generally-recognized principle of "common but differentiated responsibilities and respective capabilities" ("**CBDR-RC**"), which provides for a number of tools through which to distil the respective obligations on individual States, and which has found expression in a number of multilateral treaty instruments, including UNFCCC, the Kyoto Protocol, and particularly in the nuanced differentiation embodied in the Paris Agreement, in which the specific national circumstances, capabilities, and vulnerabilities of each State are taken into account.[5]

8. Kenya considers that, through the application of CBDR-RC, a range of obligations within the UN climate regime may bind all States equally, but bring with them specific actions and/or obligations that may be of a heightened nature for States in the jurisdiction of which fossil fuels are produced. CBDR-RC also allows for the differentiated treatment of developed States—presumed to be beneficiaries of industrialization processes—as well as historically high emitters, another marker that might distinguish States that have benefited from industrialization or extraction processes in the past, but which may no longer figure highly in the league tables of States producing fossil fuels today.[6]

9. Without clear legal definitions of any of these categories, Kenya respectfully submits to the Court that a nuanced application of CBDR-RC to all States is to be preferred, as it would entail differentiated obligations commensurate with the specific circumstances of every individual State, and will avoid any inaccuracies relating to an artificial, vague category of States most active in the production of fossil fuels. To do so also gives appropriate weight to the distinction between the obligations binding "developed" and "developing" States, as stipulated in various provisions of the Paris Agreement.

10. Such an approach is equally consistent with the reality that some fossil fuel production remains inevitable in the short term and may in fact be legitimate means for raising revenue for necessary adaptation measures, again depending on the specific circumstances of the State in question.

[5] See UNFCCC, art. 4.1(c); Paris Agreement, preamble, paras. 5, 16; arts. 4.3, 4.19

[6] See Written Comments of Kenya, paras. 5.38-5.39; *Corfu Channel (United Kingdom* v. *Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 22.

11. Before turning to the specific obligations for fossil fuel producers entailed by application of the CBDR-RC principle, Kenya considers it apposite first to address the obligations of "fossil fuel-producing States" before the entry into force of the UNFCCC in 1992.

B. Obligations on States before the entry into force of UNFCCC

12. Kenya, amongst many participants, has emphasized that international legal obligations binding States to prevent climate-related harms arose way before 1992, when the UNFCCC entered into force. In particular, Kenya has drawn attention to the well-established "no-harm principle", or the obligation under customary international law pursuant to which 'no State may knowingly to allow the activities within its territory to cause damage to another State.[7] We see no reason to revisit the arguments here, instead Kenya reiterates simply that the "no-harm principle" existing in customary international law has long embodied an important obligation of *prevention*. At a minimum, it requires States to take measures to prevent acts contrary to the rights of other States from taking place within its territory or its jurisdiction.[8]

13. The relevance of this customary legal rule for "fossil fuel-producing States" is in the fact that, as a number of participants have also argued, already by the 1960s, the severe consequences and continued risks of anthropogenic emissions of greenhouse gases were firmly established in scientific literature.[9] Accordingly, States in the jurisdiction of which the production, extraction, and combustion of fossil fuels were taking place, were doing so in full awareness of the potential of causing harm to other States, whether to their people, their ecosystems, their water supplies, or their agricultural production.

14. Such awareness, Kenya contends, entailed an obligation to act with due diligence to prevent, reduce, or at the very least, to mitigate the harms being caused through the production/extraction of fossil fuels within their jurisdiction. Though Kenya contends that the no-harm principle is of general application, its specific relevance lies in the fact that "fossil fuel-producing States" were each under a specific obligation, commensurate with the intensity and quantity of their fossil fuel production, to prevent the harms entailed thereby.

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[7] Written Comments of Kenya, paras. 5.3-5.8; ICJ CR 2024/43 (6 December 2024), paras. 8-20 (Okowa).

[8] *Ibid*.; see also *Dispute over the Status and Use of the Waters of the Silala (Chile* v. *Bolivia), Judgment, I.C.J. Reports 2022 (II)*, p. 648, para. 99.

[9] See e.g. Written Statement of Vanuatu, paras. 177-192, Expert Report of Naomi Oreskes (Exhibit D to Written Statement of Vanuatu).

C. Legal obligations embodied in the UN climate change treaty regime after 1992

15. The entry into force of UNFCCC in 1992 and the Kyoto Protocol in 1997 would bring evidence of further agreement between States about their legal obligations relating to the urgent need to reduce anthropocentric greenhouse gas emissions.[10] It was in these instruments that the CBDR-RC principle and considerations of equity, in particular between past, present, and future generations, became legally operational.

16. The obligations of "fossil fuel-producing States" are thus best understood in the light of the CBDR-RC principle. The UNFCCC and Kyoto Protocol functioned through the enumeration of States in respective annexes, with "Annex I" States required to undertake specific reductions, and "non-Annex I" States required to undertake a different series of measures. Whatever that differentiation, however, all States were bound under CBDR-RC to account for their specific capabilities, individual circumstances, and capacity to implement effective mitigation and adaptation measures. As described earlier, CBDR-RC has been further reconfirmed in the Paris Agreement.

