INTERNATIONAL COURT OF JUSTICE

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

Written Statement of the Kingdom of Thailand

22 March 2024

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I. Introduction

1. On 29 March 2023, the United Nations General Assembly adopted resolution 77/276, requesting the International Court of Justice ("ICJ") to render an advisory opinion on the following questions:

> "Having particular regard to the Charter of the United Nations, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the United Nations Framework Convention on Climate Change, the Paris Agreement, the United Nations Convention on the Law of the Sea, the duty of due diligence, the rights recognized in the Universal Declaration of Human Rights, the principle of prevention of significant harm to the environment and the duty to protect and preserve the marine environment,
>
> *(a)* What are the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for present and future generations;
>
> *(b)* What are the legal consequences under these obligations for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment, with respect to:
>
> (i) States, including, in particular, small island developing States, which due to their geographical circumstances and level of development, are injured or specially affected by or are particularly vulnerable to the adverse effects of climate change?
>
> (ii) Peoples and individuals of the present and future generations affected by the adverse effects of climate change?"

2. The Government of the Kingdom of Thailand has the honour to submit this written statement focusing on the above-mentioned questions. This written statement begins by commenting on the general approach that should be taken by the Court (Section II). It then turns to discuss Question (a), on the obligations of States under international law to ensure the protection of the climate system and other parts of the environment (Section III), outlining the State's obligation to ensure, focusing on due diligence, a direct State obligation to protect the environment, the principle of common but differentiated responsibilities, and obligations from international human rights law. Finally, this statement discusses Question (b) on legal consequences (Section IV).

II. General Approach

3. It is submitted that, in its exercise of clarifying the scope of the *lex lata*, the Court should avail itself of all international law rules to identify the obligations of States and legal consequences under these obligations, rather than those stemming from the interpretation of a few specific treaties.

4. The wide range of treaties listed in the request by the General Assembly, both environmental and other treaties, is an explicit indication of States' intention for the Court to canvas the entire corpus of international law to clarify the current state of international law. Specifically, the fifth preambular paragraph indicates relevant laws and soft laws that should provide context for the Court's consideration. The phrase "Having particular regard" in reference to these frameworks denotes that other sources of obligations may also be relevant.

5. Article 31(3)(c) of the Vienna Convention on the Law of Treaties provides that the interpretation of a treaty should take into account not only the context but "any relevant rules of international law applicable in the relations between the parties." This articulates the principle of systemic integration, making clear that rules of international law are not to be construed in an isolated manner. In clarifying the scope of the *lex lata*, the Court should thus consider material sources external to the treaty in question, including other treaties, customary rules and general principles of law. Furthermore, the Court should, to the extent possible, interpret all relevant rules harmoniously to give rise to a single set of compatible obligations in accordance with the principle of harmonisation.[1] General international rules, including the obligation of good faith, apply to the climate regime. Relevant *lex specialis*, including those in specific trade arrangements or under the United Nations Convention on Law of the Sea (UNCLOS), are also applicable.

6. Finally, in clarifying the scope of the *lex lata*, the Court may encounter definitional issues with respect to terms used in the question posed to it by the General Assembly. In particular, Thailand notes that the term "climate system" could be quite challenging to define as there is no generally accepted meaning to the term. However, the inclusion of "and other parts of the environment" suggests that the Court could focus on the protection of the environment as a whole. This would also be consistent with the comprehensive approach taken in Article 1(3) of the United Nations Framework Convention on Climate Change (UNFCCC) which defines the climate system as "the totality of the atmosphere, hydrosphere, biosphere and geosphere and their interactions."

[1] The principle of harmonisation entails that "when several norms 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". "Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law" Report of the Study Group of the International Law Commission (2006) A/CN.4/L.702, 8 at para (4).

III. Comments on Question (a)

The principle of prevention

7. Question (a) is based on the correct premise that there exist State obligations under international law to ensure the protection of the climate system and other parts of the environment. Such obligations can, *inter alia*, be found in customary international law.

