INTERNATIONAL COURT OF JUSTICE

OBLIGATIONS OF STATES IN RESPECT OF CLIMATE CHANGE

(REQUEST FOR ADVISORY OPINION)

WRITTEN STATEMENT OF THE REPUBLIC OF ECUADOR

22 MARCH 2024

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CHAPTER 1
INTRODUCTION

1.1. The Republic of Ecuador ('Ecuador') submits this Written Statement in accordance with the Court's Orders of 20 April, 4 August and 15 December 2023, so as to assist the Court by furnishing information on the questions submitted to it by the General Assembly in resolution 77/276[1].

1.2. In its resolution, the General Assembly requested the Court 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?"

1.3. **Section I** of the present chapter briefly describes the process leading to the request for the advisory opinion. **Section II** identifies the main issues raised by the questions on which an opinion is sought. **Section III** explains Ecuador's special interest in these questions. **Section IV** sets out the organization of the remainder of this Written Statement.

[1] UN General Assembly resolution 77/276, 29 March 2023.

I. The General Assembly's request for an advisory opinion

1.4. The United Nations, including the General Assembly and other competent organs, has played and continues to play a central role in addressing climate change and its adverse effects on humankind and the environment. It was therefore appropriate – and indeed necessary – for the General Assembly to make the request now pending before the Court.

1.5. The item "Request for an advisory opinion of the International Court of Justice on the obligations of States in respect of climate change" was included in the agenda of the seventy-seventh session of the General Assembly on 1 March 2023[2]. The draft resolution was co-sponsored by 132 States, including Ecuador, and was the result of extensive consultations and negotiations among the membership of the United Nations, led by Vanuatu and the 'core group'[3]. Resolution 77/276 was adopted without a vote at the seventy-seventh session of the General Assembly on 29 March 2023.

1.6. During the debate in the General Assembly, States voiced their support for the request and stressed the important role that the Court can play in connection with the issue of climate change. The Prime Minister of Vanuatu, for instance, noted that the advisory opinion "can greatly benefit our efforts to address the climate crisis and further bolster global and multilateral cooperation and State conduct in addressing climate change"[4]. The representative of the European Union similarly stated that the advisory opinion would have "the potential to make a significant contribution to the clarification of the current state of international law"[5]. The representative of Costa Rica noted that the Court's advisory opinion "could help guide other courts that are ruling in cases of climate disputes on whether the commitments of nations under the Paris Agreement on Climate Change are sufficiently robust and what would be needed to strengthen human rights and international justice"[6]. The representative of New

[2] Request for an advisory opinion of the International Court of Justice on the obligations of States in respect of climate change (A/77/L.58), 1 March 2023.

[3] The core group included Bangladesh, Costa Rica, Federated States of Micronesia, Morocco, Mozambique, New Zealand, Portugal, Samoa, Sierra Leone, Singapore, Uganda, Vanuatu, and Vietnam.

[4] Official records, Seventy-seventh session of the General Assembly, 64th plenary meeting, 29 March 2023 (A/77/PV.64), p. 2 (also on behalf of Angola, Antigua and Barbuda, Bangladesh, Costa Rica, Germany, Liechtenstein, the Federated States of Micronesia, Morocco, Mozambique, New Zealand, Portugal, Romania, Samoa, Sierra Leone, Singapore, Uganda, and Viet Nam).

[5] *Ibid*., p. 7.

[6] *Ibid*., p. 10.

Zealand added that "an advisory opinion can play a helpful role by bringing clarity and coherence to international climate law. In doing so, it can help to ensure ongoing compliance with international obligations, lift ambition and inspire action"[7]. The representative of Singapore said that the advisory opinion "will have a positive impact on the ongoing processes within the UNFCCC framework, including by accelerating mitigation action, climate financing and the political will for increased climate ambition to meet the goals of the Paris Agreement"[8]. The UN Secretary-General, for his part, observed that the Court's opinion "would assist the General Assembly, the United Nations and Member States in taking the bolder and stronger climate action that our world so desperately needs. It would also guide the actions and conduct of States in their relations with one another, as well as towards their own citizens, and that is essential"[9].

1.7. Ecuador aligns itself with these statements and believes that the advisory opinion to be rendered by the Court has the potential to greatly assist States and competent UN organs by clarifying what are the obligations that exist under international law in relation to climate change and its adverse impacts, as well as the legal consequences that might flow from the breach of those obligations.

II. The issues raised by the request

1.8. The request before the Court is of the highest importance. It concerns climate change, which is one of the greatest existential threats of our time and a pressing concern of humankind as a whole. Climate change and its adverse effects, which can no longer seriously be questioned, can only be tackled by the international community through cooperation carried out based on and with the assistance of international law[10].

[7] *Ibid*., p. 14.

[8] *Ibid*., p. 15.

[9] *Ibid*., p. 1.

[10] As early as 1988, the General Assembly recognized that "climate change is a common concern of mankind, since climate is an essential condition which sustains life on earth", and determined that "necessary and timely action should be taken to deal with climate change within a global framework". See UN General Assembly resolution 43/53, 6 December 1988, paras. 1-2.

1.9. The science is indeed settled. Climate change is caused by anthropogenic greenhouse gases ('GHG') emissions[11]. As the Intergovernmental Panel on Climate Change ('IPCC') has indicated, "[i]t is unequivocal that human influence has warmed the atmosphere, ocean and land. Widespread and rapid changes in the atmosphere, ocean, cryosphere and biosphere have occurred"[12]. The IPCC has further noted that "[h]uman activities, principally through emissions of greenhouse gases, have unequivocally caused global warming, with global surface temperature reaching 1.1°C above 1850-1900 in 2011-2020", while adding that "[g]lobal greenhouse gas emissions have continued to increase, with unequal historical and ongoing contributions arising from unsustainable energy use, land use and land-use change, lifestyles and patterns of consumption and production across regions, between and within countries, and among individuals"[13].

1.10. It is a regrettable and alarming fact that, despite the commitments made to date by numerous States within the existing climate change treaty regime to reduce GHG emissions, these emissions have increased since 2010 across all major sectors globally[14]. Several international bodies, including the Conference of the Parties ('COP') under the United Nations Framework Convention on Climate Change ('UNFCCC'), have highlighted that those commitments have been insufficient to achieve the objective, as per the Paris Agreement, to hold the increase in global average temperature to well below 2°C–1.5°C above pre-industrial levels[15].

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[11] GHG include carbon dioxide ('CO_2'), methane ('CH_4'), nitrous oxide ('N_2O'), hydrofluorocarbons ('HFCs'), perfluorocarbons ('PFCs'), sulphur hexafluoride ('SF_6'), and nitrogen trifluoride ('NF_3').

[12] IPCC, *Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (CUP, 2021), p. 4, para. A.1. The IPCC further notes that "[o]bserved increases in well-mixed greenhouse gas (GHG) concentrations since around 1750 are unequivocally caused by human activities. Since 2011 … concentrations have continued to increase in the atmosphere, reaching annual averages of 410 parts per million (ppm) for carbon dioxide (CO_2), 1866 parts per billion (ppb) for methane (CH_4), and 332 ppb for nitrous oxide (N_2O) in 2019. Land and ocean have taken up a near-constant proportion (globally about 56% per year) of CO_2 emissions from human activities over the past six decades, with regional differences (*high confidence*)" (*ibid*., para. A.1.1). See also IPCC, *Climate Change 2023: Synthesis Report* (2023), p. 10, para. A.4

[13] IPCC, *Climate Change 2023: Synthesis Report* (2023), p. 4, para. A.1.

[14] IPCC, *Climate Change 2022: Mitigation of Climate Change. Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (CUP, 2022), p. 8, paras. B.2.1-B.2.4. See also *ibid*., p. 10, para. A.4 ("Policies and laws addressing mitigation have consistently expanded since AR5. Global GHG emissions in 2030 implied by nationally determined contributions (NDCs) announced by October 2021 make it *likely* that warming will exceed 1.5°C during the 21st century and make it harder to limit warming below 2°C. There are gaps between projected emissions from implemented policies and those from NDCs and finance flows fall short of the levels needed to meet climate goals across all sectors and regions").

[15] See, for example, "World 'Massively Off Track to Limiting Global Warming to 1.5°C', Secretary-General Stresses, at Launch of United Nations Convention on Climate Change Report", Press release of the UN Secretary-

1.11. The adverse effects of climate change are wide-ranging and serious. The IPCC has conclusively determined that "widespread and rapid changes in the atmosphere, ocean, cryosphere and biosphere have occurred. Human-caused climate change is already affecting many weather and climate extremes in every region across the globe. This has led to widespread adverse impacts and related losses and damages to nature and people"[16]. The IPCC further notes that:

> "For any given future warming level, many climate-related risks are higher than assessed in AR5, and projected long-term impacts are up to multiple times higher than currently observed (*high confidence*). Risks and projected adverse impacts and related losses and damages from climate change escalate with every increment of global warming (*very high confidence*). Climatic and non-climatic risks will increasingly interact, creating compound and cascading risks that are more complex and difficult to manage (*high confidence*)"[17].

1.12. More specifically, it is well-established that climate change adversely affects terrestrial, freshwater and ocean ecosystems; water availability; agriculture crop production; animal and livestock health and productivity; fisheries yield; and aquaculture production. Furthermore, climate change may cause, *inter alia*, the spread of infectious diseases; displacement of persons; inland and coastal flooding; damage to infrastructure; damage to key economic sectors; glacier retreat; sea-level rise; ocean acidification; and increase in hot extremes[18].

1.13. These adverse effects have been recognized by the General Assembly, which also noted that developing countries find themselves in the most vulnerable position. In its recent resolution 77/165, for example, the General Assembly:

> "*Reaffirms* that climate change is one of the greatest challenges of our time, expresses profound alarm that the emissions of greenhouse gases continue to rise globally,

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General (SG/SM/22031), 14 November 2023, (available at: https://press.un.org/en/2023/sgsm22031.doc.htm, accessed on 7 March 2024); Conference of the Parties serving as the meeting of Parties to the Paris Agreement ('CMA'), "Nationally determined contributions under the Paris Agreement: Synthesis report by the secretariat" (FCCC/PA/CMA/2023/12), 14 November 2023, paras. 141-142.

[16] IPCC, *Climate Change 2022: Mitigation of Climate Change. Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (CUP, 2022), p. 5, para. A.2. See also pp. 5-6, paras. A.2.1-A.2.7.

[17] *Ibid*., p. 14, para. B.2.

[18] *Ibid*., p. 7. For further details on the wide range of possible adverse effects of climate change, see IPCC, *Climate Change 2022: Impacts, Adaptation and Vulnerability* (CUP, 2022), pp. 9-20.

> remains deeply concerned that all countries, particularly developing countries, are vulnerable to the adverse impacts of climate change and are already experiencing an increase in such impacts, including persistent drought and extreme weather events, land degradation, sea level rise, coastal erosion, ocean acidification and the retreat of mountain glaciers, further threatening food security, water availability and livelihoods, and efforts to eradicate poverty in all its forms and dimensions and achieve sustainable development, recognizes the substantial risks posed by climate change to health, and emphasizes in this regard that mitigation of and adaptation to climate change represent an immediate and urgent global priority …"[19].

1.14. It is important to highlight that States have not contributed equally to the harm that has been caused and continues to be caused to the climate system and other parts of the environment. As noted by the IPCC, regional contributions to global GHG emissions have varied widely, both historically and in recent decades[20]. The historical cumulative net anthropogenic CO_2 emissions (the primary GHG emitted through human activities) per region, between 1850 and 2019, have been weighed as follows: North America 23%; Europe 16%; Eastern Asia 12%; Latin America and Caribbean: 11%; Eastern Europe and West-Central Asia: 10%; South East Asia and Pacific 8%; Africa 7%; Australia, Japan and New Zealand 4%; Southern Asia 4%; Middle East 2%; international shipping and aviation 2%[21].

1.15. Moreover, in its latest report, the IPCC noted that around 35% of the global population lives in countries emitting more than 9 tCO_2-eq per capita, while 41% lives in countries emitting less than 3 tCO_2-eq per capita. The 10% of households with the highest per capita

[19] UN General Assembly resolution 77/165, 14 December 2022, para. 1. See also UN General Assembly resolution 76/137, 16 December 2021, para. 26 ("*Recognizes* that the international community faces increasing challenges posed by climate change and the loss of biodiversity, which have increased vulnerabilities and inequalities with direct and indirect implications for the human rights and well-being of youth and which could make youth, particularly in developing countries and small island developing States, vulnerable to their adverse impacts, including through suffering disproportionately in labour markets in times of crisis created by climate change, calls for the enhanced cooperation of and concerted action by Member States with youth in order to address those challenges, taking into account the positive role that the education of youth can play in that respect, and encourages Member States to further promote youth participation in climate action and to consider youth perspectives in decision-making processes on climate change…"); UN General Assembly resolution 51/184, 3 February 1997, sixth preambular paragraph ("Concerned that changes in climate may result in significant and often adverse impacts on many ecological systems and socio-economic sectors, including food supply and water resources, and on human health, and noting that in some cases the impacts are potentially irreversible, and that developing countries and small island developing States are typically more vulnerable to climate change…").

[20] IPCC, *Climate Change 2022: Mitigation of Climate Change. Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (CUP, 2022), pp. 9-10, paras. B.3.1-B.3.5, and Figure SPM.2.

[21] *Ibid*., p. 10.

emissions contribute 34–45% of global consumption-based household GHG emissions, while the bottom 50% contribute 13–15%[22].

1.16. In short, the largest shares of GHG emissions – and consequently the most significant harm caused thus far to the climate system – find their primary source in developed and industrialized countries. This fact has been recognized in the core treaties addressing climate change[23]. As will be later explained in this Written Statement, it must be taken into account when addressing States' obligations under international law.

1.17. At the same time, the States that have contributed the least to climate change – developing countries – are paradoxically the most vulnerable to its adverse effects. As the IPCC has noted, "[v]ulnerable communities who have historically contributed the least to current climate change are disproportionately affected"[24]. This creates a situation which is neither just nor equitable. While developing countries undoubtedly have a duty to join the efforts to combat climate change, it is essential to take into account their unique situation and their need to eradicate poverty while ensuring a sustainable development. Combating climate change requires a high degree of cooperation on the part of those States from which the largest shares of GHG emissions have originated, notably through financing, capacity-building, and technology transfer, as well as in addressing losses and damages that are the result of the adverse effects of climate change.

1.18. States have failed to sufficiently cooperate in this regard. For example, the COP to the UNFCCC recorded in 2010 that "developed country Parties commit[ed], in the context of meaningful mitigation actions and transparency on implementation, to a goal of mobilizing jointly USD 100 billion per year by 2020 to address the needs of developing countries"[25]. Yet in 2021 the States Parties "[n]oted with serious concern the gap in relation to the fulfilment of the goal of developed country Parties to mobilize jointly USD 100 billion per year by 2020,

[22] IPCC, *Climate Change 2023: Synthesis Report* (2023), p. 5, para. A.1.5.

[23] See, for example, the second preambular paragraph of the UNFCCC. See also UN General Assembly resolution 45/212, 21 December 1990, eighth preambular paragraph ("*Noting further* the fact that the largest part of the current emission of pollutants into the environment originates in developed countries, and recognizing therefore that those countries have the main responsibility for combating such pollution"). See further Chapter 3 below.

[24] IPCC, *Climate Change 2022: Mitigation of Climate Change. Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (CUP, 2022), p. 5, para. A.2.

[25] UNFCCC, Decision 1/CP.16 (FCCC/CP/2010/7/Add.1), 10-11 December 2010 , para. 98.

including due to challenges in mobilizing finance from private sources"[26]. This commitment remains unfulfilled.

1.19. The current state of affairs, briefly described above, raises several legal issues which the Court is called upon to address in the present advisory proceedings, and on which its guidance is both necessary and urgent.

1.20. The first question on which the Court's opinion is sought – Question (*a*) – concerns the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic GHG emissions. As will be explained in this Written Statement, these obligations stem mainly from certain rules of general international law and from multilateral treaties in the fields international environmental law and international human rights law.

1.21. Of particular importance in this context are certain rules of customary international law relating to the environment such as the principle of prevention and the obligation to protect and preserve the marine environment, and general principles of law such as the duty of due diligence and equity. Among the relevant conventions are the UNFCCC, the Paris Agreement, and the United Nations Convention on the Law of the Sea ('UNCLOS'). Equally relevant are the principles of common but differentiated responsibilities ('CBDR') and inter-generational equity – principles which have consistently guided States' efforts to combat climate change.

1.22. The issue of climate change also has a clear human rights dimension. Question (*a*) thus further concerns States' obligations under customary international law and 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 ('CRC'), including the obligation to guarantee the right to a healthy environment, the right to life and the right to private and family life, in relation to the adverse effects of climate change. Regional human rights treaties recognizing these and other relevant rights must also be considered where applicable.

1.23. Question (*b*) concerns matters of State responsibility in cases of significant harm to the climate system and other parts of the environment. Although the Court is not called upon to

[26] UNFCCC, Decision 4/CP.26 (FCCC/CP/2021/12/Add.1), 13 November 2021, para. 4.

make a pronouncement on the responsibility of any particular State for a breach of its obligations under international law in respect of climate change, the Court should provide guidance as to how the general rules of State responsibility may apply in case of such a breach or breaches.

1.24. These and other related legal issues are of the highest importance for Ecuador, not only because of its consistent commitment to working jointly with other States to achieve a just and sustainable framework for development, but also because of its particular vulnerability to the adverse effects of climate change.

III. Ecuador's particular vulnerability *vis-à-vis* climate change and its special interest in the present advisory proceedings

1.25. Ecuador has a special interest in the present proceedings given its particular vulnerability to the adverse effects of climate change (**A**), as well as the numerous measures it has adopted, in spite of its limited resources, to join the global efforts to combat climate change (**B**). This section provides the Court with details on these matters.

A. Ecuador's vulnerability *vis-à-vis* climate change

1.26. Ecuador only generates marginal GHG emissions – currently an approximate of 0.18-0.20% of the world's total emissions[27]. Nevertheless, due to its geographical characteristics and its megadiversity[28], Ecuador is particularly vulnerable to the adverse effects of climate change[29], and faces serious present and future threats.

[27] See, for example, Ministry of the Environment, Water and Ecologic Transition of Ecuador, "Ecuador celebró el el Día Mundial por la Reducción de las Emisiones de CO2", Press Release No.032, 29 January 2021 (https://www.ambiente.gob.ec/ecuador-celebro-el-dia-mundial-por-la-reduccion-de-las-emisiones-de-co2/, accessed on 7 March 2024); UNDP, "Climate Promise: Ecuador" (available at: https://climatepromise.undp.org/what-we-do/where-we-work/ecuador, accessed on 7 March 2024).

