

# The ICJ Advisory Opinion on States' Obligations in Respect of Climate Change: Implications for the Climate Emergency in Africa

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## Abstract

Recently, the International Court of Justice (ICJ) rendered an Advisory Opinion (ICJ AO) on States' obligations under international law in respect of climate change arising from anthropogenic greenhouse gas (GHG) emissions. Contrary to a plethora of legal commentaries and analytical projections prior to the publication of this notable ICJ AO, there does not appear to be a seismic shift towards States' legal responsibility for transborder environmental harm caused by anthropogenic GHG emissions. This paper argues that the implications of the ICJ AO for the climate emergency in Africa constitute more or less echoes in the dark plains of international law where States' responsibility and legal consequences for transborder environmental harm due to anthropogenic GHG emissions remain obvious, palpable, yet elusive. This paper however suggests ways Africa may leverage the high points of the ICJ AO to make it relevant to addressing the adverse impacts of climate change on the continent.

**Keywords:** ICJ advisory opinion, climate change, Africa climate emergency, climate change treaties, States' obligations, legal consequences for climate change

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## 1. Introduction

As a principal organ of the United Nations, the mandate of the International Court of Justice (ICJ) includes providing Advisory Opinions on legal questions referred to it by other organs, especially the General Assembly<sup>1</sup>. The ICJ Advisory Opinion (ICJ AO) is mainly consultative and declarative in character because it is usually non-binding. However, it is not without any legal effect. The legal reasoning contained in ICJ AO reflects the ICJ's authoritative position on significant issues of international legal concern, and serves as a primary source of international law.

It is in that light that ICJ AOs are influential – having legal weight and political legitimacy – and widely respected globally<sup>2</sup>. It is also in that light that a recent ICJ AO has generated much interest, analysis, and commentaries within international law and international environmental law circles<sup>3</sup>. This ICJ AO addresses the

<sup>1</sup> See Article 65(1) of the ICJ statute.

<sup>2</sup> Pieter H.F. Bekker, (2003). The UN General Assembly Requests a World Court Advisory Opinion on Israel's Separation Barrier, *American Society of International Law*, vol.8, Iss. 27. p. 5. Available at: <https://www.asil.org/insights/volume/8/issue/27/un-general-assembly-requests-world-court-advisory-opinion-israels>.

<sup>3</sup> See the International Institute for Sustainable Development (2025). Briefing Note on the International Court of Justice Advisory Opinion on States' Obligations in Respect of Climate Change: 23 July 2025, *Earth Negotiations Bulletin*, 28 July. Thomas Burri (2025). The ICJ's Opinion on Climate Change: Pushing the Boundaries of International Law, *American Society of International Law*, Iss 13, vol. 29. Available at <https://www.asil.org/insights/volume/29/issue/pdf>; Available at: <https://enb.iisd.org/international-court-justice-advisory-opinion-climate-change-briefing-note.pdf>; Emma Whitaker & Atieh Khatibi (2026). The International Court of Justice's Advisory Opinion on Climate Change: A New Mandate for Climate Security. *Toda Peace Institute*. Available at: <https://toda.org/policy-briefs-and-resources/policy-briefs/report.pdf>.

question on the legal obligations of States under international law with respect to climate change caused by anthropogenic greenhouse gas (GHG) emissions.

Prior to when the ICJ AO was published on 23 July 2025, various references were made to it by international law experts, analysts, and commentators as a landmark and epoch-making in the history of the ICJ to clarify legal obligations of States for the impact of climate change under international law<sup>1</sup>. In specific terms, it was expected that the ICJ AO would shape the future of international law relating to State's obligation to take measures aimed at addressing the environmental impact of GHG emissions which caused transborder harm, and the legal consequences for a breach of such obligation<sup>2</sup>.

For the African continent in particular, the ICJ AO was anticipated to provide a judicial framework within which the climate injustice suffered by African countries could be viewed, defined, and contextualized within the ambit of international law. Africa countries, acknowledged as among those that have contributed the least to global climate change but “already facing both climate hell and high sea levels”<sup>3</sup>, would rely heavily on any protections and remedies offered by international law. The ICJ AO that provides authoritative statement of the law clarifying States' legal obligations for transborder environmental harm due to anthropogenic GHG emissions would be crucial to accountability for the climate emergency in Africa.

However, contrary to a plethora of legal commentaries and analytical projections prior to the publication of this notable ICJ AO, there does not appear to be a seismic shift towards States' legal responsibility for transborder environmental harm caused by anthropogenic GHG emissions. This paper argues that the implications of the ICJ AO for the climate emergency in Africa constitute more or less echoes in the dark plains of international law where legal consequences and States' responsibility for transborder environmental harm due to anthropogenic GHG emissions remain obvious, palpable, yet elusive.

### 1.1 Contextual Background

On 29 March 2023, the United Nations General Assembly (UNGA) unanimously adopted Resolution 77/276, which requested the ICJ to render an Advisory Opinion on States' obligations under international law with respect to climate change<sup>4</sup>. The request attracted an unprecedented interest since the founding of the ICJ in 1945, with about 98 countries and 13 international organizations submitting written briefs and oral arguments.

Leading up to the UNGA Resolution was the planetary crisis resulting from climate change which now threatens the well-being and survival of approximately 3.3 billion people living in countries with “high” or “very high” vulnerability levels<sup>5</sup>. According to the UNGA, climate change has assumed an unprecedented challenge of

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<sup>1</sup> See Center for International Environmental Law, (2024). Climate Justice Proceedings at the ICJ. Available at: [https://www.ciel.org/wp-Climate-Justice-Proceedings-at-the-ICJ\\_Top-Arguments.pdf](https://www.ciel.org/wp-Climate-Justice-Proceedings-at-the-ICJ_Top-Arguments.pdf).

<sup>2</sup> See Setzer J and Higham C (2023) Global Trends in Climate Change Litigation: Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science.

<sup>3</sup> Per António Guterres, UN Secretary-General. See United Nations General Assembly, (2023, March 29). 64th plenary meeting, UN Dossier No. 3, Doc. A/77/PV.64.

<sup>4</sup> International Court of Justice Advisory Opinion of 23 July 2025. Available at: <https://www.icj-cij.org/case/187.pdf>.

<sup>5</sup> Birkmann, J., E. Liwenga, R. Pandey, et. al., (2022). Poverty, Livelihoods and Sustainable Development. 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, et. al. (eds.)]. Cambridge

emergency proportions and the well-being of present and future generations of humankind depends on urgent response to it<sup>1</sup>.

Aside natural factors such as volcanic eruptions and fluctuations in the amount of solar energy received by earth, climate change is mainly due to anthropogenic factors or human activities which include fossil fuel combustion, land-use changes, transportation, and solid waste management<sup>2</sup>. These human activities produce GHG emissions which accumulate in the atmosphere, reducing the amount of solar energy that is lost to space, and resulting in an increase in global temperature.

