INTERNATIONAL COURT OF JUSTICE

REQUEST BY THE UNITED NATIONS GENERAL ASSEMBLY FOR AN ADVISORY OPINION

"OBLIGATIONS OF STATES IN RESPECT OF CLIMATE CHANGE"

WRITTEN COMMENTS OF

THE UNITED STATES OF AMERICA

AUGUST 15, 2024

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CHAPTER I
INTRODUCTION

1.1 In accordance with the Orders of the Court dated April 20, 2023, and May 30, 2024, the United States of America submits these written comments (the "Written Comments") on the written statements made by other States and organizations on the questions referred to the Court by the United Nations (UN) General Assembly in resolution 77/276 of March 29, 2023, regarding States' current obligations under international law in respect of climate change.[1]

1.2 The record number of written statements filed in this proceeding demonstrates the seriousness with which the international community takes the unparalleled challenge of human-induced climate change. The more than 90 submissions recount the unequivocal scientific findings that anthropogenic greenhouse gas (GHG) emissions have caused and continue to cause climate change. They describe in detail the adverse effects—both experienced and anticipated—on individuals and the environment around the world. They recognize that all of us are affected.

1.3 The submissions also depict the scope of the challenge. States collectively set an ambitious global temperature goal in the 2015 Paris Agreement,[2] building on the objective established by the 1992 UN Framework Convention on Climate Change (UNFCCC) of

[1] G.A. Res. 77/276, U.N. Doc. A/RES/77/276 (Mar. 29, 2023), https://perma.cc/YZ4U-H8GZ [Dossier No. 2] ("G.A. Res. 77/276"). The UN General Assembly requested the Court's 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?" *Id.* As explained in the Written Statement of the United States of America filed on March 22, 2024, in this proceeding (the "U.S. Written Statement"), the first question posed to the Court, regarding States' international legal obligations "to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases," seeks an advisory opinion on States' current obligations regarding the mitigation of climate change—that is, States' current obligations with respect to the mitigation of anthropogenic GHG emissions, which are causing climate change. Accordingly, the Court's opinion should focus, in line with the text of the request, on States' current obligations to ensure the protection of the climate system from anthropogenic GHG emissions.

[2] Paris Agreement, art. 2.1(a), Dec. 12, 2015, T.I.A.S. 16-1104, 3156 U.N.T.S. 79 (entered into force Nov. 4, 2016) (stating the goal of holding the increase in the global average temperature to "well below" 2°C above pre-industrial levels, as well as "pursuing efforts to limit the temperature increase to 1.5°C"), https://perma.cc/CSF5-4SRK [Dossier No. 16] ("Paris Agreement").

avoiding dangerous anthropogenic interference with the climate system.[3] As the science became clearer, States, through successive decisions of the Parties, set their sights on an even more ambitious target: limiting the global average temperature rise to 1.5 degrees Celsius (°C) above pre-industrial levels.[4] The submissions demonstrate the sweeping and unprecedented transformations of the world's economy that will be required to deliver the deep, rapid, and sustained reductions in global GHG emissions—as well as net-zero emissions by 2050—needed to keep 1.5°C within reach.

1.4 There is widespread recognition that anthropogenic climate change poses a paradigmatic collective action problem on a global scale. Yet the submissions also illustrate the vast spectrum of national circumstances and perspectives the problem implicates. They demonstrate that the framework for a solution must be flexible and effectively universal, yet ambitious. That is the framework States have chosen in the Paris Agreement. It is one of cooperation, not contention. Such a framework is required for a durable solution to perhaps the most challenging collective action problem humanity has ever faced.

1.5 In its Written Statement of March 22, 2024, the United States underscored that addressing anthropogenic climate change is of the highest priority to the United States and numerous other States throughout the world.[5] It explained how, as a global collective action problem, climate change inherently requires near-universal action by States.[6] It also described how, since first becoming generally aware in the late 1980s of the risk of significant global harm that could be caused by anthropogenic GHG emissions, States have acted collectively to

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[3] United Nations Framework Convention on Climate Change, art. 2, May 9, 1992, S. Treaty Doc. No. 102-38, 1771 U.N.T.S. 107 (entered into force Mar. 21, 1994), https://perma.cc/98AS-N3U4; *see also* United Nations Framework Convention on Climate Change (consolidated text reflecting amendments to the Convention's annexes), https://perma.cc/88LK-37L5 [Dossier Nos. 4-10] ("UNFCCC").

[4] *See* U.S. Written Statement, n.166. *See also, e.g.*, Conf. of the Parties serving as the meeting of the Parties to the Paris Agreement ("CMA") Dec. 1/CMA.3, ¶¶ 21-23, U.N. Doc. FCCC/PA/CMA/2021/10/Add.1 (Nov. 13, 2021) ("*resolv*[*ing*] to pursue efforts to limit the temperature increase to 1.5°C," while recognizing that achieving that goal "requires rapid, deep and sustained reductions in global [GHG] emissions, including reducing global carbon dioxide emissions by 45 per cent by 2030 relative to the 2010 level and to net zero around mid-century as well as deep reductions in other [GHGs]"), https://perma.cc/R3SF-KNBE [Dossier No. 173]; CMA Dec. 1/CMA.5, ¶¶ 4-5, 27-28, 39, U.N. Doc. FCCC/PA/CMA/2023/16/Add.1 (Dec. 13, 2023) (again "*resolv*[*ing*] to pursue efforts to limit the temperature increase to 1.5°C," "*emphasiz*[*ing*] the need for urgent action and support to keep the 1.5°C goal within reach and to address the climate crisis in this critical decade," setting out a roadmap for keeping 1.5°C within reach and calling on Parties to contribute to global efforts toward that end, and calling for Parties' next NDCs to be "aligned with limiting global warming to 1.5°C"), https://perma.cc/5CLE-M8RJ ("CMA5 Global Stocktake Decision").

[5] U.S. Written Statement, ¶¶ 1.9-1.14.

[6] *Id.* ¶¶ 1.14, 2.1-2.2, 2.27-2.29.

address climate change through the establishment and development of the UN climate change regime.[7]

1.6 It is to this regime—and the Paris Agreement in particular—that the Court should look when examining States' current obligations in respect of climate change. States designed that treaty regime to address the uniquely complex collective action problem posed by anthropogenic global warming, and it embodies the clearest, most specific, and most current expression of States' consent to be bound by international law in respect of climate change. Other general, non-climate-change-specific obligations of States that the Court might examine must be considered in light of the nearly universal climate-change-specific obligations States have undertaken in the Paris Agreement and the UNFCCC.

1.7 The United States reaffirms the positions set forth in its Written Statement, including its view that ongoing diplomatic efforts, particularly multilateral engagement in the UN climate change regime and especially under the Paris Agreement, offer the best means for achieving the international community's shared climate goals and protecting the climate system for the benefit of present and future generations. Through these Written Comments, the United States avails itself of the opportunity to respond to certain assertions made in other participants' written statements.[8]

1.8 In **Chapter II**, the United States provides additional factual context regarding relative contributions to climate change, in response to claims in other submissions.

1.9 In **Chapter III**, the United States responds to assertions made in some written statements about Parties' obligations under the Paris Agreement and the nature and content of a customary international law obligation regarding significant transboundary environmental harm. It also briefly addresses the recent Advisory Opinion of the International Tribunal for the Law of the Sea on the obligations of Parties under the 1982 UN Convention on the Law of the Sea regarding climate change.

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[7] *Id.*, Chapter II.B. As used in these Written Comments, the term "UN climate change regime" comprises the UNFCCC and the Paris Agreement, as well as the decisions adopted under those agreements.

[8] The more than 90 written statements submitted, some spanning hundreds of pages, reflect the breadth and complexity of the questions referred to the Court, as well as the challenge for participants of articulating their views on the many potential topics that might be touched upon by these questions. The United States in its Written Comments will not seek to address each and every argument raised in others' submissions and instead will comment on discrete issues in certain areas of international law that constitute the focus of the majority of the submissions. No inferences should be drawn from an absence of comment by the United States.

1.10 In **Chapter IV**, the United States explains how certain concepts—"common but differentiated responsibilities," "precaution," and "polluter pays"—are not customary international law or general principles of law. It also responds to assertions regarding international human rights law and explains how such law does not impose—and is not well-suited for imposing—any obligations on States to mitigate anthropogenic GHG emissions.

1.11 In **Chapter V**, the United States offers observations on others' written statements regarding the international legal framework for evaluating the legal consequences of a State's breach of an obligation in respect of climate change.

1.12 **Chapter VI** concludes by urging the Court to provide an advisory opinion that underscores the centrality of States' obligations under the UN climate change regime, and that is mindful of the careful balance struck in the Paris Agreement to attract broad participation while also delivering increasingly ambitious climate action over time.

CHAPTER II

CLIMATE CHANGE IS A GLOBAL PROBLEM THAT REQUIRES COLLECTIVE ACTION BY ALL STATES

2.1 There is general recognition in participants' submissions that anthropogenic climate change is a complex problem, caused by a wide variety of human activities that emit GHGs, including energy production, agriculture and other land use, transportation, and various industrial processes fundamental to modern economies. There also is general recognition that climate change requires collective action by all States—and, in particular, by all the world's major GHG emitters.[9]

2.2 Some submissions, however, suggest that climate change is a problem that requires action only by, or predominantly by, "developed" or "industrialized" States. Although there is no reason in the present advisory proceeding for the Court to examine States' relative contributions to global warming, assertions that current warming is driven primarily by "developed" or "industrialized" countries' historical emissions misstates the science and risks a serious misapprehension of the collective effort that is needed to address the climate crisis.[10]

2.3 An accurate understanding of relative contributions to current global warming and how those contributions are expected to change in the future provides critical context for an examination of States' current obligations in respect of climate change. As detailed below, relative contributions to global warming—in terms of the sources of anthropogenic GHG emissions causing the warming and consequent climate change—have changed rapidly over the last few decades and will continue to change rapidly in the future.

2.4 Assertions regarding relative contributions to current global warming that consider only cumulative historical carbon dioxide (CO_2) emissions, and particularly only CO_2 emissions from fossil fuels, address only a fraction of the problem.[11] Such assessments also

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[9] *See, e.g.*, Australia Written Statement, ¶ 2.61; Denmark, Finland, Iceland, Norway, and Sweden (Nordic Countries) Written Statement, ¶ 4; Indonesia Written Statement, ¶ 61; Republic of Korea (ROK) Written Statement, ¶ 16.

[10] *Cf., e.g.*, Democratic People's Republic of the Congo (DRC) Written Statement, ¶ 64; United Arab Emirates (UAE) Written Statement, ¶ 147.

[11] U.S. Written Statement, ¶ 2.25. *Contra, e.g.*, DRC Written Statement, ¶¶ 63-64 (focusing on CO_2 emissions only); Organisation of African, Caribbean and Pacific States (OACPS) Written Statement, ¶¶ 39-42 (focusing on CO_2 emissions only, and particularly only such emissions from fossil fuels and industry); South Africa Written Statement, ¶ 28 (citing data relating only to CO_2 emissions from fossil fuels and industry in support of the assertion that "[i]t is clear that developed countries have historically been largely responsible for emissions"); UAE Written Statement, ¶ 147 (focusing only on CO_2 emissions and failing to examine relative contributions of historical GHG emissions to present global warming, and particularly the most dramatic warming that has taken place since 1992).

overemphasize the impact on global warming of emissions from certain countries—such as those often characterized as "developed" or "industrialized" countries—and either ignore or minimize the impact of human activities involving land use, land-use change, and forestry (particularly deforestation) and of such shorter-lived, but more potent, GHGs as methane, emissions of which over the past few decades have had a significant impact on current global warming.[12]

2.5 Thus, the focus in certain submissions on the more than 30-year-old factual statements in the UNFCCC's preamble that "the largest share of historical and current global emissions of [GHGs] has originated in developed countries" and "per capita emissions in developing countries are still relatively low" presents an outdated and incomplete picture of the current problem and the collective effort necessary to address it.[13] Although the terms "developed country" and "developing country" are neither defined in the UNFCCC nor equated to any of the UNFCCC's annexes,[14] an understanding of the relative contributions to current global warming of countries included in Annex I to the UNFCCC—which included members of the Organization for Economic Co-operation and Development (OECD) as of 1992, as well as Russia and Eastern European countries that, at the time, were transitioning to market economies—and non-Annex I countries is instructive.[15]

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[12] *See, e.g.*, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (IPCC), CLIMATE CHANGE 2021: THE PHYSICAL SCIENCE BASIS, CONTRIBUTION OF WORKING GROUP I TO THE SIXTH ASSESSMENT REPORT OF THE IPCC 7, Fig. SPM.2; 854, Fig. 6.12 (2021) (showing the contributions to global warming of emissions beyond just those of CO_2), https://perma.cc/4WPS-J6D5; IPCC, CLIMATE CHANGE 2022: MITIGATION OF CLIMATE CHANGE, CONTRIBUTION OF WORKING GROUP III TO THE SIXTH ASSESSMENT REPORT OF THE IPCC 159 (2022), https://perma.cc/F735-YCVA ("IPCC WGIII AR6") (explaining the "disproportionate impact on near-term temperature" of methane).

[13] *See, e.g.*, India Written Statement, ¶ 38; Marshall Islands Written Statement, ¶ 19; Pakistan Written Statement, ¶ 46; UAE Written Statement, ¶¶ 147-48.

[14] U.S. Written Statement, ¶ 3.11, n.192. As also explained in the U.S. Written Statement, the Paris Agreement does not differentiate its obligations on the basis of the UNFCCC's annexes. *Id.* ¶¶ 2.50, 3.3, 3.23, 3.27-3.30.

[15] As explained in the U.S. Written Statement, regardless of how the Annex I–non-Annex I division corresponded to different conceptions of "developed" and "developing" countries as a factual matter in 1992, by 2015, when the Paris Agreement was adopted, those categories no longer aligned with any objective understanding of "developed" versus "developing." U.S. Written Statement, ¶ 3.27. This is even more the case today. For example, in 2022, 99 non-Annex I countries had a higher per capita gross domestic product (GDP) than the least wealthy Annex I country in 1990 (Belarus), and 69 non-Annex I countries had a higher per capita GDP than the least wealthy Annex II country in 1990 (Portugal) (so-called Annex II countries are Annex I countries minus those then experiencing an economic transition), calculated based on World Bank data. *See* WORLD BANK, GDP PER CAPITA, PPP (CURRENT INTERNATIONAL $), https://perma.cc/7JJ6-4XZ3. Viewed from another perspective, in 2022, 67 non-Annex I countries had a higher per capita GDP than the least wealthy Annex I country in 2022 (Ukraine), and 17 non-Annex I countries had a higher per capita GDP than the least wealthy Annex II country in 2022 (Greece), also calculated based on World Bank data. *See id.*

2.6 Recent studies show that GHG emissions from non-Annex I countries have caused a little over 54 percent of global warming since 1850, compared to 46 percent from Annex I countries.[16] Moreover, with respect to the additional warming since 1992, when the UNFCCC was adopted, nearly 70 percent is due to GHG emissions from non-Annex I countries, while about 30 percent is due to GHG emissions from Annex I countries.[17]

2.7 In 2022 alone, non-Annex I countries contributed 71 percent of total global GHG emissions (including those from the land sector), compared to 29 percent from Annex I countries.[18] Even if one were to count CO_2 emissions only (which would present an incomplete picture), non-Annex I countries contributed 65 percent of global energy-related CO_2 emissions in 2022 and 69 percent of global CO_2 emissions (including the land sector), as compared to 35 percent and 31 percent, respectively, from Annex I countries.[19] Additionally, examining GHG emissions on a per capita basis, the top nine contributors of GHG emissions in 2022 were non-Annex I countries.[20] As an examination of those top nine countries demonstrates, however, comparing GHG emissions on a per capita basis presents a skewed picture of relative contributions to global warming and the global effort needed to address it. In particular, it highlights those States that have relatively small populations and/or large industrial sectors relative to their population size while downplaying the contributions of countries with the

[16] Matthew Jones et al., *National Contributions to Climate Change Due to Historical Emissions of Carbon Dioxide, Methane, and Nitrous Oxide Since 1850*, 10 NATURE: SCIENTIFIC DATA 155, 19 (Table 4) (2023), https://perma.cc/3GFB-JPPW.

[17] These figures were calculated using the dataset developed by and described in Matthew Jones et al., *National Contributions to Climate Change Due to Historical Emissions of Carbon Dioxide, Methane, and Nitrous Oxide Since 1850*, 10 NATURE: SCIENTIFIC DATA 155 (2023), https://perma.cc/3GFB-JPPW (the underlying dataset can be found at https://perma.cc/U7CP-BGH2).

[18] These figures are derived from the European Commission's Emissions Database for Global Atmospheric Research (EDGAR) and Houghton and Castanho's data on annual emissions of carbon from land use, land-use change, and forestry from 1850 to 2020. *See* EUROPEAN COMMISSION, EDGAR – EMISSIONS DATABASE FOR GLOBAL ATMOSPHERIC RESEARCH (V8.0), https://perma.cc/U4QG-5QTK ("EDGAR V8.0"); Richard A. Houghton & Andrea Castanho, *Annual Emissions of Carbon from Land Use, Land-Use Change, and Forestry from 1850 to 2020*, 15 EARTH SYSTEM SCIENCE DATA 5 (2023), https://perma.cc/LT7N-VQQN ("*Houghton & Castanho's Annual Emissions of Carbon*"). Using the same data, even in 1990, non-Annex I countries contributed 50 percent of total global GHG emissions, while Annex I countries contributed the other half. *See id.*

[19] The figures for global energy-related CO_2 emissions in 2022 are derived from Houghton and Castanho's data on annual emissions of carbon from land use, land-use change, and forestry from 1850 to 2020. *See Houghton & Castanho's Annual Emissions of Carbon*. The figures for global CO_2 emissions in 2022 (including the land sector) are derived from EDGAR and Houghton and Castanho's data on annual emissions of carbon from land use, land-use change, and forestry from 1850 to 2020. *See* EDGAR V8.0; *Houghton & Castanho's Annual Emissions of Carbon*.

[20] Those countries, based on calculations derived from EDGAR and World Bank data, are Palau, Qatar, Bahrain, Kuwait, Brunei, UAE, Oman, Trinidad and Tobago, and Saudi Arabia, with Australia, an Annex I country, the tenth. *See* EDGAR V8.0; WORLD BANK, POPULATION, TOTAL – WORLD, https://perma.cc/K6EC-QNA4.

largest populations even though such countries are the largest current sources of GHG emissions.[21]

2.8 The distribution of GHG emissions and relative contributions to global warming have changed dramatically since 1992, and they are projected to continue to do so.[22] Although the UNFCCC does not obligate any Parties, including Annex I Parties, to achieve any GHG emissions limitation or reduction targets, from 1992 to 2022, Annex I Parties reduced their emissions by 9 percent from 1992 levels.[23] This trend is expected to continue, with GHG emissions of non-Annex I Parties projected to continue to increase while those of Annex I Parties are expected to continue to decrease. Should current trends continue, by 2030, non-Annex I Parties can be expected to contribute 75 percent of annual GHG emissions as compared to 25 percent from Annex I Parties.[24]

2.9 These facts demonstrate how categorizing States as "developed" or "industrialized" or "developing"—terms for which there is no generally accepted definition or understanding—fails to present a full picture of either their historical contributions to current global warming or, critically, their current and anticipated future contributions. And more importantly, that categorization obscures the need for efforts by *all* countries to address anthropogenic climate change.[25]

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[21] Alternative comparators to per capita emissions, such as GHG emissions per land area or GHG emissions per GDP (also known as "carbon intensity"), could be equally if not more useful in understanding relative contributions to climate change—for example, in understanding the relative energy efficiency of various economies.

[22] IPCC WGIII AR6, Fig. 2.4, 234, Fig. 2.9.

[23] *See* EDGAR v8.0; *Houghton & Castanho's Annual Emissions of Carbon* (includes data through 2022).

[24] These figures were calculated using a linear projection based on the last fifteen years of available data (2008-22) from EDGAR and Houghton and Castanho's data on annual emissions of carbon from land use, land-use change, and forestry from 1850 to 2022. *See* EDGAR v8.0; *Houghton & Castanho's Annual Emissions of Carbon* (includes data through 2022).

[25] Additionally, some have suggested there is an inherent tension or conflict between climate ambition and sustainable development. *See, e.g.*, African Union Written Statement, ¶ 109 (asserting that "reducing GHGs today severely limits [Africa's] ability to industrialise"). This is not the case. The United States is committed to the full implementation of the 2030 Agenda for Sustainable Development and the achievement of the Sustainable Development Goals (SDGs), at home and abroad, just as it is committed to vigorously pursuing climate action, both domestically and internationally. The critical importance of achieving the SDGs, however, does not diminish the equally critical need for ambitious climate action by all States to achieve shared climate goals and avoid the worst effects of climate change. The IPCC's reports demonstrate that ambitious climate action and sustainable development can and do go hand in hand. *See, e.g.*, IPCC, GLOBAL WARMING OF 1.5°C: AN IPCC SPECIAL REPORT ON THE IMPACTS OF GLOBAL WARMING OF 1.5°C ABOVE PRE-INDUSTRIAL LEVELS AND RELATED GLOBAL GREENHOUSE GAS EMISSION PATHWAYS, IN THE CONTEXT OF STRENGTHENING THE GLOBAL RESPONSE TO THE THREAT OF CLIMATE CHANGE, SUSTAINABLE DEVELOPMENT, AND EFFORTS TO ERADICATE POVERTY 447 (2018) (stating that "[p]rioritization of sustainable development and meeting the SDGs is consistent with efforts to adapt to climate change"), https://perma.cc/3FXF-BWTU [Dossier No. 72]; IPCC, CLIMATE CHANGE 2023:

CHAPTER III

STATES' OBLIGATIONS IN RESPECT OF CLIMATE CHANGE ARE FOUND, FIRST AND FOREMOST, IN THE UN CLIMATE CHANGE REGIME

3.1 States' current obligations in respect of climate change are found, first and foremost, in the legal instruments that comprise the UN climate change regime, and particularly in the Paris Agreement, which embodies the clearest, most specific, and most current expression of States' consent to be bound by international law in respect of climate change.[26] Many other submissions state the same or a similar view.[27] There also is recognition that any other legal obligations relating to climate change mitigation identified by the Court should be interpreted consistently with obligations States have under the UN climate change regime and the Paris Agreement in particular.[28]

3.2 **Section A** responds to certain assertions in other submissions regarding key mitigation-related obligations of Parties under the Paris Agreement and purported legal effects of States' non-legally binding climate change targets and commitments.

SYNTHESIS REPORT OF THE IPCC SIXTH ASSESSMENT REPORT 30, ¶ C.4 (2023) (stating that "[m]itigation and adaptation actions have more synergies than trade-offs with [SDGs]"), https://perma.cc/LTT9-DWMY ("IPCC AR6").

[26] U.S. Written Statement, ¶ 1.3, Chapters II.B, III.

[27] *See, e.g.*, Brazil Written Statement, ¶ 10 ("it is clear that [the] answer [to the first question posed] lies in the multilateral climate change regime" comprising the UNFCCC and the Paris Agreement); Nordic Countries Written Statement, ¶ 46 (stating that the UN climate change regime "forms the primary body of international regulation setting out obligations of States to ensure the protection of the climate system from anthropogenic [GHG] emissions"); Dominican Republic Written Statement, ¶ 4.21 ("The obligations of States under international environmental law to protect the climate system against anthropogenic [GHG] emissions for present and future generations, arise, first and foremost, from two legally binding, conventional sources: the [UNFCCC] and the Paris Agreement."); France Written Statement, ¶ 11 (explaining that the UNFCCC and the Paris Agreement "set the essential legal framework for analyzing the issues raised in this proceeding"); Germany Written Statement, ¶ 32 ("The Paris Agreement is the primary legal and political framework for international cooperation in the field of climate mitigation efforts."); Japan Written Statement, ¶ 13 ("The UNFCCC and the Paris Agreement are the ultimate expression of the consensus among States on the regulation of GHG emissions."); Mauritius Written Statement, ¶ 42 ("The international legal framework concerning climate change is now principally contained in [the] UNFCCC and the Paris Agreement."); People's Republic of China (PRC) Written Statement, ¶ 13 (stating that the UN climate change regime "lays down the legal foundation for global climate governance and constitutes the core of international climate change law"); Saudi Arabia Written Statement, ¶ 1.7 (stating that "[t]he relevant existing legal obligations are set forth in the specialized treaty regime on climate change"); Seychelles Written Statement, ¶ 65 ("Regarding climate change law, in the context of the question submitted to the Court, the main relevant provisions are found in the Paris Agreement."); Singapore Written Statement, ¶ 3.27 (explaining that "[t]he UNFCCC and Paris Agreement regime forms the core of international law on climate change"); UAE Written Statement, ¶ 17 (explaining that "the central obligations related to protection of both the climate system and the environment more generally from the adverse effects of GHG emissions are those found in the UNFCCC, the Kyoto Protocol, and the Paris Agreement").

