

**INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA**



2023

Public sitting

held on Thursday, 21 September 2023, at 3 p.m.,  
at the International Tribunal for the Law of the Sea, Hamburg,  
President Albert J. Hoffmann presiding

**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)**

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**Verbatim Record**

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Uncorrected

<i>Present:</i>	President	Albert J. Hoffmann
	Vice-President	Tomas Heidar
	Judges	José Lu�s Jesus
		Stanislaw Pawlak
		Shunji Yanai
		James L. Kateka
		Boualem Bouguetaia
		Jin-Hyun Paik
		David Joseph Attard
		Markiy�n Z. Kulyk
		Alonso G�mez-Robledo
		�scar Cabello Sarubbi
		Neeru Chadha
		Kriangsak Kittichaisaree
		Roman Kolodkin
		Liesbeth Lijnzaad
		Mar�a Teresa Infante Caffi
		Jielong Duan
		Kathy-Ann Brown
		Ida Caracciolo
		Maurice K. Kamga
	Registrar	Ximena Hinrichs Oyarce

*List of delegations:*

## **INTERGOVERNMENTAL ORGANIZATIONS**

### **African Union**

Mr Tordeta Ratebaye, Ambassador, Deputy Chief of Staff, Cabinet of the  
Chairperson, African Union Commission

Mr Mohamed Salem Boukhari Khalil, Acting Legal Counsel, Director of Legal Affairs,  
African Union Commission

Mr Mamadou Hébié, Associate Professor of International Law, Grotius Centre for  
International Legal Studies, Leiden University; Member, Bar of the State of New  
York

Mr Nicolas J.S. Lockhart, Partner, Sidley Austin LLP, Geneva; Solicitor (Scotland)

Mr Deepak Raju, Senior Managing Associate, Sidley Austin LLP, Geneva; Solicitor  
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Solicitor, Supreme Court of Nigeria

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Mr Dominic Coppens, Senior Managing Associate, Sidley Austin LLP, Brussels;  
Professor, Department of International and European Law, Maastricht University;  
Member, Brussels Bar – A list

Ms Shambhavi Pandey, Trainee Associate, Sidley Austin LLP, Geneva

Ms Stella Perantakou, Associate, Sidley Austin LLP, Geneva; Member, Athens Bar

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Lawyer, Bar Council, Kingdom of Bhutan

Ms Rebecca Walker, Trainee Associate, Sidley Austin LLP, Geneva

Mr Ermias Kassaye, Legal Officer, Office of the Legal Counsel, African Union

Ms Meseret Fassil Assefa, Legal Associate, Office of the Legal Counsel, African  
Union

1 **THE PRESIDENT:** Please be seated. Good afternoon. We will now continue to the  
2 hearing in the *Request for an Advisory Opinion Submitted by the Commission of*  
3 *Small Island States and International Law*. This afternoon we will hear an oral  
4 statement from the African Union.

5  
6 I now invite the representative of the African Union, Mr Tordeta Ratebaye, to make  
7 his statement. You have the floor, Sir.

8  
9 **MR RATEBAYE:** (*Interpretation from French*) Mr President, members of the  
10 International Tribunal for the Law of the Sea, it is a great pleasure to be here in front  
11 of you on behalf of the Member States. I am happy to see the number of Member  
12 States that have joined us today to address the Tribunal during the hearing.

13  
14 In opening this statement, I would like to recall the recent Nairobi Declaration of  
15 African Leaders on Climate Change, which acknowledges that “climate change is the  
16 single greatest challenge facing humanity and the single biggest threat to all life on  
17 earth”.<sup>1</sup> The Declaration also recognizes the critical importance of the oceans as  
18 does the Moroni Declaration for Ocean and Climate Action in Africa.

19  
20 African leaders have called on the international community to fulfil its obligations, to  
21 keep its promises, and to support the African Continent in facing up to climate  
22 change. These advisory proceedings offer an unprecedented opportunity for the  
23 Tribunal to play a part in these efforts by identifying the obligations regarding climate  
24 change under the UN Convention on the Law of the Sea, a near-universal treaty that  
25 mandates the protection and preservation of the marine environment.

26  
27 In considering the relevant provisions of UNCLOS, I would like to share with you the  
28 words of the Chair of the Commission, according to whom African States are  
29 confronted with disproportionate burdens and risks as a result of unpredictable  
30 meteorological phenomena such as prolonged droughts and devastating floods at all  
31 levels. The ensuing humanitarian crisis has adverse effects on the economy, health,  
32 education, peace and security.

33  
34 Similarly, the Secretary-General of the United Nations, António Guterres, speaking at  
35 the very same Africa summit, stated the following:

36  
37 An injustice burns at the heart of the climate crisis. And its flame is scorching  
38 hopes and possibilities here in Africa. This continent accounts for less than  
39 four per cent of global emissions. Yet it suffers some of the worst effects of  
40 rising global temperatures. Extreme heat, ferocious floods and tens of  
41 thousands dead from devastating droughts. The blow inflicted on development  
42 is all around with growing hunger and displacement. Shattered infrastructure.  
43 Systems stretched to the limit. All aggravated by climate chaos not of [Africa’s]  
44 making.<sup>2</sup>

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<sup>1</sup> The African Leaders Nairobi Declaration on Climate Change and Call to Action (2023) (hereafter “Nairobi Declaration”), fifth preambular paragraph.

<sup>2</sup> United Nations, “Secretary-General’s remarks at African Climate Summit”, 5 September 2023, <https://www.un.org/sg/en/content/sg/statement/2023-09-05/secretary-generals-remarks-african-climate-summit>.

1 What more can we say, Mr President, after these two complementary and poignant  
2 statements?

3  
4 Mr President, these remarks should be at the very heart of the Tribunal's  
5 deliberations in these proceedings. They evoke the very significant harm that climate  
6 change is already wreaking on Africa, and on other parts of the world as well. This  
7 harm extends to the marine environment, with adverse effects highlighted by the  
8 COSIS request, such as rising ocean temperatures, rising sea levels, increased  
9 ocean acidification, and deoxygenation of the ocean. These effects are due to  
10 worsen. We must, therefore, tackle the crisis with utmost urgency and determination.

11  
12 The comments of these two leaders that I have cited also acknowledge a truth that  
13 lies at the heart of climate change and its brutal consequences. That truth is  
14 profound injustice. We know all too well that Africa has made an insignificant  
15 contribution to causing climate change. The IPCC recognizes that Africa has the  
16 "lowest per capita GHG emissions of all regions".<sup>3</sup> Yet despite its insignificant  
17 contribution, Africa faces the worst consequences of this crisis.

18  
19 In contrast to Africa's contribution, the contributions of developed countries to climate  
20 change have been, and remain, extremely significant. Their larger contributions are a  
21 direct consequence of their greater economic output over the past decades.  
22 Additionally and as a result, they have enjoyed consistently greater economic  
23 development at the expense of the global climate system. This wealth gives the  
24 developed countries significant capacity, and, correspondingly, particular  
25 responsibility to tackle climate change.

26  
27 The remarks that I have cited also have legal resonance for the questions before the  
28 Tribunal. They express the fact that greenhouse gas emissions are already causing  
29 significant environmental harm, including to the oceans. This explains why the  
30 African Union considers it important for the Tribunal to clarify the obligations flowing  
31 from UNCLOS to protect and preserve the marine environment, and to prevent,  
32 reduce and control marine pollution.

33  
34 These remarks also echo a pertinent feature of international law regarding climate  
35 change, which is the concept of the principle of common but differentiated  
36 responsibilities in accordance with respective capabilities. This principle is the  
37 foundational part of the climate regime expressed in the Rio Declaration, the  
38 UNFCCC and the Paris Agreement. But what is more, this principle is also to be  
39 found in article 194 of UNCLOS, and calls upon – even obliges – States Parties to  
40 act to prevent, reduce and control marine pollution in accordance with their  
41 respective capabilities. Even though the principle cannot fully repair injustices, it is  
42 nonetheless a tool to rebalance the actions necessary to combat climate change.

