

**INTERNATIONAL COURT OF JUSTICE**

**OBLIGATIONS OF STATES IN RESPECT OF CLIMATE CHANGE  
(REQUEST FOR ADVISORY OPINION)**

**WRITTEN STATEMENT OF THE REPUBLIC OF KOREA**

**22 March 2024**

## I Introduction

1. By resolution 77/276, adopted on 29 March 2023, the United Nations General Assembly decided, in accordance with Article 96 of the Charter of the United Nations, to request the Court, pursuant to Article 65 of the Statute, to render 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?*

2. In its Order dated 20 April 2023, the Court invited the United Nations and its Member States to submit written statements on the questions referred to the Court by the General Assembly in its resolution 77/276 of 29 March 2023. By its Order dated 15 December 2023, the Court extended to 22 March 2024 the time-limit within which written statements on the questions may be presented to it. This Written Statement is presented by the Republic of Korea pursuant to these Orders.

3. As one of the States that co-sponsored General Assembly resolution 77/276, the Republic of Korea welcomed its adoption, stating that “[n]o one in the world is immune to the impact of climate change” and “[n]o State is free from the burden of tackling that global crisis”<sup>1</sup>. With reference to the advisory opinion sought from the Court, the Republic of Korea emphasized that “the established distinction between *lex lata* and *lex ferenda* still remains valid in this evolving area of international law”; and it expressed its expectation that the Court would “maintain a clear legal focus and uphold judicial integrity, distancing itself from any legislative moves”<sup>2</sup>.

4. The Republic of Korea remains of the view that the purpose of the advisory opinion requested from the Court is to support the General Assembly in paving the way for further international cooperation in responding to one of the most serious existential challenges faced by humanity. This is to be achieved by clarifying the existing law rather than by seeking to lay down new rules in relation to complex matters of policy that are the subject of ongoing negotiations among States.

5. In the light of the Court’s jurisprudence, the Republic of Korea considers that the Court has jurisdiction to give the advisory opinion sought of it in this case, and there is no compelling reason for it to decline to do so.

6. The present Statement aims to assist the Court by offering the Republic of Korea’s observations on a number of matters covered by the questions posed by the General Assembly. The Republic of Korea reserves its right to express further views on these and other matters at later stages of the proceeding; and it also wishes to make clear that this Statement is without prejudice to its position on any other issues of international law lying outside the scope of this case.

7. The remainder of this Statement is structured as follows. Section II provides an overview of the contribution made by the Republic of Korea to global endeavours to combat climate change. Section III addresses the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic

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<sup>1</sup> A/77/PV.64: Official Records of the General Assembly, Seventy-seventh Session, 64th plenary meeting, 29 March 2023, p. 21.

<sup>2</sup> *Ibid.*, at p. 22.

emissions of greenhouse gases. Section IV then elaborates on 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. Section V concludes.

## **II The Republic of Korea's contribution to global endeavours to combat climate change**

8. The Republic of Korea shares the view that climate change is amongst the most pressing challenges facing humanity. As the 2023 synthesis report of the Intergovernmental Panel on Climate Change (IPCC) has warned, there is a rapidly closing window of opportunity to secure a liveable and sustainable future for human well-being and planetary health<sup>3</sup>. No single State can address the challenge of climate change alone; and every State can contribute to achieving a solution. The current state of affairs mandates that each State make the fight against climate change a national priority and act swiftly, at various levels, to address the changes that are occurring in the atmosphere, ocean, cryosphere, and biosphere. The Republic of Korea has actively participated in international efforts to deal with the climate crisis, and, in this connection, expressed its support for the 2021 Declaration of the Pacific Islands Forum on Preserving Maritime Zones in the Face of Climate Change-related Sea-Level Rise<sup>4</sup>. The Republic of Korea intends to contribute continuously to global endeavours to limit the temperature increase to 1.5°C through domestic and international instruments and initiatives.

9. The Republic of Korea announced in October 2020 its vision to achieve carbon neutrality by 2050. In line with this vision, the Republic of Korea enacted in September 2021 the Carbon Neutrality and Green Growth Act. In December 2021, it significantly enhanced its nationally determined contribution (NDC) by raising its 2030 greenhouse gas reduction target from 26.3% to 40%, compared to the 2018 level. In order to establish a detailed strategy for implementation of its carbon neutrality vision and NDC, in April 2023 the Republic of Korea adopted its first Basic National Plan for Carbon Neutrality and Green Growth, which includes a sectoral roadmap to reduce greenhouse gas emissions. The Republic of Korea monitors and assesses the implementation of the Basic Plan and its sectoral targets on an annual basis.

