

**BEFORE THE INTERNATIONAL COURT OF JUSTICE**

**REQUEST BY THE UNITED NATIONS GENERAL ASSEMBLY FOR  
AN ADVISORY OPINION ON OBLIGATIONS OF STATES IN  
RESPECT OF CLIMATE CHANGE**

**WRITTEN STATEMENT SUBMITTED BY**

**THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA**

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## I. INTRODUCTION

1. On 29 March 2023, the United Nations General Assembly adopted resolution 77/276, whereby it requested the International Court of Justice (“**Court**”) to render an advisory opinion on the following:

*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 States, 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. On 17 April 2023, the Court received certified copies of the resolution under cover of a letter from the United Nations Secretary-General, dated 12 April 2023. On 20 April 2023, the Court ordered *inter alia* that Member States may present written statements on the questions submitted to the Court for an advisory opinion on 20 October 2023.

3. In an Order, dated 04 August 2023, the Court subsequently extended the date for presenting written statements by Member States to 22 January 2024.

4. Furthermore, on 15 December 2023, the Court extended the date of presenting all written statements to 22 March 2024.

## II. JURISDICTION OF THE COURT

5. Article 36(1) of the Statute of the International Court of Justice ("**Statute**") provides that the jurisdiction of the Court includes all matters specifically provided for in the Charter of the United Nations.

6. Article 65(1) of the Statute requires the Court to consider any legal question, and regulates that the request must emanate from an organ or entity authorised to request an opinion under the Charter of the United Nations.

7. Article 96(1) of the United Nations Charter provides that the General Assembly may request the Court to give an advisory opinion on any legal question.

8. As such, in order for the Court to exercise jurisdiction in relation to requests for advisory opinions, it is necessary that an organ must be authorised to request the advisory opinion, and the request must concern a legal, as opposed to a political, question. South Africa does not contest that these requirements have been met and that this Court may exercise jurisdiction in relation to this matter.

9. It is worth noting that this Court has only in one instance refused to give an advisory opinion on the grounds that it did not have jurisdiction, which was due to the

fact that the requesting organ was deemed not to have capacity to request an advisory opinion from the Court.<sup>1</sup>

10. Whilst South Africa does not challenge the jurisdiction of the Court, it has concerns with respect to the manner in which the questions have been formulated in General Assembly resolution 77/276, which were not in its view properly negotiated, and which it deems necessary to place before the Court.

10.1 The questions are of a very broad nature and do not reflect the very contentious and complex nature of climate change and its universal impact.

10.2 The questions also do not adequately capture the vulnerability of many other States, or the sustainable development context in which States are required to respond to climate change. The questions appear to focus on the dire situation of Small Island Developing States, with whom South Africa stands in full solidarity; however, they neglect to acknowledge the vulnerability of African States, which are particularly vulnerable, and South Africa wishes to emphasise same.

10.3 An important and core treaty in the international law regime on climate change, namely the Kyoto Protocol to the United Nations Framework Convention on Climate Change (“**UNFCCC**”) was omitted from the questions, although the Kyoto Protocol has entered into force and has near universal ratification with 192 States Parties. It cannot simply be ignored by this Court.

10.4 The questions submitted to the Court do not expressly call upon the Court to address the obligations of States in relation to adaptation, which play an important role in climate change response and require States to use resources that in turn limit resources available to reduce emissions through the implementation of mitigation measures. Climate change is no longer focusing exclusively on reducing emissions, but also on enabling countries to deal with

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<sup>1</sup> *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, ICJ Reports 1996, p. 66. The Permanent Court of International Justice had similarly only once declined to issue an advisory opinion in the case of *Status of Eastern Carelia* PCIJ Series B No. 5.

its impacts. In fact, since the early 2000s, the issue of adaptation has become a significant part of international climate change discussions.<sup>2</sup> It is therefore essential that the Court also consider obligations related to adaptation.

11. It is important to emphasise that the Inter-American Court on Human Rights as well as the International Tribunal for the Law of the Sea have also been approached to provide advisory opinions on similar questions insofar as they relate to climate change *vis-à-vis* human rights and the marine environment, respectively. In that regard, approaching several fora on the same and/or similar matters may lead to a fragmentation in international law, creating uncertainty and potentially allowing for forum shopping, which would be most undesirable and undermine the developments that have already been achieved in the context of climate change.

### **III. STATEMENT OF LAW**

#### **a) General**

12. In this Statement, South Africa will focus mainly on the substantive aspects of the international legal framework related to climate change, specifically with respect to the obligations of States under international law to ensure the protection of the climate system, whilst fully recognising that there are numerous other conventions and decisions that deal with the impact on other parts of the environment by anthropogenic emissions of greenhouse gases for States and for present and future generations.

13. Whilst legal consequences may be determined, due to the nuanced nature of legal obligations arising in relation to climate change, this can only be done on a case-by-case basis in relation to a specific State.

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<sup>2</sup> Hall, N and Persson, A “Global climate adaptation governance: Why is it not legally binding?” *European Journal of International Relations* 2018, Vol. 24(3), p. 540.

14. South Africa notes that important principles have developed in, and underlie, the international legal framework related to climate change. These principles must not be confused with principles that, whilst similar, have distinct interpretations in other areas of international law. The distinct international legal regime that has developed over several decades through careful negotiations in relation to climate change should thus, in this context, be regarded as being the *lex specialis*. Furthermore, the contextual peculiarities have resulted in States agreeing to compliance mechanisms within the climate change legal regime that would be the most appropriate responses to ensure States' compliance with their obligations.

15. It will be important, therefore, for the Court to use appropriate rules of interpretation when considering the questions before it. In particular, the Court must have regard for the well-established interpretative maxim *lex specialis derogat lex generali* and the doctrine of self-contained regimes.<sup>3</sup> The *lex specialis* principle is most appropriate in the context of climate change as it "takes better account of the particular features of the context in which it is to be applied than any applicable general law" and "[i]ts application is most likely to lead to a more equitable result, which is reflective of the intent of States".<sup>4</sup>

16. We wish to draw the Court's attention to the advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, in which the Court was similarly faced with a question which required it to "decide, after consideration of the great corpus of international law norms available to it, what might be the relevant applicable law."<sup>5</sup> The Court concluded that the "most directly relevant applicable law governing the question of which it was seized", would be the applicable law.<sup>6</sup>

17. It is submitted that the most "directly relevant applicable law" in this context is that which is contained in the UNFCCC, Kyoto Protocol and Paris Agreement.

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<sup>3</sup> 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.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, para 23.

<sup>6</sup> *Supra*, at fn. 5, para 34.

18. Whilst legal consequences may be determined, due to the nuanced nature of legal obligations arising in relation to climate change, this can only be done on a case-by-case basis in relation to a specific State.

19. Therefore, in light of the above, with regard to Question a), the context of climate change will be set out, as well as the legal frameworks pertaining to climate change that have been established and developed since 1992, and the legal obligations established thereunder.

