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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 BURKINA FASO**

**14 August 2024**

*[Translation by the Registry]*

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## INTRODUCTION

1. These written comments are submitted by Burkina Faso in the advisory proceedings relating to the *Obligations of States in respect of Climate Change*, in accordance with the Order of the President of the Court extending the time-limit for such comments to 15 August 2024.

2. Burkina Faso recalls that, by virtue of resolution 77/276 of 29 March 2023, the International Court of Justice was seised of a request for an advisory opinion by the General Assembly, which posed the following two questions:

“Having particular regard to the Charter of the United Nations, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the United Nations Framework Convention on Climate Change, the Paris Agreement, the United Nations Convention on the Law of the Sea, the duty of due diligence, the rights recognized in the Universal Declaration of Human Rights, the principle of prevention of significant harm to the environment and the duty to protect and preserve the marine environment:

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

3. Burkina Faso has already submitted a written statement on the two questions put by the General Assembly, as have 90 other participants in these advisory proceedings. On question (a), Burkina Faso argued that the obligations incumbent on States to ensure the protection of the climate system and other parts of the environment from anthropogenic greenhouse gas emissions consist of one general and nine specific obligations. The general obligation is the duty to protect and preserve the climate system from the adverse effects of anthropogenic greenhouse gas emissions. The specific obligations, for their part, are:

- (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;
- (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 combatting 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.

4. On question (b), Burkina Faso argued that the legal consequences for States where they, by their acts and omissions relating to anthropogenic greenhouse gas emissions, have caused significant harm to the climate system and other parts of the environment are as follows. 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.

5. Burkina Faso observes that the written statements submitted by the various participants in these advisory proceedings illustrate a broad consensus on a number of fundamental points. *First*, none of the participants, except to a certain extent Iran, has staunchly asserted that the Court lacks jurisdiction to render the present advisory opinion or that it should exercise its discretion not to give one. However, some participants have argued that the Court should proceed with caution or adopt a restrictive approach in exercising its power to render an advisory opinion. *Second*, every participant in the proceedings recognizes that States have legal obligations under international law relating to anthropogenic greenhouse gas emissions, and none has argued that these emissions exist in a legal vacuum. However, while some participants have found these obligations in a broad array of rules, others have confined themselves to the United Nations Framework Convention on Climate Change, the Kyoto Protocol and the Paris Agreement alone. *Third*, all participants agree that States have an obligation to reduce their greenhouse gas emissions and to adapt to the adverse effects of those emissions, particularly climate change. *Lastly*, the overwhelming majority of participants agree that there are legal consequences for States that have caused significant harm to the environment by their acts and omissions relating to the emission of greenhouse gases. However, while the vast majority derives these consequences from customary international law on the responsibility of States for internationally wrongful acts, a small minority confines them to the legal consequences provided for by the United Nations Framework Convention on Climate Change, the Kyoto Protocol and the Paris Agreement.

6. Burkina Faso notes that the written statements submitted by the various participants in these proceedings do not call into question either its responses to the two questions put by the General Assembly or the legal reasoning underpinning them. Burkina Faso can therefore afford to be brief at this stage of the proceedings. Its written comments will thus focus on three points. *First*, Burkina Faso will identify the most important aspects of the contribution of its written statement to the advisory proceedings, in the light of the written statements submitted by the other participants (I). *Second*, Burkina Faso will clarify the role of the Court in these proceedings and the way in which the latter must approach the General Assembly's questions. Burkina Faso considers that the Court must address both questions put by the General Assembly in the light of its usual practice and its established jurisprudence (II). *Third*, Burkina Faso will address the fundamental difference in opinion between it (and the vast majority of the participants in these proceedings), on the one hand, and a small number of participants, on the other, namely the question whether the *lex specialis* doctrine has any bearing in these proceedings. Indeed, participants with positions diametrically opposed to Burkina Faso's consider that the questions posed by the General Assembly — which they

misinterpret — are governed by special law (*lex specialis*), which limits the scope of States' obligations in the matter and precludes the attachment thereto of the legal consequences that naturally arise under customary international law on the international responsibility of States (III).

