INTERNATIONAL COURT OF JUSTICE

OBLIGATIONS OF STATES IN RESPECT OF CLIMATE CHANGE (REQUEST FOR AN ADVISORY OPINION)

WRITTEN COMMENTS OF BELIZE

15 AUGUST 2024

TABLE OF CONTENTS

INTRODUCTION

1. In its Written Statement submitted in these proceedings, Belize focused on the application of the obligation regarding prevention of significant environmental harm in the context of anthropogenic greenhouse gas emissions (defined as '**the Prevention Obligation**'),[1] with specific reference to the obligation to carry out environmental assessments (defined as '**the Assessment Obligation**').[2]

2. The Written Statements submitted by other States in these proceedings are notably consistent with Belize's position on the Prevention Obligation[3] and its implementation with respect to the Assessment Obligation.[4]

3. Since Belize filed its Written Statement, there have been two important legal developments which have a bearing on the Assessment Obligation.

   (a) The significance of the Assessment Obligation has been affirmed by the International Tribunal for the Law of the Sea ('**ITLOS**') in its Advisory Opinion on climate change and international law ('**the ITLOS Advisory Opinion**'). Referring to the "principle of harm prevention" as "well-established",[5] ITLOS observed that "the obligation to conduction environmental impact assessments

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1 See Written Statement of Belize, Chapter 2, Section I.

2 See Written Statement of Belize, Chapter 2, Section II.

3 See, e.g., Written Statement of Palau, paras. 14–17; Written Statement of Solomon Islands, paras. 146–162; Written Statement of the Seychelles, paras. 125–129; Written Statement of Kenya, paras. 5.3–5.8; Written Statement of the Philippines, paras. 55–61; Written Statement of Albania, paras. 65–69; Written Statement of Vanuatu, paras. 261–269; Written Statement of the Federated States of Micronesia, paras. 53–62; Written Statement of Sierra Leone, paras. 3.10–3.15; Written Statement of Switzerland, paras. 14–47; Written Statement of Grenada, paras. 38–41; Written Statement of Saint Lucia, paras. 66–68; Written Statement of Saint Vincent and the Grenadines, paras. 98–102; Written Statement of the Netherlands, paras. 3.52–3.68; Written Statement of the Bahamas, paras. 92–104; Written Statement of the Republic of Koreas, paras. 33–37; Written Statement of Samoa, paras. 87–130; Written Statement of Latvia, paras. 51–61; Written Statement of Mexico, paras. 40–46; Written Statement of Barbados, paras. 133–134, 141–150; Written Statement of the African Union, paras. 56, 92; Written Statement of Uruguay, paras. 89–102; Written Statement of Egypt, paras. 83–90; Written Statement of Namibia, paras. 49–61; Written Statement of Mauritius, paras. 189–192; Written Statement of Antigua and Barbuda, paras. 125–140, paras. 298–327; Written Statement of Thailand, paras. 15–17. There are also several States which disagree with Belize on the application of the Prevention Obligation but nonetheless affirm the existence of the Prevention Obligation: see, e.g., Joint Written Statement of Denmark, Finland, Iceland, Norway and Sweden, para. 69; Written Statement of New Zealand, para. 71; Written Statement of India, para. 9; Written Statement of China, para.127; Written Statement of the United States, para. 4.2; Written Statement of Indonesia, para. 60; Written Statement of Australia, para. 4.8.

4 See, e.g., Written Statement of the Seychelles, paras. 130–132; Written Statement of Kenya, paras. 5.14–5.16; Written Statement of the Philippines, paras. 64–70; Written Statement of Albania, para. 83; Written Statement of the Federated States of Micronesia, para. 59; Written Statement of Sierra Leone, para. 3.13; Written Statement of Saint Lucia, para. 67; Written Statement of Saint Vincent and the Grenadines, para. 102; Written Statement of the Netherlands, paras. 3.69–3.72; Written Statement of the Bahamas, para. 94; Written Statement of the Republic of Korea, para. 36; Written Statement of Latvia, para. 60; Written Statement of Mexico, para. 46; Written Statement of Ecuador, paras. 3.32–3.42; Written Statement of Barbados, para. 144(c)–(d); Written Statement of the African Union, para. 96(c) Written Statement of Uruguay, para. 91; Written Statement of Egypt, paras. 113–114; Written Statement of Namibia, para. 55; Written Statement of Mauritius, paras. 193–195; Written Statement of Antigua and Barbuda, paras. 298–327; Written Statement of Thailand, para. 16.

5 *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law*, Advisory Opinion, ITLOS, 21 May 2024 ('**ITLOS Advisory Opinion**').

is *crucial* to ensure that activities do not harm the marine environment and is an *essential* part of a comprehensive environmental management system".[6]

(b) The apex court in the United Kingdom, the Supreme Court, in June 2024 handed down a landmark decision addressing the importance of environmental assessments and the circumstances in which they must be conducted: *R (on the application of Finch) v. Surrey County Council* ('***Finch***').[7] Although this case was decided with reference to a directive of the European Union, many of the Supreme Court's findings are also salient in the context of the Assessment Obligation under international law.

4. In **Chapter 1** of the present Written Comments, Belize addresses the significance of each of these developments for the Assessment Obligation.

5. Further, there are two issues raised in the Written Statements submitted by other States in the present proceedings with respect to the Prevention Obligation which Belize considers warrant a response, and which Belize addresses in turn below. Those two key issues are as follows:

(a) The application of the Prevention Obligation to the particular context of climate change, with some States arguing that it applies only to other types of environmental harm (see **Chapter 2** below).

(b) The relationship between the Prevention Obligation and the 'climate treaty regime' (notably the United Nations Framework Convention on Climate Change ('**UNFCCC**') and the Paris Agreement), with some States arguing that the 'climate treaty regime' is an exhaustive statement of what is required of States in relation to anthropogenic greenhouse gases (see **Chapter 3** below).

CHAPTER 1: THE ASSESSMENT OBLIGATION BEFORE ITLOS AND THE SUPREME COURT OF THE UNITED KINGDOM

6. As stated above, since Belize filed its Written Statement, two important judicial authorities have expressed their views as to the scope and application of the Assessment Obligation. The first is ITLOS in its Advisory Opinion, and the second is the Supreme Court of the United Kingdom in its judgment in *Finch*.

I. The ITLOS Advisory Opinion

7. The ITLOS Advisory Opinion made the following observations regarding the Assessment Obligation, which (as stated above) it considered "crucial" to and "an essential part" of the legal regime for protecting the marine environment[8]:

(a) The obligation under Article 206 of UNCLOS to conduct environmental impact assessments reflects a rule of customary international law[9] — consistent with

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6 ITLOS Advisory Opinion, para. 354 (emphasis added).

7 *R (on the application of Finch) v. Surrey County Council* [2024] UKSC 20 ('***Finch***').

8 ITLOS Advisory Opinion, para. 354.

9 ITLOS Advisory Opinion, para. 355. It is recalled that Article 206 of UNCLOS is entitled "Assessment of potential effects of activities" and provides as follows: "When States have reasonable grounds for

Belize's observation that the Assessment Obligation is a rule of customary international law.[10]

(b) Article 206 "encompasses the duty of vigilance and prevention"[11] — supporting Belize's view that the Assessment Obligation forms part of the Prevention Obligation under customary international law.[12]

(c) Article 206, like the customary rule enunciated on various occasions by the Court, requires that an assessment be "conducted prior to the implementation of a project" — a point made in Belize's Written Statement.[13] Further, according to ITLOS, the obligation covers activities "planned by private entities and those planned by States",[14] consistent with Belize's submission that the Assessment Obligation extends to activities planned by developers/contractors, irrespective of whether they are connected to the State.[15]

(d) An assessment is required for activities under a State's "jurisdiction or control". This concept is "a broad one", "encompassing not only [a State's] territory but also areas in which the State can, in accordance with international law, exercise its competence or authority", and it includes land-based activities as well as those at sea.[16] This reflects Belize's submissions regarding the scope of "jurisdiction or control" in relation to the Assessment Obligation.[17]

(e) The obligation under Article 206 arises when a State has "reasonable grounds for believing" that planned activities "may cause substantial pollution of or significant and harmful changes to the marine environment". As to the threshold of "reasonable grounds for believing", the existence and scale of a relevant risk "is a matter of objective determination based on facts and scientific knowledge"[18] — aligning with Belize's submission that an objective assessment of the risk of harm is required.[19] In the final analysis, ITLOS opined that relevant harm "need not be actual but can also be potential".[20] Belize has

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believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment, they shall, as far as practicable, assess the potential effects of such activities on the marine environment and shall communicate reports of the results of such assessments in the manner provided in article 205."