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<sup>3</sup> IPCC, 2022: Africa [Trisos, C.H., I.O. Adelekan, E. Totin, A. Ayanlade, J. Efitre, A. Gemedda, K. Kalaba, C. Lennard, C. Masao, Y. Mgaya, G. Ngaruiya, D. Olago, N.P. Simpson, and S. Zakieldeem]. In: *Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* [H.-O. Pörtner, D.C. Roberts, M. Tignor, E.S. Poloczanska, K. Mintenbeck, A. Alegría, M. Craig, S. Langsdorf, S. Lösschke, V. Möller, A. Okem, B. Rama (eds.)], (hereafter "IPCC 2022, Africa, *Impacts, Adaptation and Vulnerability*"), p. 1294, available at [https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC\\_AR6\\_WGII\\_Chapter09.pdf](https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_Chapter09.pdf), last accessed 18 September 2023.

1 In interpreting the Convention in a way that coherently aligns the different parts of  
2 international law on climate change, it is crucial that the Tribunal take account of this  
3 principle, according it proper weight. It is precisely under this principle that developed  
4 States have committed to bear a larger share of the necessary emission reductions  
5 and to mobilize significant resources, to the tune of some US\$ 100 billion per year, to  
6 meet the climate challenges of developing countries.

7  
8 Mr President, unfortunately, you will see, as I have, that both of these commitments  
9 remain unfulfilled. They are still just empty promises, but how long will that last for?

10  
11 Given the critical importance of these proceedings, the African Union urges the  
12 Tribunal to render an opinion that sets out concrete and actionable specific  
13 obligations. To do so, the African Union considers it useful to recall the conceptual  
14 framework generally used to address climate change.

15  
16 Policymakers routinely group climate responses into mitigation efforts and adaptation  
17 efforts. “Mitigation” refers to efforts to reduce the rate of climate change primarily by  
18 reducing greenhouse gas emissions, whereas “adaptation” refers to efforts to build  
19 resilience in the face of shocks. For Africa, adaptation is a particular challenge  
20 because of the severe impacts of climate change, particular vulnerabilities,  
21 especially the exposure of our numerous coastal States to those impacts.

22  
23 The African Union has identified its own specific obligations in these proceedings  
24 along the lines of mitigation and adaptation, and urges the Tribunal to consider the  
25 same approach. This would assist the international community allowing it to  
26 transform guidance into concrete actions, and the Tribunal will have worked usefully.

27  
28 The African Union explained in its written statement that the Tribunal has jurisdiction  
29 in the present matter under article 21 of its Statute but also under the COSIS  
30 Agreement. We have also explained that the request by COSIS meets all of the  
31 requirements to trigger the Tribunal’s jurisdiction, including those under article 138(1)  
32 of the ITLOS Rules.

33  
34 Without reiterating these arguments, Mr President, let me just emphasize once again  
35 that the Tribunal must exercise its full powers because the legal bases are in no way  
36 contested. An advisory opinion from ITLOS would contribute significantly to the  
37 global efforts in protecting the marine environment against the adverse effects of  
38 climate change. An opinion would equally be of assistance to COSIS and also to  
39 other international organizations including the African Union, allowing them to  
40 discharge their functions. What is more, guidance from the Tribunal would be  
41 extremely valuable for States Parties in their efforts to meet their obligations under  
42 the Convention to protect and preserve the marine environment.

43  
44 Mr President, it is at this point that I would like to thank you for your attention. I would  
45 ask you to give the floor to my colleagues for the remainder of our statement. I would  
46 ask you to invite Mr Khalil Mohamed to address the Tribunal.

47  
48 **THE PRESIDENT:** (*continued in English*) Thank you, Mr Tordeta Ratebaye. I now  
49 invite Mr Salem Boukhari Khalil to make his statement. You have the floor, Sir.

1 **MR KHALIL:** Thank you, Mr President. In this section, the African Union will first  
2 address the applicable law, then the principle of effectiveness, before turning to the  
3 relationship between UNCLOS and the climate regime.

4  
5 Let me begin with the applicable law, which is a threshold issue. Under the  
6 Convention, article 293 provides that the Tribunal shall apply the Convention and  
7 “other rules of international law not incompatible” with the Convention.

8  
9 In deciding on the applicable law, the Tribunal should be guided by the terms of the  
10 COSIS questions. These questions very clearly seek the Tribunal’s opinion on  
11 obligations *under* the Convention, owed by the Parties *to* the Convention. In these  
12 circumstances, the African Union submits that the applicable law is UNCLOS.

13  
14 In taking this position, the African Union is not suggesting that “other rules of  
15 international law” are not important. To the contrary, “other rules” are very important,  
16 and must be taken into account in interpreting UNCLOS. But the Tribunal’s task must  
17 focus on providing an interpretation of UNCLOS, as the applicable law.

18  
19 The African Union also wishes to make clear that, in advocating that UNCLOS is the  
20 applicable law, it is not suggesting that UNCLOS is “incompatible” with other rules of  
21 international law, in particular the climate regime. To the contrary, the African Union  
22 agrees with virtually all participants that the Convention is compatible with the  
23 climate regime.

24  
25 One participant has suggested that the two regimes are not compatible because the  
26 climate regime was not established “specifically” to address the marine environment  
27 or further the Convention’s principles.<sup>4</sup> However, the two regimes are perfectly  
28 “compatible”, even though the climate regime is not established specifically to  
29 address the objectives and principles of the Convention.

30  
31 Others argue, Mr President, that the climate regime is a “*sui generis*”, “specialized  
32 legal regime”, to address climate change, and describes the relationship in terms of  
33 *lex specialis*.<sup>5</sup> However, *lex specialis*, and the rule in article 237(1) of the  
34 Convention, come into play when two norms of international law conflict.<sup>6</sup> Here, the

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<sup>4</sup> Indonesia’s written statement, Request for an Advisory Opinion to the International Tribunal for the Law of the Sea by the Commission of Small Island States on Climate Change and International Law, para. 38, available at [https://www.itlos.org/fileadmin/itlos/documents/cases/31/written\\_statements/1/C31-WS-1-13-Indonesia.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/31/written_statements/1/C31-WS-1-13-Indonesia.pdf), last accessed 18 September 2023, (hereafter “Indonesia’s written statement”).

<sup>5</sup> India’s written statement, Request for an Advisory Opinion to the International Tribunal for the Law of the Sea by the Commission of Small Island States on Climate Change and International Law, paras. 16-17, available at [https://www.itlos.org/fileadmin/itlos/documents/cases/31/written\\_statements/3/C31-WS-3-4-India.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/31/written_statements/3/C31-WS-3-4-India.pdf), last accessed 18 September 2023, (hereafter “India’s written statement”). See also India’s Oral Statement, 14 September 2023, Verbatim Record ITLOS/PV.23/C31/8, pp. 17-18; Saudi Arabia’s Oral Statement, 14 September 2023, Verbatim Record ITLOS/PV.23/C31/5, pp. 23, 27-33.

<sup>6</sup> Report of the Study Group of the International Law Commission, finalized by Mr. Martti Koskenniemi, “Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law”, 13 April 2006, para. 57, footnote 58, available at [https://legal.un.org/ilc/documentation/english/a\\_cn4\\_l682.pdf](https://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf), last accessed 18 September 2023 (hereafter “Report of the Study Group of the International Law Commission, “Fragmentation of International Law”).

- 1 two regimes are “compatible”, operate harmoniously and there is no conflict to
- 2 resolve.



1 The climate regime is not the only relevant body of rules for the interpretation of  
2 UNCLOS. In interpreting Part XII of the Convention.<sup>7</sup> It should be recalled that the  
3 Tribunal itself,<sup>8</sup> as well as Annex VII arbitrary tribunals,<sup>9</sup> have used human rights law  
4 principles to interpret the Convention on different occasions.