17. Kenya recalls its earlier submissions, in which it emphasized that the 2015 Paris Agreement's move away from the practice of creating categories of States through annexes, in favour of a more factually based and dynamic distinction between "developed" and "developing" States, is a further step towards the effective implementation of CBDR-RC. By removing rigid categorizations, the distinction between developed/developing States has served to draw attention to every State's level of development and capacity to mitigate GHG emissions. [11]

18. Today, therefore, in addition to the collective temperature targets which bind all States parties to a collective obligation, all parties to the Paris Agreement must assess their existing situations through their respective NDCs, and then adopt GHG emissions reductions targets that reflect their "highest possible ambition" and progressively ambitious commitments to reduce their current emissions. All of these obligations are informed by the CBDR-RC principle, and require all States to take appropriate and effective measures in keeping with their

[10] Written Comments of Kenya, paras. 4.27-4.29

[11] Written Comments of Kenya, para. 4.29.

individual circumstances.[12] It is logical to focus on the production and extraction of fossil fuels, as the overwhelming scientific consensus remains that production and use of fossil fuels remain the primary causes of cumulative greenhouse gas emissions and the ensuing global harms to the global climate system.

19. Kenya now returns to the specific situation of "fossil fuel-producing States", which through their extractive activities have a demonstrable impact on increasing GHG concentrations in the atmosphere. Given that each State must reflect on its existing activities and set emissions reduction targets and mitigation commitments in line with its respective capacity, it follows logically that "fossil fuel-producing States", including former or historically high fossil-fuel producers, must review their production/extraction activities and implement policies in which these are reduced in line with their NDC. There is much concern that fossil fuel producers continue to expand their productive and extractive activities,[13] despite the range of potential initiatives available to them:

a. The full or partial cancellation of subsidies provided by a State for the production or extraction of fossil fuels; as determined by the IPCC in 2022, "fossil fuel subsidy removal is projected … to reduce global CO2 emissions by 1–4%, and [greenhouse gas] emissions by up to 10% by 2030, varying across regions".[14] What is more, since COP26 in Glasgow in 2021, negotiators have called annually for the phase-out of inefficient fuel subsidies;[15]

b. A halt or substantial slowdown in respect of authorization or regulatory approval by a State for the expansion of fossil fuel production, or at the very least, the obligation to adopt a precautionary approach and assess comprehensively all the

[12] Written Comments of Kenya, paras. 4.47-4.49.

[13] UNEP, *Production Gap Report 2023: Phasing down or phasing up? Top fossil fuel prodcuers plan even more extraction despite climate promises* (November 2023), at p. 5.

[14] Intergovernmental Panel on Climate Change, *Climate Change 2022: Mitigation of Climate Change. Summary for Policymakers* (IPCC, 2022), p. 46.

[15] Report of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement on its third session, held in Glasgow from 31 October to 13 November 2021, UN Doc. FCCC/PA/CMA/2021/10/Add.1, p. 5, where negotiators called for the "phase-out of inefficient fossil fuel subsidies, while providing targeted support to the poorest and most vulnerable in line with national circumstances and recognizing the need for support towards a just transition". Report of the Conference of the Parties on its twenty-seventh session, held in Sharm El-Sheikh from 6 to 20 November 2022, UN Doc. FCCC/CP/2022/10/Add.1, para. 16; Conference of the Parties to UNFCCC (Dubai), 'Matters relating to the global stocktake under the Paris Agreement', Decision -/CMA.5 (15 December 2023), para. 28(h).

foreseeable emissions resulting from fossil fuel activity prior to any authorization or support;

c. Again adopting a precautionary approach, a commitment to the review and modification of State legislation, regulation, policies, programmes, and decisions regarding energy policy, and their implementation, that support or sustain fossil fuel production, extraction, and/or consumption;

d. In the preparation of its NDC and its GHG inventories, an obligation to gather and assess relevant data, and to disclose information on fossil fuel production and its impact on excess GHG emissions;

20. All such obligations would apply to developed and developing "fossil fuel-producing States", in line with the application of the CBDR-RC principle, taking into account their respective capabilities and capacity to implement adaptation or mitigation measures. All States are moreover obliged to comply with their obligations under the Paris Agreement to prepare and publish an NDC, and to take measures reasonably capable of achieving the objectives set out therein.[16] CBDR-RC would be relevant to qualify the performance of these obligations, both in requiring the State in question to provide sufficient justification for its choice of implementing measures, as well as preventing "backsliding", or the downgrading of a State's highest possible ambition or a failure to adopt measures to meet the collective temperature targets.

21. In the case of fossil fuel producers, their obligations under the Paris Agreement could be fulfilled by a range of activities that would be reasonably capable of meeting their NDCs, including diverting a higher proportion of profits, tax revenues, or windfalls pursuant to the cancellation of subsidies, derived from fossil fuel extraction towards measures such as adaptation, the mitigation of sovereign debt loads in developing and/or vulnerable States, or climate finance. Again, the applicable law would continue to be in application of the CBDR-RC principle, but fossil-fuel producing States would have to take into account the intensity and quantity of their production of fossil fuels when determining the most effective measures available to them to reduce emissions derived from, or caused by, fossil fuel production and extraction.

