INTERNATIONAL COURT OF JUSTICE

Obligations of States in respect of Climate Change

(Request for an Advisory Opinion)

WRITTEN STATEMENT OF THE REPUBLIC OF CHILE

22 March 2024

WRITTEN COMMENTS OF THE REPUBLIC OF CHILE

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1. On 12 April 2023, the United Nations General Assembly adopted, at the 64th plenary meeting held on 29 March 2023, resolution 77/276, by which it decided, in accordance with Article 96 of the Charter of the United Nations, to request the International Court of Justice to render an advisory opinion, pursuant to Article 65 of the Statute of the Court. The question submitted to the Court reads as follows:

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

2. By 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. For this purpose, as amended by Order of 15 December 2023, it 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.

3. The purpose of this written statement is to put forward the views of the Republic of Chile regarding the jurisdiction of the Court and the admissibility of the request for an advisory opinion made by the General Assembly of the United Nations, as well as to provide its views about the substantive issues involved in this request for an advisory opinion.

4. This written statement is divided into six chapters, namely:

I. The Court has jurisdiction and should not use its discretionary power to reject giving this advisory opinion.

II. The science is clear and undisputed.

III. The applicable law relevant to assess the legal obligations of States in respect of Climate Change and the legal consequences arising from their breach.

IV. Chile's views on question (a).

V. Chile's views on question (b).

VI. Conclusions.

I. THE COURT HAS JURISDICTION AND SHOULD NOT USE ITS DISCRETIONARY POWER TO REJECT GIVING THIS ADVISORY OPINION

5. Before delving into the substantive questions, the Court will need to consider (a) whether it has jurisdiction to give the advisory opinion requested by the General Assembly, and (b) whether there are compelling reasons to reject giving this opinion.

6. In accordance with Article 65 of its Statute, the Court "may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request." As explained by the Court in its Advisory Opinion on the *Application for Review of Judgment No. 273 of the United Nations Administrative Tribunal*,[1] it is "a precondition of the Court's competence that the advisory opinion be requested by an organ duly authorized to seek it under the Charter."

7. In this regard, Chile recognizes the well-settled principle of *la compétence de la compétence*,[2] according to which the Court will decide about its own jurisdiction to give the requested advisory opinion.

[1] *Application for Review of Judgment No. 273 of the United Nations Administrative Tribunal*, Advisory Opinion, I.C.J. Reports 1982, p. 325, at pp. 333-334, para. 21.
[2] *See, e.g., Nottebohm case (Preliminary Objection)*, Judgment of November 18th, 1953, I.C.J. Reports 1953, p. 111, at pp. 119-120.

8. Even if the conditions of jurisdiction are met, the Court may exercise its discretionary power to decline to give the opinion requested when there are compelling reasons to do so.[3]

9. Chile's position is that the Court has jurisdiction to give the requested advisory opinion and that there are no compelling reasons that could lead the Court to decline to respond to the General Assembly's request.

A. JURISDICTION TO GIVE THE REQUESTED ADVISORY OPINION

10. As stated in Article 96(1) of the United Nations Charter, the General Assembly is duly authorized to request the International Court of Justice to give an advisory opinion on any legal question.

11. Further, the request concerns a matter that falls within the competence of the General Assembly, which has dealt with climate change since 11 December 1987, when it adopted resolution 42/184 stating that it:[4]

> Agrees with the Governing Council that the United Nations Environment Programme should attach importance to the problem of global climate change and that the Executive Director should ensure that the Programme cooperates closely with the World Meteorological Organization and the International Council of Scientific Unions and maintains an active, influential role in the World Climate Programme.

12. Likewise, on 6 December 1988, the General Assembly adopted resolution 43/53 endorsing:[5]

> the action of the World Meteorological Organization and the United Nations Environmental Programme establishing an Intergovernmental Panel on Climate Change to provide internationally coordinated scientific assessment of the magnitude, timing and potential environmental and socio-economic impact of climate change and realistic response strategies, and express appreciation for the work already initiated by the Panel.

13. The item "Protection of Global Climate for Present and Future Generations of Mankind" has been on the General Assembly's agenda since the late eighties[6] but, undeterred by the efforts to tackle the threat posed by climate change, "emissions of

[3] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I. C. J. Reports 2004*, p. 136, at p. 156, para. 44; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019*, p. 95, at p. 113, para. 65.
[4] UNGA Res 42/184 (11 December 1987), para. 6, UN Doc A/RES/42/184.
[5] UNGA Res 43/53 (6 December 1988), para. 5, UN Doc A/RES/43/53 (Dossier No. 104).
[6] *See, e.g.*, UNGA 'Agenda of the Seventy-Eighth Session of the General Assembly' (8 September 2023) UN Doc A/78/251.

greenhouse gases continue to rise despite the fact that all countries, in particular developing countries, are vulnerable to the adverse effects of climate change".[7] The extent and seriousness of the climate crisis has prompted the General Assembly to request this advisory opinion from this Court.

14. In addition, the request concerns a "legal question" pursuant to Article 96(1) of the United Nations Charter and Article 65(1) of the Statute of the International Court of Justice. Indeed, the present request concerns two legal topics: the identification of the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases (question a) and the legal consequences under those obligations for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment (question b).

15. The fact that a legal question also involves certain political aspects does not bar the Court from exercising its jurisdiction.[8] Moreover, the Court has stated that in situations in which political considerations are prominent, it is even more necessary to understand the legal principles applicable to the matter under debate.[9] The Court has also stated that it cannot refuse to respond to a request for an advisory opinion on the sole basis that it is related to certain political aspects or motives.[10]

16. Therefore, Chile concludes that the Court has jurisdiction to give the requested advisory opinion.

B. NO COMPELLING REASONS TO REFUSE GIVING THE ADVISORY OPINION

17. In accordance with Article 65(1) of its Statute, the Court has a discretionary power to decline to give an advisory opinion.

[7] UNGA Res 77/276 (29 March 2023).
[8] *Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion, I.C.J. Reports 1996, p. 226, at p. 234, para. 13; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Advisory Opinion, I. C. J. Reports 2004, p. 136, at p. 155, para. 41; and *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal,* Advisory Opinion, I.C.J. Reports 1973, p. 166, at p. 172, para. 14.
[9] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, I.C.J. Reports 1980, p. 73, at p. 87, para. 33.
[10] *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)*, Advisory Opinion, 1948, I.C.J. Reports 1947-1948, p. 57, at p. 61; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996 (I), p. 226, at p. 234, para. 13; and *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, I.C.J. Reports 2010, p. 403, at p. 415, para. 27.

18. The Court has stated that "given its responsibilities as the 'principal judicial organ of the United Nations' [...] [it] should in principle not decline to give an advisory opinion", except when compelling reasons lead it to take such an exceptional decision.[11]

19. In Chile's view, there are no compelling reasons that could lead the Court to refuse to give the requested advisory opinion.

20. It must be noted that an advisory opinion is not a judicial decision about a contentious matter. The purpose of the advisory opinion is to assist the General Assembly in the fulfillment of its functions.[12]

21. Thus, when a matter such as the identification of the obligations of States in respect of climate change can be regarded as of concern to the United Nations, it is clear then that an advisory opinion may contribute to the proper functioning of the Organization.[13]

22. The extensive scientific dimension of this legal issue cannot constitute a compelling reason, either, for this Court to decline to render an opinion. Chile is cognizant of the fact that the request for an advisory opinion concerning the obligations of States with regard to climate change must be examined in the light of the existing scientific evidence regarding the causes and effects of climate change. In this regard, the Intergovernmental Panel on Climate Change ("IPCC") and the World Meteorological Organization ("WMO"), among others, have provided solid evidence on the basis of which this Court can rely when answering these questions. It is important to highlight the transparency and legitimacy of the reports produced by the IPCC and the WMO. Therefore, the Court has at its disposal "the facts which are relevant and necessary for replying to the two questions posed in the request."[14] With regard to the availability

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[11] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, p. 136, at p. 199, para. 156; *See also*, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996 (I), p. 226, at p. 234, para. 14; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, I.C.J. Reports 1971, p. 16, at p. 27, para. 41; and *Western Sahara*, Advisory Opinion, I.C.J. Reports 1975, p. 12, at p. 21, para. 23.

