INTERNATIONAL COURT OF JUSTICE

OBLIGATIONS OF STATES IN RESPECT OF CLIMATE CHANGE

ADVISORY PROCEEDINGS

(REQUEST FOR AN ADVISORY OPINION)

WRITTEN COMMENTS OF BARBADOS

15 August 2024

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TABLE OF CONTENTS

I. INTRODUCTION....4

II. SUMMARY OF WRITTEN COMMENTS....6

III. THE CLIMATE CRISIS IS AFFECTING THE GLOBAL FINANCIAL SYSTEM IN WAYS THAT ARE SEVERELY DETRIMENTAL TO SMALL ISLAND AND DEVELOPING STATES....10

IV. THE UNFCCC, THE KYOTO PROTOCOL AND THE PARIS AGREEMENT DO NOT DISPLACE STATES' OBLIGATIONS ARISING FROM OTHER SOURCES OF INTERNATIONAL LAW....13

A. In their written statements, some States and international organisations have disagreed on the legal effects of these Initial Climate Change Agreements....14

B. Nothing in the texts of the Initial Climate Change Agreements, the circumstances of their adoption or subsequent State practice related to them suggests that they displaced all other relevant sources of international law....16

1. The texts of the Initial Climate Change Agreements expressly acknowledge the continued relevance of other sources of international law....16

2. When the treaties were adopted, numerous States confirmed that the Initial Climate Change Agreements did not displace other relevant sources of international law....18

3. The texts of the three treaties, statements made when they were adopted and State statements and practice since their adoption also demonstrate they were considered initial starting points that would be followed by more concrete solutions to the climate crisis....19

C. There is no legal basis to impose the three Initial Climate Change Agreements as the solely relevant source of international law....25

1. *Lex specialis derogat legi generali* does not apply because the three treaties are not inconsistent with other sources of international law nor are they more concrete than other sources of international law....27

2. The Initial Climate Change Agreements are not an "entirely efficacious" set of international rules and so do not satisfy the conditions for a "self-contained" regime.....29

3. This Court should not act as a legislator to impose the Initial Climate Change Obligations as the exclusively relevant source of law.....31

D. International and domestic judicial authorities have found, numerous times, that the Initial Climate Change Agreements do not displace all other source of law.....32

1. The ITLOS advisory opinion of 21 May 2024.....33

2. The ECtHR decision of 9 April 2024.....34

3. The Supreme Court of India decision of 21 March 2024.....35

4. The Belgian French-Speaking Court of Appeal decision of 30 November 2023.....36

5. The IACtHR decision of 27 November 2023.....36

6. The Romanian Court of Appeal in Cluj decision of June 2023..37

7. The Supreme Court of Pakistan decision of 15 April 2021.....37

8. The French Conseil d'État decision of 1 July 2021.....38

9. The Mexican Supreme Court decision of 15 January 2020.....38

10. The Dutch Supreme Court decision of 20 November 2019 39

11. Many other courts have confirmed that their respective States must take measures beyond those set forth in the Initial Climate Change Agreements, based on the universally recognised principle that a State must protect its own environment 39

V. THE COURT SHOULD EXPLAIN THE OBLIGATION OF STATES THAT CONTRIBUTED TO CLIMATE CHANGE TO PROVIDE REDRESS TO THE STATES HARMED BY IT.....40

A. This Court should explain the relevance and scope of the obligation to provide redress to guide States in their future climate change negotiations and lead to other concrete benefits.....41

B. The obligation to provide redress for climate change harms is one of strict or absolute liability, arising solely from the creation of transboundary harm.....45

C. The obligation to provide redress for climate change harms applies notwithstanding multiple States contributed to the harm and the exact measure of damages is arguably difficult to define precisely 57

D. The argument that no State or its predecessor knew or could have known about climate change until the first IPCC report was issued in 1990 is based on a misunderstanding of the complete historical record.....64

VI. CONCLUSION.....73

I. INTRODUCTION

1. Barbados submits these written comments in accordance with the Order dated 30 May 2024 in this proceeding.

2. Reviewing the "highest number of written statements ever to have been filed in advisory proceedings before the Court" (91 in total),[1] virtually all submitters have agreed that:

   a. this Court has jurisdiction to answer the questions in this advisory proceeding and it should exercise that jurisdiction;[2]

   b. climate change has been and is still being caused by anthropogenic gas emissions;

   c. anthropogenic gas emissions have caused a crisis affecting the entire world, especially developing and small island States; and

   d. there exists, *lex lata*, general principles of international law that govern States' obligations arising out of climate change.[3] (The disagreement is only whether those principles have been displaced by the United Nations Framework Convention on Climate Change (the "**UNFCCC**"), the Kyoto Protocol and the Paris Agreement (collectively, the "**Initial Climate Change Agreements**")).

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1 ICJ Press Release No. 2024/31, 12 April 2024.

2 The sole exception is the Islamic Republic of Iran's argument against the admissibility of this proceeding (*see* Written Statement of the Islamic Republic of Iran, 22 March 2024, Section II).

3 This includes principles arising out of the transboundary harm doctrine, the law of State responsibility, international environmental law and international human rights law.

3. As Barbados respectfully submits, this Court is therefore asked to resolve limited, albeit material, disagreements on international law arising in those 91 written statements. To this end, Barbados herein submits these written comments, which serve two tasks.

4. First, these comments provide legal updates from other judicial proceedings relating to climate change since March 2024.[4]

5. Second, these comments address two discrete matters on which States have disagreed in their written statements, namely:

   a. whether the Initial Climate Change Agreements displace general principles of international law otherwise relevant to States' obligations concerning climate change; and

   b. the relevance and scope of the obligation to provide redress for climate change harms arising from the law of State responsibility.

6. **Section II** provides a summary of these written comments. After this, **Section III** provides further information to this Court on climate change matters from the IACtHR proceedings – namely, Barbados provides a copy of a 12 August 2024 submission specifically requested by the IACtHR on the adverse impacts of climate change on the global financial system. **Section IV** explains why, in Barbados's submission, the Initial Climate Change Agreements do not displace relevant obligations on States found in other sources of international law. In **Section V**, Barbados then respectfully explains why, under the law of State responsibility, the Court

[4] This includes a 12 August 2024 submission to the Inter-American Court of Human Rights ("**IACtHR**") on the impacts of the climate crisis on the global financial system, as requested specifically from Barbados by Judge Hernández López of that court, as well as judicial decisions issued by the International Tribunal for the Law of the Sea ("**ITLOS**"), the European Court of Human Rights ("**ECtHR**") and the Supreme Court of India.

should recognise the obligation of States which historically and currently have contributed to climate change to provide compensation to those that did not and that do not have the fiscal space effectively to mitigate, ameliorate and adapt to it unassisted. **Section VI** then provides a conclusion to these written comments, modifying Barbados's prior requests to this Court to include also a request for the Court's advisory opinion to address the impacts of climate change on the global financial system.

II. SUMMARY OF WRITTEN COMMENTS

7. Apart from the outlier cases of conspiracy theorists and those who have economic interests otherwise, it is universally accepted that anthropogenic gas emissions have caused a climate crisis. As the 91 written statements have made clear, unjustly, the most severe consequences of the climate crisis are being visited on precisely those States that lack the capacity to address them – developing and small island States.

8. As but another example of this unjust result, Barbados submits with these comments a recent post-hearing submission it provided to the IACtHR at that court's request.[5] That submission describes three ways that the climate crisis is damaging the global financial system to the detriment of developing and small island States, through no fault of their own. Namely, the climate crisis is:

[5] *See* Section III below.

a. making private investment less profitable and less attractive in developing countries that need private investment the most;

b. making sovereign debt more expensive for developing States and forcing them to spend more on debt repayment and less on public projects, the public good or good governance; and

c. raising the cost of insurance and making it unavailable, so as again to act as a barrier to more investment in these countries.

9. Although the 91 written statements agree on these and other consequences of the climate crisis, they disagree on States' legal obligations to combat it. In this proceeding, a narrow segment of States have argued – as they do in public – that the hard work of international legal negotiation on climate change is now finished. They have taken the position that three treaties – the UNFCCC, the Kyoto Protocol and the Paris Agreement (defined above as the Initial Climate Change Agreements) – stand as the universal and exclusive source of law in respect of climate crisis obligations. No other source of international law, they argue, is relevant to define States' obligations concerning the climate crisis.

10. The international community would benefit greatly if this Court were to correct that misapprehension of the relevant law, so that climate change negotiation could continue under a common legal framework. The texts of the Initial Climate Change Agreements confirm they complement and work with other sources of international law.[6] Numerous States confirmed that fact at the time the treaties were negotiated, without

[6] *See* Section IV.B.1 below.

objection.[7] States have also confirmed, as is correct, that the Initial Climate Change Agreements are inchoate, a so-called "first step"[8] towards more robust legal solutions.[9]

11. In this light, there are no legal grounds to accept that the Initial Climate Change Agreements, important as they are, displace all other sources of international law. Instead:

a. the doctrine of *lex specialis derogat legi generali* does not apply. The agreements are not more "concrete" nor more "specialised" than other relevant sources of international law. Nor are the treaties inconsistent with other sources of international law. It is eminently possible to comply with the Initial Climate Change Agreements and other international law;[10]

b. the Initial Climate Change Agreements are far from an "entirely efficacious"[11] regime for climate change, such that they can be called a "self-contained regime". Indeed, as shown below, the treaties are inchoate and incomplete by themselves;[12] and

c. the Court should not act as a legislator and impose the treaties as the exclusively relevant source of law, solely because of policy-based arguments that benefit only certain States.[13]

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7 *See* Section IV.B.2 below.

8 *See*, e.g., paragraphs 38 and 40(a) and (b) below.

9 *See* Section IV.B.3 below.

10 *See* Section IV.C.1 below.

11 *See* Section IV.C.2 below.

12 *See* Section IV.C.2 below.

13 *See* Section IV.C.3 below.

12. Barbados also respectfully submits that the Court should correct some States' misapprehension of the relevance and scope of the law of State responsibility as it relates to the climate crisis. As with any transboundary harm, the obligation to provide redress for causing or permitting climate change harms is one of strict liability. It arises solely when a State harms another State by its actions. As discussed below, this strict liability regime is well-attested, both in international law and as a general principle of law (archaically referred to as a "general principle of law recognized by civilized nations" in the Court's Statute).[14]

13. Moreover, a State cannot escape liability from the obligation to provide redress on the grounds that other States also contributed to the same harm – or that the harm is difficult to calculate. It is established in international law that (a) the obligation of redress follows the doctrine of joint and several liability when there are concurrent liable parties; and (b) the mere difficulty in calculating damages does not relieve the obligation of redress but merely may call for approximation in determining its amount and scope.[15]

14. Finally, Barbados respectfully submits that the Court should correct a factual misunderstanding expressed by some States in their written statements. Factually, it is incorrect to claim that all States in the world, without limitation, could only have known about climate change when the Intergovernmental Panel on Climate Change (the "**IPCC**") issued its first report in 1990.[16] Drawing from the existing record and also by submitting a few new Annexes, Barbados herein shows extensive State knowledge of

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14 *See* Section V.B below.

15 *See* Section V.C below.

16 *See* Section V.D below.

climate change (at least for certain States) well before 1990, indeed starting at least in the early 1960s.[17]

15. Of course, Barbados's purpose is not to assign blame or complain. The Court need not, in an advisory opinion, find that any one State or States are particularly liable for the climate crisis – nor determine the amount of any State's corresponding liability. However, the Court is asked to correct the legal and factual misunderstandings of some States found in their written statements. In doing so, the Court will provide the common legal framework for continuing and future international negotiations to resolve this most pressing and universal crisis with all requisite urgency.[18]

III. THE CLIMATE CRISIS IS AFFECTING THE GLOBAL FINANCIAL SYSTEM IN WAYS THAT ARE SEVERELY DETRIMENTAL TO SMALL ISLAND AND DEVELOPING STATES

16. On 23 May 2024, the IACtHR held oral proceedings in Bridgetown, Barbados in relation to that court's advisory proceedings on States' obligations and the climate crisis. During those proceedings, Judge Hernández López asked Barbados to make a post-hearing submission on how the climate crisis was affecting global financial markets.

17. Barbados filed that post-hearing submission with the IACtHR on 12 August 2024, which Barbados provides also to this Court in the Appendix. In that submission, Barbados noted that the climate crisis has real,

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17 *See* Section V.D below.

18 *See* Section V.A below.

physical consequences on small island and developing States. This includes shortened lifespans, beach erosion, loss of fisheries, declines in agricultural production, harm to industries like tourism and severe weather events and natural disasters.

18. Barbados then showed that these physical consequences also affect the global financial system as it intersects with small island and developing States, by:

    a. making investment in small island and developing States less profitable and less attractive, thereby increasing the so-called "cost of capital" of those countries and disincentivising investment in those countries that need it most;

    b. making sovereign debt borrowing more expensive for the same States, as those States become riskier debtors. This makes it harder for developing States to finance public projects and perform basic government functions; and

    c. making insurance more expensive to obtain and less available, even as insurance is the core financial product necessary for most major financial transactions and activities.

19. In relation to insurance, the aftermath of the recent Hurricane Beryl, which struck the Caribbean in early July 2024, shows the disastrous effect of lack of insurance. Hurricane Beryl destroyed hundreds of fishing vessels in Barbados, many of which were not insured. As a result, the fishing industry will struggle to obtain the funds for the repair or

repurchase of the vessels needed to revive this vital industry in Barbados.[19]

20. In light of these adverse impacts, Barbados has been leading international dialogue to address the disproportionate burden of climate change on small island and developing States like Barbados. This includes: (a) the 2021 Bridgetown Declaration;[20] (b) the 2022 Bridgetown Initiative for the Reform of the Global Financial Architecture;[21] and (c), more recently, a consultation on a new Bridgetown Initiative 3.0, calling on further action in this sphere given the inadequacy of current international efforts to finance climate resilience measures.[22] Other States have similarly called for action to tackle the disproportionate financial and other burdens that climate change imposes on small island and developing States, such as over 50 States of the Climate Vulnerable Forum.[23]

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19 *See* Supplemental written observations requested by the Inter-American Court of Human Rights from Barbados, 12 August 2024, Section V.A, Appendix.

20 *See* Bridgetown Declaration, Report XXII Meeting of the Forum of Ministers of Environment of Latin America and the Caribbean, 1-2 February 2021, Annex III, UNEP/LAC-IG.XXII/7, 5 February 2021, Annex 307.

21 *See* The 2022 Bridgetown Agenda for the Reform of the Global Financial Architecture, *Government of Barbados, Ministry of Foreign Affairs and Foreign Trade*, 23 September 2022, Annex 311.

22 *See* "Bridgetown Initiative 3.0, Consultation Draft (28th May 2024)", *Bridgetown Initiative*, 28 May 2024, Annex 615.

