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INTERNATIONAL COURT OF JUSTICE

REQUEST FOR ADVISORY OPINION

OBLIGATIONS OF STATES IN RESPECT OF CLIMATE CHANGE

WRITTEN STATEMENT BY THE SWISS CONFEDERATION

18 March 2024

Contents

1. On 29 March 2023, the United Nations General Assembly (hereinafter referred to as the 'UNGA') adopted resolution A/RES/77/276 entitled 'Request for an advisory opinion of the International Court of Justice on the obligations of states in respect of climate change.' In adopting this resolution, the UNGA decided, in accordance with Article 96 of the Charter of the United Nations and pursuant to Article 65 of the Statute of the International Court of Justice (hereinafter referred to as the 'Court'), to request the Court to give an advisory opinion on the following 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?"[1]

2. By Order of 20 April 2023, 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 may do so within the time-limits fixed in this Order."[2]

3. The Court set the time limit for the submission of written statements at 22 March 2024.

4. Switzerland wishes to avail itself of this possibility and, observing the prescribed time limit and formalities, informs the Court of the following considerations.

[1] General Assembly resolution 77/276, *Request for an advisory opinion of the International Court of Justice on the obligations of States in respect of climate change*, A/RES/77/276 (29 March 2023).
[2] *Obligations of states in respect of climate change*, Order of 20 April 2023, ICJ Reports 2023, (1).

I. PRELIMINARY CONSIDERATIONS

A. General remarks

5. Climate change is one of the greatest threats facing the world today. The causes, causality and extent of damage from climate change have been recognised since the 1990s and are now scientifically proven. Switzerland, an Alpine country where global warming is progressing twice as quickly as the world average, is already affected by climate change.

6. Switzerland supports an effective international climate policy. It has ratified the Paris Agreement, and fully supports the objective of limiting the increase in global average temperature to 1.5°C above pre-industrial levels. It intends to make an active contribution to achieving these goals.

7. Climate change is a global problem that no single state can solve on its own. The solution requires the commitment of each individual state and the cooperation of all. This cooperation cannot take place in a legal vacuum. In particular, customary international law (II.B) and the agreements adopted as part of the climate change regime (II.C), as well as human rights (II.D), create an international legal basis for climate protection, which on the one hand establishes a framework for international cooperation and on the other specific obligations for the various states. Switzerland co-sponsored the UNGA's request to the Court to clarify, in an advisory opinion, the specific legal obligations of states and the international community with regard to global climate protection. The aim of obtaining this clarification is to help strengthen the action taken by governments and the international community to protect the climate.

8. The fact that the UNGA, for the first time ever, adopted by consensus a request to the Court for an advisory opinion underscores the importance of this request. The clarification of obligations under international law on climate change by the Court, the principal judicial organ of the UN, will be a crucial contribution in this area. Such clarification will support the negotiations on the climate system, which are essential. It will also help to strengthen the efforts of all states, in particular the largest emitters and those with the greatest capabilities.

B. Jurisdiction of the Court

9. Under Article 65, paragraph 1, of the Statute of the Court, the Court may give an advisory opinion on any legal question at the request of whatever body which has been authorised by or in accordance with the provisions of the Charter of the United Nations to request such an opinion. The request contained in resolution A/RES/77/276 was made pursuant to Article 96, paragraph 1, of the Charter of the United Nations, under which the UNGA may request the Court to give an advisory opinion on any legal question.

10. In this case, the questions on which the Court's advisory opinion was sought are legal questions. The Court therefore has jurisdiction to give an advisory opinion in response to a request from the UNGA.

11. Under Article 65, paragraph 1 of the Statute, "*The Court <u>may</u> give an advisory opinion...*" (emphasis added). The Court thus has the discretionary power to decide whether or not to give the advisory opinion requested of it: "*The fact that the Court has jurisdiction does not mean,*

however, that it is obliged to exercise it".[3] Nevertheless, "*only 'compelling reasons' may lead the Court to refuse its opinion in response to a request falling within its jurisdiction.*" [4]

12. In this case, there is no "compelling reason" why the Court should refuse to give the opinion requested by the UNGA. To date, the Court has also never refused its opinion in response to a request falling within its jurisdiction.[5] Moreover, the fact that the UNGA has, for the first time, adopted by consensus a request for an advisory opinion from the Court, underscores the importance that the international community attaches to this request and to the questions submitted.

II. OBLIGATIONS

A. Introduction

13. The relevant legal framework for answering the first question put to the Court comprises customary international law, in particular the no-harm rule and the obligation of prevention (II.B). This customary international law is supplemented, but not superseded, by international treaties enacted in the field of climate protection (II.C) and, to a certain extent, human rights (II.D). It is in particular these rules of customary international law and the provisions of the Paris Agreement that define the main obligations in terms of protecting the climate system. Human rights supplement these obligations between states with obligations within states.