[12] *Interpretation of Peace Treaties, First Phase*, Advisory Opinion, I.C.J. Reports 1950, p. 65, at p. 71. *See also*, *Western Sahara*, Advisory Opinion, I.C.J. Reports 1975, p. 12, at p. 24, para. 31; and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, p. 136, at p. 157, para. 47.

[13] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, p. 136, at p. 159, para. 50.

[14] *Western Sahara*, Advisory Opinion, I.C.J. Reports 1975, p. 12, at p. 21, para. 47; and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, p. 136, at p. 161, para. 56 (explaining that "the question whether the evidence available to it is sufficient to give an advisory opinion must be decided in each particular instance").

and the quality of the evidence on which the Court can rely in order to answer the questions posed by the request submitted by the General Assembly, this will be further discussed in Chapter II of this written statement.

23. The questions posed by the General Assembly are broad. This is not a reason for the Court to reject rendering the requested advisory opinion as its purpose is to allow the Court to undertake a complete examination of the applicable law in the context of the causes and effects of climate change.. The Court has been called to interpret various rules of international law in order to assist the General Assembly in exercising its functions, with a clear view on the identification of the obligations of States with regard to the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases ("GHGs") and, in the context of those obligations, the legal consequences of significant harm to the climate system and other parts of the environment resulting from States' acts and omissions. In any event, the Court's position in this matter is settled, having stated several times its "clear position"[15] that it "may give an advisory opinion on any legal question, abstract or otherwise."[16]

24. The request for this advisory opinion is not an island in the ocean of international law. Indeed, other tribunals have also received requests concerning the identification and interpretation of the obligations of States regarding climate change. Thus, on 12 December 2022, a request for an advisory opinion was submitted to the International Tribunal for the Law of the Sea ("ITLOS") by the Commission of Small Island States on Climate Change and International Law.[17] In addition, on 9 January 2023, Chile and Colombia submitted a request for an advisory opinion on the Climate Emergency and Human Rights to the Inter-American Court of Human Rights.[18]

[15] *Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion, I.C.J. Reports 1996, p. 226, at p. 234, para. 15.
[16] *Ibid*.; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I. C. J. Reports 2004, p. 136, at p. 161, para. 56.; *Conditions of Admission of a State to Membership in the United Nations (Article 4 of Charter)*, Advisory Opinion, 1948, I.C.J. Reports 1947-1948, p. 57, at p. 61; *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, Advisory Opinion, I.C.J. Reports 1954, p. 47, at p. 51; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, I.C.J. Reports 1971, p. 16, at p. 27, para. 40
[17] ITLOS, *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law* (Request for Advisory Opinion submitted to the Tribunal) (12 December 2022).
[18] Inter-American Court of Human Rights, *Request for an advisory opinion on the Climate Emergency and Human Rights submitted to the Inter-American Court of Human Rights by the Republic of Colombia and the Republic of Chile* (9 January 2023).

25. The fact that other requests for advisory opinions are pending before other tribunals is not a compelling reason for this Court to reject delivering this advisory opinion. Each of the requests for an advisory opinion regarding climate change must be seen in its own light. A comparison between these three pending advisory opinions shows that the requesting entities are not the same, the requests have been submitted to different tribunals, the questions are not identical, and the applicable law is also not entirely the same in each case.

26. For all these reasons, Chile concludes that there are no compelling reasons that could lead the Court to refuse giving the requested advisory opinion.

II. THE SCIENCE IS CLEAR AND UNDISPUTED

27. The climate crisis threatens our planet and life as we know it. Climate change has caused substantial damages, and increasingly irreversible losses, in terrestrial, freshwater, cryospheric, and coastal and marine ecosystems.[19] Many species have been unable to cope with the rapid pace of climate change, resulting in large and widespread reductions and local extinctions of populations.[20] Ecosystem and human vulnerability are interdependent, and increasing weather and climate extreme events have exposed millions of people to acute food insecurity.[21] In addition, ocean warming and ocean acidification have adversely affected food production from fisheries and shellfish aquaculture in some oceanic regions.[22]

28. The changes in our atmosphere, ocean, cryosphere and biosphere have been rapid and widespread, and the losses and damages to nature and people are overwhelming.[23] But nature is not the culprit. Since the turn of the century, it had been accepted by the scientific community that "some global trends in the climate […] since the mid-20th century, could be attributed to human action with some degree of confidence."[24]

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[19] IPCC 'Synthesis Report of the IPCC Sixth Assessment Report (AR6), Summary for Policymakers' (2023), p. 5 UN Doc IPCC AR6 SYR (Dossier No. 78).
[20] IPBES, 'Summary for policymakers of the global assessment report on biodiversity and ecosystem services of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (29 May 2019), p. 29 UN Doc IPBES/7/10/Add.1 (Dossier No. 205).
[21] IPCC 'Synthesis Report of the IPCC Sixth Assessment Report (AR6), Summary for Policymakers' (2023), p. 5 UN Doc IPCC AR6 SYR (Dossier No. 78).
[22] *Ibid.*, p. 4.
[23] *Ibid*., p. 5.
[24] IPCC 'Climate Change 2007: Synthesis Report' (2007), p. 39 ("Most of the observed increase in global average temperatures since the mid-20th century is *very likely* due to the observed increase in anthropogenic GHG concentrations.") Italics in the original; IPCC 'Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change' (2014), p. 48 ("It is *extremely likely* that more than half of the observed increase in global average

Ultimately, the IPCC in its 2023 Sixth Assessment Report observed with high confidence that "human activities, principally through emissions of greenhouse gases, have unequivocally caused global warming,"[25] and that "it is unequivocal that human influence has warmed the atmosphere, ocean, and land."[26]

29. The current state of the scientific knowledge provides strong evidence that observed changes in extremes such as heatwaves, heavy precipitation, droughts, and tropical cyclones are attributable to human influence.[27] In particular, this influence and its resulting increase in global surface temperature is due to concentrations of GHGs in the atmosphere. According to the IPCC, "observed increases in well-mixed GHG concentrations since around 1750 are unequivocally caused by GHG emissions from human activities."[28]

30. In other words, the current abnormal trends in the timing of seasons, rainfall patterns, rising sea levels, and many other multi-decadal alterations in climate processes result from global warming due to an increased greenhouse effect caused by the vast amounts of GHGs added to the atmosphere by human activities.[29]

31. As has been said in Chapter I, in answering the request for an advisory opinion submitted by the General Assembly, the Court will need to consider the underlying science regarding the determination of the significant harm caused by anthropogenic emissions of greenhouse gases in the climate system and other parts of the environment. In this regard, Chile wishes to underscore that the Court has at its disposal the best available science provided by the IPCC assessment reports, the WMO reports, and other scientific studies that have been validated by the scientific community working on a collaborative and global basis on these issues. Therefore, with respect to the harmful effects of anthropogenic greenhouse gas emissions on the climate system and other parts of the environment, the Court can rely on factual evidence that has been endorsed by the international scientific community and by States themselves.

