

INTERNATIONAL COURT OF JUSTICE

Obligations of States in respect of Climate Change

(Request for an Advisory Opinion)

WRITTEN COMMENTS OF THE REPUBLIC OF CHILE

(SECOND ROUND OF WRITTEN STATEMENTS)

15 August 2024

WRITTEN COMMENTS OF THE REPUBLIC OF CHILE

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1. By Order of 20 April 2023, the Court decided that the United Nations and its Member States are considered likely to be able to furnish information on the questions submitted to the Court for an advisory opinion on the Obligations of States in respect of Climate Change. The Court opened a first round of written statements and by Order of 15 December 2023, fixed 22 March 2024 as the time limit within which written statements on the questions may be presented to the Court, in accordance with Article 66, paragraph 2, of the Statute. Henceforth, eighty-four States, including the Republic of Chile, and seven International Organizations submitted their written statements. Subsequently, by Order of 30 May 2024, the Court fixed 15 August 2024 as the time-limit within which States and organizations having presented written statements may submit additional written comments on the written statements made by other States or organizations, in accordance with Article 66, paragraph 4, of the Statute.
 2. Chile takes this opportunity to comment on the interpretation of certain legal concepts and on the interaction between existing international obligations, insofar as the first round of written statements shows some discrepancies between States in this regard.
 3. In presenting its views on issues where discrepancies have been identified, Chile will follow the division already effected by the General Assembly in its request for an advisory opinion between question (a) and (b).
- I. COMMENTS REGARDING CERTAIN LEGAL CONSIDERATIONS RELEVANT TO QUESTION (A)
4. Question (a) reads as follows:

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?

5. The scope of this question is very broad. The question is not limited to a particular source of international law, nor to a particular regulatory regime such as the Climate Change Regime. In addition, the question refers to inter-State obligations, as well as to the obligations of States towards the present and future generations of human beings.
6. With regard to this question, Chile will refer to four legal points at issue: (A) The interplay between the Climate Change Regime and the general obligation not to cause harm to the environment; (B) The interplay between the Climate Change Regime and International Human Rights Law; (C) The due diligence character of the obligations under International Environmental Law and International Human Rights Law, and (D) the intergenerational dimension of International Environmental Law and International Human Rights Law.

A. THE INTERPLAY BETWEEN THE CLIMATE CHANGE REGIME AND THE OBLIGATION
NOT TO CAUSE HARM TO THE ENVIRONMENT

7. From the submissions of States and International Organizations during the first round of written statements in these proceedings, it transpires that, when answering question (a), the Court will need to address the interplay between various legal regimes concerned with the protection of rights that may be negatively impacted by climate change.
8. In its written statement, Chile underscored the position that there is sufficient scientific evidence to take as an undisputed fact that anthropogenic emissions of greenhouse gases (GHG) are directly linked to widespread, and in some cases irreversible, harm to the climate system and other parts of the environment.¹ The consensus of the scientific community in this regard has been acknowledged by many

¹ IPCC ‘Synthesis Report of the IPCC Sixth Assessment Report (AR6), Summary for Policymakers’ (2023) UN Doc IPCC AR6 SYR (Dossier No. 78).

States in their written statements, and the conclusions assessed by the Intergovernmental Panel on Climate Change (IPCC) have not been disputed by any State in these proceedings. Many States have also manifested in their written statements their recognition of the evidence that links the impacts of climate change with detrimental effects on the effective enjoyment of human rights. Furthermore, many posit that these impacts are disproportionate among States at different levels of development as well as across generations.

9. For this reason, when answering question (a), the Court should take into account various treaties, alongside rules and principles of international customary law, that establish obligations for States in relation to the protection of the environment and human rights.
10. The list of the relevant treaties concerned with the protection of the climate system and other parts of the environment is extensive. The United Nations Framework Convention on Climate Change (UNFCCC) and the Paris Agreement are of course very important treaties as they are directly concerned with lowering anthropogenic GHG emissions into the atmosphere. But special mention should also be made, amongst others, to:
 - a) The United Nations Convention on the Law of the Sea.
 - b) The Vienna Convention for the Protection of the Ozone Layer
 - c) The Montreal Protocol on Substances that Deplete the Ozone Layer
 - d) The Convention on long-range transboundary air pollution
 - e) The Convention on Biological Diversity
 - f) The United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa
 - g) The Convention on the Law of the Non-Navigational Uses of International Watercourses

h) The Convention on International Civil Aviation

i) Annex IV of the International Convention for the Prevention of Pollution from Ships (MARPOL)

11. Each of these treaties contain a binding obligation not to cause harm to the environment located within the territory of States and in areas beyond national jurisdiction. On the basis of this widespread State practice, the Court recognized in the *Legality of the Threat or Use of Nuclear Weapons* Advisory Opinion that “the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.”²

12. Furthermore, the International Tribunal for the Law of the Sea has recently examined the question on the relationship between the Climate Change Regime and the United Nations Convention on the Law of the Sea (UNCLOS). In its Advisory Opinion on Climate Change and International law, delivered on 21 May 2024, the Tribunal makes a clear distinction between compliance with the obligations contained in UNCLOS and compliance with the obligations and commitments under the Climate Change Regime, in particular, the Paris Agreement, stating that:

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.³

13. In that same Advisory Opinion, ITLOS further explains that: (1) the UNFCCC and the Paris Agreement, on the one hand, and UNCLOS, on the other, are separate agreements; (2) the Paris Agreement has not superseded or modified UNCLOS; (3) the Paris Agreement is not *lex specialis* to UNCLOS; and, 4) a breach of the

² *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, p. 226, at p. 242, para. 29.

³ *Request for an Advisory Opinion submitted by the Commission of Small Island States on climate change and international law*, Advisory Opinion, 21 May 2024, at p. 80, para. 223.

obligations contained in UNCLOS may engage the international responsibility of States, irrespective of their compliance with the UNFCCC and the Paris Agreement.

14. Some States have deemed that compliance with the Climate Change Regime, particularly the UNFCCC and the Paris Agreement, is sufficient to satisfy their obligations and commitments with regard to the protection of the climate system and other parts of the environment. Chile does not share this position. Despite the fact that the Climate Change Regime is a valuable and important effort to reduce anthropogenic GHG emissions, the obligations contained in the UNFCCC and the Paris Agreement do not supersede the obligation not to cause harm to the environment. In other words, a State may comply with its obligations under the UNFCCC and the Paris Agreement, and still breach other obligations under international law. That is why a holistic approach to question (a), which considers all the relevant obligations under international law, is necessary.

