OBLIGATIONS OF STATES IN RESPECT OF CLIMATE CHANGE

(REQUEST FOR ADVISORY OPINION)

WRITTEN COMMENTS OF THE
AFRICAN UNION

15 August 2024

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I – PRELIMINARY REMARKS

1. In light of the great importance, for the climate system and hence for the future of humanity, of the questions now before the International Court of Justice (the "**Court**"),[1] the African Union is honoured to contribute to the second round of submissions in these proceedings for an Advisory Opinion.

2. The unprecedented number of statements the Court has received from States and international organisations was only matched by their sophistication, and by the care these States and organisations – which represent the majority of the international community – have dedicated to addressing the General Assembly's questions in Resolution 77/276. If any doubt remained, this evidences the importance of the issues now before the Court.

3. The African Union observes that most of the participants in these advisory proceedings have not only confirmed that the Court can, and should, assist the General Assembly, but they have also provided statements and evidence that largely converge with the African Union's analysis of these questions on their merits. Where differences exist within this large majority of written statements, it is for the most part owed to emphasis placed by some of them on certain aspects of the questions.

4. However, while most participants are aligned on the answers to the two questions, the African Union notes that a divergence exists. Specifically, a minority of States and organisations, mostly consisting of large emitters of greenhouse gases, argue unsurprisingly that the Court should adopt a more restrictive position in its approach to the General Assembly's questions.

5. As will be shown in **Chapter II** of this submission, such stance lacks both legal and factual grounds. Likewise, as argued in **Chapter III**, the positions of certain States advocating an overly cautious approach should not be heeded with respect to the applicable law. Further, and in view of the submissions of other participants – including those of individual African countries – the African Union will briefly

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

supplement its position on two critical issues: the conduct at stake in these proceedings in **Chapter IV**, and the ensuing legal consequences in **Chapter V**.

6. Before proceeding with the substance of these submissions, the African Union wishes to draw the Court's attention to two points. *First*, the African Union's Written Statement has emphasized the ground-breaking character of the *African Leaders Nairobi Declaration on Climate Change and Call to Action* ("**Nairobi Declaration**"), adopted in September 2023.[2] This document represents an important source of contemporary State practice that should inform the Court's analysis of the issues from the point of view of States that are amongst the main victims of climate change, despite their negligible contribution to this human-made catastrophe. Several statements have also cited the Nairobi Declaration in support of their arguments,[3] and it is paramount that its content and spirit are given full consideration by the Court.

7. *Second*, and relatedly, the Nairobi Declaration stresses that the issue of climate change should not, and *cannot*, be decoupled from financial obligations (i.e., climate finance).[4] Other States have likewise addressed these issues in their written statements,[5] rightly pointing out that "a central element in the Paris Agreement is the recognition of the importance of finance flows in addressing climate change."[6]

8. These financial considerations include issues such as debt-relief, financial assistance, or compensation and reparation mechanisms, which should be attuned to the States least responsible for the current state of the climate. As highlighted in this submission,[7] financial considerations are not only part of the legal framework and the obligations binding upon States, but they can also serve as a remedy flowing from the legal consequences of breaches of the relevant legal obligations.

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2 **WS**, para. 11.
3 **WS Kenya**, para. 1.3; **WS Sierra Leone**, para. 1.6.
4 **WS Sierra Leone**, para. 3.147.
5 **WS Egypt**, paras. 169-189, **WS Namibia**, para. 141; **WS Sierra Leone**, para. 3.147, **WS Kenya**, para. 5.19.
6 **WS Mauritius**, para. 112.
7 *Infra*, p. 39 *et seq.*

II – UNDUE CALLS FOR CAUTION SHOULD HAVE NO IMPACT ON THE COURT'S DISCRETION

9. In the first round of written submissions, the African Union argued that the Court has jurisdiction to give the opinion requested by the General Assembly, and should exercise its authority to do so.[8] As the African Union stressed, the jurisdiction of the Court in the present proceedings is not in doubt, given the consensual nature of Resolution 77/276. Indeed, no participant has sought to contest the Court's clear jurisdiction to decide the questions posed by the General Assembly.

10. Instead, some participants have adopted a subtler approach, arguing that, in answering the questions, the Court should exercise restraint. While this position was not advanced by arguing that the Court should exercise its discretionary power to refrain from answering the General Assembly – a legal dead-end, given the Court's jurisprudence and practice on this point[9] – several participants have urged the Court to employ this discretion in a manner that would see the Court holding itself to consensual statements that would fail to engage with the more controversial aspects of the questions.

11. The African Union had anticipated this argument, which is why it had emphasized in the Introduction of its Written Statement that:

> Given the stakes, the Court **cannot confine itself to timid statements or tread a timorous path**, merely echoing the broad range of consensual talking points expressed, year on year out, in the context of multilateral conferences. These proceedings should not merely yield tentative ways forward that fail to recognise the exigency of climate action. Instead, these proceedings are an opportunity for the international community to consider bold ways to tackle climate change and to assist the most vulnerable countries in doing so – including through a recognition of the obligations of those who contributed the most to the crisis to make reparations.[10]

12. In line with the Court's jurisprudence on the circumstances where it would exercise its discretion not to answer the questions, the African Union considers that

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8 **WS**, paras. 20-38.

9 As established in **WS**, paras. 31-38.

10 **WS**, para. 18(c) (emphasis in the original).

"compelling reasons" are equally required to place any limit on what the Court can or should decide.[11] None of the various arguments levied by the proponents would justify this cautious approach:

a. **Scope of the question**: While certain States have pointed out that the scope of the questions is "broad",[12] few have pushed the argument further to argue that this should, somehow, limit the Court's answers to them.[13] These statements are however inconsequential: as aptly put by Sierra Leone: "insofar as the questions posed are broad, this is simply reflective of the broad and cross-cutting nature of climate change itself."[14]

b. **Existing diplomatic framework**: Another argument of the participants urging caution has been to draw the Court's attention to the diplomatic and political frameworks through which States are negotiating solutions and determining obligations with respect to climate change.[15] Yet, there is no ground to believe that the Court would "complicate" these diplomatic efforts,[16] or that the Court's clarification of the applicable norms – sought, once again, by the General Assembly on the basis of a consensus – would affect any State's "willingness to negotiate further agreements to address climate change."[17] Likewise, the political dimensions of the questions are not a bar to the Court's exercise of its jurisdiction.[18] If anything, the Court's Advisory Opinion may in fact even give new impetus to these negotiations, especially given the disappointing progress made in this context over the last few decades.[19]

c. **Issue of climate change before other courts**: As equally anticipated by the African Union,[20] several States have pointed out that the International

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11 *Kosovo Advisory Opinion*, para. 30.

12 **Joint WS Denmark, Finland, Iceland, Norway & Sweden**, para. 29.

13 See **WS South Africa**, para. 10. Seemingly, only **WS Iran**, para. 24, takes the even broader position that the questions' broadness, and their alleged ambiguity, should prevent the Court from answering the questions altogether. But even Iran recognises that the Court can always reformulate and interpret the questions if necessary: see *ibid.*, paras. 25-30. For greater certainty, the African Union disagrees with the position that the questions are unclear or unambiguous, or that they should be reformulated; as put by **WS Ghana**, para. 29: "Although question (a) might be considered to be drafted quite broadly […] it is appropriately formulated and can be broken down into subheadings by the Court."

14 **WS Sierra Leone**, para. 2.11.

15 **WS Saudi Arabia**, paras. 1.19, 3.5-3.16; **WS Russian Federation**, p. 5.

16 **WS Sierra Leone**, para. 2.9.

17 As alleged by **WS Saudi Arabia**, para. 3.11.

18 **WS**, para. 35; see also **WS Kenya**, para. 4.13, **WS Sierra Leone**, para. 2.9.

19 As stressed by **WS Namibia**, para. 24.

20 **WS**, para. 36.

Tribunal for the Law of the Sea ("**ITLOS**") or regional human rights courts have been asked questions about climate change.[21] This, however, is certainly not a bar to the Court's discretion.[22] The questions put to the Court in the present proceedings are broader in scope,[23] and concern several areas of international law. The Court is therefore not confined to specific areas of law – as are the specialized international courts and tribunals – and its reasoning may thus even inform the decisions of those other courts. Relatedly, a few States have alluded to the risk of fragmentation of international law.[24] Needless to say, the Court should not engage with such vague considerations.

d. **Distinction between abstract and concrete issues**: Certain participants have stressed that that Court should limit itself to an analysis *in abstracto*, and not engage in any "concrete" findings.[25] Certainly, as the Court pointed out in its very first advisory opinion, it "may give an advisory opinion on any legal question, abstract or otherwise."[26] In the case at hand, the questions put to the Court make no such distinction between abstract and concrete considerations – in fact, the Preamble of Resolution 77/276 stresses the unmistakably concrete consequences of anthropogenic emissions of greenhouses gases. In the same vein, there is no basis to interpret the General Assembly's questions as being focused on "future compliance".[27] To the contrary, Resolution 77/276 makes multiple references to the historical background of these issues, and as reflected in question (b) itself, the General Assembly seeks the Court's input on the legal consequences for harm that States "have caused".

e. ***Lex lata* and *lex ferenda***: Several participants have drawn a distinction between *lex lata* and *lex ferenda*, urging the Court not to engage with the

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21 See also **Joint WS Denmark, Finland, Iceland, Norway & Sweden**, paras. 34-40, though they do acknowledge that, given "its mandate as the principal judicial organ of the UN", the Court is "uniquely positioned to offer an important and sought after contribution to a systemic interpretation of relevant rules that more specialised international institutions would not be similarly expected or positioned to provide": *ibid*, para. 41; **WS South Africa**, para. 11.

22 **WS Sierra Leone**, para. 2.12. As pointed out by the **WS European Union**, para. 39, there is no issue of *res judicata* in these circumstances.

23 **WS Kenya**, para. 4.15; **WS Madagascar**, para. 12; **WS Indonesia**, para. 22.

24 **WS South Africa**, para. 11. See also **Joint WS Denmark, Finland, Iceland, Norway & Sweden**, para. 42.

25 See **Joint WS Denmark, Finland, Iceland, Norway & Sweden**, para. 30 **WS OPEC**, para. 20; **WS European Union**, para. 38.

26 *Admission of a State to the United Nations (Charter, Article 4)*, Advisory Opinion, I.C.J. Reports 1948, p. 57, at p. 61.

27 **Joint WS Denmark, Finland, Iceland, Norway & Sweden**, para. 23.

latter.[28] This is a red herring, and should not prevent the Court from fully answering the questions posed to it.

f. **General calls for caution**: Lastly, a few participants have made otherwise broad appeal to the idea of caution or prudence in these proceedings.[29] These suggestions lack any proper legal basis: the Court will, necessarily, answer the General Assembly's questions in line with its judicial function.

13. If anything, there are "compelling reasons" for the Court to be *ambitious* in these advisory proceedings,[30] and offer its analysis to assist the General Assembly in its "leadership role in combatting climate change".[31] The fact that this is the first advisory opinion sought by a consensus of States at the United Nations should not be overlooked.[32] Additionally, the extensive participation of States and international organizations in the proceedings underscores the significance of the questions for the international community,[33] and reflects the high expectations these participants have for the outcomes of these proceedings.[34] Finally, the importance of the issue – one of the biggest threats currently facing humankind – militates in favour of the Court providing a comprehensive answer to the General Assembly's questions.

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28 See **Joint WS Denmark, Finland, Iceland, Norway & Sweden**, paras. 22, 31-33; **WS OPEC**, paras. 15-16; **WS United Kingdom**, para. 24.2; **WS Saudi Arabia**, paras. 1.19 and 3.9-3.10; **WS China**, para. 11.

29 **WS Saudi Arabia**, paras. 3.7, 3.13; **WS China**, para. 9.

30 **WS Democratic Republic of Congo**, para. 32; **WS Sierra Leone**, para. 2.7; **WS Burkina Faso**, para. 60; **WS France**, para. 7.

31 **WS Kenya**, para. 4.9. See also **WS European Union**, para. 35.

32 **WS Namibia**, para. 25; **WS Seychelles,** para. 12.

33 **WS Portugal**, para. 36.

34 **WS Cameroon**, para. 8.

III – THE WHOLE CORPUS OF INTERNATIONAL LAW IS APPLICABLE

A. THE REQUEST BY THE UN GENERAL ASSEMBLY CLEARLY INDICATES THAT THE APPLICABLE LAW IS THE ENTIRE CORPUS OF INTERNATIONAL LAW

14. The African Union has emphasized in its Written Statement that the entire corpus of international law is applicable in answering the questions posed by the UN General Assembly. As such, when identifying the obligations of States to ensure the protection of the climate system and other parts of the environment, the Court must have regard *inter alia* to human rights treaties (e.g., the ICCPR, the ICESCR and the ACHPR), international climate change treaties (e.g., the UNFCCC, the Kyoto Protocol and the Paris Agreement), principles of general international law including customary rules, multilateral environmental agreements, and relevant instruments governing aspects of climate change in the African context.

15. The African Union submits that these sources of international law fall within the scope of the questions posed to the Court. This stems from three distinct elements of Resolution 77/276: (i) the text of the questions; (ii) the chapeau of the operative part; and (iii) the preambular paragraphs.[35] As argued by the Republic of Egypt, the Resolution's text reflects the "intention"[36] of the UN General Assembly, which specifically requests the Court to pronounce on "the obligations of States *under international law* to ensure the protection of the climate system and other parts of the environment for States and for present and future generations" (emphasis added), and on the "legal consequences under these obligations".[37]

16. Given this level of clarity, there is therefore "no need for the Court to adopt such a restrictive interpretation",[38] and as advanced by the Republic of Namibia, "[o]nly by addressing the full breadth of the request can the Court meaningfully assist States in

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35 **WS**, paras. 42-49.
36 **WS Egypt**, para. 70.
37 Resolution 77/276 (emphasis added).
38 **WS Sierra Leone**, para. 3.2; **WS**, para. 53.

meeting their climate change obligations under international law".[39] Indeed, the General Assembly would not have specifically referred to the wider corpus of international law if an answer limited to the UNFCCC, the Kyoto Protocol and/or the Paris Agreement was in any way sufficient. The chapeau of the operative part, as well as the references to the wider corpus of international law in the preamble of Resolution 77/276, particularly in the fifth paragraph, would have no *effet utile* and be utterly ignored if the Court limited its answer, as some major emitters of greenhouse gases have asked the Court to do, to the UNFCCC, the Kyoto Protocol and/or the Paris Agreement.