Conclusive evidence from studies by the Intergovernmental Panel on Climate Change (IPCC) show that anthropogenic emissions of GHG are the dominant cause of the global warming observed since the mid-20th century<sup>3</sup>. Beyond natural climate variability, human-induced global warming has caused widespread adverse impacts and related losses and damages to nature and people. And as temperatures continue to rise, impacts from climate and weather extremes are expected to pose an ever-greater social, cultural, economic and environmental threats<sup>4</sup>.

Instructively, the IPCC studies noted that across sectors and regions, the most vulnerable people and systems are disproportionately affected<sup>5</sup>. The UNGA had pointed out that while emissions of GHG are on the rise and all countries are exposed to the environmental impacts, developing countries such as in Africa are particularly vulnerable to the adverse effects of climate change but are also the most significantly constrained in terms of capacity to withstand the effects<sup>6</sup>.

Least developed and developing countries, including small island States in Africa, are already experiencing an increase in such effects. It is evident in cases of persistent drought and extreme weather events, land loss and degradation, sea level rise, coastal erosion, ocean acidification and the retreat of mountain glaciers, leading to displacement of affected persons in those regions<sup>7</sup>. The consequences include threats to food security, water availability and livelihoods, as well as efforts to eradicate poverty in all its dimensions and achieve sustainable development.

The preamble to the UNGA Resolution 77/276 emphasized the urgency of scaling up action and support, including finance, capacity-building and technology transfer, to enhance the adaptive capacity of developing countries. And to implement collaborative approaches for effectively responding to the adverse effects of climate change, as well as for averting, minimizing and addressing loss and damage associated with those effects in developing countries that are particularly vulnerable to those effects.

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University Press, Cambridge, UK and New York, p. 1174.

<sup>1</sup> International Court of Justice Advisory Opinion of 23 July 2025, *op.cit.*, at p. 7-8.

<sup>2</sup> Arias, P.A., N. Bellouin, E. Coppola, R.G., et. al. (2021). IPCC 2021: Technical Summary. In *Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* [Masson-Delmotte, V., et. al (eds.)]. Cambridge University Press, Cambridge, United Kingdom and New York, pp. 39-40.

<sup>3</sup> Arias, P.A., N. Bellouin, E. Coppola, R.G., et. al. (2021). IPCC, 2021: Technical Summary. In *Climate Change 2021*, *ibid.*

<sup>4</sup> *Ibid.*, p. 40.

<sup>5</sup> *Ibid.*

<sup>6</sup> International Court of Justice Advisory Opinion of 23 July 2025, *op.cit.*, p. 8

<sup>7</sup> Birkmann, J., E. Liwenga, R. Pandey, et. al., (2022). *Poverty, Livelihoods and Sustainable Development*. *Op.cit.*, p. 1174.

Consequently, the UNGA Resolution requested the ICJ to determine the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of GHG for States and for present and future generations. And also, to determine the legal consequences under the obligations for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment, with respect to<sup>1</sup>:

- (i) States, including, in particular, small island developing States, which due to their geographical circumstances and level of development, are injured or specially affected by or are particularly vulnerable to the adverse effects of climate change
- (ii) Peoples and individuals of the present and future generations affected by the adverse effects of climate change

There are three presumptive tripods upon which these legal questions are anchored: 1. Harmful impact of climate change, 2. Attribution to developed countries, and 3. Vulnerable developing countries adversely impacted. First, the harmful impact of climate change is undeniable and its consequences are severe and far-reaching, affecting both natural ecosystems and human populations. Studies by the IPCC have found that widespread and rapid changes have occurred in the ocean, atmosphere, cryosphere, and biosphere, and these changes are already affecting many weather and climate extremes in every region across the globe<sup>2</sup>.

Climate change has caused significant and irreversible damage to ecosystems throughout the world. These significant damages include the loss and extinction of species, an increase in diseases and events of mass mortality among plants and animals, an increase in the areas devastated by forest fires, and a decrease in crucial ecosystem services. The conclusive scientific evidence warns that climate change generates a series of alterations that will drastically change the physical and chemical processes of our planet, and these alterations have a severe and direct harmful impact on the living conditions of human beings<sup>3</sup>.

Second, major anthropogenic factors of climate change such as GHG emissions are attributed to the industrialized and developed countries of the world. Studies have historically identified the unequal contribution of different countries and regions of the world to climate change based on cumulative emissions, per capita emissions, and emissions in relation to gross domestic product<sup>4</sup>. Using cumulative emissions which measure the total amount of GHG emissions over a specific period as a point of reference, it has since been found that developed countries and industrial powers with economies that are highly dependent on fossil fuels have produced the highest level of cumulative GHG emissions<sup>5</sup>.

Third, developing countries in Africa and the global south are most vulnerable and mostly impacted by the harmful impact of climate change that is mainly attributed to the industrial GHG emissions of developed

<sup>1</sup> International Court of Justice Advisory Opinion of 23 July 2025, *op.cit.*, pp. 8-9.

<sup>2</sup> Dhakal, S., J.C. Minx, F.L. Toth, et. al., (2022). Emissions Trends and Drivers. In IPCC, 2022: Climate Change 2022: Mitigation of Climate Change. Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change [P.R. Shukla, J. Skea, R. Slade, A. et. al. (eds.)]. Cambridge University Press, Cambridge, UK and New York, NY, USA, p. 218.

<sup>3</sup> *ibid*

<sup>4</sup> Arias, P.A., N. Bellouin, E. Coppola, R.G, et. al. IPCC, (2021). Technical Summary. In Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change [Masson-Delmotte, V., P. Zhai, A. Pirani, et. al. S.L. Connors, C. Péan, S. Berger, N. Caud, Y. Chen, L. Goldfarb, M.I. Gomis, M. Huang, K. Leitzell, E. Lonnoy, J.B.R. Matthews, T.K. Maycock, T. Waterfield, O. Yelekçi, R. Yu, and B. Zhou (eds.)]. Cambridge University Press, Cambridge, United Kingdom and New York, USA.

<sup>5</sup> *Ibid*, p. 39.

countries of the world. The consensus from the most authoritative studies by the IPCC is that adverse effects of climate change disproportionately affect poor and developing countries of the world with the fewest economic resources to anticipate, withstand, and recover from extreme events<sup>1</sup>. The consensus is well represented in the following report of the UN Special Rapporteur on Climate Change and Poverty<sup>2</sup>, quoted *in extenso* for its aptness;

It is the poorest and most unequal regions of the world that are the most susceptible to experiencing the most severe consequences of climate change; precisely because their means of subsistence are more climate sensitive, they have fewer resources and capabilities to address those consequences, they have limited access to basic services and resources, they usually face greater governance challenges, and they are more likely to experience violent conflicts. These circumstances explain why more than 91% of deaths caused by disasters relating to climate change over the last 50 years have affected the people of the poorest countries. In brief, it is people living in poverty, who have least contributed to emissions and who have the least adaptation capabilities, who will be the hardest hit by climate change.

