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INTERNATIONAL COURT OF JUSTICE

CASE CONCERNING OBLIGATIONS OF STATES IN RESPECT OF CLIMATE CHANGE

(REQUEST FOR ADVISORY OPINION)

WRITTEN STATEMENT OF THE FRENCH REPUBLIC

22 March 2024

[Translation by the Registry]

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INTRODUCTION

1. By its resolution 77/276 of 29 March 2023, the General Assembly of the United Nations requested the International Court of Justice (hereinafter the "ICJ" or the "Court") to render an advisory opinion on the following questions:

> "*(a)* What are the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for present and future generations;
>
> *(b)* What are the legal consequences under these obligations for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment, with respect to:
>
> (i) States, including, in particular, small island developing States, which due to their geographical circumstances and level of development, are injured or specially affected by or are particularly vulnerable to the adverse effects of climate change?
>
> (ii) Peoples and individuals of the present and future generations affected by the adverse effects of climate change?"

2. By letters dated 17 April 2023, the request for an advisory opinion was notified to all States entitled to appear before the Court, in accordance with Article 66, paragraph 1, of the Statute of the Court. By an Order dated 20 April 2023, the Court decided that "the United Nations and its Member States . . . [were] . . . likely to be able to furnish information on the questions submitted to [it] for an advisory opinion", and that they could do so before 20 October 2023. The Court subsequently extended that time-limit by an Order dated [4] August 2023. It fixed 22 January 2024 as the time-limit within which written statements on the questions could be presented to the Court, in accordance with Article 66, paragraph 2, of the Statute. By an Order dated 15 December 2023, the Court extended that time-limit to 22 March 2024.

3. In this context, the French Republic has the honour to present this written statement to the Court. Before addressing each of the two questions put to the Court, France will first make some preliminary remarks on the requirements of Article 65, paragraph 1, of the Statute of the Court (**I**) and on the interpretation of the questions posed (**II**).

I. The jurisdiction of the Court and the propriety of rendering an opinion

4. Article 65, paragraph 1, of the Statute of the Court 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".

5. First, the jurisdiction of the Court, which is not in any doubt here. Issues of climate change, the subject-matter of the present request for an advisory opinion, are regularly — and increasingly — submitted to the General Assembly for review and fall within the mandate conferred on the latter by Chapter IV of the Charter.

6. Moreover, the questions put by the General Assembly are clearly of a "legal" character, which is not exclusive of their political implications[1]. Nonetheless, France observes that the Court could usefully have recourse to its power to interpret and even define the questions put to it, as it has done in other advisory proceedings[2], in view of their particularly broad scope[3].

7. As regards the Court's duty "to satisfy itself, each time it is seised of a request for an opinion, as to the propriety of the exercise of its judicial function"[4], there are no "compelling reasons"[5] preventing the Court from exercising that function in this case. On the contrary, these advisory proceedings offer the Court an opportunity to contribute to the discussions taking place on multilateral issues of great concern for the whole of humanity.

II. General elements of interpretation

8. Finalized in March 2023, the sixth Synthesis Report of the Intergovernmental Panel on Climate Change (hereinafter the "IPCC") recalls that anthropogenic greenhouse gas emissions have warmed the climate at an unprecedented rate[6]. Whatever the emissions scenarios, the IPCC estimates that by 2030, the rise in global surface temperatures will have reached 1.5°C above pre-industrial levels[7]. The report therefore emphasizes the need to reduce greenhouse gas emissions as a matter of urgency, in order to avoid temperature increases of more than 1.5°C above pre-industrial levels. The current and future impacts of the triple planetary crisis of climate change, biodiversity loss and pollution are now well established and concern all States without exception.

9. France "[r]ecognizes the specific needs and special circumstances of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change"[8]. Indeed, several States and territories are, because of their specific climactic, biological, geographical and socio-economic circumstances, particularly vulnerable to the effects of climate change, be they slow onset (sea level rise, melting of glaciers, etc.) or the result of sudden-onset phenomena (extreme climate events). France notes in this regard that its own territory, and particularly Overseas France, is exposed to the risks generated by climate change, and that the impact on ecosystems and human activities is already perceptible there.

10. In this context, resolution 77/276, adopted by consensus and co-sponsored by 132 States, including all Member States of the European Union (hereinafter the "EU"), is "a strong signal of

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[1] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 234, para. 13.

[2] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, pp. 153-154, para. 38; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019 (I)*, p. 112, para. 61.

[3] See below, para. 13.

[4] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 157, para. 45.

[5] *Ibid.*

[6] IPCC, *Climate Change 2023: Synthesis Report — Summary for Policymakers*, 2023, available at: https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_SPM.pdf (hereinafter "IPCC, *Climate Change 2023: Synthesis Report — Summary for Policymakers*"), pp. 4-5.

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

[8] Draft decision -/CMA.5, *First Global Stocktake*, FCCC/PA/CMA/2023/L.17 (hereinafter "*First Global Stocktake*"), para. 11.

unity in our common fight against global warming"[9]. The request for an opinion is thus intended to stimulate and reinforce "ambitious action on climate change"[10], in order "to solve the problems we have together"[11].

11. The request for an opinion concerns *all* States. The global nature of the climate issue informs the entire reasoning of the United Nations Framework Convention on Climate Change (hereinafter the "UNFCCC") and the Paris Climate Agreement (hereinafter the "Paris Agreement"). These instruments establish the essential legal framework for analysing the questions raised in these proceedings.

12. In this regard, resolution 77/276 asks the Court to answer the questions put to it,

> "[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".

13. France contends that the texts and principles mentioned cannot all be relied upon in the same way. Since the UNFCCC[12], the Kyoto Protocol[13] and the Paris Agreement[14] specifically address climate change, they are the reference texts that must be interpreted, as necessary, in the light of other "relevant rules of international law applicable in the relations between parties"[15]. These various sources of law should be interpreted in "a harmonized manner"[16], with a view to ensuring the effectiveness and coherence of the reference texts on climate change.

14. Furthermore, resolution 77/276 lists treaty texts, a General Assembly resolution (A/RES/217 (III) concerning the rights recognized in the Universal Declaration of Human Rights) and principles of customary international law without distinction. The dossier compiled by the United Nations Secretary-General and submitted to the Court also contains a vast range of instruments and documents. By their very nature, these texts and principles do not have the same legal scope and this will have to be taken into account by the Court.

15. Lastly, it is important to emphasize the eminently scientific nature of the issues underlying the questions put to the Court. This fact does not prevent the Court from performing its function. Indeed, there is no need for it to examine the facts or to request a scientific expert opinion on climate

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[9] General Assembly, Seventy-seventh session, 64th plenary meeting, 29 Mar. 2023, New York, A/77/PV.64 (hereinafter "A/77/PV.64"), p. 5.

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

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

[12] New York, 9 May 1992, *United Nations, Treaty Series* (hereinafter "*UNTS*"), Vol. 1771, No. 30822.

[13] Kyoto, 11 Dec. 1997, *UNTS*, Vol. 2303, No. 30822.

[14] Paris, 12 Dec. 2015, *UNTS*, Vol. 3156, No. 54113.

[15] Art. 31, para. 3 *(c)*, of the Vienna Convention on the Law of Treaties, 23 May 1969, *UNTS*, Vol. 1155, No. 18232, which codifies in part the customary international law in this regard.

[16] A/77/PV.64, p. 32.

change. Climate change is an observed reality, as confirmed by the reports of the IPCC among others[17]. In responding to the request for an opinion, the Court may usefully rely on work reflecting the scientific consensus on the question of climate change, particularly that of the IPCC.

16. That there is now growing concern about climate change within the international community is evidenced by numerous initiatives addressing the issues raised by this phenomenon under international law. France welcomes the advisory proceedings instituted before the International Tribunal for the Law of the Sea (hereinafter "ITLOS") on 12 December 2022 by the Commission of Small Island States. It is also closely following the work on sea level rise in relation to international law that the International Law Commission (hereinafter the "ILC") has been conducting since 2019. France has actively contributed to both procedures. It is important for these parallel initiatives to dovetail and, ultimately, improve the clarity and coherence of the obligations incumbent on States in combating climate change.

17. Combating climate change is one of the priorities of French diplomacy. France is playing its full part in the efforts of the international community in international negotiations on climate change and in the initiatives to combat the effects of this phenomenon. It supports in this regard the statement submitted by the EU in the present proceedings. In this context, it is extremely important that the opinion rendered by the Court helps to establish a clear and comprehensible legal framework in order to support the efforts made by States to ensure the protection of the climate system and other parts of the environment.

18. The phrase "ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases" must be understood as referring to measures to mitigate climate change, to adapt environments and societies to the effects of climate change and to prevent and reduce the harm resulting therefrom.

19. It is with a view to enhancing this protection that France submits these observations, which will first address the question of the obligations incumbent on States (**Question *(a)***), before turning to the question of legal consequences (**Question *(b)***).

[17] Decision 1/CMA.3, *Glasgow Climate Pact* (2021), FCCC/PA/CMA/2021/10/Add.1 (hereinafter the "*Glasgow Pact*"), para. 6; Decision 1/CMA.4, *Sharm el-Sheikh Implementation Plan*, FCCC/PA/CMA/2022/10/Add.1 (hereinafter the "*Implementation Plan*"), para. 44.

QUESTION *(A)*: THE OBLIGATIONS

20. In question *(a)*, the Court is asked to answer the following:

> "*(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"?

21. States have obligations to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases (**I**), which must be interpreted in the light of international human rights instruments (**II**).

I. Obligations to ensure the protection of the climate system and other parts of the environment from greenhouse gas emissions

22. Regarded — together with adaptation and the alignment of financial flows towards climate goals[18] — as one of the three "pillars" of climate action[19], climate change mitigation is, according to the IPCC, "[a] human intervention to reduce emissions or enhance the sinks of greenhouse gases"[20]. Among the legal obligations to be taken into account in these proceedings, it is therefore important to consider obligations to reduce anthropogenic emissions of greenhouse gases (**A**) and obligations to protect natural sinks and reservoirs of greenhouse gases (**B**).

A. Obligations to reduce greenhouse gases

23. Although every obligation in the Paris Agreement is ultimately geared towards reducing anthropogenic greenhouse gas emissions, two are particularly relevant to mitigating climate change: the obligation for each party to the Agreement to prepare, communicate and maintain a nationally determined contribution (**1**), and the obligation to pursue mitigation measures (**2**).

24. Generally speaking, it should be recalled that States are obliged to show good faith in interpreting and implementing their obligations to reduce greenhouse gases. Codified in Article 26 of the Vienna Convention on the Law of Treaties, good faith is a fundamental principle of customary international law that determines both the application and interpretation of treaties. In its Judgment of 25 September 1997 in the case concerning the *Gabčíkovo-Nagymaros Project*, the Court described the legal effect of good faith as follows:

> "Article 26 combines two elements, which are of equal importance. It provides that 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith.' This latter element, in the Court's view, implies that, in this case, it is the purpose of the Treaty, and the intentions of the parties in concluding it, which should prevail over its literal application. The principle of good faith obliges the Parties to apply it in a reasonable way and in such a manner that its purpose can be realized."[21]

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[18] See below, paras. 215 *et seq*.

[19] Paris Agreement, Art. 2, para. 1.

[20] IPCC, *Annex 1: Glossary*, *in* V. Masson-Delmotte *et al*., *Global Warming of 1.5°C: An IPCC Special Report on the Impacts of Global Warming of 1.5°C Above Pre-Industrial Levels and Related Global Greenhouse Gas Emission Pathways*, 2018, available at: https://www.ipcc.ch/site/assets/uploads/sites/2/2022/06/SR15_AnnexI.pdf (hereinafter "IPCC, *Glossary*"), p. 554.

[21] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, pp. 78-79, para. 142.

25. Therefore the Paris Agreement, like any treaty, must be applied and interpreted in good faith by the parties, which must genuinely make every effort to reduce their greenhouse gas emissions.

1. *The obligation to prepare, communicate and maintain a nationally determined contribution*

26. In accordance with Article 4, paragraph 2, of the Paris Agreement, each Party "shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve".

27. It follows from this that States parties have a legal obligation to prepare, communicate and maintain a nationally determined contribution. Article 4, paragraph 3, defines the terms of the parties' successive contributions, stipulating 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".

28. This provision, which is fundamental to ensuring the protection of the climate system, does not fix quantified obligations. It does not follow that the parties to the Paris Agreement enjoy unlimited scope in preparing, communicating and maintaining their nationally determined contribution.

29. In fact, in order to fulfil their obligation, the parties must prepare, communicate and maintain their nationally determined contributions on the basis of three key parameters: the goal of limiting global temperature increases to 1.5°C above pre-industrial levels ***(a)***; the need to take account of the principle of "common but differentiated responsibilities and respective capabilities, in the light of different national circumstances"[22] ***(b)***; and the level of ambition required by the Paris Agreement, which must be the "highest possible" and which cannot regress ***(c)***. The current cycle of increasingly ambitious climate commitments will come to an end in 2025, at the 30th Conference of the Parties to the Agreement. By February 2025, *all parties must submit their new and improved nationally determined contributions for post-2030*.

(a) The objective of the Paris Agreement

30. The terms of each party's nationally determined contribution must be commensurate with the objective of limiting the average temperature increase to 1.5ºC above pre-industrial levels, as set out in the Paris Agreement and the global stocktakes reporting on the progress made by States in this regard. In fact, the COP28 expressly recalled that the "Parties shall provide information on how the preparation of their nationally determined contributions has *been informed by the outcomes of the global stocktake*"[23]. Achieving the objective of the Paris Agreement calls for a rapid reduction in greenhouse gas emissions.

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[22] Paris Agreement, fourth preambular para.

[23] *First Global Stocktake*, para. 169 (emphasis added).

31. The UNFCCC and the Paris Agreement — both legally binding for their parties[24] — establish a temperature goal that is to be achieved through measures taken by the parties both collectively and individually.

32. This objective, defined in general terms in Article 2 of the UNFCCC, is made clear in Article 2, paragraph 1, of the Paris Agreement, which states:

> "This Agreement, in enhancing the implementation of the Convention, including its objective, aims to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty, including by . . . [h]olding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change".

33. As the Court found in its Judgment of 12 December 1996 on the preliminary objection raised in the case concerning *Oil Platforms*, treaty provisions such as Article 2 of the Paris Agreement, which establish a general objective and do not in themselves impose specific obligations on the parties, must be regarded as "fixing an objective, in the light of which the other Treaty provisions are to be interpreted and applied"[25].

34. There is broad support for the objective of the Paris Agreement, moreover: it has been reaffirmed by States during the Conferences of Parties to the UNFCCC (hereinafter the "COP") and the Conferences of the Parties serving as the Meeting of the Parties to the Paris Agreement (hereinafter the "CMA") held in Glasgow[26], Sharm el-Sheikh[27] and Dubai[28], and the pathway for achieving it is set out in the "Glasgow Pact", adopted by consensus by the CMA 3:

> "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"[29].

35. This objective is consistent with that of the Paris Agreement, which states that

> "[i]n 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 . . . and to undertake rapid reductions thereafter . . . so as to achieve a balance between

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[24] 198 and 195 parties, respectively.

[25] *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 814, para. 28.

[26] *Glasgow Pact*, para. 20.

[27] *Implementation Plan*, paras. 7 and 8.

[28] *First Global Stocktake*, paras. 3-5.

[29] *Glasgow Pact*, para. 22. This goal was adjusted during the CMA held in Sharm el-Sheikh in order to take account of developments in global emissions. The CMA "[r]ecognizes that limiting global warming to 1.5°C requires rapid, deep and sustained reductions in global greenhouse gas emissions of 43 per cent by 2030 relative to the 2019 level" (*Implementation Plan*, para. 15).

anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century" (Article 4, paragraph 1).