B. THE INTERNATIONAL CLIMATE CHANGE REGIME IS NOT *LEX SPECIALIS*

17. It is the view of certain States that the international legal obligations in respect of climate change are found *primarily* in the treaty law of a purported "climate change regime".[40] Several parties to the present proceedings have argued that the climate change regime, which they limit to the UNFCCC and the Paris Agreement (disregarding other important instruments), has established a system whereby the adverse effects of climate change are addressed *exclusively* through voluntary and cooperative mechanisms that are non-punitive and non-adversarial in nature.[41] Accordingly, these parties contend that the general rules of international law relating to the legal consequences of internationally wrongful acts codified in the ILC Draft Articles on State Responsibility for Internationally Wrongful Acts ("**ARSIWA**"), which are accepted as reflecting customary international law, are inapplicable to the questions put to the Court.[42] That view should not mislead the Court as to the scope of the applicable law.

18. At the outset, it is necessary to reiterate that the African Union considers that the UNFCCC, the Kyoto Protocol, and the Paris Agreement, form *part* of the corpus of international law under which the Court is requested to answer the questions, and are both relevant and applicable to the determination of States' obligations, and to the

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39 WS Namibia, para. 42.
40 WS USA, paras. 3.1-3.52; WS United Kingdom, para. 29; WS Canada, para. 11; WS China, para. 19; WS Russia, p. 5.
41 WS Canada, para. 33; WS European Union, paras. 333-334; WS USA, paras. 3.31-3.34; WS China, p. 54.
42 WS United Kingdom, para. 136.

assessment of the legal consequences under those obligations.[43] Indeed, in its recent Advisory Opinion,[44] the ITLOS confirmed the importance of the UNFCCC and the Paris Agreement and their relevance in interpreting and applying UNCLOS with respect to marine pollution from anthropogenic GHG emissions.[45] The African Union does not disagree with this position as applicable in the current proceedings. As mentioned previously, the international climate change regime forms part of the applicable corpus of international law and is relevant in answering the questions posed to the Court.

19. A related view is that the international climate change regime is a specialized regime, a *lex specialis*, trumping any other obligations of States governing anthropogenic emissions of greenhouse gases.[46] According to this view, the broader scope of international law under which the Court is asked to answer the questions should not be construed as imposing obligations to ensure the protection of the climate system that go beyond those agreed by the international community in the specific context of the UNFCCC and the Paris Agreement.[47] The effect of this argument is also to suggest that, for the purposes of issues of State responsibility, the climate change regime is a self-contained treaty-based regime with a *lex specialis* character that excludes the application of the general rules of State responsibility that are codified in the ARSIWA.[48]

20. Following this argument even further, States' obligations in the climate change context, it is advanced, would be satisfied by the implementation of their obligations under the climate change regime, including the Paris Agreement.[49] On matters of the responsibility of States for breaches of their obligations under the climate change

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43 **WS**, paras. 50-52.

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

45 *Ibid.*, para. 222.

46 **WS OPEC**, paras. 15, 22, and 62; **WS Kuwait**, paras. 60-81; **WS Saudi Arabia**, paras. 4.1-4.107; **WS China**, paras. 19, 92-96; **WS Japan**, paras. 14 and 18.

47 **WS Kuwait**, para. 63. Conversely, **WS Canada**, para. 27, argues that "[t]he positive impact that climate change action can have on human rights cannot be relied on to broaden the scope of States' obligations under international human rights law".

48 **WS Kuwait**, para. 86-124; **WS Saudi Arabia**, para. 4.100; **WS Japan**, para. 18; **WS European Union**, paras. 351-355.

49 **WS USA**, para. 4.1: "In the implementation of their respective obligations under the UN climate change regime, there is no indication of any widely held belief of Parties that they are subject to nontreaty- based international obligations to mitigate the risks posed by climate change. To the extent other sources of international law, such as customary international law, might establish obligations in respect of climate change, these obligations would be, at most, quite general. Any such obligations would be satisfied in the climate change context by States' implementation of their obligations under the climate change-specific treaties they have negotiated and joined, which embody the clearest, most specific, and most recent expression of their consent to be bound by international law in respect of climate change."

regime, certain parties have submitted that the provisions on loss and damage in the relevant treaties and in the decisions taken by successive Conferences of the Paris (**COP**) on the issue of loss and damage exclude the possibility of establishing liability or providing compensation for environmental harm that has caused injury to States or peoples.[50] Other parties have also argued that the Paris Agreement has provided mechanisms for the settlement of disputes that constitute the only path through which the legal consequences of wrongful conduct that relates to climate change should be determined.[51]

21. The African Union disagrees with these positions, for at least three reasons. *First*, as highlighted previously, the UN General Assembly has explicitly requested a determination of States' obligations *under international law*. If the UN General Assembly had intended for the Court to focus solely on the international climate change regime, this would have been explicitly stated. Yet, what the UN General Assembly has done, acting by consensus, is precisely the opposite: it has emphasized the need to consider the full corpus of international law, having particular regard to certain rules and treaties. Restricting the applicable law to the climate change regime as *lex specialis* is therefore inconsistent with the text – adopted by consensus – and the spirit – emphasized in the preamble – of the General Assembly's Resolution.

22. *Second*, the primary rules of international law that are relevant to climate change – specifically to the conduct of States which has resulted in massive emissions of greenhouse gases over time – and that apply to the questions put to the Court in Resolution 77/276 are not limited to the UNFCCC and the Paris Agreement. To make a proper determination of States' obligations to protect the climate system "and other parts of the environment" from harm, not only "for States" but also "for present and future generations", the Court must consider several areas of international law. The nature of climate change is such that it impacts many different sectors. As aptly put by the Republic of Sierra Leone:

> the characteristics of global climate change are such that it is an inherently complex and multifaceted phenomenon that impacts both the environment and human life. In light of the breadth of climate change's causes and effects, it is an issue that inevitably intersects

[50] WS European Union, p. 106.
[51] WS Canada, paras. 34-35.

> with different areas of international law, including those referenced in the preambular paragraphs of the General Assembly's Request.[52]

While it encompasses the UNFCCC, the Kyoto Protocol and the Paris Agreement, such treaties do not directly – and even less so, comprehensively – address issues related to, for example, human rights, the right of peoples to self-determination, the law of the sea or the protection of the wider environment. The broader framework of 'international law' – which includes climate change law, environmental law, human rights law, and the law of the sea – provides a more direct and comprehensive answer to the questions of States' obligations States' obligations to protect the climate from significant harm for present and future generations, and the legal consequences of the breach of those obligations. The rules of these areas of international law continue to apply concurrently with treaties such as the UNFCCC and the Paris Agreement. The determination of the questions must thus take into account all areas of international law.

23. From the perspective of rules and treaties other than those of the climate change regime, the formal application of human rights treaties and the UNCLOS to govern anthropogenic emissions of greenhouse gases from a State has been specifically confirmed by the European Court of Human Rights,[53] the Human Rights Committee,[54] and the ITLOS. Regarding the latter, in its recent analysis in the *COSIS Advisory Opinion*, the ITLOS provided clarity as to the scope of the applicable law, holding that it comprised not only the UNCLOS and the COSIS Agreement, but also other relevant rules of international law not incompatible with the Convention.[55] While the UNFCCC and the Paris Agreement were considered relevant in interpreting and applying UNCLOS,[56] the ITLOS made it very clear that UNCLOS and the Paris Agreement are separate agreements, with separate sets of obligations,[57] and

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52 **WS Sierra Leone**, para. 3.5. **WS Canada**, para. 19, also acknowledges that: "[w]hile the UNFCCC and the Paris Agreement are the two preeminent treaties negotiated to address climate change, [...] climate change is relevant to a variety of international legal obligations."

53 ECtHR, *Case of Verein Klimaseniorinnen Schweiz and others v. Switzerland*, Application No. 53600/20, Judgment of the Grand Chamber, 9 April 2024, paras. 410-411 ("*Klimaseniorinnen*").

54 UN Human Rights Committee, *Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3624/2019: Daniel Billy et al. v. Australia*, CCPR/C/135/D/3624/2019, 22 September 2022, para. 8.7 ; UN Human Rights Committee, *Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2728/2016: Teitiota v. New Zealand*, CCPR/C/127/D/2728/2016, 23 September 2020, para. 9.9.

55 *COSIS Advisory Opinion*, para. 127: "The positive impact that climate change action can have on human rights cannot be relied on to broaden the scope of States' obligations under international human rights law."

56 *Ibid.*, para. 222.

57 *Ibid.*, para. 223.

consequently, the relevant obligations under UNCLOS would not be fulfilled "simply by complying with the obligations and commitments under the Paris Agreement".[58] This is only natural, given that the metrics and indicators relevant to assess the degree to which the marine environment has been polluted bz the acts and omissions of a States are clearly different from global average temperature goals. Even today, at a moment in which the global average temperature is dangerously close to exceed the 1.5C target of the Paris Agreement, massive discharges of greenhouse gases into the oceans have already polluted the marine environment in a manner inconsistent with the UNCLOS and customary international law. This is the rationale which can be read into the ITLOS' explicit holding that the international climate change regime is not *lex specialis* to the UNCLOS, and that it should not be interpreted so as to frustrate the purpose of the UNCLOS.[59]

24. Similarly, in this instance, the ICCPR, the UNFCCC, and the other instruments under which the Court is requested to answer the questions are separate instruments, with separate sets of obligations. The Court must identify *all* the relevant legal obligations of States with respect to climate change under, in particular, the various instruments referred to in the Resolution. To accurately and effectively answer the questions posed by the UN General Assembly, the Court is therefore expected to consider the whole corpus of international law, rather than confining its examination to a narrow set of treaties, which do not address many core issues. Unlike the ITLOS – and unlike the questions put to the ITLOS – the Court's competence is not confined to a specific treaty or field. In the context of the ITLOS Advisory Opinion, the applicable law was the UNCLOS, the COSIS Agreement and other relevant rules of international law not incompatible with the Convention.[60] By contrast, in these proceedings, the applicable law, as expressly emphasized in Resolution 77/276, is the entire corpus of international law.

25. As to the legal consequences for States for conduct in breach of their international obligations under the relevant regimes of international law, such as environmental law, human rights law, and the law of the sea, those consequences are governed by

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58 *Ibid.*

59 *Ibid.,* para. 224.

60 *COSIS Advisory Opinion,* para. 127: "The positive impact that climate change action can have on human rights cannot be relied on to broaden the scope of States' obligations under international human rights law."

the ARSIWA. For instance, primary rules of environmental law, such as the duty of States to ensure that activities under their jurisdiction do not cause significant harm to the environment, continue to apply concurrently with obligations arising from the UNFCCC and the Paris Agreement, and the legal consequences of conduct that is inconsistent with those primary rules are governed by the ARSIWA.

26. *Third and in any event,* the UNFCCC and the Paris Agreement are not a self-contained *lex specialis* regime that excludes the operation of secondary rules of general international law. In other words, nothing in the climate change regime constitutes *lex specialis* rules of responsibility within the meaning of Article 55 of the ARSIWA.[61] The rules and institutional frameworks relating to loss and damage caused by climate change are a case in point. Article 8 of the Paris Agreement and the relevant decisions of successive COPs on loss and damage were not designed to function as *lex specialis* rules of responsibility that exclude the application of the *lex generalis* rules of State responsibility. Rather, the treaty provisions on loss and damage and the related institutional arrangements, such as the Warsaw International Mechanism for Loss and Damage and the decision taken during COP27 to establish a Loss and Damage Fund, are primary rules of international law and political commitments that provide legal and institutional frameworks for addressing the reversable damages and permanent losses caused by climate change through cooperative and facilitative action.[62] Indeed, the statement in the decision adopted by COP21 that "Article 8 of the [Paris] Agreement does not involve or provide a basis for any liability or compensation"[63] indicates that the intent of the States parties was to codify a *primary rule* that relates to addressing losses and damages caused by climate change as opposed to a *secondary rule* that relates to state responsibility or the consequences of internationally wrongful conduct, including liability, reparation, and compensation. The African Union is therefore of the view that the general rules of international law

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61 Christina Voight, State Responsibility for Climate Change, NORDIC J. INT'L L., Vol. 77, p. 3 (2008) ("[I]n the field of international environmental treaty law, the notion that these treaties constitute closed systems needs to be rejected. Most environmental treaties neither contain clear-cut primary obligations nor secondary rules that deal with legal consequences of breaches of obligations").

62 Benoit Mayer, State Responsibility and Climate Change Governance: A Light through the Storm, CHINESE J. INT'L L., Vol. 13, p. 549 (2014) (The concept of loss and damage was not officially defined, but it has been suggested that damage relates to "those impacts that can be reversed", whereas loss refers to "the negative impacts of climate change that are permanent).

63 U.N. Doc FCCC/CP/2015/L.9/Rev.1, para. 52.

relating to State responsibility, as codified in the ARSIWA, are applicable in addressing Question (b) of General Assembly Resolution 77/276.

C. THE PRINCIPLES OF SYSTEMIC INTEGRATION AND MUTUAL SUPPORTIVENESS GOVERN THE RELATIONSHIP BETWEEN THE VARIOUS LEGAL INSTRUMENTS WITHOUT AFFECTING THEIR INDIVIDUAL APPLICATION

27. The African Union further submits that, in the context of climate change, and in light of the impact of climate change on various areas of law, mutual supportiveness between legal regimes and systemic integration of the relevant norms is of utmost importance. According to this approach, "when several norms bear on a single issue they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations".[64] This ensures that legal issues are resolved in light of their broader international legal context. The principle of systemic integration is reflected in Article 31(3) (c) of the VCLT, which prescribes that when interpreting a treaty, "any relevant rules of international law applicable in the relations between the parties" shall be taken into account, together with its context.[65]

28. As such, the African Union endorses the position of the Republic of Namibia that the Court must assess the obligations of States in a "systematically integrated manner", which requires it, for instance, to "interpret environmental law obligations in light of human rights obligations and vice versa."[66] As stressed by the Court in its jurisprudence, this method of interpretation ensures that treaties do not operate in isolation but are "interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation".[67]

29. Yet, systemic integration and harmonious interpretation in no way deprive each applicable rule of its autonomous application and its specific requirements. As noted earlier in relation to the *COSIS Advisory Opinion,* the ITLOS specifically held that the obligations of States under the UNCLOS could be breached even by conduct

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64 International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, 58th session.

65 VCLT, Article 31(3).

66 **WS Namibia**, para. 42.