[28] There are 17 countries (including Ecuador) which have been characterized as the most biodiversity-rich in the world. See the *Global Assessment Report on Biodiversity and Ecosystem Services* (IPBES, 2019), p. 1045; UNEP-WCMC, "Megadiverse Countries", 2020 (available at: https://www.biodiversitya-z.org/content/megadiverse-countries, accessed on 7 March 2024). See also Ministry of the Environment of Ecuador, "Third National Communication to the UNFCCC", May 2017, p. 36; Ministry of the Environment, Water and Ecological Transition of Ecuador, "Fourth National Communication to the UNFCCC", December 2022, p. 14; Cancun Declaration of Like-Minded Megadiversity Countries (UNEP/CBD/COP/6/INF/33), 21 March 2002.

[29] Ministry of the Environment, Water and Ecological Transition of Ecuador, "Fourth National Communication to the UNFCCC", December 2022, p. 32.

1.27. The IPCC has defined 'vulnerability' as "[t]he degree to which a system is susceptible to, or unable to cope with, adverse effects of climate change, including climate variability and extremes", and as "a function of the character, magnitude, and rate of climate variation to which a system is exposed, its sensitivity, and its adaptive capacity"[30]. The IPCC has also noted that 'vulnerability' is the "propensity or predisposition to be adversely affected"[31], and that:

> "… Regions and people with considerable development constraints have high vulnerability to climatic hazards (*high confidence*). Vulnerability is higher in locations with poverty, governance challenges and limited access to basic services and resources, violent conflict and high levels of climate-sensitive livelihoods (e.g., smallholder farmers, pastoralists, fishing communities) (*high confidence*). Vulnerability at different spatial levels is exacerbated by inequity and marginalisation linked to gender, ethnicity, low income or combinations thereof (*high confidence*), especially for many Indigenous Peoples and local communities (*high confidence*). Approximately 3.3 to 3.6 billion people live in contexts that are highly vulnerable to climate change (*high confidence*). Between 2010 and 2020, human mortality from floods, droughts and storms was 15 times higher in highly vulnerable regions, compared to regions with very low vulnerability (*high confidence*). In the Arctic and in some high mountain regions, negative impacts of cryosphere change have been especially felt among Indigenous Peoples (*high confidence*). Human and ecosystem vulnerability are interdependent (*high confidence*). Vulnerability of ecosystems and people to climate change differs substantially among and within regions (*very high confidence*), driven by patterns of intersecting socio-economic development, unsustainable ocean and land use, inequity, marginalisation, historical and ongoing patterns of inequity such as colonialism, and governance (*high confidence*)"[32].

1.28. The vulnerability of a State must therefore take into account a wide range of potential adverse effects of climate change, having regard to the particular situation of that State, both in the near and long term. Relevant factors include sea-level rise, increased rainfall, decrease in water availability, reduced crop yields, increased risk of drought, loss of biodiversity, increase in forest fires, heat waves, and extreme climatic events[33].

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[30] IPCC, *Climate Change 2001: Impact, Adaptation and Vulnerability*. *Contribution of Working Group II to the Third Assessment Report of the Intergovernmental Panel on Climate Change* (CUP, 2001), p. 995.

[31] IPCC, *Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (2014), p. 128.

[32] IPCC, *Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (2023), p. 51.

[33] IPCC, *Climate Change 2022: Impacts, Adaptation and Vulnerability* (CUP, 2022), p. 12.

1.29. Sea-level rise is of particular concern for Ecuador since a significant part of its continental territory is situated in low-lying costal areas. Ecuador is also home to the Galapagos Islands, the fragile ecosystems of which face risk of significant harm due rising sea-levels[34].

1.30. Likewise, different areas of Ecuador are vulnerable to flooding, as evidenced as recently as 2023 in Guayaquil, the largest city in the country. Part of Guayaquil is below sea-level and faces heavy rains, overflows of rivers and floods, damage to infrastructure and homes, loss of income and tourism, and adverse effects on the health and well-being of the population.

1.31. Ecuador faces many other important threats. These include the intensification of extreme climatic events (such as the '*El Niño* Southern Oscillation' phenomenon); glacier retreat; the decrease in annual runoff; the increase in the transmission of dengue and other tropical diseases; the expansion of populations of invasive species in the Galapagos Islands and other sensitive ecosystems of continental Ecuador; and the extinction of species[35].

1.32. Ecuador wishes to stress that it supports the development and use of the Multidimensional Vulnerability Index[36]. The Index would enable a more comprehensive understanding of the complexities of sustainable development taking into account the specific vulnerabilities of particular States to the adverse effects of climate change, and assist in achieving a more effective allocation of global financial flows. Ecuador, as a middle income country, also advocates for the development and use of indicators that go beyond gross domestic product as a measure of progress and development, as it does not effectively capture the many dimensions of prosperity, social well-being and environmental protection.

1.33. In sum, Ecuador is exposed to several adverse effects of climate change which cause and will continue to cause serious harm to its population, its environment, and its economy.

[34] Ministry of the Environment, Water and Ecological Transition of Ecuador, "Fourth National Communication to the UNFCCC", December 2022, p. 32; Ministry of the Environment, Water and Ecological Transition of Ecuador, "National Adaptation Plan 2023-2027" (2023), pp. 86, 93.

[35] Ministry of the Environment, Water and Ecological Transition of Ecuador, "Fourth National Communication to the UNFCCC", December 2022, p. 7; Ministry of the Environment, Water and Ecological Transition of Ecuador, "National Adaptation Plan 2023-2027" (2023), p. 36.

[36] See UN High Level Panel on the Development of a Multidimensional Vulnerability Index, Final Report, September 2023 (available at: https://www.un.org/ohrlls/mvi, accessed on 7 March 2023).

B. Ecuador's efforts to combat climate change

1.34. Despite its limited resources as a developing country, Ecuador has been deeply committed to the fight against climate change, based on the principles of equity and CBDR. Ecuador's Constitution provides expressly that "[t]he State shall adopt adequate and cross-cutting measures for the mitigation of climate change, by limiting greenhouse gas emissions, deforestation, and air pollution; it shall take measures for the conservation of the forests and vegetation; and it shall protect the population at risk"[37]. Ecuador presented its first Nationally Determined Contribution ('NDC') under the Paris Agreement in 2019[38].

1.35. Ecuador has made significant efforts to increase its adaptive capacities to the adverse effects of climate change, but this alone cannot suffice. The urgency and seriousness of the current state of affairs command enhanced and much more ambitious international cooperation, particularly through the mobilization of financial resources, technology transfer and capacity-building. Cooperation by and with the most developed and industrialized countries is crucial in this context.

1.36. Ecuador also conducts significant mitigation efforts. For example, no less than 19.45% of Ecuador's territory is currently under environmental protection schemes. Since May 2021, the protected areas of the country have increased by 42%, which represents 7.7 million more hectares in comparison to 2021, in an attempt to improve the coexistence between nature and human beings. Likewise, Ecuador has increased the protection of its water heritage by 300%, considering acess to water a fundamental and inalienable human right[39].

1.37. Furthermore, Ecuador is home to more than 11.6 million hectares of rainforests in the Amazon, which covers 46.82% of the continental territory and constitutes a conservation

[37] Constitution of Ecuador, Article 414 ("*El Estado adoptará medidas adecuadas y transversales para la mitigación del cambio climático, mediante la limitación de las emisiones de gases de efecto invernadero, de la deforestación y de la contaminación atmosférica; tomará medidas para la conservación de los bosques y la vegetación, y protegerá a la población en riesgo*").

[38] Republic of Ecuador, "First Nationally Determined Contribution under the Paris Agreement and the United Nations Framework Convention on Climate Change", March 2019.

[39] Article 12 of the Constitution of Ecuador provides that: "*El derecho humano al agua es fundamental e irrenunciable. El agua constituye patrimonio nacional estratégico de uso público, inalienable, imprescriptible, inembargable y esencial para la vida*" ("The human right to water is essential and cannot be waived. Water constitutes a national strategic asset for use by the public and it is unalienable, not subject to a statute of limitations, immune from seizure and essential for life").

priority due to its high vulnerability and social and environmental fragility. It constantly seeks to promote and take action to address biodiversity loss, desertification, land degradation and drought, ocean acidification, and pollution (including plastic pollution). In this context, Ecuador has developed an ecological transition policy that seeks to guarantee the sustainability of natural heritage hand in hand with sustainable consumption and production.

1.38. Ecuador signed the UNFCCC in 1992 and began adopting measures for its implementation since 1994, confirming its strong commitment to combat climate change. In 2019, as noted above, Ecuador formulated its first NDC under the Paris Agreement, applicable for the period 2020-2025[40]. As a country particularly vulnerable to the adverse effects of climate change, Ecuador must make the best use of international and national mechanisms and instruments for the design and implementation of mitigation and adaptation policies, plans and projects.

1.39. In 2021, Ecuador adopted the Implementation Plan of its first NDC[41], a tool that aims to guide the implementation of actions at the national, sectoral and local levels that promote the reduction of GHG emissions and the preservation of carbon sinks, as well as to increase adaptive capacities and to reduce risks in relation to the adverse effects of climate change. The Implementation Plan is based on the prioritized sectors set out in Ecuador's National Climate Change Strategy 2012-2025[42].

1.40. Similarly, in 2021, Ecuador adopted its National Climate Finance Strategy ('EFIC')[43], which has three strategic lines of action: (1) clear and effective governance of climate finance; (2) consolidation of a financial system that transversally integrates a climate approach; and (3) access, management, allocation and effective and efficient mobilization of climate financing.

[40] Republic of Ecuador, "First Nationally Determined Contribution under the Paris Agreement and the United Nations Framework Convention on Climate Change", March 2019.

[41] Ministry of the Environment and Water of Ecuador, "Plan de Implementación de la Primera Contribución Determinada a Nivel Nacional de Ecuador 2020-2025" (2021) (available at: https://odsterritorioecuador.ec/wp-content/uploads/2023/05/Plan-de-Implementacion-NDC-2020-2025.pdf, accessed on 7 March 2023).

[42] Ministry of the Environment of Ecuador, "Estrategia Nacional de Cambio Climático del Ecuador 2012-2015" (2012) (available at: https://www.ambiente.gob.ec/wp-content/uploads/downloads/2017/10/ESTRATEGIA-NACIONAL-DE-CAMBIO-CLIMATICO-DEL-ECUADOR.pdf, accessed on 7 March 2024).

[43] Ministry of the Environment and Water and Ministry of Economy and Finance of Ecuador, "Estrategia Nacional de Financiamiento Climático" (2021) (available at: https://www.bivica.org/files/5789_ESTRATEGIAFCECUADOR.pdf, accessed on 7 March 2024).

Through the EFIC, Ecuador aims to strengthen and expand the formulation and implementation of climate change mitigation and adaptation projects and to achieve a climate-resilient and low-emission development, without compromising national efforts towards poverty eradication and the pursuit of sustainable development for current and future generations. Ecuador was the fourth country in Latin America and the Caribbean to have such an instrument, thus promoting the mainstreaming of the climate variable in budget planning at all levels of government, and facilitating the mobilization, monitoring, reporting and verification of climate financing from all types of sources.

1.41. In December 2022, the Fourth National Communication and Second Biennial Update Report of Ecuador was presented within the framework of the UNFCCC[44]. This report shows Ecuador's efforts to mitigate climate change and its permanent commitment to reduce vulnerability and increase the resilience of human and natural systems in the face of climate change, for the period 2016-2020.

1.42. In February 2023, Ecuador adopted its National Adaptation Plan[45], which aims to integrate adaptation measures into sectoral and local development planning, and to identify and reduce vulnerability and the climatic risk of social, economic and environmental systems in the face of the adverse effects of climate change. The Adaptation Plan sets out mechanisms, objectives and expected results of adaptation measures for the prioritized sectors[46] of the National Climate Change Strategy. This reflects the high priority that Ecuador gives to adaptation, in the hope that the commitment to double financing for adaptation until the year 2030, reached at the COP26 held in Glasgow in 2021, will be fulfilled.

1.43. Among the most ambitious strategies that Ecuador is currently developing is its 2050 National Decarbonization Plan[47], which identifies the technological, socioeconomic and

[44] Ministry of the Environment, Water and Ecological Transition of Ecuador, "Fourth National Communication to the UNFCCC", December 2022.

[45] Ministry of the Environment, Water and Ecological Transition of Ecuador, "National Adaptation Plan 2023-2027" (2023).

[46] These include human settlements, water heritage, natural heritage, health, productive and strategic sectors, food sovereignty, agriculture, livestock, aquaculture and fisheries.

[47] See Ministry of the Environment, Water and Ecologic Transition, "Ministerio del Ambiente inició la construcción, del Plan Nacional de Transición hacia la Descarbonización", Bulletin N° 153, 10 August 2022 (available at: https://www.ambiente.gob.ec/ministerio-del-ambiente-inicio-la-construccion-del-plan-nacional-de-transicion-hacia-la-descarbonizacion/, accessed on 7 March 2024).

environmental changes required in various economic sectors to reduce Ecuador's CO_2 emissions. It is expected that the Plan will be finalized in 2024 and that it will ensure a gender-sensitive approach and attention to the most vulnerable groups, as well as the close involvement of all relevant stakeholders.

1.44. In May 2023, Ecuador carried out the largest debt-for-conservation swap in history, generating savings of USD 1.1 billion in debt services, with USD 450 million to be invested in the protection, conservation, and sustainable use of the Galapagos Islands, which are a World Natural Heritage Site[48].

1.45. Ecuador had earlier announced, at the COP26 in Glasgow, its historical decision to establish a new marine reserve in the Galapagos Islands, adding 60,000 square kilometers of protection to this unique ecosystem and its migratory routes and feeding grounds for endangered species, while maintaining a responsible fishing area and strengthening international cooperation for the economic and social development of the Islands[49]. At the same Conference, the President of Ecuador signed, together with his counterparts from Colombia, Costa Rica and Panama, the Declaration for the Conservation and Management of the Ecosystems included in the Eastern Tropical Pacific Marine Corridor (CMAR) (Migravias - Cocos - Galapagos - Malpelo - Coiba)[50], with a view to strengthening the ecological connectivity of the region and the protection of highly migratory species through national and regional management and governance measures, and the creation of what would be the largest Marine Biosphere Reserve in the world under the UNESCO "Man and Bioshpere Programme". This constitutes a significant contribution to the conservation and sustainable use of biodiversity, the fight against climate change, the implementation of the Sustainable

[48] Inter-American Develoment Bank, "Ecuador completes World's Largest Debt-for-Nature Conversion with IDB and DFC Support", 9 May 2023 (available at: https://www.iadb.org/en/news/ecuador-completes-worlds-largest-debt-nature-conversion-idb-and-dfc-support, accessed 7 March 2024).

[49] UNFCCC, "Ecuador High-level Segment Statement COP 26", 3 November 2021 (available at: https://unfccc.int/documents/363054, accessed on 7 March 2024).

[50] Ministry of the Environment, Water and Ecologic Transition of Ecuador, "Un millón de dólares para conservar el Corredor Marino del Pacífico", Bulletin N° 422, 3 November 2021 (available at: https://www.ambiente.gob.ec/un-millon-de-dolares-para-conservar-el-corredor-marino-del-pacifico/, accessed on 7 March 2024). See also the creation of the Marine Reserve "Hermandad" through Decree No. 319, dated 14 January 2022 (available at: https://www.comunicacion.gob.ec/wp-content/uploads/2022/01/D.E.-319-Reserva-Marina-Hermandad.pdf, accessed on 7 March 2024).

Development Goals ('SDGs'), and the target of protecting globally 30% of the land and sea surface of the planet by 2030, also known as the "30x30" target[51].

1.46. At the COP27, held in Sharm el-Sheikh in 2022, Ecuador made important proposals regarding cooperation in issues relating to forests, oceans, biodiversity, protected areas, payments for mitigation results, fight against plastic pollution and innovative financing mechanisms. Ecuador also emphasized the need to comply with international commitments, including the global financing objective of USD 100 billion annually in favor of developing countries, having achieved the creation, for the first time, of an international fund and other arrangements to help developing countries respond to loss and damage arising from the adverse effects of climate change[52].

1.47. During the COP28, held in the United Arab Emirates in 2023, Ecuador promoted a first effective and transparent 'global stocktake' under Article 14 of the Paris Agreement; progress on the new collective quantified goal on climate finance to be agreed before 2024; the operationalization of financing arrangements to address loss and damage; and efforts at reaching agreements for net zero global emissions[53].

IV. Organization of the Written Statement

1.48. Following this Introduction, the Written Statement is divided into three chapters. **Chapter 2** shows that the Court has jurisdiction to give the advisory opinion requested by the General Assembly, and that there is no reason for it not to do so. **Chapters 3** and **4** respond in turn to Questions (*a*) and (*b*) as contained in General Assembly resolution 77/247. The Written Statement ends with a **Summary** of Ecuador's position.

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[51] See Target 3 of the Kunming-Montreal Global Biodiversity Framework (CBD/COP/DEC/15/4), 19 December 2022 (available at: https://www.cbd.int/doc/decisions/cop-15/cop-15-dec-04-en.pdf, accessed on 7 March 2024).

[52] UNFCCC Standing Committee on Finance, Report on progress towards achieving the goal of mobilizing jointly USD 100 billion per year to address the needs of developing countries in the context of meaningful mitigation actions and transparency on implementation (2022) (available at: https://unfccc.int/sites/default/files/resource/J0156_UNFCCC%20100BN%202022%20Report_Book_v3.2.pdf, accessed on 7 March 2024); UNFCCC, "Establishing a dedicated fund for loss and damage" (available at: https://unfccc.int/establishing-a-dedicated-fund-for-loss-and-damage, accessed on 7 March 2024).

[53] Ministry of the Environment, Water and Ecologic Transition of Ecuador, "Ecuador se destaca en la COP 28 marcando un compromiso firme por la sostenibilidad ambiental", Bulletin N° 003, 7 December 2023 (available at: https://www.ambiente.gob.ec/ecuador-se-destaca-en-la-cop28-marcando-un-compromiso-firme-por-la-sostenibilidad-ambiental/, accessed on 7 March 2024).

CHAPTER 2

THE COURT HAS JURISDICTION TO GIVE THE ADVISORY OPINION AND THERE IS NO REASON FOR IT NOT TO DO SO

2.1. As the Court has consistently maintained:

> "When seised of a request for an advisory opinion, the Court must first consider whether it has jurisdiction to give the opinion requested and whether, should the answer be in the affirmative, there is any reason why the Court, in its discretion, should decline to exercise any such jurisdiction in the case before it"[54].