20. With regard to Question b), the nuanced approach of obligations on different States will be emphasised thus reinforcing that a one-size-fits-all approach is not appropriate to determine legal consequences.

b) Nature and context

21. It is not possible for the Court to consider the questions posed to it without understanding and considering the nature and context in which the climate change legal regime has been developed, as well the very nature of climate change.

22. It is important to note that an abstract consideration of legal obligations related to climate change, without having regard for specific circumstances, may set a dangerous precedent and could open the floodgates to litigation, which could disrupt nationally determined plans on climate change, as well as just transitions and national consensus positions that have taken many years to create. Moreover, legal obligations in relation to climate change were negotiated in a specific context, resulting in agreement on specific compliance mechanisms that were designed to consider compliance with said obligations.

23. Climate change is a cross-cutting challenge that goes to the heart of numerous concerns facing the world; not only in terms of the devastation that it causes from an environmental perspective, but also its consequential effects on socio-economic factors, which are equally destructive, especially for developing countries. Climate change is intricately linked to development and can be seen to impact numerous Sustainable Development Goals.



24. The Intergovernmental Panel on Climate Change (“**IPCC**”) has assessed that human-caused climate change has already resulted in increased weather extremes, which is seen in the increased droughts and floods, melting of ice sheets, increased sea level rise, etc, and which will be intensified with further increases in the global temperature.<sup>7</sup> Africa is one of the geographical regions that is most affected by climate change and yet is amongst those that has contributed the least to it.<sup>8</sup> Africa has contributed a maximum of 7% to the historical cumulative net anthropogenic CO<sub>2</sub> emissions.<sup>9</sup> However, it is estimated that on average African countries spend nearly 1% of their government budget on adaptation alone – this represents 10 times more governmental expenditure on adaptation than the international support provided for adaptation.<sup>10</sup>

25. South Africa itself is particularly vulnerable to climate change due to its water scarcity and food insecurity.<sup>11</sup> The country has experienced significant damaging effects that are attributable to climate change, more recently in the form of severe floods that have had destructive effects on people’s lives and resulted in numerous fatalities. Climate change will additionally have broader implications in relation to poverty and inequality, which already serve as significant challenges with which the country is faced. South Africa is therefore keenly aware of the existing damaging effects (and potentially existential threats) of climate change for the country and its people, which will be aggravated as warming increases.

26. South Africa’s experience will be mirrored by other developing countries, which too will experience food and water insecurity, increased inequality and poverty, all of which in turn have further negative effects on health and the economy. The existing developmental challenges faced by developing countries, like South Africa, will thus be further exacerbated by climate change. Climate change is giving rise to a widening

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<sup>7</sup> IPCC (2023) *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*, pp. 5, 69.

<sup>8</sup> IPCC (2023) *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*.

<sup>9</sup> *Supra*, at fn. 7, p. 45.

<sup>10</sup> United Nations Environment Programme (2023) *Adaptation Gap Report 2023: Underfinanced. Underprepared. Inadequate investment and planning on climate adaptation leaves world exposed*, p. 48.

<sup>11</sup> The World Bank Group, *Climate Risk Profile: South Africa* (2021), p. 4.

inequality gap and driving people deeper into poverty. It is well-known that lack of development and socio-economic inequalities fuel conflict.

27. The response to climate change is centred on principles of equity as well as common but differentiated responsibilities and respective capabilities, whilst having due regard for historical and current responsibility, particularly, of developed countries.

28. The IPCC has assessed that developed countries have contributed 57% to cumulative CO<sub>2</sub>-FFI emissions between 1850 and 2019.<sup>12</sup> It is clear that developed countries have historically been largely responsible for emissions.

29. Developing countries, on the other hand, have contributed the least to climate change.<sup>13</sup> Moreover, whilst the consequences of climate change are far-reaching and will be felt by all across the globe, it is developing countries that will likely face the harshest consequences, which is compounded by the fact that they do not have the means to deal with the adverse effects of climate change.

30. Climate change is a reality and developing countries will need to prepare themselves to respond thereto. In order to respond to the climate change challenges, countries will need to adapt to existing changes and embark on mitigation measures to reduce carbon emissions. Both these responses will have cost implications. It has been estimated that to keep within the agreed 2°C mark will cost trillions of dollars.<sup>14</sup>

31. It is critical that any climate response must be done in a manner that is in line with the concept of just transitions. There is a need for an “all of economy-, all of society” response to the climate emergency, which requires shifting from a high to a low emissions economy, from incremental to transformative adaptation and climate

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<sup>12</sup> IPCC (2022) “Summary for Policymakers Change 2022”, *Climate Change 2022: Mitigation of Climate Change, Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, p. 216.

<sup>13</sup> *Ibid.*

<sup>14</sup> IPCC (2018) “Summary for Policymakers”, *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*, p. 22.

resilience; whilst building an inclusive, employment-intensive economy. However, in the absence of adequate funding, developing countries may find themselves regressing in developmental gains made thus far.

32. This complex challenge can only be addressed on the basis of agreed multilateral outcomes in terms of which States have agreed to certain binding obligations which must be fulfilled.

c) Legal frameworks pertaining to climate change

33. The international climate change regime, which has been evolving for three decades, is contained in three treaties: the UNFCCC<sup>15</sup>, Kyoto Protocol<sup>16</sup> and Paris Agreement<sup>17</sup>. As indicated above, South Africa notes with concern that the questions contained in resolution 77/276 omit to mention the Kyoto Protocol, which is a core treaty in the international law regime on climate change and cannot simply be ignored. It is part of the legal framework that the Court will have to take into account when considering the questions before it.

34. Importantly, both the Kyoto Protocol and the Paris Agreement are distinct but “related legal instruments” in that only Parties to the UNFCCC can be Parties to these later instruments.<sup>18</sup> Both the Kyoto Protocol and Paris Agreement are thus under the UNFCCC.

35. It is additionally important to underscore that the Paris Agreement did not replace the UNFCCC or its Kyoto Protocol. There is no provision in the Paris Agreement that suggests that it supersedes either the UNFCCC or the Kyoto Protocol.

36. Specifically, the Paris Agreement provides in Article 2 that: “This Agreement, in enhancing the implementation of the Convention [UNFCCC], including its objective

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<sup>15</sup> The UNFCCC entered into force on 21 March 1994, see *Treaties and international agreements registered or filed and recorded with the Secretariat of the United Nations*, Volume 1771.

<sup>16</sup> The Kyoto Protocol entered into force on 16 February 2005, see *Treaties and international agreements registered or filed and recorded with the Secretariat of the United Nations*, Volume 2303.

<sup>17</sup> The Paris Agreement entered into force on 4 November 2016, see *Treaties and international agreements registered or filed and recorded with the Secretariat of the United Nations*, Volume 3156.

<sup>18</sup> Article 23(1), Kyoto Protocol and Article 20(1), Paris Agreement.

[...]”. It is clear that the Paris Agreement is not intended to supersede the UNFCCC, but serves to implement it.