67 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 16, at p. 31, para. 53.

consistent with the Paris Agreement. It is a trite observation indeed that respecting one single obligation is not enough – and cannot be presumed to be enough - to respect every other obligation. Systemic integration and harmonious interpretation mean something quite different, namely that it must be possible for a certain conduct to be consistent with many obligations at the same time or, in other words, that compliance with one applicable obligation should not be incompatible with compliance with another applicable obligation. But each obligation retains its autonomous application and its specific requirements. Specifically, compliance with the Paris Agreement is not sufficient to comply with obligations arising under human rights, the law of the sea and customary international environmental law, if the conduct at stake does not meet, in addition, the requirements of these other rules.

30. For the preceding reasons, the African Union submits that the applicable law in answering the questions posed by the General Assembly is the entire corpus of international law. The relationship between the various legal instruments of international law must be seen as one of mutual supportiveness and complementarity, ensuring that obligations of States with respect to climate change are construed in harmony with each other. Such a relationship cannot be, and should not be, framed in exclusionary terms, especially given the nature of climate change, and the questions posed by the UN General Assembly which are all-encompassing. Consequently, the principle of systemic integration must guide the Court when interpreting the various norms of international law under which it is asked to determine States' obligations with respect to climate change. But this conclusion does not deprive each obligation of its autonomous application and its specific requirements.

IV – THE CONDUCT UNDERLYING THE TWO QUESTIONS POSED TO THE COURT

31. The definition of the conduct underpinning the two questions posed to the Court is a crucial issue as, in the absence of such characterization, the Court would lack a key element to identify the obligations applicable to such conduct, and the legal consequences stemming from this conduct.

32. As the African Union has detailed in its Written Statement,[68] there is a scientific consensus on the cause of climate change, namely anthropogenic emissions of greenhouse gases over time. This consensus is expressed in the reports of the Intergovernmental Panel on Climate Change (**IPCC**), including in their summaries for policymakers,[69] which are adopted by States, acting by consensus, following a laborious process of line-by-line approval.[70] The existence of such a consensus is stated clearly in preambular paragraph 9 of GA Resolution 77/276:

> "*Noting with utmost concern* the scientific consensus, expressed, inter alia, in the reports of the Intergovernmental Panel on Climate Change, including that anthropogenic emissions of greenhouses gases are unequivocally the dominant cause of the global warming observed since the mid-20th century"[71]

33. Resolution 77/276 requests the Court to determine the obligations of States and the legal consequences of those obligations in respect of acts and omissions of individual States – and of a specific group thereof – that have resulted over time in a level of anthropogenic GHG emissions from activities, within their jurisdiction or control, causing a significant interference with the climate system and other parts of the

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68 **WS**, paras. 6-15.

69 Intergovernmental Panel on Climate Change, Synthesis Report of the IPCC Sixth Assessment Report (AR6). Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, Summary for Policymakers (2023), statement A.1 ("Human activities, principally through emissions of greenhouse gases, have unequivocally caused global warming, with global surface temperature reaching 1.1°C above 1850–1900 in 2011–2020"); Intergovernmental Panel on Climate Change, Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, Summary for Policymakers (2021), statement A.1: "It is unequivocal that human influence has warmed the atmosphere, ocean and land".

70 Intergovernmental Panel on Climate Change, Appendix A to the Principles Governing IPCC Work: Procedures for the preparation, review, acceptance, adoption, approval and publication of IPCC Reports (adopted 15th sess, San José, 15-18 April 1999; amended 37th sess, Batumi, 14-18 October 2013), sections 2 and 4.4.

71 Resolution 77/276, preambular para. 9, relying on Intergovernmental Panel on Climate Change, Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change, Summary for Policymakers (2014), statement 1.2; Intergovernmental Panel on Climate Change, Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, Summary for Policymakers (2021), statement A.1.

environment. The conduct responsible for climate change is clearly characterized in the text of the resolution:

a. *First*, in very general terms, in order for the Court to identify the body of obligations relevant to answering the questions, Question (a) refers to "anthropogenic emissions of greenhouse gases";

b. *Then*, in more detail, so as to clarify that the conduct has unfolded over time and also encompasses conduct in relation to the activities of non-State actors, paragraph 5 of the preamble refers to "the conduct of States over time in relation to activities that contribute to climate change and its adverse effects"; and

c. *Finally*, with more precision for the Court to consider whether, as a matter of principle, the conduct is consistent or inconsistent with international law and, in the latter case, what legal consequences follow, Question (b) refers to "acts and omissions" whereby States "have caused significant harm to the climate system and other parts of the environment".

34. In this context, five specific aspects of the text of Resolution 77/276 are essential criteria for the characterization of this conduct.

a. *First*, Question (a) focuses on "anthropogenic emissions of greenhouse gases" as the general activity from which the "climate system and other parts of the environment" are protected "for States and for present and future generations" by certain obligations of States not only of an inter-State nature, but also those owed to peoples and individuals of the present and future generations.

b. *Second*, according to the IPCC Glossary, the "climate system" is "the global system consisting of five major components: the atmosphere, the hydrosphere, the cryosphere, the lithosphere and the biosphere", which "changes in time" under the influence, *inter alia*, of "anthropogenic forcings such as the changing composition of the atmosphere and land-use change".[72]

c. *Third*, the key expression mentioned in Question (a) ("anthropogenic emissions of greenhouse gases") is also referred in Resolution 77/276's preamble, which

[72] IPCC Glossary, italics original, available at https://apps.ipcc.ch/glossary/.

notes with utmost concern the scientific consensus of the IPCC that "anthropogenic emissions of greenhouses gases are unequivocally the dominant cause of the global warming observed since the mid-20th century".[73] The IPCC Glossary importantly defines "anthropogenic emissions" as GHG emissions from several "human activities", including "the burning of fossil fuels, deforestation, land use and land use changes (LULUC), livestock production, fertilisation, waste management, and industrial processes."[74]

d. *Fourth*, Resolution 77/276's preamble further highlights the relevance of a number of treaties and obligations of general international law "to the conduct of States over time in relation to activities that contribute to climate change and its adverse effects", thus underscoring both the historical cumulation of GHG emissions referred to in Question (a) and connecting the State conduct in Question (b) to the applicable obligations in Question (a).

e. *Lastly*, the chapeau of Question (b) refers to the "acts and omissions" of States which "have caused significant harm to the climate system and other parts of the environment". It therefore confirms that the obligations in Question (a) and the legal consequences in Question (b) refer to the conduct of States regarding activities under their jurisdiction or control that have contributed to GHG emissions to the point where the climate system as a part of the environment is, at least, significantly harmed.

35. As a result, the two questions posed to the Court are not focused on any specific adverse impact of climate change (as we might find in contentious proceedings between two States), but rather on the type of State acts and omissions that have historically caused significant harm to the climate system, namely State acts and omissions that have resulted in significant cumulative GHG emissions. These actions and inactions could include the State's own emission activities, its support for activities that lead to emissions (e.g., fossil fuel subsidies), or insufficient regulation of private actors whose GHG emissions have negatively impacted the climate

[73] See, in particular, IPCC, *Synthesis Report of the IPCC Sixth Assessment Report (AR6)*, Summary for Policymakers, statement A.1, available at https://www.ipcc.ch/report/sixth-assessment-report-cycle/.

[74] IPCC Glossary, available at https://apps.ipcc.ch/glossary/.

system.[75] The fossil fuel industry provides the clearest example, because of its significant contribution to the problem. The Court is thus asked for authoritative guidance as to the applicable obligations and legal consequences of acts and omissions regarding GHG emissions that have harmed the climate system to a significant degree.

36. In its Written Statement, the African Union submitted that, in order to assess the legal consequences owed by States which, "by their acts and omissions, have caused significant harm to the climate system and other parts of the environment" to African States, peoples and individuals, the Court first has to establish the existence and nature of a breach of one or more of the relevant obligations. Such an assessment requires a clarification of the conduct of States in question and its consistency with the governing obligations in the light of the general international law of State responsibility codified in the **ARSIWA**.[76] The African Union has also explained its understanding of the conduct to be assessed, its attributability to States, and its inconsistency with primary rules of obligation, as required by Article 2 of ARSIWA.[77] In this context, the African Union has submitted that, from the perspective of secondary rules of State responsibility, the "conduct is a breach arising from a 'composite act' in the meaning of the rule codified in Article 15 of ARSIWA".[78]

37. Some written statements[79] have further clarified, at times with great detail, the conduct underpinning the two questions put to the Court[80] the States which have displayed it,[81] and the impacts on the climate system.[82] Other written statements have, instead, noted the complex nature of climate change, in an attempt at blurring the lines about the exact characterization of the conduct responsible for climate change at stake in these advisory proceedings.[83] By focusing on the alleged challenges of attributing a claimed injury to a specific source of GHG emissions, these arguments avoid addressing the main issue of whether a State's actions or inactions over time

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75 For a detailed analysis, see **WS Vanuatu**, paras. 143-146, 489-506.

76 **WS**, para. 225.

77 **WS**, paras. 227-232.

78 **WS**, paras. 231.

79 See the **WS Vanuatu**, pp. 63-92; **WS Egypt**, pp. 62-74; **WS Costa Rica**, pp. 30-33; **WS OACPS**, pp. 76-83; **WS Dominican Republic**, pp. 48-53; **WS Grenada**, pp. 28-30.

80; **WS Vanuatu**, paras. 137-150.

81 *Ibid.*, paras. 151-154, 177-192.

82 *Ibid.*, paras. 162-170.

83 **WS USA**, paras. 4.17-4.19, 2.20-2.26, 4.15-4.21, and 5.7-5.10. Other participants submit that the question is not precise enough or phrased too broadly, underscoring the importance of the correct interpretation of the Relevant Conduct in GA Res. 77/276: e.g., **Joint WS Denmark, Finland, Iceland, Norway & Sweden**, paras. 29-30; **WS Iran**, paras. 15-20; **WS South Africa**, para. 10.

have led to significant harm to the climate system, which is crucial to both Questions (a) and (b).

38. On the specific issue of the conduct at stake and how the Court should approach it, three main positions of States and organizations can be identified in the written statements filed with the Court:

    a. Certain States and organizations have specifically explained why the conduct identified in Question (b) is in breach of the obligations identified in response to Question (a);[84]

    b. Other States and organizations have asserted that the conduct identified under Question (b) constitutes a violation of international law obligations, referring to the analysis of the latter provided under Question (a), and that the ARSIWA regime applies,[85] or they have asserted that, if a breach of the relevant obligations is found, it gives rise to State responsibility under general international law and the ARSIWA regime applies;[86] and, lastly,

39. A third group of States and organizations have argued that the Court cannot determine legal consequences based on the ARSIWA and that compliance with climate change obligations can only be assessed under the climate change treaty regime;[87] or that the assessment of legal consequences (based on the ARSIWA) is fraught with challenges and/or cannot be done in the abstract.[88]

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84 **WS Vanuatu**, paras. 507-526; **WS Egypt**, paras. 286-350; **WS Costa Rica**, paras. 104-114; **WS OACPS**, para. 143-157; **WS Dominican Republic**, paras. 4.57-4.62; **WS Grenada**, paras. 66-73; **WS Sri Lanka**, paras. 102-113.

85 **WS Colombia**, paras. 4.1-4.5; **WS Seychelles**, paras. 149-156; **WS Philippines**, paras. 110-119; **WS Sierra Leone**, paras. 3.134-3.135; **WS Liechtenstein**, para. 80; **WS Saint Lucia**, paras. 81-86; **WS Kiribati**, paras. 174-177, clearly stating that the "[c]onduct constitutes, in principle, a breach of international law"; **WS Madagascar**, paras. 67-74; **WS Chile**, paras. 92-110; **WS Namibia**, paras. 128-130; **WS Tuvalu**, paras. 112-125; **WS Vietnam**, paras. 37-45; **WS Melanesian Spearhead Group**, paras. 292-300; **WS Palau**, para. 20; **WS DRC**, paras. 252-316; **WS COSIS**, paras. 148-171.

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

87 **WS Canada**, paras. 32-35; **WS China**, paras. 132-142; **WS OPEC**, paras. 96-98; **WS Saudi Arabia**, **WS** paras. 6.1-6.8; **WS United Kingdom**, paras. 132-138; **WS Japan**, paras. 40-45; **WS Iran**, paras. 154-165; **WS European Union**, paras. 322-334; **WS Indonesia**, paras. 72-86; **WS Kuwait**, paras. 82-124.

88 **WS South Africa**, paras. 129-131; **Joint WS Denmark, Finland, Iceland, Norway & Sweden**, paras. 96-106; **WS New Zealand**, paras. 138-140; **WS Korea**, paras. 46-49; **WS Russian Federation**, pp 16-19; **WS Australia**, paras. 5.4-5.10.

40. In response to the position of States and organizations of the third group, this section presents the position of the African Union regarding the assessment of the conduct defined in Resolution 77/276 in the light of the general international law of State responsibility for internationally wrongful acts. The first step is to clarify whose conduct, specifically, is in breach of the governing obligations. The second step is the analysis of the temporal nature of the breach. The following analysis complements the one already developed under Chapter V, section B, of the African Union's Written statement. [89]

A. WHOSE CONDUCT IS IN BREACH OF INTERNATIONAL LAW?

41. The Court has been provided with the necessary empirical evidence regarding which States have caused significant harm to the climate system.[90] It can therefore address Question (b) *in concreto*, with respect to individual States or specific groups of States. However, the Court can also decide to assess the existence of a breach and the resulting legal consequences as a matter of principle.

42. There is indeed precedent for this approach, as already noted by the African Union in its Written statement. [91] In its advisory opinion on the *Legality of Nuclear Weapons*, the Court was asked to provide its view on the permissibility "under international law" of the "threat or use of nuclear weapons" with regard to "any circumstance". The General Assembly did not specify any individual State or group thereof or, still, any specific set of circumstances of threat or use.[92] The Court addressed the conduct in general, recalling that that "the Court may give an advisory opinion on any legal question, abstract or otherwise".[93]

43. Importantly, the Court has made it clear in the *Bosnia Genocide case* that, when it comes to an obligation requiring the exercise of due diligence, it does not matter whether the adverse outcome would have occurred even if the State in question had been fully diligent:

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89 **WS**, paras. 227-232.
90 **WS Vanuatu**, chapter III.
91 **WS**, para. 225.
92 *Nuclear Weapons Advisory Opinion*, para. 1.
93 *Ibid.*, para. 15.