[16] Written Statement of Kenya, paras. 4.51-4.52.

22. Importantly, *developed* "fossil fuel-producing States"—again, which would not be limited to Annex I States under UNFCCC, but a dynamic category whereby non-Annex I States could increase their ambitions in proportion to their level of development—would also bear specific obligations, commensurate with their national circumstances, to provide adaptation assistance, financial assistance, and technology transfer.[17] Such measures could be linked to the production/extraction of fossil fuels within their jurisdiction, but Kenya acknowledges that such a link is not a necessary condition, with all developed States being bound to the continuing obligation to assist developing and/or vulnerable States to combat, mitigate, and adapt in response to the harms engendered by climate change.[18]

D. Legal consequences for fossil-fuel producing States

23. In respect of the legal consequences that would emerge from a breach of these obligations, Kenya rests on its earlier submissions in which it has articulated these legal consequences more generally through the accepted secondary rules of the law on international responsibility.[19]

24. Kenya would, however, draw upon a number of nuances that are specifically applicable to "fossil fuel-producing States", in application of the CBDR-RC principle. First, to comply with the above-mentioned obligations, all such States would be required to review or enact applicable legislation or energy policy, or to cease activities such as subsidies or exploration activity that increases fossil fuel extraction or production. Moreover, Kenya considers that in respect of any of these activities, "fossil fuel-producing States" would also be required to exercise due diligence, as well as adhere to a precautionary approach based on the potential risk of harmful emissions arising from production or extraction activities.[20]

25. Whether developed or developing, all "fossil fuel-producing States" would be required to make full reparation for their internationally wrongful acts. The specific legal consequences for fossil fuel producers would be in the realm of cessation,[21] where activities found to be harmful relating to production and extraction would have to come to an end. Since all States

[17] See Written Comments of Kenya, paras. 4.31-4.35.

[18] Written Comments of Kenya, paras. 4.53-4.57.

[19] See Written Comments of Kenya, ch 5.

[20] Written Comments of Kenya, paras. 5.12-5.13.

[21] Written Comments of Kenya, paras. 5.17-5.18.

have committed to sustained and rapid emissions reductions, a range of acts deemed to encourage increased or continued production might need to be terminated. Such measures could entail a cessation of subsidies from a State to private actors or consumers; the repeal of legislation or regulations relating to exploration for new fossil fuel deposits; a halt to current production or extraction activity which is in breach of a State's obligations. Kenya reiterates its position that all such remedies would be determined through the CBDR-RC principle, by the specific circumstances relevant to that State, such as its level of economic or human development, its level of sovereign debt, or its infrastructure.

26. Kenya has earlier argued that other forms of reparation, such as restitution, compensation, or satisfaction, could also be appropriate remedies in situations of breach;[22] these arguments need not be repeated. However, Kenya wishes to draw attention to a specific remedy that can be invoked in response to a breach caused by "fossil fuel-producing States", whether historical or contemporary. Fossil fuel producers invariably reap the economic and developmental benefits gained by the extraction of lucrative fossil fuels; in some cases, they have emerged as economically advanced and developed through their extractive activities. Though not aimed expressly aimed at injuring vulnerable or less resource-rich States, these States and their inhabitants are the victims of the overexploitation of fossil fuel resources by producing States, which have consumed far in excess of their equitable share of the global carbon budget. Kenya considers that, in such cases, the principle of "unjust enrichment" would apply in determining the reparation due by a "fossil fuel-producing State" in breach of its obligations.

27. Unjust enrichment is codified across a breadth and range of legal systems around the world and arguably qualifies as a general principle of law. [23] It has been recognized by the Iran-United States Claims Tribunal as a general principle of law in the sense of Article 38(1)(c) of the Court's Statute.[24] Unjust enrichment as a form of reparation is entirely consistent with

[22] Written Comments of Kenya, paras. 5.19-5.24; ICJ CR 2024/43 (6 December 2024), paras. 30-39 (Okowa).

[23] B. Juratowitch and J. Shaerf, "Unjust Enrichment as a Primary Rule of International Law' in M. Andenas, M. Fitzmaurice, A. Tanzi and J. Wouters (eds.), *General Principles and the Coherence of International Law* (Brill, The Hague, 2019), pp. 227-246, at pp. 232-236, list nearly fifty States from all continents and representing a wide majority of legal traditions.