15. The UNFCCC focuses on coordinating an international response to the climate crisis because, as acknowledged in its Preamble: “the global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response”.⁴ In this vein, Article 2 of the UNFCCC states that⁵:

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

16. The text of Article 2 of the UNFCCC describes the objective of the Convention and related agreements, but it does not bar the legal relationship between the norms contained in the Convention and the general international obligation to prevent harm to the environment, as well as other obligations under International Human Rights

⁴ UNFCCC, preambular paragraph 6.

⁵ *Ibid.*, Article 2.

Law, which will be developed *infra* in section I.B. Chile considers that Article 2 cannot be interpreted as excluding the application of the obligation to prevent harm contained in other treaties and in general international law. Insofar as there is no contradiction between these obligations, there is no room for the application of the principle *lex specialis derogat generali* or the principle *lex posteriori derogat anteriori*. These principles may only come into play in the context of a conflict of norms,⁶ which in this case does not exist.

17. The principle of systematic interpretation has also been invoked by some States to support the view that the UNFCCC and the Paris Agreement supersede or modify the obligation not to cause harm. The principle of systematic interpretation allows the interpreter to take into account other rules of international law when interpreting the provisions of an international treaty. But, as has already been explained, modification and tacit abrogation go beyond the scope of treaty interpretation, moving into the field of the determination of the applicable law in cases of a conflict of norms, such as the conflict between the text of a treaty and that of another treaty that seems to contradict it. In the case of the treaties that comprise the Climate Change Regime and the obligation not to cause harm to the environment, there is no conflict of norms; therefore, there is no need to choose between them. Indeed, the two sets of rules co-exist. The same happens with respect to the rules concerning the protection of human rights, as will be developed in the next chapter.

18. In this context, Chile supports the view that the obligations contained in the Climate Change Regime co-exist with the obligation not to cause harm to the environment. Furthermore, Chile recognizes the value of the UNFCCC and the Paris Agreement “as the primary legal instruments addressing the global problem of climate change”⁷ in interpreting and applying other legal instruments,⁸ in particular for assisting in setting the standards of due diligence required in discharging other international

⁶ Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, Yearbook of the International Law Commission, 2006, vol. II, Part Two, p. 178.

⁷ *Request for an Advisory Opinion submitted by the Commission of Small Island States on climate change and international law*, Advisory Opinion, 21 May 2024, at p. 80, para. 222.

⁸ *Ibid.*

obligations,⁹ and to inform the content of necessary measures of protection that need to be taken.¹⁰

19. In conclusion, the Climate Change Regime provides a framework for international cooperation to reduce anthropogenic GHG emissions, but it does neither derogate nor modify the obligation of States to prevent harm to the territory of other States and/or to areas beyond national jurisdiction.

B. THE INTERACTION BETWEEN THE CLIMATE CHANGE REGIME AND HUMAN RIGHTS LAW

20. In its request, the General Assembly invited the Court to answer the questions submitted to it with particular regard to the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the rights recognized in the Universal Declaration of Human Rights. The Court may also consider other sources of International Human Rights Law, including treaties and customary international law, insofar as they are directly connected to the terms of the request.¹¹

21. The written submissions of States and International Organizations show a significant consensus on the fact that the impacts of climate change pose a serious threat to the enjoyment of human rights, putting at risk the lives and livelihood of an increasing number of individuals and communities worldwide. These adverse impacts on human rights do not affect the global population equally. Climate risks disproportionately affect individuals and communities that are already vulnerable due to socio-economic factors, gender, migratory status, ethnicity, age, and other vulnerability criteria.

22. The situation is catastrophic. As noted by the former Special Rapporteur on the human right to a healthy environment: “[g]lobally, at least 150,000 premature deaths

⁹ Christina Voigt, The power of the Paris Agreement in international climate litigation, 32 *Review of European, Comparative & International Environmental Law (RECIEL)* 2, Special Issue: International Climate Litigation, July 2023.

¹⁰ *Request for an Advisory Opinion submitted by the Commission of Small Island States on climate change and international law*, Advisory Opinion, 21 May 2024, at p. 80, para. 222.

¹¹ *Western Sahara*, Advisory Opinion, ICJ Reports 1975, p. 12, at p. 30, para. 52.

annually have been linked to climate change”,¹² and the adverse health impacts of climate change “include not only premature deaths but also increased incidences of respiratory disease, cardiovascular disease, malnutrition, stunting, wasting, allergies, heat stroke, injuries, water-borne and vector-borne diseases and mental illness”.¹³ Similarly, the World Bank estimates that a 2°C increase in the average global temperature would put between 100-400 million more people at risk of hunger and could result in over 3 million additional deaths from malnutrition each year.¹⁴ In turn, the Human Rights Committee has noted that “[e]nvironmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life”.¹⁵

23. In addressing question (a), Chile submits that to ensure the proper interpretation of international law, which includes International Human Rights Law, and to avoid fragmentation, the Court should take into account relevant developments that have taken place at the Inter-American Court of Human Rights, as the international tribunal that shows the most developed jurisprudence concerning the protection of human rights in the context of climate change.

24. In 2017 the Inter-American Court of Human Rights issued an Advisory Opinion (OC23-17) on Environment and Human Rights, in which it made clear that the right to a healthy environment is a fundamental human right; that the degradation of the environment, including the adverse impacts on the climate system, affects the enjoyment of this fundamental human right and others; and that States have an obligation to ensure that their actions (and the actions of those under their effective

¹² Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, 15 July 2019, UN Doc A/74/161, para. 29.

¹³ *Ibid*, para. 31.

¹⁴ World Bank, World Development Report 2010: Development and Climate Change (World Bank, 2010).

¹⁵ Human Rights Committee, General Comment N°36 – Article 5: right to life. 3 September 2019, UN Doc CCPR/C/GC/26, para. 62.

control) do not impact the enjoyment of human rights – including the rights of those living outside the State’s own borders.¹⁶

25. In order to obtain further clarification on the scope of their obligations under International Human Rights Law concerning climate change, on 9 January 2023, Chile and Colombia requested a new Advisory Opinion from the Inter-American Court of Human Rights on “The Climate Emergency and Human Rights”. These advisory proceedings have provided a unique opportunity for individuals who have been directly impacted by the climate emergency, to present their personal experiences before an international court.

26. Chile would like to invite the Court to read the testimonies of individuals who participated in these proceedings. The voices of those most affected by the climate crisis provide concrete evidence of the extent of the impact on the lives and livelihoods of individuals and communities, and the importance of this advisory opinion.¹⁷

¹⁶ Inter-American Court of Human Rights, Advisory Opinion OC-23/17 of November 15, 2017, requested by the Republic of Colombia, “The Environment and Human Rights”.

