MEMORIAL FROM THE AFRICAN UNION

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TABLE OF CONTENTS

LIST OF ABBREVIATIONS

African Network for Animal Welfare	ANAW
African Union	AU
Common Market for Eastern and Southern Africa	COMESA
Convention on Biological Diversity	CBD
East African Community	EAC
East African Treaty	EAT
International Covenant on Economic, Social and Cultural Rights	ICESCR
International Tribunal on the Law of the Sea	ITLOS
Multilateral Environmental Agreements	MEAs
Organization for Economic Cooperation and Development	OECD
Socio-Economic Rights and Accountability Project	SERAP
Southern African Development Community	SADC
United Nations Framework Convention on Climate Change	UNFCCC

LEGAL INTRUNEMTS

African Charter on Human and Peoples Rights

Convention on Biological Diversity

ICJ Statute

Kyoto Protocol

Paris Agreement

United Nations Framework Convention on Climate Change

CASE LAW

African Case Law

Serap v Nigeria

ANAW v Attorney General of Tanzania

International Case Law

Trail Smelter Case

Certain Phosphate Lands in Nauru case

Gabčíkovo-Nagymaros case

Aerial Herbicide Spraying case

Pulp Mills case

The Southern Bluefin Tuna Case

I. STATEMENT OF JURISDICTION

In Accordance with Article 66, The International Court of Justice invited all interested State parties entitled to appear before the Court to submit memorials through regional intergovernmental organizations as an efficient way to represent the multiplicity of State interests in the proceedings. Therefore, The African Union submits this memorial in answer to the question presented.

II. THE PROBLEM PRESENTED: FORESTS IMPACT ON CLIMATE CHANGE IN AFRICA

Importance of forests in Africa

Forests have been of great importance to African communities since time immemorial. In many traditional African beliefs, trees, plants, animals, and other organisms which make up the forest were infused with spirits. In Africa, the forest is not simply the trees. It is inclusive of all that inhibits and lives in the forest. To many African peoples, trees and forests had special significance. A number of peoples set aside sacred groves for sacrifices, offerings or prayers. Some communities feared the spirits of the forest and of the water and from several parts of Africa come accounts of trees which refused to be moved, even by modern machinery designed for the task. These trees are believed to have magical powers.[1]

In traditional times, African people lived and dwelled in the midst of the forest. The forest like mother earth was seen as a source of life. African people respected and revered the plants in the forest. The same forest may have different areas that were perceived with different imaginations. In some forests there were places that were accessible to all while beyond a certain place it was accessible only to the chief priest or medicine man. Some forests were considered to be evil forests for they were inhabited by malevolent forces and people who died a mysterious or untimely death were thrown into them. Evil forests as well as forests that carried the charm of life or life elixir where special sacred religious rituals were performed were generally preserved and were not to be destroyed. Not far away from African villages and towns were sacred groves inhabited by sacred trees and abode of ancestral guardian spirits. These groves were centres of biodiversity. Sacred groves as other forms of forest were inhabited by various animals, plants species and organisms. [2] Thus to say that forests played an important part of traditional African societies would be an understatement.

Today, forests play a huge role in Africa. Over two-thirds of Africa's 600 million people rely on forests for survival. It is estimated that at least 70% of all households in Africa rely on wood

[1] Ikeke M, 'The Forest in African Traditional Thought and Practice: An Ecophilosophical Discourse' *Open Journal of Philosophy*, 2013,3.

[2] Ikeke M, 'The Forest in African Traditional Thought and Practice: An Ecophilosophical Discourse' *Open Journal of Philosophy*, 2013,3.

as their primary source of energy.[3] For example, Mangrove forests have a huge value for coastal communities that derive their livelihoods from them. Although commonly defined as 'poor' in official statistics, communities living in healthy mangrove areas have what many urban people lack: diverse and abundant food. Additionally, mangroves provide many of their needs, usually complemented with other productive activities such as farming.[4] Mangrove wood is a multi-purpose resource for fish stakes, fish traps, boat building, paddles, yam stakes, fencing, carvings, building timber, fuel and many other uses. The importance of mangrove to local communities becomes even clearer when they are degraded or disappear. Much more, they are of importance to fish and invertebrate nurseries, erosion control, and water quality control.[5]

Forests also play an important role in the hydrological cycle. The role of rainforests in the hydrological cycle is to add water to the atmosphere through the process of transpiration. This moisture contributes to the formation of rain clouds. Thus, when forests are cut down, less moisture goes into the atmosphere and rainfall declines, sometimes leading to drought. This has a devastating impact on farmers who rely on rainfall for their crops as this leads to reduced harvests and a loss of income.[6] Additionally, this impacts developing countries in Africa, where subsistence farming is the main source of income for many communities and where they primarily rely on farming for food.[7]

[3] Cropper A, 'Why we need Africa's Forests' *The International Forestry Review*, 2006, 1-3.

[4] Cropper A, 'Why we need Africa's Forests' *The International Forestry Review*, 2006, 1-3.

[5] Cropper A, 'Why we need Africa's Forests' *The International Forestry Review*, 2006, 1-3.

[6] Roberts M, '*The Role of Forests in the Hydrological Cycle'* Encyclopaedia of Life Support Systems, 2010, 8.

[7] Roberts M, '*The Role of Forests in the Hydrological Cycle'* Encyclopaedia of Life Support Systems, 2010, 10.

