INTERNATIONAL COURT OF JUSTICE

OBLIGATIONS OF STATES IN RESPECT OF CLIMATE CHANGE

(REQUEST FOR ADVISORY OPINION)

WRITTEN COMMENTS OF

THE REPUBLIC OF NAMIBIA

15 AUGUST 2024

TABLE OF CONTENTS

I. INTRODUCTION

1. The Republic of Namibia ("Namibia") submits these Written Comments in accordance with the Court's Order of 30 May 2024 which extended the deadline for written comments to 15 August 2024.

2. The overwhelming majority of Written Statements submitted by States and international organizations express views consistent with those of Namibia. As set out in those Statements, the Court has the jurisdiction to give the requested advisory opinion and should exercise that jurisdiction.[1] States have climate change mitigation obligations under both international human rights law and international environmental law.[2] States must minimize anthropogenic greenhouse gas ("GHG") emissions from activities within their jurisdiction or control and take the necessary measures to hold the increase in global average temperature to, at most, 1.5°C above pre-industrial levels.[3] States must fulfil these obligations in accordance with the principles of prevention, precaution, and common but differentiated responsibilities and respective capabilities ("CBDR-RC").[4] And States that do not comply with these obligations are internationally responsible and must provide compensation, as appropriate.[5]

3. These views, which are reflected in the great majority of Written Statements, are supported by the recent advisory opinion on climate change issued by the International Tribunal for the Law of the Sea ("ITLOS"),[6] and the recent judgment rendered by the Grand Chamber

---

[1] *See, e.g.*, African Union Written Statement, § II; Brazil Written Statement, § I; France Written Statement, Introduction, § I; Micronesia Written Statement, § II; Republic of Korea Written Statement, para. 5; Switzerland Written Statement, § I.B; *see also* Namibia Written Statement, § II.

[2] *See, e.g.*, Bahamas Written Statement, §§ IV.A, IV.C; Cook Islands Written Statement, § V.A; Liechtenstein Written Statement, § 6; Netherlands Written Statement, § 3.C.1; Samoa Written Statement, § III.C; *see also* Namibia Written Statement, secs. IV.A, IV.B.

[3] *See, e.g.*, Antigua and Barbuda Written Statement, para. 337; Bangladesh Written Statement, § IV.C.1; COSIS Written Statement, § III.B.3; Solomon Islands Written Statement, para. 133; *see also* Namibia Written Statement, para. 169.

[4] *See, e.g.*, Costa Rica Written Statement, §§ D.a.i, D.a.ii, D.a.vi; Ecuador Written Statement, § 3.II; Egypt Written Statement, § VI.B.1-4; Mauritius Written Statement, para. 221(b); Mexico Written Statement, §§ IV.a-b, paras. 33, 81; *see also* Namibia Written Statement, para. 168.

[5] *See, e.g.*, Albania Written Statement, § VI.A.2; Barbados Written Statement, § VII; Kenya Written Statement, § 6; Madagascar Written Statement, § IV.C.2; Saint Lucia Written Statement, § VI; *see also* Namibia Written Statement, § V.A.

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

of the European Court of Human Rights ("ECtHR") in *KlimaSeniorinnen v. Switzerland*.[7] The former affirms that the environmental obligations codified in Part XII of the United Nations Convention on the Law of the Sea ("UNCLOS") apply to climate change, and the latter confirms that human rights obligations do as well.

4. Namibia notes with regret that a small minority of Written Statements disagree with some or all of the positions set forth above. This minority advocates for minimal climate change mitigation obligations under international law. The crux of their argument is that States' mitigation obligations go no further than those expressly set out in the United Nations Framework Convention on Climate Change ("UNFCCC"), the Kyoto Protocol, and the Paris Agreement.[8] According to this narrow view, all other obligations under international law either do not apply to climate change or are subsumed by the obligations contained in these treaties.[9] This argument is inconsistent with the majority view described above as well as recent international jurisprudence, and its adoption would contribute to detrimental and irreversible harm to the climate. The present submission refers to this argument as "the *lex specialis* fallacy", and to its advocates as "the *lex specialis* proponents".[10]

5. Namibia's Written Comments do not comment on every point raised in those Written Statements. Rather, they focus on rebutting the *lex specialis* fallacy with respect to three subjects of critical importance to Namibia that are addressed in the three sections set out below.

6. **Section II** addresses international human rights law, including the right to water, and the climate change obligations that arise therefrom. The *lex specialis* proponents assert

---

[7] ECtHR, Grand Chamber, *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, Application No. 53600/20, Judgment (9 April 2024) ("*Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*").

[8] *See, e.g.*, Australia Written Statement, para. 2.62; Japan Written Statement, paras. 11-13; Kuwait Written Statement, § II.B; New Zealand Written Statement, paras. 103, 105-106, 121; OPEC Written Statement, p. 36; South Africa Written Statement, para. 14; United States Written Statement, para. 4.1.

[9] Some participants share this view in part, asserting that, in the climate change context, the three treaties subsume *certain* other obligations of international law. *See, e.g.*, India Written Statement, para. 17; Denmark, Finland, Iceland, Norway and Sweden Written Statement, paras. 72-73; Saudi Arabia Written Statement, paras. 4.97-4.98; Singapore Written Statement, para. 3.20; United Arab Emirates Written Statement, paras. 91, 102; United Kingdom Written Statement, para. 33.

[10] Although only some of these proponents expressly refer to the *lex specialis* principle, they all effectively make a *lex specialis* argument in substance, as they consider that the rules contained in the three climate change treaties should apply since they were developed *specifically* for climate change. For proponents who expressly refer to the *lex specialis* principle, see, for example: Japan Written Statement, para. 14; Kuwait Written Statement, § II.B; OPEC Written Statement, paras. 9-10, § IV.A; South Africa Written Statement, paras. 14-15, 131.

either that human rights law does not establish any climate change mitigation obligations or that any such obligations are subsumed into the three aforementioned climate change treaties. This section rebuts those arguments by demonstrating that international jurisprudence and legal instruments, including from the continent of Africa, confirm that climate change mitigation obligations arise from human rights law, including the right to water and ultimately the right to life.

7. **Section III** turns to customary international law on the protection of the environment. It focuses on obligations arising from the prevention and precautionary principles, as well as the obligation to conduct environmental impact assessments ("EIAs"). The *lex specialis* proponents again argue that these obligations either do not apply to climate change or are subsumed into the obligations set forth in the three climate change treaties. This section responds to those arguments by explaining that these obligations exist as integral components of customary international law and why these customary obligations retain their independent effect.

8. **Section IV** addresses the need for compensation, so that the most vulnerable States, especially Small Islands and Developing States, are able to undertake the requisite sustainable adaptation and mitigation measures to combat climate change. This section demonstrates that, contrary to the views of the *lex specialis* proponents and consistent with settled principles of international law, the legal consequences set forth in the International Law Commission's ("ILC") Articles on Responsibility of States for Internationally Wrongful Acts ("ARSIWA") are fully applicable in the climate change context. Those rules operate alongside the climate change treaties' mechanisms, and justify the payment of compensation to States that suffer from breaches of climate change obligations.