10 Written Statement of Belize, para. 40(a).

11 ITLOS Advisory Opinion, para. 356. More generally on due diligence, ITLOS opined that due diligence is a "variable concept" which "[i]t is difficult to describe … in general terms, as the standard of due diligence varies depending on the particular circumstances to which an obligation of due diligence applies", requiring consideration of "scientific and technological information, relevant international rules and standards, the risk of harm and the urgency involved": para. 239.

12 Written Statement of Belize, para. 38.

13 Written Statement of Belize, para. 54(a).

14 ITLOS Advisory Opinion, para. 358. See also ITLOS Advisory Opinion, para. 247 ("The phrase 'activities under their jurisdiction or control' refers to activities carried out by both public and private actors").

15 Written Statement of Belize, para. 44(d).

16 ITLOS Advisory Opinion, paras. 247, 360.

17 Written Statement of Belize, para. 44.

18 ITLOS Advisory Opinion, para. 361.

19 Written Statement of Belize, para. 50(a).

20 ITLOS Advisory Opinion, para. 361.

similarly stated that a harm which has the "potential" to occur is one that is possible, irrespective of whether it is likely.[21]

(f) The precautionary approach "may restrict the margin of discretion" of a State in relation to the Assessment Obligation.[22] Belize has submitted that whether there is a potential adverse effect is to be considered applying the precautionary principle.[23]

(g) The text of Article 206 "does not preclude [an environmental impact] assessment from embracing not only the specific effects of the planned activities concerned but also the cumulative impacts of these and other activities on the environment".[24] Belize has already expressed its view that, as a matter of customary international law, the *cumulative* impacts of different activities must be considered: (i) in determining whether there is a risk of significant transboundary harm, triggering the obligation to conduct an environmental assessment;[25] and (ii) in the course of the environmental assessment itself.[26] According to ITLOS, the range of impacts which an assessment under Article 206 is capable of taking into account includes "socio-economic impacts".[27]

8. ITLOS also reached conclusions on the Assessment Obligation specifically in relation to climate change. It considered that, whatever precise threshold is considered to "trigger the obligation to conduct an environmental impact assessment" is immaterial "in light of [greenhouse gas emissions'] impact on the marine environment".[28] Belize agrees that any proposed activity within a State's jurisdiction or control that would result in or contribute to the release of anthropogenic emissions of greenhouse gases has the potential adversely to affect the environment of another State or other area outside national jurisdiction,[29] and that environmental assessments with respect to the adverse impacts of climate change should become a form of reflex for planned activities.[30] Belize's position is consistent with ITLOS's more general conclusion that the standard of due diligence in taking necessary measures to prevent, reduce and control marine pollution from anthropogenic greenhouse gas emissions "is stringent,

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21 Written Statement of Belize, para. 46(a).

22 ITLOS Advisory Opinion, para. 361. On the relevance of the precautionary principle more generally, ITLOS stated that "in determining necessary measures" for the purposes of Article 194 of UNCLOS, "scientific certainty is not required", and that "[i]n the absence of such certainty, States must apply the precautionary approach in regulating marine pollution from anthropogenic [greenhouse gases]": see ITLOS Advisory Opinion, para. 213. It stated that the precautionary approach "is implicit in the very notion of pollution of the marine environment", and is "all the more necessary given the serious and irreversible damage that may be caused to the marine environment by such pollution": para. 213. See also para. 242.

23 Written Statement of Belize, paras. 46(c), 51(d), 56(c).

24 ITLOS Advisory Opinion, para. 365. See also para. 367.

25 Written Statement of Belize, para. 51(c).

26 Written Statement of Belize, para. 57(b).

27 ITLOS Advisory Opinion, para. 365.

28 ITLOS Advisory Opinion, para. 362. See also para. 241 ("Best available science informs that anthropogenic GHG emissions pose a high risk in terms of foreseeability and severity of harm to the marine environment").

29 Written Statement of Belize, para. 47.

30 Written Statement of Belize, para. 51.

given the high risks of serious and irreversible harm to the marine environment from such emissions".[31]

9. More generally, ITLOS noted that "one of the most effective means for the protection and preservation of the marine environment consists in sharing information and scientific results on risks to the marine environment".[32] Belize has explained that the Assessment Obligation under customary international law forms an important part of the legal architecture for information-sharing.[33]

10. In summary, the conclusions reached by ITLOS are consistent with the Court's previous jurisprudence on the Assessment Obligation and Belize's position in its Written Statement.

II. The judgment of the Supreme Court of the United Kingdom in *Finch*

11. The landmark judgment of the Supreme Court of the United Kingdom in *Finch* also addressed the duty to carry out an environmental impact assessment. This case concerned whether an adequate environmental impact assessment had been carried out prior to the relevant local government granting permission for the development of an oil well. The Court held that it had not because the assessment had been limited to 'direct' emissions arising from the operation of the well and had not taken into account the greenhouse gas emissions that would occur when oil extracted from the well, after being refined, were burned as fuel (a category of what are routinely called "Scope 3 emissions").[34] Although this case dealt with duties under the domestic law of the United Kingdom (originally enacted to give effect to a European Union directive), it raises important parallels with the Assessment Obligation under customary international law. Specifically:

(a) The Court held that the duty to conduct an environmental impact assessment "is not concerned with the substance of the decision whether to grant development consent but with how the decision is taken", and that "[i]t is essential to the validity of the decision that, before it is made, there has been a systematic and comprehensive assessment of the likely significant effects of the project on the environment".[35] The same is true under international law. It follows from this analysis that an inclusive approach should be adopted in relation to the types of harm that should be encompassed within an adequate assessment. In *Finch*, the finding was that the relevant oil well's Scope 3 emissions needed to be accounted for.[36] Belize's submission is that, under international law, the Assessment Obligation is similarly inclusive in that it requires an assessment of cumulative greenhouse gas emissions.[37]

(b) The Court further held that, in determining whether an environmental impact assessment is required and what its scope should be, "the inquiry is forward-

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31 ITLOS Advisory Opinion, para. 141(3)(c). See also paras. 241, 256.
32 ITLOS Advisory Opinion, para. 351.
33 Written Statement of Belize, paras. 59–60, 63(f)–(g).
34 *Finch*, para. 174.
35 *Finch*, para. 62.
36 *Finch*, paras. 83–92.
37 Written Statement of Belize, para. 57.

looking" as to what the "likely" effects of the project will be (with the term "likely" included in the relevant EU directive).[38] Assessing a project's "likely" impacts "requires evidence on which to base such a determination", as only such evidence can lead to "a reasoned conclusion".[39] Belize has already submitted that, under international law, the Assessment Obligation requires recourse to the best available science.[40]

(c) The Supreme Court made clear that one important rationale for requiring environmental impact assessments is that they "serve an important educational function, contributing to public awareness of environmental issues".[41] Separately, the Court held that "public participation is … integral to the process of assessment".[42] Further, the Court explained that, even where "there are no measures which could be taken to mitigate adverse environmental effects of a project, then this is itself something the decision-maker and the public need to know".[43] Continuing its emphasis on the importance of public accountability for activities which can have serious adverse environmental effects, the Court proceeded to state:

> "[I]t needs to be recognised that the process of EIA takes place in a political context and that the information generated by an EIA will be considered within a political decision-making arena. It is therefore inevitable that economic, social and other policy factors will outweigh environmental factors in many instances. But this does not avoid or reduce the need for comprehensive and high-quality information about the likely significant environmental effects of a project. If anything, it enhances the importance of such information. Nowhere is this more so than where issues arise relating to climate change.
>
> It is foreseeable in today's world that, when development consent is sought for a project to produce oil, members of the public concerned will express comments and opinions about the impact of the project on climate change and the potential contribution to global warming of the oil produced. … [In the present case, it] is not good enough that the potential global warming effect of the proposed development was not 'completely ignored'. The effect should have been properly assessed so that public debate could take place on an informed basis. That is a key democratic function of the EIA process. It was not fulfilled here."[44]

Enhancing awareness of the impact of projects and activities and increasing transparency for the general public is also a key rationale of the Assessment Obligation under customary international law. Further, as Belize has previously

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38 *Finch*, para. 72.
39 *Finch*, para. 74.
40 Written Statement of Belize, paras. 45(d), 51, 63(a)–(b).
41 *Finch*, para. 21.
42 *Finch*, paras. 62, 77.
43 *Finch*, para. 105.
44 *Finch*, paras. 153–154.

submitted, the need for public awareness and participation by a wide range of stakeholders means that the Assessment Obligation entails duties on the assessing State to notify potentially affected States,[45] to consult potentially affected States in good faith,[46] and to publicise both environmental impact assessments and monitoring reports.[47]

CHAPTER 2: APPLICATION OF THE PREVENTION OBLIGATION TO CLIMATE CHANGE

12. In its Written Statement in these proceedings:

(a) Belize recalled that States are under a customary international law obligation to ensure that activities within their jurisdiction or control do not cause significant harm to the environment of other States or areas beyond the limits of their jurisdiction[48] (the Prevention Obligation).

(b) Belize cited the significant jurisprudence of both the Court[49] and other international courts and tribunals[50] affirming this obligation and its customary law status.

13. Some States have asserted that the Prevention Obligation does not apply to instances of transboundary environmental harm involving anthropogenic emissions of greenhouse gases. Notably and unsurprisingly, those States do not deny the existence of the Prevention Obligation, acknowledging the well-established jurisprudence on which Belize relies.[51] Rather, those States argue that there are reasons why the Prevention Obligation cannot apply to the particular context of climate change.

14. Those reasons may be distilled to the following three propositions:

(a) Emissions of greenhouse gases do not qualify as pollution ('**Proposition 1**').[52]

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45 Written Statement of Belize, para. 59.

46 Written Statement of Belize, para. 60.

47 Written Statement of Belize, paras. 59(c), 63(f).

48 Written Statement of Belize, para. 31.

49 Written Statement of Belize, para. 33. Belize notes that an additional relevant authority is cited by Barbados in its Written Statement (at para. 144(e)) and the OACPS (at para. 101), namely *Dispute over the Status and Use of the Waters of the Silala (Chile v. Bolivia)*, Judgment, ICJ Reports 2022, p. 614. At p. 648, para. 99, the Court in that judgment affirmed the Prevention Obligation and its customary law status.

50 Written Statement of Belize, para. 34, citing *Trail Smelter Case (United States/Canada)*, Decision, (1941) III RIAA 1905 at p. 1965; *South China Sea Arbitration (Philippines v. China)*, Award, 12 July 2016, para. 941 (citing *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, p. 226 at pp. 241–242, para. 29); *Arbitration Regarding the Indus Waters Kishenganga (Pakistan v. India)*, Partial Award, (2013) XXXI RIAA 1 at p. 217, para. 451.

51 See Joint Written Statement of Denmark, Finland, Iceland, Norway and Sweden, para. 69; Written Statement of New Zealand, para. 71; Written Statement of India, para. 9; Written Statement of China, para. 127; Written Statement of the United States, para. 4.2; Written Statement of Indonesia, para. 60; Written Statement of Australia, para. 4.8.

52 Written Statement of India, para. 17 ("climate change issues cannot be treated as pollution of the environment").

(b) The harm caused by anthropogenic climate change is more than just transboundary: it is global in its impact ('**Proposition 2**').[53]

(c) The harm caused by anthropogenic emissions of greenhouse gases results from: (i) cumulative emissions; and (ii) various sources; and therefore it cannot be established that the activity of any given State emitting greenhouse gases causes significant harm to the environment of other States or areas beyond the limits of their jurisdiction ('**Proposition 3**').[54]

15. Belize addresses each proposition in turn. Belize's key point, advanced in its Written Statement[55] and developed below, is that, whilst Belize of course recognises that the cases before the Court affirming the Prevention Obligation did not concern anthropogenic emissions of greenhouse gases, there is no reason as a matter of principle why that obligation does not apply with equal force in this context.

I. Proposition 1

16. The notion that the Prevention Obligation does not apply with respect to emissions of greenhouse gases on the basis that such emissions do not qualify as pollution is clearly wrong.

17. First, the Prevention Obligation is not limited to 'pollution'. Rather, the obligation is triggered in circumstances where an activity in a State's jurisdiction or control causes significant transboundary harm.[56]

18. Second, the best available science is clear that greenhouse gas emissions do cause harm.[57] Specifically: (i) greenhouse gases trap heat within the atmosphere;[58] (ii) the introduction of heat (energy) due to the accumulation of greenhouse gases results in changes to the earth's climate (notably, warming);[59] (iii) those changes lead to multiple deleterious effects.[60]

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53 Written Statement of the United States, para. 4.18.

54 Written Statement of China, para. 128; Written Statement of the United States, paras. 4.17–4.19; Written Statement of Indonesia, para. 61; Written Statement of Australia, para 4.10; Written Statement of New Zealand, para. 96; Joint Written Statement of Denmark, Finland, Iceland, Norway and Sweden, para. 71.

55 Written Statement of Belize, para. 36.

56 See the jurisprudence cited in Written Statement of Belize, paras 33–34.

57 See Written Statement of Belize, para. 47(a).

58 IPCC, Climate Change 2001, The Scientific Basis, available at https://www.ipcc.ch/site/assets/uploads/2018/03/WGI_TAR_full_report.pdf, pp. 89–90, and IPCC, Working Group II 2022 Report, available at https://report.ipcc.ch/ar6/wg2/IPCC_AR6_WGII_FullReport.pdf, p. 2911, defining greenhouse gases as "Gaseous constituents of the atmosphere, both natural and anthropogenic, that absorb and emit radiation at specific wavelengths within the spectrum of radiation emitted by the Earth's ocean and land surface, by the atmosphere itself and by clouds".

59 IPCC, Climate Change 2023: Synthesis Report — Summary for Policy-Makers, available at https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_SPM.pdf, para. A.1; IPCC, Sixth Assessment Report, Summary for Policy Makers, 2021, available at https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_SPM.pdf, p. 28, para. D.1.1.

60 IPCC, Climate Change 2023: Synthesis Report — Summary for Policy-Makers, available at https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_SPM.pdf, para. A.2. With respect to the marine environment specifically, see the ITLOS Advisory Opinion, paras. 54–61, 175.

19. Third and in any event, emissions of greenhouse gases do constitute 'pollution' as generally defined in international law.[61] Consistent with this position, in the recent ITLOS Advisory Opinion, ITLOS: (i) noted that the vast majority of States had contended that greenhouse gas emissions met the definition of pollution of the marine environment under Article 1(1)(4) of UNCLOS;[62] and (ii) expressly confirmed this position.[63] It is acknowledged that the International Law Commission in formulating its 'Guidelines on the Protection of the Atmosphere' in line with existing treaty practice elected to 'carve out' climate change from its definition of "atmospheric pollution",[64] but it is submitted that there is no principled reason to do so.

II. Proposition 2

20. The underlying premise of Proposition 2 is of course correct: "the harm caused by anthropogenic climate change is more than just transboundary" in the sense that "it is truly global in its impact".[65] However, it does not follow that the Prevention Obligation is somehow inapplicable by virtue of these facts. Belize makes three points.