37. In terms of Article 30(2) of the Vienna Convention on the Law of Treaties: “When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.”

38. Article 30(3) provides: “When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty”.

39. It is submitted that whilst it may be argued that Article 2 of the Paris Agreement does not constitute a so-called conflict clause, which has the effect that Article 30(2) of the Vienna Convention on the Law of Treaties will apply, this does not have the effect that the UNFCCC or its Kyoto Protocol no longer apply at all.

40. In terms of Article 30(4) of the Vienna Convention on the Law of Treaties, the UNFCCC and Kyoto Protocol continue to apply insofar as they are compatible with the Paris Agreement. It is only where the treaties are incompatible, i.e. their obligations cannot be complied with simultaneously, that the latter will supersede the former.<sup>19</sup> However, the mere fact that the treaties regulate the same subject matter differently does not result in one superseding the other; rather, it will require employing interpretation techniques to ensure harmonisation of seemingly conflicting provisions.<sup>20</sup>

41. As such, the Paris Agreement must be interpreted in such a way as to accord with the UNFCCC and its Kyoto Protocol.

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<sup>19</sup> Dörr, O and Schmalenbach, K (eds) (2012) *Vienna Convention on the Law of Treaties: A Commentary*, p. 511.

<sup>20</sup> *Ibid.*

42. The Conference of the Parties (COP) was established in Article 7(1) of the UNFCCC, as the supreme body of the UNFCCC.<sup>21</sup> Article 13(1) of the Kyoto Protocol provides that the COP will serve as the meeting of the Parties to the Protocol (CMP). The Paris Agreement similarly provides that the COP will serve as the meeting of the parties to the Paris Agreement (CMA).<sup>22</sup> Therefore, decisions are taken in relation to the UNFCCC, Kyoto Protocol and Paris Agreement at the COPs held annually.

43. Whilst the UNFCCC, Kyoto Protocol and Paris Agreement are all treaties within the definition of Article 1 of the Vienna Convention on the Law of Treaties and, as such, create binding rights and obligations on the part of States Parties, not all of their provisions establish binding obligations, and decisions taken in relation to the UNFCCC, Kyoto Protocol and Paris Agreement at COPs are generally not regarded as legally binding. Notwithstanding, the purpose of the multitude of decisions taken by the various COPs over several years is to implement the rights and obligations of the Parties set out in the UNFCCC, Kyoto Protocol and Paris Agreement and the Court must also have to have regard for these decisions.

44. The UNFCCC, Kyoto Protocol and Paris Agreement established different obligations on different types of countries, having regard for their different national circumstances. This Statement will focus specifically on obligations related to mitigation, adaptation, financial resources and technology transfer.

d) Guiding Principles

45. In the lead-up to the negotiations and adoption of the UNFCCC, developing countries were concerned that whilst climate change required a response, it should not be done in a manner that would hamper economic development.<sup>23</sup> Indeed, the preamble notes in various paragraphs that developing countries should not be constrained so as to limit their development.<sup>24</sup> Article 1 of the UNFCCC sets out in its

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<sup>21</sup> Article 7(2), UNFCCC.

<sup>22</sup> Article 16(1), Paris Agreement.

<sup>23</sup> Boisson de Chazournes, L. "United Nations Framework Convention on Climate Change" *United Nations Audiovisual Library of International Law*, UNFCCC (2008), p. 2.

<sup>24</sup> Preamble, UNFCCC.

objective that the pursuit of achieving the objective of the UNFCCC should be done in a manner that enables sustainable economic development.

46. Article 3 of the UNFCCC captures the principles that States Parties must be guided by in implementing the Convention.

47. Article 3(1) of the UNFCCC contains two core principles that permeate all aspects of climate change response, namely: *equity* and *common but differentiated responsibilities and respective capabilities*. The latter of the two principles comprises two elements: a) the common responsibility of all States in relation to the protection of the environment, nationally, regionally and globally; b) having regard for the different circumstances of States, both in terms of their contribution to the problem as well as their ability to prevent, reduce or control the threat.<sup>25</sup> Crucially, this principle acknowledges the specific needs of developing countries and gives rise to different obligations for different States.<sup>26</sup> These differences were reflected in the use of Annexes I and II of the UNFCCC which contains lists of certain developed countries to which certain obligations are assigned. This approach was maintained until the Paris Agreement was adopted, in which a more nuanced approach was adopted to distinguish between developed and developing countries. However, the distinction between developed and developing countries remains, as it is an inescapable reality.

48. Articles 3(2) and (3) of the UNFCCC refer to the fact that cognisance should be taken of the specific circumstances of developing countries, including their varying socio-economic contexts in order for them to give effect to their obligations. The UNFCCC states in specific terms that States Parties must be guided by the principles as listed under Article 3, including the principle of sustainable development, in their actions to achieve the objective of the UNFCCC and to implement its provisions.<sup>27</sup>

49. These provisions confirm that developed countries must move first and fastest on climate action and provide financial support to developing countries. Developed countries have greater resources to invest in just transitions.

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<sup>25</sup> Sands, P (2003) *Principles of International Environmental Law*, p. 286.

<sup>26</sup> *Supra*, at fn. 24, pp. 286, 287, 289.

<sup>27</sup> Article 3, UNFCCC.

50. Sustainable development is thus another important principle which serves as a guiding tool for States. Sustainable development is generally understood to mean “development that meets the needs of the present without compromising the ability of the future generations to meet their own needs”.<sup>28</sup> Sustainable development entails promoting economic development whilst maintaining environmental quality.

51. Climate change is a serious threat to sustainable.<sup>29</sup> Accordingly, in implementing the objective and obligations as required under the UNFCCC, Parties should promote sustainable development. The UNFCCC provides that “policies and measures to protect the climate system against human-induced change should be appropriate for the specific conditions of each Party and should be integrated with national development programmes, taking into account that economic development is essential for adopting measures to address climate change”.<sup>30</sup>

52. Furthermore, Parties are encouraged to “cooperate to promote a supportive and open international economic system that would lead to sustainable economic growth and development in all Parties, particularly developing country Parties, thus enabling them better to address the problems of climate change. Measures taken to combat climate change, including unilateral ones, should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade”.<sup>31</sup>

53. The Kyoto Protocol, under Article 2 obligates each Party included in Annex I, to take measures in accordance with its national circumstances, including through policies, to achieve its quantified emission limitation and reduction commitments as provided for in Article 3, and that these should be in line with promoting sustainable development.<sup>32</sup>

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<sup>28</sup> *Report of the World Commission on Environment and Development: “Our Common Future”*, A/42/427, 4 August 1987, para 27.

<sup>29</sup> National Climate Change Response White Paper, Republic of South Africa, p. 9.

<sup>30</sup> Article 3(4), UNFCCC.

<sup>31</sup> Article 3(5), UNFCCC.

<sup>32</sup> Article 2(1)(a), Kyoto Protocol.

