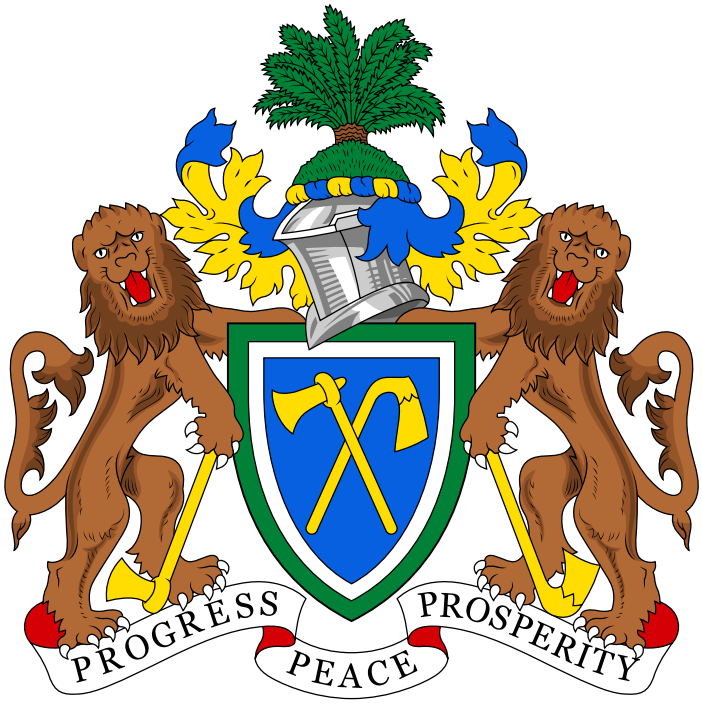
INTERNATIONAL COURT OF JUSTICE

OBLIGATIONS OF STATES IN RESPECT OF CLIMATE CHANGE

WRITTEN COMMENTS OF THE REPUBLIC OF THE GAMBIA



15 AUGUST 2024

Table of Contents

CHAPTER 1
INTRODUCTION

1.1 The Republic of The Gambia ("**The Gambia**") submits these Written Comments on the Request of the General Assembly for an Advisory Opinion on the Obligations of States in Respect of Climate Change ("**Request**") in accordance with the Court's order dated 30 May 2024.

1.2 Despite its minimal contribution to climate change, The Gambia is among the countries most vulnerable to its impacts. The Gambia accounts for less than 0.01% of the world's carbon dioxide emissions each year, yet the country and its people have had to, and will continue to bear, the catastrophic consequences of climate change. The same is true for most of the African continent. As the Nairobi Declaration on Climate Change and Call to Action recognized, although "Africa is not historically responsible for global warming", it "bears the brunt of its effects, impacting lives, livelihoods, and economies".[1] Indeed, "Africa is warming faster than the rest of the world and if unabated, climate change will continue to have adverse impacts on African economies and societies, and hamper economic growth and wellbeing".[2]

1.3 The Request is more urgent than ever. In November 2023, with the start of the 28th Conference of Parties ("**COP 28**") to the United Nations Framework Convention on Climate Change ("**UNFCCC**"), the World Meteorological Organization ("**WMO**") warned that "2023 is set to be the warmest year on record", with global temperatures rising 1.4°C above pre-industrial levels.[3] In January 2024, the WMO confirmed that 2023 "smashe[d] global temperature record[s] … by a huge margin".[4] Indeed, the year 2023 featured a "deafening cacophony of broken records" with record-high greenhouse gas ("**GHG**") levels, global temperatures and sea-level rise, and

[1] African Union, *Nairobi Declaration on Climate Change and Call to Action* (8 September 2023) ("**Nairobi Declaration**"), *available at* https://media.africaclimatesummit.org/Final+declaration+1709-English.pdf?request-content-type=%22application/force-download, para. 8.

[2] *Ibid*., para. 7.

[3] World Meteorological Organization, *Press Release: 2023 shatters climate records, with major impacts* (30 November 2023), *available at* https://wmo.int/news/media-centre/2023-shatters-climate-records-major-impacts.

[4] World Meteorological Organization, *Press Release: WMO confirms that 2023 smashes global temperature record* (12 January 2024), *available at* https://wmo.int/news/media-centre/wmo-confirms-2023-smashes-global-temperature-record. *See also* Copernicus, *Press Release: 2023 is the hottest year on record, with global temperatures close to the 1.5°C limit* (9 January 2024), *available at* https://climate.copernicus.eu/copernicus-2023-hottest-year-record.

record-low Antarctic sea ice.[5] The resulting extreme weather events, including major floods, tropical cyclones, drought, and associated wildfires, have had devastating impacts throughout the world, including heavy loss of life, food insecurity, and population displacement. As the UN Secretary-General observed, "[w]e are living through climate collapse in real time".[6]

1.4 The Gambia therefore welcomes the advisory opinion issued by the International Tribunal for the Law of the Sea ("**ITLOS**") on 21 May 2024 which confirmed that States Parties to the United Nations Convention on the Law of the Sea ("**UNCLOS**") have obligations to take all necessary measures to prevent, reduce and control marine pollution from anthropogenic GHG emissions, as well as to protect and preserve the marine environment from climate change impacts.[7] The content of such "necessary measures" is informed by the best available science,[8] as well as by the principle of common but differentiated responsibilities and respective capabilities ("**CBDR-RC**") and the duty of cooperation.[9] Crucially, ITLOS determined that the obligation of States to prevent harm from anthropogenic GHG emissions applies in a transboundary setting and requires States to ensure that pollution from such emissions within their jurisdiction or control does not cause damage to other States and their environments.[10] In reaching these conclusions, ITLOS clarified that the climate change treaty regime does not exclude but informs and complements the application of UNCLOS.[11] The Gambia submits that these conclusions are central not only to the Court's examination of States' obligations under UNCLOS but also under other bodies of international law.

---

[5] World Meteorological Organization, *Press Release: 2023 shatters climate records, with major impacts* (30 November 2023), *available at* https://wmo.int/news/media-centre/2023-shatters-climate-records-major-impacts.

[6] UN Secretary-General, *Video Message to the WMO "State of the Global Climate 2023" Report Launch* (30 November 2023), *available at* https://www.un.org/sg/en/content/sg/statement/2023-11-30/secretary-generals-video-message-the-wmo-%E2%80%9Cstate-of-the-global-climate-2023%E2%80%9D-report-launch.

[7] *Request for an advisory opinion submitted by the Commission of Small Islands States on Climate Change and International Law, ITLOS Case No. 31, Advisory Opinion (21 May 2024)* ("***ITLOS Climate Change Advisory Opinion***"), pp. 147-153.

[8] *Ibid*., paras. 212, 243.

[9] *Ibid*., paras. 229, 299.

[10] *Ibid*., para. 258.

[11] *Ibid*., paras. 222-224.

1.5 In its Written Statement, The Gambia explained why the Court has and should exercise jurisdiction to answer the Request. All States and organizations that presented written statements agree. There is also overwhelming consensus that (i) States have obligations not only under environmental law but also under human rights law and the law of the sea to mitigate anthropogenic GHG emissions and adapt to their effects; (ii) States must carry out their obligations in accordance with the duty of cooperation and the principle of CBDR-RC; and (iii) States must make full reparation to other States and individuals of current and future generations for significant harm caused to the climate system in accordance with the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts ("**ILC Articles**").

1.6 A minority of States and the Organization of Petroleum Exporting Countries ("**OPEC**"), however, disagree. With respect to Question (a), they argue that States only have obligations under and to the extent provided for by the climate change agreements, including the United Nations Framework Convention on Climate Change ("**UNFCCC**"), the Protocol to the UNFCCC ("**Kyoto Protocol**") and the Paris Agreement. It is therefore suggested that States do not have climate change obligations under general customary principles of environmental law, human rights law, the law of the sea, or other bodies of law. With respect to Question (b), some States and the OPEC argue that the climate change treaty regime constitues *lex specialis* on the legal consequences of a breach, thus excluding the application of the ILC Articles and human rights law. Some other States try to point to challenges in determining attribution and causation in the climate change context, particularly given the accumulative nature of climate change impacts, to resist the duty to pay compensation for breaches of climate change obligations.

1.7 With a view to assisting the Court, The Gambia's Written Comments focus on these key issues of contention. *First*, The Gambia sets out the scientific evidence concerning the impacts of anthropogenic GHG emissions on the climate system and responds to those States that seek to challenge the relevance of the 1.5°C temperature goal. *Second*, The Gambia addresses arguments relevant to the applicable legal framework. *Third*, The Gambia presents its views on how the Court should respond to Questions (a) and (b) of the Request.

CHAPTER 2
THE COURT SHOULD DETERMINE THE OBLIGATIONS OF STATES IN RESPECT OF CLIMATE CHANGE UNDER INTERNATIONAL LAW IN LIGHT OF THE BEST AVAILABLE SCIENTIFIC EVIDENCE

2.1 Numerous States, including the Bahamas, Chile, Mauritius, Indonesia and Solomon Islands, observe that the Court should refer to the best available scientific evidence in determining the obligations of States under international law in respect of climate change. The Gambia agrees.

2.2 As the former President of the Court, Judge Yusuf, observed, "[t]he great scientific progress made by humanity over the last century has revolutionized the way in which issues both in international relations and in daily lives are addressed". For this reason, it is inevitable that "[t]he law … and its application is, indeed, being influenced by scientific and technological changes".[12]

2.3 The UNFCCC and the Paris Agreement put science at the center of the commitments and obligations set out therein, recognizing that the "steps required to understand and address climate change will be … most effective if they are based on relevant scientific … considerations".[13] For example, the Paris Agreement provides that State Parties aim "to reach global peaking of greenhouse gas emissions as soon as possible" and "to undertake rapid reductions thereafter in accordance with best available science".[14] It further states that "adaptation action … should be based on and guided by the best available science"[15] and that the States Parties should strengthen their cooperation and enhance adaptation action in respect of developing scientific knowledge on climate change.[16] Moreover, the goal of "[h]olding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase

[12] United Nations, *Press Release: Presiding over More Scientific, Technological Cases, International Court of Justice Ensures Competency through Experts, Its President Tells Sixth Committee*, UN Doc. GA/L/3583 (26 October 2018), *available at* https://press.un.org/en/2018/gal3583.doc.htm.

[13] United Nations Framework Convention on Climate Change (adopted 9 May 1992, opened for signature 4 June 1992, entered into force 21 March 1994) (Dossier No. 4) ("**UNFCCC**"), Preamble.

[14] Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016), 3156 UNTS 79 (Dossier No. 16) ("**Paris Agreement**"), art. 4(1).

[15] *Ibid.*, art. 7(5).

[16] *Ibid.*, arts. 7(7), 7(c).

to 1.5°C above pre-industrial levels" is also based on the best available scientific evidence that it would "significantly reduce the risks and impacts of climate change".[17]

2.4 As demonstrated below, the best available science is clear. Anthropogenic GHG emissions have harmful impacts on the climate system and are the principal driver of climate change.[18] The best available science is equally conclusive that this leads to devasting consequences across the globe. The Court should give such evidence the pivotal role it deserves in assessing the impacts of GHG emissions and the obligations required of States to address such impacts.

I. There Is Overwhelming Scientific Consensus That Excess Anthropogenic Greenhouse Gas Emissions Cause Harmful Impacts to the Climate System

2.5 The climate system is defined in the UNFCCC as "the totality of the atmosphere, hydrosphere, biosphere and geosphere and their interactions".[19] As several States and

[17] *Ibid.*, art. 2(1)(a). Other international conventions and principles applicable to the questions before the Court (which The Gambia sets out in the next chapter) also contemplate the role of science in shaping the relevant legal obligations. For instance, Articles 200 to 206 of the United Nations Convention on the Law of Sea create a legal regime that envisages a process of scientific study and research which determines the "appropriate scientific criteria" for the development of rules and standards on the prevention, reduction and control of marine pollution. This process requires the provision of scientific assistance to developing States for the protection and preservation of the marine environment and the monitoring and surveillance of risks or effects of pollution of the marine environment "by recognized scientific methods". *See* United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994), 1833 UNTS 3 (Dossier No. 45) ("**UNCLOS**"), arts. 200-206. Similarly, science is central to the requirements set out in the Convention concerning the Protection of the World Cultural and Natural Heritage. Article 5 provides for specific measures that States should endeavor to undertake for the protection of cultural and natural heritage, including, *inter alia*, developing scientific and technical studies on "counteracting the dangers that threaten … cultural or natural heritage", taking appropriate scientific measures necessary for the "identification, protection, conservation, presentation and rehabilitation of th[e] heritage", and "encourag[ing] scientific research in this field". And Article 4 provides that States will do all they can to protect cultural and natural resources "with any international assistance and co-operation, in particular, financial, artistic, scientific and technical, which it may be able to obtain". *See* Convention concerning the Protection of the World Cultural and Natural Heritage (adopted 16 November 1972, entered into force 17 December 1975), 1037 UNTS 151 ("**World Heritage Convention**"), arts. 4-5.

[18] Although CO_2 is the dominant cause of global warming, other GHG emissions have a more immediate and potent warming effect on a per ton basis. Methane, for example, has a global warming potential ("**GWP**") of 82.5 over 20 years, meaning that one ton of methane causes 82.5 times more warming than one ton of CO_2 in the 20 years after it is emitted. Nitrous oxide (N_2O), hydrofluorocarbons (HFCs), chlorofluorocarbons (CFCs) and perfluorocarbons (PFCs) are also highly potent GHGs. *See* IPCC, *Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (CUP 2021) ("**IPCC 2021, AR6 WGI**"), *available at* https://report.ipcc.ch/ar6/wg1/IPCC_AR6_WGI_FullReport.pdf, p. 1017, Table 7.15. The 20-year GWPs for these pollutants are, on average: N_2O (273), HFC-32 (2693), HFC-134a (4144), CFC-11 (8231), and PFC-14 (5301).

[19] UNFCCC, art. 1(3).

organizations observed (and no participant disputed),[20] the best scientific evidence, as contained in the reports of the Intergovernmental Panel on Climate Change ("**IPCC**"), confirms that anthropogenic GHG emissions adversely affect every part of the climate system.

2.6 With respect to the *atmosphere*, the IPCC 6th Assessment Report confirmed unequivocally that human influence has warmed the atmosphere, primarily through GHG emissions.[21] This warming trend is unprecedented in at least the last 2,000 years.[22]

2.7 With respect to the *hydrosphere*, consisting of the Earth's oceans, rivers, lakes, and their frozen parts (known as the cryosphere), the IPCC concluded with very high confidence that GHG emissions have fundamentally altered "the physical and chemical characteristics of the ocean",[23] exposing "ocean and coastal ecosystems to conditions that are unprecedented over millennia".[24] There are at least four principal changes to the ocean caused by GHG emissions—ocean warming, ocean acidification, de-oxygenation, and ocean stratification.

2.8 Significant atmospheric and ocean warming, in turn, leads to accelerated ice sheet melt and sea-level rise. Past GHG emissions have committed the present and future generations to centuries or even millennia of sea-level rise and decades of mountain and polar glaciers melting.[25] Between 2011-2020, the "annual average Arctic sea ice area reached its lowest level since at least 1850".[26]

---

[20] *See, e.g.*, Written Statement of the Bahamas, Section II.A; Written Statement of Kenya, paras. 3.4-3.17; Written Statement of Mauritius, Sections IV.B.1 and IV.B.2; Written Statement of Sierra Leone, para. 3.17; Written Statement of Vanuatu, paras. 77-82; *see also* Written Statement of the Commission of Small Island States on Climate Change and International Law, Sections II.B.3 and II.C.

[21] IPCC, *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* (2023) ("**IPCC 2023, AR6 Synthesis Report**"), *available at* https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_FullVolume.pdf, p. 46.

[22] *Ibid.*, p. 42; IPCC, *Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, Summary for Policymakers (CUP 2021) (Dossier No. 75) ("**IPCC 2021, AR6 WGI, Summary for Policymakers**"), p. 4, paras. A.1-A.1.1; *ibid.*, p. 6, Figure SPM.1.

[23] IPCC, *Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (CUP 2022) ("**IPCC 2022, AR6 WGII**"), p. 381.

[24] *Ibid.*

[25] IPCC 2021, AR6 WGI, Summary for Policymakers, p. 21, para. B.5.4; IPCC 2023, AR6 Synthesis Report, p. 77.

[26] IPCC 2021, AR6 WGI, Summary for Policymakers, p. 8, para. A.2.3.

According to the IPCC, ice loss and global mean sea-level rise will continue in the 21st century (virtually certain) and extreme sea-level events will take place with increased frequency and intensity (high confidence).[27]

2.9 With respect to the *biosphere*, the IPCC determined, with high confidence, that climate change, driven by anthropogenic GHG emissions, "has caused substantial damages, and increasingly irreversible losses, in terrestrial, freshwater, cryospheric, and coastal and open ocean ecosystems".[28] It reported "[h]undreds of local losses of species" due to the magnitude of heat extremes and "mass mortality events on land and in the ocean".[29] It also underscored the approaching irreversible impacts on ecosystems caused by permafrost thaw and hydrological changes.[30]

2.10 Finally, with respect to the *geosphere*, sea-level rise and related events have caused increased coastal erosion and land salinization. The IPCC concluded, with high confidence, that anthropogenic "[c]limate change has contributed to desertification and exacerbated land degradation, particularly in low lying coastal areas, river deltas, drylands and in permafrost areas".[31] As a result of sea-level rise, atmospheric and ocean warming, and extreme climate change events, "[n]early 50% of coastal wetlands have been lost over the last 100 years".[32]

[27] IPCC 2023, AR6 Synthesis Report, p. 77.

