

**International Court of Justice**

***Obligations of States in respect of Climate Change***

**(Request for an Advisory Opinion)**

***Written Statement of the Portuguese Republic  
pursuant to Article 66, paragraph 3, of the Statute of the Court***

***March 2024***

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## I. Introduction

1. At its sixty-fourth plenary meeting, held on 29 March 2023, the United Nations General Assembly (UNGA) adopted by consensus Resolution 77/276, entitled “Request for an advisory opinion of the International Court of Justice (hereafter, “the Court”) on the obligations of States in respect of climate change”.
2. In the said resolution, the UNGA decided, in accordance with Article 96 of the Charter of the United Nations (henceforth, “the Charter”), to request the Court to render an advisory opinion pursuant to Article 65 of the Statute of the Court (henceforward, “the Statute”), on two questions:

*“Having particular regard to the Charter of the United Nations, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the United Nations Framework Convention on Climate Change, the Paris Agreement, the United Nations Convention on the Law of the Sea, the duty of due diligence, the rights recognized in the Universal Declaration of Human Rights, the principle of prevention of significant harm to the environment and the duty to protect and preserve the marine environment,*

*(a) What are 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 greenhouse gases for States and for present and future generations?*

*(b) What are the legal consequences under these 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:*

*(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?”.*

3. The Portuguese Republic co-sponsored Resolution 77/276, as did the European Union, of which Portugal is a member, and other European Union Member States. Portugal was also part of the core group that, together with Vanuatu, introduced and supported the negotiation of the said resolution, in view of the importance the Portuguese Republic has attached from the beginning to these advisory proceedings.
4. The Secretary-General of the United Nations transmitted to the Court certified true copies of the English and French texts of Resolution 77/276 by letter dated 12 April 2023.
5. In the Order of 20 April 2023, the President of the Court decided that "*the United Nations and its Member States are considered likely to be able to furnish information on the questions submitted to the Court for an advisory opinion*" and, in accordance with Article 66, paragraph 2, of the Statute, fixed 20 October 2023 as the time-limit within which written statements on the questions may be presented to the Court, and 22 January 2024 as the time-limit within which States and organizations having presented written statements may submit written comments on the written statements made by other States or organizations, in accordance with Article 66, paragraph 4, of the Statute.
6. The President of the Court, by an Order dated 4 August 2023, extended to 22 January 2024 the time-limit within which written statements on the questions put to the Court may be submitted in accordance with Article 66, paragraph 2, of its Statute, and to 22 April 2024 the time-limit within which States and organizations having presented written statements to the Court may submit written comments on the other written statements, in accordance with Article 66, paragraph 4, of the Statute.
7. By an Order dated 15 December 2023, the President of the Court extended to 22 March 2024 the time-limit within which written statements on the questions put to the Court may be submitted in accordance with Article 66, paragraph 2, of its Statute, and to 24 June 2024 the time-limit within which States and organizations having presented written statements to the Court may submit written comments on the other written statements, in accordance with Article 66, paragraph 4, of the Statute.

8. The Portuguese Republic is a Member State to the United Nations, having been admitted on 14 December 1955, and therefore wishes to avail itself of the possibility to submit the present written statement in these advisory proceedings.
9. This written statement will be structured as follows: Section II will shortly address the fact that the Portuguese Republic is especially vulnerable to the adverse effects of climate change.
10. Section III will briefly assert that the Court has jurisdiction for these advisory proceedings and that there is no reason for the Court not to exercise it.
11. Section IV will address 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 greenhouse gases for States and for present and future generations (Question A), highlighting obligations under International Climate Change Law and International Environmental Law, under the Law of the Sea, and under International Human Rights Law.
12. In Section V, the Portuguese Republic will clarify 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 (Question B).
13. Finally, Section VI will provide brief concluding observations drawn from the points made in the previous sections.

## **II . The special vulnerability of Portugal to climate change**

14. According to the Intergovernmental Panel for Climate Change (IPCC), recent emissions records are close to the scenario of an average temperature increase of 2°C, without meeting the Paris Agreement target. In this scenario, average temperature rises could vary between 2°C and 3°C in the territory of the Portuguese Republic.

15. The Portuguese Republic is among the European States with the greatest potential for vulnerability to the impacts of climate change. Most recent scientific studies point to southern Europe as one of the areas potentially most affected by climate change.
16. The IPCC states that the main impacts and vulnerabilities of the Portuguese Republic to climate change involve sea level rise, coastal erosion, an increase in the frequency and intensity of forest and rural fires, an increase in the frequency and intensity of periods of drought and water scarcity, an increase in susceptibility to desertification, and an increase in the frequency and intensity of extreme precipitation events,<sup>1</sup> among others.<sup>2</sup>
17. The coastline of the Portuguese Republic is particularly vulnerable to coastal erosion and coastal gales with very significant and serious effects. Sea level rise susceptibility plays a very important role for coastal flooding risk assessment and adaptation measures planning as the Portuguese coastline hosts about 75% of the population, major political decision-making centres, commercial and industrial hubs, and employment opportunities. The main economic activities in these areas are maritime transport, port activities, tourism, leisure activities, boating, fishing, aquaculture, salt production, mineral and energy activities. These activities contribute to about 85% of the national Gross Domestic Product (GDP) and, as such, are highly strategic activities for the Portuguese Republic.<sup>3</sup>
18. Rising temperatures and prolonged periods of drought are likely to be responsible for an increase in the number of rural fires. The risk associated with them has increased dramatically, imposing huge social and economic costs on the Portuguese Republic. 2017 was a significant year, recording the largest area burnt since 1995 and becoming the most tragic year ever, with more than 100 human lives lost.

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<sup>1</sup> *Programa de Ação para a Adaptação às Alterações Climáticas*, Council of Ministers Resolution 130/2019, 2 August 2019.

<sup>2</sup> On the effects on the main marine resources of Portugal, cf. Bueno-Pardo, J., Nobre, D., Monteiro, J.N. et al., *Climate change vulnerability assessment of the main marine commercial fish and invertebrates of Portugal*. *Sci Rep* 11, 2958 (2021).

<sup>3</sup> Cf. Rocha, C.; Antunes, C.; Catita, C., *Coastal Vulnerability Assessment Due to Sea Level Rise: The Case Study of the Atlantic Coast of Mainland Portugal*. *Water* 2020, 12, 360.

19. The new temperature and precipitation regimes associated with climate change are bringing an increase in the number of heatwaves, their duration and intensity; an intensification in the number and intensity of extreme, unpredictable, intense and localised meteorological phenomena such as torrential rain, hailstorms, cyclones and tornadoes, among others. In addition to the tendency for heatwaves to become more intense and frequent, or spatially extensive, a change in their seasonal distribution is also predicted. Other notable consequences of changing temperature and rainfall patterns are the spread of new diseases and new public health challenges, affecting the population as well as animals and plants.
20. Also, part of the Portuguese territory is already threatened by desertification, with soil degradation implying the reduction or loss of biological and economic productivity as a result of the influence of various factors, including climatic variations and human activities.
21. Climate change will also affect the Portuguese Autonomous Region of the Azores (a Macaronesian archipelago), where sea level rise can put at risk 57.6% of the population of the island of São Miguel.<sup>4</sup> Such phenomenon will also impact the Portuguese Autonomous Region of Madeira (another Macaronesian archipelago), where it can create a significant risk for food security<sup>5</sup> and it is esteemed that a sea level rise of 35cm by the end of the century will increase the vulnerability to flooding in several municipalities.<sup>6</sup>
22. Fully aware of its significant exposure to the adverse effects of climate change, like many other vulnerable States, the Portuguese Republic wishes therefore to share, in this written statement, interpretative elements regarding the two questions on which the Court was requested to provide an advisory opinion.

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<sup>4</sup> Cf. Marta, Aguiar., Margarida, Santos., Ana, Oliveira., Luísa, Magalhães., Fernando, Pereira, *Impact of Sea-Level Rise in the Azores Islands. Prospective Analysis Based on Current Projections*, 2020.

<sup>5</sup> Cf. Pinheiro de Carvalho, M.Â.A.; Ragonezi, C.; Oliveira, M.C.O.; Reis, F.; Macedo, F.L.; de Freitas, J.G.R.; Nóbrega, H.; Ganança, J.F.T. *Anticipating the Climate Change Impacts on Madeira's Agriculture: The Characterization and Monitoring of a Vine Agrosystem*. *Agronomy* 2022, 12, 2201.

<sup>6</sup> Cf. Gomes, A., Avclar, D., Duarte Santos, F., Costa, H. e Garrett, P., *Estratégia de Adaptação às Alterações Climáticas da Região Autónoma da Madeira*. Secretaria Regional do Ambiente e Recursos Naturais. 2015, p. 89.

### III. Jurisdiction of the Court to give the requested advisory opinion

23. In accordance with Article 65, paragraph 1, of the Statute, "*The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request.*".
24. Paragraph 2 of the Article 65, of the Statute states that "*Questions upon which the advisory opinion of the Court is asked shall be laid before the Court by means of a written request containing an exact statement of the question upon which an opinion is required, and accompanied by all documents likely to throw light upon the question.*".
25. Recalling the facts underscored in Section I (Introduction), these advisory proceedings relate to a request by a competent organ of the United Nations, as the UNGA, according to Article 96, paragraph 1, of the Charter, "*(...) may request the International Court of Justice to give an advisory opinion on any legal question.*".
26. In relation to the requirement that the advisory opinion requested must be on a "*legal question*", the Portuguese Republic stresses that both questions brought to the attention of the Court in Resolution 77/276 are clearly "*legal*" within the meaning of the Statute and the Charter and can be answered by reference to international law.
27. It must also be stressed that the Court has repeatedly<sup>7</sup> found that the fact that a question also has political aspects does not deprive it of its legal character. The long-standing jurisprudence the Court on this issue has recognised that many questions which arise in international life have political motives, elements, contexts, circumstances, and/or implications, and that such fact alone is insufficient to deprive the Court of jurisdiction.

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<sup>7</sup> Cf. *Judgments of the Administrative Tribunal of the International Labour Organization upon complaints made against the UNESCO*, I. C. J. Reports 1973, p. 172, §. 14; *Western Sahara*, Advisory Opinion, I.C.J. Reports 1975, p. 18, § 15; *Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, p. 73, § 16-17; *Kosovo*, Advisory Opinion, I.C.J. Reports 2010, p. 15, §27.



