INTERNATIONAL COURT OF JUSTICE

OBLIGATIONS OF STATES IN RESPECT OF CLIMATE CHANGE

(REQUEST FOR ADVISORY OPINION)

WRITTEN COMMENTS OF THE COMMONWEALTH OF THE BAHAMAS

14 August 2024

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I.
INTRODUCTION

1. The record number of written statements filed by States and international organisations in these proceedings is a testament to the prominence of international law in regulating States' behaviour in the context of the climate crisis. The Bahamas welcomes the broad engagement from the international community, and hopes that it will translate into more ambitious, effective and cooperative global action by all States. Such action is acutely necessary for the survival of The Bahamas as a State, its people, way of life, vibrant cultures, and natural resources that sustain not only the Bahamian people of present and future generations, but also help secure a liveable future for all.

2. In the nearly five months since the filing of The Bahamas' First Written Statement on 22 March 2024, atmospheric and ocean temperatures have continued to break records. In May, the streak of record global temperatures stretched into a twelfth consecutive month, meaning that for each month between May 2023 and May 2024, the temperature was the warmest on the record for that month.[1] As of May, the world's oceans had broken temperature records *every single day* in 2024, sometimes by wide margins.[2] Just last month, the daily global temperature record was broken twice in two days: Sunday 21 July and Monday 22 July were both at the time the hottest days in recorded human history.[3]

3. In its First Written Statement, The Bahamas described the alarming and ever intensifying effects of climate change on its territory and its peoples. In July, Hurricane Beryl hit the Caribbean as the earliest category five hurricane ever recorded, leaving in its wake death, destruction and despair.[4] Fuelled by unprecedented ocean temperatures, it grew from a relatively weak tropical depression into a category five storm in less than two days, leaving the

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1 "Copernicus: May 2024, streak of global records for surface air and ocean temperatures continues", *Copernicus Climate Change Service* (6 June 2024), *available at* https://climate.copernicus.eu/copernicus-may-2024-streak-global-records-surface-air-and-ocean-temperatures-continues.

2 "Climate change: World's oceans suffer from record-breaking year of heat", *BBC News* (8 May 2024), *available at* https://www.bbc.com/news/science-environment-68921215.

3 "New record daily global average temperature reached in July 2024", *Copernicus Climate Change Service* (25 July 2024), *available at* https://climate.copernicus.eu/new-record-daily-global-average-temperature-reached-july-2024.

4 "How record-breaking Hurricane Beryl is a sign of a warming world", *BBC News* (3 July 2024), *available at* https://www.bbc.co.uk/news/articles/c9r3g572lrno.

States and populations in its path very little time to prepare.[5] It is a fact that such extreme weather events will occur more frequently in the coming years, and become more intense.

4. Acknowledging the urgency, the United Nations Secretary General recently stated that "it's climate crunch time", and called on the international community to strengthen global action "especially in the next 18 months".[6] International law is key in directing States' conduct and The Bahamas urges the Court to deliver a robust opinion reaffirming States' obligations to take radical and urgent action to reduce their greenhouse gas ("***GHG***") emissions, which are the principal driver of climate change.

5. As for significant legal developments, the Court now has the benefit of the International Tribunal for the Law of the Sea ("***ITLOS***") Advisory Opinion dated 21 May 2024, which provides an authoritative interpretation of States' climate change obligations under the United Nations Convention on the Law of the Sea ("***UNCLOS***"), as well as the European Court of Human Rights ("***ECtHR***") decision in *KlimaSeniorinnen v. Switzerland* which addresses States' mitigation obligations under the European Convention on Human Rights. Both decisions support The Bahamas' submissions in its First Written Statement, and The Bahamas relies upon the key relevant findings in this statement.

6. In this statement, The Bahamas addresses the key themes that have emerged from the 91 written statements submitted to the Court in March 2024. While this submission will focus on issues which are contentious, it is important to note that there is significant common ground among States and other participants in these proceedings:

(a) Virtually all States have embraced the scientific consensus around the causes and effects of climate change, and the action necessary to effectively respond to it.[7] In doing so, States have paid special regard to the reports issued by the Intergovernmental Panel on Climate Change ("***IPCC***"),[8] which aligns with the approach advanced by The Bahamas in its First Written Statement.

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5 "Why climate change makes a hurricane like Beryl more dangerous", *NPR* (4 July 2024), *available at* https://www.npr.org/2024/07/04/nx-s1-5026730/hurricane-beryl-climate-change.

6 "There is an exit off 'the highway to climate hell', Guterres insists", *UN News* (5 June 2024) *available at* https://news.un.org/en/story/2024/06/1150661.

7 *See, e.g.*, Written Statements of Albania, paras. 51, 53–56; Barbados, para. 149; Chile, paras. 27–32; Costa Rica, paras. 19, 54, 100–102; El Salvador, para. 11; France, para. 15; Ghana, para. 30; Liechtenstein, para. 21; Madagascar, paras. 11, 37; Mexico, para. 17; Palau, paras. 8–10; Singapore, para. 3.86; Sri Lanka, paras. 26–29; Timor-Leste, paras. 97–99; Uruguay, paras. 10–25.

8 *See, e.g.*, Written Statements of Albania, paras. 50–52; Antigua and Barbuda, para. 15; Bangladesh, para. 18; Belize, para. 47; Bolivia, paras. 49, 54; Brazil, paras. 3, 51, 59; Burkina Faso, paras. 9–12; Chile, para. 31;

(b) States have overwhelmingly agreed that their obligations under international law are informed by science, and evolve with it.[9] As The Bahamas set out in its First Written Statement, climate treaties and other sources of law frequently refer to the "best available science" as underpinning the nature and scope of States' obligations.[10] Recently, ITLOS confirmed that science is a "particularly relevant" factor that States "should" consider when assessing the measures necessary to prevent, reduce and control marine pollution from anthropogenic GHG emissions, and that science "plays a crucial role" in that assessment.[11]

(c) There was broad agreement that international law obliges States to take urgent and ambitious action to mitigate anthropogenic GHG emissions, and take adaptation measures to minimise their harmful effects.[12] States have reaffirmed the significance of climate treaties, customary international law, the law of the sea, and human rights law, as a source of binding climate change obligations.[13]

(d) States have agreed that effective climate action requires, *inter alia*, a robust State regulation of private actors, many of whom are major GHG emitters.[14]

Costa Rica, paras. 98–102; Democratic Republic of Congo, paras. 39–46; Ecuador, para. 1.9; Egypt, para. 25; Grenada, paras. 27–30; Liechtenstein, para. 21; Pakistan, para. 4; Peru, paras. 10–14; Philippines, paras. 27–28; Portugal, para. 14; Romania, paras. 12–15; Singapore, para. 3.16; Spain, para. 3; Sri Lanka, paras. 13, 26–27; South Korea, para. 8; Switzerland, para. 27; Tonga, para. 130; Uruguay, paras. 15–25.

9 *See, e.g.*, Written Statements of Albania, para. 80; Argentina, para. 44; Democratic Republic of Congo, para. 223; Ecuador, para. 3.27; Grenada, para. 68; Mauritius, para. 200; Mexico, paras. 44, 61–62; Peru, paras. 84, 107; Romania, paras. 10–15; Saint Lucia, paras. 53–54; Sierra Leone, paras. 3.15, 3.19; Singapore, para. 5.1(b); Switzerland, para. 44; Tonga, paras. 157–159.

10 Written Statement of The Bahamas, paras. 59–64.

11 *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*, Case No. 31, Advisory Opinion, ITLOS (21 May 2024) (hereinafter "**ITLOS Climate Change Advisory Opinion**"), paras. 207, 211, 212.

12 *See, e.g.*, Written Statements of Antigua and Barbuda, para. 228; Bangladesh, para. 83; Barbados, paras. 193–194; Colombia, paras. 3.10–3.11; Cook Islands, paras. 238, 355; Ecuador, paras 3.43, 3.52, 3.74; Liechtenstein, para. 79; Mauritius, paras. 93, 107; Netherlands, para. 2.6; Peru, paras. 81 and 83; Seychelles, para. 6; Sierra Leone, paras 3.20, 3.29, and 3.30; Timor–Leste, paras. 100, 123; Tuvalu, para. 111; United Arab Emirates, paras. 105, 120; Vanuatu, paras. 398, 422.

13 *See, e.g.*, Written Statements of Antigua and Barbuda, paras. 229-230; Cook Islands, para. 149; Dominican Republic, paras. 4.20–4.22; Ecuador, paras. 3.66, 3.89–3.90; Egypt, paras. 119, 154; Kenya, paras. 5.49, 5.52; Latvia, paras. 20–22, 26; Micronesia, paras. 78–79; Netherlands, para. 3.23; Seychelles, para. 62; South Africa, paras. 62, 65, 68; Solomon Islands, paras. 61, 63, 67, 163; Tonga, paras. 140, 216, 224; United Arab Emirates, para. 17; Uruguay, para. 88; Vanuatu, para. 195.

14 *See, e.g.*, Written Statements of Bangladesh, paras. 105, 139; Costa Rica, para. 103; Colombia, para. 4.10; Tonga, para. 158.1; Singapore, para. 3.62; Kenya, paras. 5.49–5.50; Albania, paras. 72, 75.

(e) States have readily recognised that certain States are uniquely vulnerable to climate change, including small island and low-lying States such as The Bahamas, and that equitable climate action must account for that disparity of impact.[15]

(f) States have widely endorsed international cooperation as a critical tool of climate action, and recognised their legal obligations in that respect.[16] There is broad consensus that resource-rich States must take the lead in mitigation and adaptation efforts, and provide financial, technological and other assistance to developing States such as The Bahamas.[17]

(g) There was general recognition that international law must address the existential threat that many States face from climate change to their territorial integrity and statehood.[18] In particular, there was broad support for—and no opposition to—the fixing of baselines and maritime entitlements, as well the continuation of statehood, irrespective of physical changes to the affected States' coastlines resulting from sea level rise.[19]

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15 *See, e.g.*, Written Statements of Australia, para. 1.8; Barbados, paras. 13, 309; Dominican Republic, paras. 2.10–2.18; Grenada, paras. 7, 29-30, 72–73; Mauritius, paras. 210(d), 211(a); Palau, para. 10; Seychelles, paras. 22, 25, 27–29, 44; Solomon Islands, paras. 246–248; Singapore, paras. 1.1, 3.50; Timor-Leste, paras. 159–160, 321; Tonga, paras. 304–312; Vanuatu, paras. 89–91, 170, 174–175, 554.

16 *See, e.g.*, Written Statements of Denmark, Finland, Iceland, Norway and Sweden, paras. 4, 62; Egypt, paras. 194, 219–220, 257; Kenya, paras. 5.18–5.19, 5.21, 5.46; Micronesia, para. 65; Netherlands, paras. 3.73–3.74, 4.3, 4.14; Portugal, para. 44; Singapore, paras. 3.21–3.22; Solomon Islands, paras. 1, 58, 115, 116–122; South Africa, paras. 95–96, 105; Tonga, paras. 60, 200, 314; United Arab Emirates, paras. 72–75; United Kingdom, para. 4.4; United States of America, paras. 2.32, 3.1; Uruguay, paras. 120, 123; Vanuatu, para. 422.

17 *See, e.g.*, Written Statements of Singapore, paras. 3.38, 3.40; Bangladesh, paras. 140–143; Vanuatu, paras. 408, 411, 415, 422–427; Barbados, paras. 195–196, 198–199, 207, 232; Kenya, paras. 5.19, 5.21, 6.89; Colombia, paras. 2.77, 3.40, 3.52-3.53; Egypt, paras. 59, 65, 67, 149, 151, 156, 160.

18 *See, e.g.*, Written Statements of Albania, para. 13; Australia, para. 1.19; Bangladesh, para. 79; Belize, para. 5; Colombia, para. 1.8; Ecuador, para. 1.8; Egypt, para. 396; European Union, para. 48; Kenya, para., 4.8; Kiribati, para. 30; Liechtenstein, para. 22; Nauru, para. 7; Palau, para. 1; Peru, para. 37; Republic of Korea, para. 4; Sierra Leone, para. 2.7; South Africa, para. 25; St Vincent and the Grenadines, para. 8; Tonga, para. 266; United Arab Emirates, para. 3; Vietnam, para. 12.

19 *See, e.g.*, Written Statements of Commission of Small Island States, para. 72; Liechtenstein, para. 77; Micronesia, para. 115; Nauru, para. 12; Pacific Islands Forum Secretariat, para. 14; Solomon Islands, paras. 212–213; Tonga, para. 236.

(h) The majority of States took the view that the ordinary rules of State responsibility apply in the context of climate change, including in relation to reparation that is due for breaches of relevant obligations.[20]

7. As for the contentious issues, The Bahamas has identified in the available written statements a number of broad legal and conceptual misconceptions that it addresses below, both regarding the content of States' obligations with respect to climate change (**Section II**) and States' responsibility for breach of the relevant obligations (**Section III**). These misconceptions underscore why it is imperative that the Court be as specific as possible in articulating a response to the United Nations General Assembly's question, so as to remove ambiguity and doubt about the nature and scope of States' obligations with respect to climate change, and about the precise implications of its Opinion.

II.
STATES' OBLIGATIONS WITH RESPECT TO CLIMATE CHANGE

8. In this section, The Bahamas addresses key misconceptions that have arisen in States' and international organisations' (together referred to as "***Participants***") written statements regarding States' obligations with respect to climate change. The common thread linking these arguments is that they dilute established obligations by mischaracterising their content, nature, or relationship with other norms.

(a) In **Section A**, The Bahamas addresses the suggestion that States' obligations with respect to climate change are of a collective nature only, and lack any meaningful individual component. As will be explained, international law positively imposes individual obligations on each State, which is crucial for effective climate action.

(b) In **Section B**, The Bahamas addresses various arguments relating to norm conflict in international law, including the assertion that climate treaties establish a self-contained regime and thus displace or circumscribe the application of other environmental norms. The Bahamas will show that climate change obligations are drawn from different sources which reaffirm and reinforce each other, rather than stand in opposition.

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[20] *See, e.g.*, Written Statements of Antigua and Barbuda, para. 551; Colombia, paras. 3.18, 4.11; Egypt, para. 265; Kenya, para. 6.95; Kiribati, para. 181; Palau, para. 20; Saint Lucia, paras. 92–94; St Vincent and the Grenadines, para. 134; Sierra Leone, para. 3.145; Singapore, para. 4.11; Solomon Islands, para. 2; Timor-Leste, para. 374; Tonga, para. 307; Tuvalu, para. 133.

(c) In **Section C**, The Bahamas responds to attempts to dilute the obligations imposed under climate treaties. The Bahamas will show that climate treaties impose legally binding, substantive and onerous obligations on States parties.

(d) In **Section D**, The Bahamas addresses the argument that the unique nature of climate change precludes the application of pre-existing general rules such as the duty to prevent transboundary harm, the duty to protect and preserve the marine environment, or human rights obligations. The Bahamas will show that such pre-existing obligations are broad, open-ended commitments which evolve over time, including in light of new scientific understanding, and readily encompass protection from the harmful effects of GHG emissions.

(e) In **Section E**, The Bahamas offers a few other observations on certain specific obligations in the climate context.

A. INTERNATIONAL LAW IMPOSES ROBUST INDIVIDUAL OBLIGATIONS ON STATES

9. A number of Participants have suggested or implied that international law does not impose *individual* mitigation obligations on States, only collective ones.[21] This is on the basis that global warming can only be tackled by collective action. There is no support for such interpretation of the applicable norms, whether as a matter of law, science or policy.

10. As is clear from The Bahamas' First Written Statement, customary environmental law, climate treaties, the law of the sea and international human rights law are primarily addressed to States as individual subjects and impose a range of individual obligations with respect to climate change.[22] For instance, the Paris Agreement requires each State individually to communicate an ambitious GHG emission reduction target, and adopt measures domestically with a view to its implementation.[23] Under UNCLOS, States are required to take all necessary measures to prevent, reduce and control pollution of the marine environment by GHG emissions, "individually or jointly as appropriate".[24] Similarly, under international human rights law, each State has an individual obligation to take measures within *its* territory and jurisdiction to respect,

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[21] Joint Statement of Denmark, Finland, Iceland, Norway and Sweden, para. 108; Written Statements of Australia, paras. 3.65–3.66; China, paras. 23–24.

[22] Written Statement of The Bahamas, paras. 9–10.

[23] Paris Agreement to the United Nations Framework Convention on Climate Change, 12 December 2015, 3156 *UNTS* 219 (hereinafter "**Paris Agreement**"), art. 4.

[24] United Nations Convention on the Law of the Sea, 10 December 1982, 1833 *UNTS* 3 (hereinafter "**UNCLOS**"), art. 194(1).

protect and fulfil human rights, including by achieving and maintaining an environmentally sustainable level of GHG emissions.[25] As noted recently by the ECtHR:

> each State has its own share of responsibilities to take measures to tackle climate change and . . . the taking of those measures is determined by the State's own capabilities rather than by any specific action (or omission) of any other State.[26]

11. Thus, it is each State's freedom to act as it pleases, within its territory and jurisdiction, that is constrained by the international law norms, even if the ultimate objective can only be achieved through concerted action.[27] Any other interpretation would lead to a state of collective paralysis, or allow recalcitrant States to "free ride" on the efforts of others, which is entirely inconsistent with the content, object and purpose of the relevant norms.

12. In substance, none of the written statements seeks to negate the fact that States have individual mitigation obligations, but a number of Participants emphasise the difficulty in *identifying* and *allocating* individual mitigation obligations within the context of the broader collective objective. However, the fact that there is no readily available formula to fix that allocation does not negate that each State has an individual obligation to contribute its fair share to global mitigation action. Indeed, it is widespread practice for States to adopt individual mitigation objectives, whether binding through legislation or not.[28] For example, there has been a recent convergence around "net zero" policies as the appropriate benchmark for measurable individual action. As stated in the 2023 global stocktake, 87% of the global economy is already covered by individual net zero targets.[29] This approach to quantifying individual obligations is consistent with the achievement of global net zero which—as is widely accepted—is required

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25 *See, e.g.*, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 *UNTS* 3 (hereinafter "**ICESCR**"), art. 2(1) ("Each State Party to the . . . Covenant undertakes to take steps, individually and through international assistance and cooperation").

