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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 BURKINA FASO

2 April 2024

[Translation by the Registry]

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INTRODUCTION

1. This written statement is submitted by Burkina Faso in accordance with the Court's Order of 20 April 2023 fixing the time-limits for the presentation of written statements and written comments on those statements in the advisory proceedings relating to the *Obligations of States in respect of Climate Change*; those time-limits were extended by Orders of 4 August and 15 December 2023.

2. By its resolution 77/276 adopted on 29 March 2023, the General Assembly put the following two questions to the Court:

> "Having particular regard to the Charter of the United Nations, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the United Nations Framework Convention on Climate Change, the Paris Agreement, the United Nations Convention on the Law of the Sea, the duty of due diligence, the rights recognized in the Universal Declaration of Human Rights, the principle of prevention of significant harm to the environment and the duty to protect and preserve the marine environment:
>
> *(a)* What are the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for present and future generations;
>
> *(b)* What are the legal consequences under these obligations for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment, with respect to:
>
> (i) States, including, in particular, small island developing States, which due to their geographical circumstances and level of development, are injured or specially affected by or are particularly vulnerable to the adverse effects of climate change?
>
> (ii) Peoples and individuals of the present and future generations affected by the adverse effects of climate change?"

3. Burkina Faso joined the prevailing consensus in adopting General Assembly resolution 77/276 and, in submitting this written statement, it would like not only to contribute to the work of the Court in these proceedings, but also, and above all, to express its trust in the Court's judicial function[1]. This written statement also reflects Burkina Faso's confidence in the important role played by the Court in clarifying the content of international law, including in respect of matters as crucial for the future of humanity as greenhouse gas emissions, emissions-related climate change and the adverse effects thereof.

4. This written statement consists of five parts. In the first part, Burkina Faso clarifies the perspective from which it addresses the legal questions raised by the request for an advisory opinion, describing climate change and its adverse effects for Burkina Faso (**I**). In the second part, Burkina Faso establishes that the Court has jurisdiction to entertain the request for an advisory opinion

[1] In fact, Burkina Faso has previously had occasion to express its confidence in the Court when it accepted, by means of a special agreement, the Court's jurisdiction to settle its territorial disputes with both Mali (*Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, p. 554) and Niger (*Frontier Dispute (Burkina Faso/Niger), Judgment, I.C.J. Reports 2013*, p. 44).

submitted by the General Assembly and that there is no reason for the Court to exercise its discretion not to give an opinion (**II**). Part three addresses the issues of methodology common to the two main questions of the General Assembly. For the most part, these issues concern how time affects the determination of States' obligations in respect of greenhouse gas emissions, emissions-related climate change and the adverse effects thereof, and the legal consequences of breaching those obligations (**III**). Part four discusses **question *(a)*** of the General Assembly (**IV**), while part five addresses **question *(b)*** of the request for an advisory opinion (**V**). A general conclusion brings Burkina Faso's written statement to a close.

I. GREENHOUSE GAS EMISSIONS, CLIMATE CHANGE AND THE ADVERSE EFFECTS THEREOF FOR BURKINA FASO

5. In this section, Burkina Faso will provide the key to understanding its position on the two questions put by the General Assembly. In this regard, Burkina Faso considers climate change and its adverse effects to be scientifically established facts (**A**). Burkina Faso is among the countries bearing the brunt of climate change and its adverse effects, including rising temperatures, drought and desertification; yet it is one of the States that contributes the least to this phenomenon (**B**). This is especially alarming since Burkina Faso was one of the first States to alert the international community to the threat that climate change poses for humanity and to the urgent need for concrete action to address it (**C**). This is why, despite its limited resources, Burkina Faso has resolutely taken steps to combat climate change (**D**). Nevertheless, the challenges it faces remain immense (**E**).

A. Climate change, its causes and adverse effects: scientifically established facts

6. Burkina Faso is of the view that the Court's understanding of the phenomenon of climate change must be based on the best available scientific knowledge. This is also the view of the international community, as expressed in paragraph 5 of the Paris Agreement. The States parties to this Agreement recognize therein "the need for an effective and progressive response to the urgent threat of climate change on the basis of the best available scientific knowledge"[2]. Burkina Faso thus relies on the reports of the Intergovernmental Panel on Climate Change (the "IPCC") as consensual matrix sources of the best available scientific knowledge on the climate. Hence it considers that the Court should recognize and give considerable probative value to the IPCC's reports (**1**). These reports conclusively establish both the existence of climate change and how it is caused and must be addressed (**2**).

1. The Court must give considerable probative value to the reports of the IPCC

7. The IPCC was founded in 1989 by a memorandum of understanding concluded between the United Nations Environment Programme ("UNEP") and the World Meteorological Organization (the "WMO"). Paragraph 1 of that 1989 Memorandum of Understanding states that the IPCC has three principal objectives, namely: (i) to make assessments of available scientific information on climate change; (ii) to make assessments of environmental and socio-economic impacts of climate change; and, finally, (iii) to formulate response strategies to meet the challenge of climate change[3]. By its resolution 43/53 of 6 December 1988, the United Nations General Assembly endorsed the decision

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[2] Fifth preambular para. of the Paris Agreement, Paris, 12 Dec. 2015, *United Nations, Treaty Series* ("*UNTS*"), Vol. 3156, p. 79 (the States parties to the Agreement "[r]ecogniz[e] the need for an effective and progressive response to the urgent threat of climate change on the basis of the best available scientific knowledge") (available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-7-d&chapter=27&clang=_en).

[3] See Memorandum of Understanding between the United Nations Environment Programme and the World Meteorological Organization on the Intergovernmental Panel on Climate Change, 1989 (available at: MOU_between_UNEP_and_WMO_on_IPCC-1989.pdf).

of UNEP and the WMO to "jointly establish[] an Intergovernmental Panel on Climate Change to provide internationally co-ordinated scientific assessments of the magnitude, timing and potential environmental and socio-economic impact of climate change and realistic response strategies"[4]. The General Assembly also expressed "appreciation for the work already initiated" by the IPCC[5].

8. Burkina Faso considers that the probative value of the IPCC's reports should be assessed against criteria identified in the Court's jurisprudence. In the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, the Court noted that it had been asked to refer to a number of reports of official or independent bodies giving accounts of relevant events. It observed that

> "[t]heir value depends, among other things, on (1) the source of the item of evidence (for instance partisan, or neutral), (2) the process by which it has been generated (for instance an anonymous press report or the product of a careful court or court-like process), and (3) the quality or character of the item (such as statements against interest, and agreed or uncontested facts)"[6].

9. On the basis of these three criteria, the reports of the IPCC should be given considerable probative value in the present proceedings, particularly since their findings have never been contested[7]. *First*, the IPCC is a neutral source of information. Members of its working groups are selected on the basis of proven scientific expertise "from those experts cited in the lists provided by governments and observer organizations, and other experts as appropriate, known through their publications and works"[8]. They are subject to a strict conflict of interest policy[9]. The composition of the IPCC's working groups also meet diversity and inclusivity criteria:

> "The composition of the group of Coordinating Lead Authors and Lead Authors for a chapter, a report or its summary shall aim to reflect:
>
> — the range of scientific, technical and socio-economic views and expertise;
>
> — geographical representation (ensuring appropriate representation of experts from developing and developed countries and countries with economies in transition); there should be at least one and normally two or more from developing countries;
>
> — a mixture of experts with and without previous experience in IPCC;

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[4] General Assembly resolution 43/53: Protection of global climate for present and future generations of mankind, A/RES/43/53, para. [5].

[5] *Ibid.*

[6] *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. 135, para. 227.

[7] On the relevance of this criterion, see *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. 61, para. 61.

[8] Procedures for the Preparation, Review, Acceptance, Adoption, Approval and Publication of IPCC Reports, para. 4.3.2 (Selection of Coordinating Lead Authors, Lead Authors and Review Editors) (available at: https://www.ipcc.ch/site/assets/uploads/2018/09/ipcc-principles-appendix-a-final.pdf).

[9] See IPCC Conflict of Interest Policy, as adopted in 2011 and amended in 2016 (available at: https://www.ipcc.ch/site/assets/uploads/2018/09/ipcc-conflict-of-interest-2016.pdf).

— gender balance."[10]

10. *Second*, the IPCC's reports are subject to a meticulous scientific review process as rigorous as any judicial proceeding, which has led to it being invoked as a model by the States parties to the Paris Agreement[11]. Paragraph 2 of the Principles Governing IPCC Work provides that

> "[t]he role of the IPCC is to assess on a comprehensive, objective, open and transparent basis the scientific, technical and socio-economic information relevant to understanding the scientific basis of risk of human-induced climate change, its potential impacts and options for adaptation and mitigation. IPCC reports should be neutral with respect to policy, although they may need to deal objectively with scientific, technical and socio-economic factors relevant to the application of particular policies."[12]

11. In addition, documents issued by the IPCC "should involve both peer review by experts and review by governments"[13]. The content of IPCC documents, and of the summaries for policymakers in particular, is therefore subject to a two-fold review, both technical and political. Moreover,

> "for approval, adoption and acceptance of reports, differing views shall be explained and, upon request, recorded. Differing views on matters of a scientific, technical or socio-economic nature shall, as appropriate in the context, be represented in the scientific, technical or socio-economic document concerned. Differences of views on matters of policy or procedure shall, as appropriate in the context, be recorded in the Report of the Session."[14]

12. Nothing is hidden, therefore; everything is brought to the table and discussed. This ensures objectivity. Similarly, the IPCC does not hesitate to assign levels of confidence to its findings, which are shown in italics in its reports. While some findings are expressed with a "low" level of confidence, others are expressed with a "medium" or "high" level of confidence. Analogous terms are also used. In the discussion below, Burkina Faso will retain, in its citations, the IPCC's stated levels of confidence in its findings.

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[10] Procedures for the Preparation, Review, Acceptance, Adoption, Approval and Publication of IPCC Reports, para. 4.3.2 (Selection of Coordinating Lead Authors, Lead Authors and Review Editors) (available at: https://www.ipcc.ch/site/assets/uploads/2018/09/ipcc-principles-appendix-a-final.pdf). See also Principles Governing IPCC Work, Vienna, 1-3 Oct. 1998 (available at: https://www.ipcc.ch/site/assets/uploads/2018/09/ipcc-principles.pdf), para. 5: "[t]he IPCC Bureau, the IPCC Working Group Bureaux and the Bureaux of any Task Forces of the IPCC shall reflect balanced geographic representation with due consideration for scientific and technical requirements".

[11] Indeed, Article 13, paragraph 7 *(a)*, of the Paris Agreement stipulates that States parties must provide "[a] national inventory report of anthropogenic emissions by sources and removals by sinks of greenhouse gases, prepared using *good practice methodologies accepted by the Intergovernmental Panel on Climate Change* and agreed upon by the Conference of the Parties serving as the meeting of the Parties to this Agreement" (emphasis added).

[12] Principles Governing IPCC Work, text approved at the Fourteenth Session of the IPCC, Vienna, 1-3 Oct. 1998, para. 2 (available at: https://www.ipcc.ch/site/assets/uploads/2018/09/ipcc-principles.pdf).

[13] *Ibid.*, para. 3.

[14] *Ibid.*, para. 10.

2. The IPCC's principal findings on greenhouse gas emissions, climate change and the adverse effects thereof

13. The reports of the IPCC establish beyond any doubt that climate change is real and has anthropogenic causes, notably the emission of greenhouse gases[15]. The IPCC has also established the existence of a causal link between climate change and certain climate-related disasters. In the Summary for Policymakers, Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, the IPCC stated the following on the observed impacts of climate change:

> "Widespread, pervasive impacts to ecosystems, people, settlements, and infrastructure have resulted from observed increases in the frequency and intensity of climate and weather extremes, including hot extremes on land and in the ocean, heavy precipitation events, drought and fire weather (*high confidence*). Increasingly since AR5, these observed impacts have been attributed to human-induced climate change particularly through increased frequency and severity of extreme events. These include increased heat-related human mortality (*medium confidence*), warm-water coral bleaching and mortality (*high confidence*), and increased drought-related tree mortality (*high confidence*). Observed increases in areas burned by wildfires have been attributed to human-induced climate change in some regions (*medium to high confidence*). Adverse impacts from tropical cyclones, with related losses and damages, have increased due to sea level rise and the increase in heavy precipitation (*medium confidence*). Impacts in natural and human systems from slow-onset processes such as ocean acidification, sea level rise or regional decreases in precipitation have also been attributed to human induced climate change (*high confidence*)."[16]

14. More specifically, it is now accepted that anthropogenic greenhouse gas emissions are the cause of climate change and global warming[17]. They are also responsible for desertification and land

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[15] IPCC, Climate Change 2007: Synthesis Report, p. 72 (available at: https://www.ipcc.ch/site/assets/uploads/2018/02/ar4_syr.pdf), Robust findings 6.1:

> "Global total annual anthropogenic GHG emissions, weighted by their 100-year GWPs, have grown by 70% between 1970 and 2004. As a result of anthropogenic emissions, atmospheric concentrations of N_2O now far exceed pre-industrial values spanning many thousands of years, and those of CH_4 and CO_2 now far exceed the natural range over the last 650,000 years . . . Most of the global average warming over the past 50 years is *very likely* due to anthropogenic GHG increases and it is *likely* that there is a discernible human-induced warming averaged over each continent (except Antarctica) . . . Anthropogenic warming over the last three decades has *likely* had a discernible influence at the global scale on observed changes in many physical and biological systems."

[16] IPCC, 2022: Summary for Policymakers, Climate Change 2022: Impacts, Adaptation and Vulnerability, Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, p. 9, B.1.1 (available at: https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_SummaryForPolicymakers.pdf).

[17] See also IPCC, 2023: Summary for Policymakers, Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, p. 5, A.2.1:

> "It is unequivocal that human influence has warmed the atmosphere, ocean and land. Global mean sea level increased by 0.20 [0.15 to 0.25] m between 1901 and 2018. The average rate of sea level rise was 1.3 [0.6 to 2.1] mm yr-1 between 1901 and 1971, increasing to 1.9 [0.8 to 2.9] mm yr-1 between 1971 and 2006, and further increasing to 3.7 [3.2 to 4.2] mm yr-1 between 2006 and 2018 (*high confidence*). Human influence was very *likely* the main driver of these increases since at least 1971. Evidence of observed changes in extremes such as heatwaves, heavy precipitation, droughts, and tropical cyclones, and, in particular, their attribution to human influence, has further strengthened since AR5. Human influence has *likely* increased the chance of compound extreme events since the 1950s, including increases in the frequency of concurrent heatwaves and droughts." (available at: https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_SPM.pdf);

degradation in arid areas such as the Sahel, where Burkina Faso is found. The Summary for Policymakers of the IPCC Special Report on Climate Change, Desertification, Land Degradation, Sustainable Land Management, Food Security, and Greenhouse Gas Fluxes in Terrestrial Ecosystems states in this regard that

> "[c]limate change exacerbates land degradation, particularly in low-lying coastal areas, river deltas, drylands and in permafrost areas (*high confidence*). Over the period 1961-2013, the annual area of drylands in drought has increased, on average by slightly more than 1% per year, with large inter-annual variability. In 2015, about 500 (380-620) million people lived within areas which experienced desertification between the 1980s and 2000s. The highest numbers of people affected are in South and East Asia, the circum Sahara region including North Africa, and the Middle East including the Arabian Peninsula (*low confidence*). Other dryland regions have also experienced desertification. People living in already degraded or decertified areas are increasingly negatively affected by climate change (*high confidence*)."[18]

15. Climate change caused by anthropogenic greenhouse gas emissions also results in a scarcity of freshwater resources. The IPCC has therefore observed that climate change will lead both to frequent droughts and flooding, particularly in already arid countries such as Burkina Faso, and to poor-quality water resources:

> "Freshwater-related risks of climate change increase significantly with increasing greenhouse gas concentrations (*robust evidence, high agreement*). The fraction of global population experiencing water scarcity and the fraction affected by major river floods increase with the level of warming in the 21st century.
>
> Climate change over the 21st century is projected to reduce renewable surface water and groundwater resources significantly in most dry subtropical regions (*robust evidence, high agreement*), intensifying competition for water among sectors (*limited evidence, medium agreement*). In presently dry regions, drought frequency will likely increase by the end of the 21st century under RCP8.5 (*medium confidence*). In contrast,

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IPCC, 2023: Sections, Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, p. 42:

> "Human activities, principally through emissions of greenhouse gases, have unequivocally caused global warming, with global surface temperature reaching 1.1°C above 1850-1900 in 2011-2020. Global greenhouse gas emissions have continued to increase over 2010-2019, with unequal historical and ongoing contributions arising from unsustainable energy use, land use and land-use change, lifestyles and patterns of consumption and production across regions, between and within countries, and between individuals (*high confidence*). Human-caused climate change is already affecting many weather and climate extremes in every region across the globe. This has led to widespread adverse impacts on food and water security, human health and on economies and society and related losses and damages to nature and people (*high confidence*). Vulnerable communities who have historically contributed the least to current climate change are disproportionately affected (*high confidence*)." (available at: https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_LongerReport.pdf).

[18] IPCC, 2019: Summary for Policymakers, Climate Change and Land: an IPCC Special Report on Climate Change, Desertification, Land Degradation, Sustainable Land Management, Food Security, and Greenhouse Gas Fluxes in Terrestrial Ecosystems, p. 7, A.1.5. See also, p. 22, B.4.5:

> "Currently there is a lack of knowledge of adaptation limits and potential maladaptation to combined effects of climate change and desertification. In the absence of new or enhanced adaptation options, the potential for residual risks and maladaptive outcomes is high (*high confidence*). Even when solutions are available, social, economic and institutional constraints could pose barriers to their implementation (*medium confidence*). Some adaptation options can become maladaptive due to their environmental impacts, such as irrigation causing soil salinisation or over extraction leading to ground-water depletion (*medium confidence*). Extreme forms of desertification can lead to the complete loss of land productivity, limiting adaptation options or reaching the limits to adaptation (*high confidence*)." (available at: https://www.ipcc.ch/site/assets/uploads/sites/4/2022/11/SRCCL_SPM.pdf).

> water resources are projected to increase at high latitudes (*robust evidence, high agreement*). Climate change is projected to reduce raw water quality and pose risks to drinking water quality even with conventional treatment, due to interacting factors: increased temperature; increased sediment, nutrient, and pollutant loadings from heavy rainfall; increased concentration of pollutants during droughts; and disruption of treatment facilities during floods (*medium evidence, high agreement*)."[19]

16. Nor is the marine environment spared the adverse effects of climate change resulting from greenhouse gas emissions. In fact, the IPCC has also established that climate change is responsible

[19] IPCC, 2014: Summary for Policymakers, Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part A: Global and Sectoral Aspects, Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change, p. 14, B.2 (available at: https://archive.ipcc.ch/pdf/assessment-report/ar5/wg2/ar5_wgII_spm_en.pdf). See also IPCC, 2007: Summary for Policymakers, Climate Change 2007: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change, p. 11: "Drought-affected areas will likely increase in extent. Heavy precipitation events, which are very likely to increase in frequency, will augment flood risk." (available at: https://www.ipcc.ch/site/assets/uploads/2018/02/ar4-wg2-spm-1.pdf).

for rising sea levels[20] and sea temperatures[21], ocean acidification[22], coastal erosion[23] and even the complete disappearance of island territories[24].

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[20] IPCC, 2019: Summary for Policymakers, IPCC Special Report on the Ocean and Cryosphere in a Changing Climate, p. 10, A.3:

> "Global mean sea level (GMSL) is rising, with acceleration in recent decades due to increasing rates of ice loss from the Greenland and Antarctic ice sheets (*very high confidence*), as well as continued glacier mass loss and ocean thermal expansion. Increases in tropical cyclone winds and rainfall, and increases in extreme waves, combined with relative sea level rise, exacerbate extreme sea level events and coastal hazards (*high confidence*)." (available at: https://www.ipcc.ch/site/assets/uploads/sites/3/2022/03/01_SROCC_SPM_FINAL.pdf).

[21] *Ibid*., p. 9, A.[2]:

> "It is virtually certain that the global ocean has warmed unabated since 1970 and has taken up more than 90% of the excess heat in the climate system (*high confidence*). Since 1993, the rate of ocean warming has more than doubled (*likely*). Marine heatwaves have very likely doubled in frequency since 1982 and are increasing in intensity (*very high confidence*). By absorbing more CO2, the ocean has undergone increasing surface acidification (*virtually certain*). A loss of oxygen has occurred from the surface to 1000 m (*medium confidence*)." Later (A.2.1), the IPCC observes that: "The ocean warming trend documented in the IPCC Fifth Assessment Report (AR5) has continued. Since 1993 the rate of ocean warming and thus heat uptake has more than doubled (*likely*) from 3.22 ± 1.61 ZJ yr–1 (0–700 m depth) and 0.97 ± 0.64 ZJ yr–1 (700–2000 m) between 1969 and 1993, to 6.28 ± 0.48 ZJ yr–1 (0–700 m) and 3.86 ± 2.09 ZJ yr–1 (700–2000 m) between 1993 and 201717, and is attributed to anthropogenic forcing (*very likely*)." (available at: https://www.ipcc.ch/site/assets/uploads/sites/3/2022/03/01_SROCC_SPM_FINAL.pdf).

[22] *Ibid*., p. 9, A.2.5:

> "The ocean has taken up between 20–30% (*very likely*) of total anthropogenic CO2 emissions since the 1980s causing further ocean acidification. Open ocean surface pH has declined by a *very likely* range of 0.017–0.027 pH units per decade since the late 1980s, with the decline in surface ocean pH very *likely* to have already emerged from background natural variability for more than 95% of the ocean surface area." (available at: https://www.ipcc.ch/site/assets/uploads/sites/3/2022/03/01_SROCC_SPM_FINAL.pdf).

[23] IPCC, 2014: Summary for Policymakers, Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part A: Global and Sectoral Aspects, Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change, p. 17: "Due to sea level rise projected throughout the 21st century and beyond, coastal systems and low-lying areas will increasingly experience adverse impacts such as submergence, coastal flooding, and coastal erosion (*very high confidence*)." (available at: https://archive.ipcc.ch/pdf/assessment-report/ar5/wg2/ar5_wgII_spm_en.pdf); IPCC, 2007: Summary for Policymakers, Climate Change 2007: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change, p. 12 (available at: https://www.ipcc.ch/site/assets/uploads/2018/02/ar4-wg2-spm-1.pdf); see also p. 15:

> "Small islands, whether located in the tropics or higher latitudes, have characteristics which make them especially vulnerable to the effects of climate change, sea-level rise and extreme events . . . Deterioration in coastal conditions, for example through erosion of beaches and coral bleaching, is expected to affect local resources, e.g., fisheries, and reduce the value of these destinations for tourism . . . Sea-level rise is expected to exacerbate inundation, storm surge, erosion and other coastal hazards, thus threatening vital infrastructure, settlements and facilities that support the livelihood of island communities . . . Climate change is projected by mid-century to reduce water resources in many small islands, e.g., in the Caribbean and Pacific, to the point where they become insufficient to meet demand during low-rainfall periods . . . With higher temperatures, increased invasion by non-native species is expected to occur, particularly on mid- and high-latitude islands."

[24] IPCC, 2007: Summary for Policymakers, Climate Change 2007: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change, p. 12 (available at: https://www.ipcc.ch/site/assets/uploads/2018/02/ar4-wg2-spm-1.pdf); IPCC, 2019: Summary for Policymakers, IPCC Special Report on the Ocean and Cryosphere in a Changing Climate, B.9.2:

17. Climate change is also causing biodiversity loss[25], both in the seas and on land. The IPCC has thus noted that

> "[c]limate change has caused substantial damages, and increasingly irreversible losses, in terrestrial, freshwater and coastal and open ocean marine ecosystems (*high confidence*). The extent and magnitude of climate change impacts are larger than estimated in previous assessments (*high confidence*). Widespread deterioration of ecosystem structure and function, resilience and natural adaptive capacity, as well as shifts in seasonal timing have occurred due to climate change (*high confidence*), with adverse socioeconomic consequences (*high confidence*). Approximately half of the species assessed globally have shifted polewards or, on land, also to higher elevations (*very high confidence*). Hundreds of local losses of species have been driven by increases in the magnitude of heat extremes (*high confidence*), as well as mass mortality events on land and in the ocean (*very high confidence*) and loss of kelp forests (*high confidence*). Some losses are already irreversible, such as the first species extinctions driven by climate change (*medium confidence*). Other impacts are approaching irreversibility such as the impacts of hydrological changes resulting from the retreat of glaciers, or the changes in some mountain (*medium confidence*) and Arctic ecosystems driven by permafrost thaw (*high confidence*)."[26]

18. It is clear that effects of such significance for the climate system and its various parts are bound to have disastrous consequences for the human beings living in that environment[27]. As the

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> "High to very high risks are approached for vulnerable communities in coral reef environments, urban atoll islands and low-lying Arctic locations from sea level rise well before the end of this century in case of high emissions scenarios. This entails adaptation limits being reached, which are the points at which an actor's objectives (or system needs) cannot be secured from intolerable risks through adaptive actions (*high confidence*). Reaching adaptation limits (e.g., biophysical, geographical, financial, technical, social, political, and institutional) depends on the emissions scenario and context-specific risk tolerance, and is projected to expand to more areas beyond 2100, due to the long-term commitment of sea level rise (*medium confidence*). Some island nations are likely to become uninhabitable due to climate-related ocean and cryosphere change (*medium confidence*), but habitability thresholds remain extremely difficult to assess." (available at: https://www.ipcc.ch/site/assets/uploads/sites/3/2022/03/01_SROCC_SPM_FINAL.pdf).

[25] IPCC, 2022: Climate Change and Biodiversity, IPCC Technical Paper V, p. 1:

> "The atmospheric concentrations of greenhouse gases have increased since the pre-industrial era due to human activities, primarily the combustion of fossil fuels and land-use and land-cover change. These and natural forces have contributed to changes in the Earth's climate over the 20th century: Land and ocean surface temperatures have warmed, the spatial and temporal patterns of precipitation have changed, sea level has risen, and the frequency and intensity of El Niño events have increased. These changes, particularly the warmer regional temperatures, have affected the timing of reproduction in animals and plants and/or migration of animals, the length of the growing season, species distributions and population sizes, and the frequency of pest and disease outbreaks. Some coastal, high-latitude ecosystems have also been affected by changes in regional climatic factors." (available at: https://archive.ipcc.ch/pdf/technical-papers/climate-changes-biodiversity-en.pdf).

[26] IPCC, 2022: Summary for Policymakers, Climate Change 2022: Impacts, Adaptation and Vulnerability, Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, p. 9, B.1.2 (available at: https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_SummaryForPolicymakers.pdf).

[27] IPCC, 2023: Summary for Policymakers, Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, p. 6, A.2.6:

> "Climate change has caused widespread adverse impacts and related losses and damages to nature and people that are unequally distributed across systems, regions and sectors. Economic damages from climate change have been detected in climate-exposed sectors, such as agriculture, forestry, fishery, energy, and tourism. Individual livelihoods have been affected through, for example, destruction of homes and infrastructure, and loss of property and income, human health and food security, with adverse effects on gender and social equity. (*high confidence*)" (available at: https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_SPM.pdf).

IPCC observes, with particular emphasis on Africa, small-scale food producers and low-income households — all elements that characterize Burkina Faso and its population —

> "[c]limate change including increases in frequency and intensity of extremes have reduced food and water security, hindering efforts to meet Sustainable Development Goals (*high confidence*). Although overall agricultural productivity has increased, climate change has slowed this growth over the past 50 years globally (*medium confidence*), related negative impacts were mainly in mid- and low latitude regions but positive impacts occurred in some high latitude regions (*high confidence*). Ocean warming and ocean acidification have adversely affected food production from shellfish aquaculture and fisheries in some oceanic regions (*high confidence*). Increasing weather and climate extreme events have exposed millions of people to acute food insecurity and reduced water security, with the largest impacts observed in many locations and/or communities in Africa, Asia, Central and South America, Small Islands and the Arctic (*high confidence*). Jointly, sudden losses of food production and access to food compounded by decreased diet diversity have increased malnutrition in many communities (*high confidence*), especially for Indigenous Peoples, small-scale food producers and low-income households (*high confidence*), with children, elderly people and pregnant women particularly impacted (*high confidence*). Roughly half of the world's population currently experience severe water scarcity for at least some part of the year due to climatic and non-climatic drivers (*medium confidence*)."[28]

19. Moreover, climate change caused by greenhouse gas emissions also has an adverse impact on the health of populations[29] and on the economy of countries such as Burkina Faso which are chiefly dependent on agriculture and farming. According to the IPCC,

> "[o]verall adverse economic impacts attributable to climate change, including slow-onset and extreme weather events, have been increasingly identified (*medium confidence*). Some positive economic effects have been identified in regions that have benefited from lower energy demand as well as comparative advantages in agricultural markets and tourism (*high confidence*). Economic damages from climate change have been detected in climate-exposed sectors, with regional effects to agriculture, forestry, fishery, energy, and tourism (*high confidence*), and through outdoor labour productivity

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[28] IPCC, 2022: Summary for Policymakers, Climate Change 2022: Impacts, Adaptation and Vulnerability, Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, p. 9, B.1.3 (available at: https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_SummaryForPolicymakers.pdf).

[29] *Ibid*., p. 11, B.1.4:

> "Climate change has adversely affected physical health of people globally (*very high confidence*) and mental health of people in the assessed regions (*very high confidence*). Climate change impacts on health are mediated through natural and human systems, including economic and social conditions and disruptions (*high confidence*). In all regions extreme heat events have resulted in human mortality and morbidity (*very high confidence*). The occurrence of climate-related food-borne and water-borne diseases has increased (*very high confidence*). The incidence of vector-borne diseases has increased from range expansion and/or increased reproduction of disease vectors (*high confidence*). Animal and human diseases, including zoonoses, are emerging in new areas (*high confidence*). Water and food-borne disease risks have increased regionally from climate-sensitive aquatic pathogens, including *Vibrio* spp. (*high confidence*), and from toxic substances from harmful freshwater cyanobacteria (*medium confidence*). Although diarrheal diseases have decreased globally, higher temperatures, increased rain and flooding have increased the occurrence of diarrheal diseases, including cholera (*very high confidence*) and other gastrointestinal infections (*high confidence*). In assessed regions, some mental health challenges are associated with increasing temperatures *(high confidence*), trauma from weather and climate extreme events (*very high confidence*), and loss of livelihoods and culture (*high confidence*). Increased exposure to wildfire smoke, atmospheric dust, and aeroallergens have been associated with climate-sensitive cardiovascular and respiratory distress (*high confidence*). Health services have been disrupted by extreme events such as floods."

(*high confidence*). Some extreme weather events, such as tropical cyclones, have reduced economic growth in the short-term (*high confidence*). Non-climatic factors including some patterns of settlement, and siting of infrastructure have contributed to the exposure of more assets to extreme climate hazards increasing the magnitude of the losses (*high confidence*). Individual livelihoods have been affected through changes in agricultural productivity, impacts on human health and food security, destruction of homes and infrastructure, and loss of property and income, with adverse effects on gender and social equity (*high confidence*)."[30]

20. The IPCC has also emphasized as follows the link between climate change caused by anthropogenic greenhouse gas emissions and socio-political crises, and therefore the maintenance of international peace and security:

"Climate change is contributing to humanitarian crises where climate hazards interact with high vulnerability (*high confidence*). Climate and weather extremes are increasingly driving displacement in all regions (*high confidence*), with Small Island States disproportionately affected (*high confidence*). Flood and drought-related acute food insecurity and malnutrition have increased in Africa (*high confidence*) and Central and South America (*high confidence*). While non-climatic factors are the dominant drivers of existing intrastate violent conflicts, in some assessed regions extreme weather and climate events have had a small, adverse impact on their length, severity or frequency, but the statistical association is weak (*medium confidence*). Through displacement and involuntary migration from extreme weather and climate events, climate change has generated and perpetuated vulnerability (*medium confidence*)."[31]

21. Lastly, the IPCC has recommended a number of solutions to the climate crisis, including the need for States, individually and as a group, to significantly reduce their greenhouse gas emissions. According to the Summary for Policymakers of the Synthesis Report to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change,

"[f]rom a physical science perspective, limiting human-caused global warming to a specific level requires limiting cumulative CO_2 emissions, reaching at least net zero CO_2 emissions, along with strong reductions in other greenhouse gas emissions. Reaching net zero GHG emissions primarily requires deep reductions in CO_2, methane, and other GHG emissions, and implies net negative CO_2 emissions. Carbon dioxide removal (CDR) will be necessary to achieve net negative CO_2 emissions . . . Net zero GHG emissions, if sustained, are projected to result in a gradual decline in global surface temperatures after an earlier peak. (*high confidence*)."[32]

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[30] *Ibid.*, p. 11, B.1.6.

[31] *Ibid.*, p. 11, B.1.7.

[32] IPCC, 2023: Summary for Policymakers, Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, p. 19, B.5.1 (available at: https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_SPM.pdf). See also IPCC, 2018: Summary for Policymakers, 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, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty, p. 12, C.1:

22. The IPCC considers that only a significant reduction in greenhouse gas emissions and the accelerated implementation of adaptation actions over the next decade might reduce projected losses and damages for humans and ecosystems[33]. Conversely,

> "[c]ontinued emissions will further affect all major climate system components, and many changes will be irreversible on centennial to millennial time scales and become larger with increasing global warming. Without urgent, effective, and equitable mitigation and adaptation actions, climate change increasingly threatens ecosystems, biodiversity, and the livelihoods, health and well-being of current and future generations. (*high confidence*)."[34]

23. In this regard, Burkina Faso, an African country among the least developed countries, is one of the most vulnerable to climate change and its adverse effects. Its population is one of the worst affected by the adverse effects of climate change. In the words of the IPCC,

> "[d]elayed mitigation action will further increase global warming and losses and damages will rise and additional human and natural systems will reach adaptation limits. Challenges from delayed adaptation and mitigation actions include the risk of cost escalation, lock-in of infrastructure, stranded assets, and reduced feasibility and effectiveness of adaptation and mitigation options. Without rapid, deep and sustained mitigation and accelerated adaptation actions, losses and damages will continue to increase, including projected adverse impacts in Africa, LDCs, SIDS, Central and South America, Asia and the Arctic, and will disproportionately affect the most vulnerable populations. (*high confidence*)."[35]

24. Lastly, the IPCC has highlighted the indispensable role of international co-operation in addressing climate change caused by anthropogenic greenhouse gas emissions[36]. It notes that there

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> "In model pathways with no or limited overshoot of 1.5°C, global net anthropogenic CO_2 emissions decline by about 45% from 2010 levels by 2030 (40–60% interquartile range), reaching net zero around 2050 (2045–2055 interquartile range). For limiting global warming to below 2°C CO_2 emissions are projected to decline by about 25% by 2030 in most pathways (10–30% interquartile range) and reach net zero around 2070 (2065–2080 interquartile range). Non-CO_2 emissions in pathways that limit global warming to 1.5°C show deep reductions that are similar to those in pathways limiting warming to 2°C. (*high confidence*)" (available at: https://www.ipcc.ch/site/assets/uploads/sites/2/2022/06/SPM_version_report_LR.pdf).

[33] IPCC, 2023: Summary for Policymakers, Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, p. 25, C.2 (available at: https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_SPM.pdf).

[34] *Ibid.*, p. 24, C.1.3.

[35] *Ibid.*, p. 33, C.2.2.

[36] *Ibid.*, p. 34, C.7.6:

> "International cooperation is a critical enabler for achieving ambitious climate change mitigation, adaptation, and climate resilient development (*high confidence*). Climate resilient development is enabled by increased international cooperation including mobilising and enhancing access to finance, particularly for developing countries, vulnerable regions, sectors and groups and aligning finance flows for climate action to be consistent with ambition levels and funding needs (*high confidence*). Enhancing international cooperation on finance, technology and capacity building can enable greater ambition and can act as a catalyst for accelerating mitigation and adaptation, and shifting development pathways towards sustainability (*high confidence*). This includes support to NDCs and accelerating technology development and deployment (*high confidence*). Transnational partnerships can stimulate policy development, technology diffusion, adaptation and mitigation, though uncertainties remain over their costs, feasibility and effectiveness (*medium confidence*). International environmental and sectoral agreements, institutions and initiatives are helping, and in some cases may help, to stimulate low GHG emissions investments and reduce emissions (*medium confidence*)."

are sufficient global resources to finance the mitigation of greenhouse gas emissions and adaptation to the effects of climate change. It has observed, however, that there are barriers to redirecting this capital to climate action[37]. In this regard, the IPCC emphasizes the need to co-operate with developing countries in the most vulnerable regions such as Sub-Saharan Africa, where Burkina Faso is found. According to the IPCC,

> "[a]ccelerated financial support for developing countries from developed countries and other sources is a critical enabler to enhance adaptation and mitigation actions and address inequities in access to finance, including its costs, terms and conditions, and economic vulnerability to climate change for developing countries. Scaled-up public grants for mitigation and adaptation funding for vulnerable regions, especially in Sub-Saharan Africa, would be cost-effective and have high social returns in terms of access to basic energy. Options for scaling up mitigation in developing countries include: increased levels of public finance and publicly mobilised private finance flows from developed to developing countries in the context of the USD 100 billion-a-year goal; increased use of public guarantees to reduce risks and leverage private flows at lower cost; local capital markets development; and building greater trust in international cooperation processes. A coordinated effort to make the post-pandemic recovery sustainable over the longer-term can accelerate climate action, including in developing regions and countries facing high debt costs, debt distress and macroeconomic uncertainty. (*high confidence*)."[38]

25. Burkina Faso supports the findings of the various IPCC reports on the causes and adverse effects of climate change and on the solutions to combating them effectively. It is in the light of this broad consensus among the international and scientific communities that the Court must consider the two questions of the General Assembly of which it is seised.

B. Burkina Faso, a country seriously affected by climate change

26. The gravest observations and predictions of the IPCC in terms of climate change and its effects are a lived reality in Burkina Faso. Furthermore, the situation in which Burkina Faso finds itself as regards climate change and its effects is one of a series of injustices. While Burkina Faso contributes only 0.12 per cent to global greenhouse gas emissions[39], it is one of the States most affected by and vulnerable to the effects of climate change. It is an archetypal arid African country that is suffering and will continue to suffer the most from the consequences of climate change consistently mentioned by the IPCC in its reports.

27. Burkina Faso's extreme vulnerability to the effects of climate change is primarily linked to its geographical situation. Burkina Faso is a landlocked country in the heart of West Africa. It sits on the Sahelian strip, a transition zone between the Sahara desert and tropical and coastal forests. The Sahelian strip, a long belt of land that crosses Africa from west to east, also encompasses countries such as Mauritania, Mali, Niger, Chad, Sudan, Eritrea, northern Ethiopia and Somalia. Like all these countries, Burkina Faso is exposed to a wide range of environmental hazards directly exacerbated by climate change, in particular hydrometeorological and geophysical hazards, which in turn give rise to socio-economic and political crises.

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[37] *Ibid.*, p. 33, C.7.

[38] *Ibid.*, p. 33, C.7.4.

[39] UNDP, Climate Promise: Burkina Faso (available at: https://climatepromise.undp.org/what-we-do/where-we-work/burkina-faso).

28. Burkina Faso's vulnerability is also linked to the structure of its economy: more than 86 per cent of Burkina Faso's population makes a living from traditional agriculture[40]. Burkina Faso ranks 184th on the Human Development Index[41] and is among the countries of low human development[42]. According to the Fifth General Population and Housing Census,

> "[o]f the 20,505,155 inhabitants in Burkina Faso in 2019, 8,065,679 are classed as poor, equating to 39.3 per cent. The depth of poverty, that is the average gap in percentage terms between the consumption of poor households and the poverty threshold, is 11.6 per cent"[43].

29. The direct consequences of climate change affecting Burkina Faso are principally drought, desertification and flooding. As regards desertification, climate change results in a reduction of water reserves and a severe drop in rainfall which lead, *inter alia*, to water stress on all resources, the degradation of land and ecosystems, an ensuing and gradual loss of biodiversity and lessening of ecosystem services, changes to habitats and to the life cycles of animal and plant species, and drought and rising temperatures which diminish grain production[44]. Crop yield losses have serious consequences for the population, particularly the poor, and impede both food supply and food security[45]. According to a study by the National Council for Emergency Relief and Rehabilitation ("CONASUR"), there were repeated droughts in the years 1973, 1983, 1991, 1997, 2004 and 2011. These had disastrous consequences, resulting in a decline in biological diversity, and the loss of livestock and human lives[46]. As regards recurrent flooding caused by climate change, such flooding occurred in the years 1988, 1992, 1994, 2006, 2007, 2008, 2009, 2010, 2011 and 2012 and resulted in the loss of crops and livestock, and left thousands homeless[47]. From an economic perspective, climate change is responsible for the loss of numerous resources, both financial and material, for Burkina Faso.

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[40] Burkina Faso, Stratégie de développement rural à l'horizon 2016-2025, 2015, p. 9 (available at: https://www.gafspfund.org/sites/default/files/inline-files/6a.%20Burkina%20Faso_Agriculture%20and%20Food%20Security%20Strategy.pdf).

[41] UNDP, Human Development Report (2021-2022), p. 3 (available at: https://hdr.undp.org/system/files/documents/global-report-document/hdr2021-22reportenglish_0.pdf). See also p. 8: "Burkina Faso's HDI value for 2018 is estimated at 0.4347 — which puts the country in the 'low human development' category — positioning it at 182 out of 189 countries and territories. Between 2011 and 2018, Burkina Faso's HDI value changed from 0.331 to 0.434".

[42] See the list at: https://www.un.org/en/conferences/least-developed-countries.

[43] INSD, Cinquième recensement général de la population et de l'habitation du Burkina Faso, Vol. 3 (Mesure et cartographie de la pauvreté), 2022, p. 27 (available at: https://www.insd.bf/sites/default/files/2023-07/VOLUME%203%20-CARTOGRAPHIE%20DE%20LA%20PAUVRETE.pdf).

[44] Burkina Faso, Troisième communication nationale sur les changements climatiques sous la convention-cadre des Nations Unies sur les changements climatiques, UNFCCC, Apr. 2022, p. 15, p. 108, p. 131 (available at: https://unfccc.int/sites/default/files/resource/Troisième-Communication-Burkina Faso.pdf); Notre Dame Global Adaptation Initiative, Country Ranking: Burkina Faso (available at: https://gain.nd.edu/our-work/country-index/rankings/).

[45] Hamid El-Bilali, "Climate Change and Agriculture in Burkina Faso", *Journal of Aridland Agriculture*, 2021, Vol. 7, p. 33:

> "Evidence from the literature shows that Burkina Faso is experiencing climate change as characterized by warming, monsoonal precipitation recovery, and an increase in the occurrence of climate extremes. These climate tendencies are projected to continue although uncertainties affect climate simulations, especially regarding precipitation. A robust evidence of yield loss in BF, mainly driven by warming and increase in air temperature, emerges from the analysed literature. The negative impact of CC on crop yields results mainly from temperatures, for which climate models project an increase that is much larger with respect to changes in precipitation, which are still uncertain in climate projections . . . Yield losses and consequent decrease of agricultural production can have far-reaching effects in terms of food security and rural livelihoods in the country."

[46] SP/CONASUR, 2012.

[47] *Ibid.*

30. Lastly, climate change has had certain socio-political consequences in Burkina Faso, as it has in other countries on the Sahelian strip. The growing scarcity of resources caused by climate change reduces the margins of manoeuvre of those in power to create social goods through ambitious public policies, while low rainfall and desertification lead to impoverishment and increased competition between communities for the few resources that are available, in particular water points and grazing and agricultural land. The decline in natural resources resulting from climate change is thus one of the causes of political instability and security issues within the Sahelian strip, including in Burkina Faso[48].

31. Unfortunately, the future does not look any brighter. In 2021, Burkina Faso ranked 157th on the Climate Vulnerability Index drawn up by the United Nations Development Programme[49]. The Notre Dame Global Adaptation Initiative study on Burkina Faso emphasizes the urgent need for action to help the country, which ranks 29th on the list of States most vulnerable to climate change and 158th in terms of readiness to address it. According to the study,

> "[t]he high vulnerability score and low readiness score of Burkina Faso places it in the upper-left quadrant of the ND-GAIN Matrix. It has both a great need for investment and innovations to improve readiness and a great urgency for action. Burkina Faso is the 29th most vulnerable country and the 158th most ready country."[50]

32. In fact, climate projections and vulnerability studies show that the determinant factors for Burkina Faso's development, namely water resources, agriculture, livestock and fisheries resources, the environment and natural resources, health, energy, infrastructure and habitat, are the factors most affected by climate change and its adverse impacts in the short, medium and long term[51]. It is because of the gravity of these consequences, which constitute a threat to the very existence of the people of Burkina Faso, that the country has done its utmost since the beginning of the 1980s to alert the international community to the urgent need for action.

C. Burkina Faso, one of the first countries to alert the international community to the urgent need for climate action

33. Burkina Faso was quick to realize the adverse impact of climate change on its survival, the prosperity of its economic activities, its environment and biodiversity. The great drought of 1973 resulted in a large number of deaths, and much disease and famine. The people of Burkina Faso saw "lakes and rivers dry up . . . the environment degrade, trees die and the desert take over large swathes of land"[52]. This tangible reality prompted Burkina Faso to invite the other countries of the Sahel to a diplomatic conference in Ouagadougou, where the Convention on the Establishment of a Permanent

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[48] See Moving from Reaction to Action — Anticipating Vulnerability Hotspots in the Sahel, OSCDS/UNHCR, 2022.

[49] UNDP, Climate Promise: Burkina Faso (available at: https://climatepromise.undp.org/what-we-do/where-we-work/burkina-faso).

[50] Notre Dame Global Adaptation Initiative, Country Ranking: Burkina Faso (available at: https://gain.nd.edu/our-work/country-index/rankings/).

[51] Burkina Faso, Troisième communication nationale sur les changements climatiques sous la convention-cadre des Nations Unies sur les changements climatiques, UNFCCC, Apr. 2022, p. 15 (available at: https://unfccc.int/sites/default/files/resource/Troisième-Communication-Burkina Faso.pdf).

[52] Thomas Sankara, "Sauver l'arbre, l'environnement et la vie tout court, Conférence pour la protection de l'arbre et de la forêt, Paris, 5 février 1986", in: Daniel Gakunzi, *"Oser inventer l'avenir": la parole de Sankara (1983-1987)*, Paris, L'Harmattan, 1988, p. 163.

Interstate Committee for Drought Control in the Sahel ("CILSS") was adopted[53], some 20 years before the 1994 United Nations Convention to Combat Desertification.

34. Burkina Faso's efforts to combat desertification and protect the environment reached full swing during the presidency of Captain Thomas Sankara. Sankara was, in fact, probably one of the first political leaders to draw attention to the role of humans in the degradation of the environment and to take appropriate action[54]. He put environmental protection at the heart of the work of the Conseil National de la Révolution (the "CNR"). During an interview with journalists in the margins of the Conference on Trees and Forests held in Paris from 5 to 7 February 1986, he proclaimed:

> "My Homeland, Burkina Faso, is without question one of the rare countries on this planet justified in calling itself and viewing itself as a distillation of all the natural evils from which mankind still suffers at the end of this twentieth century . . . Here I am merely the humble spokesperson of a people who, having passively watched their natural environment die, refuse to watch themselves die. Since August 4, 1983, water, trees, and lives, if not by survival itself, have been fundamental and sacred elements in all actions taken by the National Council of the Revolution, which leads Burkina Faso."[55]

35. He also emphasized the need for a collective awareness at the international level of the importance of protecting the environment and of taking future generations and even questions of sustainable development into account, thus setting forth a very early version of the principle of generational and transgenerational equity. Sankara stated that,

> "while it is normal for each of us to think about living happily, it is essential that we also ask ourselves what will become of future generations . . . It is therefore a crime against the generations of Burkina Faso, against the very eternity of Burkina Faso, to think only of oneself, that is to take everything for oneself and leave nothing for future generations. We will fight this kind of crime as our society and the continuity of our revolution, our country, its dignity and its freedom demand."[56]

36. President Thomas Sankara fought against certain practices of the people of Burkina Faso, such as bush-fires, excessive wood-cutting and the roaming of livestock, because of their effects on desertification. He observed, however, that climate disruption was also the result of outside forces, noting that "today's devastation of Amazonia has consequences for Burkina Faso", and he stated that "there can be no doubt that all this pollution released into nature, into the seas, is disrupting the established order of things. And it is done solely for the benefit of the greatest polluters". He lamented the fact that the "greatest polluters" were those who "possess sufficient scientific and technological knowledge to describe the consequences of their incalculable acts in a scientific and rigorous way",

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[53] See the Convention Reaffirming the Establishment of a Permanent Interstate Committee for Drought Control in the Sahel (CILSS), 22 Apr. 1994 (available at: https://www.fao.org/faolex/results/details/fr/c/LEX-FAOC017464/).