[24] At international law, the principle was first recognized by the Iran-United States Claims Tribunal in *Sea-Land Service, Inc v Iran*, 6 Iran-U.S. Cl. Trib. Rep 149, 1984, at p. 169. Other decisions that have acknowledged its status as a general principle include *ADC Affiliate Ltd. and ADC & ADMC Mgmt. Lt. v Republic of Hungary*, ICSID Case No. ARB/03/16, Award (2006), paras. 496-499; *Saluka Investments BV v. Czech Republic, Partial Award* (2006), paras. 448-456;

the fundamental principle regarding the need to "wipe out all the consequences of the illegal act and re-establish the situation which would … have existed if that act had not been committed."[25] It has long been established that *restitutio in integrum*, though not exclusive to unjust enrichment, is conceptually closely related. [26] Restitution may be the only appropriate remedy across situations in which a party has been injured through an internationally wrongful act and the responsible party has been unjustly enriched thereby.[27]

28. For unjust enrichment to arise, there:

> "must have been an enrichment of one party to the detriment of the other, and both must arise as a consequence of the same act or event. There must be no justification for the enrichment, and no contractual or other remedy available to the injured party whereby he might seek compensation from the party enriched."[28]

29. The best available science emphasizes the necessity of treating anthropogenic GHG emissions as a historical, continuous, and above all *cumulative* process.[29] Accordingly, the identification of specific obligations addressed to "fossil fuel-producing States" entails that fossil fuel production or extraction be regarded as a historical, continuous and cumulative process. For both historical and contemporary fossil fuel producers, therefore, the unjust accumulation of capital by certain States, profiting from the sale of noxious and harmful fossil fuels to the detriment of all other States, endures. In 2021, the IPCC's modelling estimated the remaining "global carbon budget" as very small,[30] with fossil fuel producers and historically-high emitting States having exhausted the majority of the global carbon budget since the advent of the Industrial Revolution.

30. In Kenya's view, the essence of the unjust enrichment principle is not just that a State should not gain from its unlawful acts, but equally, that when a benefit unjustly accrues to an

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[25] *Factory at Chorzów, Germany v. Poland (Merits) (1928) P.C.I.J. Ser. A,* No. 17, 47.

[26] See B. Juratowitch and J. Shaerf, "Unjust Enrichment as a Primary Rule of International Law' in M. Andenas, M. Fitzmaurice, A. Tanzi and J. Wouters (eds.), *General Principles and the Coherence of International Law* (Brill, The Hague, 2019), pp. 227-246, at pp. 230-231.

[27] C. Schreuer, "Unjustified Enrichment in International Law" (1974) 22 *American Journal of Comparative Law* 281, at p. 285.

[28] *Sea-Land Service, Inc v Iran,* 6 Iran-U.S. Cl. Trib. Rep 149, 1984, at p. 169.

[29] See e.g. IPCC, *Climate Change 2023: Synthesis Report,* pp. 44-45; *Climate Change 2022: Adaptation and Vulnerability Report,* p. 1197, in Written Comments of Kenya, paras. 3.16-3.20.

[30] Intergovernmental Panel on Climate Change, *Climate Change 2021: The Physical Science Basis. Summary for Policymakers* (IPCC, 2021), Section D, pp. 27-31.

actor to the detriment of another, irrespective of the specific lawfulness of the act that gave rise to the enrichment, the failure to restore the status quo by retaining the unjust enrichment engages the responsibility of the State concerned.[31] The activities of the highest fossil fuel producers and consumers have allowed them to exhaust a disproportionate and inequitable share of the global carbon budget, and they continue to do so today.

31. Kenya respectfully requests that the Court confirm that, in situations where a State is injured by the extractive activities of a "fossil-fuel producing State" that has been enriched through its extractive activities, the insufficiency of present financial arrangements is such that they do not provide sufficient compensation against the unjust enrichment of present and former fossil fuel producers. Kenya submits that in such limited cases, an injured State may invoke the doctrine of unjust enrichment to assert its rights on the international plane. The fact of unjust enrichment therefore becomes a relevant factor in determining appropriate responses, including forms of compensation due to States unharmed by the unjust enrichment

[31] International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (ARSIWA), in Official Records of the United Nations General Assembly, 56th Session, Supplement No 10, (A/56/10), Chapter V, pp. 31-32; see also Juratowitch and Shaerf, *supra*, at p. 246.

II. 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 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?"

32. Kenya responds to the question put by Judge Tladi as follows.

33. Kenya rejects the argument made by certain participants that Article 4 of the Paris Agreement creates only "procedural obligations" on States Parties. In doing so, it first reiterates the arguments made in Chapter 4 (II) of its written comments that the provisions of the Paris Agreement, including Article 4, create binding "goal-oriented obligations" on States to take measures that are reasonably capable of meeting their Nationally Determined Contributions ("**NDCs**") and which contribute to the progressive realization of the Paris Agreement's ultimate goal.[32] The ultimate goal in the Paris Agreement, that States are bound to progressively realise, is to limit the increase of global mean surface temperature to 1.5°C or, in any event, well below 2°C, above pre-industrial levels ("**Temperature Targets**").[33]

34. In the light of the arguments made in its Written Comments, Kenya would supplement them as follows in order to address the question put by Judge Tladi.

35. Firstly, Kenya rejects the insistence by some participants on rigid typologies of obligations which are neither mandated by international law nor determinative of an obligation's content. In international environmental law, it would be a mistake to assume, as some participants have done, that because there can be a difference between "procedural" and "substantive" obligations, the former must be lacking in "substantive" content.[34] For example,

[32] Written Comments of the Republic of Kenya, Chapter 4(II) at paras. 4.20 to 4.56.