26 *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, ECtHR Application No. 53600/20, Judgment (9 April 2024) (hereinafter "***KlimaSeniorinnen v. Switzerland***"), para. 442. *See also State of the Netherlands v. Urgenda Foundation*, The Supreme Court of the Netherlands (20 December 2019) (hereinafter "***Urgenda* Judgment**"), paras. 5.7.2–5.8.

27 *See also*, in relation to State responsibility for failure to exercise individual due diligence in mitigation action, paras. 112–114 below.

28 Lord et al. (eds.), *Climate Change Liability: Transnational Law and Practice* (Cambridge University Press, 2011), para. 4.22.

29 UNFCCC, Report of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement on its fifth session, held in the United Arab Emirates from 30 November to 13 December 2023, Decision 1/CMA.5: Outcome of the first global stocktake, document FCCC/PA/CMA/2023/16/Add.1 (15 March 2024) (hereinafter "**UNFCCC Decision 1/CMA.5**"), para. 20.

to limit climate change to sustainable levels.[30] On that basis, and informed by IPCC's findings, the ECtHR has recently confirmed that the European Convention on Human Rights requires each State to "undertake measures for the substantial and progressive reduction of [its] *respective* GHG emission levels, *with a view to reaching net neutrality* within, in principle, the next three decades".[31]

B. CLIMATE OBLIGATIONS ARE COMPLEMENTARY AND ARE AIMED AT A COMMON OBJECTIVE

13. A number of Participants have sought to dilute international law obligations applicable in the climate context on the basis of their perceived conflict with other norms of international law. These arguments took two forms: (*i*) certain Participants argued that climate treaties represent *lex specialis* and are thus the sole source of law in relation to climate change; and (*ii*) certain Participants argued that specific legal rules, such as the right to development, permanent sovereignty over natural resources, or certain human rights obligations, conflict with and thus circumscribe the content of climate change obligations. The Bahamas respectfully submits that both these positions are misconceived.

14. As a preliminary point, international law contains a strong presumption against norm conflict, and courts strive to interpret rules emanating from different sources and governing the same subject matter in harmony with each other.[32] That is entirely possible when interpreting States' obligations with respect to climate change, not least because they are aligned around the same normative objectives. As The Bahamas noted in its First Written Statement, climate

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30 Written Statement of The Bahamas, paras. 86–87. *See also* IPCC 2023 Synthesis Report, p. 68.

31 *KlimaSeniorinnen v. Switzerland*, para. 548 (emphasis added).

32 International Law Commission (hereinafter "**ILC**"), "Report of the Study Group of the International Law Commission, finalized by Mr. Martti Koskenniemi," in *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, A/CN.4/L.682 and Add.1 (13 April 2006) (hereinafter "**ILC Report of the Study Group of the International Law Commission on Fragmentation of International Law**"), para. 37; ILC, *Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, Yearbook of the International Law Commission, 2006, vol. II, Part Two, p. 180, paras. 17–21. For illustration, *see, e.g.*, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971* (hereinafter "***Namibia* Advisory Opinion**"), pp. 31–32, para. 53; *Oil Platforms case (Islamic Republic of Iran v. United States of America) (Merits) Judgment of 6 November 2003 I.C.J. Reports 2003*, p. 182, para. 41; ITLOS Climate Change Advisory Opinion, paras. 128–137; *Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan), Award on Jurisdiction and Admissibility of 4 August 2000, UNRIAA, vol. XXIII*, pp. 40–41, para. 52; *Indus Waters Kishenganga Arbitration (Pakistan v. India)*, PCA Partial Award (18 February 2013), para. 452; *Indonesia – Certain Measures Affecting the Automobile Industry*, Report of the Panel, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R (2 July 1998), pp. 335–336, para. 14.28. *See also* Written Statements of Switzerland, para. 69; Timor-Leste, paras. 85, 89, 92–93.

treaties, customary environmental law, the law of the sea and international human rights law reaffirm and reinforce each other, rather than stand in conflict.[33]

1. The *lex specialis* issue: climate treaties do not supersede other applicable norms

15. States' obligations with respect to climate change stem from multiple branches of international law, including climate treaties[34], customary international law[35], UNCLOS[36], and human rights treaties.[37] However, certain Participants have argued that the climate treaties constitute *lex specialis* that either fully precludes the application of other norms in the climate space,[38] sets a ceiling on the applicable standards,[39] or exhausts their content.[40] The Bahamas respectfully submits that that is not an accurate representation of the law.

16. The principle that special law (or *lex specialis*) prevails over general law in case of a conflict is one of many techniques employed by courts and tribunals when interpreting international law. It is an interpretive technique rather than a self-standing rule of law, and it does not exist in a vacuum but interacts with other principles of interpretation (such as, for instance, rules relating to *lex posterior*, good faith interpretation, and so on). In this case, a number of Participants have invoked a specific version of the *lex specialis* argument, *i.e.*, that climate treaties constitute a "special regime", which is self-contained and acts as an exclusive source of climate change obligations for States.[41] That argument is misconceived for a number of reasons.

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33 Written Statement of The Bahamas, paras. 9, 89. *See also* Written Statements of the European Union, paras. 229, 230, 241, 243, 268, 296; Egypt, paras. 73–75; Cook Islands, paras. 131, 145; New Zealand, para. 86 (noting that the principle of harmonisation is "consistent with the ordinary rules of treaty interpretation and advances the systemic integration of international law").

34 Written Statement of The Bahamas, paras. 85–88.

35 *Id.*, paras. 89–111.

36 *Id.*, paras. 112–140.

37 *Id.*, paras. 141–175.

38 Written Statements of the Organization of the Petroleum Exporting Countries (hereinafter "**OPEC**"), para. 87; Saudi Arabia, paras. 4.90–4.99.

39 Written Statements of China, para. 145; Australia, paras. 2.61–2.62, 3.5, 3.9, 4.11; Saudi Arabia, paras. 4.90–4.99.

40 Written Statements of New Zealand, paras. 105, 109, 121; Australia, paras. 3.19, 4.6; United States of America, 4.25; Russian Federation, pp. 14–15; South Africa, paras. 14–15, 131; Joint Statement of Denmark, Finland, Iceland, Norway and Sweden, para. 95.

41 *See, e.g.*, Written Statements of OPEC, para. 62 (citing *Case of the SS Wimbledon (UK v. Japan), Judgment of 17 August 1923, P.C.I.J., Series A., No. 1* (hereinafter "***SS Wimbledon* Judgment**"); *United States*

17. *First*, there is no actual conflict between climate treaties and other norms relevant to climate change. By way of example, and taking the Paris Agreement as the most recent expression of the alleged *lex specialis*, States' **mitigation obligations** as articulated in the Paris Agreement can easily co-exist with obligations under the various other applicable regimes. As discussed in more detail below, the Paris Agreement imposes on States an obligation to mitigate GHG emissions by prescribing conduct consistent with the achievement of its temperature goal, thus seeking to prevent serious environmental damage.[42] In the same vein, customary international law, human rights law and the law of the sea require States to take steps to protect the environment from damage caused by GHG emissions.[43] Even if the *standard* of conduct prescribed under each regime may differ (which is not accepted), States can readily comply with all relevant obligations *at the same time* by adhering to the highest applicable standard. As explained by the International Law Commission ("***ILC***"), for norm conflict to arise "it is not enough that the same subject matter is dealt with by the two provisions, there must be some actual inconsistency between them, or else a discernible intention that one provision is to exclude the other."[44] Inconsistency may arise in cases of contradiction (one norm prescribes conduct that another norm prohibits) or opposition (two norms prescribe actions that cannot be fulfilled at the same time).[45] However, States' mitigation obligations arising from the different branches of international law are complementary and ultimately co-extensive. The same is true for States' **adaptation** and **cooperation obligations**.

18. *Second*, climate treaties do not seek to create a self-contained regime which displaces the application of other rules. This is a matter of treaty interpretation. There is no law of "special regimes", which would define what constitutes a "special" or "self-contained" regime,

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Diplomatic and Consular Staff in Tehran (United States of America v. Islamic Republic of Iran), Judgment, I.C.J. Reports 1980); South Africa, paras. 14–15, 131; Saudi Arabia, paras. 5.8–5.9.

42 Paris Agreement, arts. 2(1)(a), 4(2), 4(13), 4(17), 6(4). (Even if the Paris Agreement imposed no mitigation obligation, as some States seem to argue, there would not exist any normative conflict. In such case, climate treaties would simply not regulate the matter, while other sources of law would).

43 Written Statement of The Bahamas, paras. 92, 98, 112, 119, 142.

44 ILC, *Report on the work of its fifty-third session* (23 April–1 June and 2 July–10 August 2001), Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10, document A/56/210, Commentary to Article 55 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts, para. 4. *See also* B. Mayer, "Climate Change Mitigation as an Obligation under Customary International Law", 48 *Yale Journal of International Law* (2023) 105, 116; W. Jenks, "The Conflict of Law-making Treaties", 30 *British Yearbook of International Law* (1953) 401, pp. 425–426.

45 D. Banaszewska, "Lex specialis" in *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2015), para. 3; ILC Report of the Study Group of the International Law Commission on Fragmentation of International Law, paras. 71–74; W. Jenks, "The Conflict of Law-making Treaties", 30 *British Yearbook of International Law* (1953) 401, pp. 425–426.

or the legal consequences of such determination.[46] As the ILC has observed, the so-called self-contained regimes are merely "strong forms" of *lex specialis*.[47] How different norms interact in their application is heavily fact-dependent and a matter of interpretation in each specific case.[48] Courts will consider the language of the relevant instrument(s), the context, the nature of the norms in question, and other relevant factors on the whole.

19. The case of the *SS Wimbledon* is often cited as providing a classic illustration of a self-contained regime. There, the PCIJ considered that a special section of the Treaty of Versailles dedicated to the Kiel Canal in Germany established a special regime for passage of vessels, which was designed to deviate from that applicable to other German waterways governed by other provisions of the Treaty of Versailles. In its decision, the PCIJ highlighted two factors: (*i*) the Kiel Canal regime differed in important respects from the regime for other waterways, in particular in allowing the passage of war vessels; and (*ii*) by repeating certain provisions applicable to ordinary waterways, the Kiel Canal section evidenced an intention to provide for a comprehensive self-contained regime detached from the ordinary regime applicable to the use of waterways.[49] In any event, it appears that the *SS Wimbledon* case was an ordinary application of the *lex specialis* rule in case of norm conflict, *i.e.*, a special norm which required the free passage of war vessels prevailed over a general one that gave Germany the discretion (and potentially an obligation) to refuse such passage.

20. The situation is very different when it comes to the interpretation of climate treaties and their relationship with other norms of international law, including environmental law. Nothing in the language or the negotiating history of climate treaties reflects an intention to displace the application of such other norms. On the contrary, the United Nations Framework Convention on Climate Change ("***UNFCCC***") expressly refers to the States' customary law obligation to prevent transboundary harm;[50] recalls the Stockholm Declaration (which links the protection of the environment to the enjoyment of human rights, and specifically calls on States to prevent

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46 ILC Report of the Study Group of the International Law Commission on Fragmentation of International Law, paras. 123–137.

47 *Id.*, para. 123.

48 *Id.*, paras. 124–137.

49 *SS Wimbledon* Judgment, paras. 20–33.

50 United Nations Framework Convention on Climate Change, 9 May 1992, 1771 *UNTS* 107 (hereinafter "**UNFCCC**"), preamble.

pollution of the seas);[51] and recalls United Nations General Assembly resolution 44/206 of 1989 (which notes the adverse effects of sea level rise on islands and coastal areas).[52] The Paris Agreement builds upon the UNFCCC and expressly calls upon States to "respect, promote and consider their respective obligations on human rights".[53] Upon ratifying the UNFCCC and the Paris Agreement, a number of States specifically declared that nothing in those treaties may "be interpreted as derogating from the principles of general international law."[54]

21. Moreover, climate treaties do not comprehensively regulate States' obligations with respect to climate change, and could not therefore effectively function as a self-contained regime. The UNFCCC, for instance, is a framework treaty which sets out the basic principles of global climate action but does not impose, *e.g.*, mitigation obligations. The Paris Agreement goes further, requiring States parties to set GHG emission reduction targets and take action towards their implementation, consistent with the collective goal of limiting the global average temperature increase to 1.5–2ºC.[55] However, the Paris Agreement does not explicitly address the individual allocation of mitigation obligations beyond referring to States' "common but differentiated responsibilities" and their "highest possible ambition".[56] In contrast, the prevention obligation under customary international law requires that a State's individual mitigation action be proportional to the harm caused, *i.e.*, its level of GHG emissions.[57] In this sense, customary international law is key to identifying States' individual mitigation obligations, thus facilitating and furthering the collective goal set by the Paris Agreement. This position accords with the Court's reasoning in *Construction of a Road*, where it held that the limited procedural obligations in an 1858 Treaty between Costa Rica and Nicaragua "do . . . not exclude

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51 *Id.* (citing Stockholm Declaration on the Human Environment, United Nations Conference on the Human Environment, Stockholm (June 1972), document A/CONF.48/14/Rev.1, proclamation 1, principle 7).

52 *Ibid.* (citing United Nations General Assembly resolution 44/206, Possible adverse effects of sea-level rise on islands and coastal areas, particularly low-lying coastal areas, document A/RES/44/206 (22 December 1989)).

53 Paris Agreement, preamble, para. 12.

54 *See, e.g.*, Declarations of Fiji, Kiribati, Nauru, Papua New Guinea, and Tuvalu upon their signature of the UNFCCC, *available at* https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXVII-7&chapter=27&Temp=mtdsg3&clang=_en; Declarations of the Cook Islands, Micronesia, Nauru, Niue, Solomon Islands and Tuvalu upon their signature or ratification of the Paris Agreement, *available at* https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&clang=_en.

55 Written Statement of The Bahamas, paras. 86–87, 109, 202; *see* below para. 47.

56 *See* below paras. 46-48.

57 Written Statement of The Bahamas, para. 102(c).

any other procedural obligations with regard to transboundary harm which may exist in treaty or customary international law".[58]

22. Finally, any suggestion that climate treaties displace the customary law prevention obligation by setting a *lower* standard for mitigation action—as some Participants seem to argue[59]—is entirely at odds with the object and purpose of climate treaties, and their character as instruments of environmental law.

23. Dealing with a similar *lex specialis* objection, ITLOS recently affirmed that "[w]hile the Paris Agreement complements [UNCLOS] in relation to the obligation to regulate marine pollution from anthropogenic GHG emissions, the former does not supersede the latter" and thus held that the Paris Agreement "is not *lex specialis* to [UNCLOS]."[60] Notably, a large number of Participants in these proceedings also take the view that climate treaties do not displace other relevant obligations, which are complementary and do co-exist.[61]

24. In summary, climate treaties do not establish a self-contained regime which is the exclusive source of climate change obligations under international law. Rather, climate treaties exist alongside other sources of climate change obligations.

2. Climate obligations complement other human development-oriented norms

25. Some Participants have also argued that specific legal rules, such as the right to development, permanent sovereignty over natural resources, or certain human rights obligations, conflict with and thus necessarily circumscribe the content of climate change obligations. Such arguments are premised on a misunderstanding of both the scope and content of these other norms, which are not in fact in tension with States' climate change obligations. *First*, the suggestion that these other norms grant States unfettered discretion to allow environmental destruction is belied by the norms themselves. *Second*, these norms need to be interpreted in the broader context of international law and the competing interests it seeks to protect.

26. In any event, even if the Court were to find that any such norms *are* in conflict with climate action, The Bahamas submits that such conflicts may be satisfactorily addressed in

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58 *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), Judgment, I.C.J. Reports 2015*, p. 708, para. 108.

59 Written Statements of United States of America, paras. 4.1, 4.24; China, paras. 93, 120; Joint Statement of Denmark, Finland, Iceland, Norway and Sweden, para. 95.

60 ITLOS Climate Change Advisory Opinion, paras. 223–224.

61 *See, e.g.*, Written Statements of Costa Rica, para. 32; New Zealand, para. 86; Colombia, para. 3.9; European Union, para. 227; Cook Islands, para. 135; Egypt, para. 73; Republic of Korea, para. 51; Switzerland, para. 68.

accordance with the well-established rules for the resolution of normative conflicts under international law.

(a) The relevant norms do not grant States unfettered discretion

27. Several written statements suggest that international law obligations that mandate States to effect a deep, rapid, and sustained reduction in GHG emissions stand in tension with the right to development and the principle of permanent sovereignty over natural resources.[62] According to these submissions, poverty eradication and related goals require an approach to development that can only be sustained by economic activities that may disproportionately generate GHG emissions,[63] and obligations of climate action cannot "overrid[e]" States' sovereign choice of means of climate policies and their control over their energy systems and decisions.[64] However, the underlying norms do not in fact favour short-term economic development at the expense of environmental destruction.

28. Take, for example, the **right to development** under international law. The 1986 United Nations Declaration on the Right to Development defines the right as "an inalienable right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and

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62 *See, e.g.*, Written Statements of India, paras. 69–71 (stating that the UNFCCC "recognizes and underlines the fundamental significance and importance to developing countries of the right to development in the context of climate change" and arguing that socio-economic development is a "necessity" for addressing climate change); OPEC, para. 45 ("The Agreement, along with the Kyoto Protocol and UNFCCC, are not to be viewed as instruments to solely address climate change. Its object and purpose allow countries to achieve development while addressing the impacts of policies on the climate system and climate change effects on its development necessities. Climate change policies are thus an instrument of development, which should not be hindered or derailed."); Joint Statement of Denmark, Finland, Iceland, Norway and Sweden, para. 81 ("The ultimate objective of the UNFCCC, and the related legal instruments, is to achieve stabilisation of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. The UN climate change regime does not prescribe human rights obligations on the Parties. The UNFCCC does not explicitly mention human rights, but the Parties have a right to, and should promote, sustainable development."); Saudi Arabia, para. 1.14, ("From the outset, and up to the present, the negotiated outcomes recognize that the important global goal of combatting climate change must be addressed in the 'broader context' of also achieving sustainable development, including the eradication of poverty, safeguarding food production and ending hunger, economic development, protecting livelihoods, ensuring decent work and quality jobs, addressing socioeconomic impacts, promoting economic diversification, minimizing adverse effects on the economy, and protecting economies, including those 'most affected by the impacts of response measures, particularly developing country Parties.' . . . COP28 reaffirmed the need to balance combatting climate change, on the one hand, and sustainable development on the other.").

