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CR 2024/44

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2024

Public sitting

held on Friday 6 December 2024, at 3 p.m., at the Peace Palace,

President Salam presiding,

***on the* Obligations of States in respect of Climate Change**
(Request for advisory opinion submitted by the General Assembly of the United Nations)

VERBATIM RECORD

ANNÉE 2024

Audience publique

tenue le vendredi 6 décembre 2024, à 15 heures, au Palais de la Paix,

sous la présidence de M. Salam, président,

***sur les* Obligations des États en matière de changement climatique**
(Demande d'avis consultatif soumise par l'Assemblée générale des Nations Unies)

COMPTE RENDU

Present:	President	Salam
	Vice-President	Sebutinde
	Judges	Tomka
		Abraham
		Yusuf
		Xue
		Bhandari
		Iwasawa
		Nolte
		Charlesworth
		Brant
		Gómez Robledo
		Cleveland
		Aurescu
		Tladi
	Registrar	Gautier

Présents : M. Salam, président
M^me^ Sebutinde, vice-présidente
MM. Tomka
Abraham
Yusuf
M^me^ Xue
MM. Bhandari
Iwasawa
Nolte
M^me^ Charlesworth
MM. Brant
Gómez Robledo
M^me^ Cleveland
MM. Aurescu
Tladi, juges

M. Gautier, greffier

The Government of the Republic of Latvia is represented by:

Ms Sanita Pēkale, Director General of the Legal Directorate, Ministry of Foreign Affairs,

HE Ms Solvita Āboltiņa, Ambassador Extraordinary and Plenipotentiary of the Republic of Latvia to the Kingdom of the Netherlands,

Mr Mārtiņš Paparinskis, Professor of Public International Law, University College London, member of the International Law Commission, member of the Permanent Court of Arbitration,

Mr Vladyslav Lanovoy, Assistant Professor in Public International Law, Université Laval,

Mr Joseph Crampin, Lecturer of International Law, University of Glasgow,

Ms Elīna Luīze Vītola, Representative of the Republic of Latvia before International Human Rights Institutions,

Mr Arnis Lauva, Head of the International Law Division, Ministry of Foreign Affairs,

Mr Gatis Šneiders, Counsellor, Deputy Head of Mission, Embassy of the Republic of Latvia in the Kingdom of the Netherlands,

Ms Sabīne Jansone, Jurisconsult, International Law Division, Ministry of Foreign Affairs.

The Government of the Principality of Liechtenstein is represented by:

HE Mr Pascal Schafhauser, Ambassador of the Principality of Liechtenstein to the Kingdom of Belgium,

Mr Valentin Flatz, Diplomatic Officer,

Mr Sina Alavi, Legal Adviser,

Ms Marion Crepet, Legal Adviser,

Ms Christina Hioureas, Partner, Foley Hoag LLP.

The Government of the Republic of Malawi is represented by:

HE Mr Thabo Chakaka-Nyirenda, Attorney General,

Ms Tafadzwa Pasipanodya, Partner, Foley Hoag LLP,

Mr Manuel Casas, Barrister, Twenty Essex,

Mr John Donald Chaula, Senior State Advocate,

Ms Nafisa Imuran Shareef, Senior State Advocate,

Ms Sun Young Hwang, Associate, Foley Hoag LLP,

Ms Nour Nicolas, Associate, Foley Hoag LLP,

For the complete list of delegations of all participants, please refer to CR 2024/35.

Le Gouvernement de la République de Lettonie est représenté par :

M^me^ Sanita Pēkale, directrice générale de la direction juridique, ministère des affaires étrangères,

S. Exc. M^me^ Solvita Āboltiņa, ambassadrice extraordinaire et plénipotentiaire de la République de Lettonie auprès du Royaume des Pays-Bas,

M. Mārtiņš Paparinskis, professeur de droit international public, University College de Londres, membre de la Commission du droit international, membre de la Cour permanente d'arbitrage,

M. Vladyslav Lanovoy, professeur adjoint de droit international public à l'Université Laval,

M. Joseph Crampin, chargé d'enseignement en droit international à l'Université de Glasgow,

M^me^ Elīna Luīze Vītola, représentante de la République de Lettonie auprès des institutions internationales des droits de l'homme,

M. Arnis Lauva, chef du département du droit international, ministère des affaires étrangères,

M. Gatis Šneiders, conseiller, chef de mission adjoint à l'ambassade de la République de Lettonie au Royaume des Pays-Bas,

M^me^ Sabīne Jansone, jurisconsulte, département du droit international, ministère des affaires étrangères.

Le Gouvernement de la Principauté du Liechtenstein est représenté par :

S. Exc. M. Pascal Schafhauser, ambassadeur de la Principauté du Liechtenstein auprès du Royaume de Belgique,

M. Valentin Flatz, agent diplomatique,

M. Sina Alavi, conseiller juridique,

M^me^ Marion Crepet, conseillère juridique,

M^me^ Christina Hioureas, associée, cabinet Foley Hoag LLP.

Le Gouvernement de la République du Malawi est représenté par :

S. Exc. M. Thabo Chakaka-Nyirenda, *Attorney General*,

M^me^ Tafadzwa Pasipanodya, associée, cabinet Foley Hoag LLP,

M. Manuel Casas, *Barrister*, cabinet Twenty Essex,

M. John Donald Chaula, premier avocat de l'État,

M^me^ Nafisa Imuran Shareef, première avocate de l'État,

M^me^ Sun Young Hwang, collaboratrice, cabinet Foley Hoag LLP,

M^me^ Nour Nicolas, collaboratrice, cabinet Foley Hoag LLP,

Pour consulter la liste complète de toutes les délégations, prière de se reporter au CR 2024/35.

Ms Diem Huong Ho, Associate, Foley Hoag LLP,

Mr Muhammad Syed, Paralegal, Foley Hoag LLP.

The Government of the Republic of Maldives is represented by:

HE Mr Ahmed Usham, Attorney General,

Ms Jessica Wells, member of the Bar of England and Wales, Essex Court Chambers,

Ms Naomi Hart, member of the Bar of England and Wales, Essex Court Chambers,

Ms Camille Boileau, member of the Bar of England and Wales, Essex Court Chambers,

Ms Faena Fayyaz, Senior State Counsel, Office of the Attorney General.

The African Union is represented by:

Ms Hajer Gueldich, Legal Counsel, African Union,

Mr Makane Moïse Mbengue, Professor of International Law, Director of the Department of International Law and International Organization, University of Geneva, associate member of the Institut de droit international,

Mr Mohamed S. Helal, member of the African Union Commission on International Law (2020-2025), member of the Permanent Court of Arbitration, Associate Professor of Law, Moritz College of Law, The Ohio State University,

Ms Melina Antoniadis, member of the Law Society of Ontario, and of the Bar of England and Wales, G37 Chambers,

Mr Damien Charlotin, Research Fellow, HEC Paris, Lecturer, Sciences Po Paris, Counsel,

Ms Ginevra Le Moli, Professor, European University Institute,

Ms Saadia Bhatty, Partner, Gide Loyrette Nouel,

Ms Leslie-Anne Duvic-Paoli, Reader in Environmental Law, King's College London,

Ms Chiara Giorgetti, Professor of Law, University of Richmond School of Law,

Ms Meseret Fassil Assefa, Associate Legal Officer, African Union,

Ms Lefa Mondon, Consultant in International Law, PhD candidate, University Paris Cité, counsel, SLV Partners,

Mr John Nyanje, Doctoral Research Fellow, Africa Multiple Cluster, University of Bayreuth and University of Hannover, Germany,

Mr Ahmed Ad-Dirdeiry, Associate Legal Officer, African Union.

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M^me^ Diem Huong Ho, collaboratrice, cabinet Foley Hoag LLP,

M. Muhammad Syed, assistant juridique, cabinet Foley Hoag LLP.

Le Gouvernement de la République des Maldives est représenté par :

S. Exc. M. Ahmed Usham, *Attorney General*,

M^me^ Jessica Wells, membre du barreau d'Angleterre et du pays de Galles, Essex Court Chambers,

M^me^ Naomi Hart, membre du barreau d'Angleterre et du pays de Galles, Essex Court Chambers,

M^me^ Camille Boileau, membre du barreau d'Angleterre et du pays de Galles, Essex Court Chambers,

M^me^ Faena Fayyaz, conseillère principale d'État, bureau de l'*Attorney General*.

L'Union africaine est représentée par :

M^me^ Hajer Gueldich, conseil juridique de l'Union africaine,

M. Makane Moïse Mbengue, professeur de droit international et directeur du département de droit international public et organisation internationale de l'Université de Genève, membre associé de l'Institut de droit international,

M. Mohamed S. Helal, membre de la Commission de l'Union africaine sur le droit international (2020-2025), membre de la Cour permanente d'arbitrage, professeur associé de droit au Moritz College of Law de l'Université de l'État de l'Ohio,

M^me^ Melina Antoniadis, membre des barreaux de l'Ontario, et d'Angleterre et du pays de Galles, G37 Chambers,

M. Damien Charlotin, chercheur associé à HEC Paris, maître de conférences à Sciences Po Paris,

M^me^ Ginevra Le Moli, professeure à l'Institut universitaire européen,

M^me^ Saadia Bhatty, associée, cabinet Gide Loyrette Nouel,

M^me^ Leslie-Anne Duvic-Paoli, chargée de cours en droit de l'environnement au King's College (Londres),

M^me^ Chiara Giorgetti, professeure de droit à la faculté de droit de l'Université de Richmond,

M^me^ Meseret Fassil Assefa, juriste adjointe, Union africaine,

M^me^ Lefa Mondon, consultante en droit international, doctorante à l'Université Paris Cité, conseil, cabinet SLV Partners,

M. John Nyanje, doctorant chercheur associé, *Africa Multiple Cluster*, Université de Bayreuth et Université d'Hanovre (Allemagne),

M. Ahmed Ad-Dirdeiry, juriste adjoint, Union africaine.

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The PRESIDENT: Good afternoon. Please be seated. The sitting is now open.

We meet this afternoon to hear Latvia, Liechtenstein, Malawi, the Maldives and the African Union on the questions submitted by the United Nations General Assembly. Each of the delegations has been allocated 30 minutes for its presentation. The Court will observe a short coffee break after the presentation of Malawi.

I shall now give the floor to the delegation of Latvia. I call Her Excellency Ms Solvita Āboltiņa to the podium.

Ms ĀBOLTIŅA:

I. INTRODUCTION

1. Mr President, Members of the Court, good afternoon.

2. It is an honour for me to appear before you on behalf of the Republic of Latvia to make its first oral submissions regarding a request for an advisory opinion from either the Court or its predecessor[1].

3. Participation in these proceedings reflects the utmost seriousness with which Latvia approaches the subject-matter of obligations of States in respect of climate change. Indeed, this is the second advisory proceedings before international courts in respect of climate change in as many years for Latvia, the only State from the Eastern European Group of States to take part in both the written and the oral stage of the proceedings before the Court as well as the International Tribunal for the Law of the Sea (ITLOS)[2].

4. Latvia fully maintains the views expressed in its written statement and written comments, and respectfully refers the Court to those pleadings for further detail. Latvia recognizes reports of the Intergovernmental Panel on Climate Change as authoritative assessments of the scientific knowledge on climate change, central to these proceedings[3].

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[1] See also *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010 (II)*, p. 408, para. 6.

[2] *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law*, ITLOS Advisory Opinion of 21 May 2024 ("Request by the COSIS") paras. 17, 28 and 42.

[3] *Ibid.*, paras. 46 and 51. See also "IPCC meets in Latvia to draft outline of Special Report on Climate Change and Cities" (12 April 2024) available at https://www.ipcc.ch/2024/04/12/scoping-meeting-special-report-climate-change-and-cities/.

5. Latvia's position is consistent with the European Union's Written Submissions. Latvia also in many respects supports the views expressed in these proceedings by the small island developing States (SIDS), particularly Vanuatu and Solomon Islands earlier this week, as well as Palau, Tonga, Tuvalu, the Alliance of Small Island States (AOSIS), Pacific Islands Forum and the Commission of Small Island States on Climate Change and International Law (COSIS) in their written submissions. I note, just as Latvia's agent did before ITLOS last September[4], the powerful explanations of the importance of advisory proceedings in respect of climate change for SIDS[5].

6. Latvia will focus its submissions on the instruments and issues identified in the *chapeau* and the text of the questions, which there is no reason for the Court to reformulate[6].

7. In my presentation, I will address question *(a)*, having particular regard to the Charter of the United Nations. Professor Mārtiņš Paparinskis will then address the remainder of question *(a)* and question *(b)*.

II. QUESTION *(A)*

A. United Nations Charter

8. I turn now to question *(a)*, having particular regard to the Charter. Latvia interprets this as addressing the continuity of statehood in circumstances where the land surface becomes totally or partially submerged or rendered uninhabitable by climate change-related rising sea levels[7].

9. I will make three points.

10. *First,* as a matter of positive international law, existing statehood is *not* affected by climate change-related sea-level rise because factual control over territory is not always a necessary criterion for the continued juridical existence of States. Latvia considers as correct and consistent with its

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[4] ITLOS/PV.23/C31/9 (15 Sept. 2023) available at https://www.itlos.org/fileadmin/itlos/documents/cases/31/Oral_proceedings/ITLOS_PV23_C31_9_E.pdf 8 (Līce).

[5] CR 2024/35, p. 96, paras. 1-3 (Regenvayu), p. 99, paras. 1-3 (Loughman), p. 115, paras. 1-6 (Houniuhi); CR 2024/36, p. 14, paras. 1-20 (Browne), p. 53, paras. 1-15 (Pinder), p. 77, paras. 1-15 (Symmonds); CR 2024/37, p. 8, paras. 1-5 (Williams); CR 2024/38, paras. 1-14 (Peter); CR 2024/40, p. 68, paras. 1-12 (Daunivalu); CR 2024/41, p. 42, paras. 1-6 (Thomas), p. 44, paras. 2-20 (Joseph); CR 2024/42, p. 24, paras. 1-18 (Jetnil-Kijiner); CR 2024/42, p. 33, para. 3-18 (Muria).

[6] *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion of 19 July 2024*, para 29.

[7] Report of the International Law Commission: Seventy-fifth session (29 April-31 May and 1 July-2 August 2024) UN doc. A/79/10, para. 351.

position, the description of applicable international law in the declarations on sea-level rise and statehood adopted by the Pacific Islands Forum in 2023 and AOSIS earlier this year[8].

11. *Secondly,* Latvia has been consistent in its view on continuity of statehood in these circumstances, reiterated recently by the Minister of Foreign Affairs Baiba Braže during the High-Level Meeting on Sea Level Rise[9]. The Joint Communiqué between Latvia and Tuvalu, signed by the Ministers of Foreign Affairs in New York on 25 September this year — the first public bilateral non-legally binding instrument on the issue — states that:

> "[i]n light of Latvia's experience of continuing statehood since foundation in 1918, Latvia expressed its readiness to continue to recognize the statehood of Tuvalu and its existing maritime boundaries, even if Tuvalu's population is displaced or it loses its land surface due to sea level rise"[10].

12. *Thirdly,* Latvia's conviction about continuing statehood in these circumstances is reinforced by the legal principle underpinning "Latvia's experience of continuing statehood since foundation in 1918"[11].

13. Mr President, Members of the Court, Latvia became a State in 1918[12] and a Member of the League of Nations in 1921[13], recognizing the jurisdiction of the Permanent Court of International Justice as compulsory since 1930[14]. A late Member of the Court explained in the leading treatise on

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[8] Declaration on the Continuity of Statehood and the Protection of Persons in the Face of Climate Change-Related Sea-Level Rise (20 November 2023) <https://forumsec.org/publications/2023-declaration-continuity-statehood-and-protection-persons-face-climate-change>; Declaration on Sea-Level Rise and Statehood Adopted by the Heads of State and Government of the Alliance of Small Island States, Annex to the letter dated 9 October 2024 from the Permanent Representative of Samoa to the United Nations addressed to the Secretary-General (24 October 2024) UN doc. A/79/548.

See also Written Statement of AOSIS, paras. 5-7; Written Statement of Pacific Islands Forum Fisheries Agency, paras. 43-37; Written Statement of Tonga paras. 237-239; Written Comments of the Bahamas para 96; Written Comments of Kiribati paras 40-41; Written Comments of the Pacific Islands Forum, paras. 10-13; Written Comments of Tuvalu, paras. 10-12; CR 2024/35, p. 110, para. 13 (Wewerinke-Singh); CR 2024/39, p. 21, para. 29 (Sarvarian), p. 69, paras. 1-19 (Bordin); CR 2024/40, p. 68, para. 33 (Leung).

[9] UNGA High-level plenary meeting on addressing the existential threats posed by sea-level rise, multi-stakeholder panel on sea-level rise and its legal dimensions (25 Sept. 2024) <http://webtv.un.org/en/asset/k10/k106txklsn> 28:00. See also Summary record of the 22nd meeting (1 November 2021) UN doc. A/C6/76/SR.22 para 75; Statement on Sea-Level Rise in Relation to International Law by Latvia on behalf of the Baltic States (21 October 2024) <https://www.un.org/en/ga/sixth/79/pdfs/statements/ilc/20mtg_baltic_1.pdf>.

[10] Joint Communiqué on the Reaffirmation of Diplomatic Relations Between Tuvalu and the Republic of Latvia (25 September 2024) <https://www.mfa.gov.lv/en/media/15961/download?attachment>.

[11] Ibid.

[12] *Fisheries (United Kingdom* v. *Norway), Judgment, I.C.J. Reports 1951,* dissenting opinion of Judge McNair, pp. 158 and 162; also *Panevezys-Saldutiskis Railway, Judgment, 1939, P.C.I.J., Series A/B, No. 76*, pp. 10-11.

[13] "Admission of New Members into the League of Nations" (1921) *League of Nations Official Journal*, Vol. 2, pp. 984-985.

[14] *Sixteenth Report of the Permanent Court of International Justice (15 June 1939 – 31 December 1945), Series E, No. 16*, p. 355; Declaration of the Republic of Latvia recognizing the jurisdiction of the Court as compulsory (24 September 2019) <https://www.icj-cij.org/declarations/lv> para 3.

statehood how, despite Latvia's occupation and annexation by the Soviet Union in circumstances involving the use of force and duress, the underlying illegality and sparsity of its express recognition on the part of third States could not displace the continuity of statehood — a proposition generally accepted upon Latvia's factual recovery of independence forcibly suppressed more than half a century earlier[15]. Latvia's continuing statehood since 1918 is relevant for answering question (*a*) because it demonstrates the openness of international law to long-standing juridical continuity with limited or no factual control over territory, especially when anchored in continuing membership of universal international institutions[16].

14. Mr President, Members of the Court, I thank you for your kind attention and ask that you invite Professor Paparinskis to the podium.

The PRESIDENT: I thank Her Excellency Ms Solvita Āboltiņa. I now give the floor to Professor Mārtiņš Paparinskis.

Mr PAPARINSKIS:

1. Mr President, Members of the Court, it is an honour for me to appear before you, again on behalf of the Republic of Latvia, to continue the submissions on question *(a)* and question *(b)*.

2. On question *(a)*, I will address four issues:

— *first*, the United Nations Framework Convention on Climate Change ("UNFCCC")[17] and the Paris Agreement[18];

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[15] J. Crawford, *The Creation of States in International Law,* 2nd ed, Oxford: Oxford University Press (OUP), 2007, pp. 393-394, 416, 439 and 689-690.

See also *Border Treaty, Re, Kariņš and ors v Parliament of Latvia and Cabinet of Ministers of Latvia*, Constitutional Review, Case No 2007-10-0102, ILDC 884 (LV 2007), 29th November 2007, Latvia; Constitutional Court paras 17-34; I. Ziemele, *State Continuity and Nationality: The Baltic States and Russia* (Martinus Nijhoff Publishers 2005) Part II; L Mälksoo, *Illegal Annexation and State Continuity: The Case of the Incorporation of the Baltic States by the USSR* (2nd rev. ed., Brill 2022).

[16] Report of the International Law Commission: Seventy-fifth session (29 April-31 May and 1 July-2 August 2024) UN doc. A/79/10 para 356. See also Statement on International Law Commission: Cluster I by the Netherlands (22 October 2024) <https://www.un.org/en/ga/sixth/79/pdfs/statements/ilc/21mtg_netherlands_1.pdf> para 23.

[17] United Nations Framework Convention on Climate Change (adopted 9 May 1992, entry into force 21 March 1994), 1771 *UNTS* 107 (signed by Latvia on 11 June 1992, ratified on 23 March 1995) ("UNFCCC").

[18] Paris Agreement, adopted in Decision 1/CP.21, "Adoption of the Paris Agreement" (adopted 12 December 2015), FCCC/CP/2015/L.9 (29 January 2016) (entry into force 4 November 2016), 3156 *UNTS* 79 (signed by Latvia on 22 April 2016, ratified on 16 March 2017) ("Paris Agreement").

