INTERNATIONAL COURT OF JUSTICE

OBLIGATIONS OF STATES IN RESPECT OF CLIMATE CHANGE

WRITTEN COMMENTS OF THE REPUBLIC OF SIERRA LEONE

15 AUGUST 2024

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CHAPTER I. INTRODUCTION

1.1 Pursuant to the Court's Orders dated 20 April 2023, 4 August 2023, 15 December 2023, and 30 May 2024, and pursuant to Article 66, paragraph 4, of the Court's Statute, the Republic of Sierra Leone ("Sierra Leone") submits these Written Comments concerning the Request for an Advisory Opinion on the Obligations of States in respect of Climate Change (the "Request").

1.2 Sierra Leone welcomes the submission of 91 Written Statements by States and international organizations—the highest number that has ever been filed with the Court in an advisory proceeding. The submissions address a wide range of interests and perspectives from across the globe. These include from States that, like Sierra Leone, have contributed the least to the climate crisis yet, paradoxically, have borne the brunt of its effects. The views expressed underscore the fundamental importance of the Request to the international community, given the sweeping effects of climate change on issues ranging from biodiversity, fisheries, and sustainable development, to health, climate justice, self-determination, and culture heritage.

1.3 At the outset, Sierra Leone wishes to make three preliminary observations with respect to the views expressed by other States, the vast majority of which are consistent with those of Sierre Leone.

1.4 *First*, there is overwhelming agreement that the Court can and should answer both questions posed by the General Assembly. As one submission rightly observed, the Request presents a "unique opportunity to ensure coherence and clarity" in the articulation of the international law applicable to climate change.[1] This, in turn, will "allow States to understand and meet their obligations under international law and together address the existential climate crisis".[2]

1.5 *Second*, with respect to Question (A), the Organization of Petroleum Exporting Countries ("OPEC"), together with a small minority of States, argue that States' obligations are limited to those contained in the climate change agreements to the exclusion of general customary

[1] Written Statement of Antigua and Barbuda, para. 5.

[2] Written Statement of Bangladesh, para. 79.

principles of environmental law[3] and that international human rights law and the Law of the Sea do not impose obligations on States to mitigate greenhouse gas ("GHG") emissions. However, the vast majority of States take a contrary view. There is widespread agreement that States have mitigation and adaptation obligations, not only under international environmental law, but also under human rights law and the Law of the Sea. The precise content of such obligations—often characterized as those of due diligence—is informed by the best available science, which includes the temperature goal of limiting increases in global average temperatures to 1.5°C ("1.5°C Standard") as necessary to avoid the worst effects of the climate crisis. States thus must take all necessary measures to achieve this temperature goal and do so in accordance with the principle of common but differentiated responsibilities and respective capacities ("CBDR-RC"), the duty of cooperation, and the principle of intergenerational equity.

1.6 *Third*, of the Written Statements addressing Question (B), numerous States and international organizations agree with Sierra Leone that a failure to mitigate anthropogenic GHG emissions can constitute an internationally wrongful act, the legal consequences of which are governed by the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts ("ILC Articles"), with a small number of submission arguing that the climate change treaties constitute *lex specialis* on the legal consequences of a breach. Numerous States further argue that those States which do not comply with their mitigation and adaptation obligations must make full reparation, including by paying compensation to affected States and individuals.

1.7 Sierra Leone's views and those of the vast majority of States have been confirmed by the recent advisory opinion of the International Tribunal for the Law of the Sea ("ITLOS") on the request submitted by the Commission of Small Island States on Climate Change and International Law ("ITLOS Advisory Opinion").[4] ITLOS affirmed that:

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[3] *See, e.g.*, Written Statement of OPEC, Chapter IV(E).

[4] *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law (Advisory Opinion of 21 May 2024), ITLOS Reports 2024* ("***ITLOS Advisory Opinion***").

- State Parties to UNCLOS must take all necessary measures to prevent, reduce and control marine pollution from anthropogenic GHG emissions, and to protect and preserve the marine environment.

- Such measures must take into account the best available science and climate change agreements including, in particular, the 1.5°C temperature goal, in determining the content of necessary measures.

- States Parties must assist developing States, in particular those most vulnerable, in their efforts to address pollution resulting from GHG emissions.

- States Parties must exercise stringent due diligence given the high risks of serious and irreversible harm to the marine environment from anthropogenic GHG emissions, including by regulating the actions of private companies. It follows, therefore, that States have both the obligation and right to regulate the private sector to curb anthropogenic GHG emissions.

- States Parties must monitor, report, and conduct environmental impact assessments ("EIAs") of activities within their jurisdiction or control to determine whether they are likely to pollute the marine environment through anthropogenic GHG emissions and to take effective action in regard to such assessments.

1.8 These conclusions are relevant not only to the Court's interpretation and application of UNCLOS, but also to other bodies of international law and their applicability to the Request.

1.9 Rather than comment on every point of contention, Sierra Leone's Comments focus on the most critical issues concerning the obligations of States. **Chapter II** responds to arguments raised relating to the Court's jurisdiction and discretion to answer the Request. **Chapter III** addresses Question (A), focusing on the relevance of the 1.5°C temperature goal to States' obligations, customary environmental law, and international human rights law, as well as the role of CBDR-RC, the duty of cooperation, and intergenerational equity in determining States' climate change obligations. **Chapter IV** addresses points relevant to Question (B) and explains why the Court should apply the ILC Articles to determine the consequences arising from harm caused by

anthropogenic GHG emissions to the climate system and humanity. Finally, **Chapter VI** contains Sierra Leone's conclusions with respect to the Advisory Opinion that the Court is asked to provide.

CHAPTER II. JURISDICTION AND DISCRETION

2.1 All 91 Written Statements accept that the Court has jurisdiction to answer the questions posed in the Request. A limited number of States, however, argue that the Court should be cautious in exercising its jurisdiction because of the potential political implications of an opinion on States' ongoing negotiations on the international law of climate change,[5] and the risk that the Court would create new obligations.[6] Neither concern constitutes a compelling reason for the Court to refuse the exercise of its advisory jurisdiction or to exercise of any degree of caution in answering the questions posed in the Request.

2.2 Any putative "political" implications of the questions put before the Court are irrelevant to whether it should exercise its discretionary authority.[7] As the Court has held, the "existence of active negotiations … should not prevent [the] Court from exercising [its] separate functions under the Charter and the Statute of the Court".[8] In fact, in "situations in which political considerations are prominent it may be particularly necessary for an international organization to obtain an advisory opinion from the Court as to the legal principles applicable with respect to the matter under debate".[9] Thus, the broader political context, including ongoing multilateral

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[5] *See, e.g.*, Written Statement of Saudi Arabia, para. 3.5.

[6] *See, e.g.*, Written Statement of India, paras. 4-8; Written Statement of OPEC, para. 23; Written Statement of China, para. 11; Written Statement of Saudi Arabia, paras. 3.10-3.12.

[7] Written Statement of Sierra Leone, paras. 2.5, 2.9 (*citing Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010*, p. 403 ("***Kosovo Advisory Opinion***"), pp. 415,417-418, paras. 27 & 33; *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1973*, p. 166, at p. 172, para. 14; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 226 ("***Nuclear Weapons Advisory Opinion***"), p. 237, para. 16).

[8] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 392, at p. 440, para. 106. *See also Nuclear Weapons Advisory Opinion*, p. 237, para. 17; *Kosovo Advisory Opinion*, p. 418, para. 35 (finding that the Court "cannot—in particular where there is no basis on which to make such an assessment—substitute its own view as to whether an opinion would be likely to have an adverse [political] effect"); *Legal consequences arising from the policies and practices of Israel in the occupied Palestinian territory, including East Jerusalem*, Advisory Opinion (19 July 2024), para. 40 (holding that the Court "cannot speculate about the effects of its opinion" on the Israeli-Palestinian negotiation process).

[9] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980*, p. 73, at p. 87, para. 33; *Kosovo Advisory Opinion*, para. 27; *See also* Written Statement of Sierra Leone, para. 2.10; Written Statement of Colombia, para. 1.19.

negotiations, does not divest the questions of their legal character or detract from the discharge of a judicial task.[10]

2.3 The General Assembly has asked the Court to interpret and apply existing principles and instruments of international law. It has not been asked to create new law. As the Court has held, "The contention that the giving of an answer to the question posed would require the Court to legislate is based on a supposition that the present corpus juris is devoid of relevant rules in this matter".[11] The present *corpus juris*, which includes international environmental law, the Law of the Sea, and international human rights law, contains a plethora of rules relevant to the Request. Indeed, "even if, in stating and applying the law, the Court necessarily has to specify its scope and sometimes note its general trend",[12] this falls squarely within the "normal judicial function" of the Court.[13] The General Assembly's questions should therefore be answered in full.

[10] Written Statement of Sierra Leone, para. 2.5 (citing *Kosovo Advisory Opinion*, p. 415, para. 27).

[11] *Nuclear Weapons Advisory Opinion*, para. 18.

[12] *Ibid*.

[13] *Ibid*. *See also ITLOS Advisory Opinion*, para. 120 ("The Tribunal further finds that the Request is compatible with its judicial functions, as it is called upon to clarify and provide guidance concerning the specific obligations of States Parties to the Convention by interpreting and applying the provisions of the Convention, in particular the provisions of Part XII, and other relevant rules of international law".).

CHAPTER III. QUESTION (A)

3.1 This Chapter begins by responding to the positions of some States and international organizations concerning the best available scientific evidence and applicable legal framework. Applying that framework, Sierra Leone elaborates upon its views with respect to Question (A) that States have a duty of due diligence to reduce GHG emissions to comply with the 1.5°C Standard.

I. Applicable Law

A. Best Available Scientific Evidence and International Environmental Law

1. *The Relevance of the Paris Agreement Temperature Standard*

3.2 No State or organization disputes that the Court must determine the obligations of States in respect of climate change in light of the best available science. This reflects the incontrovertible role of science as the factual background that guides the interpretation and application of the law in the climate change context.[14]

3.3 The best available scientific evidence is clear that limiting the increase in global average temperatures to 1.5°C can prevent significant harm to the climate system and other parts of the environment and avoid the worst of the climate crisis.[15] The 1.5°C Standard thus provides the basis for determining whether States have discharged their climate change mitigation obligations.

3.4 A small minority of States argue that the 1.5°C Standard is non-binding and does not give rise to an international obligation.[16] This misses the point. The non-binding nature of the

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[14] In its advisory opinion, ITLOS held that "in the determination of necessary measures to prevent, reduce and control marine pollution from anthropogenic GHG emissions, the science undoubtedly plays a crucial role, as it is key to understanding the causes, effects and dynamics of such pollution and thus to providing the effective response". *ITLOS Advisory Opinion*, para. 212.

[15] *See* Written Statement of Sierra Leone, paras. 3.23-3.24 *citing* IPCC, *Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty* (CUP 2018) ("**IPCC, 2018**"), *available at* https://www.ipcc.ch/site/assets/uploads/sites/2/2022/06/SR15_Full_Report_LR.pdf.

[16] *See* Written Statement of Saudi Arabia, paras. 4.57-4.62; Written Statement of New Zealand, para. 52.

temperature goals does not mean that they should not be considered in ascertaining States' obligations in respect of climate change. Nor is the Paris Agreement the only basis for justifying reference to the 1.5°C Standard for purposes of ascertaining the content of these obligations. The goal reflects the scientific consensus on what is required, at a minimum, to prevent significant harm to the climate system and other parts of the environment. For this reason, the Conference of the Parties to the UNFCCC has consistently reaffirmed its relevance to States' efforts in reducing the impacts of climate change.[17] ITLOS too has affirmed this view in the context of UNCLOS.[18]

3.5 Some States argue that the temperature goals are a range rather than a fixed level, and that States' obligations to undertake ambitious efforts to achieve such goals cannot be measured against a specific outcome.[19] This is an untenable position. The best available science indicates that even with a 1.5°C increase, climate change will still pose serious, and potentially irreversible, harm to the environment and to humankind.[20] Even a +0.5°C increase in global average temperature is likely to result in "statistically significant changes in extremes", including temperature and precipitation extremes, tropical cyclones, and the worsening of droughts.[21] It is therefore no longer sufficient to refer to a range of temperature goals, or generally ambitious, yet unspecified and non-committal, efforts to achieve such goals,[22] as a credible means of preventing significant harm to the climate system. The 1.5°C Standard, in short, represents the minimum standard that informs and defines States' mitigation and adaptation obligations.

2. *States must observe due diligence with respect to climate change*

3.6 OPEC, together with a handful of States, expressed the view that the principle of due diligence is not applicable to climate change on the basis that it has been applied mainly to

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[17] *See, e.g.*, COP 27, Decision 1/CP.27 (20 November 2022), para. 4 ("[r]eiterates that the impacts of climate change will be much lower at the temperature increase of 1.5 °C compared with 2 °C and resolves to pursue further efforts to limit the temperature increase to 1.5 °C").

[18] *ITLOS Advisory Opinion*, para. 243.

[19] *See* Written Statement of China, paras. 22-24; Written Statement of Timor-Leste, para. 113; Written Statement of the United States of America para. 3.44; Written Statement of India, para. 76.

[20] *See* IPCC, 2018, pp. 7-9.

[21] IPCC, *Climate Change 2021: The Physical Science Basis* (2021), p. 1517.

[22] *See* Written Statement of China, paras. 22-24; Written Statement of Timor-Leste, para. 113; Written Statement of the United States of America para. 3.44; Written Statement of India, para. 76.

transboundary harm from specific sources, while climate change causes global harm and derives from multiple varied sources.[23]

3.7 Sierra Leone vehemently disagrees. The principle of due diligence is not limited to the circumstances that have arisen in jurisprudence to date. The internationally wrongful conduct of one State in its jurisdiction may be felt across the globe. Indeed, in *Pulp Mills*, the Court affirmed that due diligence covers all "activities", not only specific types of activities, "which take place in [a State's] territory, or in any area under its jurisdiction", that causes significant damage "to the environment of *another* State".[24] Limiting due diligence to activities that could harm neighboring States only would effectively license States to undertake activities that could harm other States so long as the other States are not in immediate geographical proximity. There is no basis in law or logic for that remarkable proposition.

3.8 There is overwhelming evidence that GHG emissions that arise from activities within the territory and jurisdiction of States has and will continue to causes significant harm to the climate system and other parts of the environment, including in other States.[25] Thus, there is no question that the due diligence principle applies to climate change, as numerous States agree.[26] In its Advisory Opinion, ITLOS recognized that "anthropogenic GHG emissions pose a *high risk*", and that these "[r]isks and projected adverse impacts and related losses and damages from climate change escalate with every increment of global warming".[27] Thus, "the standard of due diligence States must exercise in relation to marine pollution from anthropogenic GHG emissions needs to

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[23] Written Statement of OPEC, para, 87; Written Statement of the United States of America, paras. 4.15-4.21, 3.1, 4.27; *see also* Written Statement of Australia, paras. 3.16, 3.19.