B. The customary law obligation to prevent environmental harm (no-harm rule)

14. The customary law obligation [6] to prevent environmental harm (no-harm rule) is binding on all states. This rule already appeared in the award of the arbitration panel in the *Trail Smelter* case of 1941,[7] and has been clarified and applied by the Court, in particular in the *Corfu Channel* case[8] and the *Gabcikovo-Nagymaros* case[9], as well as in the advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons.*[10]

15. Moreover, this rule has been consolidated into a general positive obligation which requires states to take measures to prevent significant transboundary environmental damage.

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[3] *Legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965*, advisory opinion, ICJ. ICJ Reports 2019, p. 95, para. 63.
[4] *Legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965*, advisory opinion, ICJ. ICJ Reports 2019, p. 95, para. 65.
[5] Robert Kolb, *The International Court of Justice*, Hart Publishing, 2013, p. 1094, on the *Status of Eastern Carelia case*, Advisory Opinion, ICJ Reports B05 1923, p. 7, see Zeno Crespi Reghizzi, 'The Chagos Advisory Opinion and the Principle of Consent to Adjudication', in Thomas Burri and Jamie Trinidad (eds), *The International Court of Justice and Decolonisation: New Directions from the Chagos Advisory Opinion*, CUP, 2021, pp. 51 ff.
[6] Astrid Epiney and Martin Scheyli, *Umweltvölkerrecht: Völkerrechtliche Bezugspunkte des schweizerischen Umweltrechts (International environmental law: Swiss environmental law benchmarks in line with international law),* Stämpfli, 2000, p. 104.
[7] Trail Smelter Case (USA v. Canada), arbitral award, 11 March 1941, Reports of International Arbitral Awards, 1938-1941, Vol. 3, pp. 1905-1982, p. 1907.
[8] Corfu Channel case, Judgment, ICJ Reports 1949, p. 4.
[9] Gabcikovo-Nagymaros Project (Hungary v. Slovakia), Judgment, ICJ Reports 1997.
[10] Legality of the Threat or Use of Nuclear Weapons, Advisory opinion, ICJ Reports 1996, p. 226, para. 26 ff.

16. Although the paragraph preceding the questions submitted to the Court in the request for an advisory opinion refers to the '*principle*' of prevention of significant harm to the environment,[11] Switzerland notes that the no-harm rule is not just a 'principle' under customary international law. It also comprises an *obligation* to prevent significant environmental harm.[12]

17. In 2010, the Court clarified the status of the principle of prevention in the *Pulp Mills on the River Uruguay* case:

> *"The Court points out that the principle of prevention, as a customary rule, has its origins in the due diligence that is required of a State in its territory*.
> […]
> [*The*] *State is thus obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State."*[13]

18. This obligation under customary law is set out in various international instruments[14] and, to some extent, in *the Articles on Prevention of Transboundary Harm from Hazardous Activities* (hereinafter referred to as the 'Articles on Prevention') adopted by the International Law Commission (hereinafter referred to as the 'ILC').[15] The Articles on Prevention, which are limited to transboundary harm, or damage to other states, have codified the status of customary law in this area. The General Assembly has also commended the Articles on Prevention to the attention of governments.[16]

19. The geographical scope of this obligation of prevention includes the environment of other states, but also areas beyond national jurisdiction,[17] such as the high seas, the global climate system and the atmosphere.

20. Indeed, in keeping with the *common concern of humankind*,[18] the rule is not limited to preventing immediate harm to neighbouring states,[19] since all states also have a general

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[11] A/RES/77/276, p. 3.
[12] https://press.un.org/en/2023/sgsm21750.doc.htm
[13] Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, ICJ Reports 2010, p. 14, para. 101.
[14] For example, the Stockholm Declaration, principle 21, 1972 ; Rio Declaration on Environment and Development, principle 2, 1992 ; International Convention for the Prevention of Pollution of the Sea by Oil, 1954, International Convention for the Prevention of Pollution from Ships, 1973 ; United Nations Convention on the Law of the Sea (UNCLOS), 1982 ; Convention on Long-Range Transboundary Air Pollution, 1979 ; Convention on Environmental Impact Assessment in a Transboundary Context, 1991.
[15] ILC, Articles on Prevention of Transboundary Harm from Hazardous Activities, Yearbook of the International Law Commission, vol. II (2).
[16] A/RES/62/68, p. 2.
[17] Including, but not limited to, the Stockholm Declaration, principle 21, 1972 ; Rio Declaration on Environment and Development, principle 2, 1992, A/RES/2996(XXVII) (1.) ; Charter of Economic Rights and Duties of States, Article 30, A/RES/3281, p. 58 ; United Nations Framework Convention on Climate Change (UNFCCC), paragraph 8 of the preamble.
[18] UNFCCC, paragraph 1 of the preamble; Paris Agreement, paragraph 11 of the preamble.
[19] ILC, Articles on Prevention of Transboundary Harm from Hazardous Activities, Yearbook of the International Law Commission, vol. II (2) Article 2(c). The acknowledgment of climate change as a common concern of humankind (paragraphs 1 and 6 of the preamble to the UNFCCC and paragraph 11 of the preamble to the Paris Agreement) is also deemed to create an obligation to cooperate and an obligation to take national measures to prevent harm (Thomas Cottier, 'The Principle of Common Concern of Humankind' in *The Prospects of Common Concern of Humankind in International Law* (Thomas Cottier ed, CUP 2021) 3, pp. 9, 25, 63-68 and 73-78; Krista Nadakavukaren Schefer and Thomas Cottier, 'Responsibility to Protect (R2P) and the Emerging Principle of Common Concern', in P. Hilpold (ed.), *Responsibility to Protect (R2P). A New Paradigm of International Law?,* Martinus Nihjoff, 2013, pp. 123-142).