63 *See, e.g.*, Written Statement of Saudi Arabia, para. 2.23 ("Sustained investments in traditional energy sources alongside ongoing efforts to reduce emissions, including through scaling up renewables and carbon dioxide capture and removal technologies, are therefore necessary to ensure an orderly transition that preserves both economic prosperity and energy security.")

64 *See, e.g.*, Written Statement of OPEC, para. 70.

fundamental freedoms can be fully realized."[65] Even on its face, the right to development does not permit States to pursue unconstrained economic policies. To the contrary, the economic dimension of the right interacts with the need for social, cultural and political development, all of which are expressly aimed at the full realisation of human rights (and all of which require individuals and collective peoples to enjoy the benefit of a healthy environment, as is discussed further below). In other words, the balance between economic and other interests is embedded in the right itself. This was recognised by Vice-President Weeramantry in his separate opinion in *Gabčíkovo-Nagymaros*, in which he observed that:

> "[d]evelopment" means, of course, development not merely for the sake of development and the economic gain it produces, but for its value in increasing the sum total of human happiness and welfare.[66]

29. Submissions arguing that climate action may conflict with the **sovereign right of States to exploit their natural resources** similarly misconstrue the scope of the principle of permanent sovereignty over natural resources, which plainly does not provide a blank check for the destruction of the natural environment under a State's jurisdiction.[67] Rather, this principle entails a right and a duty to use natural resources for national development, long-term economic advancement, and the well-being of the people within a State—which includes the peoples' social, cultural and political development (and thus access to a healthy environment).[68] Thus, again, the balance between the State's and its peoples' economic and other interests is embedded in the principle itself.

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65 United Nations General Assembly resolution 41/128, Declaration on the Right to Development, document A/RES/41/128 (4 December 1986), art. 1(1). *See also* African Charter on Human and Peoples' Rights, 21 October 1986, 1520 *UNTS* 217 (hereinafter "**African Charter**"), art. 22 (providing that all peoples "shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind" and all States "shall have the duty, individually or collectively, to ensure the exercise of the right to development").

66 *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia), Separate Opinion of Vice-President Weeramantry, I.C.J. Reports 1997* (hereinafter "***Gabčíkovo-Nagymaros*, Weeramantry Opinion**"), p. 91.

67 *See* Written Statement of The Bahamas, para. 44; A. Stilz, *Territorial Sovereignty: A Philosophical Exploration* (Oxford University Press, 2019), p. 219.

68 United Nations General Assembly resolution 1803 (XVII), Permanent sovereignty over natural resources, 14 December 1962; Written Statement of Timor-Leste, para. 276. *See also* United Nations General Assembly resolution 1803 (XVII), Permanent sovereignty over natural resources, 14 December 1962, para. 1 ("The right of peoples and nations to permanent sovereignty over the natural wealth and resources must be exercised in the interest of . . . the well-being of the people of the State concerned"); African Charter on Human and Peoples' Rights, 21 October 1986, 1520 *UNTS* 217, art. 21 (permanent sovereignty "shall be exercised *in the exclusive interest of the people*" (emphasis added)).

30. Fundamentally, respect for the right to development and the States' permanent sovereignty over their natural resources in fact *call* for climate action, rather than stand in conflict with it.

(a) As was universally accepted in the Participants' written statements, climate change threatens every aspect of States' development. Destructive climate-related weather events severely compromise the ability of States, particularly small island developing States and lesser developed countries, to advance economic, social, cultural, and political agendas and fully realise human rights by causing significant physical, economic and other damage, and threatening lives and livelihoods as well as the very survival of States.[69]

(b) Similarly, the permanent sovereignty of States over their natural resources is profoundly threatened by climate change.[70] Increased flooding and storm surges, warming seas and ocean acidification, and destruction of freshwater and cultivable land deprive the people especially in low-lying island States of their means of subsistence.[71] This is all the more true for States that rely on resource-based industries for large portions of their economy, such as those with large agriculture and fishing sectors.[72]

31. Accordingly, the peoples' right to development and States' permanent sovereignty over natural resources can in fact only be safeguarded by concerted climate action.[73]

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69 *See, e.g.*, Written Statement of Tonga, para. 266.

70 *See, e.g.*, Written Statements of Bangladesh, para. 122; Alliance of Small Island States (hereinafter "**AOSIS**"), Annex 5, para. 10.

71 *See* "Sink or swim: Can island states survive the climate crisis?", *UN News* (31 July 2021), *available at* https://news.un.org/en/story/2021/07/1096642; United Nations General Assembly resolution 70/1, Transforming Our World: The 2030 Agenda for Sustainable Development, document A/RES/70/1 (25 September 2015) (hereinafter "**United Nations General Assembly Resolution 70/1**"), para. 14. *See also* Written Statement of Kiribati, para. 187.

72 *See* United Nations University, "Research Brief: The implications of climate change for the extractive industries", 4 *WIDER Research Brief* (2017), p. 1.

73 Written Statement of The Bahamas, para. 158. *See also* African Commission on Human and Peoples' Rights, *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, Decision (27 October 2001) (hereinafter "**African Commission 2001 Decision**"), para. 51 (noting that "an environment degraded by pollution and defaced by the destruction of all beauty and variety is as contrary to satisfactory living conditions and [to] development as the breakdown of the fundamental ecologic equilibria is harmful to physical and moral health") (internal citations omitted); Inter-American Court of Human Rights, *The Environment and Human Rights*, Advisory Opinion OC-23/17 (15 November 2017) (hereinafter "**IACtHR Advisory Opinion (2017)**"), para. 52 ("[T]here is extensive recognition of the interdependent relationship between protection of the environment, sustainable development, and human rights in international law."); Organization of American States resolution AG/RES. 2878, Social Charter of the

32. The same applies with respect to human rights. It is impossible, for instance, to guarantee individuals an adequate standard of living, including the availability of quality housing, food and water, without taking ambitious action against climate change. At the same time, The Bahamas acknowledges that there is a need for some GHG-generating human activity in the near term to safeguard many human rights, "as States are currently unable to produce the required amounts of energy, food, or drinking water, or provide adequate housing, schooling, or healthcare without generating GHG emissions."[74] However, international law does not require States to entirely halt GHG emissions now. It rather requires that States undergo a rapid and comprehensive *transition towards* low or zero GHG technologies with a view to achieving a deep, rapid, and sustained reduction of global GHG emissions and eventually reaching "net zero" by the middle of the century.[75] In any other scenario, the respect for economic and social rights will increasingly diminish as the adverse effects of climate change further undermine the States' ability to provide for their people.

(b) The relevant norms exist in the broader context of international law

33. *Secondly*, the relevant norms do not exist in a vacuum, but need to be balanced with other rules of international law. By signing up to international treaties and being a member of the community of States, each State has voluntarily relinquished aspects of its sovereignty and agreed to abide by international law irrespective of domestic policies or preferences. As such, the right to development and to freely dispose of natural resources are and have always been qualified by the State's other international obligations, including climate treaties, customary environmental law, the law of the sea or human rights law.[76]

34. In the present context, the freedom to pursue economic development has to be balanced with the State's obligation to protect the environment for the benefit of its people and other

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Americas (4 June 2012) (hereinafter "**Organization of American States Resolution (2012)**"), preamble ("Recognizing that a safe environment is essential to integral development").

74 Written Statement of The Bahamas, para. 101.

75 *See* Intergovernmental Panel on Climate Change, *Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (March 2023) (hereinafter "**IPCC 2023 Synthesis Report**"), p. 68; Written Statements of The Bahamas, paras. 7, 66; Micronesia, para. 89; Vanuatu, para. 95; Antigua and Barbuda, paras. 260, 339.

76 *See* Written Statement of The Bahamas, paras. 157–158; *Trail Smelter Case (United States of America, Canada), Award of 11 March 1941, Report of the International Arbitral Awards Volume* III (hereinafter "***Trail Smelter* Case**"), p. 1965 ("[N]o State has the right to use or permit the use of its territory in such a manner as to cause injury . . . in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence."); A. Stilz, *Territorial Sovereignty: A Philosophical Exploration* (Oxford University Press, 2019), p. 239.

States. As noted by the Court, this balancing of competing interests has long been reflected in the concept of "sustainable development", which provides that the right to development "must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations."[77] As noted by Vice President Weeramantry in his separate opinion in *Gabčíkovo-Nagymaros*, "development can only be prosecuted in harmony with the reasonable demands of environmental protection."[78] The principle finds broad support in State practice,[79] decisions of international tribunals and human rights treaty bodies,[80] as well as the written submissions submitted by other Participants in the present proceedings.[81]

(c) Any residual norm conflict can readily be resolved

35. To the extent that in individual instances obligations relating to climate change *are* shown to be incompatible with other obligations, including because of resource allocation issues, the norm conflict should be resolved on a case-by-case basis. International law has a "wealth of techniques . . . for dealing with tensions or conflicts between legal rules and principles."[82] These include the principle that a rule of international law "may be superior to other rules on account of the importance of its content as well as the universal acceptance of its superiority,"[83] and the use of balancing tests that consider the specific legal and factual circumstances of each normative conflict.[84]

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77 Rio Declaration on Environment and Development, adopted at the United Nations Conference on Environment and Development, Rio de Janeiro, document A/CONF.151/26/Rev.1 (Vol. I) (14 June 1992) (hereinafter "**Rio Declaration**"), principle 2.

78 *Gabčíkovo-Nagymaros*, Weeramantry Opinion, p. 92.

79 Organization of American States Resolution (2012), preamble ("Recognizing that a safe environment is essential to integral development"); United Nations General Assembly Resolution 70/1; United Nations General Assembly resolution 55/2, United Nations Millennium Declaration, A/RES/55/2 (8 September 2000).

80 IACtHR Advisory Opinion (2017), para. 52 ("[T]here is extensive recognition of the interdependent relationship between protection of the environment, sustainable development, and human rights in international law."); African Commission 2001 Decision, para. 51.

81 *See, e.g.*, Written Statements of the African Union, para. 188; Albania, paras. 114–116; Colombia, para. 3.11; Mexico, para. 100; Philippines, paras. 81–82; Thailand, para. 35.

82 ILC Report of the Study Group of the International Law Commission on Fragmentation of International Law, para. 13.

83 *Id.*, para. 14(32).

84 *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia), Judgment, I.C.J. Reports 1997* (hereinafter "***Gabčíkovo-Nagymaros* Judgment**"), para. 140; J. E. Christófolo, *Solving Antinomies Between Peremptory Norms in Public International Law* (Schulthess, 2016), p. 46. *See* Court of Justice of the European Union, *Procureur du Roi v. Benoît and Gustave Dassonville*, Judgment (11 July 1974), p. 838; *Otto-Preminger-Institut v. Austria*, ECtHR Application No. 13470/87, Judgment dated 20 September 1994, para. 45; *Smith and Grady v. the United Kingdom*, ECtHR, Application Nos. 33985/96 and 33986/96, Judgment dated 27 September 1999; *Vogt v. Germany*, ECtHR, Application No. 17851/91, Judgment dated 26 September 1995.

36. For instance, some Participants have raised concerns regarding the priority of climate policy in the larger constellation of a State's rights and obligations, especially given the resource constraints faced by lesser developed countries.[85] These submissions contend that climate change obligations must be considered in light of "challenging resource allocation decisions," which might require implementing State policies that prioritise activities that generate GHG emissions over climate action.[86] This argument has two elements: *first*, States must determine how to allocate scarce national resources among a variety of competing priorities, including economic development and poverty eradication; and *second*, certain States, particularly energy-exporting and oil-rich States, cannot reduce their emissions without incurring serious economic consequences that might in turn affect their ability to meet other international obligations.[87]

37. However, the limitations arising from scarce resources or differing levels of State development are already incorporated into the language, substance and structure of the relevant international obligation where appropriate.[88] International environmental law instruments, for example, enshrine the "principle of equity and common but differentiated responsibilities *and respective capabilities*, in the light of *different national circumstances*."[89] These are reflected both in the content of specific obligations applicable within a State's territory, which are tailored to States' individual capacity, and in obligations of global cooperation.[90] As set out by The Bahamas and other States in their written statements, the latter include obligations to grant financial, technological, and scientific cooperation and assistance to States that do not have the resources to adequately implement mitigation and adaptation policies.[91]

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85 *See, e.g.*, Written Statements of Canada, para. 26 ("In considering the extent of States' human rights obligations related to climate change, it is also important to be mindful that States must make challenging resource allocation decisions and balance sometimes competing rights."); OPEC, para. 11 ("[O]bligations and legal consequences, as set out in the special treaty rules, are all to be implemented in the context of sustainable development, poverty eradication, equity, common but differentiated responsibilities, and *differing national circumstances of States*." (emphasis added)).

86 *Ibid*. *See also* Written Statement of Saudi Arabia, para. 1.13, 2.14–2.15, 4.12.

87 *See, e.g.*, Written Statements of Saudi Arabia, paras. 1.13, 2.15, 4.12; OPEC, paras. 32, 46–48; India, paras. 60, 93.

88 *See, e.g.*, ICESCR, art. 2 ("Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources").

89 Paris Agreement, preamble (emphasis added). *See also* UNFCCC, preamble, arts. 3–6; Kyoto Protocol to the United Nations Framework Convention on Climate Change, 11 December 1997, 2303 *UNTS* 162 (hereinafter "**Kyoto Protocol**"), arts. 2–3, 10–11; Paris Agreement, art. 2.

90 Written Statement of The Bahamas, paras. 88, 138.

91 Written Statements of The Bahamas, paras. 209–212; Saint Lucia, para. 65; Tonga, paras. 58, 202, 206, 314; Solomon Islands, paras. 100, 115, 245.

38. Finally, any consideration of potential norm conflicts must also take into account international law's normative commitment to principles of intergenerational equity. As The Bahamas explains in its First Written Statement, climate change implicates the interests of generations not yet born who have a legitimate interest in the common environmental heritage and ecological patrimony that will be passed on to them.[92] International and domestic courts around the world have used the principle of intergenerational equity as an interpretive tool to analyse the relationship between diverse international legal regimes, and as a crucial balancing factor in assessing the hierarchy of competing obligations.[93]

C. THE PROPER INTERPRETATION OF CLIMATE TREATIES

39. Climate treaties are an important source of States' obligations with respect to climate change. In this section, The Bahamas will: (*i*) demonstrate that climate treaties impose legally binding and onerous obligations on States to mitigate GHG emissions and adapt to their harmful effects; and (*ii*) address the scope and import of the principle of common but differentiated responsibilities.

1. The "non-obligations" issue: climate treaties provide for legally binding onerous obligations on States

40. As The Bahamas explained in its First Written Statement, climate treaties impose a number of important obligations on States to take action in response to climate change.[94] While the majority of Participants took the same view, some have sought to dilute these obligations by asserting, in varying formulations, that they were designed so as not to be onerous, or in more extreme cases, binding.[95] That is plainly wrong.

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92 Written Statement of The Bahamas, para. 176.

93 *See* D. Bertram, "For You Will (Still) Be Here Tomorrow: The Many Lives of Intergenerational Equity", 12 *Transnational Environmental Law* (2023) 121, pp. 133–137 (analysing the application of the principle of intergenerational equity in domestic litigations globally). *See also* M. Wewerinke-Singh et al., "In Defence of Future Generations: A Reply to Stephen Humphreys", 34 *European Journal of International Law* (2023) 652, pp. 657–666; *KlimaSeniorinnen v. Switzerland*, para. 420; *Future Generations v. Ministry of Environment and Others*, Supreme Court of Justice of Colombia, STC4360-2018 (5 April 2018), para. 11.2–11.3; Written Statements of The Bahamas, paras. 176–182; Albania, paras. 114–116; Cameroon, paras. 21, 28; Ecuador, paras. 3.54–3.58; El Salvador, paras. 44–45; Solomon Islands, paras. 123–132; Vanuatu, paras. 479–483.

94 *See* Written Statement of The Bahamas, para. 87.

95 *See, e.g.*, Written Statements of United States of America, paras. 3.18–3.19; OPEC, para. 66; Saudi Arabia, para. 4.62.

41. *First*, it is trite that every treaty in force is binding upon the parties and must be performed in good faith.[96] Its terms must be interpreted in accordance with their ordinary meaning in their context and in light of the treaty's object and purpose.[97] Climate treaties are no exception. While some of their provisions take the form of political commitments or aspirations, they also contain a plethora of binding legal obligations. As the tribunal in *Indus Waters* explained, provisions worded in "best endeavours" terms can still be "obligatory and not merely aspirational in nature".[98]

42. *Second*, multiple States have made references to certain obligations under the Paris Agreement (and other climate treaties) as "obligations of conduct" rather than "obligations of result", suggesting that the former are somehow less onerous.[99] That is inaccurate. They are merely different types of obligations, which often co-exist and seek to achieve their objective through different means. Importantly, classifying obligations as one of conduct or result may be a convenient shorthand but it can also blur important nuances among different provisions. The Bahamas thus submits that each norm must be interpreted on its own terms, and prefers not to categorically align it with the conduct-result dichotomy.

43. In this section, The Bahamas addresses the proper interpretation of key mitigation and adaptation obligations with a focus on the Paris Agreement. At the outset, it bears emphasis that the obligations in the Paris Agreement are guided by the treaty's object and purpose, including as expressed in Article 2. Article 2 states that the Paris Agreement "aims to strengthen the global response" to climate change including by limiting the increase in global average temperatures to "well below 2ºC above pre-industrial levels" and "pursuing efforts to limit the temperature increase to 1.5ºC". This ambitious target is backed by science, on the basis that it would "significantly reduce the risks and impacts of climate change". States' obligations under the Paris Agreement must be interpreted in light of this commitment.

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96 Vienna Convention on the Law of Treaties, 23 May 1969, 1155 *UNTS* 331, art. 26 (hereinafter "**VCLT**").

97 VCLT, art. 31(1).

98 *Indus Waters Kishenganga Arbitration (Pakistan v. India)*, PCA Partial Award (18 February 2013), para. 372.

99 *See, e.g.*, Written Statements of Colombia, para. 3.41; OPEC, paras. 64–66; Russia, Section 1.1; European Union, paras. 67, 81–82, 129; Portugal, para. 47; Vanuatu, paras. 408–411.

(a) Climate treaties provide for legally binding and onerous mitigation obligations

44. The Kyoto Protocol, adopted in 1997, imposed an obligation on developing States to achieve specific quantified reductions in GHG emissions when compared to their base level in 1990.[100] The Paris Agreement subsequently introduced more ambitious and far-reaching obligations to tackle climate change with respect to all States parties.