[28] *See, e.g.*, Australia Written Statement, ¶ 2.62 (stating that "[o]ther international treaties or customary rules which were not negotiated and did not develop in order to address the threat posed by climate change, should not be interpreted as operating inconsistently with, or as going beyond, the UNFCCC and the Paris Agreement").

3.3 **Section B** responds to certain submissions' assertions regarding obligations States might have under customary international law regarding significant transboundary harm, including the nature of any such obligation, when such an obligation would be engaged, and what it might require of States once engaged.

3.4 **Section C** concludes this chapter with brief observations on the recent Advisory Opinion of the International Tribunal for the Law of the Sea.

A. Parties' Treaty Obligations Must Be Interpreted in Accordance with the Customary International Law of Treaty Interpretation

3.5 The Paris Agreement, the UNFCCC, and any other international agreements examined by the Court must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the respective treaty in their context and in the light of the treaty's object and purpose.[29] A correct application of the rules of treaty interpretation provides no basis to read in obligations not present in a treaty's text.

3.6 Some submissions suggest the particular relevance to this proceeding of the rule found in article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT),[30] which provides that the interpretation of a treaty shall, "together with the context," take "into account . . . any relevant rules of international law applicable in the relations between the parties."

3.7 VCLT article 31(3)(c) requires that the rule of international law to be taken into account be "relevant" to the interpretation of a particular treaty provision.[31] At root, the purpose of article 31(3)(c) is to reflect that international law rules external to the text of a treaty can, in appropriate circumstances, shed light on the meaning of provisions entered into by parties to the treaty; it does not permit rules external to the treaty to be grafted onto the treaty's terms.[32]

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[29] *See* Vienna Convention on the Law of Treaties, art. 31, May 23, 1969, 1155 U.N.T.S. 331, https://perma.cc/Y4MB-Q9MK ("VCLT"). Although the United States is not a party to the VCLT, it views many of its provisions, including article 31, as reflecting customary international law.

[30] *See, e.g.*, Solomon Islands Written Statement, ¶¶ 56-57; Thailand Written Statement, ¶ 5; Vanuatu Written Statement, ¶ 225-26.

[31] *See, e.g.*, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, 2010 I.C.J. 14, 42-43, ¶¶ 55-56; 46-47, ¶ 66 (Apr. 20) (rejecting Argentina's arguments that ostensible international legal rules or principles—"principles of equitable, reasonable and non-injurious use of international watercourses, the principles of sustainable development, prevention, precaution and the need to carry out an environmental impact assessment[]"—were relevant to the Court's interpretation of the scope of jurisdiction conferred upon it under the compromissory clause of the 1975 Statute of the River Uruguay), https://perma.cc/6UPG-X7MP ("*Pulp Mills*").

[32] *See* RICHARD K. GARDINER, TREATY INTERPRETATION 320 (2d. ed. 2015) ("Located in its immediate context of treaty interpretation, article 31(3)(c) implicitly invites the interpreter to draw a distinction between using rules of international law as part of the apparatus of treaty interpretation and applying the rules of international law directly to the facts in the context of which the treaty is being considered. The former is within the scope of the Vienna rules, the latter is not.") (U.S. Annex 1).

Further, even if an external rule is relevant to the treaty interpretation issue at hand, it will not overcome the ordinary terms of a treaty that clearly govern that issue.[33] What article 31(3)(c) does not mean is that the UNFCCC and the Paris Agreement should be interpreted in light of a long list of purportedly "universally applicable customary rules and general principles."[34] Misapplying article 31(3)(c) in that manner would create significant confusion about the meaning of treaty terms and greatly impede the negotiation of new treaties.

3.8 Additionally, some submissions suggest or assert that the Paris Agreement is somehow subordinate to the UNFCCC or that the Paris Agreement must be interpreted or understood in light of the UNFCCC's terms.[35] As explained in the U.S. Written Statement, although the Paris Agreement is related to the UNFCCC, it is a distinct international agreement from the UNFCCC, is not subject to the UNFCCC, and must be interpreted according to its own terms.[36] Characterizations of the Paris Agreement as the UNFCCC's Paris Agreement ("*its* Paris Agreement"[37]) are legally inaccurate and do not appear in any decisions of the governing bodies of the Paris Agreement (the "CMA") or the UNFCCC (the "COP"). In response to other submissions' assertions on this subject, the United States refers the Court to the detailed discussion in the U.S. Written Statement of the significant ways in which the Paris Agreement

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[33] *See, e.g.*, *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, 2008 I.C.J. 177, 219, ¶¶ 113-14 (June 4) (ruling that the general "spirit of friendship" provided for in the parties' Treaty of Friendship, although relevant within the meaning of VCLT article 31(3)(c) in an "aspirational" manner to the interpretation of the parties' Convention on Mutual Assistance in Criminal Matters, "cannot possibly stand in the way" of France's relying on a clause in that Convention that allowed for non-performance under certain circumstances), https://perma.cc/3QW4-F4ER.

[34] *Cf.* Solomon Islands Written Statement, ¶¶ 55-58 (listing, *inter alia*, numerous purported customary rules and general principles of law, including international human rights obligations generally); *accord* Vanuatu Written Statement, ¶ 225 (asserting that the rule stated in VCLT article 31(3)(c) is captured well by the UN Human Rights Committee's statement that "[t]he obligations of States parties under international environmental law should thus inform the contents of [ICCPR article 6], and the obligation of State[s] parties [under ICCPR article 6] . . . should also inform their relevant obligations under international environmental law" (quoting UN Human Rights Committee, *General Comment No. 36: Right to Life*, ¶ 62, U.N. Doc. CCPR/C/GC/36 (Sept. 3, 2019)).

[35] *See, e.g.*, Brazil Written Statement, ¶ 34 (claiming that the Paris Agreement is "bound by UNFCCC principles and provisions").

[36] U.S. Written Statement, ¶¶ 3.2-3.3, Chapter III.C. *See also* International Union for Conservation of Nature (IUCN) Written Statement, ¶ 103 (explaining that while "[t]he Paris Agreement was adopted *under* the UNFCCC, . . . it is neither a protocol to the UNFCCC nor an implementing agreement of the UNFCCC," further explaining that the Paris Agreement "is an independent treaty with its own governing and decision-making body" (emphasis in original)); Nordic Countries Written Statement, ¶¶ 51 ("[T]here is no hierarchical relationship between the Paris Agreement and the UNFCCC."), 52 ("Following the maxims lex posterior and lex specialis, there is a general presumption that the terms of the Paris Agreement should prevail over the other instruments of the UN climate change regime in the case of norm conflict, being both the later treaty and the treaty with the more precisely delimited scope of application relating to the particular issues addressed in that agreement.").

[37] *See, e.g.*, Brazil Written Statement, ¶ 10 (emphasis added); India Written Statement, ¶ 6 (emphasis added); PRC Written Statement, ¶ 21 (emphasis added).

departs from the UNFCCC, including with respect to how the Paris Agreement addresses different national circumstances.[38]

i. Article 4 of the Paris Agreement Establishes Parties' Climate Change Mitigation Obligations

3.9 The Paris Agreement's mitigation-related obligations in article 4 are at the heart of the UN climate change regime.[39] Although these obligations are addressed in detail in the U.S. Written Statement,[40] further observations are warranted in light of others' submissions.

3.10 As an initial matter, it bears repeating that where the Parties to the Paris Agreement and the UNFCCC intended for the instruments to impose legally binding obligations, they did so through use of the verb "shall." Provisions in those instruments that employ other verbs—such as "should," "will," "is to," and "are to"—do not establish legally binding obligations.[41]

3.11 The key mitigation-related obligations under the Paris Agreement, which apply to all Parties, are as follows:

- under articles 4.2 and 4.9, "[e]ach Party shall prepare, communicate and maintain successive nationally determined contributions [NDCs] that it intends to achieve," with each Party required to communicate an NDC every five years in accordance with relevant decisions of the Paris Agreement's governing body, the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement (the "CMA"), and

[38] *See* U.S. Written Statement, Chapters II.B, III.B, III.C.

[39] *See, e.g.*, Seychelles Written Statement, ¶ 70 (describing Paris Agreement article 4.2 as "the key provision of the treaty").

[40] U.S. Written Statement, ¶¶ 3.16-3.18.

[41] *See, e.g.*, *id.* ¶¶ 3.16, 3.17, n.197; Kuwait Written Statement, ¶ 14(3)(4) (explaining that "[t]he use of the word 'should' rather than 'shall' here [in UNFCCC article 3.3] is important since it does not embody a binding obligation on States but is rather hortatory," and noting that "[t]his can be contrasted with the use of the word 'shall' as contained in Article 4.1 of the UNFCCC"); Organization of the Petroleum Exporting Countries (OPEC) Written Statement, ¶ 88 (explaining that "the use of the term 'shall' is not interchangeable with 'should' or 'will'"); South Africa Written Statement, ¶¶ 72-73 (explaining that "[t]he use of the peremptory word 'shall' denotes an obligation"). *But see* Singapore Written Statement, ¶ 3.29 (stating that Paris Agreement provisions that use "shall" or "are to" and place Parties as the subject of the obligation are legally binding on Parties). The only Paris Agreement provision that uses the phrase "all Parties are to" is article 3, which contains no independent legal obligations and, rather, acts as an introduction to the Agreement, like a table of contents, with the article simply referring the reader to the relevant provisions of the Agreement. *See* Paris Agreement, art. 3 ("As nationally determined contributions to the global response to climate change, all Parties are to undertake and communicate ambitious efforts *as defined in* Articles 4, 7, 9, 10, 11 and 13 with the view to achieving the purpose of this Agreement as set out in Article 2. The efforts of all Parties will represent a progression over time, while recognizing the need to support developing country Parties for the effective implementation of this Agreement." (emphasis added)).

be informed by the outcomes of the "global stocktake"[42] that occurs every five years;[43] and

- under article 4.2, "Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of [their NDCs]."

3.12 These key mitigation-related obligations are addressed in turn below.

a. The obligation to prepare and communicate an NDC every five years is a procedural one that provides discretion to each Party to determine its national mitigation goals and actions

3.13 There is general recognition that the obligations in articles 4.2 and 4.9 of the Paris Agreement—to prepare and maintain successive NDCs, with an NDC to be communicated every five years—are procedural obligations, and that Parties are not required to achieve their NDCs.[44] There are no legally binding criteria or parameters under the Paris Agreement for the substance of the GHG emissions targets or mitigation policies and measures Parties put forward in their NDCs.[45] In terms of the approach taken in their NDCs, Parties may, for example, decide to put forward GHG emissions reduction targets, policies and measures for

[42] Paris Agreement, art. 14.1 (providing that the CMA "shall periodically take stock of the implementation of this Agreement to assess the collective progress towards achieving the purpose of this Agreement and its long-term goals (referred to as the 'global stocktake')").

[43] Additionally, under article 4.8, "[i]n communicating their [NDCs], all Parties shall provide the information necessary for clarity, transparency and understanding in accordance with decision 1/CP.21 and any relevant decisions of the [CMA]," and under article 4.13, "Parties shall account for their [NDCs]," and "[i]n accounting for anthropogenic emissions and removals corresponding to their [NDCs], Parties shall promote environmental integrity, transparency, accuracy, completeness, comparability and consistency, and ensure the avoidance of double counting, in accordance with guidance adopted by the [CMA]."

[44] *See, e.g.*, Kuwait Written Statement, ¶ 38; Nordic Countries Written Statement, ¶ 53; PRC Written Statement, ¶ 48; Samoa Written Statement, ¶ 167; U.S. Written Statement, ¶ 3.17.

[45] Parties' attempts to define "features" of NDCs have so far proven unsuccessful. The 2015 decision adopting the Paris Agreement requested an ad hoc working group "to develop further guidance on features of the [NDCs] for consideration and adoption by the [CMA] at its first session." Conf. of the Parties to the UNFCCC ("COP") Dec. 1/CP.21, ¶ 26, U.N. Doc. FCCC/CP/2015/10/Add. 1 (Dec. 12, 2015), https://perma.cc/KZL5-RHLR [Dossier No. 155] ("COP Dec. 1/CP.21"). Parties ultimately were unable to reach consensus on defining such "features." *See* CMA Dec. 4/CMA.1, ¶¶ 19-20, U.N. Doc. FCCC/PA/CMA/2018/3/Add. 1 (Dec. 15, 2018), https://perma.cc/TTP4-DEME [Dossier No. 170]; *see also* Lavanya Rajamani & Daniel Bodansky, *The Paris Rulebook: Balancing International Prescriptiveness with National Discretion*, 68 INT'L & COMPAR. L. Q. 1023, 1029 (2019) (explaining that "some countries sought to define additional features of NDCs that might be required or at least recommended—for instance, that NDCs should be quantified or quantifiable and contain an unconditional component," whereas "[o]thers argued that prescribing features would be inconsistent with the self-determined nature of Parties' mitigation contributions," and further explaining that "[i]n the end, this latter view prevailed," with CMA decision 4/CMA.1 leaving "the relative silence of the Paris Agreement on 'features' untouched"), https://perma.cc/J3QR-JR5Z.

reducing national GHG emissions, or some combination of those approaches. As a legal matter, each Party is free to decide on the approach it takes in its NDC.[46]

3.14 In contrast to the legal obligations set forth in articles 4.2 and 4.9, article 4.4 is hortatory in character. It recommends (rather than requires) that "[d]eveloped country Parties *should* continue taking the lead by undertaking economy-wide absolute emission reduction targets," and that "[d]eveloping country Parties *should* continue enhancing their mitigation efforts, and *are encouraged* to move over time towards economy-wide emission reduction or limitation targets in the light of different national circumstances" (emphases added). In recommending that developed country Parties "continue taking the lead," article 4.4 recognizes that developed country Parties already have taken the lead in setting "economy-wide absolute emission reduction targets" and should continue to do so in that manner, a recommendation that developed country Parties, and an increasing number of others, have followed in their NDCs.[47] Moreover, article 4.4 makes clear that *all* Parties are expected to adopt such targets over time. In fact, that non-legally binding normative expectation has been supplanted by the CMA's December 2023 call on *all* Parties "to come forward in their next [NDCs] with ambitious, economy-wide emission reduction targets, covering all [GHGs], sectors and categories and aligned with limiting global warming to 1.5°C, as informed by the latest science, in the light of different national circumstances."[48]

3.15 Similarly, article 4.3, like article 4.4, sets forth non-legally binding normative expectations only, albeit important ones that promote greater climate ambition.[49] Article 4.3

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[46] *See, e.g.*, Kuwait Written Statement, ¶ 35 ("Article [4.2] says nothing relating to the content of each Party's NDC. It is left solely to each Party to prepare and decide on the content of its NDC which it aims to achieve.").

[47] *See, e.g.*, UN Climate Change Secretariat, *Nationally Determined Contributions Under the Paris Agreement: Synthesis Report by the Secretariat*, ¶ 4(b), UN Doc. FCCC/PA/CMA/2023/12 (Nov. 14, 2023) ("80 per cent of Parties communicated economy-wide targets, covering all or almost all sectors defined in the 2006 IPCC Guidelines, with an increasing number of Parties moving to absolute emission reduction targets in their new or updated NDCs."), https://perma.cc/K2KGUA9X.

[48] CMA5 Global Stocktake Decision, ¶ 39; *see also* Grenada Written Statement, ¶ 34 (stating that "[r]ecent CMA decisions have also set heightened expectations on all Parties with respect to the nature and scope of their next NDCs" and noting, for example, paragraph 39 of the December 2023 CMA "global stocktake" decision). That call reflects a significant step in the continued progressive development of the UN climate change regime, given that such targets are needed from all States in order to keep the goal of limiting global warming to 1.5°C within reach, but it is no more legally binding than article 4.4 of the Paris Agreement. The evolution of non-legally binding expectations regarding Parties' NDCs is described in paragraph 3.43 of the U.S. Written Statement.

[49] This is also the case for another important provision of the Paris Agreement, article 4.19, which sets forth the normative expectation that "[a]ll Parties should strive to formulate and communicate long-term low greenhouse gas emission development strategies." The United States believes it is important that all Parties prepare and communicate such strategies, and it has done so itself. U.S. Dep't of State & Exec. Off. of the President, *The Long-Term Strategy of the United States: Pathways to Net-Zero Greenhouse Gas Emissions by 2050* (Nov. 2021),

provides that "[e]ach Party's successive [NDC] will represent a progression beyond the Party's then current [NDC] and reflect its highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances." Although non-legally binding, these expectations provide Parties with a basis for assessing and critiquing each other's NDCs, both within and outside the processes established under the Paris Agreement, in the service of increasing the ambition of climate action over time. Importantly, however, neither article 4.3 nor any other provision of the Paris Agreement provides any legal standard against which to judge the sufficiency of a Party's NDC,[50] much less a basis for finding a Party's NDC to be legally insufficient because the Party has not set a target that reflects what others assert should be the Party's "fair" or "equitable" "share" of GHG emissions reductions.[51]

3.16 More generally, the Paris Agreement does not set forth any standards, rules, or other legal requirements for apportioning among Parties respective "shares" of the "remaining global carbon budget" for a particular limit on global warming or otherwise mandating the allocation of efforts among States to reduce anthropogenic GHG emissions.[52] Instead, each Party in its discretion sets its mitigation goals under the Paris Agreement via "nationally determined," not internationally agreed, targets and actions.[53] This approach has enabled almost universal participation in the Paris Agreement, which is necessary to address the collective action problem posed by anthropogenic climate change. Combined with the elements of the Paris Agreement that comprise its "ambition cycle," this architecture is designed to propel

https://perma.cc/7C4Z-3E3C. There is no more basis for finding that article 4.19 constitutes a legally binding obligation than there is for finding that any other provision of the Paris Agreement that does not employ the verb "shall" constitutes a legally binding obligation. *See, e.g.*, Grenada Written Statement, ¶ 33 ("In addition to establishing legal obligations, Article 4 articulates several important normative expectations, that should inform all actions taken by Parties in line with the objectives of the Paris Agreement, including that: a. Developed country Parties should undertake absolute economy-wide emission reduction targets, with developing countries encouraged to move towards such targets over time (art. 4.4); and b. All Parties should strive to formulate and communicate long-term low [GHG] emission development strategies (art. 4.19).").

[50] *See, e.g.*, Kuwait Written Statement, ¶ 40 (explaining that "the use of the word 'will' in Article 4.3 demonstrates its hortatory nature" and that "a Party is ultimately not required to develop further its NDC objectives").

[51] *See, e.g.*, *id.* ¶ 42 (explaining that "the concepts of 'progression' and 'highest possible ambition' are not quantifiable concepts capable of objective determination other than by the State itself").

[52] *See, e.g.,* Nordic Countries Written Statement, ¶ 57 ("It was a clear prerequisite for the unanimous adoption of the Paris Agreement that the determination of the NDC would remain subject to the discretion of the sovereign States.").

[53] Paris Agreement, arts. 3, 4.2, 4.3, 4.8, 4.9, 4.10, 4.11, 4.12, 4.13, 4.14, 4.16, 6.1, 6.2, 6.3, 6.4(c), 6.5, 6.8, 7.11, 13.5, 13.7(b), 13.11, 13.12, 14.3. *See also, e.g.*, Egypt Written Statement, ¶133; New Zealand Written Statement, ¶ 54; Nordic Countries Written Statement, ¶ 59; Saudi Arabia Written Statement, ¶ 1.11; Singapore Written Statement, ¶ 3.32.

increasingly ambitious global climate action over time to achieve the Agreement's temperature goal.[54]

b. Article 4.2 requires the good faith pursuit by Parties of domestic mitigation measures, with the aim of achieving the "objectives" of their NDCs, but does not obligate Parties to achieve the targets set forth in their NDCs or to take specific mitigation measures

3.17 There is general recognition in the written statements submitted by participants that Parties' obligation under article 4.2 to "pursue domestic mitigation measures, with the aim of achieving the objectives of [their NDCs]" is one of effort, not result, with the verb "pursue" indicating the type of effort that is required of Parties. Like all treaty obligations, this obligation must be performed in good faith.[55]

3.18 Article 4.2 was the subject of intense negotiation, and its wording was carefully chosen.[56] Notably, article 4.2 refers to Parties' pursuit of domestic mitigation measures to "achieve" the "*objectives*" (emphasis added) of their NDCs and not the NDCs themselves, and it does not require Parties to take "all necessary measures" to achieve those objectives. Rather, article 4.2 simply requires Parties to "pursue" domestic mitigation measures "with the aim of achieving" their NDC's objectives.

3.19 Some submissions, however, suggest or assert that the obligation in article 4.2 is one of "due diligence" and construe "due diligence" very broadly, claiming, for example, that under article 4.2, Parties are "required to exercise due diligence *by ensuring* 'appropriate measures are adopted to mitigate the damage'" caused by anthropogenic climate change.[57]

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[54] *See, e.g.*, U.S. Written Statement, ¶¶ 3.14-3.15, Chapter III.E.

[55] *See* VCLT, art. 26; *Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation: 32 States intervening)*, Judgment on Preliminary Objections, 55, ¶ 142 (Feb. 2, 2024) ("[T]he Court has recalled on a number of occasions that the principle of good faith is 'a well-established principle of international law' and 'one of the basic principles governing the creation and performance of legal obligations'. However, the Court has also stated that the principle of good faith 'is not in itself a source of obligation where none would otherwise exist'." (internal citations omitted)), https://perma.cc/45RD-LT5V.

[56] *See, e.g.*, Daniel Bodansky, *The Paris Climate Change Agreement: A New Hope?*, 110 AM. J. INT'L L. 288, 304 (2016), https://perma.cc/Z3GE-7Y2Y; Lavanya Rajamani, *Ambition and Differentiation in the 2015 Paris Agreement: Interpretative Possibilities and Underlying Politics*, 65 INT'L & COMPAR. L. Q. 493, 498 (2016), https://perma.cc/VV3S-3MUG.

[57] Solomon Islands Written Statement, ¶ 82 (emphasis added); *accord* African Union Written Statement, ¶¶ 132-33 (claiming that article 4.2 must be implemented "in accordance with due diligence"); European Union (EU) Written Statement, ¶¶ 128-29; France Written Statement, ¶ 66 (asserting that Parties "must take measures capable of achieving . . . the objectives of their [NDC]"). At least one submission goes even further and suggests without any legal support that such an obligation applies only to "wealthy, high-emitting, and developed States." Solomon Islands Written Statement, ¶ 82.

These interpretations go well beyond the text of article 4.2 and reflect what some wished to include in that article rather than what was actually agreed.[58] In line with a good faith interpretation of the text, article 4.2 requires Parties only to pursue domestic mitigation measures in good faith with the aim of achieving the objectives of their NDC. A Party's failure to achieve the target(s) set forth in its NDC or to implement particular mitigation measures does not constitute non-compliance with article 4.2.

ii. NDCs and Other Non-Legally Binding Targets, Goals, and Commitments Do Not Constitute Unilateral Declarations that Create Legal Obligations

3.20 Contrary to some submissions, there is no legal support for assertions that NDCs "may be considered unilateral declarations of States, capable of creating legal obligations."[59] Parties' GHG emissions targets and/or other goals set forth in their NDCs are not legally binding,[60] and interpreting them to be legally binding unilateral declarations would be contrary to the Paris Agreement's text and Parties' intentions. More generally, States' non-legally binding climate action targets, other goals, and commitments do not give rise to international legal obligations to achieve them.

3.21 States can be legally bound by unilateral public declarations only under specific circumstances that rarely occur in practice. In this respect, the following principles articulated in the 2006 International Law Commission (ILC) Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations are essential considerations, at a minimum, in any determination as to the legal effect of a unilateral declaration: (*i*) only declarations "publicly made *and manifesting the will to be bound* may have the effect of creating legal obligations"; (*ii*) "[a] unilateral declaration entails obligations for the formulating State only if it is stated in clear and specific terms"; and (*iii*) "[i]n the case of doubt as to the scope of the obligations resulting from such a declaration . . . such obligations must be interpreted in a restrictive manner."[61]

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[58] *See, e.g.*, Daniel Bodansky, *The Paris Climate Change Agreement: A New Hope?*, 110 AM. J. INT'L L. 288, 304 (2016), https://perma.cc/Z3GE-7Y2Y; Lavanya Rajamani, *Ambition and Differentiation in the 2015 Paris Agreement: Interpretative Possibilities and Underlying Politics*, 65 INT'L & COMPAR. L. Q. 493, 498 (2016), https://perma.cc/VV3S-3MUG.