21. First, Proposition 2 does not engage with the terms of the Prevention Obligation as articulated by the Court. There is nothing in the Court's jurisprudence to suggest that the Prevention Obligation does not apply when the relevant harm materialises in more than one other State.

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61 See e.g., Convention on Long-Range Transboundary Air Pollution (adopted 13 November 1979, entered into force 16 March 1983), 1302 UNTS 21623, Article 1(a) ("'[a]ir pollution' means 'the introduction by man, directly or indirectly, of substances or energy into the air resulting in deleterious effects of such a nature as to endanger human health, harm living resources and ecosystems and material property and impair or interfere with amenities and other legitimate uses of the environment, and 'air pollutants' shall be construed accordingly"); Cairo resolution (1987) of the Institute of International Law (Institut de droit international), Article 1(1) ("[f]or the purposes of this Resolution, 'transboundary air pollution' means any physical, chemical or biological alteration in the composition or quality of the atmosphere which results directly or indirectly from human acts or omissions and produces injurious or deleterious effects in the environment of other States or of areas beyond the limits of national jurisdiction"); United Nations Office for Disaster Risk Reduction, "Pollution", available at https://www.undrr.org/understanding-disaster-risk/terminology/hips/tl0028#:~:text=Pollution%20is%20defined%20as%20the,UN%20data%2C%20no%20date)., ("Pollution is defined as the presence of substances and/or heat in environmental media (air, water, land) whose nature, location, or quantity produces undesirable environmental effects"); United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994), 1833 UNTS 3, Article 1(1)(4) ("'pollution of the marine environment' means the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities").

62 ITLOS Advisory Opinion, para. 160.

63 ITLOS Advisory Opinion, para. 179.

64 International Law Commission, Draft Guidelines on the Protection of the Atmosphere, with commentaries, UN Doc. A/76/10, available at https://legal.un.org/ilc/texts/instruments/english/commentaries/8_8_2021.pdf, commentary to Guideline 1, p. 21, para. (6).

65 Written Statement of the United States, para. 4.18.

22. Second, to the contrary, in circumstances where the geographical reach of a given harm is greater and would impact more than one State, the importance of the application of the Prevention Obligation is heightened.

23. Third, Proposition 2 begs the question of where on the sliding scale of transboundary impacts a given harm would be deemed to lie outside of the scope of the Prevention Obligation. To take a hypothetical example, if an activity in a given State caused a toxic substance to be released into the Danube River, and harm was then caused to the numerous States through which that river flows, it could not seriously be argued that the State of origin was not subject to the Prevention Obligation with respect to the relevant activity. That logic holds when extrapolated to the climate change context, where the release of greenhouse gas emissions harms every State.

III. Proposition 3

24. Proposition 3, like Proposition 2, rests on certain underlying premises which are not controversial. It is, of course, accepted that climate change results from cumulative emissions, and that those emissions emanate from various sources. However:

(a) This does not, however, place anthropogenic greenhouse gas emissions emanating from a particular State outside the scope of the Prevention Obligation with respect to significant harm to the environment of other States or other areas beyond the limits of national jurisdiction. The Prevention Obligation has been cast in wide terms that are clearly applicable in principle to activities within the jurisdiction or control of a State (or policies of that State) involving emissions of greenhouse gases.

(b) It is recalled that attempts by States to evade their individual responsibility (including with respect to the Assessment Obligation) by pointing to the fact that climate change results from cumulative emissions emanating from the territory of various States has been rejected by the European Court of Human Rights,[66] the UN Committee on the Rights of the Child,[67] and various domestic courts.[68]

25. The key submission developed by Belize below is that Proposition 3 misunderstands the relationship between the question of applicability of the primary obligation (the Prevention Obligation) and questions of causation.

26. As regards causation, two different questions can be identified.

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66 *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, Application No. 53600/20, Grand Chamber, 8 April 2024, para. 442; *Duarte Agostinho and Others v. Portugal and 32 Others*, Application No. 39371/20, Grand Chamber, 9 April 2024, para. 202.

67 Committee on the Rights of the Child, *Sacchi et al v. Argentina*, Communication No. 104/2019, UN Doc. CRC/C/88/D/104/2019, 22 September 2021.

68 See, e.g., *Stichting Urgenda v. State of the Netherlands*, Supreme Court of the Netherlands, 13 January 2020, ECLI:NL:HR:2019:2007, paras. 5.7–5.8; *Neubauer et al v. Germany*, Federal Constitutional Court of Germany, Order dated 24 March 2021, paras. 201–202; *VZW Klimaatzaak v. Kingdom of Belgium and Others*, Court of Appeal of Brussels, 30 November 2023, para. 248; *Gray v. Minister for Planning and Ors*, Land and Environment Court of New South Wales, 27 November 2006, [2006] NSWLEC 720, para. 98.

(a) The first question is one of the chain of causation, in general terms, between a given act and the relevant harm. Belize refers to this as the question of **General Causation**. In the present context, the existence of a chain of causation between anthropogenic emissions of greenhouse gases and the harm to the environment is a matter of scientific knowledge and assessment.[69] The best available science on this point is clear.[70] It is indisputable that emissions of greenhouse gases cause significant harm.[71]

(b) A second, separate, question is whether a specific chain of causation between particular greenhouse gas emissions resulting from a given present or future activity or policy and the specific harm to the environment can be identified. Belize refers to this as the question of **Specific Causation**.

27. Proposition 3 focuses on the question of **Specific Causation** and conflates this with the distinct, and logically prior, question of the applicability of the Prevention Obligation. These are two distinct questions, as reflected in the ITLOS Advisory Opinion.[72]

28. Belize sets out below its position as to the applicability of the Prevention Obligation and breach of that obligation, explaining how the separate questions of General Causation and Specific Causation are relevant to that analysis.

29. As to the initial question of the applicability of the Prevention Obligation:

(a) The applicability of the Prevention Obligation obviously turns on the precise content of the obligation.

(b) Belize recognises that there is an aspect of causation implied in the content of the Prevention Obligation (because the obligation concerns avoiding activities

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69 See Written Statement of Belize, para. 51(a) ("In the context of assessing the harm caused by anthropogenic emissions of greenhouse gases, the reports of the IPCC are of particular significance"). See also the recent observation by the Grand Chamber of the European Court of Human Rights in *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, Application No. 53600/20, Grand Chamber, 8 April 2024, para. 425 ("the question of causation relates to the link between GHG emissions — and the resulting accumulation of GHG in the global atmosphere — and the various phenomena of climate change. This is a matter of scientific knowledge and assessment").

70 As noted in Written Statement of Belize, para. 47(a).

71 See para. 18 above citing relevant reports of the IPCC. See also ITLOS Advisory Opinion, para. 241 ("Best available science informs that anthropogenic GHG emissions pose a high risk in terms of foreseeability and severity of harm to the marine environment. … [T]he IPCC, in its 2023 Synthesis Report, concludes that '[r]isks and projected adverse impacts and related losses and damages from climate change escalate with every increment of global warming (*very high confidence*)' (2023 Synthesis Report, p. 14). There is also broad agreement within the scientific community that if global temperature increases exceed 1.5°C, severe consequences for the marine environment would ensue").

72 See ITLOS Advisory Opinion, para. 252 (concerning the obligation under Article 194(2) of UNCLOS to prevent marine pollution from anthropogenic greenhouse gas emissions: "given the diffused and cumulative causes and global effects of climate change, it would be difficult to specify how anthropogenic GHG emissions from activities under the jurisdiction or control of one State cause damage to other States. However, this difficulty has more to do with establishing the causation between such emissions of one State and damage caused to other States and their environment. This should be distinguished from the applicability of an obligation under article 194, paragraph 2, to marine pollution from anthropogenic GHG emissions").

that *cause* significant harm). But that aspect of causation is a question of General Causation (and not Specific Causation).

