

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)

Verbatim Record

<i>Present:</i>	President	Albert J. Hoffmann
	Vice-President	Tomas Heidar
	Judges	José Luís Jesus
		Stanislaw Pawlak
		Shunji Yanai
		James L. Kateka
		Boualem Bouguetaia
		Jin-Hyun Paik
		David Joseph Attard
		Markiyán Z. Kulyk
		Alonso Gómez-Robledo
		Óscar Cabello Sarubbi
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		Kriangsak Kittichaisaree
		Roman Kolodkin
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		María 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
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Solicitor, Supreme Court of Nigeria

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Professor, Department of International and European Law, Maastricht University;
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Ms Shambhavi Pandey, Trainee Associate, Sidley Austin LLP, Geneva

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Court of New Zealand, Supreme Court of the Australian Capital Territory and High
Court of Australia

Ms Pem Chhoden Tshering, Member, Bar of the State of New York; Registered
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:** Good afternoon. We will now continue to the hearing in the
2 *Request for an Advisory Opinion Submitted by the Commission of Small Island*
3 *States and International Law*. This afternoon we will hear an oral statement from the
4 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:** Mr President, members of the International Tribunal for the Law of
10 the Sea, it is a great pleasure to be here in front of you on behalf of the Member
11 States. I am happy to see the number of Member States that have joined us today to
12 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”.¹ 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
38 scorching hopes and possibilities here in Africa. This continent accounts
39 for less than four per cent of global emissions. Yet it suffers some of the
40 worst effects of rising global temperatures. Extreme heat, ferocious floods
41 and tens of thousands dead from devastating droughts. The blow inflicted
42 on development is all around with growing hunger and displacement.
43 Shattered infrastructure. Systems stretched to the limit. All aggravated by
44 climate chaos not of [Africa’s] making.²

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

² 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".³ 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.

³ IPCC, 2022: Africa [Trisos, C.H., I.O. Adelekan, E. Totin, A. Ayanlade, J. Efitre, A. Gemedá, K. Kalaba, C. Lennard, C. Masao, Y. Mgaya, G. Ngaruiya, D. Olago, N.P. Simpson, and S. Zakieldeén]. 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, last accessed 18 September 2023.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25
26 One participant has suggested that the two regimes are not compatible because the
27 climate regime was not established “specifically” to address the marine environment
28 or further the Convention’s principles.¹ However, the two regimes are perfectly
29 “compatible”, even though the climate regime is not established specifically to
30 address the objectives and principles of the Convention.

31
32 Others argue, Mr President, that the climate regime is a “*sui generis*”, “specialized
33 legal regime”, to address climate change, and describes the relationship in terms of
34 *lex specialis*.² However, *lex specialis*, and the rule in article 237(1) of the
35 Convention, come into play when two norms of international law conflict.³ Here, the

¹ 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, last accessed 18 September 2023, (hereafter “Indonesia’s written statement”).

² 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 *a/so* 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.

³ 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, last accessed 18 September 2023

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

3
4 The climate regime is not the only relevant body of rules for the interpretation of
5 UNCLOS. In interpreting Part XII of the Convention.⁴ It should be recalled that the
6 Tribunal itself,⁵ as well as Annex VII arbitral tribunals,⁶ have used human rights law
7 principles to interpret the Convention on different occasions.

8
9 The right of peoples to *self-determination* and the principles resulting from it,
10 constitute a peremptory norm of general international⁷ codified in different
11 international instruments. This right includes the principle according to which “in no
12 case may a people be deprived of its own means of subsistence.”⁸ The deleterious
13 effects of climate change on the oceans, if nothing is done urgently deprive many
14 peoples of this planet of their means of substance, especially coastal communities
15 and small island States.

16
17 Mr President, I turn now to the interpretation of UNCLOS. I will address two points:
18 the principle of effectiveness and the relationship with the climate regime.