[54] Bruno Jaffré, *Thomas Sankara, La liberté contre le destin : Textes et discours rassemblés et commentés*, Paris, Syllepse, 2017, p. 3. For a complete overview of Sankara's commitment to climate issues, see Mahamady Ouédraogo, "Sankara et le climat : un exemple pour la mémoire et la conscience de la politique environnementale d'aujourd'hui et de demain", *Liaison Energie-Francophonie*, 2020, No. 114, pp. 76-79 (available at: https://www.thomassankara.net/sankara-climat-exemple-memoire-conscience-de-politique-environnementale-daujourdhui-de-demain1/).

[55] Thomas Sankara, "Sauver l'arbre, l'environnement et la vie tout court, Conférence pour la protection de l'arbre et de la forêt, Paris, 5 février 1986", in: Daniel Gakunzi, *"Oser inventer l'avenir": la parole de Sankara (1983-1987)*, Paris, L'Harmattan, 1988, p. 163.

[56] Thomas Sankara, "Discours prononcé le 22 avril 1985 lors de l'inauguration de l'Inspection générale des eaux et forêts", in: Bruno Jaffré, *Thomas Sankara, La liberté contre le destin : Textes et discours rassemblés et commentés*, Paris, Syllepse, 2017, p. 184.

and called into question the impartiality of certain studies of the time which suggested that climate change did not exist[57].

37. President Sankara also addressed the question of how to finance action to combat the degradation of forests, a carbon reservoir. At the Paris Conference on Trees and Forests for example, he reiterated his proposal that "at least 1 per cent of the colossal sums of money sacrificed to the search for cohabitation with other stars and planets be used, by way of compensation, to finance projects to save trees and lives"[58]. In response to Soir3 television journalist Richard Tripault, who asked where the figure of 1 per cent had come from, whether it was sufficient and how it had been determined, President Sankara explained that,

> "[b]eyond the figure itself, what we are trying to do is to raise awareness of a problem, the grave scourge of desertification. Responsibility for this scourge lies, in our opinion, not only with the men and women of Burkina Faso, but also with all those far from our country who are directly or indirectly causing damage to the climate and the environment."[59]

38. Burkina Faso regrets that the calls it has made since the 1980s for vigorous action to combat climate change and its adverse effects, in particular desertification, have failed to have tangible effects: such action would have enabled greenhouse gas emissions to be reduced and lives and the environment to be protected at an earlier stage.

D. Burkina Faso, a country committed to combating climate change

39. Burkina Faso's efforts to combat climate change, largely focused on drought and desertification, were further developed between 1983 and 1987 under the direction of President Sankara. In the 1980s, Burkina Faso launched its so-called "three struggles" policy, which prohibited excessive wood-cutting, the roaming of livestock and bush-fires. The purpose of these three measures was to protect Burkina Faso's forest cover[60]. During the revolutionary period (1983-1987), Burkina Faso also made visits to the country by foreigners and access to its social housing stock by nationals conditional upon the planting of at least one tree, stating that "[p]lanting a tree is one of the minimum requirements for visiting or residing in Burkina Faso"[61]. This climate awareness at the highest levels of government made it possible in 1994, that is two years after the Earth Summit, to implement a huge project to conserve the forests and biodiversity of Burkina Faso, known as "8,000 villages,

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[57] Thomas Sankara, "Sauver l'arbre, l'environnement et la vie tout court, Conférence pour la protection de l'arbre et de la forêt, Paris, 5 février 1986", in: Daniel Gakunzi, *"Oser inventer l'avenir": la parole de Sankara (1983-1987)*, Paris, L'Harmattan, 1988, pp. 163-164.

[58] *Ibid.*, p. 166.

[59] Thomas Sankara "Invité — Thomas Sankara, Président du Burkina Faso", (available at: https://www.youtube.com/watch?v=LA92O8VQdDc). See also his speech to the United Nations General Assembly in which he called for "cutting all budgets for space research by one ten-thousandth and devoting that amount to research in the field of health and to improving the human environment which has been disrupted by those 'fireworks' which are harmful to the ecosystem".

[60] Thomas Sankara, "La lutte contre le désert ne peut se dissocier de la lutte anti-impérialiste", in: Bruno Jaffré (ed.), *Thomas Sankara, la liberté contre le destin : Textes et discours rassemblés et commentés par Bruno Jaffré*, Paris, Syllepse, 2017, pp. 179-196.

[61] *Ibid.*

8,000 forests". This project helped to boost Burkina Faso's forests and, consequently, the planet's carbon reservoirs[62].

40. Burkina Faso also developed several instruments and tools for implementing the United Nations Framework Convention on Climate Change, which it ratified in 1993. In 2007, Burkina Faso began the process of drawing up its National Adaptation Programme of Action ("NAPA") on climate variability and change, the main objective of which was to identify priority actions based on the urgent and immediate need for adaptation among vulnerable populations, notably poor rural populations[63]. In addition, in 2015, Burkina Faso adopted its National Climate Change Adaptation Plan ("NAP") in order to take better account of climate change in developmental planning and in pursuance of decision 5/CP.17[64]. The NAP is currently being revised to reflect changes in both the climatic and the socio-economic context.

41. Burkina Faso also demonstrated its commitment to climate action through the submission on 23 October 2015 of its Intended Nationally Determined Contribution ("INDC")[65]. This later became its Nationally Determined Contribution ("NDC") in accordance with Article 4, paragraphs 2 and 11, of the Paris Agreement[66]. The NDC set a greenhouse gas ("GHG") emissions reduction target of 21,574.63 Gg CO_2 eq by 2030. This equates to a reduction of 18.2 per cent compared to the reference scenario (business as usual) through mitigation actions and 36.95 per cent through adaptation actions. For the first commitment cycle, i.e. 2015-2020, Burkina Faso envisioned a reduction of 5.58 per cent in the unconditional scenario and 11.9 per cent in the conditional scenario for mitigation actions. The assessment conducted in 2020 showed a reduction of 5.3 per cent in the unconditional scenario and 2.9 per cent in the conditional scenario.

42. Burkina Faso is happy to have been able to achieve these highly satisfactory implementation rates, in keeping with its commitments under the Paris Agreement. The achievement level for the commitment made in the 2015-2020 cycle was 91.37 per cent for the unconditional scenario, 24.36 per cent for the conditional scenario and 89 per cent for adaptation actions. Moreover, it should be noted that for the period 20[20]-202[5] Burkina Faso has increased its ambitions by 11.22 per cent compared to the 2015 NDC. In fact, Burkina Faso has committed, as part of its new ambitions for the second NDC cycle, to reducing its emissions by 2030 by 29.42 per cent compared to business as usual, by 19.6 per cent for the unconditional scenario and by 9.82 per cent for the conditional scenario.

43. At the subregional and continental levels, Burkina Faso has always been a pioneer of multilateral efforts to combat drought and desertification. In addition to the Permanent Interstate Committee for Drought Control in the Sahel, which was established at Ouagadougou on 12 September 1973, the African Union's project to build the Great Green Wall of the Sahara and the Sahel was an initiative of Burkina Faso. The original idea actually came from President Thomas

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[62] See François Besse, D. Djiri, Moussa Yaméogo, Etude sur les expériences de reforestation entreprises au Burkina Faso pour identification des actions à mener dans le cadre du projet "8000 villages - 8000 forêts" dans les projets et programmes finances via le fonds européen de développement, Nogent-sur-Marne, CIRAD-Forêt, 1995, p. 144.

[63] See Burkina Faso, Programme d'action national d'adaptation à la variabilité et aux changements climatiques, Nov. 2007 (available at: https://unfccc.int/resource/docs/napa/bfa01f.pdf).

[64] Burkina Faso, National Climate Change Adaptation Plan (available at: https://www4.unfccc.int/sites/NAPC/Documents/Parties/Burkina%20Faso%20NAP_English.pdf).

[65] See Burkina Faso (Ministry of Environment and Fisheries Resources), Contribution Prévue Déterminée au niveau National (CPDN), p. 50 (available at: https://faolex.fao.org/docs/pdf/Bkf188166.pdf).

[66] Burkina Faso, Nationally Determined Contribution (NDC), 2021-2025, Oct. 2021, (available at: https://unfccc.int/sites/default/files/NDC/2022-06/Rapport%20CDN_BKFA.pdf).

Sankara, who planned to "create an immense greenbelt in northern Sahel to stop the advance of the desert, by successively mobilizing the population"[67]. Burkina Faso later took this initiative to the community of Sahelo-Saharan States, where it was favourably received. It was in implementing the decision of the seventh CEN-SAD summit, held on 1 and 2 June 2005 in Ouagadougou (Burkina Faso), that the heads of State and Government of Burkina Faso, Djibouti, Eritrea, Ethiopia, Mali, Mauritania, Niger, Nigeria, Senegal, Sudan and Chad established the Great Green Wall Initiative (the "GGWI"), which was later adopted by the African Union and named the "Great Green Wall for the Sahara and the Sahel Initiative". Twenty years later, the Great Green Wall for the Sahara and the Sahel Initiative has yet to get up to cruising speed owing to a lack of funding.

E. The challenges faced by Burkina Faso in combating climate change

44. The challenges faced by Burkina Faso in combating climate change and its adverse effects relate to the very nature of climate change, the country's level of socio-economic development and its limited means.

45. The first challenge relates to the fact that Burkina Faso must combat climate change even though its efforts have very little effect in themselves. To recall, Burkina Faso contributes just 0.12 per cent to global greenhouse gas emissions. Therefore, even if it were able to achieve the goal of net zero greenhouse gas emissions, its efforts would be in vain without the more substantial efforts of States considered to be the greatest emitters of those gases. In other words, Burkina Faso is facing an existential threat whose resolution is not truly dependent on it.

46. Moreover, the current stock of greenhouse gases in the atmosphere is continuing to cause rising temperatures, drought and desertification in the most vulnerable countries such as Burkina Faso. This situation requires Burkina Faso to take particularly costly adaptation actions to address the adverse effects caused by this stock of greenhouse gases in the atmosphere.

47. The second challenge faced by Burkina Faso resides in the need to fulfil the right of its people to economic development[68], while ensuring that it is reducing its greenhouse gas emissions as much as possible. As mentioned above, Burkina Faso ranks 184th of 191 States in the UNDP's 2021 Human Development Index. It therefore faces the challenge of ensuring that the right of its people to development is respected, while maintaining and improving its good performance in combating climate change.

48. The final challenge faced by Burkina Faso is the magnitude of the financial, technological and human resources required to reduce greenhouse gas emissions effectively and to combat their effects. Burkina Faso's limited means impair its ability to make the most of its "enormous" solar energy potential as part of its climate change adaptation and mitigation policies[69]. These limited

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[67] Bruno Jaffré (ed.), *Thomas Sankara : La liberté contre le destin, Textes et discours rassemblés et commentés par Bruno Jaffré*, Paris, Syllepse, 2017, p. 180.

[68] In fact, Article 22 of the African Charter on Human and Peoples' Rights states that: "1. All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind. 2. States shall have the duty, individually or collectively, to ensure the exercise of the right to development."

[69] According to the Renewable Energy Fund for Resilience:

means also affect the scale of its efforts to protect, conserve and develop its forest resources, which are greenhouse gas reservoirs. Limited means also reduce the ability of the State to take the adaptation actions necessary to address the adverse effects of climate change, by reducing the vulnerability of development sectors and improving the resilience of the population and ecosystems. Finally, these limited means restrict Burkina Faso's ability to prevent and combat the consequences of the climate crisis, namely conflicts between communities and the terrorist crisis in the Sahel-Saharan strip. In concrete terms, according to Burkina Faso's Third National Communication on Climate Change, the country's total financial requirements will reach at least US$6,832,111,200 by 2030[70].

II. THE COURT HAS JURISDICTION TO ENTERTAIN THE REQUEST FOR AN ADVISORY OPINION AND THERE IS NO REASON FOR THE COURT TO EXERCISE ITS DISCRETION

49. Burkina Faso considers that the Court has jurisdiction to entertain the present request for an advisory opinion (**A**) and that there is no reason for it to exercise its discretion not to render the advisory opinion (**B**).

A. The Court has jurisdiction to render the requested advisory opinion

50. Pursuant to Article 65, paragraph 1, of the Statute of the Court, "[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".

51. This provision sets forth two conditions for determining whether the Court has jurisdiction to entertain a request for an advisory opinion. These relate respectively to the author of the request and to the nature of the question put to the Court.

52. As regards the author of the request for an advisory opinion, Burkina Faso notes that, by virtue of Article 96, paragraph 1, of the Charter of the United Nations, "[t]he General Assembly . . . may request the International Court of Justice to give an advisory opinion on any legal question". The General Assembly is therefore authorized, under Article 65 of the Statute of the Court, to seise the Court of the present request.

53. As regards the nature of the questions posed, Burkina Faso notes that both questions are eminently of a legal character. According to the jurisprudence of the Court, a question is of a legal character when it is "framed in terms of law" and "raise[s] problems of . . . law"[71]. Hence, "a request

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"The sun is the most abundant energy resource in Burkina Faso, with an average daily solar irradiation of 5.5kWh/m^2 and an average of 8.3 hours of sunlight per day. Normal direct sunlight ranges between 3.9 and 4.5kWh/m2, and direct insolation exceeds 3,000 hours per year. This enormous potential, which in 2011 represented 0.1 per cent of national energy consumption, is expanding rapidly within Burkina Faso". See Bulletin du Fonds des énergies renouvelables pour la résilience, July 2022, No. 5, p. 1 (available at: https://www.uncdf.org/article/8118/newsletter-9-du-fonds-des-nergies-renouvelables-pour-la-rsilience-du-burkina-faso-ferr-bf).

[70] Burkina Faso, Troisième communication nationale sur les changements climatiques sous la convention-cadre des Nations Unies sur les changements climatiques (UNFCCC, Apr. 2022), p. 163 (available at: https://unfccc.int/sites/default/files/resource/Troisième-Communication-Burkina Faso.pdf).

[71] See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 155, para. 37 (referring to the Court's Advisory Opinion in *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 18, para. 15).

from the General Assembly for an advisory opinion to examine a situation by reference to international law concerns a legal question"[72].

54. In these advisory proceedings, the two questions submitted by the General Assembly are framed in terms of law, since they ask the Court to evaluate acts, events and situations in the light of rules of international law. The first question asks the Court to determine the legal obligations of States in respect of climate change "under international law", while the second asks it to identify the "legal consequences" for States having caused significant harm to the climate system and other parts of the environment in the light of that law. In this sense, the Court is being asked in these proceedings, as it has been in other previous proceedings, to exercise its legal jurisdiction, i.e. to "identify the existing principles and rules, interpret them and apply them . . ., thus offering a reply to the question posed based on law"[73].

55. Burkina Faso concludes that the Court has jurisdiction to render the advisory opinion requested.

B. There is no reason for the Court to exercise its discretion

56. The Court has affirmed, on the basis of Article 65 of the Statute and in particular the term "may" that appears therein[74], that it has discretion not to respond to a request for an advisory opinion submitted to it. According to the Court, such discretion is necessary to "protect the integrity of the Court's judicial function as the principal judicial organ of the United Nations"[75].

57. Burkina Faso notes that the Court has never exercised this discretion not to respond to a request for an advisory opinion. In fact, the Court has always been mindful of the fact that its answer to a request for an advisory opinion "represents its participation in the activities of the Organization, and, in principle, should not be refused"[76]. The Court considers that "only 'compelling reasons' should lead [it] to refuse its opinion" in response to a request falling within its jurisdiction[77].

58. Burkina Faso considers that there is no compelling reason for the Court to exercise its discretion in these proceedings. The jurisprudence of the Court appears, at least in theory, to allow the Court to exercise its discretion in two situations: if the request for an advisory opinion seeks to

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[72] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019 (I)*, p. 112, para. 58.

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

[74] It is recalled that Article 65 of the Statute reads as follows: "The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request."

[75] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019 (I)*, p. 113, para. 64.

[76] *Ibid*., p. 113, para. 65; *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010 (II)*, p. 416, para. 29; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 156, para. 44.

[77] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 156, para. 44; *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010 (II)*, p. 416, para. 30.

circumvent the principle of consent[78], or if the Court lacks all the facts needed to answer the questions posed[79].

59. Neither reason is relevant in the present advisory proceedings. First, the questions put to the Court are general and do not fall within the scope of a bilateral inter-State dispute. Second, the IPCC's reports, the vast amount of documentation furnished to the Court by the United Nations Secretary-General and the facts that will be presented by the participants in the proceedings will provide the Court with the factual basis needed to answer the questions posed.

60. Burkina Faso concludes, in view of the relevant and well-established jurisprudence of the Court, that there is nothing to prevent the Court exercising its jurisdiction in these advisory proceedings. The exercise by the Court of its advisory function would represent its participation in the activities of the United Nations aimed at saving humanity from the scourge of climate change and its adverse effects. This participation is as unique in nature as it is necessary in terms of its potential impact for this existential challenge to humanity. Indeed, as the principal judicial organ of the United Nations[80] and international law[81], the Court alone can authoritatively clarify all obligations incumbent on States in respect of climate change and the legal consequences of breaching such obligations. It is, in fact, the only court of a universal character with unlimited subject-matter jurisdiction; this makes the exercise of its judicial function particularly important compared with other specialized[82] or regional[83] courts, or quasi-judicial bodies[84].

III. METHODOLOGICAL ISSUES COMMON TO BOTH OF THE GENERAL ASSEMBLY'S QUESTIONS

61. Burkina Faso recalls that, in substance, the General Assembly's first question asks the Court to identify the international obligations of States to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for present and future generations. The second question asks the Court to determine the legal consequences, under the obligations identified in response to the first question, for States having caused significant harm to the climate system and other parts of the environment.

62. In order to answer the General Assembly's questions, it is first necessary to resolve certain methodological issues relating first and foremost to time: the emission of greenhouse gases is ongoing conduct that first emerged at the beginning the industrial revolution and has continued since.

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[78] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 25, para. 33.

[79] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 27, para. 40.

[80] Art. 92 of the Charter of the United Nations (available at: https://treaties.un.org/doc/Publication/CTC/uncharter-all-lang.pdf).

[81] *Certain German Interests in Polish Upper Silesia, Merits, Judgment No. 7, 1926, P.C.I.J., Series A, No. 7*, p. 19: "*From the standpoint of International Law and of the Court which is its organ*, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures" (emphasis added). See also *Corfu Channel (United Kingdom* v. *Albania), Merits, Judgment, I.C.J. Reports 1949*, p. [35]: "to *ensure respect for international law, of which it is the organ*, the Court must declare that the action of the British Navy constituted a violation of Albanian sovereignty" (emphasis added).

[82] See in this regard *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. 209, para. 403.

[83] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates), Preliminary Objections, Judgment, I.C.J. Reports 2021*, p. 105, para. 104.

[84] *Ibid.*, p. 104, para. 101.

During this relevant period, both international law and scientific knowledge of climate change have evolved. Finally, it is clear that the adverse effects of climate change will affect not only present generations, but future generations too.

63. In these proceedings, the first methodological issue raised concerns the legal system within which the Court should interpret and apply the relevant rules of international law in determining the obligations of States in respect of climate change (**A**). The second relates to the point in time at which the lawfulness of greenhouse gas emissions should be assessed by the Court and their legal consequences determined (**B**). The third concerns the consideration of future generations by the Court in determining the obligations of States in respect of climate change and the consequences of breaching these obligations (**C**). The final issue, for its part, relates to the taking into account of the unique characteristics of greenhouse gas emissions, the climate change they cause and the adverse effects of this on the survival of the human race (**D**).

A. The Court must determine the legal obligations of States in respect of climate change in the light of the contemporary legal system

64. Burkina Faso contends that the Court must assess the legal obligations incumbent on States in respect of climate change in the light of the legal system of contemporary international law. In its Advisory Opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, the Court explained that

> "an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation. In the domain to which the present proceedings relate, the last fifty years, as indicated above, have brought important developments."[85]

65. The Court noted in the above-mentioned advisory proceedings that, "if it [was] faithfully to discharge its functions", it could not ignore the fact that the *corpus juris gentium* had been considerably enriched since the establishment of the mandates system[86]. The same is true here: the Court could not faithfully discharge its function were it to ignore the enrichment of the *corpus juris gentium* over the last 50 years regarding greenhouse gas emissions, emissions-related climate change and the adverse effects thereof.

66. The rule identified by the Court has a broader scope. It applies not only to the "legal instruments" referred to in the above-mentioned Advisory Opinion, but also to all sources of obligations under international law, including customary international law. Furthermore, the rule set forth by the Court applies both to the interpretation and application of obligations under international law and to the determination of those obligations, particularly when they arise from customary international law. This conclusion has two consequences in the present advisory proceedings.

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[85] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 31, para. 53.

[86] *Ibid.*, pp. 31-32, para. 53.

67. First, legal treaties and instruments on climate change, especially those mentioned in the request for an advisory opinion[87], must be interpreted and applied in the light of contemporary international law. Treaties in particular must be interpreted in the light of customary rules on treaty interpretation as codified in the 1969 Vienna Convention on the Law of Treaties. In this regard, those agreements should not be interpreted on the date on which they were adopted, which may precede or postdate the development of conventional and customary international law on climate change. Certain provisions of those treaties and the obligations arising therefrom may call for an evolutive and dynamic interpretation of their terms so as to take account of the subsequent practice of the parties, in accordance with Article 31, paragraph 2 *(b)*, of the 1969 Vienna Convention. Other provisions, however, must be interpreted in an evolutive manner if it is established or may be presumed that the parties intended to give those terms an evolving meaning. Such is the case, in particular,

> "where the parties have used generic terms in a treaty, the parties necessarily having been aware that the meaning of the terms was likely to evolve over time, and where the treaty has been entered into for a very long period or is 'of continuing duration'"[88].

68. Under the customary rule codified in Article 31, paragraph 3 *(c)*, of the Vienna Convention on the Law of Treaties, the interpretation and application of treaties must take into account any relevant rules of international law applicable in relations between the parties. In the present proceedings, the Court must take account of two bodies of rules that have a bearing on all others, namely international environmental law and international human rights law.

69. With regard to international environmental law, the principles of this body of international law must be taken into account by the Court, including when interpreting treaties concluded before its development[89]. The need to take account of these principles applies both to substantive obligations of international environmental law and to procedural obligations. In its Judgment on *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)*, the Court observed that

> "the fact that the 1858 Treaty may contain limited obligations concerning notification or consultation in specific situations does not exclude any other procedural obligations with regard to transboundary harm which may exist in treaty or customary international law"[90].

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[87] The fifth paragraph of the General Assembly resolution submitting the request for an advisory opinion to the Court cites as relevant legal instruments: (1) the Charter of the United Nations, (2) the Universal Declaration of Human Rights, (3) the International Covenant on Civil and Political Rights, (4) the International Covenant on Economic, Social and Cultural Rights, (5) the Convention on the Rights of the Child, the United Nations Convention on the Law of the Sea, the Vienna Convention for the Protection of the Ozone Layer, (6) the Montreal Protocol on Substances that Deplete the Ozone Layer, (7) the Convention on Biological Diversity, and (8) the United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa. It also refers to "the relevant principles and relevant obligations of customary international law, including those reflected in the Declaration of the United Nations Conference on the Human Environment and the Rio Declaration on Environment and Development, to the conduct of States over time in relation to activities that contribute to climate change and its adverse effects".

[88] *Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua), Judgment, I.C.J. Reports 2009*, p. 243, para. 66.

[89] *Indus Waters Kishenganga Arbitration (Pakistan* v. *India)*, *Partial Award of 18 February 2013*, para. 452.

[90] *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. 708, para. 108; see also *Indus Waters Kishenganga Arbitration (Pakistan* v. *India)*, *Partial Award of 18 February 2013*, para. 452: "It is established that principles of international environmental law must be taken into account even when (unlike the present case) interpreting treaties concluded before the development of that body of law".

As regards transboundary harm, the Court therefore considered that "a practice, which in recent years has gained so much acceptance among States"[91], had enriched the content of the general obligation of due diligence so as to encompass procedural obligations, notably the obligation to assess risks and to conduct an environmental impact assessment, and the obligation to notify third parties. The Court also clarified that this obligation concerned "industrial activities", but that "the underlying principle applies generally to proposed activities which may have a significant adverse impact in a transboundary context"[92].

70. As regards principles of international human rights law, this body of law has substantially enriched all areas of international law in the contemporary legal order[93]. Burkina Faso asserts that determining and interpreting the rules of international law with a view to identifying the obligations of States in respect of climate change and the legal consequences of breaching these obligations must take account of "the substantive development of international law" driven by human rights[94]. In the case of diplomatic protection for example, the Court considers that, in view of this substantive development, it is human rights which now establish the standards of conduct of the State towards aliens and not the minimum standard of treatment of aliens[95].

71. Second, the determination, interpretation and application of all international rules and obligations, regardless of their formal source, must be conducted in the light of current scientific knowledge of climate change. This is particularly true when international obligations expressly or implicitly incorporate references to the state of current scientific knowledge[96]. It is also true when those rules impose obligations of due diligence whose implementation is conditional upon the taking into account of the necessary scientific data and knowledge relating thereto. In the case concerning the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, the Court observed that "[i]n order to evaluate the environmental risks" of building hydro-electric dams on the Danube, "current standards must be taken into consideration"[97].

72. More generally, the identification, interpretation and application of States' obligations in respect of climate change must be founded on the best available scientific knowledge of the causes

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

[92] *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.

[93] See on this point, Theodor Meron, *The Humanization of International Law*, Leiden, Nijhoff, 2006, p. xv:

> "[b]y examining most of the general areas of public international law, I attempt to demonstrate that the influence of human rights and humanitarian norms has not remained confined to one sector of international law, and that its influence has spread to many other parts, though to varying degrees. The humanization of public international law under the impact of human rights has shifted its focus above all from State-centered to individual-centered".

See also, Antonio Cançado Trindade, *International Law for Humankind: Towards a New Jus Gentium*, Leiden/Boston, Nijhoff, 2020, p. 635: "[i]n the course of the last century International Law has undergone an extraordinary development, which gradually took the shape of an historical process of its humanization."

[94] *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Preliminary Objections, Judgment, I.C.J. Reports 2007 (II)*, p. 599, para. 39.

[95] *Ibid*.

[96] See in particular Part XII of the United Nations Convention on the Law of the Sea.

[97] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 77, para. 140.

and consequences of and the means of effectively combating climate change, principally those contained in the IPCC's reports[98].

B. The Court must evaluate the lawfulness of greenhouse gas emissions in the light of the law in force at the time that those emissions occurred and the legal consequences in the light of the law in force at the time of the Court's decision

73. To determine the legal consequences for States that have caused significant harm to the climate system, as required by question *(b)* of the request for an advisory opinion, the Court must apply the principle *tempus regit actum*, i.e. intemporal law. In the *Island of Palmas case (Netherlands, USA)*, sole arbitrator Max Huber noted that,

> "[a]s regards the question which of [the] different legal systems prevailing at successive periods is to be applied in a particular case (the so-called intertemporal law), a distinction must be made between the creation of rights and the existence of rights. The same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of law."[99]

74. The jurisprudence of the Court also establishes intertemporal law as a principle to be applied in conducting a legal assessment of acts, events and legal situations within a legal system governing a specific matter that has evolved over time[100].

75. Burkina Faso considers that the principle of intertemporal law is a methodological approach to be used not only in assessing the creation of rights, but also in evaluating acts, events and legal situations over time. Indeed, the lawfulness of acts and events must be assessed in the light of the rules of international law in existence at the time when the acts were committed or the events took place. Legal situations, for their part, must be evaluated in the light of the international law applicable at the time of their assessment. Consequently, acts and events relating to climate change must be evaluated in the light of the rules of international law in existence at the time that those acts and events took place, while the ensuing legal consequences must be assessed in the light of contemporary international law.

C. The Court must take the principles of sustainable development and intergenerational equity into account

76. Burkina Faso is of the opinion that the Court must take account of the principles of sustainable development and intergenerational equity when determining both the legal obligations in respect of climate change and the consequences of breaching them. Indeed, these principles now form an integral part of the international law corpus.

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[98] See Section I.A above.

[99] Sentence arbitrale rendue le 4 avril 1928 par M. Max Huber, entre les Etats-Unis et les Pays-Bas, dans le litige relatif à la souveraineté sur l'île de Palmas (ou Miangas), *Revue générale de droit international public*, Vol. XLII, 1935, p. 172.

[100] See in particular *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 405, para. 205.

77. As regards the principle of sustainable development, the Court considers that this "concept" aptly expresses the "need to reconcile economic development with protection of the environment"[101]. The principle of sustainable development is thus a common objective of the international community, enshrined in several legal instruments[102] and in several bilateral instruments on environmental protection[103]. As noted by the United Nations Framework Convention on Climate Change, sustainable development is at the heart of every action of the international community aimed at combating climate change. Article 2 of the Convention reads as follows:

> "The ultimate objective of this Convention and any related legal instruments that the Conference of the Parties may adopt is to achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time-frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner."[104]

78. In this sense, the principle of sustainable development prevents economic development being prioritized to the detriment of the protection of the climate system and other parts of the environment. The idea underlying the principle of sustainable development is all the more irrefutable since the development of some States has taken place, and is continuing to take place, to the detriment of the climate system and other parts of the environment indispensable to the existence of other, third States, peoples and populations. In the case concerning the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, the Court considered the question of human "interfere[nce] with nature" in the light of the "concept of sustainable development". It observed that,

> "[o]wing to new scientific insights and to a growing awareness of the risks for mankind — for present and future generations — of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. *Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past*. This need to reconcile economic development with protection of the environment is *aptly expressed in the concept of sustainable development*."[105]

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

[102] See in particular the Report of the World Summit on Sustainable Development (Johannesburg, 26 Aug.-4 Sept. 2002), Political Declaration (A/CONF/.199/20), para. 5: States "assume a collective responsibility to advance and strengthen the interdependent and mutually reinforcing pillars of sustainable development — economic development, social development and environmental protection — at the local, national, regional and global levels"; Principle 4 of the Rio Declaration adopted at the United Nations Conference on Environment and Development (Rio de Janeiro, Brazil, 3-14 June 1992) (A/CONF.151/26, Vol. I): "In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it." See also, Principle 13 of the Declaration of the United Nations Conference on the Human Environment (Stockholm, 5-6 June 1972): "In order to achieve a more rational management of resources and thus to improve the environment, States should adopt an integrated and co-ordinated approach to their development planning so as to ensure that development is compatible with the need to protect and improve environment for the benefit of their population."

[103] See e.g. the 1975 Statute of the River Uruguay, Article 27 of which was interpreted by the Court as setting out "the need to strike a balance between the use of the waters and the protection of the river consistent with the objective of sustainable development". *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p. 48, para. 75, and pp. 74-75, para. 177.

[104] Art. 2 of the United Nations Framework Convention on Climate Change, New York, 9 May 1992, *UNTS*, Vol. 1771 (available at: https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXVII-7&chapter=27&Temp=mtdsg3&clang=_en).

[105] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 78, para. 140 (emphasis added).

79. Moreover, in the *Iron Rhine (Belgium/Netherlands)* arbitration, the Arbitral Tribunal, relying on the principle of sustainable development, found that a duty existed to prevent or mitigate activities that may cause significant harm to the environment. In the words of the Tribunal:

> "Since the Stockholm Conference on the Environment in 1972 there has been a marked development of international law relating to the protection of the environment. Today, both international and EC law require the integration of appropriate environmental measures in the design and implementation of economic development activities. Principle 4 of the Rio Declaration on Environment and Development, adopted in 1992 . . ., which reflects this trend, provides that 'environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it'. Importantly, these emerging principles now integrate environmental protection into the development process. *Environmental law and the law on development stand not as alternatives but as mutually reinforcing, integral concepts, which require that where development may cause significant harm to the environment there is a duty to prevent, or at least mitigate, such harm* . . . This duty, in the opinion of the Tribunal, has now become a principle of general international law. *This principle applies not only in autonomous activities but also in activities undertaken in implementation of specific treaties between the Parties*."[106]

80. The principle of intergenerational equity, for its part, demands that there be equity between present and future generations in sharing the quality and quantity of the natural resources available and the efforts to preserve them[107]. This is alluded to in question *(b)* (ii) of the request for an advisory opinion, in which the Court is asked to determine the legal consequences, for States that have caused significant harm to the climate system, of breaching obligations with respect to "[p]eoples and individuals of the *present and future generations* affected by the adverse effects of climate change".

81. Burkina Faso further considers that the Court must take this principle into account when examining the two questions posed by the General Assembly, including when determining the content of States' obligations in respect of climate change. Intergenerational equity is a principle of contemporary international law codified in several legal instruments that reflect the existence of the following legal consensus within the international community: present generations must consider the interests of future generations[108]. For example, the United Nations Framework Convention on Climate Change stipulates that "[t]he Parties should protect the climate system for the benefit of

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[106] *Award in the Arbitration regarding the Iron Rhine ("Ijzeren Rijn") Railway (Belgium* v. *Netherlands)*, Decision of 24 May 2005, *Reports of International Arbitral Awards* ("*RIAA*"), Vol. XXVII, pp. 66-67, para. 59 (emphasis added). See also , *Indus Waters Kishenganga Arbitration (Pakistan* v. *India)*, Partial Award of 18 Feb. 2013, para. 449.

[107] On this definition, see Pierre-Marie Dupuy and Jorge Viñuales, *International Environmental Law*, 2nd ed., Cambridge, Cambridge University Press, 2018, p. 88.

[108] Principle 3 of the Rio Declaration adopted at the United Nations Conference on Environment and Development (Rio de Janeiro, Brazil, 3-14 June 1992) (A/CONF.151/26, Vol. I): "The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations." See also the Report of the World Commission on Environment and Development: Our Common Future (UN doc.A/42/427), 4 Aug. 1987, Ann. 1: "Inter-Generational Equity: 2. States shall conserve and use the environment and natural resources for the benefit of present and future generations."; Principle [1] of the Declaration of the United Nations Conference on the Human Environment (Stockholm, 5-6 June 1972):

> "Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and *he bears a solemn responsibility to protect and improve the environment for present and future generations*. In this respect, policies promoting or perpetuating apartheid, racial segregation, discrimination, colonial and other forms of oppression and foreign domination stand condemned and must be eliminated." (Emphasis added.)

present and future generations of humankind"[109]. The Court, for its part, alluded to the principle of intergenerational equity in observing that environmental harm affects not only current generations, but future generations too[110].

82. The principle of intergenerational equity also demands the taking into account of two important facts relating to climate change and concerning future generations. First, the greenhouse gases that have already accumulated in the atmosphere are causing harm which, while already affecting present generations, will continue to have an adverse effect on future generations. According to the IPCC,

> "[l]imiting global surface temperature does not prevent continued changes in climate system components that have multi-decadal or longer timescales of response (*high confidence*). Sea level rise is unavoidable for centuries to millennia due to continuing deep ocean warming and ice sheet melt, and sea levels will remain elevated for thousands of years (*high confidence*). However, deep, rapid, and sustained GHG emissions reductions would limit further sea level rise acceleration and projected long-term sea level rise commitment."[111]

Future generations will therefore be obliged in any event to bear some of the burden of taking adaptation actions to respond to climate change.

83. Second, CO_2 emissions must be significantly reduced in order to ensure future generations a reasonable margin of manoeuvre. The "remaining carbon budget"[112], i.e. the threshold of CO_2 emissions compatible with a global temperature increase of 1.5°C, is virtually non-existent and the budget for a 2 °C rise has been largely depleted. According to the IPCC,

> "[i]f the annual CO_2 emissions between 2020–2030 stayed, on average, at the same level as 2019, the resulting cumulative emissions would almost exhaust the remaining carbon budget for 1.5°C (50%), and deplete more than a third of the remaining carbon budget for 2°C (67%). Estimates of future CO_2 emissions from existing fossil fuel infrastructures without additional abatement already exceed the remaining carbon budget for limiting warming to 1.5°C (50%) (*high confidence*)"[113].

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[109] Art. 3, para. 1, of the United Nations Framework Convention on Climate Change, New York, 9 May 1992, *UNTS*, Vol. 1771 (available at: https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXVII-7&chapter=27&Temp=mtdsg3&clang=_en).

[110] In its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the Court states that "it is imperative for the Court to take account of the unique characteristics of nuclear weapons, and in particular their destructive capacity, their capacity to cause untold human suffering, and their ability to cause damage to generations to come" (*I.C.J. Reports 1996 (I)*, p. 244, para. 36). In the case concerning *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, the Court observed that "[o]wing to new scientific insights and to a growing awareness of the risks for mankind — *for present and future generations* — of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades." (*Judgment, I.C.J. Reports 1997*, p. 78, para. 140 (emphasis added).)

[111] IPCC, 2023: Summary for Policymakers, in: Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, p. 1[8], B.3.1 (available at: https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_SPM.pdf).

[112] IPCC Glossary, p. 557 (available at: https://www.ipcc.ch/site/assets/uploads/sites/2/2022/06/SR15_AnnexI.pdf).

[113] IPCC, 2023: Summary for Policymakers, in: Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, p. 20, B.5.3 (available at: https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_SPM.pdf).

84. Nevertheless, every centigrade increase in the global temperature further complicates the climate change risks and makes them more difficult to manage for future generations. According to the IPCC, climatic and non-climatic risks will increasingly interact, creating accumulations and cascades of risks that are more complex and harder to manage.

> "With further warming, climate change risks will become increasingly complex and more difficult to manage. Multiple climatic and non-climatic risk drivers will interact, resulting in compounding overall risk and risks cascading across sectors and regions. Climate-driven food insecurity and supply instability, for example, are projected to increase with increasing global warming, interacting with non-climatic risk drivers such as competition for land between urban expansion and food production, pandemics and conflict (*high confidence*)."[114]

85. The IPCC considers that each increase in the global temperature, however slight, is bringing humanity closer to the tipping point beyond which damage becomes irreversible. In fact,

> "[t]he likelihood and impacts of abrupt and/or irreversible changes in the climate system, including changes triggered when tipping points are reached, increase with further global warming (*high confidence*). As warming levels increase, so do the risks of species extinction or irreversible loss of biodiversity in ecosystems including forests (*medium confidence*), coral reefs (*very high confidence*) and in Arctic regions (*high confidence*)."[115]

86. It is therefore crucial, given the effects of climate change, to take the interests of future generations into account when examining the climate-related obligations of States and their legal consequences.

D. The Court must take account of the unique characteristics of greenhouse gas emissions, the climate change they cause and the adverse effects thereof

87. Burkina Faso considers that, in examining the two questions of the General Assembly, the Court must take account of the unique characteristics of greenhouse gas emissions and the existential threat they pose for humanity through the climate change they cause and the adverse effects thereof. In its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the Court recognized that "the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn"[116]. It attached certain procedural consequences to this observation when determining the legality of nuclear weapons, the subject-matter of the request for the advisory opinion concerned. The Court explained that, in applying the relevant international law, "it is imperative for the Court to take account of the unique characteristics of nuclear weapons, and in particular their destructive capacity, their capacity to cause untold human suffering, and their ability to cause damage to generations to come"[117]. Among other things, the Court noted that, "[b]y its very nature, that process [the process of nuclear fission], in nuclear weapons as they exist today, releases not only immense quantities of heat and energy, but also powerful and prolonged radiation". The Court asserted that,

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[114] *Ibid*., p. 15, B.2.3.

[115] *Ibid*., p. [18], B.3.2.

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

[117] *Ibid*., p. 244, para. 36.

"[t]hese characteristics render the nuclear weapon potentially catastrophic. The destructive power of nuclear weapons cannot be contained in either space or time. They have the potential to destroy all civilization and the entire ecosystem of the planet.

The radiation released by a nuclear explosion would affect health, agriculture, natural resources and demography over a very wide area. Further, the use of nuclear weapons would be a serious danger to future generations. Ionizing radiation has the potential to damage the future environment, food and marine ecosystem, and to cause genetic defects and illness in future generations."[118]

88. Burkina Faso notes that, with one exception, every characteristic of the nuclear weapon mentioned by the Court may be transposed to significant greenhouse gas emissions, the climate change they cause and the adverse effects thereof: while the Court used the conditional tense to describe the adverse effects of nuclear weapons, the negative effects of substantial greenhouse gas emissions are known, as demonstrated by the IPCC reports cited above. *First*, by its very nature, the emission of greenhouse gases releases immense quantities of heat and energy, and radiation at specific wavelengths within the spectrum of terrestrial radiation emitted by the Earth's surface, the atmosphere itself and by clouds, leading to the greenhouse effect[119]. *Second*, the climate change and adverse effects caused by these emissions have the potential to destroy all civilization and the entire ecosystem of the planet. *Third*, climate change affects health, agriculture, natural resources and demography over a very wide area — the entire the planet for centuries, in fact. *Lastly*, significant greenhouse gas emissions are a serious danger to future generations (defects and illness) and will damage the future environment, food and marine ecosystem.

89. Burkina Faso therefore argues that the Court must adopt the same approach and methodology as it did in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* in determining, interpreting and applying the relevant international law in respect of anthropogenic greenhouse gas emissions, the climate change they cause and the adverse effects thereof. Indeed, it is imperative that the Court take account of the unique characteristics of anthropogenic greenhouse gas emissions, in particular the existential risk they pose to the survival of humanity, their adverse effects on States, peoples and individuals, especially the most vulnerable, and their potential to cause immense harm to future generations.

IV. RESPONSE TO QUESTION *(A)*: THE OBLIGATIONS OF STATES IN RESPECT OF GREENHOUSE GAS EMISSIONS

90. In this section, Burkina Faso will examine question *(a)* of the General Assembly's request for an advisory opinion. It will begin by defining the meaning and scope of the question posed, which asks the Court to determine the obligations of States in respect of greenhouse gas emissions, emissions-related climate change and the adverse effects thereof (**A**). Next, Burkina Faso will identify the content of those obligations (**B**). To conclude its response to question *(a)*, Burkina Faso will argue that, over and above the specific rules protecting any given part of the climate system, there exists today in customary international law a general obligation to protect and preserve the climate system (**C**).

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[118] *Ibid.*, pp. 243-244, para. 3[5].

[119] IPCC Glossary, p. 550 (available at: https://www.ipcc.ch/site/assets/uploads/sites/2/2022/06/SR15_AnnexI.pdf).

A. The scope and meaning of the question posed

91. Question *(a)* of the General Assembly reads as follows:

> "Having particular regard to the Charter of the United Nations, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the United Nations Framework Convention on Climate Change, the Paris Agreement, the United Nations Convention on the Law of the Sea, the duty of due diligence, the rights recognized in the Universal Declaration of Human Rights, the principle of prevention of significant harm to the environment and the duty to protect and preserve the marine environment:
>
> *(a)* What are the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for present and future generations"?

92. Burkina Faso considers that the question posed by the General Assembly is clear and does not need to be reformulated. Its scope and meaning can be clarified through three observations.

93. *First*, in these proceedings the Court must, as it did in the proceedings concerning the *Legality of the Threat or Use of Nuclear Weapons*, "decide, after consideration of the great corpus of international law norms available to it, what might be the relevant applicable law"[120]. In order to do so, the Court must pay particular attention to the sources of international law and obligations mentioned in the chapeau of question *(a)*. Question *(a)* refers to a number of legal instruments and to principles, rules and obligations arising from general international law.

94. As regards the legal instruments, the chapeau of question *(a)* sets out the legal corpus in the light of which the General Assembly would like the Court to consider the questions posed, namely (1) the Charter of the United Nations, (2) the International Covenant on Civil and Political Rights, (3) the International Covenant on Economic, Social and Cultural Rights, (4) the United Nations Framework Convention on Climate Change, (5) the Paris Agreement and (6) the United Nations Convention on the Law of the Sea. This list is not exhaustive, however, since it is preceded by the phrase "[h]aving *particular* regard to". In addition to these legal instruments are those which the General Assembly describes as governing "the conduct of States over time in relation to activities that contribute to climate change and its adverse effects"[121]. These are mentioned in the fifth paragraph of resolution 77/276, namely (7) the Universal Declaration of Human Rights, (8) the Convention on the Rights of the Child, (9) the Vienna Convention for the Protection of the Ozone Layer, (10) the Montreal Protocol on Substances that Deplete the Ozone Layer, (11) the Convention on Biological Diversity and (12) the United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa.

95. As regards the principles and obligations of customary international law, the General Assembly expressly refers to one principle, namely the principle of prevention of significant harm to the environment, and one obligation, namely the duty to protect and preserve the marine environment. It is clear that the General Assembly intended to allow for a wide margin of discretion in defining the applicable law in the present advisory proceedings. The body of norms identified by the General Assembly can nevertheless be split into three broad categories: *(a)* general international

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[120] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 239, para. 23.

[121] General Assembly resolution 77/276: Request for an advisory opinion of the International Court of Justice on the obligations of States in respect of climate change, 29 Mar. 2023, fifth para.

law, *(b)* "existing international law relating to the protection and safeguarding of the environment", to use the language of the Court[122], and *(c)* international human rights law.

96. *Second*, pursuant to the General Assembly's request, the Court must determine "the obligations of *States* under international law to ensure the protection of the climate system and other parts of the environment". The General Assembly's resolution is interested only in the obligations of States and not those of other subjects of international law. However, the jurisdiction of the Court extends to States' due diligence obligations and to their obligation to ensure that the law is respected by legal and natural persons.

97. *Ratione materiae*, Burkina Faso is of the opinion that States' obligations in respect of climate change are, first, those which *directly* protect the environment and, second, those which, while protecting other values and interests under international law, *indirectly* offer protection to the climate system and other parts of the environment. This is true of certain obligations aimed at protecting human rights, which in so doing impose on States the obligation to protect the climate system and other parts of the environment. This interpretation is supported by the fact that the General Assembly has listed as elements of applicable law, in the preamble of the resolution and in the very text of question *(a)*, four fundamental instruments of protection of human rights, namely (1) the Universal Declaration of Human Rights, (2) the International Covenant on Civil and Political Rights, (3) the International Covenant on Economic, Social and Cultural Rights and (4) the Convention on the Rights of the Child.

98. *Third*, Burkina Faso considers that the term "climate system" must be defined in a broad manner and include all parts of the climate. The IPCC Glossary describes it as

> "the highly complex system consisting of five major components: the atmosphere, the hydrosphere, the cryosphere, the lithosphere and the biosphere and the interactions between them. The climate system evolves in time under the influence of its own internal dynamics and because of external forcings such as volcanic eruptions, solar variations and anthropogenic forcings such as the changing composition of the atmosphere and land-use change."[123]

As for the expression "other parts of the environment", this refers to the various components making up the environment as defined by the Court in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, i.e. "the living space, the quality of life and the very health of human beings, including generations unborn"[124]. Consequently, the obligations to be determined by the Court include obligations to protect the climate system, the ozone layer, biodiversity, the marine environment, the oceans and the forests, and obligations to combat specific environmental issues such as drought and/or desertification.

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[122] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 243, para. 33.

[123] IPCC Glossary, pp. 545-555 (available at: https://www.ipcc.ch/site/assets/uploads/sites/2/2022/06/SR15_AnnexI.pdf).

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

99. Lastly, Burkina Faso considers that question *(a)* is confined solely to anthropogenic greenhouse gas emissions[125], and excludes non-anthropogenic emissions of greenhouse gases. In this regard, as stated in the IPCC Glossary, greenhouse gases are

> "those gaseous constituents of the atmosphere, both natural and anthropogenic, that absorb and emit radiation at specific wavelengths within the spectrum of terrestrial radiation emitted by the Earth's surface, the atmosphere itself and by clouds. This property causes the greenhouse effect."[126]

B. The content of States' obligations in respect of greenhouse gas emissions, emissions-related climate change and the adverse effects thereof

100. In the previous section, Burkina Faso established that States' obligations "to ensure the protection of the climate system" are all those obligations which protect the climate system and other parts of the environment, both those directly aimed at protecting the climate system and those which protect it indirectly. In the following section, Burkina Faso will first examine the obligations of States under rules of international law specifically aimed at protecting the climate system and other parts of the environment (**1**). It will then review the rules of international law that oblige States to protect the climate system and other parts of the environment in fulfilling other international obligations (**2**). Finally, Burkina Faso will examine the obligation of co-operation imposed on Member States by the Charter of the United Nations (**3**).

1. The obligations of States arising from rules of international law specifically aimed at protecting the climate system and other parts of the environment

101. The rules of international law that protect the climate system and other parts of the environment are found in primary sources of international law, principally treaties ***(a)*** and custom ***(b)***. Burkina Faso will therefore distinguish between these two types of obligation. However, this distinction does not preclude some of the treaty rules mentioned from having a customary character, or vice versa. As the Court observed in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, treaty rules and rules of customary international law have a separate legal existence, even if they are identical in content[127].

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[125] According to the IPCC, "anthropogenic emissions" means "[e]missions of greenhouse gases (GHGs), precursors of GHGs and aerosols caused by human activities. These activities include the burning of fossil fuels, deforestation, land use and land-use changes (LULUC), livestock production, fertilisation, waste management and industrial processes. See also *Anthropogenic* and *Anthropogenic removals*." IPCC Glossary, p. 543 (available at: https://www.ipcc.ch/site/assets/uploads/sites/2/2022/06/SR15_AnnexI.pdf).

