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22 March 2024

Dear Honourable Registrar,

WRITTEN STATEMENT UNDER ICJ PRACTICE DIRECTION XII, TO THE INTERNATIONAL COURT OF JUSTICE ON OBLIGATIONS OF STATES IN RESPECT OF CLIMATE CHANGE (REQUEST FOR AN ADVISORY OPINION)

I. Introduction

1. This written statement¹ is filed by Natural Justice. Natural Justice is a non-governmental legal organization, specializing in human rights and environmental law and working within Africa to enhance the collective rights of people and protect the sacred relationships that indigenous peoples and local communities have with nature.²
2. Within this statement we highlight the following:
 - 2.1. The need for a generous interpretation of the international legal obligations of States in relation to climate change, that encompasses the broad spectrum of human rights and international law principles, that are engaged by the climate crisis, particularly in the African context, as set out below.
 - 2.2. The need for the International Court of Justice, in considering the questions before it, to take into account the disproportionate environmental, economic and social effects of the climate crisis in Africa and the pre-existing socio-economic circumstances of the African continent. As set out below, these circumstances are made worse by the climate crisis and place a multitude of internationally protected human rights at risk.
 - 2.3. That States have extensive obligations under international law to protect the climate system and other parts of the environment from anthropogenic emissions

¹ Submitted in terms of ICJ Practice Direction XII.

² <https://naturaljustice.org/>. Natural Justice is a registered (in South Africa) Public Benefit Organisation (PBO number 057-611-NPO).

of greenhouse gases. This includes legal obligations owed by high-emitting developed States towards African States.

- 2.4. The relevant international laws must be interpreted to include, at least, the following obligations:
 - 2.4.1. All States must reduce their greenhouse gas emissions in line with, at least, their fair share;
 - 2.4.2. States must use their best efforts to ensure a just transition to clean energy and away from fossil fuels;
 - 2.4.3. States must, prior to decision-making, consider the climate change impacts of any new sources of climate pollution, including fossil fuel projects, or decisions affecting energy policy; and
 - 2.4.4. High-income and high-emitting States have an obligation to provide support to States less responsible for greenhouse gas emissions.
- 2.5. As a legal consequence of States causing harm to the climate system, there should be a broad and effective range of remedies available to States that have suffered as a result, including compensation for loss and damage.

II. Background

The African Context

3. The African continent is disproportionately and significantly affected by the impacts of climate change. Africa is the most vulnerable continent to climate change impacts under all climate scenarios above 1.5 degrees Celsius. The rate of temperature increase in Africa has accelerated in recent decades, with weather- and climate-related hazards becoming more severe.³
4. African people, their land, their food and water resources and their biodiversity are exposed to particularly high risks from climate change,⁴ impacts, which are projected to

³ 'Africa suffers disproportionately from climate change', August 2023 at <https://reliefweb.int/report/world/africa-suffers-disproportionately-climate-change>.

⁴ Field, T.-L. (2021). Chapter 8: Climate Change Litigation in South Africa: Firmly Out of the Starting Blocks. In *Climate Change Litigation: Global Perspectives* (pp. 173–198); Also see: Baptista, D. M. S., Farid, M., Fayad, D., Kemo, L., Lanci, L. S., Mitra, P. M., Muehlschlegel, T. S., Okou, C., Spray, J. A., Tuitoek, K., & Unsal, F. D. 'Climate Change and Chronic Food Insecurity in Sub-Saharan Africa'

get much worse as anthropogenic greenhouse gas (“GHG”) emissions increase.⁵ In the second half of the century, extreme heat and increased desertification could make parts of the continent uninhabitable and displace millions.⁶

5. Yet, Africa accounts for less than 4% of global greenhouse gas emissions, and, as a continent, it has contributed the least to anthropogenic climate change.⁷
6. Many African States are already at a disadvantage in terms of adequately responding to, and addressing, climate-related events, because of socio-economic and political challenges. Climate change has had a detrimental impact on economic growth throughout Africa, leading to a widening gap in income inequality between African nations and those situated in the northern hemisphere climates.⁸
7. In short, many African States do not have the resources or capacity to deal with climate shocks in addition to the multitude of socio-economic and other challenges being faced. Deeply ingrained issues of poverty, and social and political instability are, and will be, exacerbated by the effects of climate change.

(2022) IMF Departmental Paper at. 2; United Nations Economic Commission for Africa, African Climate Policy Centre. ‘Climate Change and Water Resources of Africa: Challenges, Opportunities and Impacts’ (2011) Working Paper No. 5 available at <https://www.uncclearn.org/wp-content/uploads/library/uneca07.pdf>; Sintayehu, D. W. (2018). Impact of climate change on biodiversity and associated key ecosystem services in Africa: a systematic review. *Ecosystem Health and Sustainability*, 4(9), Article ID: 1530054. <https://doi.org/10.1080/20964129.2018.1530054>

⁵ See <https://unfccc.int/news/climate-change-is-an-increasing-threat-to-africa>.

⁶ IPCC, Special Report on Climate Change and Land, Chapter 9 ‘Africa’ and Cross Chapter Paper 3 ‘Deserts, Semiarid Areas and Desertification’ at <https://www.ipcc.ch/report/ar6/wg2/>; ‘Desertification and Climate Change in Africa, African Group of Negotiators Expert Support’, Policy Brief No1, March 2020 at <https://core.ac.uk/download/288634083.pdf>; and <https://www.un.org/africarenewal/web-features/desertification-threat-africa%E2%80%99s-development>.

⁷ CDP Africa Report, March 2020 at <https://www.cdp.net/en/research/global-reports/africa-report>. The Intergovernmental Panel on Climate Change notes that “Africa is one of the lowest contributors to greenhouse gas emissions causing climate change, yet key development sectors have already experienced widespread losses and damages attributable to human-induced climate change, including biodiversity loss, water shortages, reduced food production, loss of lives and reduced economic growth”. IPCC sixth assessment report Working Group II – Impacts, Adaptation and Vulnerability ‘Climate Change Impacts and Risks’ available at https://www.ipcc.ch/report/ar6/wg2/downloads/outreach/IPCC_AR6_WGII_FactSheet_Africa.pdf.

⁸ Charles A. Ray ‘The Impact of Climate Change on Africa’s economies’ (2021) available at <https://www.fpri.org/article/2021/10/the-impact-of-climate-change-on-africas-economies/>; also see IPCC Sixth Assessment Report, ‘Impacts, adaptation options and investment areas for a climate-resilient southern Africa’ available at https://cdkn.org/sites/default/files/202203/IPCC%20Regional%20Factsheet_Southern%20Africa_Web.pdf at 12; Anzette Were How climate finance can address the layered economic impacts of climate change in Africa available at <https://www.bii.co.uk/en/african-climate-conversation/how-climate-finance-can-address-the-layered-economic-impacts-of-climate-change-in-africa/>. Brenton, P., & Chemutai, V. (2021). Climate Change Nexus: The Urgency and Opportunities for Developing Countries available at <https://openknowledge.worldbank.org/server/api/core/bitstreams/5d543ded-1163-5fc6-8fe8-319d913cf269/content> at 8.