> it is irrelevant whether the State whose responsibility is in issue claims, or even proves, that even if it had employed all means reasonably at its disposal, they would not have sufficed to prevent the commission of genocide. As well as being generally difficult to prove, this is irrelevant to the breach of the obligation of conduct in question, the more so since the possibility remains that the combined efforts of several States, each complying with its obligation to prevent, might have achieved the result — averting the commission of genocide — which the efforts of only one State were insufficient to produce.[94]

44. What matters is whether the State displayed the diligence that was required of it. In *Billy v. Australia*, the respondent State argued that it could not "be held responsible – as a legal or practical matter – for the climate change impacts that the authors allege in their communication".[95] The Human Rights Committee rejected this argument, adopting a similar line to that of the Court in the *Bosnia Genocide* case. In this regard, it noted:

> With respect to mitigation measures, although the parties differ as to the amount of greenhouse gases emitted within the State party's territory, and as to whether those emissions are significantly decreasing or increasing, *the information provided by both parties indicates that the State party is and has been in recent decades among the countries in which large amounts of greenhouse gas emissions have been produced*. The Committee also notes that the State party ranks high on world economic and human development indicators. In view of the above, the Committee considers that the alleged actions and omissions fall under the State party's jurisdiction under articles 1 or 2 of the Optional Protocol and therefore, it is not precluded from examining the present communication.[96]

45. In the same line, in its recent decision in *Klimaseniorinnen v. Switzerland*, the European Court of Human Rights clarified how the responsibility of a minor emitter such as Switzerland was nevertheless engaged for failure to display the level of diligence it could be expected from it.[97] In reaching this conclusion, the Court clarified how the individual share of responsibility of the respondent State arose in the context of climate change, and it explicitly rejected the "drop in the ocean" argument, holding:

> 442. For its part, the Court notes that while climate change is undoubtedly a global phenomenon which should be addressed at the

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94 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43, para. 430. (emphasis added)

95 Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3624/2019, Human Rights Committee CCPR/C/135/D/3624/2019, 22 September 2022, para. 7.6.

96 *Ibid.*, para. 7.8. (emphasis added)

97 *Klimaseniorinnen.*

global level by the community of States, the global climate regime established under the UNFCCC rests on the principle of common but differentiated responsibilities and respective capabilities of States (Article 3 § 1). This principle has been reaffirmed in the Paris Agreement (Article 2 § 2) and endorsed in the Glasgow Climate Pact (cited above, paragraph 18) as well as in the Sharm el-Sheikh Implementation Plan (cited above, paragraph 12). *It follows, therefore, that each State has its own share of responsibilities to take measures to tackle climate change and that the taking of those measures is determined by the State's own capabilities rather than by any specific action (or omission) of any other State … The Court considers that a respondent State should not evade its responsibility by pointing to the responsibility of other States, whether Contracting Parties to the Convention or not* […]

443. *This position is consistent with the Court's approach in cases involving a concurrent responsibility of States for alleged breaches of Convention rights, where each State can be held accountable for its share of the responsibility for the breach in question ... It is also consistent with the principles of international law relating to the plurality of responsible States, according to which the responsibility of each State is determined individually, on the basis of its own conduct and by reference to its own international obligations (see ILC, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Commentary on Article 47, paragraphs 6 and 8). Similarly, the alleged infringement of rights under the Convention through harm arising from GHG emissions globally and the acts and omissions on the part of multiple States in combating the adverse effects of climate change may engage the responsibility of each Contracting Party* […]

444. *Lastly, as regards the "drop in the ocean" argument implicit in the Government's submissions – namely, the capacity of individual States to affect global climate change – it should be noted that in the context of a State's positive obligations under the Convention, the Court has consistently held that it need not be determined with certainty that matters would have turned out differently if the authorities had acted otherwise. The relevant test does not require it to be shown that "but for" the failing or omission of the authorities the harm would not have occurred. Rather, what is important, and sufficient to engage the responsibility of the State, is that reasonable measures which the domestic authorities failed to take could have had a real prospect of altering the outcome or mitigating the harm* […] In the context of

> climate change, this principle should also be understood in the light of Article 3 § 3 of the UNFCCC according to which States should take measures to anticipate, prevent or minimise the causes of climate change and mitigate its adverse effects.[98]

46. Similarly, in its advisory opinion rendered on 21 May 2024, the ITLOS clearly stated that '[a]nthropogenic GHG emissions into the atmosphere constitute pollution of the marine environment' within the meaning of Article 1(1), subparagraph 4, of the UNCLOS.[99] In particular, 'marine pollution from anthropogenic GHG emissions can be characterized as pollution from land-based sources, pollution from vessels, or pollution from or through the atmosphere.[100]

47. African contribution to historical emissions of GHGs is amongst the lowest and certainly not significant. Its countries today hold no responsibility for the continuing deterioration of the climate.[101] Such contribution is even less significant if the impact of colonial domination is taken into account, as it should.[102] The IPCC Summary for Policymakers of Climate Change 2022: Mitigation of Climate Change, has concluded (with high confidence) that "[p]resent development challenges causing high vulnerability are influenced by *historical and ongoing patterns of inequity such as colonialism*, especially for many Indigenous Peoples and local communities".[103] Climate change has created "new sacrifice zones" in relation to climate injustice, including the territories of African member States.[104] The concept of historical responsibility "embodies the idea of fairness",[105] and former colonial powers bear the responsibility for the emissions of GHGs from colonial territories at the time they were administered by them.[106]

48. Whether the Court decides to examine the conduct of specific States, a group thereof or, instead, analyzes the conformity of the conduct in general with international law,

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98 *Ibid.*, paras. 442-444. (emphasis added)
99 *COSIS Advisory Opinion*, para 441(a).
100 *Ibid.*, para 441(e); see also paras. 159-179.
101 **IPCC Africa Chapter**, p. 1294: "The contribution of Africa is among the lowest of historical greenhouse gas (GHGs) emissions responsible for human-induced climate change and it has the lowest per capita GHGs emissions of all regions currently."
102 **WS OACPS**, para. 49.
103 **IPCC, Climate Change 2022**, p. 12, B.2.4. (emphasis added)
104 **WS OACPS**, para. 51, as well as Appendix B, "Racial Equality and Racial non-discrimination Obligations in respect of climate change", Expert Report of Professor E. Tendayi Achiume, paras. 12-14.
105 **WS Egypt**, para. 51.
106 **WS Burkina Faso**, paras. 207, 209-210, 258, 368, 407; **WS OACPS**, para. 41.

this is a required step to determine the legal consequences of the conduct at stake, which is the focus of Question (b) of Resolution 77/276.

B. TEMPORAL DIMENSION OF THE BREACH

49. The temporal dimension of the conduct underpinning the two questions is important for the assessment of its consistency, as a matter of principle, with international law for three main reasons. *First*, the conduct at stake has developed over time. This is also stressed by the preamble of Resolution 77/276 which refers to "the conduct of States *over time* in relation to activities that contribute to climate change and its adverse effects" (emphasis added). As per Resolution 77/276, the substantial interference with the climate system and other parts of the environment at the core of the conduct has taken the form of a series of acts and omissions over time. The specific conduct consists of a combination of acts and omissions of individual States in relation to "the burning of fossil fuels, deforestation, land use and land use changes (LULUC), livestock production, fertilisation, waste management, and industrial processes"[107] which have taken place under their jurisdiction or control.

50. *Second*, a State's conduct might no longer be in violation of one or more obligations mentioned in response to Question (a) if it has ceased to display the specific conduct. Nonetheless, if the conduct was inconsistent with a given obligation in the past, that is enough to constitute a breach, whether or not the unlawful conduct has since ceased. In this context, it is noteworthy that the preamble of the UNFCCC acknowledges the preexisting principles governing the conduct[108] as well as the historical responsibility of developed countries,[109] which predates the negotiation process leading to the adoption of the UNFCCC. It does not reduce the seriousness of the relevant combination of acts and omissions that they may have started and finished in the past.

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[107] IPCC Glossary, available online at: https://apps.ipcc.ch/glossary/.

[108] Preambular paras. 7 and 8 of the UNFCCC expressly recall the "pertinent provisions" of the 1972 Declaration of the Stockholm Conference on the Human Environment and the specific text of the principle of prevention, already part of general international law by then, as suggested by the text of preambular para. 8 which restates Principle 21 of the Stockholm Declaration in the slightly adjusted formulation which was retained in Principle 2 of the Rio Declaration on Environment and Development: "Recalling also that States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure 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", United Nations Framework Convention on Climate Change, 9 May 1992, 1771 UNTS 107.

[109] Preambular para. 4 of the UNFCCC expressly notes "that the largest share of historical and current global emissions of greenhouse gases has originated in developed countries", United Nations Framework Convention on Climate Change, 9 May 1992, 1771 UNTS 107.

Therefore, States that have historically produced large amounts of greenhouse gas emissions cannot escape their responsibility by claiming that they have since taken steps to significantly reduce those emissions. Although such efforts to return to compliance is to be praised, under Article 14(2) and (3) of ARSIWA, it merely amounts to the termination of what is otherwise a continuing breach.

51. *Third*, different obligations have governed the conduct at stake over time, well before the entry into force of the UNFCCC on 21 March 1994,[110] the Kyoto Protocol on 16 February 2005[111] and the Paris Agreement on 4 November 2016.[112] Of particular note, the duty of due diligence has bound all States since at least the late 19th century, the principle of prevention of significant environmental harm was recognized by the *Trail Smelter* tribunal already in 1941, the obligations arising from the UDHR were already in place when the implications of the conduct at stake for the climate system became known in the 1960s, and the duty to protect and preserve the marine environment predates its codification in Article 192 of the UNCLOS. These rules are expressly referred to in the operative part of GA Resolution 77/276. Moreover, several important principles and treaties, such as those enshrined in the Charter of the United Nations, the right of peoples to self-determination[113] and the 1966 ICCPR and the ICESCR, among others, were also in force and binding on States who displayed the specific conduct. Based on Article 13 of ARSIWA, a breach occurs when the State is bound by the relevant obligation "at the time the act occurs".[114] Such criteria are fulfilled in this case. One important implication of the temporal span of the conduct at stake is that the Court is not asked to identify the exact moment in which the relevant obligations of general international law became binding, given that the conduct is a series of acts and omissions amounting to a breach, in the terms of the rule codified in Article 15 of ARSIWA, which have been displayed for well over a century.

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110 See the record in the United Nations Treaty Series at: https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXVII-7&chapter=27&Temp=mtdsg3&clang=_en.

111 See the record in the United Nations Treaty Series at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-a&chapter=27&clang=_en.

112 See the record in the United Nations Treaty Series at: https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280458f37&clang=_en.

113 *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, I.C.J. Reports 2019, p. 95, at p. 132, paras. 150 and 152, ("*Chagos Advisory Opinion*").

114 Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Yearbook of the International Law Commission, 2001, vol. II, Part Two, as corrected, Article. 13 ("ARSIWA Commentaries").

V – SPECIFIC LEGAL CONSEQUENCES

52. Before addressing the specific legal consequences arising for States as a result of their acts or omissions that have caused significant harm to the climate system and other parts of the environment, one introductory observation is necessary in light of the submissions made by other parties to the present proceedings. This observation relates to the questions of attribution and causation that are raised as result of the unique characteristics of climate change (**A**). Following these remarks, this section will focus on the traditional legal consequences arising from the general regime of international responsibility, such as the obligations of cessation and non-repetition (**B**), satisfaction (**C**), and reparation (**D**). Further legal consequences attach in particular to the principle of self-determination (**E**), while the specific consequences for future generations deserve further comment (**F**).

A. THE COURT CAN AND SHOULD ADDRESS ISSUES OF CAUSATION AND ATTRIBUTION

53. Several parties to the present proceedings have contended that the unique nature of climate change precludes the application of the ARSIWA regime. Specifically, it has been suggested that, given the unique characteristics of climate change, it is not possible to attribute damage to the climate system to specific States and that it is also difficult to demonstrate a causal link between the conduct of specific States and environmental harm that contributes to climate change, all of which precludes establishing responsibility for climate change.

54. For example, China argued that "loss and damage from the adverse effects of climate change can hardly be attributed to a particular state […] the sources of anthropogenic GHG emissions are complex and multifaceted. Not only is it difficult to identify the emitters that caused the adverse effects of climate change, but it is also difficult to prove the State that caused the loss and damage."[115] Similarly, in a joint statement, the Nordic States opined that "questions of detrimental environmental impacts

[115] WS China, para. 136.

flowing from anthropogenic emissions of greenhouse gases engage complex questions of causation intricately connected to the nature and function of global consumption patterns, energy systems and the combined requirements of life worldwide."[116] Other parties have made similar claims.[117]

55. The practical effect of arguments of this nature is to preclude the application of rules of attribution that establish the responsibility of States for conduct that is inconsistent with their international legal obligations. The African Union does not share this viewpoint.

56. Climate change is a unique phenomenon. Unlike traditional internationally wrongful acts in which the cause of injuries suffered by a State is often readily attributable and traceable to the conduct (whether an act or omission) of a specific responsible State, climate change has occurred over time as a result of the accumulation of GHGs, its impacts are continuing to unfold, and it is the result of a combination of concurrent causes. Nevertheless, the unique characteristics of climate change are *not* an insurmountable obstacle that prevent the identification of specific States that bear responsibility for the environmental harm that is causing climate change and the resultant injuries suffered by specific States, especially in Africa. The ARSIWA provides the normative tools that the Court can employ to determine the consequences that arise from the wrongful conduct of those States that contributed (and are continuing to contribute) the overwhelming portion of GHG emissions that causes climate change.

57. Specifically, Articles 46 and 47 of the ARSIWA are especially relevant for the purposes of determining the legal consequences for States that, by their acts and omissions, have caused significant harm to the climate system. Climate change is a phenomenon that is caused by a plurality of responsible States – namely, the historical and current leading emitters of GHGs; and the adverse effects of climate change are borne by a plurality of injured States, many of which are African States.

58. There is ample scientific evidence that identifies those States that contribute the overwhelming portion of GHG emissions that cause climate change, none of which are

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116 **Joint WS Denmark, Finland, Iceland, Norway & Sweden**, para. 107.

117 **WS New Zealand**, para. 140 (c), arguing that "attribution, causation and contribution are likely to be very difficult and highly contested issues".

African States.[118] This indicates that it is possible to identify a specific set of States that, as a result of their acts or omissions, are the leading emitters of GHGs and the principal contributors to climate change. These leading emitters of GHGs constitute a plurality of responsible States, within the meaning of Article 47 of the ARSIWA. Each of these States is separately responsible, to the extent of their contribution, for causing significant harm to the climate system.