[126] IPCC Glossary, pp. 550-551: "Water vapour (H_2O), carbon dioxide (CO_2), nitrous oxide (N_2O), methane (CH_4) and ozone (O_3) are the primary GHGs in the Earth's atmosphere. Moreover, there are a number of entirely human-made GHGs in the atmosphere, such as the halocarbons and other chlorine- and bromine-containing substances, dealt with under the Montreal Protocol. Beside CO_2, N_2O and CH_4, the Kyoto Protocol deals with the GHGs sulphur hexafluoride (SF_6), hydrofluorocarbons (HFCs) and perfluorocarbons (PFCs)." (available at: https://www.ipcc.ch/site/assets/uploads/sites/2/2022/06/SR15_AnnexI.pdf).

[127] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, pp. 95-96, paras. 178-179:

> "even if two norms belonging to two sources of international law appear identical in content, and even if the States in question are bound by these rules both on the level of treaty-law and on that of customary international law, these norms retain a separate existence. This is so from the standpoint of their applicability . . . It will therefore be clear that customary international law continues to exist and to apply, separately from international treaty law, even where the two categories of law have an identical content. Consequently, in ascertaining the content of the customary international law applicable to the present dispute, the Court must satisfy itself that the Parties are bound by the customary rules in question; but the Court is in no way bound to uphold these rules only in so far as they differ from the treaty rules which it is prevented by the United States reservation from applying in the present dispute."

However, some treaty rules can acquire a customary character[128], and treaties can also codify customary rules. This is particularly true in the case of rules of treaty interpretation[129]. The distinction made in this section between treaty obligations and customary obligations is done purely for the sake of clarity in setting out the views of Burkina Faso. Moreover, Burkina Faso will aim for concision and will not examine the same rule twice should it have both a customary and a conventional character.

(a) *Treaty obligations*

102. All States are bound by their treaty obligations. Under Article 26 of the Vienna Convention on the Law of Treaties, which reflects customary international law in this regard and codifies the *pacta sunt servanda* principle[130], "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith". Consequently, States are bound by all their international obligations concerning the protection of the climate system and other parts of the environment.

103. Burkina Faso will not list every relevant treaty obligation here. Rather, it will focus on certain obligations contained in the legal instruments mentioned in the General Assembly's request, namely the Paris Agreement, the United Nations Convention to Combat Desertification, the United Nations Convention on the Law of the Sea and the Montreal Protocol on Substances that Deplete the Ozone Layer. Nonetheless, Burkina Faso argues that States are bound by all their treaty obligations relating to climate change, even those that Burkina Faso has not addressed in this written statement.

(i) Obligations arising from the Montreal Protocol on Substances that Deplete the Ozone Layer

104. Burkina Faso is of the view that States' obligations in respect of climate change include their obligations under the Montreal Protocol on Substances that Deplete the Ozone Layer[131]. The Montreal Protocol governs the anthropogenic emission of certain greenhouse gases, in particular chlorofluorocarbons and halons which deplete the ozone layer[132]. These gases are known for their

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See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015 (I)*, p. 47, para. 88: "Where a treaty states an obligation which also exists under customary international law, the treaty obligation and the customary law obligation remain separate and distinct."

[128] See *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, pp. 41-43, paras. 70-74.

[129] On the subject of rules of interpretation, see e.g. Articles 31 and 32 of the Vienna Convention on the Law of Treaties, *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2019 (II)*, p. 598, para. 106.

[130] *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 473, para. 49; see also *Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements, concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affair*, decision of 30 Apr. 1990, *RIAA*, Vol. XX, p. 251, para. 75.

[131] See the Montreal Protocol on Substances that Deplete the Ozone Layer (with annex). Concluded at Montreal on 16 Sept. 1987, *UNTS*, Vol. 1522, p. 29 (available at: https://treaties.un.org/doc/publication/unts/volume%201522/volume-1522-i-26369-english.pdf).

[132] The list of controlled substances in the Protocol continues to grow. While the 1985 Montreal Protocol covered only certain chlorofluorocarbons ("CFC") and certain halons, the 1990 London Amendment added other CFCs, carbon tetrachloride and trichloroethane (methyl chloroform) to the list; the Copenhagen Amendment added hydrochlorofluorocarbons, hydrobromofluorocarbons and methyl bromide; the Beijing Amendment added bromochloromethane; and the most recent 2016 Kigali Amendment added hydrofluorocarbons ("HFC").

great global warming potential[133]. For example, the global warming potential of CFC-13 over a 100-year period is 13,900 times greater than that of an identical mass of carbon dioxide[134].

105. One of the objectives of adopting the Montreal Protocol was the protection of the climate system. The Protocol's preamble states that the parties were "[m]indful of their obligation under that Convention to take appropriate measures to protect human health and the environment against adverse effects resulting or likely to result from human activities which modify or are likely to modify the ozone layer". They "[r]ecogniz[ed] that world-wide emissions of certain substances can significantly deplete and otherwise modify the ozone layer in a manner that is likely to result in adverse effects on human health and the environment". They were also conscious "of the *potential climatic effects of emissions of these substances*". It was this awareness that led the States parties to set forth a number of obligations reflecting their determination

> "to protect the ozone layer by taking precautionary measures to control equitably total global emissions of substances that deplete it, with the ultimate objective of their elimination on the basis of developments in scientific knowledge, taking into account technical and economic considerations"[135].

106. The obligations laid down in the Montreal Protocol are binding. Under Article 2 and Annex A of that Protocol, States are obliged to monitor and progressively reduce their consumption and production of the substances concerned within fixed time-limits[136]. Under Article 4, paragraph 1, of the Protocol, States are prohibited from importing controlled substances from any State not party to the Montreal Protocol[137]. Article 4, paragraph [5], of the Protocol obliges the States parties to discourage the export of technology for producing and utilizing controlled substances to any State not party to the Protocol[138]. In accordance with Article 4, paragraph 6, each State party must refrain from providing new subsidies, aid, credits, guarantees or insurance programmes for the export to States not party to the Protocol of products, equipment, plants or technology that would facilitate the production of controlled substances[139].

107. The Montreal Protocol provides for differential treatment and for obligations of co-operation and solidarity with developing countries. Article 5, paragraph 1, of the Protocol subjects developing countries to less onerous requirements[140]. Article 5, paragraph 2, provides that "[t]he Parties undertake to facilitate access to environmentally safe alternative substances and technology for Parties that are developing countries and assist them to make expeditious use of such alternatives"[141].

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[133] Art. 2 and Ann. A of the 1986 Montreal Protocol (available at: https://ozone.unep.org/sites/default/files/2019-04/Montreal-Protocol-English-2018.pdf).

[134] See IPCC, 2013: Anthropogenic and Natural Radiative Forcing, in: Climate Change 2013: The Physical Science Basis. Contribution of Working Group I to the Fifth Assessment, Report of the Intergovernmental Panel on Climate Change, p. 731, Appendix 8.1 (available at: https://www.ipcc.ch/site/assets/uploads/2018/02/WG1AR5_all_final.pdf).

[135] Preamble, Montreal Protocol on Substances that Deplete the Ozone Layer (with annex). Concluded at Montreal on 16 September 1987, *UNTS*, Vol. 1522, p. 29 (available at: https://treaties.un.org/doc/publication/unts/volume%201522/volume-1522-i-26369-english.pdf).

[136] *Ibid.*, Art. 2, para. 1.

[137] *Ibid.*, Art. 4, para. 1

[138] *Ibid.*, Art. 4, para. [5].

[139] *Ibid.*, Art. 4, para. 6.

[140] *Ibid.*, Art. 5, para. 1.

[141] *Ibid.*, Art. 5, para. 2.

108. Article 5, paragraph 3, for its part, establishes the link between combating climate change and the conditions of access to international funding. That provision reads as follows:

> "The Parties undertake to facilitate bilaterally or multilaterally the provision of subsidies, aid, credits, guarantees or insurance programmes to Parties that are developing countries for the use of alternative technology and for substitute products."[142]

109. Article 5, paragraphs 2 and 3, of the Montreal Protocol thus give legal effect to the Protocol's preamble, which states that "special provision is required to meet the needs of developing countries for these substances" and notes

> "the importance of promoting international co-operation in the research and development of science and technology relating to the control and reduction of emissions of substances that deplete the ozone layer, bearing in mind in particular the needs of developing countries"[143].

In addition, in 1991, the States parties established a multilateral fund for the implementation of the Protocol pursuant to Article 10 of that instrument[144].

110. Burkina Faso is delighted with the success of the Montreal Protocol. According to the United Nations Environment Programme, the régime has enabled the States parties to phase out 98 per cent of ozone depleting substances and thereby indirectly protect the climate system[145]. The importance of the Montreal Protocol goes beyond the content of its obligations, however. As the United Nations Environment Programme notes,

> "[t]hroughout the implementation of the Montreal Protocol, developing countries have demonstrated that, with the right kind of assistance, they are willing, ready, and able to be full partners in global efforts to protect the environment. In fact, many developing countries have exceeded the reduction targets for phasing out ODS [ozone depleting substances], with the support of the Multilateral Fund."[146]

111. Indeed, the Montreal Protocol proves that it is possible to solve the problems caused by climate-harming substances through co-operation that takes account of the interests of developing countries and through rigorous technical and financial assistance. Unfortunately, the successful approach adopted in the Montreal Protocol has not been extended to harm caused to the climate system by other greenhouse gases. These gases are covered by the United Nations régime on climate change, notably the United Nations Framework Convention on Climate Change and the Paris Agreement.

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[142] *Ibid*., Art. 5, para. 3.

[143] *Ibid*., tenth preambular para.

[144] *Ibid*., Art. 10.

[145] See United Nations Environment Programme, "Ozonaction: Who we are/About the Montreal Protocol" (available at: https://www.unep.org/ozonaction/who-we-are/about-montreal-protocol).

[146] *Ibid*.

(ii) Obligations arising from the United Nations Framework Convention on Climate Change and the Paris Agreement

112. The United Nations climate régime consists of a series of treaties, in particular the three Rio Conventions, that is: *(a)* the United Nations Framework Convention on Climate Change[147], *(b)* the Convention on Biological Diversity[148] and *(c)* the United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa[149]. It also includes the implementing agreements of the Framework Convention such as the Kyoto Protocol, and *(d)* the Paris Agreement[150]. A whole series of decisions taken by the Conferences of the Parties to the conventions and treaties concluded within the regional economic communities of the United Nations must also be included in United Nations climate law[151].

113. Burkina Faso considers that all these legal instruments are relevant and impose obligations on States in respect of climate change. Burkina Faso will conduct a non-exhaustive review of some of these obligations below, particularly those arising from the United Nations Framework Convention on Climate Change and the Paris Agreement. In the following section, it will examine the obligations arising from the United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa.

114. Burkina Faso argues that three principal obligations derive from the United Nations climate régime: the obligation for Annex I countries of the Framework Convention to take the lead in combating climate change and its adverse effects by drastically curbing their anthropogenic greenhouse gas emissions and by protecting and reinforcing their greenhouse gas sinks and reservoirs; the general obligation applicable to all States to contribute to the reduction of greenhouse gases; and, finally, the obligation of co-operation and solidarity with developing countries and those most vulnerable to the adverse effects of climate change.

115. The obligation for the so-called Annex I countries, that is developed countries and countries in transition to a market economy, to take the lead in combating climate change by significantly reducing greenhouse gas emissions derives from Article 3, paragraph 1, of the United Nations Framework Convention on Climate Change. This provision states that the parties shall be guided by a number of principles when taking measures to achieve the objective of the Convention and in applying its provisions, which include the following:

> "The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. *Accordingly, the*

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[147] See the United Nations Framework Convention on Climate Change, New York, 9 May 1992, *UNTS*, Vol. 1771, p. 1007 (available at: https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXVII-7&chapter=27&Temp=mtdsg3&clang=_en).

[148] See the Convention on Biological Diversity, Rio de Janeiro, 5 June 1992, *UNTS*, Vol. 1760, p. 79 (available at: https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-8&chapter=27&clang=_en).

[149] United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, Paris, 14 Oct. 1994, *UNTS*, Vol. 1954, p. 3 (available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-10&chapter=27&clang=_en).

[150] Paris Agreement, 12 Dec. 2015, *UNTS*, Vol. 3156, p. 79 (available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-7-d&chapter=27&clang=_en).

[151] See e.g. the Protocol to the 1979 Convention on Long-range Transboundary Air Pollution to Abate Acidification, Eutrophication and Ground-level Ozone, *UNTS*, vol. 2132, p. 142 (available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-1-h&chapter=27&clang=_en).

developed country Parties should take the lead in combating climate change and the adverse effects thereof."[152]

116. Article 4, paragraph 2 *([a])*, of the Framework Convention gives flesh to this general principle by laying down a number of "specific[]" commitments incumbent on Annex I countries, that is developed countries and countries in transition to a market economy, in particular:

> "Each of these Parties shall adopt national policies and take corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions of greenhouse gases and protecting and enhancing its greenhouse gas sinks and reservoirs. These policies and measures will demonstrate that developed countries are taking the lead in modifying longer-term trends in anthropogenic emissions consistent with the objective of the Convention, recognizing that the return by the end of the present decade to earlier levels of anthropogenic emissions of carbon dioxide and other greenhouse gases not controlled by the Montreal Protocol would contribute to such modification, and taking into account the differences in these Parties' starting points and approaches, economic structures and resource bases, the need to maintain strong and sustainable economic growth, available technologies and other individual circumstances, as well as the need for equitable and appropriate contributions by each of these Parties to the global effort regarding that objective. These Parties may implement such policies and measures jointly with other Parties and may assist other Parties in contributing to the achievement of the objective of the Convention and, in particular, that of this subparagraph"[153].

117. This provision must be interpreted in the light of the purpose of the Framework Convention as defined in Article 2:

> "The ultimate objective of this Convention and any related legal instruments that the Conference of the Parties may adopt is to achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner."[154]

118. In other words, pursuant to Article 4, paragraph 2 *([a])*, of the Framework Convention, developed States must take the lead in combating climate change by significantly curbing their greenhouse gas emissions and boosting the quantity and quality of their carbon sinks and reservoirs so as to achieve, within ten years of the adoption of the Framework Convention, that is by 2003, in accordance with the relevant provisions of that Convention, the stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.

119. Burkina Faso argues that Annex I countries, including developed States, remain bound by their specific obligation under Article 4, paragraph 2 *([a])*, of the Framework Convention. Failure

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[152] Art. 3 of the United Nations Framework Convention on Climate Change, New York, 9 May 1992, *UNTS*, Vol. 1771, p. 1007 (available at: https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXVII-7&chapter=27&Temp=mtdsg3&clang=_en) (emphasis added).

[153] *Ibid*., Art. 4, para. 2 *([a])*.

[154] *Ibid*., Art. 2.

to respect the prescribed deadline does not mean that the obligation is extinguished[155]. On the contrary, it increases the urgency of the measures to be adopted to achieve the stated objective as quickly as possible. Moreover, the Paris Agreement did not seek to extinguish or derogate from this obligation. Article 4, paragraph 4, of the Paris Agreement reiterates that

> "[d]eveloped country Parties should continue taking the lead by undertaking economy-wide absolute emission reduction targets. Developing country Parties should continue enhancing their mitigation efforts, and are encouraged to move over time towards economy-wide emission reduction or limitation targets in the light of different national circumstances."[156]

120. As for the general obligation applicable to all States to contribute to the reduction of greenhouse gas emissions, this derives from Articles 3 and 4 of the Paris Agreement, which must be read in the light of Article 2 of the same instrument. Article 2, paragraph 1 *(a)*, of the Paris Agreement further refines the objective of the States parties to the Framework Convention by quantifying its goal of stabilizing greenhouse gas concentrations in the atmosphere. It states that the Paris Agreement seeks to implement the Framework Convention, notably 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"[157].

121. Article 3 of the Paris Agreement, for its part, provides that States must make "nationally determined contributions to the global response to climate change" and that

> "all Parties are to undertake and communicate ambitious efforts as defined in Articles 4, 7, 9, 10, 11 and 13 with the view to achieving the purpose of this Agreement as set out in Article 2. 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."[158]

122. In order to do so, each State party must "prepare, communicate and maintain successive nationally determined contributions that it intends to achieve. Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions."[159] Burkina Faso recalls that it has achieved its objectives under these provisions[160]. Article 4, paragraph 4, of the Paris

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[155] See Art. 29 of the Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, *Yearbook of the International Law Commission*, 2001, Vol. II (Part Two), p. 88: "The legal consequences of an internationally wrongful act under this part do not affect the continued duty of the responsible State to perform the obligation breached."

[156] Art. 4, para. 4, of the Paris Agreement, Paris, 12 Dec. 2015, *UNTS*, Vol. 3156, p. 79 (available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-7-d&chapter=27&clang=_en).

[157] *Ibid*., Art. 2, para. 1 *(a)*.

[158] *Ibid*., Art. 4, para. 3.

[159] *Ibid*., Art. 4, para. 2. This provision must be read in the light of Article 4, paragraph 1 *([b])*, of the Framework Convention which provides that the States parties shall "[f]ormulate, implement, publish and regularly update 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 not controlled by the Montreal Protocol, and measures to facilitate adequate adaptation to climate change".

[160] See Section I.D of this written statement.

Agreement reiterates and further develops the obligation of developed country parties to take the lead in combating climate change caused by greenhouse gas emissions. It provides that

> "[d]eveloped country Parties should continue taking the lead by undertaking economy-wide absolute emission reduction targets. Developing country Parties should continue enhancing their mitigation efforts, and are encouraged to move over time towards economy-wide emission reduction or limitation targets in the light of different national circumstances."[161]

123. Lastly, the United Nations climate régime establishes obligations of co-operation and solidarity. *First*, it sets forth an obligation of solidarity incumbent on the "developed country Parties and other developed Parties included in Annex II" to provide "new and additional financial resources", i.e. resources that are separate from development aid, to meet the agreed full costs incurred by developing country parties, in order to enable them to implement their treaty obligations relating to the protection of the climate system[162].

124. *In addition*, the obligation of solidarity extends to the costs of measures of adaptation to climate change. Under Article 4, paragraph 4, of the Framework Convention, "[t]he developed country Parties and other developed Parties included in Annex II shall also assist the developing country Parties that are particularly vulnerable to the adverse effects of climate change in meeting costs of adaptation to those adverse effects"[163].

125. Article 9, paragraph 1, of the Paris Agreement extends this obligation to mitigation by providing 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"[164]. The binding nature of this obligation was reaffirmed during the first global stocktake of the implementation of the Paris Agreement in 2023 (the "Global Stocktake Report 2023")[165].

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[161] Art. 4, para. 4, of the Paris Agreement, Paris, 12 Dec. 2015, *UNTS*, Vol. 3156, p. 79 (available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-7-d&chapter=27&clang=_en).

[162] See e.g. Art. 4, para. 3, of the United Nations Framework Convention on Climate Change, New York, 9 May 1992, *UNTS*, Vol. 1771, p. 1007 (available at: https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXVII-7&chapter=27&Temp=mtdsg3&clang=_en):

> "The developed country Parties and other developed Parties included in Annex II shall provide new and additional financial resources to meet the agreed full costs incurred by developing country Parties in complying with their obligations under Article 12, paragraph 1. They shall also provide such financial resources, including for the transfer of technology, needed by the developing country Parties to meet the agreed full incremental costs of implementing measures that are covered by paragraph 1 of this Article and that are agreed between a developing country Party and the international entity or entities referred to in Article 11, in accordance with that Article. The implementation of these commitments shall take into account the need for adequacy and predictability in the flow of funds and the importance of appropriate burden sharing among the developed country Parties."

[163] Art. 4, para. 4, of the United Nations Framework Convention on Climate Change, New York, 9 May 1992, *UNTS*, Vol. 1771, p. 1007 (available at: https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXVII-7&chapter=27&Temp=mtdsg3&clang=_en).

[164] Art. 9, para. 1, of the Paris Agreement, Paris, 12 Dec. 2015, *UNTS*, Vol. 3156, p. 79 (available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-7-d&chapter=27&clang=_en).

[165] Decision -/CMA.5, Outcome of the First Global Stocktake, 13 Dec. 2023 (FCCC/PA/CMA/2023/L.17), para. 71: "developed 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 and that other Parties are encouraged to provide or continue to provide such support voluntarily" (available at: https://unfccc.int/documents/636584).

126. *Lastly*, developed States must co-operate with developing countries, particularly in respect of funding, insurance and the transfer of technology. Pursuant to Article 4, paragraph 5, of the Framework Convention,

> "[t]he developed country Parties and other developed Parties included in Annex II shall take all practicable steps to promote, facilitate and finance, as appropriate, the transfer of, or access to, environmentally sound technologies and know-how to other Parties, particularly developing country Parties, to enable them to implement the provisions of the Convention. In this process, the developed country Parties shall support the development and enhancement of endogenous capacities and technologies of developing country Parties. Other Parties and organizations in a position to do so may also assist in facilitating the transfer of such technologies."[166]

127. Article 4, paragraph 8, states that for the purpose of implementing the specific commitments undertaken in Article 4, including assistance to meet the cost of adaptation actions,

> "the Parties shall give full consideration to what actions are necessary under the Convention, including actions related to funding, insurance and the transfer of technology, to meet the specific needs and concerns of developing country Parties arising from the adverse effects of climate change and/or the impact of the implementation of response measures, especially on:
>
> *(a)* Small island countries;
>
> *(b)* Countries with low-lying coastal areas;
>
> *(c)* *Countries with arid and semi-arid areas, forested areas and areas liable to forest decay*;
>
> *(d)* *Countries with areas prone to natural disasters*;
>
> *(e)* *Countries with areas liable to drought and desertification*;
>
> *(f)* Countries with areas of high urban atmospheric pollution;
>
> *(g)* Countries with areas with fragile ecosystems, including mountainous ecosystems;
>
> *(h)* Countries whose economies are highly dependent on income generated from the production, processing and export, and/or on consumption of fossil fuels and associated energy-intensive products; and
>
> *(i)* *Landlocked and transit countries*."[167]

128. For several reasons, Burkina Faso is a State with which developed countries must strengthen their co-operation under United Nations law relating to climate change. It is a country with arid and semi-arid areas, forested areas and areas liable to forest decay; it is also a country with areas liable to drought and desertification and prone to natural disasters such as flooding; lastly, it is a landlocked country. Burkina Faso is also among the least advanced countries, and States parties to

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[166] Art. 4, para. 5, of the United Nations Framework Convention on Climate Change, New York, 9 May 1992, *UNTS*, Vol. 1771, p. 1007 (available at: https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXVII-7&chapter=27&Temp=mtdsg3&clang=_en).

[167] *Ibid*., Art. 4, para. 8 (emphasis added).

the Framework Convention must "take full account of the specific needs and special situations of the least developed countries in their actions with regard to funding and transfer of technology"[168].

129. Point 8 of the Copenhagen Accord, adopted in 200[9] during the fifteenth session of the Conference of the Parties of the United Nations Framework Convention on Climate Change, gave concrete effect to the obligation to provide financial assistance to developing countries by specifying and quantifying its content. In it, the parties recognize several facts and obligations:

> "[1] Scaled up, new and additional, predictable and adequate funding as well as improved access shall be provided to developing countries, in accordance with the relevant provisions of the Convention, to enable and support enhanced action on mitigation, including substantial finance to reduce emissions from deforestation and forest degradation (REDD-plus), adaptation, technology development and transfer and capacity-building, for enhanced implementation of the Convention.
>
> [2] The collective commitment by developed countries is to provide new and additional resources, including forestry and investments through international institutions, approaching USD 30 billion for the period 2010–2012 with balanced allocation between adaptation and mitigation.
>
> [3] Funding for adaptation will be prioritized for the most vulnerable developing countries, such as the least developed countries, small island developing States and Africa.
>
> [4] In the context of meaningful mitigation actions and transparency on implementation, developed countries commit to a goal of mobilizing jointly USD 100 billion dollars a year by 2020 to address the needs of developing countries. This funding will come from a wide variety of sources, public and private, bilateral and multilateral, including alternative sources of finance. New multilateral funding for adaptation will be delivered through effective and efficient fund arrangements, with a governance structure providing for equal representation of developed and developing countries. A significant portion of such funding should flow through the Copenhagen Green Climate Fund."[169]

130. For States parties to the United Nations climate change régime, measures of solidarity and co-operation towards developing countries and the countries most vulnerable to the adverse effects of climate change are not mere acts of charity. Article 4, paragraph 7, of the Framework Convention explains that these measures of solidarity and co-operation are the *sine qua non* condition for developing countries to be able to participate in the "global response" to climate change and its adverse effects. In fact,

> "[t]he extent to which developing country Parties will effectively implement their commitments under the Convention will depend on the effective implementation by developed country Parties of their commitments under the Convention related to financial resources and transfer of technology and will take fully into account that

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[168] *Ibid*., Art. 4, para. 9.

[169] See Report of the Conference of the Parties on its fifteenth session, held in Copenhagen from 7 to 19 December 2009, Addendum, 30 Mar. 2010, FCCC/CP/2009/11/Add.1, Copenhagen Accord, pp. 6-7, para. 8 (available at: https://documents.un.org/doc/undoc/gen/g10/605/63/pdf/g1060563.pdf?token=zYYPFZ9CmMdoMXwKsU&fe=true) (numbering added).

economic and social development and poverty eradication are the first and overriding priorities of the developing country Parties"[170].

131. Article 4, paragraph 7, thus reflects the principle of common but differentiated responsibilities and respective capabilities that informs all United Nations law in respect of climate change[171]. The basis of the responsibility incumbent on developed countries in this area is expressed in Principle 7 of the Rio Declaration, which reads:

> "States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command."[172]

132. In conclusion, Burkina Faso considers that the States parties to the United Nations Framework Convention on Climate Change and the Paris Agreement are bound by their obligations under those instruments, in particular the obligations of technical and financial assistance.

(iii) Obligations arising from the United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa

133. The United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa is part of United Nations law in respect of climate change. It further develops certain rules already set out in the United Nations Framework Convention on Climate Change. In fact, the Framework Convention contains a number of provisions on drought and desertification that form the basis of the Convention to Combat Desertification[173].

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[170] Art. 4, para. 7, of the United Nations Framework Convention on Climate Change, New York, 9 May 1992, *UNTS*, Vol. 1771, p. 1007 (available at: https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXVII-7&chapter=27&Temp=mtdsg3&clang=_en).

[171] See also Art. 4, para. 2, of the Paris Agreement, Paris, 12 Dec. 2015, *UNTS*, Vol. 3156, p. 79 (available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-7-d&chapter=27&clang=_en).

[172] Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992, Vol. I (Resolutions adopted by the Conference) (A/CONF.151/26, Vol. I), Ann. I (Rio Declaration on Environment and Development), Principle 7.

[173] For instance, the preamble of the Framework Convention recalls General Assembly resolution 44/172 "Plan of Action to Combat Desertification" and recognizes that "countries with low-lying coastal, arid and semi-arid areas or areas liable to floods, drought and desertification, and developing countries with fragile mountainous ecosystems are particularly vulnerable to the adverse effects of climate change". Article 4 of the Framework Convention requires States to "[c]ooperate in preparing for adaptation to the impacts of climate change; develop and elaborate appropriate and integrated plans for coastal zone management, water resources and agriculture, and for the protection and rehabilitation of areas, particularly in Africa, affected by drought and desertification, as well as floods". Under Article 4, paragraph 8 *(e)*, States parties agree to

> "give full consideration to what actions are necessary under the Convention, including actions related to funding, insurance and the transfer of technology, to meet the specific needs and concerns of developing country Parties arising from the adverse effects of climate change and/or the impact of the implementation of response measures, especially on . . . [c]ountries with areas liable to drought and desertification."

134. The Convention to Combat Desertification protects the climate system and other parts of the environment by preventing desertification and land degradation, thereby encouraging reforestation and the replenishment of greenhouse gas sinks and reservoirs. The preamble of the United Nations Convention to Combat Desertification thus states that it is part of overall fight against "other environmental problems of global dimension facing the international and national communities"[174]. This is a somewhat belated recognition — for the countries of the Sahel — that the great drought of 1973 had anthropogenic causes linked to the practices of developed States. More specifically, the parties "also [bear] in mind the contribution that combating desertification can make to achieving the objectives of the United Nations Framework Convention on Climate Change, the Convention on Biological Diversity and other related environmental conventions"[175].

135. The specific objective of the Convention, according to its Article 2,

> "is to combat desertification and mitigate the effects of drought in countries experiencing serious drought and/or desertification, particularly in Africa, through effective action at all levels, supported by international cooperation and partnership arrangements, in the framework of an integrated approach which is consistent with Agenda 21, with a view to contributing to the achievement of sustainable development in affected areas"[176].

136. The obligations arising from the Convention are essentially obligations of co-operation and solidarity. What distinguishes them is that they establish the link between desertification, the fight against poverty, climate change and the need for an economic and financial system that meets the needs of the countries affected by desertification, especially in Africa. Article 4 of the Convention, which lists the principles thereof, thus provides that,

> "[i]n pursuing the objective of this Convention, the Parties shall:
>
> *(a)* adopt an integrated approach addressing the physical, biological and socio-economic aspects of the processes of desertification and drought;
>
> *(b)* give due attention, within the relevant international and regional bodies, to the situation of affected developing country Parties with regard to international trade, marketing arrangements and debt with a view to establishing an enabling international economic environment conducive to the promotion of sustainable development;
>
> *(c)* integrate strategies for poverty eradication into efforts to combat desertification and mitigate the effects of drought".

See the United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, Paris, 14 Oct. 1994, *UNTS*, Vol. 1954, p. 3 (available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-10&chapter=27&clang=_en).

[174] Twenty-f[ourth] preambular para. of the United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, Paris, 14 Oct. 1994, *UNTS*, Vol. 1954, p. 3 (available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-10&chapter=27&clang=_en).

[175] *Ibid*., twenty-f[ifth] preambular para.

[176] Art. 2 of the United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, Paris, 14 Oct. 1994, *UNTS*, Vol. 1954, p. 3 (available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-10&chapter=27&clang=_en).

137. While the Convention imposes certain obligations on States parties affected by desertification[177], in Article 6 of that instrument, the developed countries undertake to

"*(a)* actively support, as agreed, individually or jointly, the efforts of affected developing country Parties, particularly those in Africa, and the least developed countries, to combat desertification and mitigate the effects of drought;

(b) provide substantial financial resources and other forms of support to assist affected developing country Parties, particularly those in Africa, effectively to develop and implement their own long-term plans and strategies to combat desertification and mitigate the effects of drought;

(c) promote the mobilization of new and additional funding pursuant to article 20, paragraph 2 *(b)*;

(d) encourage the mobilization of funding from the private sector and other non-governmental sources; and

(e) promote and facilitate access by affected country Parties, particularly affected developing country Parties, to appropriate technology, knowledge and know-how."[178]

138. Article 20 of the Convention to Combat Desertification determines the obligation for developed States to "promote the mobilization of . . . new and additional funding" to developing countries affected by desertification. Article 20, paragraph 1, of the Convention, concerning financial resources, reads:

"Given the central importance of financing to the achievement of the objective of the Convention, the Parties, taking into account their capabilities, shall make every effort to ensure that adequate financial resources are available for programmes to combat desertification and mitigate the effects of drought."[179]

139. More specifically, in Article 20, paragraph 2,

"developed country Parties, while giving priority to affected African country Parties without neglecting affected developing country Parties in other regions, in accordance with article 7, undertake to:

(a) mobilize substantial financial resources, including grants and concessional loans, in order to support the implementation of programmes to combat desertification and mitigate the effects of drought;

(b) promote the mobilization of adequate, timely and predictable financial resources, including new and additional funding from the Global Environment Facility of the agreed incremental costs of those activities concerning desertification that relate to its four focal areas, in conformity with the relevant provisions of the Instrument establishing the Global Environment Facility;

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[177] See Art. 5 of the United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, Paris, 14 Oct. 1994, *UNTS*, Vol. 1954, p. 3 (available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-10&chapter=27&clang=_en).

[178] *Ibid*., Art. 6.

[179] *Ibid*., Art. 20.

(c) facilitate through international cooperation the transfer of technology, knowledge and know-how; and

(d) explore, in cooperation with affected developing country Parties, innovative methods and incentives for mobilizing and channelling resources, including those of foundations, non-governmental organizations and other private sector entities, particularly debt swaps and other innovative means which increase financing by reducing the external debt burden of affected developing country Parties, particularly those in Africa."[180]

140. In more general terms, under Article 7 of the Convention, the parties "give priority to affected African country Parties, in the light of the particular situation prevailing in that region, while not neglecting affected developing country Parties in other regions"[181]. In the area of international co-operation, Article 12 provides that

"[a]ffected country Parties, in collaboration with other Parties and the international community, should cooperate to ensure the promotion of an enabling international environment in the implementation of the Convention. Such cooperation should also cover fields of technology transfer as well as scientific research and development, information collection and dissemination and financial resources."[182]

141. Burkina Faso considers that all these obligations, in particular those of solidarity and co-operation, apply to climate matters. It observes, however, that combating desertification appears to be the poor relation in the fight against climate change.

(iv) Obligations arising from the United Nations Convention on the Law of the Sea

142. Burkina Faso maintains that States' obligations in respect of climate change include their obligation to protect and preserve the climate system, of which the seas and oceans are a part[183]. Indeed, the significant emission of greenhouse gases has adverse effects on the marine environment, notably ocean acidification, marine temperatures increases and sea level rise[184]. In this regard, the sixth Synthesis Report of the IPCC, dated 2023, establishes that:

"[c]limate change has caused substantial damages, and increasingly irreversible losses, in terrestrial, freshwater, cryospheric, and coastal and open ocean ecosystems (*high confidence*). Hundreds of local losses of species have been driven by increases in the

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[180] *Ibid*., Art. 20, para. 2.

[181] *Ibid*., Art. 7.

[182] *Ibid*., Art. 12.

[183] See Article 1, paragraph 3, of the United Nations Framework Convention on Climate Change, which defines the climate system as "the totality of the atmosphere, hydrosphere, biosphere and geosphere and their interactions". Seas and oceans are part of the hydrosphere, as mentioned in the IPCC Glossary. Since the term "hydrosphere" does not appear in the French version of the glossary, see the English version which defines it as follows: "The component of the climate system comprising liquid surface and subterranean water, such as in oceans, seas, rivers, freshwater lakes, underground water, wetlands, etc." (available at: https://apps.ipcc.ch/glossary/).

[184] IPCC, 2023: Summary for Policymakers, in: Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, p. 5, A.2.1: "Global mean sea level increased by 0.20 [0.15 to 0.25] m between 1901 and 2018. The average rate of sea level rise was 1.3 [0.6 to 2.1] mm yr-1 between 1901 and 1971, increasing to 1.9 [0.8 to 2.9] mm yr-1 between 1971 and 2006, and further increasing to 3.7 [3.2 to 4.2] mm yr-1 between 2006 and 2018 (high confidence)." (available at: https://www.ipcc.ch/report/sixth-assessment-report-cycle/).

magnitude of heat extremes (*high confidence*) with mass mortality events recorded on land and in the ocean (*very high confidence*).”[185]

143. The sixth Synthesis Report also proves that “[o]cean warming and ocean acidification have adversely affected food production from fisheries and shellfish aquaculture in some oceanic regions (*high confidence*)”[186].

144. In terms of the future, the sixth Synthesis Report establishes that

“[c]ontinued emissions will further affect all major climate system components . . . projected changes include further reduced extents and/or volumes of almost all cryospheric elements (*high confidence*), further global mean sea level rise (*virtually certain*), and increased ocean acidification (*virtually certain*) and deoxygenation (*high confidence*)”[187].

145. Further, the 2023 report states that

“[d]ue to relative sea level rise, current 1-in-100 year extreme sea level events are projected to occur at least annually in more than half of all tide gauge locations by 2100 under all considered scenarios (*high confidence*). Other projected regional changes include intensification of tropical cyclones and/or extratropical storms (*medium confidence*), and increases in aridity and fire weather (*medium to high confidence*).”[188]

146. Burkina Faso asserts that the emission of greenhouse gases constitutes the “pollution of the marine environment”[189], as defined in Article 1, paragraph 4, of the United Nations Convention on the Law of the Sea. Consequently, States parties to the Convention must take all measures set forth in that instrument to protect and preserve the marine environment from pollution caused by greenhouse gases. This includes not only the adoption of measures to prevent, reduce and control marine pollution under Article 194 of the Convention[190], but other obligations as well, deriving from

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[185] *Ibid*., p. 5, A.2.3.

[186] *Ibid*., p. 6, A.2.4.

[187] *Ibid*., pp. 12-13, B.1.3.

[188] *Ibid*., p. 13, B.1.4.

[189] Article 1, paragraph 4, of the United Nations Convention on the Law of the Sea defines “pollution of the marine environment” as

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

Article 212 of the Convention deals specifically with “pollution from or through the atmosphere”. For all these provisions, see United Nations Convention on the Law of the Sea, Montego Bay, 10 Dec. 1982, *UNTS*, Vol. 1834, p. 3 (available at: https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en).

[190] “1. States shall take, individually or jointly as appropriate, all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities, and they shall endeavour to harmonize their policies in this connection.

Articles 195, 196, 198, 199, 200, 201, 204, 206, 212 and 235 of that instrument. As regards the latter provision, paragraphs 2 and 3 of Article 235 provide:

> "2. States shall ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction.
>
> 3. With the objective of assuring prompt and adequate compensation in respect of all damage caused by pollution of the marine environment, States shall cooperate in the implementation of existing international law and the further development of international law relating to responsibility and liability for the assessment of and compensation for damage and the settlement of related disputes, as well as, where appropriate, development of criteria and procedures for payment of adequate compensation, such as compulsory insurance or compensation funds."[191]

147. In other words, it obliges States to make provision, within their domestic legal systems, for recourse against natural or juridical persons under their jurisdiction, with a view to assuring prompt and adequate compensation, or other forms of relief, in respect of damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction. Burkina Faso considers that this obligation applies to pollution from emissions and the absorption of greenhouse gases by the marine environment and to private companies, particularly oil companies, whose economic model is reliant on significant greenhouse gas emissions.

148. In addition, Burkina Faso is of the view that regardless of whether the emission of greenhouse gases is legally characterized as "pollution of the marine environment" under Article 1, paragraph 4, of the Convention, all States remain bound by the general obligation set forth in Article 192 of the Convention, which reads: "States have the obligation to protect and preserve the marine environment."[192]

149. The Court recognized the customary character of the obligation set forth in Article 192 of the United Nations Convention on the Law of the Sea in the case concerning *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia)*[193], while the International Tribunal for the Law of the Sea has confirmed that the obligation to protect and

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> 2. States shall take *all measures necessary* to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention.
>
> 3. The measures taken pursuant to this Part shall deal with *all sources of pollution of the marine environment*.
>
> . . . . . .
>
> 5. The measures taken in accordance with this Part shall include those necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life."

Art. 194 of the United Nations Convention on the Law of the Sea, Montego Bay, 10 Dec. 1982, UNTS, Vol. 1834, p. 3 (available at: https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en) (emphasis added).

[191] *Ibid*., Art. 235.

[192] *Ibid*., Art. 192.

[193] *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2022 (I)*, p. 311, para. 95.

preserve the marine environment of the high seas and in the Area has an *erga omnes* character[194]. Burkina Faso asserts that this obligation also extends to maritime spaces under State jurisdiction. Indeed, as noted by the International Tribunal for the Law of the Sea, the obligation to protect and preserve the marine environment encompasses all maritime spaces, both those which are subject to State jurisdiction and those which are not[195]. Moreover, "the conservation of the living resources of the sea is an element in the protection and preservation of the marine environment"[196].

150. Burkina Faso considers that States are obliged to protect and preserve the marine environment from acidification, deoxygenation, sea level rise and marine temperature increases by significantly reducing their greenhouse gas emissions. In the *South China Sea Arbitration (Philippines* v. *China)*, the Arbitral Tribunal defined the scope the obligation to protect and preserve the marine environment. It concluded that

> "[i]t well established that Article 192 does impose a duty on States Parties, the content of which is informed by the other provisions of Part XII and other applicable rules of international law. This 'general obligation' extends both to 'protection' of the marine environment from future damage and 'preservation' in the sense of maintaining or improving its present condition. Article 192 thus entails the positive obligation to take active measures to protect and preserve the marine environment, and by logical implication, entails the negative obligation not to degrade the marine environment. The corpus of international law relating to the environment, which informs the content of the general obligation in Article 192, requires that States 'ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control.' Thus States have a positive '"duty to prevent, or at least mitigate" significant harm to the environment when pursuing large-scale construction activities.' The Tribunal considers this duty informs the scope of the general obligation in Article 192."[197]

151. The obligation to protect and preserve the marine environment as a part of the climate system therefore entails a positive obligation to take measures to protect the climate system (*protect*) and a negative obligation not to cause damage to it (*preserve*). This obligation applies not only to activities directly carried out by States themselves and their organs, but also to activities taking place under States' jurisdiction or control that cause harm to the marine environment[198]. In this regard, only a significant reduction in greenhouse gas emissions will make it possible to stop the harm that has already been caused to the climate system and prevent the climate-related disasters forecast by the IPCC. Moreover, States must take the action needed to improve the resilience of the marine environment against the adverse effects of greenhouse gas emissions, taking into account the negative effects of the amounts of greenhouse gases that have already accumulated in that environment.

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

[195] *Ibid.*

[196] *Southern Bluefin Tuna (New Zealand* v. *Japan; Australia* v. *Japan), Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999*, p. 295, para. 70.

[197] *The South China Sea Arbitration, Award of 12 July 2016, RIAA*, Vol. XXXIII, para. 941 (fns omitted).

[198] *Ibid*., para. 944: "Articles 192 and 194 set forth obligations not only in relation to activities directly taken by States and their organs, but also in relation to ensuring activities within their jurisdiction and control do not harm the marine environment."

152. The United Nations Convention on the Law of the Sea pays particular attention to the situation of developing countries. In terms of technical assistance, Article 20[2] of that Convention provides that

> "States shall, directly or through competent international organizations: . . . *(b)* provide appropriate assistance, especially to developing States, for the minimization of the effects of major incidents which may cause serious pollution of the marine environment; *(c)* provide appropriate assistance, *especially to developing States*, concerning the preparation of environmental assessments"[199].

153. Article 244, paragraph 2, of the Convention stipulates that

> "States, both individually and in cooperation with other States and with competent international organizations, shall actively promote the flow of scientific data and information and the transfer of knowledge resulting from marine scientific research, *especially to developing States*, as well as the strengthening of the autonomous marine scientific research capabilities of developing States through, *inter alia*, programmes to provide adequate education and training of their technical and scientific personnel."[200]

154. The Convention also contains obligations of solidarity and co-operation with land-locked States such as Burkina Faso. Article 266 further provides that:

> "2. States shall promote the development of the marine scientific and technological capacity of States which may need and request technical assistance in this field, *particularly developing States, including land-locked and geographically disadvantaged States*, with regard to the exploration, exploitation, conservation and management of marine resources, the protection and preservation of the marine environment, marine scientific research and other activities in the marine environment compatible with this Convention, *with a view to accelerating the social and economic development of the developing States*.
>
> 3. States shall endeavour to foster favourable economic and legal conditions for the transfer of marine technology for the benefit of all parties concerned on an equitable basis."[201]

155. Article 269, for its part, provides that:

> "In order to achieve the objectives referred to in article 268 [relating to the development and transfer of marine technology], States, directly or through competent international organizations, shall endeavour, *inter alia*, to:
>
> *(a) establish programmes of technical cooperation for the effective transfer of all kinds of marine technology to States which may need and request technical assistance in this field, particularly the developing land-locked and geographically*

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[199] Art. 20[2] of the United Nations Convention on the Law of the Sea, Montego Bay, 10 Dec. 1982, *UNTS*, Vol. 1834, p. 3 (available at: https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en) (emphasis added).

[200] *Ibid*., Art. 244, para. 2 (emphasis added).

[201] *Ibid*., Art. 266 (emphasis added). See also Art. 267 (Protection of legitimate interests): "States, in promoting cooperation pursuant to article 266, shall have due regard for all legitimate interests including, *inter alia*, the rights and duties of holders, suppliers and recipients of marine technology."

> *disadvantaged States*, as well as other developing States which have not been able either to establish or develop their own technological capacity in marine science and in the exploration and exploitation of marine resources or to develop the infrastructure of such technology;
>
> *(b) promote favourable conditions for the conclusion of agreements, contracts and other similar arrangements, under equitable and reasonable conditions*"[202].

156. The provisions of the Convention relating to technical co-operation also lay down obligations in favour of developing countries, including land-locked States, relating to the development and transfer of marine technology. For example, Article 272 provides that

> "[i]n the field of transfer of marine technology, States shall endeavour to ensure that competent international organizations coordinate their activities, including any regional or global programmes, taking into account *the interests and needs of developing States, particularly land-locked and geographically disadvantaged States*."[203]

157. In conclusion, Burkina Faso notes that the States parties to the Third United Nations Conference on the Law of the Sea were aware of the existence of the link between the convention they had just adopted and the need for an equitable international economic order. Paragraph 6 of the Convention's preamble states that

> "the achievement of these goals [including those relating to the protection and preservation of the marine environment] will contribute to the realization of a just and equitable international economic order which takes into account the interests and needs of mankind as a whole and, in particular, *the special interests and needs of developing countries, whether coastal or land-locked*"[204].

158. This link is also mentioned in the resolution on development of national marine science, technology and ocean service infrastructures. In fact, the States participating in the Third United Nations Conference on the Law of the Sea recognize therein that the Convention seeks, through its new law of the sea, to establish a just and equitable international economic order, in the following terms:

> "[T]he Convention on the Law of the Sea is intended to establish a new régime for the seas and oceans which will contribute to the realization of a just and equitable international economic order through making provision for the peaceful use of ocean space, the equitable and efficient management and utilization of its resources, and the study, protection and preservation of the marine environment"[205].

159. Burkina Faso notes that some 40 years after its entry into force, the Convention has not achieved this goal of a just and equitable economic order, despite its obligations of co-operation and technical assistance in favour of developing States, including land-locked States such as Burkina

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[202] Art. 269 of the United Nations Convention on the Law of the Sea, Montego Bay, 10 Dec. 1982, *UNTS*, Vol. 1834, p. 3 (available at: https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en) (emphasis added).

[203] *Ibid*., Art. 272 (emphasis added).

[204] *Ibid*., sixth preambular para. (emphasis added).

[205] Resolution on development of national marine science, technology and ocean service infrastructures (A/CONF.62/120) (available at: https://digitallibrary.un.org/record/34377?ln=en&v=pdf).

Faso. However, the establishment of a just and equitable economic order is not merely a consequence of implementing the Convention; it is henceforth a *sine qua non* condition for achieving the very objectives of the Convention itself. In the face of an existential threat such as climate change, the international community needs the efforts of all its member States, as the Paris Agreement also recognizes, including those of developing and land-locked countries and countries at a geographical disadvantage. It is thus all the more imperative that obligations of solidarity and co-operation are rigorously fulfilled.

(b) ***Obligations under customary international law***

160. States have two customary obligations under international law as regards the protection of the climate system and other parts of the environment. There is the general obligation of due diligence that applies to all activities taking place on the territory of a State or under its control which could infringe the rights of third parties (**i**). There is also the more specific obligation of prevention of significant harm to the environment (**ii**).

(i) The general obligation of due diligence

161. The general obligation of due diligence derives from the very structure of the international community and the principle of territorial sovereignty underpinning it. According to the sole arbitrator in the *Island of Palmas case (Netherlands, USA)* case,

> "[s]overeignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State. The development of the national organisation of States during the last few centuries and, as a corollary, the development of international law, have established this principle of the exclusive competence of the State in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international relations."[206]

162. The complete and exclusive competence exercised by a State over its territory is counterbalanced by the obligation to protect the rights of third parties on that territory. As arbitrator Max Huber observed,

> "[t]erritorial sovereignty . . . involves the exclusive right to display the activities of a State. This right has as corollary a duty: the obligation to protect within the territory the rights of other States, in particular their right to integrity and inviolability in peace and in war, together with the rights which each State may claim for its nationals in foreign territory . . . Territorial sovereignty cannot limit itself to its negative side, i.e. to excluding the activities of other States; for it serves to divide between nations the space upon which human activities are employed, in order to assure them at all points the minimum of protection of which international law is the guardian."[207]

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[206] Sentence arbitrale rendue le 4 avril 1928 par M. Max Huber, entre les Etats-Unis et les Pays-Bas, dans le litige relatif à la souveraineté sur l'île de Palmas (ou Miangas), *Revue générale de droit international public*, Vol. XLII, 1935, p. 163.

[207] *Ibid*., p. 164.

163. As stated by the Court in the case concerning the *Corfu Channel (United Kingdom* v. *Albania)*, the duty of due diligence is the "obligation [for any State] not to allow knowingly its territory to be used for acts contrary to the rights of other States"[208].

164. Initially confined to the obligation to protect the rights of third States on its territory, the duty of due diligence was extended to occupied territories[209], and then more generally to all territories under the control of the State. As observed by the Court in its Advisory Opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, "[p]hysical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States"[210].

165. Burkina Faso argues that in the present circumstances States must perform their obligations of due diligence in respect of actual harm and the risk of harm posed by greenhouse gas emissions both to rights protected under international law, such as human rights, and to the environment, including the climate system and its parts. Three conditions must be met in order for the due diligence obligation to arise, namely: *(a)* there must be a risk of violations of rules of international law protecting the rights of States, peoples and individuals; *(b)* the State having sovereignty or control over a territory must be aware that activities entailing a risk of violations of third-party rights are taking place; and, finally, *(c)* the State must have the ability to prevent the breach of international law.