28. What is relevant is that the question is framed in terms of law and raises problems of international law which are by their very nature susceptible of a reply based on law<sup>8</sup> – as is the case of the questions submitted to the Court through Resolution 77/276.
29. The Portuguese Republic therefore concludes that the present request for an advisory opinion has been made in accordance with the Statute and with the Charter, and that both questions submitted to the Court are legal in character.
30. The Portuguese Republic recalls that the Court has in the past refocused or reformulated<sup>9</sup> the question(s) put to it, as well as clarified<sup>10</sup> said question(s) before giving its opinion<sup>11</sup>. In the event that the Court concludes that the questions submitted to it require refocusing or reformulating, it could do so, instead of finding that any lack of clarity, or a vague or broad character of the questions, deprive the Court of jurisdiction or that the request is not admissible.
31. Lastly, the Portuguese Republic emphasises that the Court has long acknowledged that “(...) *the reply of the Court, itself an 'organ of the United Nations', represents its participation in the activities of the Organization, and, in principle, should not be refused*”,<sup>12</sup> therefore “(...) *only compelling reasons*’ should lead it to refuse to give a requested advisory opinion.<sup>13</sup>
32. On the occasion of the adoption of Resolution 77/276 at the UNGA, the Portuguese Republic noted that time is running out for the international community to act for

<sup>8</sup> Cf. *Western Sahara*, Advisory Opinion, I.C.J. Reports 1975, p. 18, § 15.

<sup>9</sup> Cf. *Interpretation of the Greco-Turkish Agreement of 1 December 1926* Advisory Opinion, 1928, Permanent Court of International Justice, Series B, No. 16; *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, I.C.J. Reports 1980, p. 89, § 35.

<sup>10</sup> Cf. *Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal*, Advisory Opinion, I.C.J. Reports 1982, p. 348, § 46.

<sup>11</sup> Cf. *Kosovo*, Advisory Opinion, I.C.J. Reports 2010, p. 24, § 50.

<sup>12</sup> Cf. *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (First Phase)*, I.C. J. Reports 1950, p. 72; *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion, I.C.J. Reports 1999 (I), pp. 78-79, § 29; *Construction of a Wall*, Advisory Opinion, I.C.J. Reports 2004 (I), p. 156, § 44.

<sup>13</sup> Cf. *Judgments of the Administrative Tribunal of the International Labour Organization upon complaints made against the UNESCO*, Advisory Opinion, I.C. J. Reports 1956, p. 86; *Certain Expenses of the United Nations*, Advisory Opinion, I. C. J. Reports 1962, p. 155; *Difference Relating to Immunity from Legal Process of a Special Rapporteur*, Advisory Opinion, I. C.J. Reports 1999 (I), pp. 78-79, § 29; *Construction of a Wall*, Advisory Opinion, I.C.J. Reports 2004 (I), p. 156, § 44.

securing a liveable future, and that this was the time for giving the Court an opportunity for clarifying international law.

33. The Court – in reaffirming and clarifying existing international law on the obligations of States in relation to protecting the climate and environment for present and future generations, as well as on the legal consequences of the States causing significant harm to the climate system and other parts of the environment – has now a first and critical chance to participate in the activities of the United Nations relating to a phenomenon that severely impacts the sovereignty and survival of States and the full enjoyment of human rights of their populations.
34. Notably, the Court can give an important contribution concerning several paramount subjects and topics of international law in the context of climate change – *e.g.* treaty interpretation, customary international law, State responsibility and liability, international human rights law, the duty of cooperation – and thus greatly assist the UNGA in its mission.
35. The great legal weight and moral authority of an advisory opinion of the Court on these matters will contribute in a decisive manner to clarifying and progressively developing international law, promoting compliance with it, preventing disputes between States, and encouraging States to tackle the climate change emergency with ambitious measures.
36. Indeed, the importance of the future findings by the Court in these advisory proceedings is also confirmed by the fact that so many States, like the Portuguese Republic, and several international organisations, are taking part in advisory proceedings before the Court for the very first time.
37. In closing, the Portuguese Republic must also stress that the fact that cases relating to climate change litigation and other advisory opinions are pending before regional human rights courts – namely the European Court of Human Rights<sup>14</sup> and the Inter-

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<sup>14</sup> The European Court of Human Rights currently has three cases pending before its Grand Chamber: the *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, the *Carême v. France* and the *Duarte Agostinho and Others v. Portugal and Others* cases. Hearings were held on 29 March 2023 in the *Verein*

American Court of Human Rights,<sup>15</sup> and the International Tribunal for the Law of the Sea (hereinafter referred to as “ITLOS”)<sup>16</sup> – does not impair nor diminish the jurisdiction of the Court. On the contrary, these other proceedings can be useful for the Court to analyse and take into account the legal argumentation in such judgments and advisory opinions as a matter of judicial comity and for the purposes of avoiding fragmentation.

38. Hence, the Portuguese Republic respectfully asserts that it cannot find any compelling reason why the Court should, in the exercise of its discretion, decline to answer this request.

#### **IV. Obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for present and future generations (Question A)**

*«(a) What are 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 greenhouse gases for States and for present and future generations?»*

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*Klimaseniorinnen Schweiz and Others and the Carême cases*, and on 27 September 2023 in the *Duarte Agostinho and Others* case. Even though the European Convention on Human Rights does not enshrine a right to a healthy environment *per se*, in these cases the European Court is being called to develop its case-law in environmental and climate change matters on account of the fact that the exercise of certain Convention rights may be undermined by the existence of harm to the environment and exposure to environmental risks and climate change. Since the European Court of Human Rights has not ruled yet on issues of climate-change action, these are highly anticipated decisions that will be rendered soon.

<sup>15</sup> A request for an advisory opinion on the Climate Emergency and Human Rights was submitted to the Inter-American Court of Human Rights by the Republic of Colombia and the Republic of Chile in January 2023. The Inter-American Court of Human Rights has already delivered an advisory opinion on the relationship between the environment and human rights, in 2017, at the request of the Republic of Colombia (OC-23/17). In requesting a new advisory opinion, the Republic of Colombia and the Republic of Chile are seeking further clarification on “*the grounds for, and the scope of, the human rights affected by the climate emergency, and also the State obligations to address this, individually and collectively, addressing its causes and consequences urgently and taking into account considerations of equity, justice, prudence and sustainability*” (unofficial translation of the petition for the advisory opinion filed September 1, 2023). The advisory opinion might be issued before the end of 2024.

<sup>16</sup> Cf. *Case No. 31, Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law* (Request for Advisory Opinion submitted to ITLOS). This advisory opinion might be issued in the spring 2024.

39. In providing its observations on Question A, the Portuguese Republic will focus its comments on pertinent obligations that are binding on it under International Climate Change Law and International Environmental Law, the Law of the Sea and International Human Rights Law. It will do so while considering the sources of law quoted in the Request.

**i) Obligations under International Climate Change Law and International Environmental Law**

40. The Portuguese Republic underlines that human activities, primarily through greenhouse gasses (hereinafter referred to as “GHG”) emissions, have caused global warming, and that the occurrence and severity of extreme events in the climate system over the last decades have increased, primarily due to human-induced climate change.

41. Important international legally binding instruments on climate change have been concluded over the past decades, of which the Portuguese Republic highlights the United Nations Framework Convention on Climate Change (hereinafter referred to as “UNFCCC”)<sup>17</sup> and the Paris Agreement.<sup>18</sup> The importance of these multilateral treaties derives, *inter alia*, from their vast number of States Parties: 198 and 195 State Parties, respectively.

42. The Portuguese Republic is a Party both to the UNFCCC and the Paris Agreement.

43. In its Preamble, the UNFCCC recognises climate change and its adverse effects as a common concern of humankind, acknowledges that human activities – especially those of developed countries – have been contributing to this worrying trend, and concludes that it is necessary to address this issue in order to protect current and future generations.<sup>19</sup> For that end, this multilateral treaty provides the general framework for addressing climate change, with an ultimate objective of stabilising

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<sup>17</sup> United Nations Framework Convention on Climate Change (New York, May 9, 1992), 1771 UNTS 107.

<sup>18</sup> Paris Agreement (Paris, December 12, 2015), 3156 UNTS 79.

<sup>19</sup> See Recitals Nos. 1, 2 and 3 of the Preamble to the UNFCCC.

GHG concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.<sup>20</sup>

44. It is recognised in the UNFCCC that success in tackling the challenge of climate change depends on international cooperation and on an effective and appropriate participation of the entire international community.<sup>21</sup> The UNFCCC further admits that the responsibility for climate change is not evenly distributed, with the contribution of developed and developing countries to global GHG emissions varying extensively.<sup>22</sup> Consequently, international cooperation to address climate change must be based on a mechanism of differentiated responsibility that also reflects the varying capabilities and economic and social conditions of nations.<sup>23</sup>
45. The Parties to UNFCCC – particularly developed countries – should take precautionary action: taking material steps to anticipate, prevent or minimise the causes of climate change and its adverse impacts.<sup>24</sup> In implementing this obligation, the Parties to UNFCCC should adopt policies and measures to deal with climate change should be cost-effective so as to ensure global benefits at the lowest possible cost, and should take into account different socio-economic contexts, be comprehensive, cover all relevant sources, sinks and reservoirs of GHG and adaptation, and comprise all economic sectors.<sup>25</sup>
46. The UNFCCC distinguishes between two groups of Parties: it creates several general obligations for all Parties (while considering the principles of equity and of common but differentiated responsibilities, and also the specific national and regional development priorities, objectives and circumstances of each Party),<sup>26</sup> and a number of specific obligations only for developed country Parties and other Parties named in Annex I.<sup>27</sup>

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<sup>20</sup> See Article 2 of the UNFCCC.

<sup>21</sup> See Recital No. 6 of the Preamble to the UNFCCC.

<sup>22</sup> See Recital No. 3 of the Preamble to the UNFCCC, as well as Article 3(1),(2), and (4), and Article 4 of the UNFCCC.

<sup>23</sup> See Recital No. 10 of the Preamble to the UNFCCC.

<sup>24</sup> See Article 3(3) and Article 4(1) and (2) of the UNFCCC.

<sup>25</sup> See Article 3(4) and (5) of the UNFCCC.

<sup>26</sup> See Article 4(1) of the UNFCCC.

<sup>27</sup> See Article 4(2) of the UNFCCC.