32. Consequently, it is Chile's position that the Court has sufficient scientific evidence before it to take as an undisputed fact that anthropogenic emissions of greenhouse gases

surface temperature from 1951 to 2010 was caused by the anthropogenic increase in GHG concentrations and other anthropogenic forcings together." Emphasis added.

[25] IPCC 'Synthesis Report of the IPCC Sixth Assessment Report (AR6), Summary for Policymakers' (2023), p. 5.

[26] *Ibid.*

[27] *Ibid.*, p. 4.

[28] *Ibid.*, p. 5.

[29] *Ibid.*

are directly linked to harm to the climate system and other parts of the environment and, therefore, the Court can rely on the consensus reached by the international scientific community and by States themselves in this regard. Thus, it does not need to ask for further evidence in order to give its advisory opinion.

III. THE APPLICABLE LAW THAT THE COURT SHOULD TAKE INTO CONSIDERATION IN ANSWERING THE REQUEST FOR AN ADVISORY OPINION IN THE PRESENT CASE.

33. The rules and principles of international law that are relevant to answer the questions posed by the General Assembly in its request for an advisory opinion are to be found in: customary international law; the United Nations Convention on Law of the Sea ("UNCLOS"); the Convention on Biological Diversity ("CBD") and other treaties regarding the protection of various elements of the environment; the International Climate Change Regime (UNFCCC, the Kyoto Protocol and the Paris Agreement); International Human Rights Law ("IHRL") composed of the various treaties regarding the protection of human rights; the principles and rules regarding State responsibility; and the relevant provisions of the United Nations Charter.

34. The interrelation between these principles and rules will be addressed in the final section of this Chapter. At this stage, it suffices to stress that it is Chile's position that the Court should take into account all the legal rules and principles applicable, including the Climate Change Regime, as an expression of the determination to address decisively the threat posed by climate change, and the obligation not to cause harm to the environment, which predates the Climate Change Regime and has not been amended by it.

A. CUSTOMARY INTERNATIONAL LAW

35. Principle 21 of the 1972 Stockholm Declaration on the Human Environment affirms 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."[30] This obligation is reiterated by Principle 2 of the 1992 Rio Declaration on Environment and Development.[31]

[30] UN, 'Report of the UN Conference on the Human Environment, Stockholm, 5-16 June 1972" (1973), p. 5 UN Doc A/CONF.48/14/Rev.1 (Dossier No. 136).
[31] UN, 'Report of the UN Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992' (1993), p. 3 UN Doc A/CONF.151/26/Rev.1 (Vol. I) (Dossier No. 137).

36. The obligation embodied in Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration has attained the status of customary international law,[32] as has been recognized by this Court in the *Legality of the Threat or Use of Nuclear Weapons* advisory opinion, when stating 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,"[33] continuing on the same line of preceding international jurisprudence, including the *Trail smelter case (United States v. Canada)*.[34]

37. In its 2010 *Pulp Mills (Argentina v Uruguay)* decision, the Court further clarified the content of this obligation, noting that it requires any State "to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State."[35]

38. GHGs have posed a challenge to the traditional conception of transboundary pollution, as it is difficult to establish the specific cause-and-effect link between one State's emissions and the damage to another State's territory. Any harm may be perceived as the result of the accumulation of complex and synergetic effects of diverse contributory factors involving different pollutants and polluters.[36] However, not only is the best available science now capable of attributing climate change to anthropogenic GHG emissions,[37] but also — as examined in Section C below— various multilateral environmental agreements enshrine the no-harm rule in their provisions.

39. With regard to the standard of liability, the obligation to ensure that activities within States' jurisdiction and control respect the environment of other States or areas beyond national jurisdiction is an obligation of due diligence (as opposed to a strict liability obligation) and, as a result, States are required to act with due care or diligence in avoiding causing environmental damage to the territory of other States or to areas beyond national jurisdiction.[38]

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[32] Dupuy, P-M, Le Moli, G. and Viñuales, JE (2018) Customary International Law and The Environment. Cambridge Centre for Environment, Energy and Natural Resource Governance.
[33] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, p. 226, at p. 242, para. 29.
[34] *Trail smelter case* (United States v. Canada) (1938 and 1941) 3 R.I.A.A. 1905, p. 1965.
[35] *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010, p. 14, at p. 55, para. 101. *See also, Corfu Channel case*, Judgment of April 9th, 1949 I.C.J. Reports 1949, p.4, at p. 22.
[36] Christina Voigt, 'State Responsibility for Climate Change Damages' (2008) 77 NordicJIL 1-2, p. 10.
[37] Bulletin of the American Meteorological Society, Explaining Extreme Events from a Climate Perspective, BAMS Special Report (December 13, 2017), p. 1.
[38] Boyle and Redgwell, *International Law and the Environment*, p. 225 (OUP 2021, 4th ed).

B. LAW OF THE SEA

40. Considering that the ocean is a component of the climate system[39] and the detrimental effects of climate change on the ocean,[40] the Court must also assess the law of the sea in order to determine the obligations for States to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of GHGs as well as their legal consequences.

41. It is now an unequivocal fact[41] that "human influence has warmed the atmosphere, ocean and land."[42] Increases in concentrations of GHGs since around 1750 are unambiguously caused by human activities, while CO_2 concentrations have continued to increase in the atmosphere since 2011, reaching annual averages of 410 parts per million.[43]

42. The absorption of heat and CO_2 emissions are the main causes of ocean warming, ocean acidification and sea-level rise, which are undeniably disturbing the marine environment, especially rare or fragile ecosystems.[44]

43. The fundamental instrument regulating the law of the sea is UNCLOS. In particular, Part XII of UNCLOS is concerned with the protection and preservation of the environment.

44. Article 192 of UNCLOS provides that "States have the obligation to protect and preserve the marine environment." Article 1(4) of the Convention defines pollution as "the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities."

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[39] Abram, N. et al., 'Framing and Context of the Report' in IPCC, *Special Report on the Ocean and Cryosphere in a Changing Climate, Summary for Policymakers,* p. 78 (CUP 2019) (Dossier No. 74).
[40] *Ibid*., pp. 82-83.
[41] IPCC 'Synthesis Report of the IPCC Sixth Assessment Report (AR6), Summary for Policymakers' (2023), p. 4 UN Doc IPCC AR6 SYR (Dossier No. 78).
[42] *Ibid*.
[43] *Ibid*.
[44] IPCC, *Special Report on the Ocean and Cryosphere in a Changing Climate, Summary for Policymakers,* p. 9 (CUP 2019) (Dossier No. 74).

45. As interpreted by the Arbitral Tribunal in the *South China Sea Arbitration*, Article 192 extends to both "protection of the marine environment from future damage and preservation in the sense of maintaining or improving its present condition."[45]

46. Article 194(2) of UNCLOS establishes that States shall take measures seeking to comply with the general rule not to cause significant harm to other States or pollution beyond national jurisdiction.[46] In this connection, the Arbitral Tribunal in the *South China Sea Arbitration* when commenting on the scope of application of Part XII of the Convention, pointed out that "the obligations in Part XII apply to all States with respect to the marine environment in all maritime areas, both inside the national jurisdiction of States and beyond it. Accordingly, questions of sovereignty are irrelevant to the application of Part XII of the Convention."[47]

47. As explained by ITLOS in its Advisory Opinion submitted by the Sub-Regional Fisheries Commission, living resources and marine life are part of the marine environment.[48] Already in 1999, ITLOS stated in the *Southern Bluefin Tuna Cases* that "the conservation of the living resources of the sea is an element in the protection and preservation of the marine environment."[49]

48. Furthermore, with regard to the seabed, Article 145 provides that necessary measures shall be taken to ensure effective protection for the marine environment from harmful effects which may arise from activities in the Area.