45. Mitigation obligations are at the heart of the Paris Agreement. The primary mechanism for their implementation is the so-called nationally determined contributions ("***NDCs***"). Article 4(2) provides for two distinct individual, binding obligations: (*i*) Parties "shall" prepare, communicate and maintain successive NDCs; and (*ii*) Parties "shall" pursue domestic mitigation measures for their realisation.

46. **NDCs**. Contrary to some Participants' suggestions, NDCs are not discretionary or "self-defined".[101] While the Paris Agreement does not contain fixed mitigation targets, it makes clear that NDCs must reflect a State's "highest possible ambition" and "represent a progression over time".[102] In addition, NDCs must be informed by Conference of Parties ("***COP***") decisions and the outcomes of the global stocktake.[103] Crucially, the object and purpose of the Paris Agreement, including as expressed in Article 2, provides important guardrails for the setting of States' NDCs. As explained above, Article 2 records the Parties' common goal to limit the increase in global average temperatures to "well below 2ºC above pre-industrial levels" and "pursu[e] efforts to limit the temperature increase to 1.5ºC".[104] The Bahamas accepts that the Paris Agreement does not oblige States to achieve that objective, but properly interpreted it does require States to set their NDCs at a level that makes it at least reasonably possible to achieve it[105]—subject to the States' respective capabilities. In other words, improperly low NDCs would be a violation of the State's obligations under the Paris Agreement.

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100 Kyoto Protocol, arts. 2–3.

101 Written Statement of China, para. 48. *See also id.*, paras. 42–48, 130–131; Written Statements of OPEC, paras. 64–74; Russia, Section 1.1; United States of America, paras. 3.18–3.19; Saudi Arabia, para. 4.62; Joint Statement of Denmark, Finland, Iceland, Norway and Sweden, paras. 53–54.

102 Paris Agreement, arts. 3, 4(3).

103 Paris Agreement, arts. 4(9), 14(3).

104 Paris Agreement, art. 2.

105 *See, e.g.*, Paris Agreement, art. 3 (expressly linking the Parties' mitigation obligations with the temperature goal by providing that "all Parties are to undertake and communicate ambitious efforts . . . with a view to achieving the purpose of this Agreement as set out in Article 2").

47. This is further underscored by the 2023 global stocktake, which the Agreement provides "shall" inform the States' NDCs.[106] The States parties to the Paris Agreement adopted the first global stocktake decision on 13 December 2023 and resolved, *inter alia*, that:

(a) "Parties are not yet collectively on track towards achieving the purpose of the Paris Agreement and its long-term goals";

(b) the adverse impacts of climate change "[would] be much lower at the temperature increase of 1.5ºC compared with 2ºC"; and

(c) there is a "need for deep, rapid and sustained reductions in [GHG] emissions in line with 1.5ºC pathways", including by significantly increasing renewable energy capacity, accelerating the phase-down of coal power and transitioning away from fossil fuels (including fossil fuel subsidies), and accelerating zero- and low-GHG emission technologies.[107]

48. Accordingly, read in the context of the Paris Agreement as a whole, Article 4(2) requires States to set their NDCs at a level that makes it at least reasonably possible to achieve the Agreement's temperature goal. The key to that, as stated by the IPCC, is to reach "net zero" GHG emissions by the middle of the century.[108] As noted in the 2023 global stocktake, 87% of the global economy is already covered by net zero targets, which provides an important benchmark for understanding the level of ambition required by individual States to achieve the goals of the Paris Agreement.

49. **Domestic mitigation measures**. *Secondly*, Article 4(2) requires States to "pursue domestic mitigation measures with the aim of achieving the objectives of [their NDCs]".[109] Contrary to a small number of written statements,[110] this is a legally binding obligation that leaves the States the choice of means but not the standard to be achieved.[111] While The Bahamas accepts that the Paris Agreement does not require States to achieve their NDCs,

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106 Paris Agreement, arts. 4(9), 14(3).

107 UNFCCC Decision 1/CMA.5, paras. 2, 4, 28.

108 IPCC 2023 Synthesis Report, p. 68. *See also* Paris Agreement, art. 4(1); UNFCCC Decision 1/CMA.5, paras. 27, 28(d).

109 Paris Agreement, art. 4(2).

110 *See* Written Statements of Saudi Arabia, para. 5.14; United States of America, para. 3.17; Indonesia, para. 54; OPEC, paras. 68–70.

111 *See* Written Statements of Singapore, para. 3.35(a); Egypt, paras. 130–138; China, para. 39.

States must exercise due diligence and pursue effective mitigation measures which are reasonably aligned with their NDCs.[112] Several recent decisions provide important guidance in that respect. In *KlimaSeniorinnen v. Switzerland*, the ECtHR found that Switzerland's failure to set concrete measures for the achievement of its NDCs, including to quantify the carbon budget consistent with the NDCs, breached Switzerland's obligations under the European Convention on Human Rights.[113] In May 2024, the English High Court found the United Kingdom Government to be in violation of domestic legislation implementing the Paris Agreement on the basis that its "Net Zero Strategy" assumed without proper evidence that each of the measures would be fully implemented, with no allowance for under-delivery.[114]

50. Article 4 also underscores that States have *individual* mitigation obligations despite the collective nature of the Paris Agreement's temperature goal. Each State is obligated to do its share towards achieving the common objective, including through appropriately defining and implementing its NDCs. As noted above, any other design of climate change obligations would lead to a state of collective paralysis.

(b) Climate treaties provide for legally binding, onerous obligations on adaptation

51. Irrespective of mitigation efforts, global warming and its adverse impacts will continue to increase in the near term.[115] Climate treaties therefore require States to adopt adaptation measures aimed at moderating harm from actual or expected climate effects.

52. The UNFCCC and the Kyoto Protocol both refer to adaptation, recognise the importance of adapting to the impacts of climate change, and stress the value of international cooperation and support to developing nations in that regard.[116] Adaptation features more prominently in the Paris Agreement, which recognises that adaptation is a "global challenge faced by all" and

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112 *See* L. Rajamani, "Ambition and Differentiation in the 2015 Paris Agreement", 65 *International and Comparative Law Quarterly* (2016) 493, pp. 497–498; R. Bodle & S. Oberthür, "Legal Form of the Paris Agreement and Nature of its Obligations" in *The Paris Agreement on Climate Change* (Oxford University Press, 2017), pp. 99, 102–103; B. Mayer, *International Law Obligations on Climate Change Mitigation* (Oxford University Press, 2022), pp. 53, 200. *See also* Written Statement of Vanuatu, paras. 409–410.

113 *KlimaSeniorinnen v. Switzerland*, paras. 565–573.

114 *Friends of the Earth and others v. Secretary of State for Energy Security and Net Zero* [2024] EWHC 995, paras. 126–132.

115 IPCC 2023 Synthesis Report, p. 68.

116 UNFCCC, arts. 3(3), 4(1), (4); Kyoto Protocol, arts. 10(b), 12(8).

"a key component" of the global response to climate change.[117] Article 7(9) of the Paris Agreement requires that each State party "*shall*, as appropriate, engage in adaptation planning processes and the implementation of actions, including the development or enhancement of relevant plans, policies and/or contributions", before providing an illustrative list of adaptation measures.[118]

53. What is "appropriate" for each State, including in light of its specific climate risks, capacity and the principle of common but differentiated responsibilities, will vary.[119] However, within those confines, the Paris Agreement requires States to exercise due diligence and take adequate and timely adaptation measures to protect the environment and their populations from the adverse effects of climate change.[120] This is consistent with recent international decisions. For instance, in *Billy v. Australia*, the United Nations Human Rights Committee found that Australia's failure to adopt adaptation measures to protect the home, private life, family and culture of the applicants—indigenous islanders from the low-lying Torres Strait region affected by climate change—in a timely and adequate manner, violated the International Covenant on Civil and Political Rights.[121]

2. The CBDR issue: equitable distribution, not a pretext for inaction

54. States have always recognised that the distribution of individual climate change obligations needs to be equitable, and in particular that certain States should bear a greater share of responsibility for mitigation and adaptation action. The overarching principle expressing those equitable considerations became known in shorthand as the principle of "common but differentiated responsibilities" ("***CBDR***"), though its specific articulation has evolved over time.

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117 Paris Agreement, art. 7(2).

118 Paris Agreement, art. 7(9) (emphasis added).

119 I. Suárez Perez & A. Churie Kallhauge, "Adaptation (Article 7)" in *The Paris Agreement on Climate Change* (Oxford University Press, 2017), p. 210.

120 *See* Paris Agreement, art. 7(4) ("Parties recognize that the current need for adaptation is significant and that greater levels of mitigation can reduce the need for additional adaptation efforts, and that greater adaptation needs can involve greater adaptation costs."), art. 3 (referring to "efforts of all Parties" that should show "progression over time"), preamble (recognising "the need for an effective and progressive response to the urgent threat of climate change" and referring to Parties' "common but differentiated responsibilities and respective capabilities, in the light of different national circumstances"). *See also* R. Bodle & S. Oberthür, "Legal Form of the Paris Agreement and Nature of its Obligations" in *The Paris Agreement on Climate Change* (Oxford University Press, 2017), pp. 97, 99, 102–103.

121 *Daniel Billy et al. v. Australia – Torres Strait Islanders Petition*, Communication No. 3624/2019, Decision, document CCPR/C/135/D/3624/2019 (2022) (hereinafter "***Billy v. Australia***"), paras. 2.3, 2.4, 5.2, 8.11.

55. The Bahamas fully endorses the CBDR principle, which is highly relevant to the determination of States' individual mitigation, adaptation and cooperation obligations.[122] However, The Bahamas strongly opposes the efforts of certain Participants to use the CBDR principle as a pretext for inaction.[123] In particular, the CBDR principle does not imply that major emitters who self-identify as "developing States" can continue on their current trajectory of GHG emissions without having to take urgent and ambitious mitigation action. Rather, each State is required to do everything possible, within its capabilities, to achieve and maintain an environmentally sustainable level of GHG emissions. For *all* major emitters, that means effecting a deep, rapid, and sustained reduction of GHG emissions.[124]

56. None of the climate treaties provides a definition of CBDR. However, looking at the language of the treaties in their context, and in light of their object and purpose, The Bahamas considers the following to be established:

(a) *All* States have an obligation to take mitigation and adaptation action. The Paris Agreement has eschewed broad-brush black-and-white distinctions between developed and developing States and imposed obligations on all States parties to take ambitious climate action.[125]

(b) At the same time, the *specific* share of responsibility varies among States. The basis for the differentiation remains disputed, with some States emphasising the total cumulative volume of historical emissions,[126] while others refer primarily to current (and evolving) capacity.[127] The reality is that there are a range of factors which go to equitable distribution, none of which alone embodies the full

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122 *See* Written Statement of The Bahamas, paras. 88, 138.

123 Various States and International Organisations argue that States' level of development and other strategic considerations (like poverty eradication) should take priority over and be viewed on balance with adopting measures to protect the climate system. *See, e.g.*, Written Statements of China, paras. 34, 37, 63–64; India, para. 37; OPEC, paras. 11, 46, 77, 87; Saudi Arabia, para. 4.19; Russia, pp. 5–6.

124 *See* Written Statement of The Bahamas, paras. 100–102.

125 *Compare* UNFCCC, arts. 3, 4, Annex I; Kyoto Protocol, arts. 2, 3, 10 (imposing different obligations on "developing" and "developed" States), *with* Paris Agreement, arts. 3, 4 (referring to obligations undertaken by "all Parties").

126 *See, e.g.*, Written Statements of China, paras. 35, 65–66; India, para. 42; OPEC, para. 83; Saudi Arabia, paras. 2.5, 4.13, 4.101; Brazil, para. 43; Singapore, para. 3.33; Colombia, para. 3.48; Egypt, paras. 388–396. Notably, the States with the highest historical cumulative GHG emissions and the biggest current emitters are the same; *see* Emissions Database for Global Atmospheric Research, *GHG emissions of all world countries: 2023 Report* (2024), *available at* https://edgar.jrc.ec.europa.eu/report_2023.

127 *See, e.g.*, Written Statements of South Africa, para. 27; Russia, pp. 5–6; Indonesia, para. 65.

CBDR principle. Notwithstanding, the language, context, object and purpose of the climate treaties, which established the CBDR principle, help with understanding some important contours of how the principle informs individual obligations:

(i) It is clear that climate treaties provide for more onerous obligations on developed States in the area of **financial and technological assistance**. The Paris Agreement, for instance, provides that "[d]eveloped country Parties *shall* provide financial resources to assist developing country Parties with respect to both mitigation and adaptation *in continuation of their existing obligations under the* [UNFCCC]".[128] It also states that support "*shall* be provided to developing country Parties" for the implementation of adaptation action,[129] as well as to strengthen technology development and transfer.[130]

(ii) The differentiation may be more nuanced when it comes to individual **mitigation obligations**. It is undeniable that all parties to the Paris Agreement have undertaken to communicate ambitious NDCs and pursue domestic mitigation measures to achieve them. However, what constitutes each State's "highest *possible* ambition"[131] will be informed by resource constraints and thus vary based on the State's level of development. The Paris Agreement specifically acknowledges that the "peaking [of GHG emissions] will take longer for developing country Parties"[132] which are encouraged to *gradually* move towards economy-wide reduction targets, unlike developed States which should do so now.[133] As such, developed States are required to bear a higher share of responsibility for mitigation action—both in terms of speed and extent of their efforts. That said, there is no rigid accepted classification of

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128 Paris Agreement, art. 9(1) (emphasis added).

129 *Id.*, art. 7(13) (emphasis added).

130 *Id.*, art. 4(3).

131 *Id.*, art. 4(3) (emphasis added).

132 *Id.*, art. 4(3).

133 *See id.*, art. 4(4).

> States as either developed and developing, and the Paris Agreement read as a whole makes clear that *all States* are required to do *everything possible, within their respective capabilities*, towards reaching net zero GHG emissions "as soon as possible".[134] The balancing exercise between mitigation action and short-term economic development is thus specific to every State and needs to be assessed on a case-by-case basis, and periodically revised as circumstances change.[135]

57. Importantly, CBDR is not the only relevant principle for identifying each State's equitable share of mitigation obligations. As already noted above, the prevention obligation under customary international law requires that each State's mitigation action is broadly commensurate to the harm it causes, *i.e.*, its share of global GHG emissions.[136] In light of that, the import of CBDR is that States' individual mitigation obligations are not *strictly proportionate* to their share of GHG emissions, but reflect an *adjusted equitable* form of proportionality. Accordingly, the CBDR principle cannot serve as a pretext for avoiding or delaying necessary mitigation action that a State is otherwise capable of taking.[137]

D. THE APPLICATION OF PRE-EXISTING OBLIGATIONS IN THE "NEW" ERA OF CLIMATE CHANGE

58. A number of Participants have argued that climate change is a new and unique phenomenon which does not fit the established framework of general environmental obligations under customary international law, the law of the sea, or human rights law. While climate change may pose unique challenges, it does not elude such general obligations—which take the form of broad open-ended commitments, the specific content of which is designed to evolve over time, including in light of new scientific understanding. The general obligations readily encompass protection from the harmful effects of GHG emissions.

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134 *See id.*, arts. 4(1), 2.

135 *See* A. Huggins & R. Maguire, "The implementation of the principle of common but differentiated responsibilities within the Paris Agreement" in *The Implementation of the Paris Agreement on Climate Change* (Taylor & Francis, 2018), pp. 170–171; C. Voigt & F. Ferreira, "Dynamic Differentiation: The Principles of CBDR-RC", 5 *Transnational Environmental Law* (2016) 285, pp. 291–292, 294; L. Rajamani, "Ambition and Differentiation in the 2015 Paris Agreement", 65 *International and Comparative Law Quarterly* (2016) 493, p. 508.

136 Written Statement of The Bahamas, para. 102(c).

137 *See* C. Voigt & F. Ferreira, "Dynamic Differentiation: The Principles of CBDR-RC", 5 *Transnational Environmental Law* (2016) 285, p. 302; L. Rajamani, "Ambition and Differentiation in the 2015 Paris Agreement", 65 *International and Comparative Law Quarterly* (2016) 493, p. 509.

1. GHG emissions and the prevention obligation

59. Customary international law places States under an obligation to use all means at their disposal to prevent transboundary harm (the "**prevention obligation**").[138] Some Participants have suggested that the prevention obligation does not apply to transboundary harm caused by GHG emissions, since it cannot be traced from one State to another and does not have a single source.[139] There is no basis for circumscribing the prevention obligation in that way.

60. *First*, the prevention obligation is not limited to specific types of environmental pollution.[140] Rather, it is a general open-ended obligation, which is intended to evolve over time in light of the available science. As noted by the Court, it "has its origins in the due diligence that is required of a State in its territory",[141] and is thus broadly conceived. The ILC has specifically declined to limit the concept of transboundary harm to a specific list of activities.[142]

61. *Second*, the prevention obligation is not limited to harm occurring from one State into a neighbouring State, as some Participants suggest.[143] It extends to harm caused in "areas beyond national control",[144] and to other States whether or not "the States concerned share a common border".[145]

62. There is no doubt that excessive GHG emissions generated in one State cause harm in other States. It may be difficult as an evidentiary matter to identify a specific portion of the harm attributable to the emitting State, but the fact is well-established. The prevention obligation thus requires each State to achieve and maintain an environmentally sustainable level of GHG emissions within its territory and jurisdiction.[146]

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138 Written Statement of The Bahamas, para. 92.

139 Written Statement of China, para. 128.

140 Written Statement of India, para. 17.

141 *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010* (hereinafter "***Pulp Mills* Judgment**"), p. 45, para. 101.

142 Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, *Yearbook of the International Law Commission*, 2001, Vol. II (Part Two), document A/56/10 (hereinafter "**ILC Draft Articles on Transboundary Harm**"), commentary to art. 1, paras. 3–4, art. 2(c).

143 Written Statements of Australia, para. 4.10; New Zealand, para. 101.

144 *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996* (hereinafter "***Nuclear Weapons* Advisory Opinion**") , pp. 19–20, para. 29.