36. Although not all States can reduce their greenhouse gas emissions at a rate in line with that fixed at the global level, since account must be taken of their "common but differentiated responsibilities and respective capabilities, in the light of different national circumstances"[30], the CMA nevertheless recalled in 2022, in another decision adopted by consensus, that the objectives of each nationally determined contribution must "align with the Paris Agreement temperature goal by the end of 2023"[31]. Hence, every State has an obligation to reduce its greenhouse gas emissions trajectory such that it can effectively contribute to this collective goal. Notwithstanding this obligation, in the First Global Stocktake of the progress made by States towards this collective objective, the COP28 regrettably

> "*[n]ote[d] with significant concern* that, despite progress, global greenhouse gas emissions trajectories are not yet in line with the temperature goal of the Paris Agreement, and that there is a rapidly narrowing window for raising ambition and implementing existing commitments in order to achieve it"[32].

37. The First Global Stocktake is unequivocal:

> "limiting global warming to 1.5°C with no or limited overshoot requires deep, rapid and sustained reductions in global greenhouse gas emissions of 43 per cent by 2030 and 60 per cent by 2035 relative to the 2019 level and reaching net zero carbon dioxide emissions by 2050"[33].

38. It may be noted that while, in principle, the decisions of the COP and the CMA are not binding in themselves, they nevertheless have legal value in three respects. First, they help to identify, interpret, clarify and consolidate the obligations of States under the UNFCCC and the Paris Agreement. Second, they may reflect a subsequent agreement or practice by States parties within the meaning of the rules on treaty interpretation as set out in Article 31, paragraphs 3 *(a)* and *(b)*, and Article 32 of the Vienna Convention on the Law of Treaties, and, in this regard, serve as a means of interpreting climate-related treaty commitments.

39. Third, while all decisions of the COP and the CMA assist with the interpretation of treaty obligations, some also have autonomous legal force. For example, paragraphs 8 and 9 of Article 4 of the Paris Agreement state:

> "8. In communicating their nationally determined contributions, all Parties shall provide the information necessary for clarity, transparency and understanding *in accordance with decision 1/CP.21 and any relevant decisions of the Conference of the Parties serving as the meeting of the Parties to this Agreement*.

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[30] See below, paras. 43 *et seq*.

[31] *Implementation Plan*, para. 23.

[32] *First Global Stocktake*, para. 24.

[33] *Ibid*., para. 27.

> 9. Each Party shall communicate a nationally determined contribution every five years *in accordance with decision 1/CP.21 and any relevant decisions of the Conference of the Parties serving as the meeting of the Parties to this Agreement*"[34].

40. Pursuant to these provisions, parties must act "in accordance with" decisions relating to the communication of both the nationally determined contribution and the information necessary for its clarity, transparency and understanding. By virtue of this reference, the decisions in question become binding for the parties.

41. Lastly, the reasoning adopted by the Court with regard to the normative scope of United Nations General Assembly resolutions may be transposed, *mutatis mutandis*, to the decisions of the COP and the CMA:

> "even if they are not binding, [they] may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a given [decision], it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character"[35].

42. Consequently, decisions of the COP and the CMA may be regarded as instruments of interpretation for treaty obligations; in some cases, they can also have autonomous legal force, and they may contribute to the development of customary rules when they help to establish the existence of an *opinio juris* among States.

(b) The principle of "common but differentiated responsibilities and respective capabilities, in the light of different national circumstances"[36]

43. In accordance with Article 4, paragraph 3, of the Paris Agreement, the terms of each party's nationally determined contribution must be commensurate with its "common but differentiated responsibilities and respective capabilities, in the light of [the] different national circumstances" of the States parties.

44. Article 4, paragraph 1, of the Paris Agreement thus recognizes that the global peaking of greenhouse gas emissions "will take longer for developing country Parties". Paragraph 4 of the same article states that "[d]eveloped country Parties should continue taking the lead by undertaking economy-wide absolute emission reduction targets", while developing country parties are simply encouraged to "continue enhancing their mitigation efforts, and . . . to move over time towards economy-wide emission reduction or limitation targets in the light of different national circumstances".

45. Consequently, in preparing and subsequently maintaining its nationally determined contribution, each State takes account of its "national circumstances", including not only its level of

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[34] Emphasis added.

[35] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, pp. 254-255, para. 70.

[36] Paris Agreement, fourth preambular para.

development, but also its past and present greenhouse gas emission levels, and even the size of its population and its economic, social and technical ability to contribute to climate change mitigation.

46. This interpretation of the Paris Agreement is consistent with State practice. In a Synthesis Report on the "[a]ggregate effect of the intended nationally determined contributions" published in 2016, the UNFCCC Secretariat noted, on the basis of an analysis of nationally determined contributions communicated by States, that:

> "[n]ational circumstances relevant to determining the fairness and ambition of the INDCs communicated by Parties include social, economic and geographical factors . . . In providing information on how they consider their INDC to be fair and ambitious, many Parties viewed responsibility directly or indirectly in the context of their past, current and future share in the global emissions and per capita emissions in comparison with global averages, as well as of the trends in one or several of those indicators."[37]

47. The reference to "common but differentiated responsibilities and respective capabilities, in the light of different national circumstances" in Article 4, paragraph 3, thus reflects the fact that these factors are taken into consideration by States when preparing and maintaining their nationally determined contributions.

48. However, this phrase does not relieve any party to the Paris Agreement of the obligation to prepare, communicate and maintain a contribution that reflects the highest possible ambition. Article 3 of the Paris Agreement expressly recalls in this regard that,

> "[a]s nationally determined contributions to the global response to climate change, *all Parties* are to undertake and communicate ambitious efforts as defined in Article[] 4 . . . with the view to achieving the purpose of this Agreement as set out in Article 2. The efforts of *all Parties* will represent a progression over time, while recognizing the need to support developing country Parties for the effective implementation of this Agreement."[38]

(c) The high level of ambition of the Paris Agreement

49. The terms of each party's nationally determined contribution must be commensurate with the level of ambition imposed by Article 4, paragraph 3, of the Paris Agreement, which requires the parties to fix their national contribution in accordance with the principle of non-regression, at a level that reflects the "highest possible ambition". This provision can be regarded as the treaty derivative of the due diligence principle, which is applied to a higher standard in the context of combating climate change[39].

50. First, every five years[40] States must progressively maintain their nationally determined contribution: each contribution must be more ambitious than the last. This requirement, which is enshrined in the principle of non-regression as set out in Article 17 of the Global Pact for the Environment, must guide each party when drawing up its new contribution. In this regard, all parties

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[37] *Aggregate effect of the intended nationally determined contributions: an update — Synthesis report by the secretariat*, FCCC/CP/2016/2, paras. 171-172.

[38] Emphasis added.

[39] See below, paras. 57 *et seq*.

[40] Paris Agreement, Art. 4, para. 9.

must abstain from any action that would reduce the global level of protection guaranteed by the existing contribution.

51. Second, the level of ambition adopted must be the "highest possible", which requires each party to do its utmost to prepare and maintain a national contribution commensurate with the challenges of combating climate change. This interpretation is supported by the decision adopted by consensus in 2015 during the Paris COP. Recognizing, among other things, that "climate change represents an urgent and potentially irreversible threat to human societies and the planet", the COP that adopted the Paris Agreement also decided "to ensure the highest possible mitigation efforts in the pre-2020 period"[41]. Decisions adopted by subsequent COPs confirm this. In 2018, for example, the COP "[s]tresse[d] the urgency of enhanced ambition in order to ensure the highest possible mitigation and adaptation efforts by all Parties"[42].

52. Therefore, the obligation for each State to show a high level of ambition in fixing its national contribution derives from the Paris Agreement itself and is confirmed by the practice developed by States within that framework.

53. To conclude on this point, all parties to the Paris Agreement have an obligation to prepare, communicate and maintain a national contribution. While "nationally" determined, the terms of that contribution must necessarily be ambitious, in view of, in particular, the global objective of limiting the average temperature increase to 1.5ºC above pre-industrial levels and the standard of the highest possible ambition imposed by the Paris Agreement.

2. *The obligation to pursue mitigation measures*

54. The obligation for each State to prepare, communicate and maintain a nationally determined contribution is supplemented by the obligation set out in Article 4, paragraph 2, of the Paris Agreement, pursuant to which "[p]arties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions". The phrase "domestic mitigation measures" refers to what the IPCC defines as "technologies, processes or practices that contribute to mitigation, for example, renewable energy (RE) technologies, waste minimization processes and public transport commuting practices"[43]. However, since the Paris Agreement is silent on the level ***(a)*** and precise content ***(b)*** of the measures to be taken in order to comply with this obligation, these two aspects should be clarified.

(a) The high level of ambition of domestic mitigation measures

55. The level of ambition required by the parties when adopting domestic mitigation measures derives from the Paris Agreement itself. As stated above[44], all parties must do their utmost, in good faith, when pursuing domestic measures to achieve their national objective. It would be illogical to require a State to establish a contribution that reflects "its highest possible ambition" if that State were not then expected to try to achieve it.

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[41] Decision 1/CP.21, *Adoption of the Paris Agreement*, FCCC/CP/2015/10/Add.1 (hereinafter "*Adoption of the Paris Agreement*"), para. 105.

[42] Decision 1/CP.24, *Preparations for the implementation of the Paris Agreement and the first session of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement*, FCCC/CP/2018/10/Add.1, para. 14.

[43] IPCC, *Glossary*, p. 554.

[44] See above, paras. 49 *et seq*.

56. Moreover, the high level of ambition that States must show in pursuing domestic mitigation measures, in keeping with their obligation under Article 4, paragraph 2, of the Paris Agreement, is reinforced when interpreted in the light of the customary principle of prevention.

57. Embodied in environmental and climate protection instruments[45] and referred to in international jurisprudence on to these matters,

> "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'"[46].

58. Although traditionally invoked in the bilateral context of relations between two neighbouring States, there is nothing to prevent this principle being applied in the global context of climate change. This would require two conditions to be met: the existence of a transboundary setting and of a risk of significant harm.

59. Turning first to the transboundary nature of the harm, it is not stipulated that this must be confined to the boundaries adjacent to the States in question. Nevertheless, it should be pointed out in this regard that the obligation incumbent on a State is an obligation to prevent damage to the environment of *another State* and not to prevent damage to the environment in general.

60. As regards the risk of significant harm, under customary international law, the standard of due diligence required by the principle of prevention depends in particular on the gravity of the risks involved. According to the Seabed Disputes Chamber of ITLOS, the standard of due diligence must "*be more severe* for *the riskier* activities"[47].

61. In its Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities, adopted in 2001[48], the ILC also states that in determining the "measures to be adopted in order to prevent significant transboundary harm or at any event to minimize the risk thereof", the following "factors and circumstances" are relevant: "*the degree of risk* of significant transboundary harm and of the availability of means of preventing such harm, or minimizing the risk thereof or repairing the harm", and "the risk of *significant* harm to the environment and the availability of means of preventing such harm, or minimizing the risk thereof or restoring the environment"[49].

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[45] *Declaration of the United Nations Conference on the Human Environment*, 1972, A/CONF.48/14/Rev.l, p. 3; *Rio Declaration on Environment and Development*, 1992, A/CONF.151/26 (Vol. I), p. 2; UNFCCC, ninth preambular para.

[46] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, pp. 55-56, para. 101, citing *Corfu Channel (United Kingdom* v. *Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 22.

[47] *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 43, para. 117 (emphasis added). See also, *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 242, para. 29; *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 (II)*, p. 706, para. 104; *Dispute over the Status and Use of the Waters of the Silala (Chile* v. *Bolivia), Judgment, I.C.J. Reports 2022 (II)*, p. 648, para. 99.

[48] Yearbook of the ILC, Report of the Commission to the General Assembly on the work of its fifty-third session, "International liability for injurious consequences arising out of acts not prohibited by international law", *ILC Yearbook*, 2001, Vol. II (2), A/CN.4/SER.A/2001/Add.1.

[49] *Ibid.*, p. 147, Arts. 9 and 10 (emphasis added).

62. The risk of significant harm from greenhouse gas emissions and the climate change they cause is maximal. The Summary for Policymakers in the Synthesis Report of the IPCC's most recent report, published on 20 March 2023, is clear in this regard. It recalls that human activities have unequivocally caused global warming[50]. It states that in the period from 2011 to 2020, the average global surface temperature reached 1.1°C above that of the years 1850 to 1900[51]. The IPCC notes that as a result of this warming, extreme weather events are growing in number and frequency, and are exposing millions of people to acute food insecurity and to variations in water quality and quantity, leading to supply issues and a growing risk of water-related disasters (floods, erosion, etc.)[52]. Roughly half of the world's population currently experiences severe water scarcity for at least part of the year[53]. Ocean warming and ocean acidification are adversely affecting food production from fisheries in some oceanic regions[54] and, owing to unavoidable sea level rise, risks for coastal ecosystems, people and infrastructure are continuing to grow[55]. In all regions, increases in extreme heat events have resulted in human mortality and morbidity[56]. The IPCC further notes that climate change is also causing substantial harm to biodiversity. This is accompanied by increasingly irreversible losses in terrestrial, freshwater, cryospheric[57], and coastal and open ocean ecosystems. Mass mortality events have already been recorded on land and in the ocean, and some ecosystems are approaching the point of no return[58].

63. Applying to climate change the criteria for assessing the customary principle of prevention thus supports the interpretation that, in the face of harm of such magnitude and intensity, the standard of due diligence required has to be high. This is particularly true given that some consequences of climate change are irreversible.

(b) The content of domestic mitigation measures

64. Although the Paris Agreement does not specify the content of the measures expected of States under its Article 4, paragraph 2, the nature of that obligation, as clarified by customary international law, offers some insight in this regard.

65. First, Article 4, paragraph 2, of the Paris Agreement establishes an obligation of conduct, that is "an obligation to deploy adequate means, to exercise best possible efforts, to do the utmost, to obtain this result"[59]. This definition calls for three comments.

66. One, the parties to the Paris Agreement have a duty to act pursuant to Article 4, paragraph 2: they must take measures capable of achieving the aim of Article 4, paragraph 2, of the Paris Agreement, i.e. fulfilling the objectives of their nationally determined contributions.

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[50] IPCC, *Climate Change 2023: Synthesis Report — Summary for Policymakers*, p. 4, esp. para. A.1.

[51] *Ibid.*

[52] *Ibid.*, p. 5, para. A.2.

[53] *Ibid.*, p. 6, para. A.2.4.

[54] *Ibid.*

[55] *Ibid.*, p. 15, para. B.2.2.

[56] *Ibid.*, p. [6], para. A.2.5.

[57] The "cryosphere" is the name given to the frozen regions of our planet.

[58] IPCC, *Climate Change 2023: Synthesis Report—Summary for Policymakers*, p. [5], para. A.2.[3].

[59] *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 41, para. 110.

67. Two, and this characteristic is typical of climate-related obligations of conduct[60], this obligation is flexible and adaptable both to changes in scientific knowledge and understanding and to the respective circumstances and capabilities of each State. As such, the Paris Agreement takes account of the level of development of each State in defining the content and pace of the measures taken to reach carbon neutrality[61].

68. Three, although the content of the domestic measures expected of States is not set forth in the Paris Agreement, the obligation incumbent on States in this regard must be interpreted in the light of both the criteria applicable to any obligation of conduct and the other provisions of the Paris Agreement. First,

> "the measures taken must be necessary, appropriate and effective, i.e. they must contribute to the fulfilment of the objective to be achieved. In this respect, there must be a link between the measure taken and the objective to be achieved, in the sense that the measure must have the potential to be effective"[62].

69. Second, the customary principle of prevention is relevant here too, in so far as it provides insight into the nature of the domestic measures to be taken by States in order to comply with their obligation under Article 4, paragraph 2, of the Paris Agreement.

70. Hence, as the Court has stated, the principle of prevention entails an obligation for States to adopt appropriate rules and appropriate sanctions[63]. These obligations have also been recalled by the arbitral tribunal in the *South China Sea*[64] case, and by the Seabed Disputes Chamber and ITLOS[65]. The latter has observed that States should adopt appropriate legislation to deter and control unlawful conduct, while also providing for sanctions "sufficient to deter violations and to deprive offenders of the benefits accruing from their . . . activities"[66].