8. Particularly relevant among them is the principle of prevention, which is the customary international law obligation for States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control. The principle has also been reflected in the Stockholm Declaration and the 1992 Rio Declaration on Environment and Development (Rio Declaration), and in legally binding instruments, such as the United Nations Convention on Law of the Sea (UNCLOS).[2] It has also been affirmed by the Court in various cases.[3]

Obligation to ensure the protection of the climate system with regards to actors within its jurisdiction and control

9. The principle of prevention entails, *inter alia*, the obligation "to ensure" the protection of the climate system in international environmental law.[4] The Court has elaborated on the general concept of the obligation to ensure protection in the *Corfu Channel* case, whereupon the Court discussed the State obligation not to knowingly allow its territory to be used for acts contrary to the rights of other States.[5] In international human rights law, the obligation to ensure protection has been generally understood as an obligation for States to protect against non-State abuses.[6] In the context of international environmental law, this obligation to ensure protection includes two main aspects: (i) an obligation by the State to ensure that *actors within its jurisdiction and control* protect the climate system and other parts of the environment (discussed in this section), and (ii) a direct obligation on the part of the *State* to protect the climate system (discussed in the following section).

10. Thailand views the obligation to ensure that actors within its jurisdiction and control protect the climate system as integral to the protection of the environment, since reducing and controlling

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[2] UNCLOS, art.194(2).
[3] *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 241, para.29; *Pulp Mills on the River Uruguay (Argentina v Uruguay) (Judgement)* [2010] ICJ Rep 14, 14; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* [1997] ICJ Rep, 53.
[4] Other interrelated obligations also include, for example, the obligation to ensure the protection of biodiversity and the obligation to ensure safe management of hazardous wastes.
[5] *Corfu Channel Case (UK v Albania) (Merits)* [1949] ICJ Rep 4.
[6] This "State duty to protect against non-State abuses is part of the very foundation of the international human rights regime." 'Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts' (2007) A/HRC/4/035 at 18.

greenhouse gas (GHG) emissions from private actors is a crucial part of environmental mitigation.

11. In the general international environmental law context, due diligence is the standard by which the obligation to ensure protection is to be measured. As was put in the *Pulp Mills* case, the principle "has its origins in the due diligence that is required of a State in its territory".[7] The *Certain Activities* case also affirmed the obligation of each State "to exercise due diligence in preventing significant transboundary environmental harm".[8]

12. The content of the obligation to ensure protection may vary depending on the context of each case and the specific treaty provisions in question.[9] For example, in the OSPAR Arbitration, the Tribunal held that "to ensure" in Article 9(1) of the OSPAR Convention denoted a guarantee of, or an obligation to achieve, a particular result.[10] In the context of due diligence, the obligation "to ensure" protection should mean "an obligation to deploy adequate means, to exercise best possible efforts, to do the utmost, to obtain this result. [...] This obligation may be characterized *as an obligation 'of conduct' and not 'of result'*".[11] Indeed, the obligation of due diligence has been established as an obligation of conduct in many cases.[12] It is not an absolute obligation that guarantees that harm will not occur,[13] nor an obligation by which a State must guarantee that persons within its jurisdiction will not violate its laws and regulations, and the State is held liable for all violations committed by such persons under its jurisdiction. In other words, the obligation "to ensure" cannot reasonably be an obligation to eliminate every iota of risk to the climate system.

13. In light of existing jurisprudence, this obligation of due diligence can be described as twofold. First, it is an obligation to ensure that domestic laws and regulations are prescribed to give effect to relevant international treaties, and other "reasonably appropriate"[14] measures are adopted within a State's domestic legal system to prevent significant harm to the climate system. It is the standard "that which is generally considered to be appropriate and proportional to the degree of risk of transboundary harm in the particular instance".[15] Second, it entails "a certain level of vigilance" in the enforcement of said laws and regulations, including exercising administrative

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[7] *Pulp Mills* (n 3), 101.

[8] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua)* [2015] ICJ Rep 665, 104.

[9] See, for example, the tribunal's interpretation of art.9(1) of the OSPAR Convention in *Ireland v United Kingdom (OSPAR Arbitration) (Final Award)* [2003] PCA 2001-03, 132-134.

[10] Ibid, 118-148.

[11] *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area (Request for Advisory Opinion submitted to the Seabed Disputes Chamber)* [2011] ITLOS Rep 10, 110, emphasis added.