54. Furthermore, Article 10 of the Kyoto Protocol provides that in the implementation of the provisions of the UNFCCC, all Parties must take into consideration “their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances, without introducing any new commitments for Parties not included in Annex I, but reaffirming existing commitments under Article 4, paragraph 1, of the Convention, and continuing to advance the implementation of these commitments in order to achieve sustainable development”.<sup>33</sup>

55. Importantly, the Kyoto Protocol and Paris Agreement are both also to be implemented in a manner that pursues the objective of the UNFCCC and guided by the principles contained therein.<sup>34</sup>

56. In terms of Article 31(1) and (2) of the Vienna Convention on the Law of Treaties, a treaty must be interpreted in light of *inter alia* its preamble. Therefore, these principles must serve as the lens through which obligations arising from the UNFCCC, Kyoto Protocol and Paris Agreement must be viewed.

57. In particular, the Paris Agreement in its preamble emphasises the intrinsic relationship that climate change actions, responses and impacts have with equitable access to sustainable development and eradication of poverty.<sup>35</sup>

58. In South Africa, the development and implementation of its National Climate Change Adaptation Strategy (“NCCAS”) will be driven and coordinated in accordance with national sustainable development objectives, plans, policies and programmes.<sup>36</sup> Furthermore, the National Climate Change Response White Paper in relation to economic, social and ecological pillars of sustainable development recognises that a “robust and sustainable economy and a healthy society depends on the services that well-functioning ecosystems provide, and that enhancing the sustainability of the

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<sup>33</sup> Article 10, Kyoto Protocol.

<sup>34</sup> Preambular paragraphs 2 and 3, Kyoto Protocol; preambular paragraph 3, Paris Agreement.

<sup>35</sup> Preamble, Paris Agreement.

<sup>36</sup> National Climate Change Adaptation Strategy, Republic of South Africa (2021), p. 19.



economic, social and ecological services is an integral component of an effective and efficient climate change response”.<sup>37</sup>

59. It must be stressed that developed countries had the benefit of industrialising at an early stage, which contributed extensively to climate change. The UNFCCC even notes in its third preambular paragraph that “[...] the largest share of historical and current global emissions of greenhouse gases has originated in developed countries [...]”. Developing countries on the other hand have not received the economic benefits of industrialisation and are thus faced with the most detrimental effects of climate change and little financial capacity to respond thereto. As such, not only must developing countries’ response to climate change factor in their specific national capabilities, but developed countries must also assume their important role in assisting developing countries in responding adequately to climate change so that there can truly be a global response to this global threat.

60. Ultimately, climate change response must be conducive to sustainable development and to inclusive and equitable global decision-making processes. It is essential that climate action is aptly located in the broader context of sustainable development and just transitions, which encompass all-of-society and all-of-economy.

61. Accordingly, it is submitted that the obligations contained in the UNFCCC, Kyoto Protocol and Paris Agreement must be viewed through the lens of the aforementioned important guiding principles.

#### **IV. OBLIGATIONS FOR STATES UNDER THE CLIMATE CHANGE REGIME**

##### **a) Mitigation**

62. Throughout the UNFCCC distinctions are drawn between developed and developing countries. There is a clear acknowledgement that the “largest share of historical and current global emissions of greenhouse gas has originated in developed

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*Supra*, fn. 29, p. 12.

countries”.<sup>38</sup> (This statement accords with the IPCC’s assessment that developed countries have contributed 57% to cumulative CO<sub>2</sub>-FFI emissions between 1850 and 2019.<sup>39</sup>) More stringent obligations were thus placed on developed countries to contribute to addressing climate change broadly. More specifically, only “developed country Parties and other Parties included in Annex I” were obligated to “adopt national policies and take corresponding measures on the mitigation of climate change” through *inter alia* limiting emissions.<sup>40</sup> No such corresponding obligation was placed on developing countries.

63. Article 4(2)(a) of the UNFCCC clearly places an obligation on developed countries to take measures to mitigate climate change. However, it stops short of providing a target, and merely requires developed countries to submit information on its policies and measures with the aim of returning anthropogenic emissions “individually or jointly to their 1990 levels”.<sup>41</sup> The UNFCCC therefore creates an obligation of conduct whereby developed countries and those listed in Annex I are required to take steps to limit emissions, rather than obligations of result (i.e. a specific target).

64. Following the conclusion of the UNFCCC, it became clear that the commitments were insufficient to reduce greenhouse gas emissions adequately. This prompted negotiations to establish more concrete obligations and timeframes, which would ultimately be incorporated in the Kyoto Protocol.<sup>42</sup>

65. The Kyoto Protocol placed binding obligations only on developed countries (and those countries listed in Annex I of the UNFCCC) to reduce their greenhouse gas emissions.<sup>43</sup> The Kyoto Protocol followed a top-down approach by determining the prescribed emissions limitation targets, which are contained in Annex B to the Kyoto Protocol.<sup>44</sup> The Kyoto Protocol therefore established obligations of result for developed countries (including those countries listed in Annex I of the UNFCCC).

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<sup>38</sup> Preamble, UNFCCC.

<sup>39</sup> *Supra*, at fn. 10, p. 218.

<sup>40</sup> Article 4(2)(a), UNFCCC.

<sup>41</sup> Article 4(2)(b), UNFCCC.

<sup>42</sup> *Supra*, at fn. 22, p. 1.

<sup>43</sup> Article 3, Kyoto Protocol.

<sup>44</sup> Article 3(1) and Annex B, Kyoto Protocol.

66. It is important to note that under the UNFCCC and Kyoto Protocol, developing countries did not have legal obligations to reduce emissions.

67. The new approach by the Kyoto Protocol of creating obligations of result for specific countries through determining prescribed emissions limitation targets did not have the desired outcome.

68. In order to motivate countries to strengthen their response to the threat of climate change, a new treaty was negotiated. The Paris Agreement once again deviated in its approach from that of the Kyoto Protocol. One major difference is that the Paris Agreement establishes more stringent mitigation obligations on developing countries than what they had under the UNFCCC and Kyoto Protocol, but importantly continues to recognise the differences of countries in relation to their levels of development, by providing that the Paris Agreement “will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in light of different national circumstances”.<sup>45</sup>

69. The Paris Agreement once again took an approach of creating obligations of conduct (rather than result). The Paris Agreement placed an obligation on countries to self-determine their national contributions in addressing climate change. This was a key factor in States agreeing to the Paris Agreement as a binding instrument.<sup>46</sup> However, it has gone further than the UNFCCC in that there is a specific target that must be met, namely reduction of the global average temperature to well below 2°C above pre-industrial levels as set out in Article 2(1)(a) of the Paris Agreement.

70. Article 3 of the Paris Agreement provides: “As nationally determined contributions to the global response to climate change, all Parties are to undertake and communicate ambitious efforts as defined in Articles 4, 7, 9, 10, 11 and 13 with the view to achieving the purpose of this Agreement as set out in Article 2.”

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<sup>45</sup> Article 2(2), Paris Agreement.