(c) It is recalled, however, that the due diligence standard under the Prevention Obligation requires States to exercise all necessary and reasonable measures to prevent significant harm without guaranteeing that the harm will not occur (i.e. it is an obligation of conduct rather than result).[73]

(d) In the context of climate change, the Prevention Obligation applies because General Causation is not in doubt. As a matter of established science, it is clear that all greenhouse gas emissions above a *de minimis* level contribute to the risk of serious harm through climate change.[74]

(e) Similarly, as an important element of the due diligence standard under the Prevention Obligation, the specific Assessment Obligation will apply whenever the given proposed activity or policy is likely to result in significant harm to the environment. This also calls for an assessment of the risk of harm resulting from a particular activity or policy by reference to (among other things[75]) General Causation, rather than raising any requirement to demonstrate Specific Causation in the sense of accurately measuring the specific impact of the particular emissions.[76]

(f) Thus a given State cannot circumvent the applicability of the Prevention Obligation (including the Assessment Obligation) by raising questions of Specific Causation, including the contention that the relevant harm has multiple causes.[77]

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73 International Law Commission, Draft articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries, Report of the ILC on the Work of its Fifty-third Session, UN Doc. A/56/10, 2001, General commentary to Article 3, para. 7. See also ITLOS Advisory Opinion, para. 238.

74 The present context is therefore very different to the facts at issue in *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, ICJ Reports 2015, p. 665 at pp. 730–731, para. 192, where the Court reasoned that it had not been established that additional sediment eroded from the road would have detrimental effects or that the absolute quantity of sediment in the river caused significant harm *per se*.

75 See further Written Statement of Belize, para. 51.

76 In this connection, Belize approves of the reasoning of the Land and Environment Court of New South Wales in *Gloucester Resources v. Minister for Planning* in finding that:

> "The Project's cumulative GHG emissions will contribute to the total of GHG concentrations in the atmosphere. The global total of GHG concentrations will affect the climate system and cause climate change impacts. The Project's cumulative GHG emissions are therefore likely to contribute to the future changes to the climate system and the impacts of climate change."

See *Gloucester Resources Limited v. Minister for Planning*, Land and Environment Court of New South Wales, 8 February 2019, [2019] NSWLEC 7, para. 525.

77 International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Report of the ILC on the Work of its Fifty-third Session, UN Doc A/56/10, 2001, p. 125, Article 47, paras. 6, 8 ("The general rule in international law is that of separate responsibility of a State for its own wrongful acts. … Of course, situations can also arise where several States by separate internationally wrongful conduct have contributed to causing the same damage. For example, several States might contribute to polluting a river by the separate discharge of pollutants. …

(g) In assessing the risk of harm resulting from a particular activity or policy by reference to General Causation, for the purposes of the Prevention Obligation (and more specifically as regards its implementation by the Assessment Obligation[78]), Belize submits that the cumulative impacts of other activities (whether of the relevant State or a third State) must be taken into account:

i. Such cumulative impacts are simply part of the relevant factual matrix that goes to an assessment of risk and harm, and which cannot be ignored.

ii. By way of analogy, before a State permits the release of zinc into a river from a nearby factory located on its territory, that State would be obliged to consider the already accumulated levels of zinc in the river as well as reasonably foreseeable future levels of zinc (whether attributable to that State or another State). Similarly, in *Nicaragua v Costa Rica,* the Court had regard to the "current overall sediment load of the San Juan River" in considering whether significant harm had been caused by sediment contributed by Costa Rica's construction of a road.[79]

iii. Consistent with the common sense approach that cumulative impacts must be considered, with respect to the Assessment Obligation (a specific element of the implementation of the Prevention Obligation): (i) rhe Biodiversity of Areas Beyond National Jurisdiction Treaty ('**the BBNJ Treaty**') expressly provides that, in considering whether there is a risk of significant or harmful changes to the marine environment, States must include consideration of cumulative impacts;[80] (ii) ITLOS had no hesitation in affirming that Article 206 of UNCLOS "does not preclude such assessment from embracing not only the specific effects of the planned activities concerned but also the cumulative impacts of these and other activities on the environment".[81]

30. As to the question of breach of the Prevention Obligation:

(a) A State will be responsible for any conduct attributable to it which is in breach of the Prevention Obligation,[82] an obligation which, as indicated above is an obligation of conduct rather than result. A State will thus incur responsibility for breach of the Prevention Obligation whenever the State has failed to meet the standard of due diligence required of it in order to mitigate the risk of harm,

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In such cases, the responsibility of each participating State is determined individually, on the basis of its own conduct and by reference to its own international obligations").

78 Written Statement of Belize, para. 51(c).

79 *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, ICJ Reports 2015, p. 665 at p. 731, para. 193.

80 BBNJ Treaty, Articles 30(1)(a)(ii), 30(2)(e).

81 ITLOS Advisory Opinion, para. 365.

82 See generally International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, Article 2.

regardless of whether such failure in fact causes significant transboundary harm.[83]

(b) The fact that the relevant harm has multiple causes is no answer to breach of that specific obligation.[84] By way of example, in the *Bosnian Genocide case* the ICJ held the assessment of whether Serbia was in breach of the obligation to prevent genocide did not include any consideration of whether Serbia, acting alone, would have been able to prevent the Srebrenica genocide. The Court reasoned that "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".[85] While there are important differences between the obligation to prevent genocide and the Prevention Obligation, it is equally irrelevant to the question of breach of the due diligence standard under the Prevention Obligation whether the individual State whose responsibility is invoked can show that, even if it had employed all means reasonably at its disposal with respect to given emissions, it could not have prevented the environmental harm.

31. Accordingly, the questions of both the applicability of the Prevention Obligation to a given State, and whether that State is in breach of the due diligence standard, are separate from and unaffected by any consideration of whether other States have concurrently failed to perform their prevention obligations and of the harm caused by such non-performance by other States.

32. As to the question of causation in the contexts of the invocation of responsibility and reparation:

(a) Belize accepts that the identification of specific harm resulting from specific emissions is complicated by the fact that previous emissions (of the relevant State and third States) as well as current emissions (of the relevant State and third States) may contribute to an identified harm.

(b) Belize submits that for the purposes of the Prevention Obligation (given that General Causation is clearly established as a matter of scientific consensus) it does not need to be established that "but for" the relevant activity the specific significant harm would not have occurred.

i. In its commentary on Article 31 (reparation) of the Articles on State Responsibility, the International Law Commission recognised that "the

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83 See, e.g., *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, ICJ Reports 2010, p. 14 at pp. 79–80, para. 197 ("The responsibility of a party to the 1975 Statute would therefore be engaged if it was shown that it had failed to act diligently and thus take all appropriate measures to enforce its relevant regulations on a public or private operator under its jurisdiction").

84 See para. 29(f) above, citing International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Report of the ILC on the Work of its Fifty-third Session, UN Doc A/56/10, 2001, p. 125, Article 47, paras. 6, 8.

85 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Reports 2007, p. 43 at p. 221, para. 430.

requirement of a causal link is not necessarily the same in relation to every breach of an international obligation".[86]

ii. The cases affirming the Prevention Obligation do not state that this high bar is always required.

(c) Ultimately, it is accepted that how the Prevention Obligation applies with respect to the specific activity of a given State must ultimately be assessed on the basis on the particular circumstances with reference to the established facts. To this extent, Belize agrees with the position of Palau that the application of the Prevention Obligation "to the emissions from any particular State, or to the harm alleged to have been caused by any other State … can be answered in specific cases in … future adjudication".[87] The Court's task in answering the first question referred to it is to identify the scope of the Prevention Obligation (including the Assessment Obligation) and to explain when a State will incur responsibility, rather than to consider questions such as when or by whom that responsibility can be invoked or questions of Specific Causation arising in the context of reparations.