5  
6 The right of peoples to *self-determination* and the principles resulting from it,  
7 constitute a peremptory norm of general international<sup>10</sup> codified in different  
8 international instruments. This right includes the principle according to which “in no  
9 case may a people be deprived of its own means of subsistence.”<sup>11</sup> The deleterious  
10 effects of climate change on the oceans, if nothing is done urgently deprive many  
11 peoples of this planet of their means of substance, especially coastal communities  
12 and small island States.

13  
14 Mr President, I turn now to the interpretation of UNCLOS. I will address two points:  
15 the principle of effectiveness and the relationship with the climate regime.

16  
17 As a first point, the Convention must be interpreted in line with the principle of  
18 effectiveness. Four points bear emphasis here:

19  
20 *First*, the principle of effectiveness requires the Tribunal to interpret the Convention  
21 so as to make each provision fully effective, rendering none inutile.<sup>12</sup>

22  
23 *Second*, the principle calls for an interpretation that makes the Convention effective  
24 not just on paper but “in the real world where people live and work and die”.<sup>13</sup> The  
25 African Union, therefore, joins others, notably the Democratic Republic of the Congo,  
26 in urging the Tribunal to interpret the Convention in a way that is *practically*  
27 effective.<sup>14</sup>

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<sup>7</sup> See the Written Submissions of the Democratic Republic of Congo, Nauru, Mauritius)

<sup>8</sup> ITLOS, *M/V “SAIGA”* (No. 2) (Saint Vincent and the Grenadines v Guinea), ITLOS Reports 1999, p. 10, 62, para. 155; ITLOS, *M/V “Virginia G”* (Panama/Guinea-Bissau), ITLOS Reports 2014, p. 4, 101, para. 359; ITLOS, *The “Enrica Lexie”* (Italy v India), Provisional Measures, Order of 24 August 2015, ITLOS Reports 2015, p. 182, 204, para. 133.

<sup>9</sup> *Arctic Sunrise* (The Netherlands v Russian Federation), 2015, 171 ILR 1, 82, para. 197.

<sup>10</sup> ILC, Fourth report on peremptory norms of general international law (jus cogens) by Dire Tladi, 31 January 2019, A/CN.4/727.

<sup>11</sup> International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights (New York, 16 December 1966), United Nations, Treaty Series, vol. 993, No. 14531, p. 3, common art. 1(2).

<sup>12</sup> *Interpretation of Peace Treaties (second phase), Advisory Opinion, I.C.J. Reports 1950*, p. 229; Statement by H.E. Judge Ruediger Wolfrum, President of the International Tribunal for the Law of the Sea to the Informal Meeting of Legal Advisors of Ministries of Foreign Affairs (2006), available at [https://www.itlos.org/fileadmin/itlos/documents/statements\\_of\\_president/wolfrum/legal\\_advisors\\_231006\\_eng.pdf](https://www.itlos.org/fileadmin/itlos/documents/statements_of_president/wolfrum/legal_advisors_231006_eng.pdf), last accessed 19 September 2023.

<sup>13</sup> WTO Appellate Body Report, *EC – Hormones*, para. 187.

<sup>14</sup> Democratic Republic of the Congo’s written statement, Request for an Advisory Opinion to the International Tribunal for the Law of the Sea by the Commission of Small Island States on Climate Change and International Law, paras. 159, available at [https://www.itlos.org/fileadmin/itlos/documents/cases/31/written\\_statements/1/C31-WS-1-1-RD\\_Congo\\_translation\\_ITLOS.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/31/written_statements/1/C31-WS-1-1-RD_Congo_translation_ITLOS.pdf), last accessed 18 September 2023 (hereafter “Democratic Republic of the Congo’s written statement”); United Kingdom’s written statement, Request for an Advisory Opinion to the International Tribunal for the Law of the Sea by the Commission of Small Island States on Climate Change and International Law, paras. 85-87, available at [https://www.itlos.org/fileadmin/itlos/documents/cases/31/written\\_statements/1/C31-WS-1-27-UK.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/31/written_statements/1/C31-WS-1-27-UK.pdf), last accessed 18 September 2023 (hereafter “United Kingdom’s written statement”).

1 *Third*, the African Union joins the DRC, Sierra Leone and others in arguing that the  
2 principle of effectiveness requires that the Convention be interpreted in light of its  
3 “continuing – and thus necessarily evolving” nature, in view of developments in  
4 scientific and other factual knowledge, as well as in international law itself.<sup>15</sup>

5  
6 *Fourth*, the principle of effectiveness supports the “systemic integration” of different  
7 treaty regimes,<sup>16</sup> along with the “strong presumption against normative conflict”  
8 between treaty regimes.<sup>17</sup> The Tribunal should, therefore, strive to interpret the  
9 Convention and the climate regime in a coherent and mutually supportive way.

10  
11 Mr President, I will now address this last point in more detail.

12  
13 Let me start by saying that the African Union joins virtually all others in urging the  
14 Tribunal to give the climate regime a prominent place in the interpretation of  
15 UNCLOS.

16  
17 This approach flows from the rules of treaty interpretation. Under Article 31(3)(c) of  
18 the Vienna Convention,<sup>18</sup> the Tribunal’s interpretation of UNCLOS provisions must  
19 “take[ ] into account” “any relevant rules of international law applicable in the  
20 relations between the parties”. There is very wide agreement that the climate regime  
21 constitutes such “rules”, given the almost perfect overlap in the Parties to the  
22 Convention and the climate regime.<sup>19</sup>

23  
24 The requirement to take the climate regime into account, serves to foster coherence  
25 between the Convention and the climate regime, with the rule in article 31(3)(c)  
26 facilitating the “systemic integration” of different parts of international law.<sup>20</sup> In the

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<sup>15</sup> Sierra Leone’s written statement, Request for an Advisory Opinion to the International Tribunal for the Law of the Sea by the Commission of Small Island States on Climate Change and International Law, para. 22, available at [https://www.itlos.org/fileadmin/itlos/documents/cases/31/written\\_statements/1/C31-WS-1-29-Sierra\\_Leone.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/31/written_statements/1/C31-WS-1-29-Sierra_Leone.pdf), last accessed 18 September 2023; Canada’s written statement, Request for an Advisory Opinion to the International Tribunal for the Law of the Sea by the Commission of Small Island States on Climate Change and International Law, para. 36, available at [https://www.itlos.org/fileadmin/itlos/documents/cases/31/written\\_statements/1/C31-WS-1-25-Canada-rev\\_01.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/31/written_statements/1/C31-WS-1-25-Canada-rev_01.pdf), last accessed 18 September 2023; African Union’s written statement, Request for an Advisory Opinion to the International Tribunal for the Law of the Sea by the Commission of Small Island States on Climate Change and International Law, paras. 144-146, available at [https://www.itlos.org/fileadmin/itlos/documents/cases/31/written\\_statements/2/C31-WS-2-7-African\\_Union.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/31/written_statements/2/C31-WS-2-7-African_Union.pdf), last accessed 18 September 2023 (hereafter “African Union’s written statement”), citing *Gabčíkovo-Nagymaros Project* (Hungary/Slovakia), Judgment, I.C.J. Reports 1997, p. 7, available at <https://www.icj-cij.org/sites/default/files/case-related/92/092-19970925-JUD-01-00-EN.pdf>, last accessed 18 September 2023.

<sup>16</sup> Report of the Study Group of the International Law Commission, “Fragmentation of International Law”, Chapter V, paras. 410-480.

<sup>17</sup> Report of the Study Group of the International Law Commission, “Fragmentation of International Law”, para. 37.

<sup>18</sup> Vienna Convention on the Law of Treaties, Article 31(3)(c).

<sup>19</sup> All of the UNCLOS States Parties are parties to both the UNFCCC and the Paris Agreement, except for Yemen, which has signed and ratified the UNFCCC but only signed the Paris Agreement.