<sup>46</sup> Rajaman, L “The 2015 Paris Agreement: Interplay between hard, soft and non-obligations” *Journal of Environmental Law* Vol. 28(2), 2016, p. 341.

71. Articles 4(2) and (3) of the Paris Agreement provide that Parties to the Paris Agreement are required to submit successive nationally determined contributions (“**NDC**”), and that each successive NDC will be more ambitious than the previous one.

72. The Paris Agreement has provisions that are both binding and non-binding (hybrid nature). The wording of Article 4(3) is particularly important in this regard and provides: “Each Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve. Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions.”

73. The use of the peremptory word “shall” denotes an obligation. Therefore, there is a legally binding obligation on all States Parties, including developing countries, to submit NDCs as well as to pursue domestic mitigation measures. The outcome, however, is not legally binding. Rather, the obligations created in relation to mitigation of emissions under the Paris Agreement are obligations of conduct and not result. States Parties are required to put measures in place to achieve goals that they have determined for themselves based on their unique circumstances. Failure to implement such measures could give rise to legal consequences. However, achieving a specific target is not a legal obligation and a failure to achieve such specific target cannot in and of itself give rise to legal consequences.

74. It must be underscored that the abovementioned obligations should not be taken lightly. Such obligations must be interpreted in line with the principle of prevention, which this Court has found to be a customary rule (at least in the context of the law concerning transboundary harm), and which has its origins in the due diligence that is required of a State in its territory.<sup>47</sup> This Court, in the *Pulp Mills on the River Uruguay* case, quotes the decision in the *Corfu Channel* case, that every State has an “obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States”.<sup>48</sup> However, this Court continued that “[a] State is thus obliged to use all the means at its disposal in order to avoid activities which take place

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<sup>47</sup> *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, ICJ Reports 2010, para 101.

<sup>48</sup> *Corfu Channel (United Kingdom v. Albania)*, Merits, Judgment, ICJ. Reports 1949, p. 22.

in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State.”<sup>49</sup> (Our emphasis.)

75. The reference to “at their disposal” is a crucial consideration. In the context of the climate change regime, “at their disposal” encapsulates the principle of common but differentiated responsibilities and respective capabilities, which features prominently in the UNFCCC, Kyoto Protocol and Paris Agreement as well as numerous other treaties and state practice. This principle manifests itself in different legal obligations for different categories of countries.<sup>50</sup> Therefore, it is not possible to conclude that all States Parties to the Paris Agreement have the same means at their disposal or consequently the same legal obligations to mitigate emissions.

76. Accordingly, in terms of the Paris Agreement, whilst States Parties cannot be held legally responsible for failing to reach the 2°C target, they do have an obligation of conduct as contained in Article 4(2) of the Paris Agreement (i.e. maintaining NDCs and implementing domestic measures with the aim of achieving their NDCs).

77. When determining whether a State has complied with its obligations in relation to due diligence, consideration must be had for the prevailing facts and circumstances<sup>51</sup>, which in the context of the Paris Agreement would include considering the “common but differentiated responsibilities and respective capabilities, in the light of different national circumstances”<sup>52</sup>. In the context of developed countries (including countries listed in Annex I of the UNFCCC), although the commitment periods have concluded, the targets contained in Annex B of the Kyoto Protocol should be taken into consideration when determining whether their obligations of due diligence have been met.

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<sup>49</sup> *Supra*, at fn. 48, para 101.

<sup>50</sup> *Supra*, at fn. 24, pp. 287,289.

<sup>51</sup> Birnie, PW, Boyle AE and Redgwell (2009) *International Law and the Environment* 3<sup>rd</sup> ed., pp. 147-150 *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: Separate Opinion of Judge Donoghue, para 10; Report of the International Law Commission on the work of its fifty-third session, A/56/10, (23 April–1 June and 2 July–10 August 2001), pp. 154-155.

<sup>52</sup> Preambular paragraph 3, Paris Agreement.

78. On this basis, developed States have greater responsibility to reduce their greenhouse gas emissions because they have historically contributed significantly more to climate change and have greater resources to invest in just transitions.

b) Adaptation

79. Whilst the question presented to the Court relates to the obligations of States to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases, it would be an oversimplification to consider merely obligations related to mitigation measures as the States Parties are also required to adapt to climate change, which require resources that then cannot be directed towards mitigation measures.

80. It is trite that the international climate change regime has mostly focused on mitigation. However, there has been a relative shift in consensus amongst States that climate change is no longer only about reducing emissions, but also about enabling countries to deal with its impact. Indeed, in the last 25 years, the issue of adaptation has become a significant part of the international climate discourse.<sup>53</sup> Thus, the need to “adapt” to climate change has gained traction.

81. Some of the main outcomes of the recent COP28, contained in the *United Arab Emirates Consensus*, relate to decisions on the First Global Stocktake, the Mitigation Work Programme, the Just Transition Pathways Work Programme and on the Global Goal on Adaptation. The latter is particularly welcomed and long overdue. The decision on the Global Goal on Adaptation is one of the most significant decisions on adaptation since the adoption of the Paris Agreement. It recognises different thematic areas for adaptation action, and it has measurable targets that are time-bound. Targets are recognised for universal sets of themes essential for sustainable development and human well-being (food, water, health, shelter, livelihood, nature, biodiversity and culture), as well as on how to approach adaptation at local and

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<sup>53</sup> *Supra*, at fn. 2, p. 540.

national levels. Furthermore, it also recognises the importance of securing adequate public finance for adaptation from developed countries.

82. Adaptation to climate change within the South African context is understood to mean “any adjustment in natural or human systems in response to actual or expected climatic stimuli or their effects which moderates harm or exploits beneficial opportunities”.<sup>54</sup> From reading the aforementioned definition, it is clear that same mirrors the meaning of adaptation as employed by the IPCC Sixth Assessment Report, which is defined as “the process of adjustment to actual or expected climate and its effects. In human systems, adaptation seeks to moderate or avoid harm or exploit beneficial opportunities. In some natural systems, human intervention may facilitate adjustment to expected climate and its effects”.<sup>55</sup>

83. From the above, it is clear that a key feature for implementing well-developed and planned adaptation responses is to focus on strengthening resilience and reducing vulnerability to climate change. Its benefits may appear much faster and are often more tangible than mitigation responses, such as an improvement in local environmental quality.

84. However, South Africa also accepts that should adaptation be carried out incorrectly, it could also result in unintended negative consequences, this is sometimes referred to as maladaptation.<sup>56</sup>

85. A leading international assessment of the effects of climate change on the global economy, the Stern Review, estimates that damages from unmitigated climate change could range from between 5% and 20% of global Gross Domestic Product (GDP) annually by 2100.<sup>57</sup> Accordingly, in the absence of an effective adaptation response, such levels of damages would certainly threaten and even reverse many developmental gains already achieved by States.

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<sup>54</sup> Section 1, South African National Climate Change Bill (B9-2022).

<sup>55</sup> *Supra*, at fn. 7, p. 120.

<sup>56</sup> IPCC (2022) *Climate Change 2022: Impacts, Adaptation and Vulnerability, Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, p. 7.

