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INTERNATIONAL COURT OF JUSTICE

CASE CONCERNING OBLIGATIONS OF STATES IN RESPECT OF CLIMATE CHANGE

(REQUEST FOR ADVISORY OPINION)

WRITTEN COMMENTS OF THE DEMOCRATIC REPUBLIC OF THE CONGO

2 August 2024

[Translation by the Registry]

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1. By an Order dated 15 December 2023, the Court extended to 24 June 2024 the time-limit within which States and organizations having presented written statements on the request for an advisory opinion on the obligations of States in respect of climate change could submit written comments on the other written statements in accordance with Article 66, paragraph 4, of the Statute.

2. The Democratic Republic of the Congo (hereinafter "the DRC") hereby avails itself of that opportunity. The DRC reserves the right to respond, during the oral phase of the proceedings, to aspects of the written statements of other States and organizations that are not addressed in the present comments.

3. As in the DRC's written statement of 4 March 2024, these comments are preceded by a summary intended to facilitate the task of the Court.

SUMMARY

In respect of the first question

1. The UNFCCC and the agreements concluded thereunder do not constitute a *lex specialis* that renders customary international law or other international treaty régimes inapplicable.

It cannot be considered or presumed on the basis of a State's compliance with its obligations under the UNFCCC and the agreements concluded thereunder that this State has fulfilled its obligations under other rules of international law relating to climate change and its effects.

2. The duty of due diligence is being given concrete form in light of the science and international law of climate change.

In terms of *mitigation*, the duty of due diligence entails an obligation to limit the increase in global temperature to 1.5°C. To that end, it implies a specific obligation to make rapid and deep reductions in the use of fossil fuels. This specific obligation emerges from both the scientific findings of the IPCC and the COP28 declarations, in keeping with those findings and as acknowledged in various decisions adopted by the Conferences of the Parties to the UNFCCC or the Conference of the Parties to the Paris Agreement. It therefore cannot be challenged on the grounds that fossil fuel use is necessary for development and for the fight against poverty.

In terms of *adaptation*, the duty of due diligence requires States with the highest greenhouse gas (GHG) emissions to urgently provide funding for adaptation measures for delayed harm, i.e. harm that has already been set in motion but will only manifest itself in the future. This obligation is owed especially in respect of particularly vulnerable developing countries.

3. A State's obligations in respect of persons pursuant to the general principle of non-harmful use of territory recognized by international custom are not limited to persons within its jurisdiction. They cover all persons who have suffered injury caused by action or inaction on its part.

The material scope of these customary obligations is nonetheless narrower than the scope covered by certain international instruments. These obligations do not require States to respect, protect and realize the full range of human rights. They do, however, require States not to seriously infringe fundamental human rights. The responsibility of States with the highest GHG emissions is engaged on this basis, even in respect of persons outside their jurisdiction and control.

In respect of the second question

1. The UNFCCC and the agreements concluded thereunder do not prejudice the application of the general international law of State responsibility.

2. The application of the régime of Article 47 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, whereby each co-perpetrator is responsible for the entirety of the harm caused to victims, depends on the *indivisible nature of that harm*.

The breach of a single obligation by multiple perpetrators is the usual circumstance that gives rise to indivisible harm, but it is not the only one.

In climate matters, the Article 47 régime thus applies to:

— the breach by States of a single obligation. This includes:

— the breach of the duty of due diligence: harm is a constituent element of this breach. However, the harm to the climate system is common to all the States concerned;

— the breach of the obligation to co-operate in climate matters, which breach is necessarily common to the States concerned; and

— breaches of the obligation under Part XII of [UNCLOS] to prevent pollution of the marine environment: in so far as [UNCLOS] defines pollution as the introduction of substances into the marine environment, harm to the climate system is in principle caused by the accumulation of discrete breaches on the part of each State concerned. However, the application of the Article 47 régime is justified in light of the indivisible nature of the harm caused to the climate system.

3. To the extent that the Article 47 régime might not apply,

(i) the existence of harm and of a causal link in a particular case must be assessed in the light of a rebuttable presumption resulting from the scientific knowledge on climate change and its effects; and

(ii) all victims will be entitled to claim reparation from each co-perpetrator in proportion to that State's contribution to anthropogenic GHG emissions. This rule has its basis in the Court's jurisprudence and in the general principles of the law of responsibility whereby the victim of a wrongful act must not be left without any remedy.