<sup>20</sup> Report of the Study Group of the International Law Commission, “Fragmentation of International Law”, para. 413. For a recent report on coherence between the climate change regime and another area of international law (WTO law), see International Legal Expert Group on Trade-Related Climate Measures and Policies, “Principles of International Law Relevant for Consideration in the Design and

1 words of Mauritius, the Tribunal must apply “an integrated approach which  
2 maximises the effectiveness and coherence of both regimes”.<sup>21</sup>

3  
4 The text of the Convention itself lends strong support to this integrated approach.

5  
6 In general terms, the Convention displays considerable openness to other areas of  
7 international law. This shows that the Convention is intended to be understood, if  
8 possible, coherently and harmoniously with other areas of international law.<sup>22</sup>

9  
10 In that regard, we agree with Singapore that articles 207(1) and 212(1) are main  
11 “entry points” for the climate regime.<sup>23</sup> Each provision requires UNCLOS Parties to  
12 “tak[e] into account” internationally agreed rules and standards when they take  
13 action to prevent, reduce and control marine pollution. These two provisions use the  
14 same words as article 31(3)(c) to give the same weight to international rules and  
15 standards: in both cases, the relevant rules and standards must be “taken into  
16 account”.

17  
18 Articles 207(1) and 212(1) of UNCLOS, therefore, chart a second legal route, within  
19 the Convention itself, to achieve systemic integration between the Convention and  
20 other parts of international law.

21  
22 Like many other participants,<sup>24</sup> the African Union considers that the climate change  
23 regime sets forth international rules and standards covered by articles 207(1)

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Implementation of Trade-Related Climate Measures and Policies”, 13 September 2023, available at <https://tessforum.org/latest/principles-of-international-law-relevant-for-consideration-in-the-design-and-implementation-of-trade-related-climate-measures-and-policies>, last accessed 18 September 2023.

<sup>21</sup> Republic of Mauritius’ written statement, Request for an Advisory Opinion to the International Tribunal for the Law of the Sea by the Commission of Small Island States on Climate Change and International Law, para. 49, available at [https://www.itlos.org/fileadmin/itlos/documents/cases/31/written\\_statements/1/C31-WS-1-12-Mauritius.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/31/written_statements/1/C31-WS-1-12-Mauritius.pdf), last accessed 18 September 2023 (hereafter “Republic of Mauritius’ written statement”).

<sup>22</sup> See Articles 197, 207, 211, 212, 213, 237, and 293 of the Convention.

<sup>23</sup> See, e.g., Singapore’s Oral Statement, 19 September 2023, Verbatim Record ITLOS/PV.23/C31/13, pp. 4, 7.

<sup>24</sup> European Union’s written statement, Request for an Advisory Opinion to the International Tribunal for the Law of the Sea by the Commission of Small Island States on Climate Change and International Law, para. 62, available at [https://www.itlos.org/fileadmin/itlos/documents/cases/31/written\\_statements/1/C31-WS-1-9-EU.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/31/written_statements/1/C31-WS-1-9-EU.pdf), last accessed 18 September 2023 (hereafter “European Union’s written statement”); United Kingdom’s written statement (referring to Article 212), para. 68; Australia’s written statement, Request for an Advisory Opinion to the International Tribunal for the Law of the Sea by the Commission of Small Island States on Climate Change and International Law, para. 41, available at [https://www.itlos.org/fileadmin/itlos/documents/cases/31/written\\_statements/1/C31-WS-1-11-Australia.PDF](https://www.itlos.org/fileadmin/itlos/documents/cases/31/written_statements/1/C31-WS-1-11-Australia.PDF), last accessed 18 September 2023 (hereafter “Australia’s written statement”); New Zealand’s written statement, Request for an Advisory Opinion to the International Tribunal for the Law of the Sea by the Commission of Small Island States on Climate Change and International Law, para. 71, available at [https://www.itlos.org/fileadmin/itlos/documents/cases/31/written\\_statements/1/C31-WS-1-3-New\\_Zealand.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/31/written_statements/1/C31-WS-1-3-New_Zealand.pdf), last accessed 18 September 2023 (hereafter “New Zealand’s written statement”); Mozambique’s written statement, Request for an Advisory Opinion to the International Tribunal for the Law of the Sea by the Commission of Small Island States on Climate Change and International Law, para. 3.76, available at

1 and 212(1). As a result, these two UNCLOS provisions confirm that the climate  
2 regime must be “taken into account” in identifying the specific UNCLOS obligations  
3 regarding GHG emissions and climate change.

4  
5 A handful of participants take the arguments under articles 207(1) and 212(1)  
6 considerably further. They rely on these two provisions to assert that the climate  
7 change regime exhaustively defines, and effectively displaces, the UNCLOS  
8 obligations to protect and preserve the marine environment from GHG emissions  
9 and climate change.<sup>25</sup>

10  
11 These participants argue that the climate regime exhausts the UNCLOS obligations  
12 because it sets out “the internationally agreed rules and standards” regarding the  
13 “measures” necessary under UNCLOS with respect to GHG emissions and climate  
14 change.<sup>26</sup>

15  
16 However, the African Union disagrees for two reasons: one relating to the wording of  
17 UNCLOS; and the other to features of the climate regime.

18  
19 *First*, the position overstates the legal significance of “international rules and  
20 standards” under articles 207 and 212. The first paragraph, Mr President, of each  
21 provision merely requires that rules and standards be “*tak[en] into account*”. These  
22 words mean that the rules of the climate regime are weighed as just one interpretive  
23 factor that together with other interpretive factors, contribute collectively to  
24 establishing the meaning of the relevant UNCLOS provisions. This wording, in itself,  
25 excludes the climate regime exhaustively defining the UNCLOS obligations.

26  
27 Articles 207(2) and 212(2) explicitly confirm this position. Each provision requires  
28 that “States shall take other measures as may be necessary to prevent, reduce and  
29 control such pollution”. Thus, articles 207(2) and 212(2) *expressly mandate* the  
30 adoption of “*other [necessary] measures*” *in addition to* those agreed in international  
31 rules and standards.

32  
33 UNCLOS, therefore, makes clear that, while rules and standards in the climate  
34 regime must be “tak[en] into account”, they do not exhaustively define and displace  
35 the relevant UNCLOS obligations.<sup>27</sup>

36  
37 *Second*, the argument that the climate regime exhausts the UNCLOS obligations  
38 also overstates the relevance of the climate change. In the first place, the climate  
39 regime is not formulated to be the exclusive legal regime applicable to climate  
40 change. The UNFCCC preamble recognizes, for example, that other parts of  
41 international law are relevant, including principles of international law, as well the  
42 Ozone treaties.<sup>28</sup>

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[https://www.itlos.org/fileadmin/itlos/documents/cases/31/written\\_statements/1/C31-WS-1-10-Mozambique\\_01.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/31/written_statements/1/C31-WS-1-10-Mozambique_01.pdf), last accessed 18 September 2023 (hereafter “Mozambique’s written statement”)

<sup>25</sup> Australia’s written statement, para. 40; European Union’s written statement, para. 68.

<sup>26</sup> Australia’s written statement, para. 46 (underlining added); Australia’s Oral Statement, 13 September 2023, Verbatim Record ITLOS/PV.23/C31/5, p. 6.

<sup>27</sup> Republic of Mauritius’ written statement, para 74; New Zealand’s written statement, para. 71; United Kingdom’s written statement, para. 68.

<sup>28</sup> Vienna Convention for the Protection of the Ozone Layer and its Montreal Protocol.

1  
2 In the second place, the climate regime gives the marine environment virtually no  
3 attention.

4  
5 To conclude this section, Mr President:

6  
7 The applicable law in these proceedings is UNCLOS; UNCLOS must be interpreted  
8 in light of the principle of effectiveness;

9  
10 In interpreting UNCLOS, the climate regime must be taken into account, to ensure  
11 an integrated and coherent approach between two complementary areas of  
12 international law; articles 207(1) and 212(1) of UNCLOS support this view; and,

13  
14 articles 207(2) and 212(2) show that the climate regime does not exhaustively  
15 define, or displace, the UNCLOS obligation to protect and preserve the marine  
16 environment with respect to GHG emissions and climate change.