Impact of Climate change on Africa today

One of the biggest causes of climate change in Africa is the growing amount of deforestation within the continent. As African countries continue to grow and develop, forest cover reduces as the need for land for industries and houses continues to rise.[8] As a result, deforestation has had harmful effects on the African continent. Additionally, as mentioned above, forests play a role in in the hydrological cycle. Therefore, deforestation reduces the amount of rainfall in the continent leading to drought. Drought leads to loss of income for farmers and a reduction in food supply for the developing countries.[9]

Increased deforestation has led to a substantial reduction of trees mitigating greenhouse gas emissions produced by human activities. Deforestation not only removes vegetation that is important for removing carbon dioxide from the air, but the act of clearing the forests also produces greenhouse gas emissions. Increase in temperatures is also another consequence of climate change that is being felt around the continent today. [10]

Climate change is also affecting ecosystems within Africa. It has been reported that small variations in climate cause wide fluctuations in the thermal dynamics of freshwaters. Specifics include elevated water temperatures reported in surface waters of Lakes Kariba, Kivu, Tanganyika, Victoria, and Malawi. Moderate warming may be contributing to reduced lake water inflows and therefore nutrients, which subsequently destabilizes plankton dynamics and thereby adversely affects food resources for higher trophic levels of mainly planktivorous fish.[11]

Additionally, ocean acidification due to increased carbon dioxide in the atmosphere is projected to cause a severe impairment of reef accretion by organisms such as corals and coralline algae. The further combined effects of global warming and ocean acidification have been demonstrated to lower both coral reef productivity and resilience. In Africa, fisheries, a key

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[8] Cropper A, 'Why we need Africa's Forests' *The International Forestry Review*, 2006, 1-3.

[9] Roberts M, '*The Role of Forests in the Hydrological Cycle'* Encyclopaedia of Life Support Systems, 2010, 10.

[10] Cropper A, 'Why we need Africa's Forests' *The International Forestry Review*, 2006, 1-3.

[11] Thiaw A, 'Is the changing climate changing African ecosystems?' https://esajournals.onlinelibrary.wiley.com/doi/pdf/10.1890/EHS14-0025.1 on 22 April 2020.

source of livelihood, mainly depend on coral reefs. These ecosystems will be affected by climate change through ocean acidification and a rise in sea surface temperatures.[12]

Other risks posed by climate change, which will affect Africans today and in the future include, degradation of coral reefs, reduced crop productivity, adverse effects on livestock, vector- and water-borne diseases, undernutrition and migration. Increased temperatures would have negative impacts on Africa's food security, Moreover, there is a high risk of stress on water resources, degradation of coral reefs and extreme weather events such as floods. [13]

Therefore, as the effects of climate change pose a real threat to Africa and the need to combat it is of great importance to the African Union as a continental union. Specifically, as a continental union, it has a responsibility to ensure the adherence to the African Charter on Human and Peoples rights. In the charter, the right to a satisfactory environment suitable for peoples' development is guaranteed.[14] This right is threatened, as has been highlighted above, by the impact of climate change.

[12] Thiaw A, 'Is the changing climate changing African ecosystems?' https://esajournals.onlinelibrary.wiley.com/doi/pdf/10.1890/EHS14-0025.1 on 22 April 2020.

[13] Cropper A, 'Why we need Africa's Forests' *The International Forestry Review*, 2006, 1-3.

[14] Article 24, *African Charter on Human and Peoples Rights.*

III. IN CONTEXT: THE AFRICAN UNION

The African Union (AU) is a continental union composed of fifty-five countries on the African continent, extending slightly into Asia through the Sinai Peninsula in Egypt. It was established on 26th May 2001 in Addis Ababa, Ethiopia with the aim of replacing its predecessor, the Organisation of African Unity (OAU), established on the 25th of May 1963.

The Constitutive Act of the African Union identifies, among the AU's main objectives:

- To encourage international cooperation, taking due account of the Charter of the United Nations and the Universal Declaration of Human Rights.[15]
- To achieve greater unity and solidarity between the African countries and Africans.[16]
- To promote peace, security, and stability on the continent.[17]
- To establish the necessary conditions which enable the continent to play its rightful role in the global economy and in international negotiations. [18]
- To promote sustainable development at the economic, social and cultural levels as well as the integration of African economies. [19]
- To promote co-operation in all fields of human activity to raise the living standards of African peoples.[20]
- To coordinate and harmonize the policies between the existing and future Regional Economic Communities for the gradual attainment of the objectives of the Union.[21]

It is in keeping with these objectives, the AU tenders before the International Court of Justice, these submissions as regards the question presented as a representative of its member states. The question before the court is: 'what are states' obligations under international law to protect

[15] The Constitutive Act of the African Union, (2000), article 3(e).

[16] Constitutive Act, article 3(a).

[17] Constitutive Act, article 3(f).

[18] Constitutive Act, article 3(i).

[19] Constitutive Act, article 3(j).

[20] Constitutive Act, article 3(k).

[21] Constitutive Act, article 3(k).

and conserve forests under their national jurisdiction, as a response to climate change and for the benefit of present and future generations?' This memorial will seek to guide the court by discussing the obligations of states under international law. Then, this memorial will highlight how regional bodies have successfully struck a balance between development and the right to a healthy environment which the AU believes is the crux of the matter before the court.