— *secondly*, the United Nations Convention on the Law of the Sea ("UNCLOS")[19];

— *thirdly*, the duty of due diligence and the principle of prevention of significant harm to the environment; and

— *fourthly*, international human rights law.

3. The sequential treatment of these issues does not detract from the important interlinkages between these different fields of international law, particularly when being brought to the attention of international courts and tribunals[20]. International law is a legal system. Its rules and principles act in relation and should be interpreted against the background of other rules and principles[21].

B. United Nations climate change régime

4. Mr President, Members of the Court, I now turn to the UNFCCC and the Paris Agreement, which together constitute the UN climate change régime.

5. I will make four points.

6. *First*, while obligations of States in respect of climate change extend beyond the UN climate change régime, the UNFCCC and the Paris Agreement are the primary legal instruments addressing the global problem of climate change[22].

7. *Secondly*, the temperature goal and the need to pursue efforts to limit the temperature increase to 1.5ºC, pursuant to the Paris Agreement[23] and subsequent decisions by the Conference of Parties ("COP"), especially the outcome of the first global stocktake[24], provide the benchmark for the proper interpretation and application of the UN climate change régime[25].

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[19] United Nations Convention on the Law of the Sea (10 December 1982) (entry into force 16 November 1994), 1833 UNTS 3 (acceded to by Latvia on 23 December 2004) ("UNCLOS").

[20] *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, declaration of Judge Infante Caffi), https://www.itlos.org/fileadmin/itlos/documents/cases/31/Advisory_Opinion/C31_Adv_Op_21.05.2024_decl_Infante_Caffi_orig.pdf, para. 4.

[21] "Conclusions of the work of the Study Group on fragmentation of international law: difficulties arising from the diversification and expansion of international law", *Yearbook of the International Law Commission 2006: Volume II, Part Two*, UN doc. A/CN.4/SER.A/2006/Add.1 (Part 2), para. 251 ("Conclusions on fragmentation"), conclusion 1; C. McLachlan, *The Principle of Systemic Integration in International Law* (OUP 2024).

[22] *Request by the COSIS*, para. 222.

[23] Paris Agreement, Art. 2, para. 1 *(a)*.

[24] Decision 1/CMA.5, "Outcome of the First Global Stocktake" (13 December 2023), FCCC/PA/CMA/2023/16/Add. 1 ("Outcome of the First Global Stocktake"), paras. 4-5, 27; also Decision 1/CMA.3, "Glasgow Climate Pact" (13 November 2021), FCCC/PA/CMA/2021/10/Add. 1, para. 21.

[25] *Request by the COSIS*, para. 77; also Written Statement COSIS, paras. 110-111; Written Statement Mauritius, para. 101; Written Statement Tuvalu, paras. 105-110; Written Statement Vanuatu, paras. 400-404.

8. *Thirdly*, the obligation to mitigate adverse effects of climate change in Article 4, paragraph 2, of the Paris Agreement is an obligation of conduct, not result, and is subject to requirements of due diligence[26]. The discretion accorded to States by this provision in designing their nationally determined contributions ("NDC") and measures to pursue them, while wide, is not unlimited. Vanuatu has noted that State obligations are bounded by "parameters" that provide "regime-specific markers for due diligence"[27]. Latvia agrees.

9. In performing their mitigation obligations under Article 4, paragraph 2, States must act with due diligence:

— in good faith to ensure that the object and purpose of the treaty, particularly the 1.5ºC temperature goal, are properly pursued[28];

— "in accordance with best available science"[29];

— informed by the "highest possible ambition", progression over time and differentiation[30];

— in line with procedural obligations regarding preparation, communication, maintenance and implementation of NDCs[31]; and

— taking into account relevant decisions of respective COPs[32].

Discretion under such a treaty provision, as a corollary, also entails a duty "to exercise the power properly and reasonably", to borrow the language used by Judge Xue in *Whaling in the Antarctic*[33]. For Article 4, paragraph 2, it means that the NDCs must be genuinely for the purpose, and bear a reasonable relation to the objectives of achieving the temperature goal. Domestic mitigation measures must also be for the purpose of achieving such contributions and bear a reasonable relation to the party's stated objectives.

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[26] Written Statement African Union, para. 132; Written Statement Solomon Islands, para. 78; Written Statement Tonga, para. 156.

[27] Written Statement Vanuatu, para. 411.

[28] Paris Agreement, Art. 4, para. 1; see also *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, para. 142.

[29] Paris Agreement, Art. 4, para. 1.

[30] *Ibid.*, Art. 4, paras. 2-3.

[31] *Ibid.*, Art. 4, paras. 8-9, read together with Art. 14, para. 3; Art. 4, para. 15.

[32] UNFCCC, Art. 7; Paris Agreement, Art. 16. See also CR 2024/41, pp. 12-13, paras. 19-20 (France, Colas).

[33] *Whaling in the Antarctic (Australia* v. *Japan: New Zealand intervening), Judgment, I.C.J. Reports 2014*, separate opinion of Judge Xue, p. 422, para. 9.

10. *Fourthly*, Latvia highlights the importance of obligations other than mitigation, namely those relating to adaptation, financing, technology transfer and transparency[34]. International co-operation is key to an effective global response to climate change, a point reaffirmed in the outcome of the first global stocktake[35]. In particular, developed country parties must provide assistance including financial assistance to developing country parties, especially those parties that are most vulnerable to the adverse effects of climate change[36].

C. United Nations Convention on the Law of the Sea

11. Mr President, Members of the Court, I now turn to UNCLOS. I recall that the Joint Communiqué between Latvia and Tuvalu, quoted by Ambassador Āboltiņa, sets out Latvia's position on climate change-related sea-level rise and maritime zones[37], in terms consistent with the declaration by the Pacific Islands Forum of 2021[38].

12. As a preliminary matter, Latvia considers the recent ITLOS advisory opinion in *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law* to be a subsidiary means for the determination of rules of international law of considerable weight in the interpretation and application of UNCLOS. This advisory opinion is of high quality, by an international court with a specific competence with regard to the subject-matter and the rule in question, rendered unanimously after written and oral proceedings with an impressively wide and representative participation by contracting parties and intergovernmental organizations, and relates to the same instrument as the present proceedings[39].

13. I will make three points.

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[34] Paris Agreement, Arts 4, 7, 9, 10, 13.

[35] Outcome of the First Global Stocktake, preambular paras. 4, 6; on mitigation, paras. 22, 31, 34; on adaptation, paras. 48-49, 52-54 and 64; on finance, paras. 67-100; on technology transfer, paras. 102-103, 106-108; on capacity-building, paras. 115, 117, 120; on loss and damage, paras. 121-135; generally, paras. 153-163.

[36] UNFCCC, Art. 4, paras. 3, 4; Paris Agreement, Art. 4, para. 5; Art. 9, para. 1; Art. 10, para. 6.

[37] See para. 11.

[38] Declaration on Preserving Maritime Zones in the Face of Climate Change-related Sea-Level Rise (6 August 2021), https://forumsec.org/publications/declaration-preserving-maritime-zones-face-climate-change-related-sea-level-rise.

[39] "Text of the draft conclusions on subsidiary means for the determination of rules of international law provisionally adopted thus far by the Commission", *Report of the International Law Commission: Seventy-fifth session (29 April-31 May and 1 July-2 August 2024)*, UN doc. A/79/10, para. 74, draft conclusion 3, subparagraphs *(b)*, *(c)*, *(d)*, *(f)*; draft conclusion 8, subparagraphs *(a)*, *(c)*; also IDI, "Resolution on Precedents and Case Law (*Jurisprudence*) in Interstate Litigation and Advisory Proceedings" (1 September 2013) guidelines 3, 6.

14. *First*, Latvia agrees with the Tribunal that the anthropogenic greenhouse gas emissions into the atmosphere fall within the definition of "pollution of the marine environment" under Article 1, paragraph 1 (4), of UNCLOS[40].

15. Latvia also agrees, and that is my *second* point, with the explanation in *Request by the COSIS* of the relationship between UNCLOS and rules external to it, including the obligations under the UNFCCC and the Paris Agreement[41]. "[T]he provisions of [UNCLOS] and external rules should, to the extent possible, be interpreted consistently"[42], which in relation to the UN climate change régime means that it is highly relevant for UNCLOS[43], but "*lex specialis derogat legi generali* has no place in [its] interpretation"[44] — no place, Mr President. Other Participants in the present proceedings share Latvia's views[45].

16. *Thirdly*, Latvia notes several important findings in *Request by the COSIS* on the content and scope of obligations under Part XII of UNCLOS in respect of pollution caused by the anthropogenic greenhouse gas emissions:

— *regarding Article 194, paragraph 1,* the due diligence character of the obligation of States parties "not to guarantee the prevention, reduction and control of marine pollution at all times but to make their best efforts to achieve such result"[46]; that "standard is stringent, given the high risks of serious and irreversible harm to the marine environment" but "may vary according to States' capabilities and available resources"[47];

— *regarding Article 194, paragraph 2*, its two limbs in respect of "transboundary pollution"[48] that "bears a close resemblance to the well-established principle of harm prevention"[49] to ensure that, first, "activities under their jurisdiction or control do not cause damage by pollution to other

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[40] *Request by the COSIS*, paras. 159-179.

[41] *Ibid.*, paras. 130-137.

[42] *Ibid.*, para. 136.

[43] *Ibid.*, paras. 222-223.

[44] *Ibid.*, para. 224.

[45] See Written Comments COSIS para. 42; Written Comments Samoa paras. 20-26; Written Comments Solomon Islands para. 12; Written Comments Vanuatu paras. 88-89.

[46] *Request by the COSIS*, para. 233.

[47] *Ibid.*, para. 243; also paras. 232-242.

[48] *Ibid.*, para. 244.

[49] *Ibid.*, para. 246.

States and their environment" and, secondly, "pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights"[50];

— *regarding Article 192*, the broad scope of coverage, "encompassing any type of harm or threat to the marine environment"[51], which "may require restoring marine habitats and ecosystems" where "the marine environment has been degraded"[52]; and

— *regarding Articles 192 and 194*, the general and continuing "duty to cooperate [as] an integral part of the general obligations . . . given that the global effects of these emissions necessarily require States' collective action", which "requires an ongoing effort on the part of the States in the development of new or revised regulatory instruments, in particular in light of the evolution of scientific knowledge"[53].

17. Latvia agrees with the findings quoted, which are in line with its position before the Court[54] as well as earlier before the Tribunal[55], and respectfully requests that the Court give considerable weight to the legal reasoning in *Request by the COSIS* in the interpretation and application of UNCLOS.

D. The duty of due diligence and the principle of prevention of significant harm to the environment

18. Mr President, Members of the Court, I now turn to certain rules expressed in sources other than treaties, namely the duty of due diligence and the principle of prevention of significant harm to the environment. (For Latvia's position on the duty to protect and preserve the marine environment I refer to my earlier remarks on Part XII of UNCLOS.)

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[50] *Ibid.*, para. 245.

[51] *Ibid.*, para. 385.

[52] *Ibid.*, para. 400.

[53] *Ibid.*, paras. 299, 311.

[54] Written Statement Latvia, paras. 39-50; Written Comments Latvia, paras. 23-34.

[55] International Tribunal for the Law of the Sea, *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law (Request for Advisory Opinion submitted to the Tribunal)* Written Statement of the Republic of Latvia (16 June 2023) <https://www.itlos.org/fileadmin/itlos/documents/cases/31/written_statements/1/C31-WS-1-14-Latvia_01.pdf> paras. 11-19; ITLOS/PV.23/C31/9 (15 September 2023) <https://www.itlos.org/fileadmin/itlos/documents/cases/31/Oral_proceedings/ITLOS_PV23_C31_9_E.pdf> 10-14; Comments on the Written Responses by COSIS and IUCN (2 October 2023) <https://www.itlos.org/fileadmin/itlos/documents/cases/31/Oral_proceedings/questions/Comments__Latvia.pdf>.

19. Latvia interprets "the duty of due diligence" as referring to the duty of States in respect of any activities occurring within their territory, or in any area under their jurisdiction, that may cause harm to third States[56]. In the environmental law context relevant to the present proceedings, the duty of due diligence in situations of risk of significant transboundary harm is particularized in more specific procedural obligations, such as to notify, co-operate, consult[57], and undertake an environmental impact assessment[58]. Latvia also notes the importance of applying the "precautionary approach"[59], which, to quote from Judge *ad hoc* Charlesworth in *Whaling in the Antarctic*, "entails the avoidance of activities that may threaten the environment even in the face of scientific uncertainty about the direct or indirect effects of such activities"[60].

20. When addressing the general notion of "due diligence", the Court has identified as the key parameter the capacity to influence the occurrence of harmful events, which varies greatly from one State to another. Where action by more than one State is required to avert a particular outcome, each individual State is expected to "take all measures . . . which [are] within its power"[61]. In *Request by the COSIS*, the Tribunal noted that "several factors to be considered . . . include scientific and technological information, relevant international rules and standards, the risk of harm and the urgency involved"; "[t]he notion of risk in this regard should be appreciated in terms of both the probability or foreseeability of the occurrence of harm and its severity or magnitude"[62].

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

[57] *Dispute over the Status and Use of the Waters of the Silala (Chile* v. *Bolivia), Judgment, I.C.J. Reports 2022 (II)* ("*Silala*"), paras. 100-101, 118, 126.

[58] *Pulp Mills,* para. 204, also para. 102; *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 (II)* ("*Certain Activities* Judgment"), para. 104.

[59] *Responsibilities and obligations of States with respect to activities in the Area* (Advisory Opinion) [2011] ITLOS Rep 10, paras. 131, 135; *Request by the COSIS*, para. 242.

[60] *Whaling in the Antarctic (Australia* v. *Japan: New Zealand intervening), Judgment, I.C.J. Reports 2014*, separate opinion of Judge *ad hoc* Charlesworth, p. 455, para. 6. See also *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Compensation, Judgment, I.C.J. Reports 2018 (I)* ("*Certain Activities* Compensation"), separate opinion of Judge Bhandari, p. 794, para. 15.

[61] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 221, para. 430.

[62] *Request by the COSIS*, para. 239.

21. The principle of prevention of significant harm to the environment in respect of all activities within jurisdiction and control of States[63] is connected to issues discussed earlier, regarding both Article 194, paragraph 2, of UNCLOS[64], and the duty of due diligence[65], notably in its procedural particularization[66] as well as the precautionary approach[67]. States should take the best available science together with other indicators in determining the most appropriate measures to prevent environmental harm caused by the anthropogenic greenhouse gas emissions[68]. More generally, the Court recognized in *Pulp Mills on the River Uruguay* that co-operation is essential "to fulfil the obligation of prevention"[69]. Other Participants in the present proceedings, including States particularly vulnerable to the adverse effects of climate change, share Latvia's views[70].

22. In sum, the Court's previous findings on these points, especially as applicable in the transboundary environmental context, provide a point of reference for clarifying the scope and content of obligations of States in respect of climate change.

E. International human rights law

23. Mr President, Members of the Court, I turn now to international human rights law. I start by recalling the Court's important observation that "the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn"[71].

24. I will focus on what Latvia considers to be the key issue, namely *when* State action to combat climate change is necessary to secure the enjoyment of human rights (and I respectfully refer

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[63] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)* ("*Legality of the Threat or Use of Nuclear Weapons*"), para. 29; *Pulp Mills,* para. 197.

[64] *Silala*, paras. 100-101.

[65] *Pulp Mills*, para. 101.

[66] *Silala*, paras. 100-101; *Certain Activities* Judgment, paras. 101-112.

[67] *Southern Bluefin Tuna Cases (New Zealand* v. *Japan; Australia* v. *Japan)* (Provisional Measures) (Order of 27 August 1999) [1999] ITLOS Rep 280, para. 77.

[68] *Request by the COSIS*, paras. 212-213.

[69] *Pulp Mills*, p. 56, para. 102.

[70] See Written Statement Solomon Islands, para. 117; Written Statement Tonga, para. 203; Written Comments COSIS, paras. 62-63.

[71] *Legality of the Threat or Use of Nuclear Weapons*, p. 241, para. 29.

to Latvia's written pleadings for its position on procedural human rights and the obligation not to breach human rights when tackling climate change)[72].

25. I will make three points.

26. *First,* States may be under obligations arising from international human rights law to provide effective protection against the impact of climate change. The content of these obligations depends upon the instrument in question[73], so Latvia will limit itself to two general observations, regarding threshold and substance respectively.

— *On threshold*, the Human Rights Committee and the European Court of Human Rights have held in essentially congruent terms that, for climate change to be capable of impairing an individual's human rights and thus engaging a State's human rights obligations, the impact on the rights must be both foreseeable and serious. In Latvia's view, shared by other Participants[74], for that there is to be, or likely to be, a direct, adverse effect on the individual's rights; the seriousness of these adverse effects is determined according to their intensity and duration[75].

— When threshold *is* met, *on substance* human rights obligations in respect of climate change require due diligence[76]. They comprise *general* obligations to implement appropriate regulatory measures, timely and based upon the best available scientific evidence, to protect against the adverse impacts of climate change[77]; and *special* obligations, in certain cases, to take or consider taking specific measures to protect particular individuals or groups[78].

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[72] Written Statement Latvia, paras. 65-67; Written Comments Latvia, paras. 38-39. See also *Verein KlimaSeniorinnen Schweiz and others* v. *Switzerland* (application no 53600/20) Grand Chamber Judgment of 9 April 2024 ("*Verein*"), paras. 538-539.

[73] See Written Statement COSIS, para. 134; similarly Written Statement Tuvalu, para. 101.

[74] See Written Statement Albania, para. 96a; Written Statement DRC, para. 155; Written Statement Denmark, Finland, Iceland, Norway, and Sweden, para. 86; Written Statement the Netherlands, para. 3.30; Written Statement Philippines, para. 106e; Written Statement Solomon Islands, para. 168; Written Statement Tonga, para. 248; Written Statement UK, para. 127.1; Written Statement Vanuatu, para. 346.

[75] *Billy and others* v. *Australia* (21 July 2022) CCPR/C/135/D/6324/2019 ("*Billy*") para. 8.12; *Verein* paras. 513, 514.

[76] See Written Statement DRC, para. 155; Written Statement Mauritius, para. 172; Written Statement Netherlands, para. 3.30; Written Statement Portugal, para. 85; Written Statement Singapore, para. 3.82; Written Statement Tonga, para. 248; Written Statement UK, para. 127; Written Statement Vanuatu, para. 3.39.

[77] *Verein*, para. 550.

[78] *Billy*, paras. 8.3, 8.9, 8.12; *Verein* para. 552.

27. *Secondly,* Latvia supports a human rights-integrated approach to tackling climate change[79], pursuant to principles of treaty interpretation to be found in Articles 31 to 33 of the Vienna Convention on the Law of Treaties that reflect customary international law[80]. In particular, interpretation of human rights treaties must be in line with mitigation and other obligations under the UN climate change régime[81]. It must also be approached with an appreciation for the differences in terms of purpose, structure, and functioning in human rights law and climate change law, and the complex and sensitive questions of distributive justice raised by climate change. In sum, discretion under the Paris Agreement as well as the relevant human rights instruments is wide in deciding *which* measures are appropriate in light of national circumstances, but not in determining *whether* to take measures to combat climate change[82].

28. *Thirdly,* Latvia together with other voices in these proceedings urges the Court to acknowledge the differential impact of climate change upon the rights[83] of indigenous peoples[84]; gender equality[85]; people in vulnerable situations, including the elderly, children, and persons with disabilities[86]; individuals within SIDS, due to the effect of sea-level rise upon inhabitability of their territories[87]; and individuals within the Least Developed Countries, due to unequal geographical

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[79] See Written Statement Marshall Islands, para. 95; Written Statement Mauritius, paras. 162-165; Written Statement Solomon Islands, para. 169; Written Statement Vanuatu, paras. 225-227; Written Comments Tuvalu, para. 21.

[80] *Arbitral Award of 3 October 1899 (Guyana* v. *Venezuela), Preliminary Objection, Judgment, I.C.J. Reports 2023*, para. 87.

[81] *Verein*, para. 546.

[82] *Ibid.*, para. 543.

[83] See generally Paris Agreement preambular para. 11.

[84] See Written Statement Denmark, Finland, Iceland, Norway, and Sweden, para. 78; Written Statement Micronesia, para. 80; Written Statement Portugal, para. 84; Written Statement Tuvalu, sections II.A-II.B, paras. 3-9, 80-84; Written Statement Vanuatu, sections 2.6.4.-2.6.6., paras. 290-292, 299, 301, 361. See also CR 2024/41 55, para. 6 (Rodriguez Pineda).

