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INTERNATIONAL COURT OF JUSTICE

CASE CONCERNING OBLIGATIONS OF STATES IN RESPECT OF CLIMATE CHANGE

(REQUEST FOR ADVISORY OPINION)

WRITTEN COMMENTS OF THE FRENCH REPUBLIC

15 August 2024

[Translation by the Registry]

TABLE OF CONTENTS

INTRODUCTION 2

I. The purpose and context of these advisory proceedings 3

II. The content of the written statements 3

POINTS OF DISCUSSION 5

III. The necessarily systemic interpretation of the relevant applicable law with respect to combating climate change 5

A. Identification of the relevant applicable law 5

B. Systemic interpretation of the relevant applicable law 6

IV. The obligations of all States to combat climate change 7

V. The obligation to co-operate in combating climate change 10

VI. The conditions for applying the law of international responsibility 13

INTRODUCTION

1. By its resolution 77/276 of 29 March 2023, the General Assembly of the United Nations requested the International Court of Justice (hereinafter the "ICJ" or the "Court") to render an advisory opinion on the following questions:

> "*(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 letters dated 17 April 2023, the request for an advisory opinion was notified to all States entitled to appear before the Court, in accordance with Article 66, paragraph 1, of the Statute of the Court. By an Order dated 20 April 2023, the Court decided that "the United Nations and its Member States . . . [were] . . . likely to be able to furnish information on the questions submitted to [it] for an advisory opinion", and that they could do so before 20 October 2023. The Court subsequently extended that time-limit by an Order dated [4] August 2023. It fixed 22 January 2024 as the time-limit within which written statements on the questions could be presented to the Court, in accordance with Article 66, paragraph 2, of its Statute. It then extended that time-limit to 22 March 2024. In this context, 91 written statements have been filed by 83 States, including France, and 12 international organizations.

3. By an Order of 15 December 2023, the Court extended to 24 June 2024 the time-limit within which States and organizations that had presented written statements could submit written comments on the other written statements, in accordance with Article 66, paragraph 4, of its Statute. By an Order of 30 May 2024, at the request of certain States and organizations participating in the proceedings, the Court further extended this time-limit to 15 August 2024.

4. In this context, the French Republic has the honour to submit the present written comments to the Court. In accordance with Article 66, paragraph 4, of the Statute of the Court, France will "comment on the statements made by other states or organizations", further developing, where necessary, certain points of its written statement submitted on 22 March 2024, which retains its full relevance.

5. Before addressing the key points that, in its opinion, call for discussion, France will make a few preliminary remarks on the purpose and context of these advisory proceedings (**I**) and on the content of the written statements submitted in this context (**II**).

I. The purpose and context of these advisory proceedings

6. As many of the participants in these advisory proceedings have recalled, the purpose of the latter is to identify and clarify the existing primary obligations and the legal consequences of causing significant harm to the climate system and other parts of the environment. The questions are worded in such a way that they do not ask the Court, either explicitly or implicitly, to apply the law in this case or to effectively invoke, if applicable, the responsibility of a particular State or group of States.

7. Further, France has taken note of the developments since 22 March 2024 in the jurisprudence on the international obligations of States in respect of climate change: on 21 May 2024, the International Tribunal for the Law of the Sea (hereinafter "ITLOS") rendered its advisory opinion on climate change and international law, and on 9 April 2024, the European Court of Human Rights (hereinafter the "ECHR") issued three decisions relating to climate change in the cases concerning *Verein KlimaSeniorinnen Schweiz and Others* v. *Switzerland*[1], *Duarte Agostinho and Others* v. *Portugal and Others*[2] and *Carême* v. *France*[3]. These developments are clearly relevant to the response to the present request for an advisory opinion and, in the interests of a systemic and consistent approach, it is important that they be taken into account to that end.

II. The content of the written statements

8. As previously mentioned, 91 written statements have been filed by 83 States and 12 international organizations in these advisory proceedings. France welcomes this historic level of participation, as well as the wealth and variety of the statements submitted to the Court. These circumstances alone attest to the gravity of the questions posed by the United Nations General Assembly and the confidence placed in the Court by a large number of States.

9. From a general point of view, these written statements call for three remarks.

10. First, France notes that the statements largely acknowledge, in a well-documented and sometimes even quantified manner, the impact of climate change on all States and their populations, particularly those that are most vulnerable. The figures and scientific data available, notably in the authoritative reports of the Intergovernmental Panel on Climate Change (hereinafter the "IPCC"), a body widely trusted by States, provide a sufficient measure of the extent of this impact. In its advisory opinion of 21 May 2024 relating to the marine environment, ITLOS sums it up as follows:

> "The Tribunal is mindful of the fact that climate change is recognized internationally as a common concern of humankind. The Tribunal is also conscious of the deleterious effects climate change has on the marine environment and the devastating consequences it has and will continue to have on small island States, considered to be among the most vulnerable to such impacts."[4]

11. This observation is shared by France as regards the concrete effects of climate change on individuals and societies. France is particularly exposed to the adverse effects of climate change.