IV. OBLIGATIONS OF STATES UNDER INTERNATIONAL LAW

Article 38(1) of the ICJ Statute requires the Court to apply, international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; international custom, as evidence of a general practice accepted as law; the general principles of law recognized by civilized nations; judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.[22]

With regard to the hierarchy of laws as provided for in in the ICJ statute, this part of the submission before the court will discuss the treaties/conventions, specifically multilateral environmental agreements, which states have committed to and are relevant to the question before the court. This section will also discuss customary international law as well as environmental principles. These laws and principles have been selected as, in the opinion of the AU, they help advance the importance of the protection of the environment, which includes forests, and responding to climate change.

Multilateral Environmental Agreements (MEAs)

The main instruments available under international law for countries to collaborate on a broad range of global environmental challenges are international conventions and treaties on environment and natural resources also known as Multilateral Environmental Agreements (MEAs).[23]

MEAs are agreements between states which may take the form of "soft-law", setting out non legally-binding principles which parties are obligated to consider when taking actions to address a particular environmental issue, or "hard-law" which specify legally-binding actions to be undertaken toward an environmental objective. Amongst the global environmental issues that MEAs are designed to respond to include: loss of biological diversity, adverse impacts of Climate Change, depletion of the ozone layer, hazardous waste, organic pollutants, marine

[22] UNEP, 'Role of MEAs in Achieving The SDGs', 2016, 10.

[23] UNEP, 'Role of MEAs in Achieving The SDGs', 2016, 10.

pollution, trade in endangered species, destruction of wetlands, etc.[24] The following are MEAs that the AU finds are relevant to the court in response to the question at hand.

United Nations Framework Convention on Climate Change (UNFCCC)

The UNFCCC entered into force on 21 March 1994 and 197 countries that have ratified the Convention who are called Parties to the Convention.[25] The ultimate objective of the Convention is to stabilize greenhouse gas concentrations 'at a level that would prevent dangerous anthropogenic (human induced) interference with the climate system.' It states that 'such a level should be achieved within a time-frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened, and to enable economic development to proceed in a sustainable manner.'[26]

This convention puts the responsibility on developed countries to lead the way in the stabilization of greenhouse emissions. The idea is that, as they are the source of most past and current greenhouse gas emissions, industrialized countries are expected to do the most to cut emissions on home ground.[27] They are called Annex I countries and belong to the Organization for Economic Cooperation and Development (OECD). They include 12 countries with 'economies in transition' from Central and Eastern Europe.[28]

Industrialized nations also agree under the Convention to support climate change activities in developing countries by providing financial support for action on climate change above and beyond any financial assistance they already provide to these countries. A system of grants and loans has been set up through the Convention and is managed by the Global Environment Facility. Industrialized countries also agree to share technology with less-advanced nations. The Convention acknowledges the vulnerability of all countries to the effects of climate change and calls for special efforts to ease the consequences, especially in developing countries which lack the resources to do so on their own.[29]

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[24] UNEP, 'Role of MEAs in Achieving The SDGs', 2016, 10.

[25] Preamble, *United Nations Framework Convention on Climate Change*, 1994.

[26] Article 2, *United Nations Framework Convention on Climate Change*, 1994.

[27] Article 4, *United Nations Framework Convention on Climate Change*, 1994.

[28] Annex I, *United Nations Framework Convention on Climate Change*, 1994.

[29] Article 4, *United Nations Framework Convention on Climate Change*, 1994.

Industrialized countries (Annex I) have to report regularly on their climate change policies and measures. They must also submit an annual inventory of their greenhouse gas emissions, including data for their base year (1990) and all the years since. Developing countries (Non-Annex I Parties) report in more general terms on their actions both to address climate change and to adapt to its impacts - but less regularly than Annex I Parties do, and their reporting is contingent on their getting funding for the preparation of the reports, particularly in the case of the Least Developed Countries.[30]

The Convention accepts that the share of greenhouse gas emissions produced by developing nations will continue to grow. Thus, in the interests of fulfilling its ultimate goal, it seeks to help developing countries limit emissions in ways that will not hinder their economic progress.[31]

Kyoto Protocol

The Kyoto Protocol was adopted on 11 December 1997. It entered into force on 16 February 2005 and currently, there are 192 Parties to the Kyoto Protocol.[32]

The Kyoto Protocol operationalizes the UNFCC by committing industrialized countries to limit and reduce greenhouse gases emissions in accordance with agreed individual targets. The Convention itself only asks those countries to adopt policies and measures on mitigation and to report periodically. The Kyoto Protocol is based on the principles and provisions of the Convention and follows its annex-based structure.[33]

It only binds developed countries, and places a heavier burden on them under the principle of 'common but differentiated responsibility and respective capabilities', because it recognizes that they are largely responsible for the current high levels of GHG emissions in the atmosphere.[34]

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[30] Article 4, *United Nations Framework Convention on Climate Change*, 1994.

[31] Article 4, *United Nations Framework Convention on Climate Change*, 1994.

[32] UNFCC, 'What is the Kyoto Protocol?', https://unfccc.int/kyoto_protocol on 24 April 2020.

[33] Article 2, *Kyoto Protocol*, 1997.

[34] Article 2, *Kyoto Protocol*, 1997.