I. THE SUBSTANCE OF THE OBLIGATIONS OF STATES AND NON-COMPLIANCE WITH THOSE OBLIGATIONS

4. With regard to the first question put to the Court, the written statements of the other States and international organizations call for the following comments from the DRC in relation to (1) the question whether the United Nations Framework Convention on Climate Change (hereinafter the "UNFCCC") and the agreements concluded thereunder constitute a *lex specialis* rendering general international law and other treaty régimes inapplicable; (2) the application of the duty of care (due diligence) to climate change and its consequences; and (3) the obligations of States as regards activities and events outside their territory.

1. The UNFCCC and the agreements concluded thereunder do not constitute a *lex specialis* that renders customary international law or other international treaty régimes inapplicable

5. Some States and international organizations have argued in their written statements that conventional international law on climate change, which consists of the UNFCCC and the agreements concluded thereunder, constitutes a *lex specialis* that renders customary international law and other treaty régimes inapplicable[1]. Certain written statements focus more specifically on the inapplicability of general international law on the responsibility of States and international organizations for internationally wrongful acts. The DRC will confine itself in this part to the primary obligations, since the applicability of the law of international responsibility will be addressed in relation to the second question put to the Court.

6. The theory discussed below (hereinafter the "*lex specialis* theory") is clearly unfounded, for two reasons. First, it is contradicted by the rules of international law confirmed by the Court's jurisprudence on the coexistence of rules of international law. Second, and most importantly, it is contradicted by the UNFCCC itself and the international agreements concluded thereunder.

(a) *The* lex specialis *régime and the coexistence of rules of international law*

7. The *lex specialis* theory is unfounded, firstly, in light of the rules of international law confirmed by the Court's jurisprudence on the coexistence of legal rules and régimes in international law.

8. In the case concerning *Military and Paramilitary Activities in and against Nicaragua*, the Court found 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"[2].

A fortiori, the rules of customary and conventional international law continue to exist and to apply separately when their content differs, even if they can be applied to the same facts.

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[1] See, in particular, the written statement of Saudi Arabia, paras. 1.7 *et seq.*; the written statement of Kuwait, para. 3; the written statement of OPEC, para. 9; the written statement of the United Kingdom, paras. 28-121; the written statement of the United States of America, paras. 1.3, 1.6, 3.46 *et seq.*, and paras. 4.22 *et seq.*

[2] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, para. 179.

(b) ***The duty of due diligence under the UNFCCC***

9. In addition, the coexistence of the UNFCCC and the duty of due diligence under general international law is confirmed by the UNFCCC itself. The seventh preambular paragraph of the UNFCCC recalls the relevant provisions of the 1972 Stockholm Declaration. The eighth preambular paragraph then recalls, by express reference to the Charter of the United Nations and the principles of international law, the duty of due diligence in environmental matters, as also confirmed by the jurisprudence of the Court[3]:

> "Recalling . . . that States have, *in accordance with the Charter of the United Nations and the principles of international law*, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction"[4].

10. It is thus clear that the authors of the UNFCCC did not intend to render the duty of due diligence provided for by general international law inapplicable. On the contrary, they explicitly recognized its applicability to climate change and the consequences thereof, in parallel with the UNFCCC.

11. This also means that a State's compliance with the duty of due diligence cannot be assessed on the sole basis of the fulfilment of its obligations pursuant to the UNFCCC and the agreements concluded thereunder. If that were the case, the reference to such a duty in the UNFCCC would be deprived of any *effet utile*.

(c) ***International human rights law under the UNFCCC***

12. The same applies with regard to human rights. The UNFCCC contains no express references to international human rights law. The Paris Agreement, however, states the following in its eleventh preambular paragraph:

> "*Acknowledging* that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider *their respective obligations on human rights*, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity"[5].

States' human rights obligations are thus also mentioned as being applicable in relation to climate change and its consequences, alongside their obligations under the Paris Agreement.

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[3] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 242, para. 29; *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, pp. 55-56, para. 101.

[4] United Nations Framework Convention on Climate Change, eighth preambular para. (emphasis added).

[5] Emphasis added.

13. Moreover, the United Nations Human Rights Council and the Human Rights Committee[6], as well as the European Court of Human Rights[7], have already applied international human rights instruments to the impacts of climate change. These decisions of competent bodies confirm that the UNFCCC and the agreements concluded thereunder are not the only instruments applicable to climate change and its effects.

14. None of these bodies considered that compliance with international obligations pursuant to the UNFCCC and the agreements concluded thereunder provided a basis for inferring compliance with international human rights instruments. On the contrary, they emphasized the need for an independent assessment of such compliance.

(d) ***International law of the sea under the UNFCCC***

15. Finally, as regards the international law of the sea, and more specifically the United Nations Convention on the Law of the Sea (UNCLOS), its applicability to climate change and the consequences thereof was confirmed by the International Tribunal for the Law of the Sea (ITLOS) in its Advisory Opinion of 21 May 2024 on the *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*.