obligation "*to ensure that activities within their jurisdiction and control respect the environment of other States* ***or of areas beyond national control***."[20]

21. Thus, in accordance with the Court's case law,[21] the no-harm rule gives rise to a positive general obligation of prevention for states to take measures to avoid harming the environment of other states and the environment beyond national jurisdiction, such as the global climate system.

22. This is evident, for example, in Article 192 of the United Nations Convention on the Law of the Sea, which provides that states have "*the obligation to protect and preserve the marine environment*".[22] This provision should be interpreted in the light of international environmental law and therefore as imposing on states a "*duty to prevent, or at least mitigate, significant harm to the environment [...]* ".[23]

23. This obligation under customary international law contains four key elements: (i) significant damage to the environment, (ii) causality, (iii) foreseeability (knowledge) of the risk and (iv) due diligence.

i) Significant damage to the environment

24. The prohibition on causing damage to the environment and preventing its occurrence requires the damage to attain a certain threshold of severity. This threshold of severity is sometimes defined in the Court's case law through the concept of "*significant damage.*" [24]

25. The harm caused by greenhouse gas emissions as drivers of climate change, as identified by the Intergovernmental Panel on Climate Change (hereinafter referred to as the 'IPCC'), is unquestionably significant damage within the meaning of the no-harm rule.

26. The harm caused by climate change goes far beyond damage to the environment: it also causes considerable economic and social harms, and poses a fundamental threat to human life and health. The existence of significant damage is therefore clear.

ii) Causality

27. The question of causality in relation to the occurrence of damage to be prevented is inherent in the obligation of prevention.[25] The causal link between conduct and damage is thus integral to determining more broadly the obligation to do no harm to the environment. The IPCC has demonstrated the causal link between rising human-made greenhouse gas emissions and climate change.

28. The fact that climate change causation is linked to a multitude of activities and that no single state is responsible for the total extent of global climate change does not call into question this

[20] Legality of the Threat or Use of Nuclear Weapons, Advisory opinion, ICJ Reports 1996, p. 226, para. 29; Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration (emphasis added).
[21] Legality of the Threat or Use of Nuclear Weapons, Advisory opinion, ICJ Reports 1996, p.226; Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, ICJ Reports 2010, p. 14.
[22] United Nations Convention on the Law of the Sea, 1982, art. 192.
[23] *South China Sea Arbitration* (The Republic of Philippines v. The People's Republic of China), Permanent Court of Arbitration (PCA), arbitral award, 2016, paragraph 941.
[24] Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, ICJ Reports 2010, p. 14, para. 101.
[25] Samantha Besson, Due Diligence in International Law, Brill Nijhoff, 2023, p. 155.

basic causality. Nevertheless, it is difficult to attribute specific damage to a specific state, given that all states are both emitters of greenhouse gases and suffer damage caused by climate change.

29. On the one hand, there is a direct causality between the conduct of the largest emitters and the damage caused by the scale of emissions for which they are responsible. On the other hand, in environmental matters in particular, the Court recognises that damage may be "*due to several concurrent causes*." [26] In this case, collective causality applies, giving rise to both individual and collective obligations.

iii) Foreseeability of risk (knowledge)

30. The positive obligation of prevention requires a certain knowledge of the risks of significant damage from the activity in question. This knowledge must cover not only the seriousness of the potential damage, but also causality and the likelihood of the risk occurring. In other words, the risk of significant damage occurring must be reasonably foreseeable.[27]

31. In its Articles on Prevention, the ILC considered that risks are foreseeable when they take the form of a "*high probability of causing significant transboundary harm*." [28]

32. The likelihood of the risk occurring depends, in part, on the causal link between the activity and the damage. Ignorance of the causal link, and therefore the impossibility of reasonably foreseeing the damage, means that there is no breach of the obligation of prevention.

33. Knowledge and foreseeability of the risks are therefore prerequisites for breaching the obligation of prevention, which requires states to ensure that activities carried out on their territory or under their jurisdiction do not cause significant damage to the environment of other states or to areas beyond national jurisdiction.