[33] Paris Agreement, Article 2(1).

[34] *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*, p. 665, Separate Opinion of Judge Donoghue, p. 785 at para. 10.

breaches of so-called "procedural obligations" are also equally capable of giving rise to State responsibility even in the absence of material harm caused by the acts relating to States' "substantive" obligations.[35]

36. There is therefore no basis for relying on a distinction between "procedural" and "substantive" obligations when interpreting provisions in the Paris Agreement, including Article 4. It is apparent when reading the Agreement as a whole that the obligations therein are not only closely interlinked, but also vary greatly in their form and legal content.[36] Close attention must thus be paid to the text of the Paris Agreement.

37. It is for this same reason that Kenya also rejects the overreliance on a similar distinction between obligations of conduct and result; such a distinction is, in reality, both difficult to maintain and of limited practical use. Moreover, these forms of classification, though in use in some civil law systems, are entirely alien to others, including most common law jurisdictions; as such, they fail to qualify as a general principle of law. The International Law Commission (the "**ILC**") has singled out obligations of *prevention* as a form of hybrid obligation. These like the obligations in Article 4 are intended to track individual performance with a view to achieving a collective goal.[37] Many obligations especially in international climate change law require progressive realisation or are "goal-oriented obligations" as explained in Kenya's Written Comments.[38] In the words of the ILC, any classification is no substitute for the interpretation and application of the norms themselves, in the light of the treaty's object and purpose.[39] Moreover, such obligations whether designated as obligations of conduct or procedure must be interpreted consistently with the important substantive values that underpin them. Again, the received wisdom appears to be that obligations of conduct, because they do not "guarantee [an] outcome",[40] possess lesser legal force than obligations of result. Such a

[35] *Pulp Mills on the River Uruguay (Argentina v Uruguay), Judgment, ICJ Reports 2010*, p. 14 at paras. 78-79. See also *Certain Activities (Costa Rica v Nicaragua)* at paras. 217 & 224.

[36] As will be explained below, Articles 2, 3, and 4 sit at the nexus of the Paris Agreement and inform the ambition cycles created with respect to climate change mitigation, adaptation, and financial assistance.

[37] James Crawford, *Special Rapporteur on State Responsibility, Second report on State responsibility* (17 March, 1 & 30 April, 19 July 1999) UN Doc. A/CN.4/498 and Add.1–4 at paras. 80 to 83.

[38] Written Comments of the Republic of Kenya, Chapter 4(II) at paras. 4.20 to 4.56.

[39] James Crawford, *Second report on State responsibility*, at para. 77.

[40] *Ibid*., at para. 57 where the Special Rapporteur notes that the distinction as understood in civil law does not necessarily track with international law's understanding of obligations of conduct and result.

conclusion is not tenable, and the usefulness of a distinction between obligations of conduct and result in international law has rightly been questioned by the ILC.[41]

38. The upshot of the above is that the Paris Agreement's complex provisions, which are the "typical product of multilateral negotiations" are not usefully served by reference to the distinction between obligations of conduct and result.[42] The primary focus should be on an "interpretation and application of the norms themselves, taking into account their context and their object and purpose".[43] In the case of the Paris Agreement, this can be achieved by resort to accepted rules of treaty interpretation, which "above all" are concerned with the text itself.[44]

39. Kenya emphasizes that its interpretation of the Paris Agreement's terms, including Article 4,[45] as creating goal-oriented obligations can be arrived at simply by giving effect the ordinary meaning of the treaty's terms. The object and purpose of the Paris Agreement, as well as that of the UN Climate Regime,[46] further *reinforces* Kenya's textual interpretation.

40. This stands in contrast to the arguments put by certain participants that Article 4 only creates procedural obligations with respect to the preparation and communication of NDCs. The implication of such reasoning is that, while States must continue preparing and updating their NDCs, they are not obligated to take measures to implement them, let alone to achieve the Temperature Targets.

41. However, looking closely at the text of Article 4, which itself is comprised of 19 sub-clauses that are either linked together or make reference to other provisions in the treaty, it is clear that Article 4 creates binding goal-oriented obligations on States not only to "prepare" and "communicate" NDCs, but to take measures reasonably capable of achieving them as they

[41] James Crawford, *Second report on State responsibility* at paras. 57 & 68.

[42] James Crawford, *State Responsibility: The General Part* (Cambridge University Press, 2013) at p. 224.

[43] James Crawford, *Second report on State responsibility* at para. 77.

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

[45] Kenya also outlines in at paras. 4.53 to 4.56 of its Written Comments that the Paris Agreement also creates goal-oriented obligations with respect to financial assistance and technology transfer to vulnerable developing States.

