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)

Verbatim Record
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Vice-President: Tomas Heidar
Registrar: Ximena Hinrichs Oyarce
List of delegations:

INTERGOVERNMENTAL ORGANIZATIONS

African Union
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Mr Ermias Kassaye, Legal Officer, Office of the Legal Counsel, African Union
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THE PRESIDENT: Please be seated. Good afternoon. We will now continue to the hearing in the Request for an Advisory Opinion Submitted by the Commission of Small Island States and International Law. This afternoon we will hear an oral statement from the African Union.

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

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

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

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

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

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

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

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1 The African Leaders Nairobi Declaration on Climate Change and Call to Action (2023) (hereafter “Nairobi Declaration”), fifth preambular paragraph.
What more can we say, Mr President, after these two complementary and poignant statements?

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

The comments of these two leaders that I have cited also acknowledge a truth that lies at the heart of climate change and its brutal consequences. That truth is profound injustice. We know all too well that Africa has made an insignificant contribution to causing climate change. The IPCC recognizes that Africa has the “lowest per capita GHG emissions of all regions”. Yet despite its insignificant contribution, Africa faces the worst consequences of this crisis.

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

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

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

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

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

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

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

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

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

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

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

THE PRESIDENT: (continued in English) Thank you, Mr Tordeta Ratebaye. I now invite Mr Salem Boukhari Khalil to make his statement. You have the floor, Sir.
MR KHALIL: Thank you, Mr President. In this section, the African Union will first address the applicable law, then the principle of effectiveness, before turning to the relationship between UNCLOS and the climate regime.

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

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

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

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

One participant has suggested that the two regimes are not compatible because the climate regime was not established “specifically” to address the marine environment or further the Convention’s principles. However, the two regimes are perfectly “compatible”, even though the climate regime is not established specifically to address the objectives and principles of the Convention.

Others argue, Mr President, that the climate regime is a “sui generis”, “specialized legal regime”, to address climate change, and describes the relationship in terms of lex specialis. However, lex specialis, and the rule in article 237(1) of the Convention, come into play when two norms of international law conflict.

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5 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, 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.

two regimes are “compatible”, operate harmoniously and there is no conflict to resolve.
The climate regime is not the only relevant body of rules for the interpretation of UNCLOS. In interpreting Part XII of the Convention, it should be recalled that the Tribunal itself, as well as Annex VII arbitrary tribunals, have used human rights law principles to interpret the Convention on different occasions.

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

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

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

*First*, the principle of effectiveness requires the Tribunal to interpret the Convention so as to make each provision fully effective, rendering none inutile.

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

Fourth, the principle of effectiveness supports the “systemic integration” of different treaty regimes,\footnote{Report of the Study Group of the International Law Commission, “Fragmentation of International Law”, Chapter V, paras. 410-480.} along with the “strong presumption against normative conflict” between treaty regimes.\footnote{Report of the Study Group of the International Law Commission, “Fragmentation of International Law”, para. 37.} The Tribunal should, therefore, strive to interpret the Convention and the climate regime in a coherent and mutually supportive way.

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

Let me start by saying that the African Union joins virtually all others in urging the Tribunal to give the climate regime a prominent place in the interpretation of UNCLOS.\footnote{Vienna Convention on the Law of Treaties, Article 31(3)(c).} This approach flows from the rules of treaty interpretation. Under Article 31(3)(c) of the Vienna Convention,\footnote{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.} the Tribunal’s interpretation of UNCLOS provisions must “take[ ] into account” “any relevant rules of international law applicable in the relations between the parties”. There is very wide agreement that the climate regime constitutes such “rules”, given the almost perfect overlap in the Parties to the Convention and the climate regime.\footnote{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 Implementation of Climate Change Policies”, Report of the Study Group of the International Law Commission, “Fragmentation of International Law”, para. 413.}

The requirement to take the climate regime into account, serves to foster coherence between the Convention and the climate regime, with the rule in article 31(3)(c) facilitating the “systemic integration” of different parts of international law.\footnote{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.}
words of Mauritius, the Tribunal must apply “an integrated approach which maximises the effectiveness and coherence of both regimes”.21

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

In general terms, the Convention displays considerable openness to other areas of international law. This shows that the Convention is intended to be understood, if possible, coherently and harmoniously with other areas of international law.22

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

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

Like many other participants,24 the African Union considers that the climate change regime sets forth international rules and standards covered by articles 207(1)

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


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

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

These participants argue that the climate regime exhausts the UNCLOS obligations because it sets out “the internationally agreed rules and standards” regarding the “measures” necessary under UNCLOS with respect to GHG emissions and climate change.26

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

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

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

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

Second, the argument that the climate regime exhausts the UNCLOS obligations also overstates the relevance of the climate change. In the first place, the climate regime is not formulated to be the exclusive legal regime applicable to climate change. The UNFCCC preamble recognizes, for example, that other parts of international law are relevant, including principles of international law, as well the Ozone treaties.28


25 Australia’s written statement, para. 40; European Union’s written statement, para. 68.

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

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

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

To conclude this section, Mr President:

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

In interpreting UNCLOS, the climate regime must be taken into account, to ensure an integrated and coherent approach between two complementary areas of international law; articles 207(1) and 212(1) of UNCLOS support this view; and, articles 207(2) and 212(2) show that the climate regime does not exhaustively define, or displace, the UNCLOS obligation to protect and preserve the marine environment with respect to GHG emissions and climate change.