34. It is useful here to clarify the notion of foreseeability. It is not necessary to anticipate every possible outcome of an action. It is sufficient that the result could have been reasonably anticipated at the time of the act for it to be causally linked to it. In other words, the risk and the magnitude of the potential damage must be reasonably foreseeable, particularly in the light of scientific knowledge at the time of the assessment.[29]

35. As far as climate change is concerned, prior to the 1980s, nobody could have foreseen the causal links, potential damage and the scale of damage that would result from greenhouse gas emissions. While discussions within the scientific community on this issue predated the IPCC, it was the establishment of the IPCC in 1988 and the publication of its First Assessment Report in 1990,[30] followed by the adoption of the UN Framework Convention on Climate Change in 1992, that cemented the scientific consensus.[31]

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[26] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica V. Nicaragua)*, Compensation, Judgment, ICJ Reports 2018, p. 15, para. 34.
[27] Samantha Besson, Due Diligence in International Law, Brill Nijhoff, 2023, p. 157.
[28] ILC, Articles on Prevention of Transboundary Harm from Hazardous Activities, Yearbook of the International Law Commission, vol. II (2) Art. 2(a).
[29] Patricia Birnie, Alan Boyle, Catherine Redgwell, International Law and the Environment, 4th ed, OUP, 2021, p. 171.
[30] J.T. Houghton, G.J. Jenkins, J.J. Ephraums (eds), *Climate Change, The IPCC Scientific Assessment*, 1990.
[31] Paragraph 2 of the Preamble to the United Nations Framework Convention on Climate Change.

36. From the early 1990s, the objective foreseeability of climate change was therefore a given. The international obligations of states, based on the no-harm rule and in relation to their greenhouse gas emissions, thus exist from this period onwards.

iv) Due diligence

37. As the Court observed in the *Pulp Mills* case in 2010, "*the principle of prevention, as a customary rule, has its origins in the due diligence that is required of a State in its territory*." [32] With regard to the practical implementation of this obligation of due diligence, the Court noted in particular that a state must use "*all the means at its disposal*" [33] to avoid or minimise significant damage.

38. In order for states to be able to deploy all the means necessary and at their disposal, the causal links and risk of the damage occurring must be reasonably foreseeable.

39. In a 2011 advisory opinion on maritime environmental protection, the International Tribunal for the Law of the Sea (hereinafter referred to as the 'ITLOS') outlined the content of the due diligence obligations:

> *"[…] 'due diligence' is a variable concept. It may change over time as measures considered sufficiently diligent at a certain moment may become not diligent enough in light, for instance, of new scientific or technological knowledge. It may also change in relation to the risks involved in the activity. […].."* [34]

40. In particular, the ILC stated in its Articles on Prevention that "*the standard of due diligence against which a State's conduct is to be measured is that which is generally considered to be appropriate and proportionate to the degree of risk of transboundary harm in the particular case*." [35]

41. It follows from the above that risk plays a central role in determining the level of due diligence required and that states have an obligation to act in proportion to the risks posed by the activity in question.[36] ITLOS confirmed this approach, observing that "*the standard of due diligence has to be more severe for the riskier activities*." [37]

42. The content of the due diligence obligations is determined in particular by (i) scientific knowledge concerning the risks involved and the level of risk, (ii) the ability to control the activity giving rise to the risk and (iii) the available technology and capabilities. [38]

43. While, generally speaking, the obligation of due diligence is the same for all states, the elements concerning the content of the due diligence required demonstrate that there can be no abstract categorisation of states to determine the scope and content of appropriate measures. A case-by-

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[32] Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, ICJ Reports 2010, p. 14, para. 101.
[33] Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, ICJ Reports 2010, p. 14, para. 101.
[34] *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area*, Advisory Opinion, ITLOS 2011, para. 117.
[35] Report of the International Law Commission on the work of its 48th session Doc. A/51/10, Yearbook of the International Law Commission, 1996, vol. II, p. 120.
[36] Alabama Claims (United States v. Great Britain), 1871, 29 RIAA 125, p. 129.
[37] Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area, Advisory Opinion, ITLOS 2011, paras. 117-118.
[38] Samantha Besson, Due Diligence in International Law, Brill Nijhoff, 2023, p. 120 ff.

case analysis is required, based on the risk of the activity and individual national situations. The requirement that the measures to be implemented be specific to each state is also set out in the Paris Agreement, which provides that each party's nationally determined contribution reflects its highest possible ambition.[39]

44. In addition, the level of due diligence required depends on the extent of scientific knowledge and technology available. As a result, as knowledge increases and more technologies become available, the need to exercise due diligence and take action increases. This element is reflected in the Paris Agreement, which requires states parties to progress over time in their efforts to combat climate change.[40]

45. The due diligence obligation is also determined by the ability to control the activities giving rise to the risk, which requires governments to take action that is ambitious in relation to their actual greenhouse gas emissions. The Paris Agreement underlines this aspect of customary international law by referring to the common but differentiated responsibilities of each state party, in the light of different national circumstances.[41] Large emitters therefore have a greater responsibility to reduce their emissions than small emitters.

46. The measures to be taken must also be appropriate. The appropriateness of a measure depends on its effectiveness, on the one hand, and on the specific possibilities and capabilities of the state responsible, on the other. The principle of common but differentiated responsibilities and respective capabilities, taking into account the different national circumstances,[42] underscores that the obligation of due diligence is common to all states but that the efforts expected of each state must reflect the specific national circumstances.