The Kyoto Protocol also established a rigorous monitoring, review and verification system, as well as a compliance system to ensure transparency and hold Parties to account. Under the Protocol, countries' actual emissions have to be monitored and precise records have to be kept of the trades carried out. Additionally, reporting is done by Parties by submitting annual emission inventories and national reports under the Protocol at regular intervals.[35]

Paris Agreement

In Paris, on 12 December 2015, Parties to the UNFCCC reached a landmark agreement to combat climate change and to accelerate and intensify the actions and investments needed for a sustainable low carbon future. The Paris Agreement builds upon the UNFCC and brings all nations into a common cause to undertake ambitious efforts to combat climate change and adapt to its effects, with enhanced support to assist developing countries to do so.

The Paris Agreement's central aim is to strengthen the global response to the threat of climate change by keeping a global temperature rise this century well below 2 degrees Celsius above pre-industrial levels and to pursue efforts to limit the temperature increase even further to 1.5 degrees Celsius.[36] The Paris Agreement requires all Parties to put forward their best efforts through 'nationally determined contributions' (NDCs) and to strengthen these efforts in the years ahead. This includes requirements that all Parties report regularly on their emissions and on their implementation efforts. There will also be a global stocktake every 5 years to assess the collective progress towards achieving the purpose of the agreement and to inform further individual actions by Parties.[37]

The UNFCC, Kyoto Protocol and Paris agreement are relevant before the court as they highlight the commitment the international community has towards fighting climate change. The AU submits that many of the developing countries that will feel the devastating effects of climate change are in Africa and many of these countries lack the necessary resources in order to combat climate change. Thus, the AU asks the court to take note of the commitments made by developed counties under the above MEAs.

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[35] Article 6, *Kyoto Protocol*, 1997.

[36] Article 2, *Paris Agreement*, 2016.

[37] Article 4, *Paris Agreement*, 2016.

State's responsibility under Customary International law

Customary international law results from a general and consistent practice of states that they follow from a sense of legal obligation. Along with general principles of law and treaties, custom is considered by the International Court of Justice, jurists, the United Nations, and its member states to be among the primary sources of international law.[38] The African Union thus submits the following Customary International Laws for the courts consideration.

The prohibition of transboundary environmental harm

The core of this responsibility, often referred to as the no-harm rule or the prohibition of transboundary environmental harm, is that states may not conduct or permit activities within their territories, or in common spaces, without regard to other states or for the protection of the global environment. In the literature it is argued that four conditions must necessarily be satisfied for harm to qualify as transboundary harm, and thus to be covered by the obligation.[39]

Firstly, the harm must result from human activity. Not all harm caused by environmental factors that may affect more than one country is caused by human activities such as natural disasters like floods, earthquakes and hurricanes, for example, may also cause great damage across wide areas. In the literature it is held that damaging effects caused by environmental factors do not fall within the scope of the obligation unless they have some reasonably proximate causal relation to human conduct.[40]

Secondly, the harm must be a physical consequence of the human activity. Harm caused to natural resources by industrial and agricultural activities are thus included by the obligation, while for example economic consequences caused by increase in commodity prices due to environmental interferences are excluded.[41]

Thirdly, there must be a physical effect crossing national boundaries.[42] It is this boundary-crossing element which initiates application of international law.[43] The condition is not limited

[38] University of Oslo, 'The Prohibition of Transboundary Environmental Harm', 2014, 51.

[39] University of Oslo, 'The Prohibition of Transboundary Environmental Harm', 2014, 51.

[40] University of Oslo, 'The Prohibition of Transboundary Environmental Harm', 2014, 51.

[41] University of Oslo, 'The Prohibition of Transboundary Environmental Harm', 2014, 51.

[42] University of Oslo, 'The Prohibition of Transboundary Environmental Harm', 2014, 51.

[43] University of Oslo, 'The Prohibition of Transboundary Environmental Harm', 2014, 51.

to neighbouring states, but may also include transboundary effects crossing several national boundaries, thereby causing damage to multiple states. [44]

Transboundary effects usually cross boundaries through a media, such as water, soil or air, such as when an upstream state of an international river carries out activities, such as when pollutants from industrial activities conducted in one state forms acid rain which damages forests and lakes in other states. Under current international law, the no-harm rule is expanded to also include harm to areas beyond national control. The rule thus protects not only the territories under state control, but also the 'global commons', i.e. the high seas, the outer space, the atmosphere and the Polar Regions.[45]

The fourth condition is that the harm in question must exceed a certain level of severity that calls for legal action. States cannot engage in or permit activities on their territory without regard to the impact this may have on areas outside their jurisdiction. At the same time, a state cannot demand that other states abstain from all activities that may have transboundary impacts on the environment. Accordingly, not all boundary-crossing harm is prohibited under the no-harm rule as the harm must exceed a certain degree of severity.[46]

Early case law on transboundary harm suggests a relatively high threshold of severity. In *Trail Smelter*, the arbitral tribunal only considered activities which caused injury of 'serious consequences'.[47] This was similar in the *Lac Lanoux* case which set the threshold at 'serious injury'.[48] The claims put forward by the parties in more recent jurisprudence do however indicate a lower threshold of harm. In the *Certain Phosphate Lands in Nauru case*, the Government of Nauru requested the Court to adjudge and declare that Australia were 'under an obligation not to bring about changes in the condition of the territory which will cause irreparable damage to, or substantially prejudice, the existing or contingent legal interest of another State'.[49]

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[44] University of Oslo, 'The Prohibition of Transboundary Environmental Harm', 2014, 51.

[45] University of Oslo, 'The Prohibition of Transboundary Environmental Harm', 2014, 51.