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[1] European Court of Human Rights (ECHR), *Verein KlimaSeniorinnen Schweiz and Others* v. *Switzerland* [GC], No. 53600/20, 9 Apr. 2024.

[2] ECHR, *Duarte Agostinho and Others* v. *Portugal and Others* [GC], No. 39371/20, 9 Apr. 2024.

[3] ECHR, *Carême* v. *France* [GC], No. 7189/21, 9 Apr. 2024.

[4] *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*, *Advisory Opinion*, 21 May 2024, No. 31, para. 122.

Because of their specific geographical and socio-economic circumstances, France's 12 overseas territories — most of which are islands — are especially vulnerable to these effects. They are threatened by sea level rise, loss of biodiversity and increasingly frequent extreme weather events, among other things. This alarming assessment is supported by the individual testimonies that France has gathered in the course of preparing these written comments. The gravity of the climate threats facing the overseas territories is one of the driving forces behind France's climate action. As highlighted in its second national climate change adaptation plan, "the vulnerability of Overseas France to climate change must be taken into account"[5]. The particular circumstances of Overseas France in the face of climate change are extensively documented in various reports. For the full information of the Court, France has attached to these written comments two documents produced by the Interministerial Committee for Overseas France regarding the adaptation of Overseas France to climate change (Annexes 1 and 2), an extract from the annual public report of the *Cour des comptes* (2024) specifically dedicated to the prevention of climate-related natural disasters in Overseas France (Annex 3), and an April 2024 report by the French Environment and Energy Management Agency on co-operative climate and sustainable development initiatives in the Caribbean (Annex 4).

12. Second, it is worth noting that the written statements coincide in their identification of the law applicable to the response to the questions put to the Court. Indeed, a great many participants pointed out the importance of the United Nations Framework Convention on Climate Change (hereinafter the "UNFCCC") and the Paris Climate Agreement (hereinafter the "Paris Agreement") in analysing the issues raised in these proceedings. Like France, several participants also recognized the usefulness of customary international law in interpreting these treaty sources. For example, frequent mention was made of the relevance of the customary principles of prevention and the good-faith application of treaties in the context of climate change.

13. Lastly, numerous participants acknowledged that several of the obligations at issue, in particular some arising from the Paris Agreement, are what are known as obligations "of means", requiring States to demonstrate "diligence" in their implementation. France notes that there is no consensus, however, on the *standard* of diligence required in this context. Yet, as noted in its written statement, it is undeniable that "in the face of harm of such magnitude and intensity, the standard of due diligence required has to be *high*"[6]. Similarly, as regards the obligation to take all necessary measures to prevent, reduce and control marine pollution from anthropogenic greenhouse gas emissions into the atmosphere, for example, ITLOS considers that "the standard of due diligence under article 194, paragraph 1, of the [United Nations] Convention [on the Law of the Sea (hereinafter 'UNCLOS')] is *stringent*, given the high risks of serious and irreversible harm to the marine environment from such emissions"[7].

14. This high level of ambition is the only way to achieve tangible operational results in the fight against climate change. France would note that an updated estimate of its greenhouse gas (GHG) emissions in 2023 was published on 23 May 2024. It shows that these emissions (excluding carbon sinks) decreased by 5.8 per cent (or 22.8 million tonnes of CO_2[e]) between 2022 and 2023[8].

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[5] *Second national climate change adaptation plan*, 2018, p. 5 (available at: https://www.ecologie.gouv.fr/adaptation-france-au-changement-climatique) *[translation by the Registry]*.

[6] Written statement of France, para. 63 (emphasis added).

[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, No. 31, para. 243 (emphasis added).

[8] Available at: https://www.citepa.org/fr/2024_05_a02/.

POINTS OF DISCUSSION

15. Given the wealth and variety of the arguments put forward by the different participants in these proceedings, they cannot be given a comprehensive response. France will therefore focus on the four key points that, in its opinion, call for discussion and are worth exploring further: the systemic interpretation of the relevant applicable law (**III**), differentiation (**IV**), co-operation (**V**) and, lastly, the conditions for applying the law of international responsibility (**VI**).

III. The necessarily systemic interpretation of the relevant applicable law with respect to combating climate change

16. Although the applicable law in these proceedings is potentially very broad, certain instruments are undeniably directly relevant to the response to the questions put to the Court (**A**). These instruments constitute the reference framework that must be interpreted systemically, i.e. by taking account of "any relevant rules of international law applicable in the relations between the parties"[9] (**B**).

A. Identification of the relevant applicable law

17. The subject-matter jurisdiction of this Court, unlike that of ITLOS, for example, is not limited to the interpretation of a single international convention. From the outset, therefore, "[i]t is for the Court to state the law applicable to the factual situation referred to it by the General Assembly in its request for an advisory opinion"[10]. However, as the list of texts, principles and obligations in the *chapeau* to the questions put to the Court illustrates, a wide variety of rules and instruments could theoretically be relied upon in these advisory proceedings. Nevertheless, the Court must determine which of these rules are in fact relevant to its response to the questions put to it. As it states in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, "[i]n seeking to answer the question put to it by the General Assembly, the Court must decide, after consideration of the great corpus of international law norms available to it, what might be the *relevant* applicable law"[11].