47. The customary obligation of due diligence, which requires states to adopt appropriate measures to prevent activities on their own territory or under their own jurisdiction from causing transboundary harm, also applies to climate protection. This obligation, which has been applicable in this area since knowledge of the causes and consequences of climate change was substantiated in the 1990s, is the same for all states, but applies in particular to states with high levels of emissions.

C. Climate change conventions

48. The United Nations Framework Convention on Climate Change (hereinafter referred to as the 'UNFCCC'), adopted in 1992, establishes an international framework for cooperation in combating climate change. It contains general climate protection obligations, specific reporting obligations for all states parties[43] and additional commitments, including the adoption of national policies for developed country parties and the other parties set out in Annex I. [44] It also imposes obligations on developed country parties and the other developed parties listed in Annex II to provide support to developing countries which are party to the UNFCCC[45]

[39] Art. 4(3) Paris Agreement.
[40] Arts 3 and 4(3) Paris Agreement.
[41] Art. 4.3 Paris Agreement.
[42] Arts. 3 and 4(3) Paris Agreement. See also Art. 2(4) Kyoto Protocol; Art. 4(1) UNFCCC
[43] Art. 4(1) and Art. 12 of the UNFCCC.
[44] Art. 4(2) UNFCCC.
[45] Art. 4(3) UNFCCC.

49. The Kyoto Protocol (hereinafter referred to as the 'KP') sets specific, legally binding targets for reducing and limiting greenhouse gas emissions for the states parties listed in Annex I.[46] The states parties to the KP have fulfilled these obligations. However, the United States never ratified the KP while Canada withdrew during the first commitment period.

50. The categorisation of countries as 'developed' or 'developing' in the UNFCCC[47] reflected the reality of the last century, when developed countries were usually the source of a large proportion of global emissions and had far greater capabilities than developing countries. However, the 1992 categorisation is no longer justified today, as a number of major countries categorised as 'developing' under the UNFCCC are now some of the largest CO_2 emitters[48] and fall within the group of high-income countries.[49]

51. In this respect, the term 'developed country' is not explicitly defined in the UNFCCC or the KP. The UNFCCC states that Annex I cannot be used as a definition of developed countries. The wording "*the developed country Parties ... included in Annex I*"[50] demonstrates that some developed countries may not be included in Annex I. The wording *"...other Parties included in Annex I*" [51] indicates that undeveloped countries are also included in Annex I.[52] Furthermore, Annexes I and II of the UNFCCC were not drawn up on the basis of objective criteria such as the Human Development Index or the economic capacity of states.[53]

52. The absence of a definition of developed or developing countries in the UNFCCC annexes is compensated for by the principle of common but differentiated responsibilities and respective capabilities,[54] which provides the criteria by which the two categories of countries should be distinguished. By stressing that all countries take action in accordance with their common but differentiated responsibilities, respective capabilities and social and economic circumstances,[55] the UNFCCC establishes that a country should be considered as developed or developing in accordance with its responsibilities, its respective capabilities and its specific social and economic circumstances.

53. The Paris Agreement goes far beyond the distinction between developed and developing countries, which is featured under the UNFCCC. In principle, it sets out the same obligations for all states parties, with a degree of flexibility for those that require it.[56] However, only developed country parties are obliged to provide financial resources to assist developing country

[46] Art. 3 Kyoto Protocol.
[47] For example paragraphs 3, 18 and 22 of the preamble and Arts 3(1), 3(2), 4(2)(a), 4(3), 4(4), 4(5) and 4(7) UNFCCC.
[48] Seven of the 10 countries with the highest total greenhouse gas emissions are not included in Annex I of the UNFCCC. Nine of the 10 countries with the highest per capita emissions are not included in Annex I (see more generally https://www.wri.org/insights/charts-explain-per-capita-greenhouse-gas-emissions).
[49] Annex II of the UNFCCC includes 24 countries, while the World Bank's list of high-income economies includes 83 countries (see more generally https://datahelpdesk.worldbank.org/knowledgebase/articles/906519-world-bank-country-and-lending-group, as at 19.02.2024).
[50] Art. 4(2) UNFCCC; Art. 4(3), 4(4) and 4(5) UNFCCC contain the same wording as for Annex II.
[51] Art. 4(2) UNFCCC.
[52] In particular countries whose economies are in transition.
[53] See also Daniel Bodansky, Jutta Brunnée and Lavanya Rajamani, *International Climate Change Law* (OUP 2017) 121-123 and Ian H. Rowlands, 'Atmosphere and Outer Space' in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law,* OUP, 2007, p. 329.
[54] Art. 3(1) UNFCCC.
[55] Preamble para. 6, Arts 3(1) and 4(1) UNFCCC.
[56] Art. 13(2) Paris Agreement; Beatrice Wagner Pfeifer, *Umweltrecht – Besondere Regelungsbereiche (Environmental law – specific regulatory areas),* Dike, 2021, p. 477.

parties. This obligation is intended to facilitate both mitigation and adaptation in line with their obligations under the UNFCCC.[57]

54. Other parties are asked to provide or continue to provide this type of financial support on a voluntary basis.[58] However, the fact that developed country parties should continue to lead the way in mobilising funding "*as part of a global effort,*" [59] indicates that financial support efforts should not be limited to developed countries.[60]