17  
18 Mr President, may I now request you to invite Mr Lockhart to address the Tribunal  
19 next. Thank you.

20  
21 **THE PRESIDENT:** Thank you, Mr Salem Boukhari Khalil. I now give the floor to  
22 Mr Lockhart to make his statement. You have the floor, Sir.

23  
24 **MR LOCKHART:** Thank you very much, Mr President, distinguished members of the  
25 Tribunal. It is an honour to appear before you today.

26  
27 I am going to address the first of the two questions before you. As you know well by  
28 now, the focus of this question is the specific obligations “to prevent, reduce and  
29 control pollution of the marine environment” in relation to the deleterious effects of  
30 climate change.

31  
32 A threshold question is whether human-produced greenhouse gas emissions cause  
33 “pollution of the marine environment”. The African Union takes the unequivocal  
34 position that they do. In brief, these greenhouse gas emissions involve the  
35 “introduction by man”, of a “substance” (carbon dioxide) and “energy” in the form of  
36 heat into the marine environment with deleterious effects that, scientifically, are very  
37 well established. So for the African Union, the article 194 obligations are fully  
38 engaged. These obligations apply to any and all sources of greenhouse gas  
39 emissions. This includes, for example, as the Democratic Republic of the Congo has  
40 argued, plastic waste entering the oceans directly, breaking down there and  
41 releasing greenhouse gas emissions.<sup>29</sup>

42  
43 Mr President, three verbs are at the heart of article 194 – “prevent”, “reduce” and  
44 “control”. Each of these verbs has an independent meaning and, by using all three,  
45 article 194 imposes cumulative obligations. In line with the principle of effectiveness,

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<sup>29</sup> Democratic Republic of the Congo’s written statement, paras. 63: “[methane] emanates from landfill and agricultural and livestock waste and is transported to the oceans mainly through the [Land-to-Ocean Aquatic Continuum]. It is also primarily by this route that methane contained in plastics reaches marine ecosystems.”

1 the Tribunal should adopt an interpretation that gives practical, real-world effect to  
2 each of these verbs.

3  
4 There is an overwhelming consensus among the participants that the three verbs  
5 require States collectively to achieve a significant reduction in greenhouse gas  
6 emissions. The participants diverge, though, on the extent of the required emissions  
7 reductions and this divergence is driven by a difference in view on the relationship  
8 between the Convention and the climate regime.

9  
10 The African Union takes the view that the Convention and the climate regime apply  
11 concurrently and harmoniously, and that under the rules of treaty interpretation the  
12 Convention must be interpreted taking into account the climate regime to ensure the  
13 proper integration of the two regimes.

14  
15 A key part of the climate regime, which the Tribunal must take into account, is the  
16 Paris Agreement temperature goal. The international community is now very much  
17 focused on the lower end of that goal, 1.5°C. This is because the IPCC<sup>30</sup> has  
18 established that the adverse impacts of climate change will be much worse with a  
19 temperature increase of 2.0°C.<sup>31</sup>

20  
21 Given the significant additional harm at the higher temperature, the African Union  
22 argues that article 194 requires, at a minimum, that States act effectively to limit  
23 atmospheric warming to 1.5°C. In short, under UNCLOS, States cannot settle for a  
24 higher atmospheric temperature goal, when the science shows that this temperature  
25 would mean considerably more harm to the marine environment.

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<sup>30</sup> African Union's written statement, para. 217-218.

<sup>31</sup> United Nations Environment Programme's written statement, Request for an Advisory Opinion to the International Tribunal for the Law of the Sea by the Commission of Small Island States on Climate Change and International Law, para. 30, available at [https://www.itlos.org/fileadmin/itlos/documents/cases/31/written\\_statements/2/C31-WS-2-6-UNEP.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/31/written_statements/2/C31-WS-2-6-UNEP.pdf), last accessed 18 September 2023; African Union's written statement, paras. 99, 115, 120, 217-218. For discussions on harm to the marine environment, even at the 1.5 degree level, see IPCC, 2018: Technical Summary [Allen, M.R., H. de Coninck, O.P. Dube, O. Hoegh-Guldberg, D. Jacob, K. Jiang, A. Revi, J. Rogelj, J. Roy, D. Shindell, W. Solecki, M. Taylor, P. Tschakert, H. Waisman, S. Abdul Halim, P. Antwi-Agyei, F. Aragón-Durand, M. Babiker, P. Bertoldi, M. Bindi, S. Brown, M. Buckeridge, I. Camilloni, A. Cartwright, W. Cramer, P. Dasgupta, A. Diedhiou, R. Djalante, W. Dong, K.L. Ebi, F. Engelbrecht, S. Fifita, J. Ford, P. Forster, S. Fuss, V. Ginzburg, J. Guiot, C. Handa, B. Hayward, Y. Hijikoka, J.-C. Hourcade, S. Humphreys, M. Kainuma, J. Kala, M. Kanninen, H. Kheshgi, S. Kobayashi, E. Kriegler, D. Ley, D. Liverman, N. Mahowald, R. Mechler, S. Mehrotra, Y. Mulugetta, L. Mundaca, P. Newman, C. Okereke, A. Payne, R. Perez, P.F. Pinho, A. Revokatova, K. Riahi, S. Schultz, R. Séférian, S.I. Seneviratne, L. Steg, A.G. Suarez Rodriguez, T. Sugiyama, A. Thomas, M.V. Vilariño, M. Wairiu, R. Warren, K. Zickfeld, and G. Zhou]. 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.)], p. 221-228, available at [https://www.ipcc.ch/site/assets/uploads/sites/2/2022/06/SR15\\_Full\\_Report\\_HR.pdf](https://www.ipcc.ch/site/assets/uploads/sites/2/2022/06/SR15_Full_Report_HR.pdf), last accessed 15 June 2023; IPCC 2022, Africa, *Impacts, Adaptation and Vulnerability*, p. 1291.

1 The obligations under article 194 do not, however, end with limiting atmospheric  
2 warming to 1.5°C. As we have explained, the Convention’s obligations are neither  
3 defined nor exhausted by the climate regime. As New Zealand said earlier this week,  
4 while compliance with the climate regime is necessary under UNCLOS, it may not be  
5 “sufficient”.<sup>32</sup> So for you as you consider the weight to give the Paris temperature  
6 goal, the weight under UNCLOS and using the rules of treaty interpretation, you  
7 should weigh that goal in light of the words of the Convention itself. Here I would  
8 stress two points.

9  
10 *First*, the Convention is not concerned with the temperature of the *atmosphere*, it is  
11 concerned with the protection and preservation of the *marine environment*. The  
12 obligations in article 194 must, therefore, be understood in light of the impact of  
13 greenhouse gas emissions on the marine environment and not on the atmosphere.  
14

15 *The second*, point I would stress here is that the Paris temperature goal must be  
16 weighed in light of the three verbs in article 194. While actions to secure the Paris  
17 temperature goal can bring about a certain degree of “control” of marine pollution,  
18 they do not “prevent” that pollution nor do they “reduce” cumulative levels of the  
19 pollution.  
20

21 Let me be very clear about these facts: even if atmospheric warming is limited to  
22 1.5°C degrees, vast quantities of greenhouse gases will continue to be emitted into  
23 the atmosphere, and persistent marine pollution will continue to accumulate in the  
24 oceans. As the IPCC has said, far from being “reduce[d]”, as required under article  
25 194, ocean acidification, deoxygenation, temperatures, and sea levels will actually  
26 *rise*.<sup>33</sup>  
27

28 To comply with their UNCLOS obligations, therefore, to “prevent” and “reduce”  
29 marine pollution, UNCLOS parties cannot limit their endeavors to holding the  
30 atmospheric temperature increase to 1.5°C.<sup>34</sup> As Mozambique has put it, the 1.5°C  
31 standard is “the start, but not the end point”.<sup>35</sup> Parties are, therefore, obliged to make  
32 efforts to limit emissions further.  
33

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<sup>32</sup> New Zealand’s Oral Statement, 15 September 2023, Verbatim Record ITLOS/PV.23/C31/10, p. 12.