71. In addition, the principle of prevention entails an obligation for States to undertake (or to have undertaken by the relevant economic operators) an environmental impact assessment and to ensure continuous monitoring of any activity that may have a significant transboundary environmental impact[67]. The Court observes 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

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[60] J. Brunnée, "Procedure and Substance in International Environmental Law", *Collected Courses of the Hague Academy of International Law*, Vol. 405, 2020, p. 188.

[61] See above, paras. 43 *et seq*.

[62] P. d'Argent, "Les obligations internationales", *Collected Courses of the Hague Academy of International Law*, Vol. 417, 2021, p. 176, para. 254.

[63] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p. 79, para. 197.

[64] *The South China Sea Arbitration (The Republic of Philippines* v. *The People's Republic of China)*, PCA case No. 2013-19, Arbitral Award of 12 July 2016, paras. 964, 974.

[65] *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 68, para. 218.

[66] *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015, ITLOS Reports 2015*, p. 42, para. 138.

[67] *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 (II)*, p. 706, para. 104.

> activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource. Moreover, due diligence, and the duty of vigilance and prevention which it implies, would not be considered to have been exercised, if a party planning works liable to affect the [environment] did not undertake an environmental impact assessment on the potential effects of such works."[68]

72. The Court further recalls that due diligence by States no longer applies to industrial activities alone, but to "all activities which take place under the jurisdiction and control of each party"[69]. According to the Court,

> "[i]t is an obligation which entails not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as the monitoring of activities undertaken by such operators, to safeguard the rights of the other party"[70].

73. Consequently, although the Paris Agreement does not specify either the level of ambition or the content of the domestic measures expected of States under its Article 4, paragraph 2, these can be clarified in the context of the other provisions of the Agreement and in the light of States' customary obligations in environmental matters.

B. Obligations to protect natural sinks and reservoirs of greenhouse gases

74. In accordance with Article 1 of the UNFCCC, a "reservoir" means "a component or components of the climate system where a greenhouse gas or a precursor of a greenhouse gas is *stored*"[71]. The term "sink", for its part, means "any process, activity or mechanism which *removes* a greenhouse gas, an aerosol or a precursor of a greenhouse gas from the atmosphere"[72]. According to the IPCC, an ecosystem is "a functional unit consisting of living organisms, their non-living environment and the interactions within and between them"[73], while biodiversity means "the variability among living organisms from all sources, including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part"[74].

75. Therefore, from a terminological point of view, whether biomass, cryosphere, ocean or plant, natural sinks and reservoirs of greenhouse gases are ecosystems whose biodiversity affects climate change. As early as 2002, the IPCC thus stated that

> "[c]hanges in biodiversity at ecosystem and landscape scale, in response to climate change and other pressures (e.g., changes in forest fires and deforestation), would

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[68] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p. 83, para. 204.

[69] *Ibid.*, p. 79, para. 197.

[70] *Ibid.*

[71] UNFCCC, Art. 1, para. 7 (emphasis added).

[72] UNFCCC, Art. 1, para. 8 (emphasis added). See also IPCC, *Glossary*, p. 558.

[73] IPCC, *Glossary*, p. 547.

[74] *Ibid.*, p. 543, which cites Art. 2 of the Convention on Biological Diversity.

> further affect global and regional climate through changes in the uptake and release of greenhouse gases and changes in albedo and evapotranspiration"[75].

76. Recalled in subsequent reports of the IPCC in 2020[76] and 2023[77], this inextricable link between biodiversity — which includes the various ecosystems constituted by certain carbon sinks and reservoirs — and the climate is also mentioned in texts specific to these two areas.

77. For instance, the preamble of the UNFCCC emphasizes "the role and importance in terrestrial and marine ecosystems of sinks and reservoirs of greenhouse gases" (para. [4]), and Article 4, paragraph 1 *(d)*, of that instrument provides, *inter alia*, that the parties shall

> "[p]romote sustainable management, and promote and cooperate in the conservation and enhancement, as appropriate, of sinks and reservoirs of all greenhouse gases not controlled by the Montreal Protocol, *including* biomass, forests and oceans as well as other terrestrial, coastal and marine ecosystems"[78].

78. For its part, the preamble of the Paris Agreement confirms "the importance of the conservation and enhancement, as appropriate, of sinks and reservoirs of the greenhouse gases"[79].

79. Further, in 2019 the COP of the Convention on Biological Diversity (hereinafter the "CBD") adopted (and in 2022[80] recalled) voluntary guidelines for the design and effective implementation of ecosystem-based approaches to climate change adaptation and disaster risk reduction, noting that

> "escalating destruction, degradation and fragmentation of ecosystems would reduce the capacity of ecosystems to store carbon and lead to increases in greenhouse gas emissions, reduce the resilience and stability of ecosystems, and make the climate change crisis ever more challenging"[81].

80. As recognized by the States parties to the UNFCCC during the COP26 in Glasgow, protecting sinks and reservoirs of greenhouse gases is just as important as greenhouse gas reduction obligations "to achiev[ing] the long-term global goal of the Convention"[82]. It follows from this that States have an obligation to protect all natural carbon sinks and reservoirs (**1**), and forests and the marine environment, in particular (**2**).

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[75] IPCC, *Climate Change and Biodiversity*, 2002, available at: https://archive.ipcc.ch/pdf/technical-papers/climate-changes-biodiversity-en.pdf, p. 2.

[76] IPBES-IPCC Co-Sponsored Workshop on Biodiversity and Climate change — Workshop Report, 2020, available at: https://www.ipbes.net/events/ipbes-ipcc-co-sponsored-workshop-biodiversity-and-climate-change, p. 4.

[77] IPCC, *Climate Change 2023: Synthesis Report — Summary for Policymakers*, p. 6.

[78] UNFCCC, Art. 4, para. 1 *(d)*.

[79] Paris Agreement, twelfth preambular para.

[80] Decision 15/30, *Biodiversity and climate change*, CBD/COP/DEC/15/30, 19 Dec. 2022.

[81] Decision 14/5, *Biodiversity and climate change*, CBD/COP/14/14, 20 Mar. 2019, fifth preambular para.

[82] Decision 1/CP.26, *Glasgow Pact*, FCCC/CP/2021/12/Add.1, para. 21.

1. *General obligations to protect natural carbon sinks and reservoirs*

81. The obligations of States to protect carbon sinks and reservoirs must be interpreted, where appropriate, in the light of international instruments for the protection of biodiversity. The obligations in question fall into two categories.

82. First, under Article 4 of the UNFCCC, States must *undertake* to develop and periodically update "national inventories of anthropogenic emissions by sources and removals by sinks of all greenhouse gases"[83], as well as "national and, where appropriate, regional programmes containing measures to mitigate climate change by addressing anthropogenic emissions by sources and removals by sinks of all greenhouse gases"[84]. The Paris Agreement also stipulates that each party must regularly produce a "national inventory report of anthropogenic emissions by sources and removals by sinks of greenhouse gases"[85].

83. Second, under Article 4, paragraph 2 *(a)*, of the UNFCCC, all developed country parties included in Annex I "shall . . . take . . . measures on the mitigation of climate change, by . . . protecting and enhancing [their] greenhouse gas sinks and reservoirs". Article 5, paragraph 1, of the Paris Agreement, for its part, states that *all* "[p]arties should take action to conserve and enhance, as appropriate, sinks and reservoirs of greenhouse gases as referred to in Article 4, paragraph 1 (d), of the Convention"[86].

84. This provision must be read in conjunction with Article 4, paragraph 2, of the Paris Agreement, pursuant to which "[p]arties shall pursue domestic mitigation measures, with the aim of achieving the objectives" fixed by their nationally determined contributions. It must also be interpreted in the light of the obligation of conduct contained in the aforementioned Article 4, paragraph 2 *(a)*, of the UNFCCC and the higher standard of due diligence required in combating climate change, as set out above[87].

85. It can be deduced from Article 5, paragraph 1, of the Paris Agreement, interpreted in the light of the treaty's other provisions and having regard to its object and purpose, that the parties have an obligation of conduct to take action to protect and enhance sinks and reservoirs of greenhouse gases found on their territory. Indeed, a party that fails to take action to prevent the degradation of its natural carbon sinks and reservoirs could not be considered to be acting in a manner consistent with the high level of ambition required to achieve the collective objective of the Paris Agreement.

86. The measures expected of States are not specified. Nevertheless, here too, account must be taken of the collective aim of the Paris Agreement, of the national circumstances and common but differentiated responsibilities and respective capabilities of States, and of the high level of ambition required in combating climate change.

87. Once again, in the absence of information as to the precise content of the measures that States are expected to take to satisfy this obligation of conduct, it may be helpful to consider other

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[83] Art. 4, para. 1 *(a)*.

[84] Art. 4, para. 1 *(b)*.

[85] Art. 13, para. 7 *(a)*.

[86] Paris Agreement, Art. 5, para. 1.

[87] See above, paras. 49 *et seq*.

instruments applicable to inter-State relations. In this regard, texts relating specifically to the protection of ecosystems, foremost among which is the CBD signed at Rio on 5 June 1992, appear to be particularly relevant.

88. Adopting such a systematic approach with regard to the Paris Agreement is justified in two respects. First, both the Paris Agreement and the CBD are governed by common fundamental principles, such as the sovereign rights of States over their resources (fourth preambular paragraph; Article 3) and the common but differentiated responsibilities of States (fifteenth preambular paragraph), and both crystallize a high standard of due diligence. For instance, the CBD's eighth preambular paragraph states that "it is *vital* to anticipate, prevent and attack the causes of significant reduction or loss of biological diversity"[88]. Second, one of the principal objectives of the CBD — "the conservation of biological diversity" — set out in its Article 1, is closely akin to Article 5, paragraph 1, of the Paris Agreement, which obliges parties to "conserve and enhance, as appropriate, sinks and reservoirs of greenhouse gases". Indeed, maintaining biological diversity also entails preserving the diversity of ecosystems[89], which in turn include carbon sinks and reservoirs.

89. Unlike the Paris Agreement, the CBD sets forth the measures expected of States for the purpose of conserving biodiversity: these include planning, identification and monitoring actions (Articles 6 and 7 of the CBD) and *in-* and *ex-situ* conservation measures (Articles 8, 9 and 26 of the CBD).

90. Under the Paris Agreement, States therefore have an obligation to take action to protect natural carbon sinks and reservoirs, the content of which can be clarified thanks to instruments specifically addressing the protection of biodiversity, be they general like the CBD, or sector-specific like the texts applicable to certain natural carbon sinks.

2. *Specific obligations to protect certain natural carbon sinks: forests and the marine environment*

91. Since it is not possible to address States' obligations of protection in respect of all natural carbon sinks here, France will mention only two such sinks that are of particular importance: forests ***(a)*** and the marine environment ***(b)***.

(a) Forests

92. The important role that forests play in climate regulation has long been recognized by the IPCC. The Summary for Policymakers in the Special Report on Forestry adopted by States and published in 2000 noted that

> "[t]errestrial ecological systems, in which carbon is retained in live biomass, decomposing organic matter, and soil, play an important role in the global carbon cycle. Carbon is exchanged naturally between these systems and the atmosphere through photosynthesis, respiration, decomposition, and combustion."[90]

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[88] Emphasis added.

[89] CBD, Art. 2.

[90] IPCC, *Special Report on Land Use, Land-Use Change, and Forestry — Summary for Policymakers*, 2000, available at: https://www.ipcc.ch/site/assets/uploads/2018/03/srl-en-1.pdf, p. 3, para. 5.

93. Consequently, harm caused to forests leads to the capture of fewer greenhouse gases present in the atmosphere and the release into the atmosphere of greenhouse gases previously stored in the forest biomass, and contributes to climate change. Given the scale of the phenomenon, the objective of the UNFCCC and the Paris Agreement cannot reasonably be achieved without effective action from States against deforestation and forest degradation. During the COP28, States clearly emphasized "the importance [towards achieving the Paris Agreement temperature goal] of . . . enhanced efforts towards halting and reversing deforestation and forest degradation by 2030"[91].

94. This view is widely shared by States, which have made various declarations on forests[92]. For instance, in 2007, the United Nations General Assembly adopted by consensus the non-legally binding instrument on all types of forests, which recognizes "the impact of climate change on forests and sustainable forest management, as well as the important contributions that forests can make to addressing climate change"[93].

95. Article 5 of the Paris Agreement also underscores this essential role, by placing more emphasis on forests than on any other carbon sink. In accordance with Article 5, paragraph 1, parties must take action to protect "sinks and reservoirs of greenhouse gases . . ., *including forests*"[94]. Article 5, paragraph 2, encourages parties to take action to implement policy approaches both for "activities relating to reducing emissions from deforestation and forest degradation, and the role of conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries", and for "the integral and sustainable management of forests".

96. The degradation of forests has negative repercussions on the climate system, first, because it contributes to global warming and its ensuing adverse effects, and, second, because the objective of limiting the global average temperature increase to 1.5°C above pre-industrial levels, as set out in the Paris Agreement, cannot be achieved without action to protect these carbon sinks.

97. This requirement was firmly underlined at the One Forest Summit held in March 2023, during which more than 20 States gathered in Libreville in search of solutions to ensure the protection of tropical forests. The Summit's participants emphasized in particular that "the fight against climate change [cannot be won] without tropical forests, which are one of the world's key carbon sinks". They also drew attention to the need to "urgently stop and reverse deforestation by 2030"[95]. Further to the One Forest Summit, France and its partners launched a "country package for Forest, Nature and Climate for Papua New Guinea", with a view to increasing funding for forests and identifying innovative financing solutions[96].

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[91] *First Global Stocktake*, para. 33.

[92] *Non-legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests*, A/CONF.151/26 (Vol. III), Ann. III, principle 1 *(a)*; decision 2/CP.13, *Reducing emissions from deforestation in developing countries*, FCCC/CP/2007/6/Add.1, third and fourth preambular paras.

[93] General Assembly resolution 62/98 of 17 Dec. 2007.

[94] Emphasis added.

[95] The "Libreville Plan", 2 Mar. 2023, available at: https://oneplanetsummit.fr/en/events-16/one-forest-summit-245.

[96] *Joint statement on a country package for Forests, Nature and Climate with Papua New Guinea*, 28 July 2023, available at: https://www.elysee.fr/en/emmanuel-macron/2023/07/28/joint-statement-on-a-country-package-for-forests-nature-and-climate-with-papua-new-guinea.

98. It follows from these various elements that the Court should state that the UNFCCC and the Paris Agreement, read in the light of the customary principles of good faith and prevention, oblige every State "to use all the means at its disposal"[97] to conserve and "enhance"[98] its forests. The conservation measures taken are to be determined by each State, in view of the principle of permanent sovereignty over natural resources, bearing in mind the capacity of forests to absorb and store greenhouse gases, in line with the objectives of the Paris Agreement.

(b) The marine environment

99. The IPCC's report on "the Ocean and Cryosphere in a Changing Climate" makes clear the key role that the ocean plays in reducing greenhouse gas emissions:

> "[n]inety-two percent of the carbon on Earth that is not locked up in geological reservoirs (e.g., in sedimentary rocks or coal, oil and gas reservoirs) resides in the ocean . . . Most of this is in the form of dissolved inorganic carbon, some of which readily exchanges with CO2 in the overlying atmosphere. *This represents a major control on atmospheric CO2 and makes the ocean and its carbon cycle one of the most important climate regulators in the Earth system, especially on time scales of a few hundred years and more*."[99]

100. The importance of the ocean as a carbon sink is now widely recognized. In the Lisbon Declaration "Our Ocean, Our Future, Our Responsibility", adopted at the end of the Second United Nations Ocean Conference in June 2022, States thus recognize that

> "[t]he ocean is an important source of the planet's biodiversity and plays a vital role in the climate system and water cycle. The ocean provides a range of ecosystem services, supplies us with oxygen to breathe . . ., acts as a sink and reservoir of greenhouse gases and protects biodiversity"[100].