18. As regards the present request for an advisory opinion, the applicable law that is "the most directly relevant"[12] to the response to the questions put to the Court consists, first and foremost, of that laid down in the UNFCCC, the Kyoto Protocol and the Paris Agreement. These three instruments, whose very object is to establish legal commitments to combat climate change, are indeed directly relevant for the purposes of this request for an opinion.

19. While these three conventions must be given central consideration in answering the questions put to the Court, they do not constitute the entire body of applicable law, which may also include other conventions or principles of customary international law relevant to identifying and clarifying the obligations of States in respect of climate change.

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[9] Art. 31, para. 3 *(c)*, of the Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, *Treaty Series (UNTS)*, Vol. 1155, No. 18232.

[10] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019 (I)*, p. 129, para. 137.

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

[12] *Ibid.*, p. 243, para. 34.

B. Systemic interpretation of the relevant applicable law

20. As many participants in the proceedings have recalled[13], the focus should be on a systemic, consistent and harmonious application of the relevant applicable international law, in keeping with the principles of treaty interpretation codified in Article 31 of the Vienna Convention on the Law of Treaties. In this respect, France previously noted that

> "[s]ince the UNFCCC[14], the Kyoto Protocol[15] and the Paris Agreement[16] specifically address climate change, they are the reference texts that must be interpreted, as necessary, in the light of other 'relevant rules of international law applicable in the relations between parties'[17]. These various sources of law should be interpreted in 'a harmonized manner'[18], with a view to ensuring the effectiveness and coherence of the reference texts on climate change."[19]

21. Thus, the legal framework of reference in climate matters cannot be considered in a vacuum, and various rules of international law are relevant to its interpretation. It is for the Court to assess the relevance of certain rules so that it can interpret the applicable international law identified for this purpose in a consistent and systemic manner.

22. In this context, the Court will have to make a clear distinction between the different sources of international law relied upon. Indeed, conventional or customary sources cannot, strictly speaking, be treated in the same way as resolutions or declarations of international organizations, regardless of their purpose or representativeness.

23. For example, France is firmly convinced that numerous rules of international human rights law are fully relevant to the interpretation of the reference texts on climate change. The impact of climate change on a number of human rights is indisputable and must be taken into account by States when interpreting their climate obligations. In this respect, France would refer to the discussion in its written statement on "[i]nterpreting obligations to ensure the protection of the climate system and other parts of the environment in a manner harmonious with human rights"[20].

24. The need to take account of human rights as part of a systemic interpretation does not, of course, alter the scope of each State's commitments in this regard. This applies in particular to the criteria for establishing the jurisdiction of each State. In this respect, it is worth noting that the essentially territorial nature of jurisdiction has been recalled by a number of participants in the

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[13] See e.g. written statement of IUCN, para. 502; written statement of the Republic of Kenya, paras. 5.51 *et seq.*; written statement of the Republic of Namibia, paras. 42 *et seq.*; written statement of the Republic of Chile, paras. 71 *et seq.*; written statement of Solomon Islands, para. 56; written statement of Saint Vincent and the Grenadines, para. 94; written statement of the Kingdom of Tonga, para. 126; written statement of the Republic of Albania, para. 13.

[14] New York, 9 May 1992, *UNTS*, Vol. 1771, No. 30822.

[15] Kyoto, 11 Dec. 1997, *UNTS*, Vol. 2303, No. 30822.

[16] Paris, 12 Dec. 2015, *UNTS*, Vol. 3156, No. 54113.

[17] Vienna Convention on the Law of Treaties, Art. 31, para. 3 *(c)*.

[18] A/77/PV.64, p. 32.

[19] Written statement of France, para. 13.

[20] *Ibid.*, paras. 128 *et seq.*

proceedings[21]. In its decision dated 9 April 2024 in the case concerning *Duarte Agostinho and Others* v. *Portugal and Others*, the ECHR recalled that "jurisdiction" within the meaning of Article 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter the "European Convention on Human Rights") is essentially territorial, and that only in certain "exceptional circumstances" can it be concluded that a State has exercised its jurisdiction extraterritorially in respect of applicants outside its territory. In its decision, the ECHR considered that, although account needed to be taken of certain specific characteristics of climate change, there were "no grounds in the Convention for the extension, by way of judicial interpretation, of the respondent States' extraterritorial jurisdiction" in the matter[22].