166. As regards the risk of violations of international law protecting the rights of third parties and the environment, Burkina Faso has already established, on the basis of the IPCC's reports, that greenhouse gas emissions emanating from territories under the sovereignty or control of States are a cause of proven harm to the climate system and various parts of the environment[211]. Burkina Faso has also proved, on the basis of those same reports, that the ongoing emission of greenhouse gases risks exacerbating the catastrophic damage to the climate system and other parts of the environment and to the rights of States, peoples and individuals[212]. The first requisite condition for triggering the duty of due diligence is thus met.

167. As regards the ability of the State concerned to put an end to the risk of harm to the rights of third parties and the environment, Burkina Faso notes that the Court clarified the scope of this limitation on the due diligence obligation in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*. It explained that

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[208] *Corfu Channel (United Kingdom* v. *Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 22.

[209] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 231, para. 178 (the Court concluded

> "that Uganda was the occupying Power in Ituri at the relevant time. As such it was under an obligation, according to Article 43 of the Hague Regulations of 1907, to take all the measures in its power to restore, and ensure, as far as possible, public order and safety in the occupied area, while respecting, unless absolutely prevented, the laws in force in the DRC. This obligation comprised the duty to secure respect for the applicable rules of international human rights law and international humanitarian law, to protect the inhabitants of the occupied territory against acts of violence, and not to tolerate such violence by any third party.").

[210] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 54, para. 118.

[211] See Section I.A.2.

[212] *Ibid.*

"[a] State does not incur responsibility simply because the desired result is not achieved; responsibility is however incurred if the State manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide. In this area the notion of 'due diligence', which calls for an assessment *in concreto*, is of critical importance.

Various parameters operate when assessing whether a State has duly discharged the obligation concerned. The first, which varies greatly from one State to another, is clearly the capacity to influence effectively the action of persons likely to commit, or already committing, genocide.

This capacity itself depends, among other things, on the geographical distance of the State concerned from the scene of the events, and on the strength of the political links, as well as links of all other kinds, between the authorities of that State and the main actors in the events.

The State's capacity to influence must also be assessed by legal criteria, since it is clear that every State may only act within the limits permitted by international law; seen thus, a State's capacity to influence may vary depending on its particular legal position vis-à-vis the situations and persons facing the danger, or the reality, of genocide.

On the other hand, it is irrelevant whether the State whose responsibility is in issue claims, or even proves, that even if it had employed all means reasonably at its disposal, they would not have sufficed to prevent the commission of genocide. As well as being generally difficult to prove, this is irrelevant to the breach of the obligation of conduct in question, the more so since the possibility remains that the combined efforts of several States, each complying with its obligation to prevent, might have achieved the result — averting the commission of genocide — which the efforts of only one State were insufficient to produce."[213]

168. Burkina Faso considers that the way in which the Court applied the due diligence obligation in respect of the obligation to prevent the crime of genocide also holds for proven violations and potential breaches of international law attributable to greenhouse gas emissions, since the Court's methodology was not confined to the exercise of due diligence in the context of the Convention on the Prevention and Punishment of the Crime of Genocide. On the contrary, the Court expressly referred to the general obligation of due diligence under customary international law.

169. Burkina Faso, paraphrasing the Court's dictum and transposing it to greenhouse gas emissions over time, considers that the due diligence obligation is triggered when the State concerned has "the capacity to influence effectively the action of persons likely to commit, or already committing" activities releasing greenhouse gases capable of breaching the rights of third States, peoples and individuals, as well as rules of international law protecting the environment. It is of little importance whether the State bearing the due diligence obligation claims, or even proves, that even if it had employed all means reasonably at its disposal, these would not have sufficed to prevent the risks of the greenhouse gas emissions breaching the rights of third parties and causing harm to the climate system and other parts of the environment. Such a situation, as well as being generally difficult to prove, is irrelevant as regards the violation of the obligation of conduct in question: it is possible that the combined efforts of several States, each complying with its own obligation of

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[213] *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. 221, para. 430 (the paragraph has been divided into smaller subparagraphs for ease of reading).

prevention, could have achieved a result, i.e. a significant reduction in greenhouse gas emissions causing substantial harm to the climate system, which could not have been achieved by the efforts of one State alone.

170. In conclusion, Burkina Faso considers that, by virtue of the general obligation of due diligence, States are bound to take adequate measures[214] at their disposal, be they legislative, administrative or other, to prevent harm to the rights of third parties and breaches of environmental law by anthropogenic greenhouse gas emissions. They also have an obligation to implement these measures taking into account the existential risk that those emissions pose to humanity. In fact, "[t]he standard of due diligence has to be more severe for the riskier activities"[215]. Moreover, since the standard of due diligence may evolve over time[216], States must regularly review the measures of due diligence adopted to ensure that they are still consistent with their obligation to prevent breaches of the rights of other States and of the rules protecting the environment.

(ii) The obligation to prevent significant harm to the environment

171. The obligation to prevent significant harm to the environment stems from the more general obligation of due diligence; it too is an obligation of conduct and not of result[217]. In its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the Court observed that

> "[t]he existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment"[218].

172. In the case concerning *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay)*, it pointed out that

> "the principle of prevention, as a customary rule, has its origins in the due diligence that is required of a State in its territory . . . A State is thus obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State."[219]

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

[215] *Ibid*., p. 43, para. 117.

[216] *Ibid*.

[217] *Dispute over the Status and Use of the Waters of the Silala (Chile* v. *Bolivia), Judgment, I.C.J. Reports 2022 (II)*, p. 645, para. 83.

[218] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, pp. 241-242, para. 29.

[219] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, pp. 55-56, para. 101.

173. The Court has observed on several occasions that the obligation to prevent significant harm to the environment is a customary obligation of international law[220]. Burkina Faso is of the opinion that the general obligation of due diligence applicable in environmental matters also extends to the climate system and to the various parts of the environment, including in spaces that do not fall under any jurisdiction. The concept of "environment" includes the climate system. As the Court stated in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, "the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn"[221].

174. In this regard, the Rio Declaration on "Environment and Development" mentions the "integrity of the global environmental . . . system" and recognizes the "integral and interdependent nature of the Earth"[222]. Principle 7 of that Declaration provides that States must co-operate in a spirit of global partnership to conserve, protect and restore "the health and integrity of the Earth's ecosystem"[223].

175. The obligation to prevent significant harm to the environment is more specific than the general obligation of due diligence, since it concerns only harm to the environment. There must also be a certain level of gravity attached to the risk of harm, which must be "significant"[224] according to the jurisprudence of the Court.

176. Burkina Faso considers that States are bound by the obligation to prevent significant harm to the environment in relation to substantial greenhouse gas emissions. In fact, the obligation to prevent transboundary environmental harm applies to all activities, not just industrial ones. It therefore applies to greenhouse gas emissions. According to the Court,

> "[a]lthough the Court's statement in the *Pulp Mills* case refers [as regards the obligation to undertake an environmental impact assessment] to industrial activities, the underlying principle applies generally to proposed activities which may have a significant adverse impact in a transboundary context. Thus, to fulfil its obligation to exercise due diligence in preventing significant transboundary environmental harm, a State must, before embarking on an activity having the potential adversely to affect the environment of

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[220] *Dispute over the Status and Use of the Waters of the Silala (Chile* v. *Bolivia), Judgment, I.C.J. Reports 2022 (II)*, pp. 644-645, para. 83, and p. 648, para. 99; *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; *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, pp. 55-56, para. 101; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, pp. 77-78, para. 140.

[221] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 241, para. 29. See also among the relevant legal instruments: the preamble of paragraph 1 of the Declaration of the United Nations Conference on the Human Environment (Stockholm, 5-6 June 1972), which defines the environment as the natural aspect into which man is born and the man-made aspect, it being understood that "[b]oth aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights — even the right to life itself" (available at: https://documents.un.org/doc/undoc/gen/nl7/300/05/pdf/nl730005.pdf?token=91APWGw7pwWg1ucTB9&fe=true); see also the World Charter for Nature of 28 Oct. 1982, UN doc. A/RES/37/7: "Mankind is a part of nature and life depends on the uninterrupted functioning of natural systems which ensure the supply of energy and nutrients."

[222] Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992, Vol. I (Resolutions adopted by the Conference) (A/CONF.151/26, Vol. I), Ann. I (Rio Declaration on Environment and Development), preamble, paras. 3 and 4.

[223] *Ibid*., Principle 7.

[224] *Dispute over the Status and Use of the Waters of the Silala (Chile* v. *Bolivia), Judgment, I.C.J. Reports 2022 (II)*, p. 652, para. 118.

another State, ascertain if there is a risk of significant transboundary harm, which would trigger the requirement to carry out an environmental impact assessment.

Determination of the content of the environmental impact assessment should be made in light of the specific circumstances of each case."[225]

177. In concrete terms, the obligation of prevention thus covers all activities relating to greenhouse gas emissions, including the granting of licences and concessions, and the research, production, storage, commercialization, transportation and consumption of fossils fuels. Moreover, the obligation to prevent transboundary environmental harm applies both to territories under the sovereignty or control of a State and to territories outside all jurisdictions. It also applies to environmental harm in areas beyond national control:

"The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control [including the climate system as a whole] is now part of the corpus of international law relating to the environment"[226].

178. Two conditions must be met to trigger the obligation to prevent significant harm to the environment: there must be a risk of transboundary environmental harm and the risk of harm must be of a certain gravity. Burkina Faso will not focus on the harm that has already been caused to the environment by greenhouse gas emissions. It has already established this on the basis of the IPCC's reports[227]. Burkina Faso has also noted the ongoing risk that the damage caused to the climate system and other parts of the environment by greenhouse gas emissions may become exponentially worse[228]. Burkina Faso will focus instead on the criteria to be used in assessing the seriousness of the risk, as set out in the jurisprudence of the Court. According to the Court, significant transboundary harm may be established under customary international law "if, by their nature or by their magnitude, and in view of the context in which they are to be carried out, certain planned measures pose a risk of significant transboundary harm"[229].

179. Burkina Faso argues that, by their nature and magnitude, and in view of the context in which they are taking place, greenhouse gas emissions and their related activities (including the granting of licences and concessions, and the research, production, storage, commercialization, transportation and consumption of fossil fuels) evidently pose a risk of significant transboundary harm. The IPCC has established that greenhouse gas emissions cause catastrophic damage to the climate system. They constitute an existential threat to humanity. Measuring the scale of greenhouse gas emissions must also be done in two stages: account must be taken not only of the fact that greenhouse gas emissions have risen dramatically since the 1950s compared to previous centuries, but also of the fact that they have accumulated in the atmosphere. This has already undermined the climate system's capacity for resilience. It has also almost depleted the "carbon budget" for future

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[225] *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)*, pp. 706-707, para. 104.

[226] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, pp. 241-242, para. 29.

[227] See Section I.A.2.

[228] *Ibid*.

[229] *Dispute over the Status and Use of the Waters of the Silala (Chile* v. *Bolivia), Judgment, I.C.J. Reports 2022 (II)*, p. 654, para. 126. See also *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Judgment, I.C.J. Reports 2015 (II)*, p. 720, para. 155.

generations and brought humanity dangerously close to the climate's tipping point beyond which the scale of the damage increases and the climate system becomes completely unpredictable. According to the IPCC's sixth Synthesis Report, "[c]ontinued emissions will further affect all major climate system components. With every additional increment of global warming, changes in extremes continue to become larger."[230]

180. Moreover,

> "[s]ome future changes are unavoidable and/or irreversible but can be limited by deep, rapid and sustained global greenhouse gas emissions reduction. The likelihood of abrupt and/or irreversible changes increases with higher global warming levels. Similarly, the probability of low-likelihood outcomes associated with potentially very large adverse impacts increases with higher global warming levels."[231]

181. Burkina Faso concludes that the extreme gravity of the existing and potential risks calls for the obligation to prevent transboundary harm to be urgently and rigorously implemented. This imposes obligations of due diligence on States, particularly the largest emitters of greenhouse gases, in respect of all activities relating to the emission of greenhouse gases, including the granting of licences and concessions, and the research, production, storage, commercialization, transportation and consumption of fossil fuels.

182. Burkina Faso will address only three implications of the obligation of prevention in this regard. *First*, the obligation to prevent environmental and climatic harm obliges States not to engage in activities resulting in or relating to the emission of greenhouse gases[232]. While carrying out an environmental impact assessment is undoubtedly a customary rule of international law[233], in this instance the results are already known. States are therefore obliged to suspend these activities, it being established that, individually or collectively, unilaterally or together with those of other States and actors, they are causing very serious harm to the environment, including the climate system. *Second*, States must not adopt legislative, administrative or other measures that support or encourage activities relating to the emission of greenhouse gases, including the granting of licences and concessions, and the research, production, storage, commercialization, transportation and consumption of fossil fuels. *Third*, in the words of the Court in the case concerning *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay)*, States must use "all the means at [their] disposal" to prevent activities carried out by private operators on their territory or in any area under their jurisdiction relating to the emission of greenhouse gases — including the granting of licences and concessions, and the research, production, storage, commercialization, transportation and consumption of fossil fuels — causing significant harm to the environment of other States or to the climate system and its various parts[234]. In this regard, Burkina Faso considers that any failure to do so engages their international responsibility. Indeed, "[w]hether the insufficiency proceeds from deficient execution

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[230] IPCC, 2023: Summary for Policymakers, Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, pp. 12-13, B.1.3 (available at: https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_SPM.pdf).

[231] *Ibid.*, p. 18, B.3.

[232] In fact, the duty of due diligence entails an obligation not to carry out the activity concerned oneself. See *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. 113, para. 166.

[233] *Dispute over the Status and Use of the Waters of the Silala (Chile* v. *Bolivia), Judgment, I.C.J. Reports 2022 (II)*, p. 651, para. 114; *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. 707, para. 104.

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

of an intelligent law or from the fact that the laws of the country do not empower the authorities to measure up to international standards is immaterial"[235].

2. Obligations arising from human rights

183. Burkina Faso considers that international law obligations relating to the protection of human rights entail the protection and preservation of the climate system. In fact, the enjoyment or fulfilment of a large number of human rights depends on the protection of the climate system and other parts of the environment. Consequently, the obligations of States to protect human rights are obligations that concern the protection of the climate system and other parts of the environment.

184. In this written statement, Burkina Faso will refer to the human rights guaranteed by the International Bill of Human Rights, principally those assured by the Universal Declaration of Human Rights, which it considers to have a customary character[236]. Although the *instrumentum* containing the Universal Declaration of Human Rights is only a resolution and not binding in this respect, Burkina Faso considers, on the basis of the relevant jurisprudence of the Court[237], that the *negotium* of resolution 217 (III) reflects customary international law on account of its content, the conditions of its adoption and the existence of the requisite *opinio juris* as to its normative character[238]. The text of the Declaration supports this interpretation. In fact, in the preamble of the Universal Declaration of Human Rights, the General Assembly

> "*[p]roclaims* this Universal Declaration of Human Rights as a *common standard of achievement for all peoples and all nations*, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and *by progressive measures, national and international, to secure their universal and effective recognition and observance*, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction"[239].

185. Burkina Faso notes that the Court implicitly considered that the fundamental rights guaranteed by the Universal Declaration of Human Rights were of a customary character in the case concerning *United States Diplomatic and Consular Staff in Tehran*. The Court observed in that case that

> "[w]rongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship *is in itself manifestly incompatible with the*

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[235] *L. F. H. Neer and Pauline Neer (U.S.A.)* v. *United Mexican States*, 15 Oct. 1926, *RIAA*, Vol. IV, p. 62.

[236] See the Universal Declaration of Human Rights in resolution 217 (III), International Bill of Human Rights (available at: https://documents.un.org/doc/resolution/gen/nr0/043/88/pdf/nr004388.pdf?token=j4XtARcB3LTsvazVr2&fe=true).

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

[238] On this point, see B. Simma and P. Alston, "The sources of human rights: custom, *jus cogens*, and general principles", *The Australian Yearbook of International Law*, 1992, Vol. 12, p. 98.

[239] Ninth preambular para. of the Universal Declaration of Human Rights in resolution 217 (III), International Bill of Human Rights (available at: https://documents.un.org/doc/resolution/gen/nr0/043/88/pdf/nr004388.pdf?token=j4XtARcB3LTsvazVr2&fe=true) (emphasis added).

> *principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights*"[240].

186. The reference to the fact that arbitrary detention is incompatible with the fundamental rights set forth in the Universal Declaration of Human Rights has meaning only if those rights have a customary character. Similarly, the Court considered in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)* that the human rights set forth in Article 3 common to the Geneva Conventions (which can also be found in the Universal Declaration of Human Rights) formed part of the "elementary considerations of humanity" that the Court could apply without having to decide on the applicability of the treaty in which they were set forth, owing to their customary character[241]. In its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the Court also remarked that

> "[i]t is undoubtedly because a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and 'elementary considerations of humanity' . . . that the Hague and Geneva Conventions have enjoyed a broad accession. Further these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law."[242]

187. The same considerations apply to the human rights guaranteed by the Universal Declaration of Human Rights. It is because the human rights assured by the Universal Declaration of Human Rights are so fundamental to the respect of the human person and for elementary considerations of humanity that these rights were subsequently incorporated into several conventions acceded to by a large number of States. Furthermore, these fundamental rules are to be observed by all States, whether or not they have ratified the conventions expressing them, since they constitute intransgressible principles of customary international law.

188. Moreover, in the Millennium Declaration adopted by General Assembly resolution A/RES/55/2, the heads of State and government also recognized the customary character of the human rights guaranteed by the Universal Declaration of Human Rights. In it, they undertook to "spare no effort to promote democracy and strengthen the rule of law, as well as respect for all internationally recognized human rights and fundamental freedoms, including the right to development"[243]. They therefore resolved "[t]o respect fully and uphold the Universal Declaration of Human Rights"[244].

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[240] *United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran), Judgment, I.C.J. Reports 1980*, p. 42, para. [91] (emphasis added).

[241] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 114, para. 218:

> "Article 3 which is common to all four Geneva Conventions of 12 August 1949 defines certain rules to be applied in the armed conflicts of a non-international character. There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court's opinion, reflect what the Court in 1949 called 'elementary considerations of humanity' . . . The Court may therefore find them applicable to the present dispute, and is thus not required to decide what role the United States multilateral treaty reservation might otherwise play in regard to the treaties in question."

[242] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 257, para. 79.

[243] Millennium Declaration, adopted on 12 Sept. 2000 (A/RES/55/2), para. 24 (available at: https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_55_2.pdf).

[244] *Ibid*., para. 25.

189. Burkina Faso is of the view that the obligations arising from human rights guaranteed by the Universal Declaration of Human Rights are applicable in respect of climate change, even when the infringement of these rights takes place outside States' territories ***(a)***. It observes that the enjoyment and fulfilment of several human rights are being compromised by greenhouse gas emissions and the climate change and adverse effects they cause ***(b)***. Burkina Faso will thus set out the conduct expected of States in respect of climate change ***(c)***.

(a) ***States' human rights obligations are applicable in respect of greenhouse gas emissions, the climate change they cause and the adverse effects thereof***

190. Burkina Faso argues that States' obligations relating to respect for human rights are applicable to greenhouse gas emissions and the climate change they cause, including when the human rights infringement occurs outside their territories or the territories under their jurisdiction. Indeed, one of the characteristics of greenhouse gases is that their adverse effects are not confined to the territory or jurisdiction of the State that emits them. On the contrary, they affect the entire planet.

191. Burkina Faso notes *at the outset* that human rights obligations do not require the State to act outside its territory in respect of climate change. They require States to take measures to ensure that *activities taking place on their territories* do not infringe either the human rights of third persons in other territories, or the environment, including the climate system. What this entails is very much a territorial application of their obligations under human rights law. Moreover, because of the interdependence of the climate system, it is not possible to distinguish between greenhouse gas emissions affecting the territory of the State of origin and those affecting the rights of persons in third States, or the environment.

192. *Furthermore*, Burkina Faso observes that not all human rights treaties require individuals to be on the territory of a State party or a territory controlled by a State party in order to benefit from the rights it guarantees. In such situations, the Court has refused to interpret the text of a treaty as containing a territorial or jurisdictional restriction when this is not the case[245].

193. *Finally*, the jurisprudence of the Inter-American Court of Human Rights has confirmed in respect of transboundary harm that the jurisdiction of a State extends not only to the individuals on its territory, but also to those on the territories of other States, if the activities taking place on the territory of the first State are affecting the enjoyment or fulfilment of their rights. For the Inter-American Court:

> "101. The obligations to respect and to ensure human rights require that States abstain from preventing or hindering other States Parties from complying with the obligations derived from the Convention . . . Activities undertaken within the jurisdiction of a State Party should not deprive another State of the ability to ensure that the persons within its jurisdiction may enjoy and exercise their rights under the Convention. The Court considers that States have the obligation to avoid transboundary environmental damage that can affect the human rights of individuals outside their territory. For the purposes of the American Convention, when transboundary damage occurs that effects treaty-based rights, it is understood that the persons whose rights

[245] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, pp. 178-181, paras. 107-113; see also *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. 120, para. 183: "The substantive obligations arising from Articles I and III are not on their face limited by territory. They apply to a State wherever it may be acting or may be able to act in ways appropriate to meeting the obligations in question."

have been violated are under the jurisdiction of the State of origin, if there is a causal link between the act that originated in its territory and the infringement of the human rights of persons outside its territory.

102. In cases of transboundary damage, the exercise of jurisdiction by a State of origin is based on the understanding that it is the State in whose territory or under whose jurisdiction the activities were carried out that has the effective control over them and is in a position to prevent them from causing transboundary harm that impacts the enjoyment of human rights of persons outside its territory. The potential victims of the negative consequences of such activities are under the jurisdiction of the State of origin for the purposes of the possible responsibility of that State for failing to comply with its obligation to prevent transboundary damage. That said, not every negative impact gives rise to this responsibility. The limits and characteristics of this obligation are explained in greater detail in Chapter VIII of this Opinion.

103. Accordingly, it can be concluded that the obligation to prevent transboundary environmental damage or harm is an obligation recognized by international environmental law, under which States may be held responsible for any significant damage caused to persons outside their borders by activities originating in their territory or under their effective control or authority. It is important to stress that this obligation does not depend on the lawful or unlawful nature of the conduct that generates the damage, because States must provide prompt, adequate and effective redress to the persons and States that are victims of transboundary harm resulting from activities carried out in their territory or under their jurisdiction, even if the action which caused this damage is not prohibited by international law. That said, there must always be a causal link between the damage caused and the act or omission of the State of origin in relation to activities in its territory or under its jurisdiction or control. Chapter VIII of this Opinion will describe the content, scope, terms and characteristics of these obligations."[246]

194. Burkina Faso notes that the Committee on the Rights of the Child adopted the same approach in respect of the notion of "jurisdiction" in the *Chiara Sacchi et al.* v. *Argentina* case[247], and it invites the Court to follow suit in these advisory proceedings.

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[246] Inter-American Court of Human Rights, A Request for an Advisory Opinion from the Inter-American Court of Human Rights Concerning the Interpretation of Article 1(1), 4(1) and 5(1) of the American Convention on Human Rights (OC-23/17, Am.C.HR, Series A), 15 Nov. 2017, paras. 101-103. See also the Committee on the Rights of the Child, *Chiara Sacchi et al.* v. *Argentina et al*. (Communication Nos. 104-107/2019, CRC/C/88/D/104/2019, CRC/C/88/D/105/2019, CRC/C/88/D/106/2019, CRC/C/88/D/107/2019), 11 Nov. 2021, para. 10.10.

[247] *Chiara Sacchi et al*. v. *Argentina et al*., Decision adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communication No. 104/2019 (CRC/C/88/D/104/2019), 22 Sept. 2021, para. 10.7:

> "the Committee finds that the appropriate test for jurisdiction in the present case is that adopted by the Inter-American Court of Human Rights in its Advisory Opinion on the environment and human rights. This implies that when transboundary harm occurs, children are under the jurisdiction of the State on whose territory the emissions originated for the purposes of article 5 (1) of the Optional Protocol if there is a causal link between the acts or omissions of the State in question and the negative impact on the rights of children located outside its territory, when the State of origin exercises effective control over the sources of the emissions in question. The Committee considers that, while the required elements to establish the responsibility of the State are a matter of merits, the alleged harm suffered by the victims needs to have been reasonably foreseeable to the State party at the time of its acts or omissions even for the purpose of establishing jurisdiction."

(b) ***The enjoyment and fulfilment of human rights are adversely affected by greenhouse gas emissions, the climate change they cause and the adverse effects thereof***

195. Burkina Faso contends that greenhouse gas emissions and the climate change they cause adversely affect the rights guaranteed by the Universal Declaration of Human Rights. In support, it offers two types of evidence demonstrating the harm caused to human rights by climate change, namely the reports of the IPCC, and the conclusions and other findings both of human rights bodies and of various special rapporteurs appointed by the Human Rights Council. Burkina Faso has already established why the Court must give considerable probative value to the reports of the IPCC in these proceedings[248].

196. As regards the quasi-judicial human rights bodies, Burkina Faso notes that the Court ascribed "great weight" to the Human Rights Committee's interpretation of the International Covenant on Civil and Political Rights in the case concerning *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo)*[249]. Burkina Faso is of the view that similar weight must be given to such legal findings in the present advisory proceedings.

197. The Court must also ascribe great weight to the legal findings of the special rapporteurs, given the expertise of the individuals in question, their independence and impartiality, their code of conduct and their working methods. The criteria governing the selection of special rapporteurs are as follows: "*(a)* expertise; *(b)* experience in the field of the mandate; *(c)* independence; *(d)* impartiality; *(e)* personal integrity; and *(f)* objectivity"[250]. In addition, "[d]ue consideration should be given to gender balance and equitable geographic representation, as well as to an appropriate representation of different legal systems" when appointing them[251]. Lastly, in its decision 6/102, the Council adopted technical and objective requirements for eligible candidates[252], which aim to ensure that those "candidates are highly qualified individuals who possess established competence, relevant expertise and extensive professional experience in the field of human rights"[253]. Special rapporteurs are also subject to a very stringent code of conduct[254].

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[248] See Section 1.A.1 of this written statement.

[249] *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010 (II)*, p. 664, para. 66.

[250] See resolution 5/1 of the Human Rights Council: Institution-building of the United Nations Human Rights Council (2007) (A/HRC/5/1), para. 39 (available at: https://www.ohchr.org/en/hr-bodies/hrc/complaint-procedure/resolutions).

[251] *Ibid*., para. 40.

[252] Human Rights Council, decision 6/102: Follow-up to Human Rights Council resolution 5/1 (technical and objective requirements for eligible candidates for mandate holders), 27 Sept. 2007 (available at: https://ap.ohchr.org/documents/E/HRC/decisions/A_HRC_DEC_6_102.pdf).

[253] See resolution 5/1 of the Human Rights Council: Institution-building of the United Nations Human Rights Council (2007) (A/HRC/5/1), para. 41 (available at: https://www.ohchr.org/en/hr-bodies/hrc/complaint-procedure/resolutions).

[254] See e.g. Art. 3 (General Principles of Conduct) of the Code of Conduct for Special Procedures Mandate-holders of the Human Rights Council, Human Rights Council, 18 June 2007 (A/HRC/RES/5/2) (available at: https://www.ohchr.org/en/documents/procedural-documents/code-conduct-special-procedures-mandate-holders-human-rights-council). The relevant part of that provision reads as follows:

> "Mandate-holders are independent United Nations experts. While discharging their mandate, they shall:

198. As regards the sources of information upon which their reports must be based, the code of conduct stipulates that mandate-holders should

"*(a)* [a]lways seek to establish the facts, based on objective, reliable information emanating from relevant credible sources, that they have duly cross-checked to the best extent possible;

(b) [t]ake into account in a comprehensive and timely manner, in particular information provided by the State concerned on situations relevant to their mandate;

(c) [e]valuate all information in the light of internationally recognized human rights standards relevant to their mandate, and of international conventions to which the State concerned is a party"[255].

199. In their information-gathering activities, special rapporteurs must

"*(a)* [b]e guided by the principles of discretion, transparency, impartiality, and even-handedness;

(b) [p]reserve the confidentiality of sources of testimonies if their divulgation could cause *harm* to individuals involved;

(c) [r]ely on objective and dependable facts based on evidentiary standards that are appropriate to the non-judicial character of the reports and conclusions they are called upon to draw up;

(d) [g]ive representatives of the concerned State the opportunity of commenting on mandate-holders' assessment and of responding to the allegations made against this State, and annex the State's written summary responses to their reports"[256].

(a) Act in an independent capacity, and exercise their functions in accordance with their mandate, through a professional, impartial assessment of facts based on internationally recognized human rights standards, and free from any kind of extraneous influence, incitement, pressure, threat or interference, either direct or indirect, on the part of any party, whether stakeholder or not, for any reason whatsoever, the notion of independence being linked to the status of mandate-holders, and to their freedom to assess the human rights questions that they are called upon to examine under their mandate;

. . . . . .

(d) Focus exclusively on the implementation of their mandate, constantly keeping in mind the fundamental obligations of truthfulness, loyalty and independence pertaining to their mandate;

(e) Uphold the highest standards of efficiency, competence and integrity, meaning, in particular, though not exclusively, probity, impartiality, equity, honesty and good faith;

(f) Neither seek nor accept instructions from any Government, individual, governmental or non-governmental organization or pressure group whatsoever;

(g) Adopt a conduct that is consistent with their status at all times;

. . . . . .

(j) Not accept any honour, decoration, favour, gift or remuneration from any governmental or non-governmental source for activities carried out in pursuit of his/her mandate."

[255] Art. 6 of the Code of Conduct for Special Procedures Mandate-holders of the Human Rights Council, Human Rights Council, 18 June 2007 (A/HRC/RES/5/2) (available at: https://www.ohchr.org/en/documents/procedural-documents/code-conduct-special-procedures-mandate-holders-human-rights-council).

[256] *Ibid*., Art. 8.

Similar provisions also appear in the Manual of Operations for Special Rapporteurs of the Human Rights Council[257].

200. Burkina Faso notes that the Court ascribed great weight to the findings of the special rapporteurs in its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*[258]. The same must be done in these proceedings. On the basis of the IPCC's reports, the conclusions of the special rapporteurs and the legal findings of the supervisory bodies, Burkina Faso notes that the enjoyment and fulfilment of human rights are seriously affected by greenhouse gas emissions and the climate change they cause. In this regard, Burkina Faso distinguishes between infringements of the rights of peoples (**i**), infringements of the rights of indigenous peoples (**ii**) and, finally, infringements of individual rights (**iii**).

(i) The rights of peoples

201. Burkina Faso recalls that peoples are subjects of contemporary international law. By enshrining "the principle of equal rights and self-determination of peoples", Article 1, paragraph 2, of the Charter of the United Nations established two rights of peoples. The first was the right to equality of peoples, which had been rejected in 1919 when proposed by Japan for inclusion in the Covenant of the League of Nations at the Paris Peace Conference[259]. The second was the right to self-determination of peoples under colonial domination, which was nevertheless to be achieved gradually and in stages[260]. The rights of peoples were also recognized in the two 1966 Covenants. The Covenant[s] recognize the right of peoples to self-determination, their right to freely dispose of their wealth and natural resources, and the obligation not to deprive peoples of their means of subsistence. In this regard, "the right to self-determination, as a fundamental human right, has a broad scope of application"[261].

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[257] See also the Manual of Operations of the Special Procedures of the Human Rights Council, Aug. 2008, paras. 23-24 (available at: https://www.ohchr.org/sites/default/files/Documents/HRBodies/SP/Manual_Operations2008.pdf):

> "23. Mandate-holders are called upon to take account of all available sources of information that they consider to be credible and relevant. This includes information emanating from Governments, inter-governmental organizations, international and national non-governmental organizations, national human rights institutions, academic community, the victims of alleged human rights abuses, relatives of victims, and witnesses. Wherever feasible and appropriate mandate-holders should endeavour to consult and meet with such sources, and they should seek to cross-check information received to the best extent possible.
>
> 24. Because of the sensitivity of many of the issues that arise mandate-holders should be guided in their information-gathering activities by the principles of discretion, transparency, impartiality, and even-handedness. They should rely on objective and dependable facts based on evidentiary standards that are appropriate to the non-judicial character of the reports and conclusions they are called upon to draw up. Appropriate opportunities should be provided for Government representatives to comment on allegations made against them and for those alleging violations to comment on Governmental responses thereto."

[258] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, pp. 189-190, para. 133. (In para. 57, the Court notes that the dossier submitted to it by the General Assembly included " several reports based on on-site visits by special rapporteurs and competent organs of the United Nations".)

[259] See Xu Guoqi, *Asia and the Great War: a Shared History*, Oxford, Oxford University Press, 2016, pp. 185-200. Chapter 7 of this work is entitled: "The Japanese Dream of Racial Equality".

[260] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019 (I)*, p. 131, para. 147: "In the Court's view, it follows that the legal régime of non-self-governing territories, as set out in Chapter XI of the Charter, was based on the progressive development of their institutions so as to lead the populations concerned to exercise their right to self-determination."

[261] *Ibid*., para. 144.

202. The African Charter on Human and Peoples' Rights is, however, the legally binding instrument that systematically listed the rights of peoples. It mentions, in particular, the right of peoples to: *(a)* existence, *(b)* self-determination, *(c)* freely dispose of their wealth and natural resources, *(d)* economic, social and cultural development, and *(e)* national and international peace and security[262].

203. Burkina Faso considers that anthropogenic greenhouse gas emissions adversely affect the enjoyment and fulfilment by peoples of their rights. Below, Burkina Faso will focus on the right of peoples to existence, their right to self-determination, the right to respect for their territorial integrity and the right to development.

204. *The right of peoples to existence* is similar to the individual's right to life in the sense that it is this right which makes the enjoyment of all other rights of peoples possible[263]. The first instrument to reflect the existence in international law of the right of peoples to existence was the United Nations Convention on the Prevention and Punishment of the Crime of Genocide, which prohibits acts intended to destroy a "national" group in whole or in part[264]. Indeed, although the extinction of a national group is not necessarily genocide within the meaning of the 1948 Convention, since the crime of genocide is characterized by the *dolus specialis*, genocide of a national group is necessarily a breach of the right to existence of the people concerned. "Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part"[265], an offence under Article II *(c)* of the United Nations Convention on the Prevention and Punishment of the Crime of Genocide, can occur through "a people be[ing] deprived of its own means of subsistence", prohibited under common Article 1 of the 1996 Covenants. Common Article 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights also reflects the right of peoples to existence in providing that

> "[a]ll peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. *In no case may a people be deprived of its own means of subsistence*."[266]

205. In emphasizing the obligation not to deprive peoples of their means of subsistence, common Article 1 of the 1996 Covenants establishes the right of peoples to existence by addressing a threat to that existence. The African Charter on Human and Peoples' Rights goes further, beginning

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[262] See Arts. 20 to 26 of the African Charter on Human and Peoples' Rights, 1 June 1981 (available at: https://au.int/sites/default/files/treaties/36390-treaty-0011_-_african_charter_on_human_and_peoples_rights_e.pdf).

[263] General Comment 12, Article 1 (right to self-determination), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN doc. HRI/GEN/1/Rev.1 (1994), para. 1.

[264] Art. II of the Convention on the Prevention and Punishment of the Crime of Genocide, 9 Dec. 1948, *UNTS*, Vol. 78, p. 279 (available at: https://treaties.un.org/doc/Publication/UNTS/Volume%2078/volume-78-I-1021-english.pdf).

[265] *Ibid*., Art. II *(c)*.

[266] Common Art. 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, *UNTS*, Vol. 999, p. 171 (available at: https://treaties.un.org/Pages/View Details.aspx?src=IND&mtdsg_no=IV-4&chapter=4&clang=_en) (emphasis added).

its section on the rights of peoples at Article 20, paragraph 1, by proclaiming the right of peoples to existence: "All peoples shall have right to existence."[267]

206. Burkina Faso asserts that anthropogenic greenhouse gas emissions causing climate change and the adverse effects thereof infringe the enjoyment by some peoples of the right to existence. It has now been established by the IPCC that sea level rise poses an existential threat to small island countries and countries with low-lying coasts[268]. The 2009 Report of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights also recognized the existence of this threat[269], as did the Co-Chairs of the Study Group of the International Law Commission on sea-level rise in relation to international law, in their second issues paper on the subject[270]. Burkina Faso argues that greenhouse gas emissions and the climate change they cause could infringe the right to existence of peoples in desert regions by depriving them of their means of subsistence and their natural resources.

207. The Court recognized the right of peoples to territorial integrity in its Advisory Opinion on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, in which it stated that the peoples of non-self-governing territories enjoy the right to territorial integrity and that the acts of the colonial Power must not impede this right[271]. Burkina Faso considers that the right to territorial integrity applies to all peoples[272] and to the States representing them at the

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[267] Art. 20, para. 1, of the African Charter on Human and Peoples' Rights, 1 June 1981 (available at: https://au.int/sites/default/files/treaties/36390-treaty-0011_-_african_charter_on_human_and_peoples_rights_e.pdf); see on this provision, Mamadou Hébié, Article 20, paragraph 1, in: M. Kamto (ed.), *La Charte africaine des droits de l'Homme et des peuples et le protocole y relatif portant création de la Cour africaine des droits de l'Homme*, Brussels, Bruylant, 2011, pp. 452-487.

[268] IPCC, 2022: Summary for Policymakers, Climate Change 2022: Impacts, Adaptation and Vulnerability, Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, B.4.5: "[s]ea level rise poses an existential threat for some Small Islands and some low-lying coasts" (available at: https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_SummaryForPolicymakers.pdf).

[269] Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights, 15 Jan. 2009 (A/HRC/10/61), paras. 40-41 (available at: https://documents.un.org/doc/undoc/gen/g09/103/44/pdf/g0910344.pdf):

> "40. Sea level rise and extreme weather events related to climate change are threatening the habitability and, in the longer term, the territorial existence of a number of low-lying island States. Equally, changes in the climate threaten to deprive indigenous peoples of their traditional territories and sources of livelihood. Either of these impacts would have implications for the right to self-determination.
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> 41. The inundation and disappearance of small island States would have implications for the right to self-determination, as well as for the full range of human rights for which individuals depend on the State for their protection. The disappearance of a State for climate change-related reasons would give rise to a range of legal questions, including concerning the status of people inhabiting such disappearing territories and the protection afforded to them under international law (discussed further below). While there is no clear precedence to follow, it is clear that insofar as climate change poses a threat to the right of peoples to self-determination, States have a duty to take positive action, individually and jointly, to address and avert this threat. Equally, States have an obligation to take action to avert climate change impacts which threaten the cultural and social identity of indigenous peoples."

[270] International Law Commission, Sea-level rise in relation to international law: Second issues paper by Patrícia Galvão Teles and Juan José Ruda Santolaria, Co-Chairs of the Study Group of the International Law Commission on sea-level rise in relation to international law (A/CN.4/752), 31 Mar. 2022, para. 226 (available at: https://documents.un.org/doc/undoc/gen/n22/276/29/pdf/n2227629.pdf).

[271] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019 (I)*, p. 134, para. [1]60.

[272] See in this respect, General Assembly resolution 2625: Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, 24 Oct. 1970: "Every State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country." (available at: https://documents.un.org/doc/resolution/gen/nr0/348/90/pdf/nr034890.pdf).

international level[273]. In this respect, it is established that anthropogenic greenhouse gas emissions, the climate change they cause and the adverse effects thereof cause territory to be lost through extreme phenomena such as coastal erosion and sea level rise[274], and thereby impair the enjoyment by peoples and States of their right to territorial integrity.

208. *Finally, as regards the right of peoples to development*, common Article 1, paragraph 1, of the 1996 Covenants stipulates that "[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."[275] The freedom to pursue economic, social and cultural development is an essential part of the right of peoples to self-determination. In accordance with Article 1, paragraph 1, of the General Assembly's Declaration on the Right to Development,

> "[t]he right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized."[276]

209. In this regard, Burkina Faso notes that "equality of opportunity for development is a prerogative both of nations and of individuals who make up nations"[277]. It stems from the principle of equal rights of peoples, enshrined in Article 1, paragraph 2, of the United Nations Charter as part of the "principle of equal rights and self-determination of peoples". Consequently, and as required by Article 30 of the Charter of Economic Rights and Duties of States, "[t]he environmental policies of all States should enhance and not adversely affect the present and future development potential of

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[273] See Art. 2, para. 4, of the Charter of the United Nations; see also *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010 (II)*, p. 437, para. 80: "the principle of territorial integrity is an important part of the international legal order and is enshrined in the Charter of the United Nations, in particular in Article 2, paragraph 4"; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, pp. 101-103, paras. 191-193.

[274] IPCC, 2014: Summary for Policymakers, Climate Change 2014: Impacts, Adaptation and Vulnerability, Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change, p. 17: "Due to sea level rise projected throughout the 21st century and beyond, coastal systems and low-lying areas will increasingly experience adverse impacts such as submergence, coastal flooding, and coastal erosion (*very high confidence*)." (available at: https://archive.ipcc.ch/pdf/assessment-report/ar5/wg2/ar5_wgII_spm_en.pdf); IPCC, 2007: Summary for Policymakers, Climate Change 2007: Impacts, Adaptation and Vulnerability, Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change, p. 12 (available at: https://www.ipcc.ch/site/assets/uploads/2018/02/ar4-wg2-spm-1.pdf); see also p. 15:

> "Small islands, whether located in the tropics or higher latitudes, have characteristics which make them especially vulnerable to the effects of climate change, sea-level rise and extreme events . . . Deterioration in coastal conditions, for example through erosion of beaches and coral bleaching, is expected to affect local resources, e.g., fisheries, and reduce the value of these destinations for tourism . . . Sea-level rise is expected to exacerbate inundation, storm surge, erosion and other coastal hazards, thus threatening vital infrastructure, settlements and facilities that support the livelihood of island communities . . . Climate change is projected by mid-century to reduce water resources in many small islands, e.g., in the Caribbean and Pacific, to the point where they become insufficient to meet demand during low-rainfall periods . . . With higher temperatures, increased invasion by non-native species is expected to occur, particularly on mid- and high-latitude islands."

[275] Common Art. 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, *UNTS*, Vol. 999, p. 171 (available at: https://treaties.un.org/pages/View Details.aspx?src=IND&mtdsg_no=IV-4&chapter=4&clang=_en).

[276] Art. 1, para. 1, of General Assembly resolution 41/128: Declaration on the Right to Development, 4 Dec. 1986, Annex (available at: https://documents.un.org/doc/resolution/gen/nr0/496/36/img/nr049636.pdf).

[277] *Ibid*., sixteenth preambular para.

developing countries"[278]. It is this equality of opportunity for development that is being nullified by greenhouse gas emissions and climate change in regions such as the Sahel, where Burkina Faso is located. Indeed, the IPCC recognizes that

> "[r]egions and people with considerable development constraints have high vulnerability to climatic hazards (*high confidence*). Global hotspots of high human vulnerability are found particularly in West-, Central- and East Africa, South Asia, Central and South America, Small Island Developing States and the Arctic *(high confidence*). Vulnerability is higher in locations with poverty, governance challenges and limited access to basic services and resources, violent conflict and high levels of climate-sensitive livelihoods (e.g., smallholder farmers, pastoralists, fishing communities) (*high confidence*). Between 2010–2020, human mortality from floods, droughts and storms was 15 times higher in highly vulnerable regions, compared to regions with very low vulnerability (*high confidence*). Vulnerability at different spatial levels is exacerbated by inequity and marginalization linked to gender, ethnicity, low income or combinations thereof (*high confidence*), especially for many Indigenous Peoples and local communities (*high confidence*). Present development challenges causing high vulnerability are influenced by historical and ongoing patterns of inequity such as colonialism, especially for many Indigenous Peoples and local communities."[279]

210. Burkina Faso cannot fail to point out the extreme injustice of the situation of peoples, like the people of Burkina Faso, whose development has been held hostage in turn by slavery, colonization, the injustices of the global economic and financial system, and terrorism, only to be severely hampered, if not jeopardized, by the greenhouse gas emissions of the very same States that committed these historical crimes.

(ii) The rights of indigenous peoples

211. Burkina Faso asserts that greenhouse gas emissions, the climate change they cause and the adverse effects thereof have an impact on the enjoyment and fulfilment of the rights of indigenous peoples. Burkina Faso notes that it was only very belatedly, and after a long struggle, that indigenous peoples were afforded protection under contemporary international law, notably through the United Nations Declaration on the Rights of Indigenous Peoples[280]. Unfortunately, these rights remain extremely vulnerable to climate change resulting from anthropogenic greenhouse gas emissions and the adverse effects thereof. The reason for this vulnerability lies in the very nature of indigenous peoples' cultural heritage, which

> "includes tangible and intangible manifestations of their ways of life, world views, achievements and creativity, and should be considered an expression of their

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[278] Art. 30 of General Assembly resolution 3281 (XXIX): Charter of Economic Rights and Duties of States, 12 Dec. 1974.

[279] IPCC, 2022: Summary for Policymakers, Climate Change 2022: Impacts, Adaptation and Vulnerability, Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, p. 11, B.2.4 (available at: https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_SummaryForPolicymakers.pdf).

[280] See General Assembly resolution 61/295: United Nations Declaration on the Rights of Indigenous Peoples, 13 Sept. 2007 (available at: https://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf).

> self-determination and their spiritual and physical relationships with their lands, territories and resources"[281].

212. The indissoluble link between indigenous peoples and their ecosystems means that any destruction of the latter jeopardizes the right of these peoples to existence and their right to maintain their cultural identity[282]. As the IPCC notes,

> "[s]ince AR5 there is increasing evidence that degradation and destruction of ecosystems by humans increases the vulnerability of people (*high confidence*). Unsustainable land-use and land cover change, unsustainable use of natural resources, deforestation, loss of biodiversity, pollution, and their interactions, adversely affect the capacities of ecosystems, societies, communities and individuals to adapt to climate change (*high confidence*). Loss of ecosystems and their services has cascading and long-term impacts on people globally, especially for Indigenous Peoples and local communities who are directly dependent on ecosystems, to meet basic needs (*high confidence*)." [283]

213. The 2009 Report of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights states in this regard that "changes in the climate threaten to deprive indigenous peoples of their traditional territories and sources of livelihood"[284]. It concludes on this basis that "States have an obligation to take action to avert climate change impacts which threaten the cultural and social identity of indigenous peoples"[285]. In the case concerning *Daniel Billy et al.* v. *Australia*, the Human Rights Committee came to a similar conclusion regarding the threats posed by climate change to the indigenous peoples of the Torres Strait Islands. It found that the respondent State had a positive obligation to protect the right of the petitioners to enjoy their indigenous culture, as enshrined in Article 27 of the International Covenant on Civil and Political Rights. The Committee remarked that the information available indicated that the respondent State had failed to adopt timely adequate adaptation measures to protect the

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[281] Promotion and protection of the rights of indigenous peoples with respect to their cultural heritage, Study by the Expert Mechanism on the Rights of Indigenous Peoples (A/HRC/30/53), 19 Aug. 2015, para. 6; see also *Benito Oliveira Pereira et al.* v. *Paraguay*, Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2552/2015 (CCPR/C/132/D/2552/2015), 24 July 2021, para. 8.6.

[282] *Daniel Billy et al.* v. *Australia*, Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3624/2019 (CCPR/C/135/D/3624/2019), 22 Sept. 2022, para. 8.13:

> "The Committee recalls that article 27 establishes and recognizes a right which is conferred on individuals belonging to minority Indigenous groups and which is distinct from, and additional to, the other rights that all persons are entitled to enjoy under the Covenant. The Committee also recalls that, in the case of Indigenous Peoples, the enjoyment of culture may relate to a way of life which is closely associated with territory and the use of its resources, including such traditional activities as fishing or hunting. Thus, the protection of this right is directed towards ensuring the survival and continued development of cultural identity. The Committee further recalls that article 27 of the Covenant, interpreted in the light of the United Nations Declaration on the Rights of Indigenous Peoples, enshrines the inalienable right of Indigenous Peoples to enjoy the territories and natural resources that they have traditionally used for their subsistence and cultural identity. Although the rights protected under article 27 are individual rights, they depend in turn on the ability of the minority group to maintain its culture, language or religion." (fns omitted) (available at: https://juris.ohchr.org/casedetails/3855/en-US).

[283] IPCC, 2022: Summary for Policymakers, Climate Change 2022: Impacts, Adaptation and Vulnerability, Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, p. 12, B.2.1 (available at: https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_SummaryForPolicymakers.pdf).

[284] Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights, 15 Jan. 2009 (A/HRC/10/61), para. 40.

[285] *Ibid.*, para. 41.

petitioners' collective ability to maintain their traditional way of life and to transmit to their children and future generations their culture and traditions and use of land and sea resources[286].