145 ILC Draft Articles on Transboundary Harm, commentary to art. 2(c), para. 9.

146 Written Statement of The Bahamas, para. 102.

63. This has been recognised by international and domestic courts. In its recent Climate Change Advisory Opinion, ITLOS affirmed that the prevention obligation squarely applies to transboundary harm caused by GHG emissions.[147] It confirmed that GHG emissions constitute pollution and States must take all necessary measures to ensure such emissions do not escape from areas under their sovereign control and cause damage to other States or their environment.[148] In *State of the Netherlands v. Urgenda Foundation*, the Dutch Supreme Court also found that the prevention obligation "[a]pplied to greenhouse gas emissions" and meant that States "can be called upon to make their contribution to reducing greenhouse gas emissions."[149]

64. Accordingly, there is no basis for excluding transboundary harm caused by GHG emissions from the scope of the prevention obligation.

2. GHG emissions and the law of the sea

65. UNCLOS requires States to prevent and protect the marine environment from pollution, including anthropogenic GHG emissions.[150] This position garnered wide consensus among the Participants, with agreement across small island States,[151] coastal States,[152] landlocked States,[153] and international organisations.[154] ITLOS has now issued a Climate Change Advisory Opinion confirming that anthropogenic GHG emissions constitute pollution of the marine environment, which in turn triggers specific duties under UNCLOS to prevent, reduce and control such pollution.[155] The Court should reaffirm that finding in these proceedings.

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147 ITLOS Climate Change Advisory Opinion, para. 258.

148 *Urgenda* Judgment, para. 5.7.5.

149 *Id.*, paras. 250, 252, 254, 258.

150 Written Statement of The Bahamas, paras. 117–119.

151 *See* Written Statements of Costa Rica, paras. 69–70; Micronesia, paras. 94–98; Antigua and Barbuda, paras. 387–391; Barbados, para. 185; Commission of Small Island States (hereinafter "**COSIS**"), para. 100; Vanuatu, paras. 446–448; Timor-Leste, paras. 221–222.

152 *See* Written Statements of Bangladesh, para. 99; Argentina, para. 48; Canada, para. 19; Kenya, para. 5.43; New Zealand, para. 90; United Kingdom, paras. 111–117; Ecuador, para. 3.89; France, para. 101; Latvia, para. 40.

153 *See, e.g.*, Written Statement of Burkina Faso, para. 146.

154 *See* Written Statements of European Union, para. 293; Parties to the Nauru Agreement Office (hereinafter "**PNAO**"), paras. 28–29; African Union; paras. 167–168.

155 ITLOS Climate Change Advisory Opinion, paras. 179, 197.

66. In its 153-page opinion, ITLOS unanimously held that, *inter alia*: (*i*) anthropogenic GHG emissions constitute pollution of the marine environment;[156] (*ii*) the obligation under UNCLOS to prevent, reduce and control marine pollution therefore extends to anthropogenic GHG emissions;[157] and (*iii*) UNCLOS further requires States to cooperate meaningfully and in good faith to achieve these goals.[158]

67. *First*, ITLOS held that "pollution of the marine environment" under Article 1(1)(4) of UNCLOS necessarily includes anthropogenic GHG emissions.[159] Referring to this Court's reasoning in the *Nuclear Weapons* Advisory Opinion, ITLOS explained that the marine environment "combines both spatial and material components"[160] and includes the "living resources of the sea and marine life".[161] ITLOS further noted that the introduction of anthropogenic GHG emissions into the atmosphere results in deleterious effects on the marine environment, including ocean warming, ocean acidification and sea level rise, thus constituting "marine pollution" within the meaning of UNCLOS.[162] These effects, ITLOS underscored, are "widely acknowledged by States" and "recognized by international climate treaties".[163]

68. *Second*, given that anthropogenic GHG emissions are a source of marine pollution, they are subject to the obligation of Article 194(1) of UNCLOS to take all necessary measures to prevent, reduce, and control pollution of the marine environment.[164] Accordingly, States must adopt "mitigation measures" designed to "minimize, to the fullest possible extent" anthropogenic GHG emissions released into the atmosphere, in particular taking into account the common goal of limiting the global temperature increase to 1.5°C above pre-industrial levels.[165] The standard for this obligation is objective, taking into account the best available

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156 *Ibid*.

157 ITLOS Climate Change Advisory Opinion, para. 197.

158 *Id.*, para. 321.

159 *Id.*, para. 179. *See also* Written Statement of The Bahamas, paras. 118–119.

160 ITLOS Climate Change Advisory Opinion, para. 166 (quoting *Nuclear Weapons* Advisory Opinion, pp. 19–20, para. 29) (the environment represents "the living space, the quality of life and the very health of human beings, including generations unborn").

161 *Id.*, para. 169 (citing *Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan) Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999*, p. 295, para. 70; *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC), Advisory Opinion of 2 April 2015, ITLOS Reports 2015*, p. 61, para. 216).

162 *Id.*, paras. 172–178.

163 *Id.*, para. 175.

164 *Id.*, para. 197. *See also* Written Statement of The Bahamas, paras. 118–119.

165 ITLOS Climate Change Advisory Opinion, paras. 205, 243.

science, international rules and standards relating to climate change, and States' own capabilities and available means.[166] In the context of prevention of transboundary pollution under Article 194(2) of UNCLOS, which applies to anthropogenic GHG emissions with equal force, ITLOS noted that the standard may be even more stringent, "because of the nature of transboundary pollution".[167] Critically, as explained above, ITLOS rejected the view that the obligations under UNCLOS may be discharged solely by complying with the provisions of the Paris Agreement.[168]

69. *Third*, ITLOS held that a host of other obligations are applicable to anthropogenic GHG emissions.[169] Among them, The Bahamas emphasises ITLOS's finding that the duty of cooperation contained in Articles 197, 200, and 201 of UNCLOS is "central to countering marine pollution from anthropogenic GHG emissions at the global level".[170] As The Bahamas argued, such cooperation encompasses obligations to harmonise laws and policies; to cooperate through international organisations; and to grant assistance to Developing States.[171] Significantly, ITLOS emphasised that the States' adoption of the UNFCCC or the Paris Agreement does not discharge the obligations to cooperate under Part XII, which is a duty "of a continuing nature" that requires "ongoing efforts", not limited to any specific instrument or action.[172]

70. As the principal judicial organ tasked with adjudicating disputes arising from the interpretation and application of UNCLOS, ITLOS's Advisory Opinion is an authoritative statement on how to apply UNCLOS to issues of climate change.[173] The Bahamas thus urges the Court to adopt and affirm ITLOS's carefully reasoned and persuasive opinion in these proceedings.

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166 *Id.*, paras. 206–208, 225–229.

167 *Id.*, para. 258.

168 *Id.*, para. 224.

169 *Id.*, Sections VII.E.1 (obligation to adopt national legislation and establish international rules and standards); VII.E.2 (obligation of enforcement); VII.F.1 (obligation of global and regional cooperation); VII.F.2 (obligation of technical assistance); VII.F.3 (obligation of monitoring and environmental assessment).

170 *Id.*, paras. 297, 299. *See also* Written Statement of The Bahamas, paras. 131–140.

171 ITLOS Climate Change Advisory Opinion, paras. 302, 310, 319–321, 339. *See also* Written Statement of The Bahamas, paras. 133–140.

172 ITLOS Climate Change Advisory Opinion, para. 311.

173 *See* ITLOS, *The Tribunal*, *available at* https://www.itlos.org/en/main/the-tribunal/the-tribunal/.

3. GHG emissions and human rights obligations

71. Likewise, international human rights law is directly relevant to climate change, and imposes obligations on States to adopt mitigation and adaptation measures with a view to respecting, protecting, and fulfilling a broad array of human rights. This was widely acknowledged in the Participants' written statements.[174]

72. However, a small number of written statements have taken the view that human rights law does not independently impose obligations on States with respect to climate change, or is inherently unfit to address climate change. The Bahamas respectfully submits that such arguments are misconceived.

(a) International human rights law imposes self-standing obligations to mitigate GHG emissions and address their harmful effects

73. As an initial matter, The Bahamas reaffirms its submission that international human rights law imposes obligations on States to adopt mitigation and adaptation measures, and cooperate with other States in that respect.[175] The Bahamas refers to its First Written Statement for a full account of its pleadings, and in this section focuses on responding to a number of specific arguments raised by other Participants.

74. Several Participants have argued that international human rights law does not independently impose obligations with respect to climate change.[176] *First*, some States argue that the International Covenant on Civil and Political Rights ("***ICCPR***"), International Covenant on Economic, Social and Cultural Rights ("***ICESCR***") and the Universal Declaration of Human Rights ("***UDHR***") do not explicitly tackle issues relating to the environment or the

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174 *See, e.g.*, Written Statements of The Bahamas, para. 159; China, para. 120; Canada, para. 26; United States of America, para. 4.40; Antigua and Barbuda, paras. 359–360; Egypt, para. 211; Singapore, para. 5.1(w); International Union for Conservation of Nature (hereinafter ("**IUCN**"), para. 497; Slovenia, para. 43; Australia, para. 3.59; Joint Statement of Denmark, Finland, Iceland, Norway and Sweden, para. 82. *See also* Written Statements of Russia, p. 11 ("Therefore, the implementation by States of their human rights obligations may require that they apply climate change adaptation measures"); the Netherlands, paras. 3.23, 4.15; Albania, paras. 103–105; Argentina, para. 38; Latvia, para. 65; India, para. 79.

175 *See* Written Statement of The Bahamas, paras. 146, 166, 172, 179.

176 *See* Written Statements of China, para. 115; Australia, para. 3.58; Canada, para. 27; OPEC, para. 94; Saudi Arabia, para. 4.90; Joint Statement of Denmark, Finland, Iceland, Norway and Sweden, para. 84.

climate system, and are thus either irrelevant to the climate crisis[177] or subsidiary to climate treaties.[178] That fundamentally mischaracterises the nature of human rights obligations.

75. States' obligations under international human rights law are not triggered by *specific* activities. Rather, they arise when a State's conduct *in any context*—whether through action or omission—threatens or has the potential to threaten the enjoyment of individuals' human rights (subject to territorial and other limitations). Human rights are fundamentally people-focused, not activity-focused.[179] For instance, the ICCPR does not expressly regulate policing, sports or education, yet if those activities threaten individuals' right to life, freedom of expression, right to be free from discrimination, or other civil and political rights, the ICCPR requires States to respect, protect and fulfil those rights in the context of such activities, including by setting standards and regulating the conduct of private actors.[180] The same applies to GHG-generating activities which interfere with a broad array of human rights, including the right to life, right to health, and right to an adequate standard of living.[181]

76. *Second*, some Participants have asserted that international human rights obligations cannot go beyond obligations contained in the United Nations climate change treaties, including the UNFCCC, the Paris Agreement, and the Kyoto Protocol.[182] However, as already discussed above, international human rights law continues to apply alongside climate treaties and imposes self-standing obligations on States. Therefore, compliance with climate treaties does not

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177 *See* Written Statements of Saudi Arabia, paras. 4.90, 4.97; OPEC, para. 92; United States of America, para. 4.39.

178 *See* Written Statements of China, para. 119; Australia, paras. 3.58–3.59; Joint Statement of Denmark, Finland, Iceland, Norway and Sweden, para. 81. *See also* Written of United States of America, para. 4.53 ("Nothing in the [ICESCR]'s text expressly or impliedly addresses GHG emissions or climate change more generally. Therefore, although a State Party might decide that undertaking measures to mitigate or adapt to anthropogenic climate change would benefit its progressive realization within its territory of the rights contained in the ICESCR, the ICESCR does not obligate a State Party to do so (much less to adopt any specific mitigation or adaptation measures").

179 *See, e.g.*, United Nations General Assembly resolution 217 A (III), Universal Declaration of Human Rights, document A/811 (10 December 1948), preamble ("Whereas recognition of *the inherent dignity and of the equal and inalienable rights of all members of the human family* is the foundation of freedom, justice and peace in the world") (emphasis added); ICESCR, preamble ("[human] rights derive from the inherent dignity of the human person"); African Charter, preamble ("Recognizing [. . .] that fundamental human rights stem from the attributes of human beings").

180 *See* HRC, *General Comment No. 36 on Article 6: right to life*, document CCPR/C/GC/36 (2019) (hereinafter "**HRC General Comment No. 36**"), paras. 22, 25; Written Statement of Barbados, para. 163(a).

181 *See* Written Statement of The Bahamas, paras. 144–158.

182 *See, e.g*., Written Statements of China, paras. 115, 123; OPEC, paras. 92, 94; Australia, para. 3.58; Canada, para. 27; Saudi Arabia, paras. 4.90, 4.97–4.98; Joint Statement of Denmark, Finland, Iceland, Norway and Sweden, paras. 82–84.

automatically lead to compliance with human rights obligations, which may require a different standard of conduct, or a different (often additional) conduct altogether.[183]

(b) International human rights law is not inherently unsuitable to address climate change

77. Other States have portrayed climate change as a "misfit" which does not readily align with the nature and structure of the human rights regime.

78. *First*, some States argue that since human rights obligations apply primarily within a State's territory, they cannot easily encompass the effects of diffuse harm such as that caused by climate change.[184] Several statements emphasise that it is "impossible" to track the effects of individual State's GHG emissions to a specific harm, and thus attribute responsibility for a rights violation to a single State.[185] That may well be correct as a matter of fact (as the science currently stands), but it does not negate the existence of States' obligations as a matter of law. The Bahamas accepts that no single State can ensure the full realisation of its peoples' human rights without the corresponding actions of other States. However, each State can and does cause harm to individuals within its territory and jurisdiction by emitting excessive GHG emissions,[186] even if it is currently not possible to identify the specific portion of the harm attributable to that State. Meanwhile, each State exercises regulatory power primarily within its territory and jurisdiction and therefore undoubtedly has the ability to meaningfully contribute to global mitigation efforts. Thus, each State is under an *individual* obligation to undertake its fair share of global mitigation action by regulating GHG emissions in its territory and jurisdiction.[187] Recent case law has affirmed that. In *KlimaSeniorinnen v. Switzerland*, the ECtHR held that each State has an obligation to "do its part to ensure . . . protection" for individuals against the serious adverse effects on their life and well-being from climate change.[188] Substantively, this requires States to "adopt, and to effectively apply in practice, regulations and measures capable of mitigating the existing and potentially irreversible, future

183 *See* Section II.B.1 above.

184 *See, e.g.*, Written Statements of Australia, paras. 3.64–3.65; Canada, para. 28; China, para. 119; Russia, pp. 9–10; Germany, para. 91; Joint Statement of Denmark, Finland, Iceland, Norway and Sweden, para. 86.

185 Written Statement of OPEC, para. 93. *See also* Written Statements of China, paras. 118, 125; Germany, paras. 96–98; Joint Statement of Denmark, Finland, Iceland, Norway and Sweden, paras. 84–86.

186 *See* IPCC 2023 Synthesis Report, pp. 42, 46, 89; United Nations General Assembly resolution 76/300, The Human Right to a Clean, Health and Sustainable Environment, document A/RES/76/300 (28 July 2022), p. 2.

187 *See* Section II.D.3(a) above.

188 *KlimaSeniorinnen v. Switzerland*, para. 545.

effects of climate change".[189] Similarly, in *State of the Netherlands v. Urgenda Foundation*, the Supreme Court of the Netherlands determined that international human rights law imposed obligations on the Netherlands individually to reduce its level of anthropogenic GHG emissions.[190]

79. It may well be that issues of causation and individual attribution of harm can present difficulties when it comes to establishing, *e.g.*, the individual's standing to bring a human rights claim against a State. However, such procedural requirements are separate from the legal question of whether a State is under an obligation to respect, protect and fulfil human rights from the harmful effects of GHG emissions. Such obligation is well-established and widely accepted by international and domestic courts.[191] In any event, courts have recognised the need to account for "the special features of climate change" when considering procedural requirements, and make appropriate modifications to existing rules[192] so as to interpret them in light of the evolving societal circumstances.[193] As the Court noted in its *Namibia* Advisory

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189 *Id.*, p. 204, paras. 544–545.

190 *Urgenda* Judgment, para. 7.3.6.

191 *See generally* HRC, *General Comment No. 31 on the nature of the general legal obligation imposed on States Parties to the Covenant*, document CCPR/C/21/Rev.1/Add.13 (2004); P. Hunt et al., "Climate Change and the Right to the Highest Attainable Standard of Health" in *Human Rights and Climate Change* (Cambridge University Press, 2009), p. 252. *See also e.g.*, *Jonah Ghemre v. Shell Petroleum Development Co. Nigeria Ltd et al.*, Federal High Court of Nigeria, AHRLR 151 (2005), pp. 6–7, para. 5; *Subhash Kumar v. State of Bihar*, Supreme Court of India 240 (1991), p. 2 (holding that the right to a safe environment was integral to the right to life under Article 21 of the Indian Constitution); *Neubauer and Others v. Germany*, Federal Constitutional Court of Germany, Nr. 31/2021 (2021), para. 144 (finding that "[t]he fundamental right to the protection of life and health . . . obliges the state to afford protection against the risks of climate change. The state must combat the considerable potential risks emanating from climate change by taking steps which—with the help of international involvement—contribute to stopping human-induced global warming and limiting the ensuing climate change"); *Billy v. Australia*, para. 8.3 ("the right of individuals to enjoy a life with dignity and to be free from acts or omissions that would cause their unnatural or premature death"); *KlimaSeniorinnen v. Switzerland*, para. 519 (". . . Article 8 must be seen as encompassing a right for individuals to effective protection by the State authorities from serious adverse effects of climate change on their life, health, well-being and quality of life").

192 *KlimaSeniorinnen v. Switzerland*, para. 486.

193 *See, e.g.*, IACtHR, *Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights*, Advisory Opinion OC-10/89 (14 July 1989), p. 10, para. 37 ("the Court finds it necessary to point out that to determine the legal status of the American Declaration it is appropriate to look to the inter-American system of today in the light of the evolution it has undergone since the adoption of the Declaration, rather than to examine the normative value and significance which that instrument was believed to have had in 1948"); *Gabčíkovo-Nagymaros* Weeramantry Opinion, p. 111 ("The ethical and human rights related aspects of environmental law bring it within the category of law so essential to human welfare that we cannot apply to today's problems in this field the standards of yesterday").

Opinion, "an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation".[194]

80. In addition, under the ICESCR, States are obligated to refrain from interfering with the enjoyment of economic, social, and cultural rights "in other countries" or in respect of "populations outside their territory".[195] Accordingly, States have obligations to mitigate climate-induced human rights impacts beyond the areas of their territory and control, including through global cooperation.