[28] *Ibid.*, p. 46.

[29] *Ibid.*

[30] *Ibid.*

[31] IPCC 2023, AR6 Synthesis Report, p. 46.

[32] *Ibid.*

II. Anthropogenic GHG Emissions Have Caused Devastating Consequences For The Gambia And Its People

2.11 Several participants described the disproportionate impacts of climate change on Africa and its populations.[33] As the African Union correctly observed, the continent has already faced "the reality of loss of territory and maritime spaces" as well as "a threat to … peoples' rights and survival".[34] The Gambia itself has suffered serious negative impacts of anthropogenic GHG emissions to its environment and devastating consequences for its people.

2.12 *First*, as one of the lowest-lying countries in the world, The Gambia is particularly vulnerable to severe flooding events—the occurrence of which has increased in recent decades due to sea-level rise and rainfall variability resulting from climate change.[35] Relatedly, 90% of households in The Gambia are vulnerable to coastal erosion, and 75% of such households do not have sustainable costal erosion adaptation strategies.[36]

2.13 In July and August 2022, The Gambia experienced the most severe flooding in recent decades.[37] The 2022 floods displaced over 7,000 people and caused the loss of human life, property damage, crop and livestock destruction, and widespread water contamination resulting from water and sewage system breaches.[38] Climate change-induced rainfall variability is expected to continue to increase, resulting in more frequent severe flooding events.[39]

2.14 *Second*, The Gambia is also vulnerable to droughts resulting from rising temperatures and reduced rainfall runoff. Over the last several decades, The Gambia has experienced a 30% decrease

[33] Written Statement of Egypt, paras. 53-54; Written Statement of Ghana, paras. 33-34; Written Statement of South Africa, para. 25; Statement of the African Union, para. 161; Written Statement of OACPS, paras. 50-52.

[34] Written Statement of the African Union, para. 161.

[35] UNDAC, *The Gambia Floods: Rapid Needs Assessment Report and Response Recommendations* (2022), p. 3, 6-7.

[36] *Ibid.*, p. 53.

[37] *Ibid.*, p. 11.

[38] *Ibid.*, p. 3-4, 28.

[39] National Climate Change Policy of The Gambia (2016), p. 9.

in annual rainfall[40] and severe droughts in 2011 and 2014.[41] Droughts in The Gambia's peripheral regions drive displacement towards coastal and riverine low-lying areas, which are increasingly prone to severe flooding.[42]

2.15 *Third*, climate change threatens the livelihoods of approximately 75% of The Gambia's population which relies primarily on rain-fed subsistence farming[43]. Decreased rainfall and higher evaporation due to higher temperatures, as well as sea-level rise, causes saline ocean water to intrude into the River Gambia and The Gambia's coastal aquifers, increasing river and soil salinity.[44] This, in turn, destroys The Gambia's rice fields—which account for over 50% of the cultivated land in the country—and reduces the productivity of agricultural crops.[45] Climate change-induced sea-level rise is expected to "inundate over 60% of current mangrove forests, 33% of swamp areas and 20% of rice growing areas" in The Gambia before the end of the century.[46]

2.16 The impacts of climate change felt by The Gambia are grossly disproportionate to its historic and current contributions to global GHG emissions and its capacity to adapt. The situation in which The Gambia finds itself reflects the inherent inequality of climate change impacts. The IPCC has concluded, with high confidence, that "[v]ulnerable communities who have historically contributed the least to current climate change are disproportionately affected".[47] Least developed countries ("**LDC**") and small island developing States ("**SIDS**"), which have the lowest per capita emissions, paradoxically have the highest vulnerability to climatic hazards, with "global hotspots of high human vulnerability observed in West-, Central- and East Africa, South Asia, Central and South America, SIDS and the Arctic".[48] Indeed, LDCs experienced 70% of the deaths caused by

[40] *Ibid.*, p. 8.

[41] UNDAC, *The Gambia Floods: Rapid Needs Assessment Report and Response Recommendations* (2022), p. 6.

[42] *Ibid.*, p. 3, 7.

[43] *Ibid.*, p. 8; B. M'Komfida et al., *The Impacts of Saline-Water Intrusion on the Lives and Livelihoods of Gambian Rice-Growing Farmers*, 6 J. Ecology & Env't Scis. 1, 5 (2018).

[44] B. M'Komfida et al., *The Impacts of Saline-Water Intrusion on the Lives and Livelihoods of Gambian Rice-Growing Farmers*, 6 J. Ecology & Env't Scis. 1, 4 (2018).

[45] *Ibid.*, p. 2, 5.

[46] *Ibid.*, p. 5; National Climate Change Policy of The Gambia, p. 8.

[47] IPCC 2023, AR6 Synthesis Report, p. 42.

[48] *Ibid.*, p. 51.

climate disasters over the past 50 years and the economic impacts of climate change on LDCs are approximately ten times worse than for the richest countries.[49] This inequality is even more evident with the most marginalized groups, such as those with low income and poverty, ethnic minorities, women, children and indigenous people.[50]

III. According to the Best Available Scientific Evidence, Limiting the Increase in Average Global Temperatures to 1.5°C Is the Minimum Necessary to Avoid Irreversible Harm to The Climate System and People

2.17 Numerous participants are correct to observe that the Paris Agreement temperature goal—limiting global warming to 1.5°C—is the ultimate standard by which significant and irreversible harm to the climate system and humanity can be avoided.[51] The Gambia agrees, in particular, with the observation that complying with this standard "is expected to substantially reduce damages to African economies, agriculture, human health, and ecosystems compared to higher levels of global warming".[52] It should therefore inform the content of States' obligations, and corresponding rights, in respect of climate change.

2.18 A handful of States, however, challenged the relevance of this temperature goal. They advanced two main arguments: (i) the Paris Agreement long-term temperature goal is said to be a range rather than a fixed level;[53] and (ii) the temperature goal is argued to represent a joint political commitment rather than a concrete legal obligation.[54] The Gambia disagrees.

[49] UNDRR, "Disaster Risk Reduction in Least Developed Countries" (last accessed: 14 March 2024), *available at* https://www.undrr.org/disaster-risk-reduction-least-developed-countries.

[50] IPCC 2023, AR6 Synthesis Report, p. 51.

[51] *See e.g.*, Written Statement of the African Union, para. 100; Written Statement of the IUCN, paras. 54-74, 109; Written Statement of the OACPS, paras. 48; Written Statement of Antigua and Barbuda, paras. 337, 375; Written Statement of El Salvador, para. 12; Written Statement of Solomon Islands, paras. 46-51; Written Statement of St. Lucia, para. 23(v), 53; Written Statement of Timor-Leste, para. 99; Written Statement of Tuvalu, paras. 105, 111; Written Statement of Uruguay, para. 24; Written Statement of Sierra Leone, para. 3.8.

[52] Written Statement of the OACPS, para. 48.

[53] Written Statement of China, para. 22.

[54] *See, e.g.*, Written Statement of China, para. 24; Written Statement of Saudi Arabia, paras. 4.57-4.62; Written Statement of New Zealand, para. 52.

2.19 *First*, although the Paris Agreement provides for a 2°C increase in global average temperatures as a goal and 1.5°C as an ambition, both the best available science and international efforts now understand the latter as the necessary standard.

2.20 In its special report assessing "the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways",[55] the IPCC observed that the risks of harm to the climate system and people are significantly lower at 1.5°C of global warming than at 2°C. In particular:

- Global mean sea-level rise is predicted to be 0.1 meter lower at 1.5°C global warming compared to 2°C, thus reducing the risks associated with sea-level rise for many human and ecological systems, including increased saltwater intrusion, flooding, and damage to infrastructure. The IPCC estimates that, as a result, approximately ten million fewer people will be exposed to related risks;[56]

- Limiting global warming to 1.5°C compared to 2°C will lower the impacts on terrestrial, freshwater, and coastal ecosystems, including species loss and extinction, retaining more of their services to humans;[57]

- Ocean warming and associated ocean acidification and de-oxygenation will be reduced at 1.5°C global warming, thus decreasing risks to marine biodiversity, fisheries, and ecosystems and their functions and services to humans;[58] and

- Compared to 2°C, 1.5°C global warming will lower the risks to health, livelihoods, food security, water supply, human security, and economic growth. It is therefore

[55] IPCC, *Global Warming of 1.5°C: An IPCC Special Report on the impacts of global warming of 1.5 °C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty,* Summary for Policymakers (CUP 2018) (Dossier No. 72) ("**IPCC, *Global Warming of 1.5°C***"), *available at* https://www.ipcc.ch/site/assets/uploads/sites/2/2022/06/SPM_version_report_LR.pdf, p. 4.

[56] *Ibid.*, pp. 7-8, paras. B.2-B.2.1.

[57] *Ibid.*, p. 8, para. B.3.

[58] *Ibid.*, p. 8, para. B.4.

expected to reduce the number of people both exposed to climate-related risks and susceptible to poverty by up to several hundred million by 2050.[59]

2.21 In light of such evidence, the Conferences of the Parties to the UNFCCC have adopted several decisions recognizing 1.5°C global temperature increase as the "pathway" for State Parties' efforts in mitigating GHG emissions.[60] In its advisory opinion, ITLOS found that in view of the "broad agreement within the scientific community" on the severe consequences of global temperature increase beyond 1.5°C, State Parties to UNCLOS must be as diligent as necessary to comply with this limit.[61] The Court should therefore likewise adopt this specific standard, as opposed to a range of temperature goals, in ascertaining States' mitigation and adaptation obligations.

2.22 *Second*, it is immaterial that the 1.5°C temperature goal is a political commitment rather than a concrete legal obligation under the Paris Agreement. The 1.5°C temperature goal is relevant to the Court's consideration because it is the scientifically agreed standard by which significant harm to the climate system can be avoided. It thus informs the specific content of States' obligations to mitigate GHG emissions, the ultimate basis for which comes from customary principles of environmental law, international human rights law, the law of the sea and the law governing world heritage, not the Paris Agreement. The non-binding nature of commitments under the Paris Agreement, including those with respect to the temperature goal, is therefore besides the point.

***

[59] *Ibid.*, p. 9, paras. B.5-B.5.1.

[60] *See, e.g.*, COP 27, Decision 1/CMA.4 (17 March 2023), paras. 15 ("[r]ecognizes that limiting global warming to 1.5 °C requires rapid, deep and sustained reductions in global greenhouse gas emissions"); COP 27, Decision 1/CP.27 (17 March 2023), para. 7 ("[r]eiterates that the impacts of climate change will be much lower at the temperature increase of 1.5°C compared with 2 °C and resolves to pursue further efforts to limit the temperature increase to 1.5 °C"); COP 28, Decision FCCC/PA/CMA/2023/L.17 (13 December 2023), para. 28 ("recognizes the need for deep, rapid and sustained reductions in greenhouse gas emissions in line with 1.5 °C pathways").

[61] *ITLOS Climate Change Advisory Opinion*, paras. 241, 250.

2.23 In sum, there is overwhelming scientific evidence that anthropogenic GHG emissions have caused and will continue to cause significant harm to the climate system, that climate change is inherently unequal in its impacts on States and individuals, and that limiting the increase in global temperature to 1.5°C is the minimum necessary to avoid the worst of the climate crisis. It is against this factual background that The Gambia urges the Court to ascertain the obligations of States under international law in respect of climate change.

CHAPTER 3
THE APPLICABLE LEGAL FRAMEWORK

3.1 Before addressing the questions posed in the Request, The Gambia responds to arguments raised by some participants regarding the legal framework applicable to those questions.

3.2 At the outset, The Gambia notes the broad agreement among States and international organizations that the Court can and should apply all relevant rules and principles of international law that exist at the time of rendering the advisory opinion. Such rules and principles include, *inter alia*, customary principles of international environmental law, international human rights law and the law of the sea. The Gambia agrees with Kenya that the Court should additionally take into consideration the law governing cultural and natural heritage, particularly the Convention Concerning the Protection of the World Cultural and Natural Heritage 1972 ("**World Heritage Convention**").[62]

3.3 The OPEC and a small minority of States, however, argue that the applicable legal framework is to be found exclusively in the climate treaty regime, consisting of the UNFCCC, the Kyoto Protocol, and the Paris Agreement.[63] Those participants contend that: *first*, because such instruments represent a careful compromise between States on their climate change obligations, other instruments that were not developed to address climate change should not be interpreted to impose obligations that are inconsistent with or go beyond those contained in the climate change instruments;[64] and *second*, the UNFCCC, the Kyoto Protocol and the Paris Agreement constitute *lex specialis*, and to some extent, a self-contained regime "in [the] governance of anthropogenic GHG emissions",[65] thus allegedly excluding the application of other bodies of law.

---

[62] Written Statement of Kenya, para. 5.69.

[63] *See, e.g.*, Written Statement of Japan, paras. 11-13; Written Statement of OPEC, para. 9; Written Statement of Saudi Arabia, para. 1.15; Written Statement of Kuwait, Section II.B. *See also* Written Statement of the United States of America, paras 6.2-6.3.

[64] Written Statement of Australia, para. 2.62; Written Statement of Japan, para. 13; Written Statement of the United States of America, para. 6.3; Written Statement of New Zealand, para. 29-30; 84, 86.

[65] *See, e.g.*, Written Statement of OPEC, para. 62; Written Statement of Saudi Arabia, paras. 4.3, 4.95, 4.98; Written Statement of Kuwaitt, Section II.B; Written Statement of Japan, para. 14.

3.4 The first argument assumes that the climate change treaty regime represents the full extent of States' consent to be bound by international law with respect to climate change. This is incorrect. The UNFCCC, the Kyoto Protocol and the Paris Agreement were adopted with the specific purpose of "protect[ing] the climate system",[66] leaving *other* climate change issues to be governed by other rules of international law which were also developed based on State consent. For example, the Paris Agreement affirms that human rights law is applicable to the protection of fundamental rights from climate change impacts. Its Preamble emphasizes that Parties to the UNFCCC "should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights".[67] There is no infringement of State sovereignty or consent where States have parallel obligations under different treaties or customary international law.

3.5 Along with the climate change treaty regime, therefore, States continue to be bound by other international treaties to which they are parties and customary international law, including, *inter alia*, the International Covenant on Civil and Political Rights ("**ICCPR**"), and the International Covenant on Economic, Social and Cultural Rights ("**ICESCR**"), UNCLOS and the World Heritage Convention. Separate from the protection of the climate system, these instruments govern the protection of the marine environment, human rights, and cultural and natural heritage from the impacts of anthropogenic GHG emissions. In this regard, ITLOS confirmed that UNCLOS and the Paris Agreement "are separate agreements, with separate sets of obligations".[68] Obligations under UNCLOS therefore cannot be satisfied by complying with, or otherwise limited by, commitments and obligations under the climate change agreements.[69] The Gambia submits that the same conclusion applies with respect to the ICCPR, ICESCR, and the World Heritage Convention.

3.6 For the same reason, the *lex specialis* argument is entirely misguided. The climate change regime is not *lex specialis* to other bodies of law because they do not govern the same issue. International human rights law, the law of the sea, and the law governing cultural and natural

[66] UNFCCC, Preamble.

[67] Paris Agreement, Preamble.

[68] *ITLOS Climate Change Advisory Opinion*, para. 223.

[69] *Ibid*., paras. 223-224.

heritage are also special regimes of their own,[70] and like the climate change regime, constitute *lex specialis* to general international law. Among these regimes, however, there is not a *lex specialis* relationship.

3.7 Even if the climate change agreements had an element of *lex specialis* to other bodies of international law in respect of climate change, The Gambia agrees with New Zealand that *lex specialis derogat legi generali* is not relevant to the Court's consideration because the norms in question are not in conflict.[71] They instead have "relationships of interpretation" where "one norm assists in the interpretation of another".[72] In respect of UNCLOS, for example, ITLOS made clear that the UNFCCC and the Paris Agreement, as the primary legal instruments addressing climate change, are relevant in interpreting and applying provisions of UNCLOS concerning marine pollution from anthropogenic GHG emissions.[73] This is consistent with the International Law Commission's conclusion in its Study on Fragmentation of International Law that:

> "The application of the special law does not normally extinguish the relevant general law. The general law will remain valid and applicable and will, under the principle of harmonization …, *continue to give direction for the interpretation and application of the relevant special law and will become fully applicable in situations not provided for by the latter*."[74]

3.8 In this context, such situations include the protection of the marine environment, human rights, and cultural and natural heritage from the harmful impacts of anthropogenic GHG emissions, which are not provided for by the climate change treaty regime. In those cases, the

---

[70] International Law Commission, *Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law*, UN Doc. A/CN.4/L.702 (18 July 2006), paras. 6, 14(12).