16. The Tribunal notably considered that mere compliance with the Paris Agreement is not sufficient to satisfy the obligation under Article 194, paragraph 1, of UNCLOS:

> "223. The Tribunal does not consider that the obligation under article 194, paragraph 1, of the Convention would be satisfied simply by complying with the obligations and commitments under the Paris Agreement. The Convention and the Paris Agreement are separate agreements, with separate sets of obligations. While the Paris Agreement complements the Convention in relation to the obligation to regulate marine pollution from anthropogenic GHG emissions, the former does not supersede the latter. Article 194, paragraph 1, imposes upon States a legal obligation to take all necessary measures to prevent, reduce and control marine pollution from anthropogenic GHG emissions, including measures to reduce such emissions. If a State fails to comply with this obligation, international responsibility would be engaged for that State."

The Tribunal went on to consider that the Paris Agreement is not *lex specialis* to UNCLOS, and thus the principle *lex specialis derogate legi generali* is inapplicable and the Paris Agreement could not in any event undermine UNCLOS:

> "224. The Tribunal also does not consider that the Paris Agreement modifies or limits the obligation under the Convention. In the Tribunal's view, the Paris Agreement is not *lex specialis* to the Convention and thus, in the present context, *lex specialis derogat legi generali* has no place in the interpretation of the Convention. Furthermore, as stated above, the protection and preservation of the marine environment is one of the goals to be achieved by the Convention. Even if the Paris Agreement had an element of *lex specialis* to the Convention, it nonetheless should be applied in such a way as not to frustrate the very goal of the Convention."

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[6] See the written statement of the DRC, paras. 150-151.

[7] See the Grand Chamber Judgment of 9 Apr. 2024 in the case of *Verein KlimaSeniorinnen and Others* v. *Switzerland*, Application No. 53600/20.

(e) ***Conclusion***

17. It follows from the foregoing that the UNFCCC and the agreements concluded thereunder in no way affect the applicability of other rules and principles of international law to climate change and its consequences, in particular the Charter of the United Nations, the duty of due diligence under general international law, international human rights law and the international law of the sea. The applicability of these rules emerges from the UNFCCC itself and from the agreements concluded thereunder.

18. These legal rules and régimes adopt approaches that are fundamentally different in various respects. Therefore, a State that has complied with its obligations pursuant to the UNFCCC and the agreements concluded thereunder cannot be considered or presumed to have thereby complied with its obligations under other rules of international law. This is confirmed by the decisions of the bodies with jurisdiction to interpret and apply those other rules and instruments.

2. The application of the duty of due diligence to climate change and its consequences

19. The foregoing in no way precludes the fact that the UNFCCC and the agreements concluded thereunder, including the Paris Agreement, can and must be taken into account in implementing the duty of due diligence in respect of climate change and its consequences.

(a) ***The implementation of due diligence in the light of the science and international law of climate change***

20. In its Opinion of 21 May 2024 on the *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*, ITLOS thus considered that while the Paris Agreement does not require the parties to reduce their GHG emissions to a specific level according to a mandatory timeline, the temperature goal and the timeline for emission pathways "inform the content of necessary measures to be taken" under UNCLOS:

> "222. In the view of the Tribunal, the UNFCCC and the Paris Agreement, as the primary legal instruments addressing the global problem of climate change, are relevant in interpreting and applying the Convention with respect to marine pollution from anthropogenic GHG emissions. In particular, *the temperature goal and the timeline for emission pathways set out in the Paris Agreement inform the content of necessary measures to be taken under article 194, paragraph 1, of the Convention.* However, the Paris Agreement does not require the Parties to reduce GHG emissions to any specific level according to a mandatory timeline but leaves each Party to determine its own national contributions in this regard."[8]

On these bases, ITLOS concluded in the operative part of its Opinion that the measures that States parties to UNCLOS must take to prevent, reduce and control marine pollution resulting from anthropogenic GHG emissions

> "should be determined objectively, taking into account, *inter alia*, the best available science and relevant international rules and standards contained in climate change treaties such as the UNFCCC and the Paris Agreement, in particular the global

[8] Emphasis added.

> temperature goal of limiting the temperature increase to 1.5°C above pre-industrial levels and the timeline for emission pathways to achieve that goal."[9]

21. As the DRC previously noted in its written statement of March 2024[10], the same applies to the duty of due diligence under general international law.

(b) ***With regard to mitigation***

22. With regard to climate change *mitigation*, the DRC demonstrated in its written statement that States have two key international obligations:

— First, they must limit the increase in global temperature to 1.5°[C], in order to substantially reduce the risks and effects of climate change[11].