47. The Portuguese Republic underscores that the obligations stated in Article 4 of the UNFCCC are obligations of conduct, as they do not establish tangible and/or measurable individual targets in terms of concentrations of GHG emissions. Hence, Parties are not bound to achieve specific results, but rather to develop and implement national policies aimed at (i) protecting the climate system in the interest of present and future generations, and (ii) at taking precautionary action to anticipate and prevent the causes of climate change.
48. The Kyoto Protocol to the UNFCCC<sup>28</sup> was intended to fill the gap on tangible or measurable targets, by introducing caps on GHG emissions of certain States and committing others to reduction targets – with less developed States not being included in its scope.<sup>29</sup>
49. While sharing the purpose of the Kyoto Protocol of contributing to improve the implementation of the UNFCCC, the Paris Agreement aims at being a truly global and innovative instrument, as it imposes obligations on all Parties and – surpassing the UNFCCC itself – agrees on certain clear and concrete targets.
50. The Paris Agreement reflects the same principles of equity and common but differentiated responsibilities and respective capabilities among Parties as the UNFCCC, and establishes three core international obligations: (i) holding the increase in the global average temperature to well below 2°C above preindustrial levels and pursuing efforts to limit the temperature increase to 1.5°C above preindustrial levels; (ii) increasing the ability to adapt to the adverse impacts of climate change and foster climate resilience and low GHG emissions development, in a manner that does not threaten food production; and (iii) making finance flows consistent with a pathway towards low GHG emissions and climate-resilient development.<sup>30</sup>

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<sup>28</sup> Kyoto Protocol to the United Nations Framework Convention on Climate Change (Kyoto, December 11, 1997), 2303 UNTS 162.

<sup>29</sup> Cf. Written Statement of the Portuguese Republic, *Case No. 31*, ..., p. 11, §35 and 36.

<sup>30</sup> Article 2(1) of the Paris Agreement.

51. While results for the second and third obligations may be attained (though not necessarily exclusively) through domestic policies by the Parties to the Paris Agreement, the first obligation is necessarily a collective one, depending on joint efforts and international cooperation. This long-term temperature goal is based on scientific evidence arguing that such a temperature target would significantly reduce the risks and impacts of climate change. Because the goal refers to a global average temperature, no Party to the Paris Agreement is obligated to achieve this threshold in an isolated manner.
52. The Portuguese Republic stresses that, as with the UNFCCC, the Paris Agreement mostly prescribes obligations of conduct, and not obligations of result. There are, nevertheless, a few exceptions.
53. One of them is the tangible and measurable targets set forth concerning the long-term temperature goal of holding global average temperature well below 2°C above preindustrial levels<sup>31</sup>, which establishes a specific and innovative obligation. Nonetheless, given the collective nature of this obligation, its fulfilment requires the contribution of more than one Party (perhaps of all of them). Even when guided by principle of equity and common but differentiated responsibilities it is extremely difficult – if not even impossible – to determine how much the compliance or incompliance of one actual Party is more or less detrimental to achieving the result set in the specific provision. This obviously leads to difficulties when seeking to clarify the legal consequences of breaching this obligation of result under Article 2(1)(a) of the Paris Agreement (see also Section V, below).
54. Other examples of obligations of result in the Paris Agreement, this time individual ones, are linked to the obligation to periodically (every five years) submit national determined contributions<sup>32</sup> (hereunder, “NDCs”). NDCs must be designed and implemented (*i*) on the basis of good faith, (*ii*) with a view to achieving the

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<sup>31</sup> Article 2(1)(a) of the Paris Agreement.

<sup>32</sup> See, for example, Article 13(7) to (9) of the Paris Agreement.

overarching goal of the Paris Agreement, and (iii) be in line with the principles, rules, and guidelines contained throughout the Paris Agreement.<sup>33</sup>

55. In short, and within certain benchmarks,<sup>34</sup> the substance of the duty of due diligence<sup>35</sup> binding each Party of the Paris Agreement to contribute to preventing dangerous climate change by limiting its GHG emissions is not provided in the treaty itself, resting instead on the NDCs presented by each Party.<sup>36</sup>

56. The obligations under the Paris Agreement, however, preserve the right of Parties to be more ambitious in pursuing the ultimate goals set out on this treaty. The Portuguese Republic, for example, along with the European Union and other Members of the European Union, has been advocating more ambitious mitigation targets (see subsection *iv*), *infra*).

## **ii) Obligations under the Law of the Sea**

57. The critical role played by oceans regarding the impact of climate change on Humankind is today a findings-backed, scientifically accepted fact. Among other widely acknowledged crucial facts, oceans have a heat storage capacity 1.200 times greater than the atmosphere, acting as an important reservoir of CO<sub>2</sub>. This characteristic, however, results in the oceans absorbing about a quarter of the CO<sub>2</sub> that is released into the atmosphere by human activities – primarily through greenhouse gasses emission.

58. With the comprehensive and extensive international legal framework that it sets for ocean governance and 169 Parties (including 165 United Nations Member States),

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<sup>33</sup> Cf. Written Statement of the Portuguese Republic, *Case No. 31*, ..., p. 13, §41. See Articles 3, 4, 7, 9 to 11, and 13 of the Paris Agreement.

<sup>34</sup> Article 4(3) of the Paris Agreement.

<sup>35</sup> On the meaning of due diligence obligation, see *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010, p. 69, §197. Such interpretation was later reiterated by the Court in the *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and the *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)* cases.

<sup>36</sup> Article 3 of the Paris Agreement.



the United Nations Convention on the Law of the Sea (hereinafter, “UNCLOS”)<sup>37</sup> establishes the most pertinent obligations in this context.

59. As a State Party to UNCLOS, the Portuguese Republic has recently participated in Case no. 31 of ITLOS,<sup>38</sup> where it observed that “*the oceans play a critical role in the impact of climate change on humankind*”.<sup>39</sup>
60. The Portuguese Republic reiterates the interpretation and observations made in its Written Statement<sup>40</sup> and Oral Statement<sup>41</sup> in ITLOS Case no. 31. In doing so, it would like to underline the three major conclusions reached in it.
61. *Firstly*, as a living treaty, UNCLOS is subject to an evolutionary interpretation, in light of other international legal instruments and regimes. This characteristic is particularly relevant in the case of certain areas of substantive law not specifically regulated in UNCLOS – as happens with climate change, including sea-level rise, which the International Law Commission has noted was not “*perceived as an issue that needed to be addressed*” during the negotiations of UNCLOS.<sup>42</sup> Unlike at the time, the nexus between the ocean and climate is now well established from a scientific point of view.
62. As reaffirmed in the Oceans Declaration adopted in 2022 in Lisbon,<sup>43</sup> “*(...) the ocean is fundamental to life on our planet and to our future. The ocean is an important source of the planet’s biodiversity and plays a vital role in the climate system and water cycle. The ocean provides a range of ecosystem services, supplies us with*

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<sup>37</sup> United Nations Convention on the Law of the Sea (Montego Bay, December 10, 1982), 1833 UNTS 3.

<sup>38</sup> *Case No. 31, Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law* (Request for Advisory Opinion submitted to the International Tribunal for the Law of the Sea).

<sup>39</sup> Cf. Written Statement of the Portuguese Republic, *Case No. 31*, ..., p. 3, §10.

<sup>40</sup> Available at [https://www.itlos.org/fileadmin/itlos/documents/cases/31/written\\_statements/1/C31-WS-1-24-Portugal\\_01.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/31/written_statements/1/C31-WS-1-24-Portugal_01.pdf).

<sup>41</sup> Available at [https://www.itlos.org/fileadmin/itlos/documents/cases/31/Oral\\_proceedings/verbatim\\_records\\_rev/ITLOS\\_PV23\\_C31\\_7\\_Rev.1\\_E.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/31/Oral_proceedings/verbatim_records_rev/ITLOS_PV23_C31_7_Rev.1_E.pdf).

<sup>42</sup> See also *Sea-level rise in relation to international law: First issues paper* by Bogdan Aurescu and Nilufer Oral, Co-Chairs of the Study Group of the International Law Commission on sea-level rise in relation to international law, February 28, 2020, pp. 40-41, para. 104(a) (UN Doc. A/CN.4/740).

<sup>43</sup> Declaration “*Our ocean, our future, our responsibility*”, adopted at the United Nations Conference to Support the Implementation of Sustainable Development Goal 14: Conserve and sustainably use the oceans, seas and marine resources for sustainable development (Lisbon, 27 June–1 July 2022).

*oxygen to breathe, contributes to food security, nutrition and decent jobs and livelihoods, acts as a sink and reservoir of greenhouse gases and protects biodiversity, provides a means for maritime transportation, including for global trade, forms an important part of our natural and cultural heritage, and plays an essential role in sustainable development, a sustainable ocean-based economy and poverty eradication.”.*

63. Now being clear that the fight against climate change is inextricably linked to preserving the well-being of the oceans, and that the effectiveness of efforts to combat global warming depend on not neglecting the effects of climate change on the oceans and their influence on climate change<sup>44</sup>, an evolutionary interpretation of UNCLOS is key for a comprehensive and up-to-date legal regime for the oceans.
64. *Secondly*, State Parties to UNCLOS have an obligation under Part XII to preserve and protect the marine environment, which necessarily includes positive and negative obligations of conduct<sup>45</sup>. And, in order to determine exactly what Articles 192, 194(1), 207, 212, 213 and 222 of UNCLOS require of State Parties involves a complex interpretive exercise that seeks consistency and coherence with other branches of international law, including international environment law and climate change law.
65. In this context, the Portuguese Republic stresses the relevance of the United Nations Framework Convention on Climate Change and the Paris Agreement (both of which were addressed in the previous subsection) – for States and international organisations who are also Parties to UNCLOS. For instance, of the 169 Parties to UNCLOS, only the People's Democratic Republic of Yemen has not ratified the Paris Agreement.
66. All in all, the combined interpretation of these provisions justifies the conclusion that UNCLOS lays down obligations *(i)* to protect and preserve the marine environment; and *(ii)* to prevent, reduce, and control pollution in the marine environment in view

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<sup>44</sup> Cf. Written Statement of the Portuguese Republic, *Case No. 31*, ..., p. 29, §90.

<sup>45</sup> *Ibid.*, p. 20, §60 and following.

of the deleterious effects of climate change caused by anthropogenic GHG emissions.<sup>46</sup>

67. *Finally*, a combined interpretation of these legal regimes requires that States Parties to UNCLOS – by acting individually and in the context of international cooperation – endeavour to do everything in their power, in accordance with the principle of common but differentiated responsibilities, to (i) address the adverse impacts of climate change; and (ii) preserve and protect the marine environment, particularly taking into account the abovementioned nexus between the ocean and the climate system.<sup>47</sup>

68. In this regard, the Portuguese Republic – as a Member of the European Union and in its national capacity – has adopted an ambitious approach to combating climate change, including not only by complying with Articles 192, 194, 207, 212, 213 and 222 of UNCLOS, but also by adopting higher standards than those required by UNCLOS<sup>48</sup>.