49. The 2019 IPCC Special Report on the Ocean and the Cryosphere concludes that the ocean absorbs 20-30% of the anthropogenic CO_2 emissions released into the atmosphere.[50] In other words, the release of CO_2 into the atmosphere from any source, including land-based sources, is a form of pollution of the marine environment. In addition, the Special Report found that the ocean has been warming continuously and

[45] PCA, *The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)* (Merits, 2016), Case No 2013-19, para. 941.
[46] The ICJ has confirmed the binding character of this principle of international law: "The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment" (*Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, p. 226, at pp. 241-242 para. 29.).
[47] PCA, *The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)* (Merits, 2016), Case No 2013-19, para. 940.
[48] *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission* (Advisory Opinion, 2 April 2015) ITLOS Reports 2015, p. 61, para. 216.
[49] *Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan)*, (Provisional Measures, Order of 27 August 1999) ITLOS Reports 1999, p. 295, para.70.
[50] Abram, N. et al., 'Framing and Context of the Report' in IPCC, *Special Report on the Ocean and Cryosphere in a Changing Climate, Summary for Policymakers*, p. 78 (CUP 2019) (Dossier No. 74).

taking up more than 90% of the excess heat present in the climate system,[51] which amounts to the absorption of heat into the ocean and, therefore, can also be described as a form of pollution.

50. Consequently, and in accordance with Articles 192 and 194, as well as other provisions of UNCLOS, States Parties have the specific obligation to reduce GHGs emissions, in order to prevent, reduce and control ocean warming, ocean acidification and sea level rise. In the case of ocean acidification, insofar as this deleterious effect is to a great extent the result of CO_2 being captured by the ocean, the specific obligation is to reduce the emissions of a particular GHG: carbon dioxide.

C. INTERNATIONAL ENVIRONMENTAL LAW

51. Several international multilateral treaties enshrine the no-harm rule in the same terms established in Principle 2 of the Rio Declaration on Environment and Development, consisting of States' duty 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.

52. For instance, Article 3 of the CBD;[52] the preamble of the United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa;[53] the Preamble of the Vienna Convention for the Protection of the Ozone Layer;[54] the Preamble of the Convention on Long-range Transboundary Air Pollution;[55] and Article 7 of the 1997 UN Watercourses Convention.[56] All these conventions make reference to the obligation not to cause harm.

53. Indeed, as already explained in Section A of this Chapter, the no-harm principle constitutes customary international law.

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[51] *Ibid.*
[52] Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993) 1770 UNTS 79 (CBD), art. 3 (Dossier No. 19).
[53] United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa (adopted 14 October 1994, entered into force 26 December 1996) 1954 UNTS 3, preamble (Dossier No. 17)
[54] Vienna Convention for the Protection of the Ozone Layer (adopted 22 March 1985, entered into force 22 September 1988) 1513 UNTS 293. preamble (Dossier No. 25).
[55] Convention on long-range transboundary air pollution (adopted 13 November 1979, entered into force 16 March 1983) 1302 UNTS 217, preamble.
[56] Convention on the Law of the Non-Navigational Uses of International Watercourses (adopted 21 May 1997, entered into force 17 August 2014) 2999 UNTS 77, art. 7.

D. THE INTERNATIONAL CLIMATE CHANGE REGIME

54. The Court should also take into account the obligations contained in what is referred to as the Climate Change Regime, which encompasses the treaties that have attempted to stabilize GHG concentrations in the atmosphere[57] and mitigate its effects on the climate system, namely, the United Nations Framework Convention on Climate Change ("UNFCCC"), the Kyoto Protocol and the Paris Agreement. These three treaties establish a framework under which mitigation and adaptation measures are negotiated.

55. Central to the climate regime is the objective to "stabiliz[e] greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system,"[58] and to do so "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."[59]

56. The UNFCCC was negotiated under the auspices of the United Nations General Assembly. In 1988 the General Assembly adopted recommendation 43/53 (1988), calling governments, intergovernmental and non-governmental organizations, and scientific institutions to initiate action leading to a comprehensive review and recommendations with respect to, among other things, elements for inclusion in a possible future international Convention on climate. The following year, in 1989 the General Assembly adopted recommendation 44/207 urging "governments, intergovernmental and non-governmental organizations and scientific institutions to collaborate in efforts to prepare, as a matter of urgency, a framework convention on climate and associated protocols containing concrete commitments in the light of priorities that may be authoritatively identified on the basis of sound scientific knowledge, and taking into account the specific developmental needs of developing countries." The negotiation of what became the UNFCCC began in December 1990.

57. The implementation of the UNFCCC and the attainment of its objective required the negotiation of further measures. The Kyoto Protocol and the Paris Agreement constitute the result of negotiations to implement the UNFCCC. The Kyoto Protocol (1997) was the first implementation agreement establishing commitments regarding

[57] United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107 (UNFCCC), art. 2 (Dossier No. 4).
[58] UNFCCC, art. 2.
[59] UNFCCC, art. 2.

quantitative restrictions on emissions only from developed countries as well as market-based mechanisms to facilitate emission reductions, including the development of projects in developing countries.

58. The Kyoto Protocol did not result in an overall reduction in GHGs as it only covered a fraction of global emissions and major economies failed to ratify it. However, many developed countries bound by the Protocol's obligations achieved reductions that allowed them to decouple emissions and economic growth.

59. The Paris Agreement (2015) offers a new opportunity to achieve a reduction of GHG emissions. Its central aim is to keep global temperature rise well below 2°C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5°C above pre-industrial levels.[60]

60. A close look at the objectives of the UNFCCC and its implementing agreements allows us to conclude that their purpose has not been to amend or soften the terms of the obligation not to cause harm by GHG emissions. Rather, these treaties establish general goals and tools to reach certain objectives. Their purpose is to engage States in a common effort to reduce GHG emissions, in order to achieve the goal of keeping global temperature rise within 2°C above pre-industrial levels and, thus, to prevent dangerous anthropogenic interference with the global climate system.

61. Nevertheless, the Climate Change Regime accepts that, to a certain extent, even if its objectives are achieved, some significant harm to the environment may in any case occur.[61] Indeed, significant harm is already being experienced by the inhabitants of Boigu, Poruma, Warraber and Masig islands in Australia's Torres Strait region, as established by the Human Rights Committee in the case *Daniel Billy and Others v. Australia (Torres Strait Islanders Petition)*.[62]

62. In this context, the Climate Change Regime could be described as an example of international regulation of State conduct with the purpose of preventing the occurrence of extensive detrimental effects on the climate system, while accepting that it is

[60] Paris Agreement (adopted 4 December 2015, entered into force 4 November 2016) 3156 UNTS 79, art. 2(a) (Paris Agreement) (Dossier No. 16).
[61] IPCC, Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, Summary for Policymakers (Dossier No. 77), Chapter 16, p. 2420 ("[R]esidual losses and damages will occur from climate change despite adaptation and mitigation action.")
[62] UNCHR, *Daniel Billy and others v Australia (Torres Strait Islanders Petition)* (22 September 2022) UN Doc CCPR/C/135/D/3624/2019.

impossible to eliminate detrimental effects altogether. This is explained by the fact that, historically, GHG emissions have been connected with economic growth since the industrial revolution.

63. Certainly, the success of the Climate Change Regime depends on the full implementation of the ambitious contributions that States themselves establish. The role of political and economic factors should not be underestimated. Indeed, it has been widely recognized that, in order to have climate ambition by States that would take the world to emission trajectories consistent with the long-term goals of the Paris Agreement, a commensurate mobilization of finance, both locally and internationally, especially aimed at developing countries, is paramount. Ultimately, the success of the Paris Agreement depends in great part on political will and leadership to promote these objectives, and the Climate Change Regime is positively premised on that.