101. Both written and oral statements made by the parties to the advisory proceedings before ITLOS[101] also attest to the adverse effects of increases in greenhouse gas emissions on seas and oceans, which are nevertheless essential to climate regulation. In this regard, France, like others, and in keeping with an evolutive interpretation of Article 1, paragraph 1 (4), of the United Nations Convention on the Law of the Sea (hereinafter "UNCLOS"), considers that greenhouse gas emissions constitute pollution of the marine environment.

102. First, obligations to ensure the protection of the ocean arise from UNCLOS[102]. Article 194 of that instrument provides, *inter alia*, that 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". This obligation, like the whole of Part XII, must be

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[97] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p. 45, para. 101.

[98] Paris Agreement, Art. 5, para. 1.

[99] IPCC, *Special Report on the Ocean and Cryosphere in a Changing Climate*, 2019, available at: https://www.ipcc.ch/site/assets/uploads/sites/3/2022/03/SROCC_FullReport_FINAL.pdf?bcsi_scan_08ef23fd69ee142d=0&bcsi_scan_filename=SROCC_FullReport_FINAL.pdf, p. 80 (emphasis added).

[100] *Our Ocean, Our Future, Our Responsibility*, 2022, A/CONF.230/2022/12, para. 3.

[101] See above, para. 16.

[102] Montego Bay, 10 Dec. 1982, *UNTS*, Vol. 1834, No. 31363.

read in the light of the general obligation set out in Article 192, which provides that "States have the obligation to protect and preserve the marine environment".

103. The obligations to prevent, reduce and control pollution, as well as those to protect and preserve the marine environment, are obligations of conduct and, as a result, require States to take the measures necessary to that end, giving due consideration to the degree of risk of significant harm to the marine environment. As demonstrated above[103], and in view of the need for urgent action, States have a duty to be ambitious in implementing those measures and to take account of the principle of common but differentiated responsibilities and respective capabilities. In this regard, the general obligation of prevention also includes an obligation to co-operate, which "is a fundamental principle in the prevention of pollution of the marine environment under Part XII of [UNCLOS] and general international law"[104].

104. States also have an obligation to "[m]onitor[] . . . the risks or effects of pollution" (Article 204 of UNCLOS), to publish reports of the results obtained (Article 205 of UNCLOS) and to assess the potential effects of "planned activities under their jurisdiction or control" that "may cause substantial pollution of or significant and harmful changes to the marine environment" (Article 206 of UNCLOS). The Agreement under UNCLOS on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction of 2023 (known as the "BBNJ Agreement") also includes a section on environmental impact assessments, giving effect and concrete expression to the obligation enshrined in Article 206 of the Convention.

105. In addition, pursuant to Articles 237 and 311, paragraph 2, of UNCLOS, the obligations of States to protect the marine environment arise from any instrument compatible with the Convention. It is with this in mind that the legal undertakings of the parties, particularly in climate matters, and the UNFCCC and Paris Agreement specifically, should be considered and applied, in accordance with the need for coherence.

106. These proceedings are not intended to focus on the obligation to protect the marine environment from the effects of climate change. For the sake of convenience, France refers in this regard to the written and oral observations it presented during the proceedings on climate change and international law instituted before ITLOS[105].

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107. The obligations incumbent on States to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for

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[103] See above, paras. 55 *et seq*.

[104] *MOX Plant (Ireland* v. *United Kingdom), Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001*, p. 110, para. 82.

[105] *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*, Written Statement of France, 16 June 2023, available at: https://www.itlos.org/fileadmin/itlos/documents/cases/31/written_statements/1/C31-WS-1-19-France_translation_ITLOS.pdf.

present and future generations fall into two categories, therefore. First, States have obligations to reduce greenhouse gas emissions, most notably the obligation to prepare, communicate and maintain a nationally determined contribution and the obligation to pursue domestic measures of the highest possible ambition. Second, States have obligations to protect carbon sinks and reservoirs such as forests and the marine environment.

108. Obligations to ensure the protection of the climate system and other parts of the environment must also be interpreted with regard to human rights.

II. Obligations to ensure the protection of the climate system and other parts of the environment from greenhouse gas emissions with regard to human rights

109. As stated in the preamble of the Paris Agreement[106], obligations to ensure the protection of the climate system and other parts of the environment must be interpreted in a manner that is harmonious and consistent with human rights obligations (**A**), according to procedures that should be specified (**B**).

A. The need to interpret obligations to ensure the protection of the climate system and other parts of the environment in a manner that is harmonious with human rights

110. Resolution 77/276 asks the Court to answer the questions posed, "[h]aving particular regard to" the International Covenant on Civil and Political Rights (hereinafter the "ICCPR"), the International Covenant on Economic, Social and Cultural Rights (hereinafter the "ICESCR") and the rights recognized in the Universal Declaration of Human Rights (hereinafter the "UDHR").

111. The object of these instruments is not the protection of the climate system and other parts of the environment *as such*, which are the focus the questions put to the Court. Under the UDHR, the ICCPR and the ICESCR, it is "*individuals*" or "*peoples*" who are established as the holders of rights, and not the climate system or specific parts of the environment.

112. Nevertheless, several factors call for obligations to ensure the protection of the climate system and other parts of the environment to be interpreted in a manner that is harmonious with human rights, specifically the references to such rights in the relevant climate texts (**1**) and the already well-established effects of climate change on human rights (**2**).

1. *References to human rights in international instruments on climate change*

(a) General reference to the duty to respect, promote and consider human rights

113. Within the framework of the UNFCCC, the need to take account of human rights in combating climate change has been made clear since 2010, with the decision of the Conference of the Parties to the UNFCCC on the Cancun Agreements, pursuant to which "Parties should, in all climate change related actions, fully respect human rights"[107]. This call to respect human rights in

[106] See below, paras. 113 *et seq*.

[107] 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, para. 8.

combating climate change also appears in the Paris Agreement, the preamble of which acknowledges that

> "climate change is a common concern of humankind, [and that] parties should, when taking action to address climate change, 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, the empowerment of women and intergenerational equity"[108].

114. The preamble of the Paris Agreement does not create new human rights obligations for the States parties. However, it does note the human dimension of climate change, and it observes that States parties to the Paris Agreement also have human rights obligations that must be taken into account when taking climate action. In other words, the preamble of the Paris Agreement sets out the need for every State party to perform its obligations under the Paris Agreement in the light of its existing obligations under international human rights law.

115. The preamble of the Paris Agreement thus points to the need for that instrument to be interpreted in a manner that is harmonious with human rights. Such a systematic interpretation is in keeping with the rules of treaty interpretation recalled in the introduction to this statement[109].

116. How this interpretation is to be conducted must be made clear, since the rationale behind States' human rights obligations, which relate to the protection of individual rights, is not the same as that behind the obligations provided for in the UNFCCC and the Paris Agreement, founded on a global, collective objective of the States parties.

(b) Other references to human rights and related concepts

117. As well as the direct reference to States' respective human rights obligations in its preamble, the Paris Agreement also contains other indirect references to human rights and related concepts. It is worth drawing attention to two points in particular.

118. First, the preamble of the Paris Agreement states that when taking action to address climate change, parties should consider intergenerational equity[110]. In this respect, international human rights law does not recognize generations, present or future, as the holders of rights. Nevertheless, protecting human rights through the prism of the principle of intergenerational equity entails an intertemporal dimension. Several national courts of law have recently given form to this principle in the interpretation of environmental rights. In France, the *Conseil constitutionnel* concluded from Article 1 and the preamble of the Charter for the Environment (an integral part of the constitutional corpus) that

> "in adopting measures capable of causing serious and long-term harm to a balanced environment which shows due respect for health, the legislator must ensure that the choices designed to meet the needs of the present generation do not jeopardise the ability

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[108] Paris Agreement, preamble.

[109] See above, para. 13.

[110] Paris Agreement, preamble.

of future generations and other peoples to meet their own needs, by safeguarding their freedom of choice in this regard"[111].

119. Second, certain provisions of the Paris Agreement include references to the procedural rights of individuals in environmental matters. Of particular relevance are public participation and public access to information in relation to climate change, as mentioned in Article 12 of that instrument.

2. *The proven effects of climate change on human rights*

120. It is scientifically established that climate change has and will have potentially grave direct and indirect effects on the living conditions of individuals, particularly those who are already in vulnerable situations. Because of this, climate change is likely to have serious consequences for the effective enjoyment of human rights[112]. The IPCC's Working Group III warned specifically of the threat to human rights posed by climate change in its contribution to the Panel's sixth Assessment Report:

> "Climate change effects and related disasters have the potential to affect human rights broadly, for instance, by giving rise to deaths, disease or malnutrition (right to life, right to health), threatening food security or livelihoods (right to food), impacting upon water supplies and compromising access to safe drinking water (right to water), destroying coastal settlements through storm surge (right to adequate housing), and in some cases forcing relocation as traditional territories become uninhabitable"[113].

121. These already perceptible effects of climate change show that climate inaction is the course of action most likely to have grave implications for people's living conditions and, consequently, for human rights. This observation calls for decisive climate action.

122. The IPCC's Working Group III has observed that action taken in response to climate change, be it measures of mitigation or adaptation, may also affect human rights[114].

123. The Court has previously recognized the interdependence between the environment and people's living conditions, notably observing that "the environment is not an abstraction but

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[111] *Conseil constitutionnel*, 27 Oct. 2023, *Association Meuse nature environnement et autres*, decision No. 2023-1066 QPC, para. 6.

[112] For a precise description of the effects of climate change on ecosystems and human societies: IPCC, *Climate Change 2022: Impacts, Adaptation and Vulnerability*, 2022, available at: https://www.ipcc.ch/report/ar6/wg3/downloads/report/IPCC_AR6_WGIII_FullReport.pdf (hereinafter "*Climate Change 2022: Mitigation of Climate Change*").

[113] IPCC, *Climate Change 2022: Mitigation of Climate Change*, p. 1499, referring to the work of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, A/74/161 (2019); Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights, A/HCR/10/61, 15 Jan. 2009, paras. 20-41; Second issues paper by the Co-Chairs of the Study Group on sea-level rise in relation to international law, ILC, A/CN.4/752, 19 Apr. 2022, para. 251; resolutions adopted by the Human Rights Council "Human rights and climate change", A/HCR/RES/38/4 (2018), A/HCR/RES/41/21 (2019), A/HCR/RES/44/7 (2020), A/HCR/RES/47/24 (2021), A/HCR/RES/50/9 (2022), A/HCR/RES/53/6 (2023).

[114] IPCC, *Climate Change 2022: Mitigation of Climate Change*, p. 1499.

represents the living space, the quality of life and the very health of human beings, including generations unborn"[115].

124. Owing to this interdependence, the effects of climate change are likely to have an impact on several rights guaranteed by the ICCPR and the ICESCR, including, but not limited to, the right to life recognized in Article 3 of the UDHR and guaranteed by Article 6 of the ICCPR, the right to respect for private and family life recognized in Article 12 of the UDHR and guaranteed by Article 17 of the ICCPR, the right to adequate housing guaranteed by Article 11 of the ICESCR, and the right of everyone to the enjoyment of the highest attainable standard of physical and mental health guaranteed by Article 12 of the ICESCR. In several parts of the world, the effects of climate change also pose a threat to the full realization of rights to water and sanitation, recognized as essential for the full enjoyment of life and all human rights by the United Nations General Assembly (resolution 64/292) and deriving from the right to an adequate standard of living guaranteed by Article 11, paragraph 1, of the ICESCR[116].

125. In addition, it is worth noting that it is women who are often the first victims of climate change, but who are also leading the fight against it, owing to their role in production (they are preponderant in agriculture) and access to resources. It is important, in view of this, to promote climate solutions that are fair from a gender perspective, particularly at the local and rural level.

126. Lastly, it is also established that the effects of climate change are drivers of increased global population displacement[117]. France notes the importance of taking into account the effects of such climate-induced displacement on the human rights of those concerned.

127. The IPCC has likewise called attention to the interdependence between climate change and the implementation of individual rights in its most recent reports. The United Nations Human Rights Council drew attention to this interdependence in its resolution 43/18 of 8 October 2021, while simultaneously recognizing "the right to a clean, healthy and sustainable environment as a human right that is important for the enjoyment of human rights". The United Nations General Assembly acknowledged the link between climate change and human rights in its resolution A/76/300 of 28 July 2022, and recognized the "right to a clean, healthy and sustainable environment as a human right . . . related to other rights and existing international law", whose promotion "requires the full implementation of the multilateral environmental agreements under the principles of international environmental law".

B. Interpreting obligations to ensure the protection of the climate system and other parts of the environment in a manner harmonious with human rights

128. Interpreting the Paris Agreement in a manner that is harmonious with human rights requires States parties to consider their human rights obligations at every stage of drawing up, adopting and implementing their climate policies.

129. In this regard, international human rights law — and the ICCPR and ICESCR in particular — does not impose a specific obligation of mitigation. States' obligations in this area are

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[115] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 226, para. 29.

[116] General Assembly resolution 70/196 of 17 Dec. 2015.

[117] IPCC, *Climate Change 2023: Synthesis Report — Summary for Policymakers*, p. 6, para. A.2.5.

established by the régime of the UNFCCC and the Paris Agreement. As recalled above[118], under Article 4 of the Paris Agreement, States parties are obliged to prepare, communicate and maintain a nationally determined contribution based on several factors, and to pursue domestic measures to achieve the objectives thus fixed.

130. The human rights obligations of States must not be overlooked in this context. International human rights law imposes obligations on States to prevent risks to the rights of persons under their jurisdiction (**1**). Interpreting the Paris Agreement in a manner harmonious with human rights means that those obligations should guide the implementation of the obligations relating to climate change mitigation set out in the Paris Agreement (**2**).

1. *Identifying the relevant obligations and the holders of rights*

131. Reconciling obligations to combat climate change and human rights obligations requires that account be taken of the specific nature of those obligations.

132. Consideration must first be given to the scope of application of States' human rights obligations.

133. Indeed, the human rights obligations of States are limited in application to the State's "territory" or "jurisdiction". Under Article 2, paragraph 1, of the ICCPR, "[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant". The Court considers in this regard that the ICCPR is applicable on the national territory of and "in respect of acts done by a State in the exercise of its jurisdiction outside its own territory"[119]. It follows from this that the ICCPR is not applicable to persons outside the effective power or control of the State.

134. As for the ICESCR, the Court considers that "this Covenant guarantees rights which are essentially territorial", but does not exclude that it applies "both to territories over which a State party has sovereignty and to those over which that State exercises territorial jurisdiction"[120]. In the context of climate change, the human rights obligations of States are thus applicable only in respect of persons under their jurisdiction.

135. Second, reconciling obligations to combat climate change and human rights obligations requires that account be taken of the "positive" nature of some of those obligations.

136. These positive obligations may be generally understood as including both an obligation for States to have a legal and regulatory framework that respects human rights and seeks to prevent the breaching of those rights, and an obligation to take measures to prevent foreseeable risks of human rights violations, whether by State organs or private actors. Whereas the obligation to *have* a legal and regulatory framework is one of result, the obligation to *take measures* to prevent risks for human rights is one of conduct or due diligence, which is to be performed by the State vis-à-vis

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[118] See above, paras. 23 *et seq*.

[119] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 180, para. 111.

[120] *Ibid*., p. 136, para. 112.

foreseeable risks for the exercise of human rights by persons under its jurisdiction[121]. With regard to Article 6 of the ICCPR, the Human Rights Committee has ruled in particular that

> "States parties are . . . under a due diligence obligation to undertake reasonable positive measures, which do not impose on them disproportionate burdens, in response to reasonably foreseeable threats to life originating from private persons and entities, whose conduct is not attributable to the State"[122].