Africa is one region of the world that climate change presents emergency situation due to the actions or omissions of developed industrialized countries which have adversely affected the climate system and other parts of the environment. Countries and small islands in Africa have faced and are likely to face greater levels of climate change-related harm owing to their geographical circumstances and level of development. Therefore, the extent to which the ICJ AO clarifies States' obligations and characterizes legal consequences under international law with respect to the harmful environmental impacts of climate change would have monumental implications for African countries.

## 2. Climate Crisis in Africa

Studies on vulnerability and adaptation to climate change indicate that Africa is one of the lowest contributors to GHG emissions causing climate change, yet key development sectors across the continent have already experienced widespread losses and damages attributable to anthropogenic factors of climate change, including biodiversity loss, water shortages, reduced food production, loss of lives and reduced economic growth<sup>3</sup>.

The most recent Assessment Report of the IPCC stated with very high confidence that exposure and vulnerability to climate change in Africa are multi-dimensional with socioeconomic, political and environmental factors intersecting<sup>4</sup>. It noted that Africans are disproportionately employed in climate-exposed sectors: 55–62% of the sub-Saharan workforce is employed in agriculture and 95% of cropland is rainfed.

In rural Africa, poor and female-headed households face greater livelihood risks from climate hazards, and in urban areas, growing informal settlements without basic services increase the vulnerability of large populations

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<sup>1</sup> Birkmann, J., E. Liwenga, R. Pandey, et. al., (2022). Poverty, Livelihoods and Sustainable Development, op.cit, p. 1173.

<sup>2</sup> United Nations Special Rapporteur on Climate Change and Poverty, A/HRC/41/39, July 17, 2019, para. 12.

<sup>3</sup> C.H. Trisos, I.O. Adelekan, E. Totin, A. Ayanlade, J. Efitre, A. Gameda, K. Kalaba, C. Lennard, C. Masao, Y. Mgaya, G. Ngaruiya, D. Olago, N.P. Simpson, and S. Zakiideen, (2023). 'Africa', in H.-O. Pörtner, D.C. Roberts, M. Tignor, E.S. Poloczanska, K. Mintenbeck, A. Alegria, M. Craig, S. Langsdorf, S. Löschke, V. Möller, A. Okem, B. Rama (eds.), Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change (Cambridge University Press 2023), pp. 1285–1455, see Chapter 9 generally.

<sup>4</sup> Ibid, 9.10.1.

to climate hazards, especially women, children and the elderly<sup>1</sup>. It is projected that adverse impacts and related loss and damage from climate change will escalate with every increment of global warming, and the risks are higher for global warming of 1.5°C, which is the likely level by 2040, even under a very low GHG emissions scenario<sup>2</sup>.

Between 1.5°C and 2°C global warming, negative impacts are projected to become widespread and severe with reduced food production, reduced economic growth, increased inequality and poverty, biodiversity loss, increased human morbidity and mortality<sup>3</sup>. And the conclusion of the IPCC studies is that global warming of 1.5°C is not considered safe for most nations, communities, ecosystems and sectors in Africa as it poses significant risks to natural and human systems<sup>4</sup>.

Besides the apocalyptic projections for the future, in the present scenario where every increment of global warming will intensify multiple and concurrent hazards in developing countries and small islands States<sup>5</sup>, climate change and its harmful impacts in Africa have become a case of emergency that requires urgent and meaningful attention. Failure to confront the climate emergency in Africa with the urgency of purpose it requires and deserves could be catastrophic for the continent and the world at large, including future generations.

African leaders appear to understand the continent's climate emergency; that the continent is "the most vulnerable to climate change and bearing the brunt of its impacts, despite contributing less than 4% of global GHG emissions, and negligible historical responsibility"<sup>6</sup>. In 2023, the African Union adopted a Declaration on Climate Change and Call to Action, "demanding urgent and concerted action from all nations to lower emissions and reduce the concentration of greenhouse gases in the atmosphere"<sup>7</sup>.

Prior to the Declaration and Call to Action, the African Union had reiterated in a Resolution in 2019 the need for multilateral approach to addressing the impact of climate change through the United Nations Framework Convention on Climate Change (UNFCCC), and reaffirmed Africa's commitment to implement the Kyoto Protocol and the Paris Agreement<sup>8</sup>. This implies that African leaders believe that implementation of these three fundamental climate treaties would help to address current and future impacts of climate change on the continent and in the world.

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<sup>1</sup> Ibid, p. 9.8.1.

<sup>2</sup> Intergovernmental Panel on Climate Change, (2018). 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, Chap. 5, p. 447.

<sup>3</sup> Ibid.

<sup>4</sup> Ibid.

<sup>5</sup> Mycoo, M., M. Wairiu, D. Campbell, et. al., (2022). Small Islands. 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, et. al. (eds.)]. Cambridge University Press, Cambridge, UK and New York, pp. 2045-2048, 2050-2070.

<sup>6</sup> The African Union, (2023). Climate Change and Resilient Development Strategy and Action Plan (2022-2032). Available at: [https://au.int/CC\\_Strategy\\_and\\_Action\\_Plan\\_2022-2032\\_08\\_02\\_23\\_.pdf](https://au.int/CC_Strategy_and_Action_Plan_2022-2032_08_02_23_.pdf). p. 3.

<sup>7</sup> The African Union, (2023). The African Leaders Nairobi Declaration on Climate Change and Call to Action, 2023, para. 5, available at: [Nairobi Declaration 06092023.pdf.docx](https://au.int/Nairobi_Declaration_06092023.pdf) (afdb.org).

<sup>8</sup> The African Union, (2019). Africa's Engagements at the Global Climate Change Conference at COP25/CMP 15 Doc. Assembly/AU/Dec.723(XXXII), para. 8.

In the written submissions to the ICJ on the legal questions presented in the UNGA Resolution 77/276, the African Union argued that “to the extent this crisis is the fruit of a coordination failure, international law has a particular role to play in this matter”, and that international law is “the first line of defence”<sup>1</sup>. The African Union noted that it was “confident” the ICJ AO “will contribute substantially to clarifying the state of international law on this issue”, and that the ICJ would “prove equal to the task of laying out the law, with a view to a positive impact towards a better, more sustainable world”<sup>2</sup>.

These submissions are indicative of the high expectation of the African Union that the ICJ AO would provide international law approach to addressing the climate emergency in Africa. Accordingly, the African Union’s written arguments submitted to the ICJ were that in resolving the legal questions, the ICJ should have regard to “the whole corpus of international law”, which includes the UNFCCC, the Kyoto Protocol, the Paris Agreement, principles of customary international law, multilateral environmental and human rights treaties, and relevant instruments governing aspects of climate change in the African context<sup>3</sup>.