[24] *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010 (I), p. 14* ("***Pulp Mills***"), para. 101 (citing *Corfu Channel (United Kingdom* v. *Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 22) (emphasis added).

[25] *See, e.g.*, IPCC, *Climate Change 2022: Impacts, Adaptation and Vulnerability* (2022), pp. 9-10; *Verein KlimaSeniorinnen v. Switzerland*, ECHR Application No. 53600/20, Judgment (9 April 2024) ("***Verein KlimaSeniorinnen v. Switzerland***"), para. 410 ("climate change is one of the most pressing issues of our times" and its "primary cause … arises from the accumulation of GHG in the Earth's atmosphere").

[26] *See, e.g.*, Written Statement of China, para. 131; Written Statement of Democratic Republic of Congo, paras. 124 *et seq.*

[27] *ITLOS Advisory Opinion*, para. 62.

be *stringent*".[28] This standard applies even more so to developed and high-emitting States.[29] Such a conclusion applies not only to marine pollution, but also to harm inflicted by GHG emissions to the whole climate system. Sierra Leone therefore agrees that, in the context of climate change, States must exercise "nothing short of the *highest* level of due diligence".[30]

3.9 It follows, therefore, that, as ITLOS held, the obligation of stringent due diligence includes the obligation and corresponding right to regulate the actions of private companies within a State's jurisdiction or control—including in areas beyond national jurisdiction.[31] And, as the ECtHR also recently ruled, "[i]ndividuals themselves will be called upon to assume a share of responsibilities and burdens as well".[32] That applies under general international law as well. As Costa Rica observed, due diligence is not only "to be taken by State organs" but also by "individuals and private corporations".[33]

3.10 Finally, a small number of States expressed the view that observing the UNFCCC and the Paris Agreement would satisfy the duty of due diligence owed under customary international.[34] It is notable, however, that ITLOS rejected this argument in relation to UNCLOS. The Tribunal explained that the Paris Agreement is a separate agreement "with separate sets of obligations".[35] While Sierra Leone agrees that the content of the obligation of due diligence is

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[28] *Ibid.*, para. 241 (emphasis added).

[29] *See, e.g.*, *ITLOS Advisory Opinion*, para. 241 (ruling that implementation of the "stringent" standard "may vary according to States' capabilities and available resources").

[30] Written Statement of COSIS, paras. 85-95; Written Statement of IUCN, para. 515; *see also* Written Statement of Latvia, para. 30 (discussing the Paris Agreement and arguing that due diligence standard is informed by the "highest possible ambition"); *see also* Written Statement of Seychelles, para. 96.

[31] *See ITLOS Advisory Opinion*, paras. 235, 247, 358; *Request for an advisory opinion submitted by the Commission of Small Island States on Climate Change and International Law*, ITLOS/PV.23/C.31/12/rev.1 (19 September 2023), pp. 34-39 (Hioureas). *See also generally* Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction.

[32] *Verein KlimaSeniorinnen v. Switzerland*, para. 419.

[33] *See, e.g.*, Written Statement of Costa Rica, para. 39.

[34] Written Statement of the United States of America, para. 4.25 ("the Paris Agreement's 'ambition mechanism' and Parties' treaty obligations under the Agreement should be understood as satisfying any general standard of due diligence in the particular context of anthropogenic GHG emissions"); Written Statement of Australia, paras. 3.16, 3.10 (arguing that the instruments of the climate change regime satisfy the duty of due diligence under Article 194(1) of UNCLOS).

[35] *ITLOS Advisory Opinion*, para. 223.

informed by the best available science and the corpus of international climate change law reflected in the UNFCCC, the Kyoto Protocol, and the Paris Agreement, due diligence does not arise solely from those agreements. It follows that due diligence is not discharged by a State's implementation of commitments under these agreements,[36] which is only one aspect of a broader duty.

3.11 Indeed, the obligation of due diligence under custom is distinct from the obligations under the UNFCCC and the Paris Agreement; it stems from customary international law rather than a particular treaty. It also establishes different and broader obligations than those codified in the UNFCCC or the Paris Agreement. For instance, due diligence requires the adoption and enforcement of appropriate rules and measures to minimize anthropogenic GHG emissions, as well as a duty of vigilance and control over the application of these rules and measures by both public and private operators.[37] As expressed by ITLOS in its Advisory Opinion:

> The obligation of due diligence requires a State to put in place a national system, including legislation, administrative procedures and an enforcement mechanism necessary … and to exercise adequate vigilance to make such a system function efficiently, with a view to achieving the intended objective.[38]

3.12 One State argued that the due diligence duty to conduct impact assessments would be satisfied if Article 4(1)(f) of the UNFCCC is observed.[39] That is mistaken. Article 4(1)(f) does not require States to conduct these assessments whenever there is a risk of transboundary harm.[40] It simply records that these assessments are an "appropriate method" for States to undertake to

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[36] *See, e.g.*, Written Statement of the United States of America paras. 4.15-4.21; Written Statement of OPEC, para. 87; Written Statement of Germany, paras. 103-105; Written Statement of Australia, paras. 3.16-3.19.

[37] *Pulp Mills*, p. 79, para. 197; *see also* Written Statement of Albania, para. 70; Written Statement of the European Union, paras. 86, 288; Written Statement of Mauritius, para. 195; Written Statement of Philippines, paras. 62-63; Written Statement of Bahamas, para. 128; Written Statement of IUCN, para. 181; Written Statement of Bahamas, para. 128; Written Statement of Nauru, para. 30; Written Statement of Barbados, para. 163; Written Statement of Thailand, para. 9; Written Statement of India, paras. 12-15.

[38] *ITLOS Advisory Opinion*, para. 235.

[39] *See, e.g.*, Written Statement of Kuwait, paras. 79-81

[40] *Pulp Mills*, para. 204.

prevent harm to the environment.[41] Even when States consider these assessments as "appropriate", Article 4(1)(f) only requires assessing the impacts of "projects or measures undertaken by [States]".[42] In contrast, customary international law requires assessing *any* activity carried out within the State's territory or jurisdiction, conducted either by States or non-State actors.[43] Thus, complying with Article 4(1)(f) of the UNFCCC does not necessarily satisfy the customary duty to conduct impact assessments.

3.13 Although each State may determine the "specific content" of each assessment, "having regard to the nature and magnitude of the proposed development and its likely adverse impact on the environment",[44] in the context of climate change, these assessments must have minimum requirements, given States' "stringent" duty of due diligence.[45] For instance, the assessments should address both the environmental and social impacts of the relevant GHG-emitting activity; quantify anthropogenic GHG emissions;[46] and review such measures periodically, before and throughout the life of a project that may emit GHGs,[47] to ensure no harm to the climate system.[48] Sierra Leone agrees that, in the context of climate change, impact assessments must meet these minimum requirements, and such others that the Court may consider appropriate. Satisfying these minimum requirements is necessary to meet the "stringent" duty of due diligence owed in the context of climate change. They would also function to prevent States from permitting projects to undergo weak assessments in an effort to attract investments, to the detriment of the climate system's protection.

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[41] United Nations Framework Convention on Climate Change (adopted 9 May 1992, opened for signature 4 June 1992, entered into force 21 March 1994) (Dossier No. 4) ("**UNFCCC**"), Art. 4(1)(f).

[42] *Ibid.*.

[43] *ITLOS Advisory Opinion*, paras. 356-358 (observing that the duty to conduct EIAs "would not be considered to have been fulfilled if an environmental impact assessment was not undertaken of activities at risk of affecting the environment" and that the "activities under assessment comprise both those planned by private entities and those planned by States"); *see also Nuclear Weapons Advisory Opinion*, para. 29; *Pulp Mills*, para. 204.

[44] *Pulp Mills*, para. 205.

[45] Written Statement of the African Union, Written Statement of Nepal, para. 26.

[46] *See, e.g.*, Written Statement of Mauritius, para. 185.

[47] *Pulp Mills*¸ para. 205; Written Statement of Latvia, para. 53.

[48] *See, e.g.*, Written Statement of Burkina Faso, para. 170.

3.14 In sum, the customary duty of due diligence with respect to climate change is different from the obligations codified in the UNFCCC and the Paris Agreement and is not satisfied by those agreements. This is particularly true with respect to the duty to conduct EIAs, which, in the context of climate change, should contain minimum requirements to render it effective.

3. *States must prevent the harm caused by anthropogenic GHG emissions to the climate system*

3.15 A limited number of States expressed the view that the prevention principle derived from due diligence is not applicable to anthropogenic GHG emissions.[49] Numerous States, however, disagree.[50] In addition, in its Advisory Opinion, ITLOS observed that the UNCLOS obligation of prevention, which "bears a close resemblance to the well-established principle of harm prevention" under general international law, applies to anthropogenic GHG emissions.[51] Sierra Leone agrees and reiterates that the principle of prevention *is* applicable to anthropogenic GHG emissions. This duty requires a State to use "all the means at its disposal in order to *avoid* activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State".[52]

3.16 The same States further argue that the prevention principle does not apply to climate change because "there is no generally accepted standard … for determination of the effects of a specific act of anthropogenic emissions".[53] This is untenable. Regardless of the "standard" for determining the effects of anthropogenic GHG emissions, there is already consensus that

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[49] Written Statement of Denmark, Finland, Iceland, Norway and Sweden, para. 71; Written Statement of New Zealand, para. 103 (arguing that rule against transboundary harm does not apply to climate change); Written Statement of OPEC, paras. 87-88.

[50] Written Statement of Palau, paras. 16-17; *see also* Written Statement of Saint Vincent & the Grenadines, para. 101; Written Statement of St. Lucia, para. 66; Written Statement of Nauru, para. 28; Written Statement of Albania, para. 70; Written Statement of South Korea, paras. 33-37; Written Statement of Switzerland, paras. 14-16; Written Statement of Thailand, para. 8; Written Statement of Burkina Faso, para. 173.

[51] *ITLOS Advisory Opinion*, para. 246.

[52] *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, p. 706, para. 104; *Nuclear Weapons Advisory Opinion*, para. 29; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 81, para. 140.

[53] Written Statement of Denmark, Finland, Iceland, Norway and Sweden, para. 71.

anthropogenic GHG cause serious harm to the climate system [54] and there *are* concrete standards for determining the effects of such emissions. In fact, even specific legal standards have been established to avoid this. These include an obligation to reduce and to minimize GHG emissions to comply with this 1.5°C standard.[55] In turn, this implies "reaching net zero CO2 emissions globally around 2050 and concurrent deep reductions in emissions of non-CO2 forcers, particularly methane"[56] and establishing a "very ambitious, internationally cooperative policy".[57]

4. *States must observe the precautionary principle with respect to GHG emissions*

3.17 Some States argue that the precautionary approach, a rule that is derived from the overarching due diligence obligation,[58] has not crystallized into custom.[59] However, (i) States have codified the precautionary approach in multiple international agreements;[60] (ii) ITLOS reiterated that it is part of customary international law, and that "for marine pollution arising from anthropogenic GHG emissions, [this] approach is all the more necessary";[61] and (iii) most

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[54] *See also* ILC, *Draft articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries, reproduced in Yearbook of the International Law Commission 2001*, Vol. II (2) ("**ILC Draft Articles on Prevention**"), Art. 3 (commentary 7). Indeed, due diligence concerning climate change needs no specific level of harm to be triggered. As soon as the State is able to influence the emission of anthropogenic GHG that may harm the climate system, its duty of due diligence and, thus, of prevention, arises. *See* Written Statement of Burkina Faso, para. 169; Written Statement of Cook Islands, para. 163; Written Statement of Mexico, para. 43.

[55] ILC Draft Articles on Prevention, Art. 3. Paris Agreement to the United Nations Framework Convention on Climate Change (adopted 12 December 2015, entered into force 4 November 2016), 3156 UNTS 79 (Dossier No. 16) ("**Paris Agreement**"), Art. 4(1).

[56] *ITLOS Advisory Opinion*, para. 63, *citing to* IPCC 2018 Report.

[57] *Ibid*.

[58] *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 10 ("***Area Advisory Opinion***"), at p. 46, para. 131; *ITLOS Advisory Opinion*, para. 223; Written Statement of Colombia, paras. 3.26-3.27; Written Statement of Costa Rica, paras. 37, 39; Written Statement of the Marshall Islands, para. 27; Written Statement of Micronesia, para. 57; Written Statement of Samoa, para. 101; Written Statement of United Arab Emirates, para. 95.

[59] Statement of Denmark, Finland, Iceland, Norway and Sweeden, para. 76; *see also* Written Statement of Kuwait, paras. 65-69.

[60] UNFCCC, Art. 3(3); UN General Assembly, Report of the UN Conference on Environment and Development (Rio de Janeiro, 3-14 June 1992), UN Doc. A/CONF.151/26 (Vol. 1) (Dossier No. 137), Annex I: Rio Declaration on Environment and Development ("**Rio Declaration**"), Principle 15; Agreement on the implementation of the provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the conservation and management of straddling fish stocks and highly migratory fish stocks, Art. 6; Stockholm Convention on Persistent Organic Pollutants (entered into force 17 May 2004), Art. 1.

[61] *ITLOS Advisory Opinion*, para. 223; *Area Advisory Opinion*, para. 135.

importantly, numerous States acknowledge the customary character of the principle, and its application and importance in the context of climate change.[62] The Court should do so as well.[63]

B. INTERNATIONAL HUMAN RIGHTS LAW

3.18 There is widespread agreement among States and international organizations that climate change impairs the enjoyment of human rights and that States must respect human rights in taking actions with respect to climate change.[64] A small minority of States, however, argue that human rights law does not contain or create obligations for States to protect the climate system from anthropogenic GHG emissions.[65] Those States advance five main points in support of this argument: *first*, human rights instruments do not expressly address climate change;[66] *second*, human rights law cannot establish obligations that go beyond what is required by the climate change treaty regime;[67] *third*, there is no human right to a clean, healthy and sustainable environment;[68] *fourth*, human rights obligations are territorial in nature;[69] and *fifth*, the climate

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[62] Written Statement of Colombia, paras. 3.26-3.27; Written Statement of Costa Rica, paras. 37, 39; Written Statement of the Marshall Islands, para. 27; Written Statement of Micronesia, para. 57; Written Statement of Samoa, paras. 98, 101; Written Statement of the United Arab Emirates, para. 95; Statement of the African Union, para. 97; *see also* Written Statement of Burkina Faso, para. 169; Written Statement of Micronesia, para. 64; Written Statement of New Zealand, paras. 108-109.