### **iii) Obligations under International Human Rights Law**

69. The Portuguese Republic has been one of the staunchest supporters of the international recognition of the human right to a clean, healthy, and sustainable environment, as expressed, *inter alia*, by its sponsorship of landmark instruments in this regard, such as UNGA Resolution 76/300, of 28 July 2022, and Human Rights Council Resolution 48/13, of 8 October 2021.

70. The Portuguese Republic is of the view that the right to a clean, healthy, and sustainable environment is closely linked to the protection of persons affected by climate change and to other human rights and existing norms of international law, and that the promotion of said right requires the full implementation of the

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<sup>46</sup> Cf. Written Statement of the Portuguese Republic, *Case No. 31*, ..., p. 30, §93.

<sup>47</sup> *Ibid.*, p. 30, §94.

<sup>48</sup> *Idem.*

multilateral environmental agreements and principles of international environmental law.

71. The interconnection and interrelatedness of human rights and the environment has been emphasised, inter alia, by the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment (hereafter, “the SR on Human Rights and the Environment”), John Knox, in his Framework Principles on Human rights and the Environment.<sup>49</sup> According to these Framework principles, “States should ensure a safe, clean, healthy and sustainable environment in order to respect, protect and fulfil human rights” and, simultaneously, “respect, protect and fulfil human rights in order to ensure a safe, clean, healthy and sustainable environment.”
72. Other relevant principles in this regard are the prohibition of discrimination; the provision of a safe and enabling environment in which individuals, groups and organs of society that work on human rights or environmental issues can operate free from threats, harassment, intimidation and violence; the respect and protection of freedom of expression, association and peaceful assembly in relation to environmental matters; the guarantee of education and public awareness on environmental issues; the provision of public access to environmental information by collecting and disseminating information and by providing affordable, effective and timely access to information to any person upon request; the prior assessment of the possible environmental impacts of proposed projects and policies, including their potential effects on the enjoyment of human rights; the provision for, and facilitation, of public participation in decision-making related to the environment, and taking the views of the public into account in the decision-making process; access to effective remedies for violations of human rights and domestic laws relating to the environment; the establishment and maintenance of substantive environmental standards that are non-discriminatory, non-retrogressive and otherwise respect, protect and fulfil human rights; the effective enforcement of a State’s environmental standards against public and private actors; inter-State cooperation in order to establish, maintain and enforce an effective international

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<sup>49</sup> UN Doc. A/HRC/37/59, of 24 January 2018.

legal framework to prevent, reduce and remedy transboundary and global environmental harm that interferes with the full enjoyment of human rights; the adoption of additional measures to protect the rights of those who are most vulnerable to, or at particular risk from, environmental harm, taking into account their needs, risks and capacities; the fulfilment of obligations towards indigenous peoples and members of traditional communities; and respect, protection and fulfilment of human rights in the actions States take to address environmental challenges and pursue sustainable development.

73. Furthermore, the Portuguese Republic recognises that environmental degradation can and does affect, both directly and indirectly, the enjoyment of a broad range of human rights, and that the severity of the threat of climate change facing the international community makes it imperative to take urgent action to effectively address such threat.

74. For instance, as acknowledged by the Human Rights Committee in its *General Comment No. 36 on Article 6: Right to Life*:

*“Environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life. The obligations of States parties under international environmental law should thus inform the content of article 6 of the Covenant, and the obligation of States parties to respect and ensure the right to life should also inform their relevant obligations under international environmental law. Implementation of the obligation to respect and ensure the right to life, and in particular life with dignity, depends, inter alia, on measures taken by States parties to preserve the environment and protect it against harm, pollution and climate change caused by public and private actors. States parties should therefore ensure sustainable use of natural resources, develop and implement substantive environmental standards, conduct environmental impact assessments and consult with relevant States about activities likely to have a significant impact on the environment, provide notification to other States concerned about natural disasters and emergencies and cooperate with them,*

*provide appropriate access to information on environmental hazards and pay due regard to the precautionary approach.*"<sup>50</sup>

75. Other rights whose enjoyment may be directly threatened by environmental degradation and climate change include, as recognised by international human rights courts and mechanisms, the right to the enjoyment of the highest attainable standard of physical and mental health, the right to an adequate standard of living, the right to food, the right to drinking water and sanitation and the right to adequate housing.<sup>51</sup>
76. The Committee on Economic, Social and Cultural Rights, in its *General Comment No. 14: The right to the highest attainable standard of health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)*, has recognised a healthy environment as one of the “underlying determinants of health”, and “environmental safety” as one of the “social determinants of good health”<sup>52</sup>. It stated in this regard, *inter alia*, the following:

*“[...] the drafting history and the express wording of article 12.2 acknowledge that the right to health embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, and extends to the underlying determinants of health, such as food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment.”*<sup>53</sup>

77. Concerning Article 12.2 (b) of the International Covenant on Economic, Social and Cultural Rights – the right to healthy natural and workplace environments –, the same Committee stated that:

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<sup>50</sup> Human Rights Committee, *General Comment No. 36 on Article 6: Right to Life* (2019), §62.

<sup>51</sup> Cf. *Sea-level rise in relation to international law: Second issues paper by Patrícia Galvão Teles and Juan José Ruda Santolaria, Co-Chairs of the Study Group of the International Law Commission on sea-level rise in relation to international law*, April 19, 2022, UN Doc. A/CN.4/752 and the *Additional Paper to the Second Issues Paper by Patrícia Galvão Teles and Juan José Ruda Santolaria, Co-Chairs of the Study Group of the International Law Commission on sea-level rise in relation to international law*, February 19, 2024, UN Doc. A/CN.4/774 (forthcoming).

<sup>52</sup> Committee on Economic, Social and Cultural Rights, *General Comment General Comment No. 14 (2000), The right to the highest attainable standard of health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)*, Document E/C.12/2000/4, §11 and §15.

<sup>53</sup> *Ibid.*, §4.

*“(...) the improvement of all aspects of environmental and industrial hygiene” (...), comprises, inter alia, (...) the requirement to ensure an adequate supply of safe and potable water and basic sanitation; the prevention and reduction of the population’s exposure to harmful substances such as radiation and harmful chemicals or other detrimental environmental conditions that directly or indirectly impact upon human health. (...)”.*<sup>54</sup>

78. The Portuguese Republic would also like to make a special reference to the rights of the child in the context of climate change. In its General Comment No. 26 (2023) on children’s rights and the environment, with a special focus on climate change,<sup>55</sup> the Committee on the Rights of the Child clarifies a framework for a child rights-based approach to the environment, addressing aspects such as

*addressing issues ranging from access to justice and remedies in the context of environmental harm to delineating child rights-consistent measures that states must take to ensure climate change mitigation and adaptation.*

79. One of the most significant elements in this General Comment is that the Committee expressly recognises an autonomous right to a clean, healthy, and sustainable environment<sup>56</sup> as protected by the Convention on the Rights of the Child<sup>57</sup> (hereunder, “CRC”). The substantive elements of this right include clean air, a safe and stable climate, healthy ecosystems and biodiversity, safe and sufficient water, healthy and sustainable food and non-toxic environments.<sup>58</sup>
80. Additionally, this General Comment identifies climate change, pollution, and biodiversity loss as urgent examples of global threats to children’s rights that require States to work together.<sup>59</sup>

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<sup>54</sup> Ibid., §4.

<sup>55</sup> UN Doc. CRC/C/GC/26, of 22 August 2023.

<sup>56</sup> Committee on the Rights of the Child, *General Comment No. 26 (2023) on children’s rights and the environment, with a special focus on climate change*, UN Doc. CRC/C/GC/26, §63.

<sup>57</sup> Convention on the rights of the child (1989) Treaty no. 27531. United Nations Treaty Series, 1577.

<sup>58</sup> Cf. Committee on the Rights of the Child, *General Comment No. 26...*, §64.

<sup>59</sup> Ibid., §91.

81. Although the Committee recognises the principle of intergenerational equity and the interests of future generations<sup>60</sup>, it does not provide a definition for that principle. In a statement that associates State responsibility and causality, but does not clarify how that responsibility applies in view of future generations, the Committee noted:

*"[b]eyond their immediate obligations under the Convention with regard to the environment, States bear the responsibility for foreseeable environment-related threats arising as a result of their acts or omissions now, the full implications of which may not manifest for years or even decades."*<sup>61</sup>

82. The Portuguese Republic furthermore recognises that environmental degradation and climate change can have particular adverse impact on people in vulnerable situations, such as populations of small island States and indigenous peoples, persons with disabilities, persons living in poverty, and victims of discrimination, namely racial, gender-based and age-based discrimination.

83. The Portuguese Republic acknowledges the three sets of duties identified by the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy, and sustainable environment in his *Framework principles on human rights and the environment*<sup>62</sup>, namely procedural obligations, substantive obligations and obligations relating to members of groups in vulnerable situations.

84. Procedural obligations would include the duties to assess environmental impacts and make environmental information public; facilitate public participation in environmental decision-making, including by protecting the freedoms of expression and association; and provide access to remedies for harm.

85. States also have substantive obligations to protect against environmental harm that interferes with the enjoyment of human rights. Although the concrete duties in this regard may vary from right to right, depending on the content of their duties with

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<sup>60</sup> Ibid., § 11.

<sup>61</sup> Idem.

<sup>62</sup> UN Doc. A/HRC/37/59, of 24 January 2018, § 3.



respect to the particular rights threatened by the harm, some particular characteristics of these obligations are considered clear<sup>63</sup>, namely the obligations to adopt and implement legal frameworks to protect against environmental harm that may infringe on the enjoyment of human rights; and to regulate private actors with the view to protect against such environmental harm.