59. Moreover, as noted in the written statement of the African Union, it is established that developed countries have the largest historical contribution to global environmental problems, through their own process of industrialization, and that Africa has contributed "among the lowest of historical greenhouse gas […] emissions responsible for human-induced climate change."[119] These States that have not contributed to causing significant harm to the climate system, and which are bearing the adverse effects of climate change, constitute a plurality of injured States within the meaning of Article 46 of the ARSIWA.

60. The fact that there is a plurality of States that are responsible for climate change through their acts and omissions does not prevent holding each of those States separately responsible for their internationally wrongful conduct. As the ILC noted, in situations in which there is a plurality of responsible states, "each State is separately responsible for the conduct attributable to it, and that responsibility is not diminished or reduced by the fact that one or more other States are also responsible for the same act [or omission]."[120] The European Court of Human Rights has also affirmed that, notwithstanding the fact that a plurality of States have contributed to climate change, each State that, through its acts or omissions, contributes to climate change bears individual responsibility for failure to fulfil its legal obligations to

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118 According to a recent study, the top three emitters of GHGs are: China, the United States, and India, which contribute 42.6% of total emissions, while the bottom 100 states account for only 2.9% of global emissions. The other parties ranking in the top-10 emitters of GHGs are: the European Union, Russia, Japan, Brazil, Indonesia, Iran, and Canada. *See* World Resources Institute, This Interactive Chart Shows Changes in the World's Top 10 Emitters, March 2, 2023. *Available online*: https://www.wri.org/insights/interactive-chart-shows-changes-worlds-top-10-emitters.

119 **IPCC, Climate Change 2022**, p. 1294.

120 ARSIWA Commentaries, p. 124.

prevent harm to the environment, regardless of the conduct of any other responsible State.[121]

61. Furthermore, there is sufficient scientific evidence to establish a causal link between the wrongful conduct of the plurality of responsible States and the significant harm caused to the climate system. The exact nature of the causal link that applies to the conduct of the responsible States is determined by the primary rules of international law in question. This is reflected in Article 31 of the ARSIWA, which does not establish a specific causal threshold that applies to all internationally wrongful acts. As the ILC explained, "the requirement of a causal link is not necessarily the same in relation to every breach of an international obligation."[122]

62. As noted in the written submissions of the African Union and other parties, the international legal obligations of States relating to climate change include both obligations of conduct and obligations of result. One example of the former is the duty to exercise due diligence, which is a stand-alone primary rule of international law,[123] in addition to being an element of other rules that are enshrined in the UNFCCC and the Paris Agreement.[124] On the other hand, the duty of States to ensure that activities under their jurisdiction do not create significant harm to the environment is an example of an obligation of result. In either case, whether the obligation in question is one of conduct or result, the legal responsibility of a State for causing significant harm to the climate system can be established by showing that the State in question has through its acts or omissions made a material or meaningful contribution to climate change.[125] In other words, GHGs emissions that amount to a material or meaningful contribution to significant harm to the environment should be employed

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121 *Klimaseniorinnen*, para. 442. The Court "note[d] that while climate change is undoubtedly a global phenomenon which should be addressed at the global level by the community of States, the global climate regime established under the UNFCCC rests on the principle of common but differentiated responsibilities and respective capabilities of States (Article 3 § 1). This principle has been reaffirmed in the Paris Agreement (Article 2 § 2) and endorsed in the Glasgow Climate Pact as well as in the Sharm el-Sheikh Implementation Plan. It follows, therefore, that each State has its own share of responsibilities to take measures to tackle climate change and that the taking of those measures is determined by the State's own capabilities rather than by any specific action (or omission) of any other State."

122 ARSIWA Commentaries, p. 93.

123 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, I.C.J. Reports 2015, p. 665, at p. 720 para. 153, ("Certain Activities").

124 Alan Boyle and Navraj Singh Ghaleigh, *Climate Change and International Law Beyond the UNFCCC, in* THE OXFORD HANDBOOK OF CLIMATE CHANGE LAW (Cinnamon Carlarne et. al. eds. 2016)

125 Jacqueline Peel, *Climate Change, in* THE PRACTICE OF SHARED RESPONSIBILITY IN INTERNATIONAL LAW 1009, 1042-1043 (Nollkaemper et. al. eds., 2017) (Noting that it is possible to "base a finding of a sufficient causal link on the fact that emissions attributable to a state make a material or meaningful contribution to the risk of climate change harm. There is some support for this material risk approach in domestic liability law").

as the attribution and causation test for establishing State responsibility for climate change.

63. This approach to establishing responsibility for environmental harm has been adopted by several domestic and regional courts. For example, in *Massachusetts v. EPA*, the U.S. Supreme Court stated:

> Even leaving aside the other greenhouse gases, the United States transportation sector emits an enormous quantity of carbon dioxide into the atmosphere […] To put this in perspective: Considering just emissions from the transportation sector, which represent less than one-third of this country's total carbon dioxide emissions, the United States would still rank as the third-largest emitter of carbon dioxide in the world, outpaced only by the European Union and China. Judged by any standard, U. S. motor-vehicle emissions make a ***meaningful contribution*** to greenhouse gas concentrations and hence, according to petitioners, to global warming.[126]

64. Similarly, in *Clements v. Clements*, the Canadian Supreme Court used "proof of a ***material contribution*** to the risk that gave rise to the injury" as a basis for establishing responsibility in cases where "the defendant breached its duty of care (acted negligently) in a way that exposed the plaintiff to an unreasonable risk of injury."[127] Furthermore, even if the exact adverse effects of a specific project or activity cannot be measured or predicted with perfect accuracy, a State should be held legally responsible for failing to prevent environmental harm that is foreseeable and which constitutes a meaningful contribution to damage to the climate system.[128]

65. Moreover, leading emitters of GHGs that are currently contributing meaningfully to damage to the climate system are under an obligation to prevent further damage to the environment, even if the contribution of a single project or specific activity to global levels of GHG emissions is relatively low. As the Rechtbank Den Haag ruled in *Urgenda v. State of the Netherlands*:

> The fact that the amount of the Dutch emissions is small compared to other countries does not affect the obligation to take precautionary measures in view of the State's obligation to exercise care. After all, it has been established that any anthropogenic greenhouse gas emission, no matter how minor,

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126 *Massachusetts v. EPA*, 549 U.S. 497 (2007), pp.21-22.

127 *Clements v. Clements*, Supreme Court Judgments, 2012 SCC 32, para. 33 and 34.

128 As the Australian Land and Environment Court noted in *Gloucester Resources Limited v Minister for Planning*: "[t]hat the impact from burning the coal will be experienced globally as well as in [New South Wales], but in a way that is currently not able to be accurately measured, does not suggest that the link to causation of an environmental impact is insufficient.", para.518.

> contributes to an increase of CO2 levels in the atmosphere and therefore to hazardous climate change. Emission reduction therefore concerns both a joint and individual responsibility of the signatories to the UN Climate Change Convention. In view of the fact that the Dutch emission reduction is determined by the State, it may not reject possible liability by stating that its contribution is minor.[129]

66. Finally, it is not necessary, in order to establish that a State is legally responsible for causing significant harm to the climate system, to demonstrate that the State in question could have, by its conduct alone, prevented the occurrence of that harm. As the Court noted in the *Bosnia Genocide Case*, "the obligation to prevent genocide places of state under a duty to act which is not dependent on the certainty that the action to be taken will succeed in preventing the Commission of acts of genocide, or even on the likelihood of that outcome."[130] The Court should apply this same principle in addressing Question (b) of Resolution 77/276. While no single State has the capacity alone to prevent climate change, the failure of the leading emitters of GHGs to take effective action to reduce their emissions makes each of those States legally responsible for causing significant harm to the climate system, to the extent of their contribution to such harm.

B. CESSATION AND NON-REPETITION

67. The majority of the Written Statements that dealt with the applicability of ARSIWA have emphasised that the legal consequences for States responsible for conduct causing climate change and its adverse effects are, firstly, an obligation of cessation and, secondly, if circumstances so require, an obligation of non-repetition.[131] As discussed *supra,*[132] a significant number of participants share the same position as

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129 Rechtbank Den Haag, *Urgenda v State of the Netherlands*, C/09/456689 / HA ZA 13-1396 (English translation), para. 4.79.

130 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007, p. 43, para. 461.

131 See, for example: **WS Colombia**, chapter 4(A); **WS Palau**, paras. 4 and 21; **WS Tonga**, paras 295-296; **WS IUCN**, paras. 532-538; **WS Singapore**, paras. 4.6-4.10; **WS Solomon Islands**, para. 229; **WS Seychelles**, para. 149; **WS Kenya**, para. 6.91; **WS Melanesian Spearhead Group**, para. 313; **WS Albania**, paras. 133-135; **WS Vanuatu**, para. 567; **WS Micronesia**, para. 127; **WS Sierra Leone**, para. 3.136; **WS Switzerland**, para. 74; **WS Saint Lucia**, para. 91; **WS Saint Vincent and Grenadines**, para. 128; **WS Netherlands**, para. 59; **WS Bahamas**, paras. 237-238; **WS France**, paras. 196-199; **WS Kiribati**, para. 180; **WS Timor Leste**, para. 362; **WS India**, para. 89; **WS Ecuador** para. 4.12; **WS Barbados** para. 269; **WS OACPS**, paras. 162-167; **WS Madagascar**, paras. 73-74; **WS Uruguay**, paras. 155-158; **WS Egypt**, paras. 355-363; **WS Chile**, paras. 111-114; **WS Namibia**, paras. 130-134; **WS Tuvalu**, para. 126; **WS Bangladesh**, paras. 144-147; **WS Mauritius**, para. 210; **WS Costa Rica**, paras. 95-128; **WS COSIS**, paras. 172-179; **WS El Salvador**, paras. 50-51; **WS Australia**, paras. 5.6-5.8; **WS Brazil**, paras. 78-79 and 86-99; **WS Vietnam**, paras. 42-49; **WS Thailand**, para. 29; **WS Burkina Faso**, paras. 273 and 346; **WS Grenada**, para. 74.

132 *Supra*, p. 9.

the African Union: ARSIWA is applicable to State obligations arising from the international legal climate change framework.

68. As emphasised by the African Union in its Written Statement,[133] in accordance with Article 30 of ARSIWA,[134] States found responsible for an internationally wrongful act are obliged to cease the harmful conduct and, where appropriate, provide guarantees of non-repetition. Consequently, States are obliged to cease any activities that equate to an internationally wrongful act. Where it is necessary to do so, for example in the most urgent of cases, States must also provide guarantees of non-repetition of the harmful conduct.

69. Several participants have provided legal reasoning echoing the African Union on this point, which sets out that:

    a. *First*, the established two-tier test for an obligation of cessation requires the violated rule to still be in force and for the violation to be continuous.[135] Within the context of the climate change regime, violations of both customary international law obligations and the Paris Agreement satisfy this test.[136]

    b. *Second*, the African Union reiterates that omission can constitute a breach giving rise to an obligation of cessation.[137] State responsibility under ARSIWA is applicable regardless of the materiality of the damage resulting from a State's failure to meet its international obligations.[138] In the context of the climate change regime, several participants have explained (and the African Union agrees), by way of example, that a failure to implement measures to effectively reduce GHG emissions,[139] and a failure to supply finance and

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133 **WS**, paras. 263-265.

134 Article 30 of ARSIWA: "The State responsible for the internationally wrongful act is under an obligation: (a) to cease that act, if it is continuing; (b) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require."

135 *Rainbow Warrior* affair, UNRIAA, vol. XX (Sales No. E/F.93.V.3), p. 215 (1990), para. 113 ("*Rainbow Warrior*"); **WS**, para. 264; **WS Egypt**, para 357; **WS Vanuatu**, para. 564; **WS Sierra Leone**, paras. 3.136-3.137.

136 **WS Egypt**, para. 358.

137 **WS**, para. 264; **WS Egypt**, para 356; *Rainbow Warrior*, para. 113; **WS Colombia**, para. 4.2; **WS Tonga**, para. 295; **WS IUCN**, para. 559; **WS Melanesian Spearhead Group**, paras. 293-294; **WS Vanuatu**, para. 564; **WS Kenya**, para. 6.92; **WS Micronesia**, para. 120; **WS Sierra Leone**, para. 3.134; **WS France**, para. 169; **WS Egypt**, para. 330; **WS Netherlands**, para. 5.8; **WS COSIS**, paras. 148 and 153-155.

138 **WS Solomon Islands**, para. 231, referencing *Rainbow Warrior*; International Law Commission, Report of the International Law Commission on the Work of Its Fifty Third Session, UN GAOR, 56th sess, Supp No 10, UN Doc A/56/10 (2001) art 2, p.35.

139 **WS Kenya**, para. 6.91; **WS Melanesian Spearhead Group**, paras. 314-315; **WS Vanuatu**, para. 567; **WS Switzerland**, para. 74; **WS Bahamas**, para. 238

transfer green technologies to developing countries,[140] equally constitute a breach of international law obligations giving rise to an obligation of cessation.

70. The African Union refers the Court to **Chapter III** for its rebuttal of the submission by certain participants that ARSIWA is not applicable to the international climate change regime, and to **Chapter II** for a rebuttal of the views that the determination of specific legal consequences is supposedly "likely to be complicated",[141] "should be approached with caution"[142] or is "impossible".[143] For the reasons explained in these sections, the African Union respectfully requests the Court to dismiss the submission that the legal consequences of cessation and non-repetition for violation of international law obligations with respect to climate change cannot be determined because the assessment is "abstract" in nature.

71. In light of the significant degree to which participants concur on the position that ARSIWA is applicable to the climate change regime, and the consistent legal reasoning across the Written Statements on this point, the African Union reiterates that cessation and non-repetition under Article 30 of ARSIWA are amongst the legal consequences for States that are found to be responsible for climate change and its past, current and future adverse effects.

1. Fulfilment of cessation and non-repetition obligations

72. In addition to identifying the legal consequences for States responsible for climate change and its impact, it is essential that the Court provide guidance on the manifestation of the specific legal consequences of cessation and non-repetition within the context of the international climate change regime.

