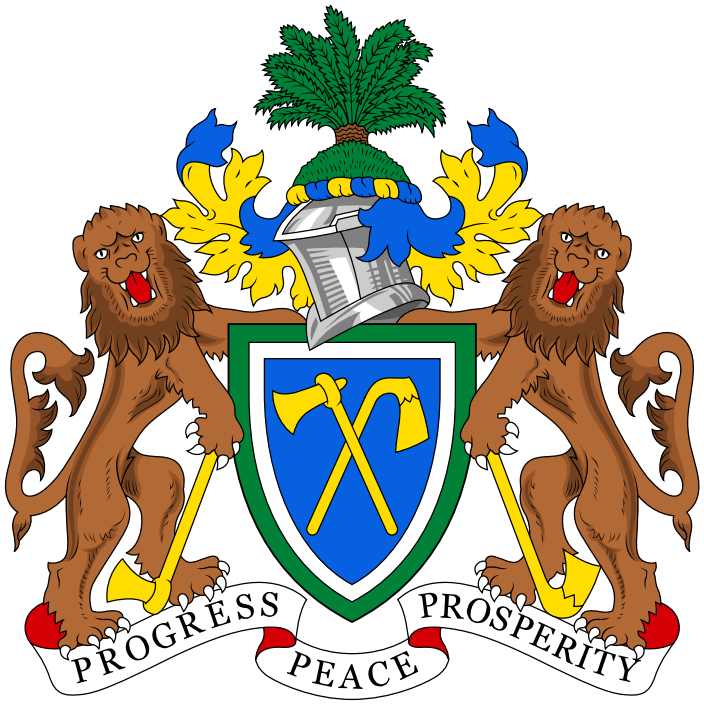
INTERNATIONAL COURT OF JUSTICE

OBLIGATIONS OF STATES IN RESPECT OF CLIMATE CHANGE

RESPONSES OF THE REPUBLIC OF THE GAMBIA TO THE JUDGES' QUESTIONS



20 DECEMBER 2024

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?"

1.1 Fossil fuels are one of the main drivers of climate change.[1] Thus, States must exercise stringent due diligence over any activity that produces fossil fuels.[2]

1.2 Consistent with views expressed by the majority of States during the written and oral phases in these proceedings, this heightened standard entails stricter obligations for developed and high-emitting States.[3] Due diligence is shaped by the principle of Common But Differentiated Responsibilities and Respective Capacities ("CBDR-RC").[4] Thus, the specific forms that this stringent duty of due diligence must take depend on each State's historical emissions and level of development. In this sense, the burden of taking measures to address climate change primarily rests on States that have contributed the most to it and have more resources to address it.[5] In

[1] IPCC, *AR6, Synthesis Report: SYR (Full Volume)*, Foreword ("unsustainable and unequal energy and land use as well as more than a century of burning fossil fuels have unequivocally caused global warming"); IPCC, *2021: Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, p. 676; UN Environment Programme, *Emissions Gap Report 2024: No more hot air … please!* (UNEP eds. 2024), p. 5 ("Fossil CO2 emissions account for approximately 68 per cent of current GHG emissions").

[2] *See, e.g. Request for an advisory opinion submitted by the Commission of Small Islands States on Climate Change and International Law, ITLOS Case No. 31*, Advisory Opinion (21 May 2024), para. 398; *see also id.*, paras. 400, 441(3)(c)-(4)(c).

[3] Written Comments of The Gambia, para. 5.9.

[4] Written Comments of The Gambia, para. 3.20. *See also* Written Statement of Albania, paras. 80-81; Written Statement of Antigua and Barbuda, paras. 338-340; Written Statement of Ecuador, para. 3.61; Written Statement of Sierra Leone, para. 3.34; Written Statement of South Africa, para. 77.