E. International Human Rights Law

64. As early as 2009,[63] the Human Rights Council ("HRC") noted that climate change-related impacts have a range of implications, both direct and indirect, for the enjoyment of human rights, including — *inter alia* — the right to life, the right to adequate food, the right to the highest attainable standard of health, the right to adequate housing, the right to self-determination and human rights obligations related to access to safe drinking water and sanitation.[64] In its latest resolution,[65] the HRC has also emphasized the adverse effects of climate change on the right to enjoy the highest attainable standard of both physical and mental health, the right to work and the right to development.[66] Furthermore, in 2022, the United Nations General Assembly affirmed the human right to a clean, healthy and sustainable environment.[67]

65. The United Nations Secretary-General[68] and the Office of the High Commissioner for Human Rights[69] ("OHCHR") have recognized that climate change threatens human

[63] HRC 'Report of the Human Rights Council on its tenth session' (25 March 2009) UN Doc 10/4A/HRC/10/29 (Dossier No. 265).
[64] HRC Res 41/21 (12 July 2019) UN Doc A/HRC/Res/41/21 (Dossier No. 272).
[65] HRC Res 53/6 (12 July 2023) UN Doc A/HRC/Res/53/6 (Dossier No. 275-A).
[66] *Ibid*., p. 3.
[67] UNGA Res 76/300 (28 July 2022) UN Doc A/RES/76/300 (Dossier No. 260).
[68] Remarks of the Secretary-General, 'The highest aspiration: a call to action for human rights' (24 February 2020) available at https://www.un.org/sg/en/content/sg/statement/2020-02-24/secretary-generals-remarks-the-un-human-rights-council-%E2%80%9Cthe-highest-aspiration-call-action-for-human-rights-delivered-scroll-down-for-all-english.
[69] OHCHR, 'Human Rights and Climate Change. Key Messages' available at https://www.ohchr.org/sites/default/files/Documents/Issues/ClimateChange/KeyMessages_on_HR_CC.pdf.

rights around the world. The World Bank has found that climate change impacts "could include injuries and deaths due to extreme weather events."[70]

66. In its Fourth Assessment Report (2007), the IPCC predicted an increase in people suffering from death, disease and injury from heatwaves, floods, storms, fires, and droughts,[71] highlighting the impacts of climate change on the right to life including an increase in hunger and malnutrition,[72] effects on child growth and development,[73] and changes in cardiorespiratory morbidity and mortality.[74] In its Fifth Assessment Report, the Panel further described how increased malnutrition from reduced food production would lead to growing risks of mortality, particularly in sub-Saharan Africa and South Asia.[75] In 2014, the IPCC noted that the potential health impacts of climate change included greater likelihood of injury and death due to more intense heatwaves and fires.[76]

67. For its part, the Paris Agreement acknowledges in its preamble that climate change is a common concern of humankind and that parties should, when taking action to address climate change, respect, promote and consider their respective obligations with regard to human rights, including the right to food, the right to health, the rights of indigenous peoples, local communities, peasants, migrants, children, persons with disabilities and persons in vulnerable situations. Regarding the latter, the HRC has included people living in small island developing States and least developed countries, and in conditions of water scarcity, desertification, land degradation and drought.[77] In addition, the HRC has recalled that States should also consider their respective obligations with regard to the right to development, gender equality, the empowerment of women and intergenerational equity when taking climate action.[78]

68. Accordingly, the Court should apply the relevant obligations contained in various international human rights instruments, namely, the Universal Declaration of Human Rights; the International Covenant on Civil and Political Rights; the International

[70] World Bank, 'Turn Down the Heat: Why a 4°C Warmer World Must Be Avoided' (2012), p. xvii.
[71] IPCC, 'Climate Change 2007: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change' (2007).
[72] *Ibid.*, p. 47.
[73] *Ibid.*
[74] *Ibid.*, p. 43.
[75] IPCC, 'Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part A: Global and Sectoral Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change' (2014), p. 1056.
[76] IPCC, 'Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change' (2014), p. 69.
[77] HRC Res 53/6 (12 July 2023), pp. 1-2 UN Doc A/HRC/Res/53/6 (Dossier No. 275-A).
[78] *Ibid.*

Covenant on Economic, Social and Cultural Rights; the Convention on the Rights of Persons with Disabilities; the Convention on the Rights of the Child; the Convention on the Elimination of All Forms of Discrimination against Women; and the International Convention on the Elimination of All Forms of Racial Discrimination. All these conventions are applicable inasmuch as they bind their respective State parties.

69. Moreover, in this vein, the Inter-American Court of Human Rights ("IACtHR") recognized that a State's jurisdiction is not limited to its territorial space.[79] In its 2017 Advisory Opinion on the Environment and Human Rights, the IACtHR considered that "States have the obligation to avoid transboundary environmental damage that can affect the human rights of individuals outside their territory."[80] The IACtHR also stressed that "this obligation does not depend on the lawful or unlawful nature of the conduct that generates the damage,"[81] as States have the obligation to provide "prompt, adequate, and effective redress"' to the victims of transboundary harm that can be causally linked to the acts or omissions of the State of origin in relation to activities in its territory or under its jurisdiction or control.[82]

70. Accordingly, the Court should take into consideration the obligations that are associated with the prevention of environmental damage to the climate system as a result of GHG emissions, as opposed to the obligations of States to adapt to the effects of climate change. The latter dimension of climate policies refers to actions that take place exclusively within a State's territory, while the former consists of a global responsibility where all States pollute one single and common space (the atmosphere). In this regard, the obligations of States to protect their own population and their human rights is a clear priority that falls within their national prerogatives as individual States, as it relates to the immediate consequences of climate change, especially in the most vulnerable groups within their jurisdictions. This of course is not inconsistent with the obligations of developed countries, as established in the UNFCCC and the Paris Agreement, to mobilize financial and technical resources to help developing countries in fulfilling these functions.[83]

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[79] *The Environment and Human Rights*, Advisory Opinion OC-23/17, Inter-American Court of Human Rights Series A No. 23 (15 November 2017), para. 95.
[80] *Ibid.*, para. 101.
[81] *Ibid.*, para. 103.
[82] *Ibid.*; Articles on Prevention of transboundary harm from hazardous activities, adopted by the International Law Commission in 2001 and annexed to UN General Assembly Resolution 62/68 of December 6, 2007, UN Doc. A/RES/62/68.
[83] *See, i.e.*, Paris Agreement, art. 7.13.

F. SYSTEMATIC INTEGRATION OF THE APPLICABLE LAW

71. The scope of international law has increased dramatically since the second half of the twentieth century, expanding to deal with the most varied kinds of international activity, from trade to environmental protection, from human rights to scientific and technological cooperation.[84] The Climate Change Regime, as a multilateral institution, responds to this trend as well. However, the focus of this expansion of international law has been on problem-solving, which has resulted in increased specialization and autonomization of these areas of law as opposed to a general, law-like regulation.[85]

72. Save for the no-harm principle — a general rule of international law — the applicable law in the present case is composed of different regimes, each with its own set of rules, principles, and institutions. This reality has been identified by the International Law Commission ("ILC") as fragmentation.[86] In determining the obligations and their legal consequences, the Court should be mindful of this fact and apply the relevant provisions in conjunction, avoiding incompatible decisions.

73. Although fragmentation is inevitable, the ILC has helpfully identified the principles that must be taken into account in order to assess and manage it.[87]

74. First, international law is a legal system. Its rules and principles "act in relation to and should be interpreted against the background of other rules and principles."[88] Thus, the climate change regime cannot be assessed on its own, but must be considered in conjunction with the other applicable law.