[46] University of Oslo, 'The Prohibition of Transboundary Environmental Harm', 2014, 51.

[47] *Trail Smelter dispute,* Arbitrational Tribunal (1938).

[48] *Certain Phosphate Lands in Nauru case,* The International Court of Justice (1989).

[49] University of Oslo, 'The Prohibition of Transboundary Environmental Harm', 2014, 51.

Further, in the *Gabčíkovo-Nagymaros case*, Hungary claimed that the 'obligation enunciated in Stockholm Principle 21 not to cause substantial damage to the territory of another State, or to areas beyond national jurisdiction, had over time become a rule of international law'.[50] In Ecuador's application in the *Aerial Herbicide Spraying case*, it was argued that fumigations dispersed by Colombia along or near the boundary line have been carried across the border and have caused significant deleterious effects in Ecuador.[51] In the *Pulp Mills case*, the Court explicitly stated that the obligation applied to 'significant damage to the environment'.[52]

Standard of care

In relation to the prohibition of transboundary environmental harm, the question of standard of care arises. Two general approaches have emerged on this issue. The first approach is that states are generally obliged to achieve actual prevention of harm. The other approach is that states are under an obligation to act with due care in implementing measures of prevention. Another way to view this issue is to ask whether the no-harm rule is one of result, or conduct.[53]

According to the first approach, states are obliged to achieve actual prevention. States are thus generally responsible for damage caused by their behaviour, regardless of negligence or fault. It is thus one of strict liability, and a causal link between the activity and the occurring damage is generally enough to trigger the no-harm rule, as long as the required thresh-old is exceeded. The approach thus places considerable emphasis on what level of harm that must be tolerated under the obligation, and on causation.[54]

The other approach is that the substantive obligation of harm prevention is one to act with due diligence in implementing measures of prevention. According to this approach, the concept of due diligence is evoked as a test to evaluate the conduct required by states, and the no-harm rule is thus breached if the required standard of care is not complied with. This approach also

[50] *Gabčíkovo-Nagymaros case,* The International Court of Justice (1995).

[51] *Aerial Herbicide Spraying case,* The International Court of Justice (2005).

[52] *Pulp Mills case,* The International Court of Justice (2005).

[53] University of Oslo, 'The Prohibition of Transboundary Environmental Harm', 2014, 58.

[54] University of Oslo, 'The Prohibition of Transboundary Environmental Harm', 2014, 58.

implies that if the state meets the required standard of care, and harm still occurs, the state is free from responsibility.[55]

International jurisprudence supports the approach that the no-harm rule imposes an obligation to act with due diligence. A due diligence test was for example applied in the *Corfu Channel case*. When addressing the question of whether Albania was responsible for explosions in Albanian waters and for the damage that resulted from them, the ICJ clearly evaluated Albania's conduct. The Court found that Albania did not notify the existence of the mine field or warn the warships of the danger they were approaching, and that nothing was done by Albania to prevent the disaster. It concluded that 'these grave omissions involve the international responsibility of Albania' and accordingly recognized that the question, whether there is a breach of an obligation not to inflict damage on other states, is a question of whether a state has acted with a certain standard of care, and that it is a state's failure to take reasonable measures to prevent harm which trigger the obligation.[56]

That the no-harm rule imposes an obligation to act with due diligence is also con-firmed in more recent jurisprudence from the Court. Of particular interest is *Pulp Mills*, where the Court in its judgment expressly stated that the obligation to respect the environment of other states was an obligation to act with due diligence.[57]

Principle of sovereignty

The obligation not to cause harm to the environment of other states, or to the areas beyond national jurisdiction cannot be understood separately from the notion of state sovereignty. State sovereignty is a founding principle and a prerequisite for the system of international law. The core of the principle is that all states are sovereign and not subject to any other determination but their own, and that all states have equal rights and duties, regardless of differences in social, economic, political or other forms of status.[58]

Sovereignty entails that states have jurisdiction, *prima facie* exclusive, over a territory and a permanent population living there. The exclusive jurisdiction that states have over their

[55] University of Oslo, 'The Prohibition of Transboundary Environmental Harm', 2014, 58.

[56] *Corfu Channel case,* The International Court of Justice (1949).

[57] University of Oslo, 'The Prohibition of Transboundary Environmental Harm', 2014, 58.

[58] University of Oslo, 'The Prohibition of Transboundary Environmental Harm', 2014, 16.

territory is sometimes referred to as *territorial sovereignty*, and is connected to a defined geographical area, which consists of land territory with subsoil, internal waters and the territorial waters, including the air space over it as well as to its bed and subsoil, and the air space above its territory, up to outer space. States also have limited sovereign rights and jurisdiction over the contiguous zone, in the exclusive economic zone and over the resources on the continental shelf.[59]

States have permanent sovereignty over natural resources. This means that states are considered to have a superior and inherent right to use and control their national resources. Except for the explicit limitation that the right is to be used to benefit citizens of the state, the principle is absolute.[60] Strong environmental concerns thus indicate that there should be a positive duty upon states to protect their own environment which includes forests.

However, even though states have permanent sovereignty over natural resources, the African Union recognises the expanding body of treaty regimes that establish limitations on the territorial sovereignty of states that have acceded to them, by imposing obligations to act in accordance with certain standards of conduct, requiring cooperation and consultation between states in environmental matters.

[59] University of Oslo, 'The Prohibition of Transboundary Environmental Harm', 2014, 16.