[85] Written Statement Tuvalu, para. 43; Written Statement Vanuatu, para. 392; also Decision 3/CP.25 'Enhanced Lima work programme on gender and its gender action plan' (8th Plenary Meeting, 15 December 2019) FCCC/CP/2019/13/Add.1; Decision -/CP.29 'Gender and climate change' (23 November 2024) (advance unedited version). See also CR 2024/35 134 para. 14 (Blair).

[86] See Written Statement Denmark, Finland, Iceland, Norway, and Sweden, para. 78; Written Statement DRC, para. 159; Written Statement Micronesia, para. 80; Written Statement Portugal 78; Written Statement Solomon Islands, para. 193; Written Statement Tonga, para. 281. CR 2024/37 62 para. 12 (Guevarra).

[87] See Written Statement Marshall Islands, paras. 50, 96-102; Written Statement Portugal, paras. 89ff; Written Statement Tuvalu, paras. 25-53, 104; Written Statement Vanuatu, paras. 45-46. See also CR 2024/42 22 para. 2 (Silk); CR 2024/42 33 para. 8 (Muria).

impacts of climate change[88]. I also note Ms Houniuhi's submission on the perspective of youth[89]. Finally, Latvia stresses the necessity of global co-operation to address the differential impacts of climate change on human rights[90].

III. QUESTION *(B)*

29. Mr President, Members of the Court, I now turn to question *(b)*.

30. I will make four points.

31. *First*, the phrase "legal consequences . . . for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment" refers to consequences "under these obligations" as well as under secondary rules of international law on State responsibility, when conduct attributable to the State under international law constitutes a breach of its obligations[91]. While question *(b)* is limited to consequences "under these obligations", the effects of climate change may also be addressed by other means, by way of example loss and damage associated with the adverse effects of climate change through the Loss and Damage Fund without involving or providing a basis for any liability or compensation[92].

32. *Secondly*, Latvia's position on consequences under obligations identified in the *chapeau* has been provided in the submissions on question *(a)*, by way of example on the differential impact upon individual rights, relevant for sub-question (ii).

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[88] See Written Statement African Union, para. 196a, c; Written Statement Kenya, para. 5.52; Written Statement Sierra Leone, para. 3.53. See also CR 2024/41 20 para. 5 (Kotia); CR 2024/42 33 para. 6 (Muria).

[89] CR 2024/35 115 paras. 1-10 (Houniuhi).

[90] Written Statement Australia, paras. 3.66-3.67; Written Statement COSIS, paras. 129ff; Written Statement Marshall Islands, para. 50; Written Statement Singapore, para. 3.92; Written Statement Tonga, para. 250; Written Comments Tuvalu, para. 20.

[91] International Law Commission, 'Draft articles on responsibility of States for internationally wrongful acts' *Yearbook of the International Law Commission 2001: Volume II Part 2 UN Doc A/CN.4/SER.A/2001/Add.1 (Part 2)* 26 ("2001 ILC articles on State responsibility") Art. 2, generally Part One.

[92] Paris Agreement Art. 8; Decision 1/CP.21, FCCC/CP/2015/L.9 para. 51. See Decision 2/CP.27 and 2/CMA.4, 'Funding arrangements for responding to loss and damage associated with the adverse effects of climate change, including a focus on addressing loss and damage' adopted (10th Plenary Meeting, 20th November 2022) FCCC/CP/2022/10/Add.1; Decision 1/CP.28 and 5/CMA.5, 'Operationalization of the new funding arrangements, including a fund, for responding to loss and damage referred to in paragraphs 2–3 of decisions 2/CP.27 and 2/CMA.4' (1st Plenary Meeting, 6th December 2023) FCCC/CP/2023/11/Add.1, FCCC/PA/CMA/2023/16/Add.1; Decision -/CP.29 and Decision -/CMA.6, 'Arrangements between the Conference of the Parties, the Conference of the Parties serving as the meeting of the parties to the Paris Agreement and the Board of the Fund for responding to Loss and Damage' (23 November 2024) (advanced unedited version); Decision -/CP.29, 'New collective quantified goal on climate finance' (24 November 2024) (advanced unedited version).

33. *Thirdly*, the scope of question *(b)* on State responsibility is limited to the content of responsibility, as reflected in the drafting of the operative phrase as "legal consequences *for* States [that] have caused significant harm" — "les conséquences juridiques *pour* les États" — and does not extend to rules on the implementation of State responsibility by other States[93]. Latvia's interpretation on this point is consistent with Articles on the Responsibility of States for Internationally Wrongful Acts, which use "legal consequences" as the technical expression for reference to the body of rules on the content of State responsibility[94].

34. *Fourthly*, an answer on State responsibility that focuses on the identification of general rules on content of responsibility would assist the General Assembly, as well as States and other relevant actors, in discussions on climate change in a variety of settings beyond these proceedings with respect to actors in sub-questions (i) and (ii). The Court has already identified several rules of customary international law relating to the content of State responsibility, often by reference to the ILC Articles on State responsibility[95]. The Court would be well placed to assist by providing a restatement and appropriate elaboration of these general rules, as applicable to the "particular issues [that] may arise . . . [i]n cases of alleged environmental damage"[96] and otherwise complex questions raised by plurality of allegedly injured and responsible actors[97].

35. Mr President, Members of the Court, this concludes the submissions of Latvia. I thank the Court for its kind attention, as well as its Registry, staff and interpreters for ensuring the smooth management of the present advisory proceedings.

The PRESIDENT: I thank the representatives of Latvia for their presentation. I will now invite the participating delegation of Liechtenstein to address the Court and I call upon His Excellency Mr Pascal Schafhauser to take the floor.

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[93] Cf. *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, para. 72, Chapter VII.B.

[94] 2001 ILC Articles on State Responsibility, Art. 28.

[95] Written Statement of Latvia, para. 76.

[96] *Certain Activities* Compensation, para. 34; *ibid.,* separate opinion of Judge Donoghue, p. 85; *ibid.,* separate opinion of Judge Bhandari, p. 96, paras. 8-12.

[97] *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, para. 56; *Armed Activities*, para. 98; also *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Judgment, I.C.J. Reports 2003*, separate opinion of Judge Simma, p. 324, paras. 63-78.

Mr SCHAFHAUSER:

1. Mr President, Members of the Court, it is a great honour and privilege to appear before this Court on behalf of the Principality of Liechtenstein, in these historic proceedings.

2. My main task today is to address the most relevant elements of Liechtenstein's written statement. I will focus my observations on the following six points:

(a) first, Liechtenstein's motivation for participating in this hearing and a brief reflection on our country's role in the initiative to request this advisory opinion from the Court;

(b) second, the undisputed scientific evidence that human-made greenhouse gas emissions have caused global warming;

(c) third, why the right to self-determination must be interpreted to cover the threats and challenges posed by climate change;

(d) fourth, the potential effects of continued global warming on human rights;

(e) fifth, the obligation of States to reduce greenhouse gas emissions and to implement measures to adapt to climate change; and

(f) sixth, the legal consequences of a failure to address the effects of climate change and the fulfilment of climate change commitments.

I. INTRODUCTION, BACKGROUND OF THE REQUEST BEFORE THE COURT AND JURISDICTION

3. Mr President, Members of the Court, with your permission, I would now like to turn to the *first point*: Liechtenstein's participation in these proceedings is motivated by the unprecedented challenges posed by climate change. As we have already heard from many States this week, there is an urgent need for clarity on principles of international law as they apply to climate change. Anthropogenic greenhouse gas emissions have reached unsustainable levels, jeopardizing the health and human rights of current and future generations. Authoritative legal guidance from the Court is needed to help the international community correct its course.

4. Liechtenstein is proud to have served as a member of the "core group" of States which drafted the United Nations General Assembly's Request for an advisory opinion on the legal consequences of climate change. We wish to thank those who have displayed immense leadership in bringing these questions before the Court. Without the brave direction of young people across the

globe who called upon governments to address this existential crisis, we might not be gathered here today. The leadership of the Republic of Vanuatu, a fellow small State, in mobilizing support of the entire United Nations Membership and gaining consensus for this advisory opinion Request has been equally invaluable.

II. ANTHROPOGENIC GREENHOUSE GAS EMISSIONS CAUSE CLIMATE CHANGE

5. The *second point* of our observation concerns the overwhelming scientific evidence that "human activities, principally through emissions of greenhouse gases, have unequivocally caused global warming"[98], which in turn causes serious environmental harm. In one of its most recent reports, the Intergovernmental Panel on Climate Change (IPCC) concluded, that GHGs have induced significant and rapid changes in the atmosphere, ocean, cryo- and biosphere, which have had "widespread adverse impacts and related losses and damages to nature and people" affecting vulnerable communities that have historically contributed the least to current climate change[99].

6. As already expressed in the written submission, in paragraphs 21 and 22, Liechtenstein fully recognizes the scientific evidence concerning the negative impact of human-induced greenhouse gas emissions on global warming and aligns its domestic climate policy in accordance with the science presented in the publications of the IPCC.

III. THE EFFECT OF CLIMATE CHANGE ON THE RIGHT TO SELF-DETERMINATION

7. *Third*, Liechtenstein is of the view that climate change can affect the exercise of the right to self-determination by disrupting the management of vital natural resources, threatening statehood

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[98] IPCC, Climate Change 2023 Synthesis Report – Summary for Policymakers (2023) (Dossier No. 78) ("IPCC 2023–Synthesis Report, Summary for Policymakers"), available at https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_SPM.pdf, para. A.1. See also Inter-American Court of Human Rights, Advisory Opinion on Climate Emergency and Human Rights, Amicus brief submitted by the UN Special Rapporteurs on Toxics and Human Rights (Marcos Orellana), Human Rights and the Environment (David Boyd), and the Right to Development (Surya Deva) (22 November 2023) ("IACtHR Climate Advisory Opinion, UN Special Rapporteurs Amicus Brief"), available at https://www.ohchr.org/sites/default/files/documents/issues/toxicwastes/activities/IACtHR-advisory-opinion-amicus-curiae-boyd-orellana-deva_EN.pdf, para. 24.

[99] IPCC 2023 – Synthesis Report, Summary for Policymakers, para. A.2. See also e.g. IPCC, *Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press (CUP) 2022) ("IPCC 2022 – Contribution of Working Group II"), available at https://report.ipcc.ch/ar6/wg2/IPCC_AR6_WGII_FullReport.pdf, p. 1207.

and undermining livelihoods, if States do not take appropriate action with regard to mitigation and adaptation.

8. Common Article 1 of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) recognizes the right to self-determination as a *jus cogens* norm. As this Court has held in the *Chagos* Advisory Opinion, in which Liechtenstein was proud to have participated, the obligation to protect the right to self-determination is thus an obligation of an *erga omnes* character[100]. The nature of the right is confirmed in the Maastricht Principles on the Human Rights of Future Generations, and must also be accorded to future generations, not just protected at the present moment[101]. Consequently, all States have an obligation to take "all necessary measures" to protect the right to self-determination[102].

9. In 2009, the Human Rights Council noted that climate change-related impacts had a range of implications, both direct and indirect, for the effective enjoyment of human rights, including the right of self-determination[103]. According to the Council, climate change will inevitably displace individuals, severing them from their homelands and limiting their ability to practice their culture and freely engage in economic, social and cultural development[104].

10. For low-lying coastal areas and for small island States, the threat posed by sea-level rise is existential[105]. Most directly, sea-level rise threatens statehood through geographic mortality and the permanent displacement of a State's population[106]. As the IPCC Working Group II has confirmed,

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

[101] Maastricht Principles on the Human Rights of Future Generations (adopted on 3 February 2023), Art. 5.

[102] *Ibid.*, Art. 20 *(a)*.

[103] See UN Human Rights Council, resolution 10/4, "Human rights and climate change", A/HRC/RES/10/4 (25 March 2009) in Report of the Human Rights Council on its tenth session, UN doc. A/HRC/10/29 (9 November 2009) (Dossier No. 265), preamble.

[104] UN Human Rights Council, resolution 35/20, "Human rights and climate change", UN doc. A/HRC/RES/35/20 (7 July 2017) (Dossier No. 270), preamble.

[105] See ILC, Report of the Study Group on sea-level rise in relation to international law, A/CN.4/L.1002 (15 July 2024), para. 20; ILC, Report of the Study Group on sea-level rise in relation to international law, A/CN.4/L.972 (15 July 2022), para. 10; "IPCC 2022 – Contribution of Working Group II", p. 1100.

[106] See generally C. Hioureas and A. Torres Camprubi, *Climate, State, and Sovereignty: Self-Determination and Sea Level Rise*, Liechtenstein Institute on Self-Determination at Princeton University (June 2021); C. Hioureas and A. Torres Camprubi, "Legal and Political Considerations on the Disappearance of States due to Sea Level Rise" in *New Knowledge and Changing Circumstances in the Law of the Sea* (2020), pp. 407-426. See also IPCC, *Climate Change 2013: The Physical Science Basis. Working Group I Contribution to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (CUP, 2013), p. 25.

"[i]n high emissions scenarios, low-lying island States may face the long-term risk of becoming uninhabitable, creating the potential for a new phenomenon of climate-induced statelessness"[107].

11. It is Liechtenstein's firm understanding that the right to self-determination is inalienable and for the presumption of continued statehood, including and in particular for States whose land territory becomes inundated by rising sea levels, and whose populations may as a result be relocated. States are thus obliged to continue to recognize the right to self-determination of peoples also in such events.

12. Liechtenstein therefore supports the position taken by the most affected States that "statehood will cease only if another form of expression of the right to self-determination is explicitly sought and exercised by that people"[108] and recognizes States in their deterritorialized forms[109].

13. As a consequence, Liechtenstein emphasizes that States which cease to meet the criteria laid out in the Montevideo Convention[110] do not lose their statehood, as there is a strong presumption of the continuity of statehood. States' baselines should be fixed as the sea level moves landward as a result of sea-level rise. This is consistent with a proper interpretation of the United Nations Convention on the Law of the Sea and the views expressed by a significant number of States before the Sixth Committee to the General Assembly on the Chapter of the International Law Commission on Sea-Level Rise in Relation to International Law[111].

14. Moreover, under the *rebus sic stantibus* principle enshrined in Article 62 (1) of the Vienna Convention on the Law of Treaties (VCLT)[112], a fundamental change of circumstances would have no effect on existing maritime delimitation treaties. Article 62 (2) *(a)* of the VCLT provides that a

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[107] IPCC 2022 – Contribution of Working Group II, p. 1100.

[108] UNGA, 78th Session, Statement by Samoa on behalf of the Alliance of Small Island States (AOSIS) United Nations Security Council Open Debate on Threats to International Peace and Security: Sea-Level Rise – Implications for International Peace and Security (14 February 2023), available at http://tinyurl.com/2p8emvtp, para. 11.

[109] International Law Commission*, Second issues paper by Patrícia Galvão Teles and Juan José Ruda Santolaria, Co-Chairs of the Study Group on sea-level rise in relation to international law*, UN doc. A/CN.4/752 (19 April 2022) (Dossier No. 102), para. 226; International Law Commission, Seventy-third session (18 April–3 June and 4 July–5 August 2022), *Report of the International Law Commission—Chapter IX: Sea-level rise in relation to international law*, UN doc. A/77/10 (2022) (Dossier No. 101), paras. 196, 199, 201.

[110] Namely a permanent population, a defined territory and a government.

[111] See International Law Commission, Seventy-fourth session (24 April–2 June and 3 July–4 August 2023), Report of the International Law Commission—Chapter VIII: Sea-level rise in relation to international law, UN doc. A/78/10 (Dossier No. 103A), para. 172.

[112] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 *UNTS*, Vol. 1155*,* Article 62 (1).

fundamental change of circumstances may not be invoked as grounds for termination or withdrawing from treaty if "the treaty establishes a boundary"[113].

15. In addition to threats to statehood, climate change will also lead to drastic changes in major economic sectors, impacting people's livelihood security, starting with the most vulnerable populations. The IPCC has found that economic impacts from climate change are already evident in sectors highly exposed to climate risks, including agriculture, forestry, fisheries, energy, tourism, and outdoor labour[114]. These effects reduce work productivity and hinder economic growth, especially in lower-income countries[115].

16. By destabilizing people's means of subsistence and interfering with their control over natural resources, climate change jeopardizes the core right of self-determination, which is also essential to the enjoyment of other fundamental rights.

IV. THE EFFECT OF CLIMATE CHANGE ON HUMAN RIGHTS

17. *Fourth*, Liechtenstein is of the view that the adverse effects of climate change have already and will very likely continue to impact a wide range of human rights, as detailed in Section V of the Liechtenstein Written Statement submitted to the Court[116].

18. Regarding the *Right to Life*, a fundamental right protected under Article 3 of the Universal Declaration of Human Rights (UDHR) and Article 6 (1) of the ICCPR[117], continued global warming may cause direct or indirect impacts on human lives. This is already illustrated by the increased

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[113] See *Aegean Sea Continental Shelf (Greece* v. *Turkey), Judgment, I.C.J. Reports 1978,* pp. 35-36, para. 85. See also *Arbitral Award of 31 July 1989 (Guinea-Bissau* v. *Senegal), Judgment, I.C.J. Reports 1991*, pp. 73-74, paras. 62-63*; In the Matter of the Bay of Bengal Maritime Boundary Arbitration between the People's Republic of Bangladesh and the Republic of India (Bangladesh v. India)*, PCA Case No. 2010-16, Award (7 July 2014), para. 218.

[114] IPCC 2023 – Synthesis Report, p. 51.

[115] M. Dell et al., "Temperature Shocks and Economic Growth: Evidence From the Last Half Century" (2012) 4(3) *American Economic Journal: Macroeconomics*, Vol. 4 (3), p. 66, available at https://scholar.harvard.edu/files/dell/files/aej_temperature.pdf, pp. 92-93; S. Dasgupta et al., "Effects of climate change on combined labour productivity and supply: an empirical, multi-model study" (July 2021) *The Lancet* Vol. 5 (7), p. 455, available at https://www.thelancet.com/journals/lanplh/article/PIIS2542-5196(21)00170-4/fulltext.

[116] See Liechtenstein Written Statement, Sect. V.

[117] UDHR, Art. 3; ICCPR, Art. 6(1).

frequency and intensity of tropical cyclones[118], droughts, floods, heatwaves and disease vectors, leading to more loss of human lives[119].

19. The increase of extreme weather events, land erosion, flooding and sea-level rise in low-lying island States[120], also has the potential to threaten the *Right to Housing*, protected by Article 11 of the ICESCR[121]. Climate change threatens this right in numerous ways such as the risk of the destruction of homes, the risk of floodings, droughts and sea-rise level, making territories uninhabitable[122].

20. Storm surges, sea-level rise, coastal flooding and inland flooding in densely populated urban regions, coupled with periods of extreme heat, already disrupt livelihoods in many communities[123]. Thereby potentially threatening the *Right to Livelihood*, protected under Articles 7 and 11 (1) of the ICESCR. Climate change may also cause occupational hazards for those pursuing their right to livelihood[124].

21. Liechtenstein also notes that cultural heritage sites, which are central to the enjoyment of *cultural rights*[125] under Article 27 (1) of the UDHR, face unprecedented risks from climate change. Many cultural sites, including buildings of historical, religious, and cultural significance, are

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[118] See IPCC 2023 – Synthesis Report, pp. 46, 69.

[119] Amnesty International, *Stop Burning Our Rights! What Governments and Corporations Must Do to Protect Humanity from the Climate Crisis: Executive Summary* (7 June 2021), available at https://www.amnesty.org/en/documents/pol30/4110/2021/en/, p. 4.

[120] UN OHCHR, 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, available at https://www.ohchr.org/sites/default/files/Documents/Issues/ClimateChange/COP21.pdf, p. 19 (citing IPCC, Climate Change 2014 – Synthesis Report (AR5) (2014), p. 13).

[121] ICCPR, Art. 17; ICESCR, Art. 11(1) ("The Parties to the present Convention recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.").

[122] IPCC 2022 – Contribution of Working Group II, p. 1100.

[123] See IPCC, Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change (2014), available at https://www.ipcc.ch/site/assets/uploads/2018/02/SYR_AR5_FINAL_full.pdf, pp. 15, 65, 69.

[124] See M. El Khayat et al., "Impacts of Climate Change and Heat Stress on Farmworkers' Health: A Scoping Review" (2022) 10 *Frontiers in Public Health*, available at https://doi.org/10.3389/fpubh.2022.782811, p. 2; International Labour Organization, *Working on a warmer planet: The impact of heat stress on labour productivity and decent work* (2019), available at https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_711919.pdf, p. 14. See also M. Kiefer et al., "Worker health and safety and climate change in the Americas: issues and research needs" (September 2016) 40(3) *Rev Panam Salud Publica* 192, available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5176103/.