23 The participants of the Climate Vulnerable Forum include: Afghanistan, Bangladesh, Barbados, Benin, Bhutan, Burkina Faso, Cambodia, Colombia, Comoros, Costa Rica, Democratic Republic of the Congo, Dominican Republic, Eswatini, Ethiopia, The Gambia, Ghana, Grenada, Guatemala, Guinea, Guyana, Haiti, Honduras, Fiji, Kenya, Kiribati, Lebanon, Liberia, Madagascar, Maldives, Malawi, Marshall Islands, Mongolia, Morocco, Nepal, Nicaragua, Niger, Palau, Papua New Guinea, Palestine, Philippines, Rwanda, Saint Lucia, Samoa, Senegal, South Sudan, Sri Lanka, Sudan, Tanzania, Timor-Leste, Tunisia, Tuvalu, Uganda, Vanuatu, Vietnam and Yemen (*see* "The Climate Vulnerable Forum & The Vulnerable Group of Twenty – An Overview Guide", *Climate Vulnerable Forum, Vulnerable Twenty Group*, 2022, page 13, Annex 369 bis). In addition, the representatives of the V20 Finance Ministers of the Climate Vulnerable

21. Barbados's submission also sets forth measures that can alleviate these adverse events. As Barbados's Prime Minister Mia Mottley has stated:

> There are a number of countries that, if they were given a shot of adrenaline, a bit of liquidity, would not find themselves needing to go into full IMF programmes or full structural transformation. And if we give them that, it will ease the pressure on all of us.[24]

IV. THE UNFCCC, THE KYOTO PROTOCOL AND THE PARIS AGREEMENT DO NOT DISPLACE STATES' OBLIGATIONS ARISING FROM OTHER SOURCES OF INTERNATIONAL LAW

22. Reviewing the 91 written statements, some States and international organisations have argued that the UNFCCC, the Kyoto Protocol and the Paris Agreement (defined above as the Initial Climate Change Agreements) displace all other sources of international law concerning States' obligations related to the climate crisis (*see* **Section IV.A** below). Barbados respectfully submits that there is no factual or textual evidence (*see* **Section IV.B** below), nor any cogent legal argument (*see* **Section IV.C** below), that supports that argument. In fact, a significant number of other courts that have considered this question have confirmed that the Initial Climate Change Agreements do not displace other relevant sources of international law (*see* **Section IV.D** below).

Forum "insist on a fairer global system with global financial safety nets that work for the most climate-vulnerable countries by transforming the international financial architecture" through, among other things, debt exchanges for fiscal space (*see* "Unlocking Growth and Prosperity through Innovations in Climate Finance and Debt", V20 Ministerial Dialogue XII Communiqué, 16 April 2024, Annex 613).

24 "'Bridgetown Initiative 3.0' unveiled to tackle debt, climate crises", *Barbados Today*, 29 May 2024, Annex 616.

A. In their written statements, some States and international organisations have disagreed on the legal effects of these Initial Climate Change Agreements

23. When the UN General Assembly unanimously requested this proceeding,[25] it asked this Court to render an advisory opinion based on all applicable international legal sources.[26] In their written statements, most States and international organisations thus discussed numerous relevant sources of international law.[27]

24. A minority of submitters adopted a narrower approach. They argued that the Initial Climate Change Agreements represent the entire corpus of now-relevant international law on three bases:

a. **the *lex specialis* argument**: they argued that the Initial Climate Change Agreements are the more "specialised" [28] form of law that

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25 *See* Request for Advisory Opinion by the Secretary-General of the United Nations dated 12 April 2023.

26 S*ee* Request for Advisory Opinion by the Secretary-General of the United Nations dated 12 April 2023, page 2 ("Having particular regard to the Charter of the United Nations, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the United Nations Framework Convention on Climate Change, the Paris Agreement, the United Nations Convention on the Law of the Sea, the duty of due diligence, the rights recognized in the Universal Declaration of Human Rights, the principle of prevention of significant harm to the environment and the duty to protect and preserve the marine environment").

27 *See*, e.g., Written Statement of Barbados, 22 March 2024 ("**Written Statement of Barbados**"), Section VI; Written statement submitted by the Republic of Vanuatu, 21 March 2024, Chapter IV, Sections 4.4.3 and 4.4.4; Written Statement of the Commission of Small Island States on Climate Change and International Law, 22 March 2024, Chapter III; Written Statement of the Republic of Chile, 22 March 2024, Chapter III. This included treaties, customary international law, international environmental law, transboundary harm doctrines, international human rights law, the law of the sea and the law of State responsibility.

28 *See*, e.g., Written Statement of Australia, 22 March 2024, Chapter 2 and paragraph 6.1; Written Statement of the People's Republic of China, 22 March 2024, paragraphs 92-96; Written Statement of the United Kingdom of Great Britain and Northern Ireland, 18 March 2024, paragraphs 4.3, 33. *See also*, e.g., Written Statement of the Federative

displace other sources of international law through the principle of *lex specialis derogat legi generali*; [29]

b. **the self-contained regime argument**: they argued that the Initial Climate Change Agreements are a self-contained regime governing every facet of the international climate change law;[30] and

c. **the policy argument**: they argued that the Court should impose the Initial Climate Change Agreements as the exclusively relevant source of law because this would be better international policy.[31]

Republic of Brazil, 21 March 2024, paragraph 10; Written Statement of the Government Canada, 20 March 2024, paragraph 11; Written Statement of the European Union, 22 March 2024, paragraphs 90-95; Written Statement by Republic of India, 21 March 2024, Section IV; Written Statement of the Islamic Republic of Iran in Advisory Proceedings concerning Obligations of States in respect of Climate Change, 22 March 2024, Chapter III and paragraphs 163-164; Written Statement of New Zealand, 22 March 2024, paragraphs 15, 21; Written Statement of the Kingdom of Tonga, 22 March 2024, paragraph 124; Written Statement of the United Arab Emirates, 22 March 2024, paragraphs 17, 99; Written Statement of the United States of America, 22 March 2024, Chapter IV.

29 *See*, e.g., Written Statement of the Government of Japan, 22 March 2024, paragraphs 14-16; Written Statement of the State of Kuwait, 22 March 2024, Chapter II.B; Written Statement of the Organization of the Petroleum Exporting Countries (OPEC), 19 March 2024, Chapter IV; Written Statement of the Russian Federation, 21 March 2024, page 20; Written Statement of the Kingdom of Saudi Arabia, 21 March 2024, Chapters 4, 5 and 6; Written Statement of the Government of the Republic of South Africa, 22 March 2024, paragraph 131. *See also*, e.g., Written Statement of the United States of America, 22 March 2024, paragraph 4.25 and footnote 320.

30 *See* Written Statement of the State of Kuwait, 22 March 2024, paragraph 87 and footnote 53; Written Statement of the Organization of the Petroleum Exporting Countries (OPEC), 19 March 2024, Chapter IV. *See also*, e.g., Written Statement of the European Union, 22 March 2024, paragraphs 351-353; Written Statement by Republic of India, 21 March 2024, Section IV; Written Statement of New Zealand, 22 March 2024, paragraphs 15, 21.

31 *See* Written Statement of the Organization of the Petroleum Exporting Countries (OPEC), 19 March 2024, paragraph 31.

25. In this section, Barbados respectfully submits that these three arguments are incorrect. First, these arguments do not accurately reflect the texts of, negotiating history of or State practice concerning the Initial Climate Change Agreements (*see* **Section IV.B** below). Second, these arguments do not satisfy established legal standards to demonstrate that the Initial Climate Change Agreements are hierarchically superior to or prevail over all other sources of international law (*see* **Section IV.C** below).

B. Nothing in the texts of the Initial Climate Change Agreements, the circumstances of their adoption or subsequent State practice related to them suggests that they displaced all other relevant sources of international law

26. As a factual matter, the position that the Initial Climate Change Agreements displace all other relevant sources of international law is disproven by: (a) the actual texts the Initial Climate Change Agreements themselves (*see* **Section IV.B.1** below); (b) the statements made by States when they were adopted (*see* **Section IV.B.2** below); and (c) the fact that the texts of the agreements and the statements and practice of States confirm that these agreements were considered starting points towards further, more concrete solutions (*see* **Section IV.B.3** below).

1. The texts of the Initial Climate Change Agreements expressly acknowledge the continued relevance of other sources of international law

27. The argument that the Initial Climate Change Agreements displace other sources of international law is a surprising one. It ignores the treaties' actual texts. These treaties' texts confirm the relevance of obligations arising out of other sources of international law.

28. For example, the preamble to the UNFCCC recognises the continuing relevance of the law governing inter-State transboundary harm. It says:

> States have, in accordance with the Charter of the United Nations and the principles of international law. . . the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.[32]

29. This preamble also applies to the Kyoto Protocol.[33]

30. Similarly, the preamble to the Paris Agreement acknowledges the continued relevance of international human rights law and international development law. It states that, "when taking action to address climate change" States must "respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development" including also "gender equality, empowerment of women and intergenerational equity."[34]

31. The Paris Agreement also explicitly did not address liability or compensation for climate change harm. In this way, it expressly leaves the law of State responsibility untouched by its terms. The decision

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32 United Nations Framework Convention on Climate Change, 9 May 1992, 1771 UNTS 107 ("**UNFCCC**"), Recitals, page 166, Annex 112.

33 *See* Kyoto Protocol to The United Nations Framework Convention on Climate Change, 11 December 1997, FCCC/CP/1997/L.7/Add.1 ("**Kyoto Protocol**"), Recitals, Annex 131; Doha Amendment to the Kyoto Protocol, 8 December 2012, 3377 UNTS, Annex 570.

34 Paris Agreement, 12 December 2015, 3156 UNTS 79 ("**Paris Agreement**"), Recitals, page 144, Annex 156.

adopting the Paris Agreement said that the agreement "does not ***involve*** or ***provide*** any basis for liability or compensation" (emphasis added).[35]

32. These express textual references do not relegate other sources of international law to mere "guiding 'principles,'" as suggested by one international organisation.[36] The phrase "principles of international law," as used in the UNFCCC, is not modified by any adjective such as "guiding." Instead, the UNFCCC refers specifically to the "responsibility" of States to prevent transboundary harm.[37] Similarly, the Paris Agreement discusses the "respective obligations" of States arising out of international human rights law and international development law.[38] "Responsibility" and "obligations" are references to mandatory legal obligations and not to mere "guiding principles."

33. The treaties' texts are clear: the treaties complement, and do not supplant, other obligations arising out of other sources of international law.

2. When the treaties were adopted, numerous States confirmed that the Initial Climate Change Agreements did not displace other relevant sources of international law

34. When the Initial Climate Change Agreements were adopted, numerous States made statements confirming the treaties did not displace other relevant sources of international law. Thirteen States made such

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35 Adoption of the Paris Agreement, Decision 1/CP.21, Report of the Conference of the Parties on its Twenty-First Session, held in Paris from 30 November to 13 December 2015, Addendum, Part two: Action taken by the Conference of the Parties at its Twenty-First Session, FCCC/CP/2015/10/Add.1, 29 January 2016, paragraph 51, Annex 293.

36 Written Statement of the Organization of the Petroleum Exporting Countries (OPEC), 19 March 2024, paragraph 88.

37 UNFCCC, Recitals, page 166, Annex 112.

38 Paris Agreement, Recitals, page 144, Annex 156.

statements in regard to the UNFCCC and Kyoto Protocol[39] and nine in regard to the Paris Agreement.[40] No other State objected.

3. The texts of the three treaties, statements made when they were adopted and State statements and practice since their adoption also demonstrate they were considered initial starting points that would be followed by more concrete solutions to the climate crisis

35. Significant evidence confirms that States negotiated the Initial Climate Change Agreements as initial measures, i.e., as starting points. States intended to supplement them with even better and more concrete solutions in the future. This also shows that these treaties were not intended to displace all other sources of international law.

36. For example, the texts of the three treaties acknowledge that they are first steps towards later developments:

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[39] Interpretive statements were made by Fiji, Kiribati, Nauru, Papua New Guinea, Cook Islands, Belize, Marshall Islands, Micronesia (Federated States of), Solomon Islands, St. Lucia, Tuvalu, Venezuela (Bolivarian Republic of) and Niue (*see* Declarations made upon signature of the United Nations Framework Convention on Climate Change, 1771 UNTS 107, pages 4-5, Annex 604; Declarations made upon signature of the Kyoto Protocol, 2303 UNTS 162, page 4, Annex 605; Declarations made upon signature of the Doha Amendment to the Kyoto Protocol, 3377 UNTS, pages 3-5, Annex 606).

[40] *See* Cook Islands, Ratification of the Paris Agreement, 1 September 2016, C.N.609.2016.Treaties-XXVII.7.d (Depositary Notification), Annex 297; Republic of the Marshall Islands, Ratification of the Paris Agreement, 22 April 2016, C.N.173.2016.Treaties-XXVII.7.d (Depositary Notification), Annex 295; Federated States of Micronesia, Ratification of the Paris Agreement, 15 September 2016, C.N.626.2016.Treaties-XXVII.7.d (Depositary Notification), Annex 298; Republic of Nauru, Ratification of the Paris Agreement, 22 April 2016, C.N.179.2016.Treaties-XXVII.7.d (Depositary Notification), Annex 296; Niue, Ratification of the Paris Agreement, 28 October 2016, C.N.807.2016.Treaties-XXVII.7.d (Depositary Notification), Annex 301; Republic of the Philippines, Ratification of the Paris Agreement, 23 March 2017, C.N.149.2017.Treaties-XXVII.7.d (Depositary Notification), Annex 302; Solomon Islands, Ratification of the Paris Agreement, 21 September 2016, C.N.650.2016.Treaties-XXVII.7.d (Depositary Notification), Annex 299; Tuvalu, Ratification of the Paris Agreement, 22 April 2016, C.N.183.2016.Treaties-XXVII.7.d (Depositary Notification), Annex 294; Republic of Vanuatu, Ratification of the Paris Agreement, 21 September 2016, C.N.653.2016.Treaties-XXVII.7.d (Depositary Notification), Annex 300.

a. the UNFCCC acknowledges that "the global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response";[41]

b. the Kyoto Protocol includes commitments for the Conference of the Parties ("**COP**") to "cooperate with other Parties to enhance the individual and combined effectiveness of their policies and measures adopted under [the UNFCCC]";[42]

c. the Kyoto Protocol (as amended) only had pledges and emission limitation or reduction commitments until 2020 and not thereafter;[43] and

d. the Paris Agreement recognises that the purpose of the agreement is to provide a "progressive response to the urgent threat of climate change"[44] and to "strengthen the global response to climate change."[45] It further includes commitments to enhance capacity "through [other] regional, bilateral and multilateral approaches."[46]

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41 UNFCCC, Recitals, page 166, Annex 112.

42 Kyoto Protocol, Article 2(1)(b), Annex 131.

43 *See* Doha Amendment to the Kyoto Protocol, 8 December 2012, 3377 UNTS, Annex 570.

44 Paris Agreement, Recitals, page 143, Annex 156.

45 Paris Agreement, Article 2, Annex 156.

46 Paris Agreement, Article 11(4), Annex 156.

37. As noted in the decision of the COP adopting the Paris Agreement (COP 21), the Paris Agreement was intended "to mobilize stronger and more ambitious climate action by all Parties and non-Party stakeholders."[47]

38. States made statements confirming this position when the treaties were being negotiated. When the Kyoto Protocol was negotiated at COP 3 (in 1997), Finland stated that the UNFCCC "signed at Rio in 1992 has only set the stage."[48] Similarly, at the same conference, States noted that the Kyoto Protocol:

a. "will only be a first step for the protection of our atmosphere" (Belgium);[49]

b. "is a first step in a long way" (Ethiopia);[50]

c. would "result in further development and strengthening of international climate regime" (Estonia);[51]

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47 Adoption of the Paris Agreement, Decision 1/CP.21, Report of the Conference of the Parties on its Twenty-First Session, held in Paris from 30 November to 13 December 2015, Addendum, Part two: Action taken by the Conference of the Parties at its Twenty-First Session, FCCC/CP/2015/10/Add.1, 29 January 2016, Recital, page 2, Annex 293.