[60] University of Oslo, 'The Prohibition of Transboundary Environmental Harm', 2014, 16.

State responsibility to adhere to environmental principles

Principle of cooperation

In 1972, the United Nations convened the Stockholm Conference which was aimed at stimulating and providing guidelines for action by national government and international organizations facing environmental issues. [61] During this conference, the Stockholm Principles were forged and these now form the bedrock of environmental law.

One of the principles of the declaration is cooperation.[62] Similarly, the Rio Declaration also provides that States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.[63]

The principle of cooperation is also tied into the principle of common but differentiated responsibility. This element is a way to take account of differing circumstances, particularly in each state's contribution to the creation of environmental problems and in its ability to prevent, reduce and control them. States whose societies have in the past imposed, or currently impose, a disproportionate pressure on the global environment and which command relatively high levels of technological and financial resources bear a proportionally higher degree of responsibility in the international pursuit of sustainable development. In practical terms, the concept of common but differentiated responsibilities is translated into the explicit recognition that different standards, delayed compliance timetables or less stringent commitments may be appropriate for different countries, to encourage universal participation and equity.[64]

Precautionary Principle

The Rio Declaration provides that in order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are

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[61] Preamble, *Stockholm Declaration*, 1972.

[62] Principle 24, *Stockholm Declaration*, 1972.

[63] Principle 7, *Rio Declaration*, 1992.

[64] United Nations Information Portal On Multilateral Environmental Agreements, *Principles and concepts of international environmental law*, 7.

threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.[65] This provision was one of the first global codifications of the precautionary approach. Other formulations also adopted in 1992 at UNCED appear in the ninth preamble paragraph of the 1992 Convention on Biological Diversity (CBD) and in article 3(3) of the 1992 Climate Change Convention. The 1992 CBD states that where there is a threat of significant reduction or loss of biological diversity, lack of full scientific uncertainty should not be used as a reason for postponing measures to avoid or minimize such a threat.[66] Article 3(3) of the 1992 Climate Change Convention appears to take a more action-oriented approach than Principle 15, stating that the parties should take precautionary measures to anticipate, prevent or minimize the cause of climate change and mitigate its adverse effects.[67]

In *the Southern Bluefin Tuna Case,*[68] the International Tribunal on the Law of the Sea (ITLOS) could not conclusively assess the scientific evidence regarding the provisional measures sought by New Zealand and indeed, the country requested the measures on the basis of the precautionary principle, pending a final settlement of the case. ITLOS found that in the face of scientific uncertainty regarding the measures, action should be taken as a measure of urgency to avert further deterioration of the tuna stock. In its decision- making, the tribunal said that in its view, the Parties should in the circumstances act with prudence and caution to ensure that effective conservation measures are taken to prevent serious harm to the stock of southern Bluefin tuna.[69]

Principle of Prevention

Experience and scientific expertise demonstrate that prevention of environmental harm should be the 'Golden Rule' for the environment, for both ecological and economic reasons. It is frequently impossible to remedy environmental injury: the extinction of a species of fauna or flora, erosion, loss of human life and the dumping of persistent pollutants into the sea, for

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[65] Principle 15, *Rio Declaration on Environment and Development*, 1992.

[66] Preamble, UN *Convention on Biological Diversity,* 1992.

[67] United Nations Information Portal On Multilateral Environmental Agreements, *Principles and concepts of international environmental law,* 12.

[68] *The Southern Bluefin Tuna Case,* International Tribunal on the Law of the Sea (1999).

[69] United Nations Information Portal On Multilateral Environmental Agreements, *Principles and concepts of international environmental law,* 12.

example, create irreversible situations. Even when harm is remediable, the costs of rehabilitation are often prohibitive. An obligation of prevention also emerges from the international responsibility not to cause significant damage to the environment extra-territorially, but the preventive approach seeks to avoid harm irrespective of whether or not there is transboundary impact or international responsibility.[70]

Principle 17 of the Rio Declaration, Agenda 21, principle 8(h) of the 1992 Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of all Types of Forests (Forests Principles), and article 14(1)(a) and (b) of the 1992 CBD treat both the national and international aspects of the issue. The concept is also contained in article 206 of UNCLOS.[71]

The AU submits the above customary laws and principles for the courts consideration. In the view of the AU, these laws and principles highlight the importance of environmental conservation which not only benefits the present generation but that of future generations. Additionally, they highlight the duty that each state has internationally to maintain a healthy environment by combating climate change. They also highlight the right to a healthy environment as enshrined in Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) as well as Article 24 of the African Charter. Therefore, they are of importance to the Court.

[70] United Nations Information Portal On Multilateral Environmental Agreements, *Principles and concepts of international environmental law,* 14.

[71] United Nations Information Portal On Multilateral Environmental Agreements, *Principles and concepts of international environmental law,* 12.