[71] Written Statement of New Zealand, para. 86. The International Law Commission made clear in its commentary on Article 55 of the Articles on the Responsibility of States for Internationally Wrongful Acts that for the *lex specialis principle* to apply, "it is not enough that the same subject matter is dealt with by two provisions; there must be some *actual inconsistency* between them, or else a *discernible intention* that one provision is to exclude the other". ILC, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), reproduced in *Yearbook of the International Law Commission, 2001*, Vol. II, Part Two ("**ILC Articles on State Responsibility**"), art. 55, commentary (4) (emphasis added).

[72] International Law Commission, *Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law*, UN Doc. A/CN.4/L.702 (18 July 2006), p. 7, para. 14(2).

[73] *ITLOS Climate Change Advisory Opinion*, para. 222.

[74] International Law Commission, *Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law*, UN Doc. A/CN.4/L.702 (18 July 2006), pp. 9-10, para. 14(9) (emphasis added).

UNFCCC, the Kyoto Protocol, and the Paris Agreement inform the interpretation and application of obligations under human rights treaties, UNCLOS, and the World Heritage Convention.

3.9 The Gambia, however, disagrees with New Zealand's suggestion that obligations under other bodies of international law must be interpreted consistently with those under the climate change agreements whereby the former are subsumed by the latter.[75] The principle of systemic integration and harmonization requires all relevant norms to be interpreted in conjunction to "give rise to a single set of compatible obligations",[76] without one set of norms taking priority over another. Applying this principle does not require the Court to rewrite or override the obligations States have negotiated and agreed to under the UNFCCC, the Kyoto Protocol and the Paris Agreement. Instead, the climate change regime, international human rights law, UNCLOS, and the World Heritage Convention complement each other and, in the final analysis, give rise to a single obligation of due diligence to protect the climate system, human rights, and cultural and natural heritage from the negative effects of GHG emissions.

I. International Environmental Law

3.10 The obligations of States (and corresponding right) to protect the climate system and other parts of the environment from anthropogenic GHG emissions are governed by international environmental law, including the UNFCCC, the Kyoto Protocol, the Paris Agreement, and relevant principles of customary international law governing the protection of the environment. The overwhelming majority of States and international organizations agree. It bears emphasizing, in this regard, that the intended effect of the UNFCCC, the Kyoto Protocol, and the Paris Agreement was not to "rul[e] out the application" of general principles of international environmental law as some participants have sought to argue, but rather to draw upon and translate them into more concrete and actionable obligations.[77]

---

[75] *See* Written Statement of New Zealand, paras. 86, 105-106, 121.

[76] International Law Commission, *Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law*, UN Doc. A/CN.4/L.702 (18 July 2006), p. 8, para. 14(4).

[77] For instance, the Preamble of the UNFCCC demonstrates that it draws upon the broader corpus of international environmental law by recalling that in accordance with "the principles of international law", States have "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".

3.11 It is well-established States are obligated not to cause environmental harm to other States. This originates from the rule that every State has the "obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States".[78] The principle was confirmed by the arbitral tribunal in the first international environmental law case—*Trail Smelter (USA v. Canada)*—which held that "no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein".[79]

3.12 This principle—known as the no-harm principle, the customary nature of which is firmly established[80]—entails the duty to prevent harm. As the Court explained in *Pulp Mills*, a State must "use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State".[81] In essence, a State must "do the utmost"[82] and "to exert its best possible efforts to minimize the risk [of harm]" to another State.[83] The Court confirmed that this obligation "is now part of the corpus of international law relating to the environment".[84]

3.13 In order to comply with this obligation, States must act with due diligence in respect of all activities under their jurisdiction and control, including those of private actors.[85] The Court made clear that to discharge this due diligence obligation, States not only must adopt "appropriate rules and measures" but also exercise "a certain level of vigilance in their enforcement and the exercise

---

[78] *Corfu Channel (United Kingdom* v. *Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 4, at p. 22.

[79] *Trail Smelter case (United States, Canada)*, 16 April 1938 and 11 March 1941, RIAA Vol. III, p. 1965. Subsequently, in *Corfu Channel*, the Court ruled that "every State" has an "obligation not to allow knowingly" the use of its territory "for acts contrary to the rights of other States". *Corfu Channel (United Kingdom* v. *Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 4, at p. 22.

[80] *Nuclear Weapons Advisory Opinion*, p. 241, para. 27.

[81] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010*, p. 14 ("***Pulp Mills***"), at p. 56, para. 101.

[82] *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 10 ("***Area Advisory Opinion***"), at p. 41, para. 110.

[83] International Law Commission, Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries (2001), reproduced in *Yearbook of the International Law Commission 2001*, Vol. II(2), art. 3, commentary (7).

[84] *Nuclear Weapons Advisory Opinion*, p. 242, para. 29; *Pulp Mills*, p. 56, para. 101.

[85] *Pulp Mills*, p. 79, para. 197.

of administrative control applicable to public and private operators".[86] Furthermore, States must assess the risk of an activity by conducting environmental impact assessments prior to authorizing and carrying out activities, and must monitor and exercise vigilance in regard to the activities' actual impacts.[87]

3.14 A small minority of States argue that the prevention principle and the duty of due diligence, which have been applied to conventional transboundary harm cases, do not apply to GHG emissions, which they contend are distinct in their nature and effect. In particular, those States argue that, unlike other activities causing transboundary harm, GHG emissions accumulate from varied and diffuse sources over decades and the resulting harm is global rather than transboundary in nature.[88] They therefore contend that it would be difficult to attribute the global effect of GHG emissions to specific activities under a State's jurisdiction or control and to impose obligations with respect to such activities and harm.

3.15 ITLOS rejected this argument in its Advisory Opinion. Although the Tribunal acknowledged the difficulty in "specify[ing] how anthropogenic GHG emissions from activities under the jurisdiction or control of one State cause damage to other States", it nonetheless held that such difficulty relates to causation. This does not affect the applicability of the obligation to prevent transboundary harm from anthropogenic GHG emissions under UNCLOS, which bears a close resemblance to the prevention principle under customary international law.[89]

3.16 Indeed, there is nothing in international jurisprudence to suggest that the prevention principle and the duty of due diligence are limited to certain activities or types of transboundary harm. On the contrary, in *Pulp Mills*, the Court highlighted the principle's broad scope—States are obligated to "use all the means at its disposal in order to avoid activities which take place in its

[86] *Ibid.*, p. 79, paras. 195, 197.

[87] *Ibid.*, pp. 82-84, paras. 204-205; *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, I.C.J. Reports 2015*, p. 665, at pp. 706-707, para. 104.

[88] *See, e.g.*, Written Statement of the United States of America, paras. 4.16-4.19; Written Statement of New Zealand, paras. 101-102. *See also* Written Statement of Australia, para. 4.10.

[89] *ITLOS Climate Change Advisory Opinion*, paras. 246, 252.

territory, or in any area under its jurisdiction, causing significant damage to the environment of another State."[90] It is clear that the principle covers *any* activities that may cause harm to *any* State, as opposed to a specific type of activity that directly causes harm to a neighboring State.

3.17 Nonetheless, because due diligence is a variable concept that may "change over time … in light … of *new scientific or technological knowledge*",[91] it is wrong to argue that the concept is incapable of covering new types of transboundary harm.[92] The science on the cause and effect of climate change has developed considerably over the past decades. While it may be difficult to attribute a particular climate-related impact to a particular State's emitting activities, the best available science is clear that all GHG emissions contribute to the overall problem. States are thus certain that, when they release GHG emissions, especially in large quantities, they will inevitably cause harm to the environments of other States. The principle of prevention and due diligence are capable of reflecting such scientific evidence and encompassing climate change impacts. To conclude otherwise would be to deprive the principle of its object and purpose.

3.18 In The Gambia's view—which is shared by numerous States[93]—the Court should take into account the best available science as set out above and as reflected in the UNFCCC, the Kyoto Protocol and the Paris Agreement, in giving content to the obligation of due diligence in the context of climate change. The Court itself has also recognized the importance of adopting measures pursuant to the due diligence standard that "conform to applicable international agreements and … internationally agreed technical standards".[94] Although the three climate change agreements do not, by themselves, establish binding obligations on States to reduce GHG emissions by any particular amount, they provide content for the obligation of due diligence against which States'

[90] *Pulp Mills*, p. 56, para. 101.

[91] *Area Advisory Opinion*, p. 43, para. 117 (emphasis added); *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015, ITLOS Reports 2015*, p. 4 ("***SRFC Advisory Opinion***"), at p. 41, para. 132 (emphasis added).

[92] *See, e.g.*, Written Statement of New Zealand, para. 103 (arguing that the duty of due diligence and the prevention principle are not "specific to transboundary harm caused by climate change").

[93] *See, e.g.*, Written Statement of Egypt, paras. 103-117; Written Statement of Samoa, para. 121; Written Statement of Micronesia, para. 57; Written Statement of COSIS, paras. 89-95; Written Statement of Mauritius, para. 193; Written Statement of Netherlands, para. 3.66.

[94] *Pulp Mills*, p. 80, para. 197.

actions must be assessed. The Gambia agrees with the position articulated in many written submissions that the climate change treaties reflect the scientific consensus on the necessary standard to prevent irreversible harm to the climate system, namely to limit global temperature increase to no more than 1.5°C above pre-industrial levels.[95]

3.19 An integral part of the obligation of due diligence is the precautionary principle which requires States to act to prevent threats of serious or irreversible environmental damage even when scientific evidence is uncertain or incomplete.[96] While certain States have questioned whether this principle has crystallized into customary international law,[97] there is no doubt that the principle is widely recognized in various international instruments, including the Rio Declaration on Environment and Development and Article 3(3) of the UNFCCC,[98] and multiple States in this proceeding have recognized its customary character.[99] As ITLOS explained, the principle requires States to "take all appropriate measures to prevent damage" even in "situations where scientific evidence concerning the scope and potential negative impact of the activity in question is insufficient but where there are plausible indications of potential risks".[100] The duty to act with precaution reaffirms the obligation to conduct environmental impact assessments which "may now be considered a requirement under general international law … where there is a risk that the

[95] *See, e.g.*, Written Statement of Tuvalu, para. 105; Written Statement of El Salvador, para. 12; Written Statement of Bangladesh, paras. 132-139; Written Statement of COSIS, paras. 79, 106-114.

[96] *Area Advisory Opinion*, p. 46, para. 131; ITLOS Climate Change Advisory Opinion, para. 242.

[97] *See* Written Statement of Denmark, Finland, Iceland, Norway and Sweden, para. 76.

[98] UN General Assembly, *Report of the United Nations Conference on Environment and Development*, UN Doc. A/CONF.151/25 (Vol. I) (Rio de Janeiro, 3-14 June 1992), Annex I: Rio Declaration on Environment and Development (Dossier No. 137) ("**Rio Declaration**"), Principle 15; UNFCCC, art. 3(3); UN General Assembly, Resolution 37/7, *World Charter for Nature*, UN Doc. A/RES/37/7 (28 October 1982) (Dossier No. 191), arts. 11-12.

[99] *See, e.g.*, Written Statement of the African Union, para. 97; Written Statement of Burkina Faso, para. 169; Written Statement of New Zealand, paras. 108-109; Written Statement of Colombia, paras. 3.26-3.27; Written Statement of Costa Rica, paras. 37, 39; Written Statement of Marshall Islands, para. 27; Written Statement of Micronesia, para. 57; Written Statement of Samoa, para. 101; Written Statement of UAE, para. 95.

[100] *Area Advisory Opinion*, p. 46, para. 131 ("the precautionary approach is also an integral part of the general obligation of due diligence of sponsoring States, which is applicable even outside the scope of the Regulations"). *See also id.*, n.126 para 135 (noting "a trend towards the precautionary approach forming part of customary international law"); D. French & T. Stephens, *International Law Association Study Group on Due Diligence in International Law, First Report* (7 March 2014), *available at* https://olympereseauinternational.files.wordpress.com/2015/07/due_diligence_-_first_report_2014.pdf, p. 26.

proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource".[101]

3.20 The content of the due diligence obligation in the climate change context is further shaped by the CBDR-RC principle. This view is shared by numerous States and organizations.[102] Stemming from the general principle of equity in general international law, CBDR-RC has become a cardinal principle of environmental law. It requires taking into account differing national circumstances relating to a State's contribution to the creation of a particular environmental problem and its ability to address that problem.[103] CBDR-RC is therefore particularly important in the climate change context where States have contributed at varying levels to the climate crisis yet have different degrees of vulnerability to climate change impacts and different socio-economic circumstances affecting their abilities to respond to such impacts. The UNFCCC, the Kyoto Protocol, and the Paris Agreement all reflect the CBDR-RC principle and apply it to the commitments contained therein.[104]

3.21 Finally, a central component of the due diligence obligation is the requirement to cooperate. This obligation is affirmed in virtually all international environmental instruments and reflects a rule of customary international law.[105] Under the climate change agreements, the obligation to

---

[101] *Pulp Mills*, p. 83, para. 204. *See also* Written Statement of Sierra Leone, para. 3.13 ("Due diligence encompasses not only the substantive obligation to prevent harm or minimize the risk thereof, but also specific procedural obligations, such as the duty to conduct environmental impact assessments before embarking on activities that pose the risk of significant transboundary harm".).

[102] *See, e.g.*, Written Statement of Albania, paras. 80-81; Written Statement of Antigua and Barbuda, paras. 338-340; Written Statement of Ecuador, para. 3.61; Written Statement of Sierra Leone, para. 3.34; Written Statement of South Africa, para. 77.

[103] P. Sands, *Principles of International Environmental Law* (4th ed., CUP 2018), p. 244.

[104] UNFCCC, arts. 3(2), 4(1); Kyoto Protocol, art. 10; Paris Agreement, arts. 2(2), 4(3), 4(19). The Nairobi Declaration also "[r]eaffirm[s] the principles set out in the United Nations Framework Convention on Climate Change (UNFCCC) and the Paris Agreement, namely equity, common but differentiated responsibilities and respective capabilities". Nairobi Declaration, para. 9.

[105] P. Sands, *Principles of International Environmental Law* (4th ed., CUP 2018), p. 214; *MOX Plant (Ireland* v. *United Kingdom) Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001*, p. 95, at p. 110, para. 82 ("the duty to cooperate is a *fundamental* principle in the prevention of pollution of the marine environment under Part XII of the Convention and general international law") (emphasis added). In this vein, The Gambia respectfully rejects the argument by a minority of States that there is "no basis" for the obligation to cooperate beyond the specific obligations embedded within the "specialized treaty regime on climate change". *See* Written Statement of the Kingdom of Saudi Arabia, paras. 5.9-5.10.

cooperate relates to both the implementation of the general objective to reduce GHG emissions and specific commitments to develop and transfer technologies.[106] Among other things, the agreements provide for enhanced training and education,[107] preparation for and strengthened adaption efforts,[108] and the promotion of sustainable economic growth and development.[109] Given the transboundary nature of environmental harm in general and climate change in particular, it is primarily through cooperation that States can "manage the risks of damage to the environment".[110]

3.22 While many elements of due diligence are reflected in the UNFCCC and the Paris Agreement, The Gambia disagrees with the position expressed in a handful of submissions that the duty is satisfied by simply carrying out the commitments and obligations under those agreements,[111] which are only aspects of the broader duty under customary international law.

3.23 For example, while Article 4(1)(f) of the UNFCCC only provides for environmental impact assessments ("**EIAs**") as one "appropriate method" for States to prevent harm to the environment, the customary duty of due diligence requires the conduct of EIAs whenever there is a risk of transboundary harm. Moreover, where EIAs are considered "appropriate", they only apply to "projects or measures" undertaken by States. The general duty of due diligence, on the other hand, requires EIAs for activities conducted by both States and private entities. The ITLOS Advisory Opinion confirmed this is the case.[112]

3.24 In *Pulp Mills*, the Court held that the prevention principle and due diligence require States to "use *all* the means at [their] disposal" to prevent harm to another State.[113] Accordingly, the duty

[106] UNFCCC, art. 4(1)(c); Kyoto Protocol, art. 10(c).

[107] UNFCCC, art. 4(1)(i); Kyoto Protocol, art. 10(e); Paris Agreement, art. 12.

[108] UNFCCC, art. 4(1)(e); Paris Agreement, arts. 7(6), 7(7).

[109] UNFCCC, art. 3(5); Paris Agreement, art. 6(1).

[110] *Pulp Mills*, p. 49, para. 77.

[111] *See* Written Statement of the United States of America, para. 4.25; Written Statement of New Zealand, para. 105; Written Statement of OPEC, para. 87; Written Statement of Germany, paras. 103-105.

[112] *ITLOS Climate Change Advisory Opinion*, para. 358 (noting that the "activities under assessment comprise both those planned by private entities and those planned by States"). *See also Nuclear Weapons Advisory Opinion*, para. 29; *Pulp Mills*, p. 82, para. 204.

[113] *Pulp Mills*, p. 56, para. 101.

cannot be fully satisfied by mere compliance with the commitments and obligations under the UNFCCC and Paris Agreement, which clearly are only *one* but not *all* means of preventing harm to the climate system.