25. Further, other rules of international law are too indirectly or tenuously linked to the specific questions put to the Court to be considered relevant for the purposes of these proceedings. For example, in France's view, general questions on the manner in which the right to self-determination is exercised in the context of decolonization have no obvious link to the question of the obligations of States to combat climate change. This view does not preclude the possibility that certain precisely identified aspects of the right to self-determination may be usefully invoked in these proceedings, as part of a systemic approach to interpreting climate obligations. This includes, for example, questions relating to the impact of climate change on sea level rise, where that rise could submerge the entire land territory of an island State.

IV. The obligations of all States to combat climate change

26. France notes that, in light of the content of the written statements, it would be appropriate for the Court to clarify the scope of certain obligations to combat climate change. This includes, in particular, the way in which the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances, might be applied in relation to the various climate obligations of States. This question, building on the discussion in France's written statement[23], gives rise to the following observations.

27. The UNFCCC, which entered into force on 21 March 1994, establishes the overarching framework within which all "related legal instruments" subsequently adopted by the Conference of the Parties (hereinafter "COP") must be interpreted[24]. These instruments dovetail with the UNFCCC in accordance with customary international law, as codified in the Vienna Convention on the Law of Treaties. Indeed, the latter stipulates that in interpreting a given treaty, account must be taken of "any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions"[25]. The Paris Agreement clearly falls into this category, as explicitly recognized in Article 2, paragraph 1: "[t]his Agreement, *in enhancing the implementation of the Convention*, including its objective, aims to strengthen the global response to the threat of climate change"[26]. It follows that the UNFCCC, the Kyoto Protocol and the Paris Agreement, notwithstanding the different ways in which they address certain issues, must be regarded as deriving from the same coherent set of norms. Since they form a whole, these different conventional instruments must be read and applied in combination.

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[21] See e.g. written statement of Australia, paras. 3.64 *et seq.*; written statement of the People's Republic of China, para. 119; written statement of New Zealand, para. 116; written statement of the Government of Canada, para. 28.

[22] ECHR, *Duarte Agostinho and Others* v. *Portugal and Others* [GC], No. 39371/20, 9 Apr. 2024, para. 213.

[23] Written statement of France, paras. 43 *et seq*.

[24] UNFCCC, Art. 2.

[25] Vienna Convention on the Law of Treaties, Art. 31, para. 3 *(a)*.

[26] Emphasis added.

28. Thus, as a "framework" agreement, the UNFCCC sets out the principles that should serve as a basis for States to define, through separate agreements, the means by which it is to be implemented in practice and operationalized. Conversely — and against a backdrop in which both scientific knowledge on climate change and the national circumstances of the States parties are evolving — these subsequent agreements are essential to the interpretation and application of the UNFCCC: they clarify its meaning and specify how it must be applied.

29. One of the framework principles established by the UNFCCC to govern States' obligations to combat climate change is that of common but differentiated responsibilities and respective capabilities. Essential to ensuring an equitable, universal and, indeed, effective system, this principle is rooted in the provisions of the UNFCCC which lay down more stringent obligations for "developed country Parties"[27]. As the text defines neither this term nor "developing country Parties", the States concerned by these obligations are identified in Annexes I and II, which, from the outset, were intended to evolve in line with the circumstances of the States concerned. Article 4, paragraph 2 *(f)*, of the UNFCCC thus states explicitly that

> "[t]he Conference of the Parties shall review, not later than 31 December 1998, available information with a view to taking decisions regarding *such amendments* to the lists in annexes I and II as may be appropriate, with the approval of the Party concerned"[28].

30. The Kyoto Protocol to the UNFCCC, adopted in 1997, maintains and even strengthens the differentiation between "developed countries" and "developing countries". For the 38 States parties "included in Annex I", it lays down obligations relating to greenhouse gas emissions "with a view to reducing their overall emissions of such gases by at least 5 per cent below 1990 levels in the commitment period 2008 to 2012"[29].

31. Adopted in 2015, the Paris Agreement, for its part, does away with this binary differentiation. While it remains guided by what is now known as the principle of "common but differentiated responsibilities and respective capabilities, in the light of different national circumstances", it requires all parties thereto to take action. Unlike the UNFCCC and the Kyoto Protocol, its structure is not static and based on quantified objectives and fixed categories, but dynamic and adaptable to the specific circumstances of each State. In keeping with the spirit of the UNFCCC, this new paradigm constitutes both innovation and progress, to which France reaffirms its commitment. This approach contributes to making the system both more equitable and more effective: by obliging each State to make a commitment, but only in accordance with its capabilities, it enables action to be taken by all States.

32. In this respect, as regards the obligation to take all necessary measures to prevent, reduce and control marine pollution, ITLOS emphasizes in its Opinion of 21 May 2024 that "the reference to available means and capabilities should not be used as an excuse to unduly postpone, or even be exempt from, the implementation of [this] obligation"[30]. It also recalls that

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[27] UNFCCC, Art. 4, paras. 2 and 3; Art. 12, paras. 2 and 5.

[28] Emphasis added.

[29] Kyoto Protocol, Art. 3, para. 1.

[30] *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*, *Advisory Opinion*, 21 May 2024, No. 31, para. 226.