V. STEPS TAKEN WITHIN AFRICA TO PROTECT AND CONSERVE FORESTS AND COMBAT CLIMATE CHANGE FOR PRESENT AND FUTURE GENERATIONS

Contribution of regional bodies

Numerous regional bodies within Africa have taken measures to fight climate change within their regions. One such body is Southern African Development Community (SADC). SADC is a political and economic institution that provides a framework for regional integration in the region. SADC has a membership of 15 Member States, namely; Angola, Botswana, Democratic Republic of Congo (DRC), Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, United Republic of Tanzania, Zambia and Zimbabwe. Its goal is to further socio-economic cooperation and integration as well as political and security cooperation among its southern African countries.[72]

SADC has enacted policies aimed at climate change adaptation, and also participating in efforts to turn back the effects of rising global temperatures and reducing their potential harm to the region. Support programme on reducing emissions from deforestation and forest degradation (REDD) 2012-2015 provides background information on climate change and REDD, a framework to improve the capacities of Member States to design national REDD programmes and to cooperate on REDD issues that are strategic and of common and regional interest. REDD is the development of systems to measure, report and verify (MRV) changes in forest cover and related carbon emissions, so called MRV Systems. Although not addressed by the Project, these systems can include monitoring of Sustainable Forest Management (SFM), Conservation of Forest Carbon Stocks, Carbon Stock Enhancement and Safeguards. The project supports the implementation of the Protocol on Forestry and the achievement of sustainable forest management in the region.[73]

[72] https://www.sadc.int/documents-publications/show/SADC%20Policy%20Paper%20Climate%20Change%20EN On 23 Feb 2020.

[73] https://www.sadc.int/documents-publications/show/SADC%20Policy%20Paper%20Climate%20Change%20EN On 23 Feb 2020.

Additionally, SADC has a policy paper on climate change. The paper provides a summary of the observed and expected climate change in SADC countries. The observed impacts of global warming and climate change on sectors and the challenges for climate change adaptation and mitigation are discussed to provide a background to the growing need of the SADC region to develop policy strategies in response to climate change. The paper also highlights the deforestation in the SADC region as a growing concern and one of the priority areas for regional action.[74]

Similarly, other regional bodies such as Common Market for Eastern and Southern Africa (COMESA) and East African Community (EAC) have followed SADCs example. These 3 regional bodies bounded together and formed The Programme on Climate Change Adaptation and Mitigation in the COMESA- EAC-SADC region. This is a programme will contribute to reversing trends in deforestation and adverse land use practices, applying adaptation strategies for food security, the protection and sustainable management of water resources and biodiversity, all of which warrant serious examination and investment. One of the main objectives of this programme is to support member states to access adaptation funds and other climate change financing sources and mechanisms through national investment frameworks for climate adaptation in agriculture, forestry and other land uses. The programme's key target group are smallholder famers, who comprise the largest population group in the region, and key elements to the programme include scaling-up and mainstreaming climate-smart agriculture and sustainable land management practices as well as forest conservation. [75]

Balancing development and the right to a healthy environment

Under the African Charter, African states are required to ensure that all peoples shall have the right to a general satisfactory environment favourable to their development.[76] To this end, the member states of the AU came together to formulate a strategy to combat the growing risk of climate change. The Vision of the African strategy is to provide the AU as a whole with a reliable source of strategic guidance to enable them effectively address climate change challenges. The strategy also proposes to carry out other interventions to address some specific

[74] https://www.sadc.int/documents-publications/show/SADC%20Policy%20Paper%20Climate%20Change%20EN On 23 Feb 2020.

[75] Programme On Climate Change Adaptation and Mitigation in The Eastern and Southern Africa (COMESA-EAC-SADC) Region, 10.

[76] Article 24, *African Charter on Human and Peoples Rights.*

priority areas including adaptation and risk management, Nationally Appropriate Mitigation Action and as well as some specific cross-cutting issues.[77]

The African Strategy also noted that the climate change agenda as generally framed by powerful international players who, incidentally, have been responsible for the onset of the ongoing climate crisis, is guided by a worldview whose underpinnings tend to condition Africa's prospect to evolve dynamic programmatic possibilities. Thus, it was noted that not a sector of any economy whether agriculture, forestry, water, health, energy, infrastructure, and so on, will be spared the damaging ramifications of climate change. Therefore, since governments the world over are vested with the power and responsibility to ensure development of their respective states, it is only natural to expect them take the lead in confronting the climate challenge.[78]

Thus, this strategy sought to find a balance between the right to a healthy environment while ensuring that African countries continue to develop. The main objective of the proposed development was to ensure that it was sustainable and that it minimised environmental degradation. While this strategy was being developed, African courts decided on cases where the question of development at the expense of the environment were decided. Below are two landmark cases.

Landmark cases in Africa balancing the development with the right to a healthy environment

SERAP v Nigeria

The Applicants in this case were the Socio-Economic Rights and Accountability Project (SERAP), a non-governmental organization who focus on damage from oil spills and other human rights violations caused by oil operations conducted on land and offshore in the Niger Delta region. For decades the Niger Delta region has suffered from oil spills which destroy the area and deny the people living there the basic necessities of life such as adequate access to clean water, food and a healthy environment in which to live.[79]

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[77] African Union, *African Strategy on Climate Change,*2014, 18.

[78] African Union, *African Strategy on Climate Change,*2014, 18.

[79]*SERAP v. Federal Republic of Nigeria*, Court of Justice for the Economic Community of West African States (2012).