### I. Important aspects of Burkina Faso's contribution to the present advisory proceedings

7. Four points distinguish Burkina Faso's written statement from those of other participants. *First*, Burkina Faso is the only State to have presented a Sahelian country's perspective on the General Assembly's questions. Indeed, Burkina Faso, like all other Sahelian States, is already gravely affected by anthropogenic greenhouse gas emissions and their adverse effects, particularly climate change. Burkina Faso clarified, in the light of international law, that the obligations of States relating to anthropogenic greenhouse gas emissions include their obligations to combat desertification, notably those arising from the United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa<sup>1</sup>. In so doing, Burkina Faso drew attention to the link between anthropogenic greenhouse gas emissions and climate change, and the socio-political and economic crises to which they give rise, especially on the Sahel-Saharan strip, as well as the need for prompt, effective and full reparation for the injury suffered<sup>2</sup>. *Second*, Burkina Faso's written statement clearly defines both the object of the obligations that the Court must identify and the relevant conduct whose legal consequences under the law on the international responsibility of States the Court must determine. Indeed, Burkina Faso argues that "the obligations of States . . . to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases" are all those which are incumbent on them and which protect, both directly and indirectly, the climate system and other parts of the environment<sup>3</sup>. As for the relevant conduct whose legal consequences under the law of international responsibility the Court must identify, this is defined in the very wording of question (b), which refers to the acts and omissions of States relating to anthropogenic emissions of greenhouse gases that have caused significant harm to the climate system and other parts of the environment. *Third*, like the vast majority of participants in these proceedings, Burkina Faso identified several conventional and customary obligations incumbent on States in respect of greenhouse gas emissions<sup>4</sup>. However, Burkina Faso went one step further and demonstrated that this great swathe of norms and obligations, and the international practice relating thereto, prove the existence in customary international law of a general obligation incumbent on all States to protect and preserve the climate system and other parts of the environment<sup>5</sup>. Moreover, Burkina Faso demonstrated that the obligation to protect and preserve the climate system and other parts of the environment is an obligation *erga omnes*, and opposable in this regard to all members of the international community<sup>6</sup>, and that its core requirement, namely the prohibition of acts and omissions causing significant harm to the climate system, is a *jus cogens* norm of contemporary international law<sup>7</sup>. *Finally*, Burkina Faso demonstrated that the legal consequences for States which, by their acts and omissions, have caused significant harm to the climate system and the environment have two bases in international law, namely the law of State responsibility for internationally wrongful acts<sup>8</sup> and the principle of unjust enrichment<sup>9</sup>.

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<sup>1</sup> Written statement of Burkina Faso, paras. 137-141.

<sup>2</sup> *Ibid.*, paras. 377-388.

<sup>3</sup> *Ibid.*, para. 97.

<sup>4</sup> *Ibid.*, Section IV.B.

<sup>5</sup> *Ibid.*, paras. 241-245.

<sup>6</sup> *Ibid.*, para. 401.

<sup>7</sup> *Ibid.*, paras. 395-396.

<sup>8</sup> *Ibid.*, para. 248.

<sup>9</sup> *Ibid.*, paras. 402-408.

Therefore, and taking into account the *erga omnes* and *jus cogens* character of the obligations and norms in question, Burkina Faso concluded that all the consequences provided for by customary international law on international responsibility are applicable to States which, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment. In particular, Burkina Faso emphasized the need to restore the degraded environment through projects such as the African Union's Great Green Wall<sup>10</sup>, as well as the obligation to pay compensation in respect of any injury for which restitution is not possible<sup>11</sup>. It also argued that States have an obligation to remove any impediments to the effective enjoyment by States, peoples and individuals of their rights violated by States' acts and omissions relating to anthropogenic greenhouse gas emissions, in particular by reforming the global financial and economic system<sup>12</sup>.

## II. The Court's approach in these advisory proceedings

8. Burkina Faso welcomes the fact that no participant in the proceedings has truly disputed the Court's jurisdiction to render the present advisory opinion. Nor has any participant staunchly asserted that the Court should exercise its discretion not to give the opinion sought.

9. However, some participants have argued, in sometimes different ways, that the Court should proceed with caution and limit the scope of the task resulting from the two questions put by the General Assembly<sup>13</sup>. A very small number of participants have thus drawn the Court's attention to the negotiations held within the framework of the United Nations Framework Convention on Climate Change, emphasizing that the Court must take care not to interfere with this process or with the agreements reached by the parties within that framework<sup>14</sup>.

10. Burkina Faso considers that the Court must identify the task incumbent on it by interpreting the questions posed in the General Assembly's resolution and in the light of its role within the institutional framework of the United Nations.