8. Cyclone Idai, which hit Mozambique, Zimbabwe, and Malawi in 2019 killing more than one thousand people;⁹ the catastrophic drought in Ethiopia, Somalia and Kenya causing widespread food insecurity;¹⁰ and countless other events, serve as stark examples of climate events that continue to affect millions of people within Africa. Increases in the prevalence of such events affecting Africa, lead to catastrophic outcomes.
9. The impacts of climate change within Africa pose significant risk for the realisation and enjoyment of most human rights, which are the subject of fundamental and universal protection, because of the implications that the climate crisis has for, *inter alia*: access to health, clean water, clean air, a healthy ecosystem, life, nutrition, housing, cultural and spiritual practices, and access to property.
10. A number of African States recognise and protect these fundamental human rights in their own domestic laws as well as in regional human rights treaties within Africa (see below). These human rights will increasingly be affected by climate change impacts. As such, it will be exceedingly difficult for States to fulfil their own obligations and duties towards their people, and their fellow African States, as the impacts of the climate crisis intensify.
11. Not only do these impacts have dire consequences for a multitude of human rights, but the costs of addressing the harms of these impacts are staggering. The loss and damage costs in Africa due to climate change are projected to range between US\$ 290 billion and \$440 billion annually by 2030, depending on the degree of warming.¹¹
12. In summary, **the scope and scale of the climate crisis, as it manifests on the African continent, poses major threats to human rights, and States' abilities to protect those rights, as well as the resource capabilities of many African States. Africa is extremely vulnerable to the impacts of the climate crisis, despite having contributed the least, as a continent, to the GHG emissions giving rise to these impacts.**
13. The Advisory Opinion to be provided by the International Court of Justice (“the Court” or “ICJ”) is, therefore, of particular relevance for African States, and the **Court ought to give due to consideration to these factors and take an approach that recognises the**

⁹ <https://www.oxfam.org/en/after-storm-one-year-cyclone-idai>.

¹⁰ <https://www.who.int/publications/m/item/snapshot--greater-horn-of-africa-food-insecurity-and-health---grade-3-emergency--31-january-2024>.

¹¹ <https://reliefweb.int/report/world/africa-suffers-disproportionately-climate-change> and <https://www.uneca.org/stories/progress-with-the-loss-and-damage-fund-is-an-important-step-in-addressing-climate-change>.

need for comprehensive and extensive protection for human rights and international law principles in its Advisory Opinion.

The ICJ Process

14. On 29 March 2023, the United Nations General Assembly (“UNGA”) adopted the resolution (A/77/L.58), requesting an Advisory Opinion on the international law obligations of States to address climate change, from the ICJ.¹² The resolution was adopted by consensus. This initiative was largely led by the Government of Vanuatu,¹³ which worked with other countries, including Mozambique, Angola, Sierra Leone, Morocco, and Uganda, to prepare a draft resolution through internal negotiations and several rounds of informal consultations with the wider United Nations membership.¹⁴ Tanzania, Namibia, Rwanda, among other Africa States, endorsed the UNGA resolution calling for the Advisory Opinion.

15. The following are the questions before the Court (“the ICJ questions”):

“Having particular regard to the Charter of the United Nations, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the United Nations Framework Convention on Climate Change, the Paris Agreement, the United Nations Convention on the Law of the Sea, the duty of due diligence, the rights recognized in the Universal Declaration of Human Rights, the principle of prevention of significant harm to the environment and the duty to protect and preserve the marine environment,

(a) What are the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for present and future generations.

(b) What are the legal consequences under these obligations for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment, with respect to:

¹² UNGA Resolution available at <https://www.icj-cij.org/sites/default/files/case-related/187/187-20230630-req-03-00-en.pdf>.

¹³ Vanuatu’s initiative flowed from a comprehensive campaign for action led by Pacific Island Students Fighting Climate Change and others. See <https://www.pisfcc.org/>.

¹⁴ <https://www.vanuatuicj.com/>.

(i) States, including, in particular, small island developing States, which due to their geographical circumstances and level of development, are injured or especially affected by or are particularly vulnerable to the adverse effects of climate change?

(ii) Peoples and individuals of the present and future generations affected by the adverse effects of climate change?”

16. The ICJ has authorised the African Union¹⁵ and the Organisation of African, Caribbean and Pacific States (“OACPS”),¹⁶ among others, to participate in the proceedings.

17. We note, with concern, that the Organization of the Petroleum Exporting Countries (“OPEC”) has been authorized, at its request, to participate in the advisory proceedings.¹⁷ We call upon the ICJ, in considering OPEC’s submission, to acknowledge and take into account, OPEC’s vested financial interest in the continued exploitation of climate change-inducing fossil fuels.¹⁸

18. States have until **22 March 2024**¹⁹ to furnish information to the ICJ on the questions before the Court, and in doing so, can make a written submission to the ICJ.

19. Only those State parties and international organizations that have made written submissions to the ICJ by 22 March, have an opportunity to make written comments on the statements that have been submitted by other States.²⁰ The deadline for those further written submissions is **24 June 2024**.

20. States and organizations that have not presented written statements are provided with a list of submitting States and organizations, but not with the written statements. The written statements are not communicated to States that have not themselves presented

¹⁵ ICJ Press Release No. 2023/42 of 18 July 2023 at <https://www.icj-cij.org/sites/default/files/case-related/187/187-20230718-pre-01-00-en.pdf>.

¹⁶ ICJ Press Release No. 2023/48 of 20 September 2023 at <https://www.icj-cij.org/sites/default/files/case-related/187/187-20230920-pre-01-00-en.pdf>.

¹⁷ <https://www.icj-cij.org/index.php/node/202985>.

¹⁸ <https://www.reuters.com/world/eu-condemns-out-whack-opec-attempt-block-cop28-fossil-fuel-deal-2023-12-09/>.

¹⁹ Confirmation of submission deadlines, as per the latest time extension of December 2023: <https://www.icj-cij.org/sites/default/files/case-related/187/187-20231219-pre-01-00-en.pdf>

²⁰ REQUEST FOR ADVISORY OPINION: PROCEDURE FOLLOWED BY THE INTERNATIONAL COURT OF JUSTICE At IV.B.1

written statements, unless those States are considered likely to be able to furnish information to the ICJ.²¹

21. For the duration of the written proceedings, statements and comments are treated as confidential documents. The ICJ may decide that the written statements and annexed documents will be made accessible to the public on or after the opening of the oral proceedings.²² Given the global significance of the matter at hand, the ICJ should make the filed State and international organization submissions publicly accessible as soon as reasonably possible.
22. This NGO statement is submitted in terms of ICJ Practice Direction XII, which provides that a non-governmental organization may, on its own initiative, submit a written statement and/or document in an advisory opinion case. While this statement is not to be considered part of the case file, it will be treated as a publication readily available and “may accordingly be referred to by States and intergovernmental organizations presenting written and oral statements in the case”.²³
23. It would be in the interests of justice and transparency – in light of the broad importance of the questions before the ICJ for humankind - to make all NGO statements filed, publicly available online on the ICJ’s website.²⁴

III. Submissions on the Questions before the ICJ

First Question: What are the obligations of states under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for present and future generations?

24. For the reasons set out below, States have extensive obligations, under international law to protect the climate system. These obligations include, *inter alia*: prohibitive duties which prevent the unconstrained emission of atmospheric pollution, duties on all States to

²¹ States that have not taken part in the written proceedings, that are considered likely to be able to furnish information to the ICJ, will be furnished with written comments and a complete set of the written statements. REQUEST FOR ADVISORY OPINION: PROCEDURE FOLLOWED BY THE INTERNATIONAL COURT OF JUSTICE At IV.A.2(b) and IV.C.

²² Ibid at IV.C and Article 106 of the ICJ Rules.