86. Such obligations may apply in case of transboundary environmental harm, in view of the States' obligations to fulfil the duties imposed by the treaties they are parties to in good faith (*pacta sunt servanda*), and provided that the general rule regarding State's jurisdiction as a pre-condition to responsibility is not undermined. We believe that undue expansion of jurisdiction is not an appropriate way to deal with the complex policy decisions that climate change presents and that a situation in which any person in the world could allege to be under the jurisdiction of any State, or of various States simultaneously, should be avoided.
87. As it results from general human rights principles, the human rights obligations relating to the environment include a general obligation of non-discrimination in their application. In particular, the right to equal protection under the law.<sup>64</sup> This entails the right to equal protection under environmental law.
88. Beyond this, and as stated before, States have additional obligations with respect to groups particularly vulnerable to environmental harm. This encompasses, for example, the protection of persons affected by phenomena that can be climate-change related, such as disasters – a topic on which the Draft Articles of the International Law Commission<sup>65</sup> can offer precious guidance.
89. The Portuguese Republic would like further to shortly focus on protection in the context of sea-level rise – one of the most adverse impacts expected in its territory (see Section II, *supra*) and also in several other States, in particular low-lying coastal States and Small Island Developing States (SIDS) – and its human rights

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<sup>63</sup> See A/HRC/25/53, §46.

<sup>64</sup> Provided for under Article 7 of the Universal Declaration of Human Rights and by several other human rights instruments.

<sup>65</sup> Draft articles on the protection of persons in the event of disasters, and commentary thereto, Yearbook of the International Law Commission, 2016, vol. II (Part Two).

obligations dimension.<sup>66</sup> This can offer a useful example on how International Human Rights Law, not having been created specifically in relation to climate-change, can offer ways to address it – and its impacts, such as sea-level rise – through contextual interpretation and application.

90. First and foremost, the principle of human dignity, an overarching principle of both International Human Rights Law (and International Humanitarian Law), orientates the protection of human rights holders in any situation and occasion, and therefore must also instruct that of persons affected by sea-level rise.
91. Secondly, as it happens with the Draft Articles on the Protection of Persons in the Event of Disaster, a two-tier approach, combining a rights-based approach and a needs-based one, could be the best basis for a legal analysis of the protection of persons affected by sea-level rise: meeting the essential needs of the persons concerned, with full respect for their rights. Among the Draft Articles on the Protection of Persons in the Event of Disaster, Draft Articles 2 (Purpose), 4 (Human Dignity), 5 (Human Rights), 7 (Duty to Cooperate), 9 (Reduction of the risk of disasters) and 10 (Role of the Affected State) are chiefly pertinent here.
92. Thirdly, the positive State obligations (1) to protect and (2) to fulfil human rights require the State, respectively, to take steps in protecting against breaches of rights emanating in specific situations or from third parties, and to create the conditions for human rights holders to realise those rights in full. The scope of State obligations will however vary, depending on different human rights obligations addressees/duty bearers (identified according to the exercise of jurisdiction over the affected persons). This will of course have consequences with respect to determining State responsibility (see Section V, below).

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<sup>66</sup> See also *Sea-level rise in relation to international law: Second issues paper by Patrícia Galvão Teles and Juan José Ruda Santolaria, Co-Chairs of the Study Group of the International Law Commission on sea-level rise in relation to international law*, April 19, 2022, UN Doc. A/CN.4/752 and the *Additional Paper to the Second Issues Paper by Patrícia Galvão Teles and Juan José Ruda Santolaria, Co-Chairs of the Study Group of the International Law Commission on sea-level rise in relation to international law*, February 19, 2024, UN Doc. A/CN.4/774 (forthcoming).

93. Lastly, the Portuguese Republic notes that the adverse effects of sea-level rise, namely the diminishing of inhabitable territories, may bring about internal or cross-border displacement, creating specific human rights challenges and calling for human rights solutions. Hence, the following could be applied to persons affected by sea-level rise: non-refoulement obligations, protection under Refugee Law when applicable, and guidelines from the 2018 Global Compact for Safe, Orderly and Regular Migration.

**iv) Measures taken by the Portuguese Republic in line with the obligations to mitigate climate change and to adapt to it**

94. The Portuguese special vulnerability to climate change was explained in Section II and Section IV has so far illustrated the most pertinent international obligations of the Portuguese Republic in this context.

95. In light of those arguments and findings, this subsection will show how, on the subject of measures to mitigate climate change and to adapt to it, the Portuguese Republic has invested in a pioneering and strong political orientation, both domestically and internationally, structured in a long-term vision combined immediate action around three interconnected axes: the valorisation of territory and habitats, a more circular economy and the decarbonisation of society and energy transition, with the ultimate objective being the promotion of wealth and wellbeing<sup>67</sup>.

96. By being a Party to international treaties such as UNCLOS, the UNFCCC and the Paris Agreement, and complying with its provisions – sometimes even going beyond the goals set in them –, the Portuguese Republic is meeting its obligation to mitigate climate change under International Climate Change Law, the Law of the Sea and International Environmental Law and International Human Rights Law (see previous subsections).

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<sup>67</sup> Cf. Roadmap for Carbon Neutrality (RCN2050), Preface, p. 4.

97. Indeed, the Portuguese Republic has had visible results in the fight against climate change, having surpassed by far the goals set under the Kyoto Protocol for 2020 on reducing emissions, bettering energy efficiency, and promoting renewable energy. Moreover, the Portuguese Republic has defined ambitious goals for 2030, establishing a way towards a prosperous, resilient, and low-carbon economy.
98. The Portuguese experience shows that ambitious climate policies can go hand in hand with economic growth, job creation, renewable energy, decarbonisation, and food security, as well as with increasing the health of populations and of the environment itself. Today, the Portuguese Republic produces more wealth with fewer emissions, and this is the road the State wishes to continue in.
99. The Portuguese Republic was one of the first States committing, in 2016 at the 22<sup>nd</sup> Conference of the Parties to the UNFCCC (COP 22), in Marrakech, to achieving carbon neutrality by 2050, setting a clear vision for a profound decarbonisation of its economy as a whole.
100. The Portuguese Republic currently has a robust climate policy framework in the areas of mitigation and adaptation. These were the main policy documents adopted since 2015:
- a) The National Programme for Climate Change<sup>68</sup>;
  - b) The National Strategy for Adaptation to Climate Change<sup>69</sup>;
  - c) The Roadmap for Carbon Neutrality 2050 (RNC2050)<sup>70</sup>;
  - d) The Action Programme for the Adaptation to Climate Change (P-3AC)<sup>71</sup>;
  - e) The National Energy-Climate Plan (PNEC2030)<sup>72</sup>.
101. The most relevant domestic legal measures can be found in the “Climate Framework Law” (Law nr. 98/2021, of December 31, 2021). This law acknowledges the climate emergency situation<sup>73</sup> and recognises the status of Climate as a Common Heritage of

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<sup>68</sup> Portuguese, *Programa Nacional para as Alterações Climáticas* (PNAC2020).

<sup>69</sup> Portuguese, *Estratégia Nacional de Adaptação às Alterações Climáticas* (ENAAC2020).

<sup>70</sup> Portuguese, *Roteiro para a Neutralidade Carbónica 2050* (RNC2050).

<sup>71</sup> Portuguese, *Programa de Ação para a Adaptação às Alterações Climáticas* (P-3AC).

<sup>72</sup> Portuguese, *Plano Nacional Energia e Clima* (PNEC2030).

<sup>73</sup> Article 2 of the Climate Framework Law.

Humanity – a pioneering measure of States in their domestic law. The Climate Framework Law establishes rights and obligations on climate matters<sup>74</sup> in a whole-of-society approach, stating for example that everyone – not only the State and other public entities, but also citizens, environmental non-governmental organisations, and other private entities such as private companies – has a duty to protect, preserve, respect and ensure the safeguard of the climatic balance, contributing to mitigating climate change.

102. The Climate Framework Law is also remarkable in the sense that it imposes several new, decisive obligations on the Portuguese Government. Among them is the obligation to study, by 2025, the possibility of bringing forward to 2045 the goal of carbon neutrality<sup>75</sup>, and the obligation to promote climate security<sup>76</sup>. Under this law, climate security is a notion that encompasses energy security, health security and food and nutrition security<sup>77</sup>. Pursuant to this obligation, the Portuguese Government has the obligations of identifying risks and acting to prevent and mitigate the consequences of climate change on public order, public safety and security, and public tranquillity, as well as on the integrity of persons and property and the regular exercise of rights, freedoms, and guarantees<sup>78</sup>.

103. Strengthening the right to citizen participation<sup>79</sup>, the Climate Framework Law includes provisions that explicitly focus on the protection of particularly vulnerable people, regions, and communities – which might apply, although not expressly mentioned, to those directly affected by sea-level rise, drought, flooding, and heatwaves. Additionally, this law has the Portuguese Government adopting a global and integrated vision in the pursuit of climate goals, respecting the limits of the sustainable use of the natural resources of the planet, and the development paths of individual States, while actively defending the following, in terms of foreign policy in the framework of climate diplomacy<sup>80</sup>: (i) the strengthening, anticipation and fulfilment of the goals of GHG emission reduction towards pursuing efforts not

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<sup>74</sup> Articles 5 to 7 of the Climate Framework Law.

<sup>75</sup> Article 18, §2, of the Climate Framework Law.

<sup>76</sup> Article 17 of the Climate Framework Law.

<sup>77</sup> Article 17, §2, of the Climate Framework Law.

<sup>78</sup> Article 17, §1, of the Climate Framework Law.

<sup>79</sup> Articles 4, 6 and 9 of the Climate Framework Law.

<sup>80</sup> Article 15 of the Climate Framework Law.

surpassing the limit of temperature increase to 1.5°C above preindustrial levels; (ii) the binding international commitments concerning climate and the protection of the environment and biodiversity; (iii) the development of international criminal justice; (iv) international cooperation and solidarity with the States of the Global South, supporting the implementation of the measures set out in the Sendai Framework for Disaster Risk Reduction 2015-2030; (v) a definition of the term and status of “climate refugee” and its recognition by the Portuguese Republic; and (vi) the recognition, by the United Nations, of a stable climate as part of the Common Heritage of Humankind. Moreover, the Climate Framework Law states that the State has an obligation to, within the framework of international relations, cooperate with and take part in aid mechanisms for countries and citizens affected by extreme weather events and their consequences.

104. Ultimately, the Climate Framework Law also consolidates and develops public policy on energy transition. In its “Roadmap for Carbon Neutrality 2050”, the Portuguese Republic established a long-term strategy towards reducing carbon emissions by 2050. Such goals were reviewed in the Climate Framework Law, becoming even more ambitious. In its article 39, this law declares, among others, an “electrification of the energy supply”, eliminating the role of natural gas in the national energy system by 2040. Moreover, pursuant to paragraph 2 of article 18 of the Climate Framework Law, the Portuguese Government shall study, by 2025, the possibility of bringing forward to 2045 the goal of carbon neutrality.