## 2.1 States’ Climate Change Obligations Prior to the ICJ AO

The obligations of States under international law mostly consist in written and signed agreements that create binding legal obligations between States, such as international treaties and conventions. Invariably, international treaties and conventions are the first point of reference because they occupy the first position in the listing hierarchy of sources of international law as identified in Article 38(1) of the Statute of the ICJ. Consequently, States’ obligations under international law with respect to climate change consist in international treaties, conventions, protocols, and resolutions which are legally binding on States that ratify or accede to the instruments.

Foremost of such instruments is the United Nations Charter which has the objective of achieving international co-operation in solving international problems of an economic, social, cultural or humanitarian character<sup>4</sup>. Climate change falls within the States’ obligations to address common global problems under the UN Charter. Following the UN Charter are three international treaties that constitute climate change regime, in the sense that they were purposely made with provisions that impose direct obligations on States relating to climate change: the UNFCCC<sup>5</sup>, the Kyoto Protocol<sup>6</sup>, and the Paris Agreement<sup>7</sup>. These climate change treaties make up the principal legal instruments that spell out States’ obligations toward the problem of climate change.

The three treaties complement each other in that while the UNFCCC is the foundational treaty that establishes the ultimate objective, basic principles, and general obligations of States in respect of climate change, the Kyoto Protocol and the Paris Agreement respectively translate the basic principles and general obligations into a set of

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<sup>1</sup> The African Union, (2024, March 22). Request For Advisory Opinion: Written Statement of the African Union. Available at: <https://www.icj-cij.org/node/204695>. p. 8.

<sup>2</sup> Ibid, p. 12.

<sup>3</sup> Ibid, p. 18.

<sup>4</sup> See Article 1 of the United Nations Charter 1945.

<sup>5</sup> United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107.

<sup>6</sup> Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 11, 1997, 2303 U.N.T.S. 162 (entered into force 16 February 2005).

<sup>7</sup> Paris Agreement, Dec. 12, 2015, T.I.A.S. No. 16-1104 (entered into force 4 November 2016).

more specific interrelated obligations, each of which gives expression to a broad practical approach of States to the problem of climate change<sup>1</sup>. For example, Article 2 of the UNFCCC provides for States' obligation to achieve stabilization of GHG concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.

It provides that such a level should be achieved within a time-frame sufficient to allow ecosystems to adapt naturally to climate change, in order to ensure that food production is not threatened, and to enable economic development to proceed in a sustainable manner. In Article 3 of the UNFCCC, States are under the obligations to take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects, and where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures. In particular, developed countries have the obligations to limit their anthropogenic emissions of GHG and to adopt national policies and take corresponding measures on the mitigation of climate change<sup>2</sup>.

The Kyoto Protocol provides additional support for establishing States' obligation for climate change as it requires reduction of emissions of carbon dioxide and sets legally enforceable emission targets for certain developed countries. The preamble to the Protocol notes that it is in pursuit of the ultimate objective of the UNFCCC, and pursuant to the obligation of developed countries listed in Annex I to limit and reduce GHG emissions in accordance with agreed individual country targets<sup>3</sup>.

The Paris Agreement is the most recent and comprehensive treaty that provides for States' obligations to address the problem of climate change, and its provisions set out obligations relating to mitigation, adaptation, finance, technology development and transfer, transparency of action and support, and capacity-building. According to Article 2 of the Paris Agreement, States have the obligation to strengthen the global response to the threat of climate change by holding the increase in the global average temperature below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels.

States are obligated under the Paris Agreement to work toward the objective of significantly reducing the risks and impacts of climate change, increasing the ability to adapt to the adverse impacts of climate change and fostering climate resilience and low GHG emissions development in a manner that does not threaten food production, including making finance flows consistent with a pathway towards low GHG emissions and climate-resilient development<sup>4</sup>. Like the Kyoto Protocol, the Paris Agreement expressly provides that its temperature goal is aimed at enhancing the implementation of the UNFCCC, including its objective and principles<sup>5</sup>.

Besides the three climate change treaties that form the core of climate change regime, a related international instrument with provisions that constitute legal obligations for States in respect of climate change is the United Nations Convention on the Law of the Sea (UNCLOS)<sup>6</sup>. States parties to the UNCLOS have obligations to prevent, reduce and control pollution of the marine environment in relation to harmful impacts that result or are

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<sup>1</sup> International Court of Justice Advisory Opinion of 23 July 2025, *op.cit.*, para. 120.

<sup>2</sup> See article 4 of the UNFCCC.

<sup>3</sup> See Article 4, paragraph (2)(a) and (b) of the UNFCCC.

<sup>4</sup> See Article 2, paragraph 1 of the Paris Agreement.

<sup>5</sup> *Ibid.*

<sup>6</sup> United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3 (entered into force November 16 1994).

likely to result from climate change due to anthropogenic GHG emissions into the atmosphere, and to protect and preserve the marine environment in relation to the impacts of climate change<sup>1</sup>.

There are international conventions and protocols that specifically provide for States' obligations to reduce emissions of GHG due to the adverse impacts of climate change. Examples are the Vienna Convention for the Protection of the Ozone Layer<sup>2</sup> and the Montreal Protocol on Substances that Deplete the Ozone Layer<sup>3</sup>. International environmental protection conventions such as the Convention on Biological Diversity<sup>4</sup> contains provisions for the protection of natural ecosystems in the forms of climate change mitigation or adaptation measures.

Similarly, the Convention to Combat Desertification Particularly in Africa<sup>5</sup> refers to the UNFCCC and affirms that combating desertification has the potential to assist States in achieving the objectives of the UNFCCC<sup>6</sup>. Others are international human rights treaties, including the Universal Declaration of Human Rights<sup>7</sup>, the International Covenant on Economic, Social and Cultural Rights<sup>8</sup>, and the International Covenant on Civil and Political Rights<sup>9</sup>, to the extent they impose obligations on States to protect the climate system or other parts of the environment.

For instance, adverse impacts of climate change on the health and livelihoods of individuals due to events like sea level rise, drought, desertification and natural disasters, may significantly impair the enjoyment of certain fundamental human rights, such as the rights to life, property, and personal dignity. In addition to international treaties, conventions, and protocols, there are obligations of States under customary international law to prevent significant cross-border environmental harm.

Since the seminal *Trail Smelter Case*<sup>10</sup>, a State is obliged to use all the means at its disposal to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State. The jurisprudence on customary international law indicates that the obligation of States to prevent significant harm to the environment is not confined to instances of direct cross-border harm but applies to the climate system and other parts of the environment<sup>11</sup>. The 'no harm principle' established in the *Trail Smelter Case* is reflected in Principle 21 of the 1972 UN Conference on the Human Environment<sup>12</sup> and

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<sup>1</sup> See articles 192-206 of UNCLOS. See also the International Tribunal for the Law of the Sea Advisory Opinion of 21 May 2024.

<sup>2</sup> Vienna Convention for the Protection of the Ozone Layer, Mar. 22, 1985, 1513 U.N.T.S. 293 (entered into force September 22 1988).