9. **Section V** concludes Namibia's Written Comments by offering final observations regarding the Court's advisory opinion.

II. INTERNATIONAL HUMAN RIGHTS LAW, INCLUDING THE RIGHT TO WATER

10. As Namibia explained in its Written Statement, many human rights—including the rights to water, food, health, life, development, and to a clean, healthy, and sustainable environment—oblige States to minimize their GHG emissions.[11] The large majority of participants in the present proceedings agree that these human rights create climate change mitigation obligations for States.[12] Of particular importance to Namibia, as one of the most arid countries on Earth, is the recognition by many participants of the right to water.[13]

11. The *lex specialis* proponents disagree. Some contend that human rights law does not create any climate change mitigation obligations.[14] Others argue that any such obligations arising from human rights law are fully subsumed into the three principal climate change treaties,[15] such that—as one State has argued—"any international human rights law obligation to mitigate GHG emissions through reductions and removals would be discharged through good faith compliance with co-existing obligations under the climate change treaty regime".[16] The essence of this argument is that the climate change treaties constitute *lex specialis* with respect to climate change mitigation obligations, thereby precluding the operation of international human rights law.

12. That is fallacious. As the ILC explained in its commentary to Article 55 of ARSIWA on *lex specialis*:

---

[11] Namibia Written Statement, § IV.B.

[12] *See, e.g.*, African Union Written Statement, para. 193-194; Albania Written Statement, paras. 100-102; Antigua and Barbuda Written Statement, para. 356; Bahamas Written Statement, paras. 163; Bangladesh Written Statement, para. 115; Cook Islands Written Statement, paras. 209-210; Ecuador Written Statement, para. 3.98; Egypt Written Statement, para. 227; Kenya Written Statement, para. 5.52; Liechtenstein Written Statement, para. 74; Sierra Leone Written Statement, para. 3.61; Vanuatu Written Statement, para. 339.

[13] *See, e.g.*, African Union Written Statement, para. 188; Albania Written Statement, para. 96(c); Antigua and Barbuda Written Statement, para. 192; Bahamas Written Statement, paras. 152-153; Bangladesh Written Statement, para. 105 fn. 209; Cook Islands Written Statement, para. 219 fn. 258; Ecuador Written Statement, para. 1.36, fn. 39; Egypt Written Statement, para. 222; Kenya Written Statement, § 5.V.B; Liechtenstein Written Statement, § 5.II.E; Sierra Leone Written Statement, para. 3.61; Vanuatu Written Statement, para. 369(b).

[14] *See, e.g.*, Russian Federation Written Statement, p. 11; Saudi Arabia Written Statement, paras. 4.97-4.98; United Kingdom Written Statement, paras. 33, 123; United States Written Statement, para. 4.39; *see also* China Written Statement, para. 115.

[15] *See, e.g.*, Australia Written Statement, para. 3.58; New Zealand Written Statement, para. 121; OPEC Written Statement, para. 92; *see also* Japan Written Statement, paras. 17-18; Kuwait Written Statement, § II.B.

[16] New Zealand Written Statement, para. 121.

> For the *lex specialis* principle to apply 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.[17]

13. Neither of these two criteria—"actual inconsistency" or "discernible intention"—is present in this context. There is no "actual inconsistency" between the climate change treaties and international human rights law. Nor is there any "discernible intention" that any provision of the former was to exclude the latter. In other words, it is possible to read the obligations under both regimes as compatible with and inclusive of each other rather than as being in conflict, meaning that there is no basis to trigger the *lex specialis* rule.

14. The Paris Agreement, in fact, emphasizes the consistency between the two bodies of law. Its preamble states that "Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights".[18] The Paris Agreement is thus intended to operate *alongside* human rights law, not displace it. Its preamble would not make sense if the Paris Agreement, or any other climate change treaty, were intended to displace human rights obligations with respect to climate change mitigation.

15. The *lex specialis* argument is also at odds with international case law. The Grand Chamber of the ECtHR recently found a State in breach of its human rights obligations under the European Convention on Human Rights because it had failed to properly implement a regulatory framework for limiting GHG emissions.[19] And numerous UN human rights treaty bodies, special rapporteurs, independent experts, and working groups have expressly recognised the existence of climate change mitigation obligations stemming from human rights law that go beyond those set forth in the climate change treaties.[20]

---

[17] ILC, *Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (2001), p. 140 (emphasis added); *see also* Colombia Written Statement, para. 3.9; Switzerland Written Statement, para. 68.

[18] Paris Agreement to the United Nations Framework Convention on Climate Change (adopted 12 December 2015, entered into force 4 November 2016) (Dossier No. 16) ("Paris Agreement"), preamble; *see also* Cook Islands Written Statement, para. 138.

[19] *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, paras. 573-574.

[20] *See, e.g.*, UN Human Rights Committee, *General Comment No. 36* (2019), para. 62; UN CESCR, *Climate change and the International Covenant on Economic, Social and Cultural Rights*, UN Doc. E/C.12/2018/1 (31 October 2018), para. 6; UN CEDAW, UN CESCR, UN CMV, UN CRC & UN CRPD, *Statement on human rights and climate change*, UN Doc. HRI/2019/1 (14 May 2020), paras. 10-13; 27 UN Special Rapporteurs, Independent Experts & Working Groups, *A new climate change agreement must include human rights protections for all* (17 October 2014), p. 3.

16. The right to water in particular establishes mitigation obligations on top of what the climate change treaties require. In its General Comment No. 15 on the right to water, the Committee on Economic, Social and Cultural Rights ("CESCR"), whose views deserve great weight as the body entrusted by States with interpreting the obligations under the relevant convention, observed that the right gives rise to certain impact assessment obligations with respect to climate change.[21] And the African Commission on Human and Peoples' Rights ("ACHPR"), whose pronouncements the Court has previously relied upon,[22] elaborated on the specific climate change mitigation obligations arising from the right to water.

17. The ACHPR has been particularly active in addressing the intersection of human rights and environmental issues, reinforcing States' obligations to integrate human rights considerations into their environmental policies (which include climate change considerations). This is evident in the ACHPR's resolutions and decisions,[23] which emphasize that States have an obligation to prevent environmental harm that could undermine the enjoyment of human rights. The ACHPR's pronouncements are critical as they not only interpret the African Charter on Human and Peoples' Rights but also influence the development of international human rights law, particularly in the context of environmental protection and climate change.

18. In its landmark 2019 Guidelines on the Right to Water in Africa, the ACHPR identified specific climate change mitigation obligations that emanate from the right to water.[24] Among other things, the Guidelines state that States must:

- "apply a human rights-based approach to guide policies and measures designed to address climate change and prevent their negative human rights impacts";

---

[21] UN CESCR, *General Comment No. 15* (2003), para. 28.