105. In point of fact, one of the most widely recognised strong suits in the Portuguese approach to climate change has been a long preference for renewable energy, especially for the production of electricity. The Portuguese Republic is a leading country when it comes to the weight of renewable energy in its energy mix. In 2023, it set an important renewable energy record as production outstripped demand for four days: from 31 October to 6 November, renewable energy production exceeded national electricity needs for 149 hours straight, and the Portuguese Republic was able to export electricity to the Kingdom of Spain. In the 2030s, the Portuguese Republic will nearly double its production capacity of electricity through renewable energy sources.

106. In the area of adaptation to climate change, policies at the local level (municipalities) are of paramount importance. Under a number of policy documents, over 90% of the Portuguese territory is covered by adaptation plans or strategies. Furthermore, measures that take advantage of solutions based in nature, such as restoring ecosystems and enlarging natural habitats, have proved extremely useful for improving soil and ocean health and for reducing the risk of flooding in coastal areas. Between 2015 and 2020, over 66 kilometres of coastline and over 1000 kilometres of rivers were restored in the Portuguese Republic.

107. The Portuguese Government has also undertaken pertinent commitments in line with international calls for financing investment in developing countries to accelerate their transition to a greener economy in the framework of a global alliance to face climate change. For instance, a memorandum of understanding was recently concluded with the Government of Cape Verde to convert up to 12 million euros of Cape Verde's debt by 2025 channelling it to a new Climate and Environmental Fund and aiming at accelerating the climate transition as well as the development of a green and blue economy. The same model was replicated with the Government of São Tomé and Príncipe and presented at COP 28 in Dubai, with a view to converting 3.5 million euros. In addition to thus showing solidarity with these Portuguese-speaking States which also are particularly vulnerable to the adverse effects of climate change (as Small Island Developing States), the Portuguese Republic is taking individual and collective action to prevent and respond to those effects – well in line with the spirit of the UNFCCC and the Paris Agreement.

**V. 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 (Question B)**

*«What are the legal consequences under these 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:*

- (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?»*

108. Question B inquires on the legal consequences for causing significant harm to the climate system and other parts of the environment, with respect to States, peoples and individuals – of the present and future generations – affected by the adverse effects of climate change.
109. The following arguments by the Portuguese Republic will not only be made under the assumption that the “legal consequences under these obligations” mentioned in Question B refer to the “legal consequences *for breaching* these obligations” – thus, from a responsibility point of view –, but also from a liability for acts not prohibited by international law point of view, and from the perspective of the legal effects of the obligations addressed in Section IV, in particular with regard to the duty of cooperation.
110. They address both legal consequences towards injured or specially affected States and affected peoples and individuals.
111. In what concerns the UNFCCC and the Paris Agreement, neither establishes an international legal framework for responsibility or liability of Parties nor for compensation for losses or damages related to climate change. And even though the terms “loss” and “damage” contained in Article 8 of the Paris Agreement invoke notions of responsibility and reparation, the Parties, in Decision 1/CP.21, have explicitly decided that the provisions on loss and damage do not involve or provide a basis for any liability or compensation under the treaty.<sup>81</sup>
112. Without prejudice to the said decision, where significant harm has come to the climate system or other parts of the environment, the Warsaw International

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<sup>81</sup> Cf. Decision 1/CP.21, *Adoption of the Paris Agreement*, Document FCCC/CP/2015/10/Add.1, §51.



Mechanism for Loss and Damage associated with Climate Change Impact, which was created to address loss and damage associated with impacts of climate change in the sense of Article 8 of the Paris Agreement, can however be of utmost relevance.

113. In the context of the Paris Agreement, Decision 1/CP.21 closes the door to any direct claims for reparation, including compensation, in relation to responsibility for losses or damages. What Article 8 establishes is that Parties recognise the importance of averting, minimizing and addressing loss and damage associated with the adverse impacts of climate change. And the idea of a collective responsibility under the Paris Agreement should be guided by the understanding of common but differentiated responsibilities and respective capabilities also in this respect.
114. However, Decision 1/CP.21 cannot be interpreted as excluding, *tout court*, international responsibility outside the scope of the Paris Agreement.
115. Thus, where significant harm has come to the climate system or other parts of the environment from an internationally wrongful act, the Articles on the Responsibility of States for Internationally Wrongful Acts (hereinafter referred to as “ARSIWA”)<sup>82</sup> – to the extent that they codify rules of customary international law – may be applicable, provided that the two elements required are present: an international wrongful act that is attributable to a State.
116. Even in such cases, it should nevertheless be recalled that most obligations under the Paris Agreement are obligations of conduct, and sometimes of a collective nature (see subsection i) of Section IV), which obviously limits judgment of wrongfulness and the task of identifying the Party or Parties to which the wrongful conduct or omission can be attributable.
117. In relation to the responsibility of States for violation of their obligations under International Human Rights Law in relation to environmental and climate change

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<sup>82</sup> Draft articles on the Responsibility of States for Internationally Wrongful Acts, and commentary thereto, Yearbook of the International Law Commission, 2001, vol. II (Part Two).

issues, the Portuguese Republic reiterates the need to ensure access to effective remedies for violations of human rights and domestic laws relating to the environment and climate change.

118. In his Commentary to Framework principle 10 of the Framework principles on human rights and the environment, the Special Rapporteur on human rights and the environment elaborates on the contents of this obligation:

*“The obligations of States to provide for access to judicial and other procedures for effective remedies for violations of human rights encompass remedies for violations of human rights relating to the environment. States must therefore provide for effective remedies for violations of the obligations set out in these framework principles, including those relating to the rights of freedom of expression, association and peaceful assembly (framework principle 5), access to environmental information (framework principle 7) and public participation in environmental decision-making (framework principle 9).*

*28. In addition, in connection with the obligations to establish, maintain and enforce substantive environmental standards (framework principles 11 and 12), each State should ensure that individuals have access to effective remedies against private actors, as well as government authorities, for failures to comply with the laws of the State relating to the environment.*

*29. To provide for effective remedies, States should ensure that individuals have access to judicial and administrative procedures that meet basic requirements, including that the procedures:*

- (a) are impartial, independent, affordable, transparent and fair;*
- (b) review claims in a timely manner;*
- (c) have the necessary expertise and resources;*
- (d) incorporate a right of appeal to a higher body; and*
- (e) issue binding decisions, including for interim measures, compensation, restitution and reparation, as necessary to provide effective remedies for violations.*

*The procedures should be available for claims of imminent and foreseeable as well as past and current violations. States should ensure that decisions are made public and that they are promptly and effectively enforced.*

30. States should provide guidance to the public about how to seek access to these procedures, and should help to overcome obstacles to access such as language, illiteracy, expense and distance. Standing should be construed broadly, and States should recognize the standing of indigenous peoples and other communal landowners to bring claims for violations of their collective rights. All those pursuing remedies must be protected against reprisals, including threats and violence. States should protect against baseless lawsuits aimed at intimidating victims and discouraging them from pursuing remedies.”<sup>83</sup>

119. In any event, and in addition to the above remarks on State jurisdiction, the effective responsibility of a State for the violation of obligations relating to International Human Rights Law or other areas of international law must always depend on finding a causal link between acts or omissions of such State and the harm effectively sustained by victims.<sup>84</sup>

120. Despite the fact that many domestic legal frameworks (including the Portuguese) recognise the right to *actio popularis* in environment-related matters, the Portuguese Republic would like to recall that no such right is recognised at the international level, and that any “evolutive” interpretation of instruments – as has been intended in some litigation cases initiated at the United Nations and regional levels – must be based on consensus as to the applicable norms.

121. Furthermore, as a rule, international complaints mechanisms are, and in our view should remain, subsidiary. Therefore, the requirement to exhaust domestic remedies

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<sup>83</sup> UN Doc. A/HRC/37/59, §§27-30.

<sup>84</sup> Cf. Oral Allegations by the Counsel for the Government of the United Kingdom, the Agent of the Government of Belgium, and the Agent of the Government of Portugal at the Grand Chamber hearing of 27 September 2023 in the *Duarte Agostinho and Others v. Portugal and 32 Others* case; webcast available at <https://www.echr.coe.int/w/duarte-agostinho-and-others-v-portugal-and-others-no-39371/20->. This is a case pending before the European Court of Human Rights, having been brought by Portuguese nationals aged between 10 and 23 against Portugal and the other European Union Member States (the Republic of Austria, the Kingdom of Belgium, the Republic of Bulgaria, the Republic of Cyprus, the Czech Republic, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Denmark, the Republic of Estonia, the Republic of Finland, the French Republic, the Republic of Croatia, Hungary, the Republic of Ireland, the Italian Republic, the Republic of Lithuania, the Grand Duchy of Luxembourg, the Republic of Latvia, the Republic of Malta, the Kingdom of the Netherlands, the Republic of Poland, Romania, the Slovak Republic, the Republic of Slovenia, the Kingdom of Spain and the Kingdom of Sweden), as well as the Kingdom of Norway, Russian Federation, Switzerland, Republic of Türkiye, Ukraine and the United Kingdom of Great Britain and Northern Ireland.

must not be waived, regardless of how “novel” a case may seem with regard to climate change, as the contrary would enable anybody to circumvent the obligation to exhaust domestic remedies by merely alleging that the cause of the applicant is “novel”.<sup>85</sup>

122. Additionally, the Portuguese Republic recalls that, despite the comprehensive framework of international obligations agreed upon by States to address environmental issues and global climate change (expressed, in particular, in the UNFCCC and in the Paris Agreement – see subsection iii) of Section IV, *supra*), no individual complaint mechanism or any other form of tribunal has been established in this regard. Such international instruments make clear and intentional distinctions between collective goals and national obligations, and as a rule do not provide for individual rights. This results from the comprehensiveness and complexity of environmental and climate-change related matters, and from the need to strike an appropriate balance between individual and broader societal interests, which requires that State authorities enjoy a wide margin of appreciation to adopt and implement legislative and policy instruments on environmental protection.

123. International responsibility of individuals might also be relevant, for example in the context of the International Criminal Court, under whose Statute “war crimes” mean, *inter alia*, serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, for “*Intentionally launching an attack in the knowledge that such attack will cause (...) widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.*”<sup>86</sup>

124. In short, it must be concluded that State or individual responsibility for international wrongful acts related to climate change can never be ascertained in abstract.