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<sup>3</sup> See *Climate Change 2023: Synthesis Report*, available at <https://www.ipcc.ch/report/sixth-assessment-report-cycle/>.

<sup>4</sup> See the 2023 Korea-Pacific Islands Leaders' Declaration: A Partnership in Pursuit of Freedom, Peace and Prosperity for a Resilient Pacific, 29 May 2023, para. 12, available at <https://eng.president.go.kr/briefing/EYexaLA6/>.

10. As part of its efforts to internalize carbon neutrality in decision-making processes of major Korean plans and projects, the Republic of Korea introduced a Climate Change Impact Assessment requirement in accordance with the Carbon Neutrality and Green Growth Act. The purpose of this mandatory Climate Change Impact Assessment is to encourage reduction in emission of greenhouse gases as well as adaptation to the climate crisis in advance of approval of the nation's major infrastructure-related plans or large-scale development projects.

11. Furthermore, consistent with its goal of accelerating the transition to a carbon-free society, the Republic of Korea is pursuing a Carbon-Free Energy (CFE) initiative<sup>5</sup>. This initiative calls for an extensive use of all sources of carbon-free clean energy, including nuclear power, hydrogen, and renewables as a realistic solution to achieve global carbon neutrality rapidly. The CFE initiative also seeks to develop a series of CFE-related certification schemes and international standards so as to create conditions where businesses can actively develop, invest in, and utilize CFE.

12. The Republic of Korea moreover continues to play a role in supporting developing countries that are particularly vulnerable to the negative effects of climate change and lack the capacity to address them. In this regard, the Republic of Korea is currently expanding its climate-related official development assistance (ODA) for developing countries with a view to helping them build climate resilience and transition to clean energy sources.

13. More specifically, the Republic of Korea has pledged a contribution of USD 300 million for the replenishment of the Green Climate Fund for the period 2024-2027, in addition to contributing USD 100 million for the Fund's initial resource mobilization and USD 200 million for its first replenishment. In addition, since 2012, the Republic of Korea has contributed USD 142 million to the Global Green Growth Institute, an intergovernmental organization dedicated to promoting green growth in developing countries. It is also contributing USD 2.7 million to the Adaptation Fund for the period 2023-2025 with the aim of helping vulnerable communities in developing countries adapt to climate change through various projects and programmes, and

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<sup>5</sup> The Carbon Free Alliance (CFA), an implementing body for the CFE initiative, was officially established in October 2023.

it is working with multilateral development banks to identify opportunities for joint projects that could reduce the upfront costs of climate adaptation for developing countries.

### **III 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**

#### A. General observations

14. Question (a) asks the Court to identify the obligations of States under international law concerning the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases. Such obligations may be found in treaties (which are binding only on the parties thereto) as well as customary international law. These two sources, which sometimes interact, will be dealt with in turn. However, it may here be noted that, in the present context, obligations under treaties are not necessarily identical to those under customary international law, not least in respect of specific mitigation obligations that are laid down in the former but do not constitute part of the corpus of the latter. Treaties that directly regulate climate change may indeed be seen as *lex specialis*, with all the applicable consequences.

15. It is also to be noted that there are different kinds of legal obligations to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases, for example, obligations of conduct as opposed to obligations of result; obligations owed to certain States only as opposed to obligations *erga omnes*; and positive obligations (to engage in a certain activity) as opposed to negative obligations (to abstain from certain acts).

16. There are moreover particular considerations in the application of the legal obligations of States with respect to climate change. The phenomenon of climate change occurs within, and impacts, the entire global atmospheric system and other parts of the environment, thus rendering difficult, if not impossible, the task of identifying the specific effects attaching to certain actions by States. Similarly, without effective collective action to confront the multifaceted risks posed by climate change, the efforts of a single State would be insufficient or even meaningless. These considerations point to the critical importance of international

cooperation, through multiple channels, including the ongoing negotiations among States, in addressing climate change.