[46] In its Written Comments at para. 4.21 Kenya defines the "UN Climate Regime" as including the Montreal Protocol, the UNFCCC, the Kyoto Protocol, and the Paris Agreement due to their identity of parties and subject matter.

progressively realize the Temperature Targets. Based on the best available science,[47] for most States (subject to considerations of CBDR-RC),[48] this requires the rapid adoption of Net Zero pathways.[49]

42. The core provisions regarding the preparation, communication, and implementation of NDCs are Articles 4(1), 4(2) and 4(3). Article 4(1) links the preparation and implementation of NDCs to the Temperature Targets in Article 2; the performance of the obligations within Article 4 is thus for the purpose of realising the treaty's aim. Article 4(2) then imposes mandatory obligations on States, who "shall" prepare their NDCs and "pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions". These are binding obligations to publish NDCs whose measures contribute to the progressive realization of the Temperature Targets and to take steps to implement said measures. With each successive NDC both representing a progression from the NDC that preceded it and the State's "highest possible ambition", per Article 4(3), the Paris Agreement creates an accelerating cycle of ambition towards the attainment of the Temperature Targets.[50]

43. Kenya notes that Article 4 does not create a strict obligation on States to achieve the measures contained in their NDCs, but the obligation to take measures is still mandatory and legally binding. It is also not correct that the words "with the aim of achieving the objectives" in a State's NDC in Article 4(2) do not impose a binding obligation to take action; the use of the word "shall" earlier in the clause mandates that measures to effect the NDC must be implemented. Furthermore, a comparison with the Paris Agreement's other equally authentic texts reveals that the measures taken by States must be reasonably capable of meeting their NDCs.[51] For example, the French text reads "prennent des mesures internes … en vue de

[47] Article 4(1) mandates that reductions in greenhouse gas emissions be "in accordance with the best available science". The best available science is contained in the work of the Intergovernmental Panel on Climate Change for the reasons given in Kenya's Written Comments at para. 3.3.

[48] States' NDCs pursuant to Article 4(3) will reflect the principle of "common but differentiated responsibilities and respective capabilities, in the light of different national circumstances".

[49] See Written Comments at para. 3.26.

[50] The ambition cycle is also facilitated by Article 3, which also applies to financial assistance and technology transfer in Articles 9, 10, and 11.

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

réaliser les objectifs", while the Chinese reads "缔约方采取国内减缓措施，以实现这种贡献的目标", and the Spanish reads "adoptar medidas de mitigación internas, con el fin de alcanzar los objetivos".[52] The meaning of Article 4(2) which best reconciles the multiple texts is that one proposed by Kenya: States must take measures reasonably capable of meeting the targets in their NDCs, which in turn must aim towards the fulfilment of the Temperature Targets.

44. Similarly, the ancillary sub-clauses in Article 4 are designed to facilitate the clear and transparent pursual of the Temperature Targets, which supports the proposition that States are obligated to act consistently with the same. Articles 4(8) and 4(9) impose mandatory obligations of clarity and transparency with respect to NDCs while Article 4(13) provides that States shall also "account" for the content in their NDCs. The machinery of Article 4's transparency provisions is to ensure compliance with the obligations in the Paris Agreement, particularly, measuring mitigation efforts against the Temperature Targets. This is the case notwithstanding that a failure to meet targets may not *ipso facto* constitute a breach of the Paris Agreement.[53]

45. Kenya's textual interpretation is both confirmed and reinforced by the object and purpose of the Paris Agreement and the wider UN Climate Regime. The object and purpose of the Paris Agreement is contained primarily in Article 2 which makes clear its tripartite objective of (i) achieving the Temperature Targets, (ii) strengthening adaptation measures for vulnerable States, and (iii) making finance flows consistent with low emissions pathways. Article 2 also makes clear the Paris Agreement's objective of "enhancing the implementation" of the UNFCCC which, in turn, had as its objective "stabilization of greenhouse gas concentrations

[52] Consider, for example, the translation of "mesures en vue de" as "measures for" by the Court in the French and English versions of the judgment in *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia v Singapore), Judgment, ICJ Reports 2008*, p. 12 at para. 147. See Benoit Mayer, "Obligations of conduct in the international law on climate change: A defence" (2018) 27 *Review of European, Comparative & International Environmental Law* 130, at p. 135. Additionally, the use of "以实现" ("for the purpose of realizing" or "to achieve") in the Chinese text is even stronger language. The Court is also invited to consider the Russian and Arabic texts.

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

in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system".[54]

46. Accordingly, in the light of the Paris Agreement's object and purpose, it is untenable to suggest that the obligations in Article 4 are merely "procedural" ones or are otherwise non-binding and can be undertaken at States' discretion. To the contrary, the Paris Agreement's object and purpose is a reflection of the scientific consensus that States' initial NDCs were insufficient to meet to meet the Temperature Targets.[55] The Paris Agreement's object was thus to accelerate States' efforts towards reaching a global peaking of greenhouse gas emissions via increasingly ambitious mitigation commitments (subject only to CBDR-RC).[56] This Court's advisory opinion, in interpreting Article 4 and related provisions, ought to give effect to the UN Climate Regime's object and purpose.

[54] UNFCCC, Article 2.

[55] Synthesis report on the aggregate effect of the intended nationally determined contributions, Note by the secretariat, UN Doc. FCCC/CP/2015/7 (30 October 2015).