55. Regarding the term 'developed countries', the Paris Agreement does not define it. However, the reference to "*respective capabilities, in the light of different national circumstances*"[61] clearly indicates that the term must take into account the specific economic and social circumstances of each country. Developed countries are thus those with greater capabilities. [62]

56. In concrete terms, each state party to the Paris Agreement must prepare, communicate and maintain successive nationally determined contributions that it intends to achieve.[63] They must also pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions.[64]

57. In addition, every five years, taking into account the results of the global stocktake, each state party must communicate a new nationally determined contribution which represents a progression beyond the previous nationally determined contribution.[65] The Paris Agreement provides that the nationally determined contribution of each state party must reflect its highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.[66] The progression of nationally determined contributions reflecting a party's highest possible ambition is a clear expectation. It establishes a relevant standard for the application of the due diligence required under the customary no-harm rule.

58. The UNFCCC, KP and Paris Agreement do not create any liability or obligation to provide assistance in respect of climate change-related loss or damage. The Paris Agreement recognises the importance of averting loss and damage.[67] However, in adopting the agreement, the parties

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[57] Art. 9(1) Paris Agreement.
[58] Art. 9(2) Paris Agreement.
[59] Art. 9(3) Paris Agreement.
[60] Laurence Boisson de Chazournes, 'L'Accord de Paris pour le climat – Contexte et avancées' (the Paris Agreement – background and progress), in *Enjeux et Perspectives – Droit international, droit de la mer, droits de l'homme,* Liber Amicorum *in honour of Haritini Dipla,* A. Pedone, 2020, p. 473
[61] Art. 2(2) Paris Agreement.
[62] Submission of Switzerland to communicate indicative quantitative and qualitative information related to Article 9, paragraphs 1 and 3 of the Paris Agreement for 2023 and 2024, p. 3, (available at https://www4.unfccc.int/sites/SubmissionsStaging/Documents/202303281159---Ex-ante%20climate%20finance%20communication%20Switzerland%202021-2022_final.pdf?_gl=1*17fmn5l*_ga*MTQxNjk5MDYxNS4xNjk0NTQ5NTg2*_ga_7ZZWT14N79*MTcxMDc5OTQ4OS44LjEuMTcxMDc5OTc4My4wLjAuMA).
[63] Art. 4(2) Paris Agreement, first sentence.
[64] Art. 4(2) Paris Agreement, second sentence.
[65] Art. 4(3) and Art. 4(9) Paris Agreement.
[66] Art. 4(3) Paris Agreement.
[67] Art. 8(1) Paris Agreement.

agreed that this cannot involve or provide a basis for any liability or compensation.[68] As a result, there is no legal obligation under the climate regime to provide compensation for climate change-related loss and damage.

D. Climate change and human rights

i) General / relationship with international environmental law

59. Climate change is causing both an environmental crisis and a human rights crisis. Its impacts are hindering the realisation and enjoyment of the standards and provisions of the international human rights legal framework in many parts of the world. [69] This is particularly the case for legal guarantees of the right to *life*[70], to food[71], *to health*[72], *to a home and to a private and family life*[73], *to property*[74], and *to the cultural rights of minorities and indigenous peoples.*[75]

60. In order to understand the consequences of the effects of climate change on human rights, a series of instruments, both legally binding and non-legally binding, and current developments are key. These include in particular (a) the existing and emerging rules, principles, norms and obligations of international environmental law referred to in sections B and C, (b) the framework principles relating to human rights and the environment, (c) the recognition, by the UN General Assembly[76] and the Human Rights Council[77] of the existence of the right to a "*clean, healthy and sustainable environment",*[78] (d) legislative and case law developments, both at international and regional level, recognising the existing link between human rights and the environment, (e) the recognition by the vast majority of states of various types of a right to a clean, healthy and sustainable environment or specific aspects of international human rights conventions, including in the case law of regional and national courts, constitutions, national legislation and policies,[79] and (f) developments at the international level in the area of "business and human rights."

61. The international human rights regime governs, in particular, relations between states and individuals. It differs from international environmental law, which deals with relations between states on issues such as cross-border environmental damage and the allocation of resources. Even if there is some overlap between the two regimes, international and regional human rights conventions were not designed as *instruments at the service of the environment,*[80] and their

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[68] Decision 1/CP.21 paragraph 51 of the Conference of the Parties on the Framework Convention on Climate Change [https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/FCCC_CP_2015_10_Add.1.pdf].

[69] Astrid Epiney and Martin Scheyli, *Umweltvölkerrecht: Völkerrechtliche Bezugspunkte des schweizerischen Umweltrechts (International environmental law: Swiss environmental law benchmarks in line with international law),* Stämpfli, 2000, p. 155.

[70] Art. 3 of the Universal Declaration of Human Rights (UDHR), Art. 6 of the International Covenant on Civil and Political Rights (ICCPR), Art. 2 of the European Convention on Human Rights (ECHR).

[71] Art. 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

[72] Art. 25 UDHR, Art. 12 ICESCR.