214. Burkina Faso notes that the critical situation of indigenous peoples is similar to that of peoples who have been subjected to slavery and subsequently colonization. The IPCC highlights that

> "[v]ulnerability at different spatial levels is exacerbated by inequity and marginalization linked to gender, ethnicity, low income or combinations thereof (*high confidence*), especially for many Indigenous Peoples and local communities (*high confidence*). Present development challenges causing high vulnerability are influenced by historical and ongoing patterns of inequity such as colonialism, especially for many Indigenous Peoples and local communities (*high confidence*)."[287]

(iii) Obligations to respect, protect, fulfil and promote the rights of individuals

215. Burkina Faso is of the view that anthropogenic greenhouse gas emissions, the climate change they cause and the adverse effects thereof infringe a host of human rights protected by the Universal Declaration of Human Rights. As noted by the Special Rapporteur on the promotion and protection of human rights in the context of climate change,

> "[w]e are faced with a global crisis in the name of climate change. Throughout the world, the rights of people are being denied as a consequence of climate change. This includes a denial of the right to, inter alia, life, health, food, development, self-determination, water and sanitation, work, adequate housing and freedom from violence, sexual exploitation, trafficking and slavery. Human-induced climate change is the largest, most pervasive threat to the natural environment and human societies the world has ever experienced. The human right to a clean, healthy and sustainable

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[286] *Daniel Billy et al.* v. *Australia*, Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3624/2019 (CCPR/C/135/D/3624/2019), 22 Sept. 2022, para. 8.14:

> "The Committee notes the authors' assertion that their ability to maintain their culture has already been impaired by the reduced viability of their islands and the surrounding seas, owing to climate change impacts. The Committee also notes the authors' claim that those impacts have eroded their traditional lands and natural resources that they use for traditional fishing and farming and for cultural ceremonies that can be performed only on the islands. The Committee further notes their claim that the health of their land and the surrounding seas is closely linked to their cultural integrity. The Committee notes that the State party has not refuted the authors' arguments that they could not practise their culture on mainland Australia, where they would not have land that would allow them to maintain their traditional way of life. The Committee considers that the climate impacts mentioned by the authors represent a threat that could have reasonably been foreseen by the State party, as the authors' community members began raising the issue in the 1990s. While noting the completed and ongoing sea wall construction on the islands where the authors live, the Committee considers that the delay in initiating these projects indicates an inadequate response by the State party to the threat faced by the authors. With reference to its findings in paragraph 8.14, the Committee considers that the information made available to it indicates that the State party's failure to adopt timely adequate adaptation measures to protect the authors' collective ability to maintain their traditional way of life and to transmit to their children and future generations their culture and traditions and use of land and sea resources discloses a violation of the State party's positive obligation to protect the authors' right to enjoy their minority culture. Accordingly, the Committee considers that the facts before it amount to a violation of the authors' rights under article 27 of the Covenant." (available at: https://juris.ohchr.org/casedetails/3855/en-US).

[287] IPCC, 2022: Summary for Policymakers, Climate Change 2022: Impacts, Adaptation and Vulnerability, Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, p. 12, B.2.4 (available at: https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_SummaryForPolicymakers.pdf).

environment was endorsed by the Human Rights Council in its resolution 48/13. Urgent action is needed to address the climate change crisis."[288]

216. The sixth Synthesis Report of the IPCC confirms that climate change resulting from greenhouse gas emissions is having a negative impact on the enjoyment and fulfilment of human rights, pointing out the interdependence between human and ecosystem vulnerability:

> "Approximately 3.3 to 3.6 billion people live in contexts that are highly vulnerable to climate change. Human and ecosystem vulnerability are interdependent. Regions and people with considerable development constraints have high vulnerability to climatic hazards. Increasing weather and climate extreme events have exposed millions of people to acute food insecurity and reduced water security, with the largest adverse impacts observed in many locations and/or communities in Africa, Asia, Central and South America, LDCs, Small Islands and the Arctic, and globally for Indigenous Peoples, small-scale food producers and low-income households. Between 2010 and 2020, human mortality from floods, droughts and storms was 15 times higher in highly vulnerable regions, compared to regions with very low vulnerability (*high confidence*)."[289]

217. The IPCC also highlights the impact of rising temperatures on the risk of disease, and thus on the enjoyment and fulfilment of the right to health:

> "In all regions increases in extreme heat events have resulted in human mortality and morbidity (*very high confidence*). The occurrence of climate-related food-borne and water-borne diseases (very high confidence) and the incidence of vector-borne diseases (*high confidence*) have increased. In assessed regions, some mental health challenges are associated with increasing temperatures (*high confidence*), trauma from extreme events (*very high confidence*), and loss of livelihoods and culture (*high confidence*). Climate and weather extremes are increasingly driving displacement in Africa, Asia, North America (*high confidence*), and Central and South America (*medium confidence*), with small island states in the Caribbean and South Pacific being disproportionately affected relative to their small population size (*high confidence*)."[290]

218. Similarly, it predicts that more serious human rights infringements will occur if urgent measures are not taken to reduce greenhouse gas emissions:

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[288] Report of the Special Rapporteur on the promotion and protection of human rights in the context of climate change: Promotion and protection of human rights in the context of climate change mitigation, loss and damage and participation (A/77/226), para. 88.

[289] IPCC, 2023: Summary for Policymakers, Climate Change 2023: Synthesis Report, Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, p. 5, A.2.2 (available at: https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_SPM.pdf); see also, p. 6, A.2.4:

> "[c]limate change has reduced food security and affected water security, hindering efforts to meet Sustainable Development Goals (*high confidence*). Although overall agricultural productivity has increased, climate change has slowed this growth over the past 50 years globally (*medium confidence*), with related negative impacts mainly in mid and low latitude regions but positive impacts in some high latitude regions (*high confidence*). Ocean warming and ocean acidification have adversely affected food production from fisheries and shellfish aquaculture in some oceanic regions (*high confidence*). Roughly half of the world's population currently experience severe water scarcity for at least part of the year due to a combination of climatic and non-climatic drivers (*medium confidence*)."

[290] IPCC, 2023: Summary for Policymakers, Climate Change 2023: Synthesis Report, Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, p. 6, A.2.5 (available at: https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_SPM.pdf).

"B.2.1 In the near term, every region in the world is projected to face further increases in climate hazards (*medium to high confidence, depending on region and hazard*), increasing multiple risks to ecosystems and humans (*very high confidence*). Hazards and associated risks expected in the near term include an increase in heat-related human mortality and morbidity (*high confidence*), food-borne, water-borne, and vector-borne diseases (*high confidence*), and mental health challenges (*very high confidence*), flooding in coastal and other low-lying cities and regions (*high confidence*), biodiversity loss in land, freshwater and ocean ecosystems (*medium to very high confidence, depending on ecosystem*), and a decrease in food production in some regions (*high confidence*). Cryosphere-related changes in floods, landslides, and water availability have the potential to lead to severe consequences for people, infrastructure and the economy in most mountain regions (*high confidence*). The projected increase in frequency and intensity of heavy precipitation (high confidence) will increase rain-generated local flooding (*medium confidence*) . . .

B.2.2 Risks and projected adverse impacts and related losses and damages from climate change will escalate with every increment of global warming (*very high confidence*). They are higher for global warming of 1.5°C than at present, and even higher at 2°C (*high confidence*). Compared to the AR5, global aggregated risk levels (Reasons for Concern) are assessed to become high to very high at lower levels of global warming due to recent evidence of observed impacts, improved process understanding, and new knowledge on exposure and vulnerability of human and natural systems, including limits to adaptation (*high confidence*). Due to unavoidable sea level rise . . . , risks for coastal ecosystems, people and infrastructure will continue to increase beyond 2100 (*high confidence*) . . .

B.2.3 With further warming, climate change risks will become increasingly complex and more difficult to manage. Multiple climatic and non-climatic risk drivers will interact, resulting in compounding overall risk and risks cascading across sectors and regions. Climate-driven food insecurity and supply instability, for example, are projected to increase with increasing global warming, interacting with non-climatic risk drivers such as competition for land between urban expansion and food production, pandemics and conflict. (*high confidence*)"[291].

219. Burkina Faso concludes that, in the light of their adverse effects, anthropogenic greenhouse gas emissions and emissions-related climate change infringe the enjoyment and

[291] *Ibid*., p. 15, B.2.1-B.2.2.

fulfilment of a whole host of human rights, including the right to life[292], the right to health[293], the right to private and family life[294] and the right to a healthy environment[295].

(c) *The content of States' human rights obligations in respect of greenhouse gas emissions, the climate change they cause and the adverse effects thereof*

220. Burkina Faso considers that States' human rights obligations relating to climate change follow the traditional taxonomy of State obligations under international human rights law: States are bound by both negative obligations (obligations to refrain from doing something) and positive obligations (obligations to do something). As broadly explained by the Human Rights Committee with regard to the obligation to "respect and ensure" the human rights recognized in Article 2 of the Covenant [on Civil and Political Rights],

> "[t]he legal obligation under article 2, paragraph 1, is both negative and positive in nature. States Parties must refrain from violation of the rights recognized by the

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[292] *Daniel Billy et al.* v. *Australia*, Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3624/2019, CCPR/C/135/D/3624/2019, 22 Sept. 2022, para. 8.3:

> "The Committee further recalls that the obligation of States parties to respect and ensure the right to life extends to reasonably foreseeable threats and life-threatening situations that can result in loss of life. States parties may be in violation of article 6 of the Covenant even if such threats and situations do not result in the loss of life. The Committee considers that such threats may include adverse climate change impacts and recalls that environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life. The Committee recalls that States parties should take all appropriate measures to address the general conditions in society that may give rise to direct threats to the right to life or prevent individuals from enjoying their right to life with dignity." (fns omitted);

See also para. 8.7:

> "the Committee recalls that without robust national and international efforts, the effects of climate change may expose individuals to a violation of their rights under article 6 of the Covenant. Furthermore, given that the risk of an entire country's becoming submerged under water is such an extreme risk, the conditions of life in such a country may become incompatible with the right to life with dignity before the risk is realized." (fns omitted) (available at: https://juris.ohchr.org/casedetails/3855/en-US); see also *Ioane Teitiota* v. *New Zealand*, Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2728/2016 (CCPR/C/127/D/2728/2016), 24 Oct. 2019, para. 9.12.

[293] See Human Rights Council resolution 53/6: Human rights and climate change (A/HRC/RES/53/6), 12 July 2023, preamble, para. 17:

> "The Human Rights Council . . . emphasiz[es] that the adverse effects of climate change have a range of implications, which can increase with greater global warming, both direct and indirect, for the effective enjoyment of human rights, including, inter alia, the right to life, the right to adequate food, the right to the enjoyment of highest attainable standard of physical and mental health, the right to adequate housing, the right to self-determination, the rights to safe drinking water and sanitation and the right to development, and recalling that in no case may a people be deprived of its own means of subsistence."

[294] *Daniel Billy et al.* v. *Australia*, Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3624/2019 (CCPR/C/135/D/3624/2019), 22 Sept. 2022, para. 8.7.

[295] See General Assembly resolution 76/300: The human right to a clean, healthy and sustainable environment (A/RES/76/300), 28 July 2022, preamble, para. 9:

> "the impact of climate change, the unsustainable management and use of natural resources, the pollution of air, land and water, the unsound management of chemicals and waste, the resulting loss of biodiversity and the decline in services provided by ecosystems interfere with the enjoyment of a clean, healthy and sustainable environment and that environmental damage has negative implications, both direct and indirect, for the effective enjoyment of all human rights";

See also *Chiara Sacchi et al*. v. *Argentina et al*., Decision adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communication No. 104/2019 (CRC/C/88/D/104/2019), 22 Sept. 2021, para. 10.13; see also the Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, David R. Boyd (A/74/161), 15 July 2019, para. 63.

> Covenant, and any restrictions on any of those rights must be permissible under the relevant provisions of the Covenant. Where such restrictions are made, States must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights. In no case may the restrictions be applied or invoked in a manner that would impair the essence of a Covenant right.
>
> 7. Article 2 requires that States Parties adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfil their legal obligations. The Committee believes that it is important to raise levels of awareness about the Covenant not only among public officials and State agents but also among the population at large."[296]

221. In this regard, States are subject to four main human rights obligations, namely the obligations to respect, protect, fulfil and promote human rights. The implications of these four obligations are without a doubt best described in the jurisprudence of the African Commission on Human and Peoples' Rights in the case concerning *Communication 55/96: Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR)* v. *Nigeria*[297]. In this case, the African Commission on Human and Peoples' Rights clarified the content of the obligation to respect and ensure human rights in the light of "[i]nternationally accepted ideas of the various obligations engendered by human rights"[298]. The conclusions of the Commission are therefore not limited to the scope of the African Charter on Human and Peoples' Rights. In the paragraphs below, Burkina Faso will define the content of each of these obligations before clarifying their implications with respect to climate change.

222. *As regards the obligation to respect human rights*, the African Commission on Human and Peoples' Rights explains that

> "the obligation to respect entails that the State should refrain from interfering in the enjoyment of all fundamental rights; it should respect right-holders, their freedoms, autonomy, resources, and liberty of their action. With respect to socio-economic rights, this means that the State is obliged to respect the free use of resources owned or at the disposal of the individual alone or in any form of association with others, including the household or the family, for the purpose of rights-related needs. And with regard to a collective group, the resources belonging to it should be respected, as it has to use the same resources to satisfy its needs."[299]

223. Burkina Faso infers from this that States have an obligation of abstention in respect of climate change, i.e. they must refrain from emitting a certain amount of greenhouse gases or from facilitating their emission, given the negative impact of such gases on the enjoyment and fulfilment of human rights. In this regard, States should refrain from adopting legislative, administrative or

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[296] United Nations Human Rights Committee, General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant (CCPR/C/21/Rev.1/Add.13), 26 May 2024, para[s]. 6 [and 7] (available at: tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2F21%2FRev.1%2FAdd.13&Lang=en).

[297] Walter Kälin and Jörg Künzli, *The Law of International Human Rights Protection*, Oxford, Oxford University Press, 2019, p. 87, fn 99 (explaining that these obligations had been described in particularly clear terms by the Commission).

[298] African Commission on Human and Peoples' Rights, *Communication 55/96: Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR)* v. *Nigeria*, 27 Oct. 2001, para. 4[4].

[299] *Ibid*., para. 45.

other measures that facilitate or encourage the production or consumption of fossil fuels, including the granting of licences and concessions, and the research, production, storage, commercialization, transportation and consumption of fossil fuels. This particularly applies to subsidies for fossil fuel research, production and consumption.

224. According to the African Commission on Human and Peoples' Rights, *the obligation to protect human rights dictates that*

> "the State is obliged to protect right-holders against other subjects by legislation and provision of effective remedies. This obligation requires the State to take measures to protect beneficiaries of the protected rights against political, economic and social interferences. Protection generally entails the creation and maintenance of an atmosphere or framework by an effective interplay of laws and regulations so that individuals will be able to freely realize their rights and freedoms."[300]

225. In climate matters, the obligation to protect human rights requires that States take positive measures to ensure that third parties or natural disasters do not violate human rights. First, States must take legislative, administrative or other measures necessary to ensure that the activities taking place on their territory do not result in greenhouse gas emissions that infringe the enjoyment of human rights. This obligation entails not just the adoption of administrative or legislative measures applicable to natural and legal persons, but also, and above all, the effective application of these measures. Second, States must adopt adaptation measures to enable individuals under their jurisdiction to adapt to the adverse effects of climate change[301]. They must also extend such measures to other populations suffering from the adverse effects of greenhouse gas emissions emanating from their territory.

226. *The obligation to fulfil human rights, for its part,*

> "is more of a positive expectation on the part of the State to move its machinery towards the actual realisation of the rights. This is also very much intertwined with the duty to promote mentioned in the preceding paragraph. It could consist in the direct provision of basic needs such as food or resources that can be used for food (direct food aid or social security)."[302]

227. In climate matters, the obligation to fulfil human rights requires that States establish the legal, institutional and procedural framework needed to ensure the fulfilment of human rights affected by climate change. In this regard, States must create effective means of recourse against private and legal persons of their nationality or under their jurisdiction whose activities result in the emission of greenhouse gases. They must also provide material or other support to persons affected by climate change.

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[300] *Ibid*., para. 46.

[301] *Daniel Billy et al.* v. *Australia*, Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3624/2019 (CCPR/C/135/D/3624/2019), 22 Sept. 2022, para. 8.7.

[302] African Commission on Human and Peoples' Rights, *Communication 55/96: Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR)* v. *Nigeria*, 27 Oct. 2001, para. 47.

228. *Finally, as regards the obligation to promote human rights*, "[t]he State should make sure that individuals are able to exercise their rights and freedoms, for example, by promoting tolerance, raising awareness, and even building infrastructures"[303].

229. In climate matters, the obligation to promote human rights requires that States take the necessary educational measures to alert and educate their populations about the causes, consequences and means of combating climate change, in particular the need for a shift towards a less polluting lifestyle. They must also rigorously counter misinformation about the causes and consequences of climate change using the best available scientific knowledge. Combating misinformation is particularly vital since it is now known that the major oil companies conducted massive misinformation campaigns in order to prevent or delay the regulation of greenhouse gas emissions by policymakers[304]. It is also essential in the face of discourse suggesting the existence of an imagined link between climate change and Africa's birth rate. Burkina Faso notes that Africa is still, by far, the least densely populated continent on the planet, and that the average greenhouse gas emissions of a European or an American are several tens of times higher than those of an African. The IPCC table below speaks for itself (**Table *(a)***). In fact, it shows that when it comes to consumption-based emissions, i.e. emissions released into the atmosphere during the process of manufacturing goods and services for a given entity, Africa has an indicator of 0.84, while Australia and Japan are at 11, Eastern Europe and West-Central Asia at 6.2, Europe at 7.8, Latin America and the Caribbean at 2.8, the Middle East at 7.6, North America at 17, South-East Asia and the Pacific at 2, and Southern Asia at 1.5[305].

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[303] *Ibid*., para. 46.

[304] Geoffrey Supran and Naomi Oreskes, "The forgotten oil ads that told us climate change was nothing", 18 Nov. 2021 (available at: https://www.theguardian.com/environment/2021/nov/18/the-forgotten-oil-ads-that-told-us-climate-change-was-nothing).

[305] IPCC, 2022: Summary for Policymakers, Climate Change 2022: Mitigation of Climate Change, Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, p. 10, Panel d. Regional indicators (2019) and regional production vs. consumption accounting (2018):

> "Panel d shows population, GDP per person, emission indicators by region in 2019 for percentage GHG contributions, total GHG per person, and total GHG emissions intensity, together with production-based and consumption-based CO2-FFI data, which is assessed in this report up to 2018. Consumption-based emissions are emissions released to the atmosphere in order to generate the goods and services consumed by a certain entity (e.g., region). Emissions from international aviation and shipping are not included."

d. Regional indicators (2019) and regional production vs consumption accounting (2018)

	Africa	Australia, Japan, New Zealand	Eastern Asia	Eastern Europe, West-Central Asia	Europe	Latin America and Caribbean	Middle East	North America	South-East Asia and Pacific	Southern Asia
Population (million persons, 2019)	1292	157	1471	291	620	646	252	366	674	1836
GDP per capita (USD1000$_{ppp}$2017 per person)[1]	5.0	43	17	20	43	15	20	61	12	6.2
Net GHG 2019[2] (production basis)										
% GHG contributions	9%	3%	27%	6%	8%	10%	5%	12%	9%	8%
GHG emissions intensity (tCO_2-eq / USD1000$_{ppp}$2017)	0.78	0.30	0.62	0.64	0.18	0.61	0.64	0.31	0.65	0.42
GHG per capita (tCO_2-eq per person)	3.9	13	11	13	7.8	9.2	13	19	7.9	2.6
CO_2-FFI, 2018, per person										
Production-based emissions (tCO_2-FFI per person, based on 2018 data)	1.2	10	8.4	9.2	6.5	2.8	8.7	16	2.6	1.6
Consumption-based emissions (tCO_2-FFI per person, based on 2018 data)	0.84	11	6.7	6.2	7.8	2.8	7.6	17	2.5	1.5

[1] GDP per capita in 2019 in USD2017 currency purchasing power basis.
[2] Includes CO_2-FFI, CO_2-LULUCF and Other GHGs, excluding international aviation and shipping.

The regional groupings used in this figure are for statistical purposes only and are described in Annex II, Part I.

Figure SPM.2 | Regional GHG emissions, and the regional proportion of total cumulative production-based CO_2 emissions from 1850 to 2019.

[**Table *(a)***]

230. The second IPCC table below shows historical greenhouse gas emissions compared to other world regions (see **Table *(b)*** below)[306].

[306] See C.H. Trisos *et al*., Africa, in: Climate Change 2022: Impacts, Adaptation and Vulnerability, Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, p. 1295 (available at: https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_Chapter09.pdf).

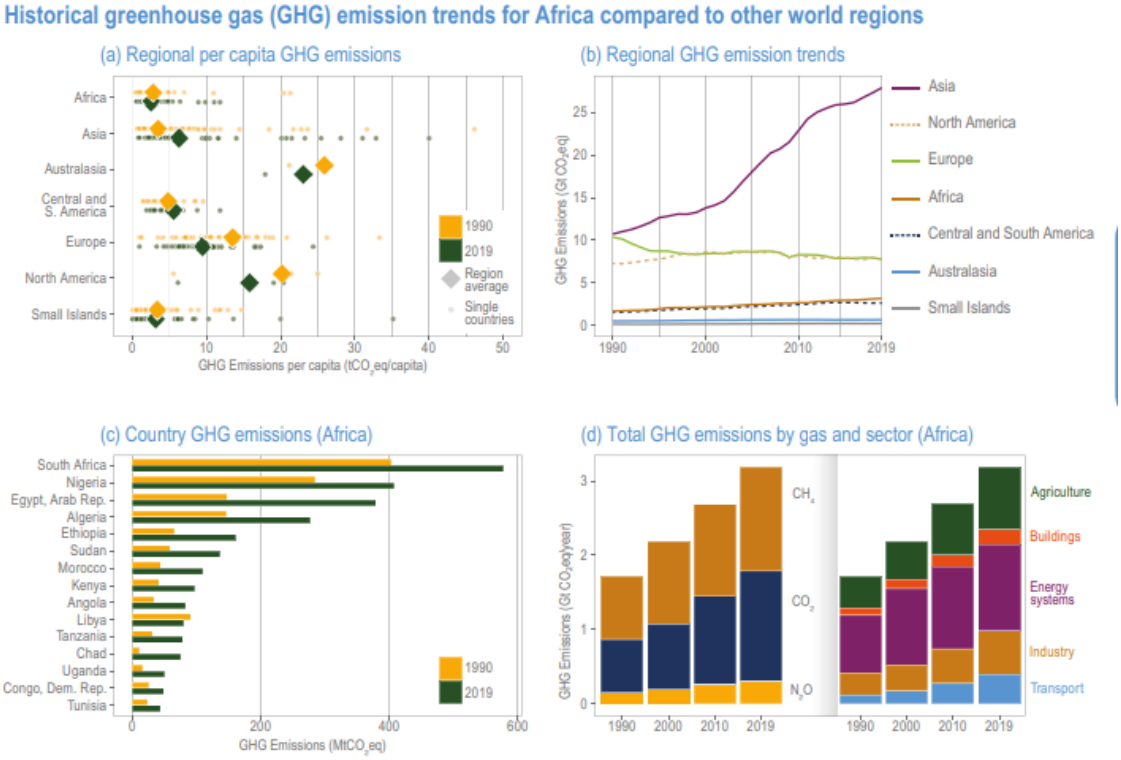

Figure 9.2 | Historical greenhouse gas (GHG) emission trends for Africa compared to other world regions:

(a) Per person GHG emissions by region and their change from 1990 to 2019 (circles represent countries, diamonds represent the region average).

(b) Total GHG emissions by region since 1990.

(c) The total GHG emissions in 1990 and 2019 for the 15 highest emitting countries within Africa.

(d) Total emissions in Africa since 1990, broken down by GHG (left) and sector (right). Methane and CO_2 emissions comprise an almost equal share of GHG emissions in Africa, with the largest emissions sectors being energy and agriculture (Crippa et al., 2021). Agriculture emissions in panel (d) do not include land use, land use change and forestry (LULUCF CO_2). One-hundred-year global warming potentials consistent with WGI estimates are used. Emissions data are from Crippa et al. (2021), compiled in Working Group III (WGIII) Chapter 2.

[**Table *(b)***]

231. In conclusion, Burkina Faso fully subscribes to the joint statement on human rights and climate change issued by five United Nations supervisory bodies. In that joint statement, the Committee on the Elimination of Discrimination against Women, the Committee on Economic, Social and Cultural Rights, the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, the Committee on the Rights of the Child and the Committee on the Rights of Persons with Disabilities asserted the following:

> "11. In order for States to comply with their human rights obligations and to realize the objectives of the Paris Agreement, they must adopt and implement policies aimed at reducing emissions. These policies must reflect the highest possible ambition, foster climate resilience and ensure that public and private investments are consistent with a pathway towards low carbon emissions and climate resilient development.
>
> 12. In their efforts to reduce emissions, States parties should contribute effectively to phasing out fossils fuels, promoting renewable energy and addressing emissions from the land sector, including by combating deforestation. In addition, States must regulate private actors, including by holding them accountable for harm they generate both domestically and extraterritorially. States should also discontinue financial incentives or investments in activities and infrastructure that are not consistent with low greenhouse gas emissions pathways, whether undertaken by public or private actors, as a mitigation measure to prevent further damage and risk.

> 13. When reducing emissions and adapting to climate impacts, States must seek to address all forms of discrimination and inequality, including advancing substantive gender equality, protecting the rights of indigenous peoples and of persons with disabilities, and taking into consideration the best interests of the child."[307]

3. The obligation to co-operate in good faith under the Charter

232. Burkina Faso asserts that States have an obligation under the Charter to co-operate in good faith in order to resolve the multifaceted problems triggered by greenhouse gas emissions, the climate change they cause and the adverse effects thereof. Article 1, paragraph 3, of the Charter of the United Nations assigns the Organization the following purpose, among others:

> "To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion".[308]

233. The implications of this purpose are further developed in Article 55 of the Charter, which states that,

> "[w]ith a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:
>
> *(a)* higher standards of living, full employment, and conditions of economic and social progress and development
>
> *(b)* solutions of international economic, social, health, and related problems; and international cultural and educational co-operation; and
>
> *(c)* universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."[309]

234. Article 56 of the Charter imposes an obligation of co-operation on Member States and affirms that the co-operation objectives set out in Article 55 apply to them: "All Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55."[310]

235. General Assembly resolution 2625 further develops the obligation of States to co-operate, as enshrined in the Charter of the United Nations. It thus provides that

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[307] Joint statement by the Committee on the Elimination of Discrimination against Women, the Committee on Economic, Social and Cultural Rights, the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, the Committee on the Rights of the Child and the Committee on the Rights of Persons with Disabilities, 14 May 2020 (HRI/2019/1), paras. 11-13.

[308] Art. 1, para. 3, of the Charter of the United Nations (available at: https://treaties.un.org/doc/Publication/CTC/uncharter-all-lang.pdf).

[309] *Ibid*., Art. 55.

[310] *Ibid*., Art. 56.

> "States have the duty to co-operate with one another, irrespective of the differences in their political, economic and social systems, in the various spheres of international relations, in order to maintain international peace and security and to promote international economic stability and progress, the general welfare of nations and international co-operation free from discrimination based on such differences.
>
> To this end:
>
> *(a)* States shall co-operate with other States in the maintenance of international peace and security;
>
> *(b)* States shall co-operate in the promotion of universal respect for, and observance of, human rights and fundamental freedoms for all, and in the elimination of all forms of racial discrimination and all forms of religious intolerance;
>
> . . . . . .
>
> States should co-operate in the economic, social and cultural fields as well as in the field of science and technology and for the promotion of international cultural and educational progress. States should co-operate in the promotion of economic growth throughout the world, especially that of the developing countries."[311]

236. Burkina Faso argues that States are bound by their duty to co-operate under the Charter in order to respond to the challenges that greenhouse gas emissions and climate change pose to respect for human rights and to the economic, social and cultural development of developing countries. Burkina Faso has already demonstrated the dramatic impact that climate change caused by anthropogenic greenhouse gas emissions is having on human rights and on the right of peoples to development[312]. In this context, co-operating to ensure the fulfilment of human rights and of the right to development is fully in line with the purpose set out in Article 1, paragraph 3, of the Charter, referred to above, namely

> "[t]o achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion".

237. Burkina Faso considers that the obligation to co-operate in good faith to ensure respect for human rights and the economic, social and cultural development of developing countries entails both positive and negative obligations.

238. *In terms of positive obligations*, States must adopt the measures at their disposal to help third States to fulfil their obligations arising from human rights and the right to development, which are adversely affected by climate change. Article 2, paragraph 1, of the International Covenant on Economic, Social and Cultural Rights lays down this obligation in particularly stringent terms:

> "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and

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[311] See General Assembly resolution 2625: Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, 24 Oct. 1970 (available at: https://documents.un.org/doc/resolution/gen/nr0/348/90/pdf/nr034890.pdf).

[312] See Section IV.B.2.b.

> technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."[313]

239. Moreover, States must take the necessary measures to ensure that activities taking place on their territories do not prevent the enjoyment or fulfilment of human rights, regardless of where the individuals concerned are located. As observed by the High Commissioner for Human Rights,

> "[i]nternational human rights law, including the International Covenant on Economic, Social and Cultural Rights, requires States, individually and through international assistance and cooperation, to mobilize the maximum available resources for the progressive realization of economic, social and cultural rights and the right to a healthy environment. States should establish domestic mechanisms to mobilize resources to address human rights harms caused by climate change and measurably advance the effective enjoyment of economic, social and cultural rights by those affected. States should adopt innovative measures to finance efforts to address loss and damage including equitable and progressive carbon taxes; wealth taxes; levies on certain sectors, e.g. fossil fuels, aviation, and shipping; and legal and policy measures to increase the accountability of businesses for climate change related harms."[314]

240. *Negative obligations, for their part*, require States to refrain from adopting on their territories measures that prevent the enjoyment, or hinder the fulfilment, of human rights in the territories of other States. In this sense, States must not encourage or facilitate the emission of greenhouse gases giving rise to climate change by granting exploitation licences or concessions. They must also refrain from facilitating — particularly through subsidies — the research, production, storage, commercialization, transportation and consumption of fossil fuels.

[C.] Conclusion on question *(a)*: there is a general obligation under customary international law to protect and preserve the climate system, over and above specific obligations

241. In conclusion, Burkina Faso recalls that States' climate change obligations are, *inter alia*, those arising from: (1) the Montreal Protocol on Substances that Deplete the Ozone Layer; (2) the United Nations Framework Convention on Climate Change; (3) the United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa; (4) the United Nations Convention on the Law of the Sea; (5) the general obligation of due diligence; (6) the obligation to prevent significant harm to the environment; (7) human rights; and (8) the obligation to co-operate in good faith to ensure the fulfilment of human rights and the right to development in the context of climate change (9).

242. On the basis of this body of norms, Burkina Faso considers that there is now a general obligation in customary international law to protect and preserve the climate system as a whole, which is independent from, but complementary to, the rules protecting the parts of this system. Indeed, the international practice of States arising from and relating to this dense body of norms demonstrates the presence in the *opinio juris* of States of a general obligation to protect and preserve the climate system as a whole, fulfilling the two conditions required by the Court to establish the

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[313] Art. 1, para. 1, of the International Covenant on Economic, Social and Cultural Rights.

[314] United Nations Human Rights Officer of the High Commissioner, Human Rights and Loss and Damage: Key Messages, Message No. 3 (available at: https://www.ohchr.org/sites/default/files/documents/issues/climatechange/information-materials/2023-key-messages-hr-loss-damage.pdf).

customary character of a rule[315]. Nevertheless, Burkina Faso notes that the Court has sometimes inferred the existence of customary rules from the existence of a body of rules, in "seek[ing] a better formulation of the norm" in question[316]. For example, the Court has on occasion concluded that rules of customary international law exist, or determined the scope of their application, on the basis of fundamental principles of international law, international practice (including treaties), the nature of the subject or functions in question, and logic. In its Advisory Opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, the Court explained that it would look for customary international law on the validity and opposability of reservations "in the rules of law relating to the effect to be given to the intention of the parties to multilateral conventions"[317]. In so doing, it took into account a series of "considerations" — including the general principle of consent and its implications, the international practice of promoting multilateralism without calling into question the integrity of treaties, and the specific characteristics of and objects pursued by the Convention on the Prevention and Punishment of the Crime of Genocide — in order to develop the régime governing reservations under international law[318]; this régime was subsequently largely reproduced in the 1969 Vienna Convention on the Law of Treaties. Similarly, when the Court was called upon to determine whether or not the United Nations possessed international legal personality, it relied on "the characteristics [the Charter] was intended thereby to give the Organization", considerations on the subjects of law in legal systems from a historical perspective, the prerogatives and tasks of the Organization under the Charter, and its rights under the Convention on the Privileges and Immunities of the United Nations, concluding that the Members of the United Nations had intended to confer international legal personality on it[319]. In the case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium)*, the Court determined the extent of personal immunities accorded to ministers for foreign affairs, taking into account not only customary international law on diplomatic and consular relations[320], but also existing conventions on the subject. In the Court's opinion, "these conventions provide useful guidance on certain aspects of the question of immunities"[321]. In the same case, the Court also took into account the nature of the functions of ministers for foreign affairs, including their role under the Vienna Convention on the Law of Treaties[322]. Finally, in the case concerning the *Frontier Dispute (Burkina Faso/Republic of Mali)*, the Court established the general scope of the principle of *uti possidetis juris* by referring to logic and the purpose pursued by enshrining the principle in question.

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[315] *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 44, para. 77.

[316] *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), Judgment, I.C.J. Reports 1984*, p. 229, para. 111:

> "A body of detailed rules is not to be looked for in customary international law which in fact comprises a limited set of norms for ensuring the co-existence and vital co-operation of the members of the international community, together with a set of customary rules whose presence in the *opinio juris* of States can be tested by induction based on the analysis of a sufficiently extensive and convincing practice, and not by deduction from preconceived ideas. It is therefore unrewarding, especially in a new and still unconsolidated field like that involving the quite recent extension of the claims of States to areas which were until yesterday zones of the high seas, to look to general international law to provide a ready-made set of rules that can be used for solving any delimitation problems that arise. A more useful course is to seek a better formulation of the fundamental norm, on which the Parties were fortunate enough to be agreed, and whose existence in the legal convictions not only of the Parties to the present dispute, but of all States, is apparent from an examination of the realities of international legal relations".

[317] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, pp. 18-21.

[318] *Ibid.*, pp. 20-23.

[319] *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, pp. 177-180.

[320] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, pp. 20-21, para. 51.

[321] *Ibid.*, p. 21, para. 52.

[322] *Ibid.*, pp. 21-22, para. 53.

It observed that *uti possidetis* is "a general principle, which is *logically* connected with the phenomenon of the obtaining of independence, wherever it occurs"[323], while recalling that the purpose of the principle was to prevent the independence and stability of new States being endangered by fratricidal struggles provoked by the challenging of frontiers following the withdrawal of the administering Power[324].

243. In the present advisory proceedings, Burkina Faso therefore invites the Court to recognize, using whichever theoretical approach it chooses, that there is a general obligation in international law to protect and preserve the climate system. This obligation requires States to both protect the climate system from future harm, and maintain and improve its current condition. The obligation to protect and preserve the climate system thus entails a positive obligation to take measures to protect the climate system (*protect*) and a negative obligation to refrain from degrading it (*preserve*).

244. The general obligation to protect and preserve the climate system is complementary to the specific obligations to protect certain parts of that system (such as the marine environment or the ozone layer) and to the obligations to protect it against certain specific threats (greenhouse gases, including substances that deplete the ozone layer, and desertification). The particular régimes protecting certain parts of the environment should therefore be considered as establishing more detailed legal frameworks that further develop (but do not replace) the contours of the general obligation under customary international law to protect and preserve the climate system.

245. In more concrete terms, [nine (9)] specific obligations can be inferred from the general obligation under customary international law to protect and preserve the climate system, namely:

(1) the obligation for all States to refrain from causing significant harm to the climate system and other parts of the environment;

(2) the obligation for all States to protect, preserve and improve, both in terms of quantity and quality, the absorption capacity of greenhouse gas reservoirs and sinks;

(3) the obligation for all States to refrain from exacerbating existing vulnerabilities of the climate system and other parts of the environment to the effects of greenhouse gases, particularly in the conservation and exploitation of natural resources;

(4) the obligation for all States to take the necessary measures of prevention to ensure that activities taking place on their territories do not cause significant harm to the climate system and other parts of the environment, and that they do not infringe the rights of States, peoples and individuals;

(5) the obligation for all States to adopt adaptation measures that strengthen the resilience of the climate system and its various parts in the face of the adverse effects of greenhouse gas emissions, and ensure the protection of human rights, including outside their jurisdiction;

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[323] *Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, p. 565, para. 20 (emphasis added); *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, pp. 29-32, paras. 39-46 (examining the notion of equidistance and determining that it is not "logically necessary, in the sense of being an inescapable *a priori* accompaniment of basic continental shelf doctrine").

[324] *Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, p. 565, para. 20.

(6) the obligation for all States to refrain from adopting legislative, administrative or other measures that encourage or facilitate the emission of greenhouse gases by third parties, including private persons, and the obligation to revoke any such measures already adopted;

(7) the obligation for all States to educate and inform their populations about the causes, consequences and means of combating climate change on the basis of the best available scientific knowledge, and to counter misinformation on the subject;

(8) the obligation for *developed States* to take the lead in the fight against climate change by taking appropriate measures to drastically reduce their greenhouse gas emissions and increase the number and capacity of their greenhouse gas sinks and reservoirs, and to reduce and limit their emissions economy-wide;

(9) the obligation for *developed States* to provide the technical and financial assistance required by developing countries so that the latter can (i) implement their climate change obligations, (ii) adapt to the adverse effects of climate change in order to protect their populations and the environment, and, lastly, (iii) fulfil the right of their peoples to development.

246. To conclude, Burkina Faso notes that climate change has disproportionate effects on certain social groups. The Human Rights Council has thus

> "[e]xpress[ed] concern that, while these implications affect individuals and communities around the world, the adverse effects of climate change are felt most acutely by those segments of the population that are already in vulnerable situations owing to factors such as geography, poverty, gender, age, race, ethnicity, indigenous or minority status where applicable, national or social origin, birth or other status, and disability, among others"[325].

247. In this regard, Burkina Faso draws the Court's attention to the largely disproportionate impact of the adverse effects of climate change both on women — and rural women in particular — and on people of African descent. Burkina Faso recalls in this respect that the Committee on the Elimination of Discrimination against Women has reaffirmed that

> "[t]he obligations of States parties to effectively mitigate and adapt to the adverse effects of climate change, in order to reduce the increased disaster risk, have been recognized by international human rights mechanisms. Limiting fossil fuel use and greenhouse gas emissions and the harmful environmental effects of extractive industries such as mining and fracking, and the allocation of climate financing, are regarded as crucial steps in mitigating the negative human rights impacts of climate change and disasters. Any mitigation or adaptation measures should be designed and implemented in accordance with the human rights principles of substantive equality and non-discrimination, participation and empowerment, accountability and access to justice, transparency and the rule of law."[326]

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[325] See resolution 53/6 of the Human Rights Council: Human rights and climate change (A/HRC/RES/53/6), 12 July 2023, eighteenth preambular para.

[326] Committee on the Elimination of Discrimination against Women, General recommendation No. 37 (2018) on the gender-related dimensions of disaster risk reduction in the context of climate change (CEDAW/C/GC/37) (available at: tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW%2FC%2FGC%2F37&Lang=en).

V. RESPONSE TO QUESTION *(B)*: THE LEGAL CONSEQUENCES FOR STATES WHERE THEY, BY THEIR ACTS AND OMISSIONS, HAVE CAUSED SIGNIFICANT HARM TO THE CLIMATE SYSTEM AND OTHER PARTS OF THE ENVIRONMENT

248. In the discussion below, Burkina Faso will consider question *(b)* of the request for an advisory opinion. In so doing, it will establish the meaning and scope of that question (**A**), which invites the Court to determine the legal consequences of the breach by certain States of their international obligations in respect of climate change. In Burkina Faso's view, the legal consequences for these States have two distinct but complementary bases in international law, namely the law of State responsibility for internationally wrongful acts and the principle of unjust enrichment. Burkina Faso will begin by examining the legal consequences arising from the law of international responsibility for internationally wrongful acts, which requires it first to establish that the States referred to in question *(b)* have breached their international obligations in respect of climate change (**B**). Burkina Faso will then determine the legal consequences of the internationally wrongful acts resulting from these violations (**C**). Following this, Burkina Faso will examine the legal consequences for the States referred to in question *(b)* arising from the general principle of law prohibiting unjust enrichment (**D**). Burkina Faso's responses to question *(b)* will be summarized in a partial conclusion (**E**).

A. The meaning and scope of question *(b)*

249. Question *(b)* of the request for an advisory opinion reads as follows:

> "What are the legal consequences under these obligations for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment, with respect to:
>
> (i) States, including, in particular, small island developing States, which due to their geographical circumstances and level of development, are injured or specially affected by or are particularly vulnerable to the adverse effects of climate change?
>
> (ii) Peoples and individuals of the present and future generations affected by the adverse effects of climate change?"[327]

250. This question must be interpreted in the light of the customary rules for interpreting resolutions of the organs of international organizations[328]. Burkina Faso considers that the question is clear and therefore need not be reformulated by the Court. Indeed, the text of the question precisely identifies both the conduct in respect of which the Court must determine the legal consequences under international law (**1**) and the States whose international responsibility the Court is to assess (**2**). In addition, the task requested of the Court is legally feasible (**3**).

1. The conduct in respect of which the Court must determine the legal consequences is clearly identified

251. According to the text of question *(b)*, the Court must determine "the legal consequences under these obligations for States where they, by their acts and omissions, have caused significant

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[327] General Assembly resolution 77/276: Request for an advisory opinion of the International Court of Justice on the obligations of States in respect of climate change, 29 Mar. 2023.

[328] See, by analogy with the rules of interpretation of Security Council resolutions, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010 (II)*, p. 442, para. 94.

harm to the climate system and other parts of the environment". Burkina Faso notes that question *(b)* identifies, by reference to question *(a)*, the obligations in the light of which the Court must examine the responsibility of the States concerned. Question *(b)* thus asks the Court to determine these legal consequences in the light of 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.

252. Burkina Faso is of the view that the scope *ratione materiae* of question *(b)* includes acts and omissions relating to cumulative anthropogenic greenhouse gas emissions since the beginning of the industrial period. Indeed, the text of question *(b)* characterizes the acts and omissions whose legal consequences are to be assessed by the Court in two ways. *First*, they must relate to anthropogenic emissions of greenhouse gases. In this regard, the IPCC Glossary defines "anthropogenic emissions" as

> "[e]missions of greenhouse gases (GHGs), precursors of GHGs and aerosols caused by human activities. These activities include the burning of fossil fuels, deforestation, land use and land use changes (LULUC), livestock production, fertilisation, waste management, and industrial processes"[329].

253. *Second*, as already noted, the text of question *(b)* also refers to the obligations to be identified by the Court in response to question *(a)*. The temporal dimension of these obligations is mentioned in the fifth [preambular] paragraph of resolution 77/276, which states that the international obligations in question relate to greenhouse gas emissions "over time"[330]. The emissions whose legal consequences are to be assessed are thus the cumulative historical contributions by the States concerned to aggregate anthropogenic greenhouse gas emissions.

2. The States referred to in question *(b)* are identifiable

254. Burkina Faso considers that the phrase "States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment", in question *(b)*, refers to the States that have made the largest contributions to greenhouse gas emissions. There is a causal and proportional relationship between the amount of such emissions, particularly carbon dioxide, and the severity of the harm caused to the climate system and other parts of the environment. Indeed, although the harmfulness of a given quantity of each greenhouse gas varies[331], the anthropogenic concentration of carbon dioxide in the atmosphere has increased at a staggering rate since the early 1950s and is the main cause of climate change and its adverse effects[332]. Accordingly, Burkina Faso will focus below on historical contributions of CO_2, in keeping with the approach adopted by the IPCC and most studies on this subject.

255. In this regard, the States concerned can be both positively and negatively identified. *In the negative*, the States referred to in the General Assembly resolution are not developing or small island countries: the first subparagraph of question *(b)* identifies developing countries, including

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[329] IPCC glossary, p. 543 (available at: www.ipcc.ch/site/assets/uploads/sites/2/2022/06/SR15_AnnexI.pdf).

[330] General Assembly resolution 77/276: Request for an advisory opinion of the International Court of Justice on the obligations of States in respect of climate change, 29 Mar. 2023, [fifth preambular] para.

[331] See IPCC, 2013: Anthropogenic and Natural Radiative Forcing, in: Climate Change 2013: The Physical Science Basis. Contribution of Working Group I to the Fifth Assessment, Report of the Intergovernmental Panel on Climate Change, p. 731, Appendix 8.1.

[332] *Ibid.*, p. 13: "[t]otal radiative forcing is positive, and has led to an uptake of energy by the climate system. The largest contribution to total radiative forcing is caused by the increase in the atmospheric concentration of CO_2 since 1750".

small island developing countries, as among those to whom an obligation is owed, in the context of the present advisory proceedings, as a result of the breach by the States concerned of their obligations in respect of climate change. This is confirmed by the fact that these countries have relatively insignificant carbon dioxide emissions. As the IPCC has noted,

> "[g]lobally, the major share of cumulative CO_2-FFI emissions [CO_2 from fossil fuels and industry] is concentrated in a few regions, while cumulative CO_2-LULUCF emissions [CO_2 from land use, land-use change and forestry] are concentrated in other regions. LDCs [least developed countries] contributed less than 0.4% of historical cumulative CO_2-FFI emissions between 1850 and 2019, while SIDS [Small Island Developing States] contributed 0.5%."[333]

256. *In the positive*, the States whose acts and omissions relating to greenhouse gas emissions are to be examined by the Court are the developed States, particularly European and North American countries. The IPCC has noted that, *by region*, North America has contributed to 23 per cent of historical cumulative CO_2 in the atmosphere; Europe, 16 per cent; East Asia, 12 per cent; Latin America and the Caribbean, 11 per cent; Eastern Europe and Central and West Asia, 10 per cent; Southeast Asia and the Pacific, 8 per cent; Africa, 7 per cent; Australia, Japan and New Zealand, 4 per cent; and the Middle East, 2 per cent; while aviation and maritime transport have also contributed 2 per cent. The table below includes both emissions from fossil fuels (in blue) and emissions from land use, land use change and forestry (in orange). Emissions from the latter category account for the majority of emissions in Africa, Latin America and the Caribbean, and South-East Asia and the Pacific **(see Table *(c)* below)**[334].

[333] See IPCC, 2022: Summary for Policymakers, in: Climate Change 2022: Mitigation of Climate Change. Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, p. 9, B.3.1 and B.3.2, (available at: https://www.ipcc.ch/report/ar6/wg3/downloads/report/IPCC_AR6_WGIII_SummaryForPolicymakers.pdf).

[334] *Ibid.*, p. 10, fig. SPM.2.b (Historical cumulative net anthropogenic CO_2 emissions per region (1850-2019)).