[56] For the reasons given in its Written Comments at para. 4.49, CBDR-RC cannot be used to downgrade a State's highest possible ambition.

III. 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 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?"

47. Kenya responds to the question put by Judge Charlesworth as follows, in two parts.

A. Legal value of these declarations

48. Kenya considers that these are *interpretative declarations*, namely, unilateral statements made by a party to a treaty whereby the said party "purports to specify or clarify the meaning or scope of a treaty or of certain of its provisions".[57] Because these declarations do not purport to exclude or modify the legal effects of any provision of a treaty, they are not reservations, which in any event are not permitted to the Paris Agreement.[58]

49. The absence of any evidence of discernible intention specifically to exclude general rules is buttressed by explicit evidence to the contrary: the declarations by a range of States parties to the Paris Agreement that nothing therein could be interpreted as derogating from the general law of State responsibility, nor as a renunciation of any claims or rights regarding compensation for the adverse effects resulting from climate change.[59] Similar declarations have been made by a range of other States to the UNFCCC.[60] Intriguingly, not a single State party to the Paris Agreement made a declaration in which the opposite view was expressed.

50. Kenya takes the view that, though not formally binding, such declarations provide a context relevant for the interpretation of the treaty, in particular under Article 31, paragraph 2, of the Vienna Convention on the Law of Treaties, which includes as "context": "b) any instrument which was made by one or more parties in connection with the conclusion of the

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[57] See International Law Commission, "Guide to Practice on Reservations to Treaties", *Year Book of the International Law Commission, 2011*, vol. II, Part Two, Guideline 1.2.; Anthony Aust, *Modern Treaty Practice* (CUP, 2013) p. 102.

[58] Paris Agreement, Article 27.

[59] See e.g. declarations by the Philippines, Cook Islands, Federated States of Micronesia, Nauru, Niue, Solomon Islands, Tuvalu, Vanuatu, and the Marshall Islands, in United Nations Treaty Collection, "Status of Ratification of the Paris Agreement" available at the following link.

[60] See e.g. declarations by Fiji, Kiribati, Nauru, Papua New Guinea, and Tuvalu, in United Nations Treaty Collection, "Status of Ratification of the United Nations Framework Convention on Climate Change", available at the following link.

treaty and accepted by the other parties as an instrument related to the treaty." Article 31, paragraph 3 of the Convention provides that together with the context, account shall also be taken of subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.

51. Kenya contends that such interpretative declarations made to UNFCCC and the Paris Agreement, respectively, fall within the ambit of Article 31, paragraph 3, as they were not met with objection at the time they were made. Kenya does not contend that such silence constitutes tacit acceptance of the declarants' positions at the time, this is not required under the Convention. Kenya considers it appropriate to take these declarations into account to support parties' positions as to the meaning of a particular treaty provision, in particular in the context of the positions taken in the present advisory proceedings. Moreover, the General Assembly resolution requesting the advisory opinion had singled out specially affected or vulnerable States for particular consideration. In your decision in the in *North Sea Continental Shelf Case*s you accepted the role that "specially affected" states may play in the elucidation of the content of customary law.[61] The declarations of these States as to the continuing application of general international law and implicit clarification as to the normative content of those rules must in Kenya's view be given particular weight, because the declarants are specially affected and particularly vulnerable from the effects of climate change including sea level rise.

52. The ILC has also noted the qualitative value of paying particular attention to the practice of "specially affected" States in the elucidation of rules as they are most likely to be concerned with the alleged rules.[62] In identifying these States, the ILC attached importance to vulnerability rather than relative "power" or "strength" of States.

53. In its oral submissions, the United Kingdom argued that as no States have brought claims for compensation for climate change related harms, such "omissions" constitute tacit acceptance that the obligations of prevention do not apply outside the paradigm context of transboundary harm.[63] However, any purported omissions or failure to institute claims must be

[61] *North Sea Continental Shelf (Federal Republic of Germany* v. *Denmark; Federal Republic of Germany* v. *the Netherlands), Judgment, I.C.J. Reports 1969*, p. 3, at p. 44.

[62] See International Law Commission, "Draft conclusions on identification of customary international law, with commentaries", *Year Book of the International Law Commission, 2018*, vol. II, Part Two, Draft Conclusion 8, Commentary (4), pp. 136-137.

[63] CR

viewed in the context of the above declarations.[64] The declarations and other acts of protest are important contextual evidence for evaluating the failure to institute claims as largely equivocal and are not indicative of or supportive of the argument that States regarded general rules of international law as inapplicable to GHG emissions. Furthermore, since these declarations are made by particularly vulnerable States with the explicit intention of preserving their rights under general international law, the absence of claims is merely a question of fact, and is not accompanied by evidence of any belief that such claims would be precluded under international law. Accordingly, it cannot attract the far-reaching implications alluded to by the United Kingdom. Finally, an important contextual element is that neither the United Kingdom, nor any other State, objected to the declarations at the time they were made.