[73] Art. 17 ICCPR, Art. 8 ECHR.

[74] Art. 17 UDHR, Art. 1 of Protocol 1 ECHR.

[75] Art. 27 ICCPR.

[76] General Assembly Resolution 76/300.

[77] A/HRC/37/59, annex.

[78] Human Rights Council Resolution 48/13.

[79] See A/HRC/43/53.

[80] Some regional instruments stand out, notably the African Charter on Human and Peoples' Rights (Art. 24) and the Additional Protocol to the American Convention on Human Rights, known as the "Protocol of San Salvador" (Art. 11), which refer to a "right to a healthy environment".

supervisory bodies cannot be required to check whether contracting states are complying with their obligations under other legal regimes such as international environmental law. At most, these instruments can shed some light on the verification of states' compliance with their human rights commitments and the determination of their related positive obligations.

ii) The scope of human rights

62. Switzerland believes that it is not currently possible to infer an *individually justiciable right to protection against climate change* from human rights treaties. However, this does not mean that human rights instruments cannot or should not deal with environmental issues.

63. In principle, all states – whether developed or developing countries – are obliged to *respect*, *protect* and *fulfil* human rights within their borders. This implies a duty to ensure that people living on their territory and under their jurisdiction can assert their rights in relation to the authorities concerned. In this context, the *right to an effective remedy*, which is an essential element of human rights obligations, plays an important role and is recognised in various international instruments and treaties.[81]

64. Individuals or communities who suffer specific violations of human rights as a result of harm caused by environmental factors are entitled to effective remedies, allowing for a fair hearing through judicial and other mechanisms.[82] In this sense, human rights can provide an important *guiding framework* for states in relation to measures to combat climate change (particularly in relation to principles such as adequate participation, transparency and non-discrimination).

65. The conventional human rights system and the legal remedies it can offer to individuals and States do not however lend themselves to an assessment of the effectiveness of national *policies* to combat global warming. The definition and choice of measures to be taken are the responsibility of national governments and parliaments.

E. The relationship between the customary no-harm rule and the conventions on climate change and human rights

66. There are no norms in the above-mentioned conventions derogating from the no-harm rule, because in various ways they contribute to the implementation of this norm of customary law. Moreover, the legal regime governing climate change is not a stand-alone regime but is part of general international environmental law and its norms.[83]

67. It follows that there is no normative conflict between this general international principle and these conventions. Rather, the relationship between different sources of law is essentially a relationship of complementarity.

68. Insofar as the conventions relating to climate change do not contain norms derogating from the general rule, they do not constitute a *lex specialis*. By definition, a *lex specialis* presupposes a normative conflict between the general rule and the more specific rules.[84] This is clearly not the

[81] E.g. Art. 8 UDHR; Art. 2 ICCPR; Art. 13 ECHR; Art. 7 American Convention on Human Rights; Art. 25 African Charter on Human and Peoples' Rights.
[82] With regard to the extensive case law of the ECtHR, please refer to the Guide to case law of the European Court of Human Rights, updated on 31 August 2022 (https://www.echr.coe.int/documents/d/echr/Guide_Environment_ENG).
[83] Leslie-Anne Duvic-Paoli, The Prevention Principle in International Environmental Law, CUP, 2018, p. 78.
[84] ILC, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Yearbook of the International Law Commission, 2006, vol. II (2) p. 186.

case regarding the relationship between the no-harm rule and the conventions on climate change and human rights.

69. At most, the principles and rules of international environmental law may assist in interpreting the scope of the rights and obligations binding the parties to the relevant conventions within the meaning of Article 31 paragraph 1 and Article 31 paragraph 3 letter c of the Vienna Convention on the Law of Treaties. This approach was used and endorsed by the arbitral tribunal in the *Iron Rhine* case, which confirmed, in particular, that the duty to prevent applied "*not only in autonomous activities but also in activities undertaken in implementation of specific treaties between the parties*".[85]

70. At the same time, the mere fact that a state participates in the conventions relating to climate change does not mean that the no-harm rule has been fully respected nor that the state has demonstrated due diligence. Switzerland considers that participation in the conventions is not necessarily sufficient to ensure compliance with this customary law obligation, as this requires a case-by-case assessment of the measures taken in response to risks.

71. The specific rules of the relevant conventions, in particular those of the Paris Agreement, may be used to interpret the rules of customary international law. This should not, however, result in a weakening or relativisation of the obligations arising from customary law, but rather in their strengthening. The requirement that each state's climate protection efforts correspond to its highest possible level of ambition[86] sets the standard of due diligence required of each state. This standard is also part of the state's obligation to ensure that activities carried out on its territory or under its jurisdiction do not cause damage outside it.

III. LEGAL CONSEQUENCES

72. The relevant legal framework for answering the second question put to the court is customary international law on the international responsibility of states. This customary law is largely reflected in the ILC's Draft articles on Responsibility of States for Internationally Wrongful Acts.