48 Oral statement by Finland at the third session of the Conference of the Parties (COP 3) to the United Nations Framework Convention on Climate Change (UNFCCC), 9 December 1997, page 1, Annex 593.

49 Oral statement by Belgium at the third session of the Conference of the Parties (COP 3) to the United Nations Framework Convention on Climate Change (UNFCCC), 9 December 1997, PDF page 2, Annex 595.

50 Oral statement by Ethiopia at the third session of the Conference of the Parties (COP 3) to the United Nations Framework Convention on Climate Change (UNFCCC), undated, PDF page 1, Annex 596.

51 Oral statement by Estonia at the third session of the Conference of the Parties (COP 3) to the United Nations Framework Convention on Climate Change (UNFCCC), 9 December 1997, PDF page 2, Annex 594.

d. would "lay a solid foundation on which the global community can build a common future in the coming millennium" (South Korea);[52]

e. "lay a solid foundation for a truly global response to climate change" (Australia);[53] and

f. would "become a cornerstone upon which concrete actions . . . to combat the adverse effects of climate change could be well founded" (Indonesia).[54]

39. When the Paris Agreement was adopted at COP 21 (in 2015), Japan similarly noted that "COP 21 is a starting point for the world to collectively tackle with climate change"[55] and Lichtenstein noted that "[t]he journey needs to continue."[56]

40. States' statements made outside the negotiation of the Initial Climate Change Agreements are also to the same effect:

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52 Oral statement by the Republic of Korea at the third session of the Conference of the Parties (COP 3) to the United Nations Framework Convention on Climate Change (UNFCCC), undated, PDF page 3, Annex 597.

53 Oral statement by Australia at the third session of the Conference of the Parties (COP 3) to the United Nations Framework Convention on Climate Change (UNFCCC), 8 December 1997, page 1, Annex 591.

54 Oral statement by Indonesia at the third session of the Conference of the Parties (COP 3) to the United Nations Framework Convention on Climate Change (UNFCCC), 8 December 1997, PDF page 4, Annex 592.

55 Oral statement by Japan at the twenty-first session of the Conference of the Parties (COP 21) to the United Nations Framework Convention on Climate Change (UNFCCC), undated, page 3, Annex 602.

56 Oral statement by Liechtenstein at the twenty-first session of the Conference of the Parties (COP 21) to the United Nations Framework Convention on Climate Change (UNFCCC), 1 December 2015, page 2, Annex 601.

a. in 1998, Indonesia described the Kyoto Protocol as "widely seen" as only a "first step towards limiting the unbridled growth in greenhouse gas emission";[57]

b. also in 1998, Barbados noted that while the Kyoto Protocol was a "first step in forging alliances to foster international consensus on needed actions," the "emission reduction targets it set were completely inadequate";[58]

c. in 2005, the Netherlands (on behalf of the European Union ("**EU**"), Albania, Bulgaria, Croatia, Norway, Romania, Serbia and Montenegro and the former Yugoslav Republic of Macedonia) commented in the UN General Assembly that the Kyoto Protocol provides an "additional legal basis for international efforts to address climate change";[59]

d. in 2008, Argentina noted that "[a]n improved international response requires that all industrialized countries adopt stricter commitments than those set out in the Kyoto Protocol";[60]

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57 Summary record of the 22nd meeting of the fifty-third session of the General Assembly, held on 22 October 1998, A/C.2/53/SR.22, paragraph 7, Annex 598.

58 Summary record of the 22nd meeting of the fifty-third session of the General Assembly held on 22 October 1998, A/C.2/53/SR.22, paragraph 33, Annex 598.

59 Summary record of the 36th meeting of the General Assembly held on 24 November 2004, A/C.2/59/SR.36, paragraph 24, Annex 599.

60 Official records of the 84th meeting of the General Assembly held on 13 February 2008, A/62/PV.84, page 17, Annex 600.

e. in 2016, Cuba noted that "the Paris Agreement constitutes a starting point" and that "it is not sufficient in itself if we want to preserve our planet for future generations";[61]

f. in 2023, Vanuatu noted that "the level of ambition under current nationally determined contributions is still far from what is needed to achieve its target of limiting the increase of global average temperature to 1.5°C above pre-industrial levels";[62]

g. at COP 26, in 2021, Samoa noted that while it acknowledged "efforts by all parties . . . it is concerning that there is still a wide emissions gap in meeting the 1.5°C goal" and that States need to act "with much higher climate ambition";[63]

h. in a joint statement on bilateral cooperation in 2023, the United Kingdom and Luxembourg noted that they would "continue . . . building on . . . commitments agreed at COP26, and identifying future areas of collaboration";[64] and

i. at COP 27, in 2022, the Cook Islands noted its "grave concerns" at scientific findings concerning the implications of States' current

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61 Official records of the 24th meeting of the General Assembly held on 5 October 2016, A/71/PV.24, page 9, Annex 603.

62 Official records of the 64th meeting of the General Assembly held on 29 March 2023, A/77/PV.64, page 2, Annex 611.

63 Oral statement by Samoa at the twenty-sixth session of the Conference of the Parties (COP 26) to the United Nations Framework Convention on Climate Change (UNFCCC), undated, pages 1-2, Annex 607.

64 Joint statement on bilateral cooperation between the United Kingdom of Great Britain and Northern Ireland and the Grand Duchy of Luxembourg 2023, 12 May 2023, paragraph 15, Annex 612.

nationally determined contributions and that the current framework and pledges are "clearly not enough."[65]

41. Finally, States party to the Paris Agreement unilaterally decide what commitments and pledges they will make to reduce greenhouse gas emissions.[66] The COP outcome of the first global stocktake, in 2023, recognised that "Parties are not yet collectively on track towards achieving the purpose of the Paris Agreement and its long-term goals" and that there are "significant gaps, including finance, that remain in responding to the increased scale and frequency of loss and damage, and the associated economic and non-economic losses."[67]

C. There is no legal basis to impose the three Initial Climate Change Agreements as the solely relevant source of international law

42. As this Court is aware, customary international law applies to the extent that States do not "contract out" from it.[68] Merely entering into a treaty is not necessarily enough to disapply general international law.[69] With respect to State responsibility, there is a presumption that international law

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65 Oral statement by the Cook Islands at the twenty-seventh session of the Conference of the Parties (COP 27) to the United Nations Framework Convention on Climate Change (UNFCCC), 8 November 2022, page 2, Annex 610.

66 *See*, e.g., Paris Agreement, Article 4, Annex 156.

67 Outcome of the first global stocktake, Decision -/CMA.5, Conference of the Parties serving as the meeting of the Parties to the Paris Agreement at its fifth session, Advance unedited version, UN Climate Change Conference – United Arab Emirates Nov/Dec 2023, UNFCCC, paragraphs 2, 128, Annex 358.

68 Panel Report, *Korea – Measures Affecting Government Procurement*, WT/DS163/R, adopted 1 May 2000, paragraph 7.96, Annex 624.

69 *See*, e.g., *Southern Bluefin Tuna Case between Australia and Japan and between New Zealand and Japan*, Award on Jurisdiction and Admissibility, 4 August 2000, RIAA, Vol. XXIII, pp. 1-57, paragraph 52, Annex 625.

norms concerning reparations are applicable until proven to have been displaced by a self-contained regime.[70] International courts, including this Court, have confirmed that multiple international legal sources can give rise to complementary and parallel legal obligations, such as in the context of human rights/*jus in bello*[71] and in the context of multiple applicable treaties.[72]

43. Although some written statements have been more ambiguous on this point, there appear to be three stated reasons for the purported primacy of the Initial Climate Change Agreements over all other relevant law. These are (a) *lex specialis derogat legi generali* (*see* **Section IV.C.1** below); (b) self-contained regimes (*see* Section **IV.C.2** below); and (c) a policy-based argument (*see* Section **IV.C.3** below).[73] None of these is legally appropriate.

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70 *See* Third Report on State responsibility by James Crawford, Special Rapporteur, A/CN.4/507, *International Law Commission*, 15 March 2000, paragraph 157, Annex 649.

71 *See*, e.g., *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of 8 July 1996, I.C.J. Reports 1996*, p. 226, paragraph 25, Annex 392; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004, I.C.J. Reports 2004*, p. 136, paragraph 106, Annex 417; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda), Merits, Judgment of 19 December 2005, I.C.J. Reports 2005*, p. 168, paragraph 216, Annex 398.

72 *See*, e.g., *Southern Bluefin Tuna Case between Australia and Japan and between New Zealand and Japan*, Award on Jurisdiction and Admissibility, 4 August 2000, RIAA, Vol. XXIII, pp. 1-57, paragraph 52, Annex 625.

73 For example, no State or international organisation has argued that the Initial Climate Change Agreements are hierarchically superior to other sources of international law, which would in all events be a fruitless argument. Nor have they argued, and nor can they, that the Initial Climate Change Agreements are *ius cogens*, supplanting other sources of international law.

1. *Lex specialis derogat legi generali* does not apply because the three treaties are not inconsistent with other sources of international law nor are they more concrete than other sources of international law

44. Some States have called the Initial Climate Change Agreements a "specialised" source of international law[74] or have expressly described these treaties as "*lex specialis.*"[75] In doing so, these States have correctly accepted that there exist (or existed, until the Initial Climate Change Agreements) other sources of international law that govern States' obligations in respect of climate change. These States argue that those other relevant sources of international law are displaced by the Initial Climate Change Agreements through the doctrine of *lex specialis*.

45. However, these States' submission fails because *lex specialis* does not apply. The principle of *lex specialis derogat legi generali* applies only where (a) legal rules conflict with each other; and (b) one of the legal rules

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74 *See*, e.g., Written Statement of Australia, 22 March 2024, Chapter 2 and paragraph 6.1; Written Statement of the People's Republic of China, 22 March 2024, paragraphs 92-96; Written Statement of the United Kingdom of Great Britain and Northern Ireland, 18 March 2024, paragraphs 4.3, 33. *See also*, e.g., Written Statement of the Federative Republic of Brazil, 21 March 2024, paragraph 10; Written Statement of the Government Canada, 20 March 2024, paragraph 11; Written Statement of the European Union, 22 March 2024, paragraphs 90-95; Written Statement by Republic of India, 21 March 2024, Section IV; Written Statement of the Islamic Republic of Iran in Advisory Proceedings concerning Obligations of States in respect of Climate Change, 22 March 2024, Chapter III and paragraphs 163-164; Written Statement of New Zealand, 22 March 2024, paragraphs 15, 21; Written Statement of the Kingdom of Tonga, 22 March 2024, paragraph 124; Written Statement of the United Arab Emirates, 22 March 2024, paragraphs 17, 99; Written Statement of the United States of America, 22 March 2024, Chapter IV.

75 *See*, e.g., Written Statement of the Government of Japan, 22 March 2024, paragraphs 14-16; Written Statement of the State of Kuwait, 22 March 2024, Chapter II.B; Written Statement of the Organization of the Petroleum Exporting Countries (OPEC), 19 March 2024, Chapter IV; Written Statement of the Russian Federation, 21 March 2024, page 20; Written Statement of the Kingdom of Saudi Arabia, 21 March 2024, Chapters 4, 5 and 6; Written Statement of the Government of the Republic of South Africa, 22 March 2024, paragraph 131. *See also*, e.g., Written Statement of the United States of America, 22 March 2024, paragraph 4.25 and footnote 320.

is more "concrete" than the other and thus is given supremacy. The International Law Commission ("**ILC**"), a body of international law experts, explained that:

> [f]or the *lex specialis* principle to apply it is not enough that the same subject matter is dealt with by two provisions; there must be some actual inconsistency between them, or else a discernible intention that one provision is to exclude the other.[76]

46. It continued by noting that:

> such special law, being more concrete, often takes better account of the particular features of the context in which it is to be applied than any applicable general law. Its application may also often create a more equitable result and it may often better reflect the intent of the legal subjects.[77]

47. Further, under international law there is a "presumption against conflict" such that "it is for the party relying on the conflict of norms to prove that there is such a conflict."[78] The ILC clarified further that such rules would

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76 "Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries", Report of the Commission to the General Assembly on the work of its fifty-third session, Yearbook of the International Law Commission, A/CN.4/SER.A/2001/Add.1 (Part 2), *International Law Commission*, 10 August 2001 ("**Commentary to the Articles on Responsibility of States**"), Article 55, page 140, paragraph 4, Annex 650. *See also*, e.g., *Air Canada v Bolivarian Republic of Venezuela*, Award, 13 September 2021, ICSID Case No. ARB(AF)/17/1, paragraph 182 (the arbitral tribunal noted it is of "paramount importance" that "there is an actual contradiction or intention that one instrument or provision excludes the other" for the principle of *lex specialis derogat legi generali* to apply), Annex 626.

77 "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law", Report of the Study Group of the International Law Commission, finalised by Mr Martti Koskenniemi, A/CN.4/L.682 and Add.1, 13 April 2006, page 105, paragraph 7, Annex 652.

78 J. Pauwelyn, *Conflict of Norms in Public International Law* (Cambridge University Press, 2009), page 243, Annex 662.

have "greater clarity and definiteness" and would be "felt 'harder' or more 'binding' than general rules."[79]

48. The Initial Climate Change Agreements do not conflict with other international law. Their obligations – to make national plans and cooperate and share information – do not require any noncompliance with other sources of international law, such as human rights law, the law of the sea, the transboundary harm principle and the law of State responsibility. States can satisfy obligations arising out of both the Initial Climate Change Agreements and other relevant sources of law at the same time.

49. Furthermore, the Initial Climate Change Agreements are inchoate and incomplete. As noted above, they are a "first step" and a new "cornerstone" for further development. They are therefore not "harder" than, nor more "definite" than, other sources of international law.

50. There is therefore no basis to argue that the conditions of *lex specialis derogat legi generali* are satisfied.

2. The Initial Climate Change Agreements are not an "entirely efficacious" set of international rules and so do not satisfy the conditions for a "self-contained" regime

51. Certain States have also argued that the three climate change treaties are a "self-contained" regime, displacing other relevant sources of international

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79 "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law", Report of the Study Group of the International Law Commission, finalised by Mr Martti Koskenniemi, A/CN.4/L.682 and Add.1, 13 April 2006, pages 19-20, paragraph 60, Annex 652.

law.[80] This, too, is not supported by legal reasoning.

52. In the *United States Diplomatic and Consular Staff in Tehran* case, this Court noted that the applicable rules of diplomatic law constitute a self-contained regime as they are "entirely efficacious."[81] This was because they (a) set down the receiving State's obligations as regards facilities, privileges and immunities; (b) foresee their abuse by members of the diplomatic mission; and (c) specify the means by which the receiving State may counter such abuse.[82] Judge Bruno Simma commented that "self-contained" systems are those "that embrace a full, exhaustive and definitive" set of rules.[83]

53. As noted above, the Initial Climate Change Agreements do not satisfy this requirement. By their statements and conduct, States concur that the Initial Climate Change Agreements are inchoate and incomplete. They are part of a global work in progress. They cannot then be "self-contained" or "entirely efficacious."

54. For example, it is incorrect to argue, as one international organisation does, that the Initial Climate Change Agreements constitute a

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80 *See* Written Statement of the State of Kuwait, 22 March 2024, paragraph 87 and footnote 53; Written Statement of the Organization of the Petroleum Exporting Countries (OPEC), 19 March 2024, Chapter IV. *See also*, e.g., Written Statement of the European Union, 22 March 2024, paragraphs 351-353; Written Statement by Republic of India, 21 March 2024, Section IV; Written Statement of New Zealand, 22 March 2024, paragraphs 15, 21.