11. As regards the rules of interpretation applicable to resolution 77/276 of 29 March 2023, Burkina Faso recalls that this resolution must be interpreted in the light of the customary rules of interpretation applicable to decisions of the organs of international organizations, as identified by the Court in its *Kosovo* Advisory Opinion relating to Security Council resolutions<sup>15</sup>. As for the Court's role in the institutional framework of the United Nations, Burkina Faso recalls that the Court is the principal judicial organ of the United Nations and, as such, must contribute to the full extent of its competence and responsibilities to the achievement of the goals of the United Nations and the smooth functioning of the Organization. The Court cannot, therefore, refuse to answer a request for an

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<sup>10</sup> *Ibid.*, para. 373.

<sup>11</sup> *Ibid.*, paras. 377-388.

<sup>12</sup> *Ibid.*, para. 397.

<sup>13</sup> See e.g. the Written statement of Saudi Arabia, para. 3.17. (See also para. 3.7.)

<sup>14</sup> See e.g. the Written statement of China, para. 9.

<sup>15</sup> *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.

advisory opinion or choose to respond to it partially, unless such an approach is necessary to preserve the integrity of its judicial function<sup>16</sup>. The Court has thus affirmed that

“[i]t is for the Court to state the law applicable to the factual situation referred to it by the General Assembly in its request for an advisory opinion. There is thus no need for it to interpret restrictively the questions put to it by the General Assembly. When the Court states the law in the exercise of its advisory function, it lends its assistance to the General Assembly in the solution of a problem confronting it”<sup>17</sup>.

12. This is why the Court must always ascertain the meaning and full implications of the questions posed in the light of the framework of fact and law in which they fall for consideration, in order to answer them exhaustively. “Otherwise its reply to the question may be incomplete and, in consequence, ineffectual and even misleading as to the pertinent legal rules actually governing the matter under consideration by the requesting Organization”<sup>18</sup>. The importance of these proceedings for all of humanity, and the unique position of the Court, i.e. its general jurisdiction, call for a full and detailed response by it to the two questions posed.

13. As regards question (a), the Court must clarify all the obligations of States relating to anthropogenic greenhouse gas emissions under international law, by examining all the sources of that law. As previously stated, the Court must give a broad interpretation to the phrase “to ensure the protection of the climate system and other parts of the environment”, so as to include both international obligations directly aimed at protecting the climate system and other parts of the environment, and international obligations whose implementation indirectly contributes to the protection of the climate system and other parts of the environment. Burkina Faso thus notes that other participants have referred to additional obligations to those examined in its own written statement, notably the obligations arising from the Convention on Biological Diversity and the Kyoto Protocol. Burkina Faso considers that this density of norms is proof of the existence in customary international law of a general obligation opposable to all States to protect and preserve the climate system.

14. As regards question (b), Burkina Faso notes that the conduct whose legal consequences are to be examined is well defined, i.e. it is the acts and omissions of States relating to anthropogenic greenhouse gas emissions. The obligations in respect of which these acts and omissions are to be assessed are also clearly identified, namely those relating to the protection of the climate system and other parts of the environment<sup>19</sup>. Finally, the States concerned are also clearly defined: it is States which, by their acts and omissions relating to anthropogenic greenhouse gas emissions, have caused significant harm to the climate system and other parts of the environment. Burkina Faso has already observed that this group of States is identifiable in practice, and that the request does not call for a determination of the responsibility of States individually, but for clarification of the legal consequences of the relevant conduct as defined above. The task before the Court is therefore legally feasible, especially since there is no reason relating to individual situations that might influence the

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<sup>16</sup> *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 71; *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999 (I)*, p. 78, 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.

<sup>17</sup> *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019 (I)*, p. 129, para. 137.

<sup>18</sup> [*Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980*,] p. 76, para. 10.

<sup>19</sup> See the arguments on the meaning and scope of question (b) put forward by Burkina Faso in its written statement, paras. 254-256.

Court's findings as to the scope of the international responsibility of the States referred to in question (b)<sup>20</sup>.

15. It is therefore not appropriate for the Court to limit its advisory function in anticipation of future negotiations within the framework of the United Nations Framework Convention on Climate Change. The Court previously rejected a similar suggestion in the advisory proceedings on the *Legality of the Threat or Use of Nuclear Weapons*. It remarked that in any event the Court's opinion would have relevance for the continuing debate on the matter in the General Assembly, while the effect of its opinion on the negotiations was "a matter of appreciation" and could not, therefore, constitute a compelling reason to decline to give the advisory opinion requested<sup>21</sup>.