¹⁷ Among the witness depositions, Jovana Hoschtialek, an 18-year-old teacher from Grenada explained to the Inter-American Court stated that: “I see the effects of climate change around me every day and I fear how much worse they will get. (...) The sea level has risen to the point where the water is lapping into the street and it is an issue we cannot mitigate against. (...) [In the island of Carriacou] the sea level has risen so much that the waves are washing away the graves of their ancestors. Inter-American Court of Human Rights, Public hearing of the Advisory Opinion of Climate Emergency and Human Rights, 24 April 2024 (Barbados). Available at: <https://www.youtube.com/watch?v=ULMKBINFycI&t=2311s>, at 21:53

Kalālapaikuānalu Winter, a 20-year-old indigenous Hawaiian woman, explained: “The climate crisis affects our native lifeways every day. It impacts our indigenous traditions of feedings ourselves from our ocean as we always have. (...) Sea level rise has eroded the roads we rely on, [and] increasingly frequent and dangerous storms threaten our very survival. In 2018, my community experienced fifty-five inches or 1.5 meters of rainfall in less than 24 hours. It was one of the most extreme flooding events in Hawaii recorded history. (...) This climate-crisis-induced rain bomb destroyed our community, including homes, farmland, and the Limahuli stream, our main water source”. *Ibid*, at 32:40

Angélica Ortiz, an indigenous Wayú women from Colombia, noted that: “The heat phenomena are more and more recurrent in our territory [...] reaching temperatures between 40 to 42 degrees [Celsius], taking into account that it is a territory where there is no water and you have to walk more than 3 hours a day to get [water]”. The situation has such a strong impact on the indigenous communities, that Ms. Ortiz added that: “All ancestral knowledge is at risk as well as the disappearance of medicinal plants (...) Spirituality in the Wayú people is also being affected because we have stopped dreaming, and this is important for the Wayú people, taking into account that we are an oneiric people; we are governed by our dreams”. Inter-American Court of Human Rights, Public hearing of the Advisory Opinion of Climate Emergency and Human Rights, 28 May 2024 (Manaus). Available at: <https://www.youtube.com/watch?v=4yuPC2hMY1w>, at 3:56:41. The presentation was originally in Spanish.

27. Similarly to what was explained *supra* regarding the interplay between the Climate Change Regime and the obligation not to cause harm to the environment, Chile also considers that the Climate Change Regime must be interpreted and applied in a manner consistent with States' obligations under International Human Rights Law. Indeed, the incorporation of human rights in the Climate Change Regime is crucial as it will help to obtain solutions that are more just, equitable and sustainable to the climate emergency, especially considering that individuals and communities affected by the emergency have been impacted in ways which are not proportional to their responsibility in generating this emergency.
28. In the context of the Advisory Opinion on Climate Emergency and Human Rights, the Inter-American Commission of Human Rights jointly with the Special Rapporteurship on Economic, Social, Cultural and Environmental Rights (REDESCA) submitted commentaries.¹⁸ They observed that the link between climate change and human rights is clear and generally accepted.¹⁹ They underlined that the right to a healthy environment is a human right in its own right, established in Article 11 of the Protocol of San Salvador and protected by Article 26 of the American Convention on Human Rights.²⁰ They also stressed that detrimental impact on the right to a healthy environment may also affect other human rights, such as the right to life, personal integrity, freedom and security, private life, health, access to water, access to food and housing, the right to participate in cultural life, property, and the

Finally, Áurea Sánchez, a fisherwoman from a coastal community in Mexico stated: “We are what you call climate displaced people. Between 2005 and 2020, we lost more than 500 meters of our geography due to sea level rise (...) In 2019 we lost the first line of houses, the sea has advanced and is not receding. We lost our house in 2022, since then my family and I live in a house that we had to build on the soccer field of the community, without drinking water, without drainage and without enough electricity to refrigerate our food or our insulin. Even our water wells have been salted. But we have not only had material losses, we lost our roots, our neighbours, what made us community (...) We live in a permanent risk of being evacuated again in every storm (...) Some people have needed therapy because of the stress and anguish (...) The sea lulled us, and now it wakes us up, takes away our sleep (...) [In 2022, because of the rising sea] we lost the school, the church and the third line of houses, including ours”. See Inter-American Court of Human Rights, Public hearing of the Advisory Opinion of Climate Emergency and Human Rights, 28 May 2024 (Manaus). Available at: <https://www.youtube.com/watch?v=aE7tpbAQZuU>, at 48:55. The presentation was originally in Spanish.

¹⁸ Observations of the Inter-American Commission on Human Rights and the Special Rapporteurship on Economic, Social, Cultural, and Environmental Rights on the Request for an Advisory Opinion on Climate Emergency and Human Rights submitted by the Republics of Chile and Colombia (18 December 2023), available at https://corteidh.or.cr/sitios/observaciones/OC-32/04_cidh.pdf.

¹⁹ *Ibid.*, para. 38.

²⁰ *Ibid.*, para. 83.

right not to suffer displacement.²¹ In this context, they highlighted that under the due diligence standard States have the obligation to oversee that individuals, companies and public entities, whether by their actions or omissions, do not affect human rights.²²

29. With regard to the relationship between the Inter-American treaties concerning the protection of human rights, on the one side, and the Climate Change Regime, on the other, the Inter-American Commission and REDESCA noted that the latter can assist in the interpretation of the former,²³ stressing the fact that, resort to other treaties that govern State conduct with regard to climate change should take into account the general principles of treaty interpretation, the specific principles of human rights treaties interpretation and, in particular, Article 29 of the American Convention on Human Rights.²⁴

30. Accordingly, Chile's position regarding the interplay between the Climate Change Regime and International Human Rights Law is that the two systems co-exist insofar as the Climate Change Regime provides a framework for international cooperation to reduce anthropogenic GHG emissions; but it does neither derogate nor modify the obligations of States to prevent human rights violations and to provide guarantees of protection of human rights with regard to climate threats, embodied both in treaties and customary international law.

31. Indeed, nowhere in the text of the UNFCCC or the Paris Agreement can a provision be found that limits the responsibility of States with regard to the prevention of damage caused by GHG emissions. On the contrary, the Preamble of the UNFCCC explicitly recalls that States have 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.²⁵ In turn, the Preamble of the

²¹ *Ibid.*, para 87.

²² *Ibid.*, para 97 and 99.

²³ *Ibid.*, para. 48.

²⁴ *Ibid.*, para. 61.

²⁵ United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107 (UNFCCC), preambular paragraph 8.

Paris Agreement takes note of the links between climate change and human rights, by stating that:

“Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity [. . .]”²⁶

32. Chile’s views on the integration between the Climate Change Regime and International Human Rights Law is also consistent with the findings at COP 16, where it was stated that the Parties should “in all climate change related actions, fully respect human rights”.²⁷

33. The need to integrate the Climate Change Regime with International Human Rights Law is further confirmed by the recognition of the right to a clean, healthy and sustainable environment as an autonomous human right by the Human Rights Council,²⁸ the General Assembly²⁹ and the Inter-American Court of Human Rights.³⁰ Chile submits that this right forms part of customary international law.