137. International human rights law affords States a degree of discretion in choosing what action to take to fulfil their international obligations, particularly in complex areas that require the balancing of sometimes conflicting interests. For instance, the European Court of Human Rights has previously stated that account must be taken of the operational choices that the national authorities have to make in terms of priorities and resources, thus recognizing that States enjoy a margin of appreciation in difficult social and technical spheres[123].

138. The level of due diligence required of States in preventing risks for human rights is determined by the context of each given situation and has been defined in various ways by international human rights bodies, depending on the right at issue. Generally speaking, the State must take all "appropriate", "necessary" or "reasonable" measures to prevent risks of violations of the rights of those under its jurisdiction[124].

139. Consequently, although States' positive human rights obligations do not stipulate specific measures to be adopted, they nevertheless oblige States to take all appropriate measures to prevent foreseeable harm to the rights of persons under their jurisdiction. The level of due diligence required may also evolve over time, to keep pace with changes in the risk environment and in the individual circumstances of each State.

2. *The taking into account of these obligations in implementing obligations to ensure the protection of the climate system and other parts of the environment*

140. The incorporation of the above-mentioned principles into the implementation of States' obligations to ensure the protection of the climate system and other parts of the environment from greenhouse gas emissions calls for two observations.

141. First, the integration of a human rights perspective must have a bearing on the choices made by States in respect of the mitigation action set forth in the Paris Agreement ***(a)***. Second, the taking into account of human rights calls for individuals to be involved in the development of

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[121] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), I.C.J. Reports 2005*, p. 231, paras. 178-179, p. 245, para. 211, and p. 280, para. 345.

[122] Human Rights Committee (hereinafter "HRC"), General Comment No. 36 (Article 6: right to life), CCPR/C/GC/36, 3 Sep. 2019, para. 2[1].

[123] European Court of Human Rights (hereinafter "ECHR"), *Öneryildiz* v. *Turkey* [GC], No. 48939/99, 30 Nov. 2004, para. 107. See also ECHR, *Osman* v. *United Kingdom* [GC], No. 23452/94, 28 Oct. 1998, para. 116.

[124] HRC, General comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, HRI/GEN/1/Rev.1 (2004), para. 8; African Commission on Human and Peoples' Rights, *Zimbabwe Human Rights NGO Forum* v. *Zimbabwe* (No. 245/2002), 40th session, 15-29 Nov. 2006, Twenty-First Activity Report of the African Commission on Human and Peoples' Rights, EX.CL/322 (X), pp. 54 *et seq*., paras. 143, 146, 147.

measures to combat climate change, in particular by ensuring their rights to information, participation and access to justice ***(b)***.

(a) Consideration of foreseeable risks for human rights in implementing the mitigation-related obligations of States

142. As noted above[125], international human rights law does not provide for a specific obligation of mitigation[126]. Nevertheless, interpreting the Paris Agreement in a manner that is harmonious with the applicable human rights obligations set out above has implications for the way in which States parties to the Paris Agreement must perform their obligations relating to mitigation, in particular Article 4 of the Paris Agreement.

(i) Preparing the nationally determined contribution

143. The human rights obligations of States, in particular their obligation of due diligence with regard to threats to the rights of persons under their jurisdiction, must be taken into account by States when preparing their nationally determined contribution.

144. This obligation of due diligence does not impose a specific objective on the State in terms of mitigation. However, since the current state of scientific knowledge suggests that the effects of climate change are likely to have a grave impact on the enjoyment of human rights, the positive human rights obligations of States must be understood, in the context of climate change, as imposing a high standard of due diligence vis-à-vis the risks for human rights caused by the effects of climate change.

145. This ambition as regards human rights must be taken into account by the State party when preparing, communicating and maintaining its nationally determined contribution[127]. A high level of human rights due diligence in the context of climate change is thus part of a dynamic approach that takes account of the changing risks posed to the rights of persons under the jurisdiction of each State and the need, recalled in Article 4, paragraph 3, of the Paris Agreement, to reflect the highest possible ambition in mitigating climate change.

(ii) Choosing domestic measures

146. The human rights obligations of States also have a role to play in the choice of domestic mitigation measures taken by States parties to the Paris Agreement with a view to achieving the objectives of their nationally determined contribution, in accordance with Article 4, paragraph 2, of the Paris Agreement.

147. Indeed, mitigation objectives can be implemented in a variety of ways. Not all are compatible with every State's human rights obligations. Moreover, the positive human rights obligations of States call for mitigation choices tailored to the specific risks for those under their jurisdiction. Although each State enjoys a margin of discretion in choosing what particular measures to take in order to respect and protect the human rights of those under its jurisdiction, account must

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[125] See above, para. 129.

[126] See also on this point HRC, *Daniel Billy and others* v. *Australia*, Communication No. 3624/2019, 21 July 2022, paras. 8.5-8.8.

[127] Paris Agreement, Art. 4, para. 3. See above, paras. 26 *et seq*.

be taken of the specific risks for those persons posed by the effects of climate change when developing domestic mitigation measures. Choosing such measures that respect applicable human rights may also require States to strike a fair balance between sometimes conflicting interests.

148. France would also point out that mitigation measures taken under Article 4, paragraph 2, of the Paris Agreement must be guided by the need to preserve intergenerational equity. It is a question of ensuring that the choices designed to meet the needs of the present generation do not jeopardize the ability of future generations and other peoples to meet their own needs, by safeguarding their freedom of choice in this regard. In this context, it is vital to emphasize the value and importance of involving younger generations in the decisions taken to address climate change.

(b) Importance of involving individuals in the development of measures implementing obligations to ensure the protection of the climate system

149. France notes that interpreting the obligations provided for in the UNFCCC and the Paris Agreement in a manner that is harmonious with applicable human rights also extends to obligations relating to information and public participation laid down by those two régimes. In this regard, the applicable human rights will determine how mitigation-related decisions are to be taken, in a manner compatible with the rights of individuals.

(i) Information and public participation

150. Information and public participation are essential in combating climate change, in so far as they make it possible to ensure that the measures taken are tailored to needs, respect the democratic process and effectively protect the rights of individuals. As emphasized in Principle 10 of the Rio Declaration, "environmental issues are best handled with the participation of all concerned citizens, at the relevant level". According to the IPCC, this results in more effective and often more ambitious action against climate change[128].

151. In this respect, it is worth drawing attention to the commonalities between the obligations laid down by international environmental law and the rights guaranteed by human rights instruments.

152. Article 4, paragraph 1 *(i)*, of the UNFCCC states that parties shall "[p]romote and cooperate in education, training and public awareness related to climate change and encourage the widest participation in this process". Article 6 of the UNFCCC sets out the precise terms of these education, training and public awareness obligations.

153. Article 12 of the Paris Agreement emphasizes the importance of implementing these obligations to enhance the action taken to combat climate change:

> "Parties shall cooperate in taking measures, as appropriate, to enhance climate change education, training, public awareness, public participation and public access to information, recognizing the importance of these steps with respect to enhancing actions under this Agreement."

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[128] IPCC, *Climate Change 2023: Synthesis Report — Full Volume,* 2023, available at: https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_FullVolume.pdf, section 4.4, p. 101.

154. In international environmental law, other conventions address the obligations of States relating to public participation specifically. These include, in particular, the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters[129] (hereinafter the "Aarhus Convention") and the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean[130] (hereinafter the "Escazú Agreement"). These conventions set forth several obligations relating to public information[131], public participation[132] and access to justice in environmental matters[133].

155. Regional[134] and universal human rights instruments also contain obligations relating to information, public participation and access to justice. For example, the right to freedom of expression guaranteed by Article 19 of the ICCPR includes the freedom to seek, receive and impart information. Article 25 of the ICCPR guarantees the right to take part in the conduct of public affairs. Article 2, paragraph 3, of the ICCPR, for its part, guarantees the right to an effective remedy.

156. Procedural obligations relating to public participation can also arise from the positive obligations of States with regard to certain substantive rights. The African Commission on Human and Peoples' Rights infers from the spirit of Article 16 (the right to enjoy the best attainable state of health) and Article 24 (the right to a satisfactory environment) of the African Charter on Human and Peoples' Rights the existence of obligations relating to the publication of environmental and social impact studies prior to any major industrial development, the provision of information to communities exposed to hazardous activities, and the possibility for individuals to be heard and to participate in the development of decisions affecting their communities[135].

157. Taking those obligations into account in implementing Article 12 of the Paris Agreement thus clarifies, for the States parties, the framework that must be put in place to ensure the information and effective participation of the public in the development and implementation of climate policies. In France, the reports of the *Haut-Conseil pour le Climat*, an independent consultative body created in November 2018, are freely available and provide information to the public about changes in France's greenhouse gas emissions and the evaluation of its public policies on climate change.

158. Other examples of participation include the Citizens' Convention on Climate, constituted in 2019 at the initiative of the President of the French Republic. This was an unprecedented democratic experiment in France, which aimed to give 150 citizens, drawn by lot, a voice to accelerate the fight against climate change. Its mandate was to define a series of measures that would allow for a reduction in greenhouse gas emissions of at least 40 per cent by 2030 (compared to 1990), in a spirit of social justice.

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[129] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Aarhus (Denmark), 25 June 1998, *UNTS*, Vol. 2161, p. 447.

[130] Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean, Escazú, 4 Mar. 2018, *UNTS*, Vol. 3397.

[131] Aarhus Convention, Arts. 4 and 5; Escazú Agreement, Arts. 5 and 6.

[132] Aarhus Convention, Arts. 6 to 8; Escazú Agreement, Art. 7.

[133] Aarhus Convention, Art. 9; Escazú Agreement, Art. 8.

[134] See Arts. 6, 10 and 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms; Inter-American Court of Human Rights, Advisory Opinion OC-23/17, 15 Nov. 2017, para. 118.

[135] African Commission on Human Rights and Peoples' Rights, *Social and Economic Rights Center (SERAC) and Center for Economic and Social Rights (CESR)* v. *Nigeria*, communication No. 155/96, 27 Oct. 2001, para. 53.

(ii) Access to justice

159. Among the procedural rights of individuals, access to justice is of particular importance in the context of combating climate change.

160. Described in Principle 10 of the Rio Declaration[136], the specific relationship in environmental matters between public information and participation, on the one hand, and access to justice, on the other, is also set out in Article 9, paragraph 2, of the Aarhus Convention, as follows:

> "Each Party shall, within the framework of its national legislation, ensure that members of the public concerned (a) Having a sufficient interest or, alternatively, (b) Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition, have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 [public participation in decisions on specific activities] and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention."

161. While the right of access to justice in environmental matters is not yet codified in a treaty of universal scope, it is confirmed by the access to justice guaranteed under customary international human rights law. In this regard, the Global Pact for the Environment contains an Article 11 on "[a]ccess to environmental justice". Access to justice is in fact vital to human rights and a constituent part of the right to effective recourse guaranteed by several international instruments. Article 2, paragraph 3, of the ICCPR provides that

> "[e]ach State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy . . . (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted."

162. In addition, Article 14, paragraph 1, of the ICCPR recognizes that

> "[i]n the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."

163. States derive from the right to effective recourse guaranteed by several international human rights instruments both a positive obligation to organize their institutional system in such a way as to allow individuals fair and effective access to justice[137], and a negative obligation not to

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[136] "Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided."

[137] CHR, General comment No. 32, Right to equality before courts and tribunals and to fair trial, CCPR/C/GC/32, 23 Aug. 2007.

impede that access, even though the right of access to a court is not absolute and permits certain limitations or modifications[138]. The right to effective recourse recognizes, in particular, that exercising the right to individual recourse before domestic courts is subject to certain conditions, such as legal standing.

164. The right of access to a court is essential for ensuring the protection of human rights in combating climate change. Several recent decisions in France have demonstrated the importance of guaranteeing means of recourse that enable individuals to challenge decisions or measures taken to combat climate change, provided that they have legal standing. For example, in the *Commune de Grande-Synthe* case, the *Conseil d'État* examined France's compliance with the trajectory it had set itself for reducing greenhouse gas emissions, and ordered the Government, by a decision dated 1 July 2021, to take all appropriate measures to curb the growth in greenhouse gas emissions produced on the national territory in order to ensure its compliance with the objectives fixed in national and EU legislation[139]. In a further decision of 10 May 2023, the *Conseil d'État* ordered the Government to take additional measures before 30 June 2024 and to transmit, by 31 December 2023, a progress report detailing the measures taken and their effectiveness[140].

165. Access to justice thus contributes to the effectiveness of the action taken against the impacts of climate change, bearing in mind the obligations of States vis-à-vis the persons under their jurisdiction.

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166. Obligations to ensure the protection of the climate system and other parts of the environment must be interpreted in a manner that is systematic and consistent with human rights obligations. This requirement arises from the references to human rights in international instruments on climate change and from the established effects of climate change on human rights.

167. In and of itself, international human rights law does not impose obligations on States in respect of climate change. Nevertheless, this legal corpus must be taken into account by States when interpreting and applying their obligations to reduce greenhouse gas emissions and protect carbon sinks.

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[138] See ECHR, *Stanev* v. *Bulgaria* [GC], No. 36760/06, 17 Jan. 2012, para. 229; ECHR, *Naït-Liman* v. *Switzerland* [GC], No. 51357/07, 15 Mar. 2018, para. 114.

[139] Conseil d'État, *Commune de Grande-Synthe*, 1 July 2021, No. 427301.

[140] Conseil d'État, *Commune de Grande-Synthe*, 10 May 2023, No. 467982.

QUESTION *(B)*: THE CONSEQUENCES

168. In question *(b)*, the Court is asked:

> "*(b)* What are the legal consequences under th[e] obligations [identified in response to question *(a)*] 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?".

169. The law on the responsibility of States for internationally wrongful acts, as largely codified by the 2001 Articles on Responsibility of States for Internationally Wrongful Acts (hereinafter the "2001 Articles")[141], refers to "the general conditions under international law for the State to be considered responsible for wrongful actions or omissions, and the legal consequences which flow therefrom"[142]. It may be further observed that the principles "governing international responsibility also apply to obligations relating to environmental protection"[143].

170. However, the distinctive nature of climate issues, and of certain obligations incumbent on States in this regard, is not easily reconciled with the traditional régime of responsibility for internationally wrongful acts[144]. Moreover, some of the language used in the text of resolution 77/276 appears to invite the Court to adopt a broad interpretation of the question of "legal consequences" and to explore complementary approaches to the traditional framework on State responsibility for internationally wrongful acts.

171. First, even though the breach of an international obligation is one of the two elements needed for an act to give rise to responsibility, the list in the chapeau to the questions is not confined to legally binding undertakings. Resolution 77/276 also mentions principles whose legal scope is less well established and texts that are not binding in and of themselves, such as the UDHR and the Stockholm and Rio Declarations on the environment.

172. Second, the law on responsibility only contemplates, on an individual basis in relation to each potentially responsible State and having regard to the obligations opposable to that State in each particular instance, the legal consequences of individualized harm caused by a particular internationally wrongful act in view of the specific circumstances of that case. In contrast, the request for an advisory opinion concerns "the legal consequences" for "States", without differentiating them

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[141] Yearbook of the ILC, Report of the ILC on the work of its fifty-third session, "Draft Articles on Responsibility of States for Internationally Wrongful Acts", *ILC Yearbook*, 2001, Vol. II (2), A/CN.4/SER.A/2001/Add.1 (hereinafter "*ILC Yearbook*, 2001, Vol. II (2)").

[142] *Ibid*., p. 92, para. 1 of the commentary on Part Two: Content of the international responsibility of a State.

[143] Institut de droit international, resolution on "Responsibility and Liability under International Law for Environmental Damage" (Session of Strasbourg, 1997), Art. 3.

[144] On the possible developments of this régime, see e.g. Art. 235, para. 3, and Art. 304 of UNCLOS; *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, pp. 65-66, para. 209; Principle 22 of the 1972 Stockholm Declaration; Principle 13 of the 1992 Rio Declaration.

from other States, peoples or individuals. It does not concern (as may have been the case in some earlier advisory proceedings[145]) the responsibility of one specific State in a given situation.