2.2. Ecuador is of the firm view that the Court is competent to give the advisory opinion requested by General Assembly resolution 77/276 and there are no compelling reasons for it to decline to exercise its jurisdiction in respect of that request.

I. The Court's jurisdiction

2.3. The jurisdiction of the Court to give an advisory opinion is based on Article 65(1) of its Statute, which provides that "[t]he Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request".

2.4. Ecuador considers that the Court undoubtedly has jurisdiction to give the advisory opinion requested of it by General Assembly resolution 77/276.

2.5. The General Assembly is duly authorized to request the Court to give an advisory opinion, as Article 96(1) of the UN Charter provides that "[t]he General Assembly … may request the International Court of Justice to give an advisory opinion on any legal question".

[54] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010*, p. 412, para. 17; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019*, p. 111, para. 54.

This competence of the General Assembly to make a request for an advisory opinion has long been recognized by the Court[55].

2.6. Nor is there any doubt that the questions put to the Court in the present advisory proceedings are legal questions[56], bearing as they do upon the "obligations of States under international law" as well as "legal consequences under these obligations".

2.7. It follows that the present request for an advisory opinion has been made to the Court in accordance with the Charter and that the questions submitted to the Court are legal in character.

II. The Court's discretion

2.8. While the Court has a discretionary power to decline to give an advisory opinion even where the conditions of jurisdiction have been met, the Court has on a number of occasions made it clear that its answer to a request for an advisory opinion "represents its participation in the activities of the Organization, and, in principle, should not be refused"[57]. The Court has also indicated that "compelling reasons" having to do with the Court's character as a principal organ of the United Nations and as a judicial body would be required to justify a refusal[58].

2.9. Ecuador, which co-sponsored and voted in favour of resolution 77/276, is of the view that there is no reason for the Court to refuse to respond to the request from the General

[55] See, most recently, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019*, p. 112, para. 56.

[56] *Ibid*., p. 112, para. 57.

[57] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, pp. 71-72. This principle has been endorsed in a long line of advisory opinions, most recently in the *Chagos* case: see *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019*, p. 113, para. 65.

[58] See *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019,* p. 113, para. 65, referring to *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950,* p. 71; *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999,* pp. 78-79, para. 29; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010,* p. 416, para. 30; and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004,* p. 156, para. 44.

Assembly contained therein. In particular, the exercise of the Court's advisory jurisdiction would not be incompatible with the integrity of its judicial function[59].

2.10. Ecuador is confident, moreover, that an advisory opinion from the Court on the questions put to it will greatly assist the General Assembly in the future exercise of its functions in relation to climate change. It may be recalled in this regard that in resolution 77/276 the General Assembly recognized "that climate change is an unprecedented challenge of civilizational proportions and that the well-being of present and future generations of humankind depends on our immediate and urgent response to it"[60].

[59] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019*, p. 113, paras. 64-65.

[60] UN General Assembly resolution 77/276, 29 March 2023, first preambular paragraph.

CHAPTER 3

THE FIRST QUESTION

3.1. Question (*a*) reads:

> "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?"

3.2. This first question is drafted in broad terms. It is not limited to a particular source of international law, nor to any specific branch thereof. Therefore, the determination of the rules concerning the protection of the climate system and other parts of the environment from anthropogenic GHG emissions, for States and for present and future generations, should in principle take into account the entirety of international law.

3.3. At the same time, the *chapeau* of the request points to certain rules and instruments that the General Assembly considered particularly relevant in the present context. It indicates that the questions put to the Court should be addressed "[h]aving 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".

3.4. This chapter is organized as follows: **Section I** provides some basic definitions relevant to Question (*a*). **Section II** sets out States' obligations under general international law concerning the protection of the climate system and other parts of the environment from anthropogenic GHG emissions. **Section III** addresses States' related obligations under the most relevant multilateral environmental agreements. Finally, **Section IV** deals specifically with States' obligations under international human rights law.

I. Basic definitions

3.5. Question (*a*) contains certain terms that Ecuador considers useful to define at the outset. This section addresses, specifically, the meaning of the terms 'climate system', 'environment', 'climate change' and 'future generations'.

3.6. 'Climate system' is defined in Article 1(3) of the UNFCCC as "the totality of the atmosphere, hydrosphere, biosphere and geosphere and their interactions". The IPCC, for its part, has defined 'climate system' as "[t]he global system consisting of five major components: the atmosphere, the hydrosphere, the cryosphere, the lithosphere and the biosphere and the interactions between them. The climate system changes in time under the influence of its own internal dynamics and because of external forcings such as volcanic eruptions, solar variations, orbital forcing, and anthropohenic forcings such as the changing composition of the atmosphere and land-use change"[61].

3.7. This definition must be read together with the definitions of 'reservoir' and 'sink', which are components of the climate system and the environment capable of storing and absorbing greenhouse gas emissions[62]. Article 4(1)(d) of the UNFCCC considers as sinks and reservoirs, for example, "biomass, forests and oceans as well as other terrestrial, coastal and marine ecosystems". By protecting and increasing the capacity of reservoirs and sinks, States also protect the climate system from the effects of anthropogenic GHG emissions.

3.8. As to the term 'environment', the Court emphasized in the *Nuclear Weapons* advisory opinion 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"[63]. The International Law Commission ('ILC'), for its part, has defined the 'environment' as including "natural resources, both abiotic and biotic, such as air, water, soil, fauna and flora and the interaction between the same factors; and the characteristic aspects of the landscape"[64]. Similarly,

[61] IPCC, *Climate Change 2022: Mitigation of Climate Change. Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (CUP, 2022), p. 1798.

[62] UNFCCC, Articles 1(7) and 1(8).

[63] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I. C. J. Reports 1996*, pp. 241 -242, para. 29; *Gabćikovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 41, para. 53.

[64] Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, with commentaries, in *Yearbook of the International Law Commission 2006*, vol. II, Part Two, p. 64, Principle 2(b).

Principle 2 of the 1972 Stockholm Declaration on the Human Environment ('Stockholm Declaration'), referring to the need to safeguard the environment for the benefit of present and future generations, mentions "natural resources of the earth, including the air, water, land, flora and fauna and especially representative samples of natural ecosystems"[65].

3.9. According to Ecuador's Constitution, "[n]ature, or Pacha Mama, where life is reproduced and occurs, has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes"[66]. The Constitutional Court of Ecuador has further explained that "[n]ature is composed of an interconnected, interdependent and indivisible set of biotic and abiotic elements (ecosystems). Nature is a community of life. All its elements, including human beings, are linked and each of them have a function or role. The properties of each element arise from the interrelationship with other elements and they function as a network. When one element is affected, the functioning of the system is altered"[67].

3.10. 'Climate change' has been defined in the UNFCCC as "a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods"[68]. The IPCC further defines 'climate change' as "a change in the state of the climate that can be identified (e.g., by using statistical tests) by changes in the mean and/ or the variability of its properties and that persists for an extended period, typically decades or longer"[69]. 'Climate variability', for its part, refers to "variations in the mean state and other

[65] Report of the United Nations Conference ont the Human Environment, Stockholm, 5-16 June 1972, p. 4. At the regional level, the Inter-American Court of Human Rights has considered as components of the environment the "forests, rivers and seas". See *The Environment and Human Rights*, Advisory Opinion OC-23/17, 15 November 2017, para. 62.

[66] Constitution of Ecuador, Article 71. The original Spanish text reads: "*La naturaleza o Pacha Mama, donde se reproduce y realiza la vida, tiene derecho a que se respete integralmente su existencia y el mantenimiento y regeneración de sus ciclos vitales, estructura, funciones y procesos evolutivos*".

[67] Constitutional Court of Ecuador, Case No. 22-18-IN/21, Judgment of 8 September 2021, para. 27. The original Spanish reads: "*La naturaleza está conformada por un conjunto interrelacionado, interdependiente e indivisible de elementos bióticos y abióticos (ecosistemas). La naturaleza es una comunidad de vida. Todos los elementos que la componen, incluida la especie humana, están vinculados y tienen una función o rol. Las propiedades de cada elemento surgen de las interrelaciones con el resto de elementos y funcionan como una red. Cuando un elemento se afecta, se altera el funcionamento del sistema*".

[68] UNFCCC, Article 1(2).

[69] IPCC, *Climate Change 2022: Mitigation of Climate Change. Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (CUP, 2022), p. 1797.

statistics (such as standard deviations, the occurrence of extremes, etc.) of the climate on all temporal and spatial scales beyond that of individual weather events. Variability may be due to natural internal processes within the climate system (internal variability), or to variations in natural or anthropogenic external forcing (external variability)"[70].

3.11. As regards the term 'future generations', the UNFCCC states that "[t]he Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities"[71]. The UN General Assembly, in its resolution 43/53, stressed "that certain human activities could change global climate patterns, threatening present and future generations with potentially severe economic and social consequences"[72]. Similarly, in *Gabćikovo-Nagymaros,* the Court underscored that environmental rules and standards have evolved in the light of scientific evidence and a growing awareness of the risks for humankind, including present and future generations[73]. Other instruments have noted the needs and interests of future generations, and the responsibility of present generations to ensure that they are safeguarded[74].

3.12. Moreover, the preamble to the Convention on the Rights of the Child ('CRC') states that "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth". Upon signature of that Convention, Ecuador noted that this "pointed to the need to protect the unborn child" and "should be borne in mind in interpreting all the articles of the Convention"[75]. On this point, General Comment No. 26, adopted by the Committee on the Rights of the Child, notes that:

> "The Committee recognizes the principle of intergenerational equity and the interests of future generations, to which the children consulted overwhelmingly referred. While the rights of children who are present on Earth require immediate urgent attention, the

[70] *Ibid*., p. 1798.

[71] UNFCCC, Article 3(1).

[72] UN General Assembly resolution 43/53, 6 December 1988, second preambular paragraph.

[73] *Gabćikovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 78, para. 140.

[74] UNFCCC, Article 3(1); 2018 Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean ('Escazú Agreement'), Article 1; UNGA, Report of the United Nations Conference on Environment and Development (A/CONF.151/26) (Vol. I), Rio Declaration on Environment and Development ('Rio Declaration'), Principle 3, Stockholm Declaration, Principle 2.

[75] UN General Assembly, Third Committee, Summary Records of the 41st Meeting (A/C.3/44/SR.41), 14 November 1989, para. 3.

children constantly arriving are also entitled to the realization of their human rights to the maximum extent"[76].

3.13. 'Future generations' has been defined in the literature as "those generations that do not exist yet"[77], "a collectivity *ad infinitum* of all human beings who succeed the present or living generation"[78] or "those generations who will be born, and the present generations who do not have legal capacity but will have it"[79]. The so-called "Maastricht Principles on the Human Rights of Future Generations" define 'future generations' as "all those generations that do not yet exist, are yet to come and who will eventually inherit this planet. Future Generations include persons, groups and Peoples"[80].

3.14. One further point concerns the term 'obligations' used in Question (*a*), which may encompass various types of rules. A distinction can be made in this regard, among others, between obligations arising under general international law and obligations set out in particular treaties; between obligations owed to certain States only and those owed *erga omnes*; between obligations owed to individuals and those owed to States; between substantive and procedural obligations; and between obligations of result and obligations of conduct (or due diligence obligations). These are addressed below.

II. Obligations under general international law

3.15. The present section addresses States' obligations under general international law relating to the protection of the climate system and other parts of the environment from anthropogenic GHG emissions. The rules that are particularly relevant in the present context

[76] Committee on the Rights of the Child, General comment No. 26 (2023) on children's rights and the environment, with a special focus on climate change (CRC/C/GC/26), May 2023, para. 11.

[77] E. Brown Weiss, "Intergenerational equity", in *Max Planck Encyclopedia of Public International Law* (2013), para. 4.

[78] A. Malhorta, "A Commentary on the Status of Future Generations as a Subject of International Law", in E. Agius and S. Busuttil, *Future Generations and International Law* (Routledge, 1998), p. 41.

[79] L.G. Ferrer Ortega, *Los derechos de las futuras generaciones desde la perspectiva del derecho internacional: el principio de equidad intergeneracional* (IIJ-UNAM, 2014), p. 46.

[80] Maastricht Principles on the Human Rights of Future Generations, 3 February 2023 (available at: https://www.ohchr.org/sites/default/files/documents/new-york/events/hr75-future-generations/Maastricht-Principles-on-The-Human-Rights-of-Future-Generations.pdf, accessed on 7 March 2024). The Maastricht Principles were adopted by a group of 58 scholars.

are the principle of prevention (**A**); the obligation to conduct environmental impact assessments ('EIA') (**B**); the precautionary principle (**C**); and the duty to cooperate (**D**)[81].

3.16. There are certain principles of international law that inform the scope and content of the above-mentioned rules. These include the principle of equity; the principle of CBDR; the principle of intergenerational equity; and the 'polluter pays' principle. These will be addressed briefly as well (**E**).

3.17. It should be noted that some of these rules and principles have been incorporated, in one form or another, in various multilateral environmental treaties, which are addressed in Section III below. Nonetheless, they exist and apply independently of those treaties, and may be relevant for the interpretation and application thereof.

A. The principle of prevention

3.18. The principle of prevention has its origin in the no-harm principle. The latter forms part of customary international law and is a corollary of the principle of permanent sovereignty over natural resources[82], recognizes the right of a State to engage in activities within its jurisdiction while imposing a duty to prevent transboundary harm. The principle was applied in the *Trail Smelter* arbitration, where the tribunal stated that "no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence"[83]. Similarly, in the *Corfu Channel* case, the Court recognized as a general principle of law "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States"[84].

[81] The duty to protect and preserve the marine environment and certain human rights obligations also form part of customary international law. These are addressed with their conventional counterparts in subsequent sections of this chapter.

[82] UN General Assembly resolution 1803 (XVII), 14 December 1962. See also P-M. Dupuy and J. Viñuales, *Internationla Environmental Law*, 2nd ed. (CUP, 2018) , p. 64.

[83] *Trail Smelter case (United States/Canada)*, Award, 11 March 1941, RIAA, vol. III, p. 1965.

[84] *Corfu Channel case, Judgment of April 4th, 1949: I.C.J. Reports 1949*, p. 22.

3.19. The principle of prevention also forms part of customary international law and is of an *erga omnes* character. It was first spelled out in the 1972 Stockholm Declaration, Principle 21 of which reads:

> "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own natural resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction".

This formulation has been reaffirmed in, *inter alia*, Principle 2 of the 1992 Rio Declaration, Article 3 of the Convention on Biological Diversity ('CBD'), and the preamble of the UNFCCC.

3.20. The Court has also set out the foundations and content of the principle:

> "… 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' … 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"[85].

3.21. The principle of prevention goes beyond the no-harm principle in that it broadens the scope of the obligation by prohibiting harm to the environment in areas beyond national jurisdiction. As such, the principle of prevention seeks to protect not only the interests of other States, but also the environment *per se*[86].

3.22. This obligation is triggered when significant harm to the environment is likely to occur. The ILC has noted that the term 'significant' requires a case-by-case analysis, taking into account all relevant facts: "It involves more factual considerations than legal determination. It is to be understood that '*significant' is something more than 'detectable' but need not be at the*

[85] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay) Judgment, I.C.J. Reports 2010*, pp. 55-56, para. 101. See also *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, pp. 241-242, para. 29; *Gabčíkovo-Nagymaros Project* (*Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, pp. 77-78, para. 140; *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.

[86] See also P-M. Dupuy and J. Viñuales, *Internationla Environmental Law*, 2nd ed. (CUP, 2018) , pp. 66-67.

level of 'serious' or 'substantial'. The harm must lead to a real detrimental effect on matters such as, for example, human health, industry, property, environment or agriculture in other States. Such detrimental effects must be susceptible of being measured by factual and objective standards"[87].

3.23. The principle of prevention may be considered a due diligence obligation. The general principle of law of due diligence generates obligations in various areas of international law. As noted by the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea ('ITLOS') in relation to Article 139 of UNCLOS, due diligence is "an obligation to deploy adequate means, to exercise best possible efforts, to do the utmost, to obtain" a certain result[88]. Thus, due diligence requires a degree of care from States. In the *Pulp Mills* case, the Court determined that compliance with a due diligence obligation requires not only adopting appropriate rules and measures for purposes of achieving the desired result, but also "a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as the monitoring of activities undertaken by such operators"[89]. Similarly, the ILC has noted that:

> "… States are under an obligation to take unilateral measures to prevent significant transboundary harm or at any event to minimize the risk thereof arising out of activities within the scope of article 1. Such measures include, first, formulating policies designed to prevent significant transboundary harm or to minimize the risk thereof and, secondly, implementing those policies. Such policies are expressed in legislation and administrative regulations and implemented through various enforcement mechanisms"[90].

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[87] Draft articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries, in *Yearbook of the International Law Commission, 2001*, vol. II, Part Two, p. 152, para. (4) (emphasis in the original).

[88] *Responsibilities and obligations of States with respect to activities in the Are*a, Advisory *Opinion, 1 February 2011, ITLOS Reports 2011*, p. 41, para. 110. See also *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay) Judgment, I.C.J. Reports 2010*, p. 77, para. 187.

[89] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay) Judgment, I.C.J. Reports 2010*, p. 79, para. 197. See also *Responsibilities and obligations of States with respect to activities in the Are*a, Advisory *Opinion, 1 February 2011, ITLOS Reports 2011*, pp. 42, 73, paras. 115, 239; *Request for Advisory Opinion by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015, ITLOS Reports 2015*, p. 41, para. 131; *South China Sea Arbitration*, Award, 12 July 2016, RIAA, vol. XXXIII, para. 944.

[90] Draft articles on Prevention of Transboundary Harm from Hazardous Activitites, with commentaries, *Yearbook of the International Law Commission, 2001*, vol. II, Part Two, p. 154, para. (10). See also Draft guidelines on the protection of the atmosphere, with commentaries, *Yearbook of the International Law Commission, 2021*, vol. II, Part Two, pp. 13-51, p. 27, Guideline 3, para (6).

3.24. The content of due diligence obligations is not static but may change over time. As the ITLOS Seabed Disputes Chamber noted in the *Area* advisory opinion:

> "'… '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"[91].

The Chamber additionally noted that "the standard of due diligence has to be more severe for the riskier activities"[92]. In a similar vein, the ILC has stated that:

> "The required degree of care is proportional to the degree of hazard involved. The degree of harm itself should be foreseeable and the State must know or should have known that the given activity has the risk of significant harm. The higher the degree of inadmissible harm, the greater would be the duty of care required to prevent it"[93].