34. There are several obligations that derive from the right to a clean, healthy and sustainable environment, which the Court should acknowledge in its advisory

²⁶ Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, 3156 U.N.T.S. 79 (Paris Agreement), preambular paragraph 11.

²⁷ Report of the Conference of the Parties on its sixteenth session, held in Cancun from 29 November to 10 December 2010, Addendum. Part Two: Action taken by the Conference of the Parties at its sixteenth session. 15 March 2011, UN Doc FCCC/CP/2010/7/Add.1, para. 8.

²⁸ HRC Res 48/13 (8 October 2021) UN Doc A/HRC/RES/48/13.

²⁹ UNGA Res 76/300 (28 July 2022) UN Doc A/RES/76/300.

³⁰ Inter-American Court of Human Rights, Advisory Opinion OC-23/17 of November 15, 2017, requested by the Republic of Colombia, “The Environment and Human Rights”, para. 62; Inter-American Court of Human Rights, Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina. Judgment of 6 February 2020 (Merits, Reparations and Costs), para. 203.

³⁰ As noted by the former Special Rapporteur on the Human Right to a Clean, Healthy and Sustainable environment, the right to a healthy environment is now legally recognized in more than 80% of UN Member States, giving rise to a practice that is widespread and consistent. The fact that this right has been recognized through constitutions, legislation and regional treaties also confirms the existence of opinion juris. *See*, David R. Boyd, *The Right to a Healthy Environment – A User’s Guide*, United Nations Human Rights Special Procedures, 2024, p. 8. This view is also supported by leading scholars. *See* William A. Schabas, *The Customary International Law of Human Rights*, Oxford University Press, 2021, p. 335: “There is compelling evidence for a human right to a safe, clean, healthy, and sustainable environment under customary international law”.

opinion, and that have been mentioned by other participants in these proceedings. For instance, States have obligations to prevent significant harm to the environment,³¹ which requires the establishment, maintenance and enforcement of effective legal and institutional frameworks that regulate air quality, the global climate, freshwater quality, marine pollution, waste, toxic substances, protected areas, conservation and biological diversity, amongst others.³²

35. In this regard, Chile submits that, when taking climate action under the Paris Agreement, States should give special consideration to adaptation measures, the lack of which exacerbates the impacts of climate change on the most vulnerable communities and individuals, including women, youth, children, and Indigenous Peoples.
36. States have an obligation to design and implement policies within their territory to protect ecosystems, peoples, and communities from the adverse effects of climate change, in line with their human rights obligations. Furthermore, fulfilling this obligation is coherent with the obligations of developed countries to provide means of implementation, including finance, based on the distribution of responsibilities under the Convention and the Paris Agreement, considering the common but differentiated responsibilities and respective capabilities principle.
37. It must be noted that adaption obligations are different from the global effort on mitigation. Mitigation consists of a collective endeavor and is linked to transboundary harm, addressed in the next section. On the other hand, adaptation relates to the immediate actions needed to protect human rights and mostly falls within the purview of the territorial State.
38. Additionally, and as noted by this Court, States shall conduct environmental impact assessments where there is a risk that a proposed activity may have a significant

³¹ Inter-American Court of Human Rights, Advisory Opinion OC-23/17 of November 15, 2017, requested by the Republic of Colombia, “The Environment and Human Rights”, para. 140.

³² Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, 24 January 2018, UN Doc A/HRC/37/59, Framework Principle 11, paras. 31-33.

adverse impact in a transboundary context.³³ Chile submits that this obligation also exists whenever there is a risk that the activity may have a significant adverse impact on the enjoyment of human rights by communities, including the right to a clean, healthy and sustainable environment.³⁴ Crucially, these obligations, as well as the obligation to regulate, maintain and enforce effective legal and institutional frameworks, as mentioned above, must be enforced against both public and private actors,³⁵ ensuring the proper supervision and monitoring.³⁶

39. States also have the duty to take measures to protect environmental defenders from threats,³⁷ and to incorporate differentiated measures to address the impact that the crisis has on certain groups³⁸ including women,³⁹ children,⁴⁰ indigenous communities,⁴¹ and people with disabilities,⁴² amongst others.

40. Moreover, States' obligations in the context of the climate crisis also include procedural duties, such as the obligation to provide access to information,⁴³ guarantee

³³ Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010, p. 14, at pp. 83-84, para. 204.

³⁴ Inter-American Court of Human Rights, Advisory Opinion OC-23/17 of November 15, 2017, requested by the Republic of Colombia, "The Environment and Human Rights", paras. 157, 160.

³⁵ Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, 24 January 2018, UN Doc A/HRC/37/59; Framework Principle 12, paras. 34-35.

³⁶ Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010, p. 14, at pp. 83-84, para. 205; Inter-American Court of Human Rights, Advisory Opinion OC-23/17 of November 15, 2017, requested by the Republic of Colombia, "The Environment and Human Rights", para. 154.

³⁷ Human Rights Committee, General Comment N°36 – Article 5: right to life. 3 September 2019, UN Doc CCPR/C/GC/26, para. 53; Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, 24 January 2018, UN Doc A/HRC/37/59, Framework Principle 4, paras. 10-11; Inter-American Court of Human Rights, Advisory Opinion OC-23/17 of November 15, 2017, requested by the Republic of Colombia, "The Environment and Human Rights", para. 67.

³⁸ Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, 24 January 2018, UN Doc A/HRC/37/59, Framework Principle 14, paras. 40-46. See also Inter-American Court of Human Rights, Advisory Opinion OC-23/17 of November 15, 2017, requested by the Republic of Colombia, "The Environment and Human Rights", para. 67.

³⁹ Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights, 15 January 2009, UN Doc A/HRC/10/61, paras. 45-47.

⁴⁰ Committee on the Rights of the Child, General Comment N°26 on children's rights and the environment, with a special focus on climate change, 22 August 2023, CRC/C/GC/26, paras. 6-8

⁴¹ Inter-American Court of Human Rights, Advisory Opinion OC-23/17 of November 15, 2017, requested by the Republic of Colombia, "The Environment and Human Rights", para.,67 footnote 121.

⁴² Inter-American Court of Human Rights, Advisory Opinion OC-23/17 of November 15, 2017, requested by the Republic of Colombia, "The Environment and Human Rights", para. 67.

⁴³ Inter-American Court of Human Rights, Case of the *Kichwa Indigenous People of Sarayaku vs. Ecuador*. Judgment of 27 June 2012 (Merits and Reparations), para. 230. See also Inter-American Court of Human Rights,

public participation⁴⁴ and access to justice with respect to the protection of the right to a clean, healthy and sustainable environment.⁴⁵

41. Crucially, State obligations in this regard arise whether those actions occur within the territory of the State, on areas where the State exercises authority or effective control over individuals or activities,⁴⁶ or whenever there is a causal link between the action that occurred within the State territory and the negative impact on the human rights of individuals outside the territory.⁴⁷ This is particularly relevant when dealing with transboundary harm, as will be developed in the next section.