[59] *Contra* Solomon Islands Written Statement, ¶ 73.

[60] *See, e.g.*, Saint Lucia Written Statement, ¶ 55; South Africa Written Statement, ¶ 73;Vanuatu Written Statement, ¶ 417.

[61] *See* Int'l Law Comm'n (ILC), *Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations, with Commentaries Thereto*, principles 1, 7, U.N. Doc. A/61/10 (2006), *reprinted in* [2006] 2 Y.B. INT'L L. COMM'N 161, A/CN.4/SER.A/2006/Add.1 (Part 2) (emphasis added), https://perma.cc/F2T9-VWKJ.

3.22 Should there be any doubt, the United States underscores that the numerous climate-related targets, other goals, and political commitments it has announced—including the GHG emissions reduction targets stated in its NDCs communicated under the Paris Agreement; political commitments to various climate goals, such as that of the Global Methane Pledge; and other climate goals the United States has announced, including 100 percent clean electricity by 2035 and net-zero emissions no later than 2050—do not express an intention to be, and therefore are not, binding under international law. There is no surer way to chill the ambition of Parties' NDCs under the Paris Agreement, as well as States' climate goal-setting efforts outside of the Paris Agreement process, than to find that they constitute legally binding unilateral declarations, contrary to the intent of the States making them.[62]

B. Any Customary International Law Obligation Concerning Prevention of Significant Transboundary Environmental Harm Would Be One of Effort, Not Result

3.23 Many submissions, including the U.S. Written Statement, address the Court's decisions finding that States have a customary international law obligation to prevent or at least minimize significant transboundary harm. Although these submissions reflect a lack of consensus that such an obligation applies to GHG emissions,[63] there is a general recognition that any such

[62] *See, e.g.*, Germany Written Statement, ¶ 36 ("It is of utmost importance to differentiate between obligations agreed upon and political goals set within the respective framework."). Consider, for example, developed country Parties' political commitment, "in the context of meaningful mitigation actions and transparency on implementation," to a collective goal of "mobilizing jointly USD 100 billion per year by 2020 to address the needs of developing countries," which was extended through 2025. COP Dec. 1/CP.16, ¶ 98, U.N. Doc. FCCC/CP/2010/7/Add.1 (Dec. 11, 2010), https://perma.cc/3EXN-TK44 [Dossier No. 156]; COP Dec. 1/CP.21, ¶ 53. Contrary to the assertions in certain submissions (*e.g.*, Brazil Written Statement, ¶¶ 71-73), the USD 100 billion collective mobilization goal is not legally binding. Any Party that contributes to the goal does so on a voluntary basis; no Party has a legal obligation to mobilize finance or, beyond that, to be part of a quantified collective goal. The finance-related obligations of certain Parties to the UNFCCC and Paris Agreement under articles 4 and 9 of those agreements, respectively, are both unquantified and substantially qualified. *See* U.S. Written Statement, ¶¶ 3.13, 3.20. Developed country Parties voluntarily decided to adopt, and later extend, the USD 100 billion goal as a political matter, and not pursuant to any obligation under the UNFCCC. The decisions stating developed country Parties' commitment to that goal do not express any intent to be bound, and therefore that commitment, and the goal itself, are not legally binding. As confirmed by the OECD, developed country Parties fully met and indeed exceeded their goal for the first time in 2022. Org. for Econ. Coop. & Dev. ("OECD"), CLIMATE FINANCE PROVIDED AND MOBILISED BY DEVELOPED COUNTRIES IN 2013-2022 6 (2024) (confirming that the goal was reached for the first time in 2022 and at a level exceeding the goal that was not projected under previous scenarios to be reached until 2025), https://perma.cc/M6TX-FBHQ.

[63] *See, e.g.*, Australia Written Statement, ¶¶ 4.10-4.11 ("[T]he international community of States has elected to address the complex challenge of climate change through the specialised climate treaty regime, including the UNFCCC and the Paris Agreement. . . . Given the widespread adoption of the climate change treaties, customary international law should not be held to have developed in a way that approaches the same problem by imposing obligations of a different kind."); Canada Written Statement, ¶ 32 ("Given the relative newness of climate change as a subject of international law, it would be difficult to conclude that there yet exists a norm protecting against the effects of climate change that carries sufficient practice and opinio juris to be considered a part of customary international law."); Nordic Countries Written Statement, ¶ 71 (stating that "the existing obligation under

obligation would be one of effort, not result, with the standard of compliance being "due diligence."[64]

3.24 Some submissions, citing the Court's dictum in its 1949 Judgment in *Corfu Channel* that every State has an "obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States,"[65] suggest or assert that a "general" customary international legal obligation of due diligence to prevent harm to other States from activities within their jurisdiction or control applies to GHG emissions.[66] In support of the claim that a general customary obligation of due diligence to prevent harm to other States exists, as compared to a specific customary rule on transboundary environmental harm for which due diligence is the standard of compliance, some submissions cite, for example, international

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customary international law regarding transboundary environmental harm may not be transposed to the case of climate change"); Indonesia Written Statement, ¶ 61 (stating that "in the context of climate change and biodiversity protection, the applicability of the principle of prevention [articulated in *Pulp Mills*] and its legal consequences to individual States remains ambiguous"); India Written Statement, ¶ 17 (asserting that "environmental pollution" and climate change "must not be conflated" and that "climate change issues cannot be treated as pollution of the environment," and therefore concluding that "climate change cannot be dealt [with] like the transboundary harm to the environment," but rather must be dealt with under the distinct international legal instruments comprising the UN climate change regime); Japan Written Statement, ¶¶ 11-18 (stating that "international legal regulations on GHG emissions are based on individual international agreements rather than on customary principles"); New Zealand Written Statement, ¶ 96 ("There is no established norm of customary law specific to transboundary harm caused by climate change."); PRC Written Statement, ¶¶ 128, 131 (stating that "[t]he principle of prevention of significant harm to the environment is inapplicable to the issue of climate change," expressing the view that "the duty of due diligence is applicable to address climate change and its adverse effects in principle," and noting that an assessment of fulfillment of that duty "should follow the relevant benchmarks set by the provisions of the UNFCCC regime"); Saudi Arabia Written Statement, ¶ 4.100 (stating that "the universally accepted specialized treaty regime on climate change comprehensively sets out international law applicable to greenhouse gas emissions and climate change"); U.S. Written Statement, Chapter IV.A.

[64] *See, e.g.*, Albania Written Statement, ¶¶ 70-72; Antigua and Barbuda Written Statement, ¶ 134; Brazil Written Statement, ¶ 70; Chile Written Statement, ¶ 39; Pakistan Written Statement, ¶ 39(b); Saint Lucia Written Statement, ¶¶ 66-67; Samoa Written Statement, ¶ 98; Switzerland Written Statement, ¶¶ 37-39; U.S. Written Statement, ¶ 4.23.

[65] *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)*, 1949 I.C.J. 4, 22 (Judgment on the Merits of Apr. 9), https://perma.cc/W4AC-C3GA. At issue in that case was the United Kingdom's assertion that Albania's failure to notify other States of a minefield in the Corfu Channel violated the United Kingdom's right of innocent passage under the law of the sea. *Id.* at 10. Although the Court stated that it based its decision on "certain general and well-recognized principles," including "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States," *id.* at 22, that statement must be viewed in context, where another State's international legal right—the United Kingdom's right of innocent passage under the law of the sea—was at issue. To generalize from there that States have a broader duty not to allow their territory to be used for any activity that might cause harm to another State also would read out a key phrase in the *Corfu Channel* dictum: that the activity be "contrary to the rights of other States."

[66] *See, e.g.*, Barbados Written Statement, § VI.A; DRC Written Statement, ¶ 138; OACPS Written Statement, ¶¶ 148-49 (alleging that "there is consensus that the principle [of due diligence] consolidated around 1648 with the Peace Treaties of Westphalia" and claiming "the obligation to exercise due diligence existed already in 1648, well before the Industrial Revolution"); Vanuatu Written Statement, ¶ 235 (alleging "that the duty of all States to exercise due diligence in the prevention of reasonably foreseeable harm from activities within their jurisdiction or control crystallized as a primary obligation of international law no later than at the end of the nineteenth century").

decisions such as the 1872 arbitral award in the *Alabama Claims* case.[67] Although the *Alabama Claims* award addressed the concept of due diligence, it did so in the context of examining specific primary obligations under the international law of neutrality in a situation of armed conflict, with due diligence identified as the standard for compliance with such neutrality rules.[68] The *Alabama Claims* award did not conclude that "due diligence" is a primary international legal obligation in its own right.[69]

3.25 Thus, although due diligence may be a standard of conduct applicable to certain specific primary obligations under international law, views on whether there is a general, freestanding customary obligation of due diligence to prevent harm to other States are mixed.[70]

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[67] *See, e.g.*, Burkina Faso Written Statement, ¶ 285; Costa Rica Written Statement, ¶ 38; OACPS Written Statement, ¶ 148.

[68] *Alabama Claims of the United States of America Against Great Britain (U.S./G.B.)*, 29 R.I.A.A. 125 (Award of Sept. 14, 1872), https://perma.cc/2NDA-38W3 ("*Alabama Claims*"). In fact, the *compromis* by which the United States and Great Britain agreed to submit the U.S. claims against Great Britain to arbitration, the 1871 Treaty of Washington, expressly stated that the arbitrators, in deciding the matters submitted to them, shall be governed by three rules, in addition to such principles of international law that are not inconsistent with them. Treaty Between the United States of America and Great Britain for the Amicable Settlement of All Causes of Difference Between the Two Countries, May 8, 1871, art. VI, 17 Stat. 863, https://perma.cc/D3P2-ECB6. Among those expressly stated rules are that "[a] neutral government is bound—First, to use due diligence to prevent the fitting out, arming, or equipping, within its jurisdiction of any vessel which it has reasonable ground to believe is intended to cruise or to carry on war against a power with which it is at peace; and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above . . . Thirdly, to exercise due diligence in its own ports and waters, and, as to all persons within its jurisdiction, to prevent any violation of the foregoing obligations and duties." *Id.* This makes clear that the "due diligence" at issue in *Alabama Claims* was a standard for compliance with rules on neutrality that were jointly accepted for purposes of deciding the U.S. claims, and that "due diligence" was not accepted as a primary international legal obligation in its own right.

[69] *Alabama Claims*, 29 R.I.A.A. at 130 (concluding that "the British government failed to use due diligence *in the performance of its neutral obligations*" (emphasis added)).

[70] *See, e.g.*, Australia Written Statement, ¶ 4.13 ("Due diligence is the standard of compliance that applies to certain obligations applicable to States, including in international environmental law. It is not a self-standing obligation."); United Nations, *Official Compendium of Voluntary National Contributions on the Subject of How International Law Applies to the Use of Information and Communication Technologies by States Submitted by Participating Governmental Experts in the Group of Governmental Experts on Advancing Responsible State Behaviour in Cyberspace in the Context of International Security Established Pursuant to General Assembly Resolution 73/266*, U.N. Doc. A/76/136, 141 (Aug. 10, 2021) (U.S. contribution) ("The United States has not identified the State practice and *opinio juris* that would support a claim that due diligence currently constitutes a general obligation under international law."), https://perma.cc/BPY4-35JK; *id.* at 117 (United Kingdom (UK) contribution) (noting that "there is not yet State practice sufficient to establish a specific customary international law rule of 'due diligence' applicable to activities in cyberspace"); New Zealand, *The Application of International Law to State Activity in Cyberspace*, ¶¶ 16, 17 (Dec. 1, 2020) (noting that it is "unsettled" whether a "norm of responsible state behaviour [that] provides that states should not knowingly allow their territory to be used for internationally wrongful acts using [information and communications technologies]" "reflects a binding legal obligation," and further stating that "New Zealand is not yet convinced that a cyber-specific 'due diligence' obligation has crystallised in international law"), https://perma.cc/99S8-PKQE; Canada, *International Law Applicable in Cyberspace* (2022), ¶ 26, n.20 (stating "[n]o State should knowingly allow its territory to be used for acts contrary to the rights of other States," and noting Canada "continues to study" whether there is a binding rule of due diligence under customary international law), https://perma.cc/4HNB-5HG5.

3.26 In any case, the Court, in the context of transboundary environmental harm, has identified a single customary international legal obligation—to prevent or at least minimize significant transboundary environmental harm—the standard for compliance with which is due diligence.[71] To the extent the Court addresses an obligation of "due diligence" under customary international law, it should be the aforementioned obligation the Court first identified in respect of transboundary environmental harm in its 1996 Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons*, and not a purported general obligation that is not specific to the environment.

3.27 The remainder of section III.B addresses aspects of the customary obligation to prevent or at least minimize significant transboundary environmental harm the Court has identified: (*i*) the nature of such an obligation (one of effort, not result); (*ii*) the threshold of harm that is relevant to such an obligation (significant) and the type of knowledge of such harm or the risk thereof that would engage the obligation (general, not expert); and (*iii*) the type of efforts that would be required of a State when such an obligation is engaged (reasonable efforts).

i. A Customary Obligation to Prevent or at Least Minimize Significant Transboundary Harm Would Not Proscribe Such Harm as an Absolute Matter

3.28 Consistent with the Court's decisions to date, the fact of harm, even "significant" harm, would not be determinative of breach of any customary obligation to prevent or at least minimize significant transboundary environmental harm.[72] Rather, the standard for compliance with such an obligation would be "due diligence." To assess compliance with such an obligation, the question is whether the relevant State was duly diligent in taking appropriate measures to address existing significant transboundary harm or the risk thereof.[73]

3.29 Contrary to suggestions in certain submissions, there is no support in State practice and *opinio juris*, and therefore no legal basis, for finding that there is strict liability under customary international law for transboundary environmental harm—that is, liability for harm that occurs even though a State has been exercising due diligence.[74] *A fortiori*, there is no legal basis for

[71] U.S. Written Statement, Chapter IV.A.i.

[72] *See, e.g.*, Singapore Written Statement, ¶ 3.5. Similarly, such an obligation would not operate to convert a non-legally binding goal to limit global warming to a particular level—such as 1.5°C above pre-industrial levels—into a legally relevant objective that States are required to achieve, such that the global average temperature rising above that level would demonstrate *per se* failure of States to comply with such an obligation.

[73] *See, e.g.*, U.S. Written Statement, ¶ 4.23.

[74] *Contra, e.g.*, African Union Written Statement, ¶ 94; Barbados Written Statement, § VI.F(i); OACPS Written Statement, ¶ 143 (submitting "that States that have caused significant harm to the climate system and other parts

finding that a strict liability rule exists for global harm caused by anthropogenic GHG emissions.

3.30 Unsurprisingly, no submission provides evidence of the State practice and *opinio juris* that would be necessary to establish a strict liability rule under customary international law regarding transboundary or global environmental harms.[75] There are limited circumstances in which States have agreed to strict liability under international law, and in all these circumstances, States have done so by treaty.[76] No such treaty rule applies to GHG emissions.

ii. A Customary Obligation to Prevent or at Least Minimize Significant Transboundary Environmental Harm Would Be Engaged Only Upon a State's General Awareness of Such Harm or the Risk Thereof

3.31 Any customary obligation to prevent or at least minimize significant transboundary environmental harm would be engaged only when the relevant State or States are aware of either such harm or the risk thereof.[77]

3.32 Setting aside the issue of whether, and if so, when, such an obligation could be determined to have crystallized as a matter of customary international law,[78] it is still necessary to consider two questions relating to when such an obligation would be engaged:

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of the environment have committed internationally wrongful acts"). As explained in the U.S. Written Statement, Stockholm Principle 21's statement of a "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" does not, on its own terms, reflect State practice. U.S. Written Statement, ¶¶ 4.7, 4.8, n.286.

[75] *See* U.S. Written Statement, ¶ 4.1, n.279 (describing the Court's long-standing approach to the identification of rules of customary international law).

[76] *See, e.g.*, Convention on International Liability for Damage Caused by Space Objects, Mar. 29, 1972, art. II, 24 U.S.T. 2389, T.I.A.S. No. 7762, 961 U.N.T.S. 187, https://perma.cc/HXJ2-QYH3; International Convention on Civil Liability for Oil Pollution Damage, Nov. 29, 1969, art. III, 973 U.N.T.S. 3, https://perma.cc/C9M9-P7GW; Vienna Convention on Civil Liability for Nuclear Damage, May 21, 1963, arts. II, IV, 1063 U.N.T.S. 265, https://perma.cc/C9XC-ZUDB; Convention on Third Party Liability in the Field of Nuclear Energy, July 29, 1960, arts. 3, 8-11, 956 U.N.T.S. 251, https://perma.cc/4C2D-JSCE; Convention Relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material, Dec. 17, 1971, 974 U.N.T.S. 255, https://perma.cc/RA3U-6F35.

[77] *See, e.g.*, Antigua and Barbuda Written Statement, ¶ 338.

[78] The Court need not determine when any such obligation might have become customary international law in order to respond to the General Assembly's request to provide States with guidance on their current obligations in respect of climate change. Rather, the Court need only determine the primary obligations States have today. *See* G.A. Res. 77/276 (using the present tense "*are*" when asking "[w]hat *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"? (emphases added)); *see also Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, 2019 I.C.J. 95, 138, ¶ 175 (Advisory Opinion of Feb. 25) (stating that "[t]he Court will answer this question, drafted in the present tense, on the basis of the international law applicable at the time its opinion is given"), https://perma.cc/8PUF-GCQ9 ("*Legal Consequences of the Separation of the Chagos Archipelago*"); U.N. GAOR, 77th Sess., 64th plen. mtg at 7-8, U.N. Doc. A/77/PV.64 (Mar. 29, 2023) (statement by the EU on behalf of the EU and its 27 member States) (stating that the requested advisory opinion "has the potential to make a

- First, how should "significance" be understood, and what would an evaluation of actual or prospective harm entail?

- Second, how should the requisite awareness of risk be assessed, in terms of both the time and the actor in question?

3.33 With respect to the first question, in the absence of evidence of actual harm, the risk of such harm would have to be qualified and quantified.[79] That assessment would entail consideration of the probability that harm will occur and such harm's potential magnitude, including the remoteness of the risk and the degree of certainty regarding potential effects. Additionally, the ILC has observed that

> [t]he term 'significant', while determined by factual and objective criteria, also involves *a value determination* which depends on the circumstances of a particular case and the period in which such a determination is made. For instance, a particular deprivation at a particular time might not be considered 'significant' because at that specific time scientific knowledge or human appreciation for a particular resource had not reached

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significant contribution to the clarification of the *current* state of international law," further stating that "we expect the advisory opinion to, first, answer the legal questions on the basis of the *current* state of international law and with regard to all States" (emphases added)), https://perma.cc/PWU5-TFDK; *id.* at 18 (statement by Germany) ("Germany's goal [in the process of drafting the questions posed] was to formulate paragraphs and questions for submission to the Court that are *future-oriented*. The aim was to produce a text that clearly addresses the *current* obligations of all States on the basis of the *current* state of the law with regard to *future* developments on the issue of climate change." (emphases added)); *id.* at 20 (statement of the United Kingdom) ("We welcome the [ICJ] considering the *current* obligations of all States under international law . . . ." (emphasis added)); *id.* at 23-24 (statement of Iceland) ("We expect the Court to answer the legal questions on the basis of the *current* obligations of all States . . . ." (emphasis added)); *id.* at 26 (statement of Norway) (welcoming the Court's consideration "of the *current* obligations of States under international law," and further noting that "the greatest value of the resolution is in the elaboration it presents on *current* obligations, and through that, its ability to lay a foundation for improved *future* compliance and greater ambition on climate action" (emphases added)); *id.* at 27 (statement of Canada) (explaining that resolution 77/276 "seeks the advice of the [ICJ] with regard to what obligations and legal consequences for *current or future* breaches States face, or could face" (emphasis added)).

[79] *See, e.g.*, ILC, *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with Commentaries*, art. 2, cmt. ¶ 2, U.N. Doc. A/56/10 (2001), *reprinted in* [2001] 2 Y.B. INT'L L. COMM'N 148, A/CN.4/SER.A/2001/Add.1 (Part 2), https://perma.cc/5AQX-ZGWB ("*ILC Draft Articles on Prevention of Transboundary Harm*"). *Consider also, e.g.*, Switzerland Written Statement, ¶ 30 ("The positive obligation of prevention requires a certain knowledge of the risks of significant damage from the activity in question. This knowledge must cover not only the seriousness of the potential damage, but also causality and the likelihood of the risk occurring. In other words, the risk of significant damage occurring must be reasonably foreseeable."). Any assessment of whether, at a given point in time, there was a general awareness of a risk that anthropogenic GHG emissions could cause significant global harm would need to take into account the projections at that time regarding the volume of future global anthropogenic GHG emissions, including how quickly such emissions might increase over time. Moreover, it would need to take into account the fact that early assessments of the risk posed by anthropogenic GHG emissions would have been made at a time when atmospheric concentrations of GHGs were still at or very close to the pre-industrial base state and, therefore, at a time when the global average temperature was at or very close to what it was prior to anthropogenic global warming. At that time, one reasonably could have expected anthropogenic GHG emissions to result in smaller global average temperature increases and therefore reasonably could have anticipated minimal—and, as noted *infra*, beneficial—impacts.

> a point at which much value was ascribed to that particular resource. But some time later that view might change and the same harm might then be considered 'significant'.[80]

3.34 As this observation indicates, consideration of factors that are potentially relevant to assessing the "significance" of transboundary harm or the risk thereof overlaps with the second question identified above. With respect to that question, an assessment of when a State gained the requisite awareness would need to be made from the vantage of the State's general awareness at the relevant time, and not based on what might appear in retrospect to have been obvious.[81] Theoretical writings in scientific literature do not suffice to establish the knowledge necessary to engage such an obligation.

3.35 Some submissions suggest that the impacts of increased atmospheric concentrations of GHGs were widely known as early as the 1800s, citing the work of those, such as Swedish scientist Svante Arrhenius and British engineer Guy Stewart Callendar, who were among the earliest to study the impact of anthropogenic CO_2 emissions on global temperature.[82] But looking back in time presents the risk of hindsight bias. Consider, for example, that although Arrhenius projected in 1896 that anthropogenic GHG emissions would warm the planet, he also concluded that such warming would be expected to result in a climate more beneficial to humans.[83] Similarly, Callendar highlighted in the late 1930s the salutary impacts of anticipated warming, including the potential of forestalling a detrimental future ice age.[84]

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[80] *ILC Draft Articles on Prevention of Transboundary Harm*, art. 2, cmt. ¶ 7 (emphasis added).

[81] *See, e.g.*, *Case of Vilnes and Others v. Norway* (apps. nos. 52806/09 and 22703/10), Judgment, ¶ 222 (ECtHR Dec. 5, 2023) (stating, in connection with the duty of care at issue in that case, that "regard ought to be had to the *knowledge* possessed at the material time," and that "an assessment of liability ought not to be based on hindsight" (emphasis in original)), https://perma.cc/P2QW-48YB.

[82] *See, e.g.*, Barbados Written Statement, ¶¶ 38-47.

[83] Svante Arrhenius, *On the Influence of Carbonic Acid in the Air Upon the Temperature of the Ground*, 41 PHIL. MAG. & J. SCI. 237, 267 (Apr. 1896) (explaining how the concentration of CO_2 in the atmosphere warms the Earth but discussing no negative impacts of that warming, instead referring to a prior geological period during which the temperature in the Arctic was eight to nine degrees Celsius warmer than the late 1800s as a "genial time [that] the ice age succeeded"), https://perma.cc/2HK2-YN54. Additionally, in his 1908 book *Worlds in the Making*, Arrhenius explained that by increasing the concentration of CO_2 in the atmosphere, "we may hope to enjoy ages with more equable and better climates, especially as regards the colder regions of the earth, ages when the earth will bring forth much more abundant crops than at present, for the benefit of rapidly propagating mankind." SVANTE ARRHENIUS, WORLDS IN THE MAKING: THE EVOLUTION OF THE UNIVERSE 63 (H. Borns trans., 1908), https://perma.cc/NC2Z-S8P5.