16. For Burkina Faso, clarification by the Court of the obligations of States in respect of anthropogenic greenhouse gas emissions and the legal consequences associated with breaching those obligations offers only benefits, all of which are equally important. Pending the outcome of negotiations, the Court's opinion will facilitate the implementation by States of their obligations relating to anthropogenic greenhouse gas emissions by removing any ambiguity about the existence and content of those obligations, and thereby eliminating "uncertainty from their legal relations"<sup>22</sup>. During negotiations, the Court's opinion will inform the discussions and enable participants to identify the mechanisms and means to implement their obligations, especially since some of those obligations are protected by peremptory rules of international law (*jus cogens*) and are therefore non-derogable. After negotiations, the Court's clarification of the obligations in question will continue to guide States and any interested actors on aspects not addressed during negotiations or those on which the parties have yet to reach agreement.

### **III. The effect of the *lex specialis* doctrine on the response to the questions posed**

17. The question whether the *lex specialis* doctrine has any bearing in these proceedings is, in Burkina Faso's opinion, the fundamental point of divergence between the overwhelming majority of participants, including Burkina Faso, on the one hand, and a handful of participants, on the other. Although the latter present the *lex specialis* argument in various ways in their written statements, its substance consists in contending that the two questions put by the General Assembly are governed by a special law, a *lex specialis*, which takes precedence over all other obligations and rules of international law applicable in respect of anthropogenic greenhouse gas emissions. According to these participants, this *lex specialis* is a treaty law on climate change constituted by the United Nations Framework Convention on Climate Change, the Kyoto Protocol and the Paris Agreement.

18. The participants in question draw two conclusions from this. *As regards question (a)*, that the obligations incumbent on States to ensure the protection of the climate system and other parts of the environment are those arising from the three above-mentioned conventions<sup>23</sup>. *As regards*

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<sup>20</sup> See Written statement of Burkina Faso, paras. 262-264.

<sup>21</sup> *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 237, para. 17. The Court reproduced the essential aspects of this jurisprudence in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, pp. 159-160, paras. 51-53.

<sup>22</sup> *Northern Cameroons (Cameroon v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963*, p. 34.

<sup>23</sup> See, *inter alia*, Written statement of Kuwait, paras. 60-65; Written statement of Japan, paras. 4-18; Written statement of Russia, p. 5; Written statement of OPEC, para. 62; Written statement of Saudi Arabia, paras. 4.1-4.5 (see more generally Chapter IV of Saudi Arabia's written statement); Written statement of South Africa, paras. 12-20; Joint written statement of Denmark, Finland, Iceland, Norway and Sweden, para. 52.

*question (b)*, that 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 are those deriving from the above-mentioned conventions, to the exclusion of the ordinary consequences of customary law on the international responsibility of States, including compensation<sup>24</sup>.

19. These participants do not appear to be troubled by the existential risk to humanity. In their view, States are bound only by their obligations to notify, to prepare a nationally determined contribution and to show the highest possible ambition. Furthermore, there are no legal consequences resulting from the violation of these obligations, which they sometimes describe as soft. However, an obligation that is not underpinned by any legal sanctions, particularly international responsibility, is a matter of decency, morality or other such sentiment, rather than an obligation derived from the law<sup>25</sup>.

20. Burkina Faso considers that the *lex specialis* argument is legally flawed because it is based on an erroneous interpretation of that doctrine and of the object of the questions put by the General Assembly.

21. The *lex specialis* doctrine derives from the Latin maxim *lex specialis derogat generalis*, i.e. “[w]here some matter otherwise dealt with [by a general norm] is governed by a special rule of international law, the latter will prevail to the extent of any inconsistency”<sup>26</sup>.