73. The African Union endorses the submission by a significant number of participants that the appropriate course of action for States that have an obligation of cessation and non-repetition of harmful conduct should be (i) the provision of revised NDCs

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140 **WS Vietnam**, paras. 48-49; **WS Burkina Faso**, para. 351; **WS Vanuatu**, para. 579; **WS Barbados**, para. 194.
141 **WS New Zealand**, para. 140.
142 See, e.g., **WS Korea**, para. 47.
143 **WS Slovenia**, para. 15.

containing policies of a binding character and (ii) the introduction of effective measures and legislation generally.[144]

74. The African Union concurs with the position of a number of participants that a State responsible for violating its treaty obligations under the Paris Agreement should fulfil its obligation of cessation through the provision of a revised NDC.[145] State Parties have an obligation to "prepare, communicate and maintain" NDCs which should reflect each State's "highest possible ambition", and to continuously monitor their actions in light of evolving circumstances.[146] States with an obligation of cessation should therefore be required to revise policies to the effect that they clearly outline concrete steps that the State will take to, *inter alia*, reduce GHG emissions in line with IPCC reports and Production Gap pathway reports,[147] reduce activities that contribute to GHG emissions and climate change,[148] and outline how the State will ensure that it brings its activities in line with its international law obligations generally.[149]

75. Furthermore, the policies of the revised NDCs should be binding in character and should be used as a mechanism through which the State introduces measures and legislation that brings each State's conduct in compliance with its Paris Agreement obligations.[150] Many participants have identified this as a more general obligation for a State that has violated its international law obligations and must consequently cease all harmful conduct.[151] Further, several participants have explicitly applied this obligation to violations of customary international law and international human rights law.[152] This course of action should be considered in the light of the ITLOS Advisory Opinion, in which the ITLOS reiterated the obligation for States to "adopt

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144 **WS Singapore**, paras. 4.6 and 4.7; **WS Cook Islands**, para. 246; **WS India**, para. 89; **WS IUCN**, para 584; **WS Seychelles**, para. 150; **WS Melanesian Spearhead Group**, paras. 314-315; **WS Albania**, paras. 133-134; **WS Vanuatu**, para. 577; **WS Bahamas**, para. 238; **WS Ecuador**, para. 412; **WS OACPS**, para. 165; **WS Egypt**, para. 359; **WS Chile**, para. 113; **WS Namibia**, para. 134; **WS Costa Rica**, para. 124; **WS COSIS**, paras. 174 and 176; **WS Burkina Faso**, paras. 150-151.

145 **WS Singapore**, paras. 4.6 and 4.7; **WS Cook Islands**, para. 246; **WS Seychelles**, para. 150; **WS Vanuatu**, para. 579.

146 **Dossier No.** 16, Paris Agreement, Article 4(2). **WS**, para. 104.

147 **WS Albania**, paras. 133-134;

148 **WS Kenya**, para. 6.91; **WS Melanesian Spearhead Group**, paras. 314-315; **WS Vanuatu**, para. 567; **WS Switzerland**, para. 74; **WS Bahamas**, para. 238.

149 **WS IUCN**, para 584; **WS Seychelles**, para. 150.

150 **WS Vanuatu**, para. 579.

151 **WS India**, para. 89; **WS IUCN**, para 584; **WS Seychelles**, para. 150; **WS Melanesian Spearhead Group**, paras. 314-315; **WS Albania**, paras. 133-134; **WS Vanuatu**, para. 577; **WS Bahamas**, para. 238; **WS Ecuador**, para. 412; **WS OACPS**, para. 165; **WS Egypt**, para. 359; **WS Chile**, para. 113; **WS Namibia**, para. 134; **WS Costa Rica**, para. 124; **WS COSIS**, paras. 174 and 176; **WS Burkina Faso**, paras. 150-151.

152 **WS Singapore**, paras. 4.8-4.10; **WS Melanesian Spearhead Group**, para. 333; **WS Vanuatu**, paras. 577-579.

laws and regulations to prevent, reduce and control marine pollution from GHG emissions" under UNCLOS.[153] An obligation to introduce legislation as a legal consequence of State responsibility would consequently be consistent with, and would complement, a State's additional international law obligations with respect to climate change. The African Union agrees that in all instances of violation of international law obligations, the introduction of measures and legislation is an appropriate course of action that would allow States to comply with their climate change obligations.

76. The adoption of domestic measures and legislation would similarly satisfy an obligation of non-repetition of harmful conduct.[154] The African Union agrees with the position of several participants that such an obligation can "restore and repair legal relationships",[155] provide "intergenerational justice [and] prevent future breakdowns in the international legal order".[156] Although it has been noted that the threshold to determine the obligation of non-repetition is "unclear",[157] the urgency with which States must act to prevent further catastrophic damage should be considered as "special" circumstances justifying guarantees and assurances of non-repetition.[158] The Court could, for example, consider this as a legal consequence for continued or repeated breaches, either concrete or expected. Further, circumstances where the severity and scale of the harmful conduct is to a particularly high degree could require the introduction of "legislative measures that criminalise the most grievous forms" of harmful conduct.[159]

77. In light of the above, the African Union respectfully requests the Court to find that the appropriate course of action for compliance with obligations of cessation and non-repetition under Article 30 of ARSIWA is the production of revised NDCs containing binding policies, and the introduction of legislation designed to combat and mitigate against the adverse effects of climate change in accordance with international law

153 *COSIS Advisory Opinion*, para. 441.3(f) and (g).
154 **WS Kenya**, para. 6.114; **WS Melanesian Spearhead Group**, para. 315; **WS Albania**, para. 134; **WS Vanuatu**, paras. 576-579; **WS COSIS**, paras. 176-177.
155 **WS Vanuatu**, para. 576.
156 **WS Kenya**, para. 6.114.
157 **WS Kenya**, para. 6.114.
158 **WS COSIS**, para. 176.
159 **WS Vanuatu**, para. 577.

obligations. Implementation of such measures should effectively cease the relevant harmful conduct whilst simultaneously providing a guarantee of non-repetition.

2. Recognition that geoengineering is not cessation

78. The African Union further respectfully requests the Court to determine that the adoption and implementation of geoengineering and carbon dioxide removal technologies do not satisfy an obligation of cessation.[160]

79. Reliance on geoengineering and carbon removal technologies would not discharge a State's obligation to cease, and to ensure non-repetition of, harmful conduct that contributes to climate change. The African Union agrees with the position of a number of participants that reliance on such technologies would have a detrimental effect; besides the fact that they are "unproven, untested and unregulated",[161] overreliance on these technologies might be counterproductive.[162] Use of them might encourage States to continue to emit high levels of GHG *in lieu* of their obligations to drastically cut emissions at a time when States should be focussing all resources and efforts on cutting emissions.

80. It is therefore essential that the Court provide guidance to States on this matter and advise that the use of geoengineering and carbon dioxide removal technologies does not fulfil an obligation under Article 30 of ARSIWA of cessation and non-repetition of harmful conduct.

C. SATISFACTION

81. Given the scale and severity of climate damage, reparation "cannot be made good by restitution or compensation".[163] As Namibia put it in its submission, "no amount of money can fully repair the damage that has been done".[164] Moreover, injuries related to climate change are not always not "financially assessable",[165] and involve significant "moral damage".[166] Such non-material injury is most visible in the mental

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160 **WS Vanuatu**, para. 577; **WS IUCN**, Appendix II, paras. 24-26; **WS OACPS**, para. 166.
161 **WS IUCN**, Appendix II, paras. 24-26; see fn. 682 and 684: See also **WS Forum Fisheries Agency**, fn. 37.
162 **WS Vanuatu**, paras. 571-572.
163 ARSIWA, Article 37(1). See **WS COSIS**, para. 192.
164 **WS Namibia**, para. 146.
165 ARSIWA Commentaries, Article 37, para 3.
166 ARSIWA Commentaries, Article 36, para 1.

health impacts of the climate crisis.[167] A global survey found that more than half of people aged 16-25 felt sad, anxious or powerless in the face of climate emergency.[168] In addition, communities that already experience poverty, inequalities and poor health, such as in African countries, are most at risk of deteriorating mental health.[169] To reaffirm Vanuatu's words, reparation should thus also "mend the deep moral wounds inflicted upon affected communities and ecosystems".[170]

82. As a result, reparation should also take the form of satisfaction. In light of the Court's finding that satisfaction "can take an entirely different form depending on the circumstances of the case",[171] various means can be considered while ensuring they are not "out of proportion to the injury".[172] The large-scale, multifaceted, and unique nature of the climate problem is no excuse to minimise the duty to repair by means of satisfaction. Some creativity is required to find appropriate means of satisfaction, and the role of the Court in this context is fundamental.

83. Article 37(2) of ARSIWA provides that satisfaction may consist in "an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality". The list is not exhaustive[173] and the Court is not limited to one form of satisfaction.[174] On the contrary, it should consider a combination of modalities commensurate to the nature and scale of the injury. This is important because, as the Court has acknowledged, "any reparation is intended, as far as possible, to benefit all those who suffered injury resulting from internationally wrongful acts":[175] given the wide-ranging and varied impacts of climate change, multiple forms of satisfaction are thus justified.

84. Modalities of satisfaction should include the following:

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167 Helen Pearson, 'The Rise of Eco-anxiety: Scientists Wake up to the Mental-health Toll of Climate Change', *Nature* (10 April 2024).

168 C Hickman, et al., 'Climate Anxiety in Children and Young People and their Beliefs about Government Responses to Climate Change: A Global Survey' (2021) 5(12) *Lancet Planetary Health* e863–e873.

169 Helen Pearson, 'The Rise of Eco-anxiety: Scientists Wake up to the Mental-health Toll of Climate Change', *Nature* (10 April 2024).

170 **WS Vanuatu**, para. 598.

171 *Armed Activities*, para 387. See also ARSIWA Commentaries, Article 37, para 5.

172 ARSIWA, Article 37(3).

173 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Reparations, Judgment, I.C.J. Reports 2022, p. 13 , at p. 50, para. 102 ("*Armed Activities*"), para 389; ARSIWA Commentaries, Article 37, para 2.

174 **WS Saint Lucia**, para. 95.

175 *Armed Activities*, para 102.

i. an expression of regret and a public apology, including acknowledgement of the facts and acceptance of responsibility;[176]

ii. the organisation of scientific education campaigns on climate change[177] to publicly disclose the reality of climate harms and offer an accurate account of climate responsibilities;

iii. the recognition of States and communities as climate victims;[178]

iv. commemorations and tributes to the victims[179] of climate change.

85. In addition, in line with ARSIWA, other appropriate modalities ought to be considered to acknowledge the specificity and scale of climate harms. One fundamental element relates to the construction of a just and equitable economic order. An important parallel can be made in this context between reparations for colonialism and for climate change, being both inter-linked and finding their origins in common sources. As the United Nations Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and racial intolerance emphasised, an "urgent dimension" of reparations for slavery and colonialism is to "pursue a just and equitable international order".[180] Indeed, reparations do not just implicate individual wrongful acts but also "entire legal, economic, social and political structures that enabled slavery and colonialism, and which continue to sustain racial discrimination and inequality today".[181] The same holds true regarding climate reparations.

86. Multiple written submissions have proposed debt relief or debt-for-climate swaps as a specific form of reparation for climate harms. Kenya explained that providing grade periods to sovereign debt related to climate change and offering grants without an obligation to repay could constitute satisfaction;[182] Namibia called for debt forgiveness for countries that must bear the burden of adaptation costs;[183] Sierra Leone explained that the "provision of debt-free finance to support mitigation and adaptation measures"

176 **WS Saint Lucia**, para. 95.
177 **WS Vanuatu**, para. 599.
178 **WS Madagascar**, para. 93; **WS Vanuatu**, para. 599.
179 UNGA Res 60/147, 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law' (21 March 2006), para 22 (g).
180 Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and racial intolerance, A/74/321 (2019), para. 9.
181 *Ibid.*, para 8
182 **WS Kenya**, para. 6.112.
183 **WS Namibia**, para. 145.

and the acceleration of the forms of the multilateral financial system was necessary;[184] and Barbados called for support "to address the high debt burdens facing Barbados and other vulnerable small island developing States as part of broader strategies for successful debt management and unlocking economic growth and other developmental goals".[185]

87. The African Union wishes to endorse, and emphasise, these calls. As Kenya clearly explained in its written statement:

> Much of the financial aid provided by polluting States takes the form of loans that will have to be repaid with interest. Indebted and poor nations are thus forced into a "vicious circle" under which, in order to repay the debt, they must engage in extractive and polluting but income-generating activities, and use public funds that could otherwise be deployed to help to their climate change adaptation and mitigation measures.[186]

88. Debt is preventing countries from investing in climate mitigation and adaptation. A study of spending in 42 countries found that debt service payments represented 32.7% of the budget in 2023 on average, while responding to the climate crisis represented only 2.5%.[187] As Professor Thomas Piketty (Paris School of Economics) emphasized:

> The world's financial system is rigged in favour of rich countries. Poor countries pay massive excess payments in interest income, relative to their asset positions, while climate reparations would require the opposite. Debt justice is a first step toward climate justice, and this has to start now.[188]

89. In the Nairobi Declaration, AU member States called for "concrete, time-bound action on the proposals to reform the multilateral financial system", including to improve debt management and to provide interventions and instruments for new debt,[189] and draw attention to the fact that "inordinate borrowing costs, typically 5 to 8 times what wealthy countries pay (the "great financial divide"), are a root cause of recurring debt

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184 **WS Sierra Leone**, para. 3.149.

185 **WS Barbados**, para. 295.

186 **WS Kenya**, para. 6.111.

187 Development Finance International, *The Worst Ever Global Debt Crisis: Putting Climate Adaptation Spending Out of Reach* (2023), at: https://www.development-finance.org/files/Debt_Service_Watch_Briefing_Climate_COP28_FINAL_281123.pdf.

188 'Cancel the Debt Now to Deliver Climate Justice!' Open Letter, 2023: https://debtgwa.net/debtandclimate.

189 The African Leaders Nairobi Declaration on Climate Change and Call to Action, 6 September 2023, para. 52 ("Nairobi Declaration"), para. 52.

crises in developing countries and an impediment to investment in development and climate action".[190]

90. It will be impossible to protect the climate and adapt to its consequences without a just and equitable international economic order. Countries "need aid to create the requisite budgetary margins to be able to mobilize their own resources and thus take part in this collective objective".[191] To do so, it is necessary to restructure sovereign debts and reduce the burden of debt. In particular, debt for adaptation swaps enables countries to divert the money that was to be spent on repayment on climate adaptation and resilience projects. Several African countries have benefited from debt for climate swaps with some developed countries,[192] but the amounts remain small and are restricted to countries that are not overindebted.

91. It is acknowledged that, as per the ARSIWA, modalities of satisfaction should not be "out of proportion to the injury and may not take a form humiliating to the responsible State".[193] Debt for adaptation swaps respect perfectly this requirement because they are not punitive: indeed, they take the form of a cooperative mechanism that benefits the international community as a whole and gives creditors the ability to contribute to the common good.