81. *Second*, some States have argued that human rights obligations concern only present risks and impacts and do not impose obligations with respect to future risks or impacts such as the adverse effects of climate change.[196] That argument starts from the wrong premise. While the worst may be yet to come, there is broad consensus that the climate crisis is already interfering with a broad array of individual rights.[197] And in any event, human rights obligations are inherently future-looking, not stagnant. They require States to assess and prevent future interference with enjoyment of human rights, such as that resulting from "reasonably foreseeable threats and life-threatening situations that can result in loss of life",[198] or threats to peoples' ability to transmit their culture. In *Billy v. Australia*, the Human Rights Commission found that Australia's failure to adopt adaptation measures aimed at mitigating future threats to the indigenous peoples of Torres Strait Islands' culture constituted a breach of

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194 *Namibia* Advisory Opinion, p. 31, para. 53. Similarly, the ECtHR consistently views the European Convention as a "living instrument which . . . must be interpreted in the light of present-day conditions"; *see Tyrer v. The United Kingdom*, ECtHR Application No. 5856/72, Judgment dated 25 April 1978, para. 31. *See also Dudgeon v. The United Kingdom*, ECtHR, Application No. 7525/76, Judgment dated 22 October 1981, para. 60; *Selmouni v. France*, ECtHR Application No. 25803/94, Judgment dated 28 July 1999, para. 101; *Rantzev v. Cyprus and Russia* ECtHR Application No. 25965/04, Judgment dated 7 January 2010, para. 277.

195 Written Statement of The Bahamas, para. 171 (citing CESCR, *General Comment No. 14 on the Right to the Highest Attainable Standard of Health (Art. 12)*, document E/C.12/2000/4 (2000), para. 39; CESCR, *General Comment No. 12 on the Right to Adequate Food (Art. 11)*, document E/C.12/1999/5 (1999), para. 36; CESCR, *General Comment No. 15 on the Right to Water (Arts. 11 and 12 of the Covenant)*, document E/C.12/2002/11 (2003), para. 31).

196 Written Statement of Russia, pp. 10–11.

197 *See, e.g.*, Written Statements of The Bahamas, paras. 144–158; Colombia, paras. 3.68–3.69; China para. 120; United States of America, para. 4.40; Singapore, para. 5.1(w); Egypt, paras. 210–211; Slovenia, para. 43. *See also* Written Statements of Russia, p. 11 ("Therefore, the implementation by States of their human rights obligations may require that they apply climate change adaptation measures"); India, para. 79; Canada, para. 26; Argentina, para. 38; the Netherlands, para. 3.36.

198 *Billy v. Australia*, para. 8.3.

its positive obligations to protect cultural rights.[199] Likewise, in *KlimaSeniorinnen v. Switzerland*, the ECtHR stated that Article 8 of the European Convention, which protects an individual's right to private and family life, "is capable of being engaged . . . not only because of actual adverse effects but also sufficiently severe risks of such effects on individuals".[200]

82. *Third*, several submissions have emphasised that the ICESCR's reference to progressive realisation of rights means that States have a wide margin of appreciation in adopting and implementing policies to safeguard economic, social, and cultural rights, particularly in the context of "the global nature of the problem presented by the threat of climate change."[201] The Bahamas recognises that the ICESCR calls on States "to take steps . . . to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the . . . Covenant by all appropriate means."[202] While this gives States certain latitude as to resource allocation and the choice of means in complying with that obligation, it binds States to a high standard of due diligence.[203] Specifically, the reference to the State's "maximum available resources" and "all appropriate means" is consistent with the standard of conduct required under the customary law prevention obligation and the climate treaties. There is no special "margin of appreciation" which applies beyond that.[204] Indeed, courts have found

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199 *Id.*, para. 8.4. *See also id.*, Concurring Opinion by Committee Member Gentian Zyberi, p. 21, para. 6 (noting that "the Committee should have linked the State obligation to 'protect the authors' collective ability to maintain their traditional way of life, to transmit to their children and future generations their culture and traditions and use of land and sea resources' more clearly to mitigation measures") (internal citations omitted).

200 *KlimaSeniorinnen v. Switzerland*, para. 435.

201 Written Statement of the United States of America, para. 4.52; Joint Statement of Denmark, Finland, Iceland, Norway and Sweden, para. 87.

202 Written Statement of The Bahamas, para. 164.

203 *See KlimaSeniorinnen v. Switzerland*, para. 543 (noting a distinction between a "State's commitment to the necessity of combating climate change and its adverse effects, and the setting of the requisite aims and objectives in this respect, and, on the other hand, the choice of means designed to achieve those objectives").

204 In some factual contexts, courts have found it appropriate to give States a broad margin of appreciation, such as in the protection of public order or morals, or where two private interests conflict. However, there is no role for a broad margin of appreciation in the face of the clear scientifically-established threat arising from the climate crisis. *See, e.g.*, *Handyside v. The United Kingdom*, ECtHR Application No. 5493/72, Judgment dated 7 December 1976, p. 17, para. 48 ("The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterised by a rapid and far-reaching evolution of opinions on the subject. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements"); *Odievre v. France*, ECtHR Application No. 42326/98, Judgment dated 13 December 2003, p. 22, para. 37. *Cf. Dickson v. The United Kingdom*, ECtHR Application No. 44362/04, Judgment dated 4 December 2007, p. 24, para. 78 ("where a particularly important facet of an individual's existence . . . , the margin of appreciation accorded to a State will in general be restricted. Where, however, there is no consensus within the member States of the Council of Europe either as to the relative importance of the interest at stake or as to how best to protect it, the margin will be wider").

States to be in violation of their human rights obligations where they have failed to set sufficiently ambitious climate targets.[205] Therefore, the ICESCR's reference to progressive realisation of economic, social and cultural rights does not and cannot allow States to delay urgent climate action.

E. OBSERVATIONS ON SPECIFIC OBLIGATIONS

1. International cooperation

83. International law imposes a duty on States to cooperate to reduce GHG emissions and to take measures to address their harmful effects.[206] Specific manifestations of the cooperation obligation, such as (*i*) the obligation of financial, technological and scientific cooperation; (*ii*) the obligation to negotiate in good faith with respect to global climate action; and (*iii*) the obligation to cooperate with respect to persons displaced by climate change, have received broad support in other written statements.

84. *First*, consistent with the view of The Bahamas, several Participants underscored the importance of the obligation of **financial cooperation**,[207] including as a "specific expression" of the duty to cooperate.[208] This position has been endorsed not just by developing States, but also by developed ones.[209]

85. Some Participants, however, have sought to frame financial assistance merely as an act of "global solidarity" or "development cooperation," as opposed to a defined legal obligation requiring specific conduct from developed States.[210] Such views run counter not just to the text of the treaties that mandate cooperation, but also to the Court's findings that the duty to cooperate is "the foundation of legal régimes dealing (*inter alia*) with shared resources and with

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[205] *See KlimaSeniorinnen v. Switzerland*, paras. 545–550 (finding that a State must adopt and effectively implement practice, regulation and measures to mitigate the existing and potentially irreversible, future effects of climate change, including the "undertak[ing of] measures for the substantial and progressive reduction of their respective GHG emission levels, with a view to reaching net neutrality within, in principle, the next three decades"). *See also Urgenda* Judgment, para. 8.3.5 (requiring the Netherlands to further reduce GHG gas emissions).

[206] Written Statement of The Bahamas, Section V.B.

[207] *See* Written Statement of The Bahamas, para. 210, Colombia, para. 3.65; Vanuatu, para. 424; Barbados, para. 216; Egypt, paras. 163–164; China, para. 91; Indonesia, para. 52; Bangladesh, para. 131; Kenya, para. 5.19.

[208] Written Statement of Australia, para. 4.6.

[209] *See* Written Statements of Australia, para. 4.6; New Zealand, para. 63; United Kingdom, paras. 72, 158; United States of America, para. 3.20.

[210] *See* Written Statement of the European Union, para. 328.

the environment"[211] and that shared resources "can only be protected through close and continuous co-operation".[212] The duty to cooperate is therefore more than an expression of political will.[213] For instance, ITLOS recently confirmed in its Climate Change Advisory Opinion that developed States are obligated under Part XII of UNCLOS to render financial assistance to "developing and least developed States" that are "most directly and severely affected" by the effects of GHG emissions on the marine environment as a "means of addressing an inequitable situation".[214]

86. There was also broad support across the written statements with respect to **technological and scientific cooperation** obligations.[215] Indeed, the existence of this duty was not disputed in *any* written statement. Additionally, The Bahamas draws attention to the ITLOS Climate Change Advisory Opinion, which concluded that UNCLOS gives rise to "specific obligations to assist developing States" by providing "*appropriate* assistance . . . in terms of capacity-building, scientific expertise, technology transfer and other matters," with preferential treatment to States "vulnerable to the adverse effects of climate change".[216]

87. *Second*, several Participants have recognised the obligation to **negotiate in good faith** with respect to global climate action.[217] The Bahamas reaffirms its position that this obligation requires States to conduct *meaningful negotiations* and to achieve a *specific result*.[218] While the modalities and details of negotiations are for States and stakeholders to decide, The Bahamas rejects the view that this duty is satisfied so long as an agreement is reached reflecting the lowest common denominator between the positions of various States.[219] Rather,

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211 *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), Separate Opinion of Judge Ad Hoc Charlesworth, I.C.J. Reports 2014*, p. 457, para. 13.

212 *Pulp Mills* Judgment, p. 51, para. 81; *Dispute over the Status and Use of the Waters of the Silala (Chile v. Bolivia), Judgment, I.C.J. Reports 2022*, p. 614, paras. 100–101. *See also Gabčíkovo-Nagymaros* Judgment, p. 78, para. 140.

213 *See* Written Statement of The Bahamas, para. 111.

214 ITLOS Climate Change Advisory Opinion, paras. 327, 330.

215 Written Statement of The Bahamas, paras. 211–212. *See also* Written Statements of Egypt, para. 168; Colombia, para. 3.65; Kenya, para. 6.89; Barbados, para. 306; Bangladesh, paras. 119, 148; the Netherlands, para. 4.9; Singapore, para. 3.40; Australia, para. 4.6; China, paras. 86, 88; South Africa, para. 123; Saudi Arabia, para. 4.28; United States of America, para. 3.10; Albania, para. 91; Argentina, pp. 24–25; Timor-Leste, para. 248; Tonga, para. 228.

216 ITLOS Climate Change Advisory Opinion, para. 339 (emphasis added).

217 *See* Written Statements of The Bahamas, paras. 213–216; Colombia, para. 3.61; European Union, para. 77; Singapore, para. 3.23; Bangladesh, para. 128; Barbados, para. 218; Egypt, para. 111.

218 Written Statement of The Bahamas, paras. 214–215.

219 *See* Written Statement of Singapore, para. 3.23.

the result of such negotiations must be an effective framework for the deep, rapid, and sustained reduction in anthropogenic GHG emissions and the enactment of measures to address their harmful effects.[220]

88. As a result, negotiations that fall short of seeking such result do not discharge the States' obligation to negotiate in good faith with respect to climate action. For instance, some written statements have stressed the primacy of COP and the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement ("***CMA***") as fora for negotiations.[221] However, the real issue is not the identity of the forum, but the nature of the negotiations and what can be achieved. Negotiations under the umbrella of COP may well discharge the States' duty to negotiate in good faith provided that they are aimed at developing an effective framework for the deep, rapid, and sustained reduction of anthropogenic GHG emissions. In contrast, discussions limited to administrative and institutional matters pursuant to UNFCCC and the Paris Agreement[222] would fall short of the standard required.

89. Finally, there was broad agreement among Participants that the duty of cooperation is also engaged in respect of **persons displaced by climate change**-related events, such as sea level rise.[223]

2. Maritime entitlements and statehood

90. In its First Written Statement, The Bahamas submitted that the obligation of States to cooperate to address the harmful effects of GHG emissions necessarily extends to cooperation to establish a fair and clear legal framework that preserves maritime entitlements and statehood from the potentially harmful effects of sea level rise.[224] This view has been amply and convincingly echoed in dozens of other written statements.

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220 Written Statement of The Bahamas, paras. 215–216.

221 *See, e.g.*, Joint Statement of Denmark, Finland, Iceland, Norway and Sweden, paras. 62–63.

222 *See, e.g.*, UNFCCC, *Administrative, financial and institutional matters*, decision 18/CP.28, document FCCC/CP/2023/11/Add.2 (15 March 2024); UNFCCC, *Administrative, financial and institutional matters*, decision 26/CP.27, document FCCC/CP/2022/10/Add.3 (17 March 2023); UNFCCC, *Matters relating to the Standing Committee on Finance*, decision 14/CMA.4, document FCCC/PA/CMA/2022/10/Add.3 (17 March 2023); UNFCCC, *Matters relating to the Adaptation Fund*, decision 18/CMA.4, document FCCC/PA/CMA/2022/10/Add.3 (17 March 2023).

223 *See, e.g.*, Written Statements of The Bahamas, Section V.B.4; Singapore, paras. 3.90, 3.95; Portugal, para. 136; Netherlands, paras. 5.43–5.44.

224 Written Statement of The Bahamas, Section V.B.3.

91. Regarding **maritime entitlements**, the statements submitted to the Court evidence a growing consensus that international law supports the fixing of baselines and maritime entitlements despite physical changes to the coastline resulting from sea level rise. This position was shared across small island States,[225] coastal States,[226] landlocked States,[227] large maritime powers,[228] and international organisations alike.[229] Critically, *no* Participant has contested this view. Rather, as the Commission of Small Island States ("***COSIS***"), of which The Bahamas is a member, submitted, "at least 104 States—representing a strong majority of island and coastal States—acknowledge that maritime baselines remain fixed at their current coordinates".[230]

92. Specifically, several written statements emphasised The Bahamas's submission that the preservation of maritime entitlements is a matter of international cooperation.[231] For instance, Korea referred to the 2023 Korea-Pacific Islands Leaders' Declaration, which endorsed the preservation of baselines and maritime zones as an example of "Cooperation for a Peaceful Pacific".[232]

93. Moreover, as argued by The Bahamas, States overwhelmingly agree that this position is fully grounded in UNCLOS.[233] As multiple written statements have noted, the legal position regarding fixed baselines is best expressed in the 2021 Pacific Island Forum Declaration on Preserving Maritime Zones in the Face of Climate Change-Related Sea-Level Rise, which has been widely endorsed.[234] Micronesia, a Pacific Islands Forum State, summarised the position

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225 *See, e.g.*, *id.*, paras. 221–223; COSIS, paras. 71–72; AOSIS, Annex 5, para. 6, Annex 4, para. 4, Annex 1, para. 5; Dominican Republic, paras. 4.35, 4.40; Kiribati, para. 198; Marshall Islands, para. 105; Micronesia, para. 115; Nauru, para. 12; Solomon Islands, paras. 209–212; Tonga, paras. 234–236, Vanuatu, para. 588; Tuvalu, para. 149.

226 *See, e.g.*, Written Statements of Costa Rica, para. 125; El Salvador, para. 56; Korea, para. 8.

227 *See, e.g.*, Written Statement of Liechtenstein, para. 77.

228 *See, e.g.*, Written Statements of United States of America, para. 1.13; Australia, para. 1.17.

229 *See, e.g.*, Written Statements of the Forum Fisheries Agency, para. 39; Pacific Islands Forum, para. 22; PNAO, para. 57.

230 Written Statement of COSIS, para. 72.

231 Written Statement of The Bahamas, para. 224.

232 Written Statement of Korea, para. 8. *See also* Written Statements of Australia, para. 1.17; United States of America, para. 1.13.

233 *See, e.g.*, Written Statements of The Bahamas, para. 221; AOSIS, Annex 1, para. 5, Annex 4, para. 4, Annex 5, para. 6; Costa Rica, para. 127; Dominican Republic, para. 4.40; Forum Fisheries Agency, para. 39; Kiribati, para. 198; Marshall Islands, para. 105; Micronesia, para. 115; Pacific Islands Forum, paras. 22–23; PNAO, para. 57; Solomon Islands, para. 209; Tonga, para. 234; Vanuatu, para. 588; Liechtenstein, para. 77; Australia, para. 1.17.

234 Pacific Island Forum, *Declaration on Preserving Maritime Zones in the Face of Climate Change-related Rise* (6 August 2021), *available at* https://forumsec.org/publications/declaration-preserving-maritime-zones-

to the Court, which The Bahamas again endorses. *First*, "UNCLOS does not require adherence to an ambulatory theory of baselines."[235] *Second*, there is a "growing internal consensus" that UNCLOS does not require States parties to keep their maritime baselines and outer limits of their maritime zones under review nor to update charts or lists.[236] *Third*, while the physical effects of sea level rise may cause inundation of the coastline, it does not follow under UNCLOS that sea level rise has the "legal effect of shifting maritime baselines and the outer limits of maritime zones of a coastal State landward and/or diminishing or otherwise undermining the rights and entitlements of the coastal State".[237] This interpretation of UNCLOS is shared by States from different regions. For example, Alliance of Small Island States submitted that it "extends beyond our region and finds support in views from many nations, including large coastal states such as the United States of America, who have recognised the pressing need for member States to have continued access to their maritime resources and ensure legal stability, security, certainty, and predictability".[238]

94. Several written statements have also demonstrated that the principle of fixed baselines reflects the principle of respect for territorial integrity, a view that The Bahamas endorses.[239] For example, as submitted by COSIS, in the context of sea level rise, the inviolability of territorial integrity necessarily demands the continuity of sovereign entitlements, including maritime baselines.[240] Likewise, Tuvalu opined that "[j]ust as States are prohibited from recognizing violations of territorial integrity . . . all States must equally respect the enduring sovereignty of States like Tuvalu even in the face of submergence of land territory."[241] This view accords with the Court's reasoning in *Jan Mayen* that "the attribution of maritime areas to the territory of a State . . . is destined to be permanent."[242]

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face-climate-change-related-sea-level-rise. *See* Written Statements of Pacific Islands Forum, paras. 20–24; Australia, para. 1.17; Korea, para. 8; Vanuatu, para. 588; Tonga, para. 235; Solomon Islands, para. 210; Micronesia, para. 115; Forum Fisheries Agency, para. 39; Dominican Republic, para. 4.40.

235 Written Statement of Micronesia, para. 115.

236 *Ibid*.