81 *United States Diplomatic and Consular Staff in Tehran, Judgment of 24 May 1980, I.C.J. Reports 1980*, p. 3, paragraph 86, Annex 415.

82 *See United States Diplomatic and Consular Staff in Tehran, Judgment of 24 May 1980, I.C.J. Reports 1980*, p. 3, paragraph 86, Annex 415.

83 B. Simma & D. Pulkowski, "Of Planets and the Universe: Self-contained Regimes in International Law", *European Journal of International Law*, 2006, pp. 483-529, page 493, Annex 660.

"comprehensive set of rules" regarding State responsibility and the obligation to provide redress.[84] In fact, the written statement of the international organisation that makes this argument is inconsistent. It both argues for the exclusive relevance of the Initial Climate Change Agreements but also notes that States have established and are establishing other means to compensate affected States from loss and damage from climate change.[85] The Paris Agreement cannot be said to set forth a "full, exhaustive and definitive" set of rules (to borrow Judge Simma's test) when States continue to expand on its limited terms.

55. Similarly, references to the possibility of just compensation through regional human rights bodies (in particular, the ECtHR)[86] are unavailing. Indeed, these bodies often have limited mandates and jurisdictions, including limitations on *ius standi* that restrict their application to global climate change.[87]

3. This Court should not act as a legislator to impose the Initial Climate Change Obligations as the exclusively relevant source of law

56. In their written statements, certain submitters have asked this Court to act as a legislator and create new law*, lege ferenda*, rather than explicate *lex lata*. They argue that the Initial Climate Change Agreements reflect an international consensus that allows States to "devise[] a multiplicity of

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84 Written Statement of the European Union, 22 March 2024, paragraph 351.

85 *See* Written Statement of the European Union, 22 March 2024, paragraphs 330-332.

86 *See* Written Statement of the European Union, 22 March 2024, paragraphs 342-347.

87 The ECtHR has acknowledged that its "threshold for fulfilling [admissibility] criteria is especially high" for climate change cases: *Verein KlimaSeniorinnen Schweiz and Others v Switzerland* [2024] ECHR 304 ("**KlimaSeniorinnen v Switzerland**"), paragraph 488, Annex 621. *See also*, e.g., *KlimaSeniorinnen v Switzerland*, paragraphs 487, 527-536, Annex 621; *Case of Carême v France*, [2024] ECHR 88, paragraphs 75-88, Annex 622.

ways which they deem domestically appropriate to address anthropogenic GHG emissions."[88]

57. This Court is not an international legislator. Instead, this Court must expound the law as it is, not as it might or should be.[89] As this Court explained in the *Nuclear Weapons* opinion:

> It is clear that the Court cannot legislate . . . . Rather its task is to engage in its normal judicial function of ascertaining the existence or otherwise of legal principles and rules applicable to [the relevant request for an advisory opinion] . . . The Court . . . states the existing law and does not legislate.[90]

58. If States intend the Initial Climate Change Agreements to displace all other relevant law, then they would have expressly said so through in their negotiations and in the texts of the treaties or in ways that triggered applicable legal norms of the hierarchies of laws. They did not.

D. International and domestic judicial authorities have found, numerous times, that the Initial Climate Change Agreements do not displace all other source of law

59. For all these reasons, multiple courts that have considered the Initial Climate Change Agreements have ruled that they do not displace other

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88 Written Statement of the Organization of the Petroleum Exporting Countries (OPEC), 19 March 2024, paragraph 31.

89 *See Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of 8 July 1996, I.C.J. Reports 1996,* p. 226, paragraph 18, Annex 392.

90 *See Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of 8 July 1996, I.C.J. Reports 1996,* p. 226, paragraph 18, Annex 392.

relevant sources of international law.[91] Barbados is not aware of any judicial authority that has taken the opposite view.

1. The ITLOS advisory opinion of 21 May 2024

60. On 21 May 2024, ITLOS confirmed that the Initial Climate Change Agreements are not *lex specialis derogat legi generali* to the United Nations Convention on the Law of the Sea ("**UNCLOS**").[92] ITLOS explained that the Paris Agreement does not "modif[y] or limi[t] the obligation[s] under [UNCLOS]."[93] It noted that the agreements are "separate" with "separate sets of obligations," meaning that the Paris Agreement "does not supersede" UNCLOS and that "*lex specialis derogat legi generali* has no place in the interpretation of [UNCLOS]."[94]

61. ITLOS underlined that obligations arising from UNCLOS would not "be satisfied simply by complying with the obligations and commitments under the Paris Agreement."[95] Nor would such obligations be discharged exclusively by States' participation in the global efforts to address the problems of climate change. Instead, "States are required to take all necessary measures, including individual actions as appropriate."[96]

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91 For example, more than 150 States have recognised and operationalised the human right to a healthy environment in their constitutions, legislation and enforcement in local courts (*see* Written Statement of Barbados, paragraph 164(g)).

92 *See Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law*, *Advisory Opinion of 21 May 2024* ("**ITLOS Climate Change Advisory Opinion**"), paragraphs 223-224, Annex 620.

93 ITLOS Climate Change Advisory Opinion, paragraph 224, Annex 620.

94 ITLOS Climate Change Advisory Opinion, paragraphs 223-224, Annex 620.

95 ITLOS Climate Change Advisory Opinion, paragraph 223, Annex 620.

96 ITLOS Climate Change Advisory Opinion, paragraph 202, Annex 620.

62. Thus, ITLOS clarified the climate change-related obligations arising exclusively from UNCLOS, which are binding on 168 States and the EU.[97] ITLOS also acknowledged States' climate-change related obligations arising out of the International Maritime Organization, the International Civil Aviation Organization and the Montreal Protocol.[98]

2. The ECtHR decision of 9 April 2024

63. On 9 April 2024, the ECtHR clarified for the 46 States party to the European Convention on Human Rights ("**ECHR**")[99] that a failure to take certain steps concerning climate change could constitute a violation of the rights of life and private and family life in ECHR, articles 2 and 8.[100]

64. The ECtHR also confirmed that compliance with the Initial Climate Change Agreements would not *per se* satisfy States' relevant obligations under the ECHR. It considered it "obvious" that global aims of limiting the rise in global temperature "as set out in the Paris Agreement . . . cannot of themselves suffice as a criterion for any assessment of [ECHR] compliance."[101] It rejected the argument that a State's nationally determined contribution under the Paris Agreement satisfied its obligation under Article 8 to quantify national greenhouse gas emissions.[102] Instead, it noted that the obligations did not contradict, but were "[i]n line with,

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97 *See*, e.g., ITLOS Climate Change Advisory Opinion, paragraph 243, 258, 321, 367, 339, 400, Annex 620.

98 *See* ITLOS Climate Change Advisory Opinion, paragraphs 78-82, Annex 620.

99 In addition, the EU recognises that the fundamental rights guaranteed by the ECHR constitute "general principles of the Union's law" (Consolidated Version of the Treaty on the European Union, 26 October 2012, OJ C 326/13, Article 6, Annex 569).

100 *See KlimaSeniorinnen v Switzerland*, paragraphs 573-574, Annex 621.

101 *KlimaSeniorinnen v Switzerland*, paragraph 547, Annex 621.

102 *See KlimaSeniorinnen v Switzerland*, paragraph 571, Annex 621.

States' international commitments including the UNFCCC and the Paris Agreement."[103]

3. The Supreme Court of India decision of 21 March 2024

65. On 21 March 2024, the Supreme Court of India confirmed that States like India must "uphold their obligations under international law" and this includes obligations to "mitigate greenhouse gas emissions, adapt to climate impacts, and protect the fundamental rights of all individuals to live in a healthy and sustainable environment."[104] It also referred to States' obligations to uphold the right to a healthy environment emanating from universal human rights treaties.[105] Further, it affirmed that the right to life and right to equality in the Indian Constitution includes the right to be free from the adverse effects of climate change.[106] The Indian Supreme Court therefore confirmed that India's obligations under the Initial Climate Change Agreements do not displace its other climate change-related obligations.

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103 *KlimaSeniorinnen v Switzerland*, paragraph 546, Annex 621.

104 *M K Ranjitsinh & Ors v Union of India & Ors.* 2024 INSC 280 ("**Ranjitsinh v India**"), paragraph 35, Annex 645.

105 *See Ranjitsinh v India*, paragraphs 28, 32, Annex 645. *See also* Written Statement of Barbados, paragraphs 160-162. *See further*, e.g., *The Environment and Human Rights (State Obligations in Relation to The Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity: Interpretation and Scope of Articles 4(1) and 5(1) in Relation to Articles 1(1) and 2 of the American Convention on Human Rights)*. Advisory Opinion OC-23/17 of November 15, 2017. Series A No. 23, Annex 372; Joint statement by the Committee on the Elimination of Discrimination against Women, the Committee on Economic, Social and Cultural Rights, the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, the Committee on the Rights of the Child and the Committee on the Rights of Persons with Disabilities, HRI/2019/1, 14 May 2020, paragraph 10, Annex 485.

106 *See Ranjitsinh v India*, paragraph 35, Annex 645. *See also Ranjitsinh v India*, paragraphs 24, 25, 35, 38, Annex 645.

4. The Belgian French-Speaking Court of Appeal decision of 30 November 2023

66. On 30 November 2023, the Belgian French-Speaking Court of Appeal confirmed Belgium's obligations with respect to climate change arising from the Belgian Civil Code and the ECHR, beyond those of the Initial Climate Change Agreements.[107] The Court of Appeal recognised that Belgium had breached its duty of care under the Civil Code by failing to take necessary measures to prevent the harmful effects of climate change and comply with mitigation targets.[108] It also determined that Belgium violated the rights to life and respect for private and family life under Articles 2 and 8 of the ECHR by failing to take sufficient action against climate change.[109]

5. The IACtHR decision of 27 November 2023

67. On 27 November 2023, the IACtHR clarified for 23 States party to the American Convention on Human Rights ("**ACHR**") that a State's failure to regulate, supervise and control the activities of third parties concerning concentrations of sulphur dioxide in the air may constitute a violation of the ACHR,[110] which is a source of law separate and additional to the Initial Climate Change Agreements.

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107 *See Klimaatzaak ASBL v Belgium*, Judgment of the French-Speaking Court of Appeal of Brussels of 30 November 2023, pages 157-158, Annex 467.

108 *See Klimaatzaak ASBL v Belgium*, Judgment of the French-Speaking Court of Appeal of Brussels of 30 November 2023, pages 157-158, Annex 467.

109 *See Klimaatzaak ASBL v Belgium*, Judgment of the French-Speaking Court of Appeal of Brussels of 30 November 2023, pages 157-158, Annex 467.

110 *See Case of La Oroya Population v Peru. Preliminary Objections, Merits, Reparations and Costs.* Judgment of November 27, 2023. Series C No. 511 ("**La Oroya v Peru**"), paragraph 53, Annex 623.

68. In addition, the IACtHR stated that States should recognise environmental protection as a *jus cogens* norm:

> the international protection of the environment requires the progressive recognition of the prohibition of these type of conduct as a peremptory norm (*jus cogens*) that earns the recognition of the International Community as a norm that does not admit derogation.
>
> (Translated from Spanish original.)[111]

6. The Romanian Court of Appeal in Cluj decision of June 2023

69. In June 2023, the Romanian Court of Appeal in Cluj affirmed that climate change-related obligations in EU law are distinct from Romania's obligations found in the Initial Climate Change Agreements. While the case was ultimately dismissed on procedural grounds, the Court of Appeal in Cluj emphasised that Romania is required under EU law to meet certain climate change targets, including to reduce net greenhouse gas emissions by at least 55% by 2030.[112]

7. The Supreme Court of Pakistan decision of 15 April 2021

70. On 15 April 2021, the Supreme Court of Pakistan affirmed that Pakistan has obligations with respect to climate change arising from domestic and international sources of law outside of the Initial Climate Change Agreements. The Supreme Court upheld a decision of the Government of Pakistan barring the construction or further development of cement plants

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111 *La Oroya v Peru*, paragraph 129 (in original Spanish, "la protección internacional del medio ambiente requiere del reconocimiento progresivo de la prohibición de conductas de este tipo como una norma imperativa (*jus cogens*) que gane el reconocimiento de la Comunidad Internacional en su conjunto como norma que no admita derogación"), Annex 623.

112 *See Declic et al v Government of Romania*, Civil Sentence No 312/2023, Romanian Court of Appeal, Cluj, page 24, Annex 643.

in environmentally fragile zones as, *inter alia*, such activity would infringe constitutionality protected rights, including the right to life, sustainability and dignity as well as the precautionary principle under general international environmental law.[113]

8. The French Conseil d'État decision of 1 July 2021

71. On 1 July 2021, the French Conseil d'État, the highest administrative court in France, confirmed that the French Government is required to take measures to reduce emissions of greenhouse gases under French law and EU law.[114] These obligations are separate to the legal obligations of France under the Initial Climate Change Agreements.[115] It ordered the French Government to take further action to reduce greenhouse gases or face penalties.[116] This decision and other similar decisions of French administrative courts[117] confirm that the Initial Climate Change Agreements do not displace climate change obligations emerging from other sources of international law in France.

9. The Mexican Supreme Court decision of 15 January 2020

72. On 15 January 2020, the Mexican Supreme Court affirmed that Mexico must consider the precautionary principle, a general principle of international law, and the right to a healthy environment when considering

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113 *See D. G. Khan Cement Company v Government of Punjab*, Judgment of the Supreme Court of Pakistan of 15 April 2021, paragraphs 16-20, Annex 639.

114 *See Commune de Grande-Synthe v the Republic of France*, Judgment of the Conseil d'État of 1 July 2021, No 427301 ("**Commune de Grande-Synthe v France**"), paragraphs 5-6, Annex 640. For a discussion of the different legal sources, *see also Commune de Grande-Synthe v France*, paragraphs 9-11, Annex 640.

115 *See Commune de Grande-Synthe v France*, paragraphs 9-11, Annex 640.

116 *See Commune de Grande-Synthe v France*, pages 6-7, Annex 640.

117 *See*, e.g., *Notre Affaire à Tous and Others v France*, *Tribunal Administratif de Paris* N°1904967, 1904968, 1904972, 1904976/4-1, 3 February 2021, Annex 638.

the climate change effects of domestic measures.[118] The Mexican Supreme Court therefore invalidated a rule that would have allowed a higher ethanol content in gasoline.[119] This decision confirms that the Initial Climate Change Agreements do not displace climate change obligations emerging from other sources of international law in Mexico.

10. The Dutch Supreme Court decision of 20 November 2019

73. On 20 December 2019, the Supreme Court of the Netherlands confirmed that the Netherlands has climate change obligations arising from the ECHR.[120] It ruled that the Netherlands must reduce greenhouse gases by the end of 2020 by at least 25% pursuant to articles 2 and 8 of the ECHR.[121] This decision affirms that the Initial Climate Change Agreements do not displace climate change obligations emerging from other sources of international law in the Netherlands.

11. Many other courts have confirmed that their respective States must take measures beyond those set forth in the Initial Climate Change Agreements, based on the universally recognised principle that a State must protect its own environment

74. In its previous written statement, Barbados explained that a general principle of law (archaically referred to as a general principle of law recognised by civilised nations) requires States to protect their own

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118 *See Amparo en Revisión 610/2019*, Judgment of the Suprema Corte de Justicia de la Nación of 15 January 2020, pages 22-23, Annex 634.