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<sup>85</sup> Cf. Oral Allegations by the Counsel for the Government of the United Kingdom, the Agent of the Government of Belgium, and the Agent of the Government of Portugal at the Grand Chamber hearing of 27 September 2023 in the Duarte Agostinho and Others v. Portugal and 32 Others case webcast available at <https://www.cchr.coe.int/w/duarte-agostinho-and-others-v-portugal-and-others-no-39371/20->.

<sup>86</sup> Cf. Article 8, §2, §§ (iv), of the Rome Statute of the International Criminal Court.

125. The same would apply in matters of liability for acts not prohibited by international law<sup>87</sup> and in what concerns their prevention.<sup>88</sup>
126. As noted at the beginning of the present section, the Portuguese Republic is furthermore interested in exploring the legal effects of the obligations addressed in Section IV, namely with regard to the duty to cooperate.
127. Adverse impacts of climate change occur even in spite of mitigation and adaptation measures and they must be addressed by the international community.
128. The global character of the climate change emergency and the now well-established principles of equity and common but differentiated responsibilities point to a notion of international cooperation as a legal effect of those obligations. As a matter of fact, a State's obligation to cooperate with other States in the context of climate change derives from/builds on a State duty to cooperate under general international law and under specialised areas of international law.
129. In general international law, the essence of the principle of cooperation can be found in the purposes of the Charter of the United Nations, with Articles 1(1) and 1(3) elevating to central objectives of the United Nations to maintain international peace and security – *“and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace”* –, as well as achieving *“international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion”*.

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<sup>87</sup> Cf. Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities (2006), Yearbook of the International Law Commission, 2006, vol. II, Part Two.

<sup>88</sup> Cf. Prevention of Transboundary Harm from Hazardous Activities, Official Records of the General Assembly (2001), Fifty-sixth Session, Supplement No. 10 (A/56/10).

130. The Charter of the United Nations contains other, specific cooperation duties that are pertinent in the context of climate change, for example in Article 56, under which all Members of the United Nations “*pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55*”. Article 55 of the same Charter states that the United Nations shall promote “*(i) higher standards of living, full employment, and conditions of economic and social progress and development; (ii) solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and (iii) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.*” – being easy to read here goals that are relevant in the in the context of international cooperation to mitigate and adapt to climate change.
131. The content and scope of these general and specific duties of States to cooperate among themselves and with the United Nations, as well as to engage with one another, requires operationalisation. When it comes to international cooperation concerning climate change, this will require pondering on obligations stemming from specialised areas of international law, such as International Climate Change, the Law of the Sea and International Environmental Law and International Human Rights Law. In Section IV, *supra*, the Portuguese Republic has underlined several instances of State obligations to cooperate.
132. An important aspect of international cooperation under the climate regime is loss and damage, as mentioned above. While there is no consensus definition for the term “loss and damage,” there are consistent, crosscutting elements across understandings of the terms, individually and together. Loss generally refers to climate-related impacts for which restoration is not possible. It can be economic or non-economic and, in many circumstances, they are overlapping or indistinguishable. Climate-induced displacement, loss of productive or sovereign territory due to slow-onset processes such as desertification or sea-level rise, and disruptions to society from permanent emergency situations, are among the most difficult impacts to resolve. Damage, by contrast, refers to negative impacts for which restoration is possible. Together, according to a UNFCCC Secretariat

proposed working definition, “loss and damage” describe “the actual and/or potential manifestation of impacts associated with climate change in developing countries that negatively affect human and natural systems.”

133. The establishment of the Warsaw International Mechanism for Loss and Damage (WIM), to address loss and damage associated with impacts of climate change, institutionalized loss and damage within the international climate-governance regime. The creation of the Task Force on Displacement (TFD) under WIM in 2015 with the mandate to “develop recommendations for integrated approaches to avert, minimize and address displacement related to the adverse impacts of climate change”, provided a special platform for cooperation in this area.<sup>89</sup>
134. Article 8 (3) of the Paris Agreement provides that Parties should “enhance understanding, action and support, including through the [WIM], as appropriate, on a cooperative and facilitative basis with respect to loss and damage associated with the adverse effects of climate change.”<sup>90</sup> Cooperation in this context aim to enhance understanding, action and support in the areas of “early warning systems, emergency preparedness, slow onset events, events that may involve irreversible and permanent loss and damage, comprehensive risk assessment and management, risk insurance facilities, climate risk pooling and other insurance solutions, non-economic losses, and resilience of communities, livelihoods and ecosystems.”<sup>91</sup>
135. COP 27 witnessed a breakthrough to provide loss and damage funding for vulnerable countries that are hit hard by climate change impacts.<sup>92</sup> Funding arrangements would provide and assist “in mobilizing new and additional resources” and as such “complement and include sources, funds, processes and initiatives under and outside the Convention and the Paris Agreement.”<sup>93</sup>

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<sup>89</sup> UNFCCC COP, “Adoption of the Paris Agreement. Proposal by the President,” UNFCCC Doc. FCCC/CP/2015/L.9/Rev.1, 12 December 2015. Decision, Para.50, available at: [https://unfccc.int/documentation/documents/advanced\\_search/items/6911.php?preref=600008831](https://unfccc.int/documentation/documents/advanced_search/items/6911.php?preref=600008831).

<sup>90</sup> Paris Agreement Art 8(3).

<sup>91</sup> Paris Agreement Art 8(4).

<sup>92</sup> Decision -/CP.27 -/CMA.4, “Funding arrangements for responding to loss and damage associated with the adverse effects of climate change, including a focus on addressing loss and damage”

<sup>93</sup> *Ibid.*, para 2.

136. A need for, and an obligation of international cooperation, is especially clear with regards to the protection of persons affected by climate change. Even though the primary responsibility for protecting its own population rests with affected State in most cases, it is obvious that the protection of persons affected by climate change can ultimately only be fully achieved through international cooperation. And in view of several bodies of those specialised areas of international law, the Portuguese Republic is of the view that the international community is moving towards a general duty to offer assistance, that could be applicable in the context of climate change.
137. The legal and practical effectiveness of a general duty to cooperate to protect persons in the event of climate change must strike a fine balance between different considerations, amongst which the sovereignty of the affected State, the clear delimitation of the burden on assisting non-affected States and the consideration of the forms that cooperation may take, including through the participation of the international community.
138. The duty to cooperate does not encompass an automatic duty for States to provide assistance. Offers of assistance, ‘whether made unilaterally or in response to a request, are essentially voluntary and should not be construed as recognition of the existence of a legal duty to assist’.
139. Non-affected States, in other words, do not have an obligation to effectively provide assistance. This is without prejudice to the possible existence of a special obligation to provide assistance under specific treaties or institutional contexts. Such an obligation is present in the field of disasters in many bilateral arrangements and appears in some regional treaties.<sup>94</sup>
140. However, despite the absence of a general, unqualified duty to “provide” assistance, it could be argued that in view of several bodies of specialized areas of international

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<sup>94</sup> E.g.: Agreement establishing the Caribbean Disaster Emergency Response Agency of the Caribbean Community, 26 February 1991, art. 13; Treaty on the Functioning of the European Union, 13 December 2007, art. 222(2); and Agreement among the Governments of the Participating States of the Black Sea Economic Cooperation on Collaboration in Emergency Assistance and Emergency Response to Natural and Man-made Disasters, 15 April 1998, arts. 3(2), 3(3) and 4(2).



law, such as disaster law, human rights law, climate change law and international law relating to refugees and migrants, the international community is moving towards a general duty to “to offer” assistance that could be applicable in the context of climate change.

141. As a manifestation of a general obligation to cooperate, arising from general international law and further specified by International Human Rights Law and International Disaster Law, non-affected States should have a duty to offer the necessary assistance to affected States whose national capacity is insufficient to adequately protect people from the effects of climate change. Without encroaching upon the affected State’s sovereignty, this duty would be a legally sound manner of operationalizing the obligations of non-affected States to cooperate as applied to the protection of persons affected by climate change.
  
142. Many instruments of International Disaster Law or related to humanitarian assistance deal either with a right or a duty to offer assistance. This is the case, for example, of the 1992 Guiding Principles on the Right to Humanitarian Assistance,<sup>95</sup> the 2003 resolution of the *Institut de Droit international* on humanitarian assistance (‘the Bruges resolution’),<sup>96</sup> and, with a more stringent language, the 1995 Mohonk Criteria for Humanitarian Assistance in Complex Emergencies.<sup>97</sup> In the latter instrument, the reference is to ‘the right and obligation to protect and provide relief’, but the caveat that this must be ‘in conformity with the principles of international law’ can be taken to mean that the sovereignty of the affected State cannot be bypassed.
  
143. Some binding instruments similarly recognize – either implicitly or explicitly – that unsolicited offers of assistance are acceptable. The ASEAN Agreement,<sup>98</sup> the Inter-

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<sup>95</sup> Council of the International Institute of Humanitarian Law, ‘Guiding Principles on the Right to Humanitarian Assistance’ (April 1993), principle 5.

<sup>96</sup> Institut de Droit International, ‘Humanitarian Assistance’ (2 September 2003), paras. IV.1 and V.1.

<sup>97</sup> Jon M. Ebersole, ‘The Mohonk Criteria for Humanitarian Assistance in Complex Emergencies: Task Force on Ethical and Legal Issues in Humanitarian Assistance’ (1995) 17 Human Rights Quarterly, 192–208, criterion II.4.

<sup>98</sup> ASEAN Agreement on Disaster Management and Emergency Response, Arts. 3.1 and 11.2.

American Convention to Facilitate Disaster Assistance,<sup>99</sup> and the Framework Convention on Civil Defense Assistance<sup>100</sup> are examples in that regard.

144. Although - either for the lack of formal bindingness of certain documents, for the use of merely suggestive language or for the limited number of States parties to specific treaties, - these instruments do not create duties for all States, they nonetheless reveal the underlying logic that offers of assistance are in accordance with the general goals, principles, and cooperative character of International Disaster Law and International Human Rights Law. As what is at stake is merely an offer, which by definition depends on the acceptance – i.e., the consent – of the affected State to be made concrete, this act is incapable of violating the sovereignty of this State. Indeed, offers of assistance do not constitute an unfriendly act, an interference, or an unlawful intervention by the offering State, and consent is a mandatory requirement for offers to become, in fact, provisions of assistance. Offering assistance is therefore an act which can ensure compliance with the duty of non-affected States to cooperate in order to protect persons and, at the same time, respect the sovereignty and primary role of the affected State.
145. This duty to offer assistance, however, is subject to qualifications to alleviate the burden on States which do not have enough resources or capacity to offer and eventually to provide assistance in concrete circumstances. The Bruges resolution of the *Institut* is the clearest example of such a qualification, as it affirms that States have a duty to offer assistance ‘to the maximum extent possible’. The language of ‘maximum extent possible’ is similar to the formulation of the duty to cooperate in International Human Rights Law.
146. Under International Human Rights Law, States must take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of their available resources, and by all appropriate means, with a view to achieving progressively the full realization of economic, social and cultural rights recognized in the International Covenant on Economic and Social Rights. Given that climate change can significantly affect the enjoyment

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<sup>99</sup> Inter-American Convention to Facilitate Disaster Assistance, 6 July 1991, art. II (a).