— Second, and more specifically, they must make rapid and deep reductions in the use of fossil fuels. Industrialized countries and countries with economies in transition have an obligation to be the first to end this use, in accordance with the principle of common but differentiated responsibilities and respective capabilities[12].

23. Contrary to what is suggested in some of the written statements, namely that of the Organization of the Petroleum Exporting Countries (OPEC)[13], the need to make rapid and deep reductions in the use of fossil fuels is well established.

24. In terms of the science, in its contribution to the Sixth Assessment Report (2022), IPCC Working Group III notes with "high confidence" the need for "rapid and deep and in most cases immediate" GHG emission reductions "in all sectors". The use of carbon dioxide removal methods is mentioned only with a view to "counterbalanc[ing] *residual* GHG emissions"[14].

The due diligence obligation must be given practical expression and applied in the light of the best possible scientific information. It is therefore appropriate to take into account the reports of the IPCC, and not studies conducted by institutions such as OPEC which have an interest in fossil fuel use. The DRC previously demonstrated the scientific value and official character [of these reports] in its written statement of March 2024[15]. Since then, ITLOS noted in its 21 May 2024 Advisory Opinion relating to climate change that

> "the IPCC reports are subject to review and endorsement by the IPCC member countries. According to the IPCC, such endorsement 'acknowledges that the report is a

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[9] ITLOS, *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*, Advisory Opinion of 21 May 2024, p. 160.

[10] Written statement of the DRC, in particular paras. 203-204.

[11] *Ibid.*

[12] *Ibid*., para. 209.

[13] Written statement of OPEC, in particular paras. 24-44.

[14] https://www.ipcc.ch/report/ar6/wg3/, point C.3.

[15] Written statement of the DRC, paras. 24 *et seq*.

> definitive assessment that has been developed following the IPCC's defined procedures, underpinning the report's authority'"[16].

25. In terms of policy and international law, the Glasgow Climate Pact, adopted by COP26 in 2021, states in particular that the Conference of the Parties:

> "[*r*]*ecognizes* that limiting global warming to 1.5°C requires rapid, deep and sustained reductions in global greenhouse gas emissions, including reducing global carbon dioxide emissions by 45 per cent by 2030 relative to the 2010 level and to net zero around mid-century as well as deep reductions in other greenhouse gases"[17].

COP28 subsequently called on the parties to the Paris Agreement to "[*t*]*ransition*[] *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"[18].

26. Thus, some written statements, such as that of OPEC[19], wrongly seek to deny the need to end the use of fossil fuels, on the grounds that the UNFCCC and the Paris Agreement are development agreements aimed at ensuring economic development and combating poverty. COP28 has its origin in these agreements and their development goals. In calling for fossil fuel use to be brought to an end, COP28 has not contradicted those goals. It has taken them fully into account from in two ways:

— first, by advocating the application of the principle of common but differentiated responsibilities and respective capabilities;

— second, because the work of the IPCC makes clear that climate change is the greatest existing threat to development and the fight against poverty.

(c) ***With regard to adaptation***

27. As regards *adaptation* to climate change and its effects, the obligation of due diligence is equally relevant.

28. In its written statement of March 2024, the DRC argued, in response to the *second* question put to the Court, that the obligation to mitigate harm requires funding to be provided for adaptation measures for delayed harm, i.e. harm that has already been set in motion but will only manifest itself in the future[20].

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[16] ITLOS, *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*, Advisory Opinion of 21 May 2024, para. 49.

[17] Decision 1/CMA.3, Glasgow Climate Pact, FCCC/PA/CMA/2021/10/Add.1, p. 4, para. 22.

[18] Decision -/CMA.5, Outcome of the first global stocktake, para 28 *(d)* (emphasis added).

[19] Written statement of OPEC, paras. 25 and *passim*.

[20] Written statement of the DRC, paras. 263 *et seq*.

29. However, this obligation to fund adaptation measures for delayed harm forthwith equally exists under the *primary* obligation of prevention, as a form of due diligence[21].

3. The scope *ratione personae* and *ratione materiae* of the obligations of States

30. In their written statements, some States stressed that international human rights law is binding on States only with regard to individuals within their jurisdiction or under their control[22]. Other States and organizations argued that these obligations apply in respect of all harm — even outside the territory of a State — caused by an activity falling under the jurisdiction or control of that State[23].

31. The DRC observes that while some human rights instruments may be confined to persons within the jurisdiction of the State, the scope of States' obligations under the general principle of non-harmful use of territory recognized by international custom is different. The scope *ratione materiae* of these obligations is narrower, but their scope *ratione personae* is not limited to persons within the State's jurisdiction.