237 *Id.*, para. 117.

238 Written Statement of AOSIS, Annex 5, para. 7.

239 *See* Written Statements of COSIS, para. 71; Costa Rica, paras. 73–74; Dominican Republic, paras. 4.35, 4.42; Forum Fisheries Agency, para. 36; Kiribati, para. 190; Pacific Islands Forum, para. 33; Tuvalu, para. 149.

240 Written Statement of COSIS, para. 71.

241 Written Statement of Tuvalu, para. 149.

242 *See* Written Statement of Nauru, para. 12 (citing *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark* v. *Norway), Judgment, I.C.J. Reports 1993,* p. 74, para. 80).

95. Other Participants have also addressed the preservation of maritime entitlements in the context of the legal consequences of a breach of an obligation with respect to climate change.[243] In particular, Participants have argued that recognition of fixed baselines may be one of the remedies for breach of the right to self-determination[244] or territorial integrity;[245] for example in the form of a duty not to recognise a change in territory or entitlements that results from such a breach.[246] The Bahamas welcomes this view and submits that States' cooperation to establish a clear legal framework to address the preservation of entitlements must address the question of remedies.

96. Dozens of written statements have also addressed the issue of continued **statehood**.[247] Notably, *no* Participant has contested the principle that sea level rise does not eviscerate the legal personality of a State.[248] Therefore, The Bahamas agrees with COSIS that the "presumption of the continuation of the State is a well-established principle of international law" and submits that it should apply to the context of sea level rise.[249] Just as The Bahamas, the Forum Fisheries Agency and the Pacific Island Forum also framed continuity of statehood as consistent with the bedrock duty of cooperation.[250]

97. Accordingly, the Participants have broadly endorsed The Bahamas' position that States' duty to cooperate entails establishing a clear legal framework to address the territorial issues presented by climate change-related sea level rise, including the preservation of maritime entitlements and statehood. In developing this framework, States should in turn take account

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243 *See, e.g.*, Written Statement of Singapore, paras. 4.20–4.22.

244 Written Statements of Kiribati, paras. 190, 198–199; Tuvalu, para. 149; Costa Rica, para. 125; Albania, para. 136; Vanuatu, para. 605.

245 Written Statements of Kiribati, para. 190; El Salvador, para. 56; Vanuatu, para. 588; Albania, para. 136.

246 *See* Written Statement of Kiribati, paras. 190, 198–199 (citing ILC, *Responsibility of States for Internationally Wrongful Acts* (2001), art. 41).

247 Written Statement of The Bahamas, para. 226.

248 *See* Written Statements of AOSIS, Annex 5, paras. 13–16, Annex 4, paras. 7–8, Annex 6, paras. 5–6; COSIS, para. 72; Dominican Republic, para. 4.39; El Salvador, paras. 54–55; Forum Fisheries Agency, paras. 33–36; Kiribati, para. 190; Latvia, para. 72; Marshall Islands, para. 104; Pacific Islands Forum, paras. 30–33; Solomon Islands, para. 217; Tonga, para. 239; Vanuatu, para. 605; Tuvalu, para. 149; United States of America, para. 1.13; Liechtenstein, para. 76; Australia, paras. 1.18–1.19; Kenya, para. 5.68.

249 Written Statement of COSIS, para. 72.

250 *See* Written Statements of Pacific Islands Forum, paras. 30–33; Forum Fisheries Agency, paras. 33–36. In addition, the fundamental principle of respect for States' territorial integrity separately gives rise to an obligation to respect legal measures enacted by an affected State to preserve its territory. *See* Written Statements of the Dominican Republic, para. 4.42; El Salvador, para. 57.

of the well-supported and unopposed views that States maintain their existing maritime delimitations, entitlements and statehood in the face of sea level rise.

3. Obligation to regulate the conduct of private actors

98. In its First Written Statement, The Bahamas set out a number of core cross-cutting obligations that apply in the context of climate change. One such core obligation—the duty of States to regulate the conduct of private actors within their jurisdiction that generate GHG emissions—has featured prominently in other Participants' written statements and The Bahamas thus offers brief additional remarks on the issue.[251]

99. Critically, other written statements widely support the proposition that States have an obligation to adopt legislative and regulatory measures aimed at reducing global GHG emissions,[252] and that this includes the duty to regulate the conduct of private actors.[253] Across the board, States emphasised that private, non-State actors are responsible for a significant proportion of global GHG emissions.[254] It was recognised that "nearly two-thirds of the major industrial GHG emissions (from fossil fuel use, methane leaks, and cement manufacture) are produced by just 90 corporations", and "from 1986 to 2010, GHG emissions from the top 20 largest investor, and State-owned companies contributed to 19.6% of the total rise in carbon dioxide."[255] As The Bahamas noted in its First Written Statement, this reality underscores the need for urgent action aimed at private conduct.

100. The obligation to regulate the conduct of private actors is reflected in all relevant areas of the law, including customary and treaty-based international environmental law, the law of the sea and international human rights law.[256]

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251 Written Statement of The Bahamas, Section V.A.2; Carbon Disclosure Project ('CDP'), *CDP Carbon Majors Report 2017* (July 2017), pp. 5–7.

252 *See, e.g.*, Written Statements of Bangladesh, paras. 105, 139; Costa Rica, para. 103; Colombia, para. 4.10; Tonga; para. 158.1; Singapore, para. 3.62; Kenya, para. 5.49; Albania, para. 75.

253 *See, e.g.*, Written Statements of Barbados, para. 163; Colombia, para. 4.10; Egypt, paras. 244–247; Costa Rica, para. 103; African Union, paras. 96(e), 196(b), 208; IUCN, para. 39; Kenya, para. 5.5, Albania, para. 102; Micronesia, para. 113; Dominican Republic, paras. 4.59, 5.1(ii); Thailand, para.10. *Cf.* Bangladesh, para. 105; Solomon Islands, para. 200.

254 *See, e.g.*, Written Statements of Kenya, para. 5.5; Australia, para. 4.10; African Union, para. 208; Albania, para. 72.

255 Written Statement of Kenya, para. 5.5. *See also* Written Statement of African Union, para. 208.

256 *See, e.g.*, Written Statements of Antigua and Barbuda, para. 550; Thailand, paras. 10–14; IUCN, para. 39; Kenya, para. 5.5; Albania, para. 72; Egypt, para. 245; Micronesia, para. 113; Mauritius, para. 171; Costa Rica, para. 110; Vanuatu, para. 254; African Union, para. 196; Barbados, para. 163; Colombia, para. 3.68; Albania, para. 102; Ecuador, para. 3.109. *See also Pulp Mills* Judgment, pp. 79–80, para. 197; UNCLOS, arts. 207–212; Rio Declaration, principle 11; Convention for the Protection and Development of the Marine

(a) Multiple States as well as the International Union for Conservation of Nature ("***IUCN***") have noted that the customary principle of due diligence and the obligation to prevent transboundary harm require the regulation of private conduct.[257] Consistent with the position taken by The Bahamas, several States have echoed the Court's position in *Pulp Mills* that the obligation of due diligence under customary international law requires regulation of both "public and private operators."[258]

(b) Similarly, the obligation to protect the marine environment under UNCLOS includes the regulation of activities carried out by private entities.[259] This is consistent with the conclusion of ITLOS in its Climate Change Advisory Opinion that States have an obligation to regulate the conduct of private actors that produce anthropogenic GHG emissions.[260] In examining the content of Article 194(2) of UNCLOS, which provides in relevant part that States must "take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment," the Tribunal found that "the phrase 'activities under their jurisdiction or control' refers to activities carried out by both public and private actors."[261]

Environment in the Wider Caribbean Region (Cartagena Convention), 11 October 1986, 1506 *UNTS* 158 (accession on 24 June 2010), art. 12(1); Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Western Indian Ocean (Nairobi Convention), 31 March 2010, art. 14(1); Convention for Cooperation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region (Abidjan Convention), 5 August 1984, art. 4; Framework Convention for the Protection of the Marine Environment of the Caspian Sea (Tehran Convention), 12 August 2006, arts. 15, 18, 19(4); Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and Contiguous Atlantic area (ACCOBAMS), 1 June 1 2001, art. II(3); Convention for the Protection of the Marine Environment of the Baltic Sea Area (Helsinki Convention), 17 January 2000, arts. 3(1), 6(2) and 16(1)(a); Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR), 25 March 1998, 2354 *UNTS* 67, art. 22(a); ICCPR, art. 2(2); ICESCR, art. 2(1).

257 *See, e.g.*, Written Statements of Antigua and Barbuda, para. 550; Thailand, paras. 10–14; Kenya, para. 5.5; Albania, para. 72; IUCN, para. 39.

258 *Pulp Mills* Judgment, pp. 79–80, para. 197. *See, e.g.*, Written Statements of Egypt, para. 245; Singapore, para. 3.5; the Netherlands, para. 3.57; Colombia, para. 3.21; Tuvalu, para. 116.

259 Written Statements of Micronesia, para. 113; Singapore, para. 3.5; The Bahamas, paras. 127–128. *See also Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area*, Case No. 17, Advisory Opinion, 2011 ITLOS Reports 10 (1 February) (hereinafter "***Activities in the Area* Advisory Opinion**"), p. 41, para. 112.

260 ITLOS Climate Change Advisory Opinion, para. 247.

261 UNCLOS, art. 194(2); ITLOS Climate Change Advisory Opinion, para. 247.

(c) States have also emphasised that international human rights law requires States to regulate the conduct of private actors.[262] For example, the Human Rights Committee's General Comment No. 36 on the right to life affirms that "the duty to protect the right to life by law also includes an obligation for States parties to adopt any appropriate laws or other measures in order to protect life from all reasonably foreseeable threats, *including from threats emanating from private persons and entities*."[263] In *KlimaSeniorinnen v. Switzerland*, the ECtHR recently affirmed that States' human rights obligations related to environmental pollution apply "whether the pollution is directly caused by the State or whether State responsibility arises from the failure to regulate private industry properly."[264]

101. Finally, the State's duty to regulate extends to private conduct abroad in appropriate cases.[265] In the context of marine pollution, ITLOS has recently affirmed that the State's duty to regulate private conduct may also apply to "[a]ctivities carried out on board ships or aircraft which are registered in a State," even if outside the territorial jurisdiction of the State.[266]

III.
CONSEQUENCES OF BREACH OF THE RELEVANT OBLIGATIONS

102. The precise nature and extent of a State's responsibility for breach of its obligations in respect of climate change is case-specific and fact-specific, and depends on the scope and formulation of the primary rule of international law that is said to be breached. Courts deciding specific cases are thus best placed to interpret and apply the relevant rules of State responsibility.

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262 *See, e.g.*, Written Statements of Mauritius, para. 171; Costa Rica, para. 110; Vanuatu, para. 254; African Union, para. 196; Barbados, para. 163; Colombia, para. 3.68; Albania, para. 102; Ecuador, para. 3.109.

263 HRC General Comment No. 36, para. 18 (emphasis added). *See also* ECtHR case law, *e.g.*, *Case of Öneryildiz v. Turkey*, ECtHR Application No. 48939/99, Judgment dated 30 November 2004, paras. 89–90; *Case of Budayeva and Others v. Russia*, ECtHR Application Nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, Judgment dated 20 March 2008, para. 132.

264 *KlimaSeniorinnen v. Switzerland*, para. 435. *See also Hatton and Others v. the United Kingdom*, ECtHR Application No. 36022/97, Judgment dated 8 July 2003, para. 98.

265 Written Statement of The Bahamas, para. 196.

266 ITLOS Climate Change Advisory Opinion, para. 247 ("The phrase 'activities under their jurisdiction or control' refers to activities carried out by both public and private actors. In addition, there should be a link of jurisdiction or control between such activities and a State. The concept of 'jurisdiction or control' of a State in this context is a broad one, encompassing not only its territory but also areas in which the State can, in accordance with international law, exercise its competence or authority. Such areas include, for example, a State's exclusive economic zone and continental shelf. Activities carried out on board ships or aircraft which are registered in a State may also be considered activities under the jurisdiction of that State.").

In this submission, The Bahamas thus limits itself to certain general observations in response to other Participants' written statements: (*i*) with respect to the application of the general rules of State responsibility in the context of climate change (**Section A**); and (*ii*) with respect to causation (**Section B**).

A. THE "SPECIAL REGIME" ISSUE: CLIMATE TREATIES DO NOT PRECLUDE RECOURSE TO GENERAL LAW OF STATE RESPONSIBILITY

103. The vast majority of Participants support The Bahamas' position that the general rules of State responsibility apply where a State breaches its obligations with respect to climate change, regardless of the source of such obligations (*e.g.*, whether emanating from climate treaties or customary international law). However, a small number of States argue that climate treaties exclude recourse to general remedies.[267] That is inaccurate.

104. Under Article 55 of the Articles on Responsibility of States for Internationally Wrongful Acts ("***ARSIWA***"), the general rules of State responsibility "do not apply where and to the extent that . . . the content or implementation of the international responsibility of a State are governed by special rules of international law".[268] However, climate treaties do not establish a special liability regime:

(a) Climate treaties are silent on the issue of remedies. Both the UNFCCC and the Paris Agreement establish monitoring bodies to oversee their respective implementation, but do not address the issue of remedies where a State breaches its obligations. Article 15 of the Paris Agreement, which provides that the relevant monitoring committee shall "function in a manner that is transparent, non-adversarial and non-punitive"[269] relates only to the functioning of the committee itself. It is not possible to extrapolate from Article 15 an agreement to exclude the ordinary rules of State responsibility where a State is found to be in breach of its obligations by a competent court or tribunal.[270]

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267 *See* Written Statements of China, paras. 133, 139; European Union, para. 351; Australia, para. 5.10; Kuwait, para. 86; Japan, para. 41.

268 ILC, *Responsibility of States for Internationally Wrongful Acts* (2001) (hereinafter "**ILC Articles on State Responsibility**"), art. 55. *See* generally B. Simma & D. Pulkowski, "Leges Speciales and Self-Contained Regimes" in *The Law of International Responsibility* (Oxford University Press, 2010).

269 Paris Agreement, art. 15. *Cf.* Written Statements of OPEC, para. 96; Kuwait, para. 96; China, para. 140.

270 For instance, Article 14 of the UNFCCC provides a basis for the States parties to accept the jurisdiction of the Court in relation to disputes under the UNFCCC, and applies *mutatis mutandis* to the Paris Agreement. *See* UNFCCC, arts. 14(2), 14(8). In any event, an intention to preclude recourse to ordinary remedies would have to be made clear and explicit. As the Court explained in *ELSI* with respect to the exhaustion of local

(b) Likewise, Article 8 of the Paris Agreement which concerns "loss and damage" is not a liability provision. The loss and damage fund is intended to support vulnerable States in dealing with irreversible and unavoidable impacts of climate change such as slow-onset sea level rise—*i.e.*, impacts which occur and will continue to occur *regardless* of States' compliance with their mitigation and adaptation obligations.[271] States have expressly confirmed in COP Decision 1/CP.21 that Article 8 of the Paris Agreement "does not involve or provide basis for any liability or compensation".[272]

(c) As such, climate treaties can be contrasted with other areas of international law which *do* establish a special liability regime, such as World Trade Organization ("***WTO***") law. Unlike climate treaties, the WTO Dispute Settlement Understanding includes special provisions on remedies, including compensation and suspension of concessions.[273] It is widely considered on that basis (and given the object and purpose of the WTO system) to exclude recourse to ordinary remedies, in particular unilateral countermeasures.[274]

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remedies rule, it cannot be that "an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so"; *see Elettronica Sicula S.p.A (ELSI) (United States of America v. Italy), Judgment, I.C.J. Reports 1989*, p. 42, para. 50. *See also* ILC Report of the Study Group of the International Law Commission on Fragmentation of International Law, para. 143.

271 UNFCCC, *Sharm el-Sheikh Implementation Plan*, decision 1/CP.27 (6 November 2022), para. 27; UNFCCC, *Funding arrangements for responding to loss and damage associated with the adverse effects of climate change, including a focus on addressing loss and damage*, decision 2/CMA.4 (6 November 2022), paras. 1–3.

272 UNFCCC, *Adoption of the Paris Agreement*, decision l/CP.21 (30 November 2015), para. 51; *see* Written Statement of Portugal, paras. 114–115.

273 Marrakesh Agreement establishing the World Trade Organization, 15 April 1994, 1869 *UNTS* 4, Annex 2: Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 22.

274 *See* B. Simma & D. Pulkowski, "Leges Speciales and Self-Contained Regimes" in *The Law of International Responsibility* (Oxford University Press, 2010), p. 158; ILC, *Document A/56/10: Report of the International Law Commission on the work of its fifty-third session (23 April–1 June and 2 July–10 August 2001), General Commentary*, Yearbook of the International Law Commission, 2001, vol. II Part Two, document A/CN.4/SER.A/2001/Add.1 (Part 2) (hereinafter "**ILC Articles on State Responsibility Commentary**") commentary to art. 55, p. 140, para. 3; Panel Report, *United States—Sections 301–310 of the Trade Act of 1974*, WTO doc. WT/DS152/R (22 December 1999), p. 311, para. 7.35 ("Article 23 of the DSU deals, as its title indicates, with the 'Strengthening of the Multilateral System'. Its overall design is to prevent WTO Members from unilaterally resolving their disputes in respect of WTO rights and obligations. It does so by obligating Members to follow the multilateral rules and procedures of the DSU."); *see also* ILC Articles on State Responsibility Commentary, commentary to art. 50, p. 133, para. 10.

105. Accordingly, climate treaties do not establish a special liability regime that displaces the application of the ordinary rules of State responsibility.

106. In any event, even if the Court were to find that climate treaties establish such a special regime, that would *still* not exclude recourse to ordinary remedies:

(a) Under Article 55 ARSIWA, ordinary remedies are excluded only "where and *to the extent*" that a special liability regime applies. Thus, if the special regime is limited in scope (*e.g.*, providing for special rules with respect to one form of remedy but not others), ARSIWA expressly provides for recourse to ordinary remedies.[275] The late Professor Crawford, in his role as ILC Rapporteur on State Responsibility, noted that there is a "presumption against the creation of *wholly* self-contained regimes in the field of reparation".[276]

(b) As noted by the ILC, subsidiary recourse to general remedies is also appropriate where the special regime "fails", *i.e.*, a State fails to receive effective reparation under the special rules.[277]

(c) In any event, a special regime established under the climate treaties would only apply to breaches of obligations under those treaties. The ordinary rules of State responsibility would continue to apply if a State breached, *e.g.*, its prevention obligation under customary international law.