D. REPARATION

1. Reparation and restitution will require material restoration, but also solutions attuned to financing needs of impacted States

92. Article 31 of ARSIWA provides that a responsible State is "under an obligation to make full reparation for the injury caused by the internationally wrongful act." The second paragraph of the provision explains that injury "includes any damage, whether material or moral, caused by the internationally wrongful act of a State. In the words of the PCIJ reparation should "wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability have existed if that act had not

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190 Nairobi Declaration, para. 55.

191 COSIS Advisory Opinion, p 19, available at: https://www.itlos.org/fileadmin/itlos/documents/cases/31/Oral_proceedings/ITLOS_PV23_C31_17_E.pdf.

192 Germany's Federal Ministry for Economic Cooperation and Development, 'Debt for Climate Swaps' (2023) https://www.bmz.de/en/issues/climate-change-and-development/climate-financing/debt-for-climate-swaps-195550.

193 ARSIWA Article 37 (3).

been committed."[194] Indeed, reparations are "the indispensable complement" of a failure to apply international law.[195]

93. In the specific instance of climate change, reparation is due because of the injury resulting from, and ascribable to, the wrongful act.[196] That reparation is due for environmental damages has clearly been stated in many instances. Most notably, the UN Security Council creating the UN Compensation Commission ("**UNCC**") held that a State (in that case, Iraq) could be "liable under international for any direct loss, damage, including environmental damages" resulting from its wrongful acts.[197] More recently, in *Certain Activities*,[198] the Court found that damage to the environment "and the consequent impairment or loss of the ability of the environment to provide goods and services, is compensable under international law."[199]

94. Article 35 of ARSIWA provides that States responsible for an internationally wrongful act must provide restitution, which means to re-establish the situation that existed before the wrongful act occurred.[200] Restitution is preferred unless it is materially impossible or it involves a burden that is out of proportion to the benefit deriving from the restitution instead of compensation. The primacy of restitution as an "obligation to restore"[201] has a broad meaning, including all the actions that the responsible States need to take to restore the situation *quo ante* and eliminate all the legal and material consequences of the wrongful acts.[202] Fundamentally for the case at hand where damages are suffered as a consequence of climate change, restitution "may take the form of material restoration."[203]

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194 *Factory at Chorzów (Merits)*, PCIJ Series A. No 17, Judgment, 13 September 1928, p. 47.

195 *Factory at Chorzów (Jurisdiction)*, PCIJ Series A. No 9, Judgement, 26 July 1927, p. 21; *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment, I.C.J. Reports 2010, p. 639, at p. 691, para. 161 (*"Ahmadou Sadio Diallo"*). See also ITLOS (Panama/Guinea Bissau) ITLOS, Judgment, 14 April 2014, para. 429 "the responsible State is under an obligation to make full reparation for the injury caused by the international wrongful act."

196 ARSIWA Commentaries, Article. 31, p.92-93.

197 SC Resolution 687/991 of 8 April 1991, para. 16. See also WS Vanuatu, para. 4, and 486.

198 *Certain Activities*, paras. 41-43.

199 *Ibid.*, para. 41.

200 ARSIWA, Article 35.

201 *Factory at Chorzów (Merits)*, PCIJ Series A. No 17, Judgment, 13 September 1928, p.48.

202 ARSIWA Commentaries, Article 35, p.97. See *Pulp Mills on the River Uruguay (*Argentina v. Uruguay), Judgment, I.C.J. Reports 2010, p. 14, at p. 103 ("Pulp Mills"), para. 273. See also ECtHR, *Savriddin Dzhurayev v. Russia*, Application No. 71386/10, Judgment, 25 April 2013, para. 248 (primary aim of the individual measures taken in response to a judgement is to put an end to the breach and make reparations s as to restore the situation exiting before the breach); *Devydov v. Russia*, Application No. 18967/07, Judgment (merits and just satisfaction), 30 October 2014, para. 25 (stating that "a judgment in which the Court finds a breach imposes on the respondent State a legal obligation to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach"); and *Kudeshkina v. Russia*, Application No. 28727/11, Decision, 17 February 2015, para. 55.

203 ARSIWA Commentaries, Article 35, p.97.

95. As discussed in more detail in the African Union's Written Statement, African countries are suffering the bulk of the consequences of climate change.[204] Indeed, the UN Office of the High Representative for Least Developed Countries, Landlock Developing Countries and Small Island Developing States (LDC High Representative) concluded that "extreme drought is already being felt in southwest Africa" and the LDC Chair of the Group on Climate Change reaffirmed that "climate change is hurting our [LDC] countries and communities worst."[205] In its Resolution 77/276 requesting the Advisory Opinion, the General Assembly also noted with profound alarm that countries that are particularly vulnerable to the adverse effects of climate change and have significant capacity constraints, such as the least developed countries and small island developing States, are already experiencing an increase in such effects, including persistent drought and extreme weather events, land loss and degradation, sea level rise, coastal erosion, ocean acidification and the retreat of mountain glaciers, leading to displacement of affected persons and further threatening food security, water availability and livelihoods.[206]

96. Restitution is particularly important when the obligation is of a continuing and shared character, as is the case in obligations related to the climate system.[207] Article 47 of ARSIWA states that where several States "are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act". This article reflects the basic principle that wrongful conduct can be attributed to multiple States simultaneously, where each State is individually and independently responsible for breaches of its international legal obligations.

97. Abundant scientific evidence shows that GHGs are causing climate change. Scientific data analysis can also identify the specific percentages of GHGs emission and contribution that can be traced historically and tracked for each specific state.[208] This is particularly important in the instant case, where restitution is better provided to

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204 **WS**, paras. 8-9, and in particular the **African Union's Expert Report**.

205 Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States, On the Frontline of Climate Crisis, Worlds Most Vulnerable Nations Suffer Disproportionately.

206 Resolution 77/276, preambular para. 8. See also the COSIS *Advisory Opinion*, inter alia at paras. 59, 175, 398. At para. 122, the Tribunal concludes that is mindful of the fact that climate change is recognized internationally as a common concern of humankind. The Tribunal is also conscious of the deleterious effects climate change has on the marine environment and the devastating consequences it has and will continue to have on small island States, considered to be among the most vulnerable to such impacts."

207 See ARSIWA, Article 15.

208 Expert Report of Professor Corinne Le Quéré submitted by Vanuatu (identifying the specific States whose individual contribution to the problem has been significant in the periods 1851- 2022 and 1990-2022).

those States that are disproportionally suffering of the consequences of climate change, many of which are members of the African Union, together by those States who have historically disproportionally caused climate change by a series of actions or omissions.[209]

98. In *Armed Activities*, the Court held that "it may be that the damage is attributable to several concurrent causes" including both acts and omissions. The Court also found that it was "possible that several internationally wrongful acts of the same nature, but attributable to different actors, may result in a single injury or in several distinctive injuries."[210] The continued emission of GHGs by developed States in violation of international law have together produced several kinds of environmental damages, especially felt by least developed countries and small island developing States, such as drought, land loss, sea level rise and other extreme weather events.

99. In its recent Advisory Opinion, the ITLOS has further confirmed that, within UNCLOS, State Parties have the specific obligation "to assist developing States, in particular vulnerable developing States, in their efforts to address marine pollution from anthropogenic GHG emissions" including by providing appropriate assistance, directly or through competent international organizations, in terms of capacity-building, scientific expertise and technology transfer.[211] Similar obligations derive from other sources of international law, as explained above.[212]

100. Providing restitution is essential for some of the most important consequences of climate change suffered in Africa, identified by the General Assembly, including "persistent drought and extreme weather events, land loss and degradation, sea level rise, coastal erosion, ocean acidification and the retreat of mountain glaciers."[213] Reparations are due for addressing the impact from climate and weather extremes, as well as slow-onset events. Specifically, actions that can assist with reparation due to African States and people include "finance, capacity-building and technology transfer" for adaptation.[214]

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209 See the **African Union's Expert Report**; see also **WS Vanuatu**, pp. 245-246, and para. 162.
210 *Armed Activities*, para. 394.
211 COSIS *Advisory Opinion*, operative para. 441(3)(k).
212 *Supra*, p. 9.
213 Resolution 77/276.
214 Resolution 77/276, preambular paras. 8, 10 and 11.

101. In so far as specific obligations of restitution are concerned, both the obligation to provide material restitution and material restoration are necessary in order to, as required by international law, "wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability have existed if that act had not been committed."[215] As a minimum, the obligation of restitution will recognise existing maritime spaces and the continued sovereignty of those States that lose their territory as a result of sea-level rise.

102. Material restitution, however, may not be sufficient to wipe out all the consequences of the internationally wrongful act. The consequences of the GHGs emissions have been severe and remedial activities are also necessary. As confirmed by the Court in *Certain Activities* natural recovery may not always be enough to return the environment "to the state in which it was before the damage occurred," such that it may be necessary to provide funding for active restoration.[216]

103. In this context, it is important to stress that all developed countries have agreed, but have so far failed, to jointly mobilize USD 100 billion per year by 2020, which could be used to mitigate some of the effects of climate change.[217] While the payment of this sum is necessary to begin restoration projects to address drought, sea level rise, land loss and degradation and coastal erosion which in all likelihood would not have happened but for excessive GHG emissions, it should not be considered restitution.

104. Moreover, separately and in addition to the funds already promised by developed countries, it will be necessary to establish a funding mechanism that specifically aims at restoring environmental damage and natural resources, including reasonable measures aimed at remediating and restoring the environment. States that have historically emitted GHGs should provide funding, those States that are suffering the main impact of climate change will be the beneficials.[218] Funds should be used to restore and remediate loss and degraded land that suffered draught and other

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215 *Factory at Chorzów (Merits)*, PCIJ Series A. No 17, Judgment, 13 September 1928, p. 47.

216 *Certain Activities*, para. 43.

217 Resolution 77/276, preambular para. 12.

218 **WS Burkina Faso**, paras. 257-258, emphasizing the probative value of IPCC reports and also citing data from Carbonbrief, a British website specializing in climate and energy science, which identified the countries that emitted the most GHGs between 1850-2021 as the US, China and Russia. It also refers to the impact of colonial emissions in GHG calculation.

environmental damages. Coastal erosion can also be addressed with restoration and remedial processes.

105. For these kinds of material restoration and remedial projects for extreme and slow onset events, the example of the Follow-Up Programme for Environmental Awards (the "Programme") may be particularly helpful. The Programme was created by the UNCC Governing Council to monitor the financial and technical implementation of restorative and remedial environmental projects implemented with funds from UNCC awards, a unique process created by the UN Security Council to compensate, among others, countries that suffered environmental damage as a direct consequence of Iraq's invasion of Kuwait in 1990-91.[219]

106. Indeed, the example of the UNCC, especially the so-called F4 claims on environmental damages, is particularly instructive in this instance, as they include decisions awarding specific sums for environmental damage and remedial activities as a consequence of Iraq's violation of international law.[220] These decisions are helpful to determine restitution mechanisms when, like in the present case, actions must be taken to reverse the adverse effect of climate change especially in countries, like those of the African Union, that are particularly vulnerable to these effects.

107. In sum, restitution is a key legal consequence arising from the conduct at stake in these proceedings, conduct that continues to damage the environment in many countries, and especially those of the African Union. Though the actions of several States caused the damage, scientific knowledge now allows us to identify the different amounts of emissions and tracked them historically to specific emitters States. States that have caused climate change now have an obligation – together – to provide reparation. Material restitution and restoration are needed to remediate damages to the environment and bring it back to the situation that would have existed but for the wrongful actions. Restitution should take the form of financing through a specially created commission funded by high emitters to the specific benefit of least developed

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219 See Norbert Wühler, "The United Nations Compensation Commission", *in* C. Giorgetti, P. Pearsall & H. Ruiz Fabri, *Research Handbook on International Claims Commissions* (E. Elgar, 2023) p. 90, at 110 (and in general the entire chapter for a helpful description of the working of the UNCC).

220 Panel of Commissioners of UNCC in F3 claims found that loss resulting from the use or diversion of Kuwait's resources to fund the costs of repair the loss and damage arising from Kuwait's invasion fell "squarely within the types of loss contemplated by Articles 31 and 35 of the ILC". In Decision on F4 (environmental claims) the Panel found that a loss due to depletion for damage to natural resources was compensable. at uncc.ch.

countries and small island developing States. The UNCC Follow- Up Programme can provide an initial blueprint for such commission.

2. *Specially-impacted States and people are also owed compensation given the gravity of the harm*

108. Given the gravity of the damages caused by the international wrongful acts described above, restitution will not be sufficient to wipe out all the consequences suffered by least developed and developing small island States. Article 36 of ARSIWA specifically provides that States that are responsible for an internationally wrongful acts are under "an obligation to compensate for the damages that was caused by it, in so far as the damage cannot be made good by restitution."[221] The injury and damage caused by the adverse effects of climate change cannot be completely repaired by restitution. The effects of continued acts and omissions have been too serious, and there is a consensus that a temperature increase of 1.5°C above pre-industrial levels is inevitable.[222] Therefore, in addition to measures of restitution, injured States and people are owed compensation for the loss and damages they suffered because of the widespread adverse impact of human-induced climate change.

109. Crucially, this compensation for loss and damage arises from State responsibility rules related to international wrongful acts, and is separate and in addition to any financial, capacity building and technology-transfer provisions that may be found within specific primary norms.[223]

110. Compensation is the most common form of reparation: as held by the Court in the *Gabčíkovo-Nagymaros Project* case, "it is a well-established rule of international law that an injured State is entitled to obtain compensation from the State which has committed an internationally wrongful act for the damage caused by it."[224] The

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221 ARSIWA, Article 36.

222 GA Res. 77/267 preambular paras. 7 and 10. See

223 As explained *supra*, section III, the existence of a specific climate law regime does not exclude the applicability of the international rules of state responsibility discussed in this section.

224 *Gabčíkovo-NagymarosProject*, (Hungary/Slovakia), Judgment, 1. C. J. Reports 1997, p. 7 at p. 81, para. 152 ("*Gabčíkovo-Nagymaros Project*"). See also the statement by PCIJ in *Factory at Chorzów*, Merits, Judgment No. 13, 1928, PCIJ, Series A, No. 17, p. 29, declaring that "[i]t is a principle of international law that the reparation of a wrong may consist in an indemnity." *Certain Activities*, para. 31; *Pulp Mills*, para. 273. *Armed Activities*, para. 101.

function of compensation is "to address the actual losses incurred as a result of the internationally wrongful act."[225]

111. In the specific instance of climate change, compensation is due because of the injury resulting from and ascribable to wrongful acts by historically high-GHGs emitters, which cannot be completed remediated by restitution alone.[226] In *Certain Activities*,[227] the Court clarified that compensation due for environmental damage and loss include both "indemnification for the impairment or loss of environmental goods and services" in the period preceding the recovery, as well as "the payment for the restoration of the damaged environment."[228]

112. As provided by Article 36 of ARSIWA compensation must cover "any financially assessable damage" including loss of profit in as much as it is established.[229] There are many methods for assessing environmental damage.[230] In general, the appropriate categories of damage and principles for assessment depend on the primary obligation that was violated.