CHAPTER 3: THE RELATIONSHIP BETWEEN THE PREVENTION OBLIGATION AND THE UNFCCC REGIME

33. A number of States have in their Written Statements in these proceedings advanced the argument that the duties of a State under the UNFCCC regime represent the entirety of the State's international law obligations in relation to anthropogenic greenhouse gas emission, such that the customary Prevention Obligation (among other rules of international law) does not impose any obligations beyond the duties under those treaties. Belize disagrees with this argument,[88] as do a number of other States.[89]

34. There are two primary ways in which this argument is advanced, but, as addressed in turn below, neither is persuasive.

35. The first form of the argument is that the UNFCCC regime is a *lex specialis* that displaces more general rules of international law which could, absent the UNFCCC

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86 International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Report of the ILC on the Work of its Fifty-third Session, UN Doc A/56/10, 2001, p. 93, Article 31, para. 10.

87 Written Statement of Palau, paras. 14–17.

88 Written Statement of Belize, para. 36 ("For the avoidance of doubt, Belize's position is that, in the context of greenhouse gas emissions and climate change, the scope of the Prevention Obligation is not fully reflected in the modest commitments that States Parties have thus far undertaken pursuant to the UNFCCC").

89 See, e.g., Written Statement of Vanuatu, paras. 208–210, 517; Written Statement of Grenada, para. 37; Written Statement of the Bahamas, paras. 89–91; Written Statement of Samoa, paras. 131–139; Written Statement of the African Union, paras. 55, 99; Written Statement of Chile, paras. 60, 71–79; Written Statement of Costa Rica, paras. 32, 91; Written Statement of Colombia, paras. 3.9–3.10; Written Statement of the Cook Islands, paras. 135–142; Written Statement of Albania, footnote 195; Written Statement of Switzerland, paras. 66–71; Written Statement of Egypt, para. 73.

regime, impose obligations in relation to anthropogenic greenhouse gas emissions (including the Prevention Obligation).[90] For example:[91]

(a) South Africa states that "[t]he distinct international legal regime that has developed over several decades through careful negotiations in relation to climate change should thus, in this context, be regarded as being the *lex specialis*", meaning that States' compliance with their international obligations pertaining to anthropogenic greenhouse gas emissions should be ascertained purely with reference to that regime.[92]

(b) Kuwait sees the UNFCCC regime as "a set of *lex specialis* rules and obligations under international law", which have the effect that "they prevail over more general international law rules and obligations that may otherwise have applied to GHG emissions".[93] It says that the rules in the treaty regime "represent the totality of States' obligations in relation to GHG emissions".[94] The system of nationally determined contributions under the Paris Agreement, Kuwait asserts, represents "the extent to which the prevention principle applies in the context of the *lex specialis* rules and obligations established by the UNFCCC and Paris Agreement".[95] Similarly, it contends that the obligation to conduct an environmental impact assessment is "subsumed by the *lex specialis* obligations contained in the UNFCCC and Paris Agreement".[96]

(c) Japan characterises the UNFCCC and the Paris Agreement as a *lex specialis* which have priority over rules of customary international law, meaning that the Court should answer the General Assembly's questions "based on the *lex specialis*".[97]

(d) Saudi Arabia states that rules of international law "outside the specialized treaty regime on climate change … cannot and do not purport to override the obligations [set out in the] specialized treaty regime on climate change".[98]

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90 Timor-Leste also describes the UNFCCC regime as *lex specialis*, but does not consider that it operates to exclude other applicable rules of international law. Instead, it says that "[t]he correct interpretation of the specific rights and obligations of the *specialised treaty regime* is informed by other applicable rules of international law": Written Statement of Timor-Leste, para. 92 (emphasis in original).

91 While not explicitly characterising the UNFCCC regime as excluding other rules of international law, the United Kingdom "emphasises the primary role of the specialised treaties within the UN climate change regime as the source of '*the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases*'", stating that "[t]hese are the treaties by which States have agreed that harm to the climate system caused by GHG emissions is to be addressed and the risk of future harm is to be lessened or avoided": Written Statement of the United Kingdom, para. 4.3 (emphasis added). Further, the Russian Federation claims the "the principle of the prevention of significant harm to the environment is applied subsidiarily to the norms of climate treaties (UNFCCC, the Kyoto Protocol, the Paris Agreement)": Written Statement of the Russian Federation, p. 8.

92 Written Statement of South Africa, para. 14.

93 Written Statement of Kuwait, para. 8.

94 Written Statement of Kuwait, para. 9. See also paras. 60–81.

95 Written Statement of Kuwait, para. 75.

96 Written Statement of Kuwait, para. 76. See also paras. 79–81.

97 Written Statement of Japan, paras. 14, 18.

98 Written Statement of Saudi Arabia, para. 3.3.

(e) Australia states that "the international community of States has elected to address the complex challenge of climate change through the specialised climate treaty regime", and that, "[g]iven the widespread adoption of the climate change treaties, customary international law should not be held to have developed in a way that approaches the same problem by imposing obligations of a different kind".[99]

36. Belize considers that such assertions are misconceived. It starts by noting that in its recent Advisory Opinion ITLOS expressly rejected the characterisation of the UNFCCC as a *lex specialis* regime that "modifies or limits the obligation under the Convention [i.e. UNCLOS]",[100] stating:

> "In the Tribunal's view, the Paris Agreement is not *lex specialis* to the Convention and thus, in the present context, *lex specialis derogat legi generali* has no place in the interpretation of the Convention."[101]

37. Although ITLOS's statement concerned the relationship between two treaty regimes, it is equally salient in relation to the interaction between the UNFCCC treaty regime and the customary Prevention Obligation. In Belize's submission, the customary Prevention Obligation is not rendered inapplicable in relation to climate change by virtue of the UNFCCC treaty regime. In particular:

(a) The International Law Commission has stated that "[f]or the *lex specialis* principle to apply" (in the sense that a special rule displaces a more general one) "it is not enough that the same subject matter is dealt with by two provisions; there must be some actual inconsistency between them, or else a discernible intention that one provision is to exclude the other".[102] Similarly, in its work on the fragmentation of international law, a study group of the International Law Commission has stated that it is permissible to apply a more specific rule to the exclusion of a more general one when the two rules "provide incompatible direction on how to deal with the same set of facts".[103]

(b) Reinforcing those views, international courts and tribunals have repeatedly emphasised that it is possible for there to be international law obligations which overlap and impose on States concurrent duties, without either of them being excluded by virtue of the *lex specialis* doctrine. This has occurred in numerous cases where overlapping obligations arising from different sources are not incompatible with each other. For example:

i. The Court expressly recognised that a customary international law obligation of notification in relation to transboundary harm was not

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99 Written Statement of Australia, para. 4.11.

100 ITLOS Advisory Opinion, para. 224.

101 ITLOS Advisory Opinion, para. 224.

102 International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Report of the ILC on the Work of its Fifty-third Session, UN Doc A/56/10, 2001, p. 140, Article 55, para. (4).

103 International Law Commission, Report of the Study Group, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, UN Doc. A/CN.4/L.682 and Add.1 (13 April 2006), p. 19, para. 57.

precluded by the existence of a treaty regime with some overlapping content. It held:

> "The Court observes that the fact that the 1858 Treaty may contain limited obligations concerning notification and consultation in specific situations does not exclude any other procedural obligations with regard to transboundary harm which may exist in treaty or customary international law."[104]

ii. The Court has repeatedly held that, in situations of armed conflict, international humanitarian law co-exists with rather than excluding international human rights law.[105]

iii. In the *Iron Rhine* arbitration, the tribunal recognised as well established the principle that "where development may cause significant harm to the environment there is a duty to prevent, or at least mitigate, such harm".[106] It proceeded to state that "[t]his principle applies not only in autonomous activities *but also in the activities undertaken in implementation of specific treaties between the Parties*".[107]

iv. In the *South China Sea* arbitration, the tribunal did not consider that customary international law rules bearing on environmental protection were displaced to the extent that they addressed matters which also fell within the scope of provisions of UNCLOS which concerned the protection and preservation of the marine environment. To the contrary, it held that "[t]he corpus of international law relating to the environment … informs the content of the general obligation in Article 192" of UNCLOS.[108]

v. In the *Southern Bluefin Tuna* arbitration, Japan argued that the terms of the Convention on the Conservation of the Southern Bluefin Tuna "not only specify and implement the principles of an anterior framework agreement", but also "exhaust and supplant those principles as long as the implementing agreement remains in force".[109] The tribunal rejected this contention, stating "that it is a commonplace of international law and State practice for more than one treaty to bear upon a particular dispute" and that "[t]here is frequently a parallelism of treaties, both in their substantive content and in

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104 *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, ICJ Reports 2015, p. 665 at p. 708, para. 108.