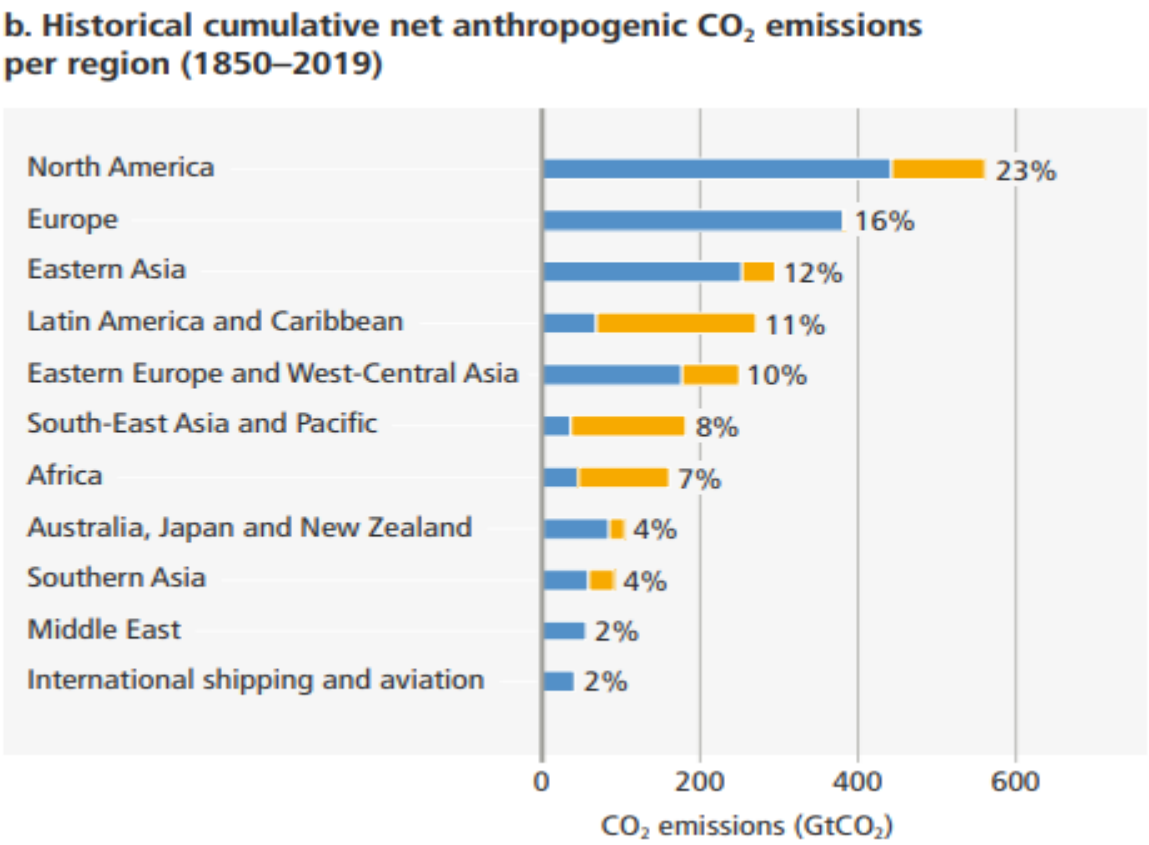
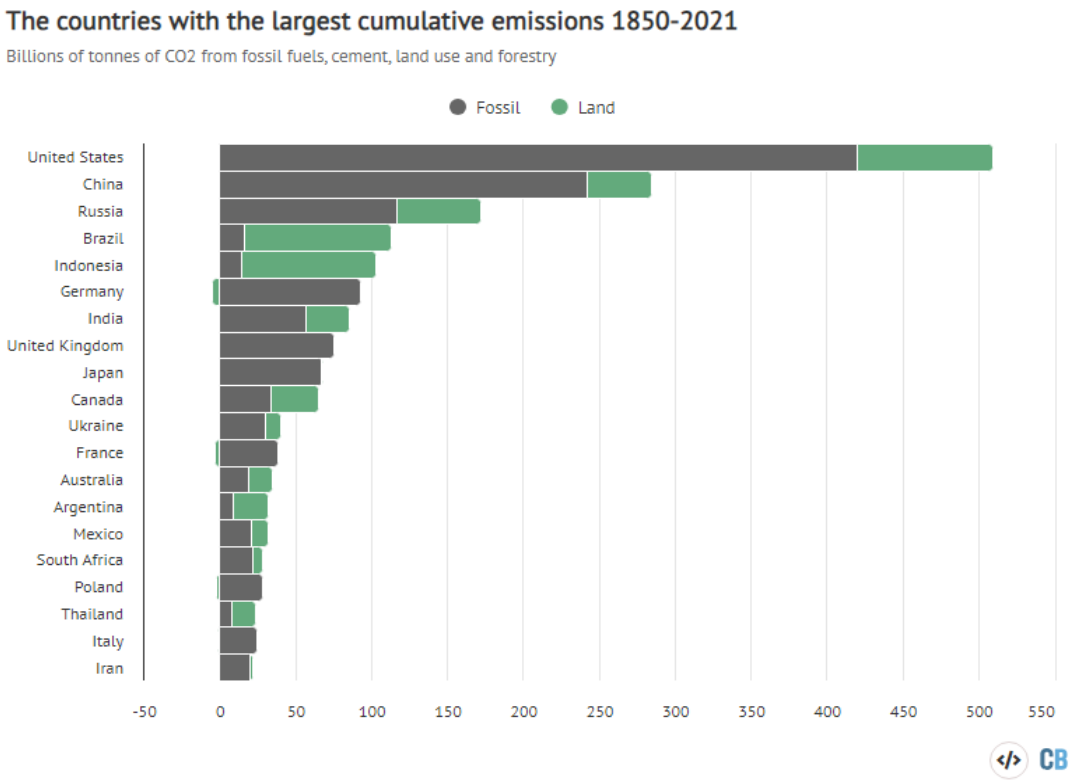


Table *(c)*: Historical cumulative net anthropogenic CO_2 emissions

257. According to Carbonbrief, a British website specializing in climate and energy science and policy, the States that were the largest contributors to greenhouse gas emissions between 1850 and 2021 were, in descending order, the United States of America, China, Russia, Brazil, Indonesia, Germany, India, the United Kingdom, Japan, Canada, Ukraine, France, Australia, Argentina, Mexico, South Africa, Poland, Thailand, Italy and Iran **(see Table *(d)* below)**[335].

[335] See Simon Evans, Carbon Brief Analysis: Which countries are historically responsible for climate change?, 5 Oct. 2021 (https://www.carbonbrief.org/analysis-which-countries-are-historically-responsible-for-climate-change/); see also the Statista web page devoted to cumulative carbon dioxide emissions from fossil fuel combustion from 1750 to 2022 (https://www.statista.com/statistics/1007454/cumulative-co2-emissions-worldwide-by-country/).

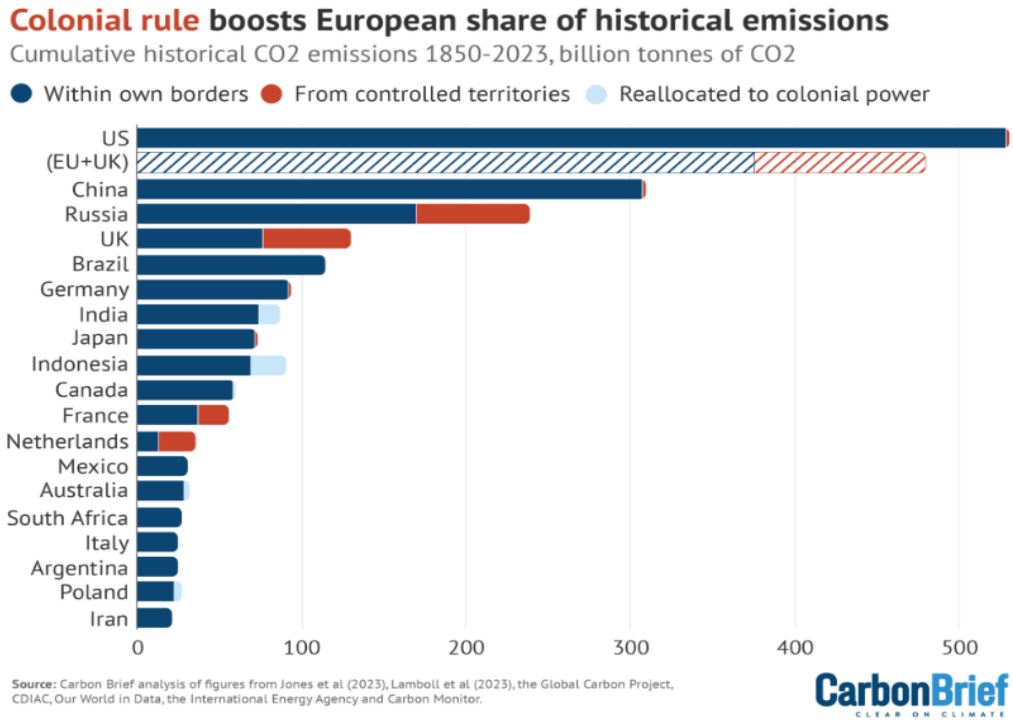


The 20 largest contributors to cumulative CO2 emissions 1850-2021, billions of tonnes, broken down into subtotals from fossil fuels and cement (grey) as well as land use and forestry (green). Source: Carbon Brief analysis of figures from the Global Carbon Project, CDIAC, Our World in Data, Carbon Monitor, Houghton and Nassikas (2017) and Hansis et al (2015). Chart by Carbon Brief using Highcharts.

Table *(d)*: Countries with the largest cumulative emissions

258. In another study, Carbonbrief also took into account the impact of colonial emissions in calculating the respective historical greenhouse gas emissions of States. To that end, it included in the contributions of former colonial Powers those emissions that were released by territories under their rule, and subtracted from the contributions of decolonized States those emissions that were released by their former colonial rulers in respect of colonized territory. When the colonial dimension of greenhouse gas emissions is taken into consideration, the full extent of the contributions of former colonial Powers becomes clear, while those of the territories formerly under their rule become even more insignificant **(see Table *(e)* below)**[336]. As a result, countries such as India and Indonesia are no longer among the largest contributors of CO_2, while the contribution of the Netherlands is doubled. The European Union and the United Kingdom rank second, whereas the latter did not appear in the table that did not take colonialism into account.

[336] See Simon Evans and Verner Visainen, Carbon Brief Revealed: How colonial rule radically shifts historical responsibility for climate change, 26 Nov. 2023 (available at: https://www.carbonbrief.org/revealed-how-colonial-rule-radically-shifts-historical-responsibility-for-climate-change/).



The top 20 countries for cumulative CO2 emissions from fossil fuels, cement, land use, land use change and forestry, 1850-2023, billion tonnes. CO2 emissions that occurred within each country's national borders are shown in dark blue, while those that took place overseas during periods of imperial rule are coloured red. Emissions reallocated to former imperial powers are shaded light blue. EU+UK is shown in addition to the relevant individual countries. Source: Carbon Brief analysis of figures from Jones et al (2023), Lamboll et al (2023), the Global Carbon Project, CDIAC, Our World in Data, the International Energy Agency and Carbon Monitor. Chart by Carbon Brief.

Table *(e)*: Effect of colonialism on the determination of cumulative CO_2 emissions between 1850 and 2023

259. In sum, the conduct referred to in the General Assembly resolution comprises the acts and omissions of developed States over time in relation to greenhouse gas emissions, which, on account of their scale, have caused significant harm to the climate system and other parts of the environment. In this regard, Burkina Faso observes that the United Nations Framework Convention on Climate Change assigns certain States a special responsibility to take the lead in combating climate change by significantly reducing their greenhouse gas emissions. The countries listed in Annex I to the Convention include the following:

> "Australia, Austria, Belarus, Belgium, Bulgaria, Canada, Croatia, Czech Republic, Denmark, European Economic Community, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, Monaco, Netherlands, New Zealand, Norway, Poland, Portugal, Romania, Russian Federation, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America"[337].

260. Burkina Faso therefore considers that the logic underlying the identification of the States referred to in question *(b)* is the same as that set out in Principle 7 of the Rio Declaration, which reads:

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[337] Ann. I of the United Nations Framework Convention on Climate Change, New York, 9 May 1992, *UNTS*, Vol. 1771, p. [189] (available at: https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXVII-7&chapter=27&Temp=mtdsg3&clang=_en).

> "In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command."[338]

261. Question *(b)* put by the General Assembly invites the Court to ascertain whether these States have complied with their obligations in respect of climate change and to determine the legal consequences arising from any breach thereof.

3. The task requested of the Court is legally feasible

262. In Burkina Faso's view, the task entrusted to the Court is legally feasible, for several reasons. Question *(b)* asks the Court to assess the conduct of a group of States in the light of their international obligations[339]. As mentioned above, the question put by the General Assembly is fully in line with United Nations climate law, which categorizes the States on which it imposes collective obligations. Each State remains individually bound by its own obligations. The group itself is also collectively bound by these obligations, since a collective effort is a condition *sine qua non* for accomplishing what they aim to achieve.

263. Burkina Faso also considers that the individual situations of the States referred to in question *(b)* are of no legal significance in the present proceedings. For example, any circumstances precluding wrongfulness that might be claimed by certain States individually are irrelevant in the case at hand. Six (6) circumstances precluding wrongfulness are recognized as such in the law of State responsibility for internationally wrongful acts, as largely codified in the Draft articles on Responsibility of States for Internationally Wrongful Acts (the "ILC Draft Articles"). They include consent[340], self-defence[341], countermeasures[342], force majeure[343], distress[344] and necessity[345]. Whereas consent requires an expression of the will of the victim State, self-defence and countermeasures require a right to have been violated by the State against which they are directed. The remaining three circumstances precluding wrongfulness require a factual situation the existence of which the State relying on such circumstances has not helped to create. Clearly, none of these

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[338] Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992, Vol. I (Resolutions adopted by the Conference) (A/CONF.151/26/Rev.l (Vol. I)), Ann. I (Rio Declaration on Environment and Development), Principle 7.

[339] Although the General Assembly resolution requesting an advisory opinion of the Court does not expressly ask it to rule on the lawfulness of acts and omissions relating to greenhouse gases, such a determination is implied in the request for the Court to make a pronouncement on their legal consequences. Indeed, it is impossible to determine the legal consequences of acts or omissions without first examining their lawfulness. See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 154, para. 39:

> "In the present instance, if the General Assembly requests the Court to state the 'legal consequences' arising from the construction of the wall, the use of these terms necessarily encompasses an assessment of whether that construction is or is not in breach of certain rules and principles of international law. Thus, the Court is first called upon to determine whether such rules and principles have been and are still being breached by the construction of the wall along the planned route."

[340] Art. 20 of the Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, *Yearbook of the International Law Commission (YILC)*, 2001, Vol. II (Part Two), p. 27.

[341] *Ibid*., Art. 21.

[342] *Ibid*., Art. 22.

[343] *Ibid*., Art. 23.

[344] *Ibid*., Art. 24.

[345] *Ibid*., Art. 25.

circumstances is relevant for States that have caused significant harm to the climate system as a result of their cumulative greenhouse gas emissions.

264. In the same vein, question *(b)* does not ask the Court to determine each State's contribution to the damage resulting from the greenhouse gas emissions that have caused significant harm to the climate system. Nor does it ask the Court to quantify the harm at issue. In sum, question *(b)* asks the Court to make a pronouncement on the principle and the content of the responsibility of the States concerned for breaching their obligations in respect of climate change.

B. The breach of international obligations by the States concerned entails their international responsibility

265. Burkina Faso contends that customary international law on State responsibility applies in respect of climate change (**1**) and that the States concerned have committed internationally wrongful acts by breaching their international obligations (**2**).

1. The customary rules of international law on State responsibility apply in respect of climate change

266. Burkina Faso maintains that the customary rules of the law of international responsibility of States apply to all violations of international law, including those resulting from the acts and omissions of States which have caused significant harm to the climate system and other parts of the environment. In accordance with Article 1 of the ILC Draft Articles, "[e]very internationally wrongful act of a State entails the international responsibility of that State"[346]. As the Permanent Court of International Justice reaffirmed in the *Factory at Chorzów* case *(Germany* v. *Poland)*, "it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation"[347].

267. Whether the source of the obligation concerned is conventional, customary or otherwise is of little importance. According to the Arbitral Tribunal in the *Rainbow Warrior* case (*France/ New Zealand*),

> "the general principles of International Law concerning State responsibility are equally applicable in the case of breach of a treaty obligation, since in the international law field there is no distinction between contractual and tortious responsibility, so that any violation by a State of any obligation, of whatever origin, gives rise to State responsibility and consequently, to the duty of reparation."[348]

268. The same applies with regard to the subject-matter of the obligation in question. As Special Rapporteur Roberto Ago has observed,

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[346] *Ibid*., Art. 1, p. 26.

[347] *Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17*, p. 29. See also *Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9*, p. 21: "[r]eparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself. Differences relating to reparations, which may be due by reason of failure to apply a convention, are consequently differences relating to its application".

[348] *Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements, concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affair*, Award of 30 Apr. 1990, *RIAA*, Vol. XX, p. 251, para. 75.

> "[t]here is not a single judgment of the Permanent Court of International Justice or of the International Court of Justice, or a single international arbitral award, that recognizes either explicitly or implicitly the existence of international obligations the breach of which would not be a wrongful act and would not entail international responsibility. Furthermore, the international awards specifying in general terms the conditions for the existence of an internationally wrongful act and the creation of international responsibility speak of the breach of an international obligation without placing any restriction on the subject-matter of the obligation breached, despite the fact that, in the different cases in question, the judges and arbitrators were concerned with obligations having the most widely different content."[349]

269. The Court has previously affirmed that general international law on international responsibility applies to breaches by States of their obligations under international environmental law. Indeed, according to the jurisprudence of the Court,

> "it is consistent with the principles of international law governing the consequences of internationally wrongful acts, including the principle of full reparation, to hold that compensation is due for damage caused to the environment, *in and of itself*, in addition to expenses incurred by an injured State as a consequence of such damage"[350].

270. Burkina Faso considers that this dictum of the Court applies to harm to the climate system, since the latter is part of the environment.

271. Burkina Faso recalls that — depending on the content of the legal obligation concerned — fault (*culpa*), i.e. an intention on the part of a State to cause harm, is not a constituent element of the obligation under international law to repair harm. As the International Law Commission explained in its commentary to Article [2] of the ILC Draft Articles,

> "[t]he question is whether those two necessary conditions [attribution, and the breach of an international obligation] are also sufficient. It is sometimes said that international responsibility is not engaged by conduct of a State in disregard of its obligations unless some further element exists, in particular, 'damage' to another State. But whether such elements are required depends on the content of the primary obligation, and there is no general rule in this respect . . . A related question is whether fault constitutes a necessary element of the internationally wrongful act of a State. This is certainly not the case if by 'fault' one understands the existence, for example, of an intention to harm. In the absence of any specific requirement of a mental element in terms of the primary obligation, it is only the act of a State that matters, independently of any intention."[351]

272. Such is also the case — subject to the content of the primary obligation — of ignorance, i.e. in the present advisory proceedings, a lack of knowledge about the effects of greenhouse gas emissions or the seriousness of the harm in question, including in the long term. The Court's task is

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[349] Report of the International Law Commission on the work of its twenty-eighth session, 3 May-23 July 1976 (UN doc. A/31/10, available at: https://legal.un.org/ilc/documentation/english/reports/a_31_10.pdf): Fifth report of the Special Rapporteur, Mr Roberto Ago, *YILC*, 1976, Vol. II (Part Two), Commentary to Art. 19, p. 96, para. 4.

[350] *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. 41.

[351] Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, *YILC*, 2001, Vol. II (Part Two), Commentary to Art. [2], p. 36, paras. 9-10.

therefore not to determine whether or not the States referred to in question *(b)* acted in fault or in ignorance; it is to examine whether they have complied with their international obligations.

2. The States referred to in question *(b)* have breached their obligations in respect of climate change

273. Burkina Faso is of the view that the States referred to in question *(b)* that have caused serious harm to the climate system and other parts of the environment have committed internationally wrongful acts. In accordance with Article 2 of the ILC Draft Articles, which reflects customary international law in this respect,

> "[t]here is an internationally wrongful act of a State when conduct consisting of an action or omission:
>
> *(a)* is attributable to the State under international law; and
>
> *(b)* constitutes a breach of an international obligation of the State."[352]

274. Article 12 of the ILC Draft Articles provides that "[t]here is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character."[353]

275. According to Article 13 of the ILC Draft Articles, "[a]n act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs."[354]

276. In the light of these rules, Burkina Faso considers that the States referred to in question *(b)* have committed internationally wrongful acts by violating some of their obligations in respect of climate change. In its response to question *(a)*, Burkina Faso has previously established that the obligations of States in respect of climate change include:

(1) the obligation for all States to refrain from causing significant harm to the climate system and other parts of the environment;

(2) the obligation for all States to protect, preserve and improve, both in terms of quantity and quality, the absorption capacity of greenhouse gas reservoirs and sinks;

(3) the obligation for all States to refrain from exacerbating existing vulnerabilities of the climate system and other parts of the environment to the effects of greenhouse gases, particularly in the conservation and exploitation of natural resources;

(4) the obligation for all States to take the necessary measures of prevention to ensure that activities taking place on their territory do not cause significant harm to the climate system and other parts of the environment, and that they do not infringe the rights of States, peoples and individuals;

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[352] *Ibid.*, Art. 2, p. 26.

[353] *Ibid.*, Art. 12.

[354] *Ibid.*, Art. 13, p. 27.

(5) the obligation for all States to adopt adaptation measures that strengthen the resilience of the climate system and its various parts in the face of the adverse effects of greenhouse gas emissions, and ensure the protection of human rights, including outside their jurisdiction;

(6) the obligation for all States to refrain from adopting legislative, administrative or other measures that encourage or facilitate the emission of greenhouse gases by third parties, including private persons, and the obligation to revoke any such measures already adopted;

(7) the obligation for all States to educate and inform their populations about the causes, consequences and means of combating climate change on the basis of the best available scientific knowledge, and to counter misinformation on the subject;

(8) the obligation for *developed States* to take the lead in the fight against climate change by taking appropriate measures to drastically reduce their greenhouse gas emissions and increase the number and capacity of their greenhouse gas sinks and reservoirs, and to reduce and limit their emissions economy-wide;

(9) the obligation for *developed States* to provide the technical and financial assistance required by developing countries so that the latter can (i) implement their climate change obligations, (ii) adapt to the adverse effects of climate change in order to protect their populations and the environment, and, lastly, (iii) fulfil the right of their peoples to development.

277. Burkina Faso considers that developed countries have violated five of their obligations in respect of climate change: the obligation to prevent significant harm to the climate system and other parts of the environment, and to the rights of States, peoples and individuals ***(a)***; the specific obligation to take the lead in combating climate change ***(b)***; the obligation not to adopt legislative, administrative or other measures that promote or facilitate greenhouse gas emissions by third parties, including private persons, and to revoke any such measures already adopted ***(c)***; the obligation to provide financial and technical assistance to developing countries for the purpose of mitigating greenhouse gas emissions and adapting to climate change ***(d)***; and the obligation to co-operate in good faith in addressing the challenges posed by greenhouse gas emissions, climate change and the adverse effects thereof ***(e)***.

(a) ***The breach of the obligation to prevent significant harm to the climate system and other parts of the environment, and to the rights of States, peoples and individuals***

278. In this instance, the conduct whose lawfulness is to be assessed is the *failure* by the States referred to in question *(b)* to take appropriate measures, since the 1950s, to prevent harm to the climate system and other parts of the environment, and to human rights, including the rights of peoples.

279. Burkina Faso notes that the IPCC views the 1950s as the critical period when the sharp increase in anthropogenic greenhouse gas emissions began to cause significant harm to the climate system. In its 2021 report, the IPCC

> "reaffirms with high confidence the AR5 finding that there is a near-linear relationship between cumulative anthropogenic CO_2 emissions and the global warming they cause.

Each 1000 $GtCO_2$ of cumulative CO_2 emissions is assessed to likely cause a 0.27°C to 0.63°C increase in global surface temperature with a best estimate of 0.45°C."[355]

280. Figure SPM.10, which accompanies the IPCC's conclusion, shows that the critical period of the 1950s marks both an abrupt increase in anthropogenic greenhouse gas emissions and a rise in temperatures (see **Table *(f)*** below).

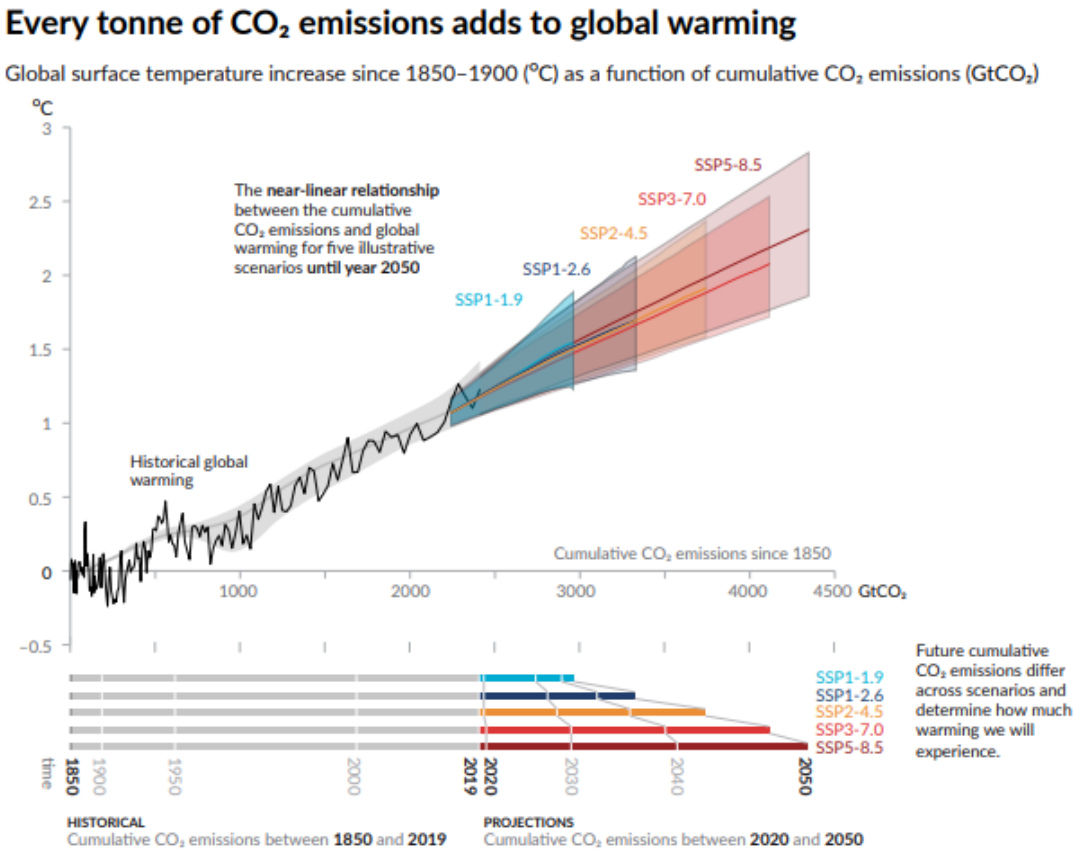


Figure SPM.10 | Near-linear relationship between cumulative CO_2 emissions and the increase in global surface temperature

Top panel: Historical data (thin black line) shows observed global surface temperature increase in °C since 1850–1900 as a function of historical cumulative carbon dioxide (CO_2) emissions in $GtCO_2$ from 1850 to 2019. The grey range with its central line shows a corresponding estimate of the historical human-caused surface warming (see Figure SPM.2). Coloured areas show the assessed *very likely* range of global surface temperature projections, and thick coloured central lines show the median estimate as a function of cumulative CO_2 emissions from 2020 until year 2050 for the set of illustrative scenarios (SSP1-1.9, SSP1-2.6, SSP2-4.5, SSP3-7.0, and SSP5-8.5; see Figure SPM.4). Projections use the cumulative CO_2 emissions of each respective scenario, and the projected global warming includes the contribution from all anthropogenic forcers. The relationship is illustrated over the domain of cumulative CO_2 emissions for which there is *high confidence* that the transient climate response to cumulative CO_2 emissions (TCRE) remains constant, and for the time period from 1850 to 2050 over which global CO_2 emissions remain net positive under all illustrative scenarios, as there is *limited evidence* supporting the quantitative application of TCRE to estimate temperature evolution under net negative CO_2 emissions.

Bottom panel: Historical and projected cumulative CO_2 emissions in $GtCO_2$ for the respective scenarios.

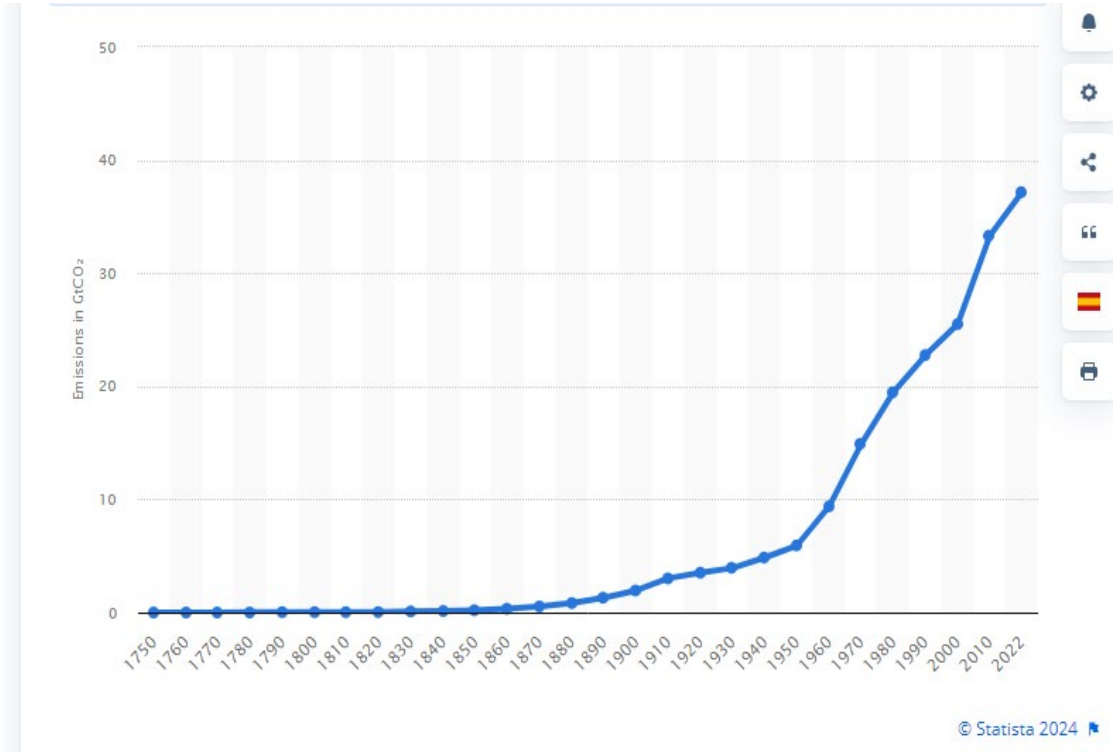
{Section 5.5, Figure 5.31, Figure TS.18}

[Table *(f)*]

281. Burkina Faso also refers to another chart that clearly shows the 1950s to be a crucial period for climate change. Produced by the website Statista, it measures historical carbon dioxide

[355] IPCC, 2021: Summary for Policymakers, in: Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment, Report of the Intergovernmental Panel on Climate Change, Figure SPM.10 (Near-linear relationship between cumulative CO2 emissions and the increase in global surface temperature), p. 28 (available at: https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_SPM.pdf).

emissions from the global burning of fossil fuels between the 1750s and 2022. It can be seen from the chart that, here too, the 1950s were a pivotal period **(see below, Table *(g)*)**[356].



[Table *(g)*]

282. This information is corroborated by other IPCC reports identifying the 1950s as the turning point after which other consequences of climate change started to be seen. The Contribution of Working Group III to the Fifth Assessment Report of the IPCC states in this respect that

> "[w]arming of the climate system is unequivocal, and since the 1950s, many of the observed changes are unprecedented over decades to millennia. The atmosphere and ocean have warmed, the amounts of snow and ice have diminished, sea level has risen, and the concentrations of greenhouse gases have increased."[357]

283. Consequently, Burkina Faso will take the 1950s as the critical period from which it will examine the existence of the obligation to prevent harm from greenhouse gas emissions, as well as the violation of that obligation by the States concerned.

(i) The obligation to prevent harm to the climate system and other parts of the environment, and to human rights, existed before 1950

284. Burkina Faso considers that, in the 1950s, the States in question already had an obligation under international law to take the necessary measures to prevent greenhouse gas emissions produced on their territories from causing harm to human rights and to the climate system and other parts of

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[356] See "Historical carbon dioxide emissions from global fossil fuel combustion and industrial processes in selected years from 1750 to 2022" (available at: https://www.statista.com/statistics/264699/worldwide-co2-emissions/).

[357] IPCC, 2013: Summary for Policymakers, in: Climate Change 2013: The Physical Science Basis. Contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change, p. 4 (available at: https://www.ipcc.ch/site/assets/uploads/2018/02/WG1AR5_SPM_FINAL.pdf).

the environment. This obligation is based on the general principle of "due diligence"[358], the obligation to prevent transboundary environmental harm[359] and, finally, the obligation to protect and fulfil human rights[360].

285. With regard to the principle of due diligence, Burkina Faso has already demonstrated that this principle derives from the structure of the current international legal order, which is centred around States which enjoy territorial sovereignty[361]. It has thus existed in contemporary international law since at least the Reformation, which enshrined the Pope's loss of absolute power over European sovereigns. The general obligation of due diligence already existed in international law when it was applied in 1871 by the Arbitral Tribunal in the *Alabama* case to facts relating to the American Revolutionary War[362].

286. The principle of preventing significant harm to the climate system and other parts of the environment, for its part, was already in existence when it was applied in 1941 by the Arbitral Tribunal in the *Trail smelter case (United States of America, Canada)*. The Tribunal observed that,

> "under the principles of international law, as well as of the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence"[363].

287. The obligation to respect and protect human rights, for its part, was enshrined in the United Nations Charter in 1945, and later in the Universal Declaration of Human Rights and other legal instruments which followed.

(ii) The States concerned knew throughout the relevant period that greenhouse gas emissions caused harm to the climate system and other parts of the environment, and to human rights

288. Below, Burkina Faso will demonstrate that the scientific knowledge available throughout the relevant period, i.e. from the 1950s onwards, made it possible to identify the risks of harm inherent in significant greenhouse gas emissions. Accordingly, Burkina Faso will not endeavour to prove that each of the States referred to in question *(b)* was aware of the adverse effects of greenhouse gas emissions on the climate system and other parts of the environment, on human rights and on the rights of third States. If the States referred to in question *(b)* were not aware, they should have been, and they should have fulfilled their obligation of due diligence. For the purposes of the present discussion, Burkina Faso will distinguish between various time periods, namely from 1950 to 1970, from 1970 to 1990, and since the 1990s.

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[358] See Section IV.B.1.b.i of this written statement.

[359] See Section IV.B.1.b.ii of this written statement.

[360] See Section IV.B.2.c of this written statement.

[361] See Section IV.B.1.b.i of this written statement.

[362] *Alabama claims of the United States of America against Great Britain*, Award of 14 Sept. 1872, *RIAA*, Vol. XXIX, pp. 125-135. For this interpretation, see *Trail smelter case (United States of America, Canada)*, Awards of 16 Apr. 1938 and 11 Mar. 1941, *RIAA*, Vol. III, p. 1963.

[363] *Trail smelter case (United States of America, Canada)*, Awards of 16 Apr. 1938 and 11 Mar. 1941, *RIAA*, Vol. III, p. 1965.

289. *The post-1990 period* succeeded the first report of the IPCC, which established, with all the requisite international scientific authority, that anthropogenic greenhouse gas emissions are the cause of climate change and its adverse effects on the environment, the rights of States, and collective and individual human rights[364]. From that point onwards, it is clear that none of the States referred to in question *(b)* can claim that they were unaware that greenhouse gas emissions had an adverse effect on the climate system and on the rights of States, peoples and individuals.

290. According to the IPCC, 42 per cent of historical cumulative CO_2 emissions were released after 1990:

> "Historical cumulative net CO2 emissions from 1850 to 2019 were 2400 ± 240 GtCO2 (high confidence). Of these, more than half (58%) occurred between 1850 and 1989 [1400 ± 195 GtCO2], and about 42% between 1990 and 2019 [1000 ± 90 GtCO2]. About 17% of historical cumulative net CO2 emissions since 1850 occurred between 2010 and 2019 [410 ± 30 GtCO2]"[365].

291. Burkina Faso notes that nearly half of the greenhouse gas emissions accumulated in the atmosphere were released at a time when there was no question as to their adverse effects on the climate system and other parts of the environment, and on human rights and the rights of third States.

292. *With regard to the period between the 1970s and the 1990s*, Burkina Faso considers that the States concerned had the necessary information to know that greenhouse gas emissions had an adverse effect on the climate system and other parts of the environment, as well as on human rights[366]. In 1969, the Secretary-General of the United Nations submitted a report referring to certain aspects of the activities of United Nations agencies and programmes relating to the human environment. It came in response to a proposal by Sweden to include an item entitled "The question of convening an international conference on the problems of human environment" on the agenda of the forty-fifth session of the Economic and Social Council. The Secretary-General explained, in reference to the World Meteorological Organization, that

> "[a]pplication of meteorology to the protection of the atmosphere is mainly related to the problem of increasing air-pollution. There are large-scale air pollution problems where we are interested in global spread of debris from nuclear tests, the increase of acidity due to increased industrialization over a large part of the globe *or the increase*

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[364] See IPCC, 1990: Climate Change: The IPCC Scientific Assessment (full report available at: https://www.ipcc.ch/site/assets/uploads/2018/03/ipcc_far_wg_I_full_report.pdf)

[365] IPCC, 2022: Summary for Policymakers, in: Climate Change 2022: Mitigation of Climate Change. Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, p. 6, B.1.3 (available at: https://www.ipcc.ch/report/ar6/wg3/downloads/report/IPCC_AR6_WGIII_SummaryForPolicymakers.pdf).

[366] In general, with regard to this period, see Nathaniel Rich, *Losing Earth: The Decade We Could Have Stopped Climate Change* (2019). See also Nathaniel Rich, *Losing Earth: The Decade We Almost Stopped Climate Change*, *New York Times*, 1 Aug. 2018:

> "Nearly everything we understand about global warming was understood in 1979. By that year, data collected since 1957 confirmed what had been known since before the turn of the 20th century: Human beings have altered Earth's atmosphere through the indiscriminate burning of fossil fuels. The main scientific questions were settled beyond debate, and as the 1980s began, attention turned from diagnosis of the problem to refinement of the predicted consequences. Compared with string theory and genetic engineering, the 'greenhouse effect' — a metaphor dating to the early 1900s — was ancient history, described in any Introduction to Biology textbook. Nor was the basic science especially complicated. It could be reduced to a simple axiom: The more carbon dioxide in the atmosphere, the warmer the planet. And every year, by burning coal, oil and gas, humankind belched increasingly obscene quantities of carbon dioxide into the atmosphere." (available at: https://www.nytimes.com/interactive/2018/08/01/magazine/climate-change-losing-earth.html).

of the carbon-dioxide in the earth's atmosphere which may change our climate. In all these cases the general circulation of the atmosphere enters as the machinery. In the case of small scale problems we are interested in the spread of pollution from a single plant or over large urban communities due to central heating with carbon fuels or from heavy motor traffic; then the meteorological parameters of greatest interest are such as turbulence, stability and wind which govern the spread and concentration of pollutants."[367]

293. United States President Richard Nixon established a working group that issued a report in June 1970 entitled "Cleaner Air for the Nation", which contained a section on the "climatic effects of pollutants". The relevant passage of the working group's report reads as follows:

"**Climatic Effects of Pollutants**

The greatest consequences of air pollution for man's continued life on the earth are its effects on the earth's climate. They are also probably the least well known of all important effects.

Three kinds of effects have received the greatest attention: *(1) the effects of increasing carbon dioxide due to the burning of fossil fuels*; (2) the effects of increased particulates; and (3) the possible effects of moisture deposition by high-flying aircraft — such as supersonic transports.

We know the rate of increase of atmospheric carbon dioxide with reasonable accuracy. (About one-half the carbon dioxide formed by burning fossil fuels moves into the oceans and into plants, leaving the other half in the atmosphere.)

We remain regrettably ignorant of the size — and even the direction — of the corresponding effect on our climate. If we consider only the trapping effect on the earth's outward radiation, the earth should warm. If we consider only the effect on the meridional circulation, the earth should cool. It may well be that the net effect depends on the — still conjectural — effect on the pattern of the easterly and westerly circulations.

In the case of particulates, our uncertainty is less. It is probable that increased particulates so much increase the reflection of incoming sunlight as to outweigh all other effects and produce a net cooling. We are not sufficiently sure of either the magnitude or the effect or of the consequences of adding this cooling to the other on-going effects.

So far as the average temperature of the earth's northern hemisphere goes, it is clear that the decades before 1945 saw a rather steady warming, while those since have seen a cooling. The contribution of carbon dioxide from the combustion of fossil fuel and from added particulates to either trend — or to the maximum — is quite uncertain.

Stratospheric Air Pollution

The highest layers of the atmosphere lying above the clouds are cleansed only every few years in contrast to a cleansing every three or four weeks of the layer where rain occurs.

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[367] Economic and Social Council, Question of convening an international conference on problems of the human environment, Activities of United Nations Organizations and Programmes relevant to the Human Environment, Report of the Secretary-General, 11 July 1968, E/4553, para. 78 (available at: https://digitallibrary.un.org/record/729430) (emphasis added).

Particulate matter put in the stratosphere by volcanic eruptions has been observed to reduce substantially the sunlight reaching the earth's surface. The eruption of the Balinese volcano Mt. Aguna in 1963 reduced the solar heat input in the lower half of the Northern hemisphere by about ten to fifteen percent for a year or more and over the entire earth for the 35 subsequent two or three years by several percent. History records several previous similar episodes.

As the possibility of extensive use of the atmosphere above 65,000 feet increases — as supersonic transports are taken more seriously — there is further concern with the possible effect of such usage on our climate. The effect most likely to be serious involves the deposition and retention of water in the stratosphere, initially in the form of contrails. These contrails, which would be much longer lasting at such altitudes, would reflect more of the light coming in from the sun.

The other effects of increased water content are not as clear, though fears of cooling by increase in the very high altitude noctilucent clouds have been expressed. So far, there seem to have been no definite studies of either contrail formation or other effects.

Another consideration is the possible effects of the nitrogen oxide emissions on the stratospheric ozone concentration and height distribution. *Study of the effects of man's activities on the earth's climate must be intensified.*

Chemical Reactions in the Atmosphere

It is of fundamental importance to learn the fate of pollutants entering the atmosphere, for we know they are subject to physical and chemical forces that we do not adequately understand. For example, there is great uncertainty as to the behavior of particulates. Likewise, our knowledge of the fate of gaseous pollutants is inadequate.

In assessing the need for control of pollutants formed in the photo-chemical reactions leading to the formation of particulates, ozone and various other irritants, it is imperative to have an accurate knowledge of the relative rates of reaction and formation at various concentrations of primary pollutants. To date efforts in obtaining accurate and statistically significant data have not been commensurate with the great importance these data have as a guide to the control effort. *Knowledge of the fate of pollutants, the reactions they undergo and their accumulative effects must be acquired.*"[368]

294. Burkina Faso notes that the report reaffirms that carbon dioxide emissions are the principal threat to the climate system. However, it expresses doubts as to whether certain factors could eliminate or mitigate this risk.

295. Burkina Faso further recalls that 1973 also saw the great drought in the Sahel, whose effects were of such a scale that they were known around the globe and were described by the General Assembly as a "tragedy". The great drought of 1973 was thus the first major disaster caused by the adverse effects of greenhouse gas emissions, in particular climate change. The General Assembly responded to the event with its resolution 3253, which emphasized the need for assistance in the Sudano-Sahelian region and the drought-stricken areas of Ethiopia and called on the

[368] Cleaner Air for the Nation: The Report of the President's Task Force on Air Pollution, 1970, pp. 34-35, available at https://babel.hathitrust.org/cgi/pt?id=mdp.39015002760075&seq=1 (emphasis in the original and added).

Secretary-General to hasten the preparatory work on the establishment of a research institute for the arid Sahelian zone[369].

296. A 1977 technical note from the World Meteorological Organization on the effects of human activities on the climate accurately identified both the cause of climate change and the effects experienced today and called on policymakers to take action. It reads as follows:

> "The largest single effect of human activities on the climate is due to the increase in atmospheric carbon dioxide concentration resulting from burning fossil fuels (coal, petroleum, natural gas), since the additional carbon dioxide gas absorbs infra-red radiation from the surface that would otherwise escape into space, producing an increase in lower atmosphere temperature.
>
> . . . . . .
>
> A *best estimate* of the resultant warming of the mean surface temperature of the Earth due to human activities is about 1°C by 2000 AD (25 per cent increase in atmospheric carbon dioxide) and about 3°C by 2050 AD (doubling of atmospheric carbon dioxide), with an uncertainty of roughly a factor of two. Warming of the polar regions is expected to be three to five times greater than the global average.
>
> . . . . . .
>
> The question is raised of how the decision-makers of the world can make use of this information, dealing as it does with a probable change that will only become readily apparent after a decade or two."[370]

297. In June 1988, the scientist James Hansen gave the following sworn testimony on the causes and impacts of climate change before the United States Senate. He observed matter-of-factly that:

> "Number one, the earth is warmer in 1988 than at any time in the history of instrumental measurements. Number two, the global warming is now large enough that we can ascribe with a high degree of confidence a cause and effect relationship to the greenhouse effect. And number three, our computer climate simulations indicate that the greenhouse effect is already large enough to begin to affect the probability of extreme events such as summer heat waves . . . Altogether the evidence that the earth is warming by an amount which is too large to be a chance fluctuation and the similarity of the warming to that expected from the greenhouse effect represents a very strong case. In my opinion, that the greenhouse effect has been detected, and it is changing our climate now."[371]

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[369] See General Assembly resolution 3253 (XXIX): Consideration of the economic and social situation in the Sudano-Sahelian region stricken by drought and measures to be taken for the benefit of that region, 4 Dec. 1974.

[370] W.W. Kellogg, Effects of Human Activities on Global Climate. A summary, with consideration of the implications of a possibly warmer Earth, WMO, Technical Note No. 156 (WMO Secretariat, Geneva, 1977), at VII-VIII (emphasis in the original) (available at: https://library.wmo.int/idurl/4/28199).

[371] Statement by Dr James Hansen, former Director of the NASA Goddard Institute for Space Studies before the Committee on Energy and Natural Resources of the United States Senate, 23 June 1988 (available at: https://babel.hathitrust.org/cgi/pt?id=uc1.b5127807&view=1up&seq=45).

298. Also in 1988, British Prime Minister Margaret Thatcher made the following observations in opening remarks before the Royal Society:

> "Recently three changes in atmospheric chemistry have become familiar subjects of concern. The first is the increase in the greenhouse gases — carbon dioxide, methane, and chlorofluorocarbons — which has led some to fear that we are creating a global heat trap which could lead to climatic instability. We are told that a warming effect of 1°C per decade would greatly exceed the capacity of our natural habitat to cope. Such warming could cause accelerated melting of glacial ice and a consequent increase in the sea level of several feet over the next century. This was brought home to me at the Commonwealth Conference in Vancouver last year when the President of the Maldive Islands reminded us that the highest part of the Maldives is only six feet above sea level. The population is 177,000. It is noteworthy that the five warmest years in a century of records have all been in the 1980s — though we may not have seen much evidence in Britain!"[372]

299. Burkina Faso considers that all these documents provide sufficient evidence that the States concerned knew or should be held to have known that greenhouse gas emissions were causing harm to the climate system and its various parts, as well as to human rights. Moreover, if those States had performed a modicum of due diligence on oil companies, they could have known that greenhouse gas emissions were causing harm to the climate system and other parts of the environment. Indeed, in the two decades between 1970 and 1990, the major oil companies whose business model was reliant on greenhouse gas emissions actively engaged in misinformation in order to shape public opinion in their favour and prevent their activities from being regulated. Geoffrey Supran and Naomi Oreskes examined the case of the oil company Exxon in a 2017 study that was later supported by a 2020 study in the scientific journal *Environmental Research Letters*. The summary of their work reads as follows:

> "In our 2017 study 'Assessing ExxonMobil's climate change communications (1977-2014)', we concluded that ExxonMobil has in the past misled the public about climate change. We demonstrated that ExxonMobil 'advertorials' — paid, editorial-style advertisements — in The New York Times spanning 1989-2004 overwhelmingly expressed doubt about climate change as real and human-caused, serious, and solvable, whereas peer-reviewed papers and internal reports authored by company employees by and large did not. Here, we present an expanded investigation of ExxonMobil's strategies of denial and delay. Firstly, analyzing additional documents of which we were unaware when our original study was published, we show that our original conclusion is reinforced and statistically significant: between 1989-2004, ExxonMobil advertorials overwhelmingly communicated doubt. We further demonstrate that (i) Mobil, like Exxon, was engaged in mainstream climate science research prior to their 1999 merger, even as Mobil ran advertorials challenging that science; (ii) Exxon, as well as Mobil, communicated direct and indirect doubt about climate change and (iii) doubt-mongering did not end after the merger. We now conclude with even greater confidence that ExxonMobil misled the public, delineating three distinct ways in which they have done so."[373]

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[372] Margaret Thatcher, Speech to the Royal Society. 27 Sept. 1988 (available at: https://www.margaretthatcher.org/document/107346).

[373] G. Supran, N. Oreskes, "Addendum to 'Assessing ExxonMobil's climate change communications (1977–2014)' Supran and Oreskes (2017 *Environ. Res. Lett.* 12 084019)", *Environmental Research Letters*, 2020, Vol. 15, summary, (available at: https://iopscience.iop.org/article/10.1088/1748-9326/aa815f/pdf).

300. Similar details have now been corroborated in a number of news articles[374] and video documentaries[375].

301. *Lastly, with regard to the period between 1950 and 1969*, Burkina Faso notes that the States concerned knew or had reason to know that greenhouse gas emissions had adverse effects on the climate system and seriously infringed rights protected by international law. Indeed, that period marked the beginning of widespread awareness of air pollution and the harmful effects of carbon dioxide emissions on the climate system. Back in 1957, Mr Edward Teller, known as the "father" of the American nuclear bomb, gave a speech at the American Chemical Society's annual meeting in which he stated that

> "the effects of the burning of coal and oil fuel on the atmosphere of the Earth . . . The simultaneous release into the atmosphere of the whole vast quantity of carbon previously stored in the Earth as coal and oil might conceivably change the climate . . . An increase in carbon dioxide content of the atmosphere will thus act in the same way as a greenhouse and will raise the temperature at the surface . . . an appreciable part of the polar ice melt"[376].