B. ISSUES OF CAUSATION

107. Issues of causation have featured prominently in certain Participants' written statements. In particular, States have pointed to the difficulty in establishing a causal link between the GHG emissions generated in a State's territory and specific harm to the environment and other parts

[275] ILC Articles on State Responsibility Commentary, commentary to art. 55, p. 140, para. 3 ("In other cases, one aspect of the general law may be modified, leaving other aspects still applicable.").

[276] J. Crawford, Third Report on State Responsibility, UN doc. A/CN.4/507 (4 August 2000), para. 157 (emphasis added). *See also* ILC Report of the Study Group of the International Law Commission on Fragmentation of International Law, para. 152(c); A. Cassese, *International Law* (2nd ed., Oxford University Press, 2005), p. 276 ("It would be contrary to the spirit of the whole body of international law on human rights to suggest that the monitoring system envisaged in the [ICCPR] and the Protocol should bar States parties from 'leaving' the self-contained regime contemplated in the Covenant and falling back on the customary law system of resort to peaceful counter-measures.").

[277] ILC Report of the Study Group of the International Law Commission on Fragmentation of International Law, para. 152(d).

of the climate system.[278] While that may be correct as a matter of fact, it has limited legal significance. In this section, The Bahamas properly contextualises causation issues and shows that: (*i*) causation is not a requirement for establishing a *breach* of international obligations with respect to climate change; and (*ii*) in the context of reparation, causation is a flexible concept which does not constitute a bar to awarding reparation for breach of climate change obligations.

1. Causation is not a requirement for establishing breach

108. International law does not require a finding of causally linked injury or damage in order to establish a breach of an international obligation, unless the primary rule says so. All that is required is absence of compliance with the primary rule.[279] When codifying the customary rules on State responsibility, the ILC has considered and rejected a proposal that the finding of "damage" or "injury" be a prerequisite to international responsibility.[280]

109. In the context of climate change, the applicable obligations typically require States to exercise due diligence, *i.e.*, take certain positive steps towards averting injury to the environment and individuals—such as taking urgent and effective mitigation and adaptation action. A State breaches its obligation of due diligence if it fails to take all measures within its power which might have contributed to preventing such harm to environment and individuals, even if no harm in fact occurs (yet)[281] or if the harm would have occurred in any event.[282] On the other hand, a State that acts with due diligence is not liable for a breach of the relevant obligation even if harm eventually materialises.[283]

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278 Written Statements of Australia, paras. 5.9–5.10; Indonesia, para. 74; Kuwait, paras. 120–121; United States of America, para. 5.10; Joint Statement of Denmark, Finland, Iceland, Norway and Sweden, para. 107.

279 ILC Articles on State Responsibility, art. 12; J. Crawford, *State Responsibility: The General Part* (Cambridge University Press, 2013), pp. 215–219.

280 J. Crawford, *State Responsibility: The General Part* (Cambridge University Press, 2013), pp. 54–60.

281 *Id.*, pp. 226–232.

282 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 43, (hereinafter "**Bosnian Genocide**"), para. 430; *KlimaSeniorinnen v. Switzerland*, para. 444.

283 *See* ILC Draft Articles on Transboundary Harm, commentary to art. 3, para. 7 ("The obligation of the State of origin to take preventive or minimization measures is one of due diligence. It is the conduct of the State of origin that will determine whether the State has complied with its obligation under the present articles. The duty of due diligence involved, however, is not intended to guarantee that significant harm be totally prevented, if it is not possible to do so. In that eventuality, the State of origin is required, as noted above, to exert its best possible efforts to minimize the risk. In this sense, it does not guarantee that the harm would not occur."); ITLOS Climate Change Advisory Opinion, para. 236 ("This obligation of due diligence is particularly relevant in a situation in which the activities in question are mostly carried out by private persons or entities. The obligation to regulate marine pollution from anthropogenic GHG emissions is a primary example in this respect. In that situation, it would not be reasonable to hold a State, which has acted with due

110. This has two important consequences.

111. *First*, a State incurs international responsibility for its failure to comply with mitigation and adaptation obligations even if it is not possible to identify with specificity the harm that its breach has caused. This has recently been demonstrated in cases such as *KlimaSeniorinnen v. Switzerland* where the ECtHR found Switzerland in breach of its obligation to put in place the necessary measures aimed at mitigating its GHG emissions (stemming from Article 8 of the European Convention which protects individuals from interference in private and family life), without any enquiry into what specific harm had been caused by the breach.[284] In any event, in the context of climate change, it is beyond doubt that anthropogenic GHG emissions are causing and will continue to cause significant harm to the environment and human life.[285] The only conceptual difficulty is linking specific GHG emissions with specific harm, but that does not preclude the finding of breach and the State's responsibility for it.

112. *Second*, it is no response for a State to allege that its actions alone would have been insufficient to effectively respond to the threat of climate change. The Court's finding in the *Bosnian Genocide* case on the nature of due diligence obligations—while limited in that case to the interpretation of Serbia's obligation to prevent genocide under Article I of the Genocide Convention—is particularly apposite and applies *mutatis mutandis* in the context of climate change:

> it is irrelevant whether the State whose responsibility is in issue claims, or even proves, that even if it had employed all means reasonably at its disposal, they would not have sufficed to prevent the commission of genocide. As well as being generally difficult to prove, this is irrelevant to the breach of the obligation of conduct in question, the more so since the possibility that the combined efforts of several States, each complying with its obligation to prevent, might have achieved the result—averting the commission of genocide—which the efforts of only one State were insufficient to produce.[286]

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diligence, responsible simply because such pollution has occurred."); *Activities in the Area* Advisory Opinion, p. 41, para. 110.

284 *KlimaSeniorinnen v. Switzerland*, paras. 544–554. The relationship between Switzerland's actions and the harm suffered by the applicants was relevant to the Court's jurisdiction (including the applicants' standing as "victims" under the European Convention), but not to the finding of breach on the merits.

285 IPCC 2023 Synthesis Report, p. 42. *See, e.g.*, Written Statements of Barbados, para. 149; Burkina Faso, paras. 13–20; Dominican Republic, para. 4.52; Egypt, paras. 41, 57; Kenya, paras. 3.23–3.28; Micronesia, paras. 24–35; New Zealand, paras. 3–5; Sierra Leone, para. 1.4; Solomon Islands, paras. 25–51; Sri Lanka, paras. 26–28; Switzerland, para. 27; Tonga, paras. 47–50; European Union, paras. 12–15, 49.

286 *Bosnian Genocide*, para. 430.

113. Indeed, it is more than a possibility that the combined efforts of States, each complying with its individual mitigation and adaptation obligations, would be able to prevent or at least minimise significant harm to environment and human life caused by anthropogenic GHG emissions. The ECtHR has also confirmed that, in the context of human rights obligations, "it need not be determined with certainty that matters would have turned out differently if the authorities had acted otherwise".[287]

114. Accordingly, a State's failure to abide by its international obligations with respect to climate change triggers the secondary regime of State responsibility without the need to identify specific harm caused by that State's action or omission. It is a well-established principle of international law that "any violation by a State of any obligation, of whatever origin, gives rise to State responsibility".[288]

115. In the context of the secondary regime of State responsibility, causation becomes relevant to some obligations but not all. For instance, the responsible State's obligation to cease the internationally wrongful act and offer appropriate assurances and guarantees of non-repetition if the circumstances so require[289] is not subject to any causation enquiry. In contrast, the duty to make full reparation requires a causal relationship between the internationally wrongful act and an injury to another State or an individual, which the reparation seeks to remedy.[290] Causation in that context is discussed in the next section. However, the fundamental point remains that a breach by a State of its obligations with respect to climate change entails that State's international responsibility; the question is merely what form it takes.

2. Causation in the context of reparation is a flexible concept

116. It is a well-established principle of international law that "the breach of an engagement involves an obligation to make reparation in an adequate form".[291] That is the fundamental starting point which informs courts' approaches to causation when determining what reparation is due in each specific case.

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287 *KlimaSeniorinnen v. Switzerland*, para. 444.

288 *Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements concluded on 9 July 1986 between the two States and which related to the problems arising from the* Rainbow Warrior *Affair*, Decision, 30 April 1990, *RIAA*, Vol. XX, p. 251, para. 75.

289 ILC Articles on State Responsibility, art. 30.

290 *Id.*, art. 31.

291 *Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9*, p. 21; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Judgment, I.C.J. Reports 2018*, (hereinafter "***Certain Activities***") p. 14, para. 29.

117. The ARSIWA codify the basic rule on reparation: "The responsible State is under an obligation to make full reparation for the injury *caused* by the internationally wrongful act."[292] Article 31 thus requires an enquiry into the causal connection between the internationally wrongful act and "the injury" which is the subject of reparation. However, international law embraces a flexible notion of causation, contrary to some States' assertions that the so-called "but-for test" is the only way to satisfy the requirement of causal connection.[293] Rather, causation is merely a tool to achieve a fair result in each specific case—on one hand, it ensures that States are not held accountable for any and all consequences of their acts, however remote they may be (or the acts of others); on the other hand, it operates in the context of the fundamental principle that States are accountable—and need to provide reparation—for breaches of international norms.

118. The commentary to Article 31 of ARSIWA makes clear that "the requirement of a causal link is not necessarily the same in relation to every breach of an international obligation",[294] and the drafters specifically considered that "it would not be prudent or even accurate to use a qualifier" for what type of causal link is required.[295] The Court itself accepted that "the causal nexus required may vary depending on the primary rule violated and the nature of extent of the injury".[296]

119. The Court has adopted a flexible approach to causation in its jurisprudence, including where factual uncertainty (which does not apply here, as discussed below) or evidentiary difficulties meant that it was not possible to ascertain with precision the existence of damage or attribute it to specific actors. Guided by "equitable considerations",[297] the Court took into

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292 ILC Articles on State Responsibility, art. 31.

293 Written Statement of United States of America, para. 5.10. *See also* Written Statements of Australia, para. 5.09 ("[A]s a matter of law a State will only have caused . . . damage that has a 'sufficiently direct and certain causal nexus' with the State's internationally wrongful act."); OPEC, para. 117 ("There are . . . a myriad of factors that have impacted the climate system. . . . Thus to establish that State are to be liable for damages to the environment individually or collectively, is misleading and lacks the preciseness that rulings on these matters require before declaring a judgment."); Saudi Arabia, para. 6.7 ("[T]here must be a proximate causal link between a specific breach of a relevant international obligation which it attributable to a Party.").

294 ILC Articles on State Responsibility Commentary, commentary to art. 31, p. 93, para. 10.

295 ILC, *Summary records of the meetings of the fifty-second session (1 May–9 June and 10 July–18 August 2000), 2662nd Meeting: Draft articles proposed by the Drafting Committee on second reading*, Yearbook of the International Law Commission, 2000, Vol. I, document A/CN.4/SER.A/2000, p. 388, para. 17.

296 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports 2022* (hereinafter "***Armed Activities***"), p. 48, para. 93.

297 *Id.*, para. 106; *Certain Activities*, para. 35.

account "the context"[298] and "the specific circumstances and characteristics of each case"[299] when assessing causation in awarding reparation. Thus, for instance, in *Armed Activities*, the Court reversed the burden of proof with respect to damage caused in the occupied Ituri region, where Uganda failed in its duty of vigilance.[300] It also awarded compensation in the form of a global sum, "within the range of possibilities indicated by the evidence and taking account of equitable considerations".[301] It considered that "[s]uch an approach may be called for where the evidence leaves no doubt that an internationally wrongful act has caused a substantiated injury, but does not allow a precise evaluation of the extent or scale of such injury".[302] In *Certain Activities*, specifically with respect to environmental damage, the Court cited the following passage from the *Trail Smelter* arbitration:

> Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate.[303]

120. In the context of climate change, courts deciding specific cases are best placed to make an assessment of what standard of causation should be applied in any given case in light of the primary norm at issue and all the surrounding circumstances. The Bahamas offers only a few general observations.

121. *First*, the "but-for test" advocated by some States is clearly unsuitable, in particular with respect to a breach of a State's mitigation obligation.[304] Its application would mean that no State could effectively be held liable for failing to take measures to mitigate its GHG emissions unless and until its cumulative total was sufficient *alone* to cause significant harm to the environment and human life. That is a road to disaster and runs against the very foundations of

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298 *Id.*, paras. 64, 68.

299 *Certain Activities*, para. 52.

300 *Armed Activities*, paras. 78, 95.

301 *Id.*, para. 106.

302 *Ibid*.

303 *Trail Smelter* Case, p. 1920, as cited in *Certain Activities*, para. 35.

304 *KlimaSeniorinnen v. Switzerland*, para. 444.

the international law protection of the environment which is based on prevention, precaution and vigilance.

122. *Secondly*, the appropriate treatment of causation in the context of mitigation obligations should account for the following specific characteristics of climate change:

(a) The factual causation between anthropogenic GHG emissions and significant harm to the environment and human life is undisputable.[305] The law does not therefore, for the most part, have to grapple with the uncertainty that may arise in other settings such as personal injury and medical negligence cases where a specific injury results from a complex combination of distinct acts and omissions as well as natural causes. There is only one main cause at play, and that is anthropogenic GHG emissions. As noted above, the only conceptual difficulty arises in linking an individual State's GHG emissions with specific harm, but that is better understood as a question of the proper apportionment of liability for reparation—and therefore an issue of legal causation—rather than an absence of a causal nexus in fact. At most, it is an evidentiary difficulty but it in no way diminishes the factual nexus between the wrongful act and the injury caused by that act; the injury merely takes the form of an unidentified portion of an identified diffuse harm.

(b) With every single GHG emission the world gets closer to the exhaustion of the finite carbon budget which would limit global warming to 1.5ºC. It therefore becomes progressively easier to overcome even the technical evidentiary difficulties in linking specific GHG emissions (which are not offset by removals) with the injury to environment and persons that occurs globally. In any event, most of the evidentiary difficulties can be easily overcome with respect to major emitters.

(c) It is well-established that in addition to factual causation, additional considerations such as proximity and foreseeability apply as outer limits on the States' obligation to make reparation for internationally wrongful acts.[306] They

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[305] IPCC 2023 Synthesis Report, pp. 42–43, 46–47, 49–50.

[306] *See, e.g.*, ILC Articles on State Responsibility Commentary, commentary to art. 31, pp. 92–93, para. 10 ("[C]ausality in fact is a necessary but not a sufficient condition for reparation. There is a further element, associated with the exclusion of injury that is too 'remote' or 'consequential' to be the subject of reparation. In some cases, the criterion of 'directness' may be used, in others 'foreseeability' or 'proximity'. . . . In international as in national law, the question of remoteness of damage 'is not a part of the law which can be

> are an expression of the general principles of fairness and equity rather than black-and-white rules, and need to be interpreted and applied accordingly. One specific feature of climate change is that there is virtually no uncertainty about the global universe of actors whose actions combine to cause the harm. The projected trajectory of anthropogenic GHG emissions, both globally and with respect to individual States, is well-documented with only a small range of outcomes for a specific time period.[307] Thus, the proximity and foreseeability of harm arising from an individual State's failure to mitigate its own GHG emissions has to be judged in the broader context of other States' predictable actions rather than in isolation.

123. *Finally,* with respect to the quantification of the damage, courts regularly award compensation by way of approximation rather than precise math, whether in the area of personal or moral injury, human rights violations, anti-trust or intellectual property cases.[308] Environmental damage, and damage caused to individuals by a State's failure to abide by its mitigation, adaptation and cooperation obligations, is just another area where the courts' discretion will play a key role, in each case guided by equitable considerations.

124. Several national and international courts hearing climate change claims have had to grapple with issues of causation both in the context of reparations and the applicant's standing, and their approaches show that law is not powerless in the face of such challenges. Some courts, for instance, have adapted well-known domestic law causation concepts such as the respondent's "material contribution to injury",[309] while others found that the damage would not have occurred in the same form without the respondent's own breach.[310] In numerous other cases, the applicants did not seek relief in the form of monetary compensation but rather

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satisfactorily solved by search for a single verbal formula'."); *Naulilaa Arbitration (Portugal v. Germany), Award of 31 July 1928, Reports of the International Arbitral Awards Volume II*, p. 1031; *Armed Activities*, paras. 94, 97; *Bosnian Genocide*, paras. 461–462.

307 IPCC 2023 Synthesis Report, pp. 57–60, 65.

308 J. Rudall, *Compensation for Environmental Damage under International Law* (Taylor & Francis, 2020), p. 15; C. Voigt, "Climate Change and Damages" in *The Oxford Handbook of International Climate Change Law* (Oxford University Press, 2016), p. 468.

309 *See Massachusetts v. Environmental Protection Agency*, 549 U.S. 497 (2007), p. 525; *Gloucester Resources v. Minister for Planning*, [2019] NSWLEC 7, para. 697.

310 *See VZW Klimaatzaak v. Kingdom of Belgium & Others*, Court of Appeal of Belgium, 30 November 2023, para. 160. *See also Clements v. Clements*, 2012 SCC 32, [2012] 2 SCR 181.

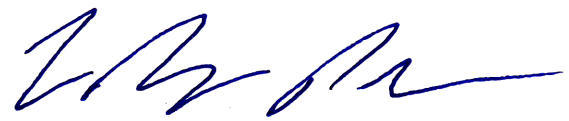
performance of the State's obligations, and as noted above identification of a specific harm and causation were therefore not a necessary part of the court's inquiry.[311]

125. The key point is that none of the technical and legal challenges with respect to causation pose an insurmountable obstacle to awarding reparation for a breach of climate change obligations, as a number of States seem to suggest in their statements to the Court.[312]

311 *KlimaSeniorinnen v. Switzerland*, para. 22; *Urgenda* Judgment, p. 3; *Notre Affaire a Tous and Others v. France*, Administrative Court of Paris (14 October 2021), pp. 1–4.

312 *See, e.g.*, Written Statements of Antigua and Barbuda, paras. 554–551; Kenya, paras. 6-103–6-104; Marshall Islands, paras. 60, 69; Namibia, para. 139; Samoa, paras. 211–212; Sierra Leone, paras. 3.145–3.147; Singapore, paras. 4.14–4.16; Uruguay, paras. 166–174.

Respectfully submitted,



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