119 *See Amparo en Revisión 610/2019*, Judgment of the Suprema Corte de Justicia de la Nación of 15 January 2020, pages 22, 78, 80, Annex 634.

120 *See Urgenda Foundation v the State of the Netherlands*, Judgment of the Supreme Court of the Netherlands of 20 December 2019, pages 6-7, Annex 460.

121 *See Urgenda Foundation v the State of the Netherlands*, Judgment of the Supreme Court of the Netherlands of 20 December 2019, pages 6-7, Annex 460.

environment.[122] Applying that principle in their domestic contexts, at least the following courts confirmed that their respective States must take measures to combat climate change implicitly beyond those set out in the Initial Climate Change Agreements: the Federal Supreme Court of Brazil (on 1 July 2022);[123] the Supreme Court of Chile (on 19 April 2022);[124] the German Constitutional Court (on 24 March 2021);[125] the Nepali Supreme Court (on 25 December 2018);[126] the Supreme Court of Colombia (on 5 April 2018);[127] and the High Court of South Africa (on 8 March 2017).[128]

V. THE COURT SHOULD EXPLAIN THE OBLIGATION OF STATES THAT CONTRIBUTED TO CLIMATE CHANGE TO PROVIDE REDRESS TO THE STATES HARMED BY IT

75. This section addresses areas of disagreement on the law of State responsibility as it relates to this proceeding. It is important that the Court explain the relevance and scope of certain States' obligation to provide redress for contributing to climate change so that all States operate under

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122 *See* Written Statement of Barbados, Section VI.B.

123 *See PSB et al. v Brazil (on Climate Fund)*, Federal Supreme Court of Brazil, ADPF 708, 1 July 2022, paragraph 36, Annex 642.

124 *See Mejillones Tourist Service Association and others with the Environmental Evaluation Service (SEA) of Antofagasta*, Judgment of the Supreme Court of Chile of 19 April 2022, pages 15, 19-20, Annex 641.

125 *See Neubauer v Germany, Order of the First Senate of 24 March 2021*, German Federal Constitutional Court – 1 BvR 2656/18, operative part of decision and, e.g., paragraphs 146, 197, Annex 461.

126 *See Shrestha v Office of the Prime Minister et al*., Order of the Nepali Supreme Court of 25 December 2018, NKP Part 61, Vol. 3, page 11, paragraphs 5-7, Annex 459.

127 *See Future Generations v Ministry of Environment and Others*, Sentence 4360-2018 of the Supreme Court of Justice of Colombia of 5 April 2018, pages 13-14, 48, Annex 458.

128 *See EarthLife Africa Johannesburg v The Minister of Environmental Affairs and Others*, Judgment of the High Court of 8 March 2017, paragraph 91, Annex 632.

the correct legal framework during future climate change negotiations (*see* **Section V.A** below). This obligation of redress is based on strict liability, i.e., merely causing transboundary harm like climate change is sufficient to give rise to the obligation of redress (*see* **Section V.B** below). The obligation is not invalidated because more than one State participated in the same conduct or that the damages are difficult to estimate (*see* **Section V.C** below**).** Finally, this Court should reject the factual position advanced by some States that State knowledge of climate change could only arise after the IPCC's first report in 1990 – because, through incontrovertible documentary evidence, the historical record actually demonstrates the opposite (*see* **Section V.D** below).

A. This Court should explain the relevance and scope of the obligation to provide redress to guide States in their future climate change negotiations and lead to other concrete benefits

76. It is important that this Court explain the relevance and scope of the obligation to provide redress for climate harms. The UN General Assembly asked that this Court clarify the climate change obligations of States and the consequences of the breach of such obligations,[129] which includes obligations emerging from the law of State responsibility. Defining the relevance and scope of the obligation to provide redress will provide concrete, practical assistance to the international system as it deals with climate change. This is particularly pressing given States vulnerable to the effects of climate change, the Vulnerable Group of Twenty (including Barbados), estimate that their "economies have lost approximately USD 525 billion over the last 20 years (2000-2019) due to

[129] *See* Request for Advisory Opinion by the Secretary-General of the United Nations dated 12 April 2023.

the impact of climate change on temperature and precipitation patterns."[130]

77. Even if advisory opinions do not order any one State to provide remedial obligations with particularity, the Court's advisory decisions explain the existing legal obligations of States under international law.[131] Advisory opinions carry persuasive, moral and legal authority. As but a few examples:

a. the *Legal Consequences of the Construction of a Wall* advisory opinion, as issued by this Court,[132] led to a UN General Assembly resolution demanding that UN Member States comply with the obligations identified therein;[133]

b. a similar UN General Assembly resolution[134] was passed following the Court's decision in *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*;[135]

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130 "Unlocking Growth and Prosperity through Innovations in Climate Finance and Debt", V20 Ministerial Dialogue XII Communiqué, 16 April 2024, Annex 613. *See also* "Climate Vulnerable Economies Loss Report", *Vulnerable Twenty Group*, June 2022, page 14, Annex 608.

131 *See* E. Sthoeger, "How do States React to Advisory Opinions? Rejection, Implementation, and what Lies in Between", *American Journal of International Law*, 2023, pp. 292-297 ("**How do States React to Advisory Opinions**"), page 292, Annex 666.

132 *See Legal consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004, I.C.J. Reports 2004*, p. 136, Annex 417.

133 *See* UN General Assembly Resolution 10/15 (2004), A/RES/ES-10/15, 2 August 2004, paragraphs 1, 2, Annex 571. *See also* How do States React to Advisory Opinions, page 294, Annex 666.

134 *See* UN General Assembly Resolution 73/295 (2019), A/RES/73/295, 24 May 2019, Annex 572.

135 *See Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, *Advisory Opinion of 25 February 2019*, *I.C.J. Reports 2019*, p.65, Annex 619.

c. the United Kingdom referred to the advisory opinion in *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* as a vital aspect of their negotiations towards a pacific solution;[136]

d. Mauritius relied on the advisory opinion in negotiations with the Indian Ocean Tuna Commission, an intergovernmental organisation under the Food and Agricultural Organization which took the view that the Indian Ocean Tuna Commission must treat Chagos as a part of Mauritius because of the opinion;[137] and

e. similarly, the Universal Postal Union chose not to recognise stamps issued by the British Overseas Territory Government of Chagos and instead considered the Chagos Archipelago to be a part of Mauritius.[138]

78. By far the most important consequence of this Court's decision will be that the Court will provide a concrete legal framework for the international negotiation of solutions to the climate crisis. As Barbados recently submitted in oral proceedings to the IACtHR in response to a question from Judge Ricardo Pérez Manrique:

> Having defined [the] obligation [to provide redress and the transboundary harm principle], this Court will allow

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136 Statement by James Cleverly, Secretary of State for Foreign, Commonwealth and Development Affairs, on the British Indian Ocean Territory/Chagos Archipelago, UIN HCWS354, 3 November 2022, Annex 609.

137 *See* How do States React to Advisory Opinions, page 295, Annex 666. *See also* Report of the 27th Session of the Indian Ocean Tuna Commission, IOTC-2023-S27-R[E],8-12 May 2023, paragraphs 11-12, Annex 653.

138 *See* "UPU Adopts UN Resolution on Chagos Archipelago", *Universal Postal Union Press Release*, 27 August 2021, Annex 655. *See also* How do States React to Advisory Opinions, page 295, Annex 666.

> States to understand the legal framework on which they must approach climate change. And that will aid in all sorts of areas. It will aid in negotiations between States as to the correct amount and form of reparations. It will assist international institutions . . . in crafting their policies in light of States' obligations as they have been defined by this Court. The current system, the current way, does not work because States do not know through judicial pronouncement precisely the obligations that apply to them in climate change. And so there are some States who would deny their obligation to compensate or the relevance of the transboundary harm principle. By defining the principle, the Court will help guide diplomacy, negotiation and future judicial decisions.[139]

79. Other States and international organisations have made similar submissions to this Court, including the Bahamas,[140] Colombia,[141] Sri Lanka,[142] Vanuatu[143] and the Commission of Small Island States on Climate Change and International Law.[144]

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139 In the *Request for Advisory Opinion OC-32 on Climate Emergency and Human Rights presented by the Republic of Chile and the Republic of Colombia*, Barbados, Oral Statement of 23 April 2024 in response to question from Judge Ricardo Pérez Manrique, Annex 614.

140 *See* Written Statement of the Commonwealth of the Bahamas, 22 March 2024, paragraph 76.

141 *See* Written Statement of the Republic of Colombia, 11 March 2024, paragraph 1.18.

142 *See* Written Statement of the Democratic Socialist Republic of Sri Lanka, 22 March 2024, paragraph 5.

143 *See* Written statement submitted by the Republic of Vanuatu, 21 March 2024, paragraph 491.

144 *See* Written Statement of the Commission of Small Island States on Climate Change and International Law, 22 March 2024, paragraph 8.

B. The obligation to provide redress for climate change harms is one of strict or absolute liability, arising solely from the creation of transboundary harm

80. In their written statements, States have disagreed on whether the obligation to provide redress for climate change harm emerges solely from the creation of the harm – so-called "strict liability" or "absolute liability"[145] – or instead requires an evaluation of additional legal criteria, namely foreseeability of the harm at the time of the conduct or a lack of due diligence.[146]

81. There is no reason to amend pre-existing and established law relating to transboundary harm or the environment to accommodate the factual circumstances of climate change. The long-standing legal principle is, and remains, that a State that harms another State through transboundary harm – or permits activities in its jurisdiction that harm another State –

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145 *See* Written Statement of Barbados, paragraphs 5-6, 228 and Section VI.F(i); Written Statement of the Republic of Ecuador, 22 March 2024, paragraph 3.65 ("compensation for transboundary damage caused by hazardous activities "should not require proof of fault"); Written Statement of the Democratic Socialist Republic of Sri Lanka, 22 March 2024, paragraph 111 ("the absolute liability for harm to the environment"); Written Statement of the Republic of Costa Rica, March 2024, paragraph 115 ("[n]egligence, even less ignorance, are not grounds for justification").

146 Certain States argue that the prohibition of transboundary environmental harm is limited to a failure to act with due diligence (*see*, e.g., Written Statement of the Parties to the Nauru Agreement Office, paragraphs 37-39; Written Statement of the Government of the Socialist Republic of Viet Nam, 22 March 2024, paragraph 25; Written Statement of the Oriental Republic of Uruguay, 22 March 2024, paragraphs 92-93; Written Statement of the Kingdom of Tonga, 15 March 2024, paragraphs 155-160; Written Statement of the Republic of Sierra Leone, 15 March 2024, paragraph 4.4; Written Statement of the Kingdom of Spain, March 2024, paragraph 7; Written Statement of the Republic of Chile, 22 March 2024, paragraph 39). Other States argue that a State can only be liable for transboundary harm if such harm was foreseeable (*see*, e.g., Written Statement of Saint Vincent and the Grenadines, 21 March 2024, paragraph 123; Written Statement of the Principality of Liechtenstein, 22 March 2024, paragraph 72).

owes the harmed State redress on a strict liability basis. This includes, especially, environmental harm.

82. Indeed, in a lecture in 1965, C. Wilfred Jenks explained that "[e]very state is liable for injury to the world community or to other States or their nationals from ultra-hazardous activities occurring or originating within its jurisdiction or undertaken on its behalf or with its authority" and liability for injury from ultra-hazardous activities "[e]xists without proof of fault."[147] He explained that this concept "represents a necessary and increasingly important exception to the principle of fault in cases in which that principle is inapplicable and impracticable."[148] Since then, other notable commentators have confirmed the same fundamental principle.[149]

83. This same principle is reflected in the ILC Draft Principles on The Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities and accompanying commentaries.[150] Principle 3 of

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147 C. W. Jenks, "Liability for ultra-hazardous activities in international law", *Recueil des cours de l'Académie de droit international de La Haye*, 1966, pp. 99-200 ("**Liability for Ultra-hazardous Activities in International Law**"), page 194, Annex 656.

148 Liability for Ultra-hazardous Activities in International Law, page 108 (also noting that "[t]he concept of ultra-hazardous liability does not involve any challenge to the principle that fault is, in general, the basis of State responsibility in international law or any attempt to revert to the principle of absolute liability as the general basis of responsibility"), Annex 656.

149 *See* R. S. J. Martha, *The Financial Obligation in International Law* (Oxford University Press, 2015), page 404, Annex 664; A. Boyle, "State responsibility and international liability for injurious consequences of acts not prohibited by international law: a necessary distinction?", *International and Comparative Law Quarterly*, 1990, pp. 1-26, page 7 ("[w]here injury does occur, reparation must be negotiated according to criteria partly indicated in the commentary. Two points are clear. Liability will be strict, in the sense that it is founded on cause, not on lack of due diligence or breach of obligation. The source State will not be liable in full, so the victim will have to bear the resulting injury to some extent, a view consistent with existing strict liability conventions on oil pollution and nuclear risk"), Annex 657.

150 *See* Written Statement of Barbados, paragraph 242, footnote 567; Written Statement of the Republic of Ecuador, 22 March 2024, paragraph 3.64.

these draft principles provides that the costs of any pollution should be borne by the person responsible for causing the pollution (which includes States or entities whose conduct is assumed by or attributed to the State).[151] Principles 4(1) and 4(2) of the draft principles acknowledge the existence of a strict liability regime primarily attached to the operator (which may be a State), not requiring proof of fault for the damages caused, supported where necessary by additional compensation funding.[152]

84. As both Barbados and Ecuador have shown, multilateral treaties demonstrate the settled position of strict liability for transboundary harm.[153] In this light, the well-known "polluter pays" principle confirms the obligation to provide redress on a strict liability basis.[154]

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151 *See* "Commentaries on the Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities", Report of the International Law Commission Fifty-eighth session, Yearbook of the International Law Commission, A/CN.4/SER.A/2006/Add.l (Part 2), *International Law Commission*, 2006 ("**ILC Commentaries on the Draft Principles on the Allocation of Loss in the Case of Transboundary Harm arising out of Hazardous Activities**"), Principle 3, pages 74, 75, footnote 401, Annex 497.

152 *See* ILC Commentaries on the Draft Principles on the Allocation of Loss in the Case of Transboundary Harm arising out of Hazardous Activities, page 74, Principles 4(1) and 4(2), Annex 497, as cited in Written Statement of the Republic of Ecuador, 22 March 2024, paragraph 3.65.

153 *See* Written Statement of the Republic of Ecuador, 22 March 2024, paragraph 3.64; Written Statement of Barbados, paragraph 234.