## B. Obligations under international conventions

17. The United Nations Framework Convention on Climate Change (UNFCCC) and the Paris Agreement are the main instruments setting out international legal obligations in respect of climate change. In the words of the United Nations General Assembly, they are “the primary international, intergovernmental forums for negotiating the global response to climate change”<sup>6</sup>. Other treaties, which do not refer expressly to climate change, may require parties thereto to take action or measures contributing to or otherwise assisting overall mitigation efforts, as appropriate, even if they do not impose obligations of mitigation beyond what is prescribed by the UNFCCC and the Paris Agreement. The UN Convention on the Law of the Sea (UNCLOS), in particular, sets out a basic legal framework for addressing the issue of climate change through obligations related to the protection and preservation of the marine environment. Human rights treaties, such as the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the Convention on the Rights of the Child may similarly require a consideration of the impact of climate change and climate change action. Moreover, climate change is without doubt one of those most important “international problems of an economic, social, cultural or humanitarian character” requiring solution through international cooperation as envisaged in Article 1(3) of the Charter of the United Nations.

### *The UNFCCC and the Paris Agreement*

18. The primary 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, concern the mitigation of such emissions. As noted above, the UNFCCC and the Paris Agreement are the most relevant sources of such obligations. In particular, the UNFCCC commits all the Parties thereto to formulate, implement, publish, and regularly update national programmes containing measures

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<sup>6</sup> UNGA resolution 77/165 (‘Protection of global climate for present and future generations of humankind’), adopted on 14 December 2022, preamble.

to mitigate climate change (Article 4(1)(b)). It also obligates the developed country Parties to adopt national policies and take corresponding measures on the mitigation of climate change by limiting their anthropogenic emissions of greenhouse gases and by protecting and enhancing their greenhouse gas sinks and reservoirs (Article 4(2)(a)). Developed country Parties are furthermore required to provide new and additional financial resources (Article 4(3)); to assist developing country Parties that are particularly vulnerable to the adverse effects of climate change in meeting costs of adaptation (Article 4(4)); and to take all practicable steps to promote, facilitate and finance, as appropriate, the transfer of, or access to, environmentally sound technologies and knowhow to other Parties (Article 4(5)). The objective of the UNFCCC (as stipulated in Article 2 thereof) is “to achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system”.

19. The Paris Agreement, adopted in pursuit of the same objective, is a critical international instrument in the fight against the climate crisis. Its Parties aim to strengthen the global response to the threat of climate change, including by “[h]olding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels” (Article 2(1)(a)).

20. The significance of the Paris Agreement in the present context cannot be overstated. A central obligation concerns nationally determined contributions (NDCs), which are to “reflect [each Party’s] highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances” (Article 4(3)). Pursuant to Article 3 of the Agreement, “all Parties are to undertake and communicate ambitious efforts as defined in Articles 4, 7, 9, 10, 11 and 13 with the view to achieving the purpose of this Agreement as set out in Article 2”. According to Article 4(2) of the Agreement, each Party “shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve” and “shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions”. While the text of the Agreement allows for flexibility in relation to NDCs, the obligations of conduct involved are to be pursued by the Parties in good faith, bearing in mind the object and purpose of the Agreement.



21. In addition, the Paris Agreement lays out a framework for providing financial, technical and capacity-building support to developing country Parties. Article 9 stipulates an obligation of developed country Parties to provide financial resources to assist developing country Parties with respect to both mitigation and adaptation. Article 10 confirms the shared long-term vision of the Parties on the importance of technology development and transfer in order to improve resilience to climate change and to reduce greenhouse gas emissions, and moreover sets out obligations of strengthening cooperative action on technology development and transfer, including by providing support to developing country Parties. In the same vein, Article 11(1) provides that capacity-building should “enhance the capacity and ability of developing country Parties, in particular countries with the least capacity, such as the least developed countries, and those that are particularly vulnerable to the adverse effects of climate change, such as small island developing States, to take effective climate change action ...”.

22. The obligations of conduct laid down in the Paris Agreement are to be implemented with due diligence, a standard on which more is said below<sup>7</sup>.

23. It moreover bears mention that the Paris Agreement Implementation and Compliance Committee (PAICC), established pursuant to Article 15 of the Agreement, is entrusted with facilitating implementation of, and promoting compliance with, the provisions of the Agreement. This Committee is “expert-based and facilitative in nature”, and functions in a “transparent, non-adversarial and non-punitive” manner, paying “particular attention to the respective national capabilities and circumstances of Parties” (Article 15(2))<sup>8</sup>.

#### *The UN Convention on the Law of the Sea*

24. UNCLOS does not refer expressly to climate change, but the Convention is nonetheless relevant. The Republic of Korea took part in the proceedings before the International Tribunal for the Law of the Sea (ITLOS) in the case concerning the *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*. The views expressed in its written and oral statements in relation to the specific obligations of

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<sup>7</sup> See paragraph 37.