B. Conclusions as to the nature of the Paris Agreement to be drawn from the interpretative declarations

54. Kenya wishes to draw the attention of the Court to the impact of these declarations on the interpretation of the Paris Agreement, which is intended to be interpreted in harmony with general international law. Simply put, there is insufficient evidence that the Paris Agreement supersedes or otherwise replaces earlier treaties or customary international law. Certainly, it is possible for treaties to create specialized legal relations *inter partes* that derogate from general rules. States may also establish through their express agreement, special rules of international law: *lex specialis*.[65] Though no derogation is tolerated with respect to peremptory norms of international law (*jus cogens*), generally speaking States may agree to derogate from existing general international law, subject to specific conditions:

a. The same subject matter is addressed by two rules but there is either an inconsistency between them, or a "discernible intention" that one is to exclude the other.[66]

[64] See Maurice Mendelson KC, "State Acts and Omissions as Explicit or Implicit claims", in *Le droit international au service de la paix, de la justice et du développement: Mélanges en honneur de Michel Virally* |(Paris 1991) pp. 379-381.

[65] International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (ARSIWA), in Official Records of the United Nations General Assembly, 56th Session, Supplement No 10, (A/56/10), Chapter V. Art. 55.

[66] ILC, ARSIWA, with commentaries, Art. 55, Commentary (4).

b. General rules thus continue to operate unless they are expressly and specifically excluded: they cannot be tacitly dispensed with.[67]

c. The threshold is high: only a treaty that "completely defines" the rules applicable to a specific situation may supersede an existing general rule.[68]

55. In its submissions, Kenya has already laid down detailed arguments elucidating the conditions for the principle of *lex specialis* to apply, and its view that these are not met by the UN climate regime. In keeping with the vast majority of participants in these proceedings, these arguments emphasize the lack of normative conflict or inconsistency with general obligations to prevent transboundary or environmental harms,[69] and need not be repeated. It suffices to observe that only a minority of participants took the opposite position; and in any event, ITLOS has held not only that the UN climate régime and the Paris Agreement are not *lex specialis*, but ought to be applied in harmony with—in that advisory proceeding—UNCLOS, "in such a way as not to frustrate [its] very goal".[70]

56. Kenya emphasizes that this general harmony extends across the UN climate regime, and thus applies *a fortiori* to the structure of claims or rights concerning compensation or liability due to the adverse effects of climate change. The interpretative declarations of the States concerned only further confirm the exactitude of this interpretation.

57. In this respect, Kenya considers that the declarations referred to in the question put by Judge Charlesworth constitute relevant subsequent practice in the interpretation of the respective treaty instruments, namely, "conduct in the application of a treaty, after its conclusion, which establishes the agreement of the parties regarding the interpretation of the treaty."[71] In its Draft Conclusions on the subject, the ILC noted that subsequent practice of

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[67] *Elettronica Sicula S.p.A. (United States of America v. Italy), Judgment, I.C.J. Reports 1989*, p. 15, at p. 42, para. 50. *See also Certain Iranian Assets (Islamic Republic of Iran v. United States of America), Judgment of 30 March 2023, I.C.J. Reports 2023*, para. 207.

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

[69] Written Comments of Kenya, paras. 2.3-2.7, ch. 4; ICJ CR 2024/43 (6 December 2024), paras. 2-7 (Okowa).

[70] ITLOS, *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law*, Case No. 31, Advisory Opinion of 21 May 2024 ("*COSIS* Advisory Opinion"), para. 224.

[71] See International Law Commission, "Draft Conclusions on Subsequent Agreements and Subsequent Practice in relation to the Interpretation of Treaties, with Commentaries", *Year Book of the International Law Commission, 2018*, vol. II, Part Two, Conclusion 4, para. 2, Commentary (16)-(18).

parties may narrow, widen, or otherwise determine the range of possible interpretations, or may contribute to the clarification of the meaning of a treaty.[72]

58. What is more, Kenya suggests that the support expressed by the vast majority of participants in the present proceedings is relevant in assessing the weight to be given to the declarations for two reasons, In Kenya's view, the clear majority of views submitted to the Court in the context of the present advisory proceedings confirm the interpretation of the parties to UNFCCC and the Paris Agreement that their intention was not to supersede any *lex generalis*.

59. Finally, Kenya would emphasize that the views of the participants themselves constitute, in the sense of Article 31, paragraph 3(b), of the Vienna Convention on the Law of Treaties, subsequent practice in the application of both UNFCCC and the Paris Agreement, as it further clarifies the agreement of the parties as to the meaning and interpretation of these respective treaty instruments.

60. In the light of the above, Kenya respectfully submits that the value of these declarations is to confirm that neither the UNFCCC and the Paris Agreement contain sufficient evidence of a discernible intention to derogate from, or otherwise to waive, general rules of international law, and in particular, the secondary rules on State responsibility, which include regimes governing compensation and liability. The existence of any funding mechanisms at subsequent conferences of the parties cannot be regarded as derogating from the duty of responsible States to make reparation for their internationally wrongful acts.

[72] *Ibid.*, Conclusion 7, paras. 1-2. See also Commentary (1)-(5), (10)-(14).