[5] Written Comments of The Gambia, para. 4.19. *See also* Written Statement of Singapore, para. 3.33; Written Statement of Costa Rica, paras. 60-61; Written Statement of Colombia, para. 3.54; Written Statement of St. Lucia, para. 88; Written Statement of Timor Leste, paras. 228-232; Written Statement of Pakistan, paras. 32-46; Written Statement of Micronesia, para. 67; Written Statement of Mauritius, para. 215; *State of the Netherlands v. Urgenda Foundation*, Hague District Court, Judgment (24 June 2015), *available at* https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2015/20150624_2015-HAZA-C0900456689_decision-1.pdf, para. 4.79 (noting that "the Netherlands, like the other Annex I countries, has taken the lead in taking mitigation measures and has therefore committed to a more than proportionte [*sic*] contribution to reduction").

contrast, developing and low-emitting States enjoy greater flexibility in respect of such measures. Indeed, CBDR-RC must not only reflect the different responsibilities and capacities of each State, it must also integrate the right of developing States to achieve development.[6]

1.3 Given these considerations, at least the following obligations must be observed in the production of fossil fuels, to ensure protection of the climate system.

- All States must adopt strict regulations for the production of fossil fuels. These regulations should be applicable both to activities within a State's territory, and to entities under its jurisdiction or control, including entities incorporated in that State's jurisdiction. These regulations require effective and continuous monitoring, vigilance and assessments of the environmental and social impacts of activities that produce fossil fuels.
- Developed and high-emitting States must phase out production of and halt subsidies for fossil fuels.
- Developed and high-emitting States must make sure to provide sufficient technical and financial assistance for developing and low-emitting States to effectively and rapidly transition towards production of clean energy. This is consistent with the CBDR-RC Principle.
- Developing States retain the right to exploit fossil fuels, especially in the absence of support from developed States to transition to clean energy, but only to the extent necessary to achieve sustainable development. This is without prejudice to the right of developing States to subsidize fossil fuels to meet their energy needs.

[6] Written Comments of The Gambia, para. 4.24; *see also* Paris Agreement, Preamble (noting that States Parties "should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights … [including] the right to development"); UNFCCC, art. 3(4) and Preamble (noting that "have a right to, and should, promote sustainable development"; that "economic development is essential for adopting measures to address climate change," and establishing that State Parties must take "into full account the legitimate priority needs of developing countries for the achievement of sustained economic growth and the eradication of poverty").

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?"

2.1 The United Nations Framework Convention on Climate Change's ("UNFCCC") stated objective is "the stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system."[7] The Paris Agreement was adopted "in pursuit of" this objective[8] and in recognition of "the need for an *effective and progressive* response to the urgent threat of climate change on the basis of the *best available scientific knowledge*".[9] In light of such object and purpose, the obligations in respect of Nationally Determined Contributions ("NDCs") under Article 4 of the Paris Agreement cannot be interpreted as purely procedural obligations, or obligations of conduct, as some suggest.[10] They are substantive obligations that must be given real effect.

2.2 Article 4 requires States to: (i) prepare, communicate, and maintain successive NDCs;[11] (ii) pursue domestic mitigation measures, with the aim of achieving the objective of such

[7] UNFCCC, art. 2.

[8] Paris Agreement, Preamble, para. 3.

[9] Paris Agreement, Preamble, para. 4 (emphasis added).

[10] *See e.g.*, CR 2024/40, pp. 41-42, paras. 13-17 (United States of America); CR 2024/36, pp. 44-46, paras. 17-20 (United Kingdom).