<sup>33</sup> IPCC, “Technical Summary” 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* (IPCC 2018), p. 37. 50 IPCC 2014, “The Ocean” in *Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part B: Regional Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (IPCC 2014) Table 30-1, p. 1667. 51 IPCC, “Impacts of 1.5°C Global Warming on Natural and Human Systems” 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* (IPCC 2018) p. 224. *See also* Mozambique’s Oral Statement, 18 September 2023, Verbatim Record ITLOS/PV.23/C31/11, pp. 15-16; and Sierra Leone’s Oral Statement, 19 September 2023, Verbatim Record ITLOS/PV.23/C31/12, pp. 30-31.

<sup>34</sup> African Union’s written statement paras. 225-231.

<sup>35</sup> Mozambique’s Oral Statement, 18 September 2023, Verbatim Record ITLOS/PV.23/C31/11, p. 15.

1 To us, this reading of article 194 flows logically from a straightforward understanding  
2 of the verbs used: parties cannot settle for conduct that, in the circumstances, merely  
3 meets the least demanding of the three verbs: “control”.

4  
5 We find strong support for this argument in articles 207(2) and 212(2) of the  
6 Convention. These provisions expressly envisage that, even when international rules  
7 and standards have been agreed, like the those in the climate regime, UNCLOS  
8 parties must still take “other measures” that may be necessary to prevent, reduce  
9 and control marine pollution. Because the 1.5°C “standard” only effects a degree of  
10 “control” over marine pollution, other measures are still necessary to “prevent” and  
11 “reduce” that pollution.

12  
13 Let me turn now to the required level of conduct. Article 194 establishes a due  
14 diligence obligation, which varies with the circumstances.<sup>36</sup> With respect to climate  
15 change, the circumstances demand an unparalleled level of diligent conduct. States  
16 are not trying to avert a *threat of potential* harm: climate change has already caused  
17 severe harm to the marine environment; we know that it threatens much more harm;  
18 and we know what action is needed: deep and sustained emission reductions.

19  
20 In typical cases, distinguished members of the Tribunal, international adjudicators  
21 say that due diligence requires States to do their “utmost” and to deploy “all of the  
22 means at their disposal”.<sup>37</sup> But given the unparalleled threats posed by climate  
23 change, we cannot simply fall back on the typical due diligence terminology. Instead,  
24 the African Union urges the Tribunal to make clear that the conduct required to  
25 reduce emissions is as historically unparalleled as the climate crisis itself.

26  
27 In considering the required level of conduct, we also believe that the Tribunal should  
28 reflect on the actions that States are currently taking to reduce emissions. As part of  
29 the First Global Stocktake under the Paris Agreement, a recent report finds  
30 significant shortcomings.<sup>38</sup> The report states that, and I quote, “much more [action] is  
31 needed now on all fronts”.<sup>39</sup> It concludes that the current global emissions pathway

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<sup>36</sup> *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011*, p. 43, para. 117, available at [https://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no\\_17/17\\_adv\\_op\\_010211\\_en.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/17_adv_op_010211_en.pdf), last accessed 19 September 2023.

<sup>37</sup> *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015, ITLOS Reports 2015*, para. 129, available at [https://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no\\_21/advisory\\_opinion\\_published/2015\\_21-advop-E.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_21/advisory_opinion_published/2015_21-advop-E.pdf), last accessed 19 September 2023, citing the *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area (Request for Advisory Opinion submitted to the Seabed Disputes Chamber), 1 February 2011, ITLOS Reports 2011*, para. 110; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Reports 2007, p. 43, available at para. 116, available at <https://www.icj-cij.org/sites/default/files/case-related/91/091-20070226-JUD-01-00-EN.pdf>, last accessed 19 September 2023.

<sup>38</sup> UNFCCC, “Technical dialogue of the first global stocktake Synthesis report by the co-facilitators on the technical dialogue”, FCCC/SB/2023/9, 8 September 2023, available at <https://unfccc.int/documents/631600>, last accessed 19 September 2023, (hereafter “UNFCCC, “Technical dialogue of the first global stocktake Synthesis report by the co-facilitators on the technical dialogue”), paras. 9-15.

<sup>39</sup> UNFCCC, “Technical dialogue of the first global stocktake Synthesis report by the co-facilitators on the technical dialogue”, para 1.



1 will lead to atmospheric warming above 2.0 degrees,<sup>40</sup> and it finds that States could  
2 reduce emissions more rapidly through: (1) more effective implementation and  
3 enforcement of current reduction targets; and (2) by adopting new more “stringent”  
4 and “comprehensive” reduction targets.<sup>41</sup>

5  
6 Mr President, what’s really striking about these findings is that they are firmly  
7 premised on the view that States are *perfectly capable* of doing much more to *control*  
8 emissions and, hence, to control marine pollution. But, for the time being, they are  
9 not doing so. It is against that background that the Tribunal must make clear that the  
10 due diligence standard under article 194 does not permit States to choose to do less,  
11 when they can and, therefore, must do more.

12  
13 In terms of apportioning obligations, the African Union wishes to emphasize that the  
14 burdens are not distributed evenly. Article 194 itself requires States to act “in  
15 accordance with their capabilities”, which vary depending on level of development.

16  
17 This reading is confirmed is confirmed by the context in articles 202, 203, 207(4)  
18 and 266 of the Convention. It is also confirmed by the principle of Common but  
19 Differentiated Responsibilities and Respective Capabilities, a foundation of the  
20 climate regime and is expressed throughout the operative parts of the UNFCCC and  
21 the Paris Agreement.<sup>42</sup> Under the rules of treaty interpretation, the principle of CBDR  
22 must, therefore, be given proper weight in the Convention. The principle of CBDR is  
23 also among the international rules and standards agreed in the climate regime that  
24 must be “tak[en] into account” under articles 207(1) and 212(1).

25  
26 Mr President, to conclude on the first question, I would like to summarize four  
27 specific obligations. States Parties are required: (1) to adopt collectively effective and  
28 urgent measures to reduce greenhouse gas emissions; (2) to reduce emissions  
29 collectively to an extent that meets the 1.5°C standard, which would secure a degree  
30 of “control” over marine pollution; (3) to reduce emissions beyond this level in order  
31 to “prevent” and “reduce” accumulated marine pollution; and (4) to allocate the

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<sup>40</sup> UNFCCC, “Technical dialogue of the first global stocktake Synthesis report by the co-facilitators on the technical dialogue”, para. 100.

<sup>41</sup> UNFCCC, “Technical dialogue of the first global stocktake Synthesis report by the co-facilitators on the technical dialogue”, paras. 13-15.

<sup>42</sup> UNFCCC, Article 3(1) (“the Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities”); UNFCCC, sixth preambular paragraph (“Acknowledging that the global nature of climate change calls for the widest possible cooperation by all countries ... in accordance with their common but differentiated responsibilities and respective capabilities and their social and economic conditions”). See also Paris Agreement, Articles 2.2 (“This Agreement will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances”), 3 (“...need to support developing country Parties for effective implementation of this Agreement”), 4.1 (“...peaking will take longer for developing country Parties, and to undertake rapid reductions thereafter ... on the basis of equity, and in the context of sustainable development and efforts to eradicate poverty”), 4.3 (“Each Party’s successive nationally determined contribution will represent a progression ... reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances”), 4.4 (“Developed country Parties should continue taking the lead...”), and 4.5 (“Support shall be provided to developing country Parties ... recognizing that enhanced support for developing country Parties will allow for higher ambition in their actions”). See, African Union’s written statement, paras. 137-143.

1 burden of emissions reductions asymmetrically in line with the wording of article 194,  
2 the context in the Convention, and the principle of CBDR.

3  
4 Mr President, I thank the Tribunal for its attention and request you to give the floor to  
5 Mr Deepak Raju.