[125] A. Markham et al., *World Heritage and Tourism in a Changing Climate* (2016), available at https://www.ucsusa.org/sites/default/files/attach/2016/05/world-heritage-and-tourism-in-a-changing-climate.pdf, p. 11 ("Climate change is one of the most significant risks for World Heritage to emerge since the adoption of the World Heritage Convention in 1972.").

physically vulnerable to rising sea levels and extreme weather conditions[126]. To date, more than 130 World Heritage Cultural sites are directly endangered by rising sea levels[127]. This threat is especially acute for indigenous groups, whose cultural heritage and identity can be closely connected to their environments and traditional lands, resources and territories[128].

22. Furthermore, climate change significantly threatens the *Right to Water and Sanitation*, particularly by affecting the core elements of safe drinking water, namely availability, quality, accessibility, affordability and acceptability[129]. The "quality" dimension might be affected by the contamination of water sources and the salinization of water due to sea-level rise[130]. While the increase of extreme weather could cause damage to water source and infrastructure, impacting "accessibility"[131], the increased demand and competition over water will likely result in rising prices for water, affecting its "affordability"[132]. Finally, small island States, polar regions, mountainous areas, like Liechtenstein, and coastal States all have geographical characteristics that make them more vulnerable to climate change than the global average[133].

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[126] UNGA, Report of the Special Rapporteur in the field of cultural rights, Karima Bennoune, UN doc. A/75/298 (10 August 2020) (Dossier No. 326), para. 36.

[127] A. Markham et al., *World Heritage and Tourism in a Changing Climate* (2016), available at https://www.ucsusa.org/sites/default/files/attach/2016/05/world-heritage-and-tourism-in-a-changing-climate.pdf, p. 14.

[128] See UN Department of Economic and Social Affairs – Indigenous Peoples, "Climate Change" (last accessed: 14 February 2024), available at https://www.un.org/development/desa/indigenouspeoples/climate-change.html; "As climate crisis alters their lands, Indigenous Peoples turn to the courts," *UNEP* (8 August 2023), available a*t* https://www.unep.org/news-and-stories/story/climate-crisis-alters-their-lands-indigenous-peoples-turn-courts; A. Markham, "Cultural Heritage is a Human Right. Climate Change is Fast Eroding It." *The Equation Blog, Union of Concerned Scientists* (27 November 2023), available at https://blog.ucsusa.org/adam-markham/cultural-heritage-is-a-human-right-climate-change-is-fast-eroding-it/. See also UN General Assembly, 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/74/161 (15 July 2019) (Dossier No. 312), para. 48; UN Human Rights Council*,* Report of the Secretary-General on the impacts of climate change on the human rights of people in vulnerable situations, UN doc. A/HRC/50/57 (Dossier No. 292), para. 8.

[129] See UN General Assembly, 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/74/161 (15 July 2019) (Dossier No. 312), para. 38.

[130] See e.g. P. Arrojo Agudo, Special Rapporteur on the human rights to safe drinking water and sanitation, *Special Thematic Report 1: Outlining the impacts of climate change on water and sanitation around the world* (January 2022), available at https://www.ohchr.org/sites/default/files/2022-01/climate-change-1-friendlyversion.pdf, pp. 2-3.

[131] *Ibid.*

[132] *Ibid.* See also UN OHCHR, *Position Paper of the Independent Expert on human rights, water and sanitation, Ms. Catarina de Albuquerque: Climate Change and the Human Rights to Water and Sanitation*, available at https://www2.ohchr.org/english/issues/water/iexpert/docs/climatechange_hrtws.pdf, pp. 2-3.

[133] P. Arrojo Agudo, Special Rapporteur on the human rights to safe drinking water and sanitation, *Special Thematic Report 1: Outlining the impacts of climate change on water and sanitation around the world* (January 2022), available at https://www.ohchr.org/sites/default/files/2022-01/climate-change-1-friendlyversion.pdf, p. 3.

23. As with water security, continued climate change also has the potential to seriously undermine global food security. The effects of climate change will contribute to a decrease in food production, which in turn impacts food security and the enjoyment of the *Right to Food*, enshrined in Article 25 (1) of the UDHR and Article 11 (2) of the ICESCR[134].

24. Finally, let me turn to the *Right to a Clean, Healthy, and Sustainable Environment*. A legal concept, first recognized by the 1972 Stockholm Declaration[135], as well as in several regional human rights systems[136] and resolutions of the United Nations Human Rights Council and the United Nations General Assembly[137], but not codified in an internationally binding legal instrument, yet. The right to a clean, healthy and sustainable environment requires the preservation of a safe climate, clean air, clean water and adequate sanitation, healthy and sustainably produced food, non-toxic environments, and healthy biodiversity and ecosystems. As discussed throughout this section, all of these aspects are threatened by continued climate change.

25. In addition, the right to a clean, healthy and sustainable environment, as promoted by the resolutions of the United Nations Human Rights Council and the United Nations General Assembly[138], is of relevance for children. The rights of children to a clean, healthy and sustainable environment are impacted by climate change in ways that can affect their physical and mental health. Given that the consequences of environmental damage are very likely long standing and difficult to reverse, the failure to secure a clean, healthy and sustainable environment jeopardizes the ability of future generations to enjoy this right[139].

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[134] UDHR, Art. 25 (1); ICESCR, Art. 11 (2).

[135] Report of the UN Conference on Human Environment, Stockholm, 5-16 June 1972, *Chapter I: Declaration of the UN Conference on Human Environment*, UN doc. A/CONF.48/14/Ref.1 (1973) (Dossier No 136), Principle 1.

[136] Organisation of African Unity, African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986), *UNTS*, Vol. 1520, p. 217, Art. 24; Inter-American Court of Human Rights, Advisory Opinion OC-23-17, *The Environment and Human Rights* (15 November 2017), para 59.

[137] See e.g. 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) (Dossier No. 279); UNGA resolution 76/300, "The human right to a clean, healthy and sustainable environment", UN doc. A/RES/76/300 (28 July 2022) (Dossier No. 260).

[138] See e.g. 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) (Dossier No. 279); UNGA resolution 76/300, "The human right to a clean, healthy and sustainable environment", UN doc. A/RES/76/300 (28 July 2022) (Dossier No. 260).

[139] *Ibid.*

V. STATES HAVE AN OBLIGATION TO REDUCE GREENHOUSE GAS EMISSIONS AND IMPLEMENT MEASURES FOR CLIMATE ADAPTATION TO COMPLY WITH THEIR OBLIGATION TO RESPECT HUMAN RIGHTS, INCLUDING THE RIGHT TO SELF-DETERMINATION

26. *Fifth*, as part of the United Nations Framework Convention on Climate Change (hereinafter the "UNFCCC"), the Kyoto-Protocol and the Paris Agreement, Liechtenstein fully aligns its domestic climate policy with the goals of these legal instruments. Especially the provisions that States must do everything in their power to address climate change and, *inter alia*, reduce GHG emissions to limit the increase in global temperatures to well below 2°C above pre-industrial levels and pursue efforts to limit the temperature increase to 1.5°C as set out in the Paris Agreement (hereinafter the "1.5°C Standard"). Liechtenstein also fully agrees with the overwhelming scientific evidence that the failure to achieve the 1.5°C Standard will seriously threaten the habitability of territories around the world and might infringe a number of human rights, including the right to self-determination.

27. As recalled in the Declaration on the Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, "[e]very State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples"[140]. Because the adverse effects of climate change may have a significant effect on the right to self-determination, at the minimum, States are obliged to exercise due diligence and take all necessary steps to hold "the increase in the global average temperature to well below 2°C above pre-industrial levels and [pursue] efforts to limit the temperature increase to 1.5°C above pre-industrial levels"[141].

28. Liechtenstein is of the view that States are — in accordance with their obligations under the UNFCCC, the Kyoto Protocol and the Paris Agreement — obliged to take all necessary measures, including the reduction of GHG emissions and the implementation of effective climate adaptation measures, to protect from violations of the right to self-determination and the other human rights mentioned above.

29. With respect to the principle of common but differentiated responsibilities, Liechtenstein is of the view that the current division of obligations between developed States parties (Annex I of

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[140] UNGA resolution 2625 (XXV), "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations", UN doc. A/RES/2625(XXV) (24 October 1970), pp. 123-124.

[141] Paris Agreement, Art. 2(1)(a).

the UNFCCC) and developing States does not reflect the current reality. Several non-Annex-I-parties have become major GHG emitters since the adoption of the UNFCCC in 1992.

VI. THE LEGAL CONSEQUENCES OF A FAILURE TO ADDRESS THE EFFECTS OF CLIMATE CHANGE AND FULFIL CLIMATE CHANGE COMMITMENTS

30. Lastly, Liechtenstein reiterates its observations from the written statement[142] that the failure to fulfil the legal obligations under international human rights and environmental law generates international responsibility. Although it might be difficult to establish full responsibility for actions that were not considered to be unlawful in the past[143], all accountability measures must be considered. Individual claims against State responsibility for breaches of international obligations, alongside common or collective responsibilities will be crucial. Moreover, ensuring continuous statehood for Member States remains key. Potential remedies might include a collective obligation of major emitters to finance mitigation actions and adaptation measures. Finally, as highlighted in the ICJ *Pulp Mills* decision[144], the use of preventive measures such as environmental impact assessments can reduce transboundary environmental risks.

VII. CONCLUSION

31. To conclude, the legal, scientific and humanitarian stakes of climate change are high. It is abundantly clear that anthropogenic GHG emissions are driving climate change, with potentially serious impacts for the enjoyment of fundamental human rights.

32. But these consequences are not being felt in the same way. Vulnerable communities, including low-lying States, face a higher risk of severe impacts. While climate change is fundamentally a shared global challenge, it will affect humanity differently, and not all States are in the same position to respond to the threats. This reality is highly relevant to the legal issues under consideration in these advisory proceedings.

33. While the harms of climate change are already materializing, we are far from powerless. The extent to which States come together in just the next few years to co-ordinate meaningful global

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[142] See Liechtenstein Written Statement, para 80.

[143] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001), reproduced in *YILC, 2001*, Vol. II, Part Two, Article 31.

[144] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p. 14.

mitigation and adaptation measures will determine whether fundamental human rights can be freely enjoyed by generations to come.

34. For the reasons set forth in our written submission and in this oral statement, Liechtenstein respectfully requests that the Court exercise its jurisdiction to deliver an advisory opinion recognizing the legal obligations to address climate change which flow from the universal duty to uphold human rights, while adequately taking into account the legal obligations under international climate and environmental law. Liechtenstein believes that such an authoritative pronouncement from this Court will aid in the ongoing negotiations related to climate change.

35. Mr President, Members of the Court, this concludes the oral presentation of the Principality of Liechtenstein. I would like to thank the Court for its kind attention.

The PRESIDENT: I thank the representative of Liechtenstein for his presentation. I now invite the delegation of Malawi to address the Court and I call upon His Excellency Mr Thabo Chakaka-Nyirenda to take the floor.

Mr CHAKAKA-NYIRENDA:

I. INTRODUCTION

1. Good afternoon. Mr President, distinguished Members of the Court, my name is Thabo Chakaka-Nyirenda. I am honoured to appear before you in these historic advisory proceedings, in my capacity as the Attorney General of the Republic of Malawi.

2. Mr President, distinguished Members of the Court, my submissions will be divided into two parts. In the first part, I will address the impact of climate change on Malawi. In the second part, I will address, at high level, three principles that Malawi invites the Court to take into account when delivering its advisory opinion.

II. MALAWI AND CLIMATE CHANGE

3. These proceedings are necessary because we have had over a century and a half of anthropogenic greenhouse gas emissions. Those emissions have affected Earth's climate. The result is an existential risk to vulnerable communities worldwide.

4. The experts convened by the Court, and many who have spoken before me, have already explained in detail the significance of the threat that the climate emergency poses to our planet and its present and future generation. But the point is so important that it is worth repeating: the climate emergency is the greatest threat to our planet.

5. The consequences of climate change have affected and will continue to affect — disproportionately — my continent, Africa. And they have affected and will continue to affect — disproportionately — my country, Malawi.

6. Malawi is a landlocked State in southern Africa. It is one of the 45 States designated as a least developed country (LDC) by the United Nations. It is here before the Court because it considers it critical that the Court hears from least developed countries and takes their particular perspective — so often ignored — into account when delivering its advisory opinion.

7. Malawi, and essentially all least developed countries, find themselves in a particularly unfortunate and a very unenviable position: despite having barely contributed to greenhouse gas emissions, they bear a disproportionate burden of the consequences of climate change.

8. Viewed globally, Malawi has contributed less than 0.01 per cent to global greenhouse gas emissions — less than 0.01 per cent[145].

9. As that number indicates, Mr President, distinguished Members of the Court, Malawi has one of the smallest greenhouse gas emission footprints in the world[146].

10. Yet despite this negligible contribution to global greenhouse gas emissions, Malawi stands to bear a particularly heavy burden, a heavy price, from the consequences of climate change. This illustrates how this is a crisis of inequity. I will give two examples:

11. First, climate change affects rainfall patterns and temperatures. In turn, this negatively and severely affects agriculture, which a large percentage (approximately 80 per cent) of Malawi's rural population depends on[147]. Changed rainfall patterns exacerbate land degradation, desertification and

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[145] Hannah Ritchie, Pablo Rosado & Max Roser, "CO_2 and Greenhouse Gas Emissions", *Our World in Data* (2024), *available at* https://ourworldindata.org/co2-and-greenhouse-gas-emissions.

[146] World Bank Group, *Malawi - Country Climate and Development Report* (October 2022), *available at* https://documents1.worldbank.org/curated/en/099545010272237260/pdf/P1772201ced75ce9182e7142761bde013662bca4fe42.pdf, p. 11.

[147] Republic of Malawi, Updated Nationally Determined Contributions (July 2021), *available at* https://unfccc.int/sites/default/files/NDC/2022-06/Malawi%20Updated%20NDC%20July%202021%20submitted.pdf, p. 5.

droughts, and thus reduce agricultural productivity. The drought that Malawi experienced between 2015 and 2017 left 6.5 million Malawians facing food insecurity — including 3.5 million children[148]. So, almost 40 per cent of our population at the time experienced food insecurity because of the drought.

12. Second, climate change is provoking widespread injury and death through climate-related disasters. Three examples:

(a) First, last year the floods Malawi experienced led to the largest cholera outbreak on record, killing more than 1,700 Malawians[149].

(b) Second, more generally, between 2010 and 2022, Malawi experienced 16 major flooding events, five storm-related disasters and two severe droughts[150]. Some of these events, taken individually and all collectively, have affected 2.3 million people — around 10 per cent of the population — and have involved costs of almost a quarter of Malawi's annual budget[151].

(c) Third, last year, Cyclone Freddy affected nearly 2.3 million people. Total damages are estimated at over half a billion US dollars[152], and it is estimated that reconstruction will take around 40 years.

13. These losses, tragic as they are, also represent a massive setback to Malawi's objectives of attaining the social and economic development goals set out in the 2030 UN Sustainable Development Goals, the African Union's Agenda 2063 and Malawi's Growth and Development Strategy 2006 and Malawi 2063 Agenda. Malawi aspires to achieve economic growth and development, to become an inclusively wealthy and self-reliant country. So far, those social and economic development dreams remain shattered by the adverse effects of climate change.

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[148] World Bank Group, *Malawi - Country Climate and Development Report* (October 2022), *available at* https://documents1.worldbank.org/curated/en/099545010272237260/pdf/P1772201ced75ce9182e7142761bde013662bca4fe42.pdf, p. 21.

[149] *See* USAID, *Malawi: Climate Change Country Profile* (29 November 2023), *available at* https://www.usaid.gov/sites/default/files/2024-11/2024-USAID-Malawi-Climate-Change-Country-Profile.pdf.

[150] World Bank Group, *Malawi - Country Climate and Development Report* (October 2022), *available at* https://documents1.worldbank.org/curated/en/099545010272237260/pdf/P1772201ced75ce9182e7142761bde013662bca4fe42.pdf, p. 21.

[151] Republic of Malawi, Ministry of Forestry and Natural Resources, *Malawi's First Biennial Update Report To The Conference Of Parties (CoP) Of The United Nations Framework Convention On Climate Change (UNFCC)* (November 2021), *available at* https://unfccc.int/sites/default/files/resource/Malawi%20BUR1%20submitted.pdf, p. 2.

[152] *See* UNICEF, *Impact of Multiple Shocks on the Most Vulnerable in Malawi* (February 2024), *available at* https://www.unicef.org/malawi/media/11251/file/UNICEF_Impact_of_Shocks_Study_A4_Web.pdf, p. 15.

Additionally, her ability to repay its debts has been severely hampered by the adverse effects of climate change.

14. I want to be very clear: Malawi is suffering these consequences of climate change — now.

15. In light of this, Malawi has taken a series of steps that highlight its robust commitment to addressing climate change, both at the domestic and at the international level. I would highlight that Malawi is proud to have recently chaired a group of LDCs that resulted in the 2024 Lilongwe Declaration on Climate Change, which emphasized the urgency of "deep reductions in global emissions aligned with the 1.5°C warming limit"[153].

III. RELEVANT PRINCIPLES

16. Let me turn to the relevant principles. The issues raised in these advisory proceedings are complex. Given that I cannot address all of them, I would like to focus on three particular ones, that I respectfully invite the Court to take into account or consider when delivering its advisory opinion.

17. First, the Court has a strong mandate from the international community. Malawi recalls that an overwhelming majority of States voted in favour of the General Assembly resolution asking for an advisory opinion. There are no doubts here that the Court should exercise its jurisdiction and render an advisory opinion.

18. Second, Malawi considers that the principle of common but differentiated responsibilities and respective capabilities must be effectively considered when interpreting States' climate change obligations. I hope that the contrast between Malawi's minimal contribution to greenhouse gas emissions, and its substantial exposure to the consequences of climate change, illustrated the inequity and the asymmetry that led to the recognition of common but differentiated responsibilities and respective capabilities as a fundamental principle of international climate change law. While Malawi firmly believes that all countries, irrespective of their size or development status, must participate in preventing and mitigating climate change, not all bear the same level of responsibility, nor possess the same capacity to address the issue.

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[153] The 2024 Lilongwe Declaration on Climate Change by the Ministers of the Least Developed Countries (28 August 2024), *available at* https://www.ldc-climate.org/press_release/road-to-baku-lilongwe-declaration-on-climate-change/.

19. In particular, LDCs like Malawi, which have not enjoyed the economic benefits of the high levels of industrialization, nor contributed to them, should not be asked to pay the same price as developed countries. In short, there should not be impunity to those that contribute to the adverse effects of climate change.

20. The Court has the opportunity to affirm that those that are the most affected by the consequences of climate change are those who have contributed the least to the problem, as reflected in the key principle of common but differentiated responsibilities and respective capabilities. This principle is fundamental to a fair and accurate understanding of the obligations of States in relation to climate change.

21. Third, the Court should consider the entire corpus of international law. This means, of course, the specific treaties on climate change — the UNFCCC, the Kyoto Protocol and the Paris Agreement — but it is not limited to those instruments only. This is evident from the General Assembly's resolution requesting the Court's opinion. It does not only mention the climate change treaties, but rather mentions a broad array of elements of international law, including multilateral environmental treaties, UNCLOS, human rights treaties and general principles of international law, such as the prevention of significant harm to the environment, the duty of due diligence and the duty to protect. If the General Assembly wished to confine the Court's analysis to climate change treaties, it would have said so. Malawi thus hopes that the Court will use these proceedings to clarify and develop the international law on climate change.

22. The Court's authoritative guidance on the content of the existing obligations would be of much-needed assistance to the international community. It is important to emphasize that this relates to existing obligations, as set out in currently existing treaties and under the general corpus of international law. We have not come before the Court in these proceedings to ask it to legislate by advisory opinion and create new law. Far from it.

23. Mr President, distinguished Members of the Court, on behalf of the Republic of Malawi, I am grateful for your attention. I now kindly ask the Court to invite Ms Pasipanodya to the podium to elaborate on Malawi's position on State obligations under international law in relation to the protection of the climate system and the legal consequences for States causing significant harm to

the climate system and other parts of the environment such as restitution, reparation in the form of monetary compensation and total debt cancellation.

The PRESIDENT: I thank His Excellency Thabo Chakaka-Nyirenda. I now give the floor to Ms Tafadzwa Pasipanodya.

Ms PASIPANODYA:

I. INTRODUCTION

1. Good afternoon, Mr President, Madam Vice-President, Members of the Court. It is a privilege to appear before you on behalf of Malawi.

2. As a member of the African Union, Malawi fully endorses the views that the AU has presented in its written submissions. Malawi nevertheless takes this opportunity to respond to certain arguments made during the oral hearing so far.