3.25 As discussed above, even if the UNFCCC and the Paris Agreement constitute a special regime to customary principles of environmental law, the former do not exclude the latter because there is no conflict between them. The customary principle of prevention and the duty of due diligence are broader. In this regard, the UNFCCC reaffirms the prevention principle in its Preamble.[114] Those principles therefore continue to apply to transboundary harm caused by anthropogenic GHG emissions and complement States' obligations and commitments under the climate change agreements.

II. International Human Rights Law

3.26 The protection of and respect for human rights is "the foundation of freedom, justice and peace in the world"[115] and one of the three pillars of the UN's mission.[116] This body of law is based largely on the ICCPR and the ICESCR. These instruments provide for the protection of rights that, as demonstrated in several Written Statements,[117] are threatened by climate change, including the right to life; the right to private and family life; the right of self-determination; the right to an adequate standard of living, including the right to food and water; and the right to health. The overwhelming majority of States and organizations agree that the ICCPR and ICESCR apply to climate change[118]—a view which The Gambia supports.

---

[114] UNFCCC, Preamble ("*Recalling also* that States have … 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").

[115] Universal Declaration of Human Rights (entered into force 10 December 1948) ("**UDHR**"), Preamble.

[116] UN Charter, art. 1(3).

[117] *See, e.g.*, Written Statement of Albania, para. 96; Written Statement of Antigua and Barbuda, paras. 189-196; Written Statement of Burkina Faso, para. 219; Written Statement of Canada, para. 25; Written Statement of the IUCN, paras. 474-475, 481; Written Statement of Madagascar, para. 65; Written Statement of the Melanesian Spearhead Group, para. 254; Written Statement of Singapore, paras. 3.77-3.81; Written Statement of Timor-Leste, para. 298.

[118] *See, e.g.*, Written Statement of Bolivia, para. 17; Written Statement of Chile, para. 68; Written Statement of Ecuador, para. 3.98; Written Statement of Kenya, para. 5.51; Written Statement of Namibia, para. 78; Written Statement of Sri Lanka, para. 94(a); Written Statement of Thailand, para. 26; Written Statement of Tuvalu, para. 98; Written Statement of the European Union, paras. 222, 231.

3.27 A minority of participants, however, while accepting that States must consider human rights when taking climate change actions,[119] dispute that States have human rights obligations in respect of climate change. They argue that (i) human rights treaties are not responsive to Question (a) because they do not contain climate change obligations;[120] and (ii) human rights obligations are territorial in nature and therefore cannot encompass climate change obligations which are global in nature.[121] As The Gambia shows below, both arguments are profoundly mistaken.

A. States Have Climate Change Obligations Under the ICCPR and ICESCR

3.28 It is immaterial that the ICCPR and ICESCR do not expressly mention "climate change". These instruments were adopted at a time when the international community did not yet fully recognize the impact of climate change on the enjoyment of human rights. Their purpose is nonetheless to protect human rights from *all* sources of infringement. A proper interpretation of the obligations under these instruments therefore must take into account existing legal frameworks and principles as well as the best available scientific evidence on climate change.

3.29 Under Article 31 of the Vienna Convention on the Law of Treaties ("VCLT"), "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".[122] There is nothing in the ordinary meaning of the relevant provisions of the ICCPR and ICESCR to indicate that they cannot be breached by the impacts of anthropogenic GHG emissions. The language of these provisions is broad and their scope of protection is comprehensive. For example:

[119] For instance, the U.S. recognizes that "[m]easures taken by a State to mitigate or adapt to the adverse effects of climate change must be in accordance with its international human rights obligations". Written Statement of the United States of America, para 4.38. *See also* Written Statement of the United Kingdom, para. 33 (recognizing that international human rights law "may have a bearing on climate change-related issues and disputes").

[120] Written Statement of the United Kingdom, para. 33; Written Statement of the United States of America, Section IV.C.ii.; Written Statement of Saudi Arabia, para. 4.97.

[121] *See, e.g.*, Written Statement of the Russian Federation, pp. 9-11.

[122] Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980), 1155 UNTS 331, art. 31(1).

- Article 6 of the ICCPR provides that "[e]very human being has the inherent right to life" and that "[n]o one shall be arbitrarily deprived of his life".[123]

- Article 17 of the ICCPR provides that "[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence".[124]

- Common Article 1 of the ICCPR and ICESCR states that "[a]ll peoples have the right of self-determination" and that they shall "freely determine their political status and freely pursue their economic, social and cultural development".[125]

- Article 11(1) of the ICESCR recognizes "the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions".[126]

3.30 Read in light of their object and purpose, namely to "secure [the] universal and effective recognition and observance [of human rights]"[127] which "derive from the inherent dignity of the human person",[128] both human rights instruments must be interpreted to account for subsequent legal and scientific developments. These include the establishment of a climate change treaty regime and an overwhelming scientific consensus regarding the impacts of climate change on the enjoyment of human rights.

3.31 Further, Article 31(3)(c) of the VCLT provides that "any relevant rules of international law applicable in the relations between the parties" "shall be taken into account". This ensures conformity between States' different obligations under international law. Indeed, as the Court has

[123] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) ("**ICCPR**"), art. 6(1).

[124] *Ibid.*, art. 17.

[125] *Ibid.*, art. 1(1); International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) ("**ICESCR**"), art. 1(1).

[126] ICESCR, art. 11(1).

[127] UDHR, Preamble.

[128] ICCPR, Preamble; ICESCR, Preamble.

confirmed, a treaty must be "interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation".[129]

3.32 This is particularly necessary "where the concepts used in the treaty are open or evolving".[130] As the Court held in the *Dispute Regarding Navigational and Related Rights* case:

> "[W]here the parties have used generic terms in a treaty, the parties necessarily having been aware that the meaning of the terms was likely to evolve over time, and where the treaty has been entered into for a very long period or is 'of continuing duration', the parties must be presumed, as a general rule, to have intended those terms to have an evolving meaning".[131]

3.33 Every element of this test is satisfied with respect to the UDHR, ICCPR and ICESCR. The UDHR was proclaimed in 1948 while the ICCPR and ICESCR entered into force in 1976. All three instruments are "of continuing duration" and contain provisions which, as demonstrated above, are generic to cover the broadest possible protection of fundamental human rights. It follows that the rights contained therein must be presumed to have an evolving meaning that is informed by the entire legal system at the time of interpretation, including international environmental law.

3.34 One State argues that the *travaux préparatoires* of the ICCPR indicate that the right to life under Article 6 of the Covenant only covers the actual taking of life rather than matters affecting the conditions and quality of life.[132] This argument, however, is inconsistent with the jurisprudence of human rights courts and treaty bodies. In General Comment No. 36, the Human Rights

---

[129] *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*, p. 31, para. 53. *See also Indus Waters Kishenganga Arbitration (Pakistan v. India)*, PCA Case No. 2011-01, Partial Award (18 February 2013), para. 452 (holding that "principles of international environmental law must be taken into account even when … interpreting treaties concluded before the development of that body of law").

[130] International Law Commission, *Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law*, UN Doc. A/CN.4/L.702 (18 July 2006), p. 16, para. 14(23).

[131] *Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua), Judgment, I.C.J. Reports 2009*, p. 213, at p. 243, para. 66.

[132] Written Statement of the United States of America, para. 4.45.

Committee explained that the right to life "should not be interpreted narrowly".[133] The right not only "concerns the entitlement of individuals to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death", it also encompasses a right to "life with dignity".[134] In light of the threats posed by climate change to the ability of present and future generations to enjoy the right to life, the Committee stated: "[O]bligations of States parties under international environmental law should thus inform the content of article 6 of the Covenant, and the obligation of States parties to respect and ensure the right to life should also inform their relevant obligations under international environmental law".[135]

3.35 Similarly, in the *Portillo* case, the Committee determined that States "should take all appropriate measures to address the general conditions in society that may give rise to threats to the right to life or prevent individuals from enjoying their right to life with dignity". The Committee emphasized that "these conditions include environmental pollution".[136]

3.36 Regional human rights courts have reached similar conclusions. The IACtHR, for example, concluded that the right to life and personal integrity under the American Convention on Human Rights requires States to "fulfill a series of obligations with regard to both damage that has occurred within their territory and transboundary damage."[137] In *Verein Klimaseniorinnen Schweiz v. Switzerland*, the ECtHR similarly held that Article 2 (the right to life) and Article 8 (the right to private and family life) of the European Convention on Human Rights encompass the duty to mitigate climate change.[138]

---

[133] UN Human Rights Committee, *General Comment No. 36 – Article 6: right to life*, UN Doc. CCPR/C/GC/36 (3 September 2019) (Dossier No. 299), para. 3.

[134] *Ibid.*

[135] *Ibid.*, para. 62.

[136] UN Human Rights Committee, *Portillo Caceres and Others v. Paraguay*, UN Doc. CCPR/C/126/D/2751/2016 (25 July 2019), para. 7.3.

[137] Inter-American Court of Human Rights, *Advisory Opinion OC-23/17* (15 November 2017) ("**IACtHR, *Advisory Opinion OC-23/17***"), para. 125 ("To comply with the obligations to respect and ensure the rights to life and personal integrity, in the context of environmental protection, States must fulfill a series of obligations with regard to both damage that has occurred within their territory and transboundary damage".).

[138] *Case of Verein Klimaseniorinnen Schweiz and others v. Switzerland*, ECHR Application No. 53600/20, Judgment (9 April 2024), paras. 513, 519.

3.37 The relationship between human rights law and environmental law and the serious threats posed by climate change to the enjoyment of human rights led the UN General Assembly in July 2022 to "[r]ecognize[] the right to a clean, healthy and sustainable environment as a human right".[139] While a handful of States question the customary status of this right and the existence of any associated obligations,[140] there is overwhelming evidence to the contrary. The right to a clean, healthy and sustainable environment is recognized in regional human rights declarations and instruments such as the African Charter on Human and People's Rights, the Arab Charter on Human Rights, the ASEAN Human Rights Declaration, and the American Declaration on the Rights of Indigenous People.[141] It is also codified in the national constitutions and laws of 156 States around the world.[142] Regional human rights bodies such as the African Commission on Human and Peoples' Rights and the IACtHR have also determined that this right imposes clear obligations upon States and "constitutes a universal value that is owed to both present and future generations".[143] The import of the right is underscored by the General Assembly as being "related to other rights".[144] As Vanuatu correctly observed, it is a condition precedent for the realization of other human rights.[145]

3.38 For these reasons, numerous participants are right to observe that the right to a clean, healthy and sustainable environment is a free-standing human right that has a customary character.[146] As the Netherlands notes, it links international environmental law to human rights

[139] UN General Assembly, Resolution 76/300, *The human right to a clean, healthy and sustainable environment*, UN Doc. A/RES/76/300 (1 August 2022) (Dossier No. 260), para. 1.

[140] Written Statement of the United States of America, paras. 4.54-4.58; Written Statement of Indonesia, para. 42-43.

[141] IACtHR, *Advisory Opinion OC-23/17*, paras. 58-59, 61.

[142] UN Human Rights Council, *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment,* UN Doc. A/HRC/43/53 (30 December 2019), paras. 11-13.

[143] IACtHR, *Advisory Opinion OC-23/17*, paras. 58-59.

[144] UN General Assembly, Resolution 76/300, *The human right to a clean, healthy and sustainable environment*, UN Doc. A/RES/76/300 (1 August 2022) (Dossier No. 260), para. 2.

[145] Written Statement of Vanuatu, para. 381.

[146] *See* Written Statement of Costa Rica, para. 82; Written Statement of Ecuador, para. 3.108; Written Statement of Micronesia, para. 79; Written Statement of Slovenia, para. 36; Written Statement of Vanuatu, para. 379.

law.[147] In the words of the General Assembly, the right "requires the full implementation of the multilateral environmental agreements under the principles of international environmental law".[148]

3.39 In light of the above, the Court should apply international human rights law in ascertaining the obligations of States in respect of climate change, giving effect to the principle that when two normative frameworks bear on a single issue "they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations".[149]

B. APPLICABLE HUMAN RIGHTS OBLIGATIONS

3.40 The Gambia submits that the following principles should guide the Court's determination of States' human rights obligations in respect of climate change.

3.41 Human rights law imposes three levels of obligations on States—the duty to respect, the duty to protect, and the duty to fulfill.[150]

3.42 The duty to *respect* requires that States take no action that would interfere with the enjoyment of the right in question.[151] In the climate change context, this entails a duty to refrain from activities that directly contribute to climate change, *i.e.*, emitting GHGs into the atmosphere in amounts that will cause global temperature rise to exceed 1.5° C.

---

[147] Written Statement of the Netherlands, para. 3.34.

[148] UN General Assembly, Resolution 76/300, *The human right to a clean, healthy and sustainable environment*, UN Doc. A/RES/76/300 (1 August 2022) (Dossier No. 260), para. 3.

[149] International Law Commission, *Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law*, UN Doc. A/CN.4/L.702 (18 July 2006), p. 8, para. 14(4).

[150] UN CESCR, *The New International Economic Order and the Promotion of Human Rights: Report on the right to adequate food as a human right submitted by Mr. Asbjorn Eide, Special Rapporteur*, UN Doc. E/CN.4/Sub.2/1987/23 (7 July 1987), paras. 66-69, 112-114; UN OHCHR, "International Human Rights Law", *available at* https://www.ohchr.org/en/instruments-and-mechanisms/international-human-rights-law; B. Lewis, *Environmental Human Rights and Climate Change: Current Status and Future Prospects* (Springer 2018), *available at* https://psipp.itb-ad.ac.id/wp-content/uploads/2020/10/Bridget-Lewis-Environmental-Human-Rights-and-Climate-Change_-Current-Status-and-Future-Prospects-2018-Springer-Singapore.pdf, p. 174.

[151] B. Lewis, *Environmental Human Rights and Climate Change: Current Status and Future Prospects* (Springer 2018), *available at* https://psipp.itb-ad.ac.id/wp-content/uploads/2020/10/Bridget-Lewis-Environmental-Human-Rights-and-Climate-Change_-Current-Status-and-Future-Prospects-2018-Springer-Singapore.pdf, p. 174.

3.43 The duty to *protect* requires that States take positive measures to prevent interference with human rights, including from non-State actors.[152] It therefore requires States to protect their citizens and those subject to their jurisdiction from the harmful effects of climate change, whether or not the States cause the harm themselves, through effective adaptation measures. In addition, the duty to protect demands that States regulate and, to the extent necessary, prevent GHG emissions from private actors.

3.44 The duty to *fulfill* obligates States to take positive actions to ensure all persons enjoy the human rights to which they are entitled.[153] It encompasses both mitigation and adaptation aspects of States' climate change obligations. It requires States to take positive steps to minimize GHG emissions as they are "a key means of ensuring that human rights can be enjoyed into the future".[154] It also obliges States to address the harmful impacts of climate change "through undertaking and supporting adaptation measures which can ensure people continue to enjoy their human rights in the face of climate change".[155]

3.45 The precise requirements corresponding to each obligation depend on the particular human right in question. Under the ICCPR, States must "take the necessary steps … to give effect to the rights recognized in the … Covenant".[156] Under the ICESCR, States are only required to take steps to progressively realize the relevant rights, "individually and through international assistance and co-operation" and "to the maximum of [their] available resources".[157]

3.46 Where the harm that jeopardizes the enjoyment of human rights cannot be directly attributable to States' conduct, the required obligation is one of due diligence. For example, under the duty to protect, States must take measures to protect human rights against interference not attributable to them, including from private actors or natural hazards, but are not required to

[152] *Ibid.*

[153] *Ibid.*

[154] *Ibid.*, p. 179.

[155] *Ibid.*

[156] ICCPR, art. 2(2).

[157] ICESCR, art. 2(1).

guarantee success.[158] In such cases, States are afforded a margin of appreciation as to how they will comply with their human rights obligations. This approach applies to climate change where the cumulative effect of GHG emissions renders attributing a particular climate event to a particular State's actions difficult. In this regard, the Inter-American Commission on Human Rights considers that actions complying with the obligations arising from the right to a healthy environment must be "framed under the application of the principle of due diligence, from which the principles of precaution and prevention of environmental damage are derived … in order to avoid damage, both within the territory and transboundary".[159] This addresses the concern of certain participants that States cannot ensure the full respect and protection of the rights of individuals outside their territory and jurisdiction[160]—they are not required to do so but only to exercise due diligence in that regard.

3.47 The IACtHR has explained that "[t]o comply with the obligations to respect and ensure the rights to life and personal integrity, in the context of environmental protection, States must fulfill a series of obligations with regard to both damage that has occurred within their territory and transboundary damage".[161] These include:

> "(1) the obligation of prevention; (2) the precautionary principle; (3) the obligation of cooperation, and (4) the procedural obligations relating to environmental protection in order to establish and determine the State obligations derived from the systematic interpretation of these provisions together with the obligations to respect and to ensure the rights to life and personal integrity established in the American Convention".[162]

[158] B. Baade, "Due Diligence and the Duty to Protect Human Rights" in H. Krieger, A. Peters & L. Kreuzer, *Due Diligence in the International Legal Order* (OUP 2020), pp. 92-94.