<sup>8</sup> See also Decision 20/CMA.1 on ‘Modalities and procedures for the effective operation of the committee to facilitate implementation and promote compliance referred to in Article 15, paragraph 2, of the Paris Agreement’, FCCC/PA/CMA/2018/3/Add.2 (2018), pp. 59-64.

States Parties to UNCLOS concerning the protection and preservation of the marine environment from climate change, are relevant to the advisory proceedings before the Court<sup>9</sup>. A number of key points made therein are reiterated below.

25. Scientific data demonstrates that climate change has a significant and far-reaching impact on the marine environment<sup>10</sup>. In particular, greenhouse gases emitted into the atmosphere cause ocean warming, ocean acidification, and sea-level rise. Article 1, paragraph 1(4) of the Convention sets out a definition of “pollution of the marine environment,” which is to be interpreted as encompassing deleterious effects resulting from greenhouse gas emissions, having regard to its terms and context as well as the object and purpose of the Convention.

26. Part XII of UNCLOS provides for various obligations in relation to the protection and preservation of the marine environment. Central to these in the present context is the obligation laid down in Article 192 (entitled ‘General obligation’), “to protect and preserve the marine environment”. Article 194 (on ‘Measures to prevent, reduce and control pollution of the marine environment’) specifies this general obligation by requiring, *inter alia*, that States Parties “shall take, individually or jointly as appropriate, all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities”. Articles 192 and 194 entail an obligation of conduct, not an obligation to ensure a certain result; the standard of due diligence applies in this context as well<sup>11</sup>. Article 193, on the sovereign right of States to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment, is also of relevance.

27. Considering the wide range of the impacts of climate change on the oceans, it can be said that Articles 192 and 194 together contain an obligation of the States Parties to the Convention to take all necessary measures to prevent, reduce and control pollution of the marine environment from deleterious effects that result or are likely to result from climate

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<sup>9</sup> See [https://www.itlos.org/fileadmin/itlos/documents/cases/31/written\\_statements/1/C31-WS-1-16-ROK.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/31/written_statements/1/C31-WS-1-16-ROK.pdf); [https://www.itlos.org/fileadmin/itlos/documents/cases/31/Oral\\_proceedings/C31\\_Minutes.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/31/Oral_proceedings/C31_Minutes.pdf), pp. 314-318.

<sup>10</sup> See generally Intergovernmental Panel on Climate Change, *Special Report on the Ocean and Cryosphere in a Changing Climate* (2019), available at <https://www.ipcc.ch/srocc/>.

<sup>11</sup> See also *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 41, para. 110; *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015, ITLOS Reports 2015*, p. 40, para. 129.

change using the best practicable means at their disposal. These include measures to reduce or mitigate greenhouse gas emissions. In this context, the Paris Agreement constitutes the most relevant measure within the meaning of Article 194 of the Convention, although UNCLOS does not itself create a legal obligation to implement other international agreements concerning climate change. Articles 197, 202, 206, 207, 212, 213 and 222 of the Convention also lay down obligations that may be relevant to addressing climate change.

### *Human rights treaties*

28. There is no express reference to climate change in existing human rights treaties. All the same, the international law relating to the environment and international human rights law are closely related. The UN Conference on the Human Environment declared over fifty years ago that everyone has “the fundamental right” to “... adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being”<sup>12</sup>. With regard to the right to life, it has been suggested that obligations under international environmental law should inform the contents of Article 6 of the ICCPR and *vice versa*<sup>13</sup>. In recognizing the human right to a clean, healthy and sustainable environment, the UN General Assembly affirmed that the promotion of this right requires “the full implementation of the multilateral environmental agreements under the principles of international environmental law”<sup>14</sup>.

29. It is indeed clear that the catastrophic consequences of climate change will affect the enjoyment of human rights, including the right to life and the right to health. The definition of the “[a]dverse effects of climate change” under the UNFCCC encompasses “significant deleterious effects on ... human health and welfare”<sup>15</sup>. The UN Human Rights Council emphasized that “the adverse effects of climate change have a range of implications, both direct and indirect, that increase with greater global warming, for the effective enjoyment of human rights”; the Council also expressed concern that “the adverse effects of climate change are felt most acutely by those segments of the population that are already in vulnerable situations”<sup>16</sup>. The UN Committee on the Rights of the Child observed that the climate emergency forms part

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<sup>12</sup> Declaration on the Human Environment (Stockholm Declaration), adopted by the United Nations Conference on the Human Environment, Stockholm, 16 June 1972, Principle 1.