32. The duty of due diligence under general international law is aimed at protecting persons as well as the environment, without it being necessary for these persons to be under the jurisdiction or control (*stricto sensu*) of the State that has caused the harm.

33. Already in the *Trail smelter* case, to which the Court has made reference in recent years[24], the Arbitral Tribunal found that the duty of due diligence applied not only to the territory of foreign States, but also to the property and persons on that territory:

> "[U]nder the principles of international law, . . . 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"[25].

34. This obligation is not confined to persons within the jurisdiction or control of the State causing the harm; quite the contrary. It covers harm to persons under the jurisdiction and control of another State. The criterion triggering the obligation is the existence of a causal link between an activity in the territory of the State causing the harm, and the injury caused outside that territory.

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[21] Comp., e.g., written statement of Portugal, para. 154, for which the duty to co-operate concerns both prevention and reparation; written statement of Albania, paras. 83 *et seq.*, on the duty to co-operate on prevention; written statement of Switzerland, paras. 14 *et seq.*; written statement of Liechtenstein, paras. 72 and 79 on the obligation to prevent foreseeable and serious human rights violations; written statement of Egypt, paras. 108-110.

[22] See, e.g., written statement of the People's Republic of China, paras. 119 and 124; written statement of France, paras. 132-134.

[23] See, e.g., written statement of Antigua and Barbuda, paras. 349 *et seq.*, p. 355; written statement of the Melanesian Spearhead Group, paras. 257 *et seq.*; written statement of Bolivia, para. 53; written statement of Chile, para. 69.

[24] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Compensation, Judgment, I.C.J. Reports 2018 (I)*, para. 35.

[25] *Trail smelter case (United States of America, Canada), Award of 16 Apr. 1938, Reports of International Arbitral Awards*, Vol. III, pp. 1905 *et seq.*, p. 1965.

35. At the same time, this obligation does not have the same scope *ratione materiae* as those deriving from international human rights treaties. In this instance, "serious consequence" must not be caused to persons outside the territory of the State.

36. This restriction *ratione materiae* is also reflected in the "minimum standard of treatment of aliens" that many contemporary investment protection treaties continue to enshrine by reference to international custom[26].

37. The scope of customary obligations thus differs from that of conventional obligations:

— The scope of some conventions is to *respect, protect and fulfil the full range* of human rights held by (only) those persons within the jurisdiction of the State. Indeed, the understanding is that States can fully guarantee these rights only to the extent that they are able to make use of their legislative, administrative and judicial apparatus, which presupposes that the persons concerned are within their jurisdiction;

— The scope of the general principle of non-harmful use of territory recognized by international custom is (solely) to respect, and more specifically *not to seriously infringe*, *the fundamental rights* of all persons, even if they are outside the jurisdiction of the State.

38. Thus, even if some international human rights instruments limit their scope to persons within the jurisdiction of the State, all States have a more general customary obligation not to seriously infringe the human rights of persons within the jurisdiction of another State.

39. Accordingly, the States with the highest GHG emissions bear international responsibility for causing serious harm, through climate change and its effects, to persons outside their jurisdiction.

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[26] See e.g. North American Free Trade Agreement (NAFTA), signed on 17 Dec. 1992, International Legal Materials, Vol. 32, 1993, p. 289; *Mondev International Ltd.* v. *United States of America, Award of 11 Oct. 2002*, ICSID case ARB(AF)/992/2, https://www.italaw.com/cases/documents/716; Nicolas Angelet, "Due diligence in international law: from environmental and economic law to migrant protection", *Verfassungsblog*, 2024, forthcoming.

II. THE LEGAL CONSEQUENCES FOR STATES WHERE THEY, BY THEIR ACTIONS AND OMISSIONS, HAVE CAUSED SIGNIFICANT HARM TO THE CLIMATE SYSTEM AND OTHER PARTS OF THE ENVIRONMENT

40. With regard to the second question put to the Court, the written statements of the other States and international organizations call for the following comments. First, the UNFCCC régime does not affect the application of the general international law of State responsibility (1). Second, State responsibility in climate matters is governed by the régime set out in Article 47 of the Draft Articles on State Responsibility and, additionally or alternatively, by the principles recognized in the jurisprudence of the Court which govern the establishment of causation and the extent of harm in climate matters (2).

1. The UNFCCC and the agreements concluded thereunder do not prejudice the application of the general international law of State responsibility

41. Some written statements, in particular those of the European Union, the Netherlands and China[27], argue that general international law on the responsibility of States and international organizations for internationally wrongful acts cannot be applied to climate change and the harm it causes to States.