[22] *See, e.g.*, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010*, para. 67; *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Compensation, Judgment, I.C.J. Reports 2012*, para. 24; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Reparations, Judgment, I.C.J. Reports 2022* ("*Armed Activities, Judgment on Reparation*"), para. 188.

[23] *See, e.g.*, African Commission on Human and People's Rights, *Resolution on Climate Change and Forced Displacement in Africa*, No. ACHPR/Res. 491 (LXIX)2021 (31 December 2021); African Commission on Human and People's Rights, *Resolution on Climate Change and Human Rights and the Need to Study its Impact in Africa*, No. ACHPR/Res. 153 (XLVI)09 (25 November 2009); African Commission on Human and People's Rights, *Resolution on Climate Change in Africa*, No. ACHPR/Res. 271(LV)2014 (12 May 2014).

[24] African Commission on Human and People's Rights, *Guidelines on the Right to Water in Africa* (2019), para. 31.1.

- "integrate human rights impact assessments into climate change mitigation and adaptation actions, ensuring these measures do not interfere with the enjoyment of the right to water"; and

- "ensure accountability and effective remedy for human rights harms caused by climate change".[25]

19. The first point is in line with the prevention principle under international environmental law. States are obligated to "prevent" the negative human rights impacts of climate change.[26] Elsewhere, the Guidelines emphasize that "States' due diligence is required to avoid negative human rights impacts".[27] This is consistent with the views expressed by the European Union in its Written Statement that "human rights obligations in relation to climate change are obligations of ... due diligence, entailing a duty to prevent human rights violations".[28] The CESCR has confirmed the extraterritorial nature of this obligation, affirming that States must "prevent their own citizens and companies from violating the right to water of individuals and communities *in other countries*".[29] This extraterritorial obligation reinforces the idea that States have a responsibility to ensure their policies do not adversely affect the human rights of individuals beyond their borders. This principle supports the broader application of the Guidelines and the necessity of a human rights-based approach to climate action.

20. The second point is analogous to the obligation to conduct environmental impact assessments under international environmental law. Here, the Guidelines require States to conduct "human rights impact assessments" ("HRIAs") with respect to climate change. Critically, that applies with respect to *both* mitigation and adaptation actions.[30] This is consistent with the ACHPR's holding in *SERAC v. Nigeria* that the African Charter on Human and Peoples' Rights requires the performance of "environmental *and social* impact studies

---

[25] *Ibid.*, paras. 31.1, 31.1.iii, 31.1.ix.

[26] *Ibid.*, para. 31.1.

[27] *Ibid.*, para. 6.4.

[28] European Union Written Statement, para. 269.

[29] UN CESCR, *General Comment No. 15* (2003), para. 33 (emphasis added).

[30] African Commission on Human and People's Rights, *Guidelines on the Right to Water in Africa* (2019), para. 31.1.iii.

prior to any major industrial development".[31] And it is further in line with the CESCR's observation in General Comment No. 15 that States should "assess[] the impacts of actions that may impinge upon water availability ... such as climate changes".[32]

21. The third point makes clear that these obligations are actionable. There must be "accountability and effective remedy for human rights harms caused by climate change".[33] This is consistent with the ACHPR's jurisprudence finding violations of the African Charter due to conduct infringing upon the right to water—including in the *FLAG v. Zaire*, *SERAC v. Nigeria*, and *SHRO & COHRE v. Sudan* cases.[34] These cases demonstrate that, indeed, the right to water in Africa is not merely aspirational but has always been considered a justiciable one that imposes concrete and enforceable obligations on States.[35] This jurisprudence further reinforces the principle that States must not only prevent violations but also offer remedies when violations occur.[36]

22. Namibia respectfully submits that the approach of the ACHPR to the right to water merits special attention, as it has been at the forefront of developing the right under international law. Africa is the only inhabited continent on the planet where *every* State is considered "water insecure".[37] Over 85% of the continent's population does not have access to

---

[31] African Commission on Human and People's Rights, *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, Communication No. 155/96, Decision (27 October 2001), para. 53 (emphasis added).

[32] UN CESCR, *General Comment No. 15* (2003), para. 28.

[33] African Commission on Human and People's Rights, *Guidelines on the Right to Water in Africa* (2019), para. 31.1.ix.

[34] African Commission on Human and People's Rights, *Free Legal Assistance Group and Others v. Zaire*, Communications Nos. 25/89, 47/90, 56/91, 100/93, Decision (October 1995), para. 47; African Commission on Human and People's Rights, *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, Communication No. 155/96, Decision (27 October 2001); African Commission on Human and People's Rights, *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v. Sudan*, Communications Nos. 279/03-296/05, Decision (May 2009), para. 212.

[35] *See, e.g.*, African Commission on Human and People's Rights, *Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights* (2011), para. 92(a)-(c); African Commission on Human and People's Rights, *Resolution on the Right to Water Obligations*, No. ACHPR/Res.300(EXT.OS/XVII)2015 (28 February 2015).

[36] African Commission on Human and People's Rights, *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, Decision (27 October 2001); African Commission on Human and People's Rights, *Sudan Human Rights Organisation, Centre on Housing Rights and Evictions v. The Sudan*, Decision (27 May 2009); African Commission on Human and People's Rights, *Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Te'moins de Jehovah v. Zaire*, Decision (11 October 1995).

[37] United Nations University, *Global Water Security 2023 Assessment* (2023), pp. 92-98.

safe drinking water, and approximately 30% lacks access to basic drinking water services.[38] Among the 10 States in the world that are most at risk of drought, eight are in Africa,[39] including Namibia.[40]

23. In sum, with the aridity caused by climate change, States across the globe are or will soon face water insecurity. It is thus instructive, if not essential, for the Court, in interpreting the right to water under general international law, to take into account the treatment of that right in the African human rights system. Water, as a scarce and vital resource, will become increasingly important for many States with the absence of it posing the risk of giving rise to conflicts. It is important that the obligations of States in the climate and human rights contexts are read in a systemic manner in line with the notion of international law as a unified instead of fragmented legal system. This Court, as the principal judicial organ of the United Nations, has a critical role to play in ensuring that unity and coherence in the interpretation and application of international law.

[38] *Ibid.*, p. 105.

[39] *Ibid.*, p. 78.

[40] *Ibid.*

III. INTERNATIONAL ENVIRONMENTAL LAW

24. Namibia explained in its Written Statement how customary rules of international environmental law—including the prevention principle, the due diligence obligation, the obligation to conduct environmental impact assessments ("the EIA obligation"), the precautionary principle, and the CBDR-RC principle—apply to climate change.[41] Namibia's position in this regard is consistent with those of the large majority of participants in the present proceedings.[42]

25. The *lex specialis* proponents, however, contend otherwise. They argue that customary obligations under international environmental law either do not apply to climate change mitigation,[43] or are subsumed into the obligations contained in the UNFCCC, the Kyoto Protocol, and the Paris Agreement.[44] Their argument is based on the premise that these treaties constitute *lex specialis* for climate change.