22. In international law, where States must consent to be bound by legal obligations, the *lex specialis* doctrine is based on a simple logic, namely that States which subscribe to a special obligation have derogated from or are deemed to have derogated from the general obligation governing the same matter. The application of the *lex specialis* doctrine thus depends on evidence of the intent to derogate from general obligations by adopting more specific ones. Such evidence can be express and derive from a treaty provision. It can also be implicit and result from a contradiction between the general and special provisions. The International Law Commission confirmed this interpretation of the *lex specialis* doctrine in its commentary on Article 55 of its Draft articles on Responsibility of States for Internationally Wrongful Acts. According to the Commission,

“[f]or the *lex specialis* principle to apply it is not enough that the same subject matter is dealt with by two provisions; there must be some actual inconsistency between them, or else a discernible intention that one provision is to exclude the other. Thus, the question is essentially one of interpretation.”<sup>27</sup>

23. Burkina Faso notes that the *lex specialis* doctrine has been very rarely applied in international jurisprudence because, it seems, of the difficulty in proving the intent to derogate from general obligations through the adoption of special ones. The jurisprudence of the International Court of Justice has made clear that the *lex specialis* doctrine does not apply “wholesale” to entire branches of international law, but covers only situations in which there are contradictory concrete obligations

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<sup>24</sup> See Written statement of the European Union, paras. 326-328; Written statement of Saudi Arabia, paras. 4.6-4.9, 6.3; Written statement of OPEC, paras. 103 and 121; Written statement of Iran, para. 162; Written statement of Japan, para. 41; Written statement of Kuwait, paras. 85, 93-107; Written statement of South Africa, para. 131.

<sup>25</sup> On this distinction, see *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)*, Second Phase, *Judgment, I.C.J. Reports 1966*, pp. 34-35, paras. 49-54.

<sup>26</sup> ILC Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, *Yearbook of the International Law Commission*, 2001, Vol. II, Part Two, General Provisions (part four), p. 139.

<sup>27</sup> *Ibid.*, commentary to Art. 55, p. 140, para. 4.

governing the same act, event or legal situation. The Court has thus confirmed, as regards the relationship between international humanitarian law and human rights, that obligations arising from different branches of international law may apply concurrently<sup>28</sup>. Burkina Faso cannot fail to point out in this regard the marked absence of any reference to the *lex specialis* doctrine in the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* and in the Court's Advisory Opinion on the *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*<sup>29</sup>.

24. Burkina Faso considers that the *lex specialis* doctrine is not applicable in the present proceedings. *First*, the international obligations identified by Burkina Faso do not have the same object or, therefore, the same scope of application as those on climate change. The obligations identified by Burkina Faso relate to the protection of the climate system and other parts of the environment from the adverse effects of anthropogenic greenhouse gas emissions, including climate change. They include both obligations under customary international law and obligations arising from a series of conventions and general principles of law. Consequently, in terms of their content, they go beyond the obligations provided for in the [United Nations] Framework Convention on Climate Change, the [Kyoto] Protocol and the Paris Agreement, which concern only climate change.

25. In other words, the obligations of States relating to anthropogenic greenhouse gas emissions concern the acts and omissions of States in this regard, which, therefore, may adversely affect the enjoyment of a host of rights and the protection of numerous values by international legal obligations. Climate change, on the other hand, is a situation whose management gives rise to additional obligations, particularly those set forth in the climate change conventions. In other words, the law governing the outcome of a particular conduct (climate change) is not the only one of relevance in terms of governing the acts and omissions of States that have caused the harm, including the creation of that situation (those relating to anthropogenic greenhouse gas emissions).

26. Consequently, Burkina Faso considers that the questions put by the General Assembly require the Court to identify both the obligations of States in terms of their acts and omissions relating to anthropogenic greenhouse gas emissions and the obligations they have undertaken to tackle one of the adverse effects of those emissions, i.e. climate change. It is thus possible to describe the present proceedings generally as those concerning the *Obligations of States in respect of Climate Change*, including both obligations relating to acts and omissions in respect of greenhouse gas emissions and obligations concerning climate change itself. However, Burkina Faso notes that the questions put by the General Assembly are more precise and concern (a) the obligations incumbent on States to ensure the protection of the climate system and other parts of the environment from anthropogenic greenhouse gas emissions and (b) the legal consequences for States of their acts and omissions in the light of the aforementioned obligations.

27. *Second*, Burkina Faso notes that none of the participants that argues in favour of the *lex specialis* doctrine has invoked a provision of the United Nations Framework Convention on Climate Change, the Kyoto Protocol or the Paris Agreement that would preclude the performance of other obligations applicable to anthropogenic greenhouse gas emissions, particularly those relating to human rights, including the rights of peoples, the law of the sea and environmental law. The reason

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<sup>28</sup> *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, pp. 239-240, paras. 24-25; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, pp. 177-178, paras. 104-106.