42. Finally, Chile would like to highlight State's obligations to cooperate with each other, especially in cases where the activities in the territory of a State may affect the human rights of persons outside its territory.⁴⁸

C. THE APPLICATION OF THE STANDARD OF DUE DILIGENCE IN THE FIELD OF THE
OBLIGATION TO PREVENT DAMAGE CAUSED BY ANTHROPOGENIC GHGs
EMISSIONS TO THE ENVIRONMENT AND HUMAN RIGHTS.

43. The general obligation not to cause harm to the environment within the territory of other States or in areas beyond national jurisdiction is an obligation of customary international law. As stated in section I.A, this rule is embedded in various treaties concerned with the protection of the environment.

44. Due diligence is the standard of conduct required from States to discharge their obligation to prevent harm to the environment. In case of a dispute, the determination of whether a State has acted with the required diligence entails the examination by

Advisory Opinion OC-23/17 of November 15, 2017, requested by the Republic of Colombia, "The Environment and Human Rights", paras. 213-218.

⁴⁴ Inter-American Court of Human Rights, Advisory Opinion OC-23/17 of November 15, 2017, requested by the Republic of Colombia, "The Environment and Human Rights", paras. 226-232.

⁴⁵ *Ibid.*, paras. 233-240.

⁴⁶ Human Rights Committee, General Comment N°31, 26 May 2004, UN Doc CCPR/C/21/Rev.1/Add.13, para. 10.

⁴⁷ Inter-American Court of Human Rights, Advisory Opinion OC-23/17 of November 15, 2017, requested by the Republic of Colombia, "The Environment and Human Rights", para. 104 (e) and (h).

⁴⁸ *Ibid.*, para. 182.

the respective tribunal of the conduct of the State in concrete situations. In doing so, the case law of this Court and other tribunals is pertinent.

45. It is Chile's position that in determining whether a State has acted with due diligence in preventing damage in a particular situation, knowledge of the risk of damage is an important factor to be taken into account.
46. Indeed, in the *Corfu Channel* case, the first case heard by the International Court of Justice, the Court recognized that every State has an obligation "not to allow knowingly its territory to be used for acts contrary to the right of other States".⁴⁹ In relation to this obligation, Ian Brownlie correctly explained that knowledge of the risk of damage worked as a condition of responsibility, that is to say, the element that triggers the obligation to prevent damage in a particular situation. In particular, he clarified that:

In fact the Court was concerned with the particular question of responsibility for the creation of danger in the North Corfu Channel by the laying of mines, warning of which was not given. The basis of responsibility was Albania's knowledge of the laying of mines. The Court considered 'whether it has been established by means of indirect evidence that Albania has knowledge of mine-laying in her territorial waters independently of any connivance on her part in this operation.' Later on it concluded that laying of the minefield 'could not have been accomplished without the knowledge of the Albanian Government' and referred to 'every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other State'. Liability thus rested upon violation of a particular duty. The use of circumstantial evidence to establish Albania's knowledge does not alter the fact that knowledge was a condition of responsibility [. . .]."⁵⁰

47. In the case of the risks posed by anthropogenic GHGs emissions to the environment, it has been clear for some time now that States are aware that these emissions cause deleterious effects on the climate system. The fact that this knowledge can be established with a high degree of certainty since at least 1990, the date of the IPCC's first report,⁵¹ means that States, since then, have a responsibility to take measures to

⁴⁹ *Corfu Channel case*, Judgment of April 9th, 1949: I.C. J. Reports 1949, p. 4, at p. 12.

⁵⁰ Ian Brownlie, *System of the Law of Nations Vol. I* (OUP, 1983) p. 45.

⁵¹ IPCC, *First Assessment Report, Policymaker Summary of Working Group 1 (Scientific Assessment of Climate Change)*, pp. 63 ff in: www.ipcc.ch/site/assets/uploads/2018/05/ipcc_90_92_assessments_far_full_report.pdf

effectively prevent damage to their own territory, to the territories of other States and to areas beyond national jurisdiction, as required by customary international law.

48. In this context, it is important to examine whether compliance with the UNFCCC and the Paris Agreement is enough proof that States are acting with due diligence. The UNFCCC is a treaty that aims at achieving stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.⁵² Chile is aware of the fact that it has been very difficult for States to jointly agree in regulating maximum emissions. For this reason, the Paris Agreement uses a different approach based on National Determined Contributions (NDCs), which leaves to each State the decision to determine the reduction of GHG emissions that it is willing and able to undertake. Thus, compliance with the Paris Agreement might not necessarily mean that a State will be discharging its due diligence obligations.

49. In fact, as was recognized by ITLOS in its recent Advisory Opinion on Climate Change and International Law, the “obligation of due diligence requires a State to put in place a national system, including legislation, administrative procedures and an enforcement mechanism necessary to regulate the activities in question, and to exercise adequate vigilance to make such a system function efficiently, with a view to achieving the intended objective.”⁵³ Implementation of these measures may vary according to each State’s capabilities; however, all States are required to do whatever they can “in accordance with [their] capabilities and available resources to prevent, reduce and control marine pollution from anthropogenic GHG emissions.”⁵⁴ These measures should take into account the standards contained in the Climate Change Regime treaties, but they should nonetheless be determined objectively in relation to the means available to each State.⁵⁵

⁵² UNFCCC, Article 2.

⁵³ *Request for an Advisory Opinion submitted by the Commission of Small Island States on climate change and international law*, Advisory Opinion, 21 May 2024, at p. 84, para. 235.

⁵⁴ *Ibid.*, pp. 86-87, para. 241.

⁵⁵ *Ibid.*, pp. 87-88, para. 243.

50. The Court should also assess the role of the principle of due diligence in the context of the obligation to prevent and protect human rights from activities conducted by private entities. In this regard, it is important that the Court takes into account that the amount and quality of scientific knowledge available regarding the effects of GHG emissions on the environment is also a relevant factor, together with the irreversible character of climate change, in assessing State conduct with regard to climate change and the protection of human rights.⁵⁶

51. In this connection, at the 56th session of the Human Rights Council (1 July 2024), Volker Türk, United Nations High Commissioner for Human Rights stated that⁵⁷:

There is an 80 per cent chance that in one of the next five years, the global annual average temperature will in fact surpass 1.5-degrees Celsius, compared to the pre-industrial baseline.

While such annual warming does not yet mean a permanent breach of the 1.5°C Paris Agreement goal, we are one terrifying step closer to an outcome we have all been fighting so hard to prevent.