26. Once again, however, the ILC's criteria of "actual inconsistency" and "discernible intention" are not satisfied. There is no "actual inconsistency" between the climate change treaties and the customary rules of international environmental law. Furthermore, there is no "discernible intention" that any provision of the climate change treaties was to exclude these customary rules.

27. The following sections address the *lex specialis* argument in greater detail with respect to three customary rules of significant importance to the fight against climate change:

---

[41] Namibia Written Statement, § IV.A.

[42] *See, e.g.*, African Union Written Statement, § IV.B; COSIS Written Statement, § III.B.1; Ecuador Written Statement, § 3.II; Egypt Written Statement, § VI.B.1-3; France Written Statement, para. 58; Madagascar Written Statement, para. 36; Mauritius Written Statement, § V.E; Netherlands Written Statement, para. 3.65; Republic of Korea Written Statement, paras. 32-40; Switzerland Written Statement, secs. II.B, II.E.

[43] *See, e.g.*, China Written Statement, para. 128; India Written Statement, para. 17.

[43] *See, e.g.*, China Written Statement, para. 128; India Written Statement, para. 17; New Zealand Written Statement, paras. 96, 101-103; OPEC Written Statement, p. 36; *see also* Australia Written Statement, para. 4.10; United States Written Statement, § IV.A.ii.

[44] *See, e.g.*, Australia Written Statement, para. 2.62; Japan Written Statement, paras. 11-13; Kuwait Written Statement, § II.B; New Zealand Written Statement, paras. 104-106; Denmark, Finland, Iceland, Norway and Sweden Written Statement, paras. 72-74; OPEC Written Statement, p. 36; Singapore Written Statement, para. 3.20; South Africa Written Statement, para. 14; United Arab Emirates Written Statement, paras. 91, 102; United States Written Statement, para. 4.1.

the prevention principle (**Section III.A**); the precautionary principle (**Section III.B**); and the EIA obligation (**Section III.C**).

A. The Prevention Principle

28. There is widespread agreement among participants in these proceedings that the prevention principle, including the due diligence obligation, applies to climate change.[45] As Sri Lanka rightly observed in its Written Statement, "perhaps *the most important principle* of international law that addresses climate change is the principle of prevention of transboundary harm".[46] ITLOS, in its recent advisory opinion, stressed that the standard of due diligence which States must meet with respect to preventing harm caused by GHG emissions is "stringent".[47]

29. The *lex specialis* proponents argue that the prevention principle either does not apply to climate change[48] or is subsumed into obligations contained in the three climate change treaties[49]—most prominently, the obligation to submit nationally determined contributions ("NDCs") under Article 4(2) of the Paris Agreement.[50] As one proponent asserts, "[t]his is the extent to which the prevention principle applies" in the climate change mitigation context.[51] Another contends, "to the extent that a State complies with the UNFCCC, the Kyoto Protocol, and the Paris Agreement ... it should be regarded as complying with the no-harm principle".[52]

---

[45] *See, e.g.*, African Union Written Statement, para. 93; Albania Written Statement, para. 65; Ecuador Written Statement, para. 3.25; El Salvador Written Statement, para. 37; France Written Statement, para. 58; Kenya Written Statement, § 5.I; Mexico Written Statement, § IV.A; Netherlands Written Statement, para. 3.65; Pakistan Written Statement, para. 36; Palau Written Statement, para. 16; Republic of Korea Written Statement, para. 37; Sri Lanka Written Statement, para. 95; Switzerland Written Statement, § II.B; Thailand Written Statement, paras. 7-17.

[46] Sri Lanka Written Statement, para. 95 (emphasis added).

[47] *ITLOS Climate Change Advisory Opinion*, para. 241.

[48] *See, e.g.*, China Written Statement, para. 128; India Written Statement, para. 17; New Zealand Written Statement, paras. 96, 101-103; OPEC Written Statement, p. 36; *see also* Australia Written Statement, para. 4.10; United States Written Statement, § IV.A.ii.

[49] *See, e.g.*, Australia Written Statement, paras. 2.62, 4.11; Japan Written Statement, paras. 11-13; Kuwait Written Statement, paras. 73-75; New Zealand Written Statement, paras. 104-106; Denmark, Finland, Iceland, Norway and Sweden Written Statement, paras. 72-74; OPEC Written Statement, p. 36; Singapore Written Statement, para. 3.20; South Africa Written Statement, para. 14; United Arab Emirates Written Statement, paras. 91, 102; United States Written Statement, § IV.A.iii.

[50] Kuwait Written Statement, paras. 74-75; Denmark, Finland, Iceland, Norway and Sweden Written Statement, paras. 72, 74; United States Written Statement, paras. 4.24-4.26.

[51] Kuwait Written Statement, para. 75.

[52] United Arab Emirates Written Statement, para. 102.

30. There is, however, no basis for this view. To take the first of the ILC's criteria, there is no "actual inconsistency" between the prevention principle and the climate change treaties. As the Court affirmed in *Pulp Mills*, the former requires every 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".[53] While fulfilling the obligations set forth in the climate change treaties may be *a* means of preventing significant damage to the environment of other States, it does not constitute *all* the means of doing so. It should moreover be recalled that *Pulp Mills* concerned alleged breaches of a specialized treaty—the Statute of the River Uruguay—yet the Court nonetheless confirmed the applicability of the customary principle of prevention. The prevention principle operates independently and complements treaty obligations and the application thereof, rather than excluding them.

31. There is also no "discernible intention" that any provision of the climate change treaties was meant to exclude the prevention principle. Namibia, when subscribing to the climate change treaties, certainly did not intend to displace this principle, and there is no indication that any other States intended to either. The climate change treaties, including the UNFCCC, the Kyoto Protocol, and the Paris Agreement, do not contain language explicitly indicating an intention to override or exclude customary environmental obligations such as the prevention principle.

32. In fact, the UNFCCC itself codifies the principle when affirming in its preamble that "States have ... the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction".[54] This provision reflects a recognition of the prevention principle within the framework of the treaty, suggesting that the intention was to complement rather than replace existing customary obligations. This further supports the view that the climate change treaties are designed to work in harmony with, rather than to negate, customary principles in addressing global environmental challenges, including climate change.

---

[53] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010*, p. 14 ("*Pulp Mills*"), para. 101 (emphasis added).

[54] 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"), preamble.

33. As Switzerland correctly observed:

> There are no norms in the [climate change] conventions derogating from the no-harm rule .... It follows that there is no normative conflict between this general international principle and these conventions .... By definition, a *lex specialis* presupposes a normative conflict between the general rule and the more specific rules. This is clearly not the case regarding the relationship between the no-harm rule and the conventions on climate change ....[55]

34. Namibia agrees. The prevention principle under customary international law applies fully to climate change. The climate change treaties in no way diminish its application in the climate change context. Instead, they complement and operationalize the principle by setting specific targets and obligations that align with the broader aim of preventing transboundary environmental harm.