<sup>57</sup> Stern Review (2006) *The Economics of Climate Change*.

86. In light of the above background, in this section we will analyse the climate change framework which imposes various fundamental obligations on States in relation to adaptation responses in addressing climate change.

87. As explained earlier, the primary focus of climate change law has long been the mitigation of climate change. Therefore, it is not surprising that the ultimate objective of the UNFCCC is one of mitigation.<sup>58</sup> However, it is important to mention that the objective of the UNFCCC also recognises the changes to ecosystems which will require States to adapt.

88. According to Article 2, the objective of the UNFCCC is “to achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time-frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner”.<sup>59</sup>

89. Despite the above, the UNFCCC does impose an impressive number of adaptation obligations on States Parties, either collectively or in their individual capacity.

90. The main obligation on adaptation arises under Article 4(1)(b) of the UNFCCC which provides as follows:

*4(1) All Parties, taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances, shall:*

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<sup>58</sup> Mayer, B “Climate Change Adaptation and the Law” *Virginia Environmental Law Journal* Vol. 39(2), 2021, p. 147.

<sup>59</sup> Article 2, UNFCCC.



*(b) formulate, implement, publish and regularly update national...programmes containing...measures to facilitate adequate adaptation to climate change.*

91. From the outset, it must be noted that Article 4 which is titled “*Commitment*”, is intended to place restrictions on the freedom of States in exercising their discretion in complying. The use of the peremptory term “shall” in Article 4(1) denotes binding obligations in the paragraphs that follow.

92. Therefore, in simple terms, under Article 4(1)(b) States Parties are required to design and implement programmes containing some measures that facilitate climate change adaptation, which may include the regulation of land use in coastal areas, managing freshwater resources, reducing risk related to natural disasters, pursuing poverty eradication, or developing public health infrastructure.

93. South Africa has long been committed to the processes and procedures established by the UNFCCC, and to enhancing the UNFCCC’s effectiveness as the instrument that created the legal foundation on climate change. As a State Party, South Africa is conscious of its obligation to facilitate and implement adaptation measures to deal with climate change. In this context, South Africa has adopted the NCCAS which serves as a common reference point for climate change adaptation efforts in South Africa, and its strategic vision is to transition to a climate resilient country, which will follow a sustainable development path, guided by anticipation, adaptation and recovery from a changing climate and environment to achieve its development aspirations.<sup>60</sup>

94. South Africa’s strategic interventions on adaptation include amongst others, the reduction of human, economic, environmental, physical and ecological infrastructure vulnerability and building adaptive capacity, and the development of a coordinated Climate Services system that provides climate products and services for key climate vulnerable sectors and geographic areas.<sup>61</sup>

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<sup>60</sup> *Supra*, at fn. 36.

<sup>61</sup> *Ibid.*

95. Other provisions of the UNFCCC which impose obligations on States Parties are Articles 4(1)(e) and 4(1)(f). Article 4(1)(e) focuses on a collective commitment from States Parties to advance adaptation as opposed to Article 4(1)(b) which deals with individual commitments. Under the provisions of Article 4(1)(e) States Parties have an obligation to cooperate with each other in “preparing for adaptation to the impacts of climate change; develop and elaborate appropriate and integrated plans for coastal zone management, water resources and agriculture, and for the protection and rehabilitation of areas, particularly in Africa, affected by drought and desertification, as well as floods”.<sup>62</sup>

96. As illustrated by the NCCAS, and the National Climate Change Response Policy, South Africa is committed to adhering to its obligations under the existing climate change regime, and has negotiated and concluded various agreements with other States, which are aimed at developing a framework of cooperation between States on climate change adaptation.

97. Article 4(1)(f) of the UNFCCC, requires States Parties to “[t]ake climate change considerations into account, to the extent feasible, in their relevant social, economic and environmental policies and actions, and employ appropriate methods, for example impact assessments, formulated and determined nationally, with a view to minimising adverse effects on the economy, on public health and on the quality of the environment, of projects or measures undertaken by them to mitigate or adapt to climate change”.<sup>63</sup>

98. Article 4(1)(f) applies to both climate change mitigation and adaptation, but the obligation it imposes on States Parties is a procedural one, as it only requires Parties to “take into consideration”.<sup>64</sup>

99. Apart from establishing a financial channel to support adaptation in developing countries which is discussed later in this Statement, it is important to note that the

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<sup>62</sup> Article 4(1)(e), UNFCCC.

<sup>63</sup> Article 4(1)(f), UNFCCC.

<sup>64</sup> *Supra*, at fn. 59, p. 141.

Kyoto Protocol's contribution to climate change adaptation is limited to reaffirming existing obligations of States Parties under the UNFCCC.<sup>65</sup>

100. Article 10 of the Kyoto Protocol provides that:

*All Parties, taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances, without introducing any new commitments for Parties not included in Annex I, but reaffirming existing commitments under Article 4, paragraph 1, of the Convention, and continuing to advance the implementation of these commitments in order to achieve sustainable development, taking into account Article 4, paragraphs 3, 5 and 7, of the Convention, shall:*

*[...]*

*(b) Formulate, implement, publish and regularly update national and, where appropriate, regional programmes containing measures to mitigate climate change and measures to facilitate adequate adaptation to climate change.*<sup>66</sup> (Our emphasis.)

101. The Paris Agreement has been celebrated and hailed as a significant step forward and the foundation of a new framework or regime, regulating clear and concise hybrid legal norms on climate change adaptation.

102. The primary binding obligation incorporated in the Paris Agreement is Article 7(9), which stipulates as follows:<sup>67</sup>

*Each Party shall, as appropriate, engage in adaptation planning processes and the implementation of actions, including the development or*

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<sup>65</sup> *Ibid.*

<sup>66</sup> Article 10(4), Kyoto Protocol.

<sup>67</sup> Article 7(9), Paris Agreement.

*enhancement of relevant plans, policies and/or contributions, which may include:*

- (a) The implementation of adaptation actions, undertakings and/or efforts;*
- (b) The process to formulate and implement national adaptation plans;*
- (c) The assessment of climate change impacts and vulnerability, with a view to formulating nationally determined prioritized actions, taking into account vulnerable people, places and ecosystems;*
- (d) Monitoring and evaluating and learning from adaptation plans, policies, programmes and actions; and*
- (e) Building the resilience of socioeconomic and ecological systems, including through economic diversification and sustainable management of natural resources.*

103. The above provision creates an individual obligation for States Parties in relation to adaptation, in that it is framed in mandatory terms (“shall”) with no qualifying or discretionary elements. Although the provisions make use of the phrase “as appropriate”, it is submitted that this does not serve to soften the obligation, but rather creates room for compliance within the Parties’ national circumstances.