<sup>13</sup> CCPR/C/GC/36, General Comment No. 36 of the Human Rights Committee (2018), para. 62.

<sup>14</sup> A/RES/76/300 (‘The human right to a clean, healthy and sustainable environment’), adopted on 28 July 2022, operative para. 3.

<sup>15</sup> See UNFCCC, Article 1(1).

<sup>16</sup> A/HRC/RES/53/6 (‘Human rights and climate change’), adopted on 12 July 2023, preamble.

of a planetary crisis that is “an urgent and systemic threat to children’s rights globally”, and it moreover suggested that “[i]nsufficient progress in achieving international commitments to limit global warming exposes children to continuous and rapidly increasing harms associated with greater concentrations of greenhouse gas emissions and the resulting temperature increases”<sup>17</sup>.

30. There are various elements to consider when thinking about the protection of human rights in the context of combatting climate change. Careful attention should be paid to such issues as the jurisdictional scope of each human rights instrument, the Parties thereto, the scope of each particular right, and the requirement of causality<sup>18</sup>. It is also to be borne in mind that States Parties to the ICESCR are required to take steps to the maximum of their available resources “with a view to achieving progressively the full realization of the rights” recognized in the Covenant by all appropriate means, including particularly the adoption of legislative measures<sup>19</sup>.

31. Indeed, it may not always be simple to look at the issue of climate change through the prism of human rights. It is difficult to infer specific obligations concerning reduction of greenhouse gas emissions or climate change adaptation from human rights treaties. However, it may be said that human rights treaties in general require parties to act diligently in relation to climate change, that is, to take appropriate measures “to prevent, to the greatest extent possible, the current and future negative human rights impacts of climate change”<sup>20</sup>. In this context, the Republic of Korea shares the view that “human rights obligations, standards and principles have the potential to inform and strengthen international, regional and national policymaking in the area of climate change, thereby promoting policy coherence, legitimacy and sustainable outcomes”<sup>21</sup>. Furthermore, the preamble to the Paris Agreement provides that

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<sup>17</sup> General comment No. 26 (2023) on children’s rights and the environment, with a special focus on climate change, paras. 1, 96.

<sup>18</sup> The International Law Commission’s draft guidelines on the protection of the atmosphere, for example, suggest that certain requirements must be fulfilled in order for international human rights law to contribute to the protection of the atmosphere, including the establishment of “a direct link between atmospheric pollution or degradation that impairs the protected right and an impairment of a protected right”: see A/76/10, Report of the International Law Commission on the work of its Seventy-second session (26 April–4 June and 5 July–6 August 2021), p. 44, para. 12 of the commentary to guideline 9.

<sup>19</sup> See International Covenant on Economic, Social and Cultural Rights, Article 2, paragraph 1.

<sup>20</sup> Office of the UN High Commissioner for Human Rights, ‘Frequently Asked Questions on Human Rights and Climate Change’, Fact Sheet No. 38 (2021), p. 31. Cf. CCPR/C/21/Rev.1/Add.13, UN Human Rights Committee, General comment No. 31 (‘The Nature of the General Legal Obligation Imposed on States Parties to the [International] Covenant [on Civil and Political Rights]’), adopted on 29 March 2004.

<sup>21</sup> *Supra* note 16, at preamble.

“Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights”.

### C. Obligations under customary international law

32. There are several rules of general customary international law that may be relevant when considering the obligations of States concerning climate change. In the view of the Republic of Korea, the most important of these are the principle of prevention of significant harm to the environment and the duty of cooperation among States<sup>22</sup>.

#### *The principle of prevention*

33. The Court has already had occasion to observe, in the specific context of the protection of the environment, that the principle of prevention is a customary rule:

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. It is “every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States” (*Corfu Channel (United Kingdom v. Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 22). A 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. This Court has established that this obligation “is now part of the corpus of international law relating to the environment” (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 242, para. 29)<sup>23</sup>.

34. The Court has also observed that an obligation to prevent pollution is “an obligation to act with due diligence” which entails “not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control”<sup>24</sup>. It moreover stated more generally that “in the field of environmental protection,

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<sup>22</sup> The International Law Commission presented these two principles as the “basic foundation” for its draft articles on prevention of transboundary harm from hazardous activities: see *Yearbook of the International Law Commission 2001*, Vol. II, Part Two, p. 153, para. 3 of the commentary to article 3.

<sup>23</sup> *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010*, pp. 55-56, para. 101. See also *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), Judgment, I.C.J. Reports 2015*, p. 706, para. 104.