[159] Inter-American Commission on Human Rights & Office of the Special Rapporteur on Economic, Social, Cultural and Environmental Rights, *Resolution No. 3/2021, Climate Emergency: Scope of Inter-American Human Rights Obligations* (31 December 2021), *available at* https://www.oas.org/en/iachr/decisions/pdf/2021/resolucion_3-21_ENG.pdf, p. 14.

[160] Written Statement of the Russian Federation, p. 10.

[161] IACtHR, *Advisory Opinion OC-23/17*, para. 125.

[162] *Ibid.*

The last category consists of obligations relating to access to information, public participation, and access to justice.[163]

3.48 The upshot is that the duties to respect, protect, and fulfill human rights obligate States to reduce GHG emissions and address the harmful effects thereof. The content of that due diligence obligation must be determined by reference to the best available scientific evidence as set out in the UNFCCC and Paris Agreement.

C. HUMAN RIGHTS NORMS ENCOMPASSES EXTRA-TERRITORIAL OBLIGATIONS

3.49 A small number of States argue that, due to the putative territorial nature of human rights norms, they do not create obligations in respect of climate change impacts which are global in nature and thus extend beyond a State's territory.[164] This is incorrect. Both the ICCPR and the ICESCR contain obligations that extend beyond a State's territory and cover activities within its jurisdiction or control.

3.50 States, for example, must respect and ensure the civil and political rights set out in the ICCPR with respect to "all individuals within its territory *and subject to its jurisdiction*".[165] In its *Wall Advisory Opinion*, the Court recognized that the Covenant is "applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory".[166] In its General Comment No. 3 on the right to life, the African Commission on Human and Peoples' Rights considered that States must respect and protect the right to life of individuals "outside of their

[163] *See ibid.*, paras. 64, 211, 212. These rights derive from the rights to seek and receive information, to participate in public affairs, and to effective judicial remedies under the American Convention, which are also provided for under the ICCPR and the IECSCR.

[164] *See, e.g.*, Written Statement of the United States of America, para. 4.48; Written Statement of the Russian Federation, p. 10.

[165] ICCPR, Art. 2(1) (emphasis added).

[166] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)* ("***Wall Advisory Opinion***"), para. 111.

territory" where States "engage[] in conduct which could reasonably be foreseen to result in an unlawful deprivation of life".[167]

3.51 Moreover, States are obligated to ensure respect for the enjoyment of economic, social and cultural rights, such as the right to health and the right to food, "in other countries".[168] The ICESCR does not have a provision limiting its scope of application. It also requires States to achieve "progressively the full realization of the rights" contained in the Covenant through both individual steps and "international assistance and co-operation".[169] The Committee on Economic, Social and Cultural Rights observed that this allows States to maximize resources both within their territory and those available from the international community.[170]

3.52 The IACtHR has affirmed the extraterritorial application of human rights obligations to transboundary environmental harm. It determined that "States have the obligation to avoid transboundary environmental damage that can affect the human rights of individuals outside of their territory."[171] In this sense, individuals whose rights have been affected by transboundary damage are considered to be "under the jurisdiction of the State of origin" based on the

[167] African Commission on Human and Peoples' Rights, *General Comment No. 3 on the African Charter on Human and Peoples' Rights: the Right to Life (Article 4)*, para. B(14).

[168] Committee on Economic, Social and Cultural Rights, General Comment No. 14: *The right to the highest attainable standard of health (article 12)*, E/C.12/2000/4 (11 August 2000), para. 39 ("State parties have to respect the enjoyment of the right to health in other countries, and to prevent third parties from violating the right in other countries, if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law".); Committee on Economic, Social and Cultural Rights, *General Comment No. 12: Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: The Right to Adequate Food (article 11)*, E/C12/1999/5 (12 May 1999), paras. 36–37 ("States parties should take steps to respect the enjoyment of the right to food in other countries, to protect that right, to facilitate access to food and to provide the necessary aid when required".).

[169] ICESCR, Article 2(1) (requiring States "to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means").

[170] Committee on Economic, Social and Cultural Rights, *General Comment No. 3 (1990) on article 12(1) of the International Covenant on Economic, Social and Cultural Rights, on the nature of States Parties' obligations*, E/1991/23 (14 December 1990), para. 13 ("the phrase 'to the maximum of its available resources' was intended by the drafters of the Covenant to refer to both the resources existing within a State and those available from the international community through international co-operation and assistance").

[171] IACtHR, *Advisory Opinion OC-23/17*, para. 101.

understanding that the State has effective control over the relevant activities and is in a position to prevent the harm.[172]

3.53 For these reasons, The Gambia agrees with those States and international organizations that have explained that human rights norms encompass extra-territorial obligations, subject to the limits of a State's jurisdiction and control.[173] Accordingly, States have human rights obligations in respect of transboundary harm from GHG emissions if "there is a causal link between the act that originated in [a State's] territory and the infringement of the human rights of persons outside its territory".[174]

III. The Law of the Sea

3.54 Following the ITLOS Advisory Opinion, it is indisputable that UNCLOS applies to anthropogenic GHG emissions. In particular, ITLOS affirmed that:

- Anthropogenic GHG emissions constitute pollution to the marine environment within the meaning of Article 1(1)(4) of UNCLOS;[175]

- State Parties have a duty of due diligence to take all necessary measures to prevent, reduce and control marine pollution from anthropogenic GHG emissions, taking into account the best available science and climate change agreements, particularly the temperature goal of limiting global warming to 1.5°C above pre-industrial levels;[176]

[172] *Ibid.*, paras. 101-102.

[173] *See, e.g.*, Written Statement of Antigua and Barbuda, paras. 349-355; Written Statement of the Bahamas, paras. 170-171; Written Statement of Bangladesh, para. 105; Written Statement of Burkina Faso, para. 190; Written Statement of Canada, para. 28; Written Statement of Colombia, para. 3.72; Written Statement of the Cook Islands, paras. 223-228; Written Statement of the DRC, para. 157; Written Statement of Ecuador, para. 3.114; Written Statement of Samoa, para. 184; Written Statement of Tuvalu, paras. 101-102; Written Statement of the African Union, para. 196; Written Statement of the European Union, para. 275; Written Statement of the ICUN, para. 407.

[174] IACtHR, *Advisory Opinion OC-23/*17, para. 101. *See also* Written Statement of Colombia, para. 3.72.

[175] *ITLOS Climate Change Advisory Opinion*, para. 441(3)(a).

[176] *Ibid.*, paras. 441(3)(b)-(c)

- States Parties have a stringent duty of due diligence to take all necessary measures to ensure that anthropogenic GHG emissions from activities under their jurisdiction, including those carried out by private actors, do not cause damage to other States and their environment;[177]

- States Parties must assist developing States, in particular those most vulnerable to climate change, in their efforts to address pollution resulting from GHG emissions.[178]

- States Parties must monitor, report, and conduct EIAs of both public and private activities within their jurisdiction or control that may cause significant harm to the marine environment through GHG emissions, including cumulative effects, with a view to mitigating and adapting to the adverse effects of such emissions;[179]

- States Parties have a duty of due diligence to protect and preserve the marine environment from climate change impacts and ocean acidification, including taking measures to restore marine habitats and ecosystems where the marine environment has been degraded;[180] and

- The standard of due diligence applicable to both the obligations to prevent, reduce and control marine pollution and to protect and preserve the marine environment is a stringent one given the high risks of serious and irreversible harm to the marine environment from anthropogenic GHG emissions.[181]

3.55 The Gambia submits that the Court should take into account these conclusions with respect to its determination of States' obligations to mitigate and adapt to climate change impacts under the law of the sea.

[177] *Ibid.*, paras. 441(3)(d).

[178] *Ibid.*, para. 441(3)(k).

[179] *Ibid.*, para. 441(3)(l).

[180] *Ibid.*, paras. 441(4)(b)-(c).

[181] *Ibid.*, paras. 441(3)(c) and 441(4)(c).

IV. The Law Governing World Heritage

3.56 The Gambia supports the view that States are obligated to protect cultural and natural heritage from climate change impacts under The World Heritage Convention,[182] which was adopted in 1972 and has been ratified by 195 States.

3.57 Cultural and natural heritage are severely impacted by anthropogenic climate change.[183] Rising temperatures and extreme weather events, such as flooding and droughts, affect fragile historical buildings. Climate change-induced alterations to hydrological, chemical, and biological processes of the soil endanger the preservation of archeological sites. Ocean warming and sea-level rise, which lead to coastal flooding and loss of biodiversity, threaten natural and mixed heritage sites that are comprised of coral reefs, rainforests, and other important ecosystems. Increased salinity and acidification of water damage underwater cultural heritage. And coastal erosion and the resulting population displacement impact cultural heritage sites that are living spaces and which their communities depend on for sustenance. These impacts were set out in a 2006 report by a working group of experts established by the World Heritage Committee, a body comprised of States Parties to the Convention.[184]

3.58 Article 4 of the World Heritage Convention requires each State Party to "do all it can" and "to the utmost of its own resources and, where appropriate, with any international assistance and co-operation", to "ensur[e] the *identification, protection, conservation, presentation and transmission to future generations* of the cultural and natural heritage … situated on its territory".[185]

3.59 Article 5 of the Convention further requires that each State Party "ensure that effective and active measures are taken for the protection, conservation and presentation of the cultural and

---

[182] Written Statement of Kenya, para. 5.69.

[183] Written Statement of Kenya, paras. 5.70-5.71.

[184] World Heritage Committee, 30th Session, *7.1 Issues related to the state of conservation of World Heritage properties: the impacts of Climate Change on World Heritage properties*, Doc. WHC-06/30.COM/7.1 (26 June 2006), Annex 4, *Predicting and Managing Effects of Climate Change on World Heritage: A joint report from the World Heritage Centre, its Advisory Bodies, and a broad group of experts to the 30th session of the World Heritage Committee*, *available at* https://whc.unesco.org/archive/2006/whc06-30com-07.1e.pdf.

[185] World Heritage Convention, art. 4 (emphasis added).

natural heritage situated on its territory".[186] These include "integrat[ing] the protection of … heritage into comprehensive planning programmes",[187] "develop[ing] scientific and technical studies and research … [to] … counteract[] the dangers that threaten … cultural or natural heritage",[188] and "tak[ing] the appropriate legal, scientific, technical, administrative and financial measures necessary for the identification, protection, conservation, presentation and rehabilitation of [the cultural or natural] heritage".[189]

3.60 Article 6 imposes an obligation to protect cultural and natural heritage that applies extraterritorially. It requires States "not to take any deliberate measures which might damage directly or indirectly the cultural and natural heritage … *situated on the territory of other States Parties* to this Convention".[190]

3.61 In light of the scientific evidence on the impacts of climate change on world heritage sites, and applying the systemic integration approach called for by Article 31 of the VCLT, the obligations under the World Heritage Convention both inform and are informed by the obligations of States under international environmental law.

3.62 The ordinary meaning of Articles 4 and 5 of the World Heritage Convention requires States to take effective localized adaptation measures to address the negative impacts of climate change on specific heritage sites within their territories.[191] Article 6 supports a mitigation obligation of States to refrain from GHG emissions which can damage cultural or natural heritage located outside their territories. The article covers both "direct" and "indirect" damage, covering the ways in which GHG emissions affect heritage sites, *i.e.*, through global warming, sea-level rise, ocean acidification, and extreme weather events. And, given the scientific consensus as to the causal

[186] *Ibid.*, art. 5.

[187] *Ibid.*, art. 5(a).

[188] *Ibid.*, art. 5(c).

[189] *Ibid.*, art. 5(d).

[190] *Ibid.*, art. 6(3) (emphasis added).

[191] O. Quirico, "Nested Boxes: Tangible Cultural Heritage and Environmental Protection in Light of Climate Change" in A. Carstens & E. Varner (eds.), *Intersections in International Cultural Heritage Law* (OUP 2020), pp. 273-274.

nexus between GHG emissions and climate change, releasing GHG emissions must be characterized as a "deliberate" act causing damage to heritage sites.

3.63 Read in the context of the Convention, the "dangers" that threaten world heritage sites, and against which protection and conservation are necessary, include "calamities and cataclysms", "serious fires", "changes in water level" and "floods".[192] These are the inevitable consequences of climate change.

3.64 The World Heritage Committee identified Articles 4, 5 and 6 as the key provisions that address the impacts of climate change on cultural heritage. It concluded that they require States to monitor climate change impacts and to take adequate site-level adaptation and mitigation measures.[193] The Committee stressed that world heritage properties can be both "an asset to be protected and a resource to strengthen the ability of communities and their properties to resist, absorb, and recover from the effects of a hazard".[194]

3.65 In ascertaining States' obligations under the World Heritage Convention, the Court should take into account the UNFCCC, the Kyoto Protocol, the Paris Agreement, and principles of environmental law as relevant rules of international law applicable in the relations between the parties to the World Heritage Convention. The result of such a systemic integration approach is that a single set of obligations emerges from these complementary legal regimes that requires States to undertake both site-level and general mitigation and adaptation measures that are optimal for protecting cultural and natural heritage against the harmful effects of climate change.

***

[192] World Heritage Convention, art. 11(4).

[193] UNESCO World Heritage Centre, *Policy Document on the Impacts of Climate Change on World Heritage Properties* (2008), *available at* https://whc.unesco.org/uploads/activities/documents/activity-397-2.pdf, pp. 6-8.

[194] General Assembly of the State Parties to World Heritage Convention, 20th Session, *Policy Document for the Integration of a Sustainable Development Perspective into the Processes of the World Heritage Convention*, Doc. WHC-15/20.GA/INF.13 (6 November 2015), *available at* https://whc.unesco.org/archive/2015/whc15-20ga-inf13-en.pdf, para. 16.

3.66 In conclusion, in determining the obligations of States in respect of climate change, the Court is not limited to interpreting and applying the UNFCCC, the Kyoto Protocol and the Paris Agreement but should be guided by other bodies of law that are implicated by climate change as well, including human rights law, the law of the sea, the law governing cultural and natural heritage, and any other bodies of law that the Court considers relevant to the Request.

CHAPTER 4
RESPONSE TO QUESTION (A): STATES HAVE AN OBLIGATION OF DUE DILIGENCE TO PROTECT THE CLIMATE SYSTEM AND OTHER PARTS OF THE ENVIRONMENT FROM ANTHROPOGENIC GREENHOUSE GAS EMISSIONS

4.1 Applying the above legal framework and taking into account the best available scientific evidence, The Gambia sets out the responses to Question (a) that it respectfully suggests should be reflected in the Court's advisory opinion.

I. States Have an Obligation of Due Diligence to Reduce GHG Emissions to Limit the Increase in Global Average Temperatures to 1.5°C Above Pre-Industrial Levels and to Adopt Effective Adaptation Measures

4.2 In The Gambia's submission, in light of the harmful impacts of GHG emissions on the climate system, States have an obligation of due diligence to minimize anthropogenic GHG emissions to, at a minimum, limit the increase in global average temperature to 1.5°C above pre-industrial levels, and to adopt effective adaptation measures against harms that still occur at a 1.5°C increase. As discussed above, this standard ("**1.5°C Standard**"), as codified in the Paris Agreement, reflects the scientific consensus that an increase of more than 1.5°C would result in irreversible harm to the environment and catastrophic consequences for people, and that even an increase of just 1.5°C, climate change would still cause harm to the environment and people.

4.3 This due diligence obligation stems from multiple sources. *First,* it is derived from the principle of no-harm and the duty of prevention under customary international law governing the protection of the environment. Given the transboundary impact of GHG emissions, which affect the atmosphere, cryosphere, ocean, ecosystems, and people around the world, it is indisputable that the due diligence obligation applies to States' actions in respect of climate change. States are accordingly required to take all necessary measures to minimize GHG emissions to prevent significant harm to the climate system and other parts of the environment. The best available scientific evidence confirms that the threshold at which significant harm can be prevented is the 1.5°C Standard.

4.4 What constitutes necessary measures must be assessed by reference to the UNFCCC, the Kyoto Protocol, and the Paris Agreement, which set out concrete and objective standards for

actions based on scientific evidence. These instruments require States to take necessary steps to curb emissions through, *inter alia*, implementing national programmes containing measures to mitigate climate change,[195] cooperating in the development and diffusion of technologies that prevent, reduce or control anthropogenic GHG emissions,[196] adopting relevant policies and measures to meet the emission reduction target,[197] preparing and maintaining nationally determined contributions to the temperature goal,[198] and mobilizing finances for both mitigation and adaption efforts.[199] Most notably, the Paris Agreement and the UNFCCC oblige States, in taking these steps, to show the "highest possible ambition"[200] and to demonstrate "progression".[201]

4.5 Necessary measures should be assessed by reference to the best available scientific evidence. The UNEP Production Gap Report confirmed that, in order to meet the 1.5°C Standard, emissions from fossil fuels must decline by approximately 6% per year. It concluded that "[b]arring dramatic, unexpected advances in carbon capture and storage (CCS) technology, th[is] decline[] mean[s] that most of the world's proven fossil fuel reserves must be left unburned".[202] In other words, the due diligence obligation to comply with the 1.5°C Standard requires States to take measures to phase out fossil fuels and replace them with clean and renewable energy.

---

[195] UNFCCC, art. 4(1)(b).

[196] *Ibid.*, art. 4(1)(c).