[84] *See, e.g.*, G.S. Callendar, *The Artificial Production of Carbon Dioxide and Its Influence on Temperature*, 64 Q. J. ROYAL METEOROLOGICAL SOC'Y 223, 236 (Apr. 1938) (concluding "that the combustion of fossil fuel, whether it be peat from the surface or oil from 10,000 feet below, is likely to prove beneficial to mankind in several ways, besides the provision of heat and power," explaining that "the above mentioned small increases of mean temperature would be important at the northern margin of cultivation, and the growth of favourably situated plants

3.36 What we now know to be true is irrelevant to assessing what was understood in the past about the probability and magnitude of harm that might occur as a result of anthropogenic GHG emissions. This also illustrates the critical distinctions among: (*i*) the scientific community's theoretical knowledge of the physical mechanism of how anthropogenic CO_2 emissions could contribute to the "greenhouse effect"; (*ii*) general awareness that this physical mechanism is actually causing, or will cause, global warming, given the complexities of the climate system; and (*iii*) a general awareness of the harms caused by global warming. It is not enough simply to recount the development of a scientific understanding of how anthropogenic GHG emissions would be expected to contribute to the greenhouse effect, as some submissions do, without also examining contemporaneous understandings of the expected effects of these emissions on the climate system.[85]

3.37 For purposes of the instant proceeding, however, these considerations are beside the point. To the extent the Court addresses a customary international legal obligation to prevent or at least minimize significant transboundary environmental harm, the Court need not determine when in the past States gained a general awareness of the risk of global harm posed by anthropogenic GHG emissions.[86] Rather, for purposes of providing an advisory opinion on States' current obligations in respect of climate change,[87] the Court need only conclude what no submission in this proceeding disputes: that States have the requisite awareness today.

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is directly proportional to the carbon dioxide pressure," and further explaining that "[i]n any case the return of the deadly glaciers should be delayed indefinitely"), https://perma.cc/K4DV-F2FB.

[85] *Cf.* Barbados Written Statement, ¶¶ 38-47 (asserting that "[h]istorically, the impacts of atmospheric carbon were known as early as 1856," yet discussing in respect of those early studies only the scientific community's understanding of the mechanism of the "greenhouse effect," rather than any general awareness of potential global harm that might be caused by anthropogenic GHG emissions); *id.* ¶ 41 (citing Arrhenius's 1896 "definitive description of climate change" but omitting a discussion of Arrhenius's assessment of the impacts of such warming); *id.* ¶¶ 43-45 (extensively citing Callendar's work in seeking to establish that there was a theoretical understanding of the mechanism of anthropogenic global warming in the scientific community but omitting a discussion of Callendar's assessment of the impacts of such warming).

[86] The United States submits that States first gained a general awareness in the late 1980s of the risk of significant global harm posed by anthropogenic GHG emissions. U.S. Written Statement, ¶¶ 1.4, 2.3, 2.12, 6.2. Other submissions that address the issue place States' acquisition of a general awareness at around the same time. Germany Written Statement, ¶ 40; Netherlands Written Statement, ¶ 5.6; New Zealand Written Statement, n.2; Switzerland Written Statement, ¶¶ 35-36. A few submissions assert that States were aware at an earlier date. *See, e.g.*, Barbados Written Statement, § IV.A; Burkina Faso Written Statement, ¶ 292; Vanuatu Written Statement, ¶ 73. The United States submits that a precise determination of when States gained the requisite awareness of the risk of significant global harm posed by GHG emissions would be a fact-intensive inquiry with respect to which the Court does not have the necessary and relevant information based on the dossier prepared for and submissions made in this advisory proceeding.

[87] *See supra* n.78.

iii. The Due Diligence Standard Is Context-Specific

3.38 As discussed *supra* and in the U.S. Written Statement, the Court has identified a customary obligation to prevent or at least minimize significant transboundary environmental harm, the standard for compliance with which is due diligence. Setting aside the differing views on the relationship between such a customary obligation and the treaty obligations States have as Parties to the Paris Agreement and the UNFCCC,[88] the United States would emphasize the convergence in the submissions of many participants about key parameters of a due diligence obligation as applied to anthropogenic GHG emissions.

3.39 First, there is general recognition that any such obligation would require States to take, in this Court's words, "appropriate measures to prevent or mitigate" the risk of significant transboundary environmental harm, or, as the International Tribunal for the Law of the Sea (ITLOS) has put it, measures that are "reasonably appropriate."[89]

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[88] The United States has submitted that any customary international law obligation to prevent or at least minimize significant transboundary harm would be satisfied in the climate change context by States' implementation of their obligations under the climate-change-specific treaties they have negotiated and joined. U.S. Written Statement, ¶¶ 1.6, 4.1, 4.22-4.28. Other submissions state a similar view. *See, e.g.*, Kuwait Written Statement, ¶ 74 (submitting that "a State that in good faith exerts efforts to meet its NDC objectives can be said to be acting with due diligence in discharge of its obligation to ensure its GHG emissions do not cause damage to the environment of other States"); Nordic Countries Written Statement, ¶ 108 ("the UN climate change regime and, in particular, the Paris Agreement, as the most recent consensus within that regime, offers the most appropriate framework from which to assess the extent to which any State has acted with the necessary due diligence in regard to its obligations to ensure protection of the climate system and other parts of the environment from anthropogenic emissions of [GHGs]"); Singapore Written Statement, ¶¶ 3.3 ("the requisite due diligence and cooperation of a State, to fulfill its customary international law obligation to prevent significant transboundary environmental harm in the climate change context, is informed by full participation in collective efforts by the international community to address anthropogenic GHG emissions"), 3.25 ("The Paris Agreement reflects virtual consensus among States of the long-term trajectory to manage the risks associated with climate change, along a pathway towards low GHG emissions and climate-resilient development that depends upon (among others) international cooperation . . . ."); UAE Written Statement, ¶ 102 ("[T]he UAE submits that what is required of States under the no-harm principle under general international law must be understood in light of, and as being given shape by, the provisions of the UN climate change regime. Accordingly, to the extent that a State complies with the UNFCCC, the Kyoto Protocol, and the Paris Agreement, and the specific commitments it has undertaken in that context, it should be regarded as complying with the no-harm principle under general international law with respect to climate change."). Still others have suggested that the *lex specialis* of the UN climate change regime would prevail over any such customary obligation when it comes to addressing the adverse global impacts of anthropogenic GHG emissions. *See, e.g.*, OPEC Written Statement, ¶ 126 ("This *lex specialis* regime within the UNFCCC, Kyoto Protocol and Paris Agreement is a self-contained regime governing anthropogenic GHG emissions.").

[89] *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)*, 2015 I.C.J. 665, 706-7, ¶ 104; 724, ¶ 168 (Dec. 16), https://perma.cc/N2V8-SV29; *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, 2011 ITLOS Rep. 10, 44, ¶ 120 (Advisory Opinion of Feb. 1), https://perma.cc/3ZH9-8UUK ("*Activities in the Area*"). *See also Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law*, ITLOS Advisory Opinion, ¶ 405 (May 21, 2024) (finding that the obligation in UNCLOS article 194.5 is a "context-specific" one of due diligence requiring "objectively reasonable approaches . . . be taken on the basis of the best available science," explaining that implementation "allows for the exercise of discretion" while reiterating the Tribunal's previous finding in *Activities in the Area* that a "State must take into account, objectively, the relevant options in a manner

3.40 Second, there is general recognition that due diligence is context-specific, since what effort is "appropriate" or "reasonable" depends on the particular circumstances and may vary over time and between different countries, based on their national circumstances.[90] There also is general recognition that relevant factors in determining whether States have taken "appropriate" or "reasonable" measures might include the nature of the activity in question, the nature and degree of risk of the transboundary harm (the assessment of which could change over time based on scientific advances), the socio-economic costs of possible steps to prevent or minimize such harm, and the availability and feasibility of methods to mitigate the risk of that harm.[91]

3.41 Third, the due diligence standard would provide States with a wide margin of appreciation in determining what measures to take to avoid or at least minimize significant transboundary harm. In light of the context-specific nature of the standard, such an obligation would not be susceptible to general, *ex ante* prescriptions of what States must do to act diligently.[92] In the words of one submission, there is "no general, bright line standard of

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that is reasonable, relevant and conducive to the benefit of mankind as a whole" and "must act in good faith, especially when its action is likely to affect prejudicially the interests of mankind as a whole"), https://perma.cc/QX8W-UXNK ("*COSIS Request for an Advisory Opinion*").

[90] *See, e.g.*, African Union Written Statement, ¶ 97(b) (stating that in the context of climate change, "the level of due diligence expected in 1992, at the time of the adoption of the UNFCCC, is vastly different from that required today"); Australia Written Statement, ¶ 4.15; IUCN Written Statement, ¶ 347; Mexico Written Statement, ¶ 44; Singapore Written Statement, ¶ 3.6; U.S. Written Statement, ¶¶ 4.5-4.14, 4.23. *See also ILC Draft Articles on Prevention of Transboundary Harm*, art. 3, cmt. ¶ 11 ("that which is generally considered to be appropriate and proportional to the degree of risk of transboundary harm in the particular instance").

[91] *See, e.g.*, Australia Written Statement, ¶ 4.15; Mexico Written Statement, ¶ 44; Singapore Written Statement, ¶¶ 3.7-3.9; U.S. Written Statement, ¶ 4.23.

[92] *See, e.g.*, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, 2007 I.C.J. 43, 221, ¶ 430 (Feb. 26) (stating, in the context of that case, that "the notion of 'due diligence' . . . calls for an assessment *in concreto*"), https://perma.cc/B3G6-BJRQ ("*Crime of Genocide*"). *See also, e.g.*, Albania Written Statement, ¶ 71 (explaining that "due diligence" is "context-specific" and "requir[es] different measures in different circumstances"); France Written Statement, ¶ 193 ("[S]i tous les États doivent prendre des mesures au titre de leur obligation de diligence requise, il appartient à chaque État, en ce qui le concerne, de déterminer les mesures appropriées pour prévenir les dommages au système climatique et aux autres composantes de l'environnement."); Mexico Written Statement, ¶ 48 (explaining that States have "a margin of discretion . . . to implement[] [their 'due diligence' obligation] according to their domestic policy, national legislation and judicial practice"); Saint Lucia Written Statement, ¶ 67 (quoting Professor Jorge Viñuales in explaining that "the 'selection of the specific measures to exercise due diligence [remains within] the purview of the State of origin'"); Samoa Written Statement, ¶ 114 (describing "due diligence" as "an inherently contextual standard"); Solomon Islands Written Statement, ¶ 160 (explaining that "'due diligence' obligations cannot be precisely described"); Switzerland Written Statement, ¶ 79 ("There is no agreement regarding the amount of [GHG] emissions each country is permitted to emit before it breaches the no-harm rule. Neither is there an agreed level of emissions reduction that would determine whether a country has met its due diligence obligation. In order to ensure the 'proper' allocation of carbon budgets, a number of factors and criteria need to be considered, which ultimately require political determination and assessment. Setting a carbon budget for states is fundamentally a political decision rather [than] the result of any legal or scientific determination.").

conduct that States must follow in order to discharge" an obligation to prevent or at least minimize significant transboundary environmental harm.[93] Similarly, any *ex post* examination of alleged non-compliance of a State with such a customary obligation would need to be fact-specific and could not be performed in the abstract.

3.42 Two additional points should be borne in mind in the specific context of climate change. First, there is no basis for finding that a State's failure to meet its non-legally binding national emissions target(s) constitutes a *prima facie* violation of any customary due diligence obligation applicable to anthropogenic GHG emissions. Rather, the question is whether a State has taken reasonable or appropriate measures in light of the known risk in question.[94]

3.43 Second, although a due diligence standard is context-dependent and takes into account different national circumstances, including States' capacities and constraints, there is no legal basis for finding that such a standard entails or implies a bifurcated differentiation of duties between categories of States, such as those considered to be "developed" and those considered to be "developing." Indeed, any category-based differentiation would run counter to the context-dependent character of the due diligence standard. Additionally, for the reasons described *infra* in Chapter IV.A, the concept of "common but differentiated responsibilities and respective capabilities" (CBDR/RC) is not relevant to the "due diligence" standard.[95] While taking different national circumstances into account, a due diligence standard would apply uniformly to all States.

C. The UN Convention on the Law of the Sea Does Not Require Parties to Adopt Particular Measures or Achieve Any Specific Result

3.44 The United States reaffirms its submission that the obligations relating to pollution of the marine environment under the 1982 UN Convention on the Law of the Sea (UNCLOS) do

[93] Singapore Written Statement, ¶ 3.6.

[94] As explained in the U.S. Written Statement, the United States submits that a Party's compliance with its Paris Agreement obligations would suffice to satisfy a customary due diligence obligation: the Paris Agreement reflects what States have agreed is "appropriate" and "reasonable" in the context of climate change. U.S. Written Statement, ¶¶ 1.6, 4.1, 4.3, 4.22-4.28.

[95] This is the case regardless of whether one takes the view that CBDR/RC is predicated on States' differing capacities (which is the U.S. view), States' differing contributions to the environmental problem in question, or a combination of those (and potentially other) factors. Similarly, there is no legal basis for finding that "historical" emissions are relevant to determining whether a State is compliant with a current "due diligence" obligation that might be found with respect to anthropogenic GHG emissions. *Contra, e.g.*, African Union Written Statement, ¶ 110 (asserting that "[a] higher standard of due diligence applies in respect of States with significant total emissions or very high *per capita* emissions (past or current), given the greater burden that their emissions place on the global climate system"); UAE Written Statement, ¶ 145. What diligence is "due" should be determined in light of the circumstances—including the general awareness of the risk of transboundary harm an activity poses—prevailing at the time.

not mandate the adoption of any particular measure or the achievement of any specific result.[96] The analysis of ITLOS in its recent Advisory Opinion in *COSIS Request for an Advisory Opinion* relating to UNCLOS obligations on pollution of the marine environment supports that position. In particular, the Tribunal characterized relevant obligations under UNCLOS part XII as obligations of conduct, not result.[97] It further noted, with respect to the due diligence standard for compliance with those obligations, that

> [i]t is difficult to describe due diligence in general terms, as the standard of due diligence varies depending on the particular circumstances to which an obligation of due diligence applies. There are several factors to be considered in this regard. They include scientific and technological information, relevant international rules and standards, the risk of harm and the urgency involved. The standard of due diligence may change over time, given that those factors constantly evolve.[98]

3.45 Additionally, with respect to the "internationally agreed rules, standards and recommended practices and procedures" Parties are required to take into account when adopting laws and regulations to prevent, reduce, and control pollution of the marine environment, the Tribunal found that the phrase "taking into account" should be understood to mean that Parties "must, in good faith, give due consideration to them" but "are not required to adopt such rules, standards and practices and procedures in their national laws and regulations," while noting that "[i]n any case, States must comply with internationally agreed rules and standards, which are binding upon them."[99]

3.46 The United States also reaffirms its submission that any obligations in UNCLOS relating to climate change should be understood in the context of the UN climate change regime, which is the primary source of international legal obligations relating to anthropogenic GHG emissions.[100] The recent ITLOS Advisory Opinion recognized the germaneness of the UN climate change regime in this context, finding, in connection with Parties' obligations under UNCLOS part XII concerning the prevention, reduction, and control of pollution to the marine environment, that "the UNFCCC and the Paris Agreement, as the primary legal

[96] U.S. Written Statement, ¶¶ 4.31-4.37.

[97] *COSIS Request for an Advisory Opinion*, ¶¶ 233 (UNCLOS art. 194(1)), 254 (UNCLOS art. 194(2)), 309 (UNCLOS art. 197).

[98] *Id.* ¶ 239.

[99] *Id.* ¶ 271.

[100] U.S. Written Statement, ¶ 4.29.

instruments addressing the global problem of climate change, are relevant in interpreting and applying the Convention with respect to marine pollution from anthropogenic GHG emissions."[101]

[101] *COSIS Request for an Advisory Opinion*, ¶ 222. *But see id.* ¶¶ 223-24 (stating that ITLOS "does not consider that the obligation under article 194, paragraph 1, of the Convention would be satisfied simply by complying with the obligations and commitments under the Paris Agreement," and that it "also does not consider that the Paris Agreement modifies or limits the obligation under the Convention").

CHAPTER IV

THERE ARE NO ADDITIONAL INTERNATIONAL OBLIGATIONS TO MITIGATE GREENHOUSE GAS EMISSIONS

4.1 In considering States' current international legal obligations in respect of climate change, it is critical to distinguish between international law, on the one hand, and concepts that might inform States' approaches to an international environmental problem but that are not customary international law or general principles of law, on the other. Similarly, it is important to recognize that although a concept might be incorporated into specific international agreements in particular ways, that does not mean it applies to the interpretation or application of international environmental law more generally.

4.2 This chapter examines three concepts discussed in some submissions and explains that there is no basis for finding that they constitute customary international law or general principles of law: "common but differentiated responsibilities" (**section A**), "precaution" (**section B**), and "polluter pays" (**section C**).[102]

4.3 **Section D** responds to assertions regarding international human rights law and explains how such law does not impose—and is not well-suited for imposing—any obligations on States to mitigate anthropogenic GHG emissions.

A. "Common But Differentiated Responsibilities" Is Not Customary International Law or a General Principle of Law

4.4 The United States reiterates that "common but differentiated responsibilities" (CBDR) must be understood in the context of the specific international agreement in which it is referenced, noting that the way in which, and the degree to which, CBDR is incorporated into each such agreement varies. As explained in the U.S. Written Statement, CBDR does not imply any categorical differentiation between or among groups of parties to an international agreement (for example, based on lists in annexes or categories such as "developed" versus "developing" countries).[103] In particular, in the Paris Agreement, States adopted a "spectrum"

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[102] The more then 90 written statements filed in this proceeding invoke a number of general concepts, such as "good neighborliness," sometimes suggesting or asserting that such concepts imply international legal obligations. *Cf.* Grenada Written Statement, ¶ 39; Kiribati Written Statement, ¶ 117; Dominican Republic Written Statement, n.141. Although such concepts might be understood as animating certain primary obligations under international law, they do not themselves entail any international legal obligations. *Contra* Barbados Written Statement, ¶ 136; Sri Lanka Written Statement, ¶ 94(c). As noted *supra* in footnote 8, the United States in these Written Comments will not seek to address each and every argument raised in others' submissions. Again, no inferences should be drawn from an absence of comment by the United States.

[103] U.S. Written Statement, ¶¶ 2.37, 3.25-3.30.

approach to differentiation of the key mitigation-related commitments, and not a bifurcated approach.[104]

4.5 Some submissions assert or suggest the general relevance of the concept of CBDR to the interpretation or application of international obligations in respect of climate change.[105] It therefore bears emphasis that the identification of customary international law requires the fulfillment of two conditions: (*i*) State practice in connection with the substance of purported customary law must be "both extensive and virtually uniform"; and (*ii*) such practice must "have occurred in such a way as to show general recognition that a rule of law or legal obligation is involved."[106] These conditions are not met with respect to CBDR. There is similarly no support for finding that CBDR constitutes a general principle of law within the meaning of article 38(1)(c) of the ICJ Statute.[107] Among other things, there is no generally accepted formulation of CBDR, much less a generally shared understanding of what it means.[108]

4.6 Principle 7 of the 1992 Rio Declaration has been cited in support of the proposition that CBDR is customary law.[109] Principle 7, however, is a political statement, incorporated into a non-legally binding political instrument; it does not purport to state or reflect international law. Nor, quite simply, does ascribing the word "principle" to a concept make it a general principle of law. CBDR's meaning has been contested from the outset.

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[104] *Id.* ¶¶ 3.23-3.30.

[105] *See, e.g.*, African Union Written Statement, ¶¶ 52 (asserting that CBDR/RC and "equity" "bear particular importance for the interpretation by the Court of States' obligations" in respect of climate change), 109 (asserting that CBDR/RC "is the building block of international climate law"); Brazil Written Statement, ¶ 12 (claiming that "[d]ifferentiation in favor of developing states remains, as it always was, the linchpin, the very heart of the climate change international legal regime").

[106] *North Sea Continental Shelf Cases (Germany/Denmark; Germany/Netherlands)*, 1969 I.C.J. 3, 43, ¶ 74 (Feb. 20), https://perma.cc/CCE4-DZUP ("*North Sea Continental Shelf*"). *See also* U.S. Written Statement, ¶ 4.1, n.279.

[107] *See* Statute of the International Court of Justice, art. 38(1)(c), June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993, https://perma.cc/Z2FL-S5U7 ("ICJ Statute").

[108] *See, e.g.*, Christopher D. Stone, *Common but Differentiated Responsibilities in International Law*, 98 AM. J. INT'L L. 276, 300 (2004) (explaining that CBDR "is not a single notion" and that its "form and scope may vary in ways not well marked in the literature"), https://perma.cc/Q8UH-YT5J. The fact that States are in stark disagreement with respect to the concepts discussed in this chapter means the concepts cannot be said to have garnered the recognition by States that is necessary to conclude a general principle of law has formed.

[109] *See, e.g.*, Bangladesh Written Statement, ¶ 129, n.261. The 1972 Stockholm Declaration contains no clear analogue to Rio Principle 7, although it notes, in its Principle 23, the importance of considering "the applicability of standards which are valid for the most advanced countries but which may be inappropriate and of unwarranted social cost for the developing countries." UN Conference on the Human Environment, *Declaration of the UN Conference on the Human Environment*, principle 23, U.N. Doc. A/CONF.48/14/Rev.1, ch. I (June 16, 1972), https://perma.cc/D6EY-QVY7 [Dossier No. 136] ("Stockholm Declaration").

4.7 Principle 7 starts by asserting that all States "shall cooperate in a spirit of global partnership to conserve, protect and restore the earth's ecosystem," and then posits that "[i]n view of the differentiated contributions to global environmental degradation, States have common but differentiated responsibilities," and that "developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command."[110] Thus, Principle 7 offers two potential bases for differentiation, without choosing between them or indicating their relative importance: first, States' differing contributions to global environmental problems; second, the different resources they could bring to bear to address a particular global environmental problem. The statement that "States have common but differentiated responsibilities" does not, by its terms, imply any bifurcation of international obligations between categories of countries.

4.8 The United States has consistently made clear, at the time of the Rio Declaration's adoption and ever since, that it "does not accept any interpretation of Principle 7 that would imply a recognition or acceptance by the United States of any international obligations or liabilities, or any diminution in the responsibilities of developing countries."[111]

4.9 With respect to the rationale for the concept of CBDR, States have focused variously on notions of "historical responsibility," relative contributions, or respective capacities to particular global environmental problems.[112] These differing views demonstrate that States have not coalesced around or recognized a single formulation of CBDR, much less a shared understanding of it.

4.10 Indeed, only a month after the adoption of the Rio Declaration, States incorporated a different formulation of CBDR into the UNFCCC, which says in article 3.1 that "[t]he Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated

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[110] UN Conference on Environment and Development, *Rio Declaration on Environment and Development*, principle 7, U.N. Doc. A/CONF.151/26 (vol. I), annex I (June 14, 1992), https://perma.cc/S4VB-DM28 [Dossier No. 137] ("Rio Declaration").

[111] *See, e.g.*, UN Conference on Environment and Development, *Report of the United Nations Conference on Environment and Development*, ch. IV.B, ¶ 16, U.N. Doc. A/CONF.151/26 (vol. IV) (Sept. 28, 1992), https://perma.cc/C5R8-AMGF; UN, *Report of the World Summit on Sustainable Development*, 145, ch. IX, ¶ 20, U.N. Doc. A/CONF.199/20 (2002), https://perma.cc/MT7R-LRQX.

[112] *Compare, e.g.*, African Union Written Statement, ¶ 109 (asserting that CBDR/RC "is justified by the serious harm caused by historical emissions"), *with* Germany Written Statement, ¶ 59 (the concept of CBDR "must not be misunderstood as referring to a differentiated 'historical' responsibility of the Parties to the Paris Agreement for [GHG] emissions in the past").

responsibilities *and respective capabilities*."[113] That text, which adds "and respective capabilities" to the Rio Declaration's formulation (making it CBDR/RC), is intentionally ambiguous as to why States have common but differentiated responsibilities.[114] Neither the UNFCCC nor the Paris Agreement refers to "historical responsibility," and neither agreement bases any obligations on historical emissions.[115]

4.11 States have divergent views as to how the UNFCCC's treaty-based formulation of CBDR/RC should operate in practice.[116] For example, in contrast to understanding CBDR/RC as referring to a range of effort due to the spectrum of Parties' national circumstances, others have asserted that CBDR/RC necessarily implies categorical differentiation, the ultimate instantiation of which is the Kyoto Protocol, with some even appearing to read out the word "common" entirely and focus only on "differentiated," seemingly concluding that certain categories of countries have no, or effectively no, climate change mitigation obligations at all.[117] In fact, "[d]isputes over the scope of [CBDR]" have been described as "a primary cause" of the "stalemate" reached in the UN climate change regime in the early 2000s.[118]

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[113] UNFCCC, art. 3.1 (emphasis added).

[114] Susan Biniaz, Remarks, *Common but Differentiated Responsibility*, 96 AM. SOC'Y INT'L L. PROC. 359, 362 (2002) ("There was no agreement among developed countries [in the process leading to the adoption of the UNFCCC] whether the reason they were to take the first action is that they were historically responsible or that they had more resources. . . . So the agreement was written so that it could be argued either way . . . .") (U.S. Annex 2).