3. Virtually every Participant has emphasized the grave threat that the climate crisis poses for humanity. Yet one small, but powerful cohort of States contends that all that international law has to say on that matter is reduced to the climate change treaties. For them, general international law is silent. They urge you to proceed with caution and warn you that your deciding otherwise would constitute radicalism in the form of *lex ferenda*.

4. With respect, that position is wrong. It is unduly restrictive. It is an invitation to ignore general and customary international law, which Malawi — and most other States that have appeared before the Court — do not share. As I will show, it is the position of that cohort which requires the Court to depart from the *lex lata*, in regard to both questions *(a)* and *(b)*. And given the time we have, I will focus on the due diligence obligation.

II. DUE DILIGENCE OBLIGATION THAT STATES PREVENT SUBSTANTIAL TRANSBOUNDARY HARM

5. First, it is radical, and wrong, to suggest that customary international law is irrelevant. The result of States meeting at COP cannot have been to strip away all existing environmental obligations under customary international law. Article 2 of the UNFCCC makes clear that the ultimate objective of that Convention and any related legal instruments is the "stabilization of greenhouse gas

concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system"[154]. There is no basis in that text for the assertion that States sought to achieve this objective by departing from well-established principles of environmental international law. In fact, the UNFCCC, which has almost universal application, expressly recalls the principle of due diligence obligation to prevent significant transboundary harm, stating 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"[155]. How then can it be true that the prevention of harm principle does not apply to greenhouse gas emissions?

6. The articulation of the prevention principle in the UNFCCC was taken almost verbatim from the Stockholm Declaration and Action Plan for the Human Environment[156]. States were thus not of the view that there is anything incompatible about applying international legal principles on broader environmental issues to the specific situation of climate change, contrary to what you have heard in this room earlier this week.

7. Indeed, the principle is rooted in the Court's long-established jurisprudence. In its very first decision in 1949, the Court held as a general and well-recognized principle, "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States"[157].

8. In 1996, in the *Nuclear Weapons* Advisory Opinion, the Court reaffirmed the principle, now in the context of the environment[158]. There, the Court first recognized that the "environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, *including generations unborn*". The Court then recalled "the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas

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[154] United Nations Framework Convention on Climate Change (1992), Art. 2.

[155] UNFCCC, preamble.

[156] UNGA, Report of the United Nations Conference on the Human Environment (Stockholm, 5-16 June 1972), UN doc. A/CONF.48/14/Rev.1 (1973) (Dossier No. 136), Chapter I: Declaration of the UN Conference on the Human Environment (Stockholm Declaration), Principle 21.

[157] *Corfu Channel (United Kingdom* v. *Albania*), *Merits, Judgment, I.C.J. Reports 1949*, p. 22.

[158] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I) ("Nuclear Weapons Advisory Opinion"),* pp. 241–242, para. 29.

beyond . . . control"[159]. It recognized unequivocally that that principle "is now part of the corpus of international law relating to the environment"[160].

9. The Court has affirmed this principle over and over again, including in the *Pulp Mills* case, where it held that a State is obligated "to use *all the means at its disposal*" in order to prevent transboundary harm emanating from its territory[161]. There, again, the Court, referred to the principle as a part of the corpus of international law relating to the environment. The Court should not now reject this principle and ignore its status. If the principle applies for localized environmental issues, it must surely apply to the gravest threat to the environment.

10. Malawi simply asks that the Court apply international law — as the Court itself has interpreted it. And, although the Court is not bound by the decisions of other courts and tribunals, we respectfully invite it to consider the International Tribunal for the Law of the Sea's Advisory Opinion of May this year, recognizing the applicability of customary international law obligations to the climate change crisis, independently of the existence of climate change treaties[162].

11. In Malawi's view, these customary international law obligations operate as a complement to the Paris Agreement. This means States have a due diligence obligation to take effective action to ensure that global temperatures do not exceed 1.5°C above pre-industrial levels. ITLOS affirmed that State parties to UNCLOS have a stringent due diligence obligation to take all necessary measures to prevent, reduce and control marine pollution from anthropogenic greenhouse gas emissions, and to protect and preserve the environment[163]. This includes concrete and specific obligations such as:

(a) adopting domestic regulatory framework to reduce greenhouse gas emissions and effectively enforcing that framework[164];

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[159] *Ibid.* (emphasis added).

[160] *Ibid.*

[161] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p. 56, para. 101 (emphasis added); *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 (II)*, p. 706, para. 104); *Dispute over the Status and Use of the Waters of the Silala (Chile* v. *Bolivia), Judgment, I.C.J. Reports 2022 (II)*, p. 648, para. 99.

[162] *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law*, ITLOS, Advisory Opinion of 21 May 2024, para. 354.

[163] ITLOS Advisory Opinion on Climate Change, paras. 234, 241.

[164] ITLOS Advisory Opinion on Climate Change, paras. 259-291.

(b) conducting and monitoring environmental impact assessments[165], providing scientific and technical assistance to vulnerable States[166], such as Malawi;

(c) and fulfilling the obligation of co-operation with other States[167].

12. Because those obligations are customary, the Court's guidance in establishing with precision their content and scope is critical. Put simply, it will assist States in determining what they need to do and how.

13. As indicated by the Honourable Attorney General, the standards by which each State must be held accountable in fulling its due diligence obligation to prevent harm will depend on the national circumstances and each State's capacity to take certain measures, consistent with the principle of common but differentiated responsibilities and respective capabilities (CBDR-RC). While all States, irrespective of their size or development status must participate in mitigating climate change, not all bear the same level of responsibility nor possess the same capacity to address the issue. It is established that the international community has agreed to an asymmetrical — but eminently fair — allocation of the burden of emissions reductions, consistent with the principle of CBDR-RC. Article 4 (4) of the Paris Agreement provides that developed States are required to "tak[e] the lead by undertaking economy-wide absolute emission reduction targets". States that have the means to transition to forms of energy that are less polluting than fossil fuels must do so as urgently as their means allow them to. This is reflected in the commitment of the global community "to a fair and accelerated process of phasing down unabated coal power and phase out of inefficient fossil fuel subsidies"[168].

III. THE OBLIGATION FOR STATES THAT HAVE CAUSED CLIMATE CHANGE AND ITS IMPACTS MUST REPAIR THE HARM CAUSED

14. Let me turn now to the second way in which the small, but powerful cohort of States seek to depart from the *lex lata*. They invite the Court to decide that there are no legal consequences for the significant harm caused by States in relation to greenhouse gas emissions because the normal

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[165] ITLOS Advisory Opinion on Climate Change, paras. 340-367.

[166] ITLOS Advisory Opinion on Climate Change, paras. 322-339.

[167] ITLOS Advisory Opinion on Climate Change, paras. 294-321.

[168] Glasgow Climate Pact, para. 20; Sharm-el-Sheikh Implementation Plan, para. 13.

international principles of State responsibility do not apply to climate change. This approach too, is radical and wrong.

15. It is a cardinal principle of international law that an internationally wrongful act of a State triggers specific legal consequences[169]. Indeed, this Court has played a crucial role in examining the legal consequences of violations of international obligations and clarifying the contours of reparations[170]. There is no justifiable reason to exempt climate change from those generally applicable rules.

16. For those who contend that there can be no legal consequences because of a lack of certainty as to when States developed an awareness of the harmful nature of their greenhouse gas emissions, Malawi emphasizes that such questions are to be determined by specific tribunals, called upon to decide specific cases, taking into account the particular circumstances of those cases. The Court's task in these proceedings is not to determine who must provide full reparations to whom.

17. Malawi, however, considers that the Court is in a position — now — to affirm the applicability of international legal norms on State responsibility and provide guidance as to what full reparation would look like, as and when the issue comes up in future cases.

18. First, Malawi submits that States must cease any act or omission that contravenes their obligations with respect to climate change[171].

19. Second, States must provide assurances of non-repetition, including by enacting domestic policies and legislations that are binding in nature and that contribute towards preventing and mitigating against climate change effects in accordance with international law obligations[172].

20. Third, restitution must be considered. Given the type of damage at issue, in some cases restitution unfortunately will not be possible. But in so far as it is possible, this could imply material

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[169] ARSIWA, commentary to Article 28, paras. 1 and 2.

[170] E.g., *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 197, para. 148; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 227, para. 165, p. 245, para. 220, pp. 253-257, paras. 250-259.

[171] ILC Draft Articles on State Responsibility, Art. 31. *See also* Bahamas Written Statement (22 March 2024), para. 238; Kiribati Written Statement (22 March 2024), paras. 178-196; Vanuatu Written Statement (21 March 2024), paras. 563, 580; Albania Written Statement (20 March 2024), paras. 133-134; Thailand Written Statement (22 March 2024), para. 29; OACPS Written Statement (22 March 2024), paras. 162, 168, 173; Burkina Faso Written Statement (2 April 2024), para. 238; Timor-Leste Written Statement (22 March 2024), paras. 373-374; The Philippines Written Statement (21 March 2024), para. 121.

[172] See African Union Written Statement (22 March 2024), para. 263.

restoration. As the Court held in *Certain Activities*, payments addressing active restoration may be necessary to return the environment "to the state in which it was before the damage occurred"[173].

21. Fourth, compensation may be the appropriate remedy when damage cannot be repaired by restitution. The Court held in *Certain Activities* that damage to the environment, including the "impairment or loss of the ability of the environment to provide goods and services", is "compensable under international law"[174]. Therefore, compensation for environmental damage is in line with the Court's precedents.

22. While tribunals deciding specific cases will have discretion and flexibility to structure those remedies in accordance with the particular circumstances of a case, the Court could indicate that peoples and individuals, both of present and future generations, are entitled to some form of compensation. These could include, for example, the creation of a compensation fund, or an international mechanism for reparation inspired by the mechanism recently created by the General Assembly for Ukraine in 2023. It could also include the creation of a register of damage inspired by the one created by the General Assembly for the Occupied Palestinian Territory, which followed the Court's Advisory Opinion on *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*.

23. As explained by the African Union, Kenya, Sierra Leone and Namibia, the Court could also suggest that, in the case of damage suffered by LDCs, such as Malawi, partial or total debt cancellation could be a valid form of compensation[175].

24. In addition, several participants have rightly recognized support for adaptation measures as a form of compensation — including through the transfer of resources and technology[176].

25. To be clear, Malawi is not asking the Court to determine that those particular forms of restitution or compensation are owed to a particular State, but inviting the Court to provide guidance.

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[173] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua) Compensation, Judgment, I.C.J. Reports 2018 (I)*, p. 28, para. 42.

[174] *Ibid.,* para. 42.

[175] See African Union, Written Comments (15 August 2024), paras. 86-91; Kenya, Written Statement (22 March 2024), para. 6.112; Sierra Leone, Written Statement (15 March 2024), para. 3.149; Namibia, Statement (19 March 2024), para. 145.

[176] See e.g. Written Statements of Barbados, para. 328; Brazil, paras. 95–96; Costa Rica, para. 122; Colombia, paras. 4.15-4.16; Kenya, paras. 6.89, 6.111-5.112; Kiribati, paras. 196; Liechtenstein, para. 80; Namibia, para. 144; Saint Lucia, paras. 92-94; Tuvalu, paras. 133, 136–140; Vanuatu, paras. 583–584; Melanesian Spearhead Group, paras. 318-322.

What is of paramount import for the Court's opinion is the affirmation of its well-established principle that internationally wrongful acts of a State trigger specific legal consequence. That the wrongful acts take place in the context of an existential threat of climate change does not make the normal principles of State responsibility inapplicable. To the contrary, those foundational principles of international law are needed more than ever.

26. Mr President, Madam Vice-President, distinguished Members of the Court, that concludes Malawi's submissions. We are grateful for your kind attention and the assistance of the Registry and the interpreters.

The PRESIDENT: I thank the representatives of Malawi for their presentation. Before I invite the next delegation to take the floor, the Court will observe a short break of 15 minutes. The hearing is suspended.

The Court adjourned from 4.20 p.m. to 4.40 p.m.

The PRESIDENT: Please be seated. The sitting is resumed. I now invite the next participating delegation, the Maldives, to address the Court and I call His Excellency Mr Ahmed Usham to the podium.

Mr USHAM:

INTRODUCTION

1. Mr President, Members of the Court, I have the honour to appear before you on behalf of the Republic of Maldives.

2. Forging a meaningful international law response to the climate crisis has been a cornerstone of the Maldives' foreign policy. In 1989, the Maldives hosted the first Small States Conference on Sea Level Rise. This meeting laid the groundwork for the formation of the Alliance of Small Island States, of which we were one of the founding members. In our capacity as Chair of that Alliance from 2015 to 2018, we advocated tirelessly for the concerns of small island developing States during the negotiations for the Paris Agreement.

3. Under the leadership of His Excellency President Dr Mohamed Muizzu, the Maldives continues to demonstrate strong and effective leadership on climate change in the international arena. We were at the forefront of efforts to establish a dedicated Fund for responding to loss and damage and are currently engaged in its operationalization efforts. We are also leading calls for a just energy transition and increased support for vulnerable communities including SIDS and the Least Developed Countries.

THE MALDIVES' ACUTE VULNERABILITY TO SLOW-ONSET IMPACTS OF CLIMATE CHANGE

4. The Maldives is an archipelagic nation with a population spread over 187 islands[177]. Over 80 per cent of our country's land is less than 1 metre above mean sea level[178], and half of our people live within 100 metres of the coastline[179]. This makes our country acutely vulnerable to impacts of the climate crisis, particularly slow-onset impacts such as sea level rise, coastal erosion and coral bleaching. Those slow-onset impacts will be the focus of the Maldives' presentation today. That we experience them so acutely is especially unjust given that the Maldives' total share of global emissions is in the range of 0.004 per cent[180].

THE MALDIVES' OPPOSITION TO FORCED RELOCATION

5. Island communities across the Maldives continue to experience sea level rise and coastal erosion, causing damage to their livelihoods, critical infrastructure and surrounding environment. The Maldives' long-term policy has been to protect all its inhabited islands through adaptation measures. We refuse to put in place any policy of forced relocation, or to accept relocation as an inevitability. We are a civilization that is thousands of years old, and we have no intention of abandoning our homeland. We have the right to live on the land to which we have unbreakable social, cultural and economic ties and where our families have lived for countless generations.

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[177] Maldives' First Biennial Transparency Report to the United Nations Framework Convention on Climate Change (UNFCCC) under the Paris Agreement, November 2024 ("First Biennial Transparency Report"), https://unfccc.int/documents/643923, para. 4.3.1.2.

[178] First Biennial Transparency Report, para. 4.3.1.1.

[179] President's statement, "Building Resilient Futures: The SIDS Debt Sustainability Support Service", 21 September 2024, https://presidency.gov.mv/Press/Article/31650.

[180] First Biennial Transparency Report, foreword.

6. The Maldives has pursued an ambitious programme of domestic measures to make this possible[181]. But the adaptation measures we need vastly exceed the Maldives' financial capacity[182]. We should not be forced to choose between funding sea walls or funding our children's education or investing in clean water, but that is the reality we currently face.

INTERNATIONAL LAW REQUIRES STATES TO PROVIDE SUPPORT TO THE MALDIVES

7. The Maldives needs international support. This is not merely a moral obligation. There are concrete legal obligations requiring developed States to work with the Maldives in implementing effective adaptation measures, and it is these obligations which the Maldives' statement will address today. Specifically:

(a) Ms Wells will identify the obligations arising under the climate treaty régime which mandate the provision of support for developing States;

(b) Dr Hart will then address the Court on the obligation to co-operate under customary international law.

8. Mr President, Members of the Court, climate change threatens our way of life, our cultural identity and our heritage. But the will to survive is embedded in our history and in our bones. President Dr Muizzu has adopted robust policies to increase resilience to climate impacts, and has tirelessly called on the international community for urgent co-ordinated global action to address climate change and sea level rising, including increasing adaptation finance, operationalizing the Fund for responding to loss and damage and facilitating technology transfer.

9. We are confident that the Court, whilst undertaking its solemn duty in these proceedings, will give careful attention to the plight of the Maldives and other small island developing States.

10. Mr President, Members of the Court, I thank you for your attention and ask you to give the floor to Ms Wells.

The PRESIDENT: I thank His Excellency Mr Ahmed Usham. I now give the floor to Ms Jessica Wells.

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[181] First Biennial Transparency Report, para. 4.3.2.1.

[182] President's statement, "High-Level Meeting on Sea Level Rise", 25 September 2024, www.presidencymaldives.gov.mv/Press/Article/31717.

Ms WELLS:

1. Mr President, Members of the Court, it is an honour to address you today on behalf of the Republic of Maldives.

2. I will address you on some of the mandatory obligations which are imposed by the Paris Agreement and which are of relevance to question *(a)*.

3. As the Court reaches the halfway point of the oral arguments, it is timely to highlight the hard-edged obligations which have been expressly accepted by developed country parties to the Paris Agreement (building on the UNFCCC): obligations which are critical to enabling States such as the Maldives to respond to the challenges of climate change and, in particular, to adapt to slow-onset effects; obligations which require States to co-operate if they are to be effectively performed and enforced. The Maldives agrees with the vast majority of Participants in these proceedings that these treaty obligations exist alongside, and neither displace nor exhaust, rules of customary international law, including those which Dr Hart will address shortly.

4. It is important to consider these mandatory obligations holistically, for they form an interlocking scheme, which targets both *the areas* in which developed countries are required to provide support, and *the means* by which such support is to be provided — bolstered by provisions to ensure transparency, communication and accountability between States.

5. One of the key *areas* in which support must be provided is in relation to adaptation[183]. Article 7 (13) of the Paris Agreement provides that "continuous and enhanced international support" *shall* be provided to developing countries in relation to the adaptation measures covered in Article 7.

6. As to the *means* by which such support is to be provided, Article 7 (13) expressly refers to Articles 9, 10 and 11:

(a) Article 9 (1) states that developed States *shall* provide financial resources to assist developing countries with respect to both mitigation and adaptation;

(b) Article 10 (2) provides that the parties *shall* strengthen co-operative action on technology development and transfer; and

[183] Article 4 (5) of the Paris Agreement provides that support *shall* be provided to developing countries in relation to the mitigation measures covered in Article 4.

(c) Article 10 (6) states that support, including financial support, *shall* be provided to developing States, including for strengthening co-operative action on technology development and transfer.

7. Articles 9, 10 and 11 also contain a number of significant steps which States "should" take. Even if this were considered a weaker term than "shall", these provisions must be interpreted in the light of the mandatory obligations set out in, for example, Article 7 (13). Of particular importance in this regard are:

(a) Article 9 (3) which provides that developed States "should" continue to take the lead in mobilizing climate finance from a variety of sources, taking into account the needs and priorities of developing States; and

(b) Paragraphs 1 and 2 of Article 11, which provide (*inter alia*) that capacity-building should: enhance the capacity and ability of States that are particularly vulnerable to the adverse effects of climate change to take effective climate change action; and be responsive to national needs.

8. The Paris Agreement also puts in place mandatory information-sharing and reporting requirements, designed to ensure that the support provided is transparent and effective. In particular:

(a) Article 13 enhances the transparency framework introduced under the UNFCCC. There are specific reporting requirements in paragraphs 7 to 10, including a mandatory requirement for developed States to provide information about the support that they are providing to developing States. These reflect substantive obligations such as the requirement in Article 9 (7) that developed States *shall provide* transparent and consistent information on the financial support provided;

(b) Article 14 provides for a "global stocktake" to assess periodically the implementation of the Paris Agreement. This again is referenced in more specific provisions such as Article 7 (14), which provides that the global stocktake shall review the adequacy and effectiveness of support provided for adaptation. Likewise Article 9 (6), which stipulates that the global stocktake shall take into account relevant information provided by developed States on efforts related to climate finance.

9. The mandatory obligation to provide financial resources for mitigation and adaptation, contained in Article 9 (1)[184], has been highlighted by a number of developed States in these proceedings[185]. The acknowledgment that this is a binding obligation is welcome. But, although the Article 9 (1) obligation is critical, it should be viewed in the context of the overall scheme which I have just summarized. For it is that context which enables a proper assessment of compliance by developed States. It is not sufficient that developed States simply write out cheques — still less that they make unfulfilled pledges. What States like the Maldives need is accessible finance and support that responds to their individual situation, and is sustainable. For this reason, the additional obligations which I have highlighted must not be overlooked. When considered in the round, it is clear that they require a high level of communication and co-operation between States.

10. Mr President, Members of the Court, the Maldives acknowledges that the Paris Agreement represented a huge step forward in the battle against climate change. It provides a legal framework which, if properly implemented, should ensure the rapid flow of financial and technological assistance to the States which need it most. But it requires all States to perform these obligations in good faith.