3.25. The principle of prevention is applicable to the protection of the climate system and other parts of the environment from anthropogenic GHG emissions[94]. The latter may meet, depending on the circumstances of the State concerned, the threshold required for triggering the obligation: a significant harm to the environment of other States or to areas beyond national jurisdiction. As shown in Chapter 1, the scientific evidence leaves no doubt that anthropogenic GHG emissions are the main cause of climate change, and that the latter has and will continue to have significant adverse effects on the climate system and other parts of the environment. This entails devastating consequences for individuals all around the world, and in particular those living in vulnerable countries.

3.26. It may be recalled that, as noted by the IPCC, "approximately 79% of global GHG emissions came from the sectors of energy, industry, transport, and buildings together and 22%

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[91] *Responsibilities and obligations of States with respect to activities in the Are*a, Advisory *Opinion, 1 February 2011, ITLOS Reports 2011*, p. 43, para. 117. See also Draft articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries, *Yearbook of the International Law Commission, 2001*, vol. II, Part Two, p. 154, Article 3, para. (11).

[92] *Responsibilities and obligations of States with respect to activities in the Are*a, Advisory *Opinion, 1 February 2011, ITLOS Reports 2011*, p. 43, para. 117.

[93] Draft articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries, *Yearbook of the International Law Commission, 2001*, vol. II, Part Two, p. 155, Article 3, para. (18). See also *The Environment and Human Rights*, Advisory Opinion OC-23/17, 15 November 2017, paras. 127 ff.

[94] The principle of prevention is expressly reaffirmed in the eighth preambular paragraph of the UNFCCC.

from agriculture, forestry and other land use"[95]. The IPCC has also determined that emissions of CO_2 from fossil fuel combustion and industrial processes have contributed significantly to the global anthropogenic GHG emissions[96].

3.27. As to the global benchmark to reduce anthropogenic GHG emissions, the target established by the Paris Agreement, to which 195 States are parties, reflects the current compromise reached by the international community, based on the best available scientific evidence. This international standard aims at keeping the global average temperature well below 2°C above pre-industrial levels and to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change[97].

3.28. In this context, the principle of prevention requires, at a minimum, that States adopt and effectively implement all the necessary measures at their disposal to reduce or mitigate GHG emissions in sectors of the economy which contribute the most to such emissions, and which cause or are likely to cause significant harm to the climate system or other parts of the environment, be in areas within the jurisdiction of another State or in areas beyond national jurisdiction.

3.29. This approach has already been followed by some national courts. In *Urgenda Foundation v. The Netherlands*, for example, The Hague District Court ordered the Netherlands to "limit the joint volume of Dutch annual greenhouse gas emissions, or have them limited, so that this volume will have reduced by at least 25% at the end of 2020 compared to the level of the year 1990"[98]. The Dutch Supreme Court upheld the decision on appeal. It recalled that the no-harm (or prevention) principle is a generally accepted principle of international law which dictates that States must not cause each other harm, and added that:

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[95] IPCC, *Climate Change 2023: Synthesis Report. A Report of the Intergovernmental Panel on Climate Change. Contribution of Working Groups I, II, and III to the Sixth Assessment Report of the IPCC* (2023), pp. 4-5, para. A.1.4.

[96] IPCC, *Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change (*2014*)*, p. 5; IPCC, *Climate Change 2022: Mitigation of Climate Change. Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (2022), p. 10.

[97] Paris Agreement, Article 2(1)(a).

[98] *Urgenda Foundation v. The State of The Netherlands (Ministry of Infrastructure and the Environment)*, The Hague District Court, Judgment, 24 June 2015 (C/09/456689/HA ZA 13-1396), para. 5.1.

> "This is also referred to in the preamble to the UNFCCC … Countries can be called to account for the duty arising from this principle. Applied to greenhouse gas emissions, this means that they can be called upon to make their contribution to reducing greenhouse gas emissions. This approach justifies partial responsibility: each country is responsible for its part and can therefore be called to account in that respect"[99].

3.30. It is also worth recalling that, according to the IPCC, "global modelled mitigation pathways reaching net zero CO2 and GHG emissions include transitioning from fossil fuels without carbon capture and storage (CCS) to very low- or zero-carbon energy sources, such as renewables or fossil fuels with CCS, demand-side measures and improving efficiency, reducing non-CO2 GHG emissions, and carnon dioxide removal (CDR)"[100]. One of the economic sectors that must be urgently addressed by States under the principle of prevention, where the obligation is triggered, is therefore the energy sector: States must adopt and effectively implement the necessary measures to move away from an economy based on fossil fuels and to foster renewable energy, in accordance with their respective capabilities.

3.31. In sum, under the principle of prevention, States are obliged to adopt and effectively implement measures to reduce GHG emissions within their jurisdiction to achieve the Paris Agreement target of 2°C–1.5°C. The specific mitigation measures required, and the exact quantity in which GHG emissions must be reduced, will depend on the particular circumstances of each State, taking into account the best available science. The principles of equity and CBDR, including historical and present contributions to climate degradation, must also be considered, as will be further explained below[101].

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[99] *Urgenda Foundation v. The State of The Netherlands (Ministry of Infrastructure and the Environment)*, Supreme Court of The Netherlands, Judgment, 20 December 2019 (19/00135), para. 5.7.5. In other domestic judicial decisions, courts have noted that climate change is caused by cumulative emissions, each proportionally small relative to the global GHG emission, and will be solved by abatement of the GHG emissions from these individual sources. See *Gloucester Resources Limited v. Minister for Planning*, New South Wales Land and Environment Court, Judgment, 8 February 2019 (NSWLEC 7), paras. 515, 525-526; *Gray v. Minister for Planning*, New South Wales Land and Environment Court, Judgment, 27 November 2006 (NSWLEC 720), para. 98.

[100] IPCC, *Climate Change 2023: Synthesis Report. A Report of the Intergovernmental Panel on Climate Change. Contribution of Working Groups I, II, and III to the Sixth Assessment Report of the IPCC* (2023), p. 21.

[101] See paras. 3.54-3.65 below.

B. The obligation to conduct environmental impact assessments

3.32. The obligation to conduct an EIA requires States to exercise due diligence in preventing significant harm to the environment. It is referred to in Principle 17 of the Rio Declaration, which reads:

> "Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to decision of a competent national authority" [102].

3.33. The Court has stated that "it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource"[103]. The ITLOS, for its part, has further clarified that the obligation to conduct an EIA likewise applies to activities carried out in areas beyond national jurisdiction[104].

3.34. With respect to the precise content of an EIA, the Court has determined that:

> "… it is for each State to determine in its domestic legislation or in the authorization process for the project, the specific content of the environmental impact assessment required in each case, having regard to the nature and magnitude of the proposed development and its likely adverse impact on the environment as well as to the need to exercise due diligence in conducting such an assessment"[105].

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[102] The obligation to conduct an EIA has been included in several other instruments. See, for example, the 1991 Convention on Environmental Impact Assessment in a Transboundary Context; 2003 Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context; 2023 Agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, Part IV. See also Draft articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries, *Yearbook of the International Law Commission, 2001*, vol. II, Part Two, pp. 157-159, Article 7; Draft guidelines on the protection of the atmosphere, with commentaries, *Yearbook of the International Law Commission, 2021*, vol. II, Part Two, pp. 13-51, Guideline 4.

[103] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay) Judgment, I.C.J. Reports 2010,* pp. 55-56, para. 204.

[104] *Responsibilities and obligations of States with respect to activities in the Are*a, Advisory *Opinion, 1 February 2011, ITLOS Reports 2011*, p. 51 para. 148. See also *South China Sea Arbitration*, Award, 12 July 2016, RIAA, vol. XXXIII, paras. 947-948; *Indus Waters Kishenganga Arbitration (Pakistan* v. *India)*, PCA Case No. 2011-01, Partial Award, 18 February 2013, paras. 450-451.

[105] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay) Judgment, I.C.J. Reports 2010,* pp. 55-56, para. 205; *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*, pp. 706-707, para. 104.

3.35. The Court clarified that, at a minimum, "a State must, before embarking on an activity having the potential adversely to affect the environment of another State, ascertain if there is a risk of significant transboundary harm, which would trigger the requirement to carry out an environmental impact assessment", and that "once operations have started, where necessary, throughout the life of the project, continuous monitoring of its effects on the environment shall be undertaken"[106]. In other words, States have both an obligation to conduct an *ex ante* evaluation of the risk of significant harm to the environment, as well as to continuously monitor the effects of a given activity or project[107].

3.36. In *Certain Activities,* the Court also noted that States have an obligation to notify and consult in good faith with the State(s) potentially affected by the activity in question:

> "If the environmental impact assessment confirms that there is a risk of significant transboundary harm, the State planning to undertake the activity is required, in conformity with its due diligence obligation, to notify and consult in good faith with the potentially affected State, where that is necessary to determine the appropriate measures to prevent or mitigate that risk"[108].

3.37. In addition to notification and consultation to potentially affected States, States ought to provide to the public likely to be affected by an activity with relevant information relating to the activity, the risk involved and the harm which might result from it[109]. Ecuador's legislation, for example, requires the observance of public participation mechanisms during the environmental licensing stage of an activity. The legal, technical and economic

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[106] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay) Judgment, I.C.J. Reports 2010*, pp. 83-84, para. 205. 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*, pp. 706-707, para. 104.

[107] 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*, pp. 722-723, para. 161 ("In its Judgment in the *Pulp Mills* case, the Court held that the obligation to carry out an environmental impact assessment is a continuous one, and that monitoring of the project's effects on the environment shall be undertaken, where necessary, throughout the life of the project … Nevertheless, the obligation to conduct an environmental impact assessment requires an *ex ante* evaluation of the risk of significant transboundary harm, and thus 'an environmental impact assessment must be conducted prior to the implementation of a project' …").

[108] *Ibid.*, p. 665, para. 104. See also Rio Declaration, Principle 19.

[109] Draft articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries, *Yearbook of the International Law Commission, 2001*, vol. II, Part Two, Article 13 ("States concerned shall, by such means as are appropriate, provide the public likely to be affected by an activity within the scope of the present articles with relevant information relating to that activity, the risk involved and the harm which might result and ascertain their views"). See also Rio Declaration, Principle 10.

recommendations ascertained through public participation must be considered by the Government and the entity carrying out the project or activity[110].

3.38. Like the principle of prevention, the obligation of States to conduct an EIA for activities likely to cause significant harm to environment is relevant in the context of climate change. It requires an *ex ante* assessment of the GHG emissions likely to be produced by a proposed activity to inform the decision-making process of the competent authorities, as well as the monitoring of the activity once it commences[111]. This obligation has been incorporated in Article 4(1)(f) of the UNFCCC[112].

3.39. Furthermore, in its General Comment No. 26, the Committee on the Rights of the Child noted the need to include child rights impact assessments in the context of EIAs:

> "All proposed environment-related legislation, policies, projects, regulations, budgets and decisions, and those already in force, require vigorous children's rights impact assessments, in accordance with article 3 (1) of the Convention. States should require the assessment, both before and after implementation, of the possible direct and indirect impact on the environment and climate, including the transboundary, cumulative, and both production and consumption effects, on the enjoyment of children's rights"[113].

The Committee added that child rights impact assessments "should incorporate a special regard for the differential impact of environmental decisions on children", that States having "substantial fossil fuel industries should assess the social and economic impact on children of their related decisions", and that "child rights impact assessments should be undertaken as early as possible in the decision-making process"[114].

3.40. National courts have referred to the relevance of EIAs in the context of climate change. For example, in *Gray v. Minister for Planning*, it was stated that:

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[110] Organic Environmental Code of Ecuador (2017), Articles 436, 440 and 441.

[111] Ecuador incorporates climate change considerations in its EIA procedures. See Ministry of the Environment of Ecuador, "Estrategia Nacional de Cambio Climático del Ecuador 2012-2015" (2012) (available at: https://www.ambiente.gob.ec/wp-content/uploads/downloads/2017/10/ESTRATEGIA-NACIONAL-DE-CAMBIO-CLIMATICO-DEL-ECUADOR.pdf, accessed on 7 March 2024), p. 14.

[112] See further paras. 3.70 and 3.74 below.

[113] Committee on the Rights of the Child, General comment No. 26 (2023) on children's rights and the environment, with a special focus on climate change (CRC/C/GC/26), May 2023, para. 75.

[114] *Ibid*., paras. 76-77.

> "As this case focuses on the environmental assessment stage not the final decision whether the project should be approved, the extent to which the precautionary principle applies is as yet undetermined. What is required is that the Director-General ensure that there is sufficient information before the Minister to enable his consideration of all relevant matters so that if there is serious or irreversible environmental damage from climate change/global warming and there is scientific uncertainty about the impact he can determine if there are measures he should consider to prevent environmental degradation in relation to this project"[115].

3.41. EIAs have also has been used as a tool to implement the principle of intergenerational equity[116] "by ensuring that the health, diversity and productivity of the environment is maintained and enhanced for the benefit of future generations"[117]. In *Gloucester Resources Limited v. Minister for Planning*, the impacts of a coal mine project on current and future generations was assessed as follows:

> "There is also inequity in the distribution between current and future generations. The economic and social benefits of the Project will last only for the life of the Project (less than two decades), but the environmental, social and economic burdens of the Project will endure not only for the life of the Project but some will continue for long after … the Project will emit greenhouse gases and contribute to climate change, the consequences of which will burden future generations"[118].

3.42. Finally, as regards the obligation to notify and consult in relation to an EIA, its application may be burdensome in the context of activities or projects that generate anthropogenic GHG emissions given their worldwide effects. However, States may, consistent

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[115] *Gray v. Minister for Planning*, New South Wales Land and Environment Court, Judgment, 27 November 2006 (NSWLEC 720), para. 133. In another case, the same court balanced the negative impacts (including climate change impacts) of a coal mine and its public benefits. The Court considered: "I find that the negative impacts of the Project, including the planning impacts on the existing, approved and likely preferred land uses, the visual impacts, the amenity impacts of noise and dust that cause social impacts, other social impacts, and climate change impacts, outweigh the economic and other public benefits of the Project. Balancing all relevant matters, I find that the Project is contrary to the public interest and that the development application for the Project should be determined by refusal of consent to the application" (see *Gloucester Resources Limited v. Minister for Planning*, New South Wales Land and Environment Court, Judgment, 8 February 2019 (NSWLEC 7), para 688).

[116] See further paras. 3.57-3.58 below.

[117] *Bentley v. BGP Properties Pty Limited*, New South Wales Land and Environment Court, Judgment, 6 February 2006 (NSWLEC 34), para. 69 ("The requirement for prior environmental impact assessment and approval enables the present generation to meet its obligation of intergenerational equity by ensuring the health, diversity and productivity of the environment is maintained and enhanced for the benefit of future generations"). See also *Gray v. Minister for Planning*, New South Wales Land and Environment Court, Judgment, 27 November 2006 (NSWLEC 720), paras. 122, 126, 134.

[118] *Gloucester Resources Limited v. Minister for Planning*, New South Wales Land and Environment Court, Judgment, 8 February 2019 (NSWLEC 7), para. 415.

with their cooperation obligations under international law[119], set up mechanisms to facilitate notification and consultation[120].

C. The precautionary principle

3.43. As shown in Chapter 1, the scientific evidence is clear as to the negative impacts of anthropogenic GHG emissions on the climate system and other parts of the environment. However, even where the evidence may not be fully conclusive on particular issues, States are still obliged to adopt measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects by virtue of the precautionary principle.

3.44. The precautionary principle is reflected in Principle 15 of the Rio Declaration, which reads:

> "In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation".

3.45. The principle has also been widely incorporated in multilateral environmental agreements, including the UNFCCC, Article 3(3) of which states:

> "The Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures**,** taking into account that policies and measures to deal with climate change should be cost-effective so as to ensure global benefits at the lowest possible cost. To achieve this, such policies and measures should take into account different socio-economic contexts, be comprehensive, cover all relevant sources, sinks and reservoirs of greenhouse gases and adaptation, and comprise all economic sectors. Efforts to address climate change may be carried out cooperatively by interested Parties"[121].

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[119] See further paras. 3.50-3.53 below.

[120] The 'Clearing-House Mechanism' under the 2023 Agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (Articles 32 and 52) provides a relevant example inasmuch as it requires States parties to notify information related to activities within the scope of the treaty, and to consult with each other.

[121] See also the preamble of the 1988 Vienna Convention for the Protection of the Ozone Layer; the preamble of the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer; Article 7(e) of the 2023 Agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction.

3.46. In 2011, the ITLOS had already indicated that the frequent incorporation of the precautionary principle in international instruments "initiated a trend towards making this approach part of customary international law"[122]. The precautionary principle may today be considered as forming part of the corpus of customary international law.

3.47. The ITLOS has further noted that the "precautionary approach is also an integral part of the general obligation of due diligence"[123], and that the latter also applies "in situations where scientific evidence concerning the scope and potential negative impact of the activity in question is insufficient but where there are plausible indicators of potential risks"[124]. According to the Tribunal, a State would fail to meet its due diligence obligation if it disregards those potential risks[125].

3.48. In the context of climate change, the precautionary principle operates by ensuring that States comply with their due diligence obligations even in the lack of full scientific certainty. In this regard, the best available scientific evidence is that contained in the reports of the IPCC[126]. The findings of each report are calibrated by using five qualitative expressions based on the robustness of the evidence: supporting a finding: very low, low, medium, high and very high[127]. Additionally, the IPCC uses quantitative expressions to describe the likelihood of an outcome or result: virtually certain 99–100% probability, very likely 90–100%, likely 66–100%, more likely than not >50–100%, about as likely as not 33–66%, unlikely 0–33%, very unlikely 0–10%, exceptionally unlikely 0–1%.[128].

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[122] *Responsibilities and obligations of States with respect to activities in the Area*, *Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 47, para. 135.

[123] *Ibid.*, p. 46, para. 131.

[124] *Ibid.*

[125] *Ibid.* See also *Southern Bluefin Tuna (New Zealand* v. *Japan; Australia* v. *Japan); Provisional Measures, Order of 27 August 199, ITLOS Reports 1999*, p. 296, at paras. 77-80.

[126] See IPCC, "Preparing Reports" (available at: https://www.ipcc.ch/about/preparingreports/, accessed on 7 March 2024).