[115] U.S. Written Statement, ¶ 3.26. *See also* Daniel Bodansky, *The United Nations Framework Convention on Climate Change: A Commentary*, 18 YALE J. INT'L L. 451, 502-3 (1993) (explaining that while both developing and developed countries supported the statement in UNFCCC article 3.1 that "developed country Parties should take the lead in combating climate change," "they disagreed on why developed countries should take the lead," with developing countries "argu[ing] that developed countries should so do because they bear the 'main responsibility' for the climate change problem," whereas developed countries "opposed [that] reasoning" but accepted that they should have a leadership role "because of their greater financial and technical capabilities"), https://perma.cc/YS7V-3YKP.

[116] *See, e.g.*, Thomas Leclerc, *The Notion of Common but Differentiated Responsibilities and Respective Capabilities: A Commendable but Failed Effort to Enhance Equity in Climate Law*, *in* DEBATING CLIMATE LAW 76, 78-79 (Benoit Mayer & Alexander Zahar eds., 2021) ("[I]n order to be legally significant and relevant, the CBDR-RC principle needed to be based on an accepted theory of differentiation. Reality proved the opposite. . . . If there are 197 parties to the UNFCCC, then probably there are 197 versions of what differential treatment means for climate change regulation.") (U.S. Annex 3).

[117] *See, e.g.*, Susan Biniaz, Remarks, *Common but Differentiated Responsibility*, 96 AM. SOC'Y INT'L L. PROC. 359, 363 (2002) (U.S. Annex 2).

[118] Christopher D. Stone, *Common but Differentiated Responsibilities in International Law*, 98 AM. J. INT'L L. 276, 281, n.39 (2004) (further noting that CBDR "is now being put forward by some developing countries—implausibly, I believe—as a 'principle' of international law"—"[t]hat is to say, applicable to all nations independently of their acceptance of treaties endorsing it"—"that should selectively relieve them from standards that the World Trade Organization may impose on the more developed countries"), https://perma.cc/Q8UH-YT5J.

4.12 In the Paris Agreement, States ultimately declined to adopt a categorical approach to differentiation of climate change mitigation-related obligations. Instead, the Agreement provided that any differentiation was to be "in the light of different national circumstances," which clearly implies a spectrum of differentiation as opposed to a bifurcation between categories of countries.[119] Thus, although CBDR/RC is referenced in the UNFCCC, the Kyoto Protocol, and the Paris Agreement, its precise formulation and the way in which it is incorporated into the instruments have varied over time.[120]

4.13 There is no legal basis to extrapolate from the varying formulations of CBDR a rule of customary international law or a general principle of law.[121] Article 3 of the UNFCCC, for example, provides that "Parties" are to be "guided" in their actions to achieve the objective of the UNFCCC and to implement its provisions by, "*inter alia*," the things listed in that article.[122] Thus, what is listed in article 3 "clearly appl[ies] only to the [P]arties and only in relation to the Convention, not as general law."[123] The UNFCCC and other international agreements that refer to CBDR did not codify customary international law (again, Rio Principle 7 is a political statement only and pre-dates the adoption of the UNFCCC by only a month). Moreover, the formulations of CBDR found in certain international agreements, and how it is incorporated into those agreements, vary, such that there is no uniform statement of CBDR.

4.14 Even if a uniform formulation of CBDR had been incorporated into various international agreements, such incorporation, without more, could not support the proposition that CBDR has become international custom or a general principle of law.[124] Treaty-based

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[119] *See* U.S. Written Statement, ¶¶ 3.27-3.30. This is recognized by other States. *See, e.g.*, Antigua and Barbuda Written Statement, ¶ 149 (explaining that "under the principle, developing countries are not treated as an undifferentiated group," and that "[i]nstead, the principle recognises that there are differences between and among developing countries themselves, both in terms of their contribution to environmental degradation and their capacity to address that degradation").

[120] U.S. Written Statement, ¶¶ 3.23-3.30.

[121] *See, e.g.*, Christopher D. Stone, *Common but Differentiated Responsibilities in International Law*, 98 AM. J. INT'L L. 276, 300 (2004) ("[A]s the number and reach of multilateral treaties has increased, so, too, has the incidence of obligation-differentiating agreements. But that falls short of proof that a new normative 'principle' is in play."), https://perma.cc/Q8UH-YT5J.

[122] UNFCCC, art. 3. Although article 3 of the UNFCCC is entitled "Principles," that does not indicate that Parties generally accept that all the things referred to in article 3 constitute "principles," much less legal principles. The UNFCCC makes clear in a footnote to the title of article 1 that "[t]itles of articles are included solely to assist the reader." UNFCCC, art. 1, n.*.

[123] Daniel Bodansky, *The United Nations Framework Convention on Climate Change: A Commentary*, 18 YALE J. INT'L L. 451, 502 (1993), https://perma.cc/YS7V-3YKP.

[124] *See, e.g.*, *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, 2007 I.C.J. 582, 615, ¶ 90 (May 24) ("The fact invoked by Guinea that various international agreements, such as

references to CBDR, for example, did not give rise to the extensive and virtually uniform State practice and *opinio juris* that would be needed to establish that CBDR is customary international law.

4.15 Thus, contrary to assertions in some submissions,[125] there is no legal basis for the general application of CBDR to the interpretation of international legal obligations, either relating to international environmental issues such as climate change or more broadly.[126] In particular, because CBDR is not customary international law or a general principle of law, there is no basis to incorporate it into customary international law obligations, such as an obligation to prevent or at least minimize significant transboundary environmental harm[127] or the secondary obligations that might arise under the law of State responsibility.[128]

4.16 Additionally, there is no legal basis for finding that CBDR is relevant to the interpretation or application of obligations under international agreements that do not refer to that principle. The ITLOS Advisory Opinion in *Activities in the Area* is instructive in this respect. In that proceeding, ITLOS examined Parties' obligations under part XI of UNCLOS.

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agreements for the promotion and protection of foreign investments and the Washington Convention, have established special legal regimes governing investment protection, or that provisions in this regard are commonly included in contracts entered into directly between States and foreign investors, is not sufficient to show that there has been a change in the customary rules of diplomatic protection; it could equally show the contrary."), https://perma.cc/8WJJ-JNEK; ILC, *Draft Conclusions on Identification of Customary International Law, with Commentaries*, concl. 11(2), cmt. ¶ 8, U.N. Doc. A/73/10 (2018), *reprinted in* [2018] 2 Y.B. INT'L L. COMM'N 107, A/CN.4/SER.A/2018/Add.1 (Part 2) (noting that conclusion 11(2) "seeks to caution that the existence of similar provisions in a number of bilateral or other treaties . . . does not necessarily indicate that a rule of customary international law is reflected in such provisions," and explaining that "an investigation into whether there are instances of practice accepted as law (accompanied by *opinio juris*) that support the written rule is required"), https://perma.cc/5TE4-2F23.

[125] *See, e.g.*, African Union Written Statement, ¶ 169; Brazil Written Statement, ¶ 21.

[126] *See, e.g.*, Germany Written Statement, ¶ 79 ("[CBDR] does not possess a normative status of its own or independently of the Paris Agreement in the field of climate protection law"). *See also, e.g.*, Christopher D. Stone, *Common but Differentiated Responsibilities in International Law*, 98 AM. J. INT'L L. 276, 299-301 (2004) (stating that CBDR "has not . . . been elevated to the status of a customary principle of international law," and further noting that "[l]ack of resources is no more a defense to transboundary pollution or trading in endangered species than it is to abusing ambassadors or practicing piracy"), https://perma.cc/Q8UH-YT5J.

[127] *Contra, e.g.*, DRC Written Statement, ¶¶ 191-95 (asserting that CBDR must be taken into account when assessing compliance with a customary "due diligence" obligation). As explained *supra* in Chapter III.B.iii, the "due diligence" standard for compliance with certain international legal obligations is context-specific by its nature and can be understood to take into account States' different national circumstances in certain respects, but that is because of the nature of the due diligence standard itself, and not because CBDR/RC is incorporated into or applied to such obligations. There would be no basis for introducing any bifurcated differentiation of duties between "developed" and "developing" States or between "industrialized" and other States into a customary obligation to prevent or at least minimize significant transboundary environmental harm. Similarly, there would be no basis for any diminution of responsibilities for "developing" States or "non-industrialized" States under a due diligence standard as such.

[128] *Contra, e.g.*, Solomon Islands Written Statement, ¶ 2.1; Viet Nam Written Statement, ¶¶ 44-46.

UNCLOS contains no reference to CBDR/RC, but ITLOS nonetheless examined "whether developing sponsoring States enjoy preferential treatment as compared with that granted to developed sponsoring States under the Convention and related instruments."[129]

4.17 ITLOS found that "none of the general provisions of the Convention concerning the responsibilities (or the liability) of the sponsoring State 'specifically provides' for according preferential treatment to sponsoring States that are developing States."[130] General statements about the "special interests and needs of developing countries" do not color or give content to obligations that, by their terms, do not provide for differentiated treatment among Parties. The Tribunal thus concluded "that the general provisions [of UNCLOS part XI] concerning the responsibilities and liability of the sponsoring State apply equally to all sponsoring States, whether developing or developed."[131]

4.18 More recently, in its May 2024 Advisory Opinion on Parties' obligations under UNCLOS in respect of climate change, ITLOS considered UNCLOS article 194(1), which provides that Parties "shall take, individually or jointly as appropriate, all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose *the best practicable means at their disposal and in accordance with their capabilities*" (emphasis added). ITLOS found that the italicized phrase "seeks to accommodate the needs and interests of States with limited means and capabilities, and to lessen the excessive burden that the implementation of this obligation may entail for those States,"[132] but noted 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 the obligation to take all necessary measures under article 194, paragraph 1."[133]

4.19 ITLOS further stated that while article 194(1) "does not refer to the principle of common but differentiated responsibilities as such, it contains some elements common to this principle," noting that the scope of measures under that provision "may differ between

[129] *Activities in the Area*, 2011 ITLOS Rep. at 52, ¶¶ 151-55.

[130] *Id.* at 53-54, ¶ 158.

[131] *Id.*

[132] *COSIS Request for an Advisory Opinion*, ¶ 226.

[133] *Id.*

developed States and developing States."[134] The United States understands the ITLOS Advisory Opinion as indicating that Parties' means and capabilities exist on a spectrum and that the measures they must take under article 194(1) may vary based on their respective means and capabilities, and not that article 194(1) implies bifurcated obligations of "developed" and "developing" country Parties (terms that do not have any agreed definition under international law). There is no legal basis to read any such bifurcation into UNCLOS.

4.20 Similarly, there is no legal basis to read any bifurcation—or, indeed, any differentiation at all—into any other international agreement, such as the Paris Agreement, that is not expressly stated in the agreement's text. The United States opposes any *ex post facto* attempts to change obligations in an agreement that were not differentiated when negotiated into differentiated obligations on the basis of CBDR. Whether obligations in an agreement are differentiated, and, if so, how, is determined by the text of what was agreed. This is true in general and is particularly clear when the issue of differentiation was explicitly considered during the negotiations.

4.21 Additionally, the United States is unaware of any customary international legal obligation that distinguishes in a bifurcated manner between "developed" and "developing" States (however those terms might be understood). Certainly, if such an obligation were to be asserted, one would have to consider that "developed" States would be "States whose interests are specially affected,"[135] such that no such customary rule could be established absent extensive and virtually uniform State practice of developed States accompanied by the requisite *opinio juris*.[136]

4.22 With respect to the limited international agreements in which States have referenced and/or incorporated CBDR as a principle, CBDR must be understood in accordance with both the formulation used in the particular agreement in question and the particular agreement's

[134] *Id.* ¶ 229 (stating that "[a]t the same time, it is not only for developed States to take action, even if they should 'continue taking the lead'," and that "[a]ll States must make mitigation efforts").

[135] *North Sea Continental Shelf*, 1969 I.C.J. at 43, ¶ 74.

[136] Although Stockholm Principle 21 and Rio Principle 2 are not legally binding, it is instructive to note that, with respect to those political statements, neither principle states that a "developing" State's "responsibility" to mitigate transboundary harm is less than a "developed" State's or otherwise differentiates on the basis of a State's development status. Stockholm Declaration, principle 21; Rio Declaration, principle 2. Again, although a consideration of national circumstances is inherent in a due diligence standard, there is no basis to import a bifurcated developed-developing or otherwise categorical differentiation into the standard or find that a "lack of resources" absolves a State from having to comply with an obligation for which due diligence is the standard for compliance.

other terms. Each international agreement that references CBDR must be interpreted based on its own terms to determine whether, and if so, how, CBDR is operationalized within it.[137]

4.23 Like the precautionary approach addressed *infra* in section B, the concept of CBDR may be utilized by States as a basis for structuring certain international agreements in particular ways. But although the concept might help guide States' development of particular international legal frameworks to address international environmental problems, it is not universally applicable to all such problems or the frameworks States have established to address them. It does not have international legal force or application beyond the specific international agreements in which it is found, and even then, only to the extent, and pursuant to the manner in which, the concept is formulated and used in a specific agreement.

B. "Precaution" Is Not a Rule of Customary International Law or a General Principle of Law

4.24 The concept of "precaution" reflects an approach to decision-making in the face of uncertainties about environmental risks, with the goal of protecting the environment. It is included in a number of multilateral environmental agreements, albeit in different forms, but should not be understood as established under customary international law or as a general principle of law.[138] In any event, it does not create any obligations of States with respect to climate change.

4.25 A recommended precautionary approach to addressing the climate change issue is reflected in UNFCCC article 3.3, which provides:

> The Parties *should* take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible harm, lack of full scientific certainty should not be used as a reason for postponing such measures, taking into account that policies and measures to deal with climate change should be cost-effective so as to ensure global benefits at the lowest possible cost. . . .[139]

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[137] The U.S. Written Statement explains how CBDR/RC is reflected differently in the UNFCCC and the Paris Agreement. U.S. Written Statement, Chapter III.C.

[138] *See, e.g.*, Nordic Countries Written Statement, ¶ 76 (noting "that an expectation of precautionary measures has not been endorsed as a rule of customary international law separate from the general obligation to prevent transboundary harm"); Kuwait Written Statement, ¶ 65 (explaining that precaution "has an uncertain status under international law" and noting that "its customary status in particular is unclear") (footnote omitted).

[139] UNFCCC, art. 3(3) (emphasis added). Although article 3 of the UNFCCC is entitled "Principles," that does not indicate that Parties generally accept that all the things referred to in article 3, including precaution, constitute "principles," much less legal principles. The UNFCCC makes clear in a footnote to the title of article 1 that "[t]itles of articles are included solely to assist the reader." UNFCCC, art. 1, n.*.

4.26 The UNFCCC was adopted at a time when significant scientific uncertainties existed. Since then, Parties have continued to act in a precautionary manner because scientific uncertainties, although greatly reduced, still persist.[140]

4.27 Neither the UN climate change regime nor other treaties or State practice establish a "precautionary principle" as a rule of customary international law, or as a general principle of law. Apart from the references in multilateral agreements, there is little State practice or *opinio juris* in support of a precautionary principle,[141] or evidence that it is a general principle of law. The Court declined to recognize a precautionary principle as a rule of customary international law in its *Nuclear Tests, Gabčíkovo-Nagymaros*, and *Whaling in the Antarctic* opinions, despite it being raised as an issue by the applicant in each case.[142] The Court discussed the concept of "precaution" in *Pulp Mills* but referred to precaution as an "approach" and said that it does not "operate[] as a reversal of the burden of proof" in establishing a breach of international law.[143] The Court did not analyze or apply a precautionary approach as a substantive component of international law.

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[140] *See* U.S. Written Statement, Chapter II.A.

[141] The United States is aware of only limited State practice invoking a precautionary principle before the Court prior to this proceeding, such as by New Zealand in the *Nuclear Tests Case* and by Hungary in *Gabčíkovo-Nagymaros*. *See Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the* Nuclear Tests (New Zealand v. France) *Case*, 1995 I.C.J. 288, 290, ¶ 5; 298, ¶ 34 (Order of Sept. 22), https://perma.cc/ZE8J-SWLV ("*Request for an Examination in the* Nuclear Tests *Case*"); *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, 1997 I.C.J. 7, 62, ¶ 97; 68, ¶ 113 (Sept. 25) (stating that Hungary argued that "[t]he previously existing obligation not to cause substantive damage to the territory of another State had . . . evolved into an *erga omnes* obligation of prevention of damage pursuant to the 'precautionary principle,'" and that Slovakia disagreed, with the Court noting, however, that both parties "agree[d] on the need to take environmental concerns seriously and to take the required precautionary measures"), https://perma.cc/SQ2J-T22U ("*Gabčíkovo-Nagymaros Project*"). Additionally, the European Communities invoked a precautionary principle in WTO proceedings, with the United States "strongly disagree[ing] that 'precaution' has become a rule of international law" or a general principle of law and the WTO panel finding that "the legal status of the precautionary principle remains unsettled." Panel Report, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, ¶¶ 4.523-24, 4.541-42, 7.89, WTO Doc. WT/DS291/R, WT/DS292/R, WT/DS293/R (Sept. 29, 2006), https://perma.cc/9EVH-QUNJ.

[142] *Request for an Examination in the* Nuclear Tests *Case,* 1995 I.C.J. 288 (rejecting New Zealand's request without ever referring to a precautionary principle even after it was invoked by New Zealand); *Gabčíkovo-Nagymaros Project*, 1997 I.C.J. 7 (deciding the case without relying on a "precautionary principle" as invoked by Hungary); *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, 2014 I.C.J. 226 (Mar. 31), https://perma.cc/PY9J-7Y4V. *See also* Panel Report, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, ¶ 7.89, WTO Doc. WT/DS291/R, WT/DS292/R, WT/DS293/R (Sept. 29, 2006) (concluding that "the legal status of the precautionary principle remains unsettled"), https://perma.cc/9EVH-QUNJ.

[143] *Pulp Mills*, 2010 I.C.J. at 71, ¶ 164.

4.28 The divergent formulations of precaution in multilateral environmental agreements bolster the conclusion that it is to be understood as the Court has, *i.e.*, as an approach, the content of which varies depending on the context:

- In a few multilateral environmental agreements, a precautionary approach is formulated as an obligation to act.[144] In others, it serves as a license to act, allowing (but not requiring) States to act when there is scientific uncertainty.[145] In others still, including the UNFCCC (as well as in Principle 15 of the non-legally binding Rio Declaration), a precautionary approach is formulated in negative terms, as precluding the use of scientific uncertainty as a reason to postpone taking action.[146]

[144] *See, e.g.*, Convention on the Protection of the Marine Environment of the Baltic Sea Area, 1992 ("Helsinki Convention") (as amended), art. 3(2), Apr. 9, 1992 ("The Contracting Parties shall apply the precautionary principle . . . ."), https://perma.cc/X9FA-JRQ6.

[145] *See, e.g.*, Cartagena Protocol on Biosafety to the Convention on Biological Diversity, arts. 10(6), 11(8), Jan. 29, 2000, 2226 U.N.T.S. 208 ("Lack of scientific certainty due to insufficient relevant scientific information and knowledge . . . shall not prevent that Party from taking a decision . . . in order to avoid or minimize such potential adverse effects."), https://perma.cc/X7BR-GV8G ("Cartagena Protocol"). In these cases, precaution is intended to reverse the requirement in some multilateral environmental agreements that decisions can only be taken based on "scientific evidence." *See, e.g.*, Convention for the Prevention of Marine Pollution from Land-Based Sources ("Paris Convention"), art. 4(4), June 4, 1974, 1546 U.N.T.S. 103 ("The Contracting Parties may . . . implement programmes or measures to forestall, reduce or eliminate pollution of the maritime area from land-based sources . . . if scientific evidence has established that a serious hazard may be created in the maritime area by that substance and if urgent action is necessary."), https://perma.cc/6ZYW-A4S6.

[146] *See, e.g.*, UNFCCC, art. 3(3) ("Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures."); Rio Declaration, principle 15 ("In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."); Resolution of the Ninth Meeting of the Conference of the Parties to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), art. 2, annex 4, Sept. 24-Oct. 4, 2016, Conf. 9.24 (Rev. CoP17) (stating that when listing a species under CITES, "the Parties shall, by virtue of the precautionary approach and in case of uncertainty either as regards the status of a species or the impact of trade on the conservation of a species, act in the best interest of the conservation of the species concerned"), https://perma.cc/72H5-P8TP ("CITES Resolution 9"); Convention on Biological Diversity, pmbl., ¶ 9, June 5, 1992, 1760 U.N.T.S. 79 ("where there is a threat of significant reduction or loss of biological diversity, lack of full scientific certainty should not be used as a reason for postponing measures to avoid or minimize such a threat"), https://perma.cc/NBY5-RANS [Dossier No. 19]; Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, art. 6(2), Dec. 4, 1995, T.I.A.S. 01-1211, 2167 U.N.T.S. 3 ("The absence of adequate scientific information shall not be used as a reason for postponing or failing to take conservation and management measures."), https://perma.cc/PQH4-KBQY; Stockholm Convention on Persistent Organic Pollutants, art. 8(7)(a), May 22, 2001, 2256 U.N.T.S. 119 ("Lack of full scientific certainty shall not prevent the proposal [to list a chemical as likely to lead to adverse health and environmental effects] from proceeding."), https://perma.cc/WUN3-32L7 ("Stockholm Convention").

- What constitutes precautionary action also varies from one instrument to another, ranging from the use of best available technology or techniques,[147] to measures that are "cost-effective,"[148] to a reversal of the burden of proof.[149]

- Additionally, the precautionary approach adopted sometimes applies to States individually,[150] and other times to States collectively.[151]

The wide variation in how a precautionary approach is articulated in different multilateral environmental instruments makes it clear that there is no single meaning of the concept, and therefore no support for finding it constitutes a rule of customary international law or a general principle of law. *A fortiori*, there is no basis for finding that a precautionary approach supplements or informs the interpretation of the UNFCCC or the Paris Agreement.

4.29 Additionally, it cannot be credibly argued that States have an affirmative obligation under customary international law to take precautionary action. Most versions of the approach serve to exclude uncertainty as a reason not to take action rather than create an affirmative duty to act, or refer to the type of evidence that is *not* required in order to take precautionary action (*e.g.*, "full scientific certainty,"[152] "absolutely clear scientific evidence,"[153] "conclusive evidence"[154]), without giving any indication of what evidence of risk *is* required to trigger application of a precautionary approach. The divergent formulations of a precautionary

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[147] *See, e.g.*, Convention for the Protection of the Marine Environment of the North-East Atlantic ("OSPAR Convention"), art. 2(3)(b), Sept. 22, 1992, 2354 U.N.T.S. 67, https://perma.cc/WY6U-QERW.

[148] UNFCCC, art. 3(3).

[149] *Compare* Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, annex I, Dec. 29, 1972, 26 U.S.T. 2403, 1046 U.N.T.S. 120 (negative listing approach where specific materials are listed for which dumping is prohibited), https://perma.cc/6G5L-7DBQ, *with* Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, annex I, Nov. 7, 1996, 36 I.L.M. 1 (1997) (positive listing approach where dumping of all materials is prohibited except for certain listed materials), https://perma.cc/L6XQ-HVFB ("London Protocol").

[150] *See, e.g.*, Cartagena Protocol, art. 10(6) (permitting a party to prohibit imports even when there is scientific uncertainty).

[151] *See, e.g.*, CITES Resolution 9, ¶ 2 (stating that when listing a species under CITES, "by virtue of the precautionary approach and in case of uncertainty regarding the status of a species or the impact of trade on the conservation of a species, the Parties shall act in the best interest of the conservation of the species concerned . . ."); Stockholm Convention, art. 8(9) (providing that the Conference of the Parties shall make decisions to list new chemicals in "a precautionary manner").

[152] Bergen Ministerial Declaration on Sustainable Development in the ECE Region, ¶ 7, U.N. Doc. A/CONF.151/PC/10 (Aug. 6, 1990), https://perma.cc/DA85-JBEL.

[153] Second International Conference on the Protection of the North Sea, Nov. 25, 1987, *Ministerial Declaration Calling for Reduction of Pollution*, ¶ VII (1988), https://perma.cc/G3HH-6E53.

[154] OSPAR Convention, art. 2(2)(a).

approach and lack of State recognition clearly demonstrate that a precautionary principle is not customary international law or a general principle of law and does not establish any obligations of States with respect to climate change.