154 *See*, e.g., Report of the United Nations Conference on the Human Environment and Development, Rio Declaration on Environment and Development, A/CONF.151/26/Rev.1 (Vol. 1), June 3-14 1992 ("**Rio Declaration**"), Principle 16, Annex 281; "OECD Recommendation on Guiding Principles concerning International Economic Aspects of Environmental Policies", OECD/LEGAL/0102, *OECD*, 26 May 1972, Annex 503; "OECD Recommendation of the Council on the Implementation of the Polluter-Pays Principle", OECD/LEGAL/0132, *OECD*, 14 November 1974, Annex 504; "OECD Recommendation concerning the Application of the Polluter-Pays Principle to Accidental Pollution", OECD/LEGAL/0251, *OECD*, 7 July 1989, Annex 505; Declaration of the Council of the European Communities and of the representatives of

85. Nor can it thus be said – as some States have – that the ILC Draft Principles on the Allocation of Loss in the Case of Transboundary Harm arising out of Hazardous Activities do not encompass climate change. As a matter of text, as shown above in paragraph 83, they do. In fact, the preamble to the draft principles reaffirms "Principles 13 and 16 of the Rio Declaration on Environment and Development" on liability and compensation for the victims of pollution and other environmental damage[155] and environmental costs.[156] Moreover, the draft principles define damage as "significant damage caused to persons, property or the environment," which includes loss or damage by impairment of the environment and the costs of reasonable measures of reinstatement of the environment.[157] The draft principles therefore apply also to climate change-related damage given, as discussed in the Written Statement of Barbados, damage occasioned by climate change is clearly significant.[158]

86. Even if, however, the ILC Draft Principles on the Allocation of Loss in the Case of Transboundary Harm arising out of Hazardous Activities did not address climate change textually, *quod non*, they confirm that the

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the Governments of the Member States meeting in the Council on the programme of action of the European Communities on the environment, OJ C 112/1, 22 December 1973, Chapter I, A(4) and B(7), Annex 279.

155 ILC Commentaries on the Draft Principles on the Allocation of Loss in the Case of Transboundary Harm arising out of Hazardous Activities, Preamble, Annex 497. *See also* Rio Declaration, Principle 13, Annex 281.

156 *See* Rio Declaration, Principle 16, Annex 281.

157 ILC Commentaries on the Draft Principles on the Allocation of Loss in the Case of Transboundary Harm arising out of Hazardous Activities, Principle 2(a), Annex 651. The term "environment" encompasses, among other things, the soil, air, water and natural resources (*see* ILC Commentaries on the Draft Principles on the Allocation of Loss in the Case of Transboundary Harm arising out of Hazardous Activities, Principle 2(b), Annex 651).

158 *See* Written Statement of Barbados, paragraph 148. *See also* Written Statement of Barbados, Section IV.

long-standing principle of strict liability as they apply it, unquestioningly, to the scenarios they do encompass.

87. It is also incorrect to posit, as some States have,[159] that the obligation to provide redress for transboundary harm is subject to the limitation of a "lack of due diligence" because the transboundary harm principle itself arises only from the obligation of due diligence. The principles of due diligence and transboundary harm are closely related – one may call them close cousins – but neither one circumscribes the other. The most qualified jurists, such as C. Wilfred Jenks, have confirmed that the duty to pay reparations for the damage exists despite the endeavours to take all the necessary measures to prevent the harm.[160] The transboundary harm

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159 *See* Written Statement of Australia, 22 March 2024, paragraph 5.6 ("failure to exercise due diligence, which results in a failure to comply with an obligation of conduct, would not have the consequence that a State is required to make reparation for harm that would have occurred whether or not due diligence had been exercised (and which therefore was not caused by the breach of the obligation of conduct)"); Written Statement of the Republic of Korea, 22 March 2024, paragraph 35 ("the ILC also stated that 'even where significant adverse effects materialize, that does not necessarily constitute a failure of due diligence'. Only when the State fails to fulfil its obligation to take all appropriate measures, will it be considered to have failed to exercise due diligence"); Written Statement of New Zealand, 22 March 2024, paragraph 98 ("[a] due diligence obligation is one of conduct, not of result.123 It is not intended to guarantee that significant harm be totally prevented"); Written Statement of the United States of America, 22 March 2024, footnote 327 ("the conclusion that a State' implementation of its obligations under the Paris Agreement would satisfy any requirements of due diligence would not imply that a State's breach of one of its obligations under the Paris Agreement would constitute a per se violation of a customary obligation to prevent or at least minimize significant transboundary environmental harm. Any alleged breach of such a customary due diligence obligation by a Paris Agreement Party would have to be assessed on a case-by-case basis in light of the specific facts and circumstances").

160 *See* Liability for Ultra-hazardous Activities in International Law, pages 194-195, Annex 656; R. S. J. Martha, *The Financial Obligation in International Law* (Oxford University Press, 2015), page 404, Annex 664; A. Boyle, "State responsibility and international liability for injurious consequences of acts not prohibited by international law: a necessary distinction?", *International and Comparative Law Quarterly*, 1990, pp. 1-26, page 7 ("[w]here injury does occur, reparation must be negotiated according to criteria partly indicated in the commentary. Two points are clear. Liability will be strict, in the sense that it is founded on cause, not on lack of due diligence or breach of obligation.

principle is indeed related to the due diligence principle.[161] However, it is also related to and reflects the no-harm[162] and prevention principles.[163]

88. Neither does liability for transboundary harm require the harm to have been foreseen or to have been foreseeable by the polluting State. As demonstrated in the Written Statement of Barbados, a vast number of international environmental and other treaties related to transboundary harm provide for liability on a strict basis.[164] Imposing a foreseeability condition on the obligation of redress would create perverse incentives. It would actively discourage States from researching the environmental effect of the activities they conduct or permit because the less States foresee or know the less they are liable.

89. The strict liability principle is also reflected, universally, in the general principles of law – a source of international law under Article 38 of this Court's Statute, which refers (archaically) to general principles of the law "recognized by civilized nations."[165] In this respect, municipal laws provide that a neighbour must pay for harm done by polluting their neighbour's lands on a strict liability basis, regardless of diligence or

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The source State will not be liable in full, so the victim will have to bear the resulting injury to some extent, a view consistent with existing strict liability conventions on oil pollution and nuclear risk"), Annex 657.

161 *See* Written Statement of Barbados, Section VI.A. *See also*, e.g., Written Statement of the Republic of Costa Rica, March 2024, paragraph 68 ("UNCLOS contains specific application to the marine environment of the abovementioned principles, such as due diligence and the obligations of prevention and of not causing significant harm.").

162 *See* Written Statement of Barbados, Section VI.A. *See also* Written Statement of the United Arab Emirates, 22 March 2024, paragraph 94.

163 *See* Written Statement of Barbados, Section VI.A. *See also* Written Statement of Solomon Islands, 22 March 2024, paragraph 153.

164 *See* Written Statement of Barbados, paragraphs 232-239.

165 Statute of the International Court of Justice, 26 June 1945, XV UNCIO 355, Article 38.

foreseeability. Quite properly, in municipal laws, the strict liability principle is used to shift the risk of pollution and its impacts on the party conducting risky activities and not the innocent bystander. As but a few examples:

a. in Brazil, the National Environmental Policy Act provides for strict liability regime for reparation for environmental damages.[166] The Brazilian Superior Tribunal de Justiça found a breach of this provision occurs "regardless of fault." It also held that whoever breaches this provision has to provide compensation, i.e.: "to repair – obviously at his own expense – all the damage he causes to the environment and to third parties affected by his activity, and it is not necessary to inquire about the subjective element, which consequently makes any good or bad faith irrelevant for the purposes of determining the nature, content and extent of the duties of the degrader";[167]

b. in South Korea, the Constitution provides that all citizens have the right to a "healthy and pleasant environment."[168] Similar provisions prohibiting pollution exist in other South Korean laws,

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166 *See* National Environmental Policy Act, No. 6.938/81, 31 August 1981, Article 14 ("the polluter is obliged, regardless of fault, to indemnify or repair the damage caused to the environment and to third parties affected by its activity"), Annex 575.

167 Supreme Tribunal of Justice of Brazil, No. 769.753/SC (2d Panel), 8 September 2009, paragraph 11 (in original Portuguese "do poluidor-pagador, previsto no art. 4°, VII (primeira parte), do mesmo estatuto, é obrigado, independentemente da existência de culpa, a reparar - por óbvio que às suas expensas - todos os danos que cause ao meio ambiente e a terceiros afetados por sua atividade, sendo prescindível perquirir acerca do elemento subjetivo, o que, consequentemente, torna irrelevante eventual boa ou má-fé para fins de acertamento da natureza, conteúdo e extensão dos deveres de restauração do status quo ante ecológico e de indenização"), Annex 630.

168 Constitution of the Republic of Korea, 17 July 1948, as amended from time to time and updated in 1987, Article 35, Annex 574.

such as the Framework Act on Environmental Policy,[169] the Soil Environment Conservation Act[170] and the Wastes Control Act.[171] The Supreme Court of South Korea considered that "where a previous landowner (first buyer) . . . caused soil pollution . . . such act can be deemed a tort committed against a counterparty or current owner of the relevant land (subsequent buyer) barring special circumstances."[172] As it was observed by Justice Kim Chang-suk in his Concurring Opinion in this case, this conclusion "interpreted the doctrine of liability without fault" under the Soil Environment Conservation Act;[173]

c. in Japan, the principle of strict liability for environmental harm was established in the *Toyama Itai Itai* case. The Nagoya High

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169 *See* Framework Act on Environmental Policy, as amended from time to time and updated in 2022, Article 2(1) ("[t]he State, local governments, business entities and citizens shall ensure that the current generation of citizens can fully enjoy environmental benefits and future generations will continue to enjoy such benefits by endeavoring to maintain and create a better environment, by considering environmental conservation first while engaging in any activities utilizing the environment and by combining their efforts to prevent any environmental harms on the earth, such as climate changes, in view of the fact that the creation of a delightful environment through a qualitative improvement and conservation of the environment and the maintenance of harmony and balance between human beings and the environment therethrough are indispensable elements for citizens' health and enjoyment of a cultural life, for the maintenance of the territorial integrity and for the everlasting development of the nation"), Annex 576.

170 *See* Soil Environment Conservation Act, 5 January 1995, as amended from time to time and updated in 2015, Article 2(1) ("[t]he term 'soil contamination' means contamination of soil caused by business or other human activities, damaging the health and property of people or the environment"), Annex 580.

171 *See* Wastes Control Act, 11 April 2007, as amended from time to time and updated in 2015, Article 1 ("[t]he purpose of this Act is to contribute to environmental conservation and the enhancement of the people's quality of life by reducing the generation of wastes to the maximum extent possible and treating generated wastes in an environment-friendly manner"), Annex 583.

172 Decision of the Supreme Court of South Korea, 2009Da66549, 19 May 2016, PDF pages 9-10, Annex 631.

173 Decision of the Supreme Court of South Korea, 2009Da66549, 19 May 2016, Justice Kim Chang-suk concurring in part, PDF page 30, Annex 631.

Court found that Mitsui Corporation breached Article 109 of the Mining Law, which covers a polluter's strict liability and ruled that more than 200 individuals suffering from the itai-itai disease caused by chronic cadmium poisoning are entitled to compensation;[174]

d. in Russia, the Constitution guarantees a "right to a favourable environment"[175] and the Law on Environmental protection stipulates the "presumption of ecological threat."[176] The Russian courts have held that a breach of this right gives rise to an obligation to compensate on a strict liability basis. In 2017, the Russian Supreme Court found that "legal persons and citizens engaged in ultrahazardous activities are obliged to restore damages caused by the source of the hazard independent of their guilt, unless they prove that the damages were caused due to a force majeure";[177]

e. in India, the Supreme Court in *M.C. Mehta v Union of India* case held that the persons conducting polluting activities are responsible for environmental damage on a strict and absolute

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174 *See* Y. Fumikazu, "Itai-Itai disease and the countermeasures against cadmium pollution by the Kamioka mine", *Environmental Economics and Policy Studies*, 1999, pp. 215-229, page 5, Annex 659.

175 Constitution of the Russian Federation, 12 December 1993, as amended from time to time and updated in 2022, Article 42 ("[e]veryone shall have the right to a favourable environment, reliable information on the state of the environment and compensation for damage caused to his (her) health and property by violations of environmental laws"), Annex 578.

176 Federal Law on Environmental Protection, No. 7-FZ, 10 January 2002, Article 3, Annex 582.

177 *On some issues of application of legislation on compensation for damage caused to the environment*, Decision of the Plenum of the Supreme Court of the Russian Federation No. 49, 30 November 2017, paragraph 8, Annex 633.

basis. It stated that "where an enterprise is engaged in a hazardous or inherently dangerous activity and harm results to anyone on account of an accident in the operation of such hazardous or inherently dangerous activity resulting, . . . the enterprise is strictly and absolutely liable to compensate all those who are affected by the accident and such liability is not subject to any of the exceptions which operate vis-a-vis the tortious principle of strict liability . . .";[178]

f. in Kenya, the Court of Appeal in *National Environment Management Authority & another v KM & 17 others*, relying on the Rio Declaration, noted that the "'polluter pays' principle is an economic instrument which initially required . . . to be responsible for the costs of preventing or dealing with any pollution that the process causes. This includes environmental costs as well as direct costs to people or property, and also covers costs incurred in avoiding pollution as well as remedying any damage";[179]

g. in Fiji, the Supreme Court in *Ramendra Prasad v Total (Fiji) Limited* unanimously supported the "polluter pays" principle under the Environment Management Act;[180]

h. in the very famous English case *Rylands v Fletcher*, the House of Lords found that "the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do

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178 *M.C. Mehta And Anr v Union of India & Ors*, Decision of the Supreme Court of India, 1987 SCR (1) 819, AIR 1987 965, 20 December 1986, page 21, Annex 629.

179 *National Environment Management Authority & another v KM & 17 others,* Decision of the Court of Appeal of Kenya, 23 June 2023, paragraph 70, Annex 644.

180 *Ramendra Prasad v Total (Fiji) Ltd*, Decision of the Court of Appeal, 28 February 2020, paragraph 18, Annex 636.

mischief if it escapes, must keep it in at his peril; and if he does not do so, is *primâ facie* answerable for all the damage which is the natural consequence of its escape";[181]

i. in Indonesia, a person producing waste that threatens the environment assumes strict responsibility as they are "responsible absolutely for the incurred losses without necessary to prove substance of mistake";[182]

j. in the Netherlands, a person during "the course of his professional practice or business"[183] is liable for pollution of "air, water or soil"[184] with a dangerous substance;

k. in Finland, "[e]ven when the loss has not been caused deliberately or negligently, liability for compensation shall lie with a person whose activity has caused the environmental damage";[185]

l. in South Africa, the Western Cape Supreme Court found that there was a common duty of lateral support to adjoining lands and breach of that duty required the payment of damages on a strict liability basis;[186] and

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181 *Rylands v Fletcher* [1868] UKHL 1, page 2, Annex 628.

182 Environmental Protection and Management, No. 32/ 2009, 3 October 2009, Article 88, Annex 584.

183 Dutch Civil Code 1990, 20 February 1990, as amended from time to time and updated in 2024, Article 6:175(1), Annex 577.

184 Dutch Civil Code 1990, 20 February 1990, as amended from time to time and updated in 2024, Article 6:175(4), Annex 577.

185 Act on Compensation for Environmental Damage, No. 737/1994, 19 August 1994, Section 7, Annex 579.

186 *See Petropulos & Another v Dias* [2020] ZASCA 53, paragraph 64, Annex 637.

m. in Greece, strict liability accompanies that "[an] owner is entitled to require the person who has infringed the ownership to remove the infringement and to refrain from doing so in the future."[187]

90. The concept of strict liability for environmental damage is also present in other areas of international law. In addition to the authorities already discussed in the Written Statement of Barbados,[188] the following treaties also impose strict liability for environmental damage:

a. the 1972 Convention on International Liability for Damage caused by Space Objects provides that a "launching State shall be absolutely liable to pay compensation for damage caused by its space object on the surface of the earth or to aircraft flight";[189]

b. the Hazardous and Noxious Substances ("**HNS**") Convention states that "[t]he registered owner of the ship in question is strictly liable to pay compensation following an incident involving HNS. This means that he is liable, even in the absence of fault on his part. The fact that damage has occurred is sufficient to establish

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187 Greek Civil Code, Article 1003, Annex 573. *See also* M. Hinteregger, *Comparison*, in ENVIRONMENTAL LIABILITY AND ECOLOGICAL DAMAGE IN EUROPEAN LAW, ed. Monika Hinteregger (Cambridge, 2008), page 581 ("In most countries, the laws of the neighbourhood play an important role in the compensation of damage caused by a polluting interference, as they do not require fault on the part of the defendant to be established. . . . Other countries that provide for this are . . . Greece (Articles 1003 and 1108)"), Annex 661.