[127] IPCC, *Climate Change 2023: Synthesis Report. A Report of the Intergovernmental Panel on Climate Change. Contribution of Working Groups I, II, and III to the Sixth Assessment Report of the IPCC* (2023), p. 3, fn. 4. See also IPCC, Procedures for the preparation, review, acceptance, adoption, approval and publication of IPCC reports (2013) (Available at: https://archive.ipcc.ch/pdf/ipcc-principles/ipcc-principles-appendix-a-final.pdf, accessed on 7 March 2024).

[128] IPCC, *Climate Change 2023: Synthesis Report. A Report of the Intergovernmental Panel on Climate Change. Contribution of Working Groups I, II, and III to the Sixth Assessment Report of the IPCC* (2023), p. 3, at fn. 4.

3.49. Considering these qualifiers, the precautionary principle must be applied to ensure that, when scientific evidence contained in IPCC reports is not conclusive, this lack of certainty may not be invoked by States to postpone adopting the necessary measures at their disposal to comply with their obligations under international law in relation to climate change[129].

D. The obligation to cooperate

3.50. States' general obligation to cooperate under international law is referred to in the 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations ('Friendly Relations Declaration'):

> "States have the duty to co-operate with one another, irrespective of the differences in their political, economic and social systems, in the various spheres of international relations, in order to maintain international peace and security and to promote international economic stability and progress, the general welfare of nations and international co-operation free from discrimination based on such differences …" [130].

3.51. In the context of environmental matters, the duty to cooperate is reflected in Principle 7 of the Rio Declaration, which provides that "States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem"[131].

3.52. The Court has stated that "it is by cooperating that the States concerned can jointly manage the risks of damage to the environment … so as to prevent the damage in question"[132]. As noted above, States are, for example, obliged in the context of an EIA to notify and consult

[129] Under Ecuadorian law, the precautionary principle reinforces the principle of prevention by requiring the State to adopt timely and effective measures aimed at preventing, reducing, mitigating or ceasing an environmental harm, where there is no full scientific certainty (See Organic Environmental Code (2017), Article 9(7)). The Constitutional Court of Ecuador has stated that the precautionary principle entails three components: the identification of a risk of a serious or irreparable harm derived from a project or activity; the scientific uncertainy of such harm due to an ongoing scientific debate, the lack of knowledge or the difficulty in determining such harm; and the adoption of protective and effective measures by the State (see Constitutional Court of Ecuador, Case No. 1149-19-JP/21, Judgment of 10 November 2021, para. 112).

[130] UN General Assembly resolution 2625 (XXV), 24 October 1970.

[131] Rio Declaration, Principle 7.

[132] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay) Judgment, I.C.J. Reports 2010,* pp. 55-56, para. 77.

in good faith with the potentially affected State or States to determine the appropriate measures to prevent or mitigate damage to the environment[133]. Similarly, the ITLOS has recognized that the duty to cooperate "is a fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention and general international law"[134]. More specific forms of cooperation are prescribed in multilateral environmental treaties.

3.53. In the specific context of climate change, the obligation to cooperate has been developed in instruments such as the UNFCCC and the Paris Agreement, as will be further explained below. Nonetheless, the obligation to cooperate as a general principle under international law is a continuous one. States are therefore required to keep under review existing cooperation mechanisms and to adopt new ones insofar as this may be required to ensure compliance with their other obligations under the relevant rules of international law, such as the principle of prevention, in light of the best available scientific evidence.

E. Balancing principles

3.54. Given the complex nature of the causes and effects of climate change, States' obligations on this matter have to be interpreted and applied in light of a wide range of circumstances, such as the differences between developed and developing countries, States' respective historical contributions to climate degradation through anthropogenic GHG emissions, and the need to protect the rights of both present and future generations. This section addresses the principles of international law that serve to strike a proper balance in this context: (i) the principle of equity; (ii) the principle of intergenerational equity; (iii) the principle of CBDR; and (iv) the polluter-pays principle.

3.55. The principle of equity is a general principle of law which serves, *inter alia*, as an interpretative tool. As the Court has noted:

[133] See paras. 3.36-3.37 above.

[134] *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 an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC), Advisory Opinion of 2 April 2015, ITLOS Reports 2015*, p. 43, para. 140; *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, ICJ Reports 2010*, p. 49, para. 77.

> "… the legal concept of equity is a general principle directly applicable as law. Moreover, when applying positive international law, a court may choose among several possible interpretations of the law the one which appears, in the light of the circumstances of the case, to be closest to the requirements of justice"[135].

3.56. The ILC has noted that the principle of equity calls for "a balancing of interests and consideration of all relevant factors that may be unique to either atmospheric pollution or atmospheric degradation"[136]. In the case of climate change, as noted earlier, the relevant factors to be considered when applying States' obligations include the different levels of development and respective capabilities of States, the historical GHG emissions of each individual State, the particular vulnerability of States to the adverse effects of climate change, and the need to protect the rights of both present and future generations. Two more specific principles have emerged under international law to carry out the required balancing exercise: the principle of intergenerational equity and the principle CBDR.

3.57. The principle of intergenerational equity is reflected in Principle 3 of the Rio Declaration, which provides that "[t]he right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations". This is also one of the guiding principles of the UNFCCC, Article 3(1) of which provides that "Parties should protect the climate system for the benefit of present and future generations of humankind on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities"[137]. As the Court has stated, "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*"[138].

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[135] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 60, para. 71. See also *Frontier Dispute, Judgment, I.C.J. Reports 1986*, pp. 567-568, 633, paras. 27-28, 149; *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, pp. 46-47, para. 85.

[136] Draft guidelines on the protection of the atmosphere, with commentaries, *Report of the International Law Commission, 2021*, vol. II, Part Two, p. 32, Guideline 6, para. (2).

[137] See also the Paris Agreement, preamble; 1997 Convention on the Law of the Non-Navigational Uses of International Watercourses, Articles 5 and 6; Draft guidelines on the protection of the atmosphere, with commentaries, *Report of the International Law Commission, 2021*, vol. II, Part Two, p. 32, Guideline 6; Draft articles on the Law of Transboundary Aquifers, with commentaries *Yearbook of the International Law Commission, 2008*, vol. II, Part Two, preamble and Articles 5 and 6.

[138] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 241, para. 29 (emphasis added).

3.58. The principle of intergenerational equity is relevant for the interpretation and application of States' obligations in relation to climate change. States must balance, for example, the interests of present and future generations when adopting and implementing measures to reduce GHG emissions, when conducting an EIA[139], and when taking action to protect and preserve the marine environment[140]. National courts have applied the principle to determine whether an activity or project in a particular economic sector (*e.g.* the fossil fuels industry) will entail more benefits than risks for both current and future generations[141].

3.59. The principle of CBDR is enshrined in Principle 7 of the Rio Declaration, which reads:

> "States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command".

3.60. CBDR has also been incorporated in the UNFCCC and the Paris Agreement as one of the guiding principles for implementation[142], and is of great importance when assessing States' obligations in relation to climate change. Developed States would normally have the financial and technological resources to reduce anthropogenic GHG emissions, yet they remain the biggest polluters having significantly contributed to the current state of affairs. Many developing States, for their part, have had marginal emissions of GHG but are at the same time the most vulnerable to the adverse effects of climate change and lack the financial, scientific and technological means that are necessary to adapt to those effects. The principle of CBDR is aimed precisely at addressing this manifestly inequitable situation.

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[139] See paras. 3.32-3.42 above.

[140] See paras. 3.86-3.96 below.

[141] See, for example, *Gloucester Resources Limited v. Minister for Planning*, New South Wales Land and Environment Court, Judgment, 8 February 2019 (NSWLEC 7), para 415.

[142] UNFCCC, Article 2(2); Paris Agreement, Articles 2(1) and 4(3). The principle is partly also included in other treaties such as Article 194(1) of UNCLOS: "States 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*, and they shall endeavour to harmonize their policies in this connection" (emphasis added).

3.61. The CBDR principle informs, for example, the principle of prevention and its ensuing due diligence obligations under customary international law. As explained above, States must adopt and implement effective measures to reduce GHG emissions within their jurisdiction so as to prevent significant harm to the climate system and other parts of the environment. But they must do so taking into account the available means at their disposal, their different economic, scientific and technical capacities, and their historical contributions to climate degradation.

3.62. The principle of CBDR is also relevant when assessing States' obligations under human rights law[143]. The Committee on the Rights of the Child has noted, for example, that:

> "In accordance with the principle of common but differentiated responsibility, as reflected in the Paris Agreement, the Committee finds that the collective nature of the causation of climate change does not absolve the State party of its individual responsibility that may derive from the harm that the emissions originating within its territory may cause to children, whatever their location"[144].

3.63. Another balancing principle to be considered by the Court is the polluter-pays principle. Principle 16 of the Rio Declaration states that:

> "National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment"[145].

3.64. The polluter-pays principle has been described by the ILC as a "principle that seeks to provide an incentive for the operator and other relevant persons or entities to prevent a hazardous activity from causing transboundary damage"[146]. In certain multilateral treaties, it "has formed the basis for the construction of liability regimes on the basis of strict liability"[147].

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[143] See paras. Section IV below.

[144] *Saachi* et al. v. *Argentina*, Communication No. 104/2019, Decision of 22 September 2021 (CRC/C/88/D/104/2019), para. 10.10. See also the related decisions adopted in respect of Brazil, France, Germany and Turkey in Communications No. 105/2019, 106/2019, 107/2019 and 108/2019, respectively.

[145] See also OECD, "Recommendation of the Council on Guiding Principles concerning International Economic Aspects of Environmental Policies" (1972) (LEGAL/0102), para. 4.

[146] Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, with commentaries, *Yearbook of the International Law Commission, 2006*, vol. II, Part Two, p. 74, Principle 3, para. (12).

[147] *Ibid*., para. (13).

3.65. The ILC has further clarified that the polluter-pays principle constitutes the core of the principle of prompt and adequate compensation, under which "[e]ach State should take all necessary measures to ensure that prompt and adequate compensation is available for victims of transboundary damage caused by hazardous activities located within its territory or otherwise under its jurisdiction or control"[148]. These measures should include the imposition of liability on the operator or, where appropriate, other person or entity, and should not require proof of fault[149].

III. Obligations under multilateral environmental agreements

3.66. This section examines States' obligations under multilateral treaties that relate to or address the protection of the climate system and other parts of the environment from anthropogenic GHG emissions. The following instruments are addressed: The UNFCCC (**A**), the Paris Agreement (**B)**; and UNCLOS (**C**). Ecuador is party to all these treaties.

3.67. These instruments are particularly relevant to the present proceedings given their particular object and purpose, content, and number of States parties. As noted in Section II above, some of the obligations envisaged in these treaties reflect or give expression to rules of general international law. These instruments must be interpreted, to the extent necessary, in the light of other rules of international law applicable between the parties, as established in Article 31(3)(c) of the Vienna Convention on the Law of Treaties ('VCLT') and the parallel rule of customary international law.

A. The UNFCCC

3.68. The UNFCCC is one of the core instruments of the climate change treaty regime and establishes an intergovernmental forum for negotiating the global response to climate change. The Convention focuses on three main substantive issues: climate change mitigation, adaptation, and the means of implementation of both. Mitigation refers to measures to limit and reduce anthropogenic GHG emissions, as well as measures to preserve and enhance the storage and removal capacity of carbon sinks and reservoirs. Adaptation refers to measures

[148] *Ibid.*, p. 76, Principle 4 (1). See also p. 74, para. (11).

[149] *Ibid.*, p. 76, Principle 4 (2).

aimed at limiting, as far as possible, the social and ecological consequences of climate change. Means of implementation, for their part, are the support to climate mitigation and adaptation actions through financial assistance, technology transfer and development, and capacity-building.

3.69. The main objective of the UNFCCC is to achieve stabilization of GHG emissions in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system, within a time-frame that allows ecosystems to adapt naturally to climate change, to ensure that food production is not threatened, and to enable economic development to proceed in a sustainable manner[150]. Article 3 of the Convention provides a non-exhaustive list of principles that must guide the actions of States Parties in the implementation of the treaty, including the principle of prevention, the precautionary principle, the principle of CBDR, the principle of intergenerational equity, and the duty to cooperate[151]. The Convention also introduces a system of differentiation between developed countries, identified in Annexes I and II, and developing countries, identified as non-Annex I parties.

3.70. The main commitments under the UNFCCC are reflected in Article 4. Under Article 4(1), all States Parties have an obligation, "taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumnstances", to, among others:

- Develop, periodically update, publish and make available to the COP national inventories of anthropogenic GHG emissions by sources and removals by sinks of all GHG not controlled by the Montreal Protocol (sub-pagraph (a));

- Formulate, implement, publish and regularly national and, where appropriate, regional programmes containing measures to mitigate climate change, as well as measures to facilitate adaptation to climate change (sub-paragraph (b));

- Promote and cooperate in the development, application and diffusion, including transfer, of technologies, practices and processes that control, reduce or prevent anthropogenic emissions of GHG in all relevant sectors, including the energy, transport, industry, agriculture, forestry and waste management sectors (sub-paragraph (c));

- Promote sustainable management, and promote and cooperate in the conservation and enhancement, as appropriate, of sinks and reservoirs of GHG, including

[150] UNFCCC, Article 2.

[151] As explained in the previous section, these principles also form part of general international law.

biomass, forests and oceans as well as other terrestrial, coastal and marine ecosystems (sub-paragraph (d));

- Cooperate in preparing for adaptation to the impacts of climate change (sub-paragraph (e));

- Take climate change considerations into account, to the extent feasible, in their relevant social, economic and environmental policies and actions, and employ appropriate methods, such as EIAs, with a view to minimizing adverse effects on the economy, on public health and on the quality of the environment, of projects or measures undertaken to mitigate or adapt to climate change (sub-paragraph (f));

- Promote and cooperate in scientific, technological, technical, socio-economic and other research, systematic observation and development of data archives related to the climate system (sub-paragraph (g)), and promote and cooperate in the full, open and prompt exchange of relevant scientific, technological, technical, socio-economic and legal information related to the climate system and climate change, and to the economic and social consequences of various response strategies (sub-paragraph (h)).

3.71. Article 4(2) of the Convention contains additional commitments assumed by developed countries included in Annex I only. Those States must, in particular:

- Adopt, individually or jointly, national policies and take corresponding measures on the mitigation of climate change, by limiting their anthropogenic GHG emissions and protecting and enhancing their sinks and reservoirs. These policies and measures must demonstrate that developed countries are taking the lead in modifying longer-term trends in GHG emissions consistent with the objective of the Convention. They must also take into account the differences in these States' starting points and approaches, economic structures and resource bases, the need to maintain strong and sustainable economic growth, available technologies and other individual circumstances, as well as the need for equitable and appropriate contributions by each of these States to the global effort regarding that objective (sub-paragraph (a));

- Periodically communicate detailed information on the above policies and measures (sub-paragraph (b));

- Identify and periodically review own policies and practices which encourage activities that lead to greater levels of GHG emissions than would otherwise occur (sub-paragraph (e)(ii)).

3.72. Furthermore, under paragraphs (3) to (5) of Article 4 of the Convention, developed countries have additional obligations to: (1) provide new and additional financial resources to meet the agreed full costs incurred by developing countries in complying with their obligations

under Article 12(1); (2) assist the developing country Parties that are particularly vulnerable to the adverse effects of climate change in meeting costs of adaptation; and (3) take all practicable steps to promote, facilitate and finance, as appropriate, the transfer of, or access to, environmentally sound technologies and know-how so as to enable other parties to implement the provisions of the Convention.

3.73. Finally, Article 4(7) makes an important caveat: the extent to which developing country Parties will effectively implement their commitments under the Convention will depend on the effective implementation by developed country Parties of their commitments under the Convention related to financial resources and transfer of technology. Furthermore, Article 4(7) recognizes that the implementation by developing country Parties under their commitments under the Convention "will take fully into account that economic and social development and poverty eradication are the first and overriding priorities" of such countries.

3.74. The UNFCCC thus contains a number of important obligations under Article 4 which reflect existing related obligations under general international law analyzed in the previous section. This is so, in particular, as regards developed country Parties' obligation to adopt and implement national policies and measures to mitigate climate change by reducing GHG emissions and protecting and enhancing sinks and reservoirs; their obligation to assist developing country Parties that are particularly vulnerable to adverse effects of climate change in meeting the costs of adaptation; and the obligation to include climate change considerations into EIAs.

3.75. Nonetheless, the Convention left a key question open: the specific target and timetable under which States Parties are required to implement their obligations. The closest reference on this matter are sub-paragraphs (a) and (b) of Article 4(2), which mention a return of emissions to 1990-levels by the year 2000. Evidently, this objective was not met.

B. The Paris Agreement

3.76. The Paris Agreement was adopted within the framework of the UNFCCC in 2015[152]. It aims to enhance the implementation of the UNFCCC, as well as to strengthen the global

[152] Decision 1/CP.21 (FCCC/CP/2015/10/Add.1).

response to the threat of climate change. As its Article 2 makes clear, this objective is to be achieved by, *inter alia*: (a) holding 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; (b) increasing the ability to adapt to the adverse impacts of climate change and foster climate resilience and low GHG emissions development in a manner that does not threaten food production; and (c) making finance flows consistent with a pathway towards low GHG emissions and climate-resilient development.

3.77. A first noteworthy aspect of the Paris Agreement is that, unlike the UNFCCC, it sets a clear target for States in terms of climate change mitigation: holding the increase of global average temperature to well below 2°-1.5°C above pre-industrial levels. As noted elsewhere in this Written Statement, this establishes an international standard that must be taken into account also when applying other rules of international law relating to climate change. Subsequent decisions of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement ('CMA') suggest that priority should be given to the 1.5°C goal. Indeed, in the 2021 Glasgow Climate Pact and in the 2022 Sharm el-Sheikh Implementation Plan, the CMA highlighted its resolve to pursue efforts to limit the temperature increase to 1.5°C[153].

3.78. Article 4(1) of the Agreement provides further parameters regarding the agreed standard, highlighting in particular that global peaking of GHG emissions ought to be reached "as soon as possible":

> "In order to achieve the long-term temperature goal set out in Article 2, Parties aim to reach global peaking of greenhouse gas emissions as soon as possible, recognizing that peaking will take longer for developing country Parties, and to undertake rapid reductions thereafter in accordance with best available science, so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century, on the basis of equity, and in the context of sustainable development and efforts to eradicate poverty".