<sup>3</sup> Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, 1522 U.N.T.S. 3 (entered into force Jan. 1, 1989).

<sup>4</sup> Convention on Biological Diversity, June 5, 1992, 1760 U.N.T.S. 79 (entered into force December 29 1993).

<sup>5</sup> United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, June 17, 1994, 1954 U.N.T.S. 3 (entered into force Dec. 26, 1996).

<sup>6</sup> See articles 1, 4, 6, and 8 of the Convention to Combat Desertification Particularly in Africa.

<sup>7</sup> Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 (December 10 1948).

<sup>8</sup> International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force January 3 1976).

<sup>9</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force March 23 1976).

<sup>10</sup> *United States v. Canada (Trail Smelter Arbitration)*, 3 R.I.A.A. 1905 (1941).

<sup>11</sup> See *Chile v. Bolivia*, Judgment, I.C.J. Reports 2022 (II), p. 648; *Nicaragua v. Costa Rica*, Judgment, I.C.J. Reports 2015 (II), p. 711; *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010 (I), p. 56; *Corfu Channel (United Kingdom v. Albania)*, Merits, Judgment, I.C.J. Reports 1949, p. 22.

<sup>12</sup> UN Conference on the Human Environment, Stockholm Declaration on the Human Environment, UN Doc

Principle 2 of the 1992 Rio Earth Summit<sup>1</sup>. Both instruments provide that States have the obligation to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or areas beyond their territorial jurisdiction.

This principle requiring all States to prevent transboundary environmental harm has acquired the status of customary international law, binding all States even in the absence of treaty obligations<sup>2</sup>. Therefore, prior to the ICJ AO international legal obligations of States with respect to climate change have been recognized to exist under international law, in the form of treaties, conventions, and customary international<sup>3</sup>. According to the ICJ, the obligations of States under the climate change regime are without prejudice to the applicability of other sources of obligations, be they universal, regional or bilateral, which may apply to the States parties to the relevant instruments<sup>4</sup>.

States' obligations in respect of climate change do not exist only within the core climate change treaties, but include obligations under all relevant international treaties, conventions, and protocols, and under customary international law. The defining element is that there is States' obligation relating directly or indirectly to the protection of the climate system or other parts of the environment.

However, the major issue which the ICJ AO had to address turned on the question whether only the climate change regime, comprising the UNFCCC, the Kyoto Protocol, and in particular, the Paris Agreement, is applicable under international law. The arguments of most of the industrialized countries such as Canada<sup>5</sup>, the United States of America<sup>6</sup>, and the United Kingdom<sup>7</sup> were that the focus should be exclusively on the climate change regime, because it constitutes *lex specialis* in relation to other relevant treaties, conventions and protocols, including customary international law. In contrast, the African Union and other developing countries with the least GHG emissions but most impacted by climate change, argued that though the climate change treaties are the primary source of State obligations, other related treaties, conventions, and protocols, including customary international law are equally relevant and applicable<sup>8</sup>.

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A/CONF.48/14/Rev.1 (1972).

<sup>1</sup> UN Conference on Environment and Development, Rio Declaration on Environment and Development, UN Doc A/CONF.151/26 (1992).

<sup>2</sup> See the decision of the ICJ in Pulp Mills on the River Uruguay (Argentina v Uruguay) [2010] ICJ Rep 14, para 101; Legality of the Threat and Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I), p. 242, para. 29)

<sup>3</sup> See Kysar, D. A. (2013). Climate Change & the International Court of Justice. Yale Center for Environmental Law & Policy. Yale Law School Public Law Research Paper No. 315; Setzer J and Higham C (2023) Global Trends in Climate Change Litigation: 2023 Snapshot. London: Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science, pp. 5, 17-18.

<sup>4</sup> International Court of Justice Advisory Opinion of 23 July 2025, op.cit, para. 367.

<sup>5</sup> Written Statement of the Government Canada (Request by the United Nations General Assembly for an Advisory Opinion on the Question of the "Obligations of States In Respect of Climate Change"). 20 March. Available at: <https://www.icj-cij.org/case/187/written-proceedings.pdf>.

<sup>6</sup> Written Statement of the United States of America: Request by the United Nations General Assembly for An Advisory Opinion (Obligations of States in Respect of Climate Change). August 15 2024. Available at: <https://www.icj-cij.org/case/187/written-proceedings>. p. 5, para 1.6.

<sup>7</sup> Written State of the United Kingdom of Great Britain and Northern Island. Obligations of States in Respect of Climate Change (Request by the United Nations General Assembly for an Advisory Opinion). 18 March 2024. Available at: <https://www.icj-cij.org/case/187/written-proceedings>. p. 5, para 4.

<sup>8</sup> The African Union, (2024, March 22). Request For Advisory Opinion: Written Statement of the African Union. Available at: <https://www.icj-cij.org/node/204695>. pdf. pp. 8 – 20; Written statement of the Organization of African Caribbean and Pacific States (OACPS). 22 March 2024. Available at: <https://www.icj-cij.org/case/187/written-proceedings.pdf>. Written statement of

Within the *corpus* of international law, the ICJ AO has resolved these legal arguments, and has determined the legal obligations of States in respect of climate change caused by anthropogenic GHG emissions, and the legal consequences arising from those obligations. It is the relevance or usefulness of the ICJ AO to African climate emergency that needs to be examined in light of the high points of the AO on the two questions submitted to the ICJ by the UNGA *via* Resolution 77/276.

### 2.1.1 High Points of the ICJ AO

On the first question of the relevant laws that are applicable to States' obligations in respect of climate change, the ICJ concludes that the three climate change treaties, namely the UNFCCC, the Kyoto Protocol, and the Paris Agreement, only form part of the most directly relevant and applicable law, and do not constitute *lex specialis* to a general exclusion of other rules of international law<sup>1</sup>. Accordingly, the ICJ identifies the UN Charter, the Convention on the Law of the Sea, treaties protecting the Ozone Layer, conventions on Biodiversity and Desertification, including human right treaties and covenants as also relevant and applicable<sup>2</sup>.

The ICJ also finds that the obligation of States to prevent significant environmental harm is a rule of customary international law which implies acting with due diligence and co-operation for the protection of the environment, and the rule applies in the context of climate change<sup>3</sup>. In addition, the principles of sustainable development, common but differentiated responsibilities and respective capabilities, equity, intergenerational equity, and the precautionary principle are relevant for the interpretation of treaties and the determination of rules of customary international law relating to the climate system and other parts of the environment<sup>4</sup>.