²³ Practice Direction XII. See also https://www.icj-cij.org/sites/default/files/2023-06/Advisory-Opinion-Procedure-followed-by-the-ICJ_E.pdf.

²⁴ We refer to a letter of 15 March 2024, sent to the President and Registrar of this Court by a number of NGOs, including Natural Justice, requesting the Court to make publicly accessible, and publish on its website the NGO statements filed in respect of this Advisory Opinion process,

use their maximum available effort and resources to address climate change and mitigate greenhouse gas emissions; and, for high-emitting, developed States, duties to support developing and less resourced States in responding to the climate crisis.

25. Due to its global nature, climate change triggers States' duties under multiple bodies of law, including the laws listed in the ICJ questions, which include: treaties specifically addressing climate change (such as the United National Framework Convention on Climate Change ("UNFCCC") and the Paris Agreement), as well as international human rights instruments such as the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights; and customary international law principles including the duty of prevention of significant harm to the environment and the duty to protect and preserve the marine environment.
26. Significantly, the General Assembly wishes to receive advice in relation to human rights law and consideration of the interaction between human rights and the impact of climate change. The Request specifically raises for consideration the relevance of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child. In short, the ICJ is being requested to consider international law obligations that exist in addition to the specific commitments made under climate instruments such as the UNFCCC and the Paris Agreement.
27. Significantly, international law obligations to avoid, avert, minimise, and remediate foreseeable harm to human rights from the impacts of climate change, are not limited to those outlined in the Paris Agreement and UNFCCC. Customary international law, general principles of law and treaty law, including the work of the United Nations and the rulings of domestic and international courts and tribunals, along with acknowledgments by States themselves, all serve to confirm the broader obligations of States to each other to protect the climate system.
28. The ICJ questions raise for consideration a number of relevant sources of international law, which may also include laws *not* specifically listed in the Advisory Opinion questions to the ICJ.²⁵

²⁵ Note that the Request for the Advisory Opinion states that "*Having particular regard to*" the international laws listed. This implies that other international laws, principles and treaties may also be considered by the ICJ.

29. A number of human rights that are protected by international law, are threatened as a result of the impacts of climate change globally, and in African States particularly, as a result of the circumstances described above. These include: the rights to life,²⁶ self-determination,²⁷ a healthy environment,²⁸ health,²⁹ and the rights of the child.³⁰ The rights must be capable of being exercised in an effective manner,³¹ which becomes impossible if climate change renders the rights meaningless or diminished.
30. We do not address *all* of the applicable international laws and principles in this statement. Instead, we highlight the international laws, including rights and principles, that are particularly relevant to the context and circumstances within Africa.
31. Further, a number of African regional instruments recognise and give protection to human rights within Africa as well as particular vulnerable marine ecosystems and regions important for sustaining livelihoods. These instruments constitute regional rules of international law and the Court may have regard to those rules. They also affirm a number of the obligations of African States to their people and to each other, in particular to women and children in African States. This bears relevance to the questions before the ICJ, particularly to the extent that **the impacts of climate change render it difficult or impossible for African States to fulfil their obligations under these regional treaties.** They include, for example:

²⁶ Article 6 of the International Covenant on Civil and Political Rights recognizes the inherent right of every person to life. This right is also recognised in: Universal Declaration of Human Rights article 3.

²⁷ Article 1 of the International Covenant on Economic, Social and Cultural Rights states that “All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.” This is also entrenched in Article 1 of the International Covenant on Civil and Political Rights.

²⁸ Article 12 of the International Covenant on Economic, Social and Cultural Rights confirms that parties “recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health” and that the steps to be taken by the States Parties to achieve the full realization of this right shall include those necessary for, inter alia: the improvement of all aspects of environmental and industrial hygiene (article 12(2)(b)). Resolutions from the Human Rights Council in 2021 (A/HRC/RES/48/13) and the General Assembly in 2022 (A/RES/76/300) recognize the right to a clean, healthy and sustainable environment as a human right that is important for the enjoyment of human rights.

²⁹ Article 25(1) of the Universal Declaration of Human Rights guarantees everyone “the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control”. Article 12 of the International Covenant on Economic, Social and Cultural Rights;

³⁰ The Convention on the Rights of the Child triggers specific obligations towards youth and future generations. “States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being ...” (article 3(2)). See also articles 24 and 27 for example.

³¹ Articles 2 and 3 of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms.

- 31.1. **The African Charter for Human and Peoples' Rights.** State parties to the Charter undertake to take the necessary measures to protect the health of their people.³² The Charter guarantees the rights of every individual to freely take part in the cultural life of his community;³³ the State must protect the rights of women and the child;³⁴ and “all people shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination.”³⁵ Climate change not only poses a threat to the lives of individuals but also to their ways of life and livelihoods.³⁶ This poses far-reaching threats to peoples' rights to self-determination.
- 31.2. **The Maputo Protocol on the Rights of Women in Africa,** guarantees extensive rights to women, including the rights to food security, in terms of which State parties shall take appropriate measures to, *inter alia*, “provide women with access to clean drinking water, sources of domestic fuel, land, and the means of producing nutritious food”,³⁷ and a healthy and sustainable environment, in terms of which State Parties shall take all appropriate measures to protect and enable the development of women's indigenous knowledge systems.³⁸
- 31.3. **The African Charter on the Rights and Welfare of the Child,** notes that “the situation of most African children, remains critical due to the unique factors of their socio-economic, cultural, traditional and developmental circumstances, natural disasters, armed conflicts, exploitation and hunger, and on account of the child's physical and mental immaturity he/she needs special safeguards and care”.³⁹ It affirms that “in all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration,”⁴⁰ and that “every child has an inherent right to life. This right shall

³² Article 16(2).

³³ Article 17(2).

³⁴ Article 18(3).

³⁵ Article 20(1).

³⁶ https://www.ohchr.org/sites/default/files/Documents/Publications/FSheet38_FAQ_HR_CC_EN.pdf, p. 5.

³⁷ Article 15(a).

³⁸ Article 18.

³⁹ African Charter on the Rights and Welfare of the Child, Preamble, at p7.

⁴⁰ African Charter on the Rights and Welfare of the Child, Article 4(1).

be protected by law” and “States Parties ... shall ensure, to the maximum extent possible, the survival, protection and development of the child”.⁴¹

31.4. **The Nairobi Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Western Indian Ocean**, signed by Comoros, France, Kenya, Madagascar, Mauritius, Mozambique, Seychelles, Somalia, Tanzania and the Republic of South Africa. It provides that “parties shall, individually or jointly, take all appropriate measures in conformity with international law ... to prevent, reduce and combat pollution of the Convention area and to ensure sound environmental management of natural resources, using for this purpose the best practicable means at their disposal, and in accordance with their capabilities;”⁴² and “contracting Parties shall, individually or jointly, take appropriate measures to conserve biological diversity and protect and preserve rare or fragile ecosystems as well as rare or threatened species of fauna and flora and their habitats in the Convention area.”⁴³ Climate change is impacting heavily in the Indian Ocean and its coasts. Changing water temperatures have been found to lead to deadly weather-related events like megadroughts in East Africa and severe flooding in Indonesia.⁴⁴

31.5. **The Benguela Current Convention (“BCC”)**⁴⁵ is a multi-sectoral intergovernmental organisation established by the Republics of Angola, Namibia and South Africa to promote a coordinated approach to long-term conservation, protection, rehabilitation, enhancement, and sustainable use of the Benguela Current Large Marine Ecosystem. Climate change is impacting on a number of marine species within the Benguela Fisheries System. This is hampering the sustainability of marine resources that thousands of people depend on for their nutrition, jobs and livelihoods.⁴⁶

⁴¹ Ibid at Articles 5(1) and 5(2).