105 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, p. 226 at p. 240, para. 25; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, p. 136 at p. 178, para. 106; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, ICJ Reports 2005, p. 168 at p. 243, para. 216.

106 *Arbitration regarding the Iron Rhine ("Ijzeren Rijn") Railway (Belgium/Netherlands)*, Award, (2005) XXVII RIAA 35 at pp. 66–67, para. 59.

107 *Arbitration regarding the Iron Rhine ("Ijzeren Rijn") Railway (Belgium/Netherlands)*, Award, (2005) XXVII RIAA 35 at p. 67, para. 59 (emphasis added).

108 *South China Sea Arbitration (Philippines v. China)*, Award, 12 July 2016, para. 941.

109 *Southern Bluefin Tuna (New Zealand/Japan; Australia/Japan)*, Award on Jurisdiction and Admissibility (2000) XXIII RIAA 1 at p. 23, para. 38(c).

their provisions for settlement of disputes thereunder". However, "[t]here is no reason why a given act of a State may not violate its obligations under more than one treaty".[110] This is equally true in relation to concurrent obligations under a treaty and customary international law, given the long-standing recognition by the Court that the same obligations can be owed under both these sources of law.[111]

(c) Of relevance to the present proceedings, there is no evidence that the States parties to the UNFCCC treaties intended to displace pre-existing and well established rules of customary international law, such as the Prevention Obligation, when they concluded those treaties.

i. There is certainly no express statement of such intention in the treaty texts.

ii. To the contrary, the preamble to the UNFCCC expressly "[r]ecall[s] the pertinent provisions" of the Stockholm Declaration (which must include principle 21, setting out the Prevention Obligation),[112] and also "[r]ecall[s]" the principle that "States have, in accordance with the Charter of the United Nations and the principles of international law, … the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction". This express invocation of rules of international law outside of the treaty regime (specifically, the rules concerning the Prevention Obligation) supports the view that the Convention was intended to co-exist with, rather than displace, those rules.

iii. In order to dispel any doubt on this issue, a number of States expressly declared upon ratification of the Paris Agreement that "no provision of the Paris Agreement can be interpreted as derogating from principles of general international law".[113] Similar declarations were made by certain States when they ratified the UNFCCC[114] and the Kyoto Protocol.[115]

(d) As a matter of substance, there is no incompatibility between the Prevention Obligation and the obligations set out under the UNFCCC treaties. A State can act compatibly with its obligations under both sources. By way of example, a

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110 *Southern Bluefin Tuna (New Zealand/Japan; Australia/Japan)*, Award on Jurisdiction and Admissibility (2000) XXIII RIAA 1 at p. 40, para. 52.

111 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, Judgment, ICJ Reports 1984, p. 392 at pp. 424–425, para. 73.

112 Declaration of the United Nations Conference on the Human Environment ('Stockholm Declaration'), reproduced in Report of the United Nations Conference on the Human Environment, 5–16 June 1972, UN Doc. A/CONF.48/14/Rev.1, Principle 21.

113 See the declarations of the Cook Islands, the Federated States of Micronesia, the Marshall Islands, Nauru, Niue, the Philippines, the Solomon Islands, Tuvalu and Vanuatu at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&clang=_en.

114 See the declarations of Fiji, Kiribati, Nauru, Papua New Guinea and Tuvalu at https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXVII-7&chapter=27&Temp=mtdsg3&clang=_en.

115 See the declarations of the Cook Islands, Kiribati, Nauru and Niue at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-a&chapter=27&clang=_en.

State can comply at the same time with the Assessment Obligation under customary international law and the obligation under Article 7(9) of the Paris Agreement to "engage in adaptation planning processes … which may include … (c) The assessment of climate change impacts and vulnerability". In the absence of any "actual inconsistency" (to use the words of the International Law Commission quoted above), there is no basis for finding that the Prevention Obligation (encompassing the Assessment Obligation) is displaced by the UNFCCC treaty regime.

(e) The Paris Agreement, in particular, is intended to articulate a particular temperature goal ("well below 2ºC above pre-industrial levels", with "efforts to limit the temperature to increase to 1.5ºC above pre-industrial levels" (Article 2(1)(a)), and to provide tools for States to achieve that goals (including through the adoption of Nationally Determined Contributions).[116] There is no reason why a globally agreed strategy of this kind would exclude pre-existing obligations of States, including in relation to activities entailing a risk of significant transboundary harm. Belize agrees with the view of the Bahamas that the UNFCCC treaties "seek to operationalise [the Prevention Obligation] by agreeing more specific quantified reduction targets", and that "[t]he mere fact that there may not exist sufficient political consensus to enact more aggressive reduction targets in the form of a treaty does not preclude the existence of a separate obligation to do so under customary international law".[117]

(f) Belize disagrees with Kuwait's claim that the UNFCCC treaty regime is a *lex specialis* that precludes the application of other rules of international law because it represents "a series of balances struck between States on a number of competing considerations that operate in the specific area of GHG emissions and climate change".[118] It is certainly clear that each of the UNFCCC treaties is the product of compromise between States. But, as stated above, there is no evidence that those treaties were intended to apply to the exclusion of, or are incompatible with, other rules of international law. Contrary to Kuwait's suggestion, there is no evidence that the parties intended to "subsume[], integrate[] or appl[y]" other rules of international law when they concluded the UNFCCC treaties.[119]

(g) In line with international decisions such as in the *Iron Rhine* and *South China Sea* arbitrations, far from being displaced by the UNFCCC treaties, the Prevention Obligation is in fact relevant to the interpretation of those treaties (a proposition which must in any event be correct by virtue of Article 31(3)(c) of the Vienna Convention on the Law of Treaties). In the words of the International Law Commission study group referred to above, a more general rule will

116 See, e.g., Written Statement of Chile, para. 60 ("these treaties establish general goals and tools to reach certain objectives", but "their purpose has not been to amend or soften the terms of the obligation not to cause harm by GHG emissions").

117 Written Statement of the Bahamas, para. 91.

118 Written Statement of Kuwait, para. 63.

119 Written Statement of Kuwait, para. 64.

"continue to give direction for the interpretation and application of the relevant special law".[120]

38. The second form of the incorrect argument concerning the relationship between the UNFCCC treaty regime and the customary Prevention Obligation is that the treaty regime does not displace the Prevention Obligation, but, in relation to anthropogenic greenhouse gas emissions, exhaustively determines what is required of a State in order to satisfy that Obligation. In other words, the argument is that a State which complies with its UNFCCC obligations must necessarily be taken as complying with the Prevention Obligation and other customary international law rules and principles in relation to anthropogenic greenhouse gas emissions.[121] For example:[122]

(a) The United Arab Emirates contends that the UNFCCC treaties "must be regarded as informing and giving content to the broad no-harm principle under general international law", and must be taken to "reflect the standards of conduct accepted by the international community as to what is required of States in their efforts to protect and preserve the environment from the adverse effects of climate change by preventing, reducing, and controlling GHG emissions and enhancing resilience to the effects of climate change".[123] Even more explicitly, it states:

> "[T]he UAE submits that what is required of States under the no-harm principle under general international law must be understood in light of, and as being given shape by, the provisions of the UN climate change régime. Accordingly, to the extent that a State complies with the UNFCCC, the Kyoto Protocol, and the Paris Agreement, and the specific commitments it has undertaken in that context, it should be regarded as complying with the no-harm principle under general international law with respect to climate change."[124]

(b) New Zealand suggests that "the obligations under the UNFCCC and the [Paris Agreement] and other international law obligations to the extent applicable should be interpreted compatibly".[125] It states that "the standards of due diligence required [under customary international law] would be determined by reference to widely agreed standards of conduct reflecting state practice", which (it contends) "are found exclusively in the climate change treaty regime", with

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120 International Law Commission, Report of the Study Group, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, UN Doc. A/CN.4/L.682 and Add.1 (13 April 2006), Annex: Draft Conclusions of the Work of the Study Group, p. 105, para. (9).