19
20 As a first point, the Convention must be interpreted in line with the principle of
21 effectiveness. Four points bear emphasis here:

22
23 *First*, the principle of effectiveness requires the Tribunal to interpret the Convention
24 so as to make each provision fully effective, rendering none inutile.⁹

25
26 *Second*, the principle calls for an interpretation that makes the Convention effective
27 not just on paper but “in the real world where people live and work and die”.¹⁰ The
28 African Union, therefore, joins others, notably the Democratic Republic of the Congo,
29 in urging the Tribunal to interpret the Convention in a way that is *practically*
30 effective.¹¹

(hereafter “Report of the Study Group of the International Law Commission, “Fragmentation of International Law”).

⁴ See the Written Submissions of the Democratic Republic of Congo, Nauru, Mauritius.

⁵ 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, “*Enrica Lexie*” (*Italy v. India*), *Provisional Measures, Order of 24 August 2015*, ITLOS Reports 2015, p. 182, 204, para. 133.

⁶ *Arctic Sunrise* (The Netherlands v. Russian Federation), 2015, 171 *ILR* 1, 82, para. 197.

⁷ ILC, Fourth report on peremptory norms of general international law (*ius cogens*) by Dire Tladi, 31 January 2019, A/CN.4/727.

⁸ 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).

⁹ *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_2310_06_eng.pdf, last accessed 19 September 2023.

¹⁰ WTO Appellate Body Report, *EC – Hormones*, para. 187.

¹¹ 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-

1
2 *Third*, the African Union joins the DRC, Sierra Leone and others in arguing that the
3 principle of effectiveness requires that the Convention be interpreted in light of its
4 “continuing – and thus necessarily evolving” nature, in view of developments in
5 scientific and other factual knowledge, as well as in international law itself.¹²
6

7 *Fourth*, the principle of effectiveness supports the “systemic integration” of different
8 treaty regimes,¹³ along with the “strong presumption against normative conflict”
9 between treaty regimes.¹⁴ The Tribunal should, therefore, strive to interpret the
10 Convention and the climate regime in a coherent and mutually supportive way.
11

12 Mr President, I will now address this last point in more detail.
13

14 Let me start by saying that the African Union joins virtually all others in urging the
15 Tribunal to give the climate regime a prominent place in the interpretation of
16 UNCLOS.
17

18 This approach flows from the rules of treaty interpretation. Under Article 31(3)(c) of
19 the Vienna Convention,¹⁵ the Tribunal’s interpretation of UNCLOS provisions must
20 “take[] into account” “any relevant rules of international law applicable in the
21 relations between the parties”. There is very wide agreement that the climate regime
22 constitutes such “rules”, given the almost perfect overlap in the Parties to the
23 Convention and the climate regime.¹⁶
24

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, last accessed 18 September 2023 (hereafter “United Kingdom’s written statement”).

¹² 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, 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, 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, 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.

¹³ Report of the Study Group of the International Law Commission, “Fragmentation of International Law”, Chapter V, paras. 410-480.

¹⁴ Report of the Study Group of the International Law Commission, “Fragmentation of International Law”, para. 37.

¹⁵ Vienna Convention on the Law of Treaties, Article 31(3)(c).

¹⁶ 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.

1 The requirement to take the climate regime into account, serves to foster coherence
2 between the Convention and the climate regime, with the rule in article 31(3)(c)
3 facilitating the “systemic integration” of different parts of international law.¹⁷ In the
4 words of Mauritius, the Tribunal must apply “an integrated approach which
5 maximises the effectiveness and coherence of both regimes”.¹⁸

6
7 The text of the Convention itself lends strong support to this integrated approach.

8
9 In general terms, the Convention displays considerable openness to other areas of
10 international law. This shows that the Convention is intended to be understood, if
11 possible, coherently and harmoniously with other areas of international law.¹⁹

12
13 In that regard, we agree with Singapore that articles 207(1) and 212(1) are main
14 “entry points” for the climate regime.²⁰ Each provision requires UNCLOS Parties to
15 “tak[e] into account” internationally agreed rules and standards when they take
16 action to prevent, reduce and control marine pollution. These two provisions use the
17 same words as article 31(3)(c) to give the same weight to international rules and
18 standards: in both cases, the relevant rules and standards must be “taken into
19 account”.

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

24
25 Like many other participants,²¹ the African Union considers that the climate change
26 regime sets forth international rules and standards covered by articles 207(1)

¹⁷ 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 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.