<sup>24</sup> *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010*, p. 79, para. 197; see also *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, supra* note 11, at p. 41,

vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage”<sup>25</sup>.

35. Similarly, the International Law Commission (ILC) referred to the principle of prevention in terms of a duty of the State of origin to “take all appropriate measures to prevent significant transboundary harm or at any event to minimize the risk thereof”<sup>26</sup>. This principle finds expression in numerous international agreements on the protection of environment<sup>27</sup>. The ILC pointed out that “States have the obligation to protect the atmosphere by exercising due diligence in taking appropriate measures, in accordance with applicable rules of international law, to prevent, reduce or control atmospheric pollution and atmospheric degradation”<sup>28</sup>. In this context of the protection of the atmosphere, the ILC also stated that “even where significant adverse effects materialize, that does not necessarily constitute a failure of due diligence”<sup>29</sup>. Only when the State fails to fulfil its obligation to take all appropriate measures, will it be considered to have failed to exercise due diligence<sup>30</sup>.

36. The principle of prevention may entail more specific procedural obligations, such as an obligation to “carry out an environmental impact assessment” and an obligation to “notify and consult” other States concerned when there is “a risk of significant transboundary harm”<sup>31</sup>.

37. In the context of ensuring the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases, it can be said that States are under a customary obligation to take all appropriate measures to prevent significant harm to the climate system or to minimize the risk thereof. This is an obligation of due diligence

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para. 131.

<sup>25</sup> *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Reports 1997, p. 78, para. 140.

<sup>26</sup> *Supra* note 22, at article 3. According to the commentary, “[t]he article thus emphasizes the primary duty of the State of origin to prevent significant transboundary harm; and only in case this is not fully possible it should exert its best efforts to minimize the risk thereof”: *ibid*, at para. 3.

<sup>27</sup> See, for example, UNCLOS, in various provisions; the Vienna Convention for the Protection of the Ozone Layer, Article 2; the UNFCCC; and the Convention on Biological Diversity, Articles 8, 14. See also the 1972 Stockholm Declaration, Principle 7.

<sup>28</sup> *Supra* note 18, at p. 26, guideline 3.

<sup>29</sup> *Ibid*, at p. 27, para. 6 of the commentary to guideline 3.

<sup>30</sup> See *ibid* (the commentary stating that “[t]he States’ obligation “to ensure” does not require the achievement of a certain result (obligation of result) but only requires the best available good faith efforts so as not to cause significant adverse effects (obligation of conduct)”).

<sup>31</sup> *Dispute over the Status and Use of the Waters of the Silala (Chile v. Bolivia)*, Judgment, I.C.J. Reports 2022, pp. 651-652, para. 114; *Certain Activities Carried Out by Nicaragua in the Border Area*, *supra* note 23; *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010, p. 83, para. 204.

requiring States not just to adopt appropriate rules and measures but also to maintain a certain level of vigilance in their enforcement. As a duty of care, it requires States to exercise their best possible efforts. In this regard, it ought to be noted that “measures considered sufficiently diligent at a certain moment may become not diligent enough in light, for instance, of new scientific or technological knowledge”<sup>32</sup>.

### *The duty of cooperation*

38. In the present context, the principle of prevention is closely connected to the duty of cooperation. It is undeniable that the common goal of protection of the climate system can only be achieved through a cooperative approach: the IPCC has stated that “[i]nternational cooperation is a critical enabler for achieving ambitious climate change mitigation, adaptation, and climate resilient development”<sup>33</sup>. In terms of protection of the marine environment, the obligation to cooperate has likewise been described as a “fundamental principle in the prevention of pollution of the marine environment under Part XII of [UNCLOS] and general international law”<sup>34</sup>. The duty of States to cooperate with one another finds expression, *inter alia*, in the Friendly Relations Declaration and the Rio Declaration on Environment and Development<sup>35</sup>. As already noted, Article 1(3) of the UN Charter likewise envisages international cooperation as a means to address “international problems of an economic, social, cultural or humanitarian character”.

39. The treaties that form the foundational legal framework for addressing climate change have themselves been driven by, and adopted based on, the duty of cooperation, and they give expression to this duty by their own terms. It may be recalled that the Parties to the Paris Agreement, who affirmed “the importance of ... cooperation at all levels on the matters

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<sup>32</sup> See *Responsibilities and obligations of States with respect to activities in the Area*, *supra* note 11, at p. 43, para. 117.

<sup>33</sup> See *supra* note 3.