The significance of these findings is that the ICJ has expanded the scope of the legal foundation for States' obligations in respect of climate change beyond the three climate treaties, declaring that environmental protection and human right conventions, including rules of customary international law, apply to protecting the climate system. In particular, the applicability of rules of customary international law implies that even countries such as the United States withdrawing from the Paris Agreement remain bound by these legal obligations in respect of climate change. The following are other high points of the ICJ AO on States' obligations under the applicable and relevant laws. According to the ICJ AO<sup>5</sup>:

- The climate treaties and relevant conventions, protocols, and customary international law provide binding obligations for States to ensure the protection of the climate system and other parts of the environment from anthropogenic factors of GHG emissions<sup>6</sup>.
- Customary international law imposes binding obligations on States to take preventive, precautionary, and other appropriate measures to avoid significant harm to the environment and the climate system,

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the Alliance of Small Island States (COSIS). 22 March 2024. Available at: <https://www.icj-cij.org/case/187/written-proceedings.pdf>.

<sup>1</sup> International Court of Justice Advisory Opinion of 23 July 2025, op.cit, para. 115-121; & 162-171.

<sup>2</sup> Para.122-129; & 143.

<sup>3</sup> Para. 131-142.

<sup>4</sup> Para. 146-158.

<sup>5</sup> See generally paras. 113-173 of the International Court of Justice Advisory Opinion of 23 July 2025, op.cit.

<sup>6</sup> Para. 404.

including the enactment of appropriate regulatory framework for private actors within their areas of jurisdiction<sup>1</sup>.

- States have binding obligation to adopt measures toward contributing to the mitigation of GHG emissions and adapting to climate change in line with the best available science which indicates that the risks and projected adverse impacts and related losses and damages from climate change escalate with every increment of global warming<sup>2</sup>.
- Developed countries have the additional binding obligation to help developing countries meet the costs of adaptation and mitigation through co-operation, and the principal forms of co-operation prescribed by the Paris Agreement are financial assistance, technology transfers and capacity-building<sup>3</sup>.
- There is a close link between the well-being of human life and the environmental conditions in which an individual lives, and States have binding obligations to protect the climate system and other parts of the environment to ensure the enjoyment of certain human rights such as the right to life, health, and the rights of women, children and indigenous peoples<sup>4</sup>.
- States have binding obligations to aspire to achieving the temperature goal of limiting global warming to 1.5°C through their Nationally Determined Contributions under the Paris Agreement, and stabilizing GHG concentrations in the atmosphere below a level that would prevent dangerous anthropogenic interference with the climate system<sup>5</sup>.

The ICJ affirms the distinction between “developed country Parties” and “developing country Parties,” which are subject to different obligations under the UNFCCC, with the specific obligations on certain developed countries to provide developing countries financial assistance, technology transfers and capacity-building toward their adaptation and mitigation efforts<sup>6</sup>. The Paris Agreement reflects these specific obligations through the principle of Common but Differentiated Responsibilities and Respective Capabilities (CBDR-RC) based on different national circumstances<sup>7</sup>.

The legal consequences arising from the CBDR-RC and other obligations of States which the ICJ identifies in the AO could manifest in practical meanings for African countries in the context of the climate emergency. While the findings of the ICJ AO on the applicable law on States’ obligations in respect of climate change align substantially with the pre-existing legal position<sup>8</sup>, its conclusions on the legal consequences arising from breach of those obligations are quite telling.

### ***2.1.2 Legal consequences arising from States’ obligations***

On the second question of the legal consequences arising from breach of States’ obligations such as acts and omissions that cause significant harm to the climate system and other parts of the environment due to anthropogenic GHG emissions, the ICJ holds that it is to be understood as referring to the legal consequences

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<sup>1</sup> Para. 271-300.

<sup>2</sup> Para. 230-233; 254-259.

<sup>3</sup> Para. 209-213; 260-267.

<sup>4</sup> Para. 372-386.

<sup>5</sup> Para. 200; 237-245.

<sup>6</sup> Para. 196-199; See also Articles 9,10,11 of the Paris Agreement.

<sup>7</sup> See Article 2(2) of the Paris Agreement.

<sup>8</sup> The African Union, (2024, March 22). Request For Advisory Opinion: Written Statement of the African Union, op.ct.

arising from internationally wrongful acts of States, which are to be ascertained on the basis of customary rules on State responsibility under international law<sup>1</sup>. The ICJ is of the opinion that a breach by a State of any obligations identified under the first question constitutes an internationally wrongful act entailing the responsibility of that State<sup>2</sup>.

The ICJ observes that the most significant primary obligation for States in relation to climate change is the obligation to prevent significant harm to the climate system and other parts of the environment, which applies to all States, including those that are not parties to one or more of the climate change treaties<sup>3</sup>. Under this obligation, as well as under other obligations, a State incurs responsibility if it fails to take all measures which were within its power to prevent the significant environmental harm.

However, under the rules on State responsibility, only an action or omission attributable to a State can give rise to international responsibility. Therefore, the ICJ opines that failure of a State to take appropriate action to protect the climate system from GHG emissions – including through fossil fuel production, fossil fuel consumption, the granting of fossil fuel exploration licences or the provision of fossil fuel subsidies – may constitute an internationally wrongful act which is attributable to that State<sup>4</sup>.

The ICJ opines that while climate change is caused by cumulative GHG emissions, it is scientifically possible to determine each State's total contribution to global emissions, taking into account both historical and current emissions<sup>5</sup>. In the climate change context, the ICJ finds that each injured State may separately invoke the responsibility of every State which has committed an internationally wrongful act resulting in damage to the climate system and other parts of the environment; and where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act<sup>6</sup>.

On the argument as to whether States' obligations identified under the first question result in any special legal consequences for States, and what legal consequences arise from international wrongful acts, the ICJ makes the following conclusions<sup>7</sup>:

- States' obligations to protect the climate system and other parts of the environment from anthropogenic GHG emissions, in particular the obligation to prevent significant transboundary harm under customary international law, are obligations that are *erga omnes partes* in character, or that concern all States, as such responsibility for breaches may be invoked by any State<sup>8</sup>.
- Legal consequences for the commission of an internationally wrongful act of breaching obligations to protect the climate system from anthropogenic GHG emissions depend on the specific breach in question and on the nature of the particular harm, and may include cessation and non-repetition, as well as consequences requiring full reparation, including restitution, compensation and/or satisfaction<sup>9</sup>.

<sup>1</sup> International Court of Justice Advisory Opinion of 23 July 2025, *op.cit.* Para. 405.

<sup>2</sup> Para. 444.

<sup>3</sup> Para. 407-409.

<sup>4</sup> Para. 425-427.

<sup>5</sup> Para. 428-430.

<sup>6</sup> Para. 431.

<sup>7</sup> Para. 439-455.

<sup>8</sup> 439-443.

<sup>9</sup> Para. 444-445.

- Breaches of States' obligations do not extinguish the underlying duty of performance as States have a continuing duty to perform the obligations breached, and the duty of cessation may require States to comply with their obligations, and in appropriate circumstances, a responsible State could be required to provide appropriate guarantees of non-repetition<sup>1</sup>.
- Whether restitution and satisfaction are appropriate forms of reparations are to be determined on a case-by-case basis, and it is possible for satisfaction to take the form of expressions of regret, formal apologies, public acknowledgments, or education of the society about climate change; but full reparations in the form of compensation may be difficult to calculate in climate change context due to the usual degree of uncertainty with respect to the exact extent of the damage caused<sup>2</sup>.