⁴² Article 4.1.

⁴³ Article 11.

⁴⁴ ‘How climate change impacts the Indian Ocean dipole, leading to severe droughts and floods’, Brown University, January 2023, at <https://www.brown.edu/news/2023-01-04/droughts-floods>.

⁴⁵ <https://www.benguelacc.org/member-states/>.

⁴⁶ BCC Climate Change Project, at <https://www.benguelacc.org/climate-change-project/>.

The Obligations of States

32. We confirm that States owe each other, as well as present and future generations, a legal obligation to ensure the protection and stability of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases. This includes a legal obligation owed by high-emitting developed States towards African States.
33. The relevant international laws, principles and rights must be interpreted to include, at least, the following obligations, and these considerations should apply, and be incorporated into the Advisory Opinion:
- 33.1. All States must reduce their greenhouse gas emissions in line with, at least, their fair share;
 - 33.2. States must use their best efforts to ensure a just transition to clean energy and away from fossil fuels;
 - 33.3. States must, prior to decision-making, consider the climate change impacts of any new sources of climate pollution, including fossil fuel projects, or decisions affecting energy policy; and
 - 33.4. High-income and high-emitting States have an obligation to provide support to States less responsible for GHG emissions.

The obligation to reduce greenhouse gas emissions in line with fair share

34. The obligation to reduce GHG emissions stems from the duty in international environmental law to prevent transboundary harm⁴⁷ and the fundamental obligations under human rights law to respect, protect and fulfil all human rights for all.⁴⁸

⁴⁷ The duty of States not to cause transboundary harm constitutes customary international law and effectively qualifies territorial sovereignty. It imposes on States the duty not to knowingly allow their territories to be used “for acts contrary to the rights of other States”. This has been confirmed by the International Court of Justice in the Corfu Channel Case (United Kingdom v. Albania), Preliminary Objection, 1949 I.C.J. Rep. 22. 26. Principle 21 of the 1972 Stockholm Declaration on the Human Environment and the Rio Declaration on Environment and Development recognise that the duty not to cause transboundary harm extends to environmental pollution. These instruments confirm that States have the “sovereign right to exploit their own resources,” but that that right exists alongside “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”. UN Conference on the Human Environment held in Stockholm, 5-16 June 1972, Stockholm Declaration on the Human Environment, U.N. Doc. No. A/CONF.48/14/Rev. 1, 3 (1973), U.N. Doc. A/Conf.48/14, 2, Corr. 1 (1972), reprinted in 11 I.L.M. 1416 (1972) [hereinafter Stockholm Declaration]; UN Conference on Environment and Development held in Rio de Janeiro, 3-14 June 1992, Rio Declaration on Environment and

35. Accepting that GHG emitting activities are the cause for harmful transboundary climate impacts, which pose risks to a number of human rights, States must take action to reduce their GHG emissions.
36. The Intergovernmental Panel on Climate Change's ("IPCC") Sixth Assessment Report, published in March 2023, reaffirmed that "every increment of global warming will intensify multiple and concurrent hazards (high confidence)".⁴⁹
37. The principles of transboundary pollution⁵⁰ make clear that greenhouse gases generated in the north may nevertheless engage the state responsibility of northern States if damage is suffered in a distant place, including Africa.
38. The rules of the United Nations Convention of the Law of the Sea ("UNCLOS") confirm the principles and duties on States to prevent transboundary harm. These rules have been raised before the International Tribunal for the Law of the Sea ("ITLOS") but they are equally relevant to the Court's consideration of the ICJ questions in this instance, particularly given the vulnerability of a number of coastal African States, such as Mozambique, Madagascar, and Namibia to the impacts of climate change. Article 194 provides that:
- "States shall take, individually or jointly as appropriate, all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities, and they shall endeavour to harmonize their policies in this connection"⁵¹ and "States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction or control

Development, U.N. Doc. No. A/CONF.151/26/Rev.1 (1992), reprinted in 31 I.L.M. 874 (1992) [hereinafter Rio Declaration].

⁴⁸ International Covenant on Economic, Social and Cultural Rights. UN Office of the High Commissioner 'Frequently Asked Questions on Human Rights and Climate Change' Fact Sheet 38, 2021 at https://www.ohchr.org/sites/default/files/Documents/Publications/FSheet38_FAQ_HR_CC_EN.pdf.

⁴⁹ IPCC, Climate Change 2023: Synthesis Report. A Report of the Intergovernmental Panel on Climate Change. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change [Core Writing Team, H. Lee and J. Romero (eds.)], IPCC, Geneva, Switzerland [hereinafter IPCC AR6, SYR], SPM B.1.

⁵⁰ This is a principle of customary international law. It is also recognized in UNCLOS, art. 194(2);

⁵¹ Article 194(1).

does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention”.⁵²

39. States must consider their obligations to avoid the pollution of the atmosphere, and the consequential effects of pollution in the marine environment.
40. It should be beyond doubt that “pollution of the marine environment” extends to the unconstrained use of the oceans as a ‘heat sink’. It follows that the Article 194 obligations are engaged.
41. The principle of “common but differentiated responsibilities and respective capabilities, in light of different national circumstances”⁵³ enshrined in international environmental law (including UNCLOS Article 194(1) referenced above) and the UNFCCC treaties,⁵⁴ confirms that not every State can or should reduce its GHG emissions at the same pace and scale.
42. The concept of States’ “fair share contributions” to global efforts to address the climate crisis, is therefore a useful guide (which should be adopted by the Court) to determining the specific measures required from each State.
43. The concept of “fair share” is based on principles of equity, responsibility, and capability to determine by how much a State should reduce its GHG emissions, including the exact pace at which a State must phase out fossil fuels (see more detail on this obligation below).⁵⁵ While there are multiple methods for determining a country’s specific fair share contribution, all are based on two main factors that are consistent with the UNFCCC treaties: (1) each State’s share of the global responsibility for causing climate change and (2) its capability to address it.⁵⁶

⁵² Article 194(2).

⁵³ Article 4(3), the Paris Agreement.

⁵⁴ Preamble to the UN Framework Convention on Climate Change, Article 3(1) Principles of the UNFCCC and article 4; and Article 2(2) of the Paris Agreement.

⁵⁵ See, e.g., Climate Equity Reference Project, About the Climate Equity Reference Project Effort-Sharing Approach,

<https://climateequityreference.org/about-the-climate-equity-reference-project-effort-sharing-approach/>.