[197] Kyoto Protocol, art. 2(1)(a).

[198] Paris Agreement, art. 4(2).

[199] *Ibid.*, arts. 9(1), 9(3).

[200] *Ibid.*, art. 4(3).

[201] *Ibid.*, arts. 3, 4(3), 9(3). *See also* UNFCCC, art. 4(2)(b) ("In order to *promote progress* to this end, each of these Parties shall communicate, within six months of the entry into force of the Convention for it and periodically thereafter, and in accordance with Article 12, detailed information on its policies and measures referred to in subparagraph (a) above, as well as on its resulting projected anthropogenic emissions by sources and removals by sinks of greenhouse gases not controlled by the Montreal Protocol for the period referred to in subparagraph (a), with the aim of returning individually or jointly to their 1990 levels these anthropogenic emissions of carbon dioxide and other greenhouse gases not controlled by the Montreal Protocol".) (emphasis added).

[202] UNEP, *Production Gap Report: The discrepancy between countries' planned fossil fuel production and global production levels consistent with limiting warming to 1.5°C or 2°C* (2019), *available at* https://www.unep.org/resources/report/production-gap-report-2019, p. 8. *See also* Union of Concerned Scientists, "The UCS Position on a Fossil Fuel Phaseout" (last accessed: 4 March 2024), *available at* https://www.ucsusa.org/ucs-fossil-fuel-phaseout.

4.6 *Second,* the due diligence obligation that States must reduce GHG emissions to comply with the 1.5°C Standard arises from States' existing obligations to respect human rights.[203] The Gambia emphasizes, in particular, the obligation to respect the right to life, the right to water, and the right of self-determination, all of which are seriously threatened by climate change and are particularly pertinent to The Gambia and other African States.

4.7 The *right to life* is protected under Article 3 of the UDHR and Article 6 of the ICCPR. It "inheres in every human being" and "is the supreme right from which no derogation is permitted".[204] As discussed above, the right to life not only entails the right to be protected from acts and omissions that may cause an unnatural or premature death but also the right to enjoy life with dignity. The right can be violated even if the relevant act or omission does not result in the loss of life.[205]

4.8 That climate change leads to loss of human lives and jeopardizes people's ability to live with dignity is incontrovertible. Since The Gambia is acutely affected by climate disasters,[206] the lives of its people are constantly in danger. Considering that the majority of The Gambia's population lives in low-lying coastal areas, they are at particular risk of being killed or displaced in climate disasters. In 2022, for instance, severe flooding in The Gambia displaced over 7,000 people.[207] Flooding, and the resulting interruption of water, sanitation, and hygiene services, often leads to outbreaks of cholera and other water-borne diseases and may limit access to essential health services.[208]

4.9 Access to safe drinking water and sanitation are internationally recognized human rights under the umbrella of the *right to water*, which is derived from the right to an adequate standard

[203] The applicability of international human rights law and standards to the climate change context are discussed in Chapter 5 of this written statement.

[204] UN Human Rights Committee, *General Comment No. 36 – Article 6: right to life*, UN Doc. CCPR/C/GC/36 (3 September 2019) (Dossier No. 299), para. 2.

[205] UN Human Rights Committee, *Ioane Teitiota v. New Zealand*, UN Doc. CCPR/C/127/D/2728/2016 (23 September 2020), paras. 9.4-9.5.

[206] UNDAC, *The Gambia Floods: Rapid Needs Assessment Report and Response Recommendations* (2022), p. 3.

[207] *Ibid.*

[208] *Ibid.*, pp. 26-28.

of living under Article 11(1) of the ICESCR. On 28 July 2010, the UN General Assembly adopted a landmark resolution recognizing "the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights".[209] The right to water focuses on ensuring availability, accessibility, affordability, quality and safety, and acceptability of water to everyone.[210] These elements, as demonstrated above, are threatened by the effects of climate change, including droughts, the contamination of water sources, and the salinization of water in coastal areas that renders water sources infit for consumption and irrigation.[211]

4.10 In a country with water scarcity like The Gambia, which also lacks resources to build and maintain water sources and is thus highly dependent on natural water sources, climate change endangers its water security. Indeed, climate change means that The Gambia's peripheral region is becoming hotter and dryer and experiencing more frequent and persistent droughts, making natural water sources even more scarce.[212] Meanwhile, the coastal region has experienced more floods, damaging The Gambia's already fragile water infrastructure.

4.11 Recognized as a *jus cogen* norm, the *right of self-determination* is provided for in Article 1 of the UN Charter and Common Article 1 of the ICCPR and ICESCR. The Court in the *Chagos Archipelago Advisory Opinion* held that respect for the right to self-determination is an obligation *erga omnes* that applies to the entire international community.[213] Accordingly, "[e]very State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples".[214] States must ensure that people are free to pursue their

[209] UN General Assembly, Resolution 64/292, *The human right to water and sanitation*, UN Doc. A/RES/64/292 (3 August 2010), art. 1.

[210] *See, e.g.*, Special Rapporteur on the human rights to safe drinking water and sanitation, P. Arrojo Agudo, *Special Thematic Report 1: Outlining the impact of climate change on water and sanitation around the world* (January 2022), *available at* https://www.ohchr.org/sites/default/files/2022-01/climate-change-1-friendlyversion.pdf, p. 3.

[211] *See, e.g.*, *ibid.*, p. 2.

[212] UNDAC, *The Gambia Floods: Rapid Needs Assessment Report and Response Recommendations* (2022), p. 3, 42.

[213] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019,* p. 95, at p. 139, para. 180.

[214] UN General Assembly, Resolution 2625 (XXV), *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, UN Doc. A/RES/2625(XXV) (24 October 1970), pp. 123-124.

economic, social and cultural development and that in no case are they "deprived of [their] own means of subsistence".[215]

4.12 Climate change threatens the right to self-determination. Ocean warming, sea-level rise, and associated events such as salinization, and extreme weather events, *inter alia*, inundate territories and displace populations. Their socio-economic impacts, including the loss of livelihoods, implicate people's means of subsistence and development.

4.13 As discussed in Chapter 4, The Gambia is extremely vulnerable to sea-level rise and rainfall variability. Floods and droughts are the most frequent extreme events in The Gambia. Droughts in The Gambia's peripheral regions drive displacement towards coastal and riverine low-lying areas, which are increasingly prone to severe flooding.[216] The consequences are not only the inundation of cities, districts and villages and the displacement of population but also the hinderance of the Gambian people's pursuit of economic, social and cultural development.

4.14 *Third*, the obligation of due diligence also finds its basis in UNCLOS, which requires State Parties to take all necessary steps to prevent, reduce and control marine pollution and protect and preserve the marine environment from anthropogenic GHG emissions. In light of the catastrophic impacts of climate change on the marine environment, which was a matter of universal consensus among States participating in the written and oral phases in the ITLOS advisory opinion proceeding, the obligation under Part XII of UNCLOS entails the obligation to cut GHG emissions to avert significant harm to the marine environment. This, again, can only be achieved by compliance with the 1.5°C Standard as reflected in the scientific consensus and confirmed by the ITLOS Advisory Opinion.

4.15 *Fourth*, States have the obligation to protect natural and cultural heritage within their own territory and the territory of other States against climate change impacts under the World Heritage Convention. As explained above, through climate change, GHG emissions cause unprecedented

[215] ICCPR, arts. 1(1), 1(2); ICESCR, arts. 1(1), 1(2). In this regard, The Gambia notes that the right of self-determination, which protects a people's freedom to pursue their economic development and means of subsistence, does not give them the right to pollute for that purpose.

[216] UNDAC, *The Gambia Floods: Rapid Needs Assessment Report and Response Recommendations* (2022), p. 3, 7.

harm to world heritage sites. In the case of The Gambia's Kunta Kinteh Island—recognized as a UNESCO cultural heritage site since 2003—climate change threatens its existence and the integrity of its structures in numerous ways. For instance, as it sits within River Gambia, it is threatened by flooding and sea-level rise.

4.16 The obligations under the World Heritage Convention, which require States to prevent transboundary harm that may affect natural and cultural heritage in other States' territory, are also ones of due diligence. In the climate change context, its content is informed by the best available science as well as the UNFCCC, the Paris Agreement and customary environmental law principles. Specifically, States must take all necessary measures to curb GHG emissions to protect their own heritage and those of other States, which can only be achieved through compliance with the 1.5°C Standard. They must additionally take effective adaptation measures to protect heritage within their own territory against climate change impacts.

4.17 To be clear, there are not four different obligations of due diligence arising under environmental law, human rights law, the Law of the Sea and the law governing cultural and natural heritage. The principle of systemic integration of all these bodies of law results in a single obligation of due diligence to curb GHG emissions to comply with the 1.5°C Standard and address any harms that still occur at that standard. This obligation not only protects the environment, including the marine environment, but also human rights and cultural and natural heritage. What constitutes due diligence—an evolving concept—must be assessed based on the best available science on climate change.

II. In Discharging Their Due Diligence Obligation, States Must Cooperate in Accordance With the Principle of CBDR-RC

4.18 The CBDR-RC principle reflects the reality that States have different degrees of vulnerability, and responsibilities for contributing, to climate change impacts, yet different socio-economic circumstances affect their abilities to respond to such impacts. The principle thus recognizes that the means by which States discharge their due diligence obligations may vary. The principle is an key pillar of international environmental law and is embodied in a variety of instruments, including the Rio Declaration, the Stockholm Declaration, the Montreal Protocol on

Substances that Deplete the Ozone Layer, and the Convention on Biological Diversity.[217] The Gambia thus disagrees with the claim by a handful of States that the applicability of CBDR-RC is limited to the Paris Agreement.[218]

4.19 States like The Gambia, which bear little responsibility for having created the present climate crisis and which are not themselves significant emitters of GHGs, should not be required to assume the same burden as States that contributed and continue to contribute the most to global GHG emissions. As numerous States have observed, the respective obligations of States must differ based on their historical and current share of GHG emissions, as well as their capacity to tackle the effects of climate change.[219]

4.20 Under the climate change treaties, mitigation obligations and commitments are shaped by CBDR-RC and the status of a country as developed, developing, or LDC and SID. Specifically: (i) developed country parties "should continue taking the lead by undertaking economy-wide absolute emission reduction targets";[220] (ii) developing country parties "should continue enhancing their mitigation efforts, and are encouraged to move over time towards economy-wide emission reduction or limitation targets in the light of different national circumstances";[221] and (iii) the LDCs and SIDSs "may prepare and communicate strategies, plans and actions for low greenhouse gas emissions development reflecting their special circumstances".[222]

---

[217] *See* Rio Declaration, Principle 7 ("In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command".); Stockholm Declaration of the United Nations Conference on the Human Environment (1972), Principle 12; Montreal Protocol on Substances that Deplete the Ozone Layer (adopted 16 September 1987, entered into force 1 January 1989), 1522 UNTS 3 (Dossier No. 26), Art. 5(1); Convention on Biological Diversity (opened for signature 5 June 1992, entered into force 29 December 1993) (Dossier No. 19), Arts. 20, 21.

[218] Written Statement of Germany, para. 79. *See also* Written Statement of Japan, para. 24.

[219] *See, e.g.*, Written Statement of Singapore, para. 3.33; Written Statement of Costa Rica, paras. 60-61; Written Statement of Indonesia, paras. 65, 67; Written Statement of Colombia, para. 3.54; Written Statement of St. Lucia, para. 88; Written Statement of Timor Leste, paras. 130, 138, 228-232; Written Statement of Pakistan, paras. 32-46; Written Statement of Micronesia, para. 67; Written Statement of China statement, para. 35.

[220] Paris Agreement, art. 4(4).

[221] *Ibid.*

[222] *Ibid.*, art. 4(6).

4.21 Article 9 of the Paris Agreement further establishes a concrete obligation for developed country parties to "provide financial resources to assist developing country Parties with respect to both mitigation and adaptation".[223] Emerging economies that are not traditionally categorized as "developed" "are encouraged to provide or continue to provide such [financial resources] voluntarily".[224] Furthermore, Article 9 stipulates that developed country parties "should continue to take the lead in mobilizing climate finance";[225] including from both private and public funds as well as domestic and international sources.[226] These differentiated commitments between developed and developing countries in respect of climate finance give effect to the principle of equity and CBDR-RC. While The Gambia appreciates the concern—expressed by a few States[227]—that the binary categorization of "developed" versus "developing" countries may be an overly rigid metric, the need for more nuanced assessments should not detract from the broad consensus that fundamental considerations of fairness and equity must inform States' common but differentiated climate change obligations.

4.22 The same equity consideration underlies the obligations under human rights law, the law of the sea, and the law governing cultural and natural heritage. Article 2(1) of the ICESCR states that the obligation to respect economic, social, and cultural rights under the Covenant requires States to take steps "to the maximum of [their] available resources". UNCLOS recognizes that the obligation to establish international rules, standards and practice to prevent, reduce and control marine pollution must "tak[e] into account characteristic regional features, the economic capacity of developing States and their need for economic development".[228] And the World Heritage

[223] *Ibid.*, art. 9(1).

[224] *Ibid.*, art. 9(2).

[225] *Ibid.*, art. 9(3).

[226] J. Gastelumendi & I. Gnittke, "Chapter 14: Climate Finance (Article 9)" in D. Klein *et al*., *The Paris Agreement on Climate Change: Analysis and Commentary* (OUP 2017), p. 244.

[227] *See* Written Statement of Germany, para. 58; Written Statement of Japan, para. 35 ("The Paris Agreement maintains the distinction between the 'developed and developing country Parties', but while these categories may still be relevant, they are nowhere defined and are certainly no longer based on Annexes I or II of the UNFCCC".); Written Statement of United States of America, paras. 3.23-3.30.

[228] UNCLOS, art. 207(4).

Convention qualifies the obligation of a State to "do all it can" to protect cultural and natural heritage by referring to "its own resources".[229]

4.23 CBDR-RC is therefore a legal principle with general application across different bodies of law. This is reflected in the *Urgenda v. Netherlands* case in which the Hague District Court, in interpreting and applying the European Convention on Human Rights, held the Netherlands in violation of the duty of care owed to its citizens for its existing pledge to reduce GHG emissions only by 17%. The court applied CBDR-RC and noted that "the Netherlands, like the other Annex I countries, has taken the lead in taking mitigation measures and has therefore committed to a more than proportionte [*sic*] contribution to reduction".[230] The District Court's decision was confirmed by the Hague Court of Appeals and the Dutch Supreme Court.[231] The importance of the CBDR-RC principle was also affirmed by ITLOS which determined that there were several categories of specific obligations under UNCLOS requiring assistance to developing States, reflecting the reality that "States with lesser capabilities need assistance from States that are better placed in order to meet their environmental responsibilities".[232]

4.24 Giving effect to CBDR-RC also requires recognizing the right to development of developing States. It is clear that developing States lack the capacity to meet the challenges of climate change, in part, due to their lack of economic development. For this reason, the Paris Agreement stresses that States Parties "should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights … [including] the right to development."[233] The UNFCCC likewise emphasizes that States Parties "have a right to, and should, promote sustainable development" and that "economic development is essential for

[229] World Heritage Convention, art. 4.

[230] *State of the Netherlands v. Urgenda Foundation*, Hague District Court, Judgment (24 June 2015), *available at* https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2015/20150624_2015-HAZA-C0900456689_decision-1.pdf, para. 4.79.

[231] *State of the Netherlands v. Urgenda Foundation*, Hague Court of Appeals, Ruling (9 October 2018), para. 76, *available at* https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2018/20181009_2015-HAZA-C0900456689_decision-4.pdf; *State of the Netherlands v. Urgenda Foundation*, Supreme Court of the Netherlands, Judgment (13 January 2020), *available at* https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2020/20200113_2015-HAZA-C0900456689_judgment.pdf, paras. 5.7.1-5.7.3, 8.3.5

[232] *ITLOS Climate Change Advisory Opinion*, paras. 326-339.

[233] Paris Agreement, Preamble.

adopting measures to address climate change".[234] The Convention further affirms that in taking climate actions, States Parties should take "into full account the legitimate priority needs of developing countries for the achievement of sustained economic growth and the eradication of poverty".[235] The Gambia thus supports Sierra Leone's view that the Court should recognize the right to development, affording developing States policy space to utilize their economic resources to develop and, in turn, mitigate and adapt to climate change.[236]

4.25 The Gambia agrees with the position explained in a number of submissions that States, in discharging their obligation of due diligence, and under the CBDR-RC principle, are under a duty to cooperate.[237] Owing to the cumulative nature of climate change, it is only through cooperation that States can achieve the 1.5°C Standard and address the harm caused by climate change. As the IPCC has observed, "[a]ccelerated financial support for developing countries from developed countries and other sources is a critical enabler to enhance mitigation action"[238] States must also share knowledge and transfer technologies on mitigation and adaptation technologies and resources, and well as promote the development and exchange of educational and public awareness materials on climate change and its effects.[239] In this sense, due diligence requires States to act both individually and collectively.

4.26 Like CBDR-RC, the duty to cooperate is not just a principle of international environmental law. It is recognized in, and is applicable to, obligations arising under international human rights law, the law of the sea and the law governing cultural and natural heritage. The ICESCR envisages the progressive realization of rights through steps taken by States "individually and through international assistance and co-operation, especially economic and technical".[240] In the same vein,

[234] UNFCCC, art. 3(4).