173. Furthermore, as stated by Vanuatu's Minister for Climate, "we need to ensure all Member States feel comfortable that this initiative is not intended to name or shame any particular nation"[146]. Faced with a question of this type, it is therefore "the duty of the Court to envisage the question submitted to it only in the abstract form which has been given to it", without referring "either directly or indirectly, to concrete cases or to particular circumstances"[147].

174. Hence, whereas the law on responsibility is characterized by its individualized focus, combating climate change demands a global approach centred on the resolution of a series of problems which are more structural than economic or accidental and which call for "a medium- and long-term, and above all universal, approach"[148]. This has been repeatedly emphasized by States[149]. For example, the Sharm el-Sheikh Implementation Plan adopted by the COP27 and the CMA 4 underlines

> "the urgent need to address, *in a comprehensive and synergetic manner*, the *interlinked* global crises of climate change and biodiversity loss *in the broader context of achieving the Sustainable Development Goals*"[150].

175. Third, question (b) concerns States which, "by their acts and omissions, have caused significant harm" to the climate system. There is thus no requirement that the acts and omissions be "wrongful"; the focus is on the "significant harm" caused. The phrase "significant harm" is in fact often used in texts concerning the injurious consequences of activities *not prohibited* under international law[151]. However, in general international law, the responsibility of a State can only be engaged by an internationally wrongful act, whether or not it results in harm[152].

176. In these circumstances, even if the law on responsibility of States for internationally wrongful acts were, under certain conditions and subject to certain limitations, to apply to matters of climate change (**I**), it could not be considered the only régime relevant to the specific challenges

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[145] See *inter alia* the requests for an advisory opinion in the *Chagos* (*I.C.J. Reports 2019 (I)*, p. 138, para. 77) and *Wall* (*I.C.J. Reports 2004 (I)*, pp. 197 *et seq*., paras. 147 *et seq*.) cases.

[146] See the (second) video statement of Vanuatu's Minister for Climate, at 1 minute and 55 seconds, available at: https://www.vanuatuicj.com/.

[147] See, *mutatis mutandis*, *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), Advisory Opinion, 1948, I.C.J. Reports 1947-1948*, p. 61.

[148] K.G. Park, "La protection des personnes en cas de catastrophe", *Collected Courses of the Hague Academy of International Law,* 2013, Vol. 368, p. 342.

[149] See decision 1/CP.26, *Glasgow Climate Pact*, FCCC/CP/2021/12/Add.1, para. 44; decision 2/CMA.2, *Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts and its 2019 review*, FCCC/PA/CMA/2019/6/Add.1, sixth preambular para.

[150] Decision 1/CP.27, *Implementation Plan*, para. 1 (emphasis added).

[151] See e.g. ILC, Draft articles on Prevention of Transboundary Harm from Hazardous Activities, 2001, annexed to General Assembly resolution 62/68 of 6 Dec. 2007, Arts. 1 *et seq*.; Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, annexed to General Assembly resolution 61/36 of 4 Dec. 2006, Principle 2; Draft principles on the protection of the environment in relation to armed conflicts, annexed to General Assembly resolution 77/104 of 7 Dec. 2022, Principles 19 and 21; Convention on the Law of the Non-navigational Uses of International Watercourses, annexed to General Assembly resolution 51/229 of [21 May] 1997, Arts. 7, 21, 22, 32.

[152] *ILC Yearbook*, 2001, Vol. II (2), p. 36, para. 9 of the commentary on Article 2.

raised by the adverse effects associated with that phenomenon[153]. It is therefore also necessary to clarify the other legal consequences under international law of damage to the climate system from anthropogenic greenhouse gas emissions (**II**).

I. The legal consequences under the law on responsibility for internationally wrongful acts

177. The régime on responsibility for internationally wrongful acts, as codified by the ILC, is divided into three integral parts: it "defines the general conditions necessary for State responsibility to arise"[154], then "deals with the legal consequences for the responsible State"[155], before setting out the conditions of and procedures for implementing that international responsibility.

178. At each stage, addressed in turn below (**A**, **B** and **C**), the distinctive nature of climate issues may make the application of the law on international responsibility difficult. While some of these problems are seemingly surmountable, the fact remains that, for the most part, applying this régime to the effects associated with climate change would call certain fundamental rules of that law into question, at the risk, ultimately, of depriving them of substance.

A. The internationally wrongful act of a State

179. Under customary international law, as codified by the 2001 Articles, an internationally wrongful act of a State occurs when conduct attributable to the State under international law constitutes a breach of one of its international obligations[156].

180. As a general principle, applying the rules on attribution to matters of climate change does not pose any particular problems and simply calls for two remarks.

181. First, as recalled by the ILC in 2001, "[t]he attribution of conduct to the State as a subject of international law is based on criteria determined by international law and not on the mere recognition of a link of factual causality"[157]. It is a legal operation. Conversely, in matters of climate change, reference is often made to the "science of attribution", which studies the correlation between climate change and extreme weather events. From a terminological point of view, a clear distinction should therefore be made between legal attribution, within the meaning of the law on international responsibility, and factual attribution in the scientific sense, which refers to issues relating to causation[158].

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[153] See e.g. C. Voigt, "State Responsibility for Climate Change Damages", *Nordic Journal of International Law*, 2008, p. 2: "This article attempts to show that international law is ill equipped when confronted with a complex situation, such as compensation for climate change damages"; B. Mayer, "Climate Change Reparations and the Law and Practice of State Responsibility", *Asian Journal of International Law*, 2017, p. 203, citing C. Tomuschat: "large-scale damage requires other rules than individual cases of wrongdoing"; or the doubts expressed by J. Peel and M. Fitzmaurice, as cited by M. Meguro *in* "Litigating Climate Change through International Law: Obligations Strategy and Rights Strategy", *Leiden Journal of International Law*, 2020, pp. 934-935, fn. 11.

[154] *ILC Yearbook*, 2001, Vol. II (2), p. 32, commentary on Part One: The internationally wrongful act of a State.

[155] *Ibid*., p. 86, para. 1 of the commentary on Part Two: Content of the international responsibility of a State.

[156] *Ibid*., p. 34, Art. 2.

[157] *Ibid.*, p. 35, para. 4 of the commentary on Article 2.

[158] See below, paras. 204 *et seq*.

182. Second, "[a]s a general principle, the conduct of private persons or entities is not attributable to the State under international law"[159]. It is therefore possible that acts carried out by private companies for example, which cause harm to the climate system and other parts of the environment, cannot be attributed to the State. It does not follow that the latter is automatically exempt of all responsibility, since a different but related act may be imputed to it: that of failing to take the necessary measures to avoid the harm-causing acts or omissions of the private individuals. The State is in fact "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"[160], be they the activities of State organs or private entities.

183. These statements are closely linked to those relating to the breach of an international obligation, the second criterion for characterization as an internationally wrongful act.

184. On this point, it should be recalled from the outset that a breach of international law can only be found to exist if conduct occurs that is prohibited by a rule that is legally binding on the actor to whom it is addressed. However, it must also be noted that damage caused by climate change is the result of the accumulation (over space and time) of innumerable greenhouse gas emissions which, individually, are not in themselves wrongful under international climate commitments.

185. In addition, the temporality and nature of climate obligations make establishing a breach even more difficult.

186. In terms of temporality, for a breach to give rise to responsibility, the obligation must be "in force for a State" and the breach must take place "at the time the act occurs". This clarification is extremely important, not only because it is an illustration of the general principle of the non-retroactivity of the rule of law[161], but also because, in view of the particular characteristics of climate obligations, it can be difficult to identify the moment at which the rule whose breach is invoked and the act itself are to be assessed. It is therefore vital to determine the date on which the rule concerned became legally binding for the State in question, be it the date of entry into force of a treaty or of the crystallization of a customary norm. It is only from that critical date that the internationally wrongful act can be established and the responsibility of the State can be engaged.

187. In this regard, the representative of the EU observed, during the explanations of position following the adoption of resolution 77/276, that: "in line with the aim and the content of the resolution, we expect the advisory opinion to, first, answer the legal questions on the basis of *the current state of international law* and with regard to all States"[162].

188. In respect of the nature of climate obligations, and with a view to facilitating the assessment of the legal consequences of climate change for States, it may be useful to distinguish between obligations of conduct and obligations of result. As regards the obligations of result

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[159] *ILC Yearbook*, 2001, Vol. II (2), p. 47, para. 1 of the commentary on Article 8.

[160] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p. 56, para. 101.

[161] See the commentary on Article 13 of the 2001 Articles: "Article 13 provides an important guarantee for States in terms of claims of responsibility. Its formulation ('does not constitute . . . unless') is in keeping with the idea of a guarantee against the retrospective application of international law in matters of State responsibility" (*ILC Yearbook*, 2001, Vol. II (2), p. 57, para. 1 of the commentary on Article 13).

[162] A/77/PV.64, p. 9 (emphasis added). In the same sense, see also the statements of the representatives of Germany (p. 20), the United Kingdom (p. 23), the Republic of Korea (p. 25), Norway (p. 29) and the United States (p. 32).

addressed in the first part of this written statement, the expected conduct of States is clear. For instance, a State is in breach of international law if it fails to prepare, communicate or maintain its nationally determined contribution[163], if it fails to conduct an impact assessment[164], or if it does not have a regulatory and legal framework that seeks to prevent harm to the climate system and other parts of the environment[165].

189. Establishing a breach of an obligation of conduct is more problematic. It is clear, as stated above, that States have an obligation to take measures to prevent their territory or persons under their jurisdiction causing significant harm to the environment of other States.

190. As a result, it is perfectly possible for a State to breach its obligation of conduct by omission: an obligation of conduct to take measures in pursuit of a given objective is breached if no measures have been taken to this end. Under certain conditions and within certain limitations, a State can also breach this obligation by its actions, by taking measures that are *not sufficient* to prevent a given harm.

191. There are, however, no criteria against which one may objectively assess whether or not the measures taken by a State are sufficient. While States are expected to adopt a high standard of due diligence in climate matters, what that standard looks like in a given situation will depend on the specific circumstances and capabilities of each State, in accordance with the principle of common but differentiated responsibilities and respective capabilities.

192. The Court's jurisprudence also emphasizes the contingent and subjective nature of due diligence, considering that "the notion of '*due diligence*' . . . calls for an assessment *in concreto*"[166]. According to the Court, "[v]arious parameters operate when assessing whether a State has duly discharged the obligation concerned", first and foremost the "capacity" of the State to take the prescribed measures[167]. Consequently, the measures States are expected to take in order to comply with their obligations cannot be fixed or the same for all.

193. Therefore, while all States must take measures under their obligation of due diligence, each State must determine for itself the measures appropriate to prevent harm to the climate system and other parts of the environment. It is for the national legislator in particular to decide how the adverse effects of climate change are to be countered, while striking a fair balance between the interests of its population and those of the international community and respecting its international obligations; this necessarily entails making complex decisions about the economic, social and political situation at the local, regional and international level. It is vital that this reconciliation is first carried out by national parliaments, in accordance with the principles of democratic governance and the rule of law.

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[163] See above, paras. 26 *et seq*.

[164] See above, para. 71.

[165] See above, para. 70.

[166] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 221, para. 430.

[167] *Ibid.*

194. It should nevertheless be noted that obligations of conduct relating to climate change must be applied to a high standard. As stated above, this requirement is justified by the immense challenges and risks that this issue raises for humanity as a whole.

B. The content of the international responsibility of a State

195. Unlike cessation of the internationally wrongful act (**1**), the obligation to remediate and means of remediation (**2**) are highly contingent on the existence of harm as a result of the breach. Resolution 77/276 asks the Court to rule, more specifically, on the legal consequences of the "significant harm".

1. *Cessation and guarantees of non-repetition*

196. As recalled by the ILC, "[c]essation of conduct in breach of an international obligation is the first requirement in eliminating the consequences of wrongful conduct"[168]. It is codified by Article 30, paragraph 1, of the 2001 Articles, which states that the obligation to cease the internationally wrongful act applies "if [that act] is continuing". In this regard, it may be recalled that in climate matters the obligations breached are very often obligations of conduct, which are part of a continuing process over time. In this spirit, the Paris Agreement emphasizes the "long-term global response to climate change"[169] and fixes "long-term [objectives and] goals"[170]: it is typically a question of putting an end not to the immediate harm but to the process giving rise to that harm, which may require a range of complex measures whose effects will necessarily be spread over a long period[171]. The obligation of cessation is particularly important in environmental matters, since "the breach may be progressively aggravated by the failure to suppress it"[172].

197. The advisory opinion requested by the General Assembly could present an opportunity to formally reaffirm the obligation to cease all wrongful conduct causing significant harm to the climate system and other parts of the environment. However, it should be noted that each State must decide for itself the measures to be taken to put an end to the internationally wrongful acts giving rise to the harm in question.

198. Article 30, paragraph *(b)*, of the 2001 Articles provides that the State responsible for the internationally wrongful act is under an obligation not only to cease that act if it is continuing, but also to "offer appropriate assurances and guarantees of non-repetition, if circumstances so require". Whereas ceasing a violation is an automatic consequence of responsibility, guarantees of non-repetition arise only under certain circumstances, which precludes a ruling in the abstract. However, given the specific characteristics of the obligations incumbent on States to ensure the protection of the climate system and other parts of the environment, which call for continuous and sustained action in order to protect present and future generations from anthropogenic greenhouse gas emissions, it cannot be excluded that certain situations may justify the obligation to provide assurances or guarantees of non-repetition.

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[168] *ILC Yearbook*, 2001, Vol. II (2), p. 89, para. 4 of the commentary on Article 30.

[169] Art. 7, para. 2.

[170] Art. 14, para. 1.

[171] See M. Wewerinke-Singh, *State Responsibility, Climate Change and Human Rights Under International Law*, Hart Publishing, 2018, p. 136.

[172] *ILC Yearbook*, 2001, Vol. II (2), p. 62, para. 14 of the commentary on Article 14.

199. As the ILC noted in its commentary on Article 30, such guarantees are "most commonly sought when the injured State has reason to believe that the mere restoration of the pre-existing situation does not protect it satisfactorily"[173]. This could be the case, for example, if it is recognized that a law in force constitutes or could constitute a threat for the climate system. Guarantees of non-repetition might be even more appropriate as regards the area covered by the request for an opinion, since "[a]ssurances and guarantees are concerned with the restoration of confidence in a continuing relationship" and "share the characteristics of being future-looking and concerned with other potential breaches. They focus on prevention rather than reparation"[174].

2. *Reparation*

200. If the conditions for engaging the responsibility of a State are met, the traditional mechanisms of the law on responsibility and the peaceful settlement of international disputes may be put into effect, without prejudice to other actions that may be initiated outside this strict framework[175].

201. The Court has consistently recalled in its jurisprudence that

> "[w]hat constitutes 'reparation in an adequate form' clearly varies depending upon the concrete circumstances surrounding each case and the precise nature and scope of the injury, since the question has to be examined from the viewpoint of what is the 'reparation in an adequate form' that corresponds to the injury"[176].

202. It is clear that more often than not, in the case of injury suffered by a State and arising from damage to the climate system or other parts of the environment, restitution in kind would be "materially impossible or involve[] a burden out of all proportion to the benefit deriving from it"[177]. Moreover, France considers that satisfaction could constitute an appropriate form of redress and a powerful tool to raise awareness of the challenges posed by climate change.

203. In order for other means of redress, such as compensation, to be considered, the harm referred to in the request for an advisory opinion must be "financially assessable"[178]. Even if the Court were to recognize environmental damage as compensable today[179], an individualizable financial assessment of the damage arising from climate change would be difficult to carry out in practice. Indeed, it would entail ascertaining "whether there is a sufficiently direct and certain causal nexus between the wrongful act . . . and the injury suffered . . . consisting of all damage of any type, material or moral"[180].

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[173] *Ibid*., pp. 89-90, para. 9 of the commentary on Article 30.