<sup>100</sup> Framework Convention on Civil Defense Assistance, Art. 3 (a), (b) and (c).

of those (and other) rights, International Human Rights Law provides an additional legal basis for the duty of non-affected States to offer assistance to an affected State in cases where the latter is unable to protect the human rights of persons affected by climate change. In view of the need to strike a balance between (i) the needs of affected States and their populations, (ii) the duty of non-affected States to cooperate, and (iii) the sovereignty of affected States, this general duty to cooperate can only be one to offer assistance to the 'maximum extent possible'.

147. Drawing upon the content of the duty to cooperate under the branches of international law most immediately relevant in the context of climate change as described above, a case can be made for the existence of two different duties for non-affected States when affected States are not capable of protecting their population from the effects of climate change. On the one hand, when they have received requests for assistance, non-affected States have a duty to give due and timely consideration to these requests. On the other hand, even if no requests for assistance have been made, non-affected States might have a duty to offer assistance to affected States.
148. A form of cooperation which assumes great importance in the case of climate change relates to persons displaced as a consequence or in anticipation of its effects. Depending on the circumstances, non-affected States might have the duty to facilitate the cross-border movement of people or offer possibilities of temporary or permanent residence in their territory. Cooperation might also include the creation of bilateral or regional arrangements to manage migratory and displacement patterns. It is also important to consider that, in certain circumstances, some effects of climate change, such as for instance sea-level rise, might make the return of persons to their place of original residence impractical or impossible. For this reason, cooperation should also include the coordination of efforts to find sustainable and durable solutions for displaced persons.
149. In the following paragraphs the Portuguese Republic offers, in a non-exhaustive manner, further examples of specific forms of assistance that might flow from the general duty to cooperate as applied to the protection of persons from the effects of climate change. Given that relief assistance has a clearer content, encompassing the

necessary personnel, supplies, equipment and other resources to address the specific needs on the ground, the following considerations will be mainly devoted to forms of assistance in the field of prevention. In all cases, the duty to cooperate is an obligation of conduct, not of result.

150. As a first example, cooperation can take the form of negotiations. By virtue of the duty to cooperate, as applied to the protection of persons affected by climate change, States have the duty to negotiate in good faith to develop the normative and institutional landscape relating to such protection. This can signify, for example, the negotiation of bilateral, regional, or universal treaties, the creation of new institutions, or the strengthening of currently existing institutions to improve their capacity to address the needs of people affected by climate change.
151. Another relevant form of cooperation relates to communication and exchange of information. It could be argued that States have a duty to ensure that information on climate change is regularly shared with all interested States. Similarly, cooperation in that form can be made concrete through the joint management of early warning systems to detect the possible occurrence of hazards associated with the impacts of climate change in a timely manner.
152. Cooperation to protect persons affected by climate change may also include scientific and technical assistance, as well as, potentially, transfers of technology and know-how. This may relate to the knowledge and technical resources necessary to combat the impacts of climate change.
153. Cooperation can also take the form of financial support for affected States. This might require, for example, that certain non-affected States incentivize private actors under their jurisdiction to offer such support or that these States provide support through funding mechanisms for humanitarian action, development banks, and the Green Climate Fund, and other available mechanisms.
154. Prevention is the most effective way of addressing the impacts of climate change. This is not to say that relief is irrelevant. In fact, once extreme events associated with climate change have occurred, relief must become the immediate priority until

the most acute effects of such events have been addressed. Crucially, however, there is no reason to argue that the duty to cooperate exists in the case of relief but not in the case of prevention. If an affected State has no sufficient capacity to adopt a relevant combination of preventive measures to protect their population from the effects of climate change, non-affected States with a capacity to do so have a duty to cooperate with the affected State to that end through offering relevant assistance or giving due and timely consideration to requests for assistance.

155. In principle, all States bear the duty to cooperate with affected States to protect persons affected by climate change. A set of criteria, however, both factual and legal, derived from formally binding international law as well as from soft law, might be offered to guide, in each concrete situation, the identification of specific duty bearers and the extent of the obligations borne by them. Naturally, no definitive answers can be provided in the present, relatively abstract exercise. Moreover, no proposed criterion is definitive in and of itself; only the interplay of different factors will provide an answer in specific cases.
156. A first criterion is the existence of agreements in force between affected and non-affected States. As mentioned above, binding agreements might impose on States specific duties relating to the offer or provision of assistance to other States parties. In certain cases, as seen above, parties might have a clear obligation to provide assistance when requested.
157. Another relevant criterion is whether an affected State has addressed requests for outside assistance. This has a direct bearing on whether non-affected States have, in one case, a duty to offer assistance or, in the other, a duty to give timely and due consideration to requests. Logically, only addressees of requests for assistance can be under an obligation to give due consideration to them. Moreover, in light of the primary role of the affected State and of the legal relevance of consent, great weight must be given to the specific terms and conditions of requests, when they are made. They, in any case, do not limit the scope of the assistance that might still be offered by non-affected States. Offers can go beyond what is explicitly requested by affected States, although they are then subject to the latter's consent to be effectively provided. In addition, when affected States call for international assistance without

addressing any specific actor, it might be argued that there is a stronger obligation to consider offering assistance than if no call for assistance existed.

158. One of the most important criteria to operationalize the duty to cooperate relates to the financial and technical capability of a non-affected State, normally in direct relation with its developmental stage. Arguably, the more financial and technical capabilities a State has, the more stringent is its obligation to offer assistance to affected States or consider requests thereof. International human rights law has been explicit in that regard. The Committee on Economic, Social and Cultural Rights, for example, has clarified that cooperation is ‘particularly incumbent upon those States which are in a position to assist others’. The same logic has been adopted in relation to the reduction of the risk of disasters, for instance in the Sendai Framework for Disaster Risk Reduction. The rationale justifying this criterion is evident in the 2003 Bruges resolution of the *Institut de Droit International*, according to which offers of assistance are not required from States when ‘such assistance would result in seriously jeopardizing their own economic, social or political conditions’.
159. Another important criterion is the possible existence of States with expertise that is particularly relevant to protect people from the effects of climate change. Therefore, States with relevant expertise in the domains in question, depending also on what is needed and effective in each specific circumstance, might bear a more stringent duty to offer assistance or give due consideration to requests thereof.
160. Yet another possible criterion relates to the geographical proximity between affected and non-affected States. This criterion is justified both by considerations of practicality and by the fact that it tracks our moral intuitions. It might be argued that, among States with similar capacities, under the same abstract legal obligations and in similar conditions under the previous criteria, those geographically closer to the affected States bear a more stringent obligation to assist the latter, as they are likely to be capable of providing assistance more quickly and effectively than distant States. Noticeably, the 2003 Bruges resolution of the *Institut* stipulates that ‘[s]pecial attention should be paid to disasters affecting neighboring States’.

161. To conclude, the Portuguese Republic believes that the present advisory proceedings constitute a unique opportunity for the Court to further clarify the operationalisation and contours of the duty of States to cooperate in relation to the protection of persons affected by climate change.

## **VI. Conclusion**

162. For the reasons set out in Section III, *supra*, the Portuguese Republic is convinced that the Court has jurisdiction to issue an advisory opinion as presently requested and that there are no reasons for the Court to decline in exercising it. To the contrary, it will be an important contribution the principal judicial organ of the United Nations can give to the activities of the Organisation on a matter of crucial importance to its members as climate change. As a State that is vulnerable to climate change, as many others, the Portuguese Republic welcomes the clarifications these advisory proceedings will bring to the obligations of States in respect of climate change.

163. The Portuguese Republic stresses that cases of climate change litigation and other advisory opinions are currently pending before regional human rights courts, namely the European Court of Human Rights and the Inter-American Court of Human Rights, and ITLOS, and that it could be useful to the Court to analyse and take into account as a matter of judicial comity and for the purposes of avoiding fragmentation the legal argumentation in such judgments and advisory opinions.

164. The Portuguese Republic is also of the view that climate change presents an urgent and grave challenge with global causes and global impacts. It raises complex questions of environmental, economic, and social policies, as well as of science. As explained in Section IV above, these questions are properly addressed under the international legal framework established under UNCLOS, the UNFCCC, the Paris Agreement, International Human Rights Law, International Disaster Law and other fields of international law, and through domestic legal and policy measures. The obligations arising for States, however, could be better understood and implemented for a more effective action against climate change.

165. The Portuguese Republic maintains that climate change is a challenge that can only be effectively fought through international action and cooperation, by involving all the States Parties to the UNFCC and the Paris Agreement, rather than relying on fragmented cases of climate litigation at the domestic, regional and international level, which under existing international law would be extremely challenging (as noted in Section V, *supra*).
166. Finally, the Portuguese Republic believes that the present advisory proceedings constitute a unique opportunity for the Court to further clarify the operationalisation and contours of the duty of States to cooperate in relation climate change.
167. The Portuguese Republic respectfully submits the present Written Statement, in the sincere hope that it may serve the Court in this important and urgent task.



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Patrícia Galvão Teles  
Director of the Department of Legal Affairs  
Ministry of Foreign Affairs of the Portuguese Republic







## REPÚBLICA PORTUGUESA

For the purposes of participation of the Portuguese Republic in the advisory proceedings on the Obligations of States in respect of Climate Change pursuant to Article 66, paragraph 2, of the Statute of the International Court of Justice, I hereby declare that the following are duly authorised officials for the Portuguese Republic:

Professor Patrícia Galvão Teles, Director of the Department of Legal Affairs of the Ministry of Foreign Affairs of the Portuguese Republic;

Her Excellency Clara Nunes dos Santos, Ambassador of the Portuguese Republic to the Kingdom of the Netherlands;

The Deputy Head of Mission of the Portuguese Republic to the Kingdom of the Netherlands, Counsellor of Embassy Henrique Azevedo.

*João Gomes Cravinho*  
João Gomes Cravinho

The Minister of Foreign Affairs