[11] Paris Agreement, art. 4(2).

contributions;[12] and (iii) ensure that their successive NDCs both represent a progression and reflect their highest possible ambition.[13]

2.3 The principal significance of these obligations lies in their alignment with the overarching temperature goal set out in Article 2 of the Paris Agreement. This is because that temperature goal was itself aimed at "enhancing the implementation of" the object and purpose of the climate change treaty framework.[14] Article 4(1) further makes clear that NDCs are one of the steps for States Parties to "reach global peaking of greenhouse gas emissions as soon as possible" and to "achieve the long-term temperature goal set out in Article 2".[15]

2.4 The obligations pertaining to NDCs must also be interpreted and applied in the broader context of the climate change framework, which is inherently linked to the best available science. Indeed, the UNFCCC and the Paris Agreement put science at the center of the commitments and obligations set out therein, recognizing that the "steps required to understand and address climate change will be … most effective if they are based on relevant scientific … considerations".[16] Moreover, the temperature goal in Article 2 of the Paris Agreement reflects the scientific consensus that existed at the time, namely that that temperature goal would "significantly reduce the risks and impacts of climate change".[17] Article 4(1) further confirms that States' commitment to rapidly reduce greenhouse gas emissions, including through preparing and implementing NDCs, must not only seek to achieve the temperature goal but also reflect "the best available science".[18] The best available science might indicate more steps are required in the future to curb greenhouse gas emissions, which would also be consistent with the precautionary principle.

2.5 A proper interpretation of Article 4 of the Paris Agreement must take into account other relevant rules of international law governing the protection of the climate system. This is not just required by the principle of systemic integration as reflected in Article 31(3)(c) of the Vienna

[12] Paris Agreement, art. 4(2).
[13] Paris Agreement, art. 4(3).
[14] Paris Agreement, art. 2.
[15] Paris Agreement, art. 4(1).
[16] UNFCCC, Preamble.
[17] Paris Agreement, art. 2.
[18] Paris Agreement, art. 4(1).

Convention on the Law of Treaties—it is also consistent with the object and purpose of the climate change treaty framework, which seeks to operate harmoniously with, *inter alia*, relevant principles of customary international law, international environmental law, and international human rights law, rather than to displace them. The Preamble of the UNFCCC confirms this by recalling the prevention principle that States are responsible for "ensur[ing] that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction".[19]

2.6 The object and purpose of the Paris Agreement and the climate change treaty framework therefore demand that States' NDC obligations be interpreted as substantive commitments, rather than simply as procedural compliance mechanisms. States must prepare and update their NDCs with a view to achieving a temperature goal that reflects the best available science. The Gambia reiterates its submission that although Article 2 provides for a 2°C increase in global average temperature as a *goal* and 1.5°C as an *ambition*, the best available science *today* understands the latter *not* as an ambition but as the *threshold* that cannot be crossed.[20] As the IPCC concluded in its 2018 Special Report, the risk of unacceptable levels of harm is *significantly lower* at a 1.5°C increase than at 2°C.[21] The relevant temperature goal for the purpose of preparing and implementing NDCs is thus 1.5°C.

2.7 Some participants are mistaken to suggest that there is no "legal standard against which to judge the sufficiency of a party's NDC".[22] A State's compliance in this regard is assessed by reference to the same stringent standard of due diligence required to comply with the principle of prevention with respect to climate change. Whether a State acts with due diligence in preparing and implementing its NDC must be considered against "scientific and technical information", "risk of harm" and the degree of "urgency", all of which constantly evolve.[23] And due diligence itself

[19] UNFCCC, Preamble, para. 8.

[20] Paris Agreement, art. 2.

[21] IPCC, *Global Warming of 1.5°C: An IPCC Special Report on the impacts of global warming of 1.5 °C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty*, Summary for Policymakers (CUP 2018) (Dossier No. 72), *available at* https://www.ipcc.ch/site/assets/uploads/sites/2/2022/06/SPM_version_report_LR.pdf.

[22] CR 2024/40, p. 42, para. 17 (United States of America).

[23] *See Responsibilities and Obligations of States with respect to activities in the Area, ITLOS Case No. 17*, Advisory Opinion (1 February 2011), p. 10, at p. 43, para. 117; *Request for an advisory opinion submitted by the Commission*

is not a purely procedural standard. When the risk of harm is as serious as that associated with exceeding the 1.5°C threshold, there is no margin for error. The measures required of States, including in respect of their NDCs, must succeed in achieving that goal.