¹⁸ 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, last accessed 18 September 2023 (hereafter “Republic of Mauritius’ written statement”).

¹⁹ See Articles 197, 207, 211, 212, 213, 237, and 293 of the Convention.

²⁰ See, e.g., Singapore’s Oral Statement, 19 September 2023, Verbatim Record ITLOS/PV.23/C31/13, pp. 4, 7.

²¹ 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, 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, 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,

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.²²

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.²³

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.²⁴

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

para. 71, available at
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
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”)

²² Australia’s written statement, para. 40; European Union’s written statement, para. 68.

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

²⁴ Republic of Mauritius’ written statement, para 74; New Zealand’s written statement, para. 71; United Kingdom’s written statement, para. 68.

1 regime is not formulated to be the exclusive legal regime applicable to climate
2 change. The UNFCCC preamble recognizes, for example, that other parts of
3 international law are relevant, including principles of international law, as well the
4 Ozone treaties.²⁵

5
6 In the second place, the climate regime gives the marine environment virtually no
7 attention.

8
9 To conclude this section, Mr President:

10
11 The applicable law in these proceedings is UNCLOS; UNCLOS must be interpreted
12 in light of the principle of effectiveness;

13
14 In interpreting UNCLOS, the climate regime must be taken into account, to ensure
15 an integrated and coherent approach between two complementary areas of
16 international law; articles 207(1) and 212(1) of UNCLOS support this view; and,

17
18 articles 207(2) and 212(2) show that the climate regime does not exhaustively
19 define, or displace, the UNCLOS obligation to protect and preserve the marine
20 environment with respect to GHG emissions and climate change.

21
22 Mr President, may I now request you to invite Mr Lockhart to address the Tribunal
23 next. Thank you.

24
25 **THE PRESIDENT:** Thank you, Mr Salem Boukhari Khalil. I now give the floor to
26 Mr Lockhart to make his statement. You have the floor, Sir.

27
28 **MR LOCKHART:** Thank you very much, Mr President, distinguished members of the
29 Tribunal. It is an honour to appear before you today.

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

35
36 A threshold question is whether human-produced greenhouse gas emissions cause
37 “pollution of the marine environment”. The African Union takes the unequivocal
38 position that they do. In brief, these greenhouse gas emissions involve the
39 “introduction by man”, of a “substance” (carbon dioxide) and “energy” in the form of
40 heat into the marine environment with deleterious effects that, scientifically, are very
41 well established. So for the African Union, the article 194 obligations are fully
42 engaged. These obligations apply to any and all sources of greenhouse gas
43 emissions. This includes, for example, as the Democratic Republic of the Congo has
44 argued, plastic waste entering the oceans directly, breaking down there and
45 releasing greenhouse gas emissions.¹

²⁵ Vienna Convention for the Protection of the Ozone Layer and its Montreal Protocol.

¹ 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.”

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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, 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 IPCC² has established that the adverse impacts of climate change will be much worse with a temperature increase of 2.0°C.³

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

² African Union’s written statement, para. 217-218.
³ 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, 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. Hijioka, 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, last accessed 15 June 2023; IPCC 2022, *Africa, Impacts, Adaptation and Vulnerability*, p. 1291.

1 higher atmospheric temperature goal, when the science shows that this temperature
2 would mean considerably more harm to the marine environment.

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

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

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

23
24 Let me be very clear about these facts: even if atmospheric warming is limited to
25 1.5°C degrees, vast quantities of greenhouse gases will continue to be emitted into
26 the atmosphere, and persistent marine pollution will continue to accumulate in the
27 oceans. As the IPCC has said, far from being "reduce[d]", as required under
28 article 194, ocean acidification, deoxygenation, temperatures, and sea levels will
29 actually *rise*.⁵

30
31 To comply with their UNCLOS obligations, therefore, to "prevent" and "reduce"
32 marine pollution, UNCLOS parties cannot limit their endeavors to holding the
33 atmospheric temperature increase to 1.5°C.⁶ As Mozambique has put it, the 1.5°C
34 standard is "the start, but not the end point".⁷ Parties are, therefore, obliged to make
35 efforts to limit emissions further.