[153] UNFCCC, Decision 1/CMA.3, Glasgow Climate Pact (FCCC/PA/CMA/2021/10/Add.1), 13 November 2021 para. 21 ("*Recognizes* that the impacts of climate change will be much lower at the temperature increase of 1.5°C compared with 2°C and *resolves* to pursue efforts to limit the temperature increase to 1.5°C") and para. 22 ("*Recognizes* that limiting global warming to 1.5 °C requires rapid, deep and sustained reductions in global greenhouse gas emissions, including reducing global carbon dioxide emissions by 45 per cent by 2030 relative to the 2010 level and to net zero around mid- century as well as deep reductions in other greenhouse gases"); UNFCCC, Decision 1/CP.27, Sharm el-Sheikh Implementation Plan (FCCC/PA/CMA/2022/L.21), 20 November 2022, para. 7 ("*Reiterates* that the impacts of climate change will be much lower at the temperature increase of 1.5°C compared with 2°C and *resolves* to pursue further efforts to limit the temperature increase to 1.5°C").

3.79. Articles 4(2) and 4(3) lay down core obligations necessary to achieve the goals of the Agreement. Article 4(2) provides that "[e]ach Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve. Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions"[154]. Article 4(3), for its part, provides that "[e]ach Party's successive nationally determined contribution will represent a progression beyond the Party's then current nationally determined contribution and reflect its highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances". Article 4(9) further stipulates that NDC shall be communicated every five years.

3.80. These provisions call for some remarks. First, the second limb of Article 4(2) builds upon Articles 4(1)(b) and 4(2)(a) of the UNFCCC, concerning the obligation of developing and developed country Parties to adopt and implement national policies, programmes and measures to mitigate climate change and to facilitate adaptation[155]. The phrase "with the aim of achieving the objectives of such contributions" suggests that the obligation under Article 4(2) is one of conduct and not of result[156]. States must adopt and implement all the necessary measures to achieve the aims of their NDCs. The compliance by a State with this obligation will not depend on whether the aims of the NDC were actually achieved, but on whether the measures adopted have been meaningful, timely and effective, taking into account, *inter alia*, the capabilities of that State and the principle of CBDR.

3.81. Second, the procedural obligation to prepare, communicate and maintain successive NDCs under Articles 4(2), 4(3) and 4(9) does not specify the precise content of NDCs – States have discretion to determine their contributions. But that discretion is not unlimited. NDCs must be first and foremost in conformity with the aims of the Agreement laid down in Article 2. NDCs must also reflect the "highest possible ambition" of the States concerned, as well as

[154] Paris Agreement, Article 4(2).

[155] UNFCCC, Article 4(1)(b) and (2)(a).

[156] See also Ch. Voigt, "The Power of the Paris Agreement in International Climate Litigation", *Review of European, Comparative and International Environmental Law*, vol. 32 (2023), p. 242; L. Rajamani. "Due Diligence in International Climate Change Law", in A. Peters *et al.* (eds.), *Due Diligence in the International Legal Order* (OUP, 2020), pp. 168-169; B. Mayer, "Obligations of conduct in the international law on climate change: a defence", *Review of European, Comparative and International Environmental Law*, vol. 27 (2018), p. 135.

the principle of CBDR. Furthermore, successive NDCs must go beyond previous ones – the level of ambition and contributions must in all cases increase over time[157].

3.82. A recent report by the UNFCCC Secretariat shows that, up to September 2023, "[a]ll NDCs cover CO_2 emissions, while 91 per cent cover CH_4, 89 per cent N_2O, 54 per cent HFCs, 34 per cent PFCs, 35 per cent SF_6 and 26 per cent NF_3. Eleven per cent of Parties included additional gases or emissions, including short-lived climate pollutants, such as black carbon, sulfur dioxide and non-methane volatile organic compounds"[158]. The Secretariat has also reported that "[m]ost Parties (80 per cent) have economy-wide NDCs, with many (66 per cent) covering all sectors defined in the 2006 IPCC Guidelines. All NDCs cover the energy sector, more than 80 per cent cover agriculture, LULUCF and waste and 76 per cent IPPU" [159]; and that "[s]ome Parties (26 per cent) provided information on coverage of specific sectors of national importance, which are often a subset of one or more IPCC sectors, such as shipping and aviation, cooling, food production, transport, mining or buildings, while others mentioned specific carbon pools, oceans or blue carbon" [160]. Among the mitigation measures included in the reported NDCs to date are renewable energy generation; improving energy efficiency of buildings; afforestation, reforestation and revegetation; improving energy efficiency of transport; and cross-cutting measures in agriculture[161].

3.83. The above measures notwithstanding, the IPCC has projected that "[g]lobal GHG emissions in 2030 implied by nationally determined contributions (NDCs) announced by October 2021 make it *likely* that warming will exceed 1.5°C during the 21st century and make it harder to limit warming below 2°C. There are gaps between projected emissions from implemented policies and those from NDCs and finance flows fall short of the levels needed to meet climate goals across all sectors and regions"[162]. The implementation gap noted by the

[157] See also Ch. Voigt and F. Ferreira, "Dynamic Differentiation: The Principles of CBDR-RC, Progression and Highest Possible Ambition in the Paris Agreement", *Transnational Environmental Law*, vol. 5(2) (2016), pp. 295-297; L. Rajamani. "Due Diligence in International Climate Change Law", in A. Peters *et al.* (eds.), *Due Diligence in the International Legal Order* (OUP, 2020), pp. 169-170.

[158] UNFCCC, "Nationally determined contributions under the Paris Agreement" (2023) (FCCC/PA/CMA/2023/12), para. 72.

[159] UNFCCC, "Nationally determined contributions under the Paris Agreement" (2022) (FCCC/PA/CMA/2022/4), para. 71.

[160] *Ibid*., para. 72.

[161] *Ibid*., para. 182.

[162] IPCC, *Climate Change 2023: Synthesis Report. A Report of the Intergovernmental Panel on Climate Change. Contribution of Working Groups I, II, and III to the Sixth Assessment Report of the IPCC* (2023), p. 10, para. A.4.

IPCC may lead to global warming of 3.2°C by 2100[163]. In these circumstances, it cannot be said that States have made sufficient efforts to fulfil their commitments in accordance with the provisions of the UNFCCC and the Paris Agreement.

3.84. It may also be noted that Article 8 of the Paris Agreement introduces, for the first time in the climate change treaty regime, a provision specifically addressing loss and damage[164]. Paragraph 1 states that "Parties recognize the importance of averting, minimizing and addressing loss and damage associated with the adverse effects of climate change, including extreme weather events and slow onset events, and the role of sustainable development in reducing the risk of loss and damage". Furthermore, paragraph 2 contains States' aim to "enhance understanding, action and support, including through the Warsaw International Mechanism, as appropriate, on a cooperative and facilitative basis with respect to loss and damage associated with the adverse effects of climate change".

3.85. It is important to highlight, however, that Article 8 does not concern the responsibility of States for breach of an obligation under international law in relation to harm caused to the climate system and other parts to the environment. Indeed, at the time of the adoption of the Paris Agreement, the COP to the UNFCCC expressly stated that "Article 8 does not involve or provide a basis for any liability or compensation"[165]. Such matters relating to State responsibility are addressed in Chapter 4 below.

C. UNCLOS

3.86. The ocean is a component of the climate system and the environment, as indicated in Article 1 of the UNFCCC. It is a carbon sink and a reservoir which stores heat and removes GHG emissions from the atmosphere[166]. However, the IPCC has found that the ocean has warmed unabated since 1970 and has taken up more than 90% of the excess heat in the climate

[163] *Ibid*., p. 11, para. A.4.4.

[164] See also L. Siegele, "Loss and Damage under the Paris Agreement", in M. Doelle and S. L. Seck (eds.), *Research Handbook on Climate Change Law and Loss & Damage* (Edward Elgar, 2021) , pp. 100-126.

[165] UNFCCC, Decision 1/CP.21 (FCCC/CP/2015/10/Add.1), para. 51. See also Linda Siegele 'Article 8' in Daniel Klein, Maria Pia Carazo, Meinhard Doelle, Jane Bulmer and Andrew Highman (eds.) *The Paris Agreement on Climate Change: Analysis and Commentary* (Oxford University Press 2017) 224-238; S. McDonell, "The COP27 decision and future directions for loss and damage finance: Addressing vulnerability and non-economic loss and damage", *Review of European, Comparative & International Environmental Law*, vol. 32 (2023), p. 420.

[166] UNFCCC, Articles 1(7) and 1(8).

system, as well as 20–30% of the total anthropogenic CO_2 emissions since the 1980s, contributing to ocean acidification[167].

3.87. UNCLOS is the main multilateral treaty aimed at regulating the activities in the ocean, including its protection and preservation. The Convention contains provisions relating to the protection and preservation of the marine environment which are relevant to the question of climate change and to the present advisory proceedings. Ecuador acknowledges in this connection the *Request for Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*, currently pending before the ITLOS, and that the Tribunal's advisory opinion may clarify various aspects of the law. The present section will therefore briefly set out Ecuador's position on some of the core provisions of UNCLOS, without prejudice to supplementing this Written Statement at a later stage of these proceedings.

3.88. At the outset, it is necessary to determine whether anthropogenic GHG emissions can be considered as marine pollution, thereby triggering States' related obligations under the Convention, in particular Part XII. UNCLOS defines 'pollution to the marine environment' in Article 1(1)(4) as:

> "… the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities".

3.89. Anthropogenic GHG emissions are undoubtedly a form of pollution to the marine environment inasmuch as they introduce energy in the form of heat, and substances such as CO_2, which have an adverse impact on marine ecosystems[168]. The ILC has recognized the link between the atmosphere and other components of the environment, and suggested a harmonious identification, interpretation and application of the various relevant rules of

[167] IPCC, *Special Report on the Ocean and Cryosphere in a Changing Climate* (CUP, 2019), p. 9; IPCC, *Climate Change 2023: Synthesis Report. A Report of the Intergovernmental Panel on Climate Change. Contribution of Working Groups I, II, and III to the Sixth Assessment Report of the IPCC* (2023), pp. 5-6.

[168] IPCC, *Special Report on the Ocean and Cryosphere in a Changing Climate* (CUP, 2019), p. 9; IPCC, *Climate Change 2023: Synthesis Report. A Report of the Intergovernmental Panel on Climate Change. Contribution of Working Groups I, II, and III to the Sixth Assessment Report of the IPCC* (2023), pp. 5-6. The Court has also recognized the impacts of atmospheric pollution in the ocean and watercourses. See: *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay) Judgment, I.C.J. Reports 2010*, pp. 55-56, para. 264; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1. C.J. Reports 1996*, p. 226, para. 35.

international law, including the law of the sea, to give rise to a single set of compatible obligations[169].

3.90. The protection and preservation of the marine environment is mainly governed by Part XII of UNCLOS. The obligations contained therein apply "with respect to the marine environment in all maritime areas, both inside the national jurisdiction of States and beyond it"[170]. Notably, Article 192 of UNCLOS, which reflects customary international law[171], provides that "States have the obligation to protect and preserve the marine environment". In the *South China Sea Arbitration*, the tribunal relied on the principle of prevention to interpret this provision. It stated that:

> "The corpus of international law relating to the environment, which informs the content of the general obligation in Article 192, requires that States 'ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control.' Thus States have a positive 'duty to prevent, or at least mitigate' significant harm to the environment when pursuing large-scale construction activities.' The Tribunal considers this duty informs the scope of the general obligation in Article 192"[172].

3.91. The tribunal also stated that the scope and content of the general obligation under Article 192 is further detailed in subsequent provisions of Part XII and "by reference to specific obligations set out in other international agreements, as envisaged in Article 237 of the Convention"[173].

3.92. Article 194 refers to measures that States shall adopt to prevent, reduce and control marine pollution from all sources, in accordance to their capacities and best available means[174]. The Article refers more specifically to pollution from land-based sources, from or through the

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[169] Draft guidelines on the protection of the atmosphere, with commentaries, *Report of the International Law Commission, 2021*, vol. II, Part Two, Guideline 9(1).

[170] *South China Sea Arbitration*, Award, 12 July 2016, RIAA, vol. XXXIII, para. 940; *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC), Advisory Opinion of 2 April 2015, ITLOS Reports 2015*, p. 37 para. 120.

[171] *South China Sea Arbitration*, Award, 12 July 2016, RIAA, vol. XXXIII, para. 941; *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2022*, p. 311, para 95.

[172] *South China Sea Arbitration*, Award, 12 July 2016, RIAA, vol. XXXIII, para. 941.

[173] *Ibid.*, para. 942.

[174] *Ibid.*, para. 944.

atmosphere or by dumping; pollution from vessels; pollution from installations and devices used in exploration or exploitation of the natural resources of the seabed and subsoil; and pollution from installation and devices operating in the marine environment.

3.93. With respect to land-based pollution, Articles 207(1), 211(2) and 212(1) of the Convention create a link with the UNFCCC and the Paris Agreement. Under these provisions, States shall adopt laws and regulations to prevent, reduce and control marine pollution from land-based sources, vessels and from the atmosphere, taking into account internationally agreed rules, standards and recommended practices and procedures. This allows for, indeed it requires, interpreting UNCLOS provisions while taking into account the provisions of related treaties and other international insruments. Of particular relevance in this regard are, for example, the obligations and standards set out in Article 4 of the UNFCCC, and Articles 2 and 4 of the Paris Agreement.

3.94. As noted above, States have an obligation to report and update NDCs under Article 4(2) of the Paris Agreement. The link between the NDCs and the oceans was recently stressed by the COP to the UNFCCC. In the 2022 Sharm el-Sheikh Implementation Plan, the COP encouraged States to integrate ocean-based actions in their NDCs and long-term strategies and adaptation communications[175]. The IPCC has noted that such actions may include measures aimed at supporting protection, restoration, precautionary ecosystem-based management or renewable resource use, the reduction of pollution, or fostering ocean renewable energy as a mitigation action[176]. Another ocean-based mitigation action is the adoption of area-based management tools, such as marine protected areas.

3.95. With respect to marine pollution from vessels under Article 211(2) of UNCLOS, States must adopt laws and regulations for the prevention, reduction and control such pollution in accordance with international rules and standards adopted within the framework of the International Maritime Organization ('IMO'). Account must be taken, for example, of the International Convention for the Prevention of Pollution from Ships '(MARPOL') and its Annex VI, which aim at preventing air pollution and minimize GHG emissions from ships, including SOx, NOx, ODS, VOC and CO_2. In July 2023, the IMO adopted the "2023 IMO

[175] UNFCCC, Decision 1/CP.27, Sharm el-Sheikh Implementation Plan (FCCC/PA/CMA/2022/L.21), 20 November 2022, para. 45.

[176] IPCC, *Special Report on the Ocean and Cryosphere in a Changing Climate* (CUP, 2019), p. 30.

Strategy on Reduction on GHG Emissions from Ships", the objective of which is to reduce CO_2 emissions per transport work, as an average across international shipping, by at least 40% by 2023, compared to 2008[177].

3.96. UNCLOS also contains, under Article 206, an obligation to conduct an EIA "when States have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment". As explained above, the obligation to conduct an EIA requires States to take into account climate change considerations, such as the impacts of GHG emissions to the cumulative global warming and the interests of future generations. Article 206 of UNCLOS must be interpreted and applied in the same way .

IV. Obligations under international human rights law

3.97. The effects of anthropogenic GHG emissions on the climate system and other parts of the environment has the potential to hinder the enjoyment of the human rights recognized under different sources of international law, including under customary international law as reflected in the Universal Declaration of Human Rights. As noted by the Human Rights Council ('HRC'), the adverse effects of climate change "are felt most acutely by those segments of the population who are already in vulnerable situations owing to factors such as geography, poverty, gender, age, indigenous or minority status where applicable, national or social origin, birth or other status, and disability"[178].

3.98. The impairment of the rights recognized in the ICCPR, the ICESCR and other human rights instruments in this context would require an individual assessment of the factual circumstances of each case. This section focuses on some selected rights that require States to adopt and implement measures to reduce GHG emissions and measures to adapt to the adverse effects of climate change, in particular: the need to respect human rights in the context of climate action (**A**), the right to a clean, healthy and sustainable environment (**B**), the right to life (**C**), the right to private and family life (**D**), and procedural obligations in connection to the enjoyment of these rights (**E**).

[177] IMO, "2023 IMO Strategy on Reduction of GHG Emissions from Ships" (2023) (MEPC 80/WP.12), para. 3.3.

[178] HRC, Resolution 50/9 ("Human rights and climate change") (A/HRC/RES/50/9), 14 July 2022, preamble.

3.99. Ecuador recalls that, on 9 January 2023, the Governments of Chile and Colombia requested an advisory opinion from the Inter-American Court of Human Rights concerning States' obligation under the American Convention on Human Rights in the context of climate change. The opinion to be rendered by the Inter-American Court may be relevant in the present advisory proceedings, and this Written Statement may be accordingly supplemented at a later stage.

A. The need to respect human rights in the context of climate action

3.100. States' obligations in respect of climate change require wide-ranging action in terms of mitigation and adaptation. Such action, however, cannot take place in isolation from obligations that States may have under other rules of international law, including international human rights law. States must comply with the latter also when implementing their climate change commitments.

3.101. The 2010 the Cancun Agreements, adopted during the COP16, emphasized that "Parties should, in all climate change related actions, fully respect human rights"[179]. The preamble of the Paris Agreement similarly stresses that, when taking action to address climate change, States should "respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity". The preamble also refers to "the imperatives of a just transition of the workforce and the creation of decent work and quality of jobs in accordance with nationally defined development priorities".

3.102. In this context, the HRC has called upon States "to adopt a comprehensive, integrated, gender-responsive, age-inclusive and disability-inclusive approach to climate change adaptation and mitigation policies, consistent with the [UNFCCC] and the objective and principles thereof, to address efficiently the economic, cultural and social impact and human rights challenges that climate change presents, for the full and effective enjoyment of human

[179] UNFCCC, Decision 1/CP.16, "The Cancun Agreements: Outcome of the Work of the Ad-Hoc Working Group on Long Term Cooperative Action Under the Convention" (FCCC/CP/2010/7/Add.1), 10-11 December 2010, para. 8.

rights for all"[180]. The Special Rapporteur on the Promotion and Protection of Human Rights in the Context of Climate Change has also noted that "States cannot ignore their human rights responsibilities when addressing climate change"[181].

B. The right to a clean, healthy and sustainable environment

3.103. In its resolution 76/300 of 28 July 2022, the General Assembly:

> "1. *Recognize[d]* the right to a clean, healthy and sustainable environment as a human right;
>
> 2. *Note[d]* that the right to a clean, healthy and sustainable environment is related to other rights and existing international law;
>
> 3. *Affirm[ed]* that the promotion of the human right to a clean, healthy and sustainable environment requires the full implementation of the multilateral environmental agreements under the principles of international environmental law;
>
> 4. *Call[ed] upon* States, international organizations, business enterprises and other relevant stakeholders to adopt policies, to enhance international cooperation, strengthen capacity-building and continue to share good practices in order to scale up efforst to ensure a clean, healthy and sustainable environment for all".