2.8 To be clear, The Gambia considers that the climate change treaties cannot be equated with due diligence.[24] While the obligations under the Paris Agreement, including those in respect of NDCs, must be interpreted and assessed by reference to due diligence, that duty under customary international law goes beyond NDCs. States can therefore comply with their NDC obligations by acting with due diligence, but cannot satisfy due diligence only by preparing and implementing their NDCs.

of Small Island States on Climate Change and International Law, ITLOS Case No. 31, Advisory Opinion (21 May 2024), para. 239. *See also* Written Comments of The Gambia, para. 3.18.

[24] *See* CR 2024/49, pp. 64-67 (The Gambia).

III. 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?"

3.1 As set out in its Written Comments, The Gambia considers that the right to a clean, healthy and sustainable environment exists as an autonomous human right under international law. It is not only recognized in regional human rights declarations and instruments,[25] but also codified in the national constitutions and laws of 156 States around the world.[26] The UN Human Rights Council and General Assembly passed resolutions in October 2021 and July 2022, respectively, explicitly recognizing "the right to a clean, healthy and sustainable environment as a human right".[27] No State voted against either resolution, with the General Assembly resolution having been adopted with 161 States voting in favour, zero against and eight abstentions. This is clear evidence that the right to a clean, healthy and sustainable environment is a universal human right. Indeed, as the International Law Commission has determined in Conclusion 12 of its 2018 conclusions on the identification of customary international law, widely supported resolutions of the General Assembly—with its near universal membership—may provide evidence for determining the existence and content of a rule of international law.[28] We wish to underline that what is material, for determining the right exists and its contents, is whether there is a general practice among States that is accepted as law. We submit that there is.

3.2 The right has substantive elements, requiring States to ensure clean air, a safe climate, healthy and sustainably produced food, safe water, adequate sanitation, non-toxic environments,

[25] International American Court of Human Rights, *Advisory Opinion OC-23/17*, paras. 58-59, 61.

[26] UN Human Rights Council, *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, UN Doc. A/HRC/43/53 (30 December 2019), paras. 11-13.

[27] UNGA Resolution 76/300; UN Human Rights Council, Resolution 48/13, *The human right to a clean, healthy and sustainable environment*, UN Doc. A/HRC/RES/48/13 (8 October 2021).

[28] International Law Commission, Draft conclusions on identification of customary international law, *Yearbook of the International Law Commission, 2018, vol. II, Part Two*, Conclusion 12.

and healthy ecosystems and biodiversity.[29] The right also includes procedural elements, such as access to information, the right to participate in decision-making, and access to justice and effective remedies.[30]

3.3 Regional human rights bodies such as the African Commission on Human and Peoples' Rights and the Inter-American Court of Human Rights have determined that this right "constitutes a universal value that is owed to both present and future generations".[31] The General Assembly also explained that the right "requires the full implementation of the multilateral environmental agreements under the principles of international environmental law".[32]

3.4 The import of the right to a clean, healthy and sustainable environment is underscored by the General Assembly as being "related to other rights".[33] As Vanuatu correctly observes, it is a condition precedent for the realization of other human rights, including the right to life, health, housing, food, culture and self-determination.[34] A violation of the right to a clean, healthy and sustainable environment could therefore entail a violation of other human rights as well.