⁴ New Zealand's Oral Statement, 15 September 2023, Verbatim Record ITLOS/PV.23/C31/10, p. 12.

⁵ 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.

⁶ African Union's written statement paras. 225-231.

⁷ Mozambique's Oral Statement, 18 September 2023, Verbatim Record ITLOS/PV.23/C31/11, p. 15.

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

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

13
14 Let me turn now to the required level of conduct. Article 194 establishes a due
15 diligence obligation, which varies with the circumstances.⁸ With respect to climate
16 change, the circumstances demand an unparalleled level of diligent conduct. States
17 are not trying to avert a *threat of potential* harm: climate change has already caused
18 severe harm to the marine environment; we know that it threatens much more harm;
19 and we know what action is needed: deep and sustained emission reductions.

20
21 In typical cases, distinguished members of the Tribunal, international adjudicators
22 say that due diligence requires States to do their “utmost” and to deploy “all of the
23 means at their disposal”.⁹ But given the unparalleled threats posed by climate
24 change, we cannot simply fall back on the typical due diligence terminology. Instead,
25 the African Union urges the Tribunal to make clear that the conduct required to
26 reduce emissions is as historically unparalleled as the climate crisis itself.

27
28 In considering the required level of conduct, we also believe that the Tribunal should
29 reflect on the actions that States are currently taking to reduce emissions. As part of
30 the First Global Stocktake under the Paris Agreement, a recent report finds
31 significant shortcomings.¹⁰ The report states that, and I quote, “much more [action] is

⁸ *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, last accessed 19 September 2023.

⁹ *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, 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.

¹⁰ 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.

1 needed now on all fronts”.¹¹ It concludes that the current global emissions pathway
2 will lead to atmospheric warming above 2.0 degrees,¹² and it finds that States could
3 reduce emissions more rapidly through: (1) more effective implementation and
4 enforcement of current reduction targets; and (2) by adopting new more “stringent”
5 and “comprehensive” reduction targets.¹³

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

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

17
18 This reading is confirmed is confirmed by the context in articles 202, 203, 207(4)
19 and 266 of the Convention. It is also confirmed by the principle of Common but
20 Differentiated Responsibilities and Respective Capabilities, a foundation of the
21 climate regime and is expressed throughout the operative parts of the UNFCCC and
22 the Paris Agreement.¹⁴ Under the rules of treaty interpretation, the principle of CBDR
23 must, therefore, be given proper weight in the Convention. The principle of CBDR is
24 also among the international rules and standards agreed in the climate regime that
25 must be “tak[en] into account” under articles 207(1) and 212(1).

26
27 Mr President, to conclude on the first question, I would like to summarize four
28 specific obligations. States Parties are required: (1) to adopt collectively effective and
29 urgent measures to reduce greenhouse gas emissions; (2) to reduce emissions
30 collectively to an extent that meets the 1.5°C standard, which would secure a degree

¹¹ UNFCCC, “Technical dialogue of the first global stocktake Synthesis report by the co-facilitators on the technical dialogue”, para. 1.

¹² UNFCCC, “Technical dialogue of the first global stocktake Synthesis report by the co-facilitators on the technical dialogue”, para. 100.

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

¹⁴ 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 of “control” over marine pollution; (3) to reduce emissions beyond this level in order
2 to “prevent” and “reduce” accumulated marine pollution; and (4) to allocate the
3 burden of emissions reductions asymmetrically in line with the wording of article 194,
4 the context in the Convention, and the principle of CBDR.

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

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

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

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

22
23 Both aspects of this obligation are critical in these proceedings, because climate
24 change has already caused, and will continue to cause, significant harm to the
25 marine environment. To echo again the Nairobi Declaration, climate change is “the
26 single biggest threat to all life on Earth”, demanding “urgent and concerted action
27 from all nations”.¹

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

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

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

40
41 First, UNCLOS Parties have an obligation to cooperate towards mitigation. As the
42 Tribunal heard earlier, greenhouse gas emissions cannot be made to respect
43 national boundaries,² and the same is true for their deleterious effects. As such,
44 cooperation is central to protecting and preserving the marine environment against
45 climate change. Cooperation is also specifically mandated by article 197 of
46 UNCLOS. Among other things, cooperation must include building and strengthening
47 international institutions and frameworks aimed at mitigating climate change, but with

¹ Nairobi Declaration, fifth preambular paragraph.