75. Second, there are accepted techniques in international law to determine the precise relationship between two or more rules and principles when both deal with the same subject matter (i.e., are valid) and have binding force for the legal subjects in said situation (i.e., are applicable). In this sense, in order to elucidate the obligations of States, Chile is of the view that the Court should find relationships of interpretation whereby one norm may assist in the interpretation of another norm, and avoid relationships of conflict, incompatibility or derogation.

76. Third, the Vienna Convention on the Law of Treaties ("VCLT") provides a unifying framework to assess and manage fragmentation, particularly, Article 30 on the relation

[84] ILC, 'ILC Report on Fragmentation' (2006), p. 3 UN Doc A/CN.4/L.702.
[85] *Ibid.*
[86] ILC, 'ILC Report on Fragmentation' (2006) UN Doc A/CN.4/L.702.
[87] *Ibid.*, pp. 7-8.
[88] *Ibid.*, p. 7.

between subsequent treaties and the provisions regarding treaty interpretation contained in Articles 31-33. In this regard, the ILC has maintained the applicability of Article 30 of the VCLT even when a conflict may arise between treaties that deal with different subjects. The different characterizations of a particular treaty (for instance, "climate change law" and "human rights law") do not bar a harmonious interpretation under Article 30 because these characterizations in and of themselves lack normative value. Indeed, most international instruments may be described from various perspectives:[89] the provisions of the climate change framework have significant human rights, environmental and marine implications and *vice versa*.

77. Fourth, the principle of harmonization, a generally accepted principle of treaty interpretation, establishes that "when several norms bear on a single issue they should, to the extent possible, be interpreted as to give rise to a single set of obligations."[90]

78. Pursuant to harmonization as a principle of treaty interpretation, the applicable rules and principles should be systematically integrated in a manner that results in obligations being compatible and non-contradictory. In the *Right of Passage over Indian Territory* judgment, the Court stated:[91]

> [I]t is a rule of interpretation that a text emanating from a Government must, in principle, be interpreted as producing and as intended to produce effects in accordance with existing law and not in violation of it.

79. Furthermore, it is Chile's position that the Court cannot create new obligations, but rather it should find them in the applicable conventions and existing customary international law. With this in mind, Chile will proceed to put forward its views regarding questions (a) and (b).

IV. CHILE'S VIEWS ON QUESTION (A)

80. Question (a) of the request for an advisory opinion reads:

> "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?"

[89] ILC, 'Report of the Study Group of the International Law Commission, finalized by Mr. Martti Koskenniemi' (2006), p. 13 UN Doc A/CN.4/L.682 and Add.1.
[90] ILC, 'Report on Fragmentation', p. 8 UN Doc A/CN.4/L.702.
[91] *Case concerning right of passage over Indian territory (Preliminary Objections), Judgment of November 26th, 1957, I.C.J. Reports I957, p. 125, at* p. 142.

81. As explained in Chapter III, Section A of this written statement, customary international law establishes that all 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. This obligation has been endorsed by the Rio Declaration on Environment and Development (1992)[92] and by the ILC Articles on Prevention of Transboundary Harm from Hazardous Activities (2001).[93] The binding character of the rule has been confirmed by this Court as well as by other tribunals.

82. In the Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, this Court stated that:[94]

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

83. In the *Pulp Mills* decision the Court reiterated the applicability of this rule, quoting the *Nuclear Weapons* Advisory Opinion.[95] In turn, the Court in the case concerning *Certain Activities Carried Out by Nicaragua in the Border Area and Construction of a Road in Costa Rica along the River San Juan (Costa Rica v. Nicaragua/Nicaragua v. Costa Rica)* referred to the *Pulp Mills* decision when dealing with the environmental impact assessment required by the obligation to exercise due diligence in preventing significant transboundary environmental harm.[96]

84. The general obligation of States to ensure that activities within their jurisdiction and control do not cause damage to the environment, has found recognition in various treaties regarding the protection of specific elements of the environment, namely, the

[92] UN, 'Report of the UN Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992' (1993), principle 2 UN Doc A/CONF.151/26/Rev.1 (Vol. I) (Dossier No. 137) ("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").
[93] Yearbook of the International Law Commission, 2001, vol. II, Part Two, p. 153, art. 3 ("The State of origin shall take all appropriate measures to prevent significant transboundary harm or at any event to minimize the risk thereof").
[94] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, p. 226, at p. 241, para. 29.
[95] *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010, p. 14, at p. 78, para. 193.
[96] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, I.C.J. Reports 2015, p. 665, at p. 706, para. 104.

United Nations Law of the Sea Convention, the UN Watercourses Convention, the Convention on Biological Diversity, and others.

85. Part XII of UNCLOS on the protection and preservation of the marine environment, starts by stating very clearly in Article 192 that "States have the obligation to protect and preserve the marine environment." Further, Article 145 of UNCLOS deals with the protection of the marine environment in the Area. Chile recalls the International Seabed Authority's primary responsibility to prevent, reduce and control pollution of the marine environment and to protect and preserve the natural resources located in the Area through the adoption of rules, regulations and procedures for the activities carried out in the Area in accordance with Part XI of UNCLOS.

86. In turn, Article 7 of the UN Watercourses Convention prescribes that States shall exercise due diligence to utilize an international watercourse in such a way as not to cause significant harm to other watercourse States. For its part, Article 3 of the CBD incorporates Principle 2 of the Rio Declaration to the text of the Convention.

87. The Court is asked to answer the question about the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from GHG emissions. As explained before, the source of the obligation not to cause harm to the environment is not to be found in the Climate Change Regime. At the time of the negotiation of the Climate Change Regime, the obligation not to cause harm to the environment already existed. In this context, the Climate Change Regime must be regarded as a case of international regulation of GHG emissions the purpose of which is to minimize the damage caused by them.

88. In answering question (a), the Court will need to examine the interplay between the Climate Change Regime, comprised of the UNFCCC, the Kyoto Protocol and the Paris Agreement, and the separate obligation of States to ensure that activities within their jurisdiction and control do not cause damage to the environment of other States or areas beyond national jurisdiction. In particular, the Court will have to examine the relationship between the Paris Agreement, on the one hand, and the customary international law obligation to prevent damage to the environment, on the other.

89. To determine compliance with the due diligence standard, the Court should look at the relevant actions taken by States to keep the risk of damage created by its economic activities below a given acceptable level. It is the position of Chile that the Climate

Change Regime does not directly address the question of due diligence in preventing harm.

90. The Climate Change Regime aims at the reduction of GHG emissions to obtain "the stabilization of GHG concentration in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system."[97] The UNFCCC states that this objective "would 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."[98] Indeed, the Climate Change Regime accepts that even if States fully comply with the Paris Agreement, some damage will still be caused. In relation to that damage, the Court will have to ask in each situation whether States have acted with due diligence in attempting to minimize the risk of damage.

V. CHILE'S VIEWS ON QUESTION (B)

91. Question (b) of the request for an advisory opinion is two-fold and reads:

> "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?"

92. In providing its views regarding question (a), Chile concluded that the climate change legal framework needs to be interpreted harmoniously with the customary obligations to prevent and ensure that activities within a State's jurisdiction and control do not cause damage to the environment of other States or areas beyond national jurisdiction. In this regard, the causing of significant harm to the climate system and other parts of the environment, even if in compliance with the regulatory measures envisaged in the Climate Change Regime, constitutes a breach of the international obligations of States.

93. Under customary international law, as reflected in the 2001 International Law Commission's (ILC) Articles on Responsibility of States for Internationally Wrongful

[97] UNFCCC, art. 2.
[98] *Ibid.*

Acts,[99] a breach of an international obligation attributable to a State is considered an internationally wrongful act,[100] which entails the international responsibility of that State.[101] Hence, in answering question (b), to determine the legal consequences arising from those acts and omissions, the Court will first need to assess whether it is possible to attribute harm caused to the climate system and other parts of the environment to States' conduct.