11. The reality is falling far short of what is required. At COP29, the Maldives identified a number of specific areas of concern. To give just two examples:

(a) The need to implement measures to enhance access to climate finance — it is not enough simply to recognize that there are barriers to access;

(b) The need for a definition of "climate finance" or at the very least agreement on the necessary attributes of climate finance (for instance, set interest rates, maturity periods and grace periods).

12. It is the Maldives' submission that these concerns can and should be addressed pursuant to the careful scheme of mandatory obligations which already exists in the Paris Agreement. But it is only through an escalation of co-operative efforts that these obligations can be performed.

13. There is a separate aspect of the climate treaty régime which also requires co-operative effort — namely, bringing to fruition the fund for responding to loss and damage.

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[184] Article 9 (1) builds on the obligation in Article 4 (3) of the UNFCCC.

[185] Including: Australia (Written Statement at [2.35]); Iran (Written Statement at [48]-[49]); Republic of Korea (Written Statement at [21]); China (Written Statement at [73]); UAE (Written Statement at [142]); United Kingdom (Written Statement at [158.1]); and South Africa (oral presentation at CR 2024/35, p. 132, [21]).

14. The need to provide a fund which can be accessed by States suffering loss and damage has long been a feature of the treaty régime. It is a goal to which all States' parties have committed. Progress towards this goal has been incremental.

(a) The Warsaw International Mechanism was established at COP19 in 2013[186]. It has developed to include a dedicated focus on slow-onset events[187] — an issue of critical importance to the Maldives;

(b) Article 8 of the Paris Agreement recognises the importance of *averting, minimizing and addressing* loss and damage and clarifies that obligations relating to loss and damage are not premised on establishing any breach of international law nor invocation of State responsibility.

15. During 2024, the Board of the Loss and Damage Fund was operationalized. It is hoped that the Board will continue this momentum and begin disbursing funds by 2026 at the latest. The progress made so far shows what is possible when States co-operate — and serves to highlight the need for further and better co-operation.

16. Mr President, Members of the Court, I thank you for your kind attention and ask that you give the floor to Dr Hart.

The PRESIDENT: I thank Ms Jessica Wells. I now give the floor to Ms Naomi Hart. You have the floor, Madam.

Ms HART:

1. Mr President, Members of the Court, tackling the climate crisis will require an unprecedented collective effort among States. International co-operation is not just a necessary political tool in this context. It is also the subject of international legal obligation.

2. It is an honour to address the Court today on the customary international law duty to co-operate. To date, the Court has had the opportunity to develop clear principles on specific procedural aspects of the duty to co-operate in relation to the duty to exercise due diligence to prevent transboundary harm. This is what the first part of my statement will address. In the second part, I will

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[186] Decision 2/CP.19.

[187] https://unfccc.int/process/bodies/constituted-bodies/WIMExCom/SOEs.

explain that the duty to co-operate is not limited to those specific aspects. It is a broader duty which has four specific manifestations in the context of climate change.

1. PROCEDURAL DUTIES TO CO-OPERATE UNDER THE DUTY TO PREVENT TRANSBOUNDARY HARM

3. I turn first to the procedural aspects of the duty to co-operate which are well established as part of the duty to prevent transboundary harm. In carrying out a required environmental impact assessment[188], a State must co-operate by notifying and consulting other States which may be affected by the activity under contemplation[189]. The Court has described these procedural obligations as "all the more vital" when the environment "can only be protected through close and continuous co-operation"[190] — as is plainly true in relation to the climate crisis[191].

4. Specifically, a State must co-operate with other States "to determine the appropriate measures to prevent or mitigate [the] risk" of a potentially harmful activity[192]. This is because, as the Court has recognized, it is only "by co-operating that the States concerned can jointly manage the risks of damage to the environment that might be created"[193].

5. The International Law Commission has explained that notification and consultation are not "a mere formality"[194] and that States contemplating potentially harmful activity must "enter into

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[188] See e.g. *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, pp. 82-83, 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 (II)*, pp. 706-707, para. 104, p. 720, para. 153; *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law*, Advisory Opinion, 21 May 2024, paras. 354-355.

[189] *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 (II)*, pp. 706-707, para. 104.

[190] *Dispute over the Status and Use of the Waters of the Silala (Chile* v. *Bolivia), Judgment, I.C.J. Reports 2022 (II)*, p. 649, para. 101; *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p. 51, para. 81.

[191] United Nations Framework Convention on Climate Change, Preamble; *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law*, Advisory Opinion, 21 May 2024, para. 297.

[192] *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 (II)*, pp. 706-707, para. 104.

[193] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p. 49, para. 77; *Dispute over the Status and Use of the Waters of the Silala (Chile* v. *Bolivia), Judgment, I.C.J. Reports 2022 (II)*, p. 649, para. 100.

[194] International Law Commission, Draft articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries, Report of the ILC on the Work of its Fifty-third Session, UN doc. A/56/10, 2001, p. 160, Art. 9, commentary para. (2).

consultations in good faith . . . with a view to arriving at an acceptable solution"[195]. It has also made the obvious point that the potentially affected State "may know better than anyone else . . . which features of the activity in question may be more damaging to it", including whether there is "a specially vulnerable ecosystem"[196].

6. The Maldives has already identified measures to combat the slow-onset effects of climate change and to enable its people to remain on their lands[197]. It stands ready to co-operate with emitting States as part of their duty to consult.

2. THE BROADER DUTY TO CO-OPERATE

7. Those procedural aspects of the duty to co-operate do not exhaust the duty's normative content. As I will turn to address now, there is a broader and more fundamental duty to co-operate under international law[198].

(a) One of the United Nations' purposes, articulated in Article 1 (3) of its Charter[199], is to "achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character". In Article 56, Member States also make a "pledge" to take "joint and separate action in co-operation with" the United Nations to achieve the purposes in Article 55.

(b) The international community reaffirmed, in the Friendly Relations Declaration, that States "have the duty to co-operate with one another" including in order to "maintain international peace and security" and to promote "the general welfare of nations" and "universal respect for, and observance of, human rights"[200].

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[195] International Law Commission, Draft articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries, Report of the ILC on the Work of its Fifty-third Session, UN doc. A/56/10, 2001, p. 160, Art. 9, commentary para. (2).

[196] International Law Commission, Draft articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries, Report of the ILC on the Work of its Fifty-third Session, UN doc. A/56/10, 2001, p. 155, Art. 4, commentary para. (1).

[197] Maldives' First Biennial Transparency Report to the United Nations Framework Convention on Climate Change (UNFCCC) under the Paris Agreement, November 2024 ("First Biennial Transparency Report"), https://unfccc.int/documents/643923, Chapter 4.

[198] See e.g. CR 2024/37, p. 27, para. 40 (Bolivia, Calzadilla Sarmiento).

[199] Charter of the United Nations, 26 June 1945 (entered into force 24 October 1945).

[200] 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UNGA Resolution 2625 (XXV), UN doc. A/RES/2625(XXV) (24 October 1970) ("Friendly Relations Declaration").

(c) A broad duty to co-operate has been frequently affirmed as a free-standing obligation in relation to environmental protection[201]. The International Tribunal for the Law of the Sea has held, including in its recent advisory opinion, that the "the duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment under . . . general international law"[202].

(d) The Court has recognized an obligation to co-operate in specific contexts outside of the duty to prevent transboundary harm. For instance, in relation to the management of shared fishery resources, it has held that States "have the obligation . . . to examine together, in the light of scientific and other available information, the measures required for the conservation and development, and equitable exploitation, of those resources"[203].

8. It is clear, therefore, that the duty to co-operate transcends the narrow procedural obligations which arise as part of the duty to prevent transboundary harm. The full scope and the outer limits of that broader duty are difficult to articulate in the abstract. But that does not deprive the duty to co-operate of its legal force, and nor does it prevent the Court from identifying some of the duty's content in the specific context of climate change. The Maldives will identify four aspects of the duty to co-operate which are relevant in this context.

9. First, States are under a duty to co-operate where this is necessary in order to perform their treaty obligations[204]. The duty to perform treaty obligations in good faith[205] demands no less. There is no clearer example than the obligations in the Paris Agreement to provide financial and technical assistance addressed by Ms Wells. Experience has shown that these obligations are empty if States do not adopt a co-operative approach to fulfilling them.

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[201] See e.g. Declaration of the United Nations Conference on the Human Environment ("Stockholm Declaration"), reproduced in Report of the United Nations Conference on the Human Environment, 5-16 June 1972, UN doc. A/CONF.48/14/Rev.1, principle 24; Rio Declaration on Environment and Development ("Rio Declaration"), reproduced at Report of the United Nations Conference on Environment and Development, 3-14 June 1992, UN doc. A/CONF.151/26 (Vol. 1), Annex 1, principles 7, 27.

[202] *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*, Advisory Opinion, 21 May 2024, para. 296, citing *MOX Plant Case (Ireland* v. *United Kingdom)*, Provisional Measures, Order of 3 December 2001, para. 82.

[203] *Fisheries Jurisdiction (United Kingdom* v. *Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 31, para. 72.

[204] See e.g. *Whaling in the Antarctic (Australia* v. *Japan: New Zealand intervening), Judgment, I.C.J. Reports 2014*, p. 257, para. 83, p. 297, para. 240; *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980*, pp. 95-97, paras. 49, 51 (2).

[205] Vienna Convention on the Law of Treaties, 23 May 1969, 1155 *UNTS* 331 (entered into force 27 January 1980), Article 26.

10. Secondly, the duty to co-operate includes a duty to act collaboratively with other States, in good faith, with a view to achieving an outcome which they have collectively committed to pursue, especially where achievement of that outcome is predicated on a co-operative effort. The Court has previously recognized that, where States have agreed to pursue a particular outcome, they bear "a joint responsibility" to do so[206]. This includes where States have agreed to pursue a "general" outcome that "ha[s] to be transformed into specific obligations of performance through a process of consultation and negotiation" which "requires a mutual willingness to discuss in good faith"[207].

11. In such a scenario, the duty to co-operate does not dictate any mandatory result of States' co-operative effort[208]. Rather, the obligation is one of conduct, whereby States must seek in good faith to achieve the outcome which they have already committed to in principle[209]. There are obvious parallels with the duty to negotiate in good faith, which requires States to "so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it"[210]. Each party "should pay reasonable regard to the interests of the other[s]"[211] and refrain from acting unilaterally in a way that would defeat the outcome they are bound to pursue[212]. While the obligation to co-operate is not the same as the obligation to negotiate, those underlying principles of good faith conduct apply with equal force to both[213].

12. How is that relevant to these proceedings? Ms Wells has highlighted the repeated commitments of State parties to the UNFCCC régime to establish a Fund for responding to loss and damage. And yet no fund that is actually accessible to developing States has materialized — and the

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[206] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, pp. 67-68, para. 112.

[207] *Ibid.*

[208] *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law*, Advisory Opinion, 21 May 2024, para. 310.

[209] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 78, para. 141; *Obligation to Negotiate Access to the Pacific Ocean (Bolivia* v. *Chile), Judgment, I.C.J. Reports 2018 (II)*, p. 538, paras. 86-87.

[210] *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, pp. 47-48, paras. 85 *(a)*, 87.

[211] *Obligation to Negotiate Access to the Pacific Ocean (Bolivia* v. *Chile), Judgment, I.C.J. Reports 2018 (II)*, p. 538, para. 86, citing *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia* v. *Greece), Judgment, I.C.J. Reports 2011 (II)*, p. 685, para. 132.

[212] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p. 67, paras. 144, 147.

[213] *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law*, Advisory Opinion, 21 May 2024, para. 309.

inadequacy of negotiations regarding the new collective quantified goal recently almost led to the collapse of COP29[214]. Germany was keen to stress earlier this week that the funding arrangements relating to loss and damage currently rest on voluntary contributions[215]. However, while there may not yet be a crystallized obligation to contribute to the Fund on a particular scale or at a particular time, the undertaking to pursue the objective of an accessible and sufficient fund has been given. That underlying commitment gives rise to a hard-edged, concrete obligation to co-operate, with co-operative efforts being subject to all the conditions of good faith conduct which I have just outlined. An important first step will be providing technical assistance to States such as the Maldives so that they can quantify the loss and damage they have suffered.

13. Third, States have a duty to co-operate in order to achieve universal respect for and observance of human rights[216]. If climate change compels individuals to relocate from their homes, that puts in jeopardy their enjoyment of the right to privacy, family and home, the right to property, cultural rights, and the right to a clean, healthy and sustainable environment[217]. You have heard the Attorney General of the Republic of Maldives speak of the pressing desire of Maldivians to remain on their ancestral homelands. Sea-level rise and coastal erosion have already forcibly displaced some communities, imperilling distinctive local cultures as well as significant cultural heritage sites, such as the Maldives' oldest cemetery with its ancient carved coral gravestones[218]. Developed States must co-operate with the Maldives to put in place adaptive measures so that its people can, consistent with basic human rights guarantees, remain on their lands.

14. So far, I have addressed how the duty to co-operate arises in primary rules of international law, falling within the first question posed to the Court. The fourth aspect of the duty to co-operate

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[214] See "'We were ready to leave climate summit' — negotiator tells BBC", *BBC News*, 25 November 2024, https://www.bbc.co.uk/news/articles/cpwrlkwz9x9o.

[215] CR 2024/35, p. 145, para. 28 (Germany, Rückert).

[216] Charter of the United Nations, 26 June 1945 (entered into force 24 October 1945), Articles 55-56; Friendly Relations Declaration. See also Inter-American Court of Human Rights, *Advisory Opinion OC-23/17 on the Environment and Human Rights*, 15 November 2017, paras. 181-210; International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 *UNTS* 3 (entered into force 3 January 1976) ("ICESCR"), Article 2 (1).

[217] Universal Declaration on Human Rights, UNGA Resolution 217 (II), UN doc. A/RES/217(III) (10 December 1948), Articles 12, 16 (3), 17, 27; International Covenant on Civil and Political Rights, 16 December 1966, 999 *UNTS* 171 (entered into force 23 March 1976), Articles 1 (1), 17, 23, 37; ICESCR, Articles 1 (1), 10 (1), 11 (1), 15 (1) *(a)*.

[218] First Biennial Transparency Report, p. 129.

falls within the second question: if there has been a breach of a primary obligation which contributes to climate change, what form should reparation assume?

15. Full reparation must, of course, "as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed"[219]. Restitution is, in principle, the primary remedy; monetary compensation is reserved for when that is not possible[220].

16. The Maldives contends that, in determining what form reparation should take, the wrongdoing State bears a duty to co-operate with the injured State to ascertain how the consequences of the wrongful act can be most effectively "wiped out".

17. Some effects of climate change are irreversible and can be remedied only by way of compensation[221]. But other consequences can and must be remediated through measures aimed at restoring or at least maintaining the status quo, at least in part. The status quo which the Maldives wishes to maintain is one in which its people are not displaced from their lands. States which must make reparations are under a duty to co-operate with the Maldives to achieve this outcome, providing the technical and financial assistance that will enable Maldivians to adapt to their changed environment, rather than be torn from it.

CONCLUSION

18. Mr President, I return to the Attorney General's words. The Maldives has a will to survive. It refuses to accept relocation of Maldivians as an inevitability.

19. Small island developing States have no desire to be passive victims of climate change. The duty to co-operate, in its many aspects, is a vehicle for granting them agency. It gives them a voice that high-emission States must seek out, listen to and respect. The Maldives urges the Court to take account of this duty when formulating its opinion.

20. Mr President, Members of the Court, I thank you for your attention.

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[219] Case concerning the *Factory at Chorzó*w*, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17*, at p. 48.

[220] *Ibid.*

[221] See, e.g., *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Compensation, Judgment, I.C.J. Reports 2018 (I)*, pp. 26-27, paras. 34-35; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Reparations, Judgment, I.C.J. Reports 2022 (I)*, pp. 51-52, para. 106.

The PRESIDENT: I thank the representatives of the Maldives for their presentation. I now invite the next participating delegation, the African Union, to address the Court and I call upon Professor Hajer Gueldich to take the floor.

M[me] GUELDICH :

INTRODUCTION

1. Monsieur le président, Madame la vice-présidente, honorables juges, c'est un honneur pour moi de me tenir devant vous aujourd'hui afin de représenter l'Union africaine et ses 55 États membres. Vous l'aurez compris, comme en témoigne la participation de nombreux États africains aux phases écrites et orales[222], cette procédure consultative est d'une importance vitale pour les générations présentes et futures du continent africain, berceau de l'humanité.

2. L'Union africaine est convaincue qu'un avis de la Cour pourrait contribuer, sur la base du droit international positif, à l'objectif crucial de justice climatique. Cet objectif, au cœur du régime sur le climat tel que défini par l'accord de Paris[223], se retrouve naturellement au centre de la présente procédure[224]. Après une semaine d'audiences, l'Union africaine en est d'autant plus convaincue.

3. Mon propos introductif aura deux objectifs essentiels : d'une part, souligner la nécessité pour la Cour de rendre un avis fondé sur la justice climatique ; et d'autre part, mettre en relief la portée juridique d'un avis de la Cour inspiré par un tel idéal.

1. LA NÉCESSITÉ D'UN AVIS FONDÉ SUR LA JUSTICE CLIMATIQUE

4. Monsieur le président, Mesdames et Messieurs les juges, l'avis consultatif attendu de vous par l'Assemblée générale des Nations Unies ne peut faire l'impasse sur le principe de justice climatique.

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[222] Les États africains suivants ont déposé des écritures : Afrique du Sud, Burkina Faso, Cameroun, Égypte, Gambie, Ghana, Kenya, Madagascar, Maurice, Namibie, République démocratique du Congo, Sierra Leone et Seychelles. Les États africains suivants participent aux audiences publiques : Afrique du Sud, Burkina Faso, Cameroun, Côte d'Ivoire, Égypte, Gambie, Ghana, Kenya, Malawi, Namibie, République démocratique du Congo, Sénégal, Seychelles, Sierra Leone, Soudan, Union des Comores, Zambie.

[223] Dossier n° 16, accord de Paris, 12 décembre 2015, 13[e] alinéa du préambule.

[224] Dossier n° 3, Nations Unies, 64[e] séance plénière (29 mars 2023), doc. A/77/PV.64, p. 1, propos du Secrétaire général.

5. Il ne fait guère de doute que les deux questions devant vous ont pour trait d'union ce principe, qui a inspiré de nombreux commentaires de la part des participants[225]. La justice climatique requiert, entre autres, que les obligations et responsabilités dans la lutte contre les changements climatiques soient réparties en fonction des États qui ont contribué et contribuent le plus à ce problème. Ce principe doit aussi servir de baromètre à la Cour dans la définition des obligations pertinentes et pour l'identification des conséquences juridiques qui en découlent. C'est, enfin, au nom de ces considérations de justice climatique que la requête de l'Assemblée générale fait expressément référence, de façon inédite, de façon unique dans l'histoire des procédures consultatives devant la Cour, aux « générations présentes et futures », « aux peuples et individus atteints », et aux États qui sont « particulièrement vulnérables » « de par leur situation géographique et leur niveau de développement »[226].

6. L'Afrique abrite la population la plus jeune du monde. Il s'agit donc du continent dont les « générations présentes et futures », les « peuples et individus », et les États, y compris « insulaires en développement », ont été, sont, et seront les plus affectés par les effets catastrophiques des changements climatiques[227]. Cette vulnérabilité résulte non seulement de la « situation géographique » et du « niveau de développement » de ces États, mais également de leur lourd passé colonial[228].

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[225] Les exposés écrits suivants renvoient à la notion de « justice climatique » : Albanie (par. 144) ; Australie (par. 3.56-3.57) ; Bangladesh (par. 5, 21, et 25) ; Barbade (par. 112 et 114) ; Bolivie (par. 60) ; Burkina Faso (par. 5) ; Colombie (par. 2.12-2.13 et 2.49) ; Commission des petits États insulaires sur le changement climatique et le droit international (par. 5-6) ; Costa Rica (par. 79) ; Égypte (par. 53 et 60) ; Équateur (par. 1.17) ; Grenade (par. 72-73) ; Groupe Fer de lance mélanésien (par. 34, 316 et 341) ; Îles Salomon (par. 89) ; Inde (par. 71, al. iv), et 72) ; Kenya (par. 5.38-5.39) ; Liechtenstein (par. 21 et 30) ; Madagascar (par. 63-64, 93-94 et 98) ; Namibie (par. 10, 12-13 et 76) ; Nauru (par. 10 et 17) ; Nouvelle-Zélande (par. 9) ; Organisation des États d'Afrique, des Caraïbes et du Pacifique (par. 7, 34, 50, 53, 63, 142 et 167) ; Organisation mondiale de la Santé (par. 9) ; Pakistan (par. 11) ; Pays-Bas (par. 4.20) ; Pérou (par. 18) ; Philippines (par. 28, al. *b)*) ; Roumanie (par. 23-29) ; Royaume-Uni (par. 13.2) ; Sierra Leone (par. 1.5-1.6 et 3.38) ; Timor-Leste (par. 36) ; Uruguay (par. 21) ; Union internationale pour la conservation de la nature (appendice 1, par. 38) ; Vanuatu (par. 87-91). Les observations écrites suivantes renvoient à la notion de « justice climatique » : Costa Rica (par. 37) ; El Salvador (par. 3) ; Gambie (par. 5.11 et 5.16) ; Groupe Fer de lance mélanésien (par. 10, 24, 206, 209 et 246) ; Organisation des États d'Afrique, des Caraïbes et du Pacifique (par. 46) ; Philippines (par. 81-84) ; Vanuatu (par. 57).