3.5 States have the duty to respect, protect and fulfill the right to a clean, healthy and sustainable environment. In the climate change context, this imposes an obligation of due diligence to reduce greenhouse gas emissions to limit global warming to 1.5°C above pre-industrial levels—the threshold beyond which significant and irreversible harm to the environment would ensue. In this regard, as set out in the Framework Principles on Human Rights and the Environment,[35] States are required to make environmental information publicly available; facilitate public participation

[29] *Inhabitants of La Oroya v. Peru*, Inter-American Court of Human Rights, 2024, para. 118. The former UN Special Rapporteur on the right to a clean, healthy and sustainable environment published comprehensive reports on each of the substantive elements, including A/74/161 (safe climate), A/75/161 (healthy ecosystems and biodiversity), A/76/179 (healthy and sustainably produced food), A/HRC/40/55 (clean air), A/HRC/46/28 (safe and sufficient water), and A/HRC/49/53 (non-toxic environments). All thematic reports of the current and previous Special Rapporteurs on human rights and the environment are here: https://www.ohchr.org/en/special-procedures/sr-environment/annual-thematic-reports.

[30] IACtHR, *Advisory Opinion OC-23/17*, para. 212.

[31] IACtHR, *Advisory Opinion OC-23/17*, paras. 58-59.

[32] UN General Assembly, Resolution 76/300, *The human right to a clean, healthy and sustainable environment*, UN Doc. A/RES/76/300 (1 August 2022) (Dossier No. 260), para. 3.

[33] UN General Assembly, Resolution 76/300, *The human right to a clean, healthy and sustainable environment*, UN Doc. A/RES/76/300 (1 August 2022) (Dossier No. 260), para. 2.

[34] Written Statement of Vanuatu, para. 381.

[35] UN Special Rapporteur on human rights and the environment, Annex to A/HRC/37/59 (2018).

in decision-making; ensure access to justice with effective remedies; provide environmental education; require environmental impact assessments of proposed projects and policies; regulate private sector activities that could harm the environment (including the climate); establish, implement and enforce environmental standards based on the best available science; and cooperate internationally.[36] Additionally, the right requires States to take adaptation measures to address past and ongoing harm to ecosystems and communities resulting from climate change impacts, and to take additional steps to protect indigenous, vulnerable and marginalized populations.

[36] UN Special Rapporteur on human rights and the environment, Annex to A/HRC/37/59 (2018).

IV. 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?"

4.1 The declarations in question confirm that the neither the UNFCCC nor the Paris Agreement derogate from any principles, rules or rights stemming from general international law. That is their main significance.

4.2 These declarations must be considered when interpreting the climate change treaties—*i.e.* the UNFCCC and the Paris Agreement. In accordance with the ILC Guidelines on Reservations and Interpretative Declarations ("ILC Guidelines"), the declarations are "interpretative" because they specify the scope the UNFCCC or the Paris Agreement.[37] Further, such interpretative

[37] *See e.g.* ILC Guidelines on Reservations and Interpretative Declarations ("ILC Guidelines"), Guideline 1.2 (noting that "unilateral statement, however phrased or named, made by a State or by an international organization whereby that State or that organization purports to specify or clarify the meaning or scope attributed by the declarant to a treaty or to certain of its provisions" are "interpretative declarations").

See also Declaration of Kiribati to the UNFCCC ("the Government of the Republic of Kiribati declares its understanding that signature and /or ratification of the Convention shall in no way constitute a renunciation of any rights under international law concerning state responsibility for the adverse effects of climate change, and that no provisions in the Convention can be interpreted as derogating from the principles of general international law."); Declaration of Papua New Guinea to the UNFCCC ("The Government of the Independent State of Papua New Guinea declares its understanding that ratification of the Convention shall in no way constitute a renunciation of any rights under International Law concerning State responsibility for the adverse effects of Climate Change as derogating from the principles of general International Law."); Declaration of Nauru to the UNFCCC and to the Paris Agreement ("The Government of Nauru declares its understanding that signature of the Convention shall in no way constitute a renunciation of any rights under international law concerning state responsibility for the adverse effects of climate change, and that no provisions in the Convention can be interpreted as derogating from the principles of general international law."); Declaration of Cook Islands to the Paris Agreement ("The Government of the Cook Islands declares its understanding that acceptance of the Paris Agreement and its application shall in no way constitute a renunciation of any rights under international law concerning State responsibility for the adverse effects of climate change and that no provision in the Paris Agreement can be interpreted as derogating from principles of general international law or any claims or rights concerning compensation due to the impacts of climate change. …"); Declaration of Marshall Islands to the Paris Agreement ("…the Government of the Republic of the Marshall Islands declares its understanding that ratification of the Paris Agreement shall in no way constitute a renunciation of any rights under any other laws, including international law, and the communication depositing the Republic's instrument of ratification shall include a declaration to this effect for international record"); Declaration of Micronesia to the Paris Agreement ("The Government of the Federated States of Micronesia declares its understanding that its ratification of the Paris Agreement does not constitute a renunciation of any rights of the Government of the Federated States of Micronesia under international law concerning State responsibility for the adverse effects of climate change, and that no provision in the Paris Agreement can be interpreted as derogating from principles of general international law or