[174] *Ibid.*

[175] See below, paras. 212 *et seq*.

[176] *Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment, I.C.J. Reports 2004 (I)*, p. 59, para. 119; *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p. 104, para. 274.

[177] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p. 103, para. 273.

[178] See 2001 Articles, Art. 36, para. 2.

[179] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Compensation, Judgment, I.C.J. Reports 2018 (I)*, p. 28, para. 42.

[180] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 234, para. 462.

204. Noting the difficulties that this question could raise in practice as regards the compensation of environmental damage, the Court has observed that:

> "[i]n cases of alleged environmental damage, particular issues may arise with respect to the existence of damage and causation. The damage may be due to several concurrent causes, or the state of science regarding the causal link between the wrongful act and the damage may be uncertain."[181]

205. Of course, these difficulties do not necessarily pose an obstacle to compensation being sought. It is clear from the Court's jurisprudence that "the absence of adequate evidence as to the extent of material damage will not, in all situations, preclude an award of compensation"[182]. Indeed,

> "[w]here the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate."[183]

206. As stated above, damage to the climate system, because of its diffuse and global nature, and the temporality of the obligations relating thereto, does not fit with an individualized approach to harm[184]. Yet the law on responsibility for internationally wrongful acts is specifically geared towards individualized damage. Although a change in and a significant relaxing of the rules governing the causal link could make it possible to partially overcome this obstacle in the case of significant climate-related harm, the present request for an advisory opinion does not require the Court to address in detail how harm should be assessed or how compensation should be calculated, which matters are dependent on the concrete circumstances of each case.

C. The implementation of the international responsibility of a State

207. In climate matters as in other areas, a State is entitled to invoke the responsibility of another State when it is injured by the internationally wrongful act[185]. While the 2001 Articles have codified the possibility for a State other than an injured State to implement responsibility, that possibility is dependent on the *erga omnes* or *erga omnes partes* character of the primary obligation breached[186].

208. In the context of the present request for an opinion, it could be appropriate for the Court to state whether one or several obligations of the Paris Agreement could be characterized as obligations "*erga omnes partes*". France would point out in this regard that under Article 48 of the

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[181] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Compensation, Judgment, I.C.J. Reports 2018 (I)*, p. 26, para. 34.

[182] *Ibid.*, p. 26, para. 35.

[183] *Ibid*., p. 27, para. 35 citing *Trail Smelter case (United States, Canada), Awards of 16 April 1938 and 11 March 1941*, United Nations, *Reports of International Arbitral Awards* (hereinafter "*RIAA*"), Vol. III, p. 1920. In this regard, see also Institut de droit international, resolution on Responsibility and Liability under International Law for Environmental Damage, Session of Strasbourg, 1997, Art. 25 (1).

[184] See above, para. 174.

[185] *ILC Yearbook,* 2001, Vol. II (2), p. 31, Arts. 42 *et seq*.

[186] *Ibid*., Art. 48.

2001 Articles, this characterization is subject to the fulfilment of *two* cumulative conditions. One, "the obligation breached [must be] owed to a group of States", which in practice means that it is set forth in a multilateral treaty. The ILC notes in this regard that "the arrangement must transcend the sphere of bilateral relations of the States parties"[187].

209. Two, the obligation in question must be "established for the protection of a collective interest of the group", which implies two things: that the convention protects a collective interest of the group, and that the obligation breached contributes to the protection of that collective interest. There is no set list of objective criteria that enable an interest to be characterized as "collective". For the ILC, "collective obligations" include those whose "principal purpose will be to foster a common interest, over and above any interests of the States concerned individually"[188]. In its view, such obligations could concern the environment, the security of a region or situations in which "States, attempting to set general standards of protection for a group or people, have assumed obligations protecting non-State entities"[189].

210. To date, only two conventions have been expressly considered by the Court as containing obligations *erga omnes partes*: the Convention on the Prevention and Punishment of the Crime of Genocide[190] and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[191]. The threshold for recognizing the commonality of the interest at issue was clarified by the Court, in particular in its 1951 Advisory Opinion concerning *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*. In that Opinion, the Court recalled that

> "[t]he objects of such a convention must also be considered. The Convention was manifestly adopted for a *purely humanitarian and civilizing purpose*. It is indeed difficult to imagine a convention that might have this dual character to a greater degree, since its object on the one hand is to *safeguard the very existence of certain human groups* and on the other to confirm and *endorse the most elementary principles of morality*. In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the raison d'être of the convention."[192]

211. It is thus for the Court to decide whether certain obligations have an *erga omnes partes* character beyond international human rights law. ITLOS has found in this regard, when invited to rule on Article 137, paragraph 1, of UNCLOS, that "[e]ach State Party may also be entitled to claim compensation in light of the *erga omnes* character of the obligations relating to preservation of the environment of the high seas and in the Area"[193].

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[187] *Ibid*., p. 126, para. 1 of the commentary on Article 48.

[188] *Ibid.*

[189] *Ibid*., pp. 136-137, para. 7 of the commentary on Article 48.

[190] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar), Preliminary Objections, Judgment, I.C.J. Reports 2022 (II)*, pp. 515-518, paras. 106-114.

[191] *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012 (II)*, pp. 449-450, paras. 68-69.

[192] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23 (emphasis added).

[193] *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 59, para. 180.

II. The legal consequences beyond the law on responsibility for internationally wrongful acts

212. As stated above[194], the harm caused to the climate system and other parts of the environment by the accumulation of greenhouse gas emissions in the atmosphere does not fall exclusively under the law on responsibility for internationally wrongful acts. Indeed, the parties to the UNFCCC and the Paris Agreement were well aware of the obstacles to a strict application of that traditional régime to matters of climate change. Therefore, they took care to create other mechanisms to address the significant harm caused to the climate system and other parts of the environment. Consequently, several norms arising not only from the reference texts on climate change (**A**), but from other treaty and customary régimes as well (**B**), also govern the legal consequences of this particular damage.

213. It is not possible to identify every obligation incumbent on States today in the case of harm caused to the climate system and other parts of the environment by the accumulation of greenhouse gas emissions in the atmosphere. Instead, the following paragraphs will focus on the obligations and principles on which it would appear particularly expedient for the Court to rule, for the purpose of emphasizing their importance and/or clarifying their content.

A. The obligations and principles set out in the reference instruments on climate change

214. It is important to recall from the outset that while, as the Court has stated, "there can be no question of distributive justice"[195], contemporary international law, particularly in the area of climate change, is sensitive to considerations of equity and solidarity. The preamble of the Paris Agreement thus refers to the "principle of equity"[196] and further notes "the importance for some of the concept of 'climate justice', when taking action to address climate change".

215. The principle of equity thus "throw[s] light on the interpretation" of the relevant international obligations[197] analysed below, within the framework of the two other pillars of climate action[198]: adaptation (**1**) and the alignment of financial flows towards climate goals (**2**).

1. *Adaptation*

216. First, as in the case of mitigation[199], France wishes to reiterate that it is important for each State party to the UNFCCC and the Paris Agreement to take account of its human rights obligations vis-à-vis those under its jurisdiction when drawing up and implementing its adaptation policies.

217. For instance, in the *Daniel Billy and others* v. *Australia* case, the Human Rights Committee found that Australia had breached Articles 17 (right to privacy and family) and 27 (right of minorities to enjoy their own culture) of the ICCPR because of its delay in implementing measures

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[194] See above, paras. 170 *et seq*.

[195] *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 40, para. 46.

[196] See also, BBNJ Agreement, Art. 7, para. *(d)*.

[197] See by analogy, *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 814, para. 28, and p. 815, para. 31.

[198] Together with mitigation, which is addressed in the first part of this written statement. See above, paras. 22 *et seq*.

[199] See above, paras. 109 *et seq*.

of adaptation aimed at protecting the living conditions of the communication's authors[200]. In that case, it was considered that the effects of climate change were already having direct and significant repercussions on the exercise of the communicants' rights.

218. Although adaptation also seeks to anticipate and prevent future harm, it is intended first and foremost to respond "to the effects of climate change, in order to limit the negative impacts of such change on human societies and the environment"[201]. This particular objective justifies its inclusion in this section of France's written statement on the legal consequences arising from the obligations of States. According to the IPCC, in human systems, adaptation is "the process of *adjustment* to actual or expected climate and *its effects*, in order to moderate harm or exploit beneficial opportunities"[202]. The IPCC's Working Group II has also emphasized the importance of adaptation in reducing risks and vulnerabilities in the face of the harmful effects of climate change[203].

219. Article 3, paragraph 3, of the UNFCCC recalls that "adaptation" is among the measures taken by States to combat climate change, while Article 2, paragraph 1 *(b)*, of the Paris Agreement states that this includes, among other things, "[i]ncreasing the ability to adapt to the adverse impacts of climate change". In this respect, the relevant instruments in this area do not set forth the measures that States are expected to take to fulfil their objective of adaptation. The latter is nevertheless reflected in several of their obligations, two of which will be addressed below by way of example.

220. First, Article 4, paragraph 1 *(b)*, of the UNFCCC states that

> "[a]ll Parties, taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances, shall . . . [f]ormulate, implement, publish and regularly update *national* and, where appropriate, regional *programmes* containing . . . measures to facilitate adequate adaptation to climate change".

221. Similarly, Article 7, paragraph 9, of the Paris Agreement states that

> "[e]ach Party shall, as appropriate, engage in adaptation planning processes and the implementation of actions, including the development or enhancement of relevant plans, policies and/or contributions, which may include . . . (b) [t]he process to formulate and implement national adaptation plans".

222. In addition, paragraphs 10 and 11 of that Article state that "[e]ach Party should, as appropriate, submit and update periodically an adaptation communication", which may be submitted "as a component of or in conjunction with other communications or documents, including a national adaptation plan"[204].

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[200] HRC, *Daniel Billy and others* v. *Australia*, Communication No. 3624/2019, 21 July 2022.

[201] *Deuxième Plan national d'adaptation aux changements climatiques*, 2018, available at: https://www.ecologie.gouv.fr/adaptation-france-au-changement-climatique, p. 1.

[202] IPCC, *Glossary*, p. 542 (emphasis added).

[203] IPCC, *Climate Change 2022: Impacts, Adaptation and Vulnerability*.

[204] Paris Agreement, Art. 7, paras. 10 and 11.

223. In accordance with the requirements of the relevant climate instruments, France has adopted two national climate change adaptation plans and is currently drawing up a third[205]. In 2022, the COP27 welcomed "the reports for 2020–2022 on progress in the process to formulate and implement national adaptation plans"[206]. However, it also expressed

> "*concern* at the large number of countries that have not been able to submit their first national adaptation plan and in this respect *note[d]* the challenges, complexities and delays experienced by developing country Parties in accessing funding and support from the Green Climate Fund for the formulation and implementation of national adaptation plans"[207].

224. Second, in adaptation as in other areas of climate action, States have an obligation to co-operate. Article 4 of the UNFCCC stipulates that all States parties must "[c]ooperate in preparing for adaptation to the impacts of climate change"[208]. In Article 7, paragraph 6, of the Paris Agreement, the "Parties recognize the importance of support for and international cooperation on adaptation efforts", and paragraph 7 of the same Article encourages them to "strengthen their cooperation on enhancing action on adaptation" through various practices mentioned. In this respect, the Paris Agreement further recalls "the importance of taking into account the needs of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change"[209].

225. In 2023, at the CMA 5, the parties adopted the framework for the global goal on adaptation in order to assist with the implementation of that global goal as provided for by Article 7 of the Paris Agreement. In so doing, the CMA:

> "*Recognize[d]* that climate change impacts are often transboundary in nature and may involve complex, cascading risks that can benefit from collective consideration and knowledge-sharing, climate-informed transboundary management and cooperation on global adaptation solutions;
>
> . . . *Emphasize[d]* that the framework for the global goal on adaptation should catalyse and strengthen regional and international cooperation on the scaling up of adaptation action and support among Parties, international organizations and non-governmental organizations"[210].

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[205] France's two adaptation plans can be consulted at the following address: https://www.ecologie.gouv.fr/adaptation-france-au-changement-climatique.

[206] Decision 9/CP.27, National adaptation plans, FCCC/CP/2022/10/Add.1, para. 1.

[207] *Ibid*., para. 4.

[208] UNFCCC, Art. 4, para. 1 *(e)*, and Art. 4, para. 4.

[209] Paris Agreement, Art. 7, para. 6.

[210] Draft decision -/CMA.5, *Glasgow–Sharm el-Sheikh work programme on the global goal on adaptation referred to in decision 7/CMA.3*, FCCC/PA/CMA/2023/L.18, paras. 18-19.

2. *The means employed and the alignment of financial flows towards climate goals in particular*

226. It is indisputable that addressing the effects of climate change requires a considerable investment of means and funds[211] and that

> "delivering such funding will require a transformation of the financial system and its structures and processes, engaging governments, central banks, commercial banks, institutional investors and other financial actors"[212].

227. On this matter, France will first address the specific régime of "loss and damage" ***(a)***, before turning to the more general financial commitments of States under the Paris Agreement ***(b)***.

(a) The specific régime of "loss and damage"

228. According to the IPCC, the two terms of the expression "loss and damage" "refer broadly to harm from (observed) impacts and (projected) risks" of climate change[213].

229. The legal régime of "loss and damage" in climate matters has been progressively instituted and is currently based on Article 8 of the Paris Agreement. This focuses on three main principles: one, recognition of "the importance of averting, minimizing and addressing loss and damage associated with the adverse effects of climate change" (paragraph 1); two, integration of the Warsaw International Mechanism for Loss and Damage subject to the authority of the Conference of the Parties serving as the Meeting of the Parties to the Paris Agreement (paragraph 2); and, three, identification of areas of co-operation and facilitation to enhance understanding, action and support with respect to loss and damage (paragraphs 3 and 4).

230. France wishes to recall in this regard decision 1/CP.21 of the COP adopting the Paris Agreement, by virtue of which the COP "*[a]grees* that Article 8 of the Agreement does not involve or provide a basis for any liability or compensation"[214]. The régime of loss and damage must therefore be seen as a régime distinct from and supplementary to the law on responsibility.

231. The régime of loss and damage is essentially co-operative in nature: it emphasizes the need for co-operation and facilitation, "including through the Warsaw International Mechanism" (Article 8, paragraph 3, of the Paris Agreement), in a range of areas that the Paris Agreement identifies in a detailed but non-exhaustive manner (Article 8, paragraph 4). Within the framework of that Mechanism, the COP25 decided to establish the Santiago Network to catalyse the technical assistance of relevant organizations, bodies, networks and experts, for the implementation of relevant approaches for averting, minimizing and addressing loss and damage at the local, national and

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[211] See, in particular, decision 1/CP.27, *Implementation Plan*, para. 33: the COP "*[h]ighlights* that about USD 4 trillion per year needs to be invested in clean energy technologies by 2030 to be able to reach net zero emissions by 2050 and that, furthermore, a global transformation to a low-carbon economy is expected to require an investment of at least USD 4-6 trillion per year", and para. 35 "*[n]otes* with concern the growing gap between the needs of developing country Parties, in particular those due to the increasing impacts of climate change and their increased indebtedness, and the support provided and mobilized for their efforts to implement their nationally determined contributions, highlighting that such needs are currently estimated at USD 5.8-5.9 trillion for the pre-2030 period".

[212] *Ibid*., para. 34.

[213] IPCC, *Glossary*, p. 553.

[214] *Adoption of the Paris Agreement*, para. 51.

regional level, in developing countries that are particularly vulnerable[215]. The COP28 and the CMA 5 also note that the "funding arrangements, including a fund, for responding to loss and damage are based on cooperation and facilitation and do not involve liability or compensation"[216].