[12] *Pulp Mills* (n 3), para.77; *Gabčíkovo-Nagymaros* (n 3), para.140; *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion* [2015] ITLOS Rep 4, 129.

[13] 'Report of the International Law Commission on the Work of Its Fifty-Third Session' (2001) GAOR A/56/10 <https://legal.un.org/ilc/documentation/english/reports/a_56_10.pdf>, 154.

[14] UNCLOS Annex III, art.4(4); see also 'appropriate rules and measures' in *Pulp Mills* (n 3), 197.

[15] International Law Commission's commentary to its Draft Articles on Prevention of Transboundary Harm from Hazardous Activities 'Report of the International Law Commission on the Work of Its Fifty-Third Session' (n 13), 394.

control, such as through monitoring of activities.[16] To this end, a State should exercise its best efforts, and in good faith, to ensure compliance by persons within its jurisdiction.

14. It is worth noting that the standard of due diligence is not set in stone. It entails different obligations in different contexts, depending on the magnitude of risk and probability of harm involved, the technology in the particular sector, etc. Importantly, it should allow for evolving best scientific practices of what constitutes generally accepted international rules and standards and developments in international law.[17] The 2001 ILC Report[18] acknowledges that "what could be a reasonable standard of care or due diligence may change with time". This is especially important in the field of international environmental law, where measures should be adopted or adapted in response to novel scientific facts relating to climate change, in particular those determined by the Intergovernmental Panel on Climate Change.

Direct State obligation to protect the climate system

15. Apart from an obligation to ensure that non-State actors within a State's jurisdiction and control do not cause significant harm to the climate system and other parts of the environment, States also have a direct obligation under international law not to do so. This general obligation to protect the environment finds its form not only in customary international law but also in various treaties such as the protection of the marine environment per Article 192 of UNCLOS.

16. This direct State obligation is both positive (i.e., to take measures to ensure the protection of the environment) and negative (i.e., to refrain from taking measures that may cause significant harm to the environment). Thailand is of the view that this State obligation also includes measures of mitigation and adaptation, in line with the UNFCCC and the Paris Agreement.[19] For States Parties to these two frameworks, the obligation includes the submission of Nationally Determined Contributions (NDCs) which are intended, in good faith, to protect the environment. More generally, it may also include due diligence (with the contents as outlined in the preceding section) as well as procedural obligations of cooperation,[20] including in carrying out environmental impact assessments, notification, and consultation with relevant parties on transboundary risk.

17. In summary of this section thus far, the obligation to ensure protection stems from the customary international law principle of prevention. The obligation to ensure protection includes, *inter alia*, an obligation of due diligence to prescribe laws and regulations to prevent significant harm to the

[16] *Pulp Mills* (n 3), 197.
[17] "[T]here are situations in which the parties' intent upon conclusion of the treaty was, or may be presumed to have been, to give the terms used — or some of them — a meaning or content capable of evolving, not one fixed once and for all, so as to make allowance for, among other things, developments in international law" *Certain Activities* (n 8), p. 242, para.64); see also *Pulp Mills* (n 3), 204.
[18] 'Report of the International Law Commission on the Work of Its Fifty-Third Session' (n 13), 11.
[19] Paris Agreement, arts.4, 7.
[20] The duty to cooperate is well-established in international law. As stated by ITLOS, "that the duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment under Part XII of [UNCLOS] and general international law". *The MOX Plant Case (Ireland v United Kingdom), Provisional Measures* [2001] ITLOS Rep 95, 82.

climate system, and enforce them. The standard by which due diligence is measured will depend on the specific set of facts and generally accepted standards at the time. It also includes a direct obligation by the State to protect the climate system and other parts of the environment-subject to the principle of common but differentiated responsibilities.

Common but differentiated responsibilities

18. State obligations to ensure the protection of the climate system and other parts of the environment apply to all States, but such obligations must be read in light of the principle of common but differentiated responsibilities, in light of different national circumstances.