² Australia’s Oral Statement, 13 September 2023, Verbatim Record ITLOS/PV.23/C31/5, p. 11.

1 a specific focus on addressing the harmful effects on the marine environment, such
2 as rising ocean temperatures, ocean acidification and rising sea levels. These
3 institutions and frameworks should also be specifically mandated to address the
4 special needs of developing nations in relation to climate change mitigation.
5

6 Second, article 192 imposes an obligation for UNCLOS parties to undertake
7 scientific research and technological development towards mitigation. Scientific
8 studies on the effects of greenhouse gases other than carbon dioxide and novel
9 technologies like carbon capture and storage and ocean fertilization, are among the
10 potential areas for such research and development. This research and development
11 must be carried out in a manner consistent with the differentiated and asymmetric
12 nature of UNCLOS obligations, interpreted in light of the principle of CBDR-RC. That
13 is, the research and development should be conducted on an inclusive basis,
14 engaging the scientific communities of developing nations; developed parties must
15 carry the burden of financing this research and development; and any output must
16 be shared inclusively with developing countries to ensure that all countries can take
17 rapid and effective action to reduce emissions within their economies, using the
18 latest techniques and technologies.
19

20 Third, in deploying novel mitigation technologies, UNCLOS parties must be alert to
21 the possible adverse impacts of such technologies on the marine environment. This
22 is particularly true for technological solutions that directly implicate the marine
23 environment, such as the storage of carbon in the seabed or the continental shelf.
24 While these technologies may remove carbon from the atmosphere, the risk of
25 leakage and the consequent harm to the marine environment must be avoided.
26

27 Finally, as my colleague Mr Lockhart just explained, States Parties are under an
28 obligation to allocate the burden of each of these mitigation obligations in an
29 asymmetric manner, with developed Parties carrying the greater weight of the
30 obligations.
31

32 This concludes my part of the statement, and I request the President to invite
33 Dr Hébié to the floor. Thank you.
34

35 **THE PRESIDENT:** Thank you, Mr Raju. I now invite Mr Hébié to make his statement.
36 You have the floor, Sir.
37

38 **MR HÉBIÉ** (*Interpretation from French*) : Mr President, distinguished members of the
39 Tribunal, it is a single honour for me to continue the presentation of the African Union
40 relative to question number 2.
41

42 I am going to focus on the obligations to adapt to the impacts of climate change.
43 Adaptation is very important for all countries, but it is a vital necessity for the most
44 vulnerable States. Unfortunately, my continent – Africa – is one of the most
45 vulnerable continents in the face of climate change effects.
46

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

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

6
7 And that's why the African Union has dealt with these adaptation issues in detail in
8 our written submission¹ and it invites the Tribunal to lend particular attention to 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

¹ 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.² It prohibits all practices which would destroy or further
7 weaken the marine ecosystem, marine species and their capacity to regenerate.³

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.⁴ 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.
26 Below that level, the system is not able to ‘manage’ or ‘implement’ its
27 normative *acquis*. This would jeopardize its own effectiveness and, and
28 thus its credibility as a legal system.⁵

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.⁶ Adaptation
41 has to follow a cycle comprising the evaluation of risks, planning, implementation,
42 follow-up assessment and the updating of the measures adopted, which might
43 include the adoption of new measures.

44

² Articles 61-69; 116-120 of the Convention.

³ See, in particular, article 194 (5) of the Convention.

⁴ UNEP/CBD/COP/DEC/X/29 (Marine and Coastal Biodiversity);
UNEP/CBD/COP/DEC/X/33 (Biodiversity and Climate Change).

⁵ G. Abi-Saab, “*Cours général de droit international public*”, 207 *RCADI* (1987-VII), 95–96 [in italics in the text].

⁶ Synthesis 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.⁷

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.⁸

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

⁷ Nairobi Declaration, p. 4, para. 20.

⁸ 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:** Thank you, Mr Hébié. I now invite Mr Tordeta Ratebaye to
6 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)