[63] Written Statement of Sierra Leone, para. 3.16; *see also* Written Statement of Micronesia, para. 64.

[64] For example, the UK acknowledges that a State may be responsible for breaches of human rights in connection with environmental damage if on the facts of a particular case, the requirements of jurisdiction, application and breach are all satisfied. Written Statement of the United Kingdom, para. 126. The U.S. also accepts that "[m]easures taken by a State to mitigate or adapt to the adverse effects of climate change must be in accordance with its international human rights obligations". Written Statement of the United States of America, para. 4.38. China recognizes that "[t]here are inter-connections between human rights and climate change and its adverse effects. … While human rights are not mentioned in the UNFCCC, subsequent instruments gradually require the incorporation of human rights norms and principles into climate actions". Written Statement of China, para. 116.

[65] *See, e.g.*, Written Statement of the United States of America, paras. 4.38-5.53; Written Statement of the United Kingdom, paras. 122-123; Written Statement of Saudi Arabia, paras. 4.97-4.98; Written Statement of China, para. 115; Written Statement of Saudi Arabia, paras. 4.97-4.98. *See also* Written Statement of Indonesia, para. 44.

[66] *See, e.g.*, Written Statement of the United Kingdom, para. 33; Written Statement of the United States of America, paras. 4.39, 4.42-4.53; Written Statement of Saudi Arabia, para. 4.97.

[67] *See, e.g.*, Written Statement of Saudi Arabia, paras. 4.97-4.99; Written Statement of OPEC, para. 92.

[68] *See, e.g.*, Written Statement of the United States of America, paras. 4.54-4.58; Written Statement of Indonesia, paras. 42-43.

[69] *See, e.g.*, Written Statement of the Russian Federation, pp. 9-11.

change treaty regime constitutes *lex specialis* concerning climate change obligations.[70] Sierra Leone dispels each of these misconceptions in the sections that follow.

1. *Human rights instruments establish climate change mitigation obligations*

3.19 A few States argue that human rights instruments do not establish climate change mitigation obligations because they do not expressly deal with climate change.[71] However, human rights instruments are designed to protect the rights of individuals, regardless of the source of the infringement or threat to those rights. Just because human rights instruments do not expressly mention climate change does not mean that they do not impose obligations on States with respect to climate change inasmuch as climate change impacts the human rights protected by those instruments.

3.20 One State argues that recourse to the *travaux préparatoires* of the ICCPR and ICESCR indicates that the parties to those instruments purportedly intended to give the relevant rights a narrow and specific meaning.[72] It is thus argued that the right to life under Article 6 of the ICCPR is limited to the actual taking of life as opposed to matters affecting the conditions and quality of life.[73] The same State similarly argues that the right to an attainable standard of living under Article 11 of the ICESCR as well as the right to health under Article 12 of the ICESCR were not intended to provide for obligations beyond the steps explicitly set out in the text of those provisions.[74]

3.21 These contentions, however, are belied by the clear and consistent jurisprudence of human rights courts and treaty bodies over decades. Although Article 6 of the ICCPR does not expressly address climate change impacts on the right to life, the Human Rights Committee, the Inter-American Court of Human Rights ("IACtHR"), and the Office of the High Commissioner on

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[70] *See, e.g.*, Written Statement of Saudi Arabia, paras. 4.97-4.98; Written Statement of New Zealand, para. 121; Written Statement of Australia, para. 3.58.

[71] *See, e.g.*, Written Statement of the United Kingdom, para. 33; Written Statement of the United States of America, paras. 4.39, 4.42-4.53; Written Statement of Saudi Arabia, para. 4.97.

[72] Written Statement of the United States of America, paras. 4.45, 4.53.

[73] *Ibid.*, para. 4.45.

[74] *Ibid.*, para. 4.53.

Human Rights all make clear that the right extends to guaranteeing the conditions and quality of life and requires States to take measures to prevent foreseeable loss of life, including in the context of climate change which presents "some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life".[75]

3.22 Indeed, the ECtHR's recent judgment in *Verein Klimaseniorinnen Schweiz v. Switzerland* confirmed that the duty to mitigate climate change is an obligation that falls within the ambit of Article 2 (the right to life) and Article 8 (the right to private and family life) of the European Convention on Human Rights.[76] Such a duty requires, *inter alia*, adopting measures specifying a target timeline for achieving carbon neutrality, setting out immediate GHG emissions reduction targets, providing proof of compliance with such targets, and keeping such targets up to date based on the best available science.[77]

3.23 It is also wrong to argue that the principle of progressive realization contained in Article 2(1) of the ICESCR means that States have no specific obligations in relation to economic and social rights.[78] Article 2(1) imposes an obligation of due diligence to take individual and collective steps towards the full realization of the relevant rights, including the right to health and the right to food.[79] This obligation must be carried out through international assistance and cooperation (closely related to the broader duty of cooperation) and in accordance with the principle of maximum available resources (akin to the CBDR-RC principle).[80] The nature of the

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[75] UN Human Rights Committee, *General Comment No. 36 – Article 6: right to life*, UN Doc. CCPR/C/GC/36 (3 September 2019) (Dossier No. 299), paras. 3, 62; Submission of the Office of the High Commissioner for Human Rights to the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change, *Understanding Human Rights and Climate Change* (2015), *available at* https://www.ohchr.org/sites/default/files/Documents/Issues/ClimateChange/COP21.pdf, p. 13; IACtHR, The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity – interpretation and scope of Articles 4(1) and 5(1) of the American Convention on Human Rights), Advisory Opinion OC-23/17 (15 November 2017), Series A No. 23 ("**IACtHR, *Advisory Opinion OC-23/17***"), para. 180.

[76] *Verein Klimaseniorinnen Schweiz v. Switzerland*, paras. 513, 519.

[77] *Ibid.*, para. 550.

[78] Written Statement of the United States of America, paras. 4.51-4.52.

[79] Written Statement of Sierra Leone, para. 3.73.

[80] *Ibid*., paras. 3.71-3.72.

obligation under the ICESCR is therefore similar to and readily encompasses the same principles as those under international environmental law.

3.24 In light of the above, the Court should apply international human rights law in determining the obligations of States in respect of climate change.[81]

2. *Human rights law establishes climate change mitigation obligations that go beyond what is required by the climate change treaties*

3.25 A small number of States argue that human rights law does not establish mitigation obligations that go beyond what is required by the climate change treaties.[82] There is no legal basis for this position. States are bound by all treaties to which they subscribe. This includes all climate change treaties and all human rights instruments to which they are party.

3.26 One State argues that human rights treaties cannot go beyond the climate change treaties because they are said to lack universality.[83] But even States not party to human rights treaties are bound by any provisions that reflect customary international law. The ICCPR and ICESCR, for example, codify fundamental rights that are not merely universal but peremptory in character (such as the right to life) or which exist under customary international law (such the right to private and family life and the right of self-determination).[84] Many of the same rights are recognized in the Universal Declaration of Human Rights ("UDHR"), which is widely regarded as reflecting customary international law, with respect to the most fundamental human rights.[85] That some States are not party to the ICCPR or ICESCR does not affect the universal character and customary status of such rights.

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[81] *See* Written Statement of Burkina Faso, paras. 183, 190; Written Statement of Nepal, para. 19; Written Statement of Bangladesh, paras. 100-123; Written Statement of France, para. 167; *see also* Written Statement of Germany statement, paras. 35, 86, applying Art. 31(3)(c) of VCLT and citing *Gulf of Maine*, *Legality of the Use of Force*, *Mutual Assistance* cases; Written Statement of the Philippines, para. 106.

[82] *See, e.g.*, Written Statement of Saudi Arabia, paras. 4.97-4.99; Written Statement of OPEC, para. 92.

[83] Written Statement of Saudi Arabia, para. 4.98.

[84] W. Schabas, *The Customary International Law of Human Rights* (OUP 2021), Chapters 4 & 9.

[85] Frederic L. Kirgis, "Custom on a Sliding Scale", (1987) 81 American Journal of International Law 146, 147–148.

3.27 To be clear, the General Assembly has not asked the Court to create new climate change obligations or to rewrite or override them.[86] It has simply requested that the Court apply the systemic integration approach to international human rights law and international environmental law as two normative frameworks bearing on the issue of climate change. Although they are both relevant to climate change, the two bodies of law govern two separate aspects—the protection of the environment from climate change impacts and the protection of human rights from climate change impacts. Under the systemic integration approach, these two bodies of law complement each other and "give rise to a single set of compatible obligations".[87]

3. *States have climate change mitigation obligations pursuant to the right to a clean, healthy and sustainable environment*

3.28 States have obligations to mitigate climate change pursuant to the right to a clean, healthy and sustainable environment. In this regard, a few States dispute the existence of this right as *lex lata*.[88] They contend that (i) the right is not provided for in any treaty of global application;[89] (ii) it has not crystallized into customary international law;[90] and (iii) the recent UN Human Rights Council and UN General Assembly resolutions recognizing this right are non-binding and do not create legal obligations.[91]

3.29 Sierra Leone disagrees. While the UDHR, ICCPR, and ICESCR do not expressly provide for a clean, healthy and sustainable environment, these human rights instruments were negotiated and adopted at a time when the international community did not have the same knowledge of environmental issues and their import to the realization of human rights. Furthermore, the right to a clean, healthy and sustainable environment has been recognized in other

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[86] Written Statement of Saudi Arabia, para. 4.97.

[87] International Law Commission, *Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law*, UN Doc. A/CN.4/L.702 (18 July 2006), p. 8, para. 14(4).

[88] Written Statement of the United States of America, paras. 4.54-4.58; Written Statement of Indonesia, para. 42-43.

[89] Written Statement of the United States of America, para. 4.55.

[90] *Ibid.*, para. 4.56.

[91] *Ibid.*, para. 4.57; Written Statement of Indonesia, para. 43.

important instruments, including the 1972 Stockholm Declaration,[92] the 1992 Rio Declaration[93] and most recently, the resolutions of the UN Human Rights Council and the General Assembly.[94] In this respect, Sierra Leone agrees with Vanuatu that this right draws upon existing rights and is a condition precedent for their full realization and enjoyment.[95] As the General Assembly confirmed, the right to a clean, healthy and sustainable environment is "related to other rights and existing international law".[96] The absence of an express reference to it in certain human rights instruments therefore is not indicative of its status (or lack thereof) under international law.

3.30 Consistent with this view, numerous participants in this proceeding consider the right to a clean, healthy and sustainable environment to be an autonomous human right that States must protect, respect and fulfill and that it has crystallized into a rule of customary international law.[97] Sierra Leone agrees. This right has been recognized at both the regional and international levels.[98] For example, it is provided for in regional human rights declarations and instruments such as the African Charter on Human and People's Rights,[99] the Arab Charter on Human Rights,[100] the ASEAN Human Rights Declaration,[101] and the American Declaration on the Rights of

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[92] UN, Report of the UN Conference on the Human Environment, (Stockholm, 5-16 June 1972), UN Doc. A/CONF.48/14/Rev.1, Chapter I: Declaration of the UN Conference on the Human Environment (Dossier No. 136) ("**Stockholm Declaration**"), Principle 1.

[93] Rio Declaration, Principle 1.

[94] UN General Assembly, Resolution 76/300, *The human right to a clean, healthy and sustainable environment*, UN Doc. A/RES/76/300 (1 August 2022) (Dossier No. 260) ("**UNGA Resolution 76/300**"); UN Human Rights Council, Resolution 48/13, *The human right to a clean, healthy and sustainable environment*, UN Doc. A/HRC/RES/48/13 (8 October 2021).

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

[96] UNGA Resolution 76/300, paras. 2-3.

[97] *See* Written Statement of Costa Rica, para. 82; Written Statement of Ecuador, para. 3.108; Written Statement of Micronesia, para. 79; Written Statement of Slovenia, para. 36; Written Statement of Vanuatu, para. 379.

[98] *See* Written Statement of Sierra Leone, para. 3.113.

[99] African Charter on Human and People's Rights (27 June 1981, entered into force 21 October 1986), 1520 UNTS 217 ("**African Charter on Human and Peoples' Rights**"), Art. 24. *See also* Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (adopted 11 July 2003, entered into force 25 November 2005), Art. XVIII(1) (stating that women "shall have the right to live in a healthy and sustainable environment") and Art. XIX ("the right to fully enjoy their right to sustainable development").

[100] Arab Charter on Human Rights (22 May 2004), Art. 38.

[101] ASEAN Human Rights Declaration (19 November 2012), Art. 28(f).

Indigenous People.[102] It is also recognized in the national constitutions and legislations of 156 States (accounting for 80% of UN Member States) around the world.[103] Regional human rights courts and bodies, including the African Commission on Human and Peoples' Rights and the IACtHR have also affirmed that the right "constitutes a universal value that is owed to both present and future generations".[104] Most recently, the UN Human Rights Council and General Assembly passed resolutions in October 2021 and July 2022, respectively, recognizing "the right to a clean, healthy and sustainable environment as a human right".[105] No State voted against either resolution, with the General Assembly resolution having been adopted with 161 States voting in favour, zero against and eight abstentions. These resolutions are compelling evidence of State practice and *opinio juris*.

4. *Human rights obligations are not territorial in nature and thus apply to climate change*

3.31 A few States argue that human rights obligations are territorial in nature and thus do not apply to climate change.[106] They insist that, under human rights law, a State cannot be responsible for guaranteeing the rights of individuals outside its territory.[107]

3.32 This is incorrect. A State owes human rights obligations not only to all individuals within its territory, but also to those subject to its jurisdiction. The ICCPR, for example, requires each State Party to respect and ensure the human rights recognized therein with respect to "all individuals within its territory *and subject to its jurisdiction*".[108] The Court in its *Wall Advisory*

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[102] Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador" (1988), Art. 11(1).

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

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

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

[106] *See, e.g.*, Written Statement of the United States of America, para. 4.48; Written Statement of the Russia Federation, p. 10.

[107] Written Statement of the Russian Federation, p. 10.

[108] International Covenant on Civil and Political Rights (16 December 1966, entered into force 23 March 1976), 999 UNTS 171 (Dossier No. 49), Art. 2(1) (emphasis added).

Opinion confirmed that the Covenant is "applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory".[109] Consistent with this, the Human Rights Committee explained that the term "jurisdiction" is not limited to a State's territory but encompasses individuals "within the power of effective control" of that State.[110] In the transboundary harm context, the IACtHR found that such individuals include those outside a State's territory whose rights are violated by activities originating in the territory of that State.[111] And the Committee on the Rights of the Child determined that, based on a State's effective control of carbon emissions through its ability to regulate emitting activities, that State has jurisdiction over children located outside its territory whose rights are subsequently impaired by the emissions.[112]

3.33 With respect to the ICESCR, the Committee on Economic, Social and Cultural Rights has repeatedly determined that the rights set out in the Covenant, such as the right to health and the right to food, have extraterritorial application.[113] This is consistent with the absence of a provision on the Covenant's scope of application and the nature of the obligations it imposes—

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[109] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136 ("***Wall Advisory Opinion***"), para. 111.