35. This is not to say that the treaties have no relevance in applying the prevention principle to climate change. To the contrary, by virtue of systemic integration,[56] principles underlying the climate change treaties may help inform the climate change mitigation obligations that arise from the prevention principle.

36. The CBDR-RC principle,[57] for example, is embedded throughout the climate change treaties,[58] including in the NDC obligation under Article 4 of the Paris Agreement.[59] This principle should thus also be applied when determining whether a State has fulfilled its mitigation obligations pursuant to the prevention principle. Indeed, many participants in the present proceedings agree that the CBDR-RC principle must be applied not only in the context of the climate change treaties, but also when ascertaining the specific measures that a State must take to comply with its customary obligation to prevent significant transboundary harm.[60] Consistent with this, ITLOS's recent advisory opinion held that States in determining the

---

[55] Switzerland Written Statement, paras. 66-68.

[56] *See* Namibia Written Statement, paras. 42-45.

[57] *See ibid.*, § IV.A.3.

[58] UNFCCC, preambular para. 6, Arts. 3(1), 4(1); Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 11 December 1997, entered into force 16 February 2005), 2303 UNTS 162 (Dossier No. 11) ("Kyoto Protocol"), Art. 10; Paris Agreement, preambular para. 3, Arts. 2(2), 4(3), 4(19).

[59] Paris Agreement, Art. 4(3).

[60] *See, e.g.*, Antigua and Barbuda Written Statement, paras. 228, 230; Costa Rica Written Statement, para. 61; Ecuador Written Statement, para. 3.31; Kenya Written Statement, para. 7.125(f); Sierra Leone Written Statement, paras. 3.41, 4.5; United Arab Emirates Written Statement, para. 145.

"necessary measures to prevent ... marine pollution from anthropogenic GHG emissions" must take into account their own "available means and capabilities".[61] This approach ensures that States' obligations are commensurate with their capacities and resources. The Court should likewise confirm that the CBDR-RC principle applies when identifying the mitigation obligations of States arising from the prevention principle.

37. The principle of intergenerational equity should also be applied when determining a State's specific obligations to prevent significant transboundary harm. The principle is referenced in Article 3(1) of the UNFCCC and the preamble to the Paris Agreement.[62] And several participants in these proceedings have expressly recognized that its applicability extends beyond the treaties to the customary obligation to prevent transboundary harm in the climate change context.[63] The Court should thus confirm that the principle of intergenerational equity applies in the context of ascertaining the mitigation obligations of States under the prevention principle.

B. The Precautionary Principle

38. In its Written Statement, Namibia explained how the precautionary principle has crystallized into custom, and applies in the context of climate change in view of the scientific uncertainty regarding the precise impacts of GHGs on climate change.[64] Many participants in the present proceedings expressed this same understanding.[65] ITLOS did as well.[66] As the Tribunal rightly explained, in the climate change context "the precautionary approach is *all the more necessary* given the serious and irreversible damage that may be caused".[67] Given the potentially catastrophic impacts of climate change, States are obligated to take precautionary measures even if some cause-and-effect relationships are not fully established scientifically. This principle necessitates proactive and comprehensive climate action, extending beyond the

---

[61] *ITLOS Climate Change Advisory Opinion*, para. 207.

[62] UNFCCC, Art. 3(1); Paris Agreement, preambular para. 11.

[63] *See, e.g.*, Kenya Written Statement, para. 7.125(f); Sierra Leone Written Statement, para. 4.5; Vanuatu Written Statement, para. 482.

[64] Namibia Written Statement, § IV.A.2.

[65] *See, e.g.*, African Union Written Statement, para. 97(c); Bangladesh Written Statement, para. 94; Belize Written Statement, para. 51(d); Ecuador Written Statement, para. 3.43; IUCN Written Statement, paras. 350-351; Kenya Written Statement, para. 5.12; Mauritius Written Statement, para. 196; Mexico Written Statement, para. 57; Micronesia Written Statement, para. 64; Solomon Islands Written Statement, para. 133.

[66] *ITLOS Climate Change Advisory Opinion*, para. 213.

[67] *Ibid.*, para. 213 (emphasis added).

specific mandates of existing climate treaties. The *lex specialis* proponents' narrow interpretation undermines the objectives of the precautionary principle and limits the scope of obligations needed to address the full scope of climate risks.

39. Many of the *lex specialis* proponents do not even attempt to challenge this position. A handful, however, assert that the principle does not reflect custom,[68] or has been subsumed into the climate change treaties, such that it does not establish obligations beyond those contained in the treaties.[69] This is problematic, as some of them contend that the principle as contained in the treaties is non-binding.[70] These participants place emphasis on how Article 3(3) of the UNFCCC uses the word "should" (instead of "shall") in connection with precautionary measures,[71] and how the preambles to the Kyoto Protocol and the Paris Agreement state that the Parties are "[g]uided" (instead of "bound") by the principle.[72] The use of "should" and "guided" does not negate or diminish the binding nature of the principle or obligation outlined elsewhere in the treaty but rather reflects the flexibility in how States are expected to implement precautionary measures.

40. Moreover, the interpretation of legal obligations should consider the treaty as a whole, including its preamble, objectives, and context, to ensure the effective implementation of its provisions. Therefore, while some provisions may not impose standalone legal obligations, they contribute to the overall legal framework and should be interpreted in conjunction with other treaty provisions to uphold the treaty's objectives and principles.

41. Indeed, there is no sound basis for diluting the precautionary principle as some of the *lex specialis* proponents propose to do. Just because the climate change treaties refer to the principle in the above manner does *not* diminish its legal content. Indeed, the most authoritative formulation of the principle, as set forth in the Rio Declaration, provides that "the precautionary

---

[68] *See, e.g.*, Indonesia Written Statement, para. 63; Kuwait Written Statement, para. 65; *see also* Denmark, Finland, Iceland, Norway and Sweden Written Statement, para. 76.

[69] Kuwait Written Statement, paras. 67, 69-71; New Zealand Written Statement, para. 109; OPEC Written Statement, pp. 36-37.

[70] Kuwait Written Statement, para. 69, 71; OPEC Written Statement, para. 88.

[71] UNFCCC, Art. 3(3).

[72] Kyoto Protocol, preambular para. 4; Paris Agreement, preambular para. 3.

approach *shall* be widely applied by States".[73] Many multilateral environmental treaties similarly provide that the precautionary principle "shall" be applied.[74]

42. African environmental treaties do the same. The African Nature Convention, for example, provides that "[t]he Parties *shall* adopt and implement all measures necessary to achieve the objectives of this Convention, in particular through ... the application of the precautionary principle".[75] The Bamako Convention similarly states that "[t]he Parties *shall* co-operate with each other ... to implement the precautionary principle to pollution prevention".[76]

43. The references to the precautionary principle in the climate change treaties do not detract from its mandatory nature. There is no "actual inconsistency" between the references to the principle in the climate change treaties on the one hand, and the content of the principle under customary international law, on the other. Nor is there any "discernible intention" that the former was to displace the latter. The principle remains integral to the treaties and complements rather than contradicts their provisions. The principle's application remains vital and undiminished, serving as a foundational guide for climate action and environmental protection in the context of evolving scientific understanding and potential risks.