A. ATTRIBUTION OF DAMAGE TO THE CLIMATE SYSTEM

94. Chile recognizes the intrinsic difficulties of attributing particular consequences of climate change to specific emissions. Nevertheless, as shown in Chapter II, the current state of scientific evidence has allowed us to determine not only the amount of current and historic emissions of each country but also the consequences of failure to reduce those emissions in the overall warming levels.[102]

95. In fact, the United Nations Environment Program ("UNEP") has reported that "[g]lobal warming is almost linearly proportional to the total net amount of CO_2 that has ever been emitted into the atmosphere from human activities."[103] UNEP has also pointed out that current Nationally Determined Contributions are not nearly enough to reach the Paris Agreement's long-term temperature goal, which can only be achieved by "relentlessly strengthening ambition and implementation this decade."[104]

96. It follows that science can quantify not only individual contributions to the global mean surface temperature rise but also the real impact that failure to adopt necessary measures has on the overarching temperature goals.[105]

97. Therefore, while it is not possible to attribute specific climate change-induced events to particular emissions, reasonable inferences can be accomplished by quantifying States' individual contributions to climate change.

98. In this regard, considering that recourse to inferences of fact and circumstantial evidence are allowed before the Court, especially when the victim of a breach of international law is "unable to furnish direct proof of facts giving rise to

[99] Yearbook of the International Law Commission, 2001, vol. II, Part Two, pp. 26-30 ("Articles on State Responsibility").
[100] Articles on State Responsibility, art. 2.
[101] Articles on State Responsibility, art. 1.
[102] *See, e.g.*, UNEP, 'Emissions Gap Report 2023: Broken Record' (20 November 2023).
[103] UNEP, 'Emissions Gap Report 2023: Broken Record' (20 November 2023), p. 27.
[104] *Ibid*, p. 1.
[105] *Ibid*, p. 33.

responsibility",[106] these difficulties should not necessarily be considered an obstacle for the establishment of responsibility.

99. A similar conclusion applies to the fact that injury to the climate system is caused by concurrent causes, and the conduct of several different States.

100. The ILC has recognized that "[w]here several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act."[107] This is because "each State is separately responsible for the conduct attributable to it, and that responsibility is not diminished or reduced by the fact that one or more other States are also responsible for the same act."[108]

101. This rule was confirmed in the *Corfu Channel* case where the Court made findings on Albania's responsibility, even though it was argued that it was another State who laid the mines; and more recently, in the *Phosphate Land in Nauru* case when concluding that, as long as the determination of responsibility of New Zealand and the United Kingdom were not the subject-matter of the judgment that needed to be rendered in the merits, the rule established in the *Monetary Gold* case was not applicable.[109] In other words, the Court determined that as long as the finding of responsibility of those other States was not a prerequisite for the determination of the responsibility of Australia, the mere fact that the judgment had implications for the legal situation of those others State was not enough for the Court to decline the exercise of its jurisdiction.[110]

102. Thus, it can be held that all States that have directly contributed with their acts and omissions to harm the climate system could be held liable for compensation for their own contributions to that injury.

103. The question of whether reparation by one State would be due for the whole or part of the claimed damage is a separate question that would need to be determined by the Court.[111]

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[106] *Corfu Channel case*, Judgment of April 9th, 1949, I.C.J. Reports 1949, p.4, at p. 18.
[107] Articles on State Responsibility, art. 47.
[108] Yearbook of the International Law Commission, 2001, vol. II, Part Two, p. 124, Commentary to art. 47, para. 1.
[109] *Ibid*.
[110] *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, Judgment, I.C.J. Reports 1992, p. 240, at p. 261, para. 55.
[111] *Ibid.*, para. 56.

B. APPLICABILITY OF THE GENERAL RULES OF INTERNATIONAL RESPONSIBILITY

104. In addition to the determination on attribution, before getting into the legal consequences that arise from the aforementioned obligations, the Court also needs to assess whether the Climate Change Regime contains special rules that would render the general rules on State responsibility inapplicable. Chile recognizes that these rules do not apply where and to the extent that the content or implementation of international responsibility is governed by special rules of international law.[112]

105. Chile would like to recall General Assembly Resolution 70/1, that adopted the 2030 Agenda for Sustainable Development and acknowledged that "the United Nations Framework Convention on Climate Change is the primary international, intergovernmental forum for negotiating the global response to climate change."[113] Chile reaffirms its commitment to strengthening multilateral action, taking into account that climate change can only be addressed adequately with the contribution of all States.

106. In this regard, notwithstanding Chile's views that the mechanisms and processes contained in the provisions of the UNFCCC and the Paris Agreement should be fully implemented as part of the obligations of States (collectively or individually), including the commitments established in Article 4 of the Convention and the Nationally Determined Contributions that Parties to the Paris Agreement intend to achieve,[114] it is Chile's position that the Climate Change Regime contains no special rules that could exclude the application of the general rules on State responsibility.

107. Indeed, the mechanisms established within the Climate Change Regime are not meant to regulate liability for damages arising from breaches of obligations under the treaties,[115] but rather to strengthen the capacity of the Parties and, in particular, developing States, to manage climate risk and implement adequate strategies.[116]

108. This means that the compliance mechanisms contemplated in the relevant climate change treaties are not meant to regulate compensation for damages arising out of breach of the no-harm rule by individual States. In this regard, when the scope of

[112] Articles on State Responsibility, art. 55.
[113] UNGA Res 70/1 (21 October 2015), p. 14 UN Doc A/RES/70/1.
[114] Paris Agreement, art. 4.2.
[115] Margaretha Wewerinke-Singh, S*tate Responsibility, Climate Change and Human Rights Under International Law* (1st edn, Hart Publishing 2018), p. 68.
[116] 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.

special laws is narrower than that of general law, as is the case with the Climate Change Regime, general law would still apply as a gap filler.[117]

109. COP Decision 1/CP.21, adopting the Paris Agreement, makes it clear that Article 8 of the Paris Agreement "does not involve or provide a basis for any liability or compensation".[118] This means that the establishment of a mechanism to address loss and damage cannot be interpreted as a recognition of liability or compensation. Neither can Article 8 be interpreted as if States Parties have waived their contingent rights to claim liability and compensation.

110. For these reasons, the legal consequences arising from a breach of the no-harm rule would be those recognized under customary international law, as reflected in Articles 30 and 31 of the International Law Commission's 2001 Articles on the Responsibility of States for Internationally Wrongful Acts (herein "Articles on State Responsibility"). Thus, States would be under the obligation (i) to cease that act, if it is continuing; (ii) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require; and (iii) to make full reparation for the injury caused.[119]

i. *The obligation to cease the wrongful conduct*

111. The obligation to cease the wrongful conduct will arise if the conduct has a continuing character and the violated rule is still in force,[120] regardless of whether the conduct has caused any harm.

112. Chile recalls that States have an obligation not to cause harm, but also to prevent such harm from occurring. Thus, the violation of its obligation to prevent, even if no harm ensues, would still trigger an obligation to cease the wrongful conduct.

113. As explained in the previous sections, in order to comply with its obligation not to cause harm to the territory of other States or areas beyond national jurisdiction, States need to adopt all necessary regulations, policies and measures to ensure they reduce their emissions accordingly. The standard of due care applicable must be determined

[117] ILC, 'Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law', p. 179, para. 15 UN Doc A/61/10.
[118] UNFCCC COP Decision 1/CP.21 (29 January 2016), para. 51, UN Doc FCCC/CP/2015/10/Add.1.
[119] Yearbook of the International Law Commission, 2001, vol. II, Part Two, pp. 26-30.
[120] Yearbook of the International Law Commission, 2001, vol. II, Part Two, p. 89, Commentary to art. 30, para. 3 (citing *Rainbow Warrior*).

on a case-by-case basis in accordance with each State's specific circumstances and capabilities.