104. Furthermore, the second mandatory provision under the Paris Agreement is Article 7(13), which stipulates that “[c]ontinuous and enhanced international support shall be provided to developing country Parties for the implementation of paragraphs 7, 9, 10 and 11 of this Article, in accordance with the provisions of Articles 9, 10 and 11”.<sup>68</sup> It is submitted that Article 7(13) creates a mandatory obligation to support climate change adaptation. Although this provision is framed in the passive voice, in that it does not identify who is responsible for the provision of such continuous and

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<sup>68</sup> Article 7(13), Paris Agreement.

enhanced support, if read against the background of the provisions on adaptation under the UNFCCC, there can be no other conclusion than that the Parties intended the support by financial means to be provided by developed countries.

105. Other provisions under the Paris Agreement which impose obligations that can be classified as provisions that recommend or encourage compliance include Articles 7(7) and 7(10). Similar to Article 4(1)(f) of the UNFCCC, Article 7(7) of the Paris Agreement encourages States Parties to “strengthen their cooperation on enhancing action on adaptation”.<sup>69</sup> However, the difference between these two provisions is that Article 7(7) of the Paris Agreement goes even further by identifying those areas of cooperation that Parties can implement. Article 7(10) of the Paris Agreement imposes an obligation on each Party, as appropriate, to “submit and update periodically an adaptation communication, which may include its priorities, implementation and support needs, plans and actions, without creating any additional burden for developing country Parties”.<sup>70</sup>

106. The importance of adaptation responses to climate change cannot be overstated; it plays a significant role in assisting with managing climate change impacts.<sup>71</sup> However, its implementation is dependent on the capacity to implement such adaptation measures. It is estimated that developing countries would likely have to spend between USD 215 billion to USD 387 billion annually for the next ten years in order to cover the costs related to adaptation.<sup>72</sup> There is insufficient climate financing that is allocated to adaptation measures, especially in developing countries, whilst the vast majority of financing is directed towards mitigation measures.<sup>73</sup>

107. Therefore, adaptation responses are closely connected with financial resources and technology transfer, which is discussed in the section that follows.

c) Financial resources and technology transfer

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<sup>69</sup> Article 7(7), Paris Agreement.

<sup>70</sup> Article 7(10), Paris Agreement.

<sup>71</sup> *Supra*, at fn. 7, pp. 55-56.

<sup>72</sup> *Supra*, at fn. 10, p. 49.

<sup>73</sup> *Supra*, at fn. 7, pp. 61-62.

108. As indicated above, the UNFCCC, Kyoto Protocol and Paris Agreement acknowledge the varying levels of development and capabilities of different States Parties. Specific obligations in respect of technology and capacity transfer as well as finance to assist developing countries were thus elaborated in the UNFCCC, Kyoto Protocol and Paris Agreement.

109. The Sixth Assessment Report of the IPCC warned that the delay in designing and implementing ambitious actions to limit global warming to below 2°C and to address adaptation measures “would lock in high-emissions infrastructure, raise risks of stranded assets and cost-escalation, reduce feasibility, and increase losses and damages”.<sup>74</sup>

110. Currently, estimates for the scale of overall climate change financing needs vary, but this will certainly run into hundreds of billions, if not trillions of US dollars annually after 2023.

111. The need to assist developing countries with financial resources was already known in 1992 when the UNFCCC was adopted, and has been reinforced by subsequent international agreements. The UNFCCC, Kyoto Protocol and Paris Agreement established international obligations to provide financial resources to developing countries to enable them to respond to the changing climate system and environment. Notwithstanding the aforementioned, there is no quantified financial goal. Therefore, whilst funding is required to be provided, it is not specified how much should be provided.

112. In what follows, the applicable provisions of the UNFCCC, Kyoto Protocol and Paris Agreement, which set out key obligations relating to the financial interaction between developed and developing countries, will be discussed.

113. The primary provisions under the UNFCCC which create legal obligations for States Parties are Articles 4(3) and (4), which provide as follows:

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<sup>74</sup> *Supra*, at fn. 7, p. 25.

*(3) The developed country Parties and other developed Parties included in Annex II shall provide new and additional financial resources to meet the agreed full costs incurred by developing country Parties in complying with their obligations under Article 12, paragraph 1. They shall also provide such financial resources, including for the transfer of technology, needed by the developing country Parties to meet the agreed full incremental costs of implementing measures that are covered by paragraph 1 of this Article and that are agreed between a developing country Party and the international entity or entities referred to in Article 11, in accordance with that Article. The implementation of these commitments shall take into account the need for adequacy and predictability in the flow of funds and the importance of appropriate burden sharing among the developed country Parties.*

*(4) The developed country Parties and other developed Parties included in Annex II shall also assist the developing country Parties that are particularly vulnerable to the adverse effects of climate change in meeting costs of adaptation to those adverse effects.*

114. Article 4(3) and (4) of the UNFCCC bind developed country Parties and other developed Parties included in Annex II. Article 4(3) requires developed country Parties and those included in Annex II to “provide financial resources, including for the transfer of technology, needed by developing countries”, whilst Article 4(4) restricts the financial assistance only to “assist the developing country Parties that are particularly vulnerable to the adverse effects of climate change in meeting the costs of adaptation to those adverse effects”.

115. Another applicable provision under the UNFCCC regulating the financial responsibilities for States Parties is Article 4(7), which goes so far as to state that the extent to which developing countries will be able to implement their commitments under the UNFCCC depends on the financial resources and transfer of technology provided by developed countries. Article 4(7) of the UNFCCC emphasises the fact that “economic and social development and poverty eradication are the first and overriding priorities of the developing country Parties”.

116. Moreover, the UNFCCC also establishes a financial mechanism in Article 11 through which financial resources would be made available to assist developing States Parties in their responses to climate change. The financial resources are to be made available on a grant or concessional basis, in terms of Article 11(1). While Article 4 sets out the financial resources that developed countries are obliged to provide to developing countries and those that are vulnerable to the adverse effects, Article 11 provides, in paragraph 5, that developed countries may assist developing countries with financial resources through alternative channels.

117. Article 9(1) of the Paris Agreement states that: “Developed country Parties shall provide financial resources to assist developing country Parties with respect to both mitigation and adaptation in continuation of their existing obligations under the Convention.”<sup>75</sup>

118. The use of the imperative “shall” in Article 9(1) of the Paris Agreement establishes a legally binding obligation, whilst the use of the plural subject, “developed country Parties”, creates a collective obligation as opposed to individual obligations.<sup>76</sup> Lastly, the phrase “in continuation of their existing obligations under the Convention” in Article 9(1) refers to the obligations under Article 4(3) and 4(4) of the UNFCCC, as discussed above.<sup>77</sup>

119. Whilst some may argue that Article 9(1) of the Paris Agreement merely reiterates existing obligations, it is submitted that this is too narrow an interpretation and rather the use of the phrase “in continuation of their existing obligation under the Convention” was included in Article 9(1) with a view to noting that for those Parties that do have an existing obligation under Article 4(3) and (4) of the UNFCCC, Article 9(1) is a continuation of that existing obligation.<sup>78</sup> The obligation to provide financial resources under Article 9(1) of the Paris Agreement applies to developed country Parties. However, the terms “developed country” and “developing country” are not defined in the Paris Agreement. Therefore, it is submitted that these classifications

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<sup>75</sup> Article 9(1), Paris Agreement.