C. "Polluter Pays" Is Not a Rule of Customary International Law or a General Principle of Law

4.30 Although it might be presumed at first glance that the "polluter pays" principle pertains to relationships between or among States, and while it is sometimes cited as such,[155] it in fact does not. Rather, the principle, when utilized, applies at the national or sub-national level.[156] It is an economic policy principle rather than a legal principle, aimed at internalizing the costs of environmental externalities by making the actor that creates the pollution in question pay for the costs of reducing or eliminating it—for example, through measures applied at the national or sub-national level such as a carbon tax or requirements on companies to install pollution control equipment. The principle is intended to "encourage rational use of scarce environmental resources," by providing that "the cost of [pollution prevention and control measures] should be reflected in the cost of goods and services."[157]

4.31 As is clear from the OECD recommendations concerning the polluter pays principle,[158] as well as the references to it in a number of environmental agreements,[159] the principle does not operate at the international level in the relations among States. Rather, it applies at the municipal level in the development of municipal environmental laws and policies.

4.32 The polluter pays principle is also reflected in Principle 16 of the Rio Declaration, which states:

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[155] *See, e.g.*, Barbados Written Statement, ¶¶ 242, 267; Brazil Written Statement, ¶ 92; Commission of Small Island States Written Statement, ¶ 165; Ecuador Written Statement, ¶¶ 3.63-3.65; Philippines Written Statement, ¶¶ 97-100; Solomon Islands Written Statement, ¶ 115; Switzerland Written Statement, ¶¶ 78-80.

[156] *See, e.g.*, Albania Written Statement, ¶ 17 (discussing the polluter pays concept only in the context of explaining Albania's national environmental legal framework, stating that "environmental protection *in Albania* adheres to these key principles: . . . (iv) the 'polluter-pays' concept" (emphasis added)).

[157] *See, e.g.*, OECD, *Recommendation of the Council Concerning the Application of the Polluter-Pays Principle to Accidental Pollution*, ¶ 3, OECD Docs. C(89)88(Final), OECD/LEGAL/0251 (July 7, 1989), https://perma.cc/44U9-XNVP.

[158] *See, e.g.*, *id.* (stating that "the Polluter-Pays Principle . . . means that the polluter should bear the expenses of carrying out the pollution prevention and control measures introduced by public authorities in Member countries, to ensure that the environment is in an acceptable state").

[159] *See, e.g.*, OSPAR Convention, art. 2(2)(b) ("The Contracting Parties shall apply . . . the polluter pays principle, by virtue of which the costs of pollution prevention, control and reduction measures are to the borne by the polluter."); London Protocol, art. 3(2) ("Taking into account the approach that the polluter should, in principle, bear the cost of pollution.").

> National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the costs of pollution, with due regard to the public interest and without distorting international trade and investment.[160]

As Principle 16 makes clear, it is hortatory and not binding in nature ("should endeavour"), to be implemented through national measures rather than international law ("[n]ational authorities should . . ."), and subject to several qualifications ("with due regard to the public interest").

4.33 In the *Rhine Chlorides* case, an arbitral tribunal concluded that it did "not view [the polluter pays] principle as being a part of general international law."[161] Although States may individually decide to implement the principle within their own domestic legal systems, there is no evidence of either extensive and virtually uniform State practice or *opinio juris* in support of the view that, as a matter of customary international law, States have an obligation to do so. Nor is there any indication that States have recognized that such a concept has been transposed to the international legal system as a general principle of law.

D. Although Climate Change Can Impact Individuals' Enjoyment of Their Human Rights, International Human Rights Law Does Not Contain Any Obligations to Mitigate Anthropogenic GHG Emissions

4.34 Numerous submissions, including the U.S. Written Statement, recognize that the adverse effects of climate change can impact individuals' enjoyment of their human rights. A number of them, however, go further and assert that international human rights law imposes obligations on States to mitigate anthropogenic GHG emissions. The United States disagrees.

4.35 International human rights law does not require States to mitigate anthropogenic GHG emissions and consequent climate change. Indeed, as described in section D.i below, there is a fundamental disconnect between assertions that international human rights law entails or implies obligations of States to mitigate GHG emissions, on the one hand, and the conceptual underpinnings and content of international human rights law, on the other:

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[160] Rio Declaration, principle 16.

[161] *The Rhine Chlorides Arbitration Concerning the Auditing of Accounts (Neth. v. Fr.)*, Perm. Ct. of Arb., Award, ¶ 103 (Mar. 12, 2004), 25 R.I.A.A. 267 (2004) (unofficial English translation) (in the original French: "*[L]e Tribunal ne pense pas que ce principe fasse partie du droit international général.*"), https://perma.cc/RF9B-UGV9.

- *First*, international human rights law is not well-suited to address a global collective action problem that requires reciprocal mitigation action by all States. It is designed to protect individuals from abuses by the State while they are in the State's territory and subject to its jurisdiction, rather than to promote collective action between and among States to solve global problems. A State acting alone can redress human rights issues within its territorial boundaries, but a State acting alone—even one that reaches net-zero GHG emissions—could not prevent or even appreciably reduce the adverse impacts of climate change on individuals within its territory.

- *Second*, anthropogenic GHG emissions are primarily caused by private actors. States' obligations under international human rights law, with very limited exceptions, do not entail positive duties to regulate the conduct of private actors, even where such conduct may impair the enjoyment of certain human rights.

4.36 Even if one believes that human rights law could effectively address collective action problems such as climate change, it does not currently, as a matter of *lex lata*, create any obligation to protect the climate system from anthropogenic GHG emissions, as discussed in section D.ii below. Any putative obligation along these lines is not supported either by the extensive and virtually uniform State practice and *opinio juris* necessary to establish a rule of customary international law or by application of the well-accepted rules of treaty interpretation. This view is expressed in many other written statements.[162]

[162] Many submissions declined to assert that there is currently a human rights obligation to mitigate GHG emissions. *See, e.g.*, Australia Written Statement, ¶ 3.58 ("The ICCPR, the ICESCR and the UDHR do not contain any express or direct obligations to 'ensure the protection of *the climate* system'" (emphasis in original)); Canada Written Statement, ¶ 27 ("The positive impact that climate change action can have on human rights cannot be relied on to broaden the scope of States' obligations under international human rights law."); Nordic Countries Written Statement, ¶ 85 ("The fact that climate change adversely impacts societies and the conditions for the enjoyment of human rights does not in itself constitute an identifiable human rights violation."); Indonesia Written Statement, ¶¶ 44-45 ("[T]he corpus of international human rights law does not create any specific obligation related to the climate system . . . ."); New Zealand Written Statement, ¶¶ 113-18 ("The international human rights law framework does not contain provisions requiring States to take steps to protect the climate system and other parts of the environment from anthropogenic climate change."; Saudi Arabia Written Statement, ¶¶ 4.97-4.98, 5.5-5.10 ("The specialized treaty regime on climate change cannot be interpreted based on a different legal regime, such as human rights . . . law."); UK Written Statement, ¶ 33 ("Human rights treaties are not directly responsive to . . . the question posed by the General Assembly in Question A."). Other submissions did not analyze human rights at all. *See, e.g.*, Belize Written Statement, ¶¶ 30-63; Brazil Written Statement, ¶¶ 30-49, 70-99; Japan Written Statement, ¶¶ 4-18; Kuwait Written Statement, ¶¶ 10-59; Pakistan Written Statement, ¶¶ 28-39; UAE Written Statement, ¶¶ 90-152.

4.37 Efforts to define a new human right must comport with the established rules for the creation of international law and should proceed through a transparent process in which States have had an opportunity to provide input and have indicated their consent to be bound.[163]

i. The Framework of International Human Rights Law Is Not Well-Suited to Address Collective Action Problems Such as Climate Change

a. A State owes human rights obligations to individuals within its territory and subject to its jurisdiction

4.38 International human rights law, which developed primarily in response to the horrors of World War II, focuses on protecting individuals from abuses perpetrated by the State and is rooted in the inherent value and dignity of the human person.[164] As a general matter, a State's human rights obligations are territorial in scope,[165] because it is within the State's territory that it can generally protect or abuse individuals' rights.

4.39 Under the International Covenant on Civil and Political Rights (ICCPR), for example, a State Party is required to, and in fact can, immediately respect and ensure civil and political rights, including by refraining from extrajudicial killings, arbitrary detentions, and acts infringing on the freedoms of expression, association, peaceful assembly, and religion or belief. Similarly, under the International Covenant on Economic, Social and Cultural Rights (ICESCR), a State Party is required to, and in fact can, take steps to progressively realize economic, social, and cultural rights within its territory. For example, a State could expand access to education, affordable healthcare, and adequate housing.

4.40 By contrast, a State cannot by its own actions to mitigate GHG emissions protect individuals within its territory and subject to its jurisdiction from the adverse effects of climate

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[163] U.S. Mission to the UN, *Explanation of Position on the Right to a Clean, Healthy, and Sustainable Environment Resolution* (July 28, 2022), https://perma.cc/P4T9-7TCP; U.S. Mission to Int'l Orgs. in Geneva, *HRC-52 Right to Environment Resolution* (Apr. 6, 2023), https://perma.cc/E5KX-762V.

[164] *See, e.g.*, Universal Declaration of Human Rights, G.A. Res. 217 (III) A, pmbl., U.N. Doc. A/RES/217(III) (Dec. 10, 1948), https://perma.cc/HR5H-BRDM [Dossier No. 257] ("Universal Declaration of Human Rights").

[165] There are very few international human rights treaties that expressly provide for extraterritorial application, and there is no support for the proposition that a State owes human rights obligations to all individuals across the globe. Except in limited circumstances, human rights obligations are territorial in scope. *See, e.g.*, International Covenant on Civil and Political Rights, art. 2(1) Dec. 16, 1966, S. Treaty Doc. No. 95-20, 999 U.N.T.S. 171 (providing that a Party's obligations are limited to individuals "within its territory and subject to its jurisdiction."), https://perma.cc/4BAA-DFJG [Dossier No. 49] ("ICCPR"); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004 I.C.J. 136, 180, ¶ 112 (Advisory Opinion of July 9) ("[ICESCR] contains no provision on its scope of application. This may be explicable by the fact that this Covenant guarantees rights which are *essentially territorial*." (emphasis added)) (discussing the International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-19, 993 U.N.T.S. 3, https://perma.cc/3G9M-Q4TX [Dossier No. 52] ("ICESCR")), https://perma.cc/223G-3Y9D ("*Legal Consequences of the Construction of a Wall*").

change because anthropogenic climate change is a global problem. Without corresponding action by other States, anthropogenic global warming and consequent climate change will continue. Consideration of what is needed to mitigate anthropogenic GHG emissions to minimize the adverse effects of climate change necessarily requires a State to consider the mitigation efforts of other States, and to attempt to coordinate with other States multilaterally.

4.41 International human rights law is not designed to promote coordinated reciprocal action among States to address collective action problems like climate change that are outside the control of the territorial State. As reflected in the ICESCR, cooperation among States can be very useful in some cases to progressively realize economic, social, and cultural rights, for example, through collaborative efforts to combat hunger.[166] However, the *ad hoc* cooperation among States "based on free consent" to take "appropriate steps" to progressively realize the right to be free from hunger, as contemplated in ICESCR article 11(2), is qualitatively different from the type of reciprocal, near-universal collective action needed to address global environmental problems like anthropogenic climate change.

b. International human rights law is not intended to regulate private actors or make States do so

4.42 Anthropogenic GHG emissions are primarily caused by private actors; consequently, actions to mitigate GHG emissions at scale necessarily require the regulation of private actors. International human rights law is concerned primarily with State action. It was not designed to regulate private conduct or to impose obligations on States to do so.[167]

4.43 Proponents of the idea that certain human rights entail State obligations to mitigate GHG emissions assert a much broader scope of international human rights law obligations than was intended, encompassing purported obligations of States to regulate a wide range of GHG-emitting activities in the private sphere, with all of the attendant policy and political considerations and implications such regulation necessarily would entail. This effectively

[166] ICESCR, arts. 2(1), 11.

[167] *See* U.S. Dep't of State, *Observations by the United States of America on Human Rights Committee General Comment 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶¶ 6-7 (Dec. 27, 2007) ("As a general matter, with notable exceptions such as slavery, a human rights violation entails state action. Human rights treaties may contain provisions that clearly and specifically impose obligations upon States Parties to prevent, in certain limited circumstances, particular kinds of misconduct by private parties or non-state actors. Article 2 [of the ICCPR], however, contains no language stating that Covenant obligations extend to private, non-governmental acts, and no such obligations can be inferred from Article 2."), https://perma.cc/Y8CM-2A9D ("*U.S. Observations on HRC General Comment 31*"); *see also* U.S. Dep't of State, *Observations by the United States of America on Fact Sheet No. 31 on "The Right to Health" Produced by the Office of the UN High Commissioner for Human Rights and the World Health Organization*, ¶¶ 24-26 (Oct. 15, 2008), https://perma.cc/8HMA-BNV5.

would convert human rights, such as the right to life, into obligations to regulate an almost limitless range of private human activity in a State's territory that could be argued to impact the enjoyment of human rights, from the standards for constructing buildings to those for the manufacturing of all manner of goods. In other words, on this theory, there would be virtually no area of private conduct that international human rights law would not reach.

4.44 In the rare cases where States Parties to a human rights treaty are required to prevent particular kinds of misconduct by private actors, the treaty provision states this obligation clearly and explicitly.[168] For example, article 2(1)(d) of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) expressly obligates States Parties to prohibit and bring to an end racial discrimination "by any persons, group or organization."[169]

4.45 In contrast, the ICESCR does not require States Parties to ensure non-infringement of economic, social, and cultural rights by private actors. Although the ICESCR contemplates that Parties will take steps to progressively realize economic, social, and cultural rights, it is still concerned with State action—for example, a State's provision of education. The ICESCR's *travaux préparatoires* demonstrate that States intentionally declined to prescribe *how* Parties progressively realize economic, social, and cultural rights.[170] This reflects the ICESCR's character as a statement of goals to be achieved progressively rather than through immediate implementation. In the few cases States sought to be more prescriptive, the corresponding ICESCR provisions provide specific goals. Even then, those provisions are concerned with State action and do not prescribe the methods States must use to progressively realize the more specific goals. Article 11 of the ICESCR, for example, which concerns the progressive realization of the right of everyone to an adequate standard of living, provides that States Parties shall, in order to combat hunger, take measures that are needed "[t]o improve methods of production, conservation, and distribution of food."

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[168] *See, e.g.*, ICCPR, art. 8 (requiring States Parties to prohibit "slavery and the slave-trade in all their forms"); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 4, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85 (providing that States Parties shall criminalize "all acts of torture" and that this includes acts "by any person" that "constitute[] complicity or participation in torture"), https://perma.cc/N63X-M4VW.

[169] International Convention on the Elimination of All Forms of Racial Discrimination, art. 2(1)(d), Mar. 7, 1966, S. Treaty. Doc. No. 95-18, 660 U.N.T.S. 195 ("Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization"), https://perma.cc/8BTP-FWSM.

[170] *See* UN Secretary-General, *Draft International Covenants on Human Rights: Annotation*, ch. V, art. 2, ¶¶ 19-24, U.N. Doc. A/2929 (July 1, 1955), https://perma.cc/D9FQ-LUVS; U.S. Written Statement, ¶ 4.53.

4.46 As demonstrated by the ICERD, States know how to draft provisions that address the actions of non-State actors. Where a treaty provision does not do so, it must be read as applying only to States.

c. Although not well-suited to address collective action problems like mitigation of GHG emissions, human rights law is critical to enabling climate advocacy and potentially relevant to adaptation action

4.47 In keeping with the foregoing, the United States does, however, emphasize that international human rights law has a role to play in addressing climate change outside of mitigation action. First, States must respect the civil and political rights of all individuals within their territory and subject to their jurisdiction, including those individuals who are exercising their rights as climate change advocates. For example, States are required to respect the freedoms of expression, association, and peaceful assembly of such advocates. The freedom of expression also includes the freedom to seek, receive, and impart information and ideas of all kinds, including information and ideas relating to climate change.

4.48 Second, with respect to economic, social, and cultural rights, the impacts of climate change might affect a State Party's ability to progressively realize the human rights enshrined in the ICESCR or its timeline for doing so. In progressively realizing the right to an adequate standard of living, for example, a Party might consider how the impacts of climate change impair progressive realization of that right and what actions might need to be taken in response. It is within the ICESCR framework that human rights law may be relevant to adaptation action. In contrast to climate change mitigation, it is possible for a State to take unilateral action through adaptation measures to minimize the adverse effects of climate change on individuals within its territory and subject to its jurisdiction. Thus, in this one respect, application of human rights law to adaptation does not present the same conceptual problems as outlined above with respect to mitigation of GHG emissions. Furthermore, the progressive realization standard under the ICESCR considers that a State's practical ability to undertake adaptation action is subject to available resources, policy trade-offs, and domestic conditions that are liable to sudden change.

4.49 In contrast, Parties' obligations under the ICCPR, which largely involve States refraining from specific acts, are designed to be immediately respected notwithstanding respective national circumstances, including resources and capabilities.[171] It is no defense for

[171] *See* UN Secretary-General, *Draft International Covenants on Human Rights: Annotation*, ch. II, ¶ 9, U.N. Doc. A/2929 (July 1, 1955) ("Those in favor of drafting two separate covenants argued that civil and political

a State to point to its level of development or limited capabilities, for example, to avoid responsibility for an arbitrary killing in violation of the right to life under the ICCPR.

ii. There Is No International Human Rights Obligation to Mitigate Anthropogenic GHG Emissions

4.50 At present, no treaty of global application or customary rule of international human rights law requires States to protect the climate system from anthropogenic GHG emissions or recognizes a human right to a clean, healthy, and sustainable environment.[172]

a. International human rights treaties of global application do not require Parties to mitigate anthropogenic GHG emissions

4.51 Neither the ICCPR nor the ICESCR obligates its Parties to mitigate anthropogenic GHG emissions. There is no legal basis to impose new obligations on Parties to the ICCPR or the ICESCR through a process of reinterpretation or inference, which would be contrary to the consent-based nature of international law.[173]

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rights were enforceable, or justiciable, or of an 'absolute' character, while economic, social and cultural rights were not or might not be; that the former were immediately applicable, while the latter were to be progressively implemented; and that generally speaking, the former were rights of the individual 'against' the State, i.e., against unlawful and unjust actions of the State, while the latter were rights which the State would have to take positive action to promote."), https://perma.cc/D9FQ-LUVS.

[172] Some States have asserted the *erga omnes* character of various international human rights law obligations. As the United States has observed, the question of which human rights give rise to *erga omnes* obligations is not settled under international law. *See, e.g.*, *U.S. Observations on HRC General Comment 31*, ¶ 38. Similarly, there is no well-established method or set of criteria for ascertaining which rights might generate *erga omnes* obligations. While the United States remains in full agreement that States have a profound and shared interest in the protection and promotion of human rights worldwide, it does not follow that all international human rights law obligations have an *erga omnes* character.

[173] There is also no legal basis to reinterpret the UN Charter or the Universal Declaration of Human Rights to impose new human rights obligations. The UN Charter noted the importance of protecting human rights, but it did not impose specific human rights obligations on States. As U.S. President Jimmy Carter explained in his transmission of the ICCPR and the ICESCR to the U.S. Senate, "[t]hese treaties are designed to implement the human rights provisions of the Charter of the United Nations, which in Articles 1, 55, and 56, provides that the Organization and its members shall promote 'universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.'" *See* Letter of Submittal from the President of the United States Transmitting International Convention on the Elimination of All Forms of Racial Discrimination; International Covenant on Economic, Social and Cultural Rights; International Covenant on Civil and Political Rights; and American Convention on Human Rights (Dec. 17, 1977), S. Ex. L. 95th Cong., 2d Sess., https://perma.cc/UJ6U-KMBW.

1. Treaty interpretations offered by UN offices, Special Procedures, and mechanisms are not legally binding[174]

4.52 As noted earlier, treaty interpretation is rooted in the ordinary meaning of the terms of the treaty in their context and in the light of the treaty's object and purpose.[175] Parties may agree in a treaty to allow another entity to provide interpretations of the treaty's text or resolve questions relating to their treaty obligations.[176] However, the United States has not done so under any human rights treaties to which it is a party.[177]

4.53 Treaty bodies and Special Procedures play an important role in highlighting human rights issues and making recommendations to States to strengthen human rights protections. As a general matter, however, they are not empowered to issue legally authoritative interpretations of States' obligations under international human rights law. As the Court has acknowledged, States Parties are not obligated under human rights treaties to implement the non-binding recommendations of treaty bodies and Special Procedures.[178] To the extent such mechanisms may recommend steps to States Parties to mitigate anthropogenic GHG emissions[179] as part of broader efforts to realize certain human rights or in an attempt to fill perceived gaps in the reach and coverage of human rights treaties, these are recommendations only.

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[174] Special Procedures are mechanisms established by the UN Human Rights Council to report and advise on human rights from a thematic and country-specific perspective. Special Procedures mandate-holders are either an individual (called a Special Rapporteur or Independent Expert) or a Working Group.

[175] *See* VCLT, art. 31.

[176] *See, e.g.*, Convention for the Protection of Human Rights and Fundamental Freedoms, art. 46, Sept. 3, 1953, 213 U.N.T.S. 221, https://perma.cc/ZW8G-EENQ ("European Convention on Human Rights").

[177] *See* U.S. Dep't of State, *Observations by the United States of America on Human Rights Committee General Comment 36: On Article 6 - Right to Life*, ¶ 15 (Oct. 6, 2017), https://perma.cc/G8Z7-RK8D ("*U.S. Observations on HRC General Comment 36*").

[178] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, 2021 I.C.J. 71, ¶ 104 (Feb. 4), https://perma.cc/BV56-VNLE. In *Application of the International Convention on the Elimination of All Forms of Racial Discrimination*, the Court noted a previous judgment indicating it would ascribe weight to the interpretation of international human rights treaty bodies, such as the Human Rights Committee's interpretations of the ICCPR, but the Court "also affirmed, however, that it was 'in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee.'" *Id.* ¶ 101. The Court interpreted the Covenant in a manner different from the Committee in that case, and thus made clear that the UAE was likewise not bound by the Committee's recommendation. *Id.* ¶¶ 88, 99, 101.

[179] For example, by recommending steps to help limit or reduce anthropogenic GHG emissions, including through regulatory measures on the private sector, to help progressively realize the right to the enjoyment of the highest attainable standard of physical and mental health. *See, e.g.*, Office of the UN High Comm'r for Human Rights, *Analytical Study on the Relationship Between Climate Change and the Human Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, ¶¶ 32, 54, U.N. Doc. A/HRC/32/23 (May 6, 2016), https://perma.cc/L9PQ-8B8L.

4.54 Treaty bodies often rely on non-legally binding sources in reaching their conclusions. Proponents of creating new human rights obligations to protect the climate system rely heavily on such non-binding sources.[180] For instance, Human Rights Committee General Comment 36, which a number of submissions cite in support of the argument that the right to life creates corresponding obligations to protect the climate system from GHG emissions, is devoid of any discussion of the ordinary meaning of the ICCPR's terms, and instead relies on extensive cross-referencing of the Committee's own prior comments and opinions or other non-legally binding documents.[181]

2. Regional human rights court decisions apply only to the corresponding regional instrument and its States Parties

4.55 In some cases, regional human rights instruments, including the European Convention on Human Rights (ECHR), overlap significantly with or provide protections that exceed the scope of similar provisions under global instruments such as the ICCPR and the ICESCR. Although certain provisions of a regional instrument like the ECHR might be virtually identical in wording to provisions in the ICCPR or the ICESCR, the regional instrument was negotiated

[180] *See, e.g.*, Bangladesh Written Statement, ¶ 108 (relying on UN Human Rights Committee (HRC) General Comment No. 36 and Inter-American Court of Human Rights (IACtHR) and European Court of Human Rights (ECtHR) judgments to assert that right to environment is "supreme right under international law"); Colombia Written Statement, ¶¶ 3.67, 3.68, 3.70 (citing UN General Assembly Resolution 76/300 as source for a right to a clean, healthy, sustainable environment, and subsequently supporting the assertion by quoting the Special Rapporteur on Human Rights and Climate Change, the HRC, and IACtHR advisory opinions); Costa Rica Written Statement, ¶¶ 56, 83, 84 (relying on IACtHR advisory opinions and a UN Committee on the Rights of the Child general comment); Egypt Written Statement, ¶¶ 199, 201, 202, 204 (citing a Special Rapporteur report, the non-legally binding "Cancun agreements," HRC resolution 7/23, an expert report presented to the HRC, and an IACtHR advisory opinion); Liechtenstein Written Statement, ¶¶ 45-46 (relying on HRC resolution 48/13, UN General Assembly resolution 76/300, and a decision issued by UN Committee on the Rights of the Child).