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

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

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

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

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

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

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\(^{29}\) 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.”
the Tribunal should adopt an interpretation that gives practical, real-world effect to each of these verbs.

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

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

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

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

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

First, the Convention is not concerned with the temperature of the atmosphere, it is concerned with the protection and preservation of the marine environment. The obligations in article 194 must, therefore, be understood in light of the impact of greenhouse gas emissions on the marine environment and not on the atmosphere. The second point I would stress here is that the Paris temperature goal must be weighed in light of the three verbs in article 194. While actions to secure the Paris temperature goal can bring about a certain degree of “control” of marine pollution, they do not “prevent” that pollution nor do they “reduce” cumulative levels of the pollution.

Let me be very clear about these facts: even if atmospheric warming is limited to 1.5ºC degrees, vast quantities of greenhouse gases will continue to be emitted into the atmosphere, and persistent marine pollution will continue to accumulate in the oceans. As the IPCC has said, far from being “reduce[d]”, as required under article 194, ocean acidification, deoxygenation, temperatures, and sea levels will actually rise.33 To comply with their UNCLOS obligations, therefore, to “prevent” and “reduce” marine pollution, UNCLOS parties cannot limit their endeavors to holding the atmospheric temperature increase to 1.5ºC.34 As Mozambique has put it, the 1.5ºC standard is “the start, but not the end point”.35 Parties are, therefore, obliged to make efforts to limit emissions further.

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34 African Union’s written statement paras. 225-231.
35 Mozambique’s Oral Statement, 18 September 2023, Verbatim Record ITLOS/PV.23/C31/11, p. 15.
To us, this reading of article 194 flows logically from a straightforward understanding of the verbs used: parties cannot settle for conduct that, in the circumstances, merely meets the least demanding of the three verbs: “control”.

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

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

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

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

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

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

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

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

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

\textsuperscript{40} UNFCCC, “Technical dialogue of the first global stocktake Synthesis report by the co-facilitators on the technical dialogue”, para. 100.

\textsuperscript{41} UNFCCC, “Technical dialogue of the first global stocktake Synthesis report by the co-facilitators on the technical dialogue”, paras. 13-15.

\textsuperscript{42} 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.
burden of emissions reductions asymmetrically in line with the wording of article 194, the context in the Convention, and the principle of CBDR.

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

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

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

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

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

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

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

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

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

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43 Nairobi Declaration, fifth preambular paragraph.
44 Australia’s Oral Statement, 13 September 2023, Verbatim Record ITLOS/PV.23/C31/5, p. 11.
institutions and frameworks should also be specifically mandated to address the special needs of developing nations in relation to climate change mitigation.

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

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

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

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

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

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

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

Africa has six Small Island Developing States and half of African countries are coastal States, the majority of which are very low lying, making them vulnerable to sea-level rise. Furthermore, the exorbitant costs necessary to adopt and employ adaptation measures pose a huge challenge for countries in Africa.
Yet, without urgent and effective adaptation measures, it would be impossible for
African States to exercise effectively their right to self-determination, *inter alia*, their
right to territorial integrity, their right to exist on the land of their ancestors and their
right to development.

And that’s why the African Union has dealt with these adaptation issues in detail in
our written submission45 and it invites the Tribunal to lend particular attention to
them.

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

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

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

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

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

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

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

45 The African Union’s written statement, paras. 296-335.
environment. Part XII also imposes on States the obligation to adopt, implement and
enforce laws, regulations and policies necessary to achieve this objective.

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

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

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

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

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

Each level of normative density should correspond to a certain level of
institutional density that allows rules to be implemented satisfactorily. Below
that level, the system is not able to ‘manage’ or ‘implement’ its normative
acquis. This would jeopardize its own effectiveness and, and thus its credibility
as a legal system.

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

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

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

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46 Articles 61-69; 116-120 of the Convention.
47 See, in particular, article 194 (5) de la Convention.
48 UNEP/CBD/COP/DEC/X/29 (Marine and Coastal Biodiversity);
UNEP/CBD/COP/DEC/X/33 (Biodiversity and Climate Change).
in the text].
50 Summary report, para. 144.
Finally, it must be possible to assess adaptation measures in light of clearly defined measurable objectives, as was expressed by the leaders of African States in paragraph 20 of the Declaration of Nairobi.51

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

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

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

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

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

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

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

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

51 Nairobi Declaration, p. 4, para. 20.
52 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
here. I would rather thank the Tribunal for its kind attention and invite you to give the
floor to His Excellency Ambassador Tordeta Ratebaye to close the oral statement of
the African Union.

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

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

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

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

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

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

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

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

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

THE PRESIDENT: Thank you, Mr Tordeta Ratebaye.

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

(The sitting closed)