52. In 2015, the Office of the High Commissioner on Human Rights submitted a Report to the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change stating that:

The Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and other human rights instruments require States to guarantee effective remedies for human rights violations. Climate change and its impacts, including sea level rise, extreme weather events, and droughts have already inflicted human rights harms on millions of people. For States and communities on the frontline, survival itself is at stake. Those affected, now and in the future, must have access to meaningful remedies including judicial and other redress mechanisms. The obligations of States in the context of climate change and other environmental harms extend to all rights-holders and to harm that occurs both inside and beyond boundaries. States should be accountable to rights-holders for their contributions to climate change including for failure to adequately regulate the emissions of

⁵⁶ As recognized by the German Constitutional Court, the effects of GHGs on the climate system are irreversible because “no method is currently known for removing CO₂ emissions from the Earth’s atmosphere on a large scale” (para.139 p. 39).

⁵⁷ High Commissioner addresses panel on the adverse impacts of climate change on human rights, available at <https://www.ohchr.org/en/statements-and-speeches/2024/07/high-commissioner-addresses-panel-adverse-impacts-climate-change>.

businesses under their jurisdiction regardless of where such emissions or their harms actually occur.

53. The Inter-American Court of Human Rights has also underlined that the obligation to protect the environment is a due diligence obligation. The Court has explained that due diligence in the field of human rights means that the “State must take all appropriate measures to protect and preserve the rights recognized in the Convention, and to organize all the structures through which public authority is exercised so that they are able to ensure, legally, the free and full exercise of human rights.”⁵⁸ Therefore, due diligence in this field would not be served by a mere “best effort” policy.

54. Finally, Chile recalls, as developed *supra*, that States’ obligations are not limited to their territory or areas where the State exercises authority or effective control over individuals or activities. The responsibility of the State may also arise whenever there is a causal link between the action that occurred within the State territory and the negative impact on the human rights of individuals outside the territory.⁵⁹

D. THE INTERGENERATIONAL DIMENSION OF INTERNATIONAL ENVIRONMENTAL AND HUMAN RIGHTS LAW

55. This request for an advisory opinion on the Obligations of States in respect of Climate Change includes the intergenerational dimension of International Environmental Law and International Human Rights Law. It asks the Court to identify the obligations of States to ensure the protection of the climate system and other parts of the environment for future generations and the legal consequences of significant harm to the climate system and other parts of the environment with respect to peoples and individuals of the future generations.

⁵⁸ *Ibid.*, at p. 50, para. 123.

⁵⁹ Inter-American Court of Human Rights, Advisory Opinion OC-23/17 of November 15, 2017, requested by the Republic of Colombia, “The Environment and Human Rights”, para. 104 (e) and (h).

56. Since its inception, the concept of sustainable development included intergenerational equity as a basic element. Principle 2 of the 1972 Stockholm Declaration states that:

The natural resources of the earth, including the air, water, land, flora and fauna and especially representative samples of natural ecosystems, must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate.

57. In turn, Principle 3 of the Rio Declaration on Environment and Development states that:

The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.

58. The main idea behind the recognition of the interests of future generations is that current use of planetary resources must not jeopardize future generations' ability to meet their own needs. As the UN Human Rights Committee recalls "environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life".⁶⁰ It is thus undeniable that climate change impacts are not restricted to present times, but that they also affect the livelihoods of future generations, which will have to deal with unprecedented and not entirely assessed challenges.

59. Some of the written submissions in the present proceedings doubt whether future generations may hold rights against States and question the relevance of their inclusion in the context of this advisory opinion. However, the interests of future generations have been recognized in various international instruments,⁶¹ including treaties that are part of the applicable law in these advisory proceedings.

⁶⁰ *Ioane Teitiota v. New Zealand*. CCPR/C/127/D/2728/2016, UNHRC, (2016), p. 9, para. 9.4

⁶¹ Charter of the United Nations, preamble; International Convention for the Regulation of Whaling African Convention on the Conservation of Nature and Natural Resources, preamble; Convention concerning the protection of the world cultural and natural heritage, Article 4; Declaration of the United Nations Conference on the Human Environment - Stockholm Declaration, para. 6; Convention on International Trade in Endangered Species of Wild Fauna and Flora, preamble; Convention on the prohibition of military or any other hostile use of environmental modification technique, preamble; Convention for the Protection of the Natural Resources and Environment of the South Pacific Region, preamble; Convention on the Conservation of European Wildlife and Natural Habitats, preamble; Convention on the Conservation of Migratory Species of Wild Animals

60. This recognition is also present in the decisions of international tribunals and international bodies. For instance, this Court has recognized that “the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn”.⁶² In the same line, in the *Gabčíkovo-Nagymaros Project* case, this Court highlighted the role of science in a new understanding of:

“the risks for mankind –for present and future generations– of pursuit of [constant interferences with nature] at an unconsidered and unabated pace [and the progressive development of norms and standards that should be considered] not only when States contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development”.⁶³

61. More recently, the Inter-American Court of Human Rights has recognized future generations as the collective face of the human right to a healthy environment, affirming that “the right to a healthy environment constitutes a universal value that is

Regional, preamble; Convention for the Conservation of the Red Sea and Gulf of Aden Environment, Article I; Regional Convention for the Conservation of the Red Sea and Gulf of Aden Environment Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Eastern African Region (Nairobi Convention), preamble; ASEAN Agreement on the Conservation of Nature and Natural Resources, preamble; Rio Declaration on Environment and Development A/CONF.151/26, Principle 3; UNFCCC, preamble and Article 3; Convention on the Transboundary Effects of Industrial Accidents, preamble; Convention for the Protection of the Environment of the North-East Atlantic (OSPAR Convention), preamble; Convention on the Protection and Use of Transboundary Watercourses and International Lakes, Article 2(5)(c); North American Agreement on Environmental Cooperation, preamble; United Nations Convention to Combat Desertification, preamble; Convention on Biological Diversity, preamble and Article 2; Convention to Ban the Importation into Forum Island Countries of Hazardous and Radioactive Wastes and to Control the Transboundary Movement and Management of Hazardous Wastes within the South Pacific Region (Waigani Convention), preamble; Protocol to Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972, preamble; UNESCO Declaration on the Responsibilities of the Present Generations Towards Future Generations; Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention), preamble and Article 1; Charter of Fundamental Rights of the European Union, preamble; Inter-American Democratic Charter - Organization of American States, Article 15; Minamata Convention on Mercury Paris Agreement, preamble; AG/RES. 2928 (XLVIII-O/18) PROMOTION AND PROTECTION OF HUMAN RIGHTS, Organization of American States, paras. viii and xxii; Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazú Agreement), Articles 1 and 3; Kunming-Montreal Global Biodiversity Framework CBD/COP/DEC/15/4, Section C (7) and GOAL B; Agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (BBNJ), preamble; among others.