73. Under the rules of customary law, states assume responsibility for their internationally wrongful acts.[87] This is therefore the case in the event of a breach of the primary rules of international law set out in Part II of this submission – in particular the no-harm rule and the duty of due diligence with regard to greenhouse gas emissions. While the result is a clear obligation on states to put an end to such unlawful behaviour (i), existing international law provides little concrete guidance on questions of compensation in the climate context (ii).

i) Cessation of the wrongful act

74. The existing rules and principles on state responsibility are clear on this point: the first duty of a state that breaches a rule of international law is to put an end to that breach[88], If a state's actions or omissions in the area of climate protection breach the due diligence obligations required in

[85] Iron Rhine Railway case (Belgium/Netherlands) arbitral award, 24 May 2005, Reports of International Arbitral Awards, vol. XXVII.
[86] Art. 4(3) Paris Agreement.
[87] Article 1 of the Articles on Responsibility of States for Internationally Wrongful Acts.
[88] Article 30 of the Articles on Responsibility of States for Internationally Wrongful Acts.

the context of the no-harm rule, then that state must take steps to bring itself into compliance with its obligations under customary international law. These measures may involve the implementation of more ambitious greenhouse gas emission reduction targets by the states concerned.

ii) Compensation for damage

75. The existing rules on state liability, however, provide less clear guidance on questions of compensation in the context of climate change. With regard to compensation, on the one hand, Switzerland agrees with the Court that "*damage to the environment, and the consequent impairment or loss of the ability of the environment to provide goods and services, is compensable under international law*."[89] On the other hand, Switzerland also supports the Court's finding that, for the time being, international law does not dictate any specific method for assessing compensation for environmental damage and that "*the specific circumstances and characteristics of each case*"[90] remain central to this assessment. These observations by the Court show the complexity of a theoretical or abstract analysis of issues relating to state liability for environmental damage.

76. In order to establish state liability there must first be a breach of an obligation deriving from a norm of international law. As noted in section II.B, the customary rule of due diligence, which requires states to adopt appropriate measures to prevent activities within their own territory or jurisdiction from causing transboundary harm, has also applied to climate protection since the 1990s. Accordingly, from the 1990s onwards, a breach of the due diligence obligation could result in liability.

77. A particular difficulty in the field of the climate system is that it is generally not damaged by the behaviour of a single state, but by the behaviour of several or even all states. Customary law on state responsibility contains only very general indications in this regard:

> *"In international law, the general principle in the case of a plurality of responsible States is that each State is separately responsible for conduct attributable to it in the sense of article 2 [of the articles on Responsibility of States for Internationally Wrongful Acts]"*. [91]

78. It follows that the share of damage will depend in particular on the individual conduct of a state and its impact, and not on the overall result of the combined activities of all the states. These elements of international law on state responsibility correspond to the *polluter pays* principle, which is widely accepted in international practice.[92]

79. However, in applying the polluter pays principle, it would be necessary to specify what share of emissions attributable to a particular country would constitute a breach of the no-harm rule. There is no agreement regarding the amount of greenhouse gas emissions each country is permitted to emit before it breaches the no-harm rule. Neither is there an agreed level of

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[89] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica V. Nicaragua)*, Compensation, Judgment, ICJ Reports 2018, p. 15, para. 42.
[90] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica V. Nicaragua)*, Compensation, Judgment, ICJ Reports 2018, p. 15, para. 52.
[91] ILC, commentary on Article 47 of *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, 2001, para. 3, 338.
[92] *OECD Recommendation on Guiding Principles concerning International Economic Aspects on Environmental Policies [26 May 1972]; OECD Recommendation on the Implementation of the Polluter-Pays Principle [14 November 1974]; OECD Recommendation on the Application of the Polluter-Pays Principle to Accidental Pollution [25 July 1989]).*

emissions reduction that would determine whether a country has met its due diligence obligation. In order to ensure the 'proper' allocation of carbon budgets, a number of factors and criteria need to be considered, which ultimately require political determination and assessment. Setting a carbon budget for states is fundamentally a political decision rather the result of any legal or scientific determination.

80. Because it is difficult and complex to determine objectively whether greenhouse gas emissions constitute a breach of the no-harm rule, applying the polluter pays principle in relation to climate change presents challenges for existing international law. Any proportional allocation of damage, in line with the *polluter pays* principle[93], should therefore be the subject of negotiations between states.

81. Given that global warming caused by greenhouse gas emissions is a challenge faced by all states globally and described as a *common concern* under international law, states need to join forces in managing climate damage, which will require the involvement of all UN system entities. Only a global forum such as the UN can provide a framework for finding appropriate solutions between states.

IV. Conclusion

82. Switzerland invites the Court to issue an advisory opinion on the questions relating to the obligations of states and the legal consequences of climate change in response to the arguments submitted.

Berne, 18 March 2024

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[93] Regarding the polluter pays principle, see Laurence Boisson de Chazournes, 'L'OCDE et la protection de l'environnement: entre innovation et maturation' (The OECD and environmental protection: between innovation and fruition, in Société Française pour le Droit International and the OECD, *Le pouvoir normatif de l'OCDE*, A. Pedone, 2013, pp. 56-58.