3.104. The resolution further notes that "a vast majority of States have recognized some form of the right to a clean, healthy and sustainable environment through international agreements, their national constitutions, legislations, laws or policies"[182]. It also emphasises that "the impact of climate change, the unsustainable management of and use of natural resources, the pollution of air, land and water, the unsound management of chemicals and waste, the resulting loss of biodiversity and the decline in services provided by ecosystems interefere with the enjoyment of a clean, healthy and sustainable environment and that environmental damage has negative implications, both direct and indirect, for the effective enjoyment of all human rights"[183].

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[180] HCR, Resolution 50/9, "Human rights and climate change" (A/HRC/RES/50/9), 14 July 2022, para. 7.

[181] UN Special Rapporteur on the promotion and protection of human rights in the context of climate change: Exploring approaches to enhance climate change legislation, supporting climate change litigation and advancing the principle of intergenerational justice (A/78/255), 28 July 2023, para. 2.

[182] *Ibid.*, twentieth preambular paragraph.

[183] *Ibid.*, ninth preambular paragraph.

3.105. In its advisory opinion on *The Environment and Human Rights*, the Inter-American Court of Human Rights noted that the right to a healthy environment is expressly established in Article 11 of the Protocol of San Salvador, and that this right is additionally among the economic, social and cultural rights protected by Article 26 of the American Convention. The Court reiterated "the inderdepedence of and indivisibility of the civil and political rights, and the economic and, social and cultural rights, because they should be understood integrally and comprehensively as human rights, with no order of precedence, that are enforceable in all cases before the competent authorities"[184]. It further noted that the right to a healthy environment was also recognized in the domestic law of several States of the region, as well as in other regional instruments[185].

3.106. The Court also clarified that the right to a healthy environment has both a collective and an individual dimension:

> "In its collective dimension, the right to a healthy environment constitutes a universal value that is owed to both present and future generations. That said, the right to a healthy environment also has an individual dimension insofar as its violation may have a direct and an indirect impact on the individual owing to its connectivity to other rights, such as the right to health, personal integrity, and life. Environmental degradation may cause irreparable harm to human beings; thus, a healthy environment is a fundamental right for the existence of humankind" [186].

It then added that:

> "… as an autonomous right, the right to a healthy environment, unlike other rights, protects the components of the environment, such as forests, rivers and seas, as legal interests in themselves, even in the absence of certainty or evidence of a risk to individuals. This means that it protects nature and the environment, not only because of the benefits they provide to humanity or the effects that their degradation may have on other human rights, such as healthy, life or personal integrity, but because of of their importance to the other living organisms with which we share the planet that also merit protection in their own right" [187].

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[184] *The Environment and Human Rights*, Advisory Opinion OC-23/17, 15 November 2017, paras. 56-57. Article 11 of the Protocol of San Salvador provides that "[e]veryone shall shall have the right to live in a healthy environment and to have access to basic public services", and that "[t]he States Parties shall promote the protection, preservation, and improvement of the environment".

[185] *Ibid.*, para. 58. The Court referred, notably, to Article 19 of the American Declaration on the Rights of Indigenous Peoples, Article 24 of the African Charter on Human and Peoples' Rights, Article 28(f) of the ASEAN Human Rights Declaration, and Article 38 of the Arab Charter on Human Rights.

[186] *Ibid.*, para. 59.

[187] *Ibid.*, para. 62. See also *Indigenous Communities of the Lhaka Honhat (Our Land) Association* v. *Argentina*, Judgment on Merits, Reparations and Costs, 6 February 2020, para. 203.

3.107. Ecuador's Constitutional Court has similarly noted that, under Ecuadorian law, the right to a healthy environment imposes positive and negative obligations upon the State. The positive obligation concerns the duty to take action directed at protecting and preserving the environment, managing resources in a sustainable manner, regulating, preventing and controlling environmental harm, and repairing environmental harm. The negative obligation, for its part, consists of abstaining from conduct that impair the exercise of rights, such as polluting or managing natural resources in a non-sustainable manner[188]. The Court also stressed that the fulfilment of the right to a healthy environment depends on the ability of present and future generations to live in an adequate and sustainable environment[189].

3.108. In light of the above, it can be concluded that the right to a clean, healthy and sustainable environment forms part of general international law. States are required to take into consideration the existence of this right when interpreting and applying their other obligations under international law relating to climate change.

C. The right to life

3.109. The right to life, as recognized in Article 6(1) of the ICCPR, can no doubt be impaired by the adverse effects of climate change. As the HRC stated in its General Comment No. 36:

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

[188] Constitutional Court of Ecuador, Case No. 2167-21-EP (*The Monjas River*), 19 January 2022, para. 73.

[189] *Ibid*., para. 89.

them, provide appropriate access to information on environmental hazards and pay due regard to the precautionary approach"[190].

3.110. In *Ioane Teitiota*, the HRC noted that the right to life under Article 6(1) includes "the right of individuals to enjoy a life with dignity and to be free from acts or omissions that would cause their unnatural or premature death"[191]. It also concluded that the right to life "extends to reasonably foreseeable threats and life-threatening situations that can result in loss of life", while recalling that climate change constitutes one of the most serious threats to the ability of present and future generations to enjoy the right to life[192]. Similarly, in *Daniel Billy*, the Committee emphasised that States have a positive duty to protect the right recognized in Article 6 of the ICCPR from threats arising from the general circumstances in society, including climate change impacts[193].

3.111. In *The Environment and Human Rights*, the Inter-American Court of Human Rights recalled that the right to life "is essential because the realization of the other rights depends on its protection", and that States are obliged to "ensure the creation of the necessary conditions for the full enjoyment and exercise of this right" [194]. The Court also clarified that this obligation must be interpreted in the light of rules of international law concerning the protection of the environment, such as the principle of prevention, as damage to the environment may impair the right to life[195]. Indeed, the Court stated that, to ensure the right to life, States have the obligation to prevent significant environmental damage within and outside their territory by, *inter alia*, regulating, supervising and monitoring activities that may cause significant harm so as to reduce risk to human rights; conducting EIAs; and mitigating significant environmental damage[196].

[190] HRC, General comment No. 36 on Article 6 of the International Convenant on Civil and Political Rights, on the right to life (CCPR/C/GC/36), 30 October 2018, para. 62. See also, para. 26. See further HRC, *Portillo Cáceres v. Paraguay*, Communication No. 2751/2016, Decision of 25 July 2019, para. 7.5.

[191] HRC, *Ioane Teitiota v. New Zealand*, Communication No. 2728/2016, Decision of 24 October 2019, para. 9.4.

[192] *Ibid.*

[193] HRC, *Daniel Billy and others v. Australia*, Communication No. 3624/2019, Decision of 21 July 2022. See also HRC, *Portillo Cáceres v. Paraguay*, Communication No. 2751/2016, Decision of 25 July 2019, para. 7.5.

[194] *The Environment and Human Rights*, Advisory Opinion OC-23/17, 15 November 2017, para. 108.

[195] *Ibid.*, paras. 116, 124 and 127 ff.

[196] *Ibid.*, para. 174. See also para. 244.

3.112. The Inter-American Court of Human Rights clarified another important aspect of States' obligations under the American Convention: the meaning of the term 'jurisdiction' under Article 1(1)[197]. The Court noted that this term signifies "that the State obligation to respect and to ensure human rights applies to every person who is within the State's territory or who is in any way subject to its authority, responsibility or control", and that a person does not need to be in the territory of a State to be subject to the latter's jurisdiction[198]. The term 'jurisdiction' therefore "contemplates circumstances in which the extraterritorial conduct of a State constitutes an exercise of its jurisdiction"[199]. Taking into account the principle of prevention under customary international law, the Court then determined that:

> "The obligations to respect and to ensure human rights require that States abstain from preventing or hindering other States from complying with the obligations derived from the Convention … Activities undertaken within the jurisdiction of a State Party should not deprive another State of the ability to ensure that the persons within its jurisdiction may enjoy and exercise their rights under the Convention. The Court considers that States have the obligation to avoid transboundary environmental damage that can affect the human rights of individuals outside their territory. For the purposes of the American Convention, when transboundary damage occurs that affects treaty-based rights, it is understood that the persons whose rights have been violated are under the jurisdiction of the State of origin, if there is a causal link between the act that originated in its territory and the infringement of the human rights of persons outside its territory" [200].

3.113. This interpretation of the term 'jurisdiction' is also applicable to other human rights treaties. The HRC, for example, has recognized the extraterritorial application of the ICCPR pursuant to Article 2(1) in certain cases[201]. The Committee on the Rights of the Child, for its part, followed the interpretation of the Inter-American Court in relation to Article 2(1) of the CRC. It stated that:

> "… when transboundary harm occurs, children are under the jurisdiction of the State on whose territory the emissions originated for the purposes of article 5 (1) of the Optional Protocol if there is a causal link between the acts or omissions of the State in

[197] This provision reads: "The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition".

[198] *The Environment and Human Rights*, Advisory Opinion OC-23/17, 15 November 2017, paras. 73-74.

[199] *Ibid.*, para. 78.

[200] *Ibid.*, para. 101.

[201] See, for example, HRC, General Comment No. 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Convention (CCPR/C/21/Rev.1/Add.13). 26 May 2004, paras. 10-11.

question and the negative impact on the rights of children located outside its territory, when the State of origin exercises effective control over the sources of the emissions in question"[202].

3.114. States' obligation to respect the right to life under relevant human rights treaties is therefore not limited to the impairment of that right within the territory of a particular State. That obligation also applies extraterritorially wherever a State exercises jurisdiction over an individual. In the context of climate change, this means that a State may be held responsible for a violation of the right to life of individuals located in the territory of another State, insofar as that violation is caused by a degradation of the climate system and other parts of the environment attributable to the State of origin of GHG emissions. To properly discharge their obligations, States must adopt timely and effective measures to mitigate climate change, and to adapt to adverse effects thereof.

D. The right to private and family life

3.115. The enjoyment of the right to private and family life as recognized in Article 17(1) of the ICCPR and other treaties may also be hindered by the adverse effects of climate change.

3.116. The HRC recently applied Article 17(1) of the ICCCPR in *Daniel Billy.* In this case, the HRC considered that "States parties must prevent interference with a person's privacy, family or home that arises from conduct not attributable to the State, at least where such interference is foreseeable and serious", and that "when environmental damage threatens disruption to privacy, family and the home, States parties must prevent serious interference with the privacy, family and home of individuals under their jurisdiction"[203]. It was also noted that Article 17 "should not be understood as being limited to the act of refraining from arbitrary interference, but rather also obligates States parties to adopt positive measures that are needed to ensure the effective exercise of the rights under article 17 in the presence of interference by the State authorities and physical or legal persons" [204].

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[202] *Saachi* et al. v. *Argentina,* Communication No. 104/2019, Decision of 22 September 2021 (CRC/C/88/D/104/2019), para. 10.7. See also the related decisions adopted in respect of Brazil, France, Germany and Turkey in Communications No. 105/2019, 106/2019, 107/2019 and 108/2019, respectively.

[203] HRC, *Daniel Billy and others v. Australia*, Communication No. 3624/2019, Decision of 21 July 2022, para. 8.9. See also HRC, *Portillo Cáceres v. Paraguay*, Communication No. 2751/2016, Decision of 25 July 2019, para. 7.8.

[204] HRC, *Daniel Billy and others v. Australia*, Communication No. 3624/2019, Decision of 21 July 2022, para. 8.10.

3.117. After assessing the various measures of adaptation adopted by the State concerned, the Committee concluded that:

> "… when climate change impacts – including environmental degradation on traditional [indigenous] lands in communities where subsistence is highly dependent on available natural resources and where alternative means of subsistence and humanitarian aid are unavailable – have direct repercussions on the right to one's home, and the adverse consequences of those impacts are serious because of their intensity or duration and the physical or mental harm that they cause, then the degradation of the environment may adversely affect the well-being of individuals and constitute foreseeable and serious violations of private and family life and the home. The Committee concludes that the information made available to it indicates that by failing to discharge its positive obligation to implement adequate adaptation measures to protect the authors' home, private life and family, the State party violated the authors' rights under article 17 of the Covenant" [205].

3.118. Thus, like the right to life, the right to private and family life requires States to adopt and implement timely and effective measures to mitigate climate change and to adapt to the adverse effects thereof. Not doing so may result in an impairment of the right in question, wherever the holder of the right may be located, thereby triggering the responsibility of the State concerned.

E. Procedural obligations

3.119. Principle 10 of the Rio Declaration reaffirms the importance of the participation of citizens in environmental issues and calls upon States to ensure access to information, public participation and access to justice in this context. A number of specific procedural rules have been developed over time which may be relevant when assessing States' compliance with their human rights obligations.

3.120. The Inter-American Court of Human Rights, for example, has identified a number of obligations in this regard. In *The Environment and Human Rights*, the Court noted that in order to ensure the right to life, as well as any other right that may be impaired by environmental damage, States have an obligation to guarantee: (i) the right to access to information related to potential environmental harm, under Article 13 of the American Convention; (ii) the right to public participation in policies and decision-making that may affect the environment, pursuant to Article 23(1)(a) of the Convention; and (iii) access to justice in relation to States' obligations

[205] *Ibid*., para. 8.12.

with regard to the protection of the environment, in accordance with Articles 8 and 25 of the Convention[206].

3.121. The Escazú Agreement contains analogous obligations for the purpose of implementing Principle 10 of the Rio Declaration. Its preamble recalls that "access rights contribute to the strengthening of, inter alia, democracy, sustainable development and human rights", and Article 1 notes that guaranteeing full and effective implementation of the rights to access to environmental information, public participation in environmental decision-making and access to justice in environmental matters contribute "to the protection of the right of every person of present and future generations to live in healthy environment and to sustainable development".

3.122. Article 5 of the Escazú Agreement requires the States parties to ensure the public's access to environmental information in its possession, control or custody. This right of access includes, in particular, requesting and receiving information from competent authorities without mentioning any special interest or explaining the reasons for the request; being informed promptly whether the information is in possession of the State concerned; and being informed of the right to challenge and appeal where a request is denied. States must further ensure that vulnerable groups, such as indigenous communities and minorities, receive assistance in exercising these rights.

3.123. In addition, Article 7 of the Agreement requires States to implement transparent and inclusive participation in decision-making related to environmental matters, including in revisions and updates. Article 7 also imposes the duty to allow the public to present observations through a process established to that effect and to give due consideration to the outcome of that process.

3.124. Regarding access to justice, Article 8 of the Escazú Agreement requires each State to adopt a legal framework that permits judicial and administrative review of any measure that could negatively impact the environment, including those related to access to information and to public participation in environmental matters. States are also required to establish legal mechanisms for reparation, including restitution and compensation when applicable.

[206] *The Environment and Human Rights*, Advisory Opinion OC-23/17, 15 November 2017, para. 241.

CHAPTER 4

THE SECOND QUESTION

4.1. The second question on which the opinion of the Court is sought – Question (*b*) – reads as follows:

> "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?"

4.2. This question concerns matters of State responsibility. At the outset, four general remarks are warranted.

4.3. *First*, Question (*b*) refers to significant harm to the climate system and other parts of the environment that has been caused by a violation of one or more of the international legal obligations of States to ensure the protection of the climate system and other parts of the environment from anthropogenic GHG emissions. In other words, Question (*b*) is not concerned with legal consequences that may form a part of these obligations, but with legal consequences as may derive from a violation thereof.

4.4. *Second*, Question (*b*) is limited in scope to legal consequences for States that have caused "significant harm to the climate system and other parts of the environment". As explained in Chapter 1, not all States have contributed equally, or to a significant degree, to the climate crisis.

4.5. *Third*, the Court is not called upon to determine the international responsibility of any particular State. The Court rather has to proceed on the assumption that one or more States have caused significant harm to the climate system and other parts of the environment, and determine what legal consequences that might entail.

4.6. *Fourth*, Question (*b*) concerns essentially the rules of international law on State responsibility. The ILC Articles on State responsibility for internationally wrongful acts codify a number of relevant rules. There is at present no *lex specialis* that would displace these rules of general international law in relation to the present matter.

4.7. **Section I** of this chapter addresses paragraph (i) of Question (*b*), that is, the legal consequences for a State that has caused significant harm to the climate system and other parts of the environment *vis-à-vis* other States. **Section II** delas with paragraph (ii) of the question, which concerns the responsibility of States with respect to peoples and individuals of the present and future generations.

I. Legal consequences with respect to States

4.8. Paragraph (i) of Question (*b*) asks the Court to consider what are the legal consequences for States that have caused significant harm to the climate system or other parts of the environment with respect to "States, including, in particular, small island developing States, which due to their geographical circumstances and level of development, are injured or specially affected by or are particularly vulnerable to the adverse effects of climate change".

4.9. The terms 'injured' and 'specially affected' or "particularly vulnerable' are well-known in the law of State responsibility[207]. The term 'particularly vulnerable', as explained in Chapter 1 of this Written Statement, refers to a particular factual situation that certain States find or may find themselves in, taking into account their degree of risk in relation to the adverse effects of climate change and their capacity to adapt[208]. Ecuador is no doubt particularly vulnerable in this context[209]. Ecuador has moreover already suffered injury as a result of climate change – injury which is very likely to become more serious in the future if States do not scale up their efforts to reduce GHG emissions and to cooperate to facilitate adaptation in accordance with

[207] As Article 42 of the ILC Articles on the responsibility of States for internationally wrongful acts makes clear, a State may be considered "injured" if the obligation breached is owed to that State individually, or where there is a breach of an obligation owed to the international community as a whole and the breach specially affects that State. In other words, a "specially affected" State is a State that has suffered particular adverse effects for breach of an *erga omnes* or *erga omnes partes* obligation. See also *Yearbook of the International Law Commission, 2001*, vol. II, Part Two, pp. 117-119, paras. (1)-(15).

[208] See paras. 1.27-1.28 above.

[209] See paras. 1.26-133 above.

international law. In that sense, Ecuador may also be considered an injured or specially affected State for purposes of Question (*b*).

4.10. As explained in Chapter 3 of this Written Statement, there are certain obligations under international law that may trigger States' responsibility *vis-à-vis* other States for causing significant harm to the climate system and other parts of the environment. Those obligations include the principle of prevention and the obligation to preserve and protect the marine environment. Any State that, by its acts or omissions, fails in accordance with these obligations to reduce GHG emissions originating in territory under its jurisdiction or control, to such a degree that significant harm to the climate system and other parts of the environment is caused, would be in breach of these obligations.