302. The oil industry's response to Mr Teller's controversial statement was published in an article in *The New Scientist* by Dr M.A. Matthews, an employee of Shell International Chemical Company. In the article, Dr Matthews acknowledges that "[t]he simultaneous release into the atmosphere of the whole vast quantity of carbon previously stored in the Earth as coal and oil might conceivably change the climate". However, he downplays this information by alleging that nature's carbon cycles have a certain regulatory effect[377].

303. In 1954, Mr Vance N. Jenkins published a praiseful article commissioned by the oil industry that was intended to prove that it was sponsoring research on air pollution. Jenkins suggested, probably inadvertently, that oil companies were already aware in the 1930s of the impact of carbon emissions on air pollution. He explained:

> "The purpose of this paper is to describe the pollution prevention activities of the petroleum industry which have resulted from the recognition, some thirty years ago, by the executives constituting the managements of its various units, that water and air pollution would become a very serious problem in certain portions of the nation unless well-planned actions were taken to prevent it"[378].

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[374] G. Supran, N. Oreskes, "The forgotten oil ads that told us that climate change was nothing", *The Guardian*, 11 Nov. 2021 (available at: https://www.theguardian.com/environment/2021/nov/18/the-forgotten-oil-ads-that-told-us-climate-change-was-nothing).

[375] See, e.g. *Temps présents*, "Climat : les gros mensonges des géants du pétrole", (https://www.youtube.com/watch?v=-UDLorjyWg0).

[376] Speech by Mr Edward Teller to the American Chemical Society, Dec. 1957 (available at: https://kuci.org/wp/podcast/edward-teller-speech/#:~:text=At%20an%20address%20to%20the,a%20greenhouse%20and%20will%20raise).

[377] Dr M.A. Matthews, "The Earth's Carbon Cycle", *The New Scientist*, 8 Oct. 1959, Vol 6, No. 151, p. 644 (available at: https://www.climatefiles.com/shell/1959-shell-earths-carbon-cycle-article/).

[378] Vance N. Jenkins, "The Petroleum Industry Sponsors Air Pollution Research", *Air Repair*, 1954, Vol. 3:3, pp. 144-149 (available at: https://www.documentcloud.org/documents/2827790-1954-Vance-Jenkins-Smoke-and-Fumes-Committee-of.html#document/p1/a366547).

304. In February 1965, United States President Lyndon Johnson affirmed, in a speech to the Congress on Conservation and Restoration of Natural Beauty, that greenhouse gas emissions had caused air pollution. He observed that "[a]ir pollution is no longer confined to isolated places. This generation has altered the composition of the atmosphere on a global scale through radioactive materials and a steady increase in carbon dioxide from the burning of fossil fuels."[379]

305. That same year, President Johnson's Scientific Advisory Committee submitted a report entitled "Restoring the Quality of our Environment", which suggested measures such as economic incentives and taxes to punish polluters[380]. This report proves that the scientific knowledge available at the time made it possible to understand the effects of carbon dioxide, which the report described as an "invisible pollutant":

> "Not all of this added carbon will remain in the air. Part of it will become dissolved in the ocean, and part will be taken up by the biosphere, chiefly in trees and other terrestrial plants and in dead plant litter called humus. *The part that remains in the atmosphere may have a significant effect on climate*: carbon dioxide is nearly transparent to visible light, it is a strong absorber and back radiator of infrared radiation, particularly in the wave lengths from 12 to 18 microns; consequently, an increase of atmospheric carbon dioxide could act, much like the glass in a greenhouse, to raise the temperature of the lower air."[381]

306. The report continued:

> "Through his worldwide industrial civilization, Man is unwittingly conducting a vast geophysical experiment. Within a few generations he is burning the fossil fuels that slowly accumulated in the earth over the past 500 million years. The CO_2 produced by this combustion is being injected into the atmosphere; about half of it remains there. The estimated recoverable reserves of fossil fuels are sufficient to produce nearly a 200% increase in the carbon dioxide content of the atmosphere.
>
> By the year 2000 the increase in the atmospheric CO_2 will be close to 25%. This may be sufficient to produce measurable and perhaps marked changes in climate, and will almost certainly cause significant changes in the temperature and other properties of the stratosphere. At present it is impossible to predict these effects quantitatively, but recent advances in mathematical modelling of the atmosphere, using large computers, may allow useful predictions within the next 2 or 3 years."[382]

307. President Johnson considered that the publication of the report was justified by public interest. At the next annual meeting of the American Petroleum Institute, Frank Ikard, the then President of the American Petroleum Institute, summarized the report's content and made a few side notes:

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[379] Lyndon B. Johnson, Special Message to the Congress on Conservation and Restoration of Natural Beauty, 8 Feb. 1965 (available at: https://www.presidency.ucsb.edu/documents/special-message-the-congress-conservation-and-restoration-natural-beauty).

[380] *Restoring the Quality of our Environment: Report of the Environmental Pollution Panel, President's Science Advisory Committee*, White House, Nov. 1965 (available at: https://www.climatefiles.com/climate-change-evidence/presidents-report-atmospher-carbon-dioxide/).

[381] *Ibid.*, Appendix Y4, p. 113 (emphasis added); see also p. 114 (where the report refers to a number of scientists whose findings confirm their conclusions).

[382] *Ibid.*, Appendix Y4, p. 127.

> "This report unquestionably will fan emotions, raise fears, and bring demands for action. The substance of the report is that there is still time to save the world's peoples from the catastrophic consequence of pollution but the time is running out . . . One of the most important predictions of the report is that carbon dioxide is being added to the earth's atmosphere by the burning of coal, oil, and natural gas at such a rate that by the year 2000 the heat balance will be so modified as possibly to cause marked changes in climate beyond local or even national efforts . . . There are more than 100 recommendations in this sweeping report, and I commend it to your study. Implementation of even some of them will keep local, state, and federal legislative bodies, as well as the petroleum and other industries, at work for generations."[383]

308. There is also evidence that, in the two decades after 1950, it became increasingly clear that greenhouse gas emissions were damaging the climate system[384]. This evidence concerns both the United States of America and other developed countries.

309. Thus, Burkina Faso considers that between 1950 and 1970, the States concerned knew and/or had the means to know the precise consequences of greenhouse gas emissions. The extremely serious danger that greenhouse gas emissions posed to humans justified using these means to prevent harm to the climate system and other parts of the environment. Moreover, if oil companies could reach such conclusions on the basis of scientific tests, in the face of increasingly critical public opinion on air pollution, it is evident that the States referred to in question *(b)* also had the technical means to carry out such tests. In this regard, the oil companies' actions are revealing of the fact that these States knew or should have known that activities taking place on their territories risked affecting the rights of third States, peoples or individuals, as well as the climate system and other parts of the environment. Burkina Faso therefore concludes that the States referred to in question *(b)* had fairly precise knowledge of the risk of violations of international law, and that this risk justified the fulfilment of their due diligence obligations.

(iii) The States referred to in question *(b)* failed to take the necessary measures to prevent harm to the climate system and other parts of the environment, and to human rights

310. Burkina Faso observes that there is consensus that the States concerned failed, throughout the three periods identified above, to take adequate measures to prevent greenhouse gas emissions, in particular carbon dioxide, from causing harm to the rights of States, individuals and peoples. Burkina Faso concludes, therefore, that they have violated various rules of international law imposing due diligence obligations on them in relation to greenhouse gas emissions. In this regard, Burkina Faso recalls that, according to the IPCC, 42 per cent of historical cumulative emissions of CO_2 were released after 1990:

> "Historical cumulative net CO_2 emissions from 1850 to 2019 were 2400 $\pm$ 240 $GtCO_2$ (high confidence). Of these, more than half (58%) occurred between 1850 and 1989 [1400 $\pm$ 195 $GtCO_2$], *and about 42% between 1990 and 2019*

[383] Frank Ikard, "Meeting the Challenges of 1966", presented at a general session during the 45th annual meeting of the American Petroleum Institute, *Proceedings of the American Petroleum Institute*, 1965, Vol. 45 (I), p. 13.

[384] On this subject, see the list of official documents collected by the website Climatefiles: Hard to Find Documents All in One Place (available at: https://www.climatefiles.com/collection-index/).

[1000 ± 90 $GtCO_2$]. About 17% of historical cumulative net CO_2 emissions since 1850 occurred between 2010 and 2019 [410 ± 30 $GtCO_2$]."[385]

311. The IPCC further estimated in 2014 that greenhouse gas emissions increased by 70 per cent between 1970 and 2004:

> "Global total annual anthropogenic GHG emissions, weighted by their 100-year GWPs, have grown by 70% between 1970 and 2004. As a result of anthropogenic emissions, atmospheric concentrations of N_2O now far exceed pre-industrial values spanning many thousands of years, and those of CH4 and CO_2 now far exceed the natural range over the last 650,000 years."[386]

312. Also according to the IPCC, "[t]he observed average rate of heating of the climate system increased from 0.50 [0.32 to 0.69] W m^{-2} for the period 1971-2006 to 0.79 [0.52 to 1.06] W m^{-2} for the period 2006-2018 (*high confidence*)."[387]

313. Finally, it can be seen from the CO_2 emissions table that this curve has been steadily increasing since the 1950s and that it has shown no response to the growing body of evidence of the adverse effects of greenhouse gas emissions **(see Table *(h)* below)**[388].

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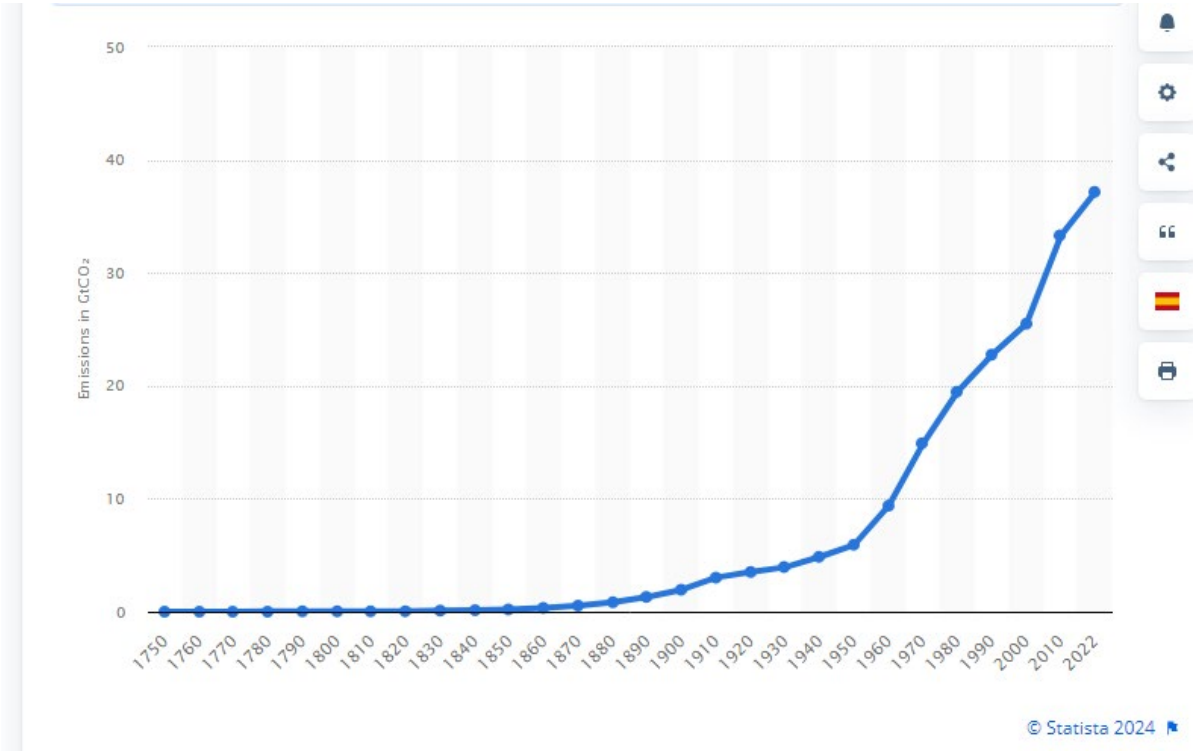
[385] IPCC, 2022: Summary for Policymakers, in: Climate Change 2022: Mitigation of Climate Change. Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, p. 6, B.1.3 (available at: https://www.ipcc.ch/report/ar6/wg3/downloads/report/IPCC_AR6_WGIII_SummaryForPolicymakers.pdf).

[386] IPCC, Climate Change 2007: Synthesis Report, p. 72 (available at: https://www.ipcc.ch/site/assets/uploads/2018/02/ar4_syr_full_report.pdf), Robust findings 6.1. The relevant passage reads as follows:

> "Global total annual anthropogenic GHG emissions, weighted by their 100-year GWPs, have grown by 70% between 1970 and 2004. As a result of anthropogenic emissions, atmospheric concentrations of N_2O now far exceed pre-industrial values spanning many thousands of years, and those of CH4 and CO_2 now far exceed the natural range over the last 650,000 years . . . Most of the global average warming over the past 50 years is *very likely* due to anthropogenic GHG increases and it is *likely* that there is a discernible human-induced warming averaged over each continent (except Antarctica) . . . Anthropogenic warming over the last three decades has *likely* had a discernible influence at the global scale on observed changes in many physical and biological systems." (Emphasis in the original.)

[387] IPCC, 2021: Summary for Policymakers, in: Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment, Report of the Intergovernmental Panel on Climate Change, p. 11, A.4.2 (available at: https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_SPM.pdf).

[388] See "Historical carbon dioxide emissions from global fossil fuel combustion and industrial processes in selected years from 1750 to 2022" (available at: https://www.statista.com/statistics/264699/worldwide-co2-emissions/).



[Table *(h)*]

(b) ***The breach by the States referred to in question* (b) *of their specific obligation to take the lead in combating climate change***

314. Burkina Faso recalls that by virtue of the United Nations Framework Convention on Climate Change, Annex I States undertook to take the lead in combating climate change by significantly reducing their greenhouse gas emissions and increasing their sinks and reservoirs of greenhouse gases, so as to achieve the objective of stabilizing greenhouse gas concentrations in the atmosphere in 2003[389].

315. Burkina Faso notes that Annex I States have not achieved that objective. Indeed, assessments by the United Nations [Economic] Commission for Europe show that their greenhouse gas emissions, which were already well above average, have remained rather stable. They are represented in the table below **(Table *(i)*)**[390].

[389] See Section IV.B.1.a.iii of this written statement.

[390] See: https://w3.unece.org/SDG/en/Indicator?id=174.

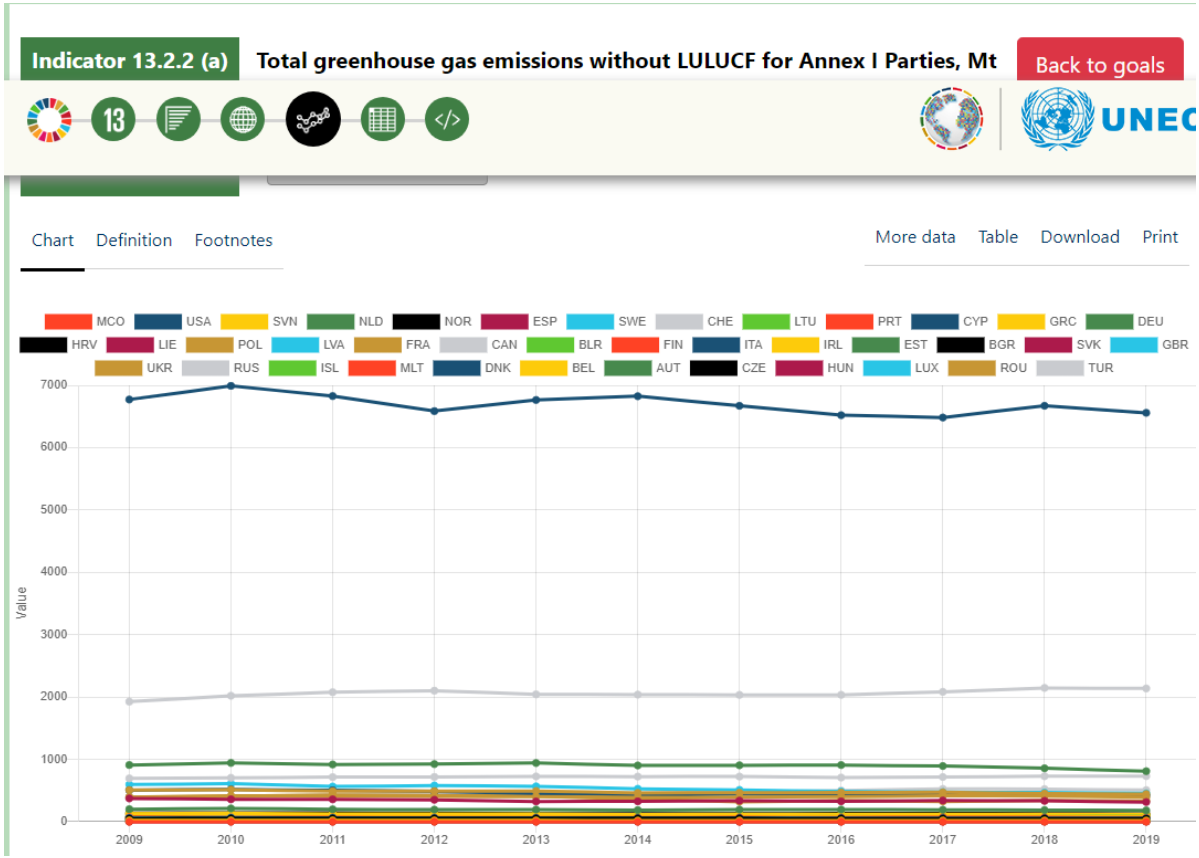


Table *(i)*: Greenhouse gas emissions by Annex I States, with the exception of emissions of greenhouse gases not related to land use and forestry

316. Burkina Faso recalls that the IPCC has also observed that there is a gap between the greenhouse gas emission reductions promised through nationally determined contributions and those that are required in order to achieve the objective of the Paris Agreement:

> "A substantial 'emissions gap' exists between global GHG emissions in 2030 associated with the implementation of NDCs announced prior to COP26 and those associated with modelled mitigation pathways that limit warming to 1.5°C (>50%) with no or limited overshoot or limit warming to 2°C (>67%) assuming immediate action (*high confidence*). This would make it *likely* that warming will exceed 1.5°C during the 21st century (*high confidence*). Global modelled mitigation pathways that limit warming to 1.5°C (>50%) with no or limited overshoot or limit warming to 2°C (>67%) assuming immediate action imply deep global GHG emissions reductions this decade (*high confidence*) (see SPM Box 1, Table 1, B.6). Modelled pathways that are consistent with NDCs announced prior to COP26 until 2030 and assume no increase in ambition thereafter have higher emissions, leading to a median global warming of 2.8 [2.1 to 3.4]°C by 2100 (*medium confidence*). Many countries have signalled an intention to achieve net zero GHG or net zero CO_2 by around mid-century but pledges differ across countries in terms of scope and specificity, and limited policies are to date in place to deliver on them . . .
>
> Policy coverage is uneven across sectors (*high confidence*). Policies implemented by the end of 2020 are projected to result in higher global GHG emissions in 2030 than emissions implied by NDCs, indicating an 'implementation gap' (*high confidence*).

> Without a strengthening of policies, global warming of 3.2 [2.2 to 3.5]°C is projected by 2100 (*medium confidence*)."[391]

317. The Emissions Gap Report 2023 produced by the United Nations Environment Programme ("UNEP") identifies the countries responsible for this gap. It states that

> "[t]he top seven global emitters remain the same as in 2021: Brazil, China, India, Indonesia, the European Union, the Russian Federation and the United States of America . . . Collectively, and with the addition of international transport, these emitters accounted for a total of 33 $GtCO_2$ in 2021, or 65 per cent of global emissions on a territorial basis, including national inventory-based LULUCF CO_2 [Land Use, Land-Use Change and Forestry]. Combined, the G20 accounted for 76 per cent of global emissions. By contrast, least developed countries accounted for 3.8 per cent of global emissions, while small island developing States contributed less than 1 per cent."[392]

318. In addition, Burkina Faso notes that the losses and damage that were meant to be stabilized through actions by the States listed in Annex I to the Framework Convention have already occurred. Thus the IPCC states that

> "[h]uman-induced climate change, including more frequent and intense extreme events, has caused widespread adverse impacts and related losses and damages to nature and people, beyond natural climate variability . . . The rise in weather and climate extremes has led to some irreversible impacts as natural and human systems are pushed beyond their ability to adapt."[393]

319. In this regard, Burkina Faso considers that Article 8, paragraph 1, of the Paris Agreement reflects the consensus of the States parties to the United Nations Framework Convention on Climate Change that the damage and losses that it was intended to prevent have come about. Indeed, in acknowledging the need to minimize and remedy the losses and damage associated with the adverse effects of climate change, this provision acknowledges that such losses and damage have already occurred[394]. Burkina Faso therefore concludes that the States concerned have committed an internationally wrongful act because they have failed to meet their obligation to take the lead in combating climate change by substantially reducing their greenhouse gas emissions and increasing the capacity of their greenhouse gas sinks and reservoirs.

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[391] IPCC, 2023: Summary for Policymakers, Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, p. 20, B.6 and B.6.1 (available at: https://www.ipcc.ch/report/sixth-assessment-report-cycle/).

[392] United Nations Environment Programme (UNEP), Emissions Gap Report 2023: Broken Record. Temperatures reach new highs, yet world fails to cut emissions (again), Nov. 2023, p. 6 (available at: https://wedocs.unep.org/bitstream/handle/20.500.11822/43922/EGR2023.pdf?sequence=3&isAllowed=y).

[393] IPCC, 2022: Summary for Policymakers, in: Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, p. 9, B.1, (available at: https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_SummaryForPolicymakers.pdf).

[394] See Art. 8, para. 1, of the Paris Agreement, Paris, 12 Dec. 2015, *UNTS*, Vol. 3156, p. 79: "Parties recognize the importance of averting, minimizing and addressing loss and damage associated with the adverse effects of climate change, including extreme weather events and slow onset events, and the role of sustainable development in reducing the risk of loss and damage." (available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-7-d&chapter=27&clang=_fr).

(c) ***The breach of the obligation not to adopt legislative, administrative or other measures that promote or facilitate greenhouse gas emissions by third parties, including private persons, and to revoke any such measures already adopted***

320. Burkina Faso recalls that States are under an obligation not to adopt legislative, administrative or other measures that promote emissions of greenhouse gases by third parties, including private persons, and to revoke any such measures already adopted. This obligation stems from their general obligation of due diligence aimed at ensuring that activities on their territories do not cause harm to the climate system or other parts of the environment, or to the rights of third parties protected by international law.

321. In this context, Burkina Faso observes that the States concerned have continued to provide financial aid and subsidies for the production and consumption of fossil fuels. According to a 2023 study by the International Monetary Fund, government subsidies have reached an all-time high of approximately US$7 trillion. About 50 per cent of these subsidies have been allocated to petroleum products, 30 per cent to coal, and 20 per cent to gas. China remains the world's largest provider of subsidies for petroleum products, followed by Russia, the European Union and India. The summary of the study speaks for itself:

> "This paper provides a comprehensive global, regional, and country-level update of: (i) efficient fossil fuel prices to reflect supply and environmental costs; and (ii) subsidies implied by charging below efficient fuel prices. Globally, fossil fuel subsidies were $7 trillion in 2022 or 7.1 percent of GDP. Explicit subsidies (undercharging for supply costs) have more than doubled since 2020 but are still only 18 percent of the total subsidy, while nearly 60 percent is due to undercharging for global warming and local air pollution. Differences between efficient prices and retail fuel prices remain large and pervasive. For example, 80 percent of global coal consumption was priced at below half of its efficient level in 2022. Full fossil fuel price reform would reduce global carbon dioxide emissions to an estimated 43 percent below baseline levels in 2030 (in line with keeping global warming to 1.5-2°C), raise revenues worth 3.6 percent of global GDP, and prevent 1.6 million local air pollution deaths per year. Accompanying spreadsheets provide detailed results for 170 countries."[395]

322. Similarly, UNEP's Production Gap Report 2023 concludes that

> "[w]hile 17 of the 20 countries profiled have pledged to achieve net-zero emissions, and many have launched initiatives to reduce emissions from fossil fuel production activities, most continue to promote, subsidize, support, and plan on the expansion of fossil fuel production. None have committed to reduce coal, oil, and gas production in line with limiting warming to 1.5°C."[396]

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[395] S. Black, A. Liu, I. Parry, N. Vernon, "IMF Fossil Fuel Subsidies Data: 2023 Update", IMF Working Paper (Fiscal Affairs Department), WP/23/169, 2023, Washington, DC, Aug. 2023, p. 4 (available at: https://www.elibrary.imf.org/view/journals/001/2023/169/article-A000-en.xml).

[396] UNEP, Production Gap Report 2023: Phasing down or phasing up? Top fossil fuel producers plan even more extraction despite climate promises, Nov. 2023, p. 5 (available at: https://productiongap.org/wp-content/uploads/2023/11/PGR2023_web_rev.pdf). The 20 States concerned are, in alphabetical order: Australia, Brazil, Canada, China, Colombia, Germany, India, Indonesia, Kazakhstan, Kuwait, Mexico, Nigeria, Qatar, Russian Federation, Saudi Arabia, South Africa, United Arab Emirates, United Kingdom, United States of America. As noted by UNEP, "[a]ltogether, these countries account for 82% of production and 73% of consumption of the world's fossil fuel supply. The status of discourses and policies towards a managed and equitable transition away from fossil fuel production in these countries is also evaluated".

323. It is also clear from that report that States' plans and projections for the production of coal, oil and gas, all of which are fossil fuels, would result in the 1.5°C target not being met. As stated in the report,

> "the increases estimated under the government plans and projections pathways would lead to global production levels in 2030 that are 46%, 29%, and 82% higher for coal, oil, and gas, respectively, than the median 1.5ºC-consistent pathways . . . The disconnect between governments' fossil fuel production plans and their climate pledges is also apparent across all three fuels."[397]

324. These results are especially alarming given that they are at odds with the provisions of the decision on the outcome of the first global stocktake of the implementation of the Paris Agreement (the "Global Stocktake Report 2023"), carried out in accordance with Article 14, paragraph 1, of the Agreement[398]. Indeed, in paragraph 28 *(d)* of that report, the Conference of the Parties [serving as the meeting of the Parties to the Paris Agreement (the "CMA")]:

> "[f]urther recognizes the need for deep, rapid and sustained reductions in greenhouse gas emissions in line with 1.5°C pathways and calls on Parties to contribute to the following global efforts, in a nationally determined manner, taking into account the Paris Agreement and their different national circumstances, pathways and approaches:
>
> . . . . . .
>
> *(d)* [t]ransitioning away from fossil fuels in energy systems, in a just, orderly and equitable manner, accelerating action in this critical decade, so as to achieve net zero by 2050 in keeping with the science"[399].

325. Burkina Faso therefore infers that the States concerned have breached their obligation not to facilitate or promote greenhouse gas emissions through the adoption of administrative, legislative or other measures.

(d) *The obligation to provide financial and technical assistance for mitigating and adapting to climate change*

326. The obligation to provide technical and financial assistance to developing countries primarily concerns the sharing of scientific knowledge and the technology and financing needed to combat climate change and its adverse effects. However, in the Global Stocktake Report 2023, the CMA:

> "*[n]otes* with concern that the adaptation finance gap is widening, and that current levels of climate finance, technology development and transfer, and capacity-building for adaptation remain insufficient to respond to worsening climate change impacts in developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change"[400].

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[397] *Ibid.*, pp. 4-5.

[398] Art. 14, para. 1, of the Paris Agreement, Paris, 12 Dec. 2015, *UNTS*, Vol. 3156, p. 79.

[399] Decision -/CMA.5, Outcome of the first global stocktake, 13 Dec. 2023 (FCCC/PA/CMA/2023/L.17), para. 28 *(d)* (available at: https://unfccc.int/documents/636584).

[400] *Ibid.*, para. 81 (emphasis in the original).

327. With regard to the scientific and technological co-operation needed to support developing countries, Burkina Faso has already demonstrated, in its response to question *(a)*, that provision for this has been made in nearly all treaties containing obligations for States in respect of climate change. Unfortunately, these obligations have never been implemented, and their reiteration in successive treaties is the clearest proof of this. The Global Stocktake Report 2023 bears this out. Indeed, the CMA:

> "*[h]ighlights* the persistent gaps and challenges in technology development and transfer and the uneven pace of adoption of climate technologies around the world and *urges* Parties to address these barriers and strengthen cooperative action, including with non-Party stakeholders, particularly with the private sector, to rapidly scale up the deployment of existing technologies, the fostering of innovation and the development and transfer of new technologies"[401].

328. With regard to climate finance, the Global Stocktake Report 2023 confirms that needs relating to both mitigation and adaptation remain tremendous. The CMA

> "*[h]ighlights* that the adaptation finance needs of developing countries are estimated at USD 215-387 billion annually up until 2030, and that about USD 4.3 trillion per year needs to be invested in clean energy up until 2030, increasing thereafter to USD 5 trillion per year up until 2050, to be able to reach net zero emissions by 2050;
>
> *[n]otes* that scaling up new and additional grant-based, highly concessional finance, and non-debt instruments remains critical to supporting developing countries, particularly as they transition in a just and equitable manner, and *recognizes* that there is a positive connection between having sufficient fiscal space, and climate action and advancing on a pathway towards low emissions and climate-resilient development, building on existing institutions and mechanisms such as the Common Framework"[402].

329. Burkina Faso also recalls that at the Conference in Copenhagen, the States parties to the Framework Convention committed to providing US$100 billion per year to developing countries to address their adaptation needs[403]. This commitment fell far short of what was needed at the time. It falls even shorter of the above-mentioned adaptation needs established on the basis of the Global Stocktake Report 2023. Even though the needs on which the Copenhagen objective was based were underestimated, that objective has still not been achieved. Indeed, at COP26 in Glasgow in 2021, the Conference of the Parties "[n]ote[d] with deep regret" that that goal had yet to be reached and noted with "serious concern" that there was still a long way to go. The Conference of the Parties thus urged developed States, which had yet to increase their climate finance contributions to developing countries, to do so "significantly . . ., including by, as appropriate, considering doubling adaptation finance with the aim of achieving a balance between mitigation and adaptation"[404]. This point was revisited in the Global Stocktake Report 2023, the CMA also noting with regret that the goal of US$100 [b]illion had still not been met[405].

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[401] *Ibid.*, para. 103 (emphasis in the original).

[402] *Ibid.*, paras. 68-69 (emphasis in the original).

[403] See Report of the Conference of the Parties on its fifteenth session, held in Copenhagen from 7 to 19 December 2009, Addendum, 30 Mar. 2010, FCCC/CP/2009/11/Add.1, Copenhagen Accord, p. 7, para. 8 (available at: https://unfccc.int/resource/docs/2009/cop15/fre/11a01f.pdf#page=19). See Section IV.B.1.a.iii.

[404] Decision 4/CP.26, Long-term climate finance (FCCC/CP/2021/12/Add.1 (unfccc.int)), para. 4.

[405] Decision -/CMA.5, Outcome of the first global stocktake, 13 Dec. 2023 (FCCC/PA/CMA/2023/L.17), paras. 80 and 85 (available at: https://unfccc.int/documents/636584).

330. Burkina Faso concludes that the States parties have breached their obligation to co-operate and to provide the financial and technical assistance needed to enable developing States to contribute to the collective response to climate change and to adapt to the adverse effects of greenhouse gas emissions and emissions-related climate change. However, this is not for lack of available means. According to the IPCC, the global financial system has the necessary resources for climate-related adaptation and mitigation:

> "There is sufficient global capital and liquidity to close global investment gaps, given the size of the global financial system, but there are barriers to redirect capital to climate action both within and outside the global financial sector and in the context of economic vulnerabilities and indebtedness facing developing countries. Reducing financing barriers for scaling up financial flows would require clear signalling and support by governments, including a stronger alignment of public finances in order to lower real and perceived regulatory, cost and market barriers and risks and improving the risk-return profile of investments. At the same time, depending on national contexts, financial actors, including investors, financial intermediaries, central banks and financial regulators can shift the systemic underpricing of climate-related risks, and reduce sectoral and regional mismatches between available capital and investment needs (*high confidence*)"[406].

(e) The obligation to co-operate in good faith in addressing the challenges posed by greenhouse gas emissions, climate change and the adverse effects thereof

331. Burkina Faso is of the view that the States referred to in question *(b)* have not co-operated in good faith in addressing the challenges posed by greenhouse gas emissions, emissions-related climate change and the adverse effects thereof. Burkina Faso is aware that a high standard of proof is required to establish that a State has breached the obligation to act in good faith[407]. Indeed, it is a well-established general principle of law that "bad faith is not to be presumed"[408]. Moreover, the general obligation to negotiate in good faith does not require the intended result of the negotiations to be achieved[409]. However, where an obligation calls for negotiation in order to achieve a specific result, its legal import goes beyond that of a mere obligation of conduct. It also requires the adoption of a particular course of conduct, namely pursuing negotiations on the matter in good faith[410]. More specifically, the States concerned are obliged to engage in negotiations in order to solve the challenges posed by greenhouse gas emissions, climate change and the adverse effects thereof. It is therefore not a matter of mere formality. States are under an obligation to conduct themselves in such

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[406] IPCC, 2023: Summary for Policymakers, Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, p. 3, C.7 (available at: https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_SPM.pdf).

[407] *Tacna-Arica question (Chile, Peru)*, Award of 4 Mar. 1925, *RIAA*, Vol. II, p. 930.

[408] *Lac Lanoux (Spain, France)*, Award of 16 Nov. 1957, *RIAA*, Vol. XII, p. 305.

[409] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p. 68, para. 150: "an obligation to negotiate does not imply an obligation to reach an agreement". For a summary of the relevant jurisprudence of the Court, see *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia* v. *Greece), Judgment, I.C.J. Reports 2011 (II)*, p. 685, para. 132.

[410] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 263, para. 99:

> "In these circumstances, the Court appreciates the full importance of the recognition by Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons of an obligation to negotiate in good faith a nuclear disarmament. This provision is worded as follows: 'Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.' The legal import of that obligation goes beyond that of a mere obligation of conduct; the obligation involved here is an obligation to achieve a precise result — nuclear disarmament in all its aspects — by adopting a particular course of conduct, namely, the pursuit of negotiations on the matter in good faith."

a way that the negotiations are meaningful, which is not the case when one of the parties insists upon its own position without contemplating any modification of it[411]. States must therefore pay attention to the rights and interests of all parties[412]. As affirmed by the Arbitral Tribunal in the *Aminoil* case, good faith, as properly understood, requires sustained upkeep of the negotiations over a period appropriate to the circumstances, awareness of the interests of the other party, and a persevering quest for an acceptable compromise[413]. In the *Lac Lanoux* case *(Spain, France)*, the Arbitral Tribunal noted that the commitments to negotiate undertaken by States in treaties

> "take very diverse forms and have a scope which varies according to the manner in which they are defined and according to the procedures intended for their execution; but the reality of the obligations thus undertaken is incontestable and sanctions can be applied in the event, for example, of an unjustified breaking off of the discussions, abnormal delays, disregard of the agreed procedures, systematic refusals to take into consideration adverse proposals or interests, and, more generally, in cases of violation of the rules of good faith"[414].

332. Whether a State has negotiated in good faith can be determined through an overall assessment of its conduct in respect of the object of the negotiations. In his third report on the law of treaties, Special Rapporteur Sir Humphrey Waldock proposed that the provision codifying the principle *pacta sunt servanda* should read as follows:

> "1. A treaty in force is binding upon the parties and must be applied by them in good faith in accordance with its terms and in the light of the general rules of international law governing the interpretation of treaties.
> 2. Good faith, *inter alia*, requires that a party to a treaty shall refrain from any acts calculated to prevent the due execution of the treaty or otherwise to frustrate its objects."[415]

333. Paragraph 2 of the draft article that later became Article 27 of the Vienna Convention on the Law of Treaties was not retained. According to the explanation provided in the ILC's report to the General Assembly,

> "[s]ome members felt that there might be advantage in also stating that a party must abstain from acts calculated to frustrate the objects and purposes of the treaty. The Commission, however, considered that this was implicit in the obligation to perform the

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[411] *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 52, para. 99.

[412] *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia* v. *Greece), Judgment, I.C.J. Reports 2011 (II),* p. 685, para. 132; *Fisheries Jurisdiction (United Kingdom* v. *Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 33, para. 78:

> "In the fresh negotiations which are to take place on the basis of the present Judgment, the Parties will have the benefit of the above appraisal of their respective rights and of certain guidelines defining their scope. The task before them will be to conduct their negotiations on the basis that each must in good faith pay reasonable regard to the legal rights of the other in the waters around Iceland outside the 12-mile limit, thus bringing about an equitable apportionment of the fishing resources based on the facts of the particular situation, and having regard to the interests of other States which have established fishing rights in the area. It is not a matter of finding simply an equitable solution, but an equitable solution derived from the applicable law.".

[413] *Government of the State of Kuwait* v. *The American Independent Oil Company (AMINOIL)*, Award of 24 Mar. 1982, *International Legal Materials*, 1982, Vol. 21, p. 1014.

[414] *Lac Lanoux (Spain, France)*, Award of 16 Nov. 1957, *RIAA*, Vol. XII, p. 307.

[415] ILC, Third Report on the law of treaties, by Sir Humphrey Waldock, Special Rapporteur (document A/CN.4/167 and Add.l-3), p. 3 (available at: https://legal.un.org/ilc/documentation/french/a_cn4_167.pdf).

treaty in good faith and that the rule should be stated in as positive and simple a form as possible."[416]

334. It is therefore possible to determine whether the States referred to in question *(b)* have co-operated in good faith to meet the challenges posed by their cumulative greenhouse gas emissions, emissions-related climate change and the adverse effects thereof, by ascertaining whether those States have refrained from any acts calculated to prevent climate change negotiations or frustrate the object of those negotiations.

335. In Burkina Faso's view, they have not. In the previous section, Burkina Faso demonstrated that rather than refraining from such acts, the States concerned have adopted administrative, legislative and other measures to promote the production and consumption of fossil fuels, on such a scale that it is impossible to reach the 1.5°C target. In addition, these States have consistently failed to meet their obligations to provide the financial and technical assistance needed to enable developing countries to implement their obligations relating to adaptation and the mitigation of greenhouse gas emissions. Finally, one cannot fail to notice the contrast between the lethargy of the States concerned when it comes to significantly reducing greenhouse gas emissions, and the determination and vigour with which they faced the ozone layer depletion crisis.

336. Burkina Faso therefore concludes that the States referred to in question *([b])* have breached their obligation under the Charter to co-operate in good faith with a view to resolving the issues raised by greenhouse gas emissions, emissions-related climate change, and the adverse effects thereof on the environment and on the rights of States, peoples and individuals.

C. The legal consequences of the breaches of international obligations by the States concerned

337. Burkina Faso considers that the Court must determine the legal consequences arising from the breaches by the States concerned of their international obligations in respect of climate change, for "[a] binding determination made by a competent organ of the United Nations to the effect that a situation is illegal cannot remain without consequence"[417].

338. The consequences of the breach by the States concerned of their obligations in respect of climate change are those which emerge from the customary rules of international law on the responsibility of States. In this respect, the ILC has identified the obligation to cease continuing breaches (**2**) and the obligation to make reparation for the injury suffered (**3**) as ordinary legal consequences resulting from any violation of international law. In addition, a special régime of responsibility applies to breaches of the obligation not to cause significant harm to the climate system and the obligation to respect human rights, including the rights of peoples, which are peremptory rules of international law that give rise to *erga omnes* obligations (**4**). First, however, a few self-evident facts must also be recalled (**1**).

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[416] Report of the International Law Commission covering the work of its sixteenth session, 11 May-24 July 1964, Commentary to Art. 55, *YILC*, 1964, Vol. II, pp. 185-186, para. 4.

[417] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 54, para. 117.

1. Some self-evident facts

339. There are two facts which are not, as such, legal consequences of internationally wrongful acts, but which are still worth recalling. First, the States referred to in question *(b)* that have caused harm to the climate system and other parts of the environment remain bound by their obligations in respect of climate change ***(a)***. Second, affected States lose no rights as a result of the adverse effects of climate change ***(b)***.

(a) ***The States referred to in question*** **(b)** ***remain bound by their duty to perform the obligations breached***

340. States that have caused significant harm to the climate system through their greenhouse gas emissions remain bound by, and must comply with, all their international obligations. This is a consequence of the secondary nature of the rules on the international responsibility of States. The breach of an international obligation does not terminate that obligation. On the contrary, a State that has breached its international obligations remains bound by the obligation to perform them[418].

341. Climate change renders the duty to comply with primary obligations a *matter of urgency*; the States referred to in question *([b])* must urgently fulfil their obligations. This urgency is no doubt attributable to the large number and the significance of the international obligations that have been breached as a result of greenhouse gas emissions. Indeed, each of the many obligations breached requires the States concerned to comply with their obligations in respect of climate change. The urgency also stems from the very nature of anthropogenic greenhouse gas emissions, in particular the fact that they have long-term effects. According to the IPCC, some of the harm caused by the carbon dioxide already emitted into the atmosphere will be irreversible for many centuries, and the compound itself may remain in the atmosphere for millennia. In the IPCC's own words:

> "A large fraction of anthropogenic climate change resulting from CO_2 emissions is irreversible on a multi-century to millennial time scale, except in the case of a large net removal of CO_2 from the atmosphere over a sustained period. Surface temperatures will remain approximately constant at elevated levels for many centuries after a complete cessation of net anthropogenic CO_2 emissions. Due to the long time scales of heat transfer from the ocean surface to depth, ocean warming will continue for centuries. Depending on the scenario, about 15 to 40% of emitted CO_2 will remain in the atmosphere longer than 1,000 years."[419]

342. In addition,

> "[s]ome future changes are unavoidable and/or irreversible but can be limited by deep, rapid and sustained global greenhouse gas emissions reduction. The likelihood of abrupt and/or irreversible changes increases with higher global warming levels. Similarly, the

[418] Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, *YILC*, 2001, Vol. II (Part Two), Art. 29, p. 28.

[419] IPCC, 2013: Summary for Policymakers, in: Climate Change 2013: The Physical Science Basis. Contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change, p. 28 (available at: https://www.ipcc.ch/site/assets/uploads/2018/02/WG1AR5_SPM_FINAL.pdf).

probability of low-likelihood outcomes associated with potentially very large adverse impacts increases with higher global warming levels."[420]

343. However, "[c]ontinued emissions will further affect all major climate system components. With every additional increment of global warming, changes in extremes continue to become larger."[421]

344. Rigorous compliance with climate change obligations is therefore an absolute emergency, not only to protect present generations, but also to give future generations and humanity a chance to adapt to the climate change caused by contemporary emissions of greenhouse gases[422].

(b) ***Affected States lose no rights as a result of the internationally wrongful acts caused by greenhouse gas emissions***

345. Burkina Faso argues that the States affected by greenhouse gas emissions, emissions-related climate change and the adverse effects thereof lose no rights. It considers, for example, that States do not lose their rights to maritime spaces as a consequence of sea level rise and coastal erosion caused by significant emissions of greenhouse gases, related changes in climate and the adverse effects thereof. It would be a double punishment to inflict irreversible harm on States, peoples and individuals affected by the consequences of significant greenhouse gas emissions, while also causing them to lose their rights because of the change in circumstances resulting from the internationally wrongful act. Contrariwise, third States cannot avail themselves of rights resulting from an internationally wrongful act or from the consequences of that act. Thus, pre-existing maritime spaces of affected States do not become the high seas, with all the rights that such characterization would give to third States. This follows from the principle *ex iniura non ius oritur*, the validity of which was acknowledged by the Court in the case concerning the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*[423].

2. The States concerned have an obligation to cease and not to repeat the breach of the obligations in question

346. Article 30 of the ILC Draft Articles, which reflects customary international law, provides:

"The State responsible for the internationally wrongful act is under an obligation:

(a) to cease that act, if it is continuing; [and]

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[420] IPCC, 2023: Summary for Policymakers, Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, p. 18, B.3 (available at: https://www.ipcc.ch/report/sixth-assessment-report-cycle/).

[421] *Ibid.*, p. 12, B.1.3.

[422] See Decision -/CMA.5, Outcome of the first global stocktake, 13 Dec. 2023 (FCCC/PA/CMA/2023/L.17), para. 25 (available at: https://unfccc.int/documents/636584): "25. *Express[ing]* concern that the carbon budget consistent with achieving the Paris Agreement temperature goal is now small and being rapidly depleted and acknowledg[ing] that historical cumulative net carbon dioxide emissions already account for about four fifths of the total carbon budget for a 50 per cent probability of limiting global warming to 1.5°C".

[423] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 76, para. 133.

(b) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require."[424]

347. In the case concerning *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening)*, the Court observed that,

> "[a]ccording to general international law on the responsibility of States for internationally wrongful acts, as expressed in this respect by Article 30 *(a)* of the International Law Commission's Articles on the subject, the State responsible for an internationally wrongful act is under an obligation to cease that act, if it is continuing. Furthermore, even if the act in question has ended, the State responsible is under an obligation to re-establish, by way of reparation, the situation which existed before the wrongful act was committed, provided that re-establishment is not materially impossible and that it does not involve a burden for that State out of all proportion to the benefit deriving from restitution instead of compensation. This rule is reflected in Article 35 of the International Law Commission's Articles."[425]

348. Burkina Faso contends that States that have caused significant harm through their actions and omissions relating to greenhouse gas emissions have committed continuing wrongful acts. According to the ILC, "a continuing wrongful act is one which has been commenced but has not been completed at the relevant time"[426].

349. With particular regard to the obligation to prevent harm to the climate system and other parts of the environment, Burkina Faso recalls that "the obligation to prevent transboundary damage by air pollution . . . [is] breached for as long as the pollution continue[s] to be emitted. Indeed, in such cases the breach may be progressively aggravated by the failure to suppress it."[427]

350. Other obligations include the specific obligation to take the lead in the global response to greenhouse gas emissions, climate change and the adverse effects thereof; the obligation not to adopt measures that promote or facilitate greenhouse gas emissions, and to revoke any such measures already adopted; the obligation to provide the technical and financial assistance needed to enable developing States to mitigate their greenhouse gas emissions and adapt to the adverse effects of climate change; the obligation to co-operate and show solidarity with developing countries and countries affected by climate change; and, finally, the obligation to co-operate in good faith in addressing the challenges posed by greenhouse gas emissions and related changes in climate, and in ensuring the global response to the effects thereof.

351. Accordingly, the States concerned must repeal all administrative, legislative and other measures, including aid, subsidies and other incentives for the production or consumption of fossil fuels. They must also take all measures necessary to ensure that the activities taking place on their territories, in particular those of oil companies, do not cause harm to third parties, including States, peoples and individuals. Finally, they must take all measures necessary to provide developing

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[424] Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, *YILC*, 2001, Vol. II (Part Two), Art. 30, p. 28.

[425] *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening), Judgment, I.C.J. Reports 2012 (I)*, p. 153, para. 137.

[426] Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, *YILC*, 2001, Vol. II (Part Two), Commentary to Art. 14, p. 60, para. 5.

[427] *Ibid.*, p. 62, para. 14.

countries with the technical and financial assistance they need in order to address the challenges of climate change. In this respect, a State cannot invoke the absence of such administrative, judicial or legislative measures to justify breaching its international obligations[428].

352. Specifically, according to the IPCC, the level of effort required is as follows:

> "All global modelled pathways that limit warming to 1.5°C (>50%) with no or limited overshoot, and those that limit warming to 2°C (>67%), involve rapid and deep and, in most cases, immediate greenhouse gas emissions reductions in all sectors this decade"; "Deep, rapid and sustained mitigation and accelerated implementation of adaptation actions in this decade would reduce projected losses and damages for humans and ecosystems . . . and deliver many co-benefits, especially for air quality and health . . . Delayed mitigation and adaptation action would lock in high-emissions infrastructure, raise risks of stranded assets and cost-escalation, reduce feasibility, and increase losses and damages . . . Near-term actions involve high up-front investments and potentially disruptive changes that can be lessened by a range of enabling policies"; and "Net zero CO_2 energy systems entail: a substantial reduction in overall fossil fuel use, minimal use of unabated fossil fuels"[429].

353. According to UNEP's Emissions Gap Report 202[2], global greenhouse gas emissions should be reduced by 45 per cent over the next eight years[430]. UNEP's Production Gap Report 2023, for its part, clarifies that

> "to stay on track to achieve net-zero CO_2 emissions by mid-century and limit long-term warming to 1.5C, global production of all three fossil fuels needs to decline substantially between now and 2050, in parallel with other key climate mitigation strategies such as reducing fossil fuel demand, increasing renewable energy generation, and reducing methane emissions from all sources, including oil and gas production activities"[431].

354. Burkina Faso notes that in the Global Stocktake Report 2023, the CMA adopted these conclusions and recognized that

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[428] *L. F. H. Neer and Pauline Neer (U.S.A.)* v. *United Mexican States*, Award of 15 Oct. 1926, *RIAA*, Vol. IV, pp. 61-62:

> "Without attempting to announce a precise formula, it is in the opinion of the Commission possible to go a little further than the authors quoted, and to hold (first) that the propriety of governmental acts should be put to the test of international standards, and (second) that the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency. *Whether the insufficiency proceeds from deficient execution of an intelligent law or from the fact that the laws of the country do not empower the authorities to measure up to international standards is immaterial*." (Emphasis added.)