[110] UN Human Rights Committee, *General Comment No. 31: The nature of the general legal obligation imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add. 13 (26 May 2004), para. 1.

[111] IACtHR, *Advisory Opinion OC-23/17*, paras. 101-102.

[112] Committee on the Rights of the Child, *Decision adopted by the Committee on the Rights of the Child under the Optional Protocol to the Convention on the Rights of the Child, concerning Communication Nos. 104-107/2019: Chiara Sacchi et al. v. Argentina, Brazil, France, and Germany (CRC/C/88/D/104/2019, CRC/C/88/D/105/2019, CRC/C/88/D/106/2019, CRC/C/88/D/107/2019)* (11 November 2021), paras. 10.5, 10.7.

[113] Committee on Economic, Social and Cultural Rights, General Comment No. 14: *The right to the highest attainable standard of health (article 12)*, E/C.12/2000/4 (11 August 2009), para. 39 ("States parties have to respect the enjoyment of the right to health in other countries, and to prevent third parties from violating the right in other countries, if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law"); Committee on Economic, Social and Cultural Rights, *General Comment No. 12: Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: The Right to Adequate Food (article 11)*, E/C12/1999/5 (12 May 1999), paras. 36–37 ("States parties should take steps to respect the enjoyment of the right to food in other countries, to protect that right, to facilitate access to food and to provide the necessary aid when required"). *See also* Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights.

one of progressive realization through international cooperation and assistance, utilizing resources both within a State's territory and from the international community.[114]

3.34 For this reason, a great number of States and international organizations agree that human rights obligations could apply extraterritorially subject to the limits of a State's jurisdiction and effective control.[115] In particular, if the State has jurisdiction or effective control over an activity and a causal link between that activity and the infringement of human rights outside that State's territory can be established, the State must be held to have an extraterritorial obligation to protect human rights.[116] Sierra Leone agrees.

3.35 Regardless, as the Inter-American Commission on Human Rights and the IACtHR have found, human rights obligations in the context of environmental protection must be framed in terms of the duty of due diligence.[117] States are thus not required to ensure that human rights are fully respected beyond their territory from transboundary environmental harm. They are only obliged to exercise due diligence in that regard. States must take all necessary measures to prevent transboundary harm that is reasonably foreseeable to impair the enjoyment of human rights; they are not required to ensure complete prevention.

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[114] International Covenant on Economic, Social and Cultural Rights (16 December 1966, entered into force 3 January 1976), 993 UNTS 3 (Dossier No. 52), Article 2(1) (requiring States "to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means"); Committee on Economic, Social and Cultural Rights, *General Comment No. 3 (1990) on article 12(1) of the International Covenant on Economic, Social and Cultural Rights, on the nature of States Parties' obligations*, UN Doc. E/1991/23 (14 December 1990), para. 13 ("the phrase 'to the maximum of its available resources' was intended by the drafters of the [Covenant] to refer to both the resources existing within a State and those available from the international community through international cooperation and assistance").

[115] *See* Written Statement of Antigua and Barbuda, paras. 349-355; Written Statement of the Bahamas, paras. 170-171; Written Statement of Bangladesh, para. 105; Written Statement of Burkina Faso, para. 190; Written Statement of Canada, para. 28; Written Statement of Colombia, para. 3.72; Written Statement of the Cook Islands, paras. 223-228; Written Statement of the Democratic Republic of Congo, para. 157; Written Statement of Ecuador, para. 3.114; Written Statement of Samoa, para. 184; Written Statement of Tuvalu, paras. 101-102; Written Statement of the African Union, para. 196; Written Statement of the European Union, para. 275; Written Statement of the ICUN, para. 407.

[116] Written Statement of Colombia, para. 3.72.

[117] Inter-American Commission on Human Rights & Office of the Special Rapporteur on Economic, Social, Cultural and Environmental Rights, *Resolution No. 3/2021, Climate Emergency: Scope of Inter-American Human Rights Obligations* (31 December 2021), *available at* https://www.oas.org/en/iachr/decisions/pdf/2021/resolucion_3-21_ENG.pdf, p. 14; IACtHR, *Advisory Opinion OC-23/17*, para. 125.

5. *The climate change treaties do not constitute* lex specialis vis-à-vis *international human rights law with respect to climate change mitigation obligations*

3.36 Finally, some States contend that the UNFCCC, the Kyoto Protocol and the Paris Agreement constitute *lex specialis* with respect to climate change mitigation obligations, thereby either excluding the application of international human rights law or subsuming the obligations arising thereunder.[118]

3.37 The Court should reject this position for at least two reasons.

3.38 *First*, the climate change treaties cannot be considered *lex specialis vis-à-vis* international human rights law. The Paris Agreement confirms that human rights law continues to operate alongside the climate change treaty regime to govern the protection of human rights from climate change impacts. Its preamble provides that Parties to the UNFCCC, "should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights".[119] Therefore, like UNCLOS, human rights norms establish "separate sets of obligations"[120] from the climate change treaties.

3.39 *Second*, the requirements for *lex specialis* to apply are not met. The commentary to Article 55 of the ILC Articles makes clear that "it is not enough that the same subject matter is dealt with by two provisions; there must be some *actual inconsistency* between them, or else a *discernible intention* that one provision is to exclude the other".[121] There is no inconsistency between the climate change agreements and human rights law. On the contrary, these two bodies of law complement each other and give rise to a single obligation of due diligence to protect the climate system and human rights from the negative effects of GHG emissions.

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[118] *See, e.g.*, Written Statement of Saudi Arabia, paras. 4.97-4.98; Written Statement of New Zealand, para. 121; Written Statement of Australia, para. 3.58.

[119] Paris Agreement, Preamble.

[120] *ITLOS Advisory Opinion*, para. 223.

[121] ILC, *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, reproduced in Yearbook of the International Law Commission, 2001*, Vol. II(2) ("**ILC Draft Articles on State Responsibility**"), Article 55 (emphasis added).

3.40 In short, the climate change treaties do not exclude the application of human rights law to climate change.

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3.41 Sierra Leone notes that in addition to international environmental law and human rights law, the Court should consider the broader interplay between other bodies of law which are implicated by climate change and which are relevant to the Request. In this regard, ITLOS has confirmed that States have obligations under UNCLOS to take all necessary measures to prevent, reduce and control marine pollution from anthropogenic GHG emissions and to protect and preserve the marine environment from climate change impacts[122]—conclusions that Sierra Leone respectfully requests the Court to adopt. Sierra Leone further reiterates the position set out in its Written Statement that the Convention Concerning the Protection of the World Cultural and Natural Heritage also applies to the Court's determination of States' obligation in respect of climate change—a position supported by Belize and the Commission of Small Island States on Climate Change and International Law.

II. States Have an Obligation of Due Diligence to Protect the Climate System and Other Parts of the Environment from GHG Emissions

3.42 The principle of systemic integration of all relevant bodies of law results in a single obligation of due diligence to curb GHG emissions to comply with the 1.5°C Standard. This obligation not only protects the environment, including the marine environment, but also human rights and world heritage from significant harm.

3.43 Several States noted that due diligence is an obligation of conduct.[123] While true, this does not detract from the importance and significance of the due diligence obligation in the context of climate change. Due diligence is a flexible concept that evolves with scientific knowledge and technical advancements and is exercised in proportion to the degree of risk.[124]

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[122] *ITLOS Advisory Opinion*.

[123] Written Statement of China, para. 131.

[124] *See, e.g.*, Written Statement of Vanuatu, para. 236; Written Statement of Switzerland, para. 43; Written Statement of Egypt, paras. 103-117; Written Statement of Samoa, para. 121; Written Statement of Mauritius, para. 193.

Given the overwhelming scientific consensus on the significant risk of irreversible harm to the environment caused by GHG emissions, due diligence should be understood as a "goal-oriented" obligation—the ultimate goal being compliance with the 1.5°C Standard—encompassing both mitigation and adaptation obligations.

3.44 With respect to the mitigation obligation, States must do their utmost to minimize GHG emissions and comply with the 1.5°C Standard, beyond which point the risks of significant and irreversible harm to the environment, the enjoyment of human rights, and cultural and natural heritage become too high. This requires regulating and where appropriate preventing emissions from private entities, which are the main contributors to global GHG emissions. In doing so, States must constantly assess and revise such measures in light of the best available scientific evidence on the impacts of anthropogenic climate change on human lives and livelihoods. This, among other things, obligates States to conduct environmental impact assessments before engaging in any emitting activities, monitor and publish information on any risk of harm, and take effective measures to ensure that the results of such assessments and monitoring are taken into account.

3.45 In terms of the adaptation obligation, States must undertake measures to protect people against the effects of climate change. States must, *inter alia*, have a contingency plan to respond to environmental emergencies,[125] including the establishment of early warning systems and coastal defences against climate disasters to protect lives; invest in water infrastructure that can withstand climate change impacts to ensure basic supply of water in all events; restore coastal ecosystems which provide nature-based defences against flooding and storms to protect their land and territory; and design buildings and infrastructure to minimize the displacement of people. More generally, States must consult with and provide information to potentially affected individuals on adaptation measures and to provide assistance to affected communities in cases of climate disasters. As the IACtHR has emphasized, where appropriate, States must implement contingency plans "in cooperation with other States that are potentially affected, and also competent international organizations".[126]

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[125] IACtHR, *Advisory Opinion OC-23/17*, para. 171.

[126] *Ibid.*

3.46 Due diligence under UNCLOS further encompasses obligations to adopt and enforce laws—including internationally agreed standards—to limit GHG emissions;[127] monitor and assess risks of activities contributing to climate change and threatening the marine environment;[128] undertake measures that bolster the capability of ecosystems to withstand the impacts of climate change on the marine environment even at the 1.5°C Standard, through, for example, the storage of GHG emissions and protection and restoration of coastal "blue carbon" ecosystems; and cooperate in the promotion of scientific research and exchange of scientific information on the impacts of GHG emissions on the marine environment that will inform the formulation of rules and regulations.[129]

3.47 The obligations under the World Heritage Convention encompass the requirement to prevent transboundary harm that may affect natural and cultural heritage in other States' territory. The general obligations set out in Articles 4 and 6 are ones of due diligence, the precise content of which must be defined by reference to the UNFCCC, the Paris Agreement, and environmental law principles, as well as the best scientific evidence. In particular, States are required to take all mitigation measures necessary to curb GHG emissions to comply with the 1.5°C Standard so as not to damage their own heritage and those of other States and to take effective adaptation measures to protect natural and cultural heritage within their own territory against the effects of climate change.

3.48 In addition to the specific mitigation and adaptation measures mentioned above, the due diligence obligation requires States to constantly have regard to the best available science in adopting and assessing the effectiveness of their measures. This is consistent with the nature of

[127] United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994), 1833 UNTS 3 (Dossier No. 45), Arts. 207, 211, 212, 213, 222.

[128] *Ibid.*, Arts. 204-206.

[129] *Ibid.*, Arts. 201-203.

due diligence—it evolves with "new scientific or technological knowledge".[130] Thus, the failure to have regard to the best available science results in a breach of the due diligence obligation.

III. The Due Diligence Obligation Is Informed by the Principles of CBDR-RC and Intergenerational Equity

3.49 The due diligence obligation under international law to minimize GHG emissions is informed by principles of law and equity, including both the common but differentiated responsibilities and respective capabilities principle ("CBDR-RC") and respect for intergenerational equity.[131] A great many States and organizations share this view.[132] A handful of States, however, seek to limit the applicability of the principles of CBDR-RC and intergenerational equity. The following sections respond to their arguments.

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[130] *Area Advisory Opinion*, para. 117; *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015, ITLOS Reports 2015*, p. 4 at p. 41, para. 132.

[131] Written Statement of Sierra Leone, para 3.9. Sierra Leone recognizes that the CBDR principle is expressed as the "principle of common but differentiated responsibilities and respective capabilities, in light of different national circumstances" in Article 2(2) of the Paris Agreement. The references to "respective capacities" and "different national circumstances" have transformed the CBDR principle into a more nuanced and dynamic one. That said, the additional references do not alter the fundamental premise underlying the CBDR principle as originally developed under international environmental law, namely, the need for an equitable distribution of responsibilities. In this sense, Sierra Leone clarifies that its usage of the term "CBDR principle" in both of its written statements is broad enough to encompass the specific variations throughout the climate change treaties.

[132] For statements on the CBDR principle, *see, e.g.*, Written Statement of African Union, para. 52 ("These principles [of equity and common but differentiated responsibilities and respective capabilities] bear particular importance for the interpretation by the Court of States' obligations"); Written Statement of Saint Lucia, para. 58 ("[CBDR-RC] is a foundational element of global climate governance, integral to both the UNFCCC and the Paris Agreement, and mandates specific legal responsibilities for developed countries to take the lead in reducing and mitigating climate change, reflecting the recognition of historical emissions and disparities in resources and capacities"); Written Statement of Tonga, para. 171 ("[T]he principle of CBDR-RC structures States' obligations through self-determined differentiation, including the content, form, and implementation of obligations"); Written Statement of Barbados, para. 207; Written Statement of Cook Islands, para. 137; Written Statement of Kuwait, para. 10; Written Statement of Uruguay, para. 176; Written Statement of China, para. 33. For statements on intergenerational equity, *see, e.g.*, Written Statement of the European Union, para. 179 ("the European Union considers that since climate change has a (detrimental) impact on future generations, the consideration of the principle of intergenerational equity should inform the content of the due diligence obligations under the Paris Agreement"); Written Statement of Costa Rica, para. 57; Written Statement of Ecuador, para. 3.57; Written Statement of El Salvador, para. 44 ("The principle of intergenerational equity is expressly incorporated by the climate change regime").

A. THE CBDR-RC PRINCIPLE

3.50 A few States have argued that the CBDR-RC principle has no bearing beyond the scope of the Paris Agreement.[133] According to one State, the CBDR-RC principle "does not possess a normative status of its own or independently of the Paris Agreement in the field of climate protection law".[134]

3.51 This is an untenable position. The CBDR-RC principle, which stems from considerations of equity, is a cardinal principle of environmental law that is reflected in a range of multilateral environmental agreements and instruments, including the Stockholm Declaration, the Rio Declaration, the Montreal Protocol on Substances that Deplete the Ozone Layer, and the Convention on Biological Diversity.[135] Its importance extends beyond the climate change context and shapes the content of the due diligence obligation generally.[136] The International Law

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[133] Written Statement of Germany, para. 79 (arguing that the CBDR principle "has no bearing beyond the scope of the provisions contained in the Paris Agreement"); Written Statement of Japan, para. 24 (arguing that the CBDR principle "does not have autonomous legal force" and "is not in itself a source of obligation where none would otherwise exist").