4.11. As also explained in Chapter 3, these obligations are of an *erga omnes* or, where applicable, *erga omnes partes* character. Therefore, any State (or State party, as may be the case) is in principle entitled to invoke the responsibility of the State that has violated them. Certain States, however, may be specifically injured, specially affected or particularly vulnerable, and may be entitled therefore to seek not only the performance of the obligationin question, but also reparation for its breach, as elaborated below.

4.12. The first legal consequence arising for States that have caused significant harm to the climate system and other parts of the environment contrary to their obligations under international law is that they must cease their unlawful acts or omissions[210]. In the context of climate change, this means that the States concerned must adopt all necessary measures to reduce their GHG emissions in accordance with internationally agreed standards[211]. The measures that ought to be adopted by each of those States are to be determined on a case-by-

[210] As noted by the ILC in its commentary to the 2001 Articles on State responsibility, "[t]he function of cessation is to put an end to a violation of international law and to safeguard the continuing validity and effectiveness of the underlying primary rule. The responsible State's obligation of cessation thus protects both the interests of the injured State or States and the interests of the international community as a whole in the preservation of, and reliance on, the rule of law (*Yearbook of the International Law Commission, 2001*, vol. II, Part Two, p. 89, para. (5)).

[211] IPCC, *Climate Change 2023: Synthesis Report* (2023), p. 18, para. B.3 ("Some future changes are unavoidable and/or irreversible but can be limited by deep, rapid, and sustained global greenhouse gas emissions reduction. The likelihood of abrupt and/or irreversible changes increases with higher global warming levels. Similarly, the probability of low-likelihood outcomes associated with potentially very large adverse impacts increases with higher global warming levels. (*high confidence*)").

case basis, taking into account the specific circumstances of the State concerned and the scientific evidence available.

4.13. A further legal consequence is that the States concerned must make full reparation for the injury caused by the internationally wrongful act, in the form of restitution and/or compensation. Which of the two forms of reparation is most appropriate will depend on the circumstances of each specific case.

4.14. Restitution concerns the re-establishment of the situation which existed before the wrongful act was committed to that extent that this is not materially impossible or does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation. As noted by the ILC, restitution can in some cases be straightforward, but in other cases it "may be a more complex act"[212]. In principle, restitution has primacy over compensation[213].

4.15. Compensation relates to the obligation to compensate for the damage caused by an internationally wrongful act, insofar as that damage is not made good by restitution. It covers any financially assessable damage, including loss of profits. As the ILC said expressly, compensation may also arise in relation to costs incurred in responding to pollution damage[214].

4.16. In the context of climate change and its adverse effects, a combination of restitution and compensation may be in order, especially with regard to a State that is specifically injured, specially affected or particularly vulnerable[215].

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[212] *Yearbook of the International Law Commission, 2001*, vol. II, Part Two, p. 96, para. (1).

[213] *Ibid.*, p. 96, para. (3).

[214] *Ibid*., p. 100, para. (8). It further noted that: "In cases where compensation has been awarded or agreed following an internationally wrongful act that causes or threatens environmental damage, payments have been directed to reimbursing the injured State for expenses reasonably incurred in preventing or remedying pollution, or to providing compensation for a reduction in the value of polluted property. However, environmental damage will often extend beyond that which can be readily quantified in terms of clean-up costs or property devaluation. Damage to such environmental values (bio- diversity, amenity, etc.—sometimes referred to as "non- use values") is, as a matter of principle, no less real and compensable than damage to property, though it may be difficult to quantify" (p. 101, para. (15)).

[215] *Ibid*., p. 99, para. (3) ("Restitution, despite its primacy as a matter of legal principle, is frequently unavailable or inadequate. It may be partially or entirely ruled out either on the basis of the exceptions expressed in article 35, or because the injured State prefers compensation or for other reasons. Even where restitution is made, it may be insufficient to ensure full reparation. The role of compensation is to fill in any gaps so as to ensure full reparation for damage suffered").

4.17. Determining the injury caused to a State by significant harm to the climate system or other parts of the environment may raise the question of the existence of a causal link between the injury and the internationally wrongful act. As noted by the ILC, "the subject matter of reparation is, globally, the injury resulting from and ascribable to the wrongful act, rather than any and all consequences flowing from an internationally wrongful act"[216]. Although the Court is not called upon to address specific instances of injury in the present advisory proceedings, it must be noted that scientific evidence has conclusively shown that a wide range of disasters and extreme conditions are the result of climate change, including sea-level rise, prolonged heatwaves, desertification, acidification of the ocean, and loss of biodiversity, with a corresponding damage suffered by economies and individuals[217].

4.18. Due to the nature of the cause of climate change, there may well be a plurality of responsible States *vis-à-vis* a State that is specifically injured, specially affected or particularly vulnerable. Indeed, climate change and its adverse effects are not the result of the actions or omissions of one State alone, but the combined result of the conduct of several States, and in particular those that have caused significant harm by having the largest GHG emissions, both historically and over the past several decades.

4.19. As indicated in Article 47 of the ILC Articles on State responsibility, "[w]here several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act". As further explained by the ILC:

> "It is important not to assume that internal law concepts and rules in this field can be applied directly to international law. Terms such as 'joint', 'joint and several' and 'solidary' responsibility derive from different legal traditions and analogies must be applied with care. In international law, the general principle in the case of a plurality of

[216] *Ibid.*, p. 92, para. (9). The ILC also noted that "[v]arious terms are used to describe the link which must exist between the wrongful act and the injury in order for the obligation of reparation to arise. For example, reference may be made to losses 'attributable to [the wrongful] act as a proximate cause', or to damage which is 'too indirect, remote, and uncertain to be appraised', or to 'any direct loss, damage including environmental damage and the depletion of natural resources or injury to foreign Governments, nationals and corporations as a result of' the wrongful act. Thus, causality in fact is a necessary but not a sufficient condition for reparation. There is a further element, associated with the exclusion of injury that is too 'remote' or 'consequential' to be the subject of reparation. In some cases, the criterion of 'directness' may be used, in others 'foreseeability' or 'proximity' … the requirement of a causal link is not necessarily the same in relation to every breach of an international obligation. In international as in national law, the question of remoteness of damage 'is not a part of the law which can be satisfactorily solved by search for a single verbal formula'. The notion of a sufficient causal link which is not too remote is embodied in the general requirement in article 31 that the injury should be in consequence of the wrongful act, but without the addition of any particular qualifying phrase" (*ibid.*, pp. 92-93, para. (10)).

[217] See paras. 1.11-1.13 above.

> responsible States is that each State is separately responsible for conduct attributable to it in the sense of article 2. The principle of independent responsibility reflects the position under general international law, in the absence of agreement to the contrary between the States concerned. In the application of that principle, however, the situation can arise where a single course of conduct is at the same time attributable to several States and is internationally wrongful for each of them. It is to such cases that article 47 is addressed"[218].

4.20. Thus, the general rule under the law of State responsibility is that each State is independently responsible, even if the wrongful act is the result of the combined acts or omissions of more than one State[219].

4.21. As explained in Chapter 3 above, Article 8 of the Paris Agreement recognizes "the importance of averting, minimizing and addressing loss and damage associated with the adverse effects of climate change, including extreme weather events and slow onsent events, and the role of sustainable development in reducing the risk of loss and damage". This, however, does not create a system for reparation in the sense of the law of State responsibility. As made clear by Decision 1/CP.21, "Article 8 of the Agreement does not involve or provide a basis for any liability or compensation"[220]. In other words, Article 8 of the Paris Agreement and the cooperation mechanisms that may be put in place on the basis of it do not affect the responsibility of States for a violation of their obligations under international law in relation to climate change.

II. Legal consequences with respect to peoples and individuals

4.22. Following on from Question (*a*), which concerns the international legal obligations of States to ensure the protection of the climate system and other parts of the environment from

[218] *Yearbook of the International Law Commission, 2001*, vol. II, Part Two, p. 124, para. (3).

[219] See also *Certain Phosphate Lands in Nauru, Preliminary Objections*, pp. 258-259, para. 48 ("Australia has raised the question whether the liability of the three States would be 'joint and several' (*solidaire*), so that any one of the three would be liable to make full reparation for damage flowing from any breach of the obligations of the Administering Authority, and not merely a one-third or some other proportionate share. This ... is independent of the question whether Australia can be sued alone. The Court does not consider that any reason has been shown why a claim brought against only one of the three States should be declared inadmissible *in limine litis* merely because that claim raises questions of the administration of the Territory, which was shared with two other States. It cannot be denied that Australia had obligations under the Trusteeship Agreement, in its capacity as one of the three States forming the Administering Authority, and there is nothing in the character of that Agreement which debars the Court from considering a claim of a breach of those obligations by Australia").

[220] UNFCCC, Decision 1/CP.21 (FCCC/CP/2015/10.Add.1), 29 January 2016 , para. 51.

anthropogenic emissions of GHG for States and for present and future generations, Question (*b*)(ii) asks the Court what are the legal consequences under these obligations for States that, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment, with respect to "[p]eoples and individuals of the present and future generations affected by the adverse effects of climate change".

4.23. Much like question (*b*)(i), question (*b*)(ii) refers to legal consequences deriving from a violation by States of one or more of the obligations earlier identified (that have caused significant harm to the climate system and other parts of the environment), and invites consideration of how the rules on State responsibility may apply. Such obligations include those deriving from the ICCPR, the CRC and other treaties, as well as customary international law, in relation to the right to life, the right to private and family life, and the right to a clean, healthy and sustainable environment.

4.24. The legal consequences pertaining to peoples and individuals of the present generation on the one hand, and to peoples and individuals of future generations on the other hand, are not identical. It will be convenient, therefore, to address them in turn.

A. Peoples and individuals of the present generation

4.25. In Ecuador's view, those States that have caused significant harm to the climate system and other parts of the environment in violation of their international legal obligations, are responsible to peoples and individuals of the present generation for such harm.

4.26. Invocation of this responsibility by peoples and individuals, and obtaining redress for the harm caused, including compensation, may depend on various considerations, not least those of jurisdiction and of standing.

4.27. In appropriate cases, a State may and should exercise diplomatic protection, that is, invoke through diplomatic means or other means of peaceful settlement, the responsibility of another State for the injury caused by the internationally wrongful act of that State to a person

or persons that are nationals of the former State with a view to the implementation of such responsibility.[221]

4.28. Ecuador recalls in this connection that the ILC's articles on diplomatic protection provide that local remedies need not be exhausted before diplomatic protection is exercised where "there are no reasonably available local remedies to provide effective redress", for example, because the local courts have no jurisdiction over the dispute in question, or they do not have the competence to grant an appropriate and adequate remedy to the alien[222]. The exception to exhaustion of local remedies moreover exists where "there was no relevant connection between the injured person and the State alleged to be responsible at the date of injury", for instance, in cases where an injured person's property "has suffered environmental harm caused by pollution".[223] Indeed, the Commission's commentary makes express mention of transboundary environmental harm in recognizing that "an individual may today be injured by the act of a foreign State outside its territory or by some act within its territory in circumstances in which the individual has no connection with the territory"[224].

4.29. It is further recalled that the ILC's articles provide, as recommended practice, that a State entitled to exercise diplomatic protection should give due consideration to the possibility of doing so "especially when a significant injury has occurred"[225].

4.30. Express mention should also be made in the present context of indigenous peoples, who, as the UN Declaration on the Rights of Indigenous Peoples recognizes, "have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources"[226]. The special relationship between indigenous peoples and their

[221] See also the definition of diplomatic protection in Article 1 of the Draft articles on diplomatic protection (*Yearbook of the International Law Commission 2006*, Vol. II (Part Two), p. 26), which the Court has found to reflect customary international law: *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Preliminary Objections, Judgment, I.C.J. Reports 2007*, p. 599, para. 39.

[222] *Ibid.*, pp. 46-47, Article 15(a) and the commentary thereto.

[223] *Ibid.*, pp. 46-48, Article 15(c) and the commentary thereto.

[224] *Ibid.*, p. 48, para. (8).

[225] *Ibid.*, p. 53, Article 19(a).

[226] UN Declaration on the Rights of Indigenous Peoples (2007), Article 29(1). See also Article 32(3).

environment has been recognized, protected, and upheld by various international instruments[227].

B. Peoples and individuals of future generations

4.31. As explained in Chapter 3, peoples and individuals of future generations are those who will one day inherit and inhabit the planet and, as such, clearly have an interest in the protection of the climate system.

4.32. It will be recalled that the Court itself has had occasion to recognize, in the *Nuclear Weapons* advisory opinion, 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"[228]. In that case the Court moreover acknowledged that damage to the environment may cause damage to future generations[229].

4.33. The long-term implications of climate change and the serious threat they pose to the well-being of future generations indeed make climate change an intergenerational issue. This has been recognized by the General Assembly as early as in 1988, when it adopted resolution 43/53 entitled "Protection of Global Climate for Present and Future Generations of Mankind". In that resolution, the General Assembly expressed its concern "that certain human activities could change global climate patterns, threatening present and future generations with potentially severe economic and social consequences"[230]. As noted earlier, various other instruments, including the Rio Declaration and the UNFCCC, have similarly noted the imperative of protecting the environment for the benefit of future generations.

4.34. Ecuador's Constitution, too, gives clear expression to the interest of future generations in the matter of climate change. It recognizes as an "environmental principle" that the State must "guarantee a sustainable model of development, one that is environmentally balanced and respectful of cultural diversity, conserves biodiversity and the natural regeneration capacity of

[227] See also the ILC Draft principles on protection of the environment in relation to armed conflicts, with commentaries (2022), Principle 5 and the commentary thereto.

[228] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 241, para. 29.

[229] *Ibid.*, p. 244, para. 35 ("… the use of nuclear weapons would be a serious danger to future generations. Ionizing radiation has the potential to damage the future environment, food and marine ecosystem, and to cause genetic defects and illness in future generations").

[230] See also resolutions 44/207 of 22 December 1989, 45/212 of 21 December 1990, and 46/169 of 19 December 1991.

ecosystems, and ensures meeting the needs of present and future generations"[231]. The Constitution moreover prescribes that "[t]he State shall exercise sovereignty over biodiversity, whose administration and management shall be conducted on the basis of responsibility between generations"[232]. With respect to non-renewable natural resources, in particular, the Constitution mandates that "[i]n the management of these resources, the State shall give priority to responsibility between generations …"[233].

4.35. In Ecuador's view, all States are under an obligation to ensure that future generations have access to an environment that is comparable with, or better than, that enjoyed by prior generations, and that they are not exposed to conditions that may endanger their health or their existence.

4.36. As for those States that have caused significant harm to the climate system and other parts of the environment in violation of their international legal obligations, these States are under an obligation to take necessary and timely action to combat climate change also bearing in mind the interests of peoples and individuals of future generations. In particular, they must give due regard to these interests of future generations when remedying their internationally wrongful acts.

4.37. Mention may be made in this regard of General comment No. 26 of the Committee on the Rights of the Child, according to which that "States bear the responsibility for foreseeable environment-related threats arising as a result of their acts or omissions now, the full implications of which may not manifest for years or even decades"[234]. The Committee recognized expressly "the principle of intergenerational equity and the interests of future generations".[235]

[231] Article 395(1).

[232] Article 400.

[233] Article 317.

[234] Committee on the Rights of the Child, General comment No. 26 (2023) on children's rights and the environment, with a special focus on climate change (CRC/C/GC/26), May 2023, para. 11.

[235] *Ibid.*

SUMMARY OF ECUADOR'S POSITION

For the reasons set out in this Written Statement, the Republic of Ecuador is of the view, in relation to Question (*a*) contained in General Assembly resolution 77/276, that States have a host of obligations under international law in in respect of climate change, arising under customary international law, general principles of law and international conventions. In particular:

(1) States have an obligation, under the principle of prevention, to reduce anthropogenic GHG emissions that cause or are likely to cause significant harm to the climate system and other parts of environment.

(2) States have an obligation, in accordance with the duty to protect and preserve the marine environment under customary international law and UNCLOS, to reduce GHG emissions. This duty also requires States to adopt and implement adaptation measures to protect and preserve the marine environment from the adverse effects of climate change.

(3) States have an obligation, in accordance with the relevant provisions of the UNFCCC and the Paris Agreement, to adopt and implement measures aimed at mitigating climate change by reducing GHG emissions, as well as measures to adapt to climate change.

(4) States are required to adopt mitigation and adaptation measures so as to ensure respect for the right to life, the right to privacy and family life, and the right to a clean, healthy and sustainable environment, in accordance with the treaties to which they are parties and customary international law.

(5) The above obligations must be interpreted and applied in the light of the best available science, as well as internationally agreed standards. The objective laid down in the Paris Agreement reflects the current standard which must guide States' implementation of their obligations.

(6) Under the precautionary principle, States may not avail themselves of lack of scientific certainty so as not to adopt the necessary mitigation and adaptation measures.

(7) States have an obligation to cooperate in the context of climate change, in accordance with the treaties to which they are parties and customary international law. This includes the duty to cooperate in matters relating to financing, capacity building, technology transfer, and scientific cooperation, as well to address loss and damage. Where the available science so demands, States may be required to negotiate and conclude new agreements that allow them to meet their mitigation and adaptation obligations under international law.

(8) States' obligations in relation to climate change, whatever the source, must be carried out in the light of the principles of equity and common but differentiated responsibilities and respective capabilities, taking into account also the historical contributions of each State to the climate crisis. States must additionally take into account the principle of intergenerational equity.

Furthermore, in relation to Question (*b*), the Republic of Ecuador considers that:

(1) In cases of significant harm to the climate system and other parts of the environment by a State or group of States, the responsibility of the latter will be engaged in accordance with the rules of general international law on State responsibility.

(2) The abovementioned obligations are of an *erga omnes* or *erga omnes partes* character. All States (or States parties, where applicable) are therefore entitled to demand compliance with those obligations.

(3) A State that is specifically injured, specially affected, or particularly vulnerable to the adverse effects is entitled to request reparation for the harm suffered from the responsible State or States.

(4) An individual whose rights are impaired by the adverse effects of climate change is entitled to claim reparation for the harm suffered from the responsible State or States. The State of nationality may exercise diplomatic protection to safeguard the rights of its nationals.

Ambassador Marcelo Vázquez-Bermúdez

Legal Adviser of the Ministry of Foreign Affairs and Human Mobility

Representative of the Republic of Ecuador

22 March 2024