<sup>29</sup> *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports 2005*, p. 243, para. 216; *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion of 19 July 2024*, para. 99.

for this is clear: rather than derogate from these obligations, the Paris Agreement actually reaffirms their application to the measures taken to address climate change. In fact, the preamble of the Paris Agreement states that the parties,

“[a]cknowledging that climate change is a common concern of humankind, . . . 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”<sup>30</sup>.

28. The preamble of the Paris Agreement also states that the parties “[r]ecogniz[e] the importance of the conservation and enhancement, as appropriate, of sinks and reservoirs of the greenhouse gases referred to in the Convention”, and note the “importance of ensuring the integrity of all ecosystems, including oceans, and the protection of biodiversity, recognized by some cultures as Mother Earth”, as well as “the importance for some of the concept of ‘climate justice’, when taking action to address climate change”<sup>31</sup>.

29. In other words, the preamble of the Paris Agreement reaffirms the relevance of all these obligations in the context of climate action. It would therefore be absurd to argue that States must take these obligations into account when pursuing measures to combat climate change, but that they may breach them through their acts and omissions relating to the anthropogenic emission of greenhouse gases that cause climate change.

30. However, some participants have invoked paragraph 51 of decision 1 of the Conference of the States Parties to the 2015 Paris Agreement, which makes clear that Article 8 of that Agreement cannot serve as a basis for any liability or compensation. Article 8 of the Paris Agreement reads as follows:

- “1. 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.
2. The Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts shall be subject to the authority and guidance of the Conference of the Parties serving as the meeting of the Parties to this Agreement and may be enhanced and strengthened, as determined by the Conference of the Parties serving as the meeting of the Parties to this Agreement.
3. Parties should enhance understanding, action and support, including through the *Warsaw International Mechanism, as appropriate, on a cooperative and facilitative basis with respect to loss and damage associated with the adverse effects of climate change.*
4. Accordingly, areas of cooperation and facilitation to enhance understanding, action and support may include:

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<sup>30</sup> Preamble of the Paris Agreement, Paris, 12 Dec. 2015, *United Nations, Treaty Series (UNTS)*, Vol. 3156 (available at: [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=XXVII-7-d&chapter=27&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-7-d&chapter=27&clang=_en)).

<sup>31</sup> *Ibid.*

- (a) Early warning systems;
  - (b) Emergency preparedness;
  - (c) Slow onset events;
  - (d) Events that may involve irreversible and permanent loss and damage;
  - (e) Comprehensive risk assessment and management;
  - (f) Risk insurance facilities, climate risk pooling and other insurance solutions;
  - (g) Non-economic losses; and
  - (h) Resilience of communities, livelihoods and ecosystems.
5. The Warsaw International Mechanism shall collaborate with existing bodies and expert groups under the Agreement, as well as relevant organizations and expert bodies outside the Agreement.”<sup>32</sup>

31. In paragraph 51 of the COP 21 decision, the Conference of the States Parties to the United Nations Framework Convention on Climate Change “[a]gree[] that Article 8 of the Agreement does not involve or provide a basis for any liability or compensation”<sup>33</sup>.

32. It is clear that neither Article 8 of the Paris Agreement nor paragraph 51 addresses the *lex specialis* doctrine. As regards paragraph 51 specifically, although it excludes liability and compensation actions, its scope is limited to (a) liability and compensation actions based on Article 8 of the Paris Agreement. Therefore, it does not cover compensation and liability actions based on other provisions of the Paris Agreement or other climate change treaties, including the [United Nations] Framework Convention on Climate Change and the Kyoto Protocol. Nor does it concern liability and compensation actions based either on customary international law on the international responsibility of States for internationally wrongful acts, or on the general principle of unjust enrichment. These are the two bases on which Burkina Faso and the overwhelming majority of participants found the legal consequences of international responsibility for the acts and omissions of States relating to greenhouse gas emissions.

33. *Third*, Burkina Faso recalls that the general obligation to protect the climate system is an obligation *erga omnes* under general international law and that its core requirement, the obligation not to cause significant harm to the climate system and other parts of the environment, is a *jus cogens* obligation. Consequently, these obligations take precedence over States’ obligations under specific conventions and cannot be derogated from by treaty<sup>34</sup>. Moreover, some of the obligations of States in respect of climate change are obligations which derive from the Charter of the United Nations and

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<sup>32</sup> Art. 8 of the Paris Agreement, Paris, 12 Dec. 2015, *UNTS*, Vol. 3156 (available at: [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=XXVII-7-d&chapter=27&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-7-d&chapter=27&clang=_en)).