The Applicants alleged that the industrial operations of the Shell Petroleum Development Company (SPDC) were responsible for much of the oil spillage in the Niger Delta. They alleged that these spillages led to a violation of people in the Niger Delta's right to health and an adequate standard of living and argued that the economic and social development of the people of the Niger Delta had been badly affected, as Nigeria had failed to enforce laws and regulations to protect the environment. In particular, the Applicants alleged violations of articles 1, 5, 9, 14, 17, 21, 24 of the African Charter on Human and Peoples' Rights (ACHPR), Articles 1, 2 and 6 of the International Covenant on Economic Social and Cultural Rights (ICESCR), Article 12-2 (b) of the International Covenant on Civil Political Rights (ICCPR) and Article 15 of the Universal Declaration of Human Rights (UDHR).[80]

In its consideration of the case, one of the main questions that the ECOWAS Court had to answer was whether Nigeria had violated the right to a 'satisfactory' environment provided for under Article 24 of the ACHPR. [81]

To determine the state responsibility of Nigeria, the ECOWAS Court made the link between Article 24 and Article 1 of the ACHPR, which provides that 'The member states of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them'. The Court declared that Article 24 'requires every state to take every measure to maintain the quality of the environment…such as it may satisfy the human beings who live there, and enhance their sustainable development'. The Court then reasoned that the state obligation under Article 24 of the ACHPR is both 'an obligation of attitude and an obligation of result'.[82]

The Court went on to find that the Nigerian government had failed to protect the Niger Delta and its people from oil operations. It found that Nigeria had not taken measures to prevent environmental damage and interestingly failed to hold the oil companies responsible for environmental degradations. The ECOWAS Court therefore ordered Nigeria to 'take all

[80] *SERAP v. Federal Republic of Nigeria*, Court of Justice for the Economic Community of West African States (2012).

[81] *SERAP v. Federal Republic of Nigeria*, Court of Justice for the Economic Community of West African States (2012).

[82] *SERAP v. Federal Republic of Nigeria*, Court of Justice for the Economic Community of West African States (2012).

effective measures to ensure restoration of the environment of the Niger Delta by oil spills from Shell and other companies and to take all effective measures to prevent the occurrence of damage to the environment'. The ECOWAS Court took a broad view of environmental protection and referred in its judgement to the definition provided by the International Court of justice (ICJ) who expressed in the *Legality of the threat or use of nuclear arms advisory opinion* that the environment 'is not an abstraction but represents the living space, the quality of life and the very health of human being, including generations unborn'. [83]

The ECOWAS Court subsequently determined that the 'environment is essential to every human being and the quality of human life depends on the quality of the environment'. The ECOWAS Court finally declared that Nigeria failed in its duty to maintain a satisfactory environment favourable to the development of the Niger Delta region and also failed to enact effective laws and establish effective institutions to regulate the activities of companies. The court also held that Nigeria had failed to enforce environmental standards, thereby violating the rights of the people in the region.[84] With this decision, the ECOWAS Court recognized the right to a healthy environment as provided for by the ACHPR.

ANAW v. The Attorney General of Tanzania

The central dispute in the ANAW case concerned the decision of the Tanzanian government to build a road across the Serengeti National Park. In this case, the EACJ sought to enforce the environmental obligations states have agreed to under the East African Treaty (EAT).[85]

The Applicants in this case were the African Network for Animal Welfare (ANAW), a non-profit environmental conservation organization based in Kenya. In 2010, Tanzania released plans to build a 53 kilometre bitumen road across the Serengeti National Park for use by the general public. ANAW claimed that the construction of the road would have a negative impact on animal behaviour and the quality of life of the citizens living in the vicinity. ANAW sought, inter alia, a declaration that the construction of the road across the Serengeti would be unlawful and in violation of several provisions of the EAT. They also sought a permanent injunction,

[83] *SERAP v. Federal Republic of Nigeria*, Court of Justice for the Economic Community of West African States (2012).

[84] *SERAP v. Federal Republic of Nigeria*, Court of Justice for the Economic Community of West African States (2012).

[85] *ANAW v. The Attorney General of Tanzania*, East African Court of Justice (2014).

restraining Tanzania from maintaining any road or highway across any part of the Serengeti National Park. The Applicants argued that Tanzania had violated its obligations in respect of the Serengeti, which had been declared a World Heritage Property of "Outstanding value" according to United Nations Educational, Scientific and Cultural Organization (UNESCO).[86]

The EACJ went on to analyse what it considered the key issue which was whether the proposed action infringed the provisions of the EAT itself. In this regard, the EACJ held that the proposal to construct a road across the Serengeti National Park was unlawful and infringed articles 5 (3) (c), 8 (1) (c), 111 (2) and 114 of the EAT which require partner states to conserve, protect and co-operate in the management of natural resources and the environment. According to the EACJ 'there is no doubt that if implemented the road project initially would violate the Treaty'. The EACJ was convinced by the negative consequences on the environment of the proposed action and therefore ordered an injunction restraining Tanzania from operationalizing the proposal.[87]

Tanzania appealed the decision of the First Instance Court to the Court of Appeal however, the Court of Appeal upheld the decision, holding that partner states must respect their environmental obligations and re-affirming that the EACJ had the power to grant permanent injunctions against sovereign partner States.[88]

VI. CONCLUSION

In Summary, the AU asks the court to consider the International law highlighted in this submission. The AU also asks the court to recognise that in order to secure a healthy environment for current and future generations, the threat of climate change must be addressed. However, a balance must be struck between the development of economies, especially of developing countries, such as those in Africa, and the right to a healthy environment.

[86] *ANAW v. The Attorney General of Tanzania*, East African Court of Justice (2014).

[87] *ANAW v. The Attorney General of Tanzania*, East African Court of Justice (2014).

[88] *ANAW v. The Attorney General of Tanzania*, East African Court of Justice (2014).

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