[134] Written Statement of Germany, para. 79.

[135] Written Statement of Sierra Leone, para. 3.39 (citing Stockholm Declaration, Principle 12; Rio Declaration, Principles 6, 7; Montreal Protocol on Substances that Deplete the Ozone Layer (adopted 16 September 1987, entered into force 1 January 1989), 1522 UNTS 3 (Dossier No. 26), Art. 5(1); Convention on Biological Diversity, Arts. 20, 21). *See also* Written Statement of Solomon Islands, para. 92 ("CBDR-RC is set out in the UNFCCC and the Paris Agreement, as well as the Glasgow Climate Pact, the Sharm el-Sheikh Implementation Plan, and The UAE Consensus"); Written Statement of Egypt, para. 140 ("The principle of common but differentiated responsibilities (hereinafter 'CBDR') 'forms the core of international environmental law'"); Written Statement of OACPS, para. 135 ("The OACPS notes that 'the principle of common but differentiated responsibilities and respective capabilities, in light of different national circumstances' is a fundamental principle of the UN climate change regime, and of international environmental law in general".); Written Statement of Brazil, para. 21 ("Since the Rio Declaration (1992), international law unequivocally recognizes the common but differentiated responsibilities (CBDR) principle").

[136] *See, e.g.*, Written Statement of Vanuatu, para. 415 ("Thus, differentiation based on contributions to climate change, is part of the normative architecture of the climate change regime, and it influences the standard of due diligence in relation to the obligations of conduct it contains"); Written Statement of Switzerland, para. 45 ("The due diligence obligation is also determined by the ability to control the activities giving rise to the risk, which requires governments to take action that is ambitious in relation to their actual greenhouse gas emissions. The Paris Agreement underlines this aspect of customary international law by referring to the common but differentiated responsibilities of each state party, in the light of different national circumstances"); Written Statement of Democratic Republic of Congo, para. 226 (« La RDC a déjà insisté sur le principe des responsabilités communes mais différenciées dans le cadre de l'interprétation de l'obligation de diligence requise »); Written Statement of the Republic of Kirabati, para. 149 ("The principle of 'common but differentiated responsibilities' is deeply intertwined with the principle of due diligence. In fact, it can be said to be a manifestation of due diligence"); Written Statement of Thailand, para. 20 ("[CBDR] is relevant in the assessment of the due diligence standard. … Due diligence requires 'the exercise of best possible efforts' at the State's disposal. However, the best possible efforts of a developing State and a developed State are not the same".); Written Statement of Timor-Leste, para. 127 ("The due diligence standard of care expected of a State

Commission thus observed in its commentary to the Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities that, as a general rule, "[t]he economic level of States is one of the factors to be taken into account in determining whether a State has complied with its obligation of due diligence".[137] In this context, the Commission also made note of Principle 11 of the Rio Declaration and Principle 23 of the Stockholm Declaration, which both provide that standards that are valid for developed countries may be inappropriate and unwarranted for developing countries.[138]

3.52 The CBDR-RC principle has particular importance in the field of climate change. As the ITLOS Advisory Opinion confirmed, "measures to reduce anthropogenic GHG emissions causing marine pollution[] may differ between developed States and developing States" and developed countries should "continue taking the lead" in mitigation efforts.[139] In a similar vein, the Tribunal recognized that "[t]he main recipients of the assistance under article 202 of the Convention … should be those developing and least developed States that are most directly and severely affected by the effects of [anthropogenic GHG] emissions on the marine environment".[140]

3.53 The Paris Agreement stipulates in Article 2(2) that "[t]his Agreement will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances".[141] The suggestion by two

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with a well-developed economy and resources and with highly evolved systems and structures of government is different from States that are not so well-placed. … States' climate change obligations should take full account of the special circumstances and needs of developing countries and be based on the principle of CBDR-RC".).

[137] ILC Draft Articles on Prevention, Commentary (13) to Art. 3, p. 155. *See also* Written Statement of Vanuatu, para. 415.

[138] Rio Declaration, Principle 11 ("States shall enact effective environmental legislation. Environmental standards, management objectives and priorities should reflect the environmental and developmental context to which they apply. Standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries"); Stockholm Declaration, Principle 23 ("Without prejudice to such criteria as may be agreed upon by the international community, or to standards which will have to be determined nationally, it will be essential in all cases to consider the systems of values prevailing in each country, and the extent of the applicability of standards which are valid for the most advanced countries but which may be inappropriate and of unwarranted social cost for the developing countries").

[139] *ITLOS Advisory Opinion*, para. 229.

[140] *Ibid.*, para. 330.

[141] Art. 2(2), Paris Agreement.

States that the relevance of the CBDR-RC principle under the Paris Agreement is limited to Article 2(2) is misguided.[142] The plain and clear text of Article 2(2) confirms its cross-cutting applicability.[143] It is also patently wrong to suggest that the CBDR-RC principle is confined to the Paris Agreement. As multiple States[144] and ITLOS confirm, "*both* the UNFCCC and the Paris Agreement recognize the principle of common but differentiated responsibilities and respective capabilities as a *key principle* in their implementation".[145] In particular, Article 2 of the UNFCCC—which sets forth the guiding principles "to achieve the objective of the Convention and to implement its provisions"—provides that "Parties should protect the climate system … on the basis of equity and in accordance with their common but differentiated responsibilities and

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[142] *See* Written Statement of the United States of America, para. 3.30 ("As reflected in article 2.2, [the Paris Agreement] was designed, and its provisions constructed, to reflect equity and the principle of CBDR/RC/ILODNC, without those elements serving as an overarching gloss or guide to the interpretation or application of the Paris Agreement".); Written Statement of Germany, para. 79 (noting that since the adoption of the Paris Agreement, the General Assembly has referred to this concept "only in conjunction with Article 2 (2) thereof").

[143] As the ITLOS Tribunal also observed, the CBDR-RC principle guides the implementation of provisions dealing not only with the mitigation of GHG emissions but also the provision of financial resources. *See ITLOS Advisory Opinion*, para. 76 ("Article 9, paragraph 1, of the Paris Agreement requires developed country Parties to provide financial resources to assist developing country Parties with respect to both mitigation and adaptation in continuation of their existing obligations under the UNFCCC"); *ibid.*, para. 228 ("Article 4, paragraph 4, of the Paris Agreement, in particular, stipulates the differentiated responsibilities between developed country Parties and developing country Parties with respect to GHG mitigation efforts").

[144] *See* Written Statement of Sierra Leone, para. 3.39; Written Statement of Argentina, para. 39 ("The principle of common but differentiated responsibilities and respective capabilities (CBDR-RC) is the core guiding principle of the whole climate change regime"); Written Statement of Bolivia, para. 28 ("[The Paris Agreement] reaffirms the principle of CBDR-RC with respect to climate change established in the UNFCCC"); Written Statement of Brazil, para. 27 ("the CBDR-RC principle … is a crucial legal principle that informs the whole international legal regime on climate change"); Written Statement of China, para. 35 ("The principle [of CBDR-RC] was initially established in the UNFCCC, and reaffirmed by its Kyoto Protocol and Paris Agreement"); Written Statement of India, para. 36 ("However, as also well-enshrined in the UNFCCC, its Kyoto Protocol and its Paris Agreement, the responsibilities of States, while common, are differentiated for developing countries and developed countries"); Written Statement of Portugal, para. 50 ("The Paris Agreement reflects the same principles of equity and common but differentiated responsibilities and respective capabilities among Parties as the UNFCCC").

[145] *ITLOS Advisory Opinion*, para. 227 (emphasis added). *See also ibid.*, para. 76 ("Article 9, paragraph 1, of the Paris Agreement requires developed country Parties to provide financial resources to assist developing country Parties with respect to both mitigation and adaptation *in continuation of their existing obligations under the UNFCCC*") (emphasis added). Article 10 of the Kyoto Protocol likewise provides that all Parties shall implement their commitments under the treaty "taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances".

respective capabilities" and "the specific needs and special circumstances of developing country Parties … should be given *full consideration*".[146]

3.54 Some States have contended that the Paris Agreement's addition of "different national circumstances" reflects a departure from "static categories of developed and developing States to a more nuanced system of differentiation".[147] Those States argue that the CBDR-RC principle "cannot thus constitute a basis for holding developed countries solely responsible for climate change".[148] Sierra Leone does not deny that the CBDR-RC principle has evolved into a more dynamic and nuanced standard under the Paris Agreement, when compared to the annex-based classification of "developed" and "developing" countries in prior treaties.[149] The classification of States thereunder should indeed be updated, and there may well be additional factors to consider.[150] Sierra Leone also does not seek to hold developed countries "solely responsible for climate change".[151] An indispensable element of the CBDR-RC principle is that the obligations are *common*, albeit differentiated. As Sierra Leone explained in its Written

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[146] UNFCCC, Art. 3 (emphasis added). *See also ibid.*, Art. 4 (providing that all Parties "shall" meet their commitments by "taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances").

[147] Written Statement of Germany, para. 58. *See also* Written Statement of Japan, para. 35 ("The Paris Agreement maintains the distinction between the 'developed and developing country Parties', but while these categories may still be relevant, they are nowhere defined and are certainly no longer based on Annexes I or II of the UNFCCC".); Written Statement of the United States of America, paras. 3.23-3.30.

[148] Written Statement of Japan, para. 31.

[149] Written Statement of Sierra Leone, para. 3.41 ("That said, the [Paris] Agreement recognizes that what constitutes such highest possible ambition may vary between States, and demonstrates that it is indeed possible for States to bear a differentiated and fair share of the mitigation burden, based on dynamic, flexible, and nuanced differentiated … parameters taking into account equitable considerations".). *See also* Written Statement of Vanuatu, para. 415(b) ("While there are operational challenges in identifying each Party's 'fair share' of the climate effort there is extensive emerging scholarship on methodologies to determine 'fair shares', variously presented by litigants in national and regional courts").

[150] *Cf.* Written Statement of Liechtenstein, para. 79 ("In respect of the principle of Common but Differentiated Responsibilities, the current division of obligations between Developed States Parties and Developing States Parties (Annex I of the UNFCCC) may not reflect the current reality. Several Non-Annex-I-Parties have become major GHG emitters since the adoption of the UNFCCC in 1992".).

[151] Written Statement of Japan, para. 31.

Statement, developing countries may not use the principle as an excuse for meeting their obligations with respect to climate change.[152]

3.55 That said, the reference to "different national circumstances" neither represents a fundamental shift in the bases for differentiation in the climate change regime, nor renders the distinction between developed and developing countries obsolete. As Vanuatu's Written Statement explains, "the principled basis for differentiation in the climate change regime", *i.e.*, differentiation "between States both in relation to capacities ('*respective capabilities*') as well as to contributions to climate harm ('*responsibilities*')" remains the same, without dilution.[153] Consistent with this principled basis, the Paris Agreement expressly retains an emphasis on "developed country Parties" taking the lead in undertaking absolute emission reduction targets,[154] and providing financial resources to assist "developing country Parties" in relation to their mitigation and adaptation obligations under the treaty.[155] The Paris Agreement is non-binary, yet makes clear that the economic level of States is one of the key factors to be taken into consideration.[156]

3.56 Sierra Leone rejects the suggestion by a handful of States that the CBDR-RC principle does not entail a differentiated "historical responsibility" of States Parties to the Paris Agreement.[157] The CBDR-RC principle is rooted in the well-established principle of equity under

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[152] Written Statement of Sierra Leone, para. 3.41 ("By endorsing the principle of "highest possible ambition", the Paris Agreement makes clear that developing countries cannot use the CBDR principle as an excuse for not doing more".). *See also* ILC Draft Articles on Prevention, Commentary (13) to Art. 3, p. 155 ("But a State's economic level cannot be used to dispense the State from its obligation under the present articles".).

[153] Written Statement of Vanuatu, para. 415. *See also id.*, 415(b) ("The qualification of the CBDRRC principle by a reference to 'national circumstances' introduced in the Paris Agreement, injects a dynamic element to the interpretation of the principle—as national circumstances evolve, so too will the common but differentiated responsibilities of States. However, this clause does not seek to shift the bases for differentiation in the climate change regime. Thus, differentiation based on contributions to climate change, is part of the normative architecture of the climate change regime, and it influences the standard of due diligence in relation to the obligations of conduct it contains").

[154] Paris Agreement, Article 4(4).

[155] *Ibid.*, Article 9(1). Various other provisions recognize the specific needs and special situations of least developed countries and small island developing States. *See* Paris Agreement, Preamble, Arts. 4(6), 9(4), 9(9), 11, and 13.

[156] *Cf. ITLOS Advisory Opinion*, para. 229 ("Thus, the scope of the measures under [article 194, paragraph 1, of the United Nations Convention on the Law of the Sea], in particular those measures to reduce anthropogenic GHG emissions causing marine pollution, may differ between developed States and developing States".).

[157] Written Statement of Germany, para. 80, footnote 46. *See also ibid.*, para. 59 ("Hence, the concept must not be misunderstood as referring to a differentiated 'historical' responsibility of the Parties to the Paris Agreement for

international law.[158] At its core, equity recognizes that considerations of commonsense fairness and justice must be infused into the fabric of the law.[159] In the context of climate change, fairness has always been contextualized by the historically unequal share of GHG emissions.[160]

3.57 This explains why the preamble of the UNFCCC, concluded in 1992, notes that "the largest share of *historical and current* global emissions of greenhouse gases has originated in developed countries, that per capita emissions in developing countries are still relatively low and that the share of global emissions originating in developing countries will grow to meet their social and developmental needs".[161] As Sierra Leone explained in its Written Statement, the CBDR-RC

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greenhouse gas emissions in the past – *i.e.* before any legal norm on greenhouse gas emissions had been established".); Written Statement of the United States of America, para. 3.26 ("In particular, neither agreement refers to 'historical responsibility,' and neither bases any obligations on historical emissions. This is intentional".); Written Statement of Japan, para. 27 ("Differentiation is thus based on the present status of countries, rather than on their historical contributions".).

[158] Written Statement of Sierra Leone, para. 3.35. *See also* Philippe Sands, "The "Greening" of International Law: Emerging Principles and Rules" (1994) 1 Indiana Journal of Global Legal Studies 293, 307 ("The principle of common but differentiated responsibility is one of the most important developments of UNCED, resulting from the application of the broader principle of equity in general international law, together with the recognition that the special needs of developing countries must be taken into account in the development, application, and interpretation of rules of international environmental law".).