⁵⁶ See Supreme Court of the Netherlands, *The State of the Netherlands v. Stichting Urgenda* (20 Dec. 2019), paras. 5.7.1—5.7.9, 6.2 https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2020/20200113_2015-HAZA-C0900456689_judgment.pdf (noting that “[t]hese general obligations and principles [set out in the UNFCCC] mean that a fair distribution must take place, taking into account the responsibility and state of development of the individual countries.”); Civil Society Equity Review, *A Fair Shares Phase Out: A Civil Society Equity Review on an Equitable Global Phase Out of Fossil Fuels*, p. 16 (2021),

44. On the first factor of the “fair share” test, focused on the share of responsibility, developed States have more responsibility to reduce their GHG emissions because they have far exceeded their fair share level of emissions for a number of years.⁵⁷
45. The second factor for considering in determining fair share - economic capacity - considers both a country’s available economic resources and the difficulty of ending fossil fuel dependency. This takes into account the conditions in each State as well as its “respective capabilities,”⁵⁸ while still recognising the need to “dedicate the maximum available resources to the adoption of measures that could mitigate climate change.”⁵⁹
46. Developed States have a greater capacity to phase out fossil fuel extraction rapidly, greater resources to invest in just transition, and lower levels of economic dependence on fossil fuels.⁶⁰ Whereas, less-developed States with a greater dependency on fossil fuel revenues may need more time to transition their economies without adversely affecting development and social programs dependent on these revenues.
47. While national conditions and fair share considerations are certainly important and relevant, all States that are contributing to climate change (and the cross-boundary harms that go with it) must take *some* measures to mitigate their greenhouse gas emissions. Any effort to do so that does not reflect a State’s maximum available means and resources is inconsistent with its human rights obligations, the obligation of a State party under the Paris Agreement to reflect its “highest possible ambition”,⁶¹ and the principle of common but differentiated responsibilities.

<https://static1.squarespace.com/static/620ef5326bbf2d7627553dbf/t/622824a543109c49186ef913/1646797999602/CSO.Equity.Review-2021-A.Fair.Shares.Phase.Out.Of.Fossil.Fuels.pdf>; Climate Action Tracker, Fair Share, <https://climateactiontracker.org/methodology/cat-rating-methodology/fair-share/>; Lavanya Rajamani et al., National ‘Fair Shares’ in Reducing Greenhouse Gas Emissions Within the Principled Framework of International Environmental Law, *Climate Policy*, vol. 21, p. 996 (7 Sept. 2021), <https://www.tandfonline.com/doi/epdf/10.1080/14693062.2021.1970504?needAccess=true>.

⁵⁷ See, e.g., Andrew L. Fanning and Jason Hickel, Compensation for Atmospheric Appropriation, *Nature Sustainability*, vol. 6, pp. 1078-89 (5 June 2023), <https://www.nature.com/articles/s41893-023-01130-8>.

⁵⁸ Paris Agreement, Article 4(3).

⁵⁹ UN Committee on Economic, Social and Cultural Rights, Climate change and the International Covenant on Economic, Social and Cultural Rights has noted that a failure to prevent foreseeable human rights harm caused by climate change, or a failure to mobilize the maximum available resources in an effort to do so, could constitute a breach of the obligation to respect, protect and fulfil all human rights for all. At <https://www.ohchr.org/en/statements/2018/10/committee-releases-statement-climate-change-and-covenant>.

⁶⁰ Civil Society Equity Review, A Fair Shares Phase Out, p28. At https://static1.squarespace.com/static/620ef5326bbf2d7627553dbf/t/65b1db9ab744dd496a23d576/1706154910336/COP28_Civil_Society_Equity_Review_Equitable_Extraction_Phaseout_Report.pdf.

⁶¹ Article 4(3).

48. States' obligations to protect human rights may require them to do more or act faster to mitigate climate changes and reduce GHG emissions than their Nationally Determined Contributions offered under the Paris Agreement.⁶² In such circumstances, States must implement the more ambitious measures necessary to protect human rights. The temperature goal set out in the Paris Agreement does not supersede fundamental human rights obligations. This is because current levels of warming are already causing adverse human rights impacts. The Paris Agreement recognises that human rights obligations must be respected in and through climate action.⁶³
49. There is nothing in the UNFCCC agreements that limits States' obligations to take *all* actions necessary to meet their commitments under any human rights treaty. Those obligations may require States to adopt more ambitious action than that pledged in the Paris Agreement, particularly as the science develops.
50. Further, States cannot suspend or withhold on acting upon, or making, climate commitments simply because other States have failed to take the necessary action. The human rights obligation to prevent climate damage and harms are owed to the entire international community. As such, every State must use its maximum available means and resources, regardless of the actions of other States, to reduce GHG emissions within their territory.

The obligation to ensure a just transition from fossil fuels, to clean energy

51. Most of the emissions that cause global warming are the result of energy generation, specifically the production and use of fossil fuels for electricity, heating, and transportation.⁶⁴ Every new oil well drilled and every existing gas or coal-burning power plant that is allowed to continue emitting GHGs will make it harder to reduce warming and mitigate the resulting effects on human rights.

⁶² International Covenant on Economic, Social and Cultural Rights. UN Office of the High Commissioner 'Frequently Asked Questions on Human Rights and Climate Change' Fact Sheet 38, 2021, p66 – 67 at https://www.ohchr.org/sites/default/files/Documents/Publications/FSheet38_FAQ_HR_CC_EN.pdf.

⁶³ In the preamble to the Agreement, the Parties acknowledged that they “should, when taking action to address climate change, respect, promote and consider their obligations on human rights....” Paris Agreement, pmb.; see also Conference of the Parties serving as the meeting of the Parties to the Paris Agreement, 16th session, 15 March 2011, Cancun Agreements, 1/CP.16, U.N. Doc. No. FCCC/CP/2010/7/Add.1, para. 8 (acknowledging for the first time in a UNFCCC decision that Parties should fully respect human rights in all climate actions).

⁶⁴ United Nations, Facts and Figures, <https://www.un.org/en/actnow/facts-and-figures>.

52. Science confirms that avoiding and minimising further foreseeable harm and the irreversible damage of overshooting 1.5°C, requires rapid and steep reductions in GHG emissions, which is only possible through the phase-out of fossil fuels. Global carbon dioxide (“CO₂”) emissions must decrease by at least 48% from 2019 levels by 2030 and reach net zero around 2050, alongside similar reductions in non-CO₂ GHGs, in order to have a chance of limiting warming to 1.5°C.⁶⁵
53. The duties to respect and protect human rights impose on States an obligation to refrain from conduct that foreseeably causes or contributes to human rights harm, and to take all necessary measures to prevent conduct by others that foreseeably endangers human rights.⁶⁶ Fulfilment of these duties requires States to address, alleviate, and mitigate foreseeable threats to human rights. This means that States must use the maximum available means and resources to transition away from fossil fuels, to ensure a just transition to clean energy and to ensure that their activities do not pollute the marine or atmospheric environments so as to affect the rights of people in other States.
54. Rapidly replacing fossil fuel infrastructure with clean and carbon-free sources of energy, many of which are readily available and technically and economically feasible for most States, is therefore, one of the most important mitigation measures a State can take.
55. The transition to clean energy is also supported by the precautionary principle. Under this principle, scientific or technical uncertainty about the full extent or scope of a risk cannot justify delaying the adoption of effective and proportionate measures aimed at preventing the risk from causing serious and irreversible damage to people and the environment. The European Court of Human Rights found that the precautionary principle requires that

⁶⁵ See IPCC, 2022: Climate Change 2022: Mitigation of Climate Change. Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change [P.R. Shukla, J. Skea, R. Slade, A. Al Khourdajie, R. van Diemen, D. McCollum, M. Pathak, S. Some, P. Vyas, R. Fradera, M. Belkacemi, A. Hasija, G. Lisboa, S. Luz, J. Malley, (eds.)], Cambridge University Press, Cambridge, UK and New York, NY, USA [hereinafter IPCC AR6 WGIII], SPM C.1.2, Table SPM.2; see also IPCC AR6 WGIII, Ch. 3, 3.3.