19. The need to take into account the special interests and needs of developing States is evinced in myriad soft law and normative instruments.[21] It is also confirmed in decisions of international courts and tribunals and even in trade-oriented forums: the WTO Panel in the *US-Shrimp Turtle* case, for example, affirmed that "States have common but differentiated responsibilities to conserve and protect the environment".[22]

20. This principle is relevant in the assessment of the due diligence standard. All States have the common responsibility to exercise due diligence; this does not vary between developing and developed countries. Due diligence requires "the exercise of best possible efforts" at the State's disposal.[23] However, the best possible efforts of a developing State and a developed State are not the same. This means that the standard of due diligence should exhibit a degree of flexibility for States to use the "best practicable means at their disposal and in accordance with their capabilities".[24] In this regard, a State's regulatory capacity and technological capabilities should be considered in the assessment of the due diligence standard.

21. To clarify, this does not mean that developing countries are allowed to conduct activities without regard for the environment. All States should at least adhere to internationally agreed standards in all activities related to the protection of the environment, which may evolve with new scientific practices, as they represent the lowest common denominator. The standard of due diligence for all States may be stricter when other factors are involved, including risk or the likelihood that a certain activity may disproportionately affect a particularly vulnerable State. However, a flexible standard of due diligence recognises that, while all countries have to at least adhere to internationally agreed standards, not all countries are capable of accessing the best available techniques according to latest scientific developments.

22. Thailand notes that ITLOS, in its advisory opinion on *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, did not apply a differential standard, noting that:

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[21] For example, the Rio Declaration, Principles 6-7; Paris Agreement, Preamble, art.2(2), arts.4(3) and 4(19); the Kyoto Protocol, art.10; the United Nations Framework Convention on Climate Change (UNFCCC, Preamble, arts.3(l) and 4(1)); UNCLOS art.194(1).

[22] Panel Report (Recourse to Article 21.5 by Malaysia), para.7.2.

[23] *Activities in the Area* (n 11).

[24] UNCLOS, art.194.

> "According to [article 148 of the Convention], the general purpose of promoting the participation of developing States in activities in the Area taking into account their special interests and needs is to be achieved "as specifically provided for" in Part XI (an expression also found in article 140 of the Convention). This means that there is no general clause for the consideration of such interests and needs beyond what is provided for in specific provisions of Part XI of the Convention… However, none of the general provisions of the Convention concerning the responsibilities (or the liability) of the sponsoring State "specifically provides" for according preferential treatment to sponsoring States that are developing States. As observed above, there is no provision requiring the consideration of such interests and needs beyond what is specifically stated in Part XI. It may therefore be concluded that the general provisions concerning the responsibilities and liability of the sponsoring State apply equally to all sponsoring States, whether developing or developed".[25]

23. Therefore, it can be assumed that the specific provisions of UNCLOS in relation to Part XI precluded the Seabed Disputes Chamber from applying the principle of common but differentiated responsibilities which would otherwise allow developing States the opportunity to develop their economy in a less stringent environmental standard. The inapplicability of the principle in this case, which pertains specifically to the aforementioned provisions governing seabed mining activities, cannot be extrapolated for general application across all areas of international environmental law, where the causes of anthropogenic emissions of GHGs are much more complex and disparate. In the absence of such specific provisions, the principle remains applicable in international environmental law more generally and is found in various sources as discussed in paragraph 19. This issue is particularly salient as countries' development is crucial for enabling them to better address the problems of climate change.[26]

24. Lastly, the corollary of the principle of common but differentiated responsibilities is that developed countries also have a strict obligation to ensure that their activities do not cause significant harm, in particular, to small island developing States, which due to their geographical circumstances and level of development, are injured or specially affected by or are particularly vulnerable to the adverse effects of climate change. The UNFCCC acknowledges that "the largest share of historical and current global emissions of greenhouse gases has originated in developed countries."[27] The key elements of the said obligation can be found in the decisions of the Conference of the Parties (COP) to the UNFCCC, including the contribution towards funding arrangements for assisting developing countries and a fund for responding to loss and damage,[28]

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[25] *Activities in the Area* (n 11), 156, 158.
[26] As noted in art.3(5) of the UNFCCC, "The Parties should cooperate to promote a supportive and open international economic system that would lead to sustainable economic growth and development in all Parties, particularly developing country Parties, thus enabling them better to address the problems of climate change".
[27] UNFCCC, PP3.
[28] Decision 2/CP.27 adopted by the Conference of the Parties on its twenty-seventh session, UN Doc. FCCC/CP/2022/10/Add.1, 12, at 1-3; UN Doc. FCCC/CP/2023/L.1−FCCC/PA/CMA/2023/L.1.

operationalization of the fund to assist developing countries, and the commitment by developed countries to provide 100 billion USD.[29]

25. In sum, the obligations of States to ensure the protection of the climate system and other parts of the environment must be interpreted in light of the principle of common but differentiated responsibilities.