[159] *See North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 47, para. 85 (noting that equity is not just "a matter of abstract justice", but a concept capable of generating concrete legal obligations through "the application of equitable principles, in accordance with the ideas which have always underlain the development of the [particular] legal régime"); *ibid.*, p. 48, para. 88 ("Whatever the legal reasoning of a court of justice, its decisions must by definition be just, and therefore in that sense equitable".); IPCC, *Climate Change 1995: Economic and Social Dimensions of Climate Change* (1995), p. 7 ("In common language equity means 'the quality of being impartial' or 'something that is fair and just.'").

[160] *See, e.g.*, Written Statement of China, para. 35 (under the CBDR-RC principle, "developed countries *with historical responsibility* and their capability advantages should take the lead in tackling climate change") (emphasis added); Written Statement of Colombia, para. 3.54 ("It is crucial to acknowledge that [under the CBDR-RC principle] states have different levels of responsibility based on their *historic and current* emissions") (emphasis added); Written Statement of Costa Rica, paras. 58-59 (under the CBDR principle States "do not bear the same responsibility, due to different *historical and economic circumstances*") (emphasis added); Written Statement of El Salvador, para. 39 (the CBDR principle "recognizes that States have different levels of *historical responsibility* for climate change, and of capacity to address it") (emphasis added); Written Statement of Indonesia, para. 65 (principle of CBDR-RC emphasizes that "developed States, which have *historically contributed more to global GHG emissions*, have a greater responsibility to lead in reducing emissions and supporting developing countries") (emphasis added); Written Statement of the Marshall Islands, para. 19 ("CBDR in the UNFCCC recognizes that developed countries have a greater responsibility for combating climate change due to their *historical and current* emissions, as well as their higher levels of economic development") (emphasis added); Written Statement of Timor-Leste, para. 130 (CBDR-RC principle takes into account "each State's contribution of greenhouse gas emissions, including both *historical and current responsibility* for anthropogenic greenhouse gas emissions, causing climate change and environmental problems, and each State's ability to prevent, reduce, and control the threat").

[161] UNFCCC, preamble para. 3. *See also* Dossier Part VII (B), Report of the Secretary-General on "The effects of climate change on oceans", of 6 March 2017 (A/72/70), para. 79, p. 25 ("Capacity-building is an essential component

principle recognizes that States have a common duty but differentiated obligations that depend on a variety of factors, *including* their developmental needs, *historical contribution* to environmental degradation, present contribution to the problem, and access to technological and financial resources.[162]

B. THE PRINCIPLE OF INTERGENERATIONAL EQUITY

3.58 There is no question that future generations will suffer the most catastrophic impacts of climate change.[163] Despite this, a small number of States suggest that international law does not provide a basis to establish obligations owed to future generations.[164]

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of the global response to climate change. Associated with the need to support capacity-building in developing countries has been the idea that developed countries, being those historically responsible for greenhouse gas emission levels, have a duty to help to finance the costs of climate change responses in the most vulnerable countries".); Dossier Part V(B), Report of the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change on the work of its 3rd session, held at Nairobi from 9 to 20 September 1991, Item 2(a) of the provisional agenda, p. 11 ("The whole world needs to launch a cooperative effort, as the atmosphere knows no boundaries. Furthermore, those who will be most hit by the effects of global warming are not necessarily those who historically have contributed most to the emission of greenhouse gases. We also know that economic development will change the emission patterns over time".); Report of the Conference of the Parties on its sixteenth session, held in Cancun from 29 November to 10 December 2010, FCCC/CP/2010/7/Add.1, The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention, p. 8 ("Acknowledging that the largest share of historical global emissions of greenhouse gases originated in developed countries and that, owing to this historical responsibility, developed country Parties must take the lead in combating climate change and the adverse effects thereof"); Conference of the Parties serving as the meeting of the Parties to the Paris Agreement Third session Glasgow, 31 October to 12 November 2021, FCCC/PA/CMA/2021/8/Rev.1, Nationally determined contributions under the Paris Agreement Revised synthesis report by the secretariat, p. 25 ("Almost all Parties explained, using different metrics, how they consider their NDCs to be fair and ambitious in the light of their national circumstances. Metrics include capabilities; historic and current responsibility; climate justice; share in global emissions; level of per capita emissions; vulnerability to the adverse impacts of climate change; development and/or technological capacity; mitigation potential; cost of mitigation actions; degree of progression or progression beyond the current level of effort; and link to objectives of the Paris Agreement and its long-term global goals".)

[162] Written Statement of Sierra Leone, para. 3.39 (citing E. Hey & S. Paulini, "Common but Differentiated Responsibilities" in *Max Planck Encyclopedia of International Law* (2021)).

[163] Written Statement of Sierra Leone, para. 3.44 (citing IPCC, 2023, pp. 68-78).

[164] *See* Written Statement of the United Kingdom, para. 166 ("Peoples and individuals of the present and future generations affected by the adverse effects of climate change" are not owed obligations under the Climate Change Treaties. However, they are the intended beneficiaries of the Climate Change Treaties".); Written Statement of Canada, para. 29 ("while international environmental law does acknowledge the notion of 'future generations', international human rights law does not guarantee rights of future generations but rather seeks to protect and promote individuals' human rights in the present".).

3.59 Sierra Leone disagrees. The principle of intergenerational equity is a core concept of international environmental law that forms the basis for responsibilities on the part of the current generation towards future generations.[165] The principle is widely recognized in an array of multilateral agreements and instruments,[166] jurisprudence,[167] domestic practice,[168] and specialized writings on the subject.[169] In fact, many (if not all) treaties governing international environmental law encompass concerns of long-term and potential impacts of States' actions and omissions, thus implicitly accepting that States' obligations thereunder are not temporally-bound.[170]

3.60 The UNFCCC and the Paris Agreement expressly confirm the need to account for "intergenerational equity"[171] and recognize that "every generation holds the Earth in common with members of the present generation and with other generations, past and future".[172] ITLOS' recent Advisory Opinion also affirms that the obligation to take all necessary measures to "prevent, reduce and control" pollution of the marine environment from anthropogenic GHG emissions "necessarily applies to pollution that has not yet occurred, namely, future or potential pollution".[173]

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[165] E.B. Weiss, "Intergenerational Equity" in *Max Planck Encyclopedia of Public International Law* (2021), para. 13.

[166] *See* Written Statement of Sierra Leone, para. 3.48.

[167] *See ibid.*, paras. 3.46-3.47.

[168] *See ibid.*, para. 3.51.

[169] *See, e.g.*, E.B. Weiss, "Intergenerational Equity" in *Max Planck Encyclopedia of Public International Law* (2021); *See* E.B. Weiss, 'Our Rights and Obligations to Future Generations for the Environment' (1990) 84(1) Am. J. of Int'l L.; L. Gündling, "Our Responsibility to Future Generations" (1990) 84(1) Am. J. of Int'l L., p. 208 ("The protection of future generations is mentioned specifically in various international instruments. In addition, responsibility to future generations is the implied subject of several recent developments [including sustainable development]".); M. Collins, "Revisiting the Doctrine of Intergenerational Equity in Global Environmental Governance" (2007) 30(1) Dalhousie Law Journal, p. 121; C. McKinnon, *Climate Change and Future Justice: Precaution, Compensation and Triage* (1st Ed., Routledge 2012); E.D. Gibbons, 'Climate Change, Children's Rights, and the Pursuit of Intergenerational Climate Justice' (2014) 16(1) Health and Human Rights Journal 19; A.V. Sanson & S.E.L. Burke, "Climate Change and Children: An Issue of Intergenerational Justice" in N. Balvin & D.J. Christie (eds.), *Children and Peace* (2020); K. Horne *et al*., Status Report on Principles of International and Human Rights Law Relevant to Climate Change (2023).

[170] *See* E.B. Weiss, "Our Rights and Obligations to Future Generations for the Environment" (1990) 84(1) Am. J. of Int'l L., p. 202 ("Nuclear and hazardous waste disposal, the loss of biological diversity and ozone depletion, for example, have significant effects on the natural heritage of more distant generations".).

[171] Paris Agreement, Preamble.

[172] UNFCCC, Art. 3(1); E.B. Weiss, "Intergenerational Equity" in *Max Planck Encyclopedia of Public International Law* (2021), para. 1.

[173] *ITLOS Advisory Opinion*, para. 198.

3.61 Sierra Leone rejects the argument that one cannot speak of the "rights" of future generations.[174] In its Advisory Opinion on the Environment and Human Rights, the IACtHR recognized that the "the right to a healthy environment constitutes a universal value that is *owed* to both present and *future generations*".[175] Judge Weeramantry similarly noted in his opinion in the *Nuclear Weapons* case that "the *rights* of future generations … [have] woven themselves into international law through major treaties, through juristic opinion and through general principles of law recognized by civilized nations".[176]

3.62 Indeed, numerous leading human rights experts (including Human Rights Council special rapporteurs and members of human rights treaty bodies and regional human rights bodies) observed in the *Maastricht Principles on The Human Rights of Future Generations* that "[n]either the Universal Declaration of Human Rights, nor any other human rights instrument contains a temporal limitation or limits rights to the present time"[177] and "[t]he human rights of future generations form an essential dimension of humankind's duty to uphold the inherent dignity, equality, and inalienable rights of all".[178] The *Maastricht Principles* leave no doubt that States' obligations in relation to climate change can be articulated in terms of the human rights of future generations. According to those principles, "States must refrain from conduct they foresee, or ought reasonably to foresee, will create or contribute to, a substantial risk of violations of the human rights of future generations".[179] Thus, "[c]ontributing to … anthropogenic climate change",

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[174] Written Statement of the Russian Federation, p. 10 ("A State cannot, in principle, guarantee the rights of individuals outside its jurisdiction, nor can it guarantee the rights of individuals not yet born. Indeed, no international human rights treaty requires States to do so".). *See also* Written Statement of Canada, para. 29 ("while international environmental law does acknowledge the notion of 'future generations', international human rights law does not guarantee rights of future generations but rather seeks to protect and promote individuals' human rights in the present").

[175] IACtHR, *Advisory Opinion OC-23/17*, para. 59 (emphasis added).

[176] *Nuclear Weapons Advisory Opinion*, Dissenting Opinion of Judge Weeramantry, p. 455 (emphasis added).

[177] Maastricht Principles on the Human Rights of Future Generations (adopted on 3 February 2023), Preamble, para. II. *Cf. See* E.B. Weiss, "Our Rights and Obligations to Future Generations for the Environment", Am. J. of Int'l L., Vol. 84, No. 1 (1990), p. 203 ("[I]nternational human rights law—the genocide convention, and the prohibition against racial discrimination, to cite two examples—are arguably directed as much to the protection of future, as to present, generations".).

[178] Maastricht Principles on the Human Rights of Future Generations (adopted on 3 February 2023), Preamble, para. IV.

[179] *Ibid*., Principle 16.

"[i]mpairing the ability of future generations to prevent and respond to climate change", and "fail[ing] to avert, minimize and address loss and damage associated with the adverse effects of climate change" all breach the obligation to respect and protect those rights.[180]

IV. States Have the Right to Regulate Activities Within Their Territories to Reduce Greenhouse Gas Emissions

3.63 States have a duty to ensure the right to development.[181] Climate change has the real potential to undo decades of development progress. The adverse effects of climate change directly interfere with the economic, social, cultural, and political development of States.[182] To effectively realize the right to development, it is thus important that States, individually and collectively, adopt regulatory actions to reduce GHG emissions within their territories.[183]

3.64 At the same time, the reality is that developing countries have limited resources to fulfill ambitious climate commitments. Investing in mitigation and adaptation measures forces States like Sierra Leone to divert scarce resources away from other immediate development priorities such as tackling poverty and food insecurity. For developing countries to commit to robust adaptation and mitigation goals while ensuring their duty to protect, respect and fulfill the right to development, sufficient financial, technical, and capacity-building support is essential.[184]

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[180] *Ibid.*, Principles 17(d), 17(g), 19(c).

[181] Written Statement of Sierra Leone, paras. 3.100-3.101. *See also* UN General Assembly, Resolution 41/128, Declaration on the right to development, UN Doc. A/RES/41/128 (4 December 1986) ("**Declaration on the Right to Development**"), Art. 1 (the right to development "is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized".); African Charter on Human and Peoples' Rights, Art. 22(2) ("States shall have the duty, individually or collectively, to ensure the exercise of the right to development".); Arab Charter on Human Rights (22 May 2004), Art. 37; ASEAN Human Rights Declaration (19 November 2012), Art. 35.

[182] Written Statement of Sierra Leone, para. 3.105.

[183] *Ibid.*, para. 3.104.

[184] *Ibid.*, para. 3.110. *See also* Declaration on the Right to Development, Art. 3(3) ("States have the duty to co-operate with each other in ensuring development and eliminating obstacles to development".).

3.65 In addition to such cooperation and support, it is critical to recognize that States not only have obligations to reduce GHG emissions to comply with their obligations under international law, but also a corresponding right to regulate activities within their territories or under their control to achieve that objective. Article 2(3) of the Declaration of the Right to Development thus stipulates that "States have the *right* and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals".[185] These policies include measures aimed at regulating GHG emissions, such as legislation or regulations designed to phase out coal-fired power plants, limit oil and gas exploration, or incentivize the development of clean tech and clean energy.[186]

3.66 The right to regulate in the public interest—especially in the realm of environmental protection—is recognized in multiple investment and trade treaties.[187] International courts and tribunals have also stressed that deference should be given to governmental judgments of national needs in public policy matters.[188] Reinforcing the right to regulate is pivotal in light of the growing concern that governments taking regulatory steps to fulfill their climate commitments have begun to face legal risks, in particular by investors challenging these steps through the

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[185] Written Statement of Sierra Leone, para. 3.104 (citing and quoting Article 2(3) of the Declaration on the Right to Development).

[186] ITLOS, Case 31, Doc No. ITLOS/PV.23/C31/12/Rev.1, Verbatim Record (19 September 2023), 38:18-21 (Hioureas).

[187] *See, e.g.*, Agreement Establishing the African Continental Free Trade Area (adopted 21 March 2018, entered into force 30 May 2019), Preamble ("REAFFIRMING the right of State Parties to regulate within their territories and the State Parties' flexibility to achieve legitimate policy objectives in areas including public health, safety, environment, public morals and the promotion and protection of cultural diversity"); Kingdom of the Netherlands, Model Bilateral Investment Treaty (2019), Art. 2(2) ("The provisions of this Agreement shall not affect the right of the Contracting Parties to regulate within their territories necessary to achieve legitimate policy objectives such as the protection of … environment …"); United States of America, Model Bilateral Investment Treaty (2012), Annex B, para. 4(b) ("Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as … the environment …"); Canada-Chile Free Trade Agreement (modernization of the agreement, signed 5 June 2017, entered into force 5 February 2019), Art. G-14; General Agreement on Trade and Tariffs, 55 U.N.T.S. 187 (signed 30 October 1947, provisionally applied 1 January 1948), Art. XX.