<sup>34</sup> *MOX Plant (Ireland v. United Kingdom)*, *Provisional Measures*, *Order of 3 December 2001*, *ITLOS Reports 2001*, p. 110, para. 82; *Land Reclamation in and around the Straits of Johor (Malaysia v. Singapore)*, *Provisional Measures*, *Order of 8 October 2003*, *ITLOS Reports 2003*, p. 25, para. 92; *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, *supra* note 11, at p. 43, para. 140.

<sup>35</sup> See UNGA resolution 2625 (XXV) (‘Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations’), adopted on 24 October 1970, which refers to “[t]he duty of States to co-operate with one another in accordance with the Charter”; and A/CONF.151/26 (Vol. I), Report of the United Nations Conference on Environment and Development (Rio de Janeiro, 3-14 June 1992), Principle 7 (“States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth’s ecosystem. ...”).

addressed in this Agreement”<sup>36</sup>, should cooperate to enhance the capacity and ability of developing country Parties to implement the Agreement<sup>37</sup>, to enhance understanding, action and support with respect to loss and damage associated with the adverse effects of climate change<sup>38</sup>, and to enhance action on adaptation<sup>39</sup>. They are also required to strengthen cooperative action on technology development and transfer<sup>40</sup>; and to take measures, as appropriate, to enhance climate change education, training, public awareness, public participation and public access to information<sup>41</sup>. Moreover, they are required or encouraged, as the case may be, to provide financial support<sup>42</sup>. The global stocktake under Article 14 of the Paris Agreement is also relevant for enhancing international cooperation for climate action<sup>43</sup>.

40. The duty of cooperation, too, involves due diligence related to the mitigation of and adaptation to climate change. It does not specify concrete reduction targets such as those mandated under the Paris Agreement. Like the principle of prevention, however, the duty of cooperation can sometimes function as among the “relevant rules of international law applicable in the relations between the parties” (within the meaning of Article 31, paragraph 3, of the Vienna Convention on the Law of Treaties) in the interpretation of the Paris Agreement and other relevant treaties.

#### **IV 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**

##### A. General observations

41. Question (b) concerns the legal consequences under the obligations existing for States to ensure the protection of the climate system where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment, with respect to States, including, in particular, small island developing States, as well as peoples and individuals of the present and future generations. The Republic of Korea agrees that the

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<sup>36</sup> See Paris Agreement, preamble.

<sup>37</sup> *Ibid*, at Article 11.

<sup>38</sup> *Ibid*, at Article 8.

<sup>39</sup> *Ibid*, at Article 7.

<sup>40</sup> *Ibid*, at Article 10.

<sup>41</sup> *Ibid*, at Article 12.

<sup>42</sup> *Ibid*, at Article 9.

<sup>43</sup> *Ibid*, at Article 14, para. 3.



position of both small island developing States and peoples and individuals of the present and future generations merits particular attention in the present context.

42. The question is in general terms only and does not ask the Court to determine that any violations have in fact occurred.

43. The concept of ‘legal consequences’ can generally be understood as dealing with issues of State responsibility arising from violations of specific international legal obligations. The jurisprudence of the Court<sup>44</sup>, and the language of article 28 of the ILC’s articles on responsibility of States for internationally wrongful acts conforms with this understanding<sup>45</sup>. In the present context, however, consideration of the general rules of State responsibility calls for caution, as elaborated below.

44. Another term that stands out in question (b) is “future generations”. This expression has been used in the titles of successive United Nations General Assembly resolutions concerning climate change since 1988<sup>46</sup>. There is no doubt that the protection of the global climate is indeed required for the well-being of the present and future generations of humankind. The Court itself observed more generally, in its advisory opinion on *Nuclear Weapons*, that “the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn”; it also acknowledged that damage to the environment may cause damage to future generations<sup>47</sup>.

## B. Legal consequences for States

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<sup>44</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 54, para. 118; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 154, para. 39; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019*, p. 138, para. 177.

<sup>45</sup> See *Yearbook of the International Law Commission 2001*, Vol. II, Part Two, pp. 87-88. Article 28 is entitled ‘Legal consequences of an internationally wrongful act’, and it stipulates that “[t]he international responsibility of a State which is entailed by an internationally wrongful act in accordance with the provisions of Part One [of the Articles] involves legal consequences as set out in” Part Two thereof, which deals with the “content of the international responsibility of a State”.

<sup>46</sup> See A/RES/43/53 (‘Protection of global climate for present and future generations of mankind’), adopted on 6 December 1988.