44. The Court should thus declare that the precautionary principle *shall* apply to climate change mitigation obligations, such that, in view of the threats of serious and irreversible damage, scientific uncertainty requires taking precautionary measures. As Namibia recalled in its Written Statement,[77] the Intergovernmental Panel on Climate Change ("IPCC") has found that, even if the global average temperature increases by just 1.1°C above pre-industrial levels, there would be a moderate risk of crossing critical tipping points, such as mass loss from the

---

[73] Rio Declaration on Environment and Development (1992) (Dossier No. 137), principle 15 (emphasis added).

[74] *See, e.g.*, 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 (opened for signature 4 August 1995, entered into force 11 December 2001) (Dossier No. 47), Art. 6(1); 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972 (concluded 7 November 1996, entered into force 24 March 2006), Art. 3(1).

[75] African Convention on the Conservation of Nature and Natural Resources (adopted 11 July 2003, entered into force 23 July 2016), Art. IV (emphasis added).

[76] Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa (adopted 30 January 1991, entered into force 22 April 1998), Art. 4(3)(f) (emphasis added).

[77] Namibia Written Statement, para. 69.

Antarctic and Greenland ice sheets.[78] Indeed, the Organisation for Economic Co-operation and Development ("OECD") reports that certain tipping points may have *already* been crossed.[79] This calls for the urgent need for precautionary action to mitigate potential environmental catastrophes.

45. Accordingly, the precautionary principle mandates that, in view of the uncertainty in the precise manifestations of climate change, States must not allow that uncertainty to forestall effective action. States must, pursuant to the principle, take immediate and substantial measures to minimize their GHG emissions. This principle necessitates proactive and comprehensive action, ensuring that efforts to combat climate change are robust and responsive to the uncertainties inherent in predicting future environmental impacts. Given the climate crisis facing our planet today, the principle is not only obligatory but also critical for safeguarding our environment and promoting global sustainability.

C. The EIA Obligation

46. The prevention principle encompasses a procedural and due diligence obligation to carry out an EIA where a proposed activity risks causing significant transboundary harm.[80] The large majority of participants in the present proceedings that address the subject agree that this customary obligation applies to GHG emissions.[81]

47. Some of the *lex specialis* proponents, however, assert that this obligation does not extend beyond what is required by the climate change treaties.[82] One such proponent argues that the customary EIA obligation is entirely subsumed into Article 4(1)(f) of the UNFCCC,[83] which requires States to "employ appropriate methods, for example impact assessments,

---

[78] IPCC, *Climate Change 2022: Impacts, Adaptation and Vulnerability* (2022) (Dossier No. 76), p. 70.

[79] OECD, *Climate Tipping Points: Insights for Effective Policy Action* (2022), p. 11.

[80] *See, e.g., Pulp Mills*, para. 204; *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*, para. 104; *Dispute over the Status and Use of the Waters of the Silala (Chile v. Bolivia), Judgment, I.C.J. Reports 2022*, para. 114.

[81] *See, e.g.*, African Union Written Statement, para. 96(c); Albania Written Statement, fn. 99; Bangladesh Written Statement, para. 132; Belize Written Statement, para. 47; Costa Rica Written Statement, paras. 43-44; Ecuador Written Statement, para. 3.38; Ghana Written Statement, para. 26; IUCN Written Statement, para. 422; Mauritius Written Statement, para. 195; Netherlands Written Statement, paras. 3.71-3.72.

[82] *See, e.g.*, Kuwait Written Statement, paras. 76, 79-81; South Africa Written Statement, paras. 14, 97-98; United States Written Statement, § IV.A.iii, fn. 297.

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

formulated and determined nationally, with a view to minimizing adverse effects on the economy, on public health and on the quality of the environment, of projects or measures undertaken by them to mitigate or adapt to climate change".[84]

48. There is nothing in this provision, however, which indicates that it subsumes the customary EIA obligation. Article 4(1)(f) is in fact much less concrete: it merely provides that "impact assessments" may be "appropriate", whereas the customary obligation makes clear that EIAs must be conducted whenever a proposed activity risks causing significant transboundary harm. The Article 4(1)(f) obligation is also narrower: it applies only to "projects or measures" undertaken by the State itself, whereas the customary EIA obligation, as a derivative of the prevention principle, applies to any activities within the State's "jurisdiction or control".[85] If Article 4(1)(f) were to represent the full extent to which the EIA obligation applies in the climate change context, then the obligation would in practice be reduced to very little.

49. This is not the case. There is no "actual inconsistency" between Article 4(1)(f) and the customary EIA obligation, as required for the *lex specialis* principle to apply. There is also no "discernible intention" behind the former to exclude the latter. If anything, the reference to "impact assessments" in Article 4(1)(f) is best interpreted as *supporting* the customary law requirement to conduct EIAs.

50. The Court should thus confirm that the customary EIA obligation applies in the climate change context. It should also confirm that the obligation applies to both activities undertaken by the State and activities carried out within the State's "jurisdiction or control", including in marine areas beyond national jurisdiction, and it should include activities undertaken by transnational corporations throughout its value chains.[86] The Court, building on the submissions of States, its own jurisprudence and that of other tribunals, should further establish the minimum requirements for EIAs in the climate change context.[87] Otherwise,

---

[84] UNFCCC, Art. 4(1)(f).

[85] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, para. 29.

[86] 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), Art. 206; 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 (adopted 19 June 2023), Art. 28(2); *see also* IACtHR, *The Environment and Human Rights*, Advisory Opinion OC-23/17 (15 November 2017), paras. 158, 160.

[87] *Cf.* Convention on Environmental Impact Assessment in a Transboundary Context (adopted 25 February 1991, entered into force 10 September 1997), 1989 UNTS 309, appendix II; Agreement under the United Nations

States would be incentivized to adopt lenient EIA standards and without significant enforcement mechanisms to attract private companies seeking to limit their climate change mitigation obligations—the classic race to the bottom.

51. These minimum requirements arise naturally from the Court's recognition that the requisite content of an EIA should depend on "the nature and magnitude of the proposed [activity] and its likely adverse impact on the environment".[88] Given the catastrophic consequences of climate change, the minimum requirements for EIAs in the climate change context must include taking into account, among other things: the "stringent" standard of due diligence in the climate change context;[89] the "high risks of serious and irreversible harm" due to climate change;[90] the precautionary principle;[91] the potential harm caused to future generations;[92] and the impact of cumulative GHG emissions,[93] including Scope 3 emissions—that is, emissions that the proposed activity does not directly produce, but which it is indirectly responsible for through the wider value chain.[94] Only by establishing such minimum requirements can the customary EIA obligation be "effective".[95] These requirements ensure that EIAs are not merely procedural formalities but are substantive tools for environmental protection. They provide a robust framework for assessing the full spectrum of potential impacts and for implementing necessary measures to mitigate harm. The Court's affirmation of these standards will reinforce the global commitment to addressing climate change and ensure that States fulfill their obligations under both customary international law and treaty law.