The ICJ opines that in cases where reparation is claimed, it must be shown that the damage for which reparation is claimed has been factually and legally caused by a State, depending on whether a given climatic event can be attributed to anthropogenic climate change, and the extent to which the damage caused by climate change can be attributed to a particular State or group of States<sup>3</sup>. However, the ICJ concludes that the causal link between the wrongful actions or omissions of a State and the harm arising from climate change must be established in each case through an *in concreto* assessment<sup>4</sup> – actual circumstances of the case.

### 3. Implications for African

For the most part, the ICJ AO has received positive reviews since it was published<sup>5</sup>. It has been praised for sending a clear message that climate action is now a legal obligation, not a policy preference, and that this sets a strong legal baseline for rights-based, prevention-focused climate action<sup>6</sup>. In general terms, the ICJ AO expansively interprets the legal framework for States' obligations under international law in respect of climate change, and provides a clear legal standard against which to evaluate climate action.

Briefly and simply put, on the first question the ICJ AO comprehensively clarifies international law on States' obligations in respect of climate change arising from anthropogenic GHG emissions. However, in the specific context of developing countries and small islands in Africa and other regions of the world, the ICJ AO does not sufficiently address the second question on the legal consequences arising from breach of States' obligations. It appears the ICJ was unmindful of the peculiar circumstances which led to the UNGA Resolution seeking the AO, and the specific wording of the second question.

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<sup>1</sup> Para. 446-448.

<sup>2</sup> Para. 449-455.

<sup>3</sup> Para. 433-437.

<sup>4</sup> Para. 438.

<sup>5</sup> See International Institute of Sustainable Development (2026). International Court of Justice Advisory Opinion on the Obligations of States in Respect of Climate Change (Summary Report), Earth Negotiations Bulletin. Available at: <https://enb.iisd.org/international-court-justice-advisory-opinion-climate-change-briefing-note/pdf>; Emma Whitaker and Atieh Khatibi (2026). The International Court of Justice's Advisory Opinion on Climate Change: A New Mandate for Climate Security, TODA Peace Institute, Report No.264. Available at: <https://toda.org/policy-briefs-and-resources/policy-briefs/report>; Lukas Schaugg, Natalie Jones, Jeffrey Qi (2025). Historic International Court of Justice Opinion Confirms States' Climate Obligations, International Institute of Sustainable Development. <https://www.iisd.org/articles/deep-dive/icj-advisory-opinion-climate>.

<sup>6</sup> Emma Whitaker and Atieh Khatibi (2026). The International Court of Justice's Advisory Opinion on Climate Change: A New Mandate for Climate Security, *ibid.* p. 2.

A Core Group of States<sup>1</sup>, mainly developing countries and small islands suffering the adverse impacts of climate change caused by anthropogenic GHG emissions, had petitioned the UNGA in 2022, urging it to request the ICJ AO on, *inter alia*, the legal consequences arising from the obligations of States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment;

“with respect to States, including, in particular, small island developing States, which due to their geographical circumstances and level of development, are injured or specially affected by or are particularly vulnerable to the adverse effects of climate change; and Peoples and individuals of the present and future generations affected by the adverse effects of climate change”<sup>2</sup>.

The ICJ AO should have addressed the above question in more concrete and specific terms, in the particular context it was framed, and for the underlying purpose of the UNGA Resolution 77/276. In the Resolution, the UNGA had noted with profound alarm that GHG emissions continue to rise despite the fact that developing countries and small islands States that are particularly vulnerable to the adverse effects of climate change have significant capacity constraints, and are already experiencing an increase in such effects<sup>3</sup>.

Curiously, the ICJ notes that it was “requested to address legal consequences in a general manner, and that it is not called upon to identify the legal responsibility of any particular State or group of States”<sup>4</sup>. In the view of the ICJ, it was “only called upon, first, to establish the applicable legal framework of State responsibility in respect of States that have breached their obligations to protect the climate system, and, second, to outline in general terms the legal consequences flowing therefrom”<sup>5</sup>. With due respect to the ICJ, this is a misunderstanding or mischaracterization of the second question on legal consequences and States’ responsibility for environmental harm caused by anthropogenic GHG emissions.

The ICJ was requested to identify the legal consequences arising from the obligations of developed countries who, through many decades of GHG emissions, have caused significant harm to the climate system which is adversely impacting developing countries and small island States, including peoples and individuals equally impacted. While the ICJ is correct that it was not called upon to identify the legal responsibility of any particular State, the question demanded that it specify the legal consequences arising from GHG emissions by developed countries (as a group) *vis-à-vis* the adverse impacts of climate change on developing countries and small island States (as a group).

As noted in the contextual background section above, there are three presumptive tripods upon which the question on legal consequences arising from breach of States’ obligations are anchored: 1. Harmful impact of climate change, 2. Attribution to developed countries, and 3. Vulnerable developing countries adversely impacted. Citing authoritative scientific sources, the ICJ finds that the harmful impact of climate change is mainly due to anthropogenic GHG emissions; that developed countries are historically responsible for GHG emissions; and that developing countries and small island States are particularly vulnerable and impacted, even though they have contributed the least to climate change.

<sup>1</sup> The Core Group of States was led by the Republic of Vanuatu, and included African representative countries such as Angola, Morocco, Mozambique, Sierra Leone, and Uganda.

<sup>2</sup> See paragraph 1 of the Preamble to the UNGA Resolution 77/276.

<sup>3</sup> *ibid.*

<sup>4</sup> International Court of Justice Advisory Opinion of 23 July 2025, *op.cit.* Para. 106.

<sup>5</sup> *Ibid.*

The ICJ ignored the underlying objective of climate justice and the specific context of developing countries and small island States as framed in the question and presented in the UNGA Resolution. Instead, the ICJ embarked on a jurisprudential voyage and declares States' obligations in respect of climate change from anthropogenic GHG emissions as obligations *erga omnes partes* in character, meaning that responsibility for breaches of the obligations may be invoked generally by all States, including developed countries.

The ICJ ought to have gone beyond the “general manner”<sup>1</sup> to determine in the specific context of the question, whether developing countries and small island States can invoke the responsibility of the developed countries for breach of their obligations to protect the climate system and other parts of the environment, and the precise remedies that are available in the particular circumstances.

Contrary to its findings on the first question and the scientific evidence upon which those findings are based, the ICJ fails to specify precisely what legal consequences are entailed by the commission of an internationally wrongful act of breaching obligations to protect the climate system from anthropogenic GHG emissions in the specific context of developing and small island countries. Rather, the ICJ makes a general observation that breaches of States' obligations identified under the first question may give rise to the entire panoply of legal consequences and remedies available under the law of State responsibility<sup>2</sup>.