[429] IPCC, 2023: Summary for Policymakers, Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, p. 20, B.6; p. 25, C.2; p. 28, C.3.2 (available at: https://www.ipcc.ch/report/sixth-assessment-report-cycle/).

[430] UNEP, Emissions Gap Report 2022: The Closing Window — Climate crisis calls for rapid transformation of societies, executive summary at page xvi, (available at: https://www.unep.org/resources/emissions-gap-report-2022?gclid=EAIaIQobChMIjO2oxJST_gIVuBoGAB2YvQ5LEAAYASAAEgKv7PD_BwE).

[431] UNEP, Production Gap Report 2023: Phasing down or phasing up? Top fossil fuel producers plan even more extraction despite climate promises, Nov. 2023, p. 27 (available at: https://productiongap.org/wp-content/uploads/2023/11/PGR2023_web_rev.pdf).

> "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"[432].

3. The States concerned have an obligation to make full reparation for the injury caused by their internationally wrongful acts

355. Burkina Faso recalls that "it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation"[433]. In this regard, by breaching their climate-related obligations, in particular the obligations to protect and preserve the climate system and to co-operate and show solidarity with the States, peoples and individuals most affected, the States referred to in question *(b)* have an obligation to make reparation for the injury caused. In the section below, Burkina Faso will identify the injury covered by the obligation to make reparation ***(a)***. It will then discuss the content of that obligation ***(b)***, before turning finally to the matter of compensation (**[b.ii]**).

(a) *The injury caused by the States concerned through the breach of their obligations*

356. Burkina Faso recalls that any injury caused by the breach by the States concerned of their international obligations entails an obligation to make reparation. Article 31 of the ILC Draft Articles provides:

> "1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.
>
> 2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State."[434]

357. According to the ILC,

> "[t]he notion of 'injury', defined in paragraph 2, is to be understood as including any damage caused by that act. In particular, in accordance with paragraph 2, 'injury' includes any material or moral damage caused thereby. This formulation is intended both as inclusive, covering both material and moral damage broadly understood, and as limitative, excluding merely abstract concerns or general interests of a State which is individually unaffected by the breach. 'Material' damage here refers to damage to property or other interests of the State and its nationals which is assessable in financial terms. 'Moral' damage includes such items as individual pain and suffering, loss of

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[432] Decision -/CMA.5, Outcome of the first global stocktake, 13 Dec. 2023 (FCCC/PA/CMA/2023/L.17), para. 27 (available at: https://unfccc.int/documents/636584).

[433] *Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17*, p. 29. See also *Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9*, p. 21: "[r]eparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself. Differences relating to reparations, which may be due by reason of failure to apply a convention, are consequently differences relating to its application."

[434] Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, YILC, 2001, Vol. II (Part Two), Art. 31, p. 28.

> loved ones or personal affront associated with an intrusion on one's home or private life."[435]

358. Burkina Faso is of the view that three categories of damage can be considered to have been caused by the obligations breached by the States referred to in the General Assembly's question *([b])*. These include *(a)* environmental damage, including damage to the climate, *(b)* damage to humanity resulting from the violation of human rights and, finally, *(c)* socio-economic damage deriving from the socio-economic consequences of greenhouse gas emissions, emissions-related climate change and the adverse effects thereof.

359. Burkina Faso considers that these three types of injury were "caused" or "result from" the internationally wrongful acts committed by the States referred to in question *(b)*. According to the jurisprudence of the Court, the condition of causality requires the establishment of "a sufficiently direct and certain causal nexus between the wrongful act . . . and the injury suffered by the Applicant, consisting of all damage of any type, material or moral"[436].

360. In addition, "the causal nexus required may vary depending on the primary rule violated and the nature and extent of the injury"[437]. Burkina Faso contends that the nature of the existential injury caused by greenhouse gas emissions (which takes place in the short, medium and long term), and [its] extent (vast and at various levels), are such that there is no need for flexibility in establishing the existence of the causal nexus.

361. *With regard to environmental harm*, Burkina Faso recalls that, according to the jurisprudence of the Court,

> "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. These are difficulties that must be addressed as and when they arise in light of the facts of the case at hand and the evidence presented to the Court. Ultimately, it is for the Court to decide whether there is a sufficient causal nexus between the wrongful act and the injury suffered."[438]

362. However, in the case at hand, the IPCC has already demonstrated with a high degree of certainty that there is a causal link between anthropogenic greenhouse gas emissions, climate change and certain climate disasters, namely rising temperatures, droughts and fires, land degradation,

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[435] *Ibid*., Commentary to Art. 31, pp. 91-92, para. 5.

[436] *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.

[437] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Reparations, Judgment, I.C.J. Reports 2022 (I)*, p. 48, para. 93.

[438] See also *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:

> "In 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. These are difficulties that must be addressed as and when they arise in light of the facts of the case at hand and the evidence presented to the Court. Ultimately, it is for the Court to decide whether there is a sufficient causal nexus between the wrongful act and the injury suffered."

freshwater resource scarcity, flooding, soil depletion, sea level rise, coastal erosion, loss of biodiversity, ocean acidification and rising ocean temperatures[439].

363. *Regarding damage to humanity*, Burkina Faso contends that this damage has already taken place. Burkina Faso has already demonstrated, on the basis of IPCC reports, that climate change caused by greenhouse gas emissions has had adverse effects on the enjoyment of human rights. In this regard, it refers to the above-mentioned conclusions A.2.2, A.2.4 and A.2.5 of the Summary for Policymakers of the IPCC's sixth Synthesis Report. Burkina Faso notes that these conclusions of the IPCC are expressed with a high level of confidence[440].

364. *Concerning socio-economic damage*, Burkina Faso is of the view that the socio-economic crises throughout the Sahelian strip, including in Burkina Faso, are partly the result of harm caused by anthropogenic greenhouse gas emissions and emissions-related climate change. According to the IPCC,

> "[c]limate change is contributing to humanitarian crises where climate hazards interact with high vulnerability (*high confidence*). Climate and weather extremes are increasingly driving displacement in all regions (*high confidence*), with Small Island States disproportionately affected (*high confidence*). Flood and drought-related acute food insecurity and malnutrition have increased in Africa (*high confidence*) and Central and South America (*high confidence*). While non-climatic factors are the dominant drivers of existing intrastate violent conflicts, in some assessed regions extreme weather and climate events have had a small, adverse impact on their length, severity or frequency, but the statistical association is weak (*medium confidence*). Through displacement and involuntary migration from extreme weather and climate events, climate change has generated and perpetuated vulnerability (*medium confidence*)"[441].

365. Further on, the IPCC report states that West Africa is one of the regions whose populations are highly vulnerable to the effects of climate change:

> "Regions and people with considerable development constraints have high vulnerability to climatic hazards (*high confidence*). Global hotspots of high human vulnerability are found particularly in West-, Central- and East Africa, South Asia, Central and South America, Small Island Developing States and the Arctic (*high confidence*). Vulnerability is higher in locations with poverty, governance challenges and limited access to basic services and resources, violent conflict and high levels of climate-sensitive livelihoods (e.g., smallholder farmers, pastoralists, fishing communities) (*high confidence*). Between 2010–2020, human mortality from floods, droughts and storms was 15 times higher in highly vulnerable regions, compared to regions with very low vulnerability (*high confidence*). Vulnerability at different spatial levels is exacerbated by inequity and marginalization linked to gender, ethnicity, low income or combinations thereof (*high confidence*), especially for many Indigenous

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[439] See above, Section I.A.2.

[440] See Section IV.B.2.b. See also IPCC, 2023: Summary for Policymakers, Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, p. 5, A.2.2, p. 6, A.2.4 and A.2.5 (available at: https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_SPM.pdf).

[441] IPCC, 2022: Summary for Policymakers, in: Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, p. 11, B.1.7 (available at: https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_SummaryForPolicymakers.pdf).

> Peoples and local communities (*high confidence*). Present development challenges causing high vulnerability are influenced by historical and ongoing patterns of inequity such as colonialism, especially for many Indigenous Peoples and local communities (*high confidence*)."[442]

366. Burkina Faso notes that the Security Council — the United Nations body with primary responsibility for peacekeeping — has acknowledged the link between climate change and instability in Africa. In its resolution 2349 (2017), the Security Council "[r]ecogniz[ed] the interconnectedness of the challenges facing the Lake Chad Basin and the wider Sahel region and encourag[ed] greater regional and international coherence in addressing these challenges". It affirmed that it

> "*[r]ecognises the adverse effects of climate change and ecological changes* among other factors *on the stability of the Region*, including through water scarcity, drought, desertification, land degradation, and food insecurity, and emphasises the need for adequate risk assessments and risk management strategies by governments and the United Nations relating to these factors"[443].

367. Burkina Faso further notes that both the Security Council and the IPCC refer to the fact that there are multiple causes of the socio-economic and security situation in the Sahel. In this regard, the Court clarified in the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)* that

> "the fact that the damage was the result of concurrent causes is not sufficient to exempt the Respondent from any obligation to make reparation . . . [I]n certain situations in which multiple causes attributable to two or more actors have resulted in injury, a single actor may be required to make full reparation for the damage suffered . . . In other situations, in which the conduct of multiple actors has given rise to injury, responsibility for part of such injury should instead be allocated among those actors"[444].

368. Burkina Faso therefore does not deny that the socio-political and security crisis taking place on its territory, as in almost all countries of the Sahel, has multiple causes and disastrous humanitarian consequences. However, a fair proportion of this should also be attributed to those States which, through their acts and omissions relating to greenhouse gas emissions, have contributed to this situation. To this end, Burkina Faso recalls that its vulnerability to climate change is also at least partially rooted in historical crimes, such as slavery and colonization, committed by some of the States referred to in question *(b)*.

(b) ***The content of the obligation to make reparation for the injury suffered***

369. Burkina Faso contends that the content of the obligation to make reparation for the injury suffered as a result of the significant greenhouse gas emissions that have caused climate change must be determined in the light of customary international law on international responsibility. This includes restitution (**i**) as well as — in the event that restitution is not materially possible or is out of all proportion — compensation (**ii**) and satisfaction. This is what emerges from Article 34 of the ILC

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[442] *Ibid.*, p. 12, B.2.4.

[443] Security Council resolution 2349 (2017), 31 Mar. 2017, para. 26 (available at: https://undocs.org/Home/Mobile?FinalSymbol=S%2FRES%2F2349(2017)&Language=E&DeviceType=Desktop&LangRequested=False) (emphasis added).

[444] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Reparations, Judgment, I.C.J. Reports 2022 (I)*, pp. 49-50, paras. 97-98.

Draft Articles, which in some respects reflect customary international law. In view of the seriousness of the harm caused by greenhouse gas emissions and emissions-related climate change, satisfaction cannot be an appropriate form of reparation in the context of these advisory proceedings.

(i) The obligation to restore the *status quo ante*

370. Pursuant to Article 35 of the ILC Draft Articles, which reflects customary international law in this respect,

> "[a] State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:
>
> *(a)* Is not materially impossible;
>
> *(b)* Does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation."[445]

371. The Permanent Court of International Justice has explained in this regard that

> "[t]he essential principle contained in the actual notion of an illegal act — a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals — is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it — such are the principles which should serve to determine the amount of compensation due for an act contrary to international law."[446]

372. Burkina Faso considers that restitution can be made for certain aspects of the harm caused by the breach by the States concerned of their international obligations in respect of climate change.

373. As regards environmental harm, restitution may include restoring the environment to its prior condition. In the case concerning *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua*), the Court was of the opinion that "active restoration measures may be required in order to return the environment to its prior condition, in so far as that is possible"[447]. In the specific case of the Sahel, the States referred to in question *(b)* must assist the countries of the Sahel region in financing the construction of the Great Green Wall, which is aimed at restoring the vegetation cover that existed there previously and preventing continued land degradation. They also have an obligation to support these countries' active efforts to restore land degraded by climate change.

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[445] Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, *YILC*, 2001, Vol. II (Part Two), Art. 35, p. 28.

[446] *Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17*, p. 47.

[447] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Compensation, Judgment, I.C.J. Reports 2018 (I)*, pp. 28-29, paras. 42-43.

374. Restitution may also be applicable with regard to territorial and property rights affected by sea level rise resulting from greenhouse gas emissions. In this regard, the ILC has wisely noted that "[r]estitution may take the form of material restoration or return of territory, persons or property, or the reversal of some juridical act, or some combination of them"[448]. As far as the loss of territories is concerned, restitution requires the States in question to help identify new territories for affected States that would lose their own as a result of climate change. It also requires them to support affected States in their efforts to reclaim territories that would be affected by coastal erosion. The States referred to in question *(b)* are further required to support the affected States in adopting physical adaptation measures to combat such erosion.

375. Finally, restitution applies to losses of revenue resulting from the adverse effects of greenhouse gas emissions, in particular climate change. This observation applies especially to States whose economic foundations are affected by greenhouse gas emissions, emissions-related climate change and the adverse effects thereof. Such is the case of Burkina Faso, which has an agricultural economy and is thus particularly vulnerable to rising temperatures, desertification and water scarcity. In addition, restitution requires the States concerned to show solidarity in addressing the development challenges posed by greenhouse gas emissions, emissions-related climate change and the adverse effects thereof. As the IPCC explains,

> "[o]pportunities for climate resilient development are not equitably distributed around the world (*very high confidence*). Climate impacts and risks exacerbate vulnerability and social and economic inequities and consequently increase persistent and acute development challenges, especially in developing regions and sub-regions, and in particularly exposed sites, including coasts, small islands, deserts, mountains and polar regions. This in turn undermines efforts to achieve sustainable development, particularly for vulnerable and marginalized communities (*very high confidence*)."[449]

376. Burkina Faso is conscious of the difficulty that may arise in attempting to restore the climate system to the state it was in prior to the climate change caused by significant greenhouse gas emissions. In this respect, the obligation of restitution requires the States concerned to give themselves the resources they need to achieve that goal. This includes researching and developing the necessary technology and means to mitigate greenhouse gas emissions, reduce their concentration in the atmosphere and adapt to their consequences. According to the International Law Commission, "[t]he term 'restitution' in article 35 thus has a broad meaning, encompassing any action that needs to be taken by the responsible State to restore the situation resulting from its internationally wrongful act"[450].

(ii) The obligation to provide compensation for the injury suffered

377. The above-mentioned Article 35 of the ILC Draft Articles provides for compensation when it is established that restitution is materially impossible or involves a burden out of all

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[448] Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, *YILC*, 2001, Vol. II (Part Two), Commentary to Art. 35, p. 97, para. 5.

[449] IPCC, 2022: Summary for Policymakers, in: Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, p. 29, D.1.2 (available at: https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_SummaryForPolicymakers.pdf).

[450] Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, *YILC*, 2001, Vol. II (Part Two), Commentary to Art. 35, pp. 97-98, para. 5.

proportion to the benefit that would derive from restitution instead of compensation[451]. Burkina Faso considers that, as with any damage caused by an internationally wrongful act, States that have breached their obligations must provide compensation for the injury suffered by other States, peoples and individuals as a result of these acts.

378. Burkina Faso is of the opinion that the standard of proof for determining compensation for internationally wrongful acts is lower than the standard applied in establishing international responsibility in principle. Such is the case, in particular, where the adverse effects of climate change, such as desertification, cyclones and coastal erosion, have caused evidence to be destroyed or rendered inaccessible. In the words of the Court:

> "In light of the foregoing and given that a large amount of evidence has been destroyed or rendered inaccessible over the years since the armed conflict, the Court is of the view that the standard of proof required to establish responsibility is higher than in the present phase on reparation, which calls for some flexibility."[452]

379. Moreover, "the absence of adequate evidence as to the extent of material damage will not, in all situations, preclude an award of compensation for that damage". 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"[453].

380. *With regard to environmental harm*, Burkina Faso recalls that compensation may be awarded for harm caused to the environment itself, including the climate system, without it being necessary to consider the economic value of the injury suffered by the States, individuals and peoples that receive such compensation. Indeed, according to the Court's jurisprudence,

> "it is consistent with the principles of international law governing the consequences of internationally wrongful acts, including the principle of full reparation, to hold that compensation is due for damage caused to the environment, *in and of itself*, in addition to expenses incurred by an injured State as a consequence of such damage"[454].

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

> "The Court recalls that customary international law provides for restitution as one form of reparation for injury, restitution being the re-establishment of the situation which existed before occurrence of the wrongful act. The Court further recalls that, where restitution is materially impossible or involves a burden out of all proportion to the benefit deriving from it, reparation takes the form of compensation or satisfaction, or even both".

[452] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Reparations, Judgment, I.C.J. Reports 2022 (I)*, p. 56, para. 124.

[453] *Trail smelter case (United States of America, Canada)*, Awards of 16 Apr. 1938 and 11 Mar. 1941, *RIAA*, Vol. III, p. 1920.

[454] *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. 41.

381. More specifically,

> "damage to the environment, and the consequent impairment or loss of the ability of the environment to provide goods and services, is compensable under international law. Such compensation may include indemnification for the impairment or loss of environmental goods and services in the period prior to recovery and payment for the restoration of the damaged environment."[455]

382. *Concerning damage to humanity*, Burkina Faso notes that this damage is immense and must also be compensated[456]. Indeed, according to the Court, "any reparation is intended, as far as possible, to benefit all those who suffered injury resulting from internationally wrongful acts"[457].

383. In this respect, the Human Rights Council has stated that

> "the adverse effects of climate change have a range of implications, both direct and indirect, that increase with greater global warming, for the effective enjoyment of human rights, including, inter alia, the right to life, the right to adequate food, the right to the enjoyment of the highest attainable standard of physical and mental health, the right to adequate housing, the right to self-determination, the rights to safe drinking water and sanitation, the right to work and the right to development, and recalling that in no case may a people be deprived of its own means of subsistence".

384. The Council has also expressed concern that

> "while these implications affect individuals and communities around the world, the adverse effects of climate change are felt most acutely by those segments of the population that are already in vulnerable situations owing to factors such as geography, poverty, gender, age, race, ethnicity, indigenous or minority status where applicable, national or social origin, birth or other status, and disability, among others"[458].

385. Burkina Faso contends that where the States referred to in question *(b)*, by their acts and omissions relating to greenhouse gas emissions, have caused such damage to humanity, they must provide effective remedies to the individuals and peoples whose rights have been violated by greenhouse gas emissions, emissions-related climate change and the adverse effects thereof. As Special Rapporteur Ian Fry has noted, "[f]rom a human rights perspective, loss and damage are

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[455] *Ibid.*, para. 42.

[456] Committee on the Rights of the Child, General comment No. 26 (2023) on children's rights and the environment, with a special focus on climate change (CRC/C/GC/26), 22 Aug. 2023, para. 104: "In the Paris Agreement, the parties addressed the importance of averting, minimizing and addressing loss and damage associated with the adverse impacts of climate change. Through a human rights lens, the adverse impacts of climate change have led to significant losses and damages, in particular for those in the developing world."

[457] See *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Reparations, Judgment, I.C.J. Reports 2022 (I)*, p. 50, para. 102; *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Compensation, Judgment, I.C.J. Reports 2012 (I)*, p. 344, para. 57.

[458] See Human Rights Council resolution 53/6: Human rights and climate change (A/HRC/RES/53/6), 12 July 2023, preambular paras. 18 and 19 (available at: https://documents.un.org/doc/undoc/gen/g23/148/71/pdf/g2314871.pdf?token=kTUaSIJbwHw4v3oJJP&fe=true).

closely related to the right to remedy and the principle of reparations, including restitution, compensation and rehabilitation" [459].

386. Burkina Faso recalls that a similar obligation can be found in Article 235 of the United Nations Convention on the Law of the Sea[460].

387. With regard to the scope of this right to remedy, the States concerned must ensure that it applies equally to harm caused outside their territory and to harm occurring within it. They must also establish in their legislation legal grounds for action against oil companies whose activities cause greenhouse gas emissions-related harm to human rights. Finally, these legal grounds must also include action against States for a failure to exercise due diligence regarding the activities of private persons on their territories which cause harm to human rights, regardless of where that harm occurs[461]. Additionally, the States concerned must co-operate with States of the nationality of those affected by greenhouse gas emissions to ensure the implementation of their right to reparation. In this regard, in the *Daniel Billy* v. *Australia* case, the Human Rights Committee considered that,

> "[p]ursuant to article 2 (3) *(a)* of the Covenant, the State party is under an obligation to provide the authors with an effective remedy. This requires it to make full reparation to individuals whose Covenant rights have been violated. Accordingly, the State party is obligated, inter alia, to provide adequate compensation to the authors for the harm that they have suffered; engage in meaningful consultations with the authors' communities in order to conduct needs assessments; continue its implementation of measures necessary to secure the communities' continued safe existence on their respective islands; and monitor and review the effectiveness of the measures implemented and resolve any deficiencies as soon as practicable. The State party is also under an obligation to take steps to prevent similar violations from occurring in the future."[462]

388. *As regards socio-economic damage*, Burkina Faso contends that this may be compensated if there is a sufficiently direct and certain causal link between the internationally wrongful acts and the damage in question[463]. Burkina Faso noted earlier that greenhouse gas emissions,

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[459] Report of the Special Rapporteur (Ian Fry) on the promotion and protection of human rights in the context of climate change: Promotion and protection of human rights in the context of climate change mitigation, loss and damage and participation (A/77/226), para. 26.

[460] See above-mentioned Art. 235 of the United Nations Convention on the Law of the Sea, Montego Bay, 10 Dec. 1982, *UNTS*, Vol. 1834, p. 3 (available at: https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en).

[461] Office of the United Nations High Commissioner for Human Rights, Human Rights and Climate Change: Key Messages, Message No. 3:

> "Climate change and its impacts, including sea-level rise, extreme weather events, and droughts have already inflicted human rights harms on millions of people. For States and communities on the frontline, survival itself is at stake. Those affected, now and in the future, must have access to meaningful remedies including judicial and other redress mechanisms. The obligations of States in the context of climate change and other environmental harms extend to all rights-holders and to harm that occurs both inside and beyond boundaries. States should be accountable to rights-holders for their contributions to climate change including for failure to adequately regulate the emissions of businesses under their jurisdiction regardless of where such emissions or their harms actually occur" (available at: https://www.ohchr.org/sites/default/files/Documents/Issues/ClimateChange/materials/KMClimateChange.pdf).

[462] *Daniel Billy et al* v. *Australia*: Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3624/2019 (CCPR/C/135/D/3624/2019), 22 Sept. 2022, para. 11.

[463] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Reparations, Judgment, I.C.J. Reports 2022 (I)*, p. 56, para. 124.

emissions-related climate change and the adverse effects thereof cause tremendous socio-economic damage, because they compound the development challenges faced by affected countries while reducing the resources available to them. This direct and certain damage must also be compensated.

4. The special legal consequences applicable to serious breaches of obligations arising from peremptory norms of general international law

389. Burkina Faso contends that the special régime of international responsibility under customary international law is applicable to the breach of certain obligations by States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment. Indeed, customary international law recognizes the existence of a special régime of responsibility applicable to breaches of the most fundamental obligations under contemporary international law. Article 40 of the ILC Draft Articles sets out the following:

> "1. This chapter [on serious breaches of obligations under peremptory norms of general international law] applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law.
>
> 2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation."[464]

390. Article 41 defines the specific consequences of a serious breach of an obligation arising under a peremptory norm of general international law:

> "1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of Article 40.
>
> 2. No State shall recognize as lawful a situation created by a serious breach within the meaning of Article 40, nor render aid or assistance in maintaining that situation.
>
> 3. This article is without prejudice to the other consequences referred to in this part and to such further consequences that a breach to which this chapter applies may entail under international law."[465]

391. Burkina Faso notes that the Court has not yet established the customary character of Articles 40 and 41 of the ILC Draft Articles. Nevertheless, it applied the special régime of international responsibility in its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, at a time when the concept of *jus cogens* had yet to be adopted in its jurisprudence. The Court observed that "the obligations violated by Israel include certain obligations *erga omnes*", notably "the obligation to respect the right of the Palestinian people to self-determination" and certain obligations under international humanitarian law. It concluded that

> "[g]iven the character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction. It is also for all States, while respecting the United Nations Charter and international law,

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[464] Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, *YILC*, 2001, Vol. II (Part Two), Art. 40, pp. 112.

[465] *Ibid.*, Art. 41, pp. 113-114.

> to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end."[466]

392. More recently, in its Advisory Opinion on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, the Court observed that "[s]ince respect for the right to self-determination is an obligation *erga omnes*, all States have a legal interest in protecting that right"[467]. On this basis, it inferred that "the United Kingdom has an obligation to bring to an end its administration of the Chagos Archipelago as rapidly as possible, and that all Member States must co-operate with the United Nations to complete the decolonization of Mauritius"[468].

393. Burkina Faso notes in this regard that the jurisprudence of the Court has recognized breaches of obligations protecting human rights in general, as well as those protecting the right of peoples, as acts giving rise to the special régime of international responsibility. Burkina Faso argues that in addition to these two categories of obligations, the special régime of international responsibility is applicable to breaches of the obligation to protect and preserve the climate system as a whole. According to the International Law Commission, "[t]he obligations referred to in article 40 arise from those substantive rules of conduct that prohibit what has come to be seen as intolerable because of the threat it presents to the survival of States and their peoples and the most basic human values" [469].

394. Indeed, as explained by the Special Rapporteur, Roberto Ago, who proposed this provision,

> "*[c]ontemporary international law has reached the point of condemning outright the practice of certain States* in forcibly keeping other peoples under colonial domination or forcibly imposing internal regimes based on discrimination and the most absolute racial segregation, in imperilling human life and dignity in other ways, or in so acting as *gravely to endanger the preservation and conservation of the human environment*. The international community as a whole, and not merely one or other of its members, now considers that such acts violate principles formally embodied in the Charter and, even outside the scope of the Charter, principles which are now so deeply rooted in the conscience of mankind that they have become particularly essential rules of general international law."[470]

395. In this respect, Burkina Faso notes that the obligation to protect and preserve the climate system and other parts of the environment is mentioned in a footnote to the commentary to Article 40 of the ILC Draft Articles, as an example of an obligation whose breach triggers the special régime of

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[466] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 200, para. 159.

[467] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019 (I)*, p. 139, para. 180.

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

[469] Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, *YILC*, 2001, Vol. II (Part Two), Commentary to Art. 40, p. 112. para. 3.

[470] Report of the International Law Commission on the work of its twenty-eighth session, 3 May-23 July 1976 (UN doc. A/31/10): Fifth report of the Special Rapporteur, Mr Roberto Ago, *YILC*, 1976, Vol. II (Part Two), Commentary to Art. 19, p. 109, para. 33 (emphasis added).

international responsibility[471]. The 2001 Draft Articles therefore capture the *essence* of Article 19 *(d)* of the 1976 version, which included the following among other examples of obligations whose breach would entail the special régime of international responsibility: "a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas"[472].

396. Given the character and the importance of the obligations breached, Burkina Faso contends that the States concerned have an obligation not to recognize as lawful any situation created by breaches of obligations protecting the rights of peoples or calling for the protection and preservation of the climate system. Specifically, States must not recognize any loss of rights to maritime spaces that might arise from the loss of State territories or from the erosion of maritime spaces. Similarly, the States concerned by question *([b])* must not consider as lawful the harm caused by greenhouse gas emissions to third States, peoples and individuals. They must co-operate in good faith to put an end to such harm.

397. To paraphrase the above-cited dictum of the Court in its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the States concerned have an obligation to see to it that any impediment resulting from greenhouse gas emissions — to the exercise of the rights of peoples and human rights, or to the protection of the climate system and other parts of the environment — is brought to an end. Specifically, Burkina Faso emphasizes the need to put an end to injustice in the global financial and economic system. It notes that the vast majority of treaties aimed at protecting the climate system and other parts of the environment concur that inequality in the current economic and financial system is a major impediment to the achievement of their objectives. As an example, Article 3, paragraph 5, of the United Nations Framework Convention on Climate Change states that

> "[t]he Parties should cooperate to promote a supportive and open international economic system that would lead to sustainable economic growth and development in all Parties, particularly developing country Parties, thus enabling them better to address the problems of climate change"[473].

398. The States parties reaffirmed this obligation during the first global stocktake[474]. Importantly, they noted that the fight against climate change will not be successful if the global

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[471] See Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, *YILC*, 2001, Vol. II (Part Two), p. 113, fn 651; see also Draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*), with commentaries, *YILC*, 2001, Vol. II (Part Two), pp. 88-89, para. 15.

[472] Report of the International Law Commission on the work of its twenty-eighth session, 3 May-23 July 1976 (UN doc. A/31/10): Fifth report of the Special Rapporteur, Mr Roberto Ago, *YILC*, 1976, Vol. II (Part Two), Art. 19, p. 96.

[473] Art. 3 of the United Nations Framework Convention on Climate Change, New York, 9 May 1992, *UNTS*, Vol. 1771, p. 1007 (available at: https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXVII-7&chapter=27&Temp=mtdsg3&clang=_en); see also Art. 5, para. 3, of the Montreal Protocol on Substances that Deplete the Ozone Layer (with annex), concluded in Montreal on 16 Sept. 1987, *UNTS*, Vol. 1522, p. 29 (available at: https://treaties.un.org/doc/publication/unts/volume%201522/volume-1522-i-26369-english.pdf); Art. 12 of the United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, Paris, 14 Oct. 1994, *UNTS*, Vol. 1954, p. 3 (available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-10&chapter=27&clang=_en); sixth preambular para. of the United Nations Convention on the Law of the Sea, Montego Bay, 10 Dec. 1982, *UNTS*, Vol. 1834, p. 3 (available at: https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en).

[474] Decision -/CMA.5, Outcome of the first global stocktake, 13 Dec. 2023 (FCCC/PA/CMA/2023/L.17), para. 54 (available at: https://unfccc.int/documents/636584).

financial and economic system is not reformed to facilitate the access of developing countries to capital through methods other than debt. The CMA

> "[*n*]*otes* that scaling up new and additional grant-based, highly concessional finance, and non-debt instruments remains critical to supporting developing countries, particularly as they transition in a just and equitable manner, and *recognizes* that there is a positive connection between having sufficient fiscal space, and climate action and advancing on a pathway towards low emissions and climate-resilient development, building on existing institutions and mechanisms such as the Common Framework"[475].

399. The idea of reforming the global economic and financial system is not just an exhortation or the expression of a pious wish. Such reform is an imperative that developing countries have been calling for since the early 1970s in their struggle for a new international economic order. Unfortunately, the establishment of a new fair and equitable economic order was met with fierce opposition from certain States whose greenhouse gas emissions have caused significant harm to the climate system, with a disproportionate impact on developing countries. General Assembly resolution 3201 adopting the Declaration on the Establishment of a New International Economic Order incisively notes that

> "the interests of the developed countries and those of the developing countries can no longer be isolated from each other, that there is a close interrelationship between the prosperity of the developed countries and the growth and development of the developing countries, and that the prosperity of the international community as a whole depends upon the prosperity of its constituent parts. International co-operation for development is the shared goal and common duty of all countries."

400. The new international economic order should be founded on respect for a number of principles, including the following:

> "*(c)* Full and effective participation on the basis of equality of all countries in the solving of world economic problems in the common interest of all countries, bearing in mind the necessity to ensure the accelerated development of all the developing countries, *while devoting particular attention to the adoption of special measures in favour of the least developed, land-locked and island developing countries as well as those developing countries most seriously affected by economic crises and natural calamities, without losing sight of the interests of other developing countries*;
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> . . . . . .
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> *(j)* Just and equitable relationship between the prices of raw materials, primary commodities, manufactured and semi-manufactured goods exported by developing countries and the prices of raw materials, primary commodities, manufactures, capital goods and equipment imported by them with the aim of bringing about sustained improvement in their unsatisfactory terms of trade and the expansion of the world economy;
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> *(k) Extension of active assistance to developing countries by the whole international community,* free of any political or military conditions;

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[475] *Ibid.*, paras. 68-69 (emphasis in the original).

(l) Ensuring that one of the main aims of the reformed international monetary system shall be the promotion of the development of the developing countries and the adequate flow of real resources to them"[476].

401. Creating a fair and equitable economic and financial system that facilitates the access of developing countries to capital is not just an idea whose necessity has been belatedly recognized. It is a secondary obligation arising from the violation of peremptory norms of international law entailing *erga omnes* obligations, namely the obligation to protect and preserve the climate system, the rights of peoples and other human rights. In this respect, the States concerned by question *(b)*, which are the main architects and beneficiaries of the current global economic and financial system, must initiate its reform in keeping with the approach set out in the Declaration on the Establishment of a New International Economic Order and the Charter of the Economic Rights and Duties of States[477].

D. The legal consequences arising from the principle of unjust enrichment

402. In the previous sections, Burkina Faso has proved that the acts and omissions of the States concerned by question *(b)* are in breach of their international obligations in respect of climate change and thus entail their international responsibility. In the section below, Burkina Faso will consider another basis for the legal consequences of the significant harm caused to the climate system and other parts of the environment by the acts and omissions of the States concerned, namely the principle of unjust enrichment. The prohibition of unjust enrichment is based on the general principle of justice and equity and does not require a wrongful act to be committed, although nor does it exclude that possibility. It is an intrinsically flexible means of preventing one or more parties to a legal relationship from unduly enriching themselves, to the detriment of one or more third parties.

403. Burkina Faso argues that the principle of unjust enrichment is a general principle of law within the meaning of Article 38 of the Statute of the International Court of Justice. This point of

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[476] General Assembly resolution 3201 (S-VI): Declaration on the Establishment of a New International Economic Order, 1 May 1974 (emphasis added).

[477] See General Assembly resolution 3281 (XXIX): Charter of Economic Rights and Duties of States, 12 Dec. 1974. Art. 25 of the Charter, one aim of which was the "protection, preservation and enhancement of the environment", recalled, *inter alia*, that

> "[i]n furtherance of world economic development, the international community, especially its developed members, *shall pay special attention to the particular needs and problems of the least developed among the developing countries*, of land-locked developing countries and also island developing countries, with a view to helping them to overcome their particular difficulties and thus contribute to their economic and social development" (emphasis added).

Art. 30 also stresses the fact that "[t]he environmental policies of all States should enhance and not adversely affect the present and future development potential of developing countries".

view is confirmed both by the literature[478] and by a long list of arbitral awards[479]. Indeed, the principle of unjust enrichment can be found, in one form or another, in all domestic legal systems[480].

404. Burkina Faso observes that the principle of unjust enrichment is already applied in the law of international responsibility. It is this principle that prohibits the awarding of punitive or exemplary damages[481]. This is why, in the present advisory proceedings, Burkina Faso is not calling for exemplary damages as a penalty for the breaches by the States referred to in question *(b)* of their obligations with respect to climate change. In this regard, Burkina Faso agrees with the explanations provided by Umpire Parker in the *Lusitania Cases (United States of America*/*Germany)*[482]. Nevertheless, although the respondent must not be subjected to punitive or exemplary damages, as this might unduly enrich the victim, nor does the respondent have any right to enrich itself unjustly

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[478] Bin Cheng, *General principles of law as applied by international courts and tribunals*, Cambridge, The Burlington Press, 1987, p. 236; Christoph H. Schreuer, "Unjustified Enrichment in International Law", *American Journal of Comparative Law*, Vol. 22, 1974, p. 281; Charles Manga Fombad, "The Principle of Unjust Enrichment in International Law", *The Comparative and International Law Journal of Southern Africa*, 1997, Vol. 30, No. 2, pp. 120-130.

[479] See, in particular, *Saluka Investments BV* v. *The Czech Republic, PCA (Case No. 2001-04)*, Partial Award, 17 Mar. 2006, para. 449: "The concept of unjust enrichment is recognised as a general principle of international law. It gives one party a right of restitution of anything of value that has been taken or received by the other party without a legal justification"; *Libyan American Oil Company (Liamco)* v. *Government of the Libyan Arab Republic, International Law Reports*, 1982, Vol. 62, p. 175:

> "Moreover, in the absence of that primary law of the [72] contract, the same Paragraph provides as a secondary choice to apply subsidiarily 'the general principles of law as may have been applied by international tribunals'. These general principles are usually embodied in most recognized legal systems, and particularly in Libyan legislation, including its modern codes and Islamic law. *They are applied by municipal courts and are mainly referred to in international and arbitral case-law*. They, thus, form a compendium of legal precepts and maxims, universally accepted in theory and practice. Instances of such precepts are, inter alia, the principle of the sanctity of property and contracts, the respect, of acquired vested rights, *the prohibition of unjust enrichment*, the obligation of compensation in cases of expropriation and wrongful damage, etc." (emphasis added);

Isaiah, Claimant v. *Bank Mellat (as Successor to International Bank of Iran), Respondent, International Law Reports*, 1987, Vol. 72, p. 721, para. 41: "restitutionary theories such as unjust enrichment and *enrichissement sans cause* are found in the laws of many nations . . . In international law unjust enrichment is an important element of state responsibility".

[480] See Ben Juratowicz and James Schaerf, "Unjust Enrichment as a Primary Rule of International Law", in: Mads Andenas *et al*., *General Principles and the Coherence of International Law*, Leiden, Boston/Brill-Nijhoff, 2019, pp. 233-240.

[481] See e.g. the jurisprudence of Court in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Reparations, Judgment, I.C.J. Reports 2022*, p. 50, para. 102, where the Court refers to its Judgment in the case concerning *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. 31: "The Court has held that compensation may be an appropriate form of reparation, particularly in those cases where restitution is materially impossible or unduly burdensome . . . Compensation should not, however, have a punitive or exemplary character."

[482] *Opinion in the Lusitania Cases (United States of America*/*Germany)*, 1 Nov. 1923, *RIAA*, Vol. VII, p. 39:

> "the words exemplary, vindictive, or punitive as applied to damages are misnomers. The fundamental concept of 'damages' is satisfaction, reparation for a loss suffered; a judicially ascertained compensation for wrong. The remedy should be commensurate with the loss, so that the injured party may be made whole. The superimposing of a penalty in addition to full compensation and naming it damages, with the qualifying word exemplary, vindictive, or punitive, is a hopeless confusion of terms, inevitably leading to confusion of thought. Many of the American authorities lay down the rule that where no actual damage has been suffered no exemplary damages can be allowed, giving as a reason that the latter are awarded, not because the plaintiff has any right to recover them, but because the defendant deserves punishment for his wrongful acts; and that, as the plaintiff can not maintain an action merely to inflict punishment upon a supposed wrongdoer, if he has no cause of action independent of a supposed right to recover exemplary damages, he has no cause of action at all. It is apparent that the theory of the rule is not based upon any right of the plaintiff to receive the award assessed against the defendant, but that the defendant should be punished. The more enlightened principles of government and of law clothe the state with the sole power to punish but insure to the individual full, adequate, and complete compensation for a wrong inflicted to his detriment".

by creating a burden of harm and inflicting it on the victim of the internationally wrongful act. The principle of unjust enrichment also justifies "equitable considerations" being taken into account when awarding compensation, even if evidence as to the extent of the harm cannot be provided[483]. In this regard, Burkina Faso notes that the Court has justified the application of such "equitable considerations" by referring to the Arbitral Award of the Tribunal in the *Trail smelter case (United States of America, Canada)*. To recall, in that Award, the Tribunal stated:

> "Where 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."[484]

405. Burkina Faso considers that it would be a perversion of "fundamental principles of justice" to deny all relief to injured States, peoples and individuals — and thereby relieve those responsible for the serious and multifaceted injury caused by greenhouse gas emissions — on the pretext that the States concerned by question *(b)* were unaware of the adverse effects of greenhouse gases or of the extent of their impact.

406. Three conditions must generally be met in order for legal action based on the principle of unjust enrichment to succeed. According to the Iran-US Claims Tribunal,

> "[t]here must have been [a] an enrichment of one party to the detriment of the other, and both must arise as a consequence of the same act or event. There must be [b] no justification for the enrichment, and [c] no contractual or other remedy available to the injured party whereby he might seek compensation from the party enriched."[485]

407. Burkina Faso contends that these three conditions are met with respect to the harm caused by the greenhouse gases emitted by the States concerned by question *(b)*, emissions-related climate change and the adverse effects thereof. *First*, there has been an enrichment of the States that have emitted significant quantities of greenhouse gases and thereby caused significant harm to the climate system. In fact, these States have converted a common good, namely the climate system, into a private good for their own benefit. *Second*, this enrichment is unjust and has no legal basis whatsoever. Indeed, there is no rule of international law authorizing the climate system to be polluted by greenhouse gas emissions to the detriment of third States, peoples and individuals. It is also unjust because it constitutes an existential threat to humanity. Furthermore, this unjust enrichment disproportionately burdens peoples whom a number of the States concerned by question *(b)* had already made vulnerable through slavery and colonization. It is as if these peoples have been perpetually sacrificed for the sake of the States concerned by question *(b)*. *Third*, Burkina Faso is invoking the principle of unjust enrichment only in so far as reparation for certain aspects of the injury caused by greenhouse gas emissions would not be made in full through application of the general rules on the international responsibility of States for internationally wrongful acts. In this respect, Burkina Faso recalls that its written statement has focused on greenhouse gas emissions since the 1950s, without prejudice to the harm caused by earlier greenhouse gas emissions.

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[483] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Compensation, Judgment, I.C.J. Reports 2018 (I)*, pp. 26-27, para. 35.

[484] *Trail smelter case (United States of America, Canada),* Awards of 16 Apr. 1938 and 11 Mar. 1941, *RIAA*, Vol. III, p. 1920 (emphasis added).

[485] *Sea-Land Service, Inc* v. *Iran*, 6 Iran-U.S. Claims Tribunal. Rep. 149, p. 169.

408. Burkina Faso therefore concludes that the principle of unjust enrichment also provides a legal basis for compensating for harm to the climate system and to certain parts of the environment. Consequently, any harm that cannot be compensated for under the rules on the responsibility of States for internationally wrongful acts must be compensated for under the principle of unjust enrichment. There is also nothing to stop the Court from applying the general principle of unjust enrichment when determining the scope of the obligation of due diligence so as to prevent responsibility being evaded. In this sense, the principle of unjust enrichment would reflect "equity *infra legem*, that is, that form of equity which constitutes a method of interpretation of the law in force, and is one of its attributes"[486].

E. Conclusion on question *(b)*

409. In conclusion, Burkina Faso contends that the ordinary rules on international responsibility apply to the harm that the States concerned by question *(b)* have caused to the climate system and other parts of the environment. There are two distinct yet complementary legal bases for the legal consequences of the acts and omissions of the States concerned that have caused significant harm to the climate system and other parts of the environment, namely the responsibility of States for internationally wrongful acts and the principle of unjust enrichment.

410. In the light of these two legal bases, where States, by their acts or omissions relating to anthropogenic emissions of greenhouse gases, have caused significant harm to the climate system and other parts of the environment, they must:

(1) rigorously comply, as a matter of urgency, with all their obligations relating to greenhouse gas emissions, in particular by drastically and rapidly reducing their greenhouse gas emissions in accordance with the best available scientific knowledge and by reducing and limiting their emissions economy-wide;

(2) repeal their legislative, administrative or other measures that promote or facilitate greenhouse gas emissions, in particular subsidies and aid for the production or consumption of fossil fuels;

(3) provide financial and technical support for the countries affected by the adverse effects of greenhouse gas emissions, prioritizing as a matter of urgency the countries of the Sahel and small island countries, in particular by showing solidarity with their efforts to (i) regenerate the environment destroyed by the adverse effects of greenhouse gas emissions, (ii) adapt to the adverse effects of climate change and (iii) ensure the sustainable economic development of their peoples;

(4) make full reparation for the injury suffered by the States, peoples and individuals most affected by the effects of climate change, including by granting compensation for the injury suffered, and, to this end, create effective remedies enabling States, peoples and individuals to obtain compensation for harm that cannot be made good by restitution, irrespective of where that harm occurred;

(5) remove all impediments to the protection of the climate system and to the enjoyment and effective fulfilment of human rights and the rights of peoples, in particular by reforming the international economic, financial and monetary system so that developing countries can enjoy effective and stable access to the capital needed to protect and preserve the climate system;

(6) co-operate in good faith with developing countries to put an end, by lawful means, to violations by the States referred to in question *(b)* of their obligation not to cause significant harm to the

[486] *Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, pp. 567-568, para. 28.

climate system and other parts of the environment as well as to the rights of peoples and human rights;

(7) not recognize as lawful the legal situations created by the violation by the States referred to in question *(b)* of their obligation not to cause significant harm to the climate system, including territories and maritime spaces, and, to this end, oppose any notion that climate change resulting from greenhouse gas emissions may cause affected States, peoples and individuals to lose their rights; and

(8) accordingly, finance scientific research and the development of appropriate techniques to explore possible ways of restoring the climate system to the state that it was in before the emission of large quantities of greenhouse gases caused significant harm to it and other parts of the environment.

CONCLUSION

411. In the light of the analysis above, Burkina Faso has the honour to conclude that the Court's responses to the questions posed by the General Assembly in the request for an advisory opinion set out in resolution 77/276 of 29 March 2023 should include the following elements:

Question *(a)*

412. The obligations of 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 present and future generations are as follows:

(1) the obligation for all States to refrain from causing significant harm to the climate system and other parts of the environment;

(2) the obligation for all States to protect, preserve and improve, both in terms of quantity and quality, the absorption capacity of greenhouse gas reservoirs and sinks;

(3) the obligation for all States to refrain from exacerbating existing vulnerabilities of the climate system and other parts of the environment to the effects of greenhouse gases, particularly in the conservation and exploitation of natural resources;

(4) the obligation for all States to take the necessary measures of prevention to ensure that activities taking place on their territory do not cause significant harm to the climate system and other parts of the environment, and that they do not infringe the rights of States, peoples and individuals;

(5) the obligation for all States to adopt adaptation measures that strengthen the resilience of the climate system and its various parts in the face of the adverse effects of greenhouse gas emissions, and ensure the protection of human rights, including outside their jurisdiction;

(6) the obligation for all States to refrain from adopting legislative, administrative or other measures that encourage or facilitate the emission of greenhouse gases by third parties, including private persons, and the obligation to revoke any such measures already adopted;

(7) the obligation for all States to educate and inform their populations about the causes, consequences and means of combating climate change on the basis of the best available scientific knowledge, and to counter misinformation on the subject;

(8) the obligation for *developed States* to take the lead in the fight against climate change by taking appropriate measures to drastically reduce their greenhouse gas emissions and increase the

number and capacity of their greenhouse gas sinks and reservoirs, and to reduce and limit their emissions economy-wide;

(9) the obligation for *developed States* to provide the technical and financial assistance required by developing countries so that the latter can (i) implement their climate change obligations, (ii) adapt to the adverse effects of climate change in order to protect their populations and the environment, and, lastly, (iii) fulfil the right of their peoples to development.

Question *(b)*

413. Where States, by their acts and omissions relating to anthropogenic emissions of greenhouse gases, have caused significant harm to the climate system and other parts of the environment, they must:

(1) rigorously comply, as a matter of urgency, with all their obligations relating to greenhouse gas emissions, in particular by drastically and rapidly reducing their greenhouse gas emissions in accordance with the best available scientific knowledge and by reducing and limiting their emissions economy-wide;

(2) repeal their legislative, administrative or other measures that promote or facilitate greenhouse gas emissions, in particular subsidies and aid for the production or consumption of fossil fuels;

(3) provide financial and technical support for the countries affected by the adverse effects of greenhouse gas emissions, prioritizing as a matter of urgency the countries of the Sahel and small island countries, in particular by showing solidarity with their efforts to (i) regenerate the environment destroyed by the adverse effects of greenhouse gas emissions, (ii) adapt to the adverse effects of climate change and (iii) ensure the sustainable economic development of their peoples;

(4) make full reparation for the injury suffered by the States, peoples and individuals most affected by the effects of climate change, including by granting compensation for the injury suffered, and, to this end, create effective remedies enabling States, peoples and individuals to obtain compensation for harm that cannot be made good by restitution, irrespective of where that harm occurred;

(5) remove all impediments to the protection of the climate system and to the enjoyment and effective fulfilment of human rights and the rights of peoples, in particular by reforming the international economic, financial and monetary system so that developing countries can enjoy effective and stable access to the capital needed to protect and preserve the climate system;

(6) co-operate in good faith with developing countries to put an end, by lawful means, to violations by the States referred to in question *(b)* of their obligation not to cause significant harm to the climate system and other parts of the environment as well as to the rights of peoples and human rights;

(7) not recognize as lawful the legal situations created by the violation by the States referred to in question *(b)* of their obligation not to cause significant harm to the climate system, including territories and maritime spaces, and, to this end, oppose any notion that climate change resulting from greenhouse gas emissions may cause affected States, peoples and individuals to lose their rights; and

(8) accordingly, finance scientific research and the development of appropriate techniques to explore possible ways of restoring the climate system to the state that it was in before the emission of

large quantities of greenhouse gases caused significant harm to it and other parts of the environment.

HE Mr Léopold Tonguenoma BONKOUNGOU,

Ambassador of Burkina Faso in Brussels.

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