⁶² *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, p. 226, at p. 242, para. 29; and *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Reports 1997, p. 7, at p. 41, para. 53.

⁶³ *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Reports 1997, p. 7, at p. 78, para. 140.

owed to both present and future generations”.⁶⁴ In a similar understanding, the UN Human Rights Committee expressed: “the principle of intergenerational equity places a duty on current generations to act as responsible stewards of the planet and ensure the rights of future generations to meet their developmental and environmental needs”.⁶⁵

62. In addition, several initiatives have tried to ensure the rights of future generations. As an example of these efforts, although non-binding, in February 2023, the Maastricht Principles on the Human Rights of Future Generations was adopted, affirming that neither the Universal Declaration of Human Rights nor other human rights instruments contains a temporal limitation or limit rights to the present time.

63. It is Chile’s position that in answering question (a) the Court needs to recognize that decisions that States take today may have a detrimental impact on the opportunities available to future generations to live in and enjoy this planet. The debate should focus on how this factor should be taken into account when determining the particular conduct that is expected from States when discharging their obligations concerning the protection of the environment, including the climate system, and human rights. In this vein, consideration of the interests of future generations should have an impact on the determination of whether a State has acted with the required due diligence in lowering its anthropogenic GHG emissions.

II. COMMENTS REGARDING CERTAIN LEGAL CONSIDERATIONS RELEVANT TO QUESTION (B):

64. Question (b) reads as follows:

What are the legal consequences under these obligations for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment, with respect to:

⁶⁴ Inter-American Court of Human Rights, Advisory Opinion OC-23/17 of November 15, 2017, regarding the Environment and Human Rights, at p. 26, para. 59.

⁶⁵ HRC, Daniel Billy and others v Australia (Torres Strait Islanders Petition), 2019, at p. 8, para 5.8 UN Doc. CCPR/C/135/D/3624/2021.

(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?

65. In its written submissions, Chile argued that in answering question (b), the Court needs to apply the Law of State Responsibility. However, considering that this view has been contested in some of the other submissions, Chile would like to further develop the idea that (A) the Climate Change Regime cannot be deemed *lex specialis* regarding other relevant international obligations, and (B) that Article 8 of the Paris Agreement cannot be interpreted as a waiver on the right to seek compensation for breaches of international obligations beyond the climate regime.

66. Lastly, Chile would like to include a few words on the legal consequences arising, in particular, with respect to future generations.

A. THE CLIMATE CHANGE REGIME IS NOT *LEX SPECIALIS*

67. In interpreting this question, some States have pointed out that question (b) does not refer to a State's "breach" of the obligations addressed in question (a), and thus, the secondary rules of State Responsibility are not triggered. Accordingly, they argue that the question must be construed as referring exclusively to the legal consequences that arise for significant harm under primary obligations, and more specifically, those obligations under the UNFCCC, the Kyoto Protocol, and the Paris Agreement.

68. Some States have even gone so far as to argue that these agreements are *lex specialis* in relation to more general rules of international law, and therefore have priority of application over customary international law.

69. However, if the Court were to uphold this reasoning, the necessary consequence would be that any irreversible loss and damage caused by climate change would remain largely unaddressed. Hence, the biggest emitters would only be submitted to voluntary commitments to cooperate, facilitate and enhance understanding, action and support with respect to loss and damage associated with the adverse effects of

climate change,⁶⁶ irrespective of any breach of international obligations outside the climate change framework. This certainly cannot be the case.

70. While Chile recognizes the importance of the Climate Change Regime as the main fora for climate negotiations,⁶⁷ it also acknowledges, as was mentioned in Section I, that this regime does not exhaust the instruments and norms that are relevant to the protection of the climate system and other parts of the environment from anthropogenic emissions of GHG, and in that regard it cannot be deemed *lex specialis* with respect to other international legal regimes that may offer protection.
71. Indeed, the International Tribunal for the Law of the Sea (ITLOS) in its Advisory Opinion on Climate Change and International Law, recently recognized that the UNFCCC and related agreements are not *lex specialis* in relation to other bodies of law that might be relevant when dealing with the effects of climate change, such as the United Nations Convention on the Law of the Sea.⁶⁸
72. Furthermore, the inclusion of a list of international treaties, principles, and customary norms for the Court to consider when providing its opinion in the *chapeau* of both questions, reflects the clear expectation of the General Assembly to obtain from the Court an advisory opinion that will ponder all relevant norms holistically and harmonically.
73. Lastly, the fact that the *lex specialis* view was only supported by twelve out of ninety-one submissions is also very telling of the lack of support for this interpretation.
74. Consequently, the Climate Change Regime, and in particular the loss and damage provisions contained in the Paris Agreement, cannot be deemed a special regime that precludes the application of general rules on State Responsibility in the sense of Article 55 of the Articles on State Responsibility.

⁶⁶ Article 8, Paris Agreement.

⁶⁷ UNGA Res 70/1 (21 October 2015), p. 14 UN Doc A/RES/70/1.

⁶⁸ *Request for an Advisory Opinion submitted by the Commission of Small Island States on climate change and international law*, Advisory Opinion, 21 May 2024, at p. 81, para. 224.

75. In fact, “[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.”⁶⁹

76. Nevertheless, it is clear that the compliance mechanisms contemplated in the relevant climate change treaties are not meant to regulate compensation for damages arising out of the breach of other relevant international obligations outside the Climate Change Regime, but rather, its purpose is to facilitate cooperation, strengthen the capacity of the Parties to manage climate risk, and implement adequate strategies.⁷⁰ In that regard, these provisions are not inconsistent with the application of the general rules on State Responsibility.

77. Therefore, as was submitted by forty-nine States in the present proceedings, including Chile, and five organizations, when discussing “legal consequences” under international law, the Court must consider the Law of State Responsibility.

B. THE LOSS AND DAMAGE PROVISIONS CANNOT BE CONSTRUED AS A WAIVER ON
COMPENSATION

78. In addition, the loss and damage provisions in the Paris Agreement cannot be construed as a waiver on States’ rights to seek compensation for breaches of relevant international obligations beyond the Climate Change Regime.

79. The inclusion of Article 8 in the Paris Agreement was an issue of great contention in the negotiating history of the agreement, because the “notions of liability and compensation were a red line for developed countries”,⁷¹ to the point where the inclusion of this provision “could become one of the factors on which the success of

⁶⁹ Yearbook of the International Law Commission, 2001, vol. II, Part Two, p. 140, Commentary to art. 55, para. 4.