[235] *Ibid.*, Preamble.

[236] *See* Written Statement of Sierra Leone, paras. 3.100-3.105.

[237] *See, e.g.*, Written Statement of Sierra Leone, paras. 3.26-3.32; Written Statement of COSIS, paras. 115-145; Written Statement of Kenya, paras. 5.17-5.21; Written Statement of Mexico, paras. 74-81; Written Statement of Micronesia, paras. 65-68.

[238] IPCC 2023, AR6 Synthesis Report, p. 62.

[239] *See* UNFCCC, arts. 4(1)(c), 4(1)(g), 4(1)(i), 6(b).

[240] ICESCR, art. 2(1).

UNCLOS provides mechanisms for collective action to counter climate change impacts on the marine environment, including through the formulation of rules, standards, and guidelines,[241] the elimination and minimization of the effects of pollution,[242] and the promotion of studies and research as well as exchange of information and data.[243] The World Heritage Convention anticipates that States will carry out their obligations "with any international assistance and co-operation, in particular, financial, artistic, scientific and technical, which [they] may be able to obtain".[244] The duty to cooperate is thus recognized by all relevant bodies of international law.

4.27 Read with the CBDR-RC principle, the duty to compensate requires not only providing financial assistance to States that are most vulnerable to the impacts of climate change but also transferring technology at different stages of the technology cycle and engaging in capacity-building measures and other actions to enhance climate change education and public participation.[245] Such financial assistance, transfer of technology, and capacity building relate not only to the environmental impacts of climate change but also the impacts on human rights and cultural and natural heritage. Given the human aspect of climate change, States must work together in responding to climate disasters, including through rescue and humanitarian missions.

4.28 In addition, the duty obliges States to cooperate, at the regional and international levels, to formulate rules addressing any gaps which may obstruct the achievement of the 1.5°C Standard. In The Gambia's view, it is through such international rules that States can make attaining the 1.5°C Standard a realistic prospect.

III. The Obligation of Due Diligence Is Owed to Both Present and Future Generations

4.29 Climate change impacts will be felt for generations to come. The scientific evidence is clear that past GHG emissions have committed present and future generations to many decades of global warming, ice sheet melting, and sea-level rise. It is therefore virtually certain that future

[241] UNCLOS, art. 197.

[242] *Ibid.*, arts. 198-199.

[243] *Ibid.*, art. 200.

[244] World Heritage Convention, art. 4.

[245] Paris Agreement, arts. 7, 9, 12.

generations will experience the catastrophic consequences of climate change—a problem to which they have not contributed.

4.30 A few States have suggested that the climate change treaties do not establish obligations towards future generations.[246] The Gambia disagrees. The UNFCCC and the Paris Agreement both expressly acknowledge the need to respect "intergenerational equity"[247] and "protect the climate system for the benefit of present and future generations of humankind".[248] This principle finds recognition in General Assembly resolutions, which highlight the need to protect the climate system for present and future generations, and in the Court's jurisprudence, which acknowledges that environmental impacts can "cause damage to generations to come"[249] because the environment "represents the living space, the quality of life and the very health of human beings, including generations unborn".[250] Many international treaties protecting the common heritage of mankind recognize the principle of intergenerational equity.[251] These include the World Heritage Convention, which requires each State to "ensur[e] the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage".[252]

4.31 The due diligence obligation to curb GHG emissions so as to meet the 1.5°C Standard extends to future generations. Inherent in the obligation, which encompasses the precautionary principle, is the requirement to act even if scientific evidence is uncertain or incomplete with

[246] *See* Written Statement of the United Kingdom, para. 166; Written Statement of Canada, para. 29.

[247] Paris Agreement, Preamble.

[248] UNFCCC, art. 3(1).

[249] *Nuclear Weapons Advisory Opinion,* p. 244, para. 36.

[250] *Ibid.*, p. 241, para. 29.

[251] Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993), 1760 UNTS 79, Preamble ("Determined to conserve and sustainably use biological diversity for the benefit of present and future generations".); United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (signed 14 October 1994, entered into force 26 December 1996), 1954 UNTS 3, Preamble ("Determined to take appropriate action in combating desertification and mitigating the effects of drought for the benefit of present and future generations"); Rio Declaration, Principle 3 ("The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations".).

[252] World Heritage Convention, art. 4.

respect to a future risk that has not yet materialized. Intergenerational equity is therefore entirely consistent with the due diligence obligation.

4.32 In short, the Court should recognize that the due diligence obligation to protect the climate system from GHG emissions is owed to both present and future generations. In practice, this requires States, in curbing emissions and taking adaptation measures, to assess the long-term risks and impacts of their acts or omissions on future generations, and in doing so, undertake all necessary measures to preserve and conserve the climate system so that future generations can access and benefit from it.

***

4.33 Cognizant of its own obligations to tackle climate change, The Gambia has made significant strides in respect of both mitigation and adaptation measures within the limits of its national capacity and resources. In 2016, it adopted the National Climate Change Policy of The Gambia (the "**NCCP**"), which "provides the framework for managing climate risks, building institutions and capacities, and identifying new opportunities for climate-resilient sustainable development in The Gambia."[253] The goal of the NCCP "is, by 2025, to achieve the mainstreaming of climate change into national planning, budgeting, decision-making, and programme implementation, through effective institutional mechanisms, coordinated financial resources, and enhanced human resources capacity."[254]

4.34 In its first Nationally Determined Contribution ("**NDC**") under the Paris Agreement, The Gambia proposed to reduce GHG emissions by about 2,380 $GgCO_2e$ between 2021 and 2025.[255] This is a significant figure when viewed against The Gambia's actual emissions, which represents

[253] National Climate Change Policy of The Gambia, p. 4.

[254] *Ibid.*, p. 16.

[255] First Nationally Determined Contribution, p. 3. The Gambia's first NDC was initially submitted as its Intended Nationally Determined Contribution and resubmitted as part of the ratification of its ratification of the Paris Agreement. UNDP, *The Gambia Climate Promise: The NDC Update Report* (2021), p. 6.

less than 0.01 percent of global CO_2e emissions.[256] In The Gambia's second NDC, submitted in 2021, it proposed to reduce GHG emissions by 3,290 $GgCO_2e$ between 2021 and 2030.[257]

4.35 The Gambia has also undertaken important adaptation measures. At the national level, The Gambia is working with national and international partners to secure funding to advance its National Adaptation Planning process, which was initiated in 2015 with the aim of transitioning The Gambia to an integrated approach to adaptation.[258]

4.36 The Gambia is committed to transitioning to a low-emissions, climate-resilient development pathway by adjusting national and sectorial policies, including its fiscal policy, to take account of climate change.[259] Current efforts to realize a climate-resilient development pathway include: The Gambia's Strategic Programme for Climate Resilience, which identifies strategies for creating an enabling environment for climate resilient development, incorporating climate resilience into development plans, and enhancing the climate resilience of rural and urban areas in The Gambia;[260] The Gambia's Long-Term Climate Neutral Development Strategy 2050, which identifies specific mitigation and adaptation actions needed for The Gambia to reach net-zero emissions by 2050;[261] and The Gambia's National Development Plan 2023-2027, which prioritizes climate resilience programs.[262]

4.37 The Gambia's capacity to deploy meaningful adaptation measures, however, is impeded by high levels of poverty, as well as limited technological and infrastructure development. In many cases, The Gambia is forced to prioritize sanitation, food security, and health needs over the benefits of long-term adaptation measures. The Gambia therefore sincerely hopes that its experience and that of developing nations in mitigating and adapting to climate change will help

[256] International Monetary Fund, *The Gambia: Climate Change Vulnerabilities and Strategies* (2023), p. 6.

[257] Second Nationally Determine Contribution of the Gambia, p. 11.

[258] *Ibid.*, p. 21.

[259] *Ibid.*, p. 22-23.

[260] *Ibid.*, p. 23-24.

[261] The Gambia's Long-Term Climate Neutral Development Strategy 2050, p. 4.

[262] International Monetary Fund, The Gambia: Climate Change Vulnerabilities and Strategies (2023), p. 5-6.

inform the Court's determination of the content of States' due diligence obligation in respect of climate change.

CHAPTER 5
RESPONSE TO QUESTION B: LEGAL CONSEQUENCES UNDER INTERNATIONAL LAW ARISING FROM ACTS AND OMISSIONS OF STATES CAUSING SIGNIFICANT HARM TO THE CLIMATE SYSTEM AND OTHER PARTS OF THE ENVIRONMENT

5.1 Question (b) seeks the Court's opinion on the legal consequences arising from both "acts and omissions" of States causing significant harm to the climate system and the environment. The Gambia demonstrated in the preceding Chapter that in light of the harmful effects of GHG emissions on the climate system and the environment, States have a due diligence obligation under international law to reduce anthropogenic GHG emissions to, at a minimum, ensure that the 1.5°C Standard is not exceeded. A breach of this due diligence obligation, therefore, entails State responsibility.

5.2 The Court is thus asked to apply the framework for determining the legal consequences of a State's internationally wrongful acts as codified in the ILC Articles on State Responsibility, in the absence of *lex specialis* secondary rules governing the climate change regime. Here, The Gambia disagrees with the position taken by a few States that the climate change agreements constitute *lex specialis* on the legal consequences arising from breaches of climate change obligations.[263]

5.3 The Paris Agreement only establishes a mechanism of compliance with the commitments contained therein, but says nothing about the legal consequences of non-compliance.[264] As the decision adopting the Paris Agreement made clear, the agreement "does not involve or provide a basis for any liability or compensation".[265] Even if it did, since the due diligence obligation to address climate change arises from several bodies of law rather than the climate change agreements *per se*, any rules relating to legal consequences stemming from breaches of those agreements

[263] *See, e.g.*, Written Statement of Kuwait, paras. 89-90; 93-96; *see also* Written Statement of the European Union, para. 326; Written Statement of Saudi Arabia, paras. 6.3-6.8; Written Statement of OPEC, para. 99; Written Statement of the U.S., paras. 3.31-3.35; Written Statement of Germany, paras. 62-63.

[264] Paris Agreement, art. 14(1) (mandating the Conference of the Parties to "periodically take stock of the implementation" of the Agreement); art. 15(1) (establishing a "mechanism to facilitate implementation of and promote compliance with the provisions" of the Agreement, consisting of a Committee).

[265] UNFCCC, Decision 1/CP.21, *Adoption of the Paris Agreement*, UN Doc. FCCC/CP/2015/10/Add.1 (29 January 2016) (Dossier No. 155), para. 51.

cannot govern the legal consequences stemming from breaches of other instruments or bodies of law.

5.4 Additionally, for the *lex specialis* principle to apply, there must be a clear and unambiguous intention of the parties to exclude general international law principles, which is absent in the climate change treaties.[266] On the contrary, when the UNFCCC was open for signature, several small-island States made declarations to the effect that their ratification of the Convention "shall in no way constitute a renunciation of any rights under international law concerning State responsibility for the adverse effects of climate change".[267]

5.5 One State argues that anthropogenic GHG emissions are not internationally wrongful acts because international law does not prohibit States from emitting GHGs.[268] This, however, misses the point. States commit an internationally wrongful act by breaching the due diligence obligation to comply with the 1.5°C standard, rather than just by emitting GHG *per se*. The commentary to Article 1 of the ILC Articles makes clear that "[a]n internationally wrongful act of a State may consist in one or more actions or omissions or a combination of both."[269] Accordingly, both a State's acts as well as its failures to act, including in regard to mitigation and adaptation, can amount to an internationally wrongful act. States can also breach the due diligence obligation through a series of actions or omissions (known as a composite breach) if their GHG emissions alone are not sufficient to constitute a wrongful act.[270] In its advisory opinion, ITLOS confirmed that the failure to "take all necessary measures to prevent, reduce and control marine pollution" from GHG emissions engages "international responsibility".[271]

5.6 Whether a State has breached the due diligence obligation to prevent and address climate change must be assessed on a case-by-case basis, taking account of whether that State has taken

[266] ILC Articles on State Responsibility, art. 55, commentary (4).

[267] *See*, *e.g.*, UNFCCC, "Declarations by Parties", *available at* https://unfccc.int/process-and-meetings/the-convention/status-of-ratification/declarations-by-parties, Declarations of Nauru, Papua New Guinea and Kiribati.

[268] Written Statement of China, para. 135.

[269] ILC Articles on State Responsibility, art. 1, commentary (1).

[270] ILC Articles on State Responsibility, art. 15.

[271] *ITLOS Climate Change Advisory Opinion*, para. 223.

all necessary steps to the utmost of its resources in light of its national circumstances. There are a range of ways in which a State can breach the due diligence obligation, for example, by failing to:

- Set a sufficiently ambitious nationally determined contribution in light of its national circumstances and level of GHG emissions;
- Adopt domestic legislation and policies to, at a minimum, reduce reliance on fossil fuels and promote clean and renewable energy;
- Regulate high-emitting activities by private actors;
- Conduct environmental impact assessments before engaging in or authorizing potentially high-emitting activities and failing to monitor and publish information on the associated risks to the climate system, particularly in circumstances of transboundary harm;
- Implement early warning systems if its resources so permit;
- Provide financial and technical assistance to the most vulnerable States; and
- Have proper regard to the best scientific evidence in connection with mitigation and adaptation.

5.7 Under intertemporal law, a State's act or omission only constitutes a breach where it violates a rule of international law binding on the State at the time of the act or omission.[272] There is thus no doubt that a State failing to act with due diligence to curb GHG emissions to comply with the 1.5°C Standard and address any resulting harm *today* is in breach of its obligation under international law. States are also responsible for their historic anthropogenic GHG emissions from the moment that they became subject to the due diligence obligation to prevent and address climate change impacts. In The Gambia's view, although the duty of due diligence has long been

[272] ILC Articles on State Responsibility, art. 13; *Island of Palmas (Netherlands, United States of America)*, UNRIAA, Vol. II (Sales No. 1949.V.1) (4 April 1928), p. 829, at p. 845 ("[A] juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled".).

recognized as a customary law principle and in international agreements, its application to climate change commenced when scientific evidence began to show that GHG emissions could have harmful impacts on the climate system, starting no later than in the 1990s when the IPCC released its first assessment report and concluded that GHG emissions led to atmospheric, ocean and land warming.[273]

5.8 More specifically, the IPCC's first assessment report predicted that climate change will have significant impacts on agriculture and livestock, natural terrestrial ecosystems, water sources, human settlements especially exposed to natural hazards, and human health.[274] It observed that human-induced climate change will accentuate the impacts of large-scale natural events, particularly for developing countries.[275] Accordingly, a State's failure to undertake mitigation measures to reduce its GHG emissions following that assessment report would amount to a breach of the due diligence obligation.

5.9 Intertemporal law does not prevent facts occurring prior to the applicability of the due diligence obligation to climate change from being considered in assessing a breach (as opposed to assessing compensation).[276] This is because a higher standard of due diligence must apply to States whose emissions place a greater burden on the global climate system. An assessment of whether a State has failed to act with due diligence may, for instance, consider a State's historic emissions in determining whether it has set a sufficiently ambitious nationally determined contribution under the Paris Agreement, or adopted sufficiently effective laws and policies to reduce its current emissions. Indeed, the consideration of historic emissions is particularly important because the current impacts of climate change are the accumulative result of historic emissions, consistent with the CBDR-RC principle. Numerous States support this position.[277]

---

[273] IPCC, *First Assessment Report* (1990), Overview, *available at* https://www.ipcc.ch/site/assets/uploads/2018/05/ipcc_90_92_assessments_far_overview.pdf, pp. 52-53.

[274] *Ibid.*, pp. 54-56.

[275] *Ibid.*, p. 53.

[276] ILC Articles on State Responsibility, art. 13, commentary (9).

[277] *See, e.g.*, Written Statement of Singapore, para. 3.33; Written Statement of Costa Rica, paras. 60-61; Written Statement of Colombia, para. 3.54; Written Statement of St. Lucia, para. 88; Written Statement of Timor Leste,

5.10 The due diligence obligation is continuous, requiring States to constantly take mitigation and adaptation measures in light of the best available science. Failure to do so, including by continuing to engage in high-emitting activities, is accordingly a continuing breach.[278] Article 14(3) of the ILC Articles provides that "the breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation".[279] The duty to prevent transboundary harm in *Trail Smelter*—which provides the basis for the obligation of due diligence to prevent harm to the climate system—has been recognized as an obligation within the meaning of Article 14(3). In that case, the obligation was breached for as long as air pollution continued to be emitted.[280] In the present case, the due diligence obligation is breached while States continue to, through GHG emissions, cause significant harm to the climate system and other parts of the environment.

5.11 The Gambia disagrees with the suggestion that international law does not prescribe specific consequences with respect to future generations.[281] Recognizing the rights and legitimate interest of future generations in the preservation of a stable climate system, as a matter of primary obligation, entails adopting intergenerational justice principles in ascertaining legal consequences and remedies. Such remedies should include proactive measures to prevent further harm and ensure sustainable use of environmental resources. Furthermore, in light of the obligation to reduce GHG emissions arising under human rights law, individuals of present and future generations can invoke responsibility and claim reparation for injuries suffered due to the impacts of climate change.