Obligations from international human rights law

26. International human rights law should be considered in the determination of the obligations of States to ensure protection of the environment. The connection between climate change and human rights has been long established in myriad ways. The Paris Agreement sets out this connection in its preamble. General Comment No. 36 of the Human Rights Committee concluded that international environmental law must be read in light of Article 6 of the ICCPR (right to life).[30] Furthermore, climate change cases, both in regional[31] and domestic[32] courts have acknowledged the necessary interrelationship between ensuring protection of the climate system and upholding various human rights.

27. Relevant rights for individuals may include, *inter alia*, the right to life,[33] the right to health,[34] the right to pursue economic development,[35] the right to water[36] and adequate food,[37] and the right to

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[29] "In the context of meaningful mitigation actions and transparency on implementation, developed countries commit to a goal of mobilising jointly USD 100 billion dollars a year by 2020 to address the needs of developing countries". Decision 2/CP.15 adopted by the Conference of the Parties on its fifteenth session, UN Doc. FCCC/CP/2009/11/Add.1, 7, at. 8.

[30] General Comment No. 36 (2018) on art.6.

[31] *Advisory Opinion (OC-23/17) of November 15, 2017 Requested by the Republic of Colombia* (Inter-American Court of Human Rights).

[32] See, for example, arts.2 (Right to life) and 8 (Right to private and family life) of European Convention on Human Rights (ECHR) in *Urgenda Foundation v. State of the Netherlands* [2015] HAZA C/09/00456689; arts.1(1) (human dignity) and 2(2) (right to life and physical integrity), as well as art.2 and 8 ECHR in *Neubauer et al. v Germany*, Case No. BvR 2656/18/1, BvR 78/20/1, BvR 96/20/1, BvR 288/20; and art.225 (the right to a healthy environment) of the Brazilian Constitution in *Laboratório do Observatório do Clima v. Minister of Environment and Brazil* Ação Civil Pública Nº 1027282-96.2021.4.01.3200 (pending).

[33] ICCPR, art.6; CRC, art.6.

[34] Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), arts.12 and 14, para.2(b); International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), art.5(e)(iv); Convention on Rights of the Child (CRC), art.24; Convention on the Rights of Persons with Disabilities (CRPD), arts.16, para.4, 22, para.2, and 25; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW), arts.43, para.1(e), 45, para.1(c), and 70. See also International Covenant on Economic, Social and Cultural Rights (ICESCR) arts.7(b) and 10.

[35] art.1 of the 1966 ICCPR and ICESCR

[36] ICESCR, arts.11-12.

[37] ICESCR, art.11; CRC, art.24 (c); CRPD, art.25(f) and art.28, para.1; CEDAW, art.14, para.2 (h); ICERD, art.5 (e).

a clean, healthy and sustainable environment.[38] These rights and interests should be balanced to the extent that they conflict.

28. Regard should be had to the rights of specific groups of peoples that may be specifically affected by climate change. Vulnerable groups should be treated in accordance with the principle of equality and non-discrimination[39] in line with international human rights law.

IV. Comments on Question (b)

(i) States, including, in particular, small island developing States

29. Given the variable nature of due diligence, and of State obligations in environmental law more generally, specific legal consequences may not be capable of determination *ex ante*. Furthermore, legal consequences may depend on specific treaty obligations undertaken by States. However, the ILC Articles on State Responsibility for Internationally Wrongful Acts shed light on legal consequences, which include: (1) cessation and non-repetition; (2) reparation, including (i) restitution, where possible; (ii) compensation; and (iii) satisfaction.[40] This is widely considered to reflect customary international law.[41] A State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to that State individually, or a group of States including that State, or to the international community as a whole, and the breach of the obligation specially affects that State.[42]