* * *

Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction (adopted 19 June 2023), Arts. 27-39.

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

[89] *See ITLOS Climate Change Advisory Opinion*, para. 243.

[90] *See ibid.*

[91] *See* Belize Written Statement, para. 56(c).

[92] *See ibid.*, para. 56(f).

[93] *See* IACtHR, *The Environment and Human Rights*, Advisory Opinion OC-23/17 (15 November 2017), para. 165; Belize Written Statement, para. 57; Mauritius Written Statement, para. 195.

[94] *See* Mauritius Written Statement, para. 195.

[95] *Ibid.*

52. In sum, there is no basis for the argument that the UNFCCC, the Kyoto Protocol, and the Paris Agreement fully subsume States' customary obligations under international environmental law. No "actual inconsistency" exists between the former and the latter, and no "discernible intention" may be found in the provisions of the former to exclude the application of the latter to climate change. As Switzerland observed:

> The specific rules of the relevant conventions, in particular those of the Paris Agreement, may be used to interpret the rules of customary international law. This should not, however, result in a weakening or relativisation of the obligations arising from customary law, *but rather in their strengthening*.[96]

53. Namibia concurs. The climate change treaties should not be interpreted as displacing the customary obligations under international environmental law. Rather, they are complementary and mutually reinforcing, providing a robust legal framework for addressing climate change.

[96] Switzerland Written Statement, para. 71 (emphasis added).

IV. THE COMPENSATION IMPERATIVE

54. A third area where the *lex specialis* proponents seek to exclude rules of international law is with regards to the legal consequences arising from non-compliance with climate change mitigation obligations. In this respect, Namibia agrees with the large majority of participants in these proceedings that the framework set forth in ARSIWA should be followed, including the principle of compensation.[97]

55. Certain *lex specialis* proponents, however, argue that the relevant rules are again found exclusively in the climate change treaties.[98] They contend that the legal consequences for breach of climate change mitigation obligations are dealt with through various mechanisms embedded in those treaties, such as the Compliance Committee under Article 18 of the Kyoto Protocol, [99] the Warsaw International Mechanism for Loss and Damage ("Warsaw Mechanism") established under Article 8 of the Paris Agreement,[100] the Implementation and Compliance Committee under Article 15 of the Paris Agreement, [101] and the recently operationalized Loss and Damage Fund.[102] These mechanisms are said to preclude the concepts of liability, cessation, reparation, and compensation as legal consequences for breaches of climate change mitigation obligations.[103]

56. Namibia agrees that the aforementioned mechanisms are important tools. Indeed, Namibia particularly welcomes the fact that the international community could find a way out of the current impasse through the recently created Loss and Damage Fund. However, Namibia

---

[97] *See, e.g.*, African Union Written Statement, § V.C; Bahamas Written Statement, § VI; Colombia Written Statement, § 4; Costa Rica Written Statement, § E.b; Democratic Republic of the Congo Written Statement, § IV; Egypt Written Statement, § VII.B; El Salvador Written Statement, § IV.C; India Written Statement, § VIII; Kiribati Written Statement, § IV.C; Madagascar Written Statement, § IV; Peru Written Statement, § IV.D; Switzerland Written Statement, § III; Thailand Written Statement, § IV; Tuvalu Written Statement, § IV; Uruguay Written Statement, § IV.B.

[98] *See, e.g.*, China Written Statement, paras. 134-141; European Union Witness Statement, para. 351; Japan Written Statement, para. 41; Kuwait Written Statement, paras. 3(4), 86; OPEC Written Statement, para. 96; Saudi Arabia Written Statement, para. 6.3; South Africa Written Statement, paras. 14, 131.

[99] *See, e.g.*, Kuwait Written Statement, para. 95.

[100] *See, e.g.*, China Written Statement, para. 141; Saudi Arabia Written Statement, para. 6.4.

[101] *See, e.g.*, China Written Statement, para. 140; Kuwait Written Statement, paras. 96(3), 97; OPEC Written Statement, para. 96(1).

[102] *See, e.g.*, China Written Statement, para. 141; European Union Written Statement, para. 355; Japan Written Statement, para. 45; South Africa Written Statement, para. 131.

[103] *See, e.g.*, China Written Statement, para. 141; European Union Written Statement, para. 353; Japan Written Statement, para. 44; Kuwait Written Statement, paras. 104-107; OPEC Written Statement, para. 99; Saudi Arabia Written Statement, para. 6.4.

strongly objects to any idea that these mechanisms operate to the exclusion of the customary rules on legal consequences set forth in ARSIWA, including those on reparation, compensation, and satisfaction. Indeed, many States in their Written Statements expressly rejected the claim that *lex specialis* somehow applies in this context.[104]

57. Once again, there is no "actual inconsistency" between those mechanisms and the rules set forth in ARSIWA. The Loss and Damage Fund, for example, can continue to operate while States seek compensation for harm incurred as a result of other States' breaches of their climate change mitigation obligations. The Warsaw Mechanism under Article 8 of the Paris Agreement is no different. As several States noted in their Written Statements,[105] the Conference of the Parties, when adopting the Paris Agreement, expressly decided that "Article 8 of the Agreement does *not* involve or provide a basis for any liability or compensation".[106] There can be no inconsistency if the mechanisms do not address the same subject-matter covered by ARSIWA.

58. International human rights law is instructive in this regard. Many multilateral human rights treaties establish committees to monitor States' compliance with their provisions.[107] Yet, the existence of these committees does not foreclose application of the customary rules on legal consequences codified in ARSIWA. To the contrary, States alleging breaches of these treaties before the Court have consistently requested reparation in accordance

---

[104] *See, e.g.*, Albania Written Statement, para. 129, fn. 195; Antigua and Barbuda Written Statement, para. 533; Democratic Republic of the Congo Written Statement, para. 270; Ecuador Written Statement, para. 4.6; Egypt Written Statement, para. 288.

[105] *See, e.g.*, Antigua and Barbuda Written Statement, fn. 567; Barbados Written Statement, para. 265; Democratic Republic of the Congo Written Statement, para. 270.

[106] Conference of the Parties, Decision 1/CP.21, *Adoption of the Paris Agreement*, para. 51, *reproduced in Report of the Conference of the Parties on its twenty-first session, held in Paris from 30 November to 13 December 2015: Addendum: Part two: Action taken by the Conference of the Parties at its twenty-first session*, UN Doc. FCCC/CP/2015/10/Add.1 (29 January 2016), p. 8 (emphasis added).