[188] *See, e.g.*, *Marvin Roy Feldman Karpa v. The United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award (16 December 2002) (Kerameus, Covarrubias Bravo, Gantz), para. 103 ("[G]overnments must be free to act in the broader public interest through protection of the environment ... and the like. Reasonable governmental regulation of this type cannot be achieved if any business that is adversely affected may seek compensation, and it is safe to say that customary international law recognizes this".); Alan Boyle, 'Human Rights and the Environment: Where Next?' 23(3) EJIL (2012) 613, at 641 (noting that States are entitled to a "wide margin of appreciation … when balancing economic, environmental and social policy objectives").

investor-State dispute settlement system.[189] When States adopt robust climate change adaptation and mitigation measures, they must be respected and enforced, including against private corporations which, in many cases, are the main polluters.

[189] *See also* ITLOS/PV.23/C31/12/Rev.1, Verbatim Record (19 September 2023), pp. 34-39 (Hioureas).

CHAPTER IV. QUESTION (B)

4.1 The specific legal consequences of causing significant harm to the climate system, or failing to prevent such harm, depend on the circumstances of each case. There are nonetheless generally applicable rules on which the Court is asked to opine. Section I below explains why the relevant rules on legal consequences are set forth in the ILC's Articles on State Responsibility, and Section II elaborates on the principal rules in question, namely the duty of cessation, non-repetition and reparation, and the right to invoke State responsibility.

I. The Legal Consequences of Causing Significant Harm to the Climate System, or Failing to Prevent Such Harm, Are Set Forth in the ILC Articles on State Responsibility

4.2 The majority of States that addressed Question (B) agree with Sierra Leone that the ILC Articles set forth the relevant rules on the legal consequences of causing significant harm to the climate system, or failing to prevent such harm.[190]

4.3 A minority of States, however, argue that the UNFCCC, the Kyoto Protocol, and the Paris Agreement constitute *lex specialis* with respect to legal consequences arising from breaches of obligations in respect of climate change.[191] As the argument goes, these treaties effectively displace the ILC Articles, such that the latter do not apply when ascertaining the legal consequences for such breaches. This view is erroneous for two main reasons.

4.4 *First*, the UNFCCC, the Kyoto Protocol, and the Paris Agreement do not establish any rules relating to the legal consequences stemming from a breach of these instruments, let alone

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[190] Written Statement of Egypt, paras. 315-331; Written Statement of Mauritius, para. 124; Written Statement of Marshall Islands, paras. 55-58; Written Statement of Tuvalu, paras. 126-142; Written Statement of Democratic Republic of Congo, paras. 296-304; Written Statement of El Salvador, paras. 50-51; Written Statement of Bahamas, para. 233; Written Statement of Saint Vincent & the Grenadines, para. 128; Written Statement of St. Lucia, para. 96.vi; Written Statement of Kiribati, paras. 178-196; Written Statement of Uruguay, para. 164; Written Statement of Vanuatu, para. 557; Written Statement of OACP, paras. 143-144; Written Statement of France, para. 169; Written Statement of Palau, para. 26; Written Statement of Burkina Faso, paras. 266, 269, 273

[191] *See* Written Statement of Kuwait, paras. 89-90; 93-96; *see also* Written Statement of the European Union, para. 326; Written Statement of Australia, paras. 2.45, 5.9-5.10; Written Statement of Saudi Arabia, paras. 6.3-6.8; Written Statement of Germany, paras. 62-63; Written Statement of United States of America, paras. 3.31-3.35; Written Statement of China, paras. 134-136; Written Statement of OPEC, para. 99; Written Statement of Kuwait, para. 119.

from any other obligation concerning climate change.[192] While the Paris Agreement establishes a mechanism of compliance with the Agreement,[193] as well as a mechanism for addressing climate change loss and damage ("L&D"),[194] it does not establish rules applicable in the event of a breach. Indeed, when the Paris Agreement was adopted, it was clarified that the Agreement does not provide a basis for responsibility or liability.[195] Accordingly, as argued by, among other States, Portugal, Mauritius, Madagascar, and the Netherlands, these provisions of the Paris Agreement do not preclude the application of the ILC Articles.[196]

4.5 *Second*, even if any of the climate change treaties were to establish rules relating to legal consequences, such rules would complement, not exclude, the ILC Articles. The UNFCCC, the Kyoto Protocol, and the Paris Agreement do not conflict with the ILC Articles.[197] Thus, the latter remains applicable to the breaches of States' obligations concerning climate change. Indeed, States "have emphasised the continued application of international law on state responsibility"[198]

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[192] *See, e.g.*, Written Statement of the Russia Federation, p. 16 ("The specialized treaties of the UNFCCC system do not establish special norms on state responsibility. Consequently, in case of a breach by a State of its obligations under these treaties, the norms of general international law on state responsibility shall apply").

[193] Paris Agreement, Art. 14(1) (mandating the Conference of the Parties to "periodically take stock of the implementation" of the Agreement); Art. 15(1) (establishing a "mechanism to facilitate implementation of and promote compliance with the provisions" of the Agreement, consisting of a Committee). The Modalities and Procedures for the Effective Operation of the Committee to Facilitate Implementation and Promote Compliance Referred to in Article 15, Paragraph 2, of the Paris Agreement, UN Doc FCCC/PA/CMA/2018/3/Add.2 (19 March 2019) neither establishes specific rules concerning the legal consequences of breaches of the Paris Agreement nor any other obligations with respect to climate change.

[194] Paris Agreement, Art. 8(1).

[195] COP, *Adoption of the Paris Agreement*, UN Doc. FCCC/CP/2015/L.9/Rev.1 (12 December 2015), para. 52.

[196] Written Statement of Portugal, para. 114; Written Statement of Mauritius, para. 123; Written Statement of Netherlands, para. 5.7.

[197] *See, e.g.*, *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. 708, para. 108 ("the fact that the 1858 Treaty [of Limits between Costa Rica and Nicaragua] may contain limited obligations … does not exclude any other procedural obligations with regard to transboundary harm which may exist in treaty or customary international law"); *see also* International Law Commission, *Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law*, UN Doc. A/CN.4/L.702 (18 July 2006).

[198] E. Calliari *et al*., "Article 8: Loss & Damage", *in* G. van Calster & L. Reins (eds.) A COMMENTARY ON THE PARIS AGREEMENT ON CLIMATE CHANGE (2021), para. 8.47; R. Verheyen and Roderick Peter (WWF-UK), *Beyond Adaptation: The legal duty to pay compensation for climate change damage* (November 2008), *WWF-UK Climate Change Programme*, *available at* https://wwfint.awsassets.panda.org/downloads/beyond_adaptation_lowres.pdf, p. 17.

in the context of climate change. Furthermore, some have even stated that the UNFCCC, the Kyoto Protocol and/or the Paris Agreement are not renunciations of rights arising from the law of State responsibility, as codified in the ILC Articles.[199]

4.6 In sum, the ILC Articles govern the legal consequences of causing or failing to prevent significant harm to the climate system and other parts of the environment.[200]

II. Causing or Failing to Prevent Significant Harm Engages State Responsibility

4.7 Certain States argue that the rules of international responsibility are not applicable to climate change because anthropogenic GHG emissions are not unlawful.[201] But multiple obligations concerning climate change require reducing or halting GHG emissions (depending on the circumstances of the emitting State), and thus require States not to emit or permit the emission of GHGs. These include the duty of due diligence, and the principles of prevention and precaution. Failure to meet these obligations constitutes an internationally wrongful act that engages international responsibility.[202]

4.8 The ECtHR reached this conclusion in *Verein KlimaSeniorinnen v. Switzerland*. It held that State responsibility is engaged where a State does not observe "reasonable measures

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[199] *See* S. Maljean-Dubois¸ *Climate Change Litigation*, MPEPIL, para. 13 (describing declarations made by Fiji, Kiribati, Nauru, Papua New Guinea, Tuvalu, Cook Islands, Niue, Marshall Islands, Micronesia, Philippines, Solomon Islands).

[200] The ILC Articles on State Responsibility do not govern consequences in respect of individuals. Sierra Leone considers that where individuals are harmed by the effects of excess anthropogenic GHG emissions, whether by public or private actors, legal consequences should be determined by reference to the applicable legal framework, taking into account the polluter pays principle as recognized in several international instruments. *See* Rio Declaration, Principle 16 (stating that "national authorities should endeavor to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution"); Treaty on the Functioning of the European Union , art. 191(2) ("Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay"); Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (1989), Preamble (recognizing the need to ensure that the polluter should, in principle, bear the cost of pollution).

[201] Written Statement of China, para. 134.

[202] *See, e.g.*, Written Statement of PNAO, paras. 37-39 (arguing that States must "exert [their] best possible efforts to avert the risk of significant transboundary harm" and that "fail[ing] of a State to comply with its duty of due diligence, which constitutes the breach of its international obligations").

[that] could have had a real prospect of altering the outcome or mitigating the harm" of climate change.[203] Ceasing GHG emissions, or at least reducing them, would have a "real prospect of altering the outcome or mitigating the harm". Thus, not taking this measure, when reasonable, engages responsibility. ITLOS took the same view in its recent Advisory Opinion. It ruled that the failure to "take all necessary measures to prevent, reduce and control marine pollution" from GHG emissions, which include *not* emitting GHGs, engages "international responsibility".[204]

4.9 The fact that multiple States may be responsible for the harm does not prevent application of the rules of States responsibility. As held the ECtHR held, "a respondent State should not evade its responsibility by pointing to the responsibility of other States".[205] Indeed, Articles 46 and 47 of the ILC Articles establish that any and all injured States can invoke the responsibility of any and all responsible States.[206].

4.10 States which argue that international responsibility cannot be applied because it may be difficult to identify the emitters which caused the adverse effects of climate change and the particular State that caused the loss and damage are equally mistaken.[207] A breach of any international obligation attributable to the State is sufficient to engage responsibility.[208] There is no need to show "adverse effects of climate change" or "loss and damage".[209]

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[203] *Verein KlimaSeniorinnen v. Switzerland*, para. 444.

[204] *ITLOS Advisory Opinion*, para. 223.

[205] *Verein KlimaSeniorinnen v. Switzerland*, para. 442; *see also ibid.*, para. 443.

[206] ILC Draft Articles on State Responsibility, Arts. 46-47; *see also* Written Statement of Tuvalu, paras. 121-122; Written Statement of the African Union, para. 206; Written Statement of Denmark, Finland, Iceland, Norway and Sweden, para. 106; Written Statement of Vanuatu, para. 552.

[207] Written Statement of China, para. 136.

[208] ILC Draft Articles on State Responsibility, Arts. 1 and 2.

[209] *See, e.g.*, Written Statement of Netherlands, para. 5.12; Written Statement of Uruguay, para. 173; Written Statement of Burkina Faso, para. 379 (agreeing that failure to establish causation does not prevent claiming State responsibility).

4.11 In fact, most obligations with respect to climate change, including the duty of due diligence, prevention and precaution, are *independent* of the harm caused or prevented.[210] As the ECtHR explained:

> The relevant test [for responsibility] 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.[211]

4.12 This reasoning, and the relevance of the UNFCCC, applies beyond the human rights context. Thus, neither "adverse effects" nor "loss and damage", let alone causation, needs to be proven to engage a State's international responsibility.

4.13 Indeed, a State does not need to suffer any "injury" to invoke the responsibility of another State, if such State breaches obligations that protect collective interests.[212] These obligations include the duty of due diligence and prevention;[213] the right to self-determination;[214] the principles and rules concerning the basic rights of the human person;[215] the general obligation

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[210] *See, e.g.*, Written Statement of Belize, para. 39.b ("a failure to conduct an environmental assessment can give rise to a finding that a State has breached the Prevention Obligation without any showing of material transboundary harm"); *see also* Written Statement of Netherlands, para. 5.08; Written Statement of PNAO, paras. 37-39

[211] *Verein KlimaSeniorinnen v. Switzerland*, para. 444.

[212] Written Statement of Vanuatu, para. 552; Written Statement of Netherlands, para. 5.8.

[213] Written Statement of Egypt, paras. 83-96; Written Statement of Kiribati, paras. 115-131; Written Statement of Democratic Republic of Congo, paras. 279-281.

[214] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019, p. 95*, at p. 139, para. 180.

[215] *Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium v. Spain), Second Phase, Judgment, I.C.J. Reports 1970*, p. 3, at p. 32, para. 34.

to protect and preserve the marine environment, the high seas and the Area, under UNCLOS;[216] and the duty to protect cultural heritage under the UNESCO Convention.[217]

III. State Responsibility Entails the Obligation of Cessation and Non-Repetition

4.14 Sierra Leone concurs with the many of the States and international organizations that have expressed the view that a State must cease any act or omission that contravenes its obligations with respect to climate change.[218] Indeed, when climate change obligations are breached, the underlying duty must still be performed.[219]

4.15 In this regard, because the right to self-determination is a peremptory norm of international law, whenever anthropogenic GHG emissions cause a breach to this right, all States must cooperate to bring that breach to an end. They must also minimize anthropogenic GHG emissions to avoid aiding or assisting in this violation.[220]

4.16 Sierra Leone also agrees with those participants that have correctly noted that States which are responsible for violations of obligations concerning climate change must provide assurances of non-repetition, when circumstances so require.[221] It agrees as well that

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[216] For instance, the ITLOS Chamber found that "[e]ach State Party may also be entitled to claim compensation in light of the *erga omnes* character of the obligations relating to the preservation of the environment of the high seas and in the Area". *Area Advisory Opinion*, para. 180.

[217] UNESCO, *Convention Concerning the Protection of the World Cultural and Natural Heritage* (16 November 1972), *available at* https://whc.unesco.org/archive/convention-en.pdf, Art. 6.

[218] ILC Draft Articles on State Responsibility, Art. 31; *Wall Advisory Opinion*, para. 150 (*citing to Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 149; *United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, p. 44, para. 95; *Haya de la Torre. Judgment, I.C.J. Reports 1951*, p. 82); *see also* Written Statement of the Philippines, para. 121; Written Statement of the Bahamas, para. 238; Written Statement of Kiribati, paras. 178-196; Written Statement of Vanuatu, paras. 563, 580; Written Statement of Albania, paras. 133-134; Written Statement of Thailand, para. 29; Written Statement of OACPS, paras. 162, 168, 173; Written Statement of Burkina Faso, para. 238; Written Statement of Timor-Leste, paras. 373-374.

[219] ILC Draft Articles on State Responsibility, Art. 29; Written Statement of the Bahamas, para. 236.