<sup>47</sup> *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 241, para. 29; and p. 244, para. 35.

45. As discussed in Section III, States bear certain obligations, under international conventions and customary international law, to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases. Violating these obligations may entail legal consequences as determined under the relevant international conventions and the law of treaties, where applicable, and subsidiarily by the general rules on the responsibility of States for internationally wrongful acts.

46. That said, applying the rules of State responsibility in the context of climate change is not straightforward. In particular, attributing a breach to a State, and establishing a causal link between a breach and the alleged harm and/or an injured party, may prove difficult. Problems of inter-temporal law may arise as well, as “[a]n act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs”<sup>48</sup>.

47. Question (b) seems to presuppose that a causal link has been established, but considering that greenhouse gas emissions have various large-scale impacts globally, it is indeed difficult to see how such a causal link between one State’s actions or omissions and concrete damage suffered by another State or States may be sufficiently established so as to enable allocation of legal responsibility. It should also be noted that significant harm may occur even when States have faithfully implemented their legal obligations under the legal framework existing at the relevant time. The remedies of cessation, non-repetition, and of reparation, may likewise raise challenging questions in the context of climate change. It follows, in the view of the Republic of Korea, that the question on legal consequences should be approached with caution.

48. It is noteworthy in this context that the Paris Agreement excluded the issue of compensation from its scope. While Article 8 of the Agreement addresses loss and damage, the Conference of the Parties of the UNFCCC agreed that Article 8 neither involves nor provides a basis for liability or compensation<sup>49</sup>. Instead, the provision calls expressly for a “cooperative and facilitative” approach, in expectation of actions and remedies through political processes. During the recent COP28, agreement was indeed reached on the operationalization of the loss

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<sup>48</sup> See also Article 13 of the articles on responsibility of States for internationally wrongful acts, *supra* note 45, at p. 57.

<sup>49</sup> See FCCC/CP/2015/10/Add.1, Decision 1/CP.21 (‘Adoption of the Paris Agreement’), para. 51.

and damage fund to help developing countries cope with the effects of climate change; agreement was also reached on the UN Office for Disaster Risk Reduction and the UN Office for Project Services hosting the secretariat of the Santiago Network for Loss and Damage, in order to catalyze technical assistance to developing countries that are particularly vulnerable to the adverse effects of climate change<sup>50</sup>.

49. The challenges of applying the general rules of State responsibility may help to explain, at least in part, why States have sought to engage constructively in very difficult negotiations on loss and damage. Indeed, they highlight the significance of international cooperation in addressing climate change for the benefit of all those affected by it, especially the most vulnerable. The duty of engaging in such cooperation may itself arise as a consequence of significant harm that is caused to the climate system and other parts of the environment.

## V Conclusion

50. As set out above, the Republic of Korea welcomes the opportunity for the Court to clarify the existing law concerning the obligations of States to ensure the protection of the climate system and other parts of environment from anthropogenic emissions of greenhouse gases, in order to pave the way for further international cooperation in responding to the pressing global challenge of climate change.

51. As regards the existing obligations concerning the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases, these may be found in international conventions as well as customary international law. The former, of which the UNFCCC and the Paris Agreement are of primary significance, may be seen as *lex specialis* and attest to the significance of international cooperation in mitigation and adaptation. Other treaties, including UNCLOS and human rights treaties, are also of relevance even if they do not refer expressly to climate change, as climate change is undoubtedly related to the fulfilment of various obligations laid down in them. Bearing in mind the scope and nature of the provisions in question, States are to act in good faith in fulfilling their treaty obligations, including those that incorporate the standard of due diligence. That standard also informs relevant obligations of States under customary international law, of which the most important

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<sup>50</sup> See <https://unfccc.int/news/cop28-agreement-signals-beginning-of-the-end-of-the-fossil-fuel-era>.

are the principle of prevention of significant harm to the environment and the duty to cooperate to protect the climate system.

52. Significant harm to the climate system leaves small island developing States, and peoples and individuals of the present and future generations, particularly vulnerable to its adverse impacts. The legal consequences for causing such significant harm in violation of international legal obligations may be established under the relevant international conventions and the law of treaties, where applicable, and subsidiarily by the general law on the responsibility of States for their internationally wrongful acts. As with determining the existence of relevant obligations for States, defining the legal consequences of their violation ought to be approached carefully while taking into consideration the nature of climate change as a global phenomenon and such challenges as establishing causality. These challenges, too, highlight the critical importance of international cooperation by States in taking joint action urgently to mitigate and adapt to climate change.

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