<sup>33</sup> Report of the Conference of the Parties on its twenty-first session, held in Paris from 30 November to 13 December 2015, Addendum, Part two: Action taken by the Conference of the Parties at its twenty-first session, decision 1/CP.21, Adoption of the Paris Agreement, para. 51 (available at: <https://unfccc.int/resource/docs/2015/cop21/eng/10a01.pdf>).

<sup>34</sup> See here Arts. 53 and 64 of the 1969 Vienna Convention on the Law of Treaties.

which thus, like all obligations under the Charter, prevail over the other treaty obligations of Member States, in accordance with Article 103 of the Charter.

34. *Lastly*, Burkina Faso observes that several international judicial bodies have examined questions relating to climate change, which topic is narrower in scope than anthropogenic greenhouse gas emissions. The judicial and quasi-judicial human rights monitoring bodies that have assessed the compatibility of States' acts and omissions relating to climate change in the light of human rights did not conclude that the body of rules they were charged with applying had been supplanted by the United Nations Framework Convention on Climate Change, the [Kyoto] Protocol and the Paris Agreement<sup>35</sup>. When the International Tribunal for the Law of the Sea, for its part, performed a similar task — this time with regard to the 1982 United Nations Convention on the Law of the Sea — it stated that

“[t]he 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.”<sup>36</sup>

35. In sum, Burkina Faso maintains that the *lex specialis* doctrine has no application in these advisory proceedings. The Court must consider the entire corpus of relevant rules and obligations examined by Burkina Faso in its written statement in order to provide a complete and sufficient response to the two questions put by the General Assembly.

## CONCLUSION

36. In conclusion, Burkina Faso notes that none of the arguments submitted by the aforementioned minority affects the validity of the conclusions of its written statement. Burkina Faso therefore reiterates the responses set out in its written statement, with some minor stylistic amendments.

37. As regards question (a) of the General Assembly, Burkina Faso considers that the obligations incumbent on States in respect of greenhouse gas emissions are as follows:

- (1) the general obligation to protect and preserve the climate system;
- (2) the obligation for all States to refrain from causing significant harm to the climate system and other parts of the environment;
- (3) 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;

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<sup>35</sup> See, *inter alia*, the European Court of Human Rights (Grand Chamber), *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, Application No. 53600/20, Judgment of 9 April 2024; *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.

<sup>36</sup> ITLOS, *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*, *Advisory Opinion*, 21 May 2024, para. 224.

- (4) 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, exploitation and management of natural resources;
- (5) 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 do not adversely affect the effective enjoyment by States, peoples and individuals of their rights;
- (6) the obligation for all States to adopt the requisite 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 the effective enjoyment of human rights from those effects, including outside their jurisdiction;
- (7) 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 repeal any such measures already adopted;
- (8) the obligation for all States to educate and inform their populations about the causes, consequences and means of combatting climate change on the basis of the best available scientific knowledge, and to counter misinformation on the subject;
- (9) 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 the obligation to reduce and limit their emissions economy-wide;
- (10) 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.

38. As regards question (b), Burkina Faso considers that the legal consequences for States where they, 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 are as follows:

- (1) the obligation to 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;
- (2) the obligation to repeal their legislative, administrative or other measures that promote or facilitate greenhouse gas emissions, in particular subsidies and aid for the production, transport, storage or consumption of fossil fuels;
- (3) the obligation to 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) the obligation to make prompt, effective and full reparation for the injury suffered by the States, peoples and individuals most affected by the negative effects of anthropogenic greenhouse gas emissions and emissions-related climate change, including by granting compensation for the

injury suffered, and, to this end, the obligation to 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) the obligation to remove all impediments to the protection of the climate system and to the enjoyment and effective fulfilment of human rights and 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) the obligation to 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) the obligation not to 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, to oppose any notion that climate change resulting from greenhouse gas emissions may cause affected States, peoples and individuals to lose their rights; and
- (8) the obligation to finance accordingly scientific research and the development of appropriate techniques enabling the climate system to be restored to the state that it was in before substantial anthropogenic emissions 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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