42. In its own written statement, the DRC previously observed[28] that Article 8 of the Paris Agreement recognizes as a fact the existence of loss and damage linked to the adverse effects of climate change. However, the UNFCCC and the agreements concluded thereunder do not establish a specific régime of international liability for such loss and damage. In this regard, in Decision 1/CP.21 on the Adoption of the Paris Agreement, the Conference of the Parties to the UNFCCC agreed that "Article 8 of the Agreement does not involve or provide a basis for any liability or compensation"[29]. Thus, Article 8 does not establish a *lex specialis* on the international responsibility of States, nor, therefore, does it in any way preclude the international responsibility of States from being engaged under general international law.

43. More particularly, while its specific purpose is to articulate the relationship between Article 8 of the Paris Agreement and international responsibility, the aforementioned Decision does *not* provide that Article 8 of the Paris Agreement *relieves* responsibility under general or particular international law. States parties to the climate change treaty régime therefore are not relieved of any responsibility they may bear under general international law.

44. This is further confirmed by various declarations made on the occasion of the adoption or ratification of the Paris Agreement. For example, upon signing the Agreement, Fiji made the following declaration:

> "The Government of Fiji declares its understanding that signature of the Convention shall, in no way, constitute a renunciation of any rights under international law concerning state responsibility for the adverse effects of climate change, and that

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[27] Written statement of the European Union, paras. 348 *et seq.*; written statement of the Netherlands, paras. 5.15 *et seq.*; written statement of the People's Republic of China, paras. 132 *et seq.*

[28] Written statement of the DRC, paras. 268-270.

[29] Decision 1/CP.21, Doc. FCCC/CP/2015/10/Add.1 of 21 Jan. 2016, para. 51.

> no provisions in the Convention can be interpreted as derogating from the principles of general international law."[30]

Kiribati, Nauru, Tuvalu and Papua New Guinea made the same or similar declarations[31]. These declarations have not been challenged.

2. The responsibility of States for harm to the climate system and the adverse effects thereof on States, peoples and individuals

45. The written statements of other States and international organizations also call for the comments below.

(a) *Article 47 of the Draft Articles on State Responsibility*

46. In its written statement[32], the DRC made the following arguments in particular:

— States having caused significant harm *to the climate system beyond national jurisdiction* have an obligation *erga omnes* to make reparation for the harm. Indeed, it is clear from Principle 21 of the Stockholm Declaration and from the Court's jurisprudence that the duty of due diligence also requires States to cause no harm to the environment in areas beyond any national jurisdiction. This obligation has an *erga omnes* character by nature. Each State may seek cessation of the breach of this obligation and reparation for the harm caused.

— States having caused significant harm *to other States* as a result of climate change have an individual obligation to make reparation.

— Each State has an individual obligation to make reparation for the entirety of the harm, in accordance with the rule set out in Article 47 of the Articles on the Responsibility of States for Internationally Wrongful Acts, it being understood that (i) States that have made only a negligible contribution to climate change cannot be held internationally responsible; (ii) responsible States may offset their respective debts through a comparison of the respective contributions of the States concerned to global GHG emissions; and (iii) States having caused significant harm to the climate system can limit their responsibility in proportion to their contributions of GHG emissions, by creating a multilateral mechanism ensuring full reparation for the harm caused to injured States.

47. The DRC notes that the régime of Article 47 of the Draft Articles on State Responsibility (hereinafter the "Article 47 régime") was considered relevant by a significant number of States and

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[30] United Nations, Multilateral Treaties Deposited with the Secretary-General, Ch. XXVII.7, pp. 933-934.

[31] *Ibid.*

[32] Written statement of the DRC, paras. 277 *et seq*.

international organizations, including but not limited to Antigua and Barbuda[33], Barbados[34], Vanuatu[35], COSIS[36], Liechtenstein[37], Ecuador[38], Chile[39], Tuvalu[40], Egypt[41] and Mauritius[42].

48. Having read their written statements, the DRC wishes to return to the justification for and scope of the Article 47 régime, as regards the indivisible nature of the harm, on the one hand, and the common breach of a single obligation, on the other. To be more specific, the decisive criterion is the indivisible nature of the harm. The breach of a single obligation is the usual circumstance that may give rise to indivisible harm, but it is not the only one.

49. As Antigua and Barbuda and COSIS recall in their written statements[43], the Court confirmed the existence of the regime in question, without clearly delimiting its scope, in its 2022 Judgment in the case concerning *Armed Activities on the Territory of the Congo*, in which it stated the following:

> "The Court recalls that, in 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 (*Corfu Channel (United Kingdom* v. *Albania), Merits, Judgment, I.C.J. Reports 1949*, pp. 22-23; see commentary to Article 31 of the ILC Articles on State Responsibility, . . . paras. 12-13 . . .). 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"[44].