[226] Dossier nº 2, Nations Unies, Assemblée générale, résolution 77/276 du 4 avril 2023, doc. A/RES/77/276, p. 3.

[227] Voir, par exemple, le rapport récent de l'Organisation météorologique mondiale, intitulé « État du climat en Afrique », OMM-nº 1360, 2 septembre 2024 : accessible à l'adresse suivante : https://library.wmo.int/records/item/69000-state-of-the-climate-in-africa-2023 (ci-après, « OMM, État du climat en Afrique »). Notre Dame Global Adaptation Initiative, Country Index, Rankings by vulnerability, accessible à l'adresse suivante : https://gain.nd.edu/our-work/country-index/rankings/ ; voir aussi rapport d'expertise de l'Union africaine, par. 28.

[228] Rapport d'expertise de l'Union africaine, 22 mars 2024, par. 20. Voir aussi dossier nº 76, C.H. Trisos, I.O. Adelekan, E. Totin, A. Ayanlade, J. Efitre, A. Gemeda, K. Kalaba, C. Lennard, C. Masao, Y. Mgaya, G. Ngaruiya, D. Olago, N.P. Simpson, and S. Zakieldeen, « 2022: Africa », *in* H.-O. Pörtner, D.C. Roberts, M. Tignor, E.S. Poloczanska, K. Mintenbeck, A. Alegría, M. Craig, S. Langsdorf, S. Löschke, V. Möller, A. Okem, B. Rama (eds), *Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment*

7. Les rapports établis par le GIEC, tout comme le rapport d'expertise annexé à notre mémoire[229], sont univoques. Que ce soient ses retombées sur la biodiversité, la production alimentaire, la santé, l'accès à l'eau, le changement climatique a coûté et continue de coûter la vie à des millions d'Africains et de porter atteinte à leurs droits fondamentaux individuels et collectifs[230]. La mortalité due aux inondations, à la sécheresse et aux tempêtes est quinze fois plus élevée dans les 32 États africains les plus vulnérables au changement climatique[231].

8. Les effets du changement climatique pèsent de plus en plus sur l'économie africaine. En Afrique subsaharienne, il est estimé que l'adaptation au changement climatique coûtera entre 30 et 50 milliards de dollars, soit 2 à 3 % du PIB régional[232]. Par ailleurs, les risques climatiques exacerbent les tensions et les conflits dans les pays les plus fragiles, confrontés au défi quasi insurmontable de tout à la fois protéger leur environnement, croître leur économie, et se prévenir des conflits et des crises humanitaires. Chaque pays, chaque secteur du continent africain pourra témoigner de ces défis.

9. Or, et c'est là un paradoxe de l'histoire, l'Afrique est le continent qui a contribué le moins — seulement à hauteur de 3 % — aux émissions cumulées de gaz à effet de serre, et demeure aujourd'hui le continent avec les émissions de CO_2 *per capita* les plus basses[233].

10. Dès lors, la Cour ne saurait définir les obligations « *en matière* de changement climatique » *in abstracto*. Le *corpus* du « droit international » du climat, sur lequel la Cour est invitée à s'appuyer, ne repose pas que sur des « principes » de droit mais également sur des « données scientifiques »[234]. Les faits climatiques scientifiquement avérés invitent la Cour à exercer sa fonction consultative *in concreto*, en tenant compte, au cas par cas, des *différents* niveaux de contributions des États aux

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Report of the Intergovernmental Panel on Climate Change (Cambridge University Press 2023), p. 1285-1455, https://www.cambridge.org/core/books/climate-change-2022-impacts-adaptation-and-vulnerability/africa/9E657A48555494EF46C0DD4550D9C006 (ci-après, « GIEC, WGII 2022 »), fig. 9.2.

[229] Rapport d'expertise de l'Union africaine, Dr. Christopher Trisos, « Evidence of Observed Impacts from Human-Induced Climate Change, and Projected Future Impacts on Africa » (22 March 2024) (ci-après, « rapport Trisos »). Voir aussi OMM, État du climat en Afrique.

[230] Charte africaine des droits de l'homme et des peuples (27 juin 1981), OAU, doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

[231] Rapport Trisos, par. 29, citant GIEC WGII 2022, chap. 8, sect. 8.3.2, fig. 8.6.

[232] OMM, État du climat en Afrique, p. 17.

[233] Rapport Trisos, par. 20.

[234] Dossier n° 167, « Plan de mise œuvre de Charm el-Cheikh », 20 novembre 2022, 3e alinéa du préambule.

changements climatiques[235] et des *différents* niveaux d'effets au sein de la communauté internationale.

11. Si un doute devait persister quant à la nécessité de donner effet utile à l'objectif de « justice climatique », tel qu'il est cité dans l'accord de Paris, la Cour peut également tenir compte de la pratique subséquente[236] des États parties. En effet, le « Plan de mise en œuvre de Charm el-Cheikh », qui a été adopté lors de la COP 27, indique expressément que la « "justice climatique" est importante dans l'action menée face aux changements climatiques »[237]. *En droit*, cela signifie que la justice climatique est désormais reconnue *erga omnes* et est, et par ricochet, opposable *erga omnes* dans l'interprétation et l'application du droit international relatif au changement climatique. La Cour doit en tirer toutes les implications nécessaires pour les obligations qui incombent aux États et leurs conséquences juridiques.

2. LA PORTÉE JURIDIQUE D'UN AVIS FONDÉ SUR LA JUSTICE CLIMATIQUE

12. J'en viens maintenant à la question de la *portée juridique* potentielle d'un avis de la Cour articulé autour de la justice climatique, notamment pour l'Afrique. L'Union africaine se féliciterait d'un avis de la Cour qui mettrait ce principe en exergue et qui en ferait une pierre angulaire du droit international : tous les membres de la communauté internationale devraient alors en tenir compte dans le cadre de leurs actions sur ce plan.

13. Et un tel résultat rejoindrait non seulement la pratique, mais aussi les attentes de la communauté internationale. L'Afrique et, avec elle, la grande majorité des pays en développement se sont engagés de bonne foi au sein du régime sur le climat, avec l'attente légitime que les considérations de justice climatique serviront de boussole tant à la confection des règles primaires qu'à l'interprétation des règles secondaires[238]. Si la Cour devait s'écarter de cette voie, en ignorant,

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[235] Voir, par exemple, la contribution des 42 pays visés à l'annexe I à la CCNUCC au cumul historique des émissions de gaz à effets de serre.

[236] Voir *Sentence arbitrale du 3 octobre 1899 (Guyana c. Venezuela), exception préliminaire, arrêt, C.I.J. Recueil 2023 (I)*, p. 290-291, par. 103.

[237] Dossier n° 167, « Plan de mise œuvre de Charm el-Cheikh », 20 novembre 2022, 9e alinéa du préambule.

[238] Voir, par exemple, Commission économique pour l'Afrique, « Le Groupe africain des négociateurs appelle la COP 28 à conclure par une décision sur la justice climatique conçue pour l'Afrique », 10 décembre 2023.

par exemple, les droits humains, comme l'y ont invité certains participants[239], elle réécrirait le droit international du climat au détriment d'une grande majorité d'États membres de la communauté internationale.

14. Au contraire, la pratique des États et la jurisprudence internationale soulignent l'imbrication des questions de droits humains et de changement climatique. Comme l'a démontré la Cour africaine des droits de l'homme et des peuples dans l'affaire *Ogiek*[240], ainsi que d'autres juridictions internationales et régionales[241], les questions environnementales sont indissociables des droits humains. Et la forte participation des États à ces procédures internationales témoigne également de leur importance : récemment encore, et de façon historique, l'Union africaine a joint sa voix à des dizaines d'États devant le Tribunal international du droit de la mer, contribuant ainsi au premier avis consultatif sur le climat, dont la Cour saura certainement s'inspirer.

15. En s'engageant dans la voie de la justice climatique, la Cour contribuerait à atténuer fortement les divergences de nature juridique entre les États développés et les États en développement, qui ont marqué encore cette semaine nombre de plaidoiries. Elle assisterait également la communauté internationale, et en particulier la COP, à fixer les lignes directrices et les principes juridiques cohérents, précis et prévisibles en matière d'action climatique, auxquels tous les États doivent se soumettre de bonne foi. Sans cohérence, précision et prévisibilité juridiques, l'objectif de limiter l'élévation de la température à 1,5 °C ne demeurera qu'un vœu pieux, comme le démontre là encore le GIEC[242].

16. L'avis de la Cour contribuerait également à assister d'autres organisations en dehors du système des Nations Unies, telles que l'Union africaine. Le premier sommet africain sur le climat en

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[239] Voir, par exemple, les exposés écrits de l'Arabie saoudite (par. 113-118) ; Canada (par. 27-29) ; Royaume-Uni (par. 33). Voir aussi les observations écrites des États-Unis d'Amérique (par. 4.34-4.70).

[240] *Commission c. République du Kenya*, requête 006/2012, arrêt, 26 mai 2017.

[241] Inter-American Court of Human Rights, *Advisory Opinion OC-23/17*, 15 November 2017.

[242] Dossier nº 72 : de Coninck, H., A. Revi, M. Babiker, P. Bertoldi, M. Buckeridge, A. Cartwright, W. Dong, J. Ford, S. Fuss, J.-C. Hourcade, D. Ley, R. Mechler, P. Newman, A. Revokatova, S. Schultz, L. Steg, and T. Sugiyama, 2018: Strengthening and Implementing the Global Response. In: *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* [Masson-Delmotte, V., P. Zhai, H.-O. Pörtner, D. Roberts, J. Skea, P.R. Shukla, A. Pirani, W. Moufouma-Okia, C. Péan, R. Pidcock, S. Connors, J.B.R. Matthews, Y. Chen, X. Zhou, M.I. Gomis, E. Lonnoy, T. Maycock, M. Tignor, and T. Waterfield (eds.)]. Cambridge University Press, Cambridge, UK and New York, NY, USA, pp. 313-444 : https://www.cambridge.org/core/books/global-warming-of-15c/strengthening-and-implementing-the-global-response/51C0BCDC8572D2705245720919BF03F5, p. 359, par. 4.4.2.1.

septembre 2023 — juste quelques mois après l'adoption de la requête — a été l'occasion d'adopter le seul instrument continental à ce jour en cette matière : à savoir la « Déclaration de Nairobi sur le changement climatique et l'Appel à l'Action ». Cette déclaration insiste sur la nécessité de renforcer la justice climatique au sein de l'ordre juridique international dans une perspective d'intégration systémique. En particulier, la déclaration souligne le fait — scientifiquement avéré — que « l'Afrique se réchauffe plus rapidement que le reste du monde et que, s'il ne s'atténue pas, le changement climatique continuera d'avoir des impacts négatifs sur les économies et les sociétés africaines et d'entraver la croissance et le bien-être »[243].

17. En conclusion, l'Union africaine demande respectueusement à la Cour que son avis réponde aux enjeux principaux de la justice climatique, à savoir élucider une bonne fois pour toutes le droit international applicable au *respect des obligations* et à l'*exécution des engagements et promesses internationaux* en matière climatique, et notamment les engagements et promesses portant sur *l'assistance et le soutien* aux États les plus vulnérables.

18. Je vous remercie de votre attention et vous prie, Monsieur le président, de donner la parole à mon collègue le professeur Mbengue.

Le PRÉSIDENT : Je remercie Madame la professeure Hajer Gueldich. I now give the floor

I now give the floor to Professor Makane Mbengue. Professor, you have the floor.

Mr MBENGUE:

THE OBJECTIVE OF CLIMATE JUSTICE AND ITS IMPLICATIONS FOR THE COURT'S APPROACH TO THE TWO QUESTIONS

1. Mr President, distinguished Members of the Court, it is an honour to appear again before you and to represent the African Union in these historic advisory proceedings.

2. After an intensive week of oral pleadings, the African Union would like to seize the opportunity, as the final intervener, to refocus the Court on three key aspects: (1) the object of the

[243] « Déclaration de Nairobi sur le changement climatique et l'Appel à l'Action », 6 septembre 2023, 5e alinéa du préambule.

questions; (2) the exercise of the Court's advisory function in the present proceedings; and (3) the treatment to be given to each question.

1. The object of the two questions

3. In addressing the two questions posed by the General Assembly, the Court is called upon, as it has in the past, to define the "object"[244] of the questions. In accordance with its jurisprudence, this requires the Court to ascertain the "scope and meaning"[245] of the questions. In the view of the African Union, both the scope and meaning of the two questions point to one single co-ordinate: climate justice.

4. Indeed, many written and oral submissions have underscored that addressing the effects of climate change requires upholding climate justice[246]. The reason is simple. Climate change is a phenomenon that has not been caused by *all* States equally, and nor will *all* States equally suffer its effects[247].

5. Such a reading of the scope and meaning of the questions is not just induced by a plain reading of the Request; it is compelling as a matter of climate science. A significant number of

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[244] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 19; *Western Sahara*, *Advisory Opinion, I.C.J. Reports 1975,* p. 26, para. 39; *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion of 19 July 2024*, para. 77.

[245] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010 (II)*, p. 423, para. 49; *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion of 19 July 2024*, paras. 72 *et seq*.

[246] See, e.g., the Written Statements of African Union (para. 245); Albania (para. 144); Colombia (para. 44); Kenya (para. 5.38); Egypt (para. 67); India (para. 106); Madagascar (paras. 63-64, 93-94, 98); MSG (para. 341); Namibia (paras. 12-13, and 76); Saint Lucia (paras. 6 and 93); Saint Vincent & the Grenadines (para. 8); Sri Lanka (para. 6); Vanuatu (paras. 490 and 554). See also the Written Comments of Burkina Faso (para. 28); Colombia (paras. 1.2 and 3.49); Cook Islands (paras. 3 and 137-139); Kenya (para. 1.9); Kiribati (para. 64); Sierra Leone (para. 1.2); Saint Vincent & the Grenadines (para. 8); Sri Lanka (para. 92); Vanuatu (paras. 3 and 165). See also CR 2024/35, p. 140 (Albania), para. 23; CR 2024/36, p. 66 (Bangladesh), para. 6; CR 2024/37, p. 31 (Brazil), para. 4; CR 2024/38, p. 35 (China), para. 40; CR 2024/39, p. 68 (El Salvador), para. 11; CR 2024/41), p. 30, para. 2; p. 34, para. 9 (Ghana); CR 2024/41 p. 49 (Grenada), para. 22; CR 2024/42 p. 10 (Cook Islands), para. 2; CR 2024/42 p. 24 (Marshall Islands), para. 11; CR 2024/42 p. 44 (Solomon Islands),para. 25; CR 2024/42 p. 49, para. 22 and p. 50, para. 29 (India).

[247] See, e.g., the Written Statements of Albania (para. 144); African Union (paras. 8-9); Bangladesh (paras. 5, 21-25) ; Barbados (para. 112); Burkina Faso (para. 26); Colombia (para. 2.8); COSIS (paras. 5-6, 20, 33); Costa Rica (para. 64); Ecuador (para. 1.17); Egypt (paras. 53, 60); Grenada (paras. 72-73); India (paras. 45, 71(iv), 72); IUCN (App. 1, para. 38); Liechtenstein (paras. 21, 30); Mauritius (para. 59); MSG (paras. 34, 224, and 339); Nauru (para. 10); OACPS (paras. 7 and 167); Pakistan (para. 11); Sierra Leone (paras. 1.5-1.6, 3.38); Solomon Islands (para. 89); Timor-Leste (para. 36); United Kingdom (para. 13.2); United Arab Emirates (para. 11); Uruguay (para. 21); WHO (para. 9); Vanuatu (para. 87-91). See also the Written Comments of Antigua and Barbuda (para. 2); Costa Rica (para. 37); Kenya (para. 5.27); Gambia (paras. 2.11, 2.16); Vanuatu (para. 49).

scientific and expert reports have been introduced by Participants in these proceedings[248], including the Expert Report submitted by the African Union[249]. These reports, which should be given full weight[250], have provided evidence of the striking asymmetries: while climate change continues to impact a specific, identifiable set of States, its causes and origins are primarily attributable to others[251], who were fully aware of the risks since at least the 1960s[252].

6. The scientific record requires the Court to undertake a *scientific characterization* of the two questions — or, as the Court puts it, a "factual determination"[253] — of the origins, causes and impacts of climate change based on the available science. This would compel the Court to take into account considerations of climate justice in its determination of the *effects* of climate change on existing international obligations, and on the consequences arising out of the wrongful conduct of States.

7. It is in response to — or perhaps denial of — this stark reality that certain Participants have attempted to downplay the role and importance of science[254]. Science is the pillar of climate justice for States, peoples, and individuals impacted by climate change[255], science reinforces the need for

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[248] See the reports annexed to the Written Statements of Barbados, Appendix – Annex 598, "Sinking islands, rising debts: Urgent need for new financial compact for Small Island Developing States", The International Institute for Environment and Development, September 2023, p. 6; Cook Islands, Annex 1, Expert Report for Cook Islands from the Pacific Community's Geoscience, Energy and Maritime Division, Fisheries, Aquaculture and Marine Ecosystems Division, Land Resources Division, and Human Rights and Social Development Division (14 March 2024), p. 12; COSIS, Annex 1, Expert Report of Sarah R. Cooley, Ph.D., on Impacts of Anthropogenic Greenhouse Gas Emissions on the Marine Environment and Affected Communities (22 March 2024), and Annex 2, Expert Report of Shobha Maharaj on Impacts of Climate Change on Small Island States (22 March 2024); Grenada, Annex 1, Science of Climate Change and the Caribbean: Findings from the Intergovernmental Panel on Climate Change (IPCC) Sixth Assessment Cycle (AR6) (5 March 2024); Mauritius, Annex I, Expert Report of Dr James E. Hansen in Support of the Republic of Mauritius (9 August 2024); MSG, Exhibits 30 to 39; and Sri Lanka, Annex 2, Expert Opinion of Prof. Buddhi Marambe, p. 1; Vanuatu, Exhibit B, Expert Report of Professor Corinne Le Quéré on Attribution of global warming by country (8 December 2023).

[249] Written Statement of the African Union, Expert Report of Dr. Christopher Trisos, 'Evidence of Observed Impacts from Human-Induced Climate Change, and Projected Future Impacts on Africa' (22 March 2024).

[250] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 135, para. 227; *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion of 19 July 2024*, para. 76.

[251] See Annex I Parties to the UNFCCC. See also M. Rocha et al., *Historical Responsibility for Climate Change – from countries emissions to contribution to temperature increase* (2015).

[252] Written Statement of Vanuatu (para. 73), and see annexed report Exhibit D, Expert Report of Professor Naomi Oreskes on Historical Knowledge and Awareness, in Government Circles, of the Effects of Fossil Fuel Combustion as the Cause of Climate Change (29 January 2024).

[253] *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion of 19 July 2024*, para. 77.

[254] See, e.g., Written Statements of the United Kingdom, para. 137.4; United States, para. 5.1; OPEC, para. 117; China, paras. 118, 136.

See also CR 2024/36, pp. 29-30 (Saudi Arabia), para. 10; CR 2024/40, p. 50 (United States of America), para. 46. *Contra*, CR 2024/35, p. 139 (Albania), para. 20; CR 2024/36, p. 61 (Bahamas), para. 14.

[255] IPCC Report 2023, p. 112. IPCC Press Release, 2023/06/PR, 20 March 2023 available at: IPCC_AR6_SYR_PressRelease_en.pdf.

obligations to protect the climate system[256], and demands accountability for States that have harmed the climate system. In this context, the African Union welcomes the Court's engagement with experts from the Intergovernmental Panel on Climate Change ("IPCC") prior to the commencement of the hearings[257].

8. The African Union notes efforts of certain States — albeit a minority — to negate science and to trivialize the ordinary meaning of the terms of the Request[258], their repeated calls for undue caution now and in their written submissions[259], are transparent attempts to dilute the very object of the present proceedings. The African Union respectfully urges the Court to dismiss these unfounded arguments. Climate justice remains the object of the questions; as such, it carries implications on the advisory function of the Court itself — a point to which I will now turn.

2. Implications for the approach to be taken by the Court in the exercise of its advisory function

9. Mr President, Members of the Court, the quest for climate justice makes the present advisory proceedings unique both in character and in process.