[107] *See, e.g.*, International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969), 660 UNTS 195, Art. 8; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976), 999 UNTS 171, Art. 28.

with the provisions of ARSIWA,[108] and the Court has not shied away from awarding compensation for such breaches.[109]

59. Even if, *quod non*, there was any "actual inconsistency" between the mechanisms found in the climate change treaties and the ARSIWA rules on legal consequences, there is certainly no "discernible intention" behind the former to exclude the latter. In fact, the intention was the opposite. As several participants observed in their Written Statements,[110] a number of States upon signing or ratifying the UNFCCC made declarations stating that their signature or ratification "shall in no way constitute a renunciation of any rights under international law concerning state responsibility for the adverse effects of climate change".[111] It would be contrary to their intentions if the Court were to hold that all States, by agreeing to the climate change treaties, renounced their rights under the customary rules of State responsibility as codified in ARSIWA.

60. If any of the mechanisms under the climate change treaties were to have the effect of displacing the ARSIWA rules, then their operationalization would be a step *backwards* in the fight for climate justice. They were not, however, intended to have such an effect. Rather, these mechanisms constitute a step *forward*, and serve to strengthen the principles surrounding legal consequences as prescribed by ARSIWA. They endorse the notion that States suffering the most from the impacts of climate change should receive financial support for the injuries they have incurred and such support should be financed by the States that have the highest emission rates.

61. Here, Namibia wishes to highlight that in considering the options for reparation a court or tribunal is not limited to an award of compensation in the traditional sense but may consider appropriate forms of satisfaction such as debt forgiveness. Namibia, like many

---

[108] *See, e.g., Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, para. 17; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Preliminary Objections, Judgment, I.C.J. Reports 2021*, para. 22; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan), Provisional Measures, Order of 7 December 2021, I.C.J. Reports 2021*, para. 2.

[109] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Judgment, I.C.J. Reports 2012*, para. 61.

[110] *See, e.g.*, Albania Written Statement, fn. 195; Sierra Leone Written Statement, fns. 408, 429; Vanuatu Written Statement, para. 433.

[111] UN Climate Change, *Declarations by Parties*, *available at* https://unfccc.int/process-and-meetings/the-convention/status-of-ratification/declarations-by-parties.

developing States, pays a substantial amount of its GDP to servicing foreign debts, sometimes to the very States that have contributed the most to the emission of greenhouses. Satisfaction in the form of debt relief would enable Namibia to reevaluate its priorities by using the resulting savings for mitigation and adaptation measures.

62. As Namibia explained in its Written Statement, compensation is of utmost importance to remedy injuries caused by breaches of climate change mitigation obligations.[112] The first form of reparation—restitution—also has a role to play, such as through the application of carbon removal technologies. But given that complete restitution is not possible in the context of climate change, compensation is key to ensuring that full reparation is made. It is of particular importance to African States that face prohibitive costs associated with addressing the impacts of climate change, and with implementing adaptation projects to build climate resilience.[113] Access to remedies and compensation should be regarded as integral components for protecting the human rights of peoples, especially the right to water and the right to development.

63. Several *lex specialis* proponents argue that calculating the specific amount of damage caused by particular GHG emissions is impossible.[114] But this does not mean that ARSIWA's customary rules on legal consequences, including the legal principle of compensation, must be discarded. Compensation can still be awarded even if a precise quantification of damages cannot be calculated—as the Court has demonstrated in its jurisprudence, including in the context of environmental harm.[115]

64. Nor does any difficulty in establishing specific causality affect the right to invoke the responsibility of States for not complying with climate change mitigation obligations. One *lex specialis* proponent observed how, in the context of climate change harms, "all States are

---

[112] Namibia Written Statement, § V.A.2.

[113] *See ibid.*, paras. 140-142.

[114] China Written Statement, para. 138; Kuwait Written Statement, paras. 120-124; New Zealand Written Statement, para. 140(c); Russian Federation Written Statement, p. 17; Saudi Arabia Written Statement, para. 6.7; United Kingdom Written Statement, para. 126; United States Written Statement, paras. 2.20-2.26, 5.10; *see also* OPEC Written Statement, para. 118.

[115] *See, e.g.*, *Armed Activities*, *Judgment on Reparation*, para. 365; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Compensation, Judgment, I.C.J. Reports 2018*, para. 35; *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Compensation, Judgment, I.C.J. Reports 2012*, para. 33.

contributors to the injury to varying degrees".[116] But as the ECtHR held in *KlimaSeniorinnen v. Switzerland*, "a respondent State should not evade its responsibility by pointing to the responsibility of other States".[117] Namibia takes this view as well.

65. In summary, ARSIWA's rules on legal consequences are fully applicable in the context of climate change. The specific mechanisms established by the climate change treaties serve to advance the cause of providing reparation to States suffering the most from climate change. They must not be interpreted as displacing the customary rules on reparation, and in particular the principle of compensation.

66. The fact is that the Loss and Damage Fund does not yet have the substantial resources required by all Small Islands and Developing States (SIDS), including those in Africa, to tackle climate change adaptation and mitigation at the level that is required to ensure greater climate resilience. Furthermore, it is clearly the case that payment into the fund was not intended to foreclose the general rules on State responsibility.

---

[116] New Zealand Written Statement, para. 140(c).

[117] *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, para. 442.

V. CONCLUSION

67. The *lex specialis* fallacy is just that—a fallacy. There is no cogent reason why States' climate change mitigation obligations should be limited only to those expressly set forth in the UNFCCC, the Kyoto Protocol, and the Paris Agreement. Also, the Paris Agreement is not *lex specialis* in relation to the Kyoto Protocol—the stringent CBDR-RC provisions in the UNFCCC and Kyoto Protocol continues to frame the content of the obligations. These three instruments are the product of political compromise. They do not represent what is required under international law to address climate change. Rather, they represent the minimal obligations—primarily procedural in nature—that States were able to agree on through diplomatic negotiations.

68. International law, however, requires more. The right to water and other fundamental human rights, including the right to development, as well as customary environmental law, require States to minimize their GHG emissions, and take the necessary measures to hold the increase in the global average temperature to, at most, 1.5°C above pre-industrial levels, in accordance with the prevention, precautionary, and CBDR-RC principles. The customary rules on legal consequences for breaches of international law provide that States in non-compliance with their obligations are internationally responsible, and must pay compensation as appropriate. Waving a *lex specialis* wand does not make these obligations disappear.

69. Namibia thus respectfully asks that the Court reject the *lex specialis* fallacy and affirm these obligations under international law.

Dated at Brussels, Belgium on this 13..... Day of August 2024

Dr Mekondjo Kaapanda-Girnus

Ambassador of the Republic of Namibia

to the Kingdoms of Belgium and the Netherlands,

the Grand Duchy of Luxembourg

and Mission to the European Union

ON BEHALF OF THE

GOVERNMENT OF

THE REPUBLIC OF NAMIBIA