⁶⁶ See UN General Assembly, 85th Plenary Meeting, Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, U.N. Doc. No. A/RES/53/144, 9 December 1998, art. 2 (“Each State has a prime responsibility and duty to protect, promote and implement all human rights and fundamental freedoms...”); Human Rights Committee, General Comment No. 31 - The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13, 29 March 2014 [hereinafter HRC GC No. 31], para. 7; Committee on Economic, Social and Cultural Rights, General Comment No. 20 - Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), U.N. Doc. No. E/C.12/GC/20, 2 July 2009 [hereinafter CESCR GC No. 20], para. 8.

relevant authorities take measures within the scope of their powers that could be reasonably regarded as capable of mitigating known risks.⁶⁷

56. The transition to clean energy, if just and conducted with respect for human rights, comes with many additional positive opportunities for States and their people, such as: greater access to cheaper electricity, and health benefits in circumstances where pollution from energy sources like coal, oil and gas have dangerous impacts on human health.
57. African States could also benefit substantially from choosing to invest in clean energy now, over new fossil fuels, as a means to address energy poverty and energy supply challenges within Africa. By choosing sustainable energy sources over fossil fuels, Africa can create new jobs; avoid the transition risks of lock-in to expensive and obsolete fossil fuel technology; experience greater economic growth; and harvest social and health benefits while helping to mitigate the impacts of climate change.⁶⁸ It is important that developed States support Africa in more swiftly transitioning to clean energy solutions.
58. The timeline and speed at which States must halt fossil fuel extraction and use, should reflect their “fair share” contribution to reducing global emissions, as set out above.
59. According to the International Energy Agency, to reach net zero emissions, “emissions in advanced economies [need to] fall nearly two-times faster in the current decade than emissions in emerging market and developing economies.”⁶⁹ A study by the University of Manchester concludes that wealthier fossil fuel producing States have the capacity to, and must, eliminate coal production by 2030⁷⁰ and all other fossil fuels by 2034.⁷¹
60. For these reasons, developed, historically high-emitting States must immediately stop approving fossil fuel exploitation, including exploration and production in new and existing reserves, and must begin shutting down fossil fuel activities.
61. Developing states should also be supported in efforts to transition to clean energy, by financial and technical assistance from developed States, to help compensate for lost

⁶⁷ Tătar v. Romania, para. 108.

⁶⁸ The Renewable Energy Transition in Africa Powering Access, Resilience and Prosperity, 2021 at https://www.irena.org/-/media/Files/IRENA/Agency/Publication/2021/March/Renewable_Energy_Transition_Africa_2021.pdf.

⁶⁹ International Energy Agency (IEA), Net Zero Roadmap: A Global Pathway to Keep the 1.5°C Goal in Reach, p. 59 (2023) <https://www.iea.org/reports/net-zero-roadmap-a-global-pathway-to-keep-the-15-0c-goal-in-reach>.

⁷⁰ Caverley and Anderson, Phaseout Pathways for Fossil Fuel Production within Paris-compliant Carbon Budgets, p. 6.

⁷¹ Ibid.

revenues and accelerate the transition. However, the entitlement to support cannot justify increasing emissions beyond their fair shares, or avoiding and delaying taking measures to begin the fossil fuel phase-out.

62. As a result of the above, and in order to give effect to the obligation to transition to clean energy, States must immediately begin implementing the following sets of practical measures:

- 62.1. Take immediate steps to phase out fossil fuel extraction according to their fair share, with developed States following an expedited timeline and providing significant aid to less-developed States;
- 62.2. Eliminate all subsidies for fossil fuel extraction and begin reducing subsidies for fossil fuel consumption;
- 62.3. Replace most fossil-fuel generated power with clean energy, including by:
 - 62.3.1. Taking immediate steps to phase out existing fossil fuel-burning power plants according to the State's fair share, with more-developed States immediately stopping the approval of new plants and retiring existing plants on an expedited timeline and providing funding and technical assistance to support less developed States in doing the same;
 - 62.3.2. Removing arbitrary barriers to, and promoting, clean energy;
 - 62.3.3. Avoiding "false solutions", namely, practices that are promoted as climate solutions but that actually allow the burning of fossil fuels to continue, and deepen dependency on fossil fuels for example, replacement of coal or oil with so-called natural gas (methane). Gas is often touted as a "clean" alternative to complement renewable energy. However, when the full life-cycle emissions of methane gas are considered, there is no justification for the allegation that gas is cleaner than coal or oil;⁷²

⁷² Several studies have concluded that gas production can be more carbon-intensive than coal production when accounting for leakages and the full lifecycle. See Evaluating Net Life-Cycle Greenhouse Gas Emissions Intensities from Gas and Coal at Varying Methane Leakage Rates, Environmental Research Letters (17 July 2023), <https://iopscience.iop.org/article/10.1088/1748-9326/ace3db> (finding that GHG emissions from gas production were comparable to those from coal when as little as 0.2% of gas leaks along the supply chain). In

- 62.3.4. Ensuring the realisation and respect for human rights for all communities affected by renewable energy projects; and
- 62.3.5. Providing opportunities for public participation and access to information for all decisions regarding energy policy that will create new sources of climate pollution.

The obligation to assess and consider climate change impacts in decision-making

- 63. In order to be able to prioritise the activities to be stopped, phased out, or undertaken to minimise the human rights impacts of climate change, as well as the pace at which each State must act, States must have an accurate understanding of how newly proposed activities and policies contribute to global climate change, particularly with consideration as to how climate impacts are manifesting in African States and Small Island States.
- 64. Therefore, States must conduct climate impact assessments *before* new sources of climate pollution, including fossil fuel projects, or decisions affecting energy policy, are taken.
- 65. Such assessments must, *inter alia*:
 - 65.1. Account for total life-cycle emissions, which include all direct and indirect (“scope 3”) emissions, from upstream and downstream activities;
 - 65.2. Analyse whether a project is compatible with a country’s “fair-share” contribution to global GHG emission reductions and its human rights obligations;
 - 65.3. Assess all feasible alternatives and reject fossil fuel proposals where a clean energy project could bring similar benefits and avoid or reduce GHG emissions;
 - 65.4. Analyse how the worsening climate crisis will impact the project/decision to be taken or exacerbate its other, non-climate impacts on the environment; and
 - 65.5. In addition to evaluating individual projects, States should also conduct strategic environmental assessments that can evaluate the large-scale climate effects of

the United States, it has been estimated that 2.3% of gas leaks during production and transmission, over 10 times higher than what is needed for gas to be comparable to coal. See, Alvarez, Ramón A., et al., Assessment of Methane Emissions from the US Oil and Gas Supply Chain, *Science* 361.6398 (2018): 186-188, <https://www.science.org/doi/full/10.1126/science.aar7204>; see also Ziaochun Zhang et al., Key Factors for Assessing Climate Benefits of Natural Gas Versus Coal Electricity Generation, *Environmental Research Letters* (2014), <https://iopscience.iop.org/article/10.1088/1748-9326/9/11/114022/pdf> (“[W]ithout carbon capture and storage natural gas power plants cannot achieve the deep reductions that would be required to avoid substantial contribution to additional global warming.”).

high-level energy policies or regulations, as these decisions have a significant impact on a country's overall GHG emissions and its capacity to transition to clean energy.