188 *See* Written Statement of Barbados, paragraphs 231-245.

189 Convention on the International Liability for Damage Caused by Space Objects, 29 March 1972, 961 UNTS 187, Article II, Annex 79.

the shipowner's liability, provided there is a causal link between the damage and the HNS carried on board the ship";[190] and

c. the Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal takes into account Rio Declaration and provides for strict liability.[191]

C. The obligation to provide redress for climate change harms applies notwithstanding multiple States contributed to the harm and the exact measure of damages is arguably difficult to define precisely

91. In their written statements, States have diverged on whether the obligation to provide redress under international law can apply to climate change, given that climate change was caused by multiple States and the exact degree of damages is difficult to calculate.

92. Numerous States and international organisations have adopted the same position as Barbados,[192] recognising the obligation of States to pay compensation notwithstanding that multiple States have contributed to the adverse effects of climate change.[193] This includes, by way of example,

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190 International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea "2010 HNS Convention", 30 April 2010, Article 17, Annex 150.

191 *See* Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal, 10 December 1999, Preamble and Article 4, Annex 134.

192 *See* Written Statement of Barbados, paragraph 256.

193 *See* Written Statement of the African Union, 22 March 2024, paragraphs 272-275; Written Statement the Republic of Albania, 22 March 2024, paragraph 130(d); Written Statement of Antigua and Barbuda, 22 March 2024, paragraphs 381, 547-551, 572-578; Written Statement of the People's Republic of Bangladesh, 22 March 2024, paragraph 145; Written Statement of the Republic of Chile, 22 March 2024, paragraphs 94-103;

Antigua and Barbuda[194] and the Commission of Small Island States on Climate Change and International Law.[195]

93. On the other hand, several States and international organisations have argued that the obligation of redress should not apply to climate change due to practical difficulties that arise in establishing causation and the calculation of damages. These States have argued, essentially, that:

a. **climate change is different**: the environmental consequences of anthropogenic greenhouse gas emissions are materially distinct from an ordinary case of transboundary harm and thus require a new regime that does not include redress;[196]

Written Statement of the Republic of Colombia, 11 March 2024, paragraph 4.14; Written Statement of the Commission of Small Island States on Climate Change and International Law, 22 March 2024, paragraphs 164-171; Written Statement of the Republic of Ecuador, 22 March 2024, paragraphs 3.62, 4.18-4.21; Written Statement of the Arab Republic of Egypt, 22 March 2024, paragraphs 295-297, 346-348, 367-373, 385-386; Written Statement of the International Union for Conservation of Nature, 19 March 2024, paragraphs 488 and 489; Written Statement of the Republic of Mauritius, 22 March 2024, paragraphs 210 and 211; Written Statement of the Federated States of Micronesia, 15 March 2024, paragraphs 124; Written Statement of Solomon Islands, 22 March 2024, paragraphs 231-233; Written Statement of the Republic of Kenya, 22 March 2024, paragraph 6.116; Written statement submitted by the Republic of Vanuatu, 21 March 2024, paragraph 535; Written Statement of the Republic of Sierra Leone, 15 March 2024, paragraph 3.145; Written Statement of the Independent State of Samoa, 22 March 2024, paragraphs 210-213; Written Statement of Tuvalu, 22 March 2024, paragraphs 123-125; Written Statement of the Republic of the Marshall Islands, 22 March 2024, pages 61-73.

194 *See* Written Statement of Antigua and Barbuda, 22 March 2024, paragraphs 549 and 576.

195 *See* Written Statement of the Commission of Small Island States on Climate Change and International Law, 22 March 2024, paragraphs 166 and 170.

196 *See* Written Statement of Australia, 22 March 2024, paragraph 4.10; Written Statement People's Republic of China, 22 March 2024, paragraphs 134 and 137; Written Statement by the Governments of Denmark, Finland, Iceland, Norway and Sweden, 21 March 2024, paragraph 71; Written Statement of the Kingdom of the Netherlands, 21 March 2024, paragraph 5.11; Written Statement of New Zealand, 22 March 2024, paragraph 103; Written Statement of the Organization of the Petroleum Exporting Countries (OPEC), 19 March 2024, paragraph 93.

b. **loss and damage is too hard to calculate and too abstract for this advisory opinion**: the obligation of redress does not apply, both generally and in the context of this advisory proceeding, because it is difficult to identify and attribute loss and damage to a particular State and also there are complex questions of causation;[197] and

c. **multiple States caused climate change so no one State can be liable**: because liability must be apportioned among multiple responsible States, the obligation of redress does not apply.[198]

94. Each of these three arguments, however, fails on the merits and law.

95. First, the damage caused by climate change may be unique. But it is unique only as a matter of degree – not as a matter of form. This may be the first time in history that human beings have so significantly affected the entire global environment. But the form of the harms at issue – harm to the environment that affects human rights and populations in adverse ways – is neither novel nor is it devoid of historical precedent. The

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197 *See* Written Statement of Australia, 22 March 2024, paragraph 5.9; Written Statement People's Republic of China, 22 March 2024, paragraphs 136-138; Written Statement by the Governments of Denmark, Finland, Iceland, Norway and Sweden, 21 March 2024, paragraphs 105-107; Exposé Écrit De La République Française, 22 March 2024, paragraph 206; Written Statement the State of Kuwait, 22 March 2024, paragraphs 120 and 121; Written Statement of New Zealand, 22 March 2024, paragraphs 102, 103 and 116(b)(ii); Written Statement of the Portuguese Republic pursuant to Article 66, paragraph 3, of the Statute of the Court, March 2024, paragraph 124; Written Statement of the Russian Federation, 21 March 2024, page 20; Written Statement of the Republic of Korea, 22 March 2024, paragraph 16; Written Statement of the United States of America, 22 March 2024, paragraph 5.10; Written Statement of the Organization of the Petroleum Exporting Countries (OPEC), 19 March 2024, paragraphs 93 and 117.

198 *See* Written Statement People's Republic of China, 22 March 2024, paragraph 136; Written Statement of the Kingdom of the Netherlands, 21 March 2024, paragraph 5.11; Written Statement of New Zealand, 22 March 2024, paragraphs 102-103; Written Statement of the Russian Federation, 21 March 2024, page 17; Written Statement of the United States of America, 22 March 2024, paragraph 5.12.

principle of transboundary harm and related obligation of compensation on a strict liability basis already exists and covers climate change harms, as previously noted in the Written Statement of Barbados.[199]

96. Second, the purported practical difficulties in assigning a specific numerical value to climate change damage do nothing to prevent this Court from explaining States' general obligation to provide redress, without specifying in particularity which State bears that obligation and to what degree. This is, after all, an advisory opinion in which such a contentious outcome may be considered inappropriate. Instead, the Court may simply define the relevant legal standard as it already exists in international law – that States that materially contributed to climate change bear the international responsibility for doing so and so must satisfy the corollary obligation of redress. Thereafter, as detailed in **Section V.A** above, the international community will define the scope and content of that redress by means, *inter alia*, of negotiation and diplomacy.

97. In all events, it is well-established that the mere difficulty of assessing damages with certitude does not negate the obligation of redress. The authorities to this effect are legion and were cited by Barbados[200] and others[201] in their written statements.

98. Thirdly, and finally, the fact that multiple States contributed to climate change does not excuse each of them, individually, and thus all of them *de facto* collectively as a whole, from the responsibility to provide redress. As Article 31 of the Articles on Responsibility of States states, "[t]he

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199 *See* Written Statement of Barbados, paragraphs 132-150 and 229-245.

200 *See* Written Statement of Barbados, paragraphs 247-248, 260-261.

201 *See*, e.g., Written statement submitted by the Republic of Vanuatu, 21 March 2024, paragraphs 591-592.

responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act" (Article 31)[202] and that "[w]here several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act" (Article 47).[203] As the ILC explained in the commentary thereto:

a. where separate factors combine to cause damage and only one of these factors is to be ascribed to the responsible State, "international practice and the decisions of international tribunals do not support the reduction or attenuation of reparation for concurrent causes";[204]

b. regarding Article 47:

> where several States are each responsible for the same internationally wrongful act, the responsibility of each may be separately invoked by an injured State in the sense of article 42.[205]

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202 "Draft Articles on Responsibility of States for Internationally Wrongful Acts", Report of the Commission to the General Assembly on the work of its fifty-third session, Yearbook of the International Law Commission, A/CN.4/SER.A/2001/Add.1 (Part 2), *International Law Commission*, 10 August 2001, Article 31, Annex 494.

203 "Draft Articles on Responsibility of States for Internationally Wrongful Acts", Report of the Commission to the General Assembly on the work of its fifty-third session, Yearbook of the International Law Commission, A/CN.4/SER.A/2001/Add.1 (Part 2), *International Law Commission*, 10 August 2001, Article 47, Annex 494.

204 Commentary to the Articles on Responsibility of States, Article 31, page 93, paragraph 12, Annex 650.

205 Commentary to the Articles on Responsibility of States, Article 47, page 125, paragraph 7, Annex 650.

99. The position is confirmed by international jurisprudence. In his Separate Opinion in the *Nauru* case, Judge Shahabudeen considered joint and several obligations at length, stating that:

> I do not find it surprising that, in regard to Nauru, the view has been expressed "that the three countries are jointly and severally responsible under international law for the administration of the territory" . . . I think this view is to be preferred to the view that the responsibility was exclusively joint.[206]

100. In his Separate Opinion in the *Oil Platforms* case, Judge Simma held that:

> [e]levating the joint-and-several liability doctrine thus described to the level of international law in the present case would lead to a finding that Iran is responsible for damages, or impediments, that it did not directly cause. Personally, I would find it more objectionable not to hold Iran liable than to hold Iran liable for the entire damage caused to the United States as a result of actions taken during the Iran-Iraq war. In fact, I see no objection to holding Iran responsible for the entire damage even though it did not directly cause it all.[207]

101. The UN Committee on the Rights of the Child in *Chiara Sacchi et al.* (as cited in these proceedings by Vanuatu),[208] stated that the "collective nature of the causation of climate change does not absolve the State party of its individual responsibility that may derive from the harm that the

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206 *Certain Phosphate Lands in Nauru (Nauru v Australia), Judgment of 26 June 1992, I.C.J Reports 1992*, p. 240, Separate Opinion of Judge Shahabuddeen, page 285, Annex 617.

207 *Oil Platforms (Islamic Republic of Iran v United States of America)*, *Judgment of 6 November 2003, I.C.J Reports 2003,* p. 161, Separate Opinion of Judge Simma, paragraph 73, Annex 618.

208 *See* Written statement submitted by the Republic of Vanuatu, 21 March 2024, page 156.

emissions originating within its territory may cause to children, whatever their location."[209]

102. The ECtHR also demonstrates that States may be held jointly and severally liable for concurrent harms, as when that court held Russia and Moldova liable for compensation in the *Ilaşcu* case.[210]

103. The work of leading jurists also supports such an approach. As Crawford, Pellet and Olleson have observed, "a concept of joint and several responsibility seems to be accepted in international law . . . The International Court's jurisprudence generally admits the possibility of holding States responsible jointly and severally."[211] Further, Crawford (citing Brownlie) stated that "[a] rule of joint and several liability in delict should certainly exist as a matter of principle, but practice is scarce."[212]

104. This Court has itself previously observed that it "is also possible that several internationally wrongful acts of the same nature, but attributable to different actors, may result in a single injury or in several distinct injuries."[213]

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209 "Decision adopted by the Committee on the Rights of the Child under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure in respect of Communication No. 104/2019", CRC/C/88/D/104/2019, *UN Committee on the Rights of the Child*, 11 November 2021, paragraph 9.10, Annex 627. This is a final decision of the unedited version in Annex 452 to the Written Statement of Barbados.

210 *See Ilasçu and others v Russia and Moldova* [2004] ECHR 318, Annex 425.

211 A. Orakhelashvili, *Division of Reparation between Responsible Entities,* in THE LAW OF INTERNATIONAL RESPONSIBILITY, eds. James Crawford et al. (Oxford University Press, 2010), page 659, Annex 663.

212 J. Crawford, *Brownlie's Principles of Public International Law* (Oxford, 9ed., 2019), page 537, Annex 665.

213 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda), Reparations, Judgment of 9 February 2022, I.C.J. Reports 2022*, p.13, paragraph 94, Annex 409.

105. Finally, the Guiding Principles on Shared Responsibility in International Law provide that "[t]he commission by multiple international persons of one or more internationally wrongful acts that contribute to an indivisible injury entails shared responsibility,"[214] and that each party sharing responsibility for such an international wrongful act "is under an obligation to make full reparation for the indivisible injury caused by the single or multiple internationally wrongful acts, unless its contribution to the injury is negligible."[215]

D. The argument that no State or its predecessor knew or could have known about climate change until the first IPCC report was issued in 1990 is based on a misunderstanding of the complete historical record

106. In their written statements, certain States have argued that, with regard to each and every State in the world without exception, State-attributable knowledge of climate change could only have arisen after the IPCC issued its first report in 1990.[216] As a result, those States assert that the obligation to provide redress for climate change harms can theoretically only arise for anthropogenic gas emissions after 1990 – on the legal

214 A. Nollkaemper et al., "Guiding Principles on Shared Responsibility in International Law", *The European Journal of International Law*, 2020, Principle 2(1), Annex 530.

215 A. Nollkaemper et al., "Guiding Principles on Shared Responsibility in International Law", *The European Journal of International Law*, 2020, Principle 10, Annex 530.

216 *See* Written Statement by the Swiss Confederation, 18 March 2024, paragraphs 5, 35; Written Statement of the United States of America, 22 March 2024, paragraphs 2.3, 2.12; Written Statement of the Kingdom of the Netherlands, paragraph 5.6; Written Statement of the Russian Federation, 21 March 2024, page 16. *See also* Written Statement of the Government of Canada, 20 March 2024, paragraphs 12-13.

grounds that climate harms were not foreseeable[217] and could not have been prevented by due diligence before that point in time.[218]

107. This argument is incorrect legally and factually. Legally, States' obligation to provide redress for climate change harms is governed by a regime of strict liability. Under this regime, the harm alone gives rise to the obligation to compensate (*see* **Section V.B** above). Foreseeability and due diligence have no legal relevance.

108. Factually, this argument is based on an incomplete understanding of the historical record. As noted in the Written Statement of Barbados[219] and other written statements,[220] and based on additional annexes found for these written comments, the factual evidence is clear: as a matter of fact, it is incorrect to state, as some States do, that the climate crisis was neither not known nor knowable until 1990. The incontrovertible documentary evidence, by year, is as follows:

1956: 67 States collaborated in the International Geophysical Year ("**IGY**"). Those 67 States represented just over 83 percent of UN Member States at the

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217 *See*, e.g., Written Statement of the United States of America, 22 March 2024, paragraphs 2.12, 2.14; Written Statement of the Russian Federation, 21 March 2024, page 16; Written Statement of the Kingdom of the Netherlands, 21 March 2024, paragraph 5.6; Written Statement of Germany, 20 March 2024, paragraph 40; Written Statement by the Swiss Confederation, 18 March 2024, paragraph 35.