121 Some States take a more nuanced position, which is that the UNFCCC regime "informs relevant obligations of States under customary international law": Written Statement of the Republic of Korea, para. 51.

122 Adopting a position that is more nuanced but still places undue weight on the UNFCCC treaties, Singapore states that "[t]he discharge of the customary international law obligation of due diligence in the context of climate change will … be primarily informed by States' compliance with their obligations under the UNFCCC and Paris Agreement": Written Statement of Singapore, para. 3.20.

123 Written Statement of the United Arab Emirates, para. 99.

124 Written Statement of United Arab Emirates, para. 102.

125 Written Statement of New Zealand, para. 86.

the consequence that "good faith compliance with the obligations under the UNFCCC and the [Paris Agreement] and good faith engagement in ongoing negotiations in the climate change treaty system would constitute the necessary standards of conduct for States in relation to climate change-related transboundary harm".[126]

(c) The United States argues that, in determining what level is due diligence is required to meet the Prevention Obligation, the regime of nationally determined contributions to mitigate anthropogenic greenhouse gas emissions set out in the Paris Agreement "should be considered a reasonable and appropriate approach".[127] It further states that "the Parties' treaty obligations under the [Paris] Agreement should be understood as satisfying any general standard of due diligence in the particular context of anthropogenic GHG emissions",[128] and that "[a]ny customary obligation of due diligence that the Court might find applies to anthropogenic GHG emissions should be considered fulfilled by a State's implementation of its obligations under the Paris Agreement".[129]

(d) China claims that, "[i]n assessing whether States have fulfilled their duty of due diligence by their actions to address climate change and its adverse effects, it should follow the relevant benchmarks set by the provisions of the UNFCCC regime".[130]

(e) Romania states that "[t]he level of vigilance" demanded by the due diligence standard is "indicated in the Paris Agreement".[131]

(f) The Organization of Petroleum Exporting Countries states that "the principle of prevention can only ever operationalize the consensus solution adopted by the family of nations in the Paris Agreement rather than contradicting or 'enhancing' it".[132]

39. Again, Belize disagrees that the UNFCCC treaty regime, including the Paris Agreement, determines the scope and content of the Prevention Obligation under customary international law. It is notable that, in its recent advisory proceedings on climate change, ITLOS faced an equivalent argument that compliance with Article 194(1) of UNCLOS "would be satisfied simply by complying with the obligations and commitments under the Paris Agreement".[133] ITLOS rejected this argument. While it accepted that the UNFCCC and the Paris Agreement "are relevant in interpreting and applying [UNCLOS] with respect to marine pollution from anthropogenic GHG emissions",[134] it proceeded to state:

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126 Written Statement of New Zealand, paras. 104–105.
127 Written Statement of the United States, para. 4.24.
128 Written Statement of the United States, para. 4.25.
129 Written Statement of the United States, para. 4.28.
130 Written Statement of the People's Republic of China, para. 131.
131 Written Statement of Romania, para. 106.
132 Written Statement of the Organization of the Petroleum Exporting Countries, para. 82.
133 ITLOS Advisory Opinion, para. 223.
134 ITLOS Advisory Opinion, para. 222. See also para. 441(3)(b) (measures required under Article 194(1) "should be determined … taking into account … relevant international rules and standards contained in climate change treaties such as the UNFCCC and the Paris Agreement").

> "The Convention and the Paris Agreement are separate agreements, with separate sets of obligations. While the Paris Agreement complements the Convention in relation to the obligation to regulate marine pollution from anthropogenic GHG emissions, the former does not supersede the latter. Article 194, paragraph 1, imposes upon States a legal obligation to take all necessary measures to prevent, reduce and control marine pollution from anthropogenic GHG emissions, including measures to reduce such emissions. If a State fails to comply with this obligation, international responsibility would be engaged for that State."[135]

40. The same reasoning must apply to the relationship between the UNFCCC treaties and the Prevention Obligation under customary international law.

(a) In the same way as the treaties do not contain an express intention to displace customary international law, there is also no express statement that it is intended to modify or determine the content of relevant rules of customary international law. Instead, as stated above, the Court's jurisprudence is replete with examples of situations where two overlapping regimes have been held to co-exist without either effectively displacing the other by exhaustively governing the scope of the other, even where: (i) one rule is considered more 'specific' than the other; and/or (ii) one rule is contained in a treaty and the other arises under customary international law.[136]

(b) As a matter of interpretation, it is not possible for the Tribunal to state in the abstract whether the Prevention Obligation, variable as it is between States and across time,[137] would be satisfied by compliance with any particular commitment made under the Paris Agreement. Indeed, the International Court of Justice has held that "the notion of 'due diligence' … calls for an assessment *in concreto*".[138] Rather, in identifying what measures are necessary in order to meet the Prevention Obligation in a specific context, it is obvious that regard must be had to the best available science regarding the impacts of greenhouse gas emissions and what steps can be taken to mitigate those impacts.[139]

(c) It is important to recall not only that, at least as currently implemented, the regime of Nationally Determined Contributions is falling far short of what is necessary to address the serious transboundary harm caused by anthropogenic greenhouse gas emissions. Simply to take one example of importance to Belize (given its coral reef and mangrove ecosystems), the IPCC's Special Report on the Oceans and the Cryosphere, with specific reference to the specialised conventions, including the UNFCCC and the Paris Agreement, stated: "Existing international instruments do not adequately address climate change challenges

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135 ITLOS Advisory Opinion, para. 223.

136 See para. 37(b) above.

137 International Law Commission, Draft articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries, Report of the ILC on the Work of its Fifty-third Session, UN Doc. A/56/10, 2001, Article 2, Commentary at p. 153, para. (8).

138 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Reports 2007, p. 43 at p. 221, para. 430.

139 See, e.g., Written Statement of Belize, paras. 45(d), 51, 63(a)–(b).

for the open ocean and coastal seas".[140] It would be anathema to the purpose of the Prevention Obligation for this manifestly inadequate system to be seen as exhausting what is required of States under customary international law.

(d) The Paris Agreement does not even purport to address all of the types of harm which would be captured by the Prevention Obligation. Belize recalls that the Prevention Obligation applies to activities "causing significant damage to the environment of another State".[141] Significant harm is *already* occurring with current global temperatures at around 1.1ºC above pre-industrial levels.[142] And yet the Paris Agreement sets, and provides a framework for achieving, the temperature goal identified above ("well below 2ºC above pre-industrial levels", with "efforts to limit the temperature to increase to 1.5ºC above pre-industrial levels"). Thus, the Paris Agreement — despite being the product of hard-fought compromise — does not purport to be sufficient to prevent significant environmental harm. It thus cannot be seen as co-extensive with the Prevention Obligation, which is a duty to prevent transboundary harm meeting the threshold of "significant".

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15 August 2024

140 IPCC, "The Ocean and Cryosphere in a Changing Climate: Special Report of the Intergovernmental Panel on Climate Change" (2022), p. 541, Table 5.9 ("Ocean Governance and Climate Change: Major Issues").

141 *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, ICJ Reports 2010, p. 14 at pp. 55–56, para. 101.

142 IPCC, Climate Change 2023: Synthesis Report — Summary for Policy-Makers, available at https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_SPM.pdf, paras. A.1–A.2.