10. The Court has regularly been called upon to determine obligations and consequences with respect to *specific situations*, while at the same time declaring obligations and consequences of a *systemic* nature, that is to say, for *all* States[260].

11. By contrast, the present proceedings deal with a *global situation* — a common concern of humankind[261] — yet, this is a situation for which the Court cannot, as a matter of international law and science, limit itself exclusively to setting obligations and consequences for *all* States. In fact, if

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[256] Core Writing Team, H. Lee and J. Romero (eds.), *Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the IPCC 2023*, available at: IPCC_AR6_SYR_LongerReport.pdf ("IPCC Report 2023"), p. 110.

[257] International Court of Justice, Press Release No. 2024/75: 'The Court meets with scientists of the Intergovernmental Panel on Climate Change (IPCC)' (26 November 2024).

[258] See, e.g., Written Statements of the United Kingdom, para. 137.4; United States, para. 5.1; OPEC, para. 117; China, paras. 118, 136. See also CR 2024/36 pp. 29-30 (Saudi Arabia), paras. 4,8, and 10; CR 2024/40, p. 50 (United States of America), para. 46. *Contra*, CR 2024/35, p. 139 (Albania), para. 20; CR 2024/36, p. 61 (Bahamas), para. 14; CR 2024/41, p. 38 (Ghana), para. 29. CR 2024/42, p. 38 (Solomon Islands), p. 6; CR 2024/42, p. 28 (Marshall Islands), para. 6.

[259] Written Comments of the African Union, Section II.

[260] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019 (I)*, p. 139, para. 180. *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion of 19 July 2024*, para. 273 *et seq*.

[261] Dossier No. 4, UNFCC, Preamble, para. 1; Dossier No. 16, Paris Agreement, Preamble, para. 11.

the Court were to proceed in this way, it would run the risk of diluting the objective of climate justice, and of exacerbating legal tensions within the international community. Again, the ordinary terms of the Request speak for themselves. They do not refer to the legal consequences "that arise *for all States and the United Nations*"[262], but instead stress the relevance of *specific groups of States and specific groups of peoples and individuals*. In a pioneer manner, the Request even invites the Court to take into account the specific "geographical circumstances and level of development" of States. This means that any legal determination by the Court should be plural, and necessarily address *specific groups of States*.

12. This is not to say that the Court should refrain from declaring that the obligation to protect the climate system is an *erga omnes* obligation. The Court has already emphasized, almost 30 years ago, the "great significance that it attaches to respect for the environment, not only for [all] States but also for the whole of mankind . . . including generations unborn"[263]. The same dictum can apply today *mutatis mutandis* to the climate.

13. But beyond this, the Court is also called upon to determine obligations and consequences that are adapted *ratione personae*, *ratione materiae* and *ratione temporis* to the specific situation of States. Such a tailored approach is of utmost importance not only for African countries, and for all other developing countries, but also for small developing States.

14. A tailored and dynamic approach to obligations and consequences is also warranted given the *evolving* nature of climate change[264].

15. This leads me to my last point, that is, how the Court should address the two questions, in light of the objective of climate justice.

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[262] Compare with General Assembly Resolution 77/247, 'Israeli Practices Affecting the Human rights of the Palestinian People in the Occupied Palestinian Territory, including East Jerusalem' (A/RES/77/247 of 30 December 2022), para. 18(b).

[263] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 41, para. 53; see also *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 241, para. 29.

[264] CR 2024/36, p. 21 (Antigua and Barbuda), para. 2; CR 2024/36, p. 60 (Bahamas), para. 11; CR 2024/40, pp. 11, 14 (UAE), paras. 20, 38-39.

3. Implications for the treatment by the Court of the two questions

A. First question

16. With respect to the first question, climate justice calls for the legal identification of the obligations under international law to protect the climate system. The African Union reaffirms its position set out in its written submissions.

17. Part of the answer to question one certainly lies in obligations owed by *all* States. This irreducible core of obligations are as follows: climate change obligations per se stemming from the climate régime[265]; environment-related climate obligations deriving from multilateral environmental agreements[266]; human rights-related climate obligations resulting from human rights instruments[267]; and trade and investment-related obligations emerging from trade and investment agreements[268].

18. As such, the Court should reject the flawed argument — which was repeated again this week[269] — that the relevant obligations are reduced solely to the so-called *lex specialis* of the UNFCCC and the Paris Agreement. The same arguments were tried, tested and defeated before ITLOS. They should find no fertile ground before the principal judicial organ of the United Nations,

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[265] Written Statement of the African Union (paras. 123-163). See also, e.g., Written Statement of Vanuatu (paras. 397-441). This category is covered in all written statements and is undisputed.

[266] Written Statement of the African Union (paras. 164-187). In relation to UNCLOS, see e.g., Written Statement of Vanuatu (paras. 442-467), and the endorsement of the ITLOS Advisory Opinion in, e.g., Written Comments of New Zealand (para. 16); Philippines (para. 30); and United Kingdom (paras. 42-44.9). On other environmental duties, including in relation to biodiversity and desertification, see e.g., Written Statements of Australia (paras 3.30-3.53); France (paras. 81-106); Germany (paras. 65-70); Pakistan (paras. 62-72); and Written Comments of IUCN (paras. 83-93).

[267] Written Statement of the African Union (paras. 188-217). See also, e.g., Written Statements of Australia (paras. 3.59-3.63); France (paras. 109-165); Kenya (paras. 5.51-5.80); Mauritius (paras. 155-187); Namibia (paras. 42-45, 78-125); Vanuatu (paras. 329-396); and Written Comments of European Union (paras. 80-87); CR 2024/35, pp. 134-136 (Albania); CR 2024/37, pp. 56-57 (Cameroon), paras 21-25); CR 2024/38, p. 23-24 (Chile), paras. 19-24; CR 2024/38, p. 41 (Colombia), para. 23; CR 2024/39, p. 67 (El Salvador), para. 7; CR 2024/40 pp. 31-34 (Spain); CR 2024/40, p. 20 (Ecuador), para. 19; CR 2024/40, pp-72-73 (Fiji); CR 2024/38, pp. 56-57, paras 17-20; p. 60, para. 35 (Commonwealth of Dominica); CR 2024/37, pp. 21-22 (Bolivia), paras. 12-14; CR 2024/37, p. 34 (Brazil), para. 14; CR 2024/37, pp. 64-65, paras. 8-14 ; p. 67, para. 7 (Philippines); CR 2024/36 p. 63 (Bahamas), para. 27; CR 2024/36, p. 70 (Bangladesh) para. 13; CR 2024/41, pp. 22-23 (Sierra Leone) paras. 14-18; CR 2024/41, pp. 36-37 (Ghana), paras. 20-23; CR 2024/41, p. 48 (Grenada) paras. 18-20; CR 2024/41, pp. 61-62 (Guatemala) paras. 42-43; CR 2024/41, p. 9 (France) para. 6; CR 2024/42, p. 11 (Cook Islands) para. 6; CR 2024/42, p. 28, para. 6 and p. 30, para. 9 (Marshall Islands); CR 2024/42, p. 38 (Solomon Islands) para. 7.

[268] Written Statement of Antigua and Barbuda (paras. 215-227); Written Comments of Brazil (para. 29); Cameroon (paras. 46-55). See also CR 2024/35, p. 133, para. 25 (Albania); CR 2024/37, pp. 58-60, paras. 29-34 (Cameroon); CR 2024/41, p. 24, para. 20 (Sierra Leone).

[269] See e.g. CR 2024/38, pp. 29-30, para. 8 (China); CR 2024/38, p. 67, para. 6 (South Korea); CR 2024/39, p. 47, para. 18 and pp. 49-50, para. 30 (Nordic bloc); CR 2024/40, p. 64, para. 83 (Russia); CR-2024/36, p. 29, para. 7 (Saudi Arabia). *Contra* see e.g. CR 2024/36, pp. 68-70 (Bangladesh); CR 2024/36 pp. 82-83 (Barbados); CR 2024/37 pp. 43-44, paras 3-4 (Burkina Faso); CR 2024/38, p. 44, para. 12 and p. 47, para. 29 (Colombia); CR 2024/39, p. 12, para. 6 (Costa Rica); CR 2024/39, pp. 58-59, paras. 9-14 and p. 64, para. 31 *(b)* (Egypt); CR 2024/40, p. 18, para. 9 (Ecuador); CR 2024/39 p. 66, para. 3 (El Salvador); CR 2024/40, p. 69, para. 9 (Fiji); CR 2024/38, p. 57, para. 22 (Commonwealth of Dominica); CR 2024/37 pp. 9-12 (Belize); CR 2024/37, p. 21, para. 12 (Bolivia); CR 2024/41, pp. 20-21, paras. 5-6 (Sierra Leone). CR 2024/41, p. 33, para. 3 (Ghana); CR 2024/41, p. 58, paras. 22-24 (Guatemala); CR 2024/42, p. 38, para. 7 (Solomon Islands).

whose Advisory Opinions have consistently contributed to maintaining the systemic coherence of the international legal system[270].

19. If the Court were to avoid identifying obligations, this would be tantamount to a situation of *non liquet* and would grant States *carte blanche* to continue harming the climate system. Such an outcome, could hardly have been the intention of the General Assembly in seeking this advisory opinion.

20. Therefore, in answering question 1, the African Union respectfully invites the Court to focus, *a minima*, on two primary considerations: on the one hand, the *preventive duties*, and on the other hand the *principles* that govern the content and scope of obligations relating to climate change.

21. As regards the *preventive duties*, for all the categories of obligations identified, the Court should define a common set of *preventive duties* that are attached to them under customary international law. This would ensure the full application of the principle of prevention to obligations relating to the protection of the climate system. It would leave no room for States to escape these duties, as some Participants suggested this week[271]. The common set of preventive duties is to be found in the jurisprudence of the Court and other international courts and tribunals, and these duties embody mainly: (i) the *duty to take such measures and rules necessary* in light of scientific evidence[272]; (ii) the *duty to carry out impact assessments* to identify risks[273]; (iii) the *duty to notify* potentially affected States to determine the appropriate measures to prevent or mitigate the risk[274];

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[270] See UNGA resolution 73/295, "Advisory opinion of the International Court of Justice on the legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965", UN doc. A/RES/73/295 of 22 May 2019, p. 2; UNGA resolution ES-10/24, "Advisory opinion of the International Court of Justice on the legal consequences arising from Israel's policies and practices in the Occupied Palestinian Territory, including East Jerusalem, and from the illegality of Israel's continued presence in the Occupied Palestinian Territory", UN doc. A/RES/ES-10/24 of 18 September 2024, p. 4.

[271] CR 2024/36, p. 42, para. 6 and pp. 43-44, paras. 9 and 14 (Australia); CR 2024/36, p. 32, para. 8 (Saudi Arabia); CR 2024/38, p. 18, para. 42 (Canada); CR 2024/40, p. 61, paras. 8-9 (Russia).

[272] ILC, 'Draft Articles on Prevention of Transboundary Harm', UN doc. A/RES/56/82 (2001), Article 5; *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*, ITLOS Case No. 31, Advisory Opinion of 21 May 2024, para. 235.

[273] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p. 83, 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 (II)*, p. 706, paras. 101-104; *Responsibilities and obligations of States with respect to activities in the Area*, *Advisory Opinion*, *ITLOS Reports 2011*, p. 10, paras. 145–48; African Commission on Human & Peoples' Rights, *Social and Economic Rights Action Center (SERAC)* v. *Nigeria*, para. 53; *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*, ITLOS Case No. 31, Advisory Opinion of 21 May 2024, paras. 354-355.

[274] *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 (II)*, p. 706, para. 104.

(iv) the *duty to co-operate* internationally in good faith[275]; (v) the *duty to take into account international rules and standards*[276]*;* and last but not least, (vi) the *duty to exercise a level of vigilance* by monitoring the activities of public and private operators[277].

22. In relation to the *principles*, the African Union is convinced that the content and scope of obligations of States to protect the climate system — and the ensuing preventive duties — must be governed by three principles, three compasses for climate justice. These are common but differentiated responsibilities ("CBDR")[278], intergenerational equity[279], and sustainable development[280]. These principles have been constantly incorporated in climate change instruments since 1992, in nationally determined contributions ("NDCs")[281] under the Paris Agreement, in a great number of international legal instruments[282], in national constitutions, particularly in Africa[283], and recognized in the case law of regional[284], and international courts and tribunals, including this very Court[285].

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[275] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p. 83, para. 205.

[276] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 77, para. 140; *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p. 79, para. 197 and p. 89, para. 225.

[277] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 67, para. 112 and p. 77, para. 140; *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p. 79, para. 197 and pp. 82-83, paras. 204-205; *Responsibilities and obligations of States with respect to activities in the Area*, *Advisory Opinion, ITLOS Reports 2011,* p. 10, paras. 142–44; *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*, ITLOS Case No. 31, Advisory Opinion of 21 May 2024, paras. 235-236.

[278] See e.g. CR 2024/36, pp. 20-21, paras. 19-22 (Antigua and Barbuda); CR 2024/35, p. 125, para. 8 (South Africa); CR 2024/37, pp. 25-26, paras. 25-38 (Bolivia); CR 2024/37, pp. 34-35, paras. 2-7 (Brazil); CR 2024-40, pp. 11-12, paras. 21-25 and p. 14, para. 35 (UAE). CR 2024/40, p. 23, para. 6, and p. 25, para. 17 (Ecuador); CR 2024/36, p. 61, para. 16 (Bahamas); CR 2024/36, p. 74, para. 11 (Bangladesh); CR 2024/41, pp. 25-26, para. 26 (Sierra Leone); CR 2024/41, pp. 33-34, paras. 6-9 (Ghana); CR 2024/41, p. 60, para. 32 (Guatemala).

[279] See e.g. CR 2024-35, p. 116, para. 5 (Vanuatu); CR 2024-37 p. 67, para. 5 (Philippines); CR 2024/39, p. 15, para. 16 and p. 17 para. 11 (ii) (Costa Rica); CR 2024/40 p. 23, para. 6 and p. 26, paras. 20-23 (Ecuador); CR 2024/40, p. 73, para. 25 (Fiji); CR 2024/38, p. 43, para. 10 (Colombia); CR 2024-37, pp. 54-55, paras. 10-14 (Cameroun); CR 2024/41, p. 38, para. 29 (Ghana); CR 2024/41, p. 51, para. 9 (Grenada); CR 2024-/4, p. 57, para. 20 (Guatemala); CR 2024/41, p. 13, para. 21 (France); CR 2024/42, p. 31, para. 10 (Marshall Islands); CR 2024/42 p. 50, para. 31 (India).

[280] Written Statement of the African Union, pp. 77 *et seq*.

[281] Out of 155 NDCs submitted by non-Annex I countries, 44 NDCs make references to the principle of common but differentiated responsibilities. See NDC Registry, at https://unfccc.int/NDCREG.

[282] For CBDR, see Written Statement of the African Union, paras. 126 and 169; Written Comments of the African Union, para. 42. For the principle of intergenerational equity, Written Statement of the African Union, para. 117. For the principle of sustainable development, see Written Statement of the African Union, paras. 69, 115, and pp. 77 *et seq.*.

[283] For the principle of intergenerational equity, see Written Comments of the African Union, para. 117, fn. 191.

[284] For CBDR, see Written Comments of the African Union, para. 45.

[285] For the principle of intergenerational equity, see Written Comments of the African Union, paras. 117-118, and fns. 192 and 193. For the principle of sustainable development, see *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, pp. 77-78, para. 140.

23. Contrary to what has been advanced by some of the Participants this week[286], these principles are without a doubt part of customary international law[287]. The African Union respectfully invites the Court to declare as such.

B. Second question

24. Mr President, these three compasses of climate justice must also guide the Court with respect to question 2, the final point I will address.

25. The question of legal consequences is rooted in the need to achieve climate justice[288]. Importantly, the present proceedings urge the Court to determine *sui generis* consequences — *sui generis* consequences, that is, consequences that are tailored to *a specific group of States* that have been especially affected by the adverse effects of climate change.

26. African States, as well as their peoples and individuals have been and continue to be *injured, specially affected* and *particularly vulnerable* to the adverse effects of climate change — at a point that those impacts impede the right to sustainable development of African States and African peoples.

27. This devastating effect of climate change on Africa *has been* and *is* the result of continuous breaches of international law by a specific group of States[289]. Paradoxically, the Participants which have insisted on the alleged *lex specialis* status of the UNFCCC appear to have overlooked that the same treaty recognizes the historical responsibility of *all* developed States in the degradation of the climate system, and went as far as listing them in its Annex I.

28. In this context, there is no problem of intertemporal law and surely no problem of causation[290].

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[286] See e.g. CR 2024/38, p. 15, para. 23 (Canada); CR 2024/40, p. 47, para. 32 (United States of America).

[287] CR 2024/38, p. 43, para. 10 (Colombia); CR 2024/41, p. 26, para. 26 (Sierra Leone).

[288] Written Statement of Vanuatu, para. 490.

[289] See Written Statements of the African Union (para. 230); Burkina Faso (para. 273); Democratic Republic of Congo (paras. 291-304); Vanuatu (paras. 493-499); COSIS (para. 148); Micronesia (para. 122); OACPS (paras. 145-146); Costa Rica (para. 103); Bahamas (para. 234). See also Written Comments from the African Union (paras. 53-60); Vanuatu (paras. 161-164); Solomon Islands (paras. 52-55); Melanesian Spearhead Group (para. 199), Mauritius (paras. 115-117); Mexico (paras. 112-116); COSIS (para. 199); France (para. 180).

[290] As suggested in CR 2024/36, p. 49, paras. 3, 10-12 (Australia); CR 2024/40, p. 50, para. 46 (United States of America); CR 2024/40, p. 61, paras. 64-65 (Russia). But see, *contra*, CR 2024/36, p. 24, para. 35 (Antigua & Barbuda); CR 2024/39, p. 60, para. 15 (Egypt); CR 2024/40, p. 25, para. 16 (Ecuador).

29. Those breaches call for legal consequences. The first evident consequence is for States that bear the responsibility for causing climate change to cease their unlawful conduct.

30. The second consequence for those States is to provide reparation. In this regard, the African Union respectfully invites the Court to consider debt cancellation, or at least debt relief, as a suitable form of restitution, compensation, and satisfaction.

31. Debt cancellation can only occur through co-operation in good faith between African countries, other developing countries, and developed countries within competent organizations of the United Nations system. Such co-operation, however, needs a catalyst, which only the Court can provide. By formulating such a remedy — debt cancellation — the Court would contribute to intergenerational equity towards the future generations of Africans, in particular children, whose fundamental rights are being constrained by climate change[291], and the shackles of debt[292].

32. Mr President, with your permission, I would just request one minute to conclude. Thank you. In conclusion, Mr President, the position of the African Union reflects the historical experience and present realities of Africa, and can be summarized as follows: *first*, the advancement of climate justice should be the overarching objective that guides the Court in answering the questions put to it; and *second* — in line with this objective — a tailored approach is necessary to identify *sui generis* legal consequences, adapted to the specific situation of States specially affected by the adverse effects of climate change. This is indispensable to achieving climate justice for present and future generations of Africans.

33. As a final remark, I wish to draw inspiration from the African Union's anthem: "*O Sons and Daughters of Africa, Flesh of the Sun and Flesh of the Sky, Let us make Africa the Tree of Life.*" As we stand at this pivotal moment for the protection of our continent and its peoples, climate justice must become the foundation upon which this tree grows. Africa has deep historical roots, and branches that grow into the future; an advisory opinion from the Court will determine whether this Tree of Life withers or thrives.

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[291] See African Committee of Experts on the Rights and Welfare of the Child (ACERWC), Working Group on Children's Rights and Climate Change, Report, 27 November 2024.

[292] See Written Statements of the African Union (para. 230); Burkina Faso (para. 273); Democratic Republic of Congo (paras. 291-304); Vanuatu (paras. 493-499); COSIS (para. 148); Micronesia (para. 122); OACPS (paras. 145-146); Costa Rica (para. 103); Bahamas (para. 234). See also Written Comments from the African Union (paras. 53-60); Vanuatu (paras. 161-164); Solomon Islands (paras. 52-55); Melanesian Spearhead Group (para. 199); Mauritius (paras. 115-117); Mexico (paras. 112-116); COSIS (para. 199); France (para. 180).

34. Mr President, distinguished Members of the Court, I thank you for your kind attention.

The PRESIDENT: I thank the representatives of the African Union for their presentation. This concludes this afternoon's sitting. The oral proceedings will resume on Monday 9 December 2024 at 10 a.m., in order for Mexico, the Federated States of Micronesia, Myanmar, Namibia and Japan to be heard on the questions submitted to the Court.

The sitting is closed.

The Court rose at 5.40 p.m.

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