[181] *See* Human Rights Committee, *General Comment No. 36: Article 6 – Right to Life*, n.95-106, 259-60, U.N. Doc. CCPR/C/GC/36 (Sept. 3, 2019), https://perma.cc/Q5DN-MK9W [Dossier No. 299]. In 2017, when General Comment No. 36 was in draft form, several States Parties to the ICCPR, including the United States, provided observations disagreeing with various conclusions by the Human Rights Committee. *See, e.g.*, *U.S. Observations on HRC General Comment 36*, ¶ 3 ("[T]he range of issues the Committee considers to fall within the scope of the inherent right to life and the obligations of States Parties under Article 6 is overly expansive and the Committee provides little or no authoritative legal support or treaty analysis grounded in established rules of treaty interpretation under international law to support many of its positions. The Committee's citations to its own work products, whether in the form of general comments, concluding observations and recommendations, or 'views' on Protocol communications, do not in and of themselves provide legal support under international law. They merely represent a collection of the Committee's prior consistent, non-binding views and carry no greater weight or authority than when first published."); *Comments of the Government of the United Kingdom of Great Britain and Northern Ireland on Human Rights Committee General Comment 36: On Article 6 - Right to Life*, ¶¶ 3-4 (Sept. 25, 2017), https://perma.cc/HE4N-93S8; *Comments by the Government of Canada on Human Rights Committee General Comment 36: On Article 6 – Right to Life,* ¶¶ 2-5 (Oct. 23, 2017), https://perma.cc/AX3Z-EGBV.

at a different time, among a subset of States, and with different and varied interests in mind. Such regional instruments do not create obligations for States not party to them.[182]

4.56 A regional human rights court's interpretations of provisions in its respective regional instrument do not extend to similar provisions in more broadly applicable instruments or to the Parties to those more broadly applicable instruments that are not party to the regional instrument. For example, the European Court of Human Rights (ECtHR) recently rendered a judgment in *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* interpreting article 8(1) of the ECHR, which pertains to the right to respect for private and family life, as imposing an obligation on Switzerland to protect individuals from the adverse impacts of climate change.[183] Although ECHR article 8(1) has some elements in common with ICCPR article 17(1), the ECtHR is entrusted by its Parties to interpret and apply only the ECHR.[184] The European Court has acknowledged that, in carrying out this responsibility, it "has defined the scope of Article 8 broadly, even when a specific right is not set out in the Article," noting that its "generous approach to the definition of personal interests has allowed [its] case-law to develop in line with social and technological developments."[185] As a result, while the text of ECHR article 8(1) states that "[e]veryone has the right to respect for his private and family life, his home and his correspondence," the European Court has interpreted it to encompass a more general right of individuals to effective protection by State authorities from serious adverse effects on their life, health, well-being, and quality of life.[186] A regional court's choice to take such an approach to the application of a regional instrument can affect the obligations only of that regional instrument's States Parties, which have given that court the authority under that instrument to bind them.

[182] VCLT, art. 34 ("A treaty does not create either obligations or rights for a third State without its consent.").

[183] *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* (app. no. 53600/20), Judgment, ¶ 454 (ECtHR Apr. 9, 2024) ("The Court reiterates that it only has the authority to ensure that the Convention is complied with. This is the instrument which the Court is entrusted to interpret and apply. The Court does not have the authority to ensure compliance with international treaties or obligations other than the Convention."), https://perma.cc/WG8W-2Y7P ("*KlimaSeniorinnen Schweiz and Others*").

[184] *Id.*

[185] European Court of Human Rights, *Guide on Article 8 of the European Convention on Human Rights* (Apr. 9, 2024), ¶¶ 2, 87, https://perma.cc/L6X4-LULA.

[186] *Id.* ¶ 2; *KlimaSeniorinnen Schweiz and Others*, ¶ 519.

b. There are no relevant State obligations under customary international law

4.57 As a matter of customary international law, there is currently no human right to a clean, healthy, and sustainable environment or any corresponding customary obligation to mitigate GHG emissions. Such a putative right is not supported by the extensive and virtually uniform State practice and *opinio juris* necessary for the creation of a rule of customary international law. The widely varying views offered in submissions demonstrate this point.

4.58 The UN General Assembly and the Human Rights Council resolutions "recognizing" the right to a clean, healthy, and sustainable environment reflect moral and political aspirations, but they do not change the current state of treaty or customary international law.[187] A number of submissions recognize this.[188]

4.59 In the absence of the State practice and *opinio juris* necessary to establish environmental rights as a matter of customary international law, if States wish to establish new

[187] *See* U.S. Written Statement, n.373; *see also* U.S. Mission to the UN, *Explanation of Position on the Right to a Clean, Healthy, and Sustainable Environment Resolution* (July 28, 2022) ("[T]he United States supports this resolution, which expresses the aspirations of those around the world seeking a clean and healthy environment for all. Taking into account our history and current efforts of environmental protection and our belief that every person should enjoy the benefits of a healthy environment, the United States supports the development of a right to a clean, healthy, and sustainable environment in a manner that is consistent with international human rights law and international environmental law. We note that adoption of an UNGA resolution on the recognition of a human right is not legally binding or a statement of current international law. International law has yet to establish a right to a clean, healthy, and sustainable environment as a matter of customary international law, nor does treaty law provide for such a right. As such, there is no legal relationship between a right as recognized under this resolution and existing international law. And, in voting 'YES' on this resolution the United States does not recognize any change in the current state of conventional or customary international law. There is not yet a shared understanding of what the basis for the right would be and/or what its scope would entail. For our part, the United States looks forward to working with other states to exchange views to further develop understanding in this regard."), https://perma.cc/P4T9-7TCP; UK Foreign, Commonwealth, & Development Office and UK Mission to the UN, *Explanation of Vote on Resolution on the Right to a Clean, Healthy and Sustainable Environment* (July 28, 2022) ("First, General Assembly resolutions are not legally-binding. Second, as such, the recognition of the right in this resolution does not legally bind States to its terms."), https://perma.cc/Z8AT-UTY5.

[188] *See, e.g.*, Canada Written Statement, ¶ 24 (supporting UN General Assembly resolution 76/300 but explaining "there is currently no common or internationally agreed upon understanding of the context and scope of a right to a clean, healthy, and sustainable environment"); EU Written Statement, ¶ 262 ("[G]iven the lack of codification of the right to a healthy environment in any global (rather than regional) international treaty and the lack of recognition of such right by international courts, it is not possible to conclude that a sufficient *opinio iuris* has emerged as regards the existence of a human right to a healthy environment."); Germany Written Statement, ¶¶ 101-102 (recognizing imminent harm can be shown in certain alleged human rights violations caused by climate change, but affirming that "the idea of individual human rights of members of future generations does not form part of the current international *lex lata*"); Indonesia Written Statement, ¶¶ 43-44 (acknowledging resolutions that include the right to a clean, healthy, and sustainable environment but arguing "it is indisputable that no legal obligations are derived from such recognition"); Switzerland Written Statement, ¶¶ 59-62 ("It is not currently possible to infer an individually justiciable right to protection against climate change from human rights treaties.").

international human rights obligations relating to climate change, they must do so through the treaty-making process. To date, however, this process has not been engaged.

c. There is no legal basis to extend a State's current human rights obligations to persons or collectives in future generations who do not yet exist

4.60 Some submissions assert the relevance of the concept of "intergenerational equity" to the interpretation and application of international human rights law. More specifically, some argue that States are required to respect and ensure the human rights of future generations—today—and to take their best interests into account when making decisions today that might affect them.[189] Such arguments propose a dramatic expansion of States' human rights obligations. The intended beneficiaries of international human rights law are individuals already existing—indeed, human rights law is premised on the principle reflected in the Universal Declaration of Human Rights (UDHR) that "[a]ll human beings are *born* free and equal in dignity and rights."[190] The negotiating history of the UDHR demonstrates that the word "born" was intentionally included to exclude the application of human rights to those not yet existing.[191] Attempts to delete the term during the course of negotiations were rejected.[192] Human rights treaties of global application are similarly limited to individuals that already exist. They do not refer to the human rights of indeterminate, unidentifiable future generations—either as individuals or a collective—and there is no textual basis for extending the rights specified in those instruments to those who do not yet exist.

[189] *See, e.g.*, Costa Rica Written Statement, ¶ 57 ("The principle of intergenerational equity 'places a duty on current generations to act as responsible stewards of the planet and ensure the rights of future generations to meet their developmental and environmental needs.'" (citing Office of the UN High Comm'r for Human Rights, *Analytical Study on the Relationship Between Climate Change and the Full and Effective Enjoyment of the Rights of the Child*, ¶ 35, U.N. Doc. A/HRC/35/13 (May 4, 2017))); Saint Vincent and the Grenadines Written Statement, ¶ 124 ("The recently adopted *Maastricht Principles on the Human Rights of Future Generations* provide that future generations must be free from intergenerational discrimination."); Sierra Leone Written Statement, ¶ 3.9 ("All States must also fully take into account the rights and interests of children and future generations when developing and undertaking measures to minimize anthropogenic GHG emissions."); Vanuatu Written Statement, ¶ 483 ("Moreover, in the context of human rights obligations, Vanuatu submits that States must: (a) respect the rights of future generations; (b) ensure the rights of future generations; and (c) take into account the best interests of future generations of children when making decisions that will affect them.").

[190] Universal Declaration of Human Rights, art. 1.

[191] *See* U.N. GAOR, 3d Sess., 99th mtg. at 115-25, U.N. Doc. A/C.3/SR.99 (Oct. 11, 1948) (representative of France explaining that "the statement 'All human beings are born free and equal . . .' meant that the right to freedom and equality was inherent from the moment of birth"), https://perma.cc/UJJ5-E5TK.

[192] *See id.* at 123-24.

4.61 The United States acknowledges that individuals in future generations will become beneficiaries of international human rights law once they are born, but it does not follow that a State has legal obligations *now* to respect and ensure those future individuals' rights.[193]

4.62 Additionally, although "intergenerational equity" is not customary international law or a general principle of law, intergenerational considerations have animated, in part, the negotiation of international environmental law frameworks.[194] Those frameworks, however, have been carefully negotiated to take into account the significant and complex political and socio-economic tradeoffs—and thus compromises—that such intergenerational considerations entail. Human rights, in contrast, are not generally considered to be subject to such intergenerational considerations, tradeoffs, and compromises, and international human rights law unsurprisingly provides no guidance on how a State should proceed, for example, when protecting the rights of existing persons arguably impacts the ability of future individuals to enjoy their human rights once they are born (or vice versa). As explained in the U.S. Written Statement, it is through States' implementation of their obligations under the UN climate change regime that the climate system can be best protected for the benefit of present and future generations.

d. Self-determination is not at issue in this proceeding

4.63 Several submissions assert that territorial and other damage caused by anthropogenic climate change implicates State obligations in connection with the right to self-

[193] *See, e.g.*, Canada Written Statement, ¶ 29 ("[I]nternational human rights law does not guarantee rights of future generations but rather seeks to protect and promote individuals' human rights in the present."); Germany Written Statement, ¶¶ 101-102 ("[I]ndividual rights of human beings who will only come into existence in the future, but who do not yet exist as of today, cannot be taken into account when considering alleged human rights violations that are claimed to take place now, or that are reasonably foreseeable. Likewise, human beings alive now cannot claim rights on behalf of members of future generations. . . . [T]he idea of individual human rights of members of future generations does not form part of the current international *lex lata*. . . . [T]his concept lacks a grounding in generalized State practice and *opinio iuris*."); New Zealand Written Statement, ¶¶ 116(c) ("[I]nternational human rights law is generally concerned with actual or imminent violations of rights rather than future or speculative violations. While there are current impacts of climate change that affect the enjoyment of human rights, international human rights law does not obviously impose actionable obligations on States to take mitigation measures today to avoid the very serious human rights consequences that may arise from unmitigated climate change 30 years hence."), 144 ("New Zealand does not consider that international law currently prescribes any specific legal consequences with respect to future generations, for States who, through their internationally wrongful acts, fail to protect the climate system or other parts of the environment from anthropogenic GHGs."); Thailand Written Statement, ¶¶ 37-38 ("There are several challenges to determining the legal consequences for future generations. First, they are an ill-defined, indeterminate, and overly broad class of people who do not currently exist and are without *locus standi*. . . . Second, at present, there seems to be a paucity of state practice to support the concept of intergenerational equity in international law.").

[194] *See, e.g.*, UNFCCC, pmbl. ("*Determined* to protect the climate system for present and future generations").

determination.[195] Such assertions, however, seek to transform the right into a wholly new construct divorced from its historical underpinnings and any agreed-upon understanding of its parameters.

4.64 Although the Court has recognized the right to self-determination as an essential principle of contemporary international law, with the obligation to respect the right having an *erga omnes* character,[196] the contours of the right have been fiercely debated.[197] In any case, there is nothing in the historical record to support a finding that States understood anthropogenic GHG emissions or similar transnational environmental problems as implicating their obligations in relation to a people's right to self-determination within a State, much less the right of peoples in other States.

4.65 Similarly, the principle of permanent sovereignty over natural resources is not germane to the present advisory proceeding. In considering the applicability of this principle, the Court has previously looked to relevant UN General Assembly resolutions.[198] Nothing in these resolutions—which are most centrally concerned with the ability of peoples subjected to colonial or foreign domination to freely dispose of their natural wealth and resources—

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[195] For instance, some submissions argue that the impacts of climate change have deprived peoples of the free disposal of their natural resources and have deprived them of their own means of subsistence. *See, e.g.*, Bangladesh Written Statement, ¶ 122; Costa Rica Written Statement, ¶ 72; Nauru Written Statement, ¶¶ 37, 41-44; Dominican Republic Written Statement, ¶ 4.45; Micronesia Written Statement, ¶ 82; Vanuatu Written Statement, ¶¶ 293-299. Several submissions also assert that the threat of sea-level rise to the existence of low-lying island States has implications for the right to self-determination. *See, e.g.*, Antigua and Barbuda Written Statement, ¶ 195; Philippines Written Statement, ¶¶ 106(b)-106(c); Singapore Written Statement, ¶ 3.81; Vanuatu Written Statement, ¶¶ 292, 299-300.

[196] *See, e.g.*, *East Timor (Portugal v. Australia),* 1995 I.C.J. 90, 102, ¶ 29 (June 30), https://perma.cc/9TQ2-LLAJ; *Legal Consequences of the Construction of a Wall*, 2004 I.C.J. at 199, ¶ 155; *Legal Consequences of the Separation of the Chagos Archipelago*, 2019 I.C.J. at 139, ¶ 180; *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem,* ICJ Advisory Opinion, ¶ 232 (July 19, 2024), https://perma.cc/272Q-6FNT ("*Policies and Practices of Israel*"). The Court also recently pronounced that in cases of foreign occupation, the right to self-determination constitutes a peremptory norm of international law. *Policies and Practices of Israel*, ¶ 233. Although the United States recognizes the right to self-determination, it "question[s] whether the right constitutes a *jus cogens* norm." *See Comments of the United States on the ILC's Draft Conclusions on Peremptory Norms of General International Law (*Jus Cogens*) and Draft Annex, Provisionally Adopted by the Drafting Committee on First Reading*, 17 (June 30, 2021), https://perma.cc/N9NB-9UBN. Regardless, for the reasons explained herein, obligations with respect to the right to self-determination are not implicated in this context.

[197] *See, e.g.*, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, 2010 I.C.J. 403, 438, ¶ 82 (Advisory Opinion of July 22) (noting that States presented "radically different views" with regard to the concept of "remedial secession"), https://perma.cc/3DT4-GAQV.

[198] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, 2005 I.C.J. 168, 251-52, ¶ 244 (Dec. 19) (determining that the principle does not apply to "the specific situation of looting, pillage, and exploitation of certain natural resources by members of the army of a State militarily intervening in another State"), https://perma.cc/LRL2-WQXB.

suggests that the principle has any applicability to the impacts of climate change.[199] Nor is there the extensive and virtually uniform State practice and *opinio juris* necessary to support finding that, as a matter of customary international law, the principle of permanent sovereignty over natural resources creates obligations for States with respect to the impacts of climate change.

4.66 To be sure, States are subject to international law obligations to "respect" the right to self-determination and to "promote" its "realization."[200] These obligations contemplate both negative and positive duties upon States. Unlike obligations under international human rights law, the obligation of a State to respect the right to self-determination and promote its realization informs its relations with peoples beyond its territory and jurisdiction. Even so, that obligation is not implicated by the questions before the Court.

4.67 To identify the *opinio juris* of States to respect and promote the realization of the right to self-determination under customary international law, the Court has looked to article 1 of the ICCPR and the ICESCR and General Assembly resolution 2625 (the "Friendly Relations Declaration"), whose Principles I and V address the right to self-determination in reference to the principle of self-determination as it appears in the UN Charter.

4.68 The Friendly Relations Declaration provides clarity on the performance of the obligation to respect the right to self-determination under customary international law.[201] Performance of that obligation, and in particular refraining from forcible action that deprives

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[199] *See, e.g.*, G.A. Res. 1803(XVII), U.N. Doc. A/RES/1803(XVII) (Dec. 14, 1962), https://perma.cc/VG2J-HZ98; G.A. Res. 3201(S-VI) (Declaration on the Establishment of a New International Economic Order), U.N. Doc. A/RES/3201(S-VI) (May 1, 1974), https://perma.cc/6WBP-UERU; G.A. Res. 3281(XXIX) (Charter of Economic Rights and Duties of States), U.N. Doc. A/RES/3281(XXIX) (Dec. 12, 1974), https://perma.cc/6ZDV-HTKA. *See also* ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 100 (1995) (U.S. Annex 4).

[200] *See, e.g.*, ICCPR, art. 1(3); ICESCR, art. 1(3); G.A. Res. 2625(XXV), Annex (Friendly Relations Declaration), principle V, U.N. Doc. A/RES/2625(XXV) (Oct. 24, 1970), https://perma.cc/4FK5-S2RS ("Friendly Relations Declaration"). *Accord Legal Consequences of the Construction of a Wall*, 2004 I.C.J. at 199, ¶¶ 155-56; *Legal Consequences of the Separation of the Chagos Archipelago*, 2019 I.C.J. at 139, ¶ 180.

[201] The Friendly Relations Declaration explains that "[e]very State has the duty to *refrain from any forcible action* which deprives peoples . . . of their right to self-determination and freedom and independence." Friendly Relations Declaration, principle V, ¶ 5 (emphasis added). It also explains that States "shall *refrain from any action aimed at* the partial or total disruption of the national unity and territorial integrity of any other State or country." *Id.*, principle V, ¶ 8 (emphasis added). It further explains "that subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle, as well as a denial of fundamental human rights, and is contrary to the Charter." *Id.*, principle V, ¶ 2. The Court recently reaffirmed that States have a duty to refrain from forcible action that deprives peoples of their right to self-determination. *Policies and Practices of Israel*, ¶ 255.

peoples of their right to self-determination, is simply not in play in the context of global climate change.

4.69 The same goes for the obligation to promote the realization of the right to self-determination. Article 1(3) of the ICCPR and the ICESCR frames this duty in relation to decolonization obligations under the UN Charter.[202] Paragraph 2 of the Friendly Relations Declaration contemplates the performance of this obligation in similar terms, identifying two objectives: to promote friendly relations and cooperation among States and to bring "a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned."[203] Even if the obligation to promote the realization of the right to self-determination exists beyond its apparent focus on decolonization, it is not implicated by the request before the Court, and, even if it was, States would enjoy a margin of appreciation in the specific actions taken to promote realization of the right to self-determination.[204]

4.70 Although anthropogenic climate change might affect the ability of peoples to freely determine their political status and freely pursue their economic, social, and cultural development—underscoring the imperative of continued international cooperation to address the collective action problem posed by climate change—this does not implicate individual States' obligations to promote the realization of the right to self-determination or establish the breach of such obligations.

[202] *See* ICCPR, art. 1(3) ("The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination[.]"); *see also* Friendly Relations Declaration, principle V, ¶ 5. *Accord Legal Consequences of the Construction of a Wall*, 2004 I.C.J. at 171-72, ¶ 88.

[203] Friendly Relations Declaration, principle V, ¶ 2. *Accord Legal Consequences of the Construction of a Wall*, 2004 I.C.J. at 171-72, ¶ 88; *Legal Consequences of the Separation of the Chagos Archipelago*, 2019 I.C.J. at 139, ¶ 180.

[204] *See Bernard Anbataayela Mornah v. Benin et al.* (app. no. 028/2018), Judgment, ¶ 314 (ACtHPR 2022) (stating that under the African Charter on Human and Peoples' Rights, "it is up to the Respondent States to choose the kind of positive measures that they consider appropriate for the realisation of the right [to self-determination] for the said people"), https://perma.cc/M45T-Q6RT.

CHAPTER V

THE LEGAL CONSEQUENCES OF AN ALLEGED BREACH CANNOT BE ASSESSED IN THE ABSTRACT

5.1 The U.S. Written Statement set out the framework under the customary international law of State responsibility for the consequences of breaching an obligation in respect of climate change. In so doing, it stressed some of the challenges of the application of this framework to the profoundly complex and global context of climate change, in which an indeterminate number of actors, causes, and effects collide with a framework designed to assign responsibility explicitly to States. A number of other submissions acknowledge these challenges.[205] Some submissions also appear to suggest that the UN climate change regime itself governs the issue of legal consequences[206] or perhaps that the customary international law of State responsibility has been displaced altogether in this context.[207] Still others interpreted the question posed to refer exclusively to the UN climate change regime.[208]

5.2 The United States agrees that the UN climate change regime, broadly supported by the overwhelming community of States, embodies the clearest, most specific, and most current expression of States' consent to be bound by international law in respect of climate change.[209] Although neither the UNFCCC nor the Paris Agreement contains rules regarding State liability for adverse effects of human-induced climate change, the existence of the near-universal regime demonstrates that States are intent on addressing the issue of climate change through it, including through a cooperative, facilitative, and serious approach to "loss and damage" associated with the adverse effects of climate change.[210]

5.3 In the following sections, the United States responds to issues raised by other participants in their written statements with respect to the customary international law of State responsibility. As a threshold matter, the second question posed is framed in general terms and does not ask whether any State or group of States might have breached or be in breach of

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[205] *See, e.g.*, Australia Written Statement, ¶ 5.3; New Zealand Written Statement, ¶ 140; Nordic Countries Written Statement, ¶ 107; PRC Written Statement, ¶136; ROK Written Statement, ¶¶ 46-47; Singapore Written Statement, ¶¶ 4.11, 4.16, 4.19; Switzerland Written Statement, ¶ 75; UK Written Statement, ¶ 137.4.

[206] *See, e.g.*, EU Written Statement, ¶¶ 353-55; Saudi Arabia Written Statement, ¶¶ 6.3-6.6.

[207] *See, e.g.*, Kuwait Written Statement, ¶ 86; PRC Written Statement, ¶¶ 133, 139-42.

[208] *See, e.g.*, UK Written Statement, ¶ 138. *See also* Japan Written Statement, ¶ 41.

[209] U.S. Written Statement, ¶ 1.3.

[210] *See* U.S. Written Statement, ¶¶ 3.31-3.35. Neither the UNFCCC nor the Paris Agreement contains legally binding obligations relating to loss and damage. *Id.*

an obligation in respect of climate change. Thus, as several submissions point out, the discussion of legal consequences is a hypothetical exercise, as any finding of liability would need to be made on a case-by-case basis with respect to the particular facts, the particular claims, and the particular parties to a dispute.[211] Such conclusions cannot be reached in the abstract.[212]

A. A Breach Can Only Occur If an Obligation Is in Force

5.4 A breach can occur only if an international obligation is in force for a State at the time of the conduct in question.[213] In respect of climate change, the primary obligations for States arise under the Paris Agreement and the UNFCCC. Without an international legal obligation in force for a State, there can be no internationally wrongful act to which responsibility can attach.[214]

5.5 Nor can reliance on a continuing or composite breach theory result in legal consequences for conduct occurring prior to the entry into force of a particular obligation. While in narrow circumstances facts predating entry into force of an international obligation

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[211] *See, e.g.*, France Written Statement, ¶ 173; Nordic Countries Written Statement ¶ 109; Peru Written Statement, ¶ 95; Saudi Arabia Written Statement, ¶ 6.2; Slovenia Written Statement, ¶ 15.

[212] Although the Court has affirmed that a lack of State consent in general might not affect the Court's advisory jurisdiction, it has noted that lack of consent could be relevant if, for example, "to give a reply would have the effect of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent." *Western Sahara*, 1975 I.CJ. 12, 25, ¶ 33 (Advisory Opinion of Oct. 16), https://perma.cc/DR5N-KEC4; *see also Legal Consequences of the Construction of a Wall*, 2004 I.C.J. at 158, ¶ 47. Many States are participating in this advisory proceeding to assist the Court on the legal questions referred to it, but such participation does not mean that States have consented to the Court's jurisdiction to answer a very different question (put forward in certain submissions), namely, whether and which States might have breached their international obligations.