> "the scope of the measures under this provision, in particular those measures to reduce anthropogenic GHG emissions causing marine pollution, may differ between developed States and developing States. At the same time, it is not only for developed States to take action, even if they should 'continue taking the lead'. All States must make mitigation efforts."[31]

33. Moreover, while the terms "developing countries" and "developed countries" do appear in the Paris Agreement, they do so contextually, i.e. in a manner specific to each provision rather than as a distinction affecting the text as a whole. The aide-memoire sent to delegations ahead of the ministerial consultations to prepare for COP21 thus explicitly stated that "[t]he practical application of differentiation will vary depending on the element of the agreement (mitigation, adaptation, support, transparency)"[32].

34. Furthermore, the Paris Agreement does not establish a list or annex for the purpose of determining whether a State falls into one or the other category. This new approach, when compared to that of the UNFCCC and the Kyoto Protocol, has two key implications. First, as mentioned above, the absence of a predetermined list provides the necessary flexibility for these categories to evolve in line with the capabilities and national circumstances of each State, ultimately contributing to the effectiveness of the fight against climate change. Second, the Paris Agreement allows for each State to take account of its level of development when defining the content and pace of measures taken to reach carbon neutrality.

35. It is therefore up to each State, as a "developed country" or a "developing country", to determine the content of the measures that will allow the objectives set by the Agreement to be met. France recalls that, as with the other provisions of the Paris Agreement, these terms must be interpreted and applied in good faith, in the light of the Agreement's global objective of limiting the average temperature increase to 1.5ºC above pre-industrial levels, and bearing in mind the highest possible ambition of each party.

36. In this context, besides commonly used criteria such as gross national income per capita, the human capital index and economic vulnerability, States should take into account criteria specific to the context of climate change, such as cumulative greenhouse gas emissions, the percentage of global biodiversity on their territory and environmental vulnerability. The latter two criteria are related to the obligation of States to protect all natural carbon sinks and reservoirs and, more specifically, forests and the marine environment. As France recalled in its written statement[33], this general obligation, and the specific obligations that give it concrete expression, flow from the acknowledgment that protecting greenhouse gas sinks and reservoirs is just as important as greenhouse gas reduction obligations in "achiev[ing] the long-term global goal of the Convention"[34].

37. Moreover, several States have emphasized in their written statements the need to take account of the right to development in interpreting the individual obligations of each State to combat climate change. In any event, it may be noted that development must be understood, particularly in the context of climate change, as being geared towards sustainability. As Principle 4 of the

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[31] *Ibid.*, para. 229.

[32] First informal ministerial consultations to prepare COP21, Paris, 20-21 July 2015: Aide-mémoire produced by France and Peru, 31 July 2015 (available at: https://www.minam.gob.pe/somoscop20/wp-content/uploads/sites/81/2014/10/Aide-m%C3%A9moire-Paris-July-Informals.pdf).

[33] Written statement of France, paras. 74 *et seq.*

[34] Decision 1/CP.26, Glasgow Climate Pact, FCCC/CP/2021/12/Add.1, para. 21.

Rio Declaration recalls, "environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it".

38. In its Judgment in the case concerning the *Gabčíkovo-Nagymaros Project*, the Court recalled the "need to reconcile economic development with protection of the environment"[35]. The Arbitral Tribunal in the *Iron Rhine* case, for its part, noted that "[e]nvironmental law and the law on development stand not as alternatives but as mutually reinforcing, integral concepts", and considered that the duty to prevent, or at least mitigate, the environmental harm caused by development-related activities was a principle of general international law[36]. The need to reconcile economic development with the protection of the environment has been recalled by the Court and other international bodies on a number of occasions[37].

39. France also notes that, if recognized by the Court, the right to development should be interpreted in a manner that is harmonious and consistent with the obligations laid down in international instruments on climate change, in particular the obligation of all States to prepare, communicate and maintain their nationally determined contributions — which reflect their highest possible ambition taking into account both their common but differentiated responsibilities and respective capabilities — and the obligation to pursue domestic measures to achieve the objectives of those contributions.

V. The obligation to co-operate in combating climate change

40. France welcomes the emphasis placed in almost all the written statements on the obligation to co-operate in protecting the climate system and other parts of the environment, but also on the obligation to co-operate with respect to the legal consequences of causing significant harm to the climate and other parts of the environment. The participants thus seem to agree that such an obligation exists, although its exact content still requires clarification.

41. Numerous texts recall the general duty of States to co-operate in protecting the environment. For example, Principle 24 of the Stockholm Declaration recalls that

> "[c]ooperation through multilateral or bilateral arrangements or other appropriate means is essential to effectively control, prevent, reduce and eliminate adverse environmental effects resulting from activities conducted in all spheres, in such a way that due account is taken of the sovereignty and interests of all States"[38].

42. This obligation is also established in the jurisprudence. ITLOS has thus considered that the duty to co-operate is "a fundamental principle in the prevention of pollution of the marine environment" under UNCLOS[39]. Further, in the case concerning *Pulp Mills on the River Uruguay*,

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[35] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, pp. 77[-78], para. 140.