6  
7 **THE PRESIDENT:** Thank you, Mr Lockhart. I now invite Mr Raju to make his  
8 statement. You have the floor, Sir.

9  
10 **MR RAJU:** Thank you, Mr President. Distinguished members of the Tribunal, in this  
11 section, the African Union turns to the second question. The participants broadly  
12 agree that this question requires the Tribunal to interpret the general obligation in  
13 article 192 of the Convention, as well as further provisions in Part XII that elaborate  
14 on this general obligation.

15  
16 At the heart of the obligation in article 192 are two verbs: “protect” and “preserve”. In  
17 employing these verbs, article 192 requires States Parties to “protect” the marine  
18 environment from future harm, and “preserve” the environment by maintaining and  
19 improving its current state.

20  
21 Both aspects of this obligation are critical in these proceedings, because climate  
22 change has already caused, and will continue to cause, significant harm to the  
23 marine environment. To echo again the Nairobi Declaration, climate change is “the  
24 single biggest threat to all life on Earth”, demanding “urgent and concerted action  
25 from all nations”.<sup>43</sup>

26  
27 Article 192 requires just such “action” to end the ongoing harm, prevent future harm,  
28 and to undo the harm already caused. Meeting this obligation requires conduct  
29 directed towards both mitigation and adaptation.

30  
31 In this section of African Union’s statement, I will address the obligations under  
32 article 192, as they relate to mitigation. Dr Hebié will then address the Tribunal on  
33 obligations relating to adaptation.

34  
35 The most important mitigation obligations under article 192 are emission reduction  
36 obligations, identical to the ones discussed under article 192, which we have just  
37 addressed. I will now identify several additional obligations related to mitigation.

38  
39 First, UNCLOS Parties have an obligation to cooperate towards mitigation. As the  
40 Tribunal heard earlier, greenhouse gas emissions cannot be made to respect  
41 national boundaries,<sup>44</sup> and the same is true for their deleterious effects. As such,  
42 cooperation is central to protecting and preserving the marine environment against  
43 climate change. Cooperation is also specifically mandated by article 197 of  
44 UNCLOS. Among other things, cooperation must include building and strengthening  
45 international institutions and frameworks aimed at mitigating climate change, but with  
46 a specific focus on addressing the harmful effects on the marine environment, such  
47 as rising ocean temperatures, ocean acidification and rising sea levels. These

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<sup>43</sup> Nairobi Declaration, fifth preambular paragraph.

<sup>44</sup> Australia’s Oral Statement, 13 September 2023, Verbatim Record ITLOS/PV.23/C31/5, p. 11.

1 institutions and frameworks should also be specifically mandated to address the  
2 special needs of developing nations in relation to climate change mitigation.

3  
4 Second, article 192 imposes an obligation for UNCLOS parties to undertake  
5 scientific research and technological development towards mitigation. Scientific  
6 studies on the effects of greenhouse gases other than carbon dioxide and novel  
7 technologies like carbon capture and storage and ocean fertilization, are among the  
8 potential areas for such research and development. This research and development  
9 must be carried out in a manner consistent with the differentiated and asymmetric  
10 nature of UNCLOS obligations, interpreted in light of the principle of CBDR-RC. That  
11 is, the research and development should be conducted on an inclusive basis,  
12 engaging the scientific communities of developing nations; developed parties must  
13 carry the burden of financing this research and development; and any output must  
14 be shared inclusively with developing countries to ensure that all countries can take  
15 rapid and effective action to reduce emissions within their economies, using the  
16 latest techniques and technologies.

17  
18 Third, in deploying novel mitigation technologies, UNCLOS parties must be alert to  
19 the possible adverse impacts of such technologies on the marine environment. This  
20 is particularly true for technological solutions that directly implicate the marine  
21 environment, such as the storage of carbon in the seabed or the continental shelf.  
22 While these technologies may remove carbon from the atmosphere, the risk of  
23 leakage and the consequent harm to the marine environment must be avoided.

24  
25 Finally, as my colleague Mr Lockhart just explained, States Parties are under an  
26 obligation to allocate the burden of each of these mitigation obligations in an  
27 asymmetric manner, with developed Parties carrying the greater weight of the  
28 obligations.

29  
30 This concludes my part of the statement, and I request the President to invite  
31 Dr Hebié to the floor. Thank you.

32  
33 **THE PRESIDENT:** Thank you, Mr Raju. I now invite Mr Hebié to make his statement.  
34 You have the floor, Sir.

35  
36 **MR HEBIÉ:** (*Interpretation from French*) Mr President, distinguished members of the  
37 Tribunal, it is a single honour for me to continue the presentation of the African Union  
38 relative to question number 2.

39  
40 I am going to focus on the obligations to adapt to the impacts of climate change.  
41 Adaptation is very important for all countries, but it is a vital necessity for the most  
42 vulnerable States. Unfortunately, my continent – Africa – is one of the most  
43 vulnerable continents in the face of climate change effects.

44  
45 Africa has six Small Island Developing States and half of African countries are  
46 coastal States, the majority of which are very low lying, making them vulnerable to  
47 sea-level rise. Furthermore, the exorbitant costs necessary to adopt and employ  
48 adaptation measures pose a huge challenge for countries in Africa.

1 Yet, without urgent and effective adaptation measures, it would be impossible for  
2 African States to exercise effectively their right to self-determination, *inter alia*, their  
3 right to territorial integrity, their right to exist on the land of their ancestors and their  
4 right to development.

5

6 And that's why the African Union has dealt with these adaptation issues in detail in  
7 our written submission<sup>45</sup> and it invites the Tribunal to lend particular attention to  
8 them.

9

10 I will structure my presentation today around three main points. Firstly, I will go  
11 briefly into the considerations that can kept in mind in identifying obligations relating  
12 to adaptation. Then I will review a few of these obligations and especially how they  
13 are to be implemented before examining, thirdly, how the burden of this  
14 implementation should be shared.

15

16 Let's start with my first point: considerations to be kept in mind in identifying the  
17 specific obligations relating to adaptation.

18

19 First consideration: we need to see what the state of play is. What is the current  
20 situation of the marine environment? I can say that it is largely degraded because of  
21 the effects of climate change and because of certain human activities such as illegal,  
22 unreported and unregulated fishing. We also need to add to this the future adverse  
23 effects of climate change on the marine environment, while likewise taking on board  
24 the vulnerabilities of States, of peoples and of marine ecosystems, including those of  
25 marine species. All of this has to be taken on board.

26

27 Secondly, we need to see what the state of needs is. What do we need today to be  
28 able to meet our obligations to protect and preserve the marine environment – in  
29 terms of scientific knowledge, technological means, the adoption of practical  
30 measures, also taking all these elements as a whole on board.

31

32 Thirdly, we have to take on board the state of resources and means available but  
33 above all in individual situations, in particular by noting the difficulties certain States  
34 may encounter when wishing to take such measures, owing to limited resources and  
35 capabilities.

36

37 Mr President, keeping in mind these three points, we can identify the measures that  
38 need to be taken to protect and preserve the marine environment. But the good  
39 news – because there is good news – is that the drafters of the UN Convention of  
40 the Law of the Sea did a good job. It took on board all these fundamental aspects  
41 that are needed in order to protect and preserve the marine environment. You have  
42 heard much about this over these two weeks so I won't dwell on this.

43

44 But let us briefly look at Part XII of the Convention: obligation to undertake research  
45 and scientific studies on the threats and vulnerabilities of the marine environment; to  
46 develop appropriate technologies to address this; to share the knowledge,  
47 technologies and financing necessary with developing States; to build their capacity,  
48 and more generally, to cooperate whenever this is essential to protect the marine

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<sup>45</sup> The African Union's written statement, paras. 296-335.

1 environment. Part XII also imposes on States the obligation to adopt, implement and  
2 enforce laws, regulations and policies necessary to achieve this objective.