<sup>76</sup> Lawyers Responding to Climate Change, “*Interpretation of Article 9.1, Paris Agreement*”, available at <https://legalresponse.org/legaladvice/interpretation-of-article-9-1-paris-agreement/>.

<sup>77</sup> *Ibid.*

<sup>78</sup> *Ibid.*



are dynamic, and thus more countries may identify as developed country Parties in the future, which will have the resultant effect that this obligation will apply to those Parties if and when they identify as a developed country Party. Therefore, whilst Article 9(1) continues an existing obligation for developed country Parties and those that are included in Annex II to the UNFCCC, it creates new obligations for Parties that identify as developed country Parties but are not included in Annex II to the UNFCCC.

120. Those States identifying as developed country Parties have a collective obligation to provide financial resources under Article 9(1) of the Paris Agreement. This obligation is, however, subject to the principle of “common but differentiated responsibilities and respective capabilities, in the light of different national circumstances”.<sup>79</sup>

121. Another relevant provision under the Paris Agreement is Article 9(5), which compels developed country Parties to “biennially communicate indicative quantitative and qualitative information related to paragraphs 1 and 3 of Article 9”, this includes, available projected levels of public financial resources to be provided to developing country Parties, whilst other Parties providing resources are merely encouraged to communicate such information voluntarily.

122. Furthermore, Article 9(7) creates an obligation for developed country Parties to “provide transparent and consistent information on support for developing country Parties provided and mobilized through public interventions biennially in accordance with the modalities, procedures and guidelines to be adopted by the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement, at its first session, as stipulated in Article 13(13), while other parties are also encouraged to do so”.<sup>80</sup>

123. The UNFCCC, Kyoto Protocol and Paris Agreement recognise that there is an obligation for States Parties to cooperate in relation to technology transfer.<sup>81</sup>

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<sup>79</sup> *Ibid.*

<sup>80</sup> Article 9(7), Paris Agreement.

<sup>81</sup> Articles 4(1)(c), UNFCCC; Article 10(c), Kyoto Protocol; Article 10(2), Paris Agreement.

Furthermore, the obligation on developed countries to provide financial resources, as contained in the UNFCCC and Kyoto Protocol, includes doing so with a view to transferring technology.<sup>82</sup> The Paris Agreement further provides that developing countries shall receive financial support with a view to transferring technology.<sup>83</sup>

124. Article 4(7) of the UNFCCC goes so far as to state expressly that the extent to which developing countries will be able to implement their commitments under the UNFCCC depends on the financial resources and transfer of technology provided by developed countries. Without the much-needed finance and technology transfer, developing countries were and still are restricted in what they can do to implement their obligations.

125. It is thus clear that there are legally binding obligations on developed countries to provide developing countries with financial resources to enable them to respond to climate change. Notwithstanding, there is no quantified financial goal. Therefore, whilst funding is required to be provided, it is not specified how much should be provided.

126. Developed countries committed to mobilising USD 100 billion each year by 2020 to address the needs of developing countries in the Copenhagen Accord, in 2009.<sup>84</sup> More recently, in 2021, the COP expressed deep regret at the failure of developed country Parties to mobilise USD 100 billion, and the Glasgow Climate Pact again called on developed countries urgently to deliver on their goal through to 2021.<sup>85</sup>

127. Whilst the mobilisation of USD 100 billion may not be a legal obligation per se, it must be underscored that in order for a majority of developing countries to implement their NDCs under the Paris Agreement, they require financial assistance and technology transfer.<sup>86</sup>

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<sup>82</sup> Article 4(3) and (5), UNFCCC; Article 11(2)(b), Kyoto Protocol.

<sup>83</sup> Article 10(6), Paris Agreement.

<sup>84</sup> Copenhagen Accord, para 8 of Decision 2/CP.15.

<sup>85</sup> Decision 1/CP.26, paras 26 and 27.

<sup>86</sup> *Nationally determined contributions under the Paris Agreement: Synthesis report by the secretariat*, FCCC/PA/CMA/2023/12, 14 November 2023.

128. If developing countries do not receive the requisite support, they cannot be held responsible for failure to give effect to their NDCs. As the IPCC has indicated, there is a need for accelerated support from developed countries to developing countries, particularly in the form of increased adaptation and mitigation finance.<sup>87</sup>

## V. LEGAL CONSEQUENCES

129. As discussed above, legal obligations of States Parties to the UNFCCC, Kyoto Protocol and Paris Agreement must be viewed through the lens of important guiding principles, in particular, that of equity and common but differentiated responsibilities and respective capabilities, as well as sustainable development. It has the effect that legal obligations in relation to climate change are nuanced and different States have different legal obligations.

130. Consequently, it is not possible to conclude that legal consequences flowing from differing obligations will be uniform. Legal consequences cannot be determined in the abstract and it will require an assessment of each unique case, having regard for each specific State's level of development and unique circumstances, to determine firstly if there is a breach of legal obligations, and secondly the legal consequences that flow therefrom. Any advisory opinion by the Court on legal consequences in the abstract would therefore be purely academic and a restatement of the law.

131. The Court should also have regard for the fact that States have developed compliance mechanisms within the climate change legal framework, as well as the recently operationalised loss and damage fund<sup>88</sup>, which is an expression of their intent that was formulated through extensive and careful negotiations. In applying the *lex specialis* principle and the doctrine of self-contained regimes, such compliance mechanisms are thus the first and also the most appropriate means through which State compliance or non-compliance should be addressed.

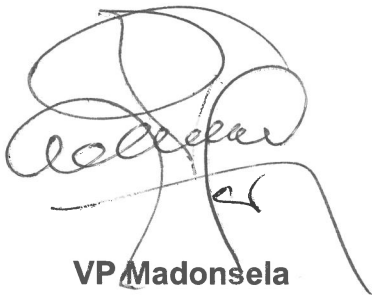
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<sup>87</sup> *Supra*, at fn. 7, p. 112.

<sup>88</sup> See Decision 1/CP.28 on the operationalisation of the loss and damage fund.

## **VI. CONCLUSION**

132. Whilst advisory opinions are not legally binding, they do contribute significantly to the development of international law and therefore the Court must be circumspect in its role of interpreting and applying international law related to climate change. The UNFCCC, Kyoto Protocol and Paris Agreement were very carefully negotiated having due regard for a variety of factors including the varying levels of development of countries and their varying capabilities in responding to climate change. To reach broad conclusions without having consideration for nuances will be far more detrimental in addressing climate change effectively.

A handwritten signature in black ink, appearing to read 'VP Madonsela', with a stylized flourish extending from the bottom right.

**VP Madonsela**

**Ambassador Extraordinary and Plenipotentiary to the Kingdom of the Netherlands**

**FOR AND ON BEHALF OF THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA**

**22 MARCH 2024**