⁷⁰ UNFCCC COP Decision 2/CP.19 (31 January 2014) UN Doc. FCCC/CP/2013/10/Add.1; and UNFCCC COP Decision 3/CP.18 (28 February 2013) UN Doc FCCC/CP/2012/8/Add.1.

⁷¹ Elisa Calliari, et. al, *Article 8: Loss and Damage AI* in The Paris Agreement on Climate Change: a commentary (Calster, G.v. and Reins, L., eds.) (2021), Edward Elgar Publishing Limited, at p. 203.

Paris would hinge”.⁷² The way out of this discord was a compromise that consisted in the inclusion of Article 8, accompanied by clarifying language in the decision.

80. In particular, paragraph 51 of COP Decision 1/CP.21, that adopted the Paris Agreement, explains that Article 8 “does not involve or provide a basis for any liability or compensation”.⁷³

81. Article 8 is significant because, even though it does not create legally binding obligations,⁷⁴ it recognizes the importance of addressing loss and damage from adverse effects of climate change.⁷⁵ However, the clarification included in Decision 1/CP.21 does not constitute, in any way, a waiver to compensation under other international legal regimes, such as International Human Rights Law, or the customary rules on State Responsibility. Indeed, although Article 8 does not involve a basis for liability or compensation, it does not follow that it could provide a basis for a waiver of liability or compensation.

82. In fact, the clarification in paragraph 51 is the result of a political compromise to exclude liability claims under the Climate Change Regime, nevertheless “the door was left open for the remedy to be pursued through other legal channels.”⁷⁶ Indeed, it is clear that paragraph 51 is exclusively limited to the implementation of Article 8 of the Paris Agreement, thus it cannot “preclude parties from seeking remedies under international law for loss and damage associated with the adverse impacts of climate change outside the parameters of processes set in motion by Article 8.”⁷⁷

⁷² Linda Siegele, *Loss and Damage (Article 8)* in *The Paris Agreement on Climate Change: Analysis and Commentary* (Klein, Daniel R., María Pía Carazo Ortiz, Meinhard Doelle, Jane Bulmer, and Andrew Higham, eds. 2017), OUP, at p. 227.

⁷³ UNFCCC COP Decision 1/CP.21 (29 January 2016), para. 51, UN Doc FCCC/CP/2015/10/Add.1.

⁷⁴ Elisa Calliari, et. al, *Article 8: Loss and Damage AI* in *The Paris Agreement on Climate Change: a commentary* (Calster, G.v. and Reins, L., eds.) (2021), Edward Elgar Publishing Limited, at p. 205.

⁷⁵ Linda Siegele, *Loss and Damage (Article 8)* in *The Paris Agreement on Climate Change: Analysis and Commentary* (Klein, Daniel R., María Pía Carazo Ortiz, Meinhard Doelle, Jane Bulmer, and Andrew Higham, eds. 2017), OUP, at p. 228.

⁷⁶ Elisa Calliari, et. al, *Article 8: Loss and Damage AI* in *The Paris Agreement on Climate Change: a commentary* (Calster, G.v. and Reins, L., eds.) (2021), Edward Elgar Publishing Limited, at p. 211.

⁷⁷ Linda Siegele, *Loss and Damage (Article 8)* in *The Paris Agreement on Climate Change: Analysis and Commentary* (Klein, Daniel R., María Pía Carazo Ortiz, Meinhard Doelle, Jane Bulmer, and Andrew Higham, eds. 2017), OUP, at pp. 232-233.

83. Moreover, this Court has explained that a waiver of rights should not be determined lightly. In fact, in *Armed Activities in the territory of Congo* it stated that⁷⁸:

293. The Court observes that waivers or renunciations of claims or rights must either be express or unequivocally implied from the conduct of the State alleged to have waived or renounced its right. In the case concerning *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, the Court rejected a similar argument of waiver put forth by Australia, which argued that Nauru had renounced certain of its claims; noting the absence of any express waiver, the Court furthermore considered that a waiver of those claims could not be implied on the basis of the conduct of Nauru (*Preliminary Objections, Judgment, I.C.J. Reports 1992*, pp. 247- 250, paras. 12-21). Similarly, the International Law Commission, in its commentary on Article 45 of the Draft Articles on Responsibility of States for internationally wrongful acts, points out that “[a]lthough it may be possible to infer a waiver from the conduct of the States concerned or from a unilateral statement, the conduct or statement must be unequivocal” (ILC report, doc. A/56/10, 2001, p. 308) (...).

84. Consequently, there is nothing that precludes States that are specially affected by or are particularly vulnerable to the adverse effects of climate change from pursuing legal remedies, under the Law of State Responsibility, against States that might breach any of the international obligations identified under question (a); nor any peoples or individuals affected by the adverse effects of climate change from pursuing corresponding remedies under International Human Rights Law.

C. THE RELEVANCE OF THE DETRIMENTAL IMPACT ON FUTURE GENERATIONS IN
ASSESSING THE LEGAL CONSEQUENCES RESULTING FROM BREACH OF
ENVIRONMENTAL AND HUMAN RIGHTS OBLIGATIONS

85. When assessing the legal consequences of a breach of the environmental and human rights obligations of States, the fact that such breaches affect future generations should be a relevant factor in determining adequate forms of reparation under the general rules of international responsibility.

⁷⁸ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, I.C.J. Reports 2005, p. 168, at p. 266, para. 293.

86. Taking into consideration that “reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed”,⁷⁹ when it comes to climate damage and the particular consequences that this damage has on future generations, it appears that the most appropriate forms of reparation would be cessation of the unlawful conduct by the adoption of appropriate measures to tackle climate change effects, and environment restoration. These forms of redress would contribute more directly to future generations’ welfare than disbursing compensations without tied outcomes. In that regard, appropriate reparations should be designed considering their contribution to future generations.

III. FINAL REMARKS

87. These written comments have sought to contribute factual and legal considerations that may assist the Court in answering the questions posed by the General Assembly in the present advisory proceedings.

88. Chile reaffirms its commitment to strong multilateralism and the need for clear rules of global governance as the basis for peace and progress, recalling that global issues such as climate change demand global actions. In times when global governance is in a predicament, Chile is confident that instances such as these advisory opinion proceedings are opportunities to strengthen common understanding among humankind regarding the greatest challenges of our era. In that light, Chile recognizes the singular position that this Court has in order to answer the important questions submitted to its advisory jurisdiction and values the potential of the Court’s opinion as a tool that will assist all nations in their concerted efforts and response to climate change.

⁷⁹ *Factory at Chorzów (Germany v Poland)*, Judgment, Claim for Indemnity, Merits, Judgment No 13, (1928) PCIJ Series A No 17, ICGJ 255 (PCIJ 1928), at p. 47.

THE HAGUE, 15 August 2024

Jaime Moscoso Valenzuela
Ambassador of the Republic of Chile
to the Kingdom of The Netherlands