The commentary of the International Law Commission referred to by the Court noted, in particular, that the decisive question was whether or not an identifiable element of injury could be allocated to a specific cause. If so, the harm would be apportioned. If not, any responsible State could be held responsible for the entirety of the injury:

> "It is true that cases can occur where an identifiable element of injury can properly be allocated to one of several concurrently operating causes alone. But unless some part of the injury can be shown to be severable in causal terms from that attributed to the responsible State, [the latter is held responsible for all the consequences, not being too remote,] of its wrongful conduct."[45]

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[33] Written statement of Antigua and Barbuda, paras. 572 *et seq.*

[34] Written statement of Barbados, paras. 249 *et seq.*

[35] Written statement of Tuvalu, para. 123.

[36] Written statement of COSIS, paras. 163 *et seq.*

[37] Written statement of Liechtenstein, para. 80.

[38] Written statement of Ecuador, paras. 4.17-4.19.

[39] Written statement of Chile, para.100.

[40] Written statement of Tuvalu, para. 47.

[41] Written statement of Egypt, para. 294.

[42] Written statement of Mauritius, paras. 210 *et seq.*

[43] Written statement of Mauritius, paras. 210 *et seq.*

[44] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Reparations, Judgment, I.C.J. Reports 2022 (I)*, para. 98.

[45] International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Commentary to Art. 31, p. 248, para. 13.

Thus, if it is impossible to apportion different elements of injury, the default position is that each actor may be held responsible for the entirety of the injury.

50. This confirms what the DRC demonstrated in its written statement of March 2024[46]. The application of the Article 47 régime is appropriate where the acts (action and inaction) common to the States with the highest GHG emissions have caused *indivisible* harm to the climate system and thus *indivisible* harm to other States, peoples and individuals. Indeed, it is the indivisibility of the harm, and the impossibility for the victim to identify the specific contribution of each co-perpetrator, that justifies the application of this legal régime.

51. This conclusion is particularly true as regards the consequences of a breach of the duty of due diligence. The occurrence of harm is a constituent element of the breach of that duty. To this extent, we are faced not only with indivisible harm, but also with a single or systemic breach, the precise scenario covered by Article 47.

52. As COSIS observed[47], the same applies to the breach of the international obligation to co-operate, which is a single breach common to all States, especially those with the highest GHG emissions.

53. In this context, the Article 47 régime applies to:

— the breach of obligations in respect of *emissions*, i.e. the introduction of substances into the environment, such as the obligation to prevent pollution provided for in Part XII of UNCLOS[48]. Although the present case involves multiple discrete breaches, they have nonetheless resulted in indivisible harm, which justifies the application of the Article 47 régime.

— the breach of the duty of due diligence and the obligation to co-operate, in respect of which the application of the Article 47 régime is justified not only because of the existence of indivisible harm, but also and especially because of the existence of a single breach of an international obligation.

(b) ***Additionally or alternatively: the causal link and the obligation to make reparation***

54. In the event that the Article 47 régime should not be applicable to the consequences of certain breaches, international law would nevertheless require that due account be taken of the nature of the injury and the need to ensure that affected States are not deprived of reparation.

[46] Written statement of the DRC, paras. 296 *et seq*.

[47] Written statement of COSIS, paras. 166-169.

[48] Written statement of the DRC, paras. 211 *et seq*.

55. This requirement notably emerges from the Court's Judgments on compensation in the cases concerning *Ahmadou Sadio Diallo*[49] and *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)*[50].

56. In the latter Judgment, the Court considered that the general rule of *actori incumbit probatio* may be applied flexibly in certain circumstances[51]. With regard to environmental damage, the Court noted that particular issues could arise with respect to the *establishment of the existence of damage and causation*, especially where there are concurrent causes or scientific uncertainties. Such issues then had to be examined in light of the facts of the case:

> "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."[52]

57. These principles must be applied with regard to the harm that the GHG emissions of the highest emitting States cause to the climate system and to States, peoples and individuals. More specifically:

— On a *general* level, the existence of harm and a causal link between anthropogenic GHG emissions and harm to the climate system and to States, peoples and individuals must be assessed in the light of the IPCC reports establishing, as a general matter, that such emissions have caused and continue to cause harm to the climate system, as well as, consequently, various natural phenomena (hurricanes, but also slow-onset events such as rising sea levels, etc.) entailing specific injury to States, peoples and individuals.

— These general observations provide a basis for a rebuttable presumption as to the existence of specific harm and as to the causal link between anthropogenic GHG emissions and this specific harm suffered by a particular State, people or individual.