113. In *Certain Activities*, a case centred on compensation for environmental damage, the Court approached the evaluation of environmental damage "from the prospective of the ecosystem as whole" and thus adopted an "overall assessment of the impairment or loss of environmental goods and service",[231] rather than focusing on specific categories of goods and services. Because of the widespread adverse impacts and related losses and damage for both nature and people of man-induced climate change particularly for vulnerable developing countries, an overall assessment based on the ecosystem as a whole would be particularly helpful.

114. Several international tribunals are exploring the consequences of the violations of international obligations related to climate change. These include the ITLOS's recent Advisory Opinion[232], but also the European Court of Human Rights in three recent

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225 ARSIWA Commentaries, Article 36, p.99.
226 ARSIWA Commentaries, Article 31, pp. 92-93.
227 *Certain Activities Carried Out by Nicaragua in the Border Area* (Costa Rica v. Nicaragua), Compensation, Judgment, I.C.J. Reports 2018, paras. 41-43.
228 *Certain Activities*, para. 42.
229 ARSIWA, Article. 36, para. (4), see also ARSIWA Commentaries, Article 36, pp. 98-105.
230 *Certain Activities*, para. 52.
231 *Certain Activities*, para. 78.
232 *COSIS Advisory Opinion.*

important decisions related to climate change,[233] and the Inter-American Court of Human Rights which will soon issue its decision on a case brought by Columbia and Chile.[234] Moreover, issues of compensation have helpfully been addressed by the Iran-US Claims Tribunal, as well as tribunals constituted under the International Convention for Settlement of Investment Disputes.

115. Once again, the UNCC and other compensation commissions could also serve as an important blueprint to build a compensation mechanism for climate change. Notably, inspiration could be taken from the decision of the UNCC Governing Council to specify the various heads of damage for environmental harm.[235] This approach resulted in billions of dollars being awarded for environmental harm and remedial activities after thorough review by the UNCC Commissioners. Furthermore, "the strength of a claims commission model is that it allows an opportunity to construct an adjudicatory framework that is at once unique, adaptive to the specific circumstances, yet also draws from the successes of past commissions" including on issues of party structures, and possible claims and claimants.[236]

116. African States are especially affected by human-induced climate change due to their geographical circumstances and level of economic development. Many also have significant capacity constrains to confront the many injuries caused by climate change. Many African States are already experiencing persistent drought and extreme weather events, land loss and degradation, sea level rise, coastal erosion and ocean acidification. As indicated in Resolution 77/267, climate change also leads to displacement of affected persons and further threatening food security, water availability and livelihoods, as well as efforts to eradicate poverty in all its forms and dimensions and achieve sustainable development.[237]

117. States that have contributed to GHGs and have omitted to take actions need to provide compensation to States that have been affected by it. Such compensation, as the Court held in *Certain Activities*, can take the form of lump-sum payments to

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233 See especially *Klimaseniorinnen* , para. 573, finding that respondent State failed to comply with the positive obligation to combat climate change.

234 Request for an advisory opinion on the Climate Emergency and Human Rights submitted to the Inter-American Court of Human Rights by the Republic of Colombia and the Republic of Chile (here).

235 UNCC Governing Council, Decision 7 of 16 March 1992, Criteria for Additional Categories of Claims, S/AC.26/1991/7/Rev. 1, para. 35.

236 L. Brilmayer, C. Giorgetti and L. Charlton, *International Claims Commissions – Righting Wrong After Conflict* (Elgar International Law series 2017), p. 232.

237 Resolution 77/267.

address the "ecosystem as whole."[238] Compensation is urgently needed to address situations that are already occurring as well as slow-onset events that, as the General Assembly pointed out, "will pose an ever-greater social, cultural, economic and environmental threat."[239]

118. Compensation for damages and loss caused by climate change would be better delivered through a claims commission that can holistically address both material and non-material losses.[240]

E. LEGAL CONSEQUENCES ARISING FROM THE RIGHT TO SELF-DETERMINATION

119. The obligation to respect the right of self-determination is an obligation *erga omnes*, and thus, as the Court has held, "all States have a legal interest in protecting that right".[241] In addition, it is also a peremptory norm of international law,[242] meaning a rule of general applicability "from which no derogation is permitted".[243] The breach of this obligation is "serious" as it involves a "systematic failure"[244] to respect the right, with consequences of an incommensurable magnitude. Chapter III of the ARSIWA, on serious breaches of obligations under peremptory norms of general international law is thus applicable, the situation created by climate harms engaging what the ARSIWA commentary describes as "substantive rules of conduct that prohibit what has come to be seen as intolerable because of the threat it presents to the survival of States and their peoples and the most basic human values".[245]

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238 *Certain Activities*, para. 78.

239 Resolution 77/267. The Resolution also emphasized "the urgency of scaling up action and support, including finance, capacity-building and technology transfer, to enhance adaptive capacity and to implement collaborative approaches for effectively responding to the adverse effects of climate change, as well as for averting, minimizing and addressing loss and damage associated with those effects in developing countries that are particularly vulnerable to these effects".

240 African Court on Human and Peoples' Rights, *Beneficiaries of Late Norbert Zongo, Abdoulaye Nikiema Alias Ablasse, Ernest Zongo and Blaise Ilboudo & the Burkinabe Human and Peoples' Rights Movement v. Burkina Faso*, Application No. 013/2011, Judgment on Reparations, 5 June 2015, para. 26, stating that "according to international law, both material and moral damages have to be repaired."

241 *Chagos Advisory Opinion*, para. 180. See also *East Timor* (Portugal v Australia), (1995) ICJ Reports 90, para. 29; *Wall Advisory Opinion*, para. 155.

242 ILC, Draft Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law (*Jus Cogens*), with Commentaries, A/77/10 (2022), Conclusions 23, Annex; ARSIWA Commentaries, Article 40, p.112. See also *Chagos Advisory Opinion*, Separate Opinion of Judge Robinson, para. 77; Separate Opinion of Judge Sebutinde, para. 13.

243 VCLT, Article 53.

244 ARSIWA, Article 40(2).

245 ARSIWA Commentaries, Article 40, p. 112.

120. Article 41 of ARSIWA sets out special consequences resulting from a breach of such an obligation. The first consequence resulting from a serious breach of a peremptory norm is the obligation of all States to cooperate to bring an end to those breaches.[246] This requires a "joint and coordinated effort by all States to counteract the effects of these breaches", often within the framework of international organisations.[247] As explained in Vanuatu's written submission, the finding by the Court, in *Chagos*, that the nature of the right to self-determination creates certain consequences for third States, can serve as guidance for the present question.[248] In *Chagos*, the Court found that it is for the UN General Assembly "to pronounce on the modalities required to ensure" the continued enjoyment of the right to self-determination by such peoples, and "all Member States must co-operate with the United Nations to put those modalities into effect".[249] In addition, pursuant to the ARSIWA, such cooperation needs to go beyond what is already in place and should "strengthen existing mechanisms".[250]

121. The second consequence resulting for third States from a serious breach of a peremptory norm is the obligation not to recognize any unlawful situation resulting from that breach.[251] States are also "under an obligation not to render aid or assistance in maintaining the situation".[252] As Vanuatu noted in its written submission:

> the obligation of non-recognition of the situation resulting from the breach requires the recognition of the continued enjoyment by the affected peoples of their right to self-determination in the way it has been exercised, including independence and Statehood, and in the limits of their own territory and maritime spaces. Also, the obligation not to render aid or assistance in maintaining the breach calls into question the lawfulness of all newly concluded or future infrastructure (e.g. pipelines) and supply agreements that effectively expand reliance on fossil fuels, contrary to the required cessation of the breach.[253]

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246 ARSIWA, Article 40(1).
247 ARSIWA Commentaries, Article 41, p.114
248 **WS Vanuatu**, paras. 637-642.
249 *Chagos Advisory Opinion*, para. 180.
250 ARSIWA Commentaries, Article 41, p.114.
251 ARSIWA Article 41(2).
252 ARSIWA Commentaries, Article 41, p.114; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I. C.J. Reports 2004, p. 136, at p. 200, para. 159 (*"Wall Advisory Opinion"*).
253 **WS Vanuatu**, paras. 637-642.

122. Indeed, the existence of an obligation not to recognise as legal any acquisition of territory brought about by the use of force is well established.[254] Applied in the context of climate change, all States are under an obligation not to accept the consequences of failures to limit GHG emissions on the sovereignty of States, including on the territory and maritime spaces of small island States and coastal States impacted by rising sea level.[255]

F. LEGAL CONSEQUENCES WITH RESPECT TO "PEOPLES AND INDIVIDUALS OF THE PRESENT AND FUTURE GENERATIONS AFFECTED BY THE ADVERSE EFFECTS OF CLIMATE CHANGE"

123. Compensation for the adverse effects of climate change is also due to peoples and individuals of present and future generations adversely affected by climate change. Indeed, the Court has long recognized that the environment "represents the living space, the quality of life and the very health of human beings, including generations unborn."[256]

124. Question (b)(ii) refers to specific rights holders under international human rights law. These include specific protected groups – such children, women, indigenous and tribal peoples, minorities – as well as individuals in general. Children, women, migrant workers, persons with disability, members of minorities – all deserving and owning specific legal protections. Reparations are intended "to benefit all those who suffered injury."[257]

125. Article 24 of the African Charter specifically stipulates that all peoples have the right to a satisfactory and comprehensive environment, conducive to their development. In upholding that right, it is crucial to consider future generations as well as present generations.

126. Climate change is causing significant economic and non-economic loss and damage, including psychological harm, destruction of cultural heritage and forced migration from traditional lands. As Kenya's Written Submission emphasized, "pastoralist

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254 ARSIWA Commentaries, Article 41, p.114.

255 **WS COSIS**, para. 196; **WS Liechstenstein**, para. 80.

256 *Nuclear Weapons Advisory Opinion*, at p. 241, para. 29.

257 *Armed Activities*, para. 102. See also *Ahmadou Sadio Diallo* (Republic of Guinea v. Democratic Republic of the Congo), Compensation, Judgment, I.C.J. Reports 2012 (I), p. 344, para. 57.

communities in Kenya's Turkana County are becoming more susceptible to addiction, anxiety and emotional distress because of migration and disruption caused by climate change."[258]

127. Article 1(2) of the ICESCR provides that peoples should not be deprived of their "own means of subsistence." People leaving in least developed and small island States are being deprived of their own means of substances because of the consequences of climate change, including loss of territory due to sea level rising, and loss of usable land to due to drought, desertification, and erosion. People are forced to migrate to find alternative sources of subsistence and they become homeless and displaced.[259]

128. In *Armed Activities*, the Court found that in cases involving large groups of victims, compensation has often been awarded as a "global sum" for certain categories of injury based on the available evidence.[260] Awarding a global sum would be particularly suitable to compensate individuals and people that are suffering the consequences of climate change.

129. In particular, the experience of past international claims commissions might be instructive when dealing with a multitude of possible individual claims, as in this case. The UNCC, for example, developed specific methodologies including on kinds of compensable claims, types of heads of damage and kinds of claimants that allowed for the mass process of individual claims for set amount of compensation.[261] For example, individuals were compensated for a set amount when they had to leave their homes. Similarly, a compensation commission could be envisaged to provide compensation to those who are forced to migrate and relocate as a consequence of climate change. Other compensable injuries would include loss of sources of income and loss of land.

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258 **WS Kenya**, para. 6.101.

259 As recounted by Diane Desierto, ""Stringent Due Diligence", Duties of Cooperation and Assistance to Climate Vulnerable States, and the Selective Integration of External Rules in the ITLOS Advisory Opinion on Climate Change and International Law", *EJIL!Talk*, 3 June 2024.

260 *Armed Activities*, para. 107.f

261 Norbert Wühler, The United Nations Compensation Commission, in C. Giorgetti, P. Pearsall & H. Ruiz Fabri, *Research Handbook on International Claims Commissions* (E. Elgar, 2023), p. 90.

VI – CONCLUSIONS

130. In view of what precedes, the African Union suggests that the Court should answer the General Assembly's questions along the following lines, in view of the entire corpus of international law:[262]

131. *Question (a)*: States have multiple obligations to ensure the protection of the climate system, including:

i. An obligation to take all the necessary measures and use their best efforts to prevent harm from GHG emissions, with additional obligations to urgently make deep reductions to such emissions in line with 1.5 °C pathways for the parties to the Paris Agreement;

ii. A duty to allocate the burden of emissions reductions asymmetrically and fairly, in line with the principle of common but differentiated responsibilities;

iii. Duties related to the ongoing efforts to slow or reverse climate change, including a duty to cooperate, to mitigate greenhouse gas emissions, and to adapt to climate change impacts;

iv. Obligations in terms of finance, technology transfer, and capacity-building, and to address losses and damages;

v. Obligations to protect the environment from climate harm and enhance carbon sinks, including in relation to the marine environment, biological diversity, and land;

vi. Multiple obligations pertaining to the human and peoples' rights, including the right to self-determination, the right to sustainable development, and the right to life; and

vii. Duties to take steps to progressively achieve the full realisation of economic, social and cultural rights, and to promote meaningful participation, secure access to information and ensure access to effective remedies in the context of the climate crisis.

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[262] See **WS**, Chapter III, p. 16 *et seq.*

132. *Question (b)*: In light of the international law of State responsibility, acts and omissions of individual States over time that have resulted in an interference with the climate system and other parts of the environment, entail consequences with respect not only to the States and Peoples of Africa, but also to future generations.

These consequences include:

i. A continued duty of performance with respect to the obligations being breached;

ii. Obligations of cessation and non-repetition; and

iii. A duty to make full reparation, including through restitution and compensation to African States and its peoples and individuals.

iv. These obligations are owed to other States, as well as to the international community as a whole.

143. The African Union emphasizes that these answers perfectly align with and complement the Nairobi Declaration, whose ambitious program to address climate change in a manner consistent with the African Union's efforts to eradicate poverty in all its forms and dimensions and to achieve sustainable development will certainly find echo and support in the Court's answers to the General Assembly.

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