[220] *See, e.g.*, Written Statement of Bangladesh, paras. 193-199; Written Statement of Sierra Leone, para. 4.7

[221] *See, e.g.*, Written Statement of Albania, paras. 133-134; Written Statement of the African Union, para. 263; Written Statement of Netherlands, para. 5.9; Written Statement of OACPS, para. 162; Written Statement of Samoa, paras. 196-199; Written Statement of Singapore, paras. 4.5-4.6; Written Statement of Thailand, para. 29; Written Statement of Tonga, paras. 295-296; Written Statement of Vanuatu, para. 576; Written Statement of Viet Nam, para. 46.

internationally wrongful acts concerning climate change that cause significant harm to the climate system "impair intergenerational justice", "threaten future generations", and "hinder future legal relationships of the responsible State".[222] As such, they are acts that must not be repeated.[223]

IV. States Responsible for Causing Significant Harm to the Climate System, or for Failing to Prevent Such Harm, Must Provide Full Reparation

4.17 Causing or failing to prevent significant harm to the climate system entails an obligation to provide full reparation.[224] Reparation must "as far as possible … benefit all those who suffered injury resulting" from the unlawful conduct.[225] It is imperative for reparation to benefit SIDS and other States vulnerable to climate change (like Sierra Leone) and their populations.

A. States Must Provide Restitution, When Possible

4.18 The "first of the forms of reparation" is restitution.[226] States have rightly suggested that restitution in the context of climate change can include: (i) "reforestation of lost natural resources" and "wetlands";[227] (ii) investment in healthcare for communities impacted by pollution;[228] (iii) "reconstruction of infrastructure damaged or destroyed";[229] (iv) recognizing "sovereignty, statehood, territory and maritime spaces of low-lying" SIDS if any of these elements

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[222] Written Statement of Kenya, para. 6.114.

[223] *Ibid*.

[224] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgement, I.C.J. Reports 2022, p. 28* ("***Armed Activities, Judgment on Reparations***"), para. 69 (*citing to Factory at Chorzów, Jurisdiction, 1927, P.C.I.J., Series A, No. 9,* p. 21*; Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 81, para. 152; *Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment, I.C.J. Reports 2004*, p. 59, para. 119). *See also Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Compensation, Judgment, I.C.J. Reports 2018*, p. 15 ("***Certain Activities, Judgment on Compensation***"), at p. 26, para. 30.

[225] *Armed Activities, Judgment on Reparations*, para. 102 (*citing to Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Compensation, Judgment, I.C.J. Reports 2012 (I)*, p. 324, at p. 344, para. 57).

[226] ILC Draft Articles on State Responsibility, Art. 35 (Commentary 1).

[227] Written Statement of Kenya, para. 6.94.

[228] *Ibid.*

[229] *Ibid.*

is lost because of climate change;[230] and (v) contributing land to States that lost territory because of climate change.[231]

4.19 While implementation of these restitution measures is imperative, the appropriateness of each measure should be assessed on a case-by-case basis.

B. STATES MUST COMPENSATE CLIMATE CHANGE L&D

1. *Compensation is applicable to L&D as a means of reparation or under unjust enrichment*

4.20 While many States agree with Sierra Leone that compensation is the most appropriate form of reparation for climate change L&D,[232] a small minority resists the applicability of compensation for climate change L&D. According to them, it is not possible to link GHG emissions of a particular country to climate change L&D.[233] That argument, however, is contradicted by the ECtHR's recent judgment in *Verein KlimaSeniorinnen v. Switzerland*, which affirms that science permits findings of causation with respect to the linkages between GHG emissions and harm to the climate system.[234] That is correct, as numerous other States, including Switzerland,[235] Chile[236] and Kenya,[237] have pointed out.

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[230] Written Statement of Kiribati, paras. 206.4.b, 188-195; Written Statement of El Salvador, para. 56

[231] Written Statement of Burkina Faso, para. 374; *see also* ILC Draft Articles on State Responsibility, Art. 35, (Commentary 5) ("Restitution may take the form of material restoration or return of territory, persons or property, or the reversal of some juridical act, or some combination of them").

[232] *See, e.g.*, Written Statement of Samoa, paras. 201-202; Written Statement of St. Lucia, para. 94.

[233] Written Statement of the United Kingdom, paras. 126, 137; Written Statement of China, paras. 138; Written Statement of the Russian Federation, p. 17; *see also* Written Statement of the United States of America, paras. 2.20-2.26, 5.10; Written Statement of OPEC, para. 118; Written Statement of Kuwait, paras. 120-121, 124.

[234] *Verein KlimaSeniorinnen v. Switzerland*, para. 429.

[235] Written Statement of Switzerland, para. 27 (showing a direct causality between the conduct of the largest emitters and the damage caused by the scale of emissions for which they are responsible).

[236] Written Statement of Chile, para. 94 (showing that science allows for the determination of "the amount of current and historic emissions of each country" and "the consequences of failure to reduce those emissions in the overall warming levels" and *citing to* UNEP, "Emissions Gap Report 2023: Broken Record" (20 November 2023)).

[237] Written Statement of Kenya, para. 6.102 (showing that science now "clarifie[s] the causal links between GHG emissions and climate change L&D" and permits an understanding of "how GHG emissions affect the frequency and severity of extreme heat, drought, and precipitation events").

4.21 For this reason, the argument that compensation must be precluded because quantification of climate change L&D may be difficult [238] has no merit. There is ample science that facilities this quantification. In any event, any difficulty of quantifying damages does not preclude the obligation to compensate.[239] As the Court held in *Certain Activities (Costa Rica v. Nicaragua)*, "it will be enough if the evidence show the extent of the damages *as a matter of just and reasonable interference*, although the result be only approximate".[240] Moreover, equitable considerations can be applied when assessing causation and quantum, as the Court has previously done when considering claims for environmental damage.[241]

4.22 Finally, even if assuming, *quod non*, that compensation is not available as a means of reparation, it could still be required under the theory of unjust enrichment. The three-prong test of unjust enrichment is met in the context of climate change: (i) high GHG emitting States have been enriched; (ii) the enrichment is unjust because no rule authorizes the pollution caused by anthropogenic GHG emissions; and (iii) if compensation cannot be a means of reparation, there would be no means to recover climate change L&D.[242]

2. *Compensation should cover financial damage and moral damage*

4.23 Sierra Leone agrees with the many Written Statements which observe that compensation should cover all financially assessable L&D, including costs of restoration and

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[238] Written Statement of the United Kingdom, paras. 126, 137; Written Statement of China, paras. 138; Written Statement of the Russian Federation, p. 17; *see also* Written Statement of the United States of America, paras. 2.20-2.26, 5.10; Written Statement of OPEC, para. 118; Written Statement of Kuwait, paras. 120-121, 124.

[239] *See* Written Statement of COSIS, para. 187; Written Statement of Uruguay, para. 170; Written Statement of Antigua & Barbuda, paras. 547-548.

[240] *Certain Activities, Judgment on Compensation*, para. 35 (emphasis added)*, citing to Trail Smelter.*

[241] Written Statement of Sierra Leone, paras. 3.144-3.148; Written Statement of Kenya, para. 6.108-109; Written Statement of Singapore, para. 4.15; Written Statement of Antigua & Barbuda, para. 562; Written Statement of India, paras. 87-88 (arguing that in assessing breach, "it would be fair to focus on developed countries" because (1) developed countries have contributed more to the problem; (2) they have the resources to address the problem; and (3) the UNFCCC and the Paris Agreement impose greater obligations on developed countries"); *Armed Activities, Judgment on Reparations*, paras. 364-365; *Certain Activities, Judgment on Compensation*, para. 35; *see also Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010 (II)*, p. 324, at p. 337, para. 33.

[242] Written Statement of Burkina Faso, paras. 406-408, *citing to Sea-Land Service, Inc v Iran*, 6 Iran-U.S. Cl. Trib. Rep 149, 169.

adaptation; [243] "insurance payouts, loss of business profits", and "damage to economic infrastructure".[244]

4.24 Sierra Leone agrees as well that compensation should also address climate change debt.[245] States responsible for climate change L&D should forgive climate change related debt.[246] This would not only contribute to full reparation, but as Colombia rightly observed, would "bolster … climate resilience" of vulnerable States.[247] Furthermore, it would benefit the climate system as a whole, as it could halt the "vicious cycle" under which States are constrained to engage in extractive and other polluting activities to repay climate change debt.[248]

4.25 Sierra Leone agrees with those States that have highlighted the regrettable fact that developed countries have "hardly met the obligation to provide collectively USD 100 billion on an annual basis to assist developing countries".[249] Compensation requires complying with this

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[243] Written Statement of Antigua & Barbuda, para. 599.

[244] Written Statement of Micronesia, para. 130.

[245] Written Statement of Namibia, paras. 144-145; Written Statement of Colombia, para. 4.15.

[246] *See, e.g.*, Written Statement of Kenya, para. 6.112; Written Statement of Namibia, para. 145, *citing to* Chetan Hebbale & Johannes Urpelainen, "Debt-for-adaptation swaps: A financial tool to help climate vulnerable nations", *Brookings* (21 March 2023), *available at* https://www.brookings.edu/articles/debt-for-adaptation-swaps-a-financial-tool-to-help-climate-vulnerable-nations; Larry Elliott & Phillip Inman, "New push for debt relief to help developing world fund climate action", *The Guardian* (30 November 2023), *available at* https://www.theguardian.com/global-development/2023/nov/30/new-push-for-debt-relief-to-help-developing-world-fund-climate-action; *see also* African Union, *The African Leaders Declaration on Climate Change and Call to Action* (September 2023), paras. 52(v-vi), 58.

[247] Written Statement of Colombia, para. 4.15.

[248] Written Statement of Kenya, para. 6.111, *citing to* R. Warlenius *et al.*, "Reversing the arrow of arrears: the concept of 'ecological debt' and its value for environmental justice", (2015) 30 *Global Environmental Change* 21-30, *available at* https://doi.org/10.1016/j.gloenvcha.2014.10.014, p. 24. *See also* Nairobi Declaration, paras. 53-55, 58; *see also* African Union, *The African Leaders Declaration on Climate Change and Call to Action* (September 2023), paras. 53-55, 58.

[249] Written Statement of Egypt, paras. 392, 396; Written Statement of Bolivia, para. 30; Written Statement of Uruguay, paras. 131, 165; *see also* African Union, *The African Leaders Nairobi Declaration on Climate Change and Call to Action* (September 2023), para. 19(ii).

obligation. It also requires contributing to the UNFCCC climate change L&D fund,[250] and to any of the multiple funds existing to combat climate change.[251]

4.26 Finally, Sierra Leone agrees with the States that have stressed that compensation must cover non-economic L&D, such as "psychological harm; destruction of cultural heritage and dislocation of ancestral lands and traditions; and deterioration of vital ecosystems".[252]

C. Reparation Should also Take the Form of Satisfaction Through Debt Forgiveness

4.27 In addition to restitution and compensation, satisfaction is another means to achieve full reparation.[253] As held by the Court, "satisfaction can take an entirely different form" from acknowledgement of the breach, an expression of regret or a formal apology, "depending on the circumstances of the case".[254] Sierra Leone, like many other vulnerable States, has incurred debts in coping with the impacts of climate change. In such circumstances, full reparation requires that satisfaction be made through debt forgiveness.

4.28 Besides addressing the full extent of climate change consequences, debt forgiveness would also allow States with high climate change-related debts to invest in adaptation and mitigation measures, including meeting the increasing social needs to adapt to climate change, instead of debt servicing. Indeed, the scarcity of funds for crucial climate actions has been exacerbated by the burden of debt servicing. This is certainly true for Sierra Leone, which is

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[250] Written Statement of Timor-Leste, para. 371; *see also* Written Statement of Mauritius, para. 213; Written Statement of Egypt, paras. 392, 396; Written Statement of Bolivia, para. 30; Written Statement of Uruguay, paras. 131, 165.

[251] For instance, the Global Environmental Facility, the Green Climate Fund, the Special Climate Change Fund, the Least Developed Countries Fund, the Adaptation Fund. Contributions to these funds can help States fulfil their obligation to make reparation for the injury caused by greenhouse gas emissions. *See, e.g.*, Written Statement of Namibia, para. 143.

[252] *See, e.g.*, Written Statement of Kenya, para. 6.101, *citing to* K.E. McNamara *et al*., "Exploring climate-driven non-economic loss and damage in the Pacific Islands" (2021) 50 *Current Opinion on Environmental Sustainability* 1-11, *available at* https://www.sciencedirect.com/science/article/pii/S1877343520300531 (observing these NELD and others in the Pacific Islands); *see also* Written Statement of Philippines, para. 131; Written Statement of OACPS, para. 176.

[253] ILC Draft Articles on State Responsibility, Art. 37(1).

[254] *Armed Activities, Judgment on Reparations*, para. 387.

currently "assessed as being at high overall risk of public debt distress",[255] with its public debt estimated to amount to 87% of its GDP.

4.29 Sierra Leone thus submits that satisfaction, as a means of reparation, should take the form of debt forgiveness.

[255] International Monetary Fund, *Technical Assistance Report, Sierra Leone, Climate Module of the PUBLIC Investment Management Assessment* (June 2024), p. 25, para. 15.

CHAPTER V. CONCLUSION

5.1 For the reasons set out in its Written Statement and Written Comments, Sierra Leone submits as follows.

5.2 The Court has jurisdiction to answer the Request and there are no compelling reasons for the Court to decline to exercise such jurisdiction.

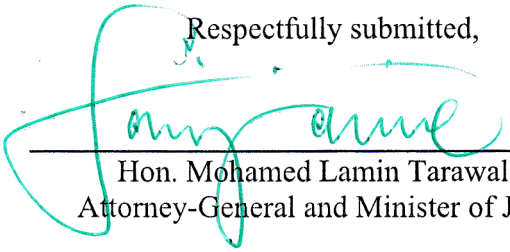
5.3 States have a due diligence obligation to take all necessary measures to limit global temperature increase to 1.5°C above pre-industrial levels to prevent significant harm to the climate system and to protect human rights. The precise content of such an obligation is informed by the CBDR-RC principle and respect for intergenerational equity.

5.4 States have a right to regulate activities within their territory, including those of private actors, to reduce anthropogenic GHG emissions in compliance with their due diligence obligation to protect the climate system and human rights.

5.5 States in breach of this due diligence obligation must cease such a breach and make full reparation for the injury caused to other States, including through restitution, satisfaction and compensation. Satisfaction and compensation, where appropriate, can take the form of debt forgiveness.

5.6 Individuals of present and future generations are entitled to invoke the responsibility of States for breaching their due diligence obligation to protect human rights from climate change impacts.

Respectfully submitted,



Hon. Mohamed Lamin Tarawalley
Attorney-General and Minister of Justice

Republic of Sierra Leone

Freetown, Sierra Leone

15 August 2024