[36] *Iron Rhine Arbitration (Belgium/Netherlands), Award of 24 May 2005*, para. 59.

[37] See e.g. *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010*, p[p. 48-49], paras. 75-76; *Indus Waters Kishenganga Arbitration (Pakistan* v. *India), [Partial] Award of [18 Feb. 2013]*, paras. 449-451.

[38] See also e.g. Rio Declaration, Principle 7.

[39] *The MOX Plant Case (Ireland* v. *United Kingdom), Provisional Measures, Order of 3 Dec. 2001, ITLOS Reports 2001*, p. 110, para. 82.

the Court noted that "it is by co-operating that the States concerned can jointly manage the risks of damage to the environment that might be created by the plans initiated by one or other of them"[40].

43. As regards the fight against climate change more specifically, the preamble of the UNFCCC states that "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"[41], and the preamble of the Paris Agreement emphasizes "the importance . . . of cooperation at all levels on the matters addressed in this Agreement"[42].

44. These provisions are important in that they assert and formalize the existence of an obligation to co-operate in climate matters. The Court could usefully clarify the scope of that obligation, and France has two remarks in this respect.

45. The first concerns the need to take account of three principles in interpreting and applying this obligation. To begin with, like all the provisions of the Paris Agreement, the obligation to co-operate must necessarily be interpreted and implemented ambitiously, considering, in particular, the global objective of limiting the average temperature increase to 1.5ºC above pre-industrial levels and the standard of the highest possible ambition imposed by the Paris Agreement[43]. In this respect, ITLOS recalls in its 2024 Opinion that the obligation to co-operate under Article 197 of the UNCLOS "is an obligation of conduct which requires States to act with 'due diligence'"[44]. More specifically, it requires that "they participate *meaningfully* in the formulation and elaboration of rules, standards and recommended practices and procedures for the protection and preservation of the marine environment"[45].

46. Moreover, this obligation must be read with due regard for the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances: although the obligation is binding on all States parties, the measures taken to implement it may vary according to their specific circumstances, as expressly recalled in certain provisions of the Paris Agreement. For example, Article 11, paragraph 3, stipulates that

> "[a]ll Parties should cooperate to enhance the capacity of developing country Parties to implement this Agreement. Developed country Parties should enhance support for capacity-building actions in developing country Parties".

47. Finally, the obligation to co-operate cannot be dissociated from the principle of good faith. In the case concerning *Pulp Mills on the River Uruguay*, the Court explicitly stated that

> "the mechanism for co-operation between States is governed by the principle of good faith. Indeed, according to customary international law, as reflected in Article 26 of the 1969 Vienna Convention on the Law of Treaties, '[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith'. That applies to all

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[40] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010*, p. 49, para. 77.

[41] UNFCCC, sixth preambular para.

[42] Paris Agreement, fourteenth preambular para.

[43] Written statement of France, paras. 49 *et seq.*

[44] *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law, Advisory Opinion*, 21 May 2024, No. 31, para. 309.

[45] *Ibid.*, para. 307 [emphasis added].

obligations established by a treaty, including procedural obligations which are essential to co-operation between States. The Court recalled in the cases concerning *Nuclear Tests (Australia* v. *France) (New Zealand* v. *France)*:

> 'One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation'."[46]

48. The second remark relates to the fact that, in its 2024 Opinion, ITLOS considers that "[m]ost multilateral climate change treaties, including the UNFCCC and the Paris Agreement, contemplate and *variously give substance* to the duty to cooperate"[47]. ITLOS further describes how the general duty to co-operate under the international law of the sea ties in with the specific obligations under UNCLOS, applying reasoning that may be transposed to the Paris Agreement:

> "the duty to cooperate is reflected in and permeates the entirety of Part XII of [UNCLOS]. *This duty is given concrete form in a wide range of specific obligations* of States Parties, which are central to countering marine pollution from anthropogenic GHG emissions at the global level."[48]

49. The scope of the obligation to co-operate in climate matters is thus made clear, on a case-by-case basis, by the provisions of the relevant conventions, in particular the Paris Agreement. They describe the specific intended purpose of such co-operation and, in most cases, the means by which it is to be achieved. For example, Article 7, paragraph 6, of the Paris Agreement recognizes the importance of co-operation on adaptation efforts, and paragraph 7 lists the means available to States to implement that co-operation (such as sharing "information, good practices, experiences", or assisting "developing country Parties in identifying effective adaptation practices"). Article 8, on loss and damage, lists key areas of co-operation, and Article 10 focuses on co-operative mitigation and adaptation action through technology transfer. Article 11 calls on States to "cooperate to enhance the capacity of developing country Parties to implement this Agreement" by providing them with support[49], "including through regional, bilateral and multilateral approaches"[50]. Finally, while it is confined to stating that States must "take measures" in this respect, Article 12 of the Paris Agreement recalls that one of the intended purposes of co-operation must be "climate change education, training, public awareness, public participation and public access to information".