[213] *See Island of Palmas (Netherlands/United States of America)*, 2 R.I.A.A. 829, 845 (Apr. 4, 1928) ("[A] juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled."), https://perma.cc/H45V-AA8H; *cf. Phosphates in Morocco (Italy v. France)*, 1938 P.C.I.J. (ser. A/B) No. 74, 18 (June 14) (noting that the intention of the limitation *ratione temporis* was clear: "it was inserted with the object of depriving the acceptance of the compulsory jurisdiction of any retroactive effects, in order both to avoid, in general, a revival of old disputes, and to preclude the possibility of the submission to the Court by means of an application of situations or facts dating from a period when the State whose action was impugned was not in a position to foresee the legal proceedings to which these facts and situations might give rise"), https://perma.cc/YYY2-TBPH.

[214] ILC, *Draft Articles on State Responsibility for Internationally Wrongful Acts, with Commentaries,* art. 13, U.N. Doc. A/56/10, *reprinted in* [2001] 2 Y.B. INT'L L. COMM'N 31, A/CN.4/SER.A/2001/Add.1 (Part 2) ("An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs."), https://perma.cc/F5Q7-L66Z [*see* Dossier No. 82] ("*ILC Draft Articles on State Responsibility*"). Although some submissions cite the 2006 ILC Draft Articles on Prevention of Transboundary Harm from Hazardous Activities as support for the notion that there is strict liability under customary international law, this is misguided. The ILC's mandate was to encourage the "progressive development of international law and its codification," and in any event, the Draft Articles state a due diligence standard, not a strict liability regime. *See ILC Draft Articles on Prevention of Transboundary Harm*, pmbl., art. 3, cmt. ¶ 7. As explained *supra*, there is no legal basis for finding that a strict liability rule exists for global harm caused by anthropogenic GHG emissions. *See supra* ¶¶ 3.28-3.30.

may be considered when examining jurisdiction or assigning liability for a breach of a continuing or composite act,[215] no compensation may be awarded for any period prior to the entry into force of an obligation.[216] With respect to composite breach specifically, "[i]n cases where the relevant obligation did not exist at the beginning of the course of conduct but came into being thereafter, the 'first' of the actions or omissions of the series for the purposes of State responsibility *will be the first occurring after the obligation came into existence*."[217]

5.6 Moreover, a theory of composite breach is unlikely to be applicable to the climate change context. Composite breaches focus on "a series of acts or omissions defined in aggregate as wrongful," and are related to obligations concerning systematic acts (composite obligations), such as those concerning genocide, apartheid, crimes against humanity, and systematic acts of racial discrimination.[218] Importantly, these are obligations breached by *systematic* policies or practices, and with the relevant *intention* to inflict harm on particular populations.[219] Although there could be categories of action that might lend themselves to

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[215] *See, e.g.*, *Papamichalopoulos and Others v. Greece* (app. no. 14556/89), Judgment, ¶ 40 (ECtHR June 24, 1993) (in determining its jurisdiction, noting that "the applicants' complaints relate to a continuing situation, which still obtains at the present time"), https://perma.cc/FP4S-ZRYR; *Loizidou v. Turkey* (app. no. 15318/89), Judgment, ¶¶ 41-47, 63-64 (ECtHR Dec. 18, 1996) (finding a continuing breach that began before Turkey accepted the Court's jurisdiction and continued to the present), https://perma.cc/YAS6-57YR ("*Loizidou*"); Human Rights Committee, *Views Adopted by the Committee under Article 5(4) of the Optional Protocol, Concerning Communication No. 024/1977*, ¶¶ 10-11, U.N. Doc. CCPR/C/OP/1 (July 30, 1981), https://perma.cc/L76Q-U87E; *but see Loizidou*, Dissenting Opinion of Judge Bernhardt, Joined by Judge Lopes Rocha, ¶¶ 1-2 (noting that the limits of the application of continuing violations "must be appreciated" and that the situation of a border closure before Turkey had consented to the jurisdiction of the Court "should not be brought under the notion of a 'continuing violation'").

[216] *See ILC Draft Articles on State Responsibility*, art. 13, cmt. ¶ 9 ("Nor does the principle of the intertemporal law mean that facts occurring prior to the entry into force of a particular obligation may not be taken into account where these are otherwise relevant. For example, in dealing with the obligation to ensure that persons accused are tried without undue delay, periods of detention prior to the entry into force of that obligation may be relevant as facts, *even though no compensation could be awarded in respect of the period prior to the entry into force of the obligation*." (emphasis added)).

[217] *See ILC Draft Articles on State Responsibility*, art. 15, cmt. ¶ 11 (emphasis added) (noting that a court may take into account earlier actions or omissions for other purposes, such as "to establish a factual basis for later breaches or to provide evidence of intent"). The contrary approach suggested in certain submissions disregards entirely key portions of the ILC Draft Articles on which those arguments otherwise rely. *See, e.g.*, African Union Written Statement, ¶ 231; Albania Written Statement, ¶ 130; Mauritius Written Statement, ¶ 210; Melanesian Spearhead Group Written Statement, ¶ 299; Vanuatu Written Statement, ¶¶ 532-33.

[218] *See ILC Draft Articles on State Responsibility*, art. 15, cmt. ¶ 2.

[219] *See ILC Draft Articles on State Responsibility*, art. 15, cmt. ¶¶ 3, 4 (using the prohibition of genocide as an illustration of a "composite" obligation, which implies that the responsible entity "will have adopted a systematic policy or practice" that is "carried out with the relevant intention"); Jean Salmon, *Duration of the Breach*, *in* THE LAW OF INTERNATIONAL RESPONSIBILITY 390, 391 (James Crawford et al. eds., 2010) ("To determine the existence of a composite act, a second characteristic, other than the multiplicity of conducts, plays a fundamental role . . . : it is the element of intent implied by the notion of policy or plan. 'It is the intention to harm the victim State, which is brought up to date through the attack on the rights of its nationals, which provides the jurisdiction

consideration as composite acts in the environmental context, such as certain war crimes involving the environment,[220] conduct consisting of a series of failures to adhere to procedural obligations under the Paris Agreement, for example, would not constitute a composite breach. Acts or omissions that predate the establishment of an international obligation to take reasonable or appropriate measures to prevent or mitigate significant transboundary environmental harm likewise would not attach by way of composite breach to any alleged wrongful act post-dating the establishment of such obligation.

B. Each State Is Separately Responsible for Conduct Attributable to It

5.7 Some States appear to submit that an injured State could hold a single responsible State to account for the wrongful conduct as a whole even where the harm is caused by multiple responsible States.[221] However, "[i]n international law, the general principle in the case of a plurality of responsible States is that each State is separately responsible for conduct attributable to it . . . . The principle of independent responsibility reflects the position under general international law, in the absence of agreement to the contrary between States concerned."[222] States remain at liberty to stipulate to joint and several liability by consenting to it through separate agreements, *i.e.*, through *lex specialis*.[223] But as the United States and others have maintained, "apart from such agreements, . . . states should only be held liable to the extent the degree of injury suffered by a wronged state can be attributed to the conduct of the breaching state."[224]

(ressort) of wrongfulness, and this intention existed at the beginning of the State conduct.'" (citing ERIC WYLER, L'ILLICITE ET LA CONDITION DES PERSONNES PRIVEES 57 (1995))) (U.S. Annex 5).

[220] *See, e.g.*, Rome Statute of the International Criminal Court, art. 8(2)(b)(iv), July 17, 1998, 2187 U.N.T.S. 90 ("For the purpose of this Statute, 'war crimes' means [*inter alia*]: . . . [i]ntentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated."), https://perma.cc/RNV6-5NV6.

[221] *See, e.g.*, Albania Written Statement, ¶ 130; Micronesia Written Statement, ¶ 124.

[222] *ILC Draft Articles on State Responsibility*, art. 47, cmt. ¶ 3; *see also* James Crawford (Special Rapporteur), *Third Report on State Responsibility*, ¶ 277, U.N. Doc. A/CN.4/507/Add.2 (2000), https://perma.cc/M6VA-H7QT ("*Crawford Third Report on State Responsibility*"); John Quigley, *Complicity in International Law: A New Direction in the Law of State Responsibility*, 57 BRIT. Y.B. INT'L L. 77, 129 (1986) (U.S. Annex 6).

[223] *ILC Draft Articles on State Responsibility*, art. 47, cmt. ¶ 5 (stating that, in one example of a treaty that provides for joint and several liability, the Convention on International Liability for Damage Caused by Space Objects "is clearly a lex specialis"); *see generally id.*, art. 55 ("These articles do not apply where and to the extent that the conditions for the existence of an international wrongful act of the content or implementation of the international responsibility of a State are governed by special rules of international law.").

[224] U.S. Dep't of State, *Digest of United States Practice in International Law: 2001*, 379 (citing *Crawford Third Report on State Responsibility*, ¶ 277), https://perma.cc/8PFV-GJ2X. Any other reading of the ILC Draft Articles to effectively permit joint and several liability would not be based on customary international law and State

5.8 Neither the Statute nor the Rules of this Court speak to the issue of apportionment of liability among multiple responsible States.[225] The Court, in fact, has never specifically ruled on the apportionment of liability among multiple jointly responsible States.[226] Blanket analogies to municipal law are no more availing.[227]

5.9 Drawing on the hypothetical of multiple States polluting a river, the ILC commentary to the Draft Articles on State Responsibility states that "situations can also arise where several States by separate internationally wrongful conduct have contributed to causing the same damage."[228] In such circumstances, "[t]he identification of such an act will depend on the particular primary obligation, and cannot be prescribed in the abstract."[229] Rather, "the responsibility of each participating State is determined individually, on the basis of its own conduct and by reference to its own international obligations."[230]

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practice. *See id.* at 365, 380 (expressing the U.S. objective of "aligning [the Draft Articles] more closely with customary international law and state practice," and further that the Draft Articles, as they stood in March 2001, "continue[d] to deviate from customary international law and state practice"). *See also Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections of the Government of Australia, ¶ 298 (Dec. 1990) ("There is no evidence of the existence in customary international law of a general regime of joint and several liability in cases where damage results from the joint action of more than one subject of international law. Such a rule only exists where there is agreement."), https://perma.cc/P47T-HU5Z.

[225] *Cf.* ICJ Statute; Rules of Court (1978) (as amended), https://perma.cc/XBM9-RZWG.

[226] Alexander Orakhelashvili, *Division of Reparation Between Responsible Entities*, *in* THE LAW OF INTERNATIONAL RESPONSIBILITY 647, 649 (James Crawford et al. eds., 2010) ("Attempts to locate the applicable principles are not assisted by the fact that in practice cases involving the responsibility of multiple States for the same wrongful act have quite often been settled, rejected or discontinued before reaching the stage at which the reparation is determined . . . .") (citations omitted)) (U.S. Annex 7). For example, in *Certain Phosphate Lands in Nauru*, the Court held that joint and several responsibility of three States tasked with the administration of a trust territory did not render inadmissible a claim brought against only one of those States. *See Certain Phosphate Lands in Nauru (Nauru v. Australia)*, 1992 I.C.J. 240, 258-59, ¶ 48 (June 26), https://perma.cc/7CYT-WST9 ("*Certain Phosphate Lands in Nauru*"). But as the ILC noted, "[t]he Court was careful to add that its decision on jurisdiction 'does not settle the question whether reparation would be due from Australia, if found responsible, for the whole or only for part of the damage Nauru alleges it has suffered.'" *ILC Draft Articles on State Responsibility*, art. 47, cmt. ¶ 4 (quoting *Certain Phosphate Lands in Nauru*, ¶ 48). The parties settled the case before the issue was addressed by the Court. *Certain Phosphate Lands in Nauru* does not speak directly to joint and several liability. *See Crawford Third Report on State Responsibility*, ¶ 277 (stating that "there is no need to identify [the situation at issue in *Certain Phosphate Lands in Nauru*] with 'joint and several liability'. . . . States are free to incorporate that principle into their agreement" through *lex specialis*).

[227] *ILC Draft Articles on State Responsibility*, art. 47, cmt. ¶ 3. The United States in a specific context in another case nearly 70 years ago drew on municipal law to argue that a respondent State should be jointly and severally liable. *Aerial Incident of 27 July 1955 (United States of America v. Bulgaria)*, U.S. Memorial, 227-33 (Dec. 2, 1958), https://perma.cc/U8ZH-MC2M. The United States withdrew the case before the Court had occasion to rule on the issue, and, as noted *supra*, the United States has subsequently clarified that, absent *lex specialis* to the contrary, States should only be held liable to the extent the degree of injury suffered by a wronged State can be attributed to the conduct of the breaching State.

[228] *ILC Draft Articles on State Responsibility,* art. 47, cmt. ¶ 8.

[229] *Id*.

[230] *Id*.

5.10 The problem of anthropogenic GHG emissions does not present a situation in which "one State . . . direct[s] and control[s] another State in the commission of the same internationally wrongful act by the latter . . . ."[231] That context also does not present a situation in which two or more States carry out a joint operation, or a situation in which those States "act through a common organ . . . , e.g. a joint authority responsible for the management of a boundary river."[232] To the extent primary obligations give rise to responsibility for harm caused by anthropogenic GHG emissions, the general principle still applies: in the case of a plurality of responsible States, each State is separately responsible only for conduct attributable to it.[233]

C. Legal Consequences Require Proof of Causation

5.11 As the United States explained in its Written Statement, when a State breaches an international obligation, it is under a continuing duty to perform the obligation breached, cease the relevant internationally wrongful act or omission, and make full reparation for the injury caused.[234] The gravity of any given breach does not impact these requirements.[235] Importantly, the obligation to make full reparation requires a causal link between the

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[231] *Id.*, art. 47, cmt. ¶ 2.

[232] *Id.*; *see also* BRIAN D. SMITH, STATE RESPONSIBILITY AND THE MARINE ENVIRONMENT 61 (1988) ("The factors cited in support of joint and several liability for participants in common enterprises do not apply in the circumstance of independent actors producing a single harm. By definition, such wrongdoers have neither the prior opportunity to establish substantive or procedural rights with respect to the sharing of liability nor the communal benefits and expectations present in the concerted conduct situation.") (U.S. Annex 8).

[233] BRIAN D. SMITH, STATE RESPONSIBILITY AND THE MARINE ENVIRONMENT 61-62 (1988) (contrasting "situations in which the acts of any of the of the independent wrongdoers would have been sufficient to cause the harm" with those "in which joint and several liability might result in a state with a relatively minor degree of responsibility standing entirely liable without any effective means to achieve contribution") (U.S. Annex 8).

[234] U.S. Written Statement, ¶¶ 5.5-5.6.

[235] Some submissions argue that alleged violations of purported international obligations constitute "a serious breach by a State of an obligation arising under a peremptory norm of general international law," citing Draft Articles 40 and 41 of the ILC Draft Articles on State Responsibility. There are no qualitative distinctions among wrongful acts and, as the United States stated at the time of the Draft Articles' conclusion, almost any breach of international obligation could be described as meeting the criteria for a serious breach. Indeed, the United States cautioned at the time that such an uncabined rule might encourage injured States to argue that an ordinary breach is in fact a "serious breach." U.S. Dep't of State, *Digest of United States Practice in International Law: 2001*, 372-73, https://perma.cc/8PFV-GJ2X. To the extent the Draft Articles propose additional obligations related to "serious breaches," these proposals are progressive development and not binding on States.

Some have also highlighted the alleged *erga omnes* character of various obligations. *See, e.g.*, Egypt Written Statement, ¶ 335 (asserting that many human rights obligations, such as the right to life, are obligations *erga omnes*); Slovenia Written Statement, ¶ 36 (asserting that obligations to implement a purported right to a clean, healthy, and sustainable environment are obligations *erga omnes*). This is a distinction without a difference, as the *erga omnes* character of an obligation has no bearing on the responsibility of a breaching State to perform the obligation, cease the wrongful act or omission, or make full reparation.

internationally wrongful act and any injury alleged.[236] "As a general rule, it falls to the party seeking compensation to prove the existence of a causal nexus between the internationally wrongful act and the injury suffered."[237]

5.12 Both "causality in fact"—that the State's conduct must cause an outcome that would not have occurred absent the breach[238]—and some criterion of "directness," "proximity" or "foreseeability" must be demonstrated.[239] In the words of the Court, a claimant must demonstrate a "sufficiently direct and certain causal nexus between the wrongful act . . . and the injury suffered . . . ."[240] Accordingly, a finding of an internationally wrongful act "does not give rise to an obligation to make reparation for all that comes afterwards."[241]

5.13 Some submissions cite statements by the Court on the questions of causation and calculation of compensation, but these statements are taken out of context. For example, although the Court stated in *Armed Activities* that the "causal nexus required may vary depending on the primary rule violated and the nature and extent of the injury,"[242] that should not be understood to mean that causation may be assumed based on the existence of a breach and an independent finding of harm, thereby dispensing with the causation requirement altogether. Instead, in *Armed Activities*, the Court was clear that, in the "*particular . . . case of damage resulting from war*," the question of the causal nexus would be considered "in light of the facts of [the] case and the evidence available."[243] In other words, the Court would

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[236] *See generally ILC Draft Articles on State Responsibility*, art. 31, cmt. ¶ 9. *See also* U.S. Written Statement, ¶ 5.7, n.383.

[237] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, 2022 I.C.J. 13, 48, ¶ 93 (Feb. 9), https://perma.cc/QEZ9-9T47 ("*Armed Activities on the Territory of the Congo*"); *see also Activities in the Area*, ITLOS Rep. at 60, ¶ 182 ("[s]uch a causal link cannot be presumed and must be proven").

[238] *See* U.S. Written Statement, ¶ 5.8 and accompanying footnotes.

[239] *See ILC Draft Articles on State Responsibility*, art. 31, cmt. ¶ 10. *See also* U.S. Written Statement, ¶ 5.9 and accompanying footnotes.

[240] *Crime of Genocide*, 2007 I.C.J. at 234, ¶ 462. *See also Armed Activities on the Territory of the Congo*, 2022 I.C.J. at 48, ¶ 93; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, 2018 I.C.J. 15, 26, ¶ 32 (Feb. 2), https://perma.cc/V7Q6-4ZGZ ("*Certain Activities Carried Out by Nicaragua*"); *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, 2012 I.C.J. 324, 331-32, ¶ 14 (June 19), https://perma.cc/W3MH-DRQV.

[241] *Armed Activities on the Territory of the Congo*, 2022 I.C.J. at 130, ¶ 382 (finding that compensation can only be awarded for losses that were not "too remote from the unlawful use of force" and "Uganda's conduct [was] not the only relevant cause of all that happened during the conflict").

[242] *Id.* at 48, ¶ 93.

[243] *Id.* at 48, ¶ 94 (emphasis added).

address the question of a causal nexus not in the abstract but "between Uganda's internationally wrongful acts and the various forms of damage allegedly suffered by the DRC."[244]

5.14 Similarly, in the *Certain Activities* case, the Court noted that, in the case of alleged environmental damage, there may be uncertainty "due to several concurrent causes, or the state of science regarding the causal link between the wrongful act and the damage."[245] Here, too, the Court was clear that the issues must be addressed "as and when they arise in light of the facts of the case at hand,"[246] and not in the abstract.

5.15 With respect to calculating compensation, the Court also recognized that some uncertainty does not necessarily preclude a determination of compensation, but such uncertainty is not unbounded.[247] For example, in the *Armed Activities* case, the Court rejected the applicant's argument to calculate compensation based on the proportion of Congolese territory under Ugandan influence, noting that this methodology has "no basis in law or in fact."[248] Importantly, the Court found that any compensation determination that takes account of equitable considerations should be done only "on an exceptional basis . . . *where the evidence leaves no doubt that an internationally wrongful act has caused a substantiated injury*, but does not allow a precise evaluation of the extent or scale of such injury."[249]

5.16 In all cases, as the Court has stated on multiple occasions, how these questions might be resolved in a situation of a finding of breach of an internationally wrongful act will depend on the facts of a particular situation.

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[244] *Id.*

[245] *Certain Activities Carried Out by Nicaragua*, 2018 I.C.J. at 26, ¶ 34.

[246] *Id.*

[247] *See Armed Activities on the Territory of the Congo*, 2022 I.C.J. at 52, ¶ 106.

[248] *Id.* at 49, ¶ 97.

[249] *Id.* at 52, ¶ 106 (emphasis added).

CHAPTER VI
CONCLUSION

6.1 The more than 90 written statements submitted in this proceeding, comprising thousands of pages, attest to the breadth and complexity of the questions referred to the Court by the UN General Assembly. At its core, however, the request seeks an advisory opinion on States' current obligations with respect to the mitigation of anthropogenic GHG emissions, to help guide States' collective efforts to address the unprecedented challenge of climate change.

6.2 As the submissions make clear, international law plays a crucial role in coordinating these collective efforts. Numerous submissions underscore the centrality of the UN climate change regime, and the Paris Agreement in particular, in this respect, noting the "careful" and "delicate" balances struck in the Paris Agreement and the UNFCCC to obtain near-universal adherence, while providing a legal framework for transparent and increasingly ambitious climate action over time. Any other legal obligations relating to climate change mitigation identified by the Court should be interpreted consistently with the obligations States have under this treaty regime.

6.3 The submissions also demonstrate how an accurate understanding of the facts of climate change, including of relative contributions to current global warming and how those contributions are expected to change, is critical context for the Court's advisory opinion. Climate change is global in its causes and effects. It is not caused only or even primarily by GHG emissions from "developed" or "industrialized" countries.[250] Action by all States—and, in particular, all the world's major GHG emitters when it comes to reducing emissions—is necessary to address this unprecedented collective action problem.[251]

6.4 States' most current expression of their consent to be bound by international law in respect of climate change, the Paris Agreement, reflects these facts and the collective effort needed of all States. In particular, the Agreement's key mitigation-related obligations, in article 4, apply to all Parties.[252] In that regard, States adopted a "spectrum" approach to differentiation, not a bifurcated developed-developing country approach. This is reflected, for

[250] *See supra* Chapter II; *see also* U.S. Written Statement, Chapter II.

[251] *See supra* Chapter II; *see also* U.S. Written Statement, Chapter II.

[252] *See supra* Chapter III; *see also* U.S. Written Statement, ¶¶ 3.16-3.18.

example, in the nationally determined nature of the mitigation contributions each Party agreed to prepare, submit, and maintain under the Paris Agreement.

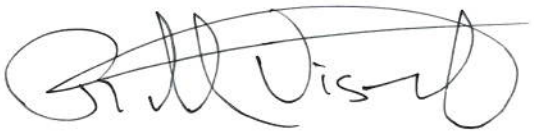
6.5 In this respect, the United States emphasizes that "common but differentiated responsibilities and respective capabilities" is not an overarching principle of the Paris Agreement, customary international law, or a general principle of law. There is no legal basis to interpret or apply the Paris Agreement's provisions in light of it.[253] Rather, the Agreement's provisions themselves were drafted to reflect CBDR/RC "in the light of different national circumstances." Those provisions that reflect differentiation do so in different ways and must be interpreted according to their own terms.[254]

6.6 This advisory proceeding comes at an important moment. This is the critical decade for action to keep within reach the non-legally binding goal of limiting global average temperature rise to 1.5°C. It is also a key point in the Paris Agreement's "ambition cycle," with Parties' next nationally determined contributions under the Paris Agreement due in February 2025. With an advisory opinion that underscores the centrality of States' obligations under the UN climate change regime and is mindful of the careful balance struck in the Paris Agreement to attract broad participation while also delivering increasingly ambitious climate action over time, the Court could reinforce both the Paris Agreement's ambition mechanism and the ongoing negotiations in the UN climate change regime. It is those diplomatic efforts that provide the best means for protecting the climate system for the benefit of present and future generations.

[253] The same is the case for any customary international law the Court might examine.

[254] *See supra* Chapters III.A, IV.A; *see also* U.S. Written Statement, Chapters II.B, III.B, III.C.

Respectfully submitted,



Richard C. Visek
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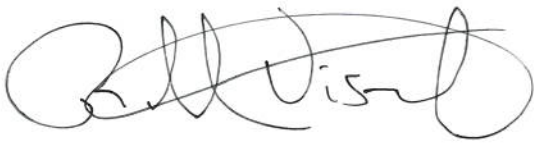
August 15, 2024

CERTIFICATION

I, Richard C. Visek, representative of the United States of America, hereby certify that the copies of these written comments and all documents annexed to it are true copies of the originals.



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