114. In this sense, if found to be in breach of these obligations, the wrongful conduct will continue for as long as the responsible State does not take all necessary and appropriate measures to reduce their emissions.

ii. *Reparation for harm caused with respect to small island developing States*

115. The second duty that arises from State responsibility is the duty to make reparation. This Court has recognized the obligation to make full reparations for the damage caused by a wrongful act on several occasions,[121] including, in particular, in cases of environmental damage.[122]

116. In cases where restitution is materially impossible or unduly burdensome, as would be the case with harm to the climate system, the Court has held that compensation may be an appropriate form of reparation.[123]

117. When it comes to damage to the environment, the Court has also held that "it is consistent with the principles of international law governing the consequences of internationally wrongful acts, including the principle of full reparation, to hold that compensation is due for damage caused to the environment, in and of itself, in addition to expenses incurred by an injured State as a consequence of such damage."[124]

118. Chile is aware that in climate change cases, as with environmental cases, "particular issues may arise with respect to the existence of damage and causation. The damage may be due to several concurrent causes, or the state of science regarding the causal link between the wrongful act and the damage may be uncertain."[125]

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[121] *i.e.*, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment, I.C.J. Reports 2010 (II), p. 639, at p. 691, para. 161; *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment, I.C.J. Reports 2004 (I), p. 12, at p. 59, para. 119; and *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Reports 1997, p. 7, at p. 80, para. 150.

[122] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Compensation, Judgment, I.C.J. Reports 2018, p. 15, at p. 26, para. 30.

[123] *Ibid.*, para. 31; and *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010 (I), pp. 103-104, para. 273

[124] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Compensation, Judgment, I.C.J. Reports 2018, p. 15, at p. 28, para. 41.

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

119. Nevertheless, while it is true that those issues would need to be determined on a case-by-case basis,[126] it is also true, as explained above, that the current state of the science has made it possible to determine, with a reasonable amount of certainty, that a particular harm is a direct result of climate change. In this regard, considering that the anthropogenic activities that are directly linked to the deleterious effects of climate change are so well established, the connection between this conduct and climate change-related harm is an informed and educated inference.

120. Thus, it follows that States responsible for causing serious harm to the climate system and other parts of the environment may have an obligation to compensate other 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, including damages to the environment itself.

121. It is important to note that, although the question put to the Court specifically refers to small island developing States, it is not confined to them and the same principles and consideration can be applicable to other States, especially developing States, due to their vulnerability and special circumstances described in the UNFCCC.[127]

iii. *Reparation for harm caused with respect to peoples and individuals of the present and future generations*

122. In relation to the harm caused with respect to peoples and individuals of the present and future generations under international human rights law, it must be noted that States have an obligation to respect, protect and fulfil the human rights of every person falling under their jurisdiction.

123. As already explained, a State's jurisdiction will generally include everyone within its territorial boundaries; however, in exceptional situations, there might be "circumstances in which the extraterritorial conduct of a State constitutes an exercise of its jurisdiction."[128]

124. In this regard, Chile notes that the Inter-American Court of Human Rights, in its Advisory Opinion on the *Environment and Human Rights* has already recognized that:

[126] *Ibid.*
[127] UNFCCC, art. 4.8
[128] *The Environment and Human Rights*, Advisory Opinion OC-23/17, Inter-American Court of Human Rights Series A No. 23 (15 November 2017), para. 78.

> the obligation to prevent transboundary environmental damage or harm is an obligation recognized by international environmental law, under which States may be held responsible for any significant damage caused to persons outside their borders by activities originating in their territory or under their effective control or authority.[129]

125. Thus, whenever States' acts or omissions cause transboundary environmental damage that directly affects the human rights of individuals, whether they reside within the territorial boundaries of the State or not, the State would be under an obligation to compensate them for that damage.

126. In order to determine whether a State's conduct has effectively affected the enjoyment of human rights, the Human Rights Committee in the *Torres Strait Islanders Petition*, assessed whether the adaptation measures taken by the State to reduce existing vulnerabilities and build resilience to climate change-related harms in the Islands were sufficient.

127. In particular, the Committee concluded that, because there were about 10 to 15 years before the petitioner's right to life was directly threatened, the State still had sufficient time to take affirmative measures to protect said life, which consequently, could not be deemed to be impaired. However, regarding the petitioners' right to private, family and home life, and the right to enjoy their minority culture, the Committee found that since those rights had already been affected, the State had failed to discharge its positive obligation to implement adequate adaptation measures, and consequently the State had violated the petitioners' rights.[130]

128. The protection and respect of human rights is primarily a responsibility of the State in relation to its own population. This cannot override, however, the responsibility of other States for the damage they have caused to the climate system with their GHG emissions.

129. It is thus clear that, with respect to climate change-related harm caused to peoples and individuals of present and future generations, States are under an obligation to adopt policies to the best of their available resources to reduce GHG emissions, and implement adequate and sufficient adaptation measures that ensure protection and respect of relevant human rights obligations. They are also under an obligation to

[129] *The Environment and Human Rights*, Advisory Opinion OC-23/17, Inter-American Court of Human Rights Series A No. 23 (15 November 2017), para. 103.
[130] UNCHR, *Daniel Billy and others v Australia* (Torres Strait Islanders Petition) (22 September 2022), para. 8.12 UN Doc CCPR/C/135/D/3624/2019.

cooperate with each other through, for example, the transfer of technology and capacity building opportunities, which can be achieved through the Climate Change Regime.

130. If those measures, however, are not sufficient so as to represent a direct threat to their rights,[131] then a human rights violation would have occurred, and the State or States would be under an obligation to fully compensate the victims for that harm.

VI. CONCLUSIONS

131. The Court has jurisdiction to give the present advisory opinion as it was requested by the General Assembly of the United Nations, a body authorized to make such a request, and it concerns a legal question pursuant to Article 96(1) of the United Nations Charter.

132. Although the Court has discretionary power to refuse to give an advisory opinion on issues that fall within its jurisdiction, there are no compelling reasons for the Court to exercise its discretion in this case.

133. Regarding Question (a), Chile is of the view that, considering the various sources of the applicable law in this case, the main obligation of States is to reduce anthropogenic emissions of greenhouse gases at a level that will ensure the protection of the climate system and other parts of the environment, preventing harm to the territory of other States or to areas beyond national jurisdiction. This is a due diligence obligation, which means that in assessing compliance with the rule, the Court should decide on a case-by-case basis.

134. Regarding Question (b), Chile recognizes the intrinsic difficulties that exist when it comes to attributing the particular consequences of climate change to specific emissions and emitters. However, recourse to inferences from science-backed sources and circumstantial evidence can very well stand in for a lack of direct proof in this regard. In sum, these difficulties cannot obstruct the establishment of international responsibility.

135. In addition, it is Chile's position that the climate change regime does not contain any special rules of international law that would bar the application of the general rules of State responsibility. Therefore, the legal consequences resulting from a breach of the no-harm rule are: the obligation to cease the wrongful conduct, to offer appropriate assurances and guarantees of non-repetition, and to make full reparation for the injury

[131] UNCHR, *Daniel Billy and others v Australia* (Torres Strait Islanders Petition) (22 September 2022), para. 8.7 UN Doc CCPR/C/135/D/3624/2019.

caused. Reparations may also be owed to peoples and individuals by virtue of the application of international human rights law.

THE HAGUE, 22 March 2024

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