5.12 Pursuant to the ILC Articles on State Responsibility, the core legal consequences of a State's violation of the due diligence obligation to protect the climate system from anthropogenic

---

paras. 228-232; Written Statement of Pakistan, paras. 32-46; Written Statement of Micronesia, para. 67; Written Statement of Mauritius, para. 215.

[278] *See* J. Crawford, *State Responsibility: The General Part* (CUP 2013), pp. 259-260.

[279] ILC Articles on State Responsibility, art. 14(3).

[280] *Ibid.*, art. 14(3), commentary (14) (citing *Trail Smelter case (United States, Canada)*, 16 April 1938 and 11 March 1941, RIAA Vol. III, p. 1905).

[281] Written Statement of New Zealand, para. 144.

GHG emissions include the obligations to: (i) cease that breach, if continuing;[282] (ii) offer assurances and guarantees of non-repetition, if circumstances so require; [283] and (iii) make full reparation for the injury caused to another State.[284]

5.13 *First*, the requirement of cessation arises if "the wrongful act has a continuing character and that the violated rule is still in force at the time in which the order is issued".[285] As explained above, both the due diligence obligation and the failure to comply therewith are of a continuing character and therefore covered by the cessation requirement. Moreover, the obligation applies "regardless of whether the conduct of a State is an action or an omission" as "there may be cessation consisting in abstaining from certain actions".[286] Cessation of a breach of the climate change due diligence obligation—which most likely results from a failure to act—would therefore require that States take positive steps in climate change mitigation and adaptation and have regard to the best available scientific evidence in doing so. In The Gambia's view, such steps include implementing systemic changes in national policies, including enacting and enforcing domestic legislation that aligns with international climate targets, transitioning energy systems away from fossil fuels, and integrating climate risk assessments into all levels of policy-making.

5.14 The due diligence obligation to prevent harm to the climate system is an obligation *erga omnes.* As explained above, this obligation arises from the duty to respect the right to life and the right to self-determination, which are themselves *jus cogens* norms and obligations *erga omnes*. It also arises from the obligation to protect and preserve the marine environment under UNCLOS and to protect cultural and natural heritage under the World Heritage Convention, both of which are obligations *erga omnes* or *erga omnes partes*.[287] Recognizing the *erga omnes* status of the

[282] ILC Articles on State Responsibility, art. 30(a)

[283] *Ibid.*, art. 30(b).

[284] *Ibid.*, art. 31.

[285] *Ibid.*, art. 30, commentary (3) (citing and quoting *Rainbow Warrior case (New Zealand, France)*, 30 April 1990, RIAA Vol. XX, p. 270, para. 114).

[286] *Ibid.*, art. 30, commentary (2) (citing and quoting *Rainbow Warrior case (New Zealand, France)*, 30 April 1990, RIAA Vol. XX, p. 270, para. 113).

[287] In the *Area Advisory Opinion*, the ITLOS Chamber confirmed that "[e]ach State Party may also be entitled to claim compensation in light of the *erga omnes* character of the obligations relating to preservation of the environment of the high seas and in the Area". *See Area Advisory Opinion,* p. 59, para. 180. With respect to the obligation under the

climate change-related due diligence obligation follows from the fact that "climate change is a common concern of humankind"[288] and the duty to protect the global climate system is a collective duty that can only be effectively carried out by the entire international community. Such an obligation therefore requires not only individual action but also collective measures to support vulnerable States through financial aid, technology transfer, and capacity building.

5.15 The Gambia shares the view that, in the event of a breach of that obligation, the cessation requirement obliges *all* States to cooperate to bring the breach to an end, not to recognize as lawful the situation created by the breach, and not to render aid or assistance to the responsible State in maintaining the situation so created.[289] As the Court has repeatedly held, States must "see to it that any impediment" resulting from a breach of an obligation *erga omnes* is "brought to an end", including through cooperation with the United Nations.[290] This requires States, for example, not to provide aid or assistance to States engaging in high-emitting activities and not to obstruct the adoption of multilateral rules or statements aimed at phasing out fossil fuels to prevent climate change.

5.16 *Second*, when "circumstances so require", State responsibility also entails the obligation to provide assurances of non-repetition of the internationally wrongful act.[291] Such assurances in the climate change context mean assurances not to engage in high-emitting activities and to take positive steps to minimize emissions and adapt to the resulting harm. Because anthropogenic GHG emissions have consequences on future generations, assurances of non-repetition can help preserve

---

World Heritage Convention, Article 6 explicitly recognizes that natural or cultural heritage constitutes "world heritage for whose protection it is *the duty of the international community as a whole* to co-operate" (emphasis added).

[288] Paris Agreement, Preamble.

[289] ILC Articles on State Responsibility, arts. 40-41. *See, e.g.*, Written Statement of Bangladesh, paras. 193-199; Written Statement of Sierra Leone, para. 4.7

[290] *Wall Advisory Opinion*, p. 200, para. 159; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019,* p. 95, at p. 139, para. 180.

[291] *See, e.g.*, Written Statement of Albania, paras. 133-134; Written Statement of the Netherlands, para. 5.9; Written Statement of Samoa, paras. 196-199; Written Statement of Singapore, paras. 4.5-4.6; Written Statement of Thailand, para. 29; Written Statement of Tonga, paras. 295-296; Written Statement of Vanuatu, para. 576; Written Statement of Viet Nam, para. 46; Written Statement of the African Union, para. 263; Written Statement of OACPS, para. 162.

the climate system for the use and benefit of future generations in line with the principle of intergenerational justice.

5.17 *Finally*, States must make full reparation for the injury caused to another State, including its people.[292] Reparation "shall take the form of restitution, compensation and satisfaction, either singly or in combination".[293] Full reparation requires the responsible States to "as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed".[294]

5.18 States are under an obligation to compensate for climate change loss and damage, although each case must be assessed individually and on its own terms. The Court has recognized that, as a matter of principle, environmental damage is compensable under international law. In *Certain Activities Carried Out by Nicaragua in the Border*, the Court found that "it is consistent with the principles of international law governing the consequences of internationally wrongful acts, including the principle of full reparation, to hold that compensation is due for damage caused to the environment, in and of itself, in addition to expenses incurred by an injured State as a consequence of such damage".[295] On this basis, the Court concluded that "damage to the environment, and the consequent impairment or loss of the ability of the environment to provide goods and services, is compensable under international law".[296]

5.19 The Paris Agreement expressly recognizes the importance of "addressing loss and damage associated with the adverse effects of climate change".[297] Indeed, an assessment of climate change loss and damage must take into account the best scientific evidence. In this regard, science has

[292] ILC Articles on State Responsibility, art. 31.

[293] *Ibid.*, art. 34

[294] *Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17*, p. 47.

[295] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Compensation, Judgment, I.C.J. Reports 2018 (I)*, p. 15 ("***Certain Activities Carried Out by Nicaragua in the Border Area, Judgment on Compensation***"), at p. 28, para. 41.

[296] *Ibid.*, p. 28, para. 42. *See also generally* Rudall, *Environmental Compensation in the Practice of International Courts and Tribunals* (Routledge 2020).

[297] Paris Agreement, art. 8(1).

made it possible to calculate an amount that would make the injured parties whole for the damages that they have and will suffer from climate change.[298]

5.20 As the Court explained in *Costa Rica v. Nicaragua*, "where the [wrongful act] 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".[299] The Court therefore accepted that "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".[300] It is clear from the Court's ruling that equitable considerations must be taken into account in the calculation of damages.

5.21 Contrary to contention of a small number of States,[301] any challenges in establishing a causal link between a particular State's failure to curb GHG emissions in accordance with its obligations under international law and the climate change impacts on another State and its people is not an obstacle to ordering compensation.[302] The extent to which a casual nexus must be proven "may vary depending on the primary rule violated and the nature and extent of the injury".[303] It is

[298] *See* M. Burke *et al.*, *Quantifying Climate Change Loss and Damage Consistent with a Social Cost of Greenhouse Gases*, NBER Working Paper No. 31658 (September 2023), *available at* https://www.nber.org/system/files/working_papers/w31658/w31658.pdf.

[299] *Certain Activities Carried Out by Nicaragua in the Border Area*, *Judgment on Compensation*, p. 27, para. 35 (citing and quoting *Trail Smelter case (United States, Canada)*, 16 April 1938 and 11 March 1941, RIAA Vol. III, p. 1920) (emphasis added).

[300] *Ibid.* (citing and quoting *Trail Smelter case (United States, Canada)*, 16 April 1938 and 11 March 1941, RIAA Vol. III, p. 1920). The Court similarly indicated that "non-material injury can be established even without specific evidence" where it is an inevitable consequence of the wrongful acts in question. *See Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Compensation, Judgment, I.C.J. Reports 2012*, p. 324, at p. 334, para. 21.

[301] Written Statement of China, paras. 136, 138; Written Statement of the United Kingdom, paras. 126, 137; Written Statement of Russian Federation, p. 17; Written Statement of the United States of America, paras. 2.20-2.26, 5.10; Written Statement of OPEC, para. 118.

[302] ILC Articles on State Responsibility, art. 31 commentary (12); "V. Lanovoy, Causation in the Law of State Responsibility" (2022) 90 *British Yearbook of International Law*, *available at* https://ssrn.com/abstract=3831985, pp. 87-88, 93-95 (noting that the Court has never reduced compensation due to concurrent causes of damage).

[303] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Reparations, Judgment, I.C.J. Reports 2022*, p. 13, at p. 48, para. 93.

ultimately for a court or tribunal "to decide whether there is a sufficient causal nexus between the wrongful act and the injury suffered" based on the facts of each case.[304]

5.22 In the context of climate change, where many States and actors emit GHGs, injured States should not have to bear the impossible burden of apportioning which GHG contribution caused which damage,[305] although source attribution science, which traces the origin of the pollutants that cause climate change and quantifies their role in driving climate impacts may render such an apportionment possible in some cases.[306] Moreover, as several submissions have correctly observed, in light of overwhelming scientific evidence as to the cause and effects of anthropogenic climate change, it is certain that all GHG emissions contribute to the overall problem, and that States' GHG emissions, especially in large quantities, inevitably cause climate change.[307] Establishing causation thus merits a flexible approach that takes account of scientific developments and equitable considerations.

5.23 In light of the complex and cumulative nature of climate change, courts and tribunals could adopt an approach to causation that considers the collective responsibility of major emitters and the proportional contribution of each to the overall harm. This approach aligns with principles of equity and justice, ensuring that no single State bears disproportionate responsibility while recognizing the shared global duty to address climate impacts.

5.24 In the event that a causal link cannot be sufficiently established between a State's act or omission and the injury to another State, climate mitigation obligations can be understood as *erga omnes* obligations. In this regard, the ILC has suggested that reparations can be required without the need to identify an injured State "in the interest … of the beneficiaries of the obligation

---

[304] *See, e.g.*, *Certain Activities Carried Out by Nicaragua in the Border Area*, *Judgment on Compensation*, p. 26, para. 34.

[305] R. Verheyen, *Climate Change Damage and International Law: Prevention Duties and State Responsibility* (Brill 2005), pp. 252-256.

[306] *See generally* B. Ekwurzel *et al.*, "The rise in global atmospheric CO_2, surface temperature, and sea level emissions traced to major carbon providers" (2017) 144 *Climatic Change* 479, *available at* https://doi.org/10.1007/s10584-017-1978-0.

[307] *See, e.g.*, Written Statement of Chile, para. 94; Written Statement of Kenya, para. 6.102; Written Statement of Switzerland, para. 27.

breached".[308] This could take the form of a common fund to which responsible States contribute and from which affected States benefit. Such a fund, managed by an independent international body, could facilitate equitable distribution of resources and ensure that affected States receive the necessary support in taking climate responses. Contributions to this fund should be based on historical emissions and current capabilities.

5.25 Since in many cases full reparation including restitution may not be possible, The Gambia urges the Court to consider alternative forms of reparation that may amount to appropriate satisfaction. Since The Gambia spends a considerable amount of its GDP in servicing foreign debts and borrowing considerably more to address the climate crisis, satisfaction could take the form of debt forgiveness, which in turn would enable The Gambia to reassign those resources towards climate change mitigation and adaptation efforts. Indeed, according to the International Monetary Fund, the country's "overall external debt service between 2022–2029 stands at a cumulative US$652 million. Of the total debt service, amortization stands at $562 million, with the remaining US$90 million in interest charges."[309] Furthermore, The Gambia's "total public debt to GDP stood at about 84 percent and external debt to GDP at about 52 percent as of end-2022."[310] In this regard, according "to a national assessment of investment and financial flows completed in October 2011, the Gambia will need an additional US$1.35 billion to implement priority actions to reduce greenhouse gas emissions from the energy sector and forest degradation and adapt to the impacts of climate change in the agriculture and water sectors by 2030. Of this, US$420.66 million is for adaption and US$925.74 million for mitigation."[311]

5.26 The funds required—which have increased over the years—would better allow investments in renewable energy infrastructure, climate-smart agriculture, and disaster risk reduction measures. At present, such funds are not available, whether directly through national coffers or indirectly

[308] ILC Articles on State Responsibility, art. 48(2)(b).

[309] In this regard, International Monetary Fund, African Department, *The Gambia, Staff Report for the 2023 Article IV Consultations and Request for an Arrangment under the Extended Credit Facility – Debt Sustainability Analysis* (18 January 2024), *available at* https://www.elibrary.imf.org/view/journals/002/2024/015/article-A003-en.xml.

[310] *Ibid.*

[311] Briefing, *Climate Change Financing in The Gambia* (April 2014), *available at* https://www.iied.org/sites/default/files/pdfs/migrate/17224IIED.pdf.

through bilateral or multilateral support by development partners, including global multilateral institutions. The ability to set aside such funds is inhibited by the high debt servicing costs stemming from existing loan commitments and affects the country's ability to cover social needs in a wide range of sectors ranging from health to food security to agriculture and beyond. This means that national adaptation and mitigation efforts to address climate change issues are further undermined. By enabling countries such as The Gambia to invest in their own resilience, debt cancellation or debt reduction could help break the cycle of climate vulnerability and economic instability, and increase its level of preparedness for climate change.[312]

5.27 Article 37 of the ILC Articles on State Responsibility provides that "[t]he State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation".[313] The article leaves it open as to what constitutes appropriate satisfaction. In the climate change context, therefore, debt forgiveness could constitute satisfaction. There are additional historical precedents for debt cancellation. The London Debt Agreement of 1953 effectively canceled Germany's external debts.[314] This cancellation has been cited as a key factor accounting for Germany's post-Second World War economic success. The Gambia submits that, to address the climate crisis, such creative approaches should be taken into account and examined as possible models through which to tackle climate financing, adaptation, and mitigation.

5.28 In addition, or as alternatives, other forms of satisfaction could also include contribution to the existing loss and damage fund established by COP 27 that will come into operation pursuant to the agreement of the parties to the UNFCCC at COP 28.

[312] *Ibid.*

[313] ILC Articles on State Responsibility, art. 37(1).

[314] *See* James Thuo Gathii, "Introduction" in *How to Reform the Global Debt and Financial Architecture* (James Thuo Gathii, eds., 2023, Sheria Publishing House) at xxiii.

CHAPTER 6
CONCLUSIONS

6.1 For the reasons set out in these Written Comments, The Gambia respectfully submits the following conclusions to the Court.

6.2 The Court has jurisdiction to give the advisory opinion and there exists no compelling reason to decline to exercise such jurisdiction.

6.3 In respect of Question (a), the Court should determine that:

- States have an obligation of due diligence to reduce anthropogenic GHG emissions to limit the increase in global average temperatures to 1.5°C above pre-industrial levels and to adopt effective adaptation measures to address any harm that still occurs at that standard. This obligation, and corresponding right to regulate, arises from international environmental law, international human rights law, the law of the sea, and the law governing cultural and natural heritage;

- The due diligence obligation requires States to constantly have regard to the best available science in adopting and assessing the effectiveness of their mitigation and adaptation measures;

- The precise content of the due diligence obligation for each State must be assessed in accordance with the CBDR-RC principle and the right to development of developing States;

- In complying with the due diligence obligation, States must cooperate and take collective actions to limit the increase in global average temperatures to 1.5°C above pre-industrial levels and implement effective adaptation measures;

- The due diligence obligation is owed to both present and future generations, thus requiring that States assess the long-term risks and impacts of their acts or omissions

on future generations as well as undertake all necessary measures to preserve and conserve the climate system so that future generations can access and benefit from it.

6.4 In respect of Question (b), the Court should determine that:

- States in breach of the due diligence obligation as set out in question (a) must cease the breach, make full reparation, including through satisfaction and compensation, and offer guarantees of non-repetition where appropriate;

- Satisfaction could take the form of, *inter alia*, debt forgiveness;

- Other States must not to provide aid or assistance to States engaging in high-emitting activities and must not obstruct the adoption of multilateral rules or statements aimed at phasing down or phasing out fossil fuels to prevent climate change.

Respectfully submitted,

H.E. Dawda A. Jallow

Attorney-General and Minister of Justice

Republic of The Gambia

Banjul

13 August 2024