The obligation to support developing States affected by climate change, and provide them with the resources to adequately respond to climate impacts

66. The following international law principles bear relevance under this obligation:

- 66.1. The principle of equity, which requires States to acknowledge and address the disproportionate impacts of climate change;⁷³
- 66.2. The polluter pays principle, which is an environmental law concept that requires any person or entity that causes pollution to be responsible for the costs of managing such pollution in order to prevent or repair harm caused;⁷⁴ and
- 66.3. the principle of common but differentiated responsibilities and respective capabilities in light of different national circumstances (“CBDRRC-NC”),⁷⁵ which requires high-income, high-emitting States to move first and fastest on climate action and provide financial support to States less responsible for GHG emissions. This is confirmed in the UNFCCC and the Paris Agreement.⁷⁶

67. Under the Paris Agreement, States have committed to, *inter alia*:

- 67.1. ensuring that finance flows are “consistent with a pathway towards low greenhouse gas emissions and climate-resilient development”;⁷⁷
- 67.2. “increasing the ability to adapt to the adverse impacts of climate change and foster climate resilience”; and
- 67.3. under the global goal on adaptation, “enhancing adaptive capacity, strengthening resilience and reducing vulnerability to climate change”.⁷⁸

⁷³ Equity requires international tribunals to consider justice and fairness when establishing, operating, or applying a rule of law. See Sands P and others, *Principles of International Environmental Law* (Cambridge University Press 2019), p. 119 and Youth Climate Justice Handbook, Legal Memorandum, p. 23. The principle of equity is also reflected in treaties such as principles 3 and 6 of the Rio Declaration on Environment and Development.

⁷⁴ This principle was first introduced in 1972 by the Organization for Economic Cooperation and Development (OECD), and it is recognised internationally as a way of promoting environmental protection and sustainable development. In 1992, it was adopted as Principle 16 of the Rio Declaration on Environment and Development.

⁷⁵ Rio Declaration, Principle 7.

⁷⁶ UNFCCC, arts. 3.1, 4; Paris Agreement, art. 2.2; Rio Declaration, Principle 7.

⁷⁷ Paris Agreement, art. 2.1(c).

68. States with high GHG emissions, particularly those that have economically benefited from their GHG emissions, have a duty to provide financial support to States for adapting and responding to the impacts of the climate crisis. This obligation extends, particularly, to support for African States, most of which are not economically in the position to adequately respond to the impacts of the climate crisis, while these impacts are having a disproportionate effect in their territories.
69. Any financial support must be in the form of grants and not loans. Many African States are already facing substantial debt burdens.⁷⁹ While loans may provide momentary relief, plunging States into further debt in the long-term, for expenses that are not of their making, is not within the principles of equity, justice or CBDRRC-NC.
70. The above is confirmed by the UN Special Rapporteur on Human Rights and the Environment, who has advised that:
- 70.1. “[t]he main contributors to the problem have reaped immense economic benefits and thus have the greatest responsibility to solve the problem, pursuant to the principle of common but differentiated responsibilities”;⁸⁰ and
- 70.2. “[w]ealthy States must contribute their fair share towards the costs of mitigation and adaptation in low-income countries, in accordance with the principle of common but differentiated responsibilities. Climate finance to low-income countries should be composed of grants, not loans. **It violates basic principles of justice to force poor countries to pay for the costs of responding to climate change when wealthy countries caused the problem**”.⁸¹ (emphasis added)
71. The Committee on Economic, Social and Cultural Rights recognizes that the countries who have historically contributed the most to climate change, and the current main contributors, “shall assist the countries that are most affected by climate change but are least able to cope with its impact, including by supporting and financing land-related adaptation measures”.⁸²

⁷⁸ Paris Agreement, arts. 2.1(b) and 7.

⁷⁹ [https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/754616/EPRS_BRI\(2023\)754616_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/754616/EPRS_BRI(2023)754616_EN.pdf).

⁸⁰ Special Rapporteur Report on the Human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, U.N. Doc. A/74/161, para. 26.

⁸¹ Special Rapporteur Report on the Human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, U.N. Doc. A/74/161, para. 68.

⁸² CESCR GC No. 26, para. 58.

72. As stated above, many States on the African continent face a high risk of desertification – an impact which is accelerated, in many instances, by the effects of climate change. The United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (“UNCCD”), also imposes obligations of support and cooperation on its member States, in particular an obligation to support African States. 197 countries are a party to the UNCCD including the European Union, China, Canada, France, Germany, The United Kingdom of Great Britain and Northern Ireland and The United States, as well as a number African States including Algeria, Benin, Nigeria, Botswana, Burkina Faso, Cameroon, Egypt, Ethiopia, Senegal and South Africa.
73. The parties to the UNCCD undertake to “integrate strategies for poverty eradication into efforts to combat desertification and mitigate the effects of drought”⁸³ and “promote cooperation among affected country Parties in the fields of environmental protection and the conservation of land and water resources, as they relate to desertification and drought”.⁸⁴ Developed country parties to the UNCCD undertake to:
- “actively support, as agreed, individually or jointly, the efforts of affected developing country Parties, particularly those in Africa, and the least developed countries, to combat desertification and mitigate the effects of drought; (b) **provide substantial financial resources and other forms of support to assist affected developing country Parties, particularly those in Africa, effectively to develop and implement their own long-term plans and strategies to combat desertification and mitigate the effects of drought**”⁸⁵ (emphasis added). Article 7 notes that “**in implementing this Convention, the Parties shall give priority to affected African country Parties, in the light of the particular situation prevailing in that region, while not neglecting affected developing country Parties in other regions**” (emphasis added).
74. The Paris Agreement recognizes the “importance of averting, minimizing and addressing loss and damage associated with the adverse effects of climate change, including extreme weather events and slow onset events, and the role of sustainable development in

⁸³ Article 4(2)(c).

⁸⁴ Article 4(2)(d).

⁸⁵ Article 6(a) and (b).

reducing the risk of loss and damage.”⁸⁶ It stipulates that the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts shall be subject to the authority and guidance of the Conference of the Parties serving as the meeting of the Parties to this Agreement, “and may be enhanced and strengthened, as determined by the Conference of the Parties serving as the meeting of the Parties to this Agreement.”⁸⁷

75. “Loss and damage” is a term generally used to refer to the harms of climate change that cannot be avoided through mitigation or adaptation measures.⁸⁸

76. While Article 8 of the Paris Agreement does not create an express or binding obligation on States for loss and damage, it does provide that parties should enhance understanding, action and support, including through the Warsaw International Mechanism, as appropriate, on a cooperative and facilitative basis with respect to loss and damage associated with the adverse effects of climate change.⁸⁹

77. A decision was taken at the COP 28 UN Climate Change Conference in Dubai, 2023 to operationalise the Loss and Damage Fund. This decision directed the Fund’s board to prepare a plan to mobilise new, additional, predictable and adequate financial resources from all sources of funding.⁹⁰ The funds contributed to the Fund thus far are a mere drop in the ocean of what is required to effectively cover the true loss and damage costs being borne, and expected to be borne, by States for climate-related loss and damages. As it is, Africa is woefully under-resourced⁹¹ to appropriately cover the loss and damages arising from climate impacts in its States.

78. Aligned with the submission above regarding the nature of financial support, funds provided under the Loss and Damages Fund ought to be in the form of grants, and not

⁸⁶ Article 8(1).

⁸⁷ Article 8(2).