58. With regard to the *valuation* of harm, the Court recalled in the case concerning *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* that the absence of adequate evidence does not preclude an award of compensation on the basis of equity *infra legem*. Indeed, it would be a perversion of the fundamental principles of justice and law to deny all relief to the victim and to relieve the wrongdoer from the obligation to make reparation, on the pretext that the nature of the wrongful act is such that a precise valuation cannot be established:

> "In respect of the valuation of damage, the Court recalls that 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. For example, in the *Ahmadou Sadio Diallo* case, the Court determined the amount of compensation due on the basis of equitable

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[49] *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Compensation, Judgment, I.C.J. Reports 2012 (I)*.

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

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

[52] *Idem.*

considerations . . . A similar approach was adopted by the Tribunal in the *Trail Smelter* case, which, . . . 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.'"[53]

59. In the context of climate change, the Court's reasoning on the valuation of harm also applies to the establishment of the causal link between anthropogenic GHG emissions and specific harm. Indeed, the contribution of each of the largest GHG emitting States to climate change and its effects has been scientifically demonstrated. The causal link is thus established in principle. What is open to question is the scale of each State's contribution to a particular injury. In the context of climate change, the questions of the establishment of a causal link and the valuation of harm are broadly similar in this regard. The considerations underlying the Court's jurisprudence on the valuation of harm must therefore also be applied when examining the causal link.

60. The primary objective of not denying relief to the victim and not relieving the wrongdoer from the obligation to make reparation, which underpins the assessment based on equity *infra legem* established by the Court, requires in particular that the victim of harm resulting from concurrent causes must *at the very least*[54] be able to claim reparation from each co-perpetrator in proportion to its contribution to anthropogenic GHG emissions.

61. This assessment is still more favourable to the States having caused the injury than to the victims. A wrongdoing State's contribution in proportion to its GHG emissions substantially corresponds to the economic benefits derived from its consumption of fossil fuels or from agriculture, etc. That is what makes the assessment fair from the perspective of the wrongdoing State. The victim, on the other hand, will only rarely obtain reparation for the entirety of the harm it has suffered, in the absence of the ability to take legal action or obtain voluntary compensation from each co-perpetrator. In any event, the victim will never obtain more than full reparation for the harm it has suffered.

62. Therefore, to the extent that the Article 47 régime does not apply, the obligation of States to contribute to reparation for climate harm in proportion to their GHG emissions has a clear foundation in the jurisprudence of the Court and in the general principles of the law of responsibility on which it is based.

(c) *Conclusion*

63. In conclusion on this point, the DRC requests the Court to find that:

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[53] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Compensation, Judgment, I.C.J. Reports 2018 (I)*, para. 35.

[54] In the absence of the ability to claim reparation from each co-perpetrator for the entirety of the injury suffered, as permitted by the above-mentioned Art. 47 régime.

— The régime of Article 47 of the Draft Articles on State Responsibility as set out in detail in the written statement of the DRC is also applicable to the harm resulting from climate change.

— To the extent that this régime might be inapplicable to all or part of the harm resulting from climate change, (i) the existence of such harm and of a causal link in any particular case must be assessed in the light of a rebuttable presumption resulting from the general scientific knowledge on the subject; and (ii) all victims will be entitled to claim reparation from each co-perpetrator in proportion to that State's contribution to anthropogenic GHG emissions.

FINAL SUBMISSIONS

In light of the foregoing, the Democratic Republic of the Congo requests the Court to:

— Uphold all the final submissions set out in the written statement of the Democratic Republic of the Congo of 4 March 2024.

— Find, as a consequence, that the United Nations Framework Convention on Climate Change and the agreements concluded thereunder do not constitute a *lex specialis* that renders general international law, or other treaty régimes such as the United Nations Charter, international human rights instruments and the United Nations Convention on the Law of the Sea, inapplicable. It cannot be considered or presumed on the basis of a State's compliance with its obligations under the UNFCCC and the agreements concluded thereunder that this State has fulfilled its obligations under other relevant rules of international law relating to climate change and its effects.

— Find that, to the extent that the régime of responsibility set out in Article 47 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts might be inapplicable to all or part of the harm resulting from climate change, (i) the existence of such harm and of a causal link in any particular case must be assessed in the light of a rebuttable presumption resulting from the general scientific knowledge on the subject; and (ii) all victims will be entitled to claim reparation from each co-perpetrator in proportion to that State's contribution to anthropogenic GHG emissions.

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Done at Kinshasa, 2 August 2024.

On behalf of the Democratic
Republic of the Congo,

Its Agent,
(Signed) Ivon MINGASHANG.