218 *See*, e.g., Written Statement by the Swiss Confederation, 18 March 2024, paragraphs 37 and 38.

219 *See* Written Statement of Barbados, Section IV.A.

220 *See* Written statement submitted by the Republic of Vanuatu, 21 March 2024, paragraphs 177-192; Written Statement of Saint Lucia, 21 March 2024, paragraph 23(i); Written Statement of the Arab Republic of Egypt, 22 March 2024, paragraphs 304-314; Written Statement of the Republic of Kiribati, 2 March 2024, paragraphs 98, 184; Written Statement of the Organisation of African Caribbean and Pacific States (OACPS), 22 March 2024, paragraphs 21-24; Exposé Écrit de la République de Madagascar, 20 March 2024, paragraphs 24, 27; Exposé Écrit du Burkina Faso, 2 April 2024, paragraphs 288-309.

time.[221] The IGY was a "a global effort for a comprehensive study of the Earth, its poles, its atmosphere, and its interactions with the Sun."[222] One of the key areas of research of the IGY programme was meteorological observations that would form the basis for measurement of global average temperatures, to determine if climate change was occurring;[223]

1962: based on a direct request from President John F Kennedy himself, the United States National Academy of Sciences – National Research Council issued a report to the same President explaining, in detail, "secular climatic change in the direction of higher average temperatures" based on "greatly increasing use of fossil fuels" that "could have profound effects both on the weather and on the ecological balances";[224]

1965:

- in a special message to the US Congress, US President Lyndon B Johnson observed that "[t]his generation has altered the composition of the atmosphere on a global scale through . . . a steady increase in carbon dioxide from the burning of fossil fuels";[225]

- in 1965, US President Lyndon B Johnson's Science Advisory Committee released a Report of the Environmental Pollution Panel for the President's

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221 These figures were derived based on the timeline established in "Growth in United Nations membership", *United Nations*, Annex 648.

222 J. Uri, "65 Years Ago: The International Geophysical Year Begins", *The National Aeronautics and Space Administration (NASA)*, 5 July 2022, Annex 566. *See also* "International Geophysical Year (IGY)", *Dwight D. Eisenhower Presidential Library, Museum, and Boyhood Home*, Annex 567 bis.

223 *See* "What was the International Geophysical Year?", *UK Antarctic Heritage Trust*, 26 June 2023, Annex 567.

224 "Energy Resources: A Report to the Committee on Natural Resources of the National Academy of Sciences", *United States National Academy of Sciences – National Research Council*, 1962, page 96, Annex 14.

225 L. Johnson, "Special Message to the Congress on Conservation and Restoration of Natural Beauty", *The American Presidency Project*, 8 February 1965, Annex 585, as cited at paragraph 22 of the Expert Report of Professor Naomi Oreskes on Historical Knowledge and Awareness, in Government Circles, of the Effects of Fossil Fuel Combustion as the Cause of Climate Change, 29 January 2024 ("**Oreskes Expert Report**") at page 91 of the Exhibit Bundle to the Written Statement submitted by the Republic of Vanuatu, 21 March 2024.

Science Advisory Committee, which also confirmed the same conclusions;[226]

1966: Nobel Prize winner Glen T Seaborg, then-chairperson of the United States Atomic Energy Commission, confirmed the climate crisis;[227]

1968:

- Mr Jérôme Monod, who was then in charge of an inter-ministerial department which coordinated regional planning and action in France, discussed the need to address the global increase in carbon dioxide level at a public symposium. Mr Monod attended the meeting in which another attendee expressed, plainly, that carbon dioxide emissions could lead to modifications in the earth's climate within a decade to half a century;[228]

- the UN General Assembly heard addresses on climate change from, *inter alia*, US Ambassador Wiggins and the Representative of the Republic of India;[229]

- senior French public administrators attended a high-level symposium with oil and gas industry companies and academics that identified climate change as one of the reasons for switching to nuclear energy in France;[230]

- the UN Secretary-General described the World Meteorological Organization's work as including the "increase of the carbon-dioxide in the earth's atmosphere which may change our climate";[231]

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226 *See* "Restoring the Quality of our Environment: Report of the Environmental Pollution Panel for the President's Science Advisory Committee", *The White House*, November 1965, Annex 555.

227 *See* G. Seaborg, "The Role of Energy", *United States Atomic Energy Commission,* 13 January 1966, Annex 556.

228 *See* "1er Colloque International sur l'Aménagement du Territoire et les Techniques Avancées", *Collège des techniques avancées et de l'aménagement du territoire*, March 1968, Annex 557.

229 *See* UN General Assembly, Agenda Item 91, 1733rd Plenary Meeting, A/PV.1733, 3 December 1968, paragraphs 38, 125, 128, Annex 276.

230 *See* "1er Colloque International sur l'Aménagement du Territoire et les Techniques Avancées", *Collège des techniques avancées et de l'aménagement du territoire*, March 1968, Annex 557.

231 Activities of United Nations Organizations and programmes relevant to the human environment: report of the Secretary-General, E/4553, 11 July 1968, paragraph 78, Annex 646, as cited at paragraph 34 in the Oreskes Expert Report at page 91 of the Exhibit Bundle to the Written Statement submitted by the Republic of Vanuatu, 21 March 2024.

1969:

- in the UK Parliament, the Second Viscount St Davids asked whether the Government had taken action concerning the fact "what were abnormal temperatures last summer may not be abnormal if we continue to discharge carbon dioxide into the air by the burning of various fossil carbons, so increasing the greenhouse effect?";[232]

- prominent US Senator Henry Jackson requested, and received, specific confirmation from scientific advisor to President Nixon, Mr Lee DuBridge, confirming climate change through anthropogenic gas emissions;[233]

1970:

- global warming and climate change was reported in the official journal of the inter-Ministerial French land planning administration *Délégation interministérielle à l'aménagement du territoire et à l'attractivité régionale* – a warning that was repeated in 1972 as well;[234]

- the greenhouse gas effect and climate change was discussed in depth in the UK House of Commons;[235]

1972:

- the UN held a Conference on the Human Environment from 5-16 June, with 113 States in attendance.[236] The report of that conference contained specific

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232 "Railways: Use of Continuous Welded Rail", *House of Lords Debate*, 5 November 1969, Annex 588, as cited at paragraph 23 in the Oreskes Expert Report at page 91 of the Exhibit Bundle to the Written Statement submitted by the Republic of Vanuatu, 21 March 2024.

233 *See* Exchange of letters between Lee DuBridge and Senator Henry Jackson, National Archives and Records Administration-Office of Science and Technology, 1969, Annex 587, as referred to at paragraph 29 in the Oreskes Expert Report at page 91 of the Exhibit Bundle to the Written Statement submitted by the Republic of Vanuatu, 21 March 2024.

234 This reporting was discussed in Bonneuil et al., "Early warnings and emerging accountability: Total's responses to global warming, 1971-2021", *Global Environmental Change*, 2021, pp. 1-10, page 3, Annex 565.

235 *See* Statement by Mr C. Mather, Environmental Pollution, United Kingdom Parliament Hansard, Volume 804, 21 July 1970, Annex 278.

236 *See* Report of the United Nations Conference on the Human Environment, Declaration of the United Nations Conference on the Human Environment, A/CONF.48/14/Rev.1, 16 June 1972 ("**Declaration of the UN Conference on the Human Environment**"), page 43, Annex 647.

recommendations concerning climate change. First, it recommended the Secretary-General "take steps to ensure the proper collection, management, measurement and analysis of data relating to the environmental effects of energy use and production" including from "the emission of carbon dioxide."[237] Second, it recommended "Governments" "[c]onsult fully other interested States" when conducting "activities carrying a risk of [climatic] effects."[238] This report led to the Stockholm Declaration;

- the USSR and the US signed an Agreement on Cooperation in the Field of Environmental Protection, which established cooperation between the two States including regarding the "influence of environmental changes on climate";[239]

1974: the US Central Intelligence Agency recognised the existence of climate change and noted that climate change would foment "an era of drought, famine, and political unrest";[240]

1975:

- the Joint US/USSR Committee on Cooperation in the Field of Environmental (which had been established in 1973) published a report that recognised that anthropogenic gases caused climate change[241] and projected the "most unforeseen and, perhaps, unpleasant consequences" therefrom.[242] An author

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237 Declaration of the UN Conference on the Human Environment, Recommendations 57-58, pages 18-19, Annex 647.

238 Declaration of the UN Conference on the Human Environment, Recommendation 70, page 20, Annex 647.

239 Agreement on Cooperation in the Field of Environmental Protection between the United States of America and the Union of Soviet Socialist Republics, 23 May 1972, U.S. State Department, Treaties and Other International Act Series 7345, as set out in "U.S. and U.S.S.R. Sign Environmental Cooperation Treaty", *United States Environmental Protection Agency*, Annex 568.

240 "A Study of Climatological Research as it Pertains to Intelligence Problems", *Central Intelligence Agency*, August 1974, page 1, Annex 558.

241 *See* I. P. Gerasimov et al., *Organization of Biosphere Preserves (Stations) in the USSR,* in SECOND JOINT U.S./USSR SYMPOSIUM ON THE COMPREHENSIVE ANALYSIS OF THE ENVIRONMENT (U.S. Environmental Protection Agency Washington, October 21-26, 1975), page 89, Annex 560.

242 V. D. Fedorov, *The Problem of The Maximum Permissible Effects of the Anthropogenic Factor From The Ecologist's Viewpoint*, in SECOND JOINT U.S./USSR SYMPOSIUM ON THE COMPREHENSIVE ANALYSIS OF THE ENVIRONMENT (U.S. Environmental Protection Agency Washington, October 21-26, 1975), page 104, Annex 561.

of that joint commission report, Mr Yu A Izrael, later became the people's representative in the Supreme Council of the USSR, the supreme legislative body of the Soviet Union, from 1978 to 1988;[243]

- knowledge of climate change was so widespread in the West German Government that senior politicians of both the Social Democratic Party and the Christian Democratic Union – the major German political parties at the time – were quoted as supporting nuclear power due to the risk of global warming caused by CO_2 emissions;[244]

- the Science Council of Canada, created in 1966 by federal statute to advise the Canadian government on science and technology policy, reported that Canada's "reliance on fossil fuels may accelerate this effect through the release of carbon dioxide (CO_2) into the atmosphere. Carbon dioxide is suspected of engendering a 'greenhouse' effect";[245]

1977: the Canadian Science Council repeated its 1975 warnings with even greater alarm;[246]

1978:

- the European Commission received a scientific report noting human causes of climate change and its negative impact.[247] The European Commission's membership at the time was composed of representatives from 9 States, as listed in the footnote below;[248]

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243 *See* "Academician Israel Yuri Antonievich is 80 years old!", *Russian Academy of Sciences*, 15 May 2010, Annex 667.

244 *See* J. Cavender & J. Jager, "The History of Germany's Response to Climate Change", *International Environmental Affairs*, 1993, pp. 3-18 ("**The History of Germany's Response to Climate Change**"), page 8, Annex 658.

245 "Report No.23: Canada's Energy Opportunities", *Science Council of Canada*, March 1975, page 83, Annex 559.

246 *See* "Report No.27: Canada as a Conserver Society: Resource Uncertainties and the Need for New Technologies", *Science Council of Canada*, September 1977, page 10, Annex 562.

247 *See* "Proposal for a multiannual research programme in the field of climatology (Indirect action - 1979-83)", *Commission of the European Communities*, 11 September 1978, pages 7, 15-16, Annex 563.

248 Belgium, Denmark, France, Federal Republic of Germany, Ireland, Italy, Luxembourg, Netherlands and the United Kingdom (*see* "History of the European Union 1970-79", *European Union*, Annex 654).

- the West German Parliamentary State Secretary acknowledged climate change and its impacts;[249]

1979:

- Parliamentarians discussed climate change in sessions of the West German Bundestag;[250]

- the West German Federal Environment Agency published a report confirming the existence of climate change through anthropogenic gas emissions;[251]

- the West German Federal Cabinet ordered the launch of a national climate research program on the basis of knowledge of climate change;[252]

- Switzerland hosted the World Climate Conference, in cooperation with *inter alia* the World Meteorological Organization. The resulting declaration from that conference acknowledged that human activities cause "global changes of climate";[253]

1980: the US Department of Energy published a summary of the Carbon Dioxide Effects Research and Assessment Program which concluded that an increase in CO_2 in the atmosphere causes the greenhouse effect;[254] and

1983: the US Environmental Protection Agency published a study also confirming that climate change was occurring.

109. Again, Barbados does not intend to criticise any particular State. However, at least one senior judicial authority has confirmed that its

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249 *See* German Bundestag, Plenary Protocol 8/126 of the 126 Session, 15 December 1978, pages 9873-9874, Annex 589.

250 *See* German Bundestag, Plenary Protocol 8/162 of the 162 Session, 22 June 1979, Annex 65, page 12964, Annex 590.

251 *See* The History of Germany's Response to Climate Change, page 8, Annex 658.

252 *See* The History of Germany's Response to Climate Change, page 8, Annex 658.

253 Declaration of the World Climate Conference, World Meteorological Organization, IOC/SAB-IV/INF.3, February 1979, page 2, Annex 586.

254 *See* "Summary of the Carbon Dioxide Effects Research and Assessment Program", *United States Department of Energy, Office of Health and Environmental Research*, July 1980, cover slide, "Effects on Climate", "Implications of CO_2 Induced Climate Change", Annex 564.

relevant Government had prior knowledge of climate change before 1990. In January 2020, the US Court of Appeals for the Ninth Circuit considered a detailed factual record concerning the United States of America's knowledge of climate change starting decades before 1990. That court, composed of highly respected jurists, found that:

> [a] substantial evidentiary record documents that the federal government has long promoted fossil fuel use despite knowing that it can cause catastrophic climate change . . .[255]

110. This Court is thus respectfully asked not to accept the position that State knowledge of climate can only have arisen after the IPCC's first report in 1990. Barbados respectfully submits that this Court should explain that knowledge of climate change through anthropogenic gas emissions may have arisen well before 1990 for certain States. Since this is not a contentious proceeding, this Court need not identify precisely which particular State or States had such an understanding (although the Court is of course free to refer to the historical record presented to it).

111. Thereafter, the international community of States, through negotiations, will determine the exact nature, scope and form of redress from those States that the international community, by reference to incontrovertible documentary evidence of the calibre cited above, identifies as having had prior knowledge of climate change.

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255 *Juliana v United States*, No. 18-36082, Op., 17 January 2020 (9th Cir.), Annex 635.

VI. CONCLUSION

112. For the reasons described above, Barbados respectfully invites the Court to make an advisory opinion:

a. on the same terms as set out in paragraph 343 of the Written Statement of Barbados; and

b. stating that States are obligated under international law to adopt measures that would ameliorate the disproportionately deleterious effects of the climate crisis on the financial system, including insurance, for vulnerable States.

15 August 2024

Ambassador François Jackman, Ambassador and Permanent Representative, Permanent Mission of Barbados to the United Nations

Representative of Barbados

Professor Robert G Volterra, Partner at Volterra Fietta and Visiting Professor of International Law at University College London

Co-Representative of Barbados