50. Consequently, to identify the content of the obligation to co-operate in climate matters, reference must be made to the specific obligations to co-operate set out in the Paris Agreement, read ambitiously and in good faith, as well as to the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.

51. Obligations relating to international co-operation also exist in international human rights law. These obligations are not without a bearing on the obligation to co-operate that may exist in

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[46] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010*, p. 67, para. 145; see also *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015, ITLOS Reports 2015*, pp. 59-60, para. 210; *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law, Advisory Opinion*, 21 May 2024, No. 31, para. 309.

[47] *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*, *Advisory Opinion*, 21 May 2024, No. 31, para. 298 (emphasis added).

[48] *Ibid.*, para. 297 (emphasis added).

[49] Paris Agreement, Art. 11, para. 3.

[50] *Ibid.*, Art. 11, para. 4.

climate matters, since human rights obligations are, within the meaning of customary international law as codified in the Vienna Convention on the Law of Treaties, "relevant rules of international law applicable"[51] in relations between States in the context of combating climate change.

52. Article 2, paragraph 1, of the International Covenant on Economic, Social and Cultural Rights (hereinafter the "ICESCR") thus provides that

> "[e]ach State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures".

53. Moreover, under the terms of Articles 55 and 56 of the United Nations Charter, Member States have pledged "to take joint and separate action in co-operation with the Organization" to achieve, in particular, "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion".

54. In its General Comment No. 3 on the nature of the obligations of States parties under Article 2, paragraph 1, of the ICESCR, the Committee on Economic, Social and Cultural Rights (hereinafter the "CESCR") noted that international co-operation for the realization of economic, social and cultural rights is "an obligation of all States"[52], although it is "particularly incumbent upon those States which are in a position to assist others in this regard"[53].

55. While international co-operation entails economic and technical measures in particular, its implementation may take many forms, as determined by States both individually and collectively. In the context of climate change, and as part of a systemic approach to interpreting the relevant applicable law, obligations to co-operate on the realization of human rights must be considered to be implemented when States participate in good faith in the UNFCCC system and put in place the specific means of co-operation — notably technical, financial and technological — provided for by the UNFCCC and the Paris Agreement.

VI. The conditions for applying the law of international responsibility

56. In the written statements submitted to the Court, there is some disagreement as to the question of the applicability of the law of State responsibility for internationally wrongful acts. France reiterates its view that the rules of the law of international responsibility are applicable to climate change matters. In this regard, France refers to the arguments set out in its written statement[54]. This question calls for further clarification in two respects.

57. First, international responsibility is not established *in abstracto*, but *in concreto*, that is, wrongful act by wrongful act, and State by State. It is settled jurisprudence that in order to determine whether the responsibility of a State is engaged in a given instance, the Court takes a case-by-case

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[51] Vienna Convention on the Law of Treaties, Art. 31, para. 3 *(c)*.

[52] CESCR, General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, para. 1, of the Covenant), Fifth Session, 1990, para. 14.

[53] *Ibid.*

[54] Written statement of France, paras. 168 *et seq*.

approach to its analysis, considering each obligation individually, in the light of one or more specific disputed facts[55].

58. In its commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts adopted in 2001 (hereinafter the "2001 Articles")[56], the United Nations International Law Commission (hereinafter the "ILC") repeatedly recalls that "[t]here is no such thing as a breach of an international obligation in the abstract"[57]. Hence,

> "[w]hether a particular obligation is breached forthwith upon a failure to act on the part of the responsible State, or whether some further event must occur, depends on the content and interpretation of the primary obligation *and cannot be determined in the abstract*"[58].

59. In this regard, several written statements have explicitly asserted that the questions put to the Court do not concern the possibility that the individual responsibility of one or more States may be engaged with respect to specific facts. France fully supports this approach.

60. Second, the application of the law of responsibility to climate change matters necessarily raises the question of the causal link between an internationally wrongful act and the harm it causes. Yet establishing a causal link in the case of climate-related harm is an exercise which, although possible, often proves particularly complex.

61. On this point, in its latest Opinion, ITLOS judiciously distinguishes the question of the applicability of an obligation in respect of harm resulting from anthropogenic greenhouse gas emissions from that of the applicability of an obligation in respect of harm effectively caused by such emissions in a bilateral inter-State relationship. It thus explicitly states that

> "[i]t is acknowledged that, given the diffused and cumulative causes and global effects of climate change, it would be difficult to specify how anthropogenic GHG emissions from activities under the jurisdiction or control of one State cause damage to other States. However, this difficulty has more to do with establishing the causation between such emissions of one State and damage caused to other States and their environment. This should be distinguished from the applicability of an obligation under article 194, paragraph 2, [of UNCLOS] to marine pollution from anthropogenic GHG emissions."[59]

62. France notes the various avenues envisaged by the participants in these proceedings in an attempt to overcome this obstacle to the effective invocation of the responsibility of States for significant harm to the climate system and other parts of the environment. For example, some participants call for the exploration of *de lege ferenda* solutions, for a focus on general rather than specific causation, for a determination on the basis of equity, or for reliance on States' (historical)

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[55] See *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010 (II)*, pp. 662-663, para. 63.