The ICJ identifies the remedy of reparation, which includes restitution, compensation, and satisfaction, for damage caused by an internationally wrongful act such as a breach of the obligation to protect the climate system and other parts of the environment. However, it notes that in the climate change context the appropriate nature and quantum of reparations cannot be assessed in the abstract and depends on the circumstances of a particular case<sup>3</sup>. Ironically, the ICJ was presented with the legal question mainly in the circumstances of the particular case of developing and small island countries, and as demonstrated by scientific evidence and its findings on the first question.

The ICJ undermined the underlying objective and the specific context of the second question as framed in the UNGA Resolution, and as addressed in the written submissions of the African Union, the Organization of African Caribbean and Pacific States, and the Alliance of Small Island States<sup>4</sup>. Consequently, the ICJ ended up engaging in an abstract examination of legal consequences, the law of State responsibility and remedies in a general manner divorced from the particular and realistic context of the significant harm to the climate system caused by historical GHG emissions by developed countries, and the adverse impact of climate change on developing countries and small island States<sup>5</sup>.

Unfortunately for African countries, the overarching implication of the ICJ AO is that it does not provide a clear interpretation of the legal consequences and State responsibility for a breach of obligations in respect of climate change that has been caused by anthropogenic GHG emissions. More so, because the ICJ AO does not address

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<sup>1</sup> See para. 406.

<sup>2</sup> Para. 445.

<sup>3</sup> Para. 450.

<sup>4</sup> The African Union, (2024, March 22). Request For Advisory Opinion: Written Statement of the African Union, op.cit; Written Statement of the Organization of African Caribbean and Pacific States. 22 March 2024. Available at: <https://www.icj-cij.org/case/187/written-proceedings.pdf>. Written statement of the Alliance of Small Island States (COSIS). 22 March 2024. Available at: <https://www.icj-cij.org/case/187/written-proceedings.pdf>.

<sup>5</sup> See para. 7 of the Separate Opinion of Judge Yusuf.

the question of legal consequences in the particular context of developed countries' responsibility for climate change due to anthropogenic GHG emissions and the significant harmful impacts on developing countries and small islands States.

The ICJ fails to discern the concept of climate justice as the underlying objective of the UNGA Resolution 77/276, and as originally instigated by the Core Group of States made up of predominantly developing African and Pacific countries and small island States. In spite of written submissions that argued and called for the remedy of reparations, particularly compensation, in favour of impacted developing countries and small island States<sup>1</sup>, the ICJ AO declares that the remedy of reparations in all its forms may not be available in the climate change context.

### **3.1 Making the ICJ AO Relevant to Climate Emergency in Africa**

It is arguable that the ICJ adopted a diplomatic approach to rendering its AO on the legal questions presented to it in the UNGA Resolution 77/276, in the sense that it tries to strike a balance on the scale of climate justice between developed and developing countries – ensuring a win-win situation. Against the arguments of developed countries in respect of the first question on States obligations, the ICJ opines in favour of developing countries through an expansive and prescriptive interpretations of the applicable law. It is on this score that the ICJ AO is widely and positively reviewed.

On the second question of legal consequences for breach of those obligations, the ICJ avoids attaching responsibility and stating appropriate remedies by providing an abstract analysis in general terms, instead of the particular circumstances and specific context of developing countries and small island States. So far, this part of the ICJ AO is given a short-shrift and unexamined by legal commentators. In light of the diplomatic approach, the AO is more of the ICJ 's own contributions to climate action than the exercise of its judicial powers to invoke the authority of international law as required by the UNGA Resolution 77/276, albeit in an advisory capacity.

According to the ICJ, through this AO it “participates in the activities of the United Nations and the international community represented in that body, with the hope that its conclusions will allow the law to inform and guide social and political action to address the ongoing climate crisis”<sup>2</sup>. Therefore, in the context of the climate emergency in Africa, the ICJ AO mainly offers a basis for social and political strategies to nudge developed countries to comply with their obligations to protect the climate system as required under international law, without the probability of legally enforceable consequences and remedies for failure to fully comply with those obligations.

The ICJ AO therefore provides a basis for initiating strategic action plans and programs at multinational and regional levels to facilitate and progressively ensure that developed countries comply with their climate obligations towards developing countries in Africa. For instance, obligations of developed countries to comply with the principle of CBDR-RC, and to provide developing countries with financial assistance, technology

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<sup>1</sup> See the African Union, (2024, March 22). Request For Advisory Opinion: Written Statement of the African Union, op.cit, paras. 269-290.

<sup>2</sup> Para. 456.

transfers, and capacity-building toward their adaptation and mitigation efforts may be achieved more through multilateral negotiations than international litigations.

Multilateral entities such as the Organization of Petroleum Exporting Countries (OPEC) occupying such an influential position may be able to drive action plan for non-legal compliance of developed countries with their climate obligations that address the adverse impacts of climate change on African countries. In the written submission to the ICJ, the OPEC supported the position of developed countries by asserting that only the three climate change treaties are applicable to States' obligations, and that the treaties exclude liability for loss and damage as legal consequences for a breach of those obligations<sup>1</sup>. The OPEC therefore advocated for the implementation of mechanisms of cooperation that are of a facilitative, non-adversarial, and non-punitive nature, including financial and technical support for impacted developing countries and small islands States<sup>2</sup>.

Aside the OPEC, African countries may need to form inter-regional coalitions with Asian, Caribbean and Pacific States to put pressure on developed countries to do more in compliance with their obligations to provide financial assistance, transfer technology, and build adaptation and mitigation capacity of adversely impacted developing countries and small islands States. Such pressure may be intensified to create reputational risks for developed countries and major oil and gas corporations if environmental, climate justice, and human rights organizations create public awareness around the ICJ AO.

### 3.1.1 Conclusion

Without a doubt, on the first question in the UNGA Resolution 77/276 the ICJ AO clarifies the obligations of States under international law in respect of climate change arising from anthropogenic GHG emissions. However, it mainly echoes the existing position of international law, including climate treaties, conventions, and principles of customary international law. Similarly, on the second question relating to legal consequences, the ICJ AO merely echoes the principles of State responsibility and remedies under international law without applying those principles to the specific context of developing countries and small island States.

Consequently, the ICJ AO does not offer a possible legal route to compel developed countries to comply with their obligations under international law in respect of climate change due to anthropogenic GHG emissions. Therefore, addressing the climate emergency and its harmful effects in Africa may require African countries to devise ingenious social and political action plans to leverage the ICJ AO. Otherwise, the implications of the ICJ AO for climate emergency in Africa may remain more or less echoes of international law in respect of States' obligations and legal consequences for climate change resulting from anthropogenic GHG emissions.

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<sup>1</sup> See Chapter IV and V, Paras. 95-128 of the Written Statement of the Organization of the Petroleum Exporting Countries, 19 March 2024.

<sup>2</sup> *ibid*