232. One of the crucial questions in terms of loss and damage is how measures taken to avert, minimize and address loss and damage are financed. In keeping with the decision taken by the COP27 and the CMA 4 in this regard[217], the COP28 and the CMA 5 decided to put new funding arrangements into effect, including by establishing an independent fund to respond to the loss and damage referred to in paragraphs 2 and 3 of decisions 2/CP.27 and 2/CMA.4[218]. Since that fund was formally implemented on the first day of the COP28 and the CMA 5, several pledges have been made to it, including a pledge of up to €100 million by France. The fund's Governing Instrument expressly provides that

> "[t]he purpose of the Fund is to assist developing countries that are particularly vulnerable to the adverse effects of climate change in responding to economic and non-economic loss and damage associated with the adverse effects of climate change, including extreme weather events and slow onset events"[219].

(b) Financial commitments

233. As stated by the COP28, "enhanced access to international climate finance is important to support . . . developing countries"[220]. France recalls in this regard that a Summit for a New Global Financing Pact was held on 22 and 23 June 2023 in Paris with the aim of strengthening international consensus to respond to key global challenges: combating poverty, decarbonizing economies in order to reach carbon neutrality by 2050 and protecting biodiversity.

234. Article 9, paragraph 1, of the Paris Agreement provides that "[d]eveloped country Parties shall provide financial resources to assist developing country Parties with respect to both mitigation and adaptation in continuation of their existing obligations under the Convention". This provision calls for several comments.

235. The English version of this provision leaves no doubt as to its legally binding nature: "[d]eveloped country Parties *shall* provide financial resources"[221]. Moreover, while the Paris Agreement does not contain any quantified commitments in this area, it nevertheless offers certain clarifications as to how this obligation should be implemented. First, this obligation to provide financial resources relates to the financing of both mitigation and adaptation measures, and, second,

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[215] Decision 2/CMA.2, *Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts and its 2019 review*, FCCC/PA/CMA/2019/6/Add.1, para. 43.

[216] Draft decision -/CP.28 -/CMA.5, *Operationalization of the new funding arrangements, including a fund, for responding to loss and damage referred to in paragraphs 2–3 of decisions 2/CP.27 and 2/CMA.4*, FCCC/CP/2023/L.1−FCCC/PA/CMA/2023/L.1, sixth preambular para.

[217] Decision 1/CP.27, *Implementation Plan*, paras. 26-27.

[218] Draft decision -/CP.28 -/CMA.5, *Operationalization of the new funding arrangements, including a fund, for responding to loss and damage referred to in paragraphs 2–3 of decisions 2/CP.27 and 2/CMA.4*, FCCC/CP/2023/L.1−FCCC/PA/CMA/2023/L.1.

[219] *Ibid*., Ann. 1, para. 2.

[220] General Assembly resolution 77/165, 14 Dec. 2022, para. 15.

[221] Emphasis added. See L. Rajamani, according to whom "[d]eveloped countries are required in mandatory terms ('shall') to provide financial resources to developing country Parties" ("Innovation and Experimentation in the International Climate Change Regime", *Collected Courses of the Hague Academy of International Law*, Vol. 404, 2019, p. 177).

it is accompanied by a number of recommendations for developed countries regarding the mobilization of funds for climate action, making clear that this mobilization "should represent a progression beyond previous efforts" and take account of

> "the priorities and needs of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change and have significant capacity constraints, such as the least developed countries and small island developing States" (Article 9, paragraphs 3 and 4).

236. Reflecting Principle 6 of the Rio Declaration and the terms of the question put to the Court, the wording of this provision recalls the need to bear in mind the specific requirements of certain States: "additional measures should be taken for those who are particularly vulnerable to environmental harm"[222]. For the purposes of the question put to the Court, the concept of States "particularly vulnerable" to the adverse impacts of climate change (to which Article 9 of the Paris Agreement gives legal effect[223]) must be understood in a broad and contingent manner. On the one hand, it refers not only to States as such, and to small island developing States in particular, but also to their populations and to the categories of persons who are particularly affected by those adverse effects. On the other hand, its scope of application is dependent on the circumstances. In the Draft Articles on the Protection of Persons in the event of Disasters, the ILC thus observed that the expression "particularly vulnerable" could "include not only the categories of individuals usual[ly] associated with the concept 'particularly vulnerable' . . . but also other possible individuals that might find themselves being particularly vulnerable in the wake of a disaster"[224].

237. In the "Copenhagen Accord" of 18 December 2009, annexed to decision 2/CP.15 of the COP, it is recalled that "developed countries commit to a goal of mobilizing jointly USD 100 billion dollars a year by 2020 to address the needs of developing countries". In 2015, Sustainable Development Goal No. 13 recalled that developed country parties to the UNFCC undertook

> "to . . . mobiliz[e] *jointly* $100 billion annually by 2020 from all sources to address the needs of developing countries in the context of meaningful mitigation actions and transparency on implementation and fully operationalize the Green Climate Fund through its capitalization as soon as possible"[225].

238. Although the collective commitment undertaken in 2009 and extended in 2015 is not legally binding as such, it is certainly not without import. It is clear that the community of parties to the UNFCCC and the Paris Agreement expect the objective set in 2009 to be achieved. Decision 1/CP.21 adopting the Paris Agreement,

> "*strongly urges* developed country Parties to scale up their level of financial support, with a concrete road map to achieve the goal of jointly providing USD 100 billion annually by 2020 for mitigation and adaptation while significantly increasing adaptation

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[222] General Assembly resolution 76/300, 28 July 2022, fifteenth preambular para.

[223] See also Paris Agreement, Art. 6, para. 6, and Art. 7, paras. 2 and 6, and Art. 11, para. 1.

[224] See para. 7 of the commentary on Article 6 of the ILC's Draft Articles on the Protection of Persons in the event of Disasters, *ILC Yearbook*, 2016, Vol. II (2), pp. 37-38, see also Guideline 9, para. 3, of the Draft Guidelines on the Protection of the Atmosphere, and paras. 16 to 18 of its commentary, *in* A/76/10 (2021), pp. 39-40 and p. 45.

[225] Emphasis added.

> finance from current levels and to further provide appropriate technology and capacity-building support"[226].

239. Subsequent decisions of the COP have reiterated this commitment[227], and the fact that the objective set has not been collectively reached has been deplored by the COP to the UNFCCC[228] and by the meeting of the parties to the Paris Agreement[229] and the United Nations General Assembly[230]. Similarly, in the European Council's conclusions of 16 October 2023 on the preparations for the COP28, the EU

> "REAFFIRM[ED] the strong commitment of the EU and its Member States towards the delivery of the collective USD 100 billion goal for climate finance mobilisation through 2025 in the context of meaningful mitigation action and transparency on implementation, EXPECT[ED] this goal to be met in 2023 and URGE[D] all other concerned countries to step up their efforts in this regard."[231]

240. France is fully committed to supporting the transition of developing countries and the protection of the most vulnerable countries. It has undertaken to provide €6 billion a year from 2021 to 2025, which sum is more than its strictly proportionate share. A third of these resources will be used to fund adaptation in developing countries. France achieved this objective in 2021 (€6.1 billion, including €2.2 billion for adaptation) and greatly surpassed it in 2022 (€7.6 billion, including €2.6 billion for adaptation). At the collective level, the annual target of US$100 million has likely been reached since 2022, according to OECD estimates.

B. Obligations arising from other conventional and customary régimes

241. While the UNFCCC and the Paris Agreement remain the frames of reference for analysing the legal consequences of harm caused to the climate system and other parts of the environment, other conventional and customary régimes also appear to be relevant. All these legal norms should be interpreted in a complementary manner as part of a systematic approach. The obligation to restore the environment (**1**) and the polluter-pays principle (**2**) can thus be mentioned by way of example.

1. *The obligation to restore the environment*

242. When significant harm is caused to the climate system and other parts of the environment by the accumulation of anthropogenic greenhouse gas emissions in the atmosphere, obligations to restore the affected ecosystems may find application. The goal of restoration was emphasized by the parties to the UNFCCC and the Paris Agreement in the Glasgow Pact, which noted:

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[226] Decision 1/CP.21, *Adoption of the Paris Agreement*, para. 114.

[227] See in this regard decision 1/CP.16, para. 98; decision 1/CP.21, paras. 53 and 114; decision 5/CP.21, para. 1; decision 14/CMA.1, para. 1. See also decision 1/CMA.3 of 2020, para. 18; decision 1/CP.26, paras. 11, 22 and 25.

[228] See decision 1/CP.26, *Glasgow Climate Pact*, FCCC/CP/2021/12/Add.1, paras. 26-27 and decision 1/CP.27, para. 36.

[229] See *Implementation Plan*, para. 57.

[230] See General Assembly resolution 77/165, 14 Dec. 2022, para. 16.

[231] EU, *Preparations for the COP28 of the UNFCCC (Dubai, United Arab Emirates, 30 Nov. – 12 Dec. 2023), Council conclusions*, doc. 14285/23, paras. 25 and 28. See also para. 34.

> "the importance of protecting, conserving and restoring ecosystems to deliver crucial services, including acting as sinks and reservoirs of greenhouse gases, reducing vulnerability to climate change impacts and supporting sustainable livelihoods, including for indigenous peoples and local communities"[232].

243. At the COP28, States also recalled "the vital importance of protecting, conserving, restoring and sustainably using nature and ecosystems for effective and sustainable climate action"[233] and "the importance of conserving, protecting and restoring nature and ecosystems towards achieving the Paris Agreement temperature goal"[234].

244. Obligations of restoration arise from sector-specific conventions, each of which defines the régime governing and the extent to which the undertakings made either in the form of obligations or in the form of principles and objectives are opposable to the States parties. This is true of Article 8, paragraph *(f)*, of the 1992 CBD, of measures to combat desertification including the restoration of desertified land within the meaning of Article 1, paragraph *(a)*, of the 1994 United Nations Convention to Combat Desertification or Article 7, paragraph *(h)*, and Article 17, paragraph *(c)*, of the BBNJ Agreement, and of measures of restoration deriving from the obligation to preserve the marine environment under UNCLOS[235].

2. *The polluter-pays principle*

245. France wishes to reiterate here its support for the polluter-pays principle, formulated as follows in Article 8 of the draft Global Pact for the Environment presented by the President of the French Republic at the "Summit on a Global Pact for the Environment" held on 19 September 2017 on the margins of the 72nd session of the United Nations General Assembly: "Parties shall ensure that prevention, mitigation and remediation costs for pollution, and other environmental disruptions and degradation are, to the greatest possible extent, borne by their originator."

246. While doubts may have been expressed in the past as to the customary character of this principle[236], France considers that there is no longer any cause to do so. Having featured among the principles in the Rio Declaration of 1992, it must now be regarded as a principle of international law, as confirmed by the fact that it is referred to in the preamble of several multilateral conventions "as

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[232] *Glasgow Pact*, para. 38. See also decision 1/CP.26, *Glasgow Climate Pact*, FCCC/CP/2021/12/Add.1, para. 50.

[233] *First Global Stocktake*, twelfth preambular para.

[234] *Ibid*., para. 33.

[235] On this latter point see France's written statement of 16 June 2023 in the ITLOS advisory proceedings on the *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law* available at https://www.itlos.org/fileadmin/itlos/documents/cases/31/written_statements/1/C31-WS-1-19-France_translation_ITLOS.pdf, para. 151.

[236] In its award of 12 March 2004 in the *Case concerning the audit of accounts between the Netherlands and France in application of the Protocol of 25 September 1991 Additional to the Convention for the Protection of the Rhine from Pollution by Chlorides of 3 December 1976*, the arbitral tribunal observed that "this principle features in several international instruments, bilateral as well as multilateral, and that it operates at various levels of effectiveness. Without denying its importance in treaty law, the Tribunal does not view this principle as being a part of general international law." (*RIAA*, Vol. XXV, p. 312, para. 103.) In 2006, the ILC further noted that "[s]ome commentators doubt 'whether [the "polluter pays" principle] has achieved the status of a generally applicable rule of customary international law, except perhaps in relation to states in the [European Community], the UNECE, and the OECD'", *ILC Yearbook*, 2006, Vol. II (2), p. 75, para. 15 of the commentary on Principle 3.

a general principle of international environmental law"[237], and was recently included in Article 7, paragraph *(a)*, of the BBNJ Agreement. The polluter-pays principle is also written into the founding treaties of the EU[238].

247. As has been observed in the literature, implementing this principle is the responsibility of States (in their domestic legal orders or through particular international commitments), and they have some room for manoeuvre in terms of the specific procedures enabling it to be given effect[239].

248. The polluter-pays principle can be applied in various forms in domestic legal orders, through any mechanism that requires, by one means or another, the costs incurred through the prevention, mitigation and remediation of the harmful effects resulting from the accumulation of greenhouse gas emissions in the atmosphere to be borne by their originator.

249. In French law, for example, the Charter for the Environment, which forms part of the constitutional corpus, provides that "[e]veryone shall be required, in the conditions provided for by law, to contribute to the making good of any damage he or she may have caused to the environment"[240]. Article L110-1, paragraph II, subparagraph 3, of the French Environmental Code recalls that the laws on biodiversity must be based, *inter alia*, on the "polluter pays principle, according to which the costs arising from measures to prevent, reduce or combat pollution must be borne by the polluter". France's Civil Code has also included, since the law of 8 August 2016, a chapter specifically covering "remediation of ecological damage" (Articles 1246 to 1252). The Civil Code states, in the clearest terms, that "[a]ny person responsible for causing ecological damage shall be required to make it good" (Article 1246). Likewise, environmental damage imputable to public authorities gives entitlement to remedies before the administrative courts; in practice, these rules are applied by the courts responsible for dealing with climate issues.

250. Finally, it will be noted that the mechanisms governing responsibility in private international law are also capable of being applied to environmental matters[241]. Thus when "a polluter pays approach to liability is simply not economically feasible, and would not be in the public interest", other solutions may be developed on the lines of conventions[242]. It might be possible, for instance, to draw on the Convention on Supplementary Compensation for Nuclear Damage of 12 September 1997, in which the parties opted for an international mechanism supplementing the system of compensation provided for by national law, in the form of public funds made available by

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[237] See e.g. the third preambular paragraph of the Protocol on Civil Liability and Compensation for Damage caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes and to the 1992 Convention on the Transboundary Effects of Industrial Accidents, 21 May 2003.

[238] See Art. 191, para. 2, of the Treaty on the Functioning of the European Union, which states: "Union policy on the environment shall . . . be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay." See also, in French legislation, Art. 110-1, para. II, subpara. 3 of the Environmental Code, which incorporates "[t]he polluter pays principle, according to which the costs arising from measures to prevent, reduce or combat pollution must be borne by the polluter".

[239] See in particular A. Boyle, "Polluter Pays", in *Max Encyclopedia of Public International Law*, Mar. 2009 (online), paras. 7 *et seq*., esp. para. 13: "Thus the polluter pays principle and the general policy of internalizing environmental costs cannot be treated as a rigid rule of universal application, nor are the means used to implement it going to be the same in all cases".

[240] See Charter for the Environment, Art. 4.

[241] See in particular U. Baxi, "Mass Torts, Multinational Enterprise Liability and Private International Law", *Collected Courses of the Hague Academy of International Law*, Vol. 276, 1999, pp. 297-427.

[242] A. Boyle, "Polluter Pays", in *Max Encyclopedia of Public International Law*, Mar. 2009 (online), para. 12.

the State within whose territory the installation is situated, on the one hand, and by the other States parties on the basis of a formula calculated, in one respect, by reference to their share of the contributions to the budget of the United Nations[243].

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251. To conclude this written statement, Frances wishes to recall the importance it attaches to combating climate change. The importance of what is at stake justifies collective action at all levels, including the law. The questions posed in the request for an advisory opinion are complex, and the Court's response will make it possible to strengthen the legal framework for action by States to combat climate change. France has every confidence that the Court will be able to find the appropriate answers so as to identify the applicable rules of positive law, in accordance with its task of applying international law and clarifying it when necessary.

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[243] Convention on Supplementary Compensation for Nuclear Damage, Vienna, 12 Sep. 1997, *UNTS*, Vol. 3038, No. 52722, Arts. III and IV.