[56] Report of the Commission to the General Assembly on the work of its fifty-third session, "International liability for injurious consequences arising out of acts not prohibited by international law", *Yearbook of the International Law Commission (YILC)*, 2001, Vol. II (2) (A/CN.4/SER.A/2001/Add.1).

[57] *Ibid.*, para. 2 of the Commentary to Chap. III; para. 8 of the Commentary to Art. 47.

[58] *Ibid.*, para. 9 of the Commentary to Art. 2 (emphasis added).

[59] *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*, *Advisory Opinion*, 21 May 2024, No. 31, para. 252.

contributions to global warming to determine their corresponding responsibility. Some of these avenues are predicated on a veritable shift in international law, which would require the consent of all States in order to be brought about.

63. France also observes that, in its Judgment in the case concerning *Duarte Agostinho and Others* v. *Portugal and Others*, the ECHR recalled that "albeit complex and multi-layered, there is a certain causal relationship between public and private activities based on a State's territories that produce GHG emissions and the adverse impact on the rights and well-being of people residing outside its borders"[60]. Similarly, in its Judgment in the case concerning *Verein KlimaSeniorinnen Schweiz and Others* v. *Switzerland*, it found that,

> "[i]n the context of climate change, the particularity of the issue of causation becomes more accentuated. The adverse effects on and risks for specific individuals or groups of individuals living in a given place arise from aggregate GHG emissions globally, and the emissions originating from a given jurisdiction make up only part of the causes of the harm. Accordingly, the causal link between the acts or omissions on the part of State authorities in one country, and the harm, or risk of harm, arising there, *is necessarily more tenuous and indirect* compared to that in the context of local sources of harmful pollution. Furthermore, from the perspective of human rights, the essence of the relevant State duties in the context of climate change relates to the reduction of the risks of harm for individuals. Conversely, failures in the performance of those duties entail an aggravation of the risks involved, although the individual exposures to such risks will vary in terms of type, severity and imminence, depending on a range of circumstances. Accordingly, in this context, issues of individual victim status or the specific content of State obligations *cannot be determined on the basis of a strict* conditio sine qua non *requirement*."[61]

64. The ECHR does not suggest that the requirement of a causal link be disregarded, but rather that it be tailored to addressing the specific characteristics of climate change[62]. In its written statement, France previously expressed the view that "a change in and a significant relaxing of the rules governing the causal link could make it possible to partially overcome this obstacle in the case of significant climate-related harm"[63]. Nevertheless, it is for States to decide collectively on these questions, adjusting, as appropriate, the legal conditions under which their responsibility may be engaged.

65. As the ECHR recently noted, "the problem of climate change is of a truly existential nature for humankind, *in a way that sets it apart from other cause-and-effect situations*"[64]. The particularity of the issues raised by climate change, which are not limited to questions of causation, is such that States must work together to foster the development of international law with a view to building a framework tailored to the challenges at hand. In this regard, France welcomes the constructive interpretation adopted by ITLOS in its latest Opinion in concluding that "anthropogenic GHG emissions into the atmosphere constitute pollution of the marine environment within the meaning of

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[60] ECHR, *Duarte Agostinho and Others* v. *Portugal and Others* [GC], No. 39371/20, 9 Apr. 2024, para. 193.

[61] ECHR, *Verein KlimaSeniorinnen Schweiz and Others* v. *Switzerland* [GC], No. 53600/20, 9 Apr. 2024, para. 439 (emphasis added).

[62] See also *ibid.*, para. 422.

[63] Written statement of France, para. 206.

[64] ECHR, *Duarte Agostinho and Others* v. *Portugal and Others* [GC], No. 39371/20, 9 Apr. 2024, para. 194 (emphasis added).

article 1, paragraph 1, subparagraph 4, of [UNCLOS]"[65]. It also refers to the discussion in its written statement regarding the applicability of the principle of prevention "in the global context of climate change"[66].

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66. To conclude these written comments, France wishes to reaffirm its commitment to combating climate change. As it stressed in its written statement, "[t]he importance of what is at stake justifies collective action at all levels, including the law"[67], and in this respect, France again applauds the historic level of participation in these advisory proceedings. It joins the vast majority of the 91 written statements submitted to the Court in conveying the will of States to bolster — in a manner that must be ambitious — the legal framework for their action to combat climate change. In this context, France also wishes to reaffirm its confidence in and support for the Court in its endeavours to identify and clarify both the obligations of States in this regard and the legal consequences of causing significant harm to the climate system and other parts of the environment.

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[65] *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*, *Advisory Opinion*, 21 May 2024, No. 31, para. 179.

[66] Written statement of France, paras. 58 *et seq.*

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