⁸⁸ There is no single definition of loss and damage. The United Nations Framework Convention on Climate Change (UNFCCC) broadly defines the concept as “the actual and/or potential manifestation of climate impacts that negatively affect human and natural systems”. See Patrick Touissant “Loss and damage and climate litigation: The case for greater Interlinkage” (2020) 30 *Review of European, Comparative and International Environmental Law* 16 at 19; Maria Antonia Tigre and Margaretha Wewerinke-Singh “Beyond the North-South divide: Litigation’s role in resolving climate loss and damage claims” (2023) 32 *RECIEL* 439 at 440.

⁸⁹ Article 8(3).

⁹⁰ Operationalization of the new funding arrangements, including a fund, for responding to loss and damage referred to in paragraph 2 and paragraph 3 of decisions 2/CP.27 and 2/CMA.4 VIII. Financial inputs. Para. 55. At https://unfccc.int/sites/default/files/resource/TC5_4_Cochairs%20draft%20text_Rev2.pdf.

⁹¹ [https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/754616/EPRS_BRI\(2023\)754616_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/754616/EPRS_BRI(2023)754616_EN.pdf).

loans. Again, this would be aligned with the principles of polluter pays, equity and justice. The ICJ's Advisory Opinion could, and should, provide much-needed confirmation of the obligations of high-emitting States to compensate other States for loss and damage suffered as a result of climate impacts.

Second Question: What are the consequences for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment?

79. The second aspect of the Advisory Opinion requires clarity on the legal consequences under these obligations for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment, with respect to:

79.1. States, including, in particular, small island developing States, which due to their geographical circumstances and level of development, are injured or especially affected by, or are particularly vulnerable to, the adverse effects of climate change?

79.2. Peoples and individuals of the present and future generations affected by the adverse effects of climate change?

80. In short, the ICJ is asked to confirm what legal consequences and recourse might flow from circumstances where a State or States have breached, or are breaching, their international law obligations, as clarified under the first question above, on climate change.

81. The consequences are twofold. First, the offending conduct must cease. Secondly, there should be a broad and effective range of remedies available to States that have suffered climate-related harms as a result of the conduct of another State or States in breach of international obligations. The remedies must be effective, in the sense of amounting to actual, and measurable, reparation for the wrongs committed.

82. The Articles on the Responsibility of States for Internationally Wrongful Acts ("ARSIWA") confirm that: "there is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under

international law; and (b) constitutes a breach of an international obligation of the State.”⁹²

83. The general consequence of breaching international law obligations is State responsibility. This requires that a breaching State must cease acting contrary to its legal obligations,⁹³ and is liable for reparation for the damage caused.⁹⁴ The duty to cease the harmful activities and the liability for reparation, are legal consequences flowing from the wrongful act(s) of a State.
84. GHG emissions in excess of a State’s fair share, for example, would entail an ongoing breach of international law that causes harm to present and future generations.⁹⁵
85. The State responsible for an internationally wrongful act, is under an obligation to cease that act, if it is continuing,⁹⁶ and the injured State may specify the conduct that the responsible State should take in order to cease the wrongful act.⁹⁷ As mentioned, the wrongful act to be ceased in this instance, could be GHG emissions in excess of a State’s fair share, and/or plans to proceed with fossil fuel projects where such plans are misaligned with a State’s fair share.
86. Injured States and affected populations have the right to invoke State responsibility for the breach of international law obligations and can impose countermeasures against the breaching State, where that State does not cease the harmful activity. Peoples and individuals affected by climate change may take legal action against their governments for failing to uphold international law obligations, including by seeking reparation for damages caused by climate change.
87. In certain cases, a non-injured State can invoke a breach of international law on behalf of other States and/or the international community as a whole.⁹⁸
88. Affected individuals and persons can also enforce their rights before human rights courts and other competent bodies.

Forms of Reparation

⁹² ARSIWA, Article 2.

⁹³ ARSIWA, Articles 41 and 43.

⁹⁴ ARSIWA, Article 34

⁹⁵ Youth Climate Justice Handbook, Legal Memorandum, p. 59.

⁹⁶ ARSIWA, Article 30(a).

⁹⁷ ARSIWA, Article 43(2)(a).

⁹⁸ ARSIWA, Articles 42(b) and 48.

89. Reparation can be made in three ways: (i) restitution, (ii) compensation, and/or (iii) satisfaction, including through a combination of these forms.⁹⁹
90. African States, or even non-injured States that wish to invoke international law on behalf of African States, could rely on these various forms of reparation to remedy and address, at least to some extent, breaches of international law that are resulting in climate harms within African States.

Restitution

91. Restitution refers to the legal obligation of a party to provide redress for any harm or damage caused to the environment by their actions by restoring the environment or affected area to its original state. This can involve a range of measures, such as cleaning up contaminated areas, restoring habitats for wildlife, and implementing new policies to eliminate existing harm. The aim of restitution in environmental law is to ensure that the responsible parties are held accountable for their actions, and that the environment is protected and restored to its original state.¹⁰⁰
92. Restitution as a form of reparation must be materially possible and it must not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.¹⁰¹ In other words, the burden of restitution must not outweigh the benefits, where compensation could also provide an effective remedy.
93. In the context of reparations for climate harms manifesting in African States, the remedy of restitution could be difficult to apply, in circumstances where the environment is irreparably altered – for example through desertification, sea-level rise or an extreme weather event. It might not be possible to restore an affected environment to its original state. To the extent that it is possible, and where financial compensation alone would not be sufficient reparation, then restitution must be undertaken by the breaching State.

Compensation

94. Compensation refers to the payment of monetary compensation to a State for loss and/or damages suffered.

⁹⁹ ARSIWA, Article 34.

¹⁰⁰ Youth Climate Justice Handbook, Legal Memorandum, p. 57.

¹⁰¹ ARSIWA, Article 35.

95. Where a State or multiple States have been injured by an internationally wrongful act, they each have a claim against the breaching State or States and can recover up to the damage suffered.¹⁰²
96. Compensation as a form of redress is particularly important in the African context given that the socio-economic circumstances in the majority of African States mean that most States do not have the resources to respond to harmful climate change impacts, particularly where such impacts are increasing in frequency and magnitude.
97. To date, much of the financing given to States to respond to climate change has been in the form of loans (some concessional). As stated above, based on international law principles of justice, equity as well as the polluter pays principle, **States should have access to compensation for climate harms suffered. This is fully aligned with the Articles of Responsibility of States for Internationally Wrongful Acts. States should not have to loan money to address and remedy harms that they did not, wholly or even in part, cause.**

Satisfaction

98. Satisfaction is usually employed when an injury cannot be remedied through either restitution or compensation. Satisfaction can be given through public acknowledgments or statements, and/or by taking disciplinary actions against state officials who have fostered or committed breaches of international law.
99. Satisfaction, in the current circumstances, could be a useful remedy for confirming the obligations of high-emitting States to, *inter alia*, transition away from fossil fuels and take specific action to reduce GHG emissions in line with their fair share.

Conclusion

100. The circumstances of States within the African continent are fundamental when it comes to the questions before the Court.
101. As a continent, Africa has contributed the least and yet, carries the worst impacts of climate change. Its people, including women and children, due to existing socio-economic and political complexities, are particularly vulnerable to the impacts of the climate crisis, and face a number of threats to the rights protected under international law.

¹⁰² ARSIWA, article 36.2.

102. Based on the submissions made above, the ICJ should follow an interpretation of international law that is expansive and just, in order to advance climate justice for African States and African people.

103. Natural Justice further calls on all States to make robust submissions to the ICJ, which seek to defend and advance human rights and the principles of international law to adequately respond to the climate crisis.

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