declarations are "an element to be taken into account in interpreting" treaties, including the UNFCCC and the Paris Agreement.[38]

4.3 Taking into account the declarations provides additional confirmation that the climate change treaties do not derogate from any principles, rules or rights of general international law. There is no element in the text of these treaties purporting to derogate from general international law. Quite the contrary. The UNFCCC recalls "principles of international law", including prevention principle,[39] and the Paris Agreement is "guided by" the Convention.[40] Including the interpretative declarations in this textual context affirms that such treaties do not derogate from any principles, rules or rights stemming from general international law.

4.4 The declarations also show that compliance with the climate change treaties does not entail compliance with general international law. They confirm that two sets of norms co-exist and that those norms have different contents. For instance, in contrast to the principles and rules of general international law, the climate change treaties apply only to States Parties, not to the international community as a whole; they do not include the duty to conduct environmental impact assessments, or to monitor harmful activities;[41] and they establish no rules governing the breaches of such

any claims or rights concerning compensation and liability due to the adverse effects of climate change …"); Declaration of the Philippines to the Paris Agreement ("THAT it is the understanding of the Government of the Republic of the Philippines that its accession to and the implementation of the Paris Agreement shall in no way constitute a renunciation of rights under any local and international laws or treaties, including those concerning State responsibility for loss and damage associated with the adverse effects of climate change;"); Declaration of Solomon Islands to Paris Agreement ("he Government of Solomon Islands declares its understanding that acceptance of the aforesaid Paris Agreement shall in no way constitute a renunciation of any rights under international law concerning State responsibility for the adverse effects of climate change;"); Declaration of Tuvalu to the UNFCCC and the Paris Agreement ("The Government of Tuvalu further declares its understanding that acceptance of the aforesaid Paris Agreement and its provisional application shall in no way constitute a renunciation of any rights under international law concerning State responsibility for the adverse effects of climate change and that no provision in the Paris Agreement can be interpreted as derogating from principles of general international law or any claims or rights concerning compensation due to the impacts of climate change. …"); Declaration of Vanuatu to the Paris Agreement ("WHEREAS the Government of the Republic of Vanuatu declares its understanding that ratification of the Paris Agreement shall in no way constitute a renunciation of any rights under any other laws, including international law, and the communication depositing the Republic's instrument of ratification shall include a declaration to this effect for international record;"); *see also* Declaration of Niue to the Kyoto Protocol and the Paris Agreement.

[38] ILC Guidelines ("ILC Guidelines"), Guideline 4.7.1.

[39] UNFCCC, Preamble, eight paragraph.

[40] Paris Agreement, Preamble, third paragraph.

[41] *See e.g. Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010, p. 14*, para. 204.

treaties, or the obligations deriving from such breaches.[42] Thus, fulfilling the obligations of the UNFCCC or the Paris Agreement does not entail fulfilling general international law.

4.5 In conclusion, the declarations in question clarify that the climate change treaties do not derogate from general international law. Consequently, they further confirm that both sets of norms co-exist and must be respected and fulfilled.

[42] CR 2024/49, pp. 65-55, para. 13 (The Gambia).