3  
4 The Convention – more generally, beyond Part XII – also provides for obligations  
5 relating to the long-term and sustainable conservation, management and exploitation  
6 of natural marine resources.<sup>46</sup> It prohibits all practices which would destroy or further  
7 weaken the marine ecosystem, marine species and their capacity to regenerate.<sup>47</sup>

8  
9 Article 192 requires, for reasons of climate urgency, that States comply rigorously  
10 with all these provisions. So the marine environment should not be degraded.

11  
12 Measures must be taken to enable it to regenerate. Measures must be taken to  
13 strengthen its resilience and enable it to flourish. That is why it is very important to  
14 pay special attention to the concrete measures identified by the Conference of  
15 States Parties to the Convention on Biological Diversity relating to the protection of  
16 the marine environment.<sup>48</sup> Furthermore, the consistent use of environmental impact  
17 studies each and every time would ensure that adaptation measures taken do not  
18 themselves cause damage to the marine environment.

19  
20 Mr President, I will now look at three ways of implementing these obligations.

21  
22 First, the obligation to cooperate. According to Professor Georges Abi-Saab:

23  
24 Each level of normative density should correspond to a certain level of  
25 institutional density that allows rules to be implemented satisfactorily. Below  
26 that level, the system is not able to ‘manage’ or ‘implement’ its normative  
27 *acquis*. This would jeopardize its own effectiveness and, and thus its credibility  
28 as a legal system.<sup>49</sup>

29  
30 Therefore, we have to reinforce cooperation. And in so doing, we need to consider  
31 establishing specialized institutions that would be devoted to the protection of the  
32 marine environment so that they can further develop standards, translate them into  
33 concrete measures, coordinate State actions and monitor their implementation of  
34 obligations relating to adaptation.

35  
36 Secondly, article 192 of the Convention requires States Parties to adopt physical  
37 adaptation measures to protect the marine environment.

38  
39 Thirdly, a sectoral approach should not be applied to adaptation measures. Quite the  
40 contrary; they should be integrated into all aspects of State governance.<sup>50</sup>  
41 Adaptation has to follow a cycle comprising the evaluation of risks, planning,  
42 implementation, follow-up assessment and the updating of the measures adopted,  
43 which might include the adoption of new measures.

44  

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<sup>46</sup> Articles 61-69; 116-120 of the Convention.

<sup>47</sup> See, in particular, article 194 (5) de la Convention.

<sup>48</sup> UNEP/CBD/COP/DEC/X/29 (Marine and Coastal Biodiversity);  
UNEP/CBD/COP/DEC/X/33 (Biodiversity and Climate Change).

<sup>49</sup> G. Abi-Saab, « *Cours général de droit international public* », 207 *RCADI* (1987-VII), 95–96 [in italics in the text].

<sup>50</sup> Summary report, para. 144.

1 Finally, it must be possible to assess adaptation measures in light of clearly defined  
2 measurable objectives, as was expressed by the leaders of African States in  
3 paragraph 20 of the Declaration of Nairobi.<sup>51</sup>

4  
5 Mr President, that takes me to my last point: how do we share the burden of  
6 adopting adaptation measures?

7  
8 These obligations must be implemented asymmetrically, taking into account the  
9 respective capabilities of States and their level of development. A number of  
10 provisions of the Convention already reflect this idea, which can likewise be found in  
11 the climate regime as the principle of common but differentiated responsibilities and  
12 respective capabilities. You have already heard this a number of times; this principle  
13 is an elementary principle of justice and equity.

14  
15 Everybody knows this. Even the most developed States recognize the importance of  
16 this principle and have committed themselves to provide \$100 billion a year to  
17 African countries and developing States to finance their climate change needs. Still  
18 to no effect.

19  
20 Since 2009, when the promise was made, the marine environment has degraded;  
21 adaptation needs have increased. The climate crisis is more pressing now than ever.  
22 This is why developed States must now make additional commitments to adequately  
23 finance and reinforce the capabilities of developing States to enable them to fulfil  
24 their obligations. But there must also be a show of creativity – creativity because  
25 these developing countries need aid to create the requisite budgetary margins to be  
26 able to mobilize their own resources and thus take part in this collective objectives.

27  
28 How? Restructuring sovereign debts, reducing the debt burden: options that  
29 developed countries must take in that sense.

30  
31 I should stop here because some might be wondering why I have started talking  
32 about the need to set up a just and equitable international economic order, but this  
33 idea is not at all foreign to the Convention. The fifth preambular paragraph reflects  
34 this very clearly because States Parties considered that achieving the objectives of  
35 the Convention would “contribute to the realization of a just and equitable  
36 international economic order” which takes into the account the interests of all States  
37 and of mankind, but above all, those of developing countries.<sup>52</sup>

38  
39 Today, the realization of a just and equitable international order is not a  
40 consequence of the achievement of the objectives of the Convention. It is a  
41 necessity if developing countries are to be in a position to realize their own aims and  
42 goals. Without this order, it will be impossible, difficult, to protect the marine  
43 environment as it should be protected.

44  
45 Mr President, I am coming to the end of my present. The written statement of the  
46 African Union contains in its paragraph 341 a list of all the specific obligations  
47 responding to question 1 and question 2, so I will not attempt to summarize them

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<sup>51</sup> Nairobi Declaration, p. 4, para. 20.

<sup>52</sup> See also, Resolution on development of national marine science, technology and ocean service infrastructures: A\_CONF.62\_120-EN (1).pdf: <https://digitallibrary.un.org/record/34377?ln=en>

1 here. I would rather thank the Tribunal for its kind attention and invite you to give the  
2 floor to His Excellency Ambassador Tordeta Ratebaye to close the oral statement of  
3 the African Union.

4  
5 **THE PRESIDENT:** (*continued in English*) Thank you, Mr Hebié. I now invite  
6 Mr Tordeta Ratebaye to continue his statement. You have the floor, Sir.

7  
8 **MR RATEBAYE:** Thank you, honourable President and members of the Tribunal.

9  
10 In conclusion, we stand before you not merely as the representative of nations but as  
11 the collective voice of a continent grappling with an existential crisis. Our plea is for  
12 your compassionate attention to the cry for justice, fairness, and a lifeline to the very  
13 existence of humanity.

14  
15 The urgent call echoes across Africa, where international support and intervention  
16 are imperative, especially in addressing the devastating impacts of climate change,  
17 vividly demonstrated by recent tragedies in Libya.

18  
19 We call on you to recognize the unique challenges we confront and the injustice we  
20 endure, even as we tirelessly strive to mitigate and adapt to the impact of climate  
21 change.

22  
23 Rising temperatures, sea-level rise and ocean acidification knows no borders. They  
24 pose a threat to all of us. UNCLOS, a symbol of maritime justice, must collaborate  
25 harmoniously with the climate regime to safeguard our oceans and protect our  
26 vulnerable coastal communities.

27  
28 As the African Union makes this impassioned plea for justice and humanity, let us be  
29 reminded of the profound words echoed in the Nairobi Declaration on Climate  
30 Change: "Africa possesses both the potential and the ambition to be a vital  
31 component of the global solution to climate change." This is not solely a matter of  
32 law; it is a moral imperative.

33  
34 The African Union strongly believes that the Tribunal has jurisdiction to render an  
35 advisory opinion in accordance with the relevant provision of UNCLOS. This advisory  
36 opinion should clarify the States Parties' obligations to prevent, to reduce and control  
37 the pollution of the marine environment resulting from the climate change.

38  
39 Honourable President, I just realized why your Tribunal is based here in Hamburg: a  
40 very green, clean city. I think it is another way to protect the environment. I do hope  
41 that your opinion will allow us to make our oceans more bluer than what we have  
42 now, and more clean. I thank you.

43  
44 **THE PRESIDENT:** Thank you, Mr Tordeta Ratebaye.

45  
46 This brings us to the end of this afternoon's sitting. The Tribunal will sit again on  
47 Monday, 25 September, at 10 a.m., when it will hear statements on behalf of France,  
48 Italy, the Netherlands and the United Kingdom. I wish you all a good afternoon. This  
49 sitting is now closed.

50  
(*The sitting closed*)