30. While the general rule in customary international law is that no material damage is required to incur liability from a State's failures to meet its international obligations,[43] "significant harm" caused is the standard set by this question to determine the legal consequences for States. "Significant" harm is defined by the International Law Commission as passing the *de minimis* threshold of "something more than 'detectable' or 'appreciable', but need not be at the level of

[38] UNGA Resolution 76/300 of 28 July 2022 and Human Rights Council (HRC) Resolution 48/13 of 18 October 2021. It is now recognised by law in more than 80 percent of UN Member States. See A/HRC/43/53 of 30 December 2019. Admittedly, however, many human rights instruments (with the notable exception of the American Convention on Human Rights) generally do not recognise a healthy environment as an autonomous right nor as a prerequisite to enjoying human rights. See discussion in Paula F. Henin, 'Adjudicating States' International Climate Change Obligations before International Courts and Tribunals' (2019) 113 Am Soc'y Int'l L Proc 201, 204-205.

[39] ICESCR and ICCPR, art.2; CERD, art.2; CEDAW, art.2.

[40] ILC Articles on State Responsibility for Internationally Wrongful Acts, Chapter II, arts.34-37. In the context of transboundary harm, this is confirmed by *Certain Activities* (n 12).

[41] *Activities in the Area* (n 11), 169. As the Seabed Disputes Chamber affirms, the ILC Articles on State Responsibility is widely considered to reflect customary international law.

[42] ILC Articles on State Responsibility, art.42.

[43] *Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affair* (1990) vol. XX UNRIAA 215, para.110); ILC Articles on State Responsibility, paragraph 9 of the Commentary to art.2; *Activities in the Area* (n 8), 178.

'serious' or 'substantial'".[44] This is a broad formulation that does not unduly restrict the principle of prevention, in contrast to the need for "serious" harm.[45]

31. Article 31 of the ILC Articles on State Responsibility provides that "the responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act". Compensation sought when restitution is not materially possible (which is often the case) shall cover "any financially accessible damage".[46] The assessment of damage, which may include both material and moral damages per Article 31, is a complex matter that can be entrusted to an expert inquiry, as was the case in the *Corfu Channel* case. Account shall also be taken of a State's contribution to the injury.[47]

(ii) Peoples and individuals of the present and future generations

Present generation

32. International human rights law may be especially relevant when assessing legal consequences with respect to "peoples and individuals" of the present generation. Should a State cause significant harm to the climate system and other parts of the environment, and breach peoples' and individuals' human rights in the process, there may be legal consequences with respect to that group.

33. It is acknowledged that climate litigation on the basis of human rights have been brought in domestic courts, regional courts, and international tribunals[48] with varying degrees of success.[49] Domestic case law reveals that legal consequences may require a State to take positive action, such as those aimed at reduction of GHGs,[50] or measures to address deforestation.[51] However, while growing in number, practice illustrating State responsibility and liability on the international level in respect of people and individuals, especially in the form of compensation,

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[44] Report of the ILC, Official Records of the General Assembly, 51st session (A/51/10) 108 at para 4.
[45] See, for example, the threshold used in *Lac Lanoux* Arbitration and *Trail Smelter* Arbitration. *Lake Lanoux Arbitration (France v Spain)* (1957) 12 R.I.A.A. 281; *Trail smelter case (United States, Canada)* [1952] 3 UNRIAA 1905.
[46] ILC Articles on State Responsibility, art.36(2).
[47] Ibid, art.29.
[48] See *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5 (Ecuadorian law was applicable in this case).
[49] For example of such cases, see (n 30). For examples of unsuccessful cases, see *Teitiota v. The Chief Executive of the Ministry of Business, Innovation and Employment* [2015] NZSC 107; *Armando Ferrão Carvalho and Others v. The European Parliament and the Council Case* [2018] T-330/18.
[50] This was the case in *Urgenda Foundation v. State of the Netherlands*, where the Supreme Court of the Netherlands upheld the lower courts' decision to order the Dutch State to reduce GHG emissions by at least 25 percent by the end of 2020. See (n 29).
[51] This was the case in *Supreme Court of Columbia Andrea Lozano Barragán and others v the President of Colombia and others* [2018] STC 4360-20, where the Colombian Supreme Court ordered the State to take measures against deforestation in the Amazon.

remains scant.[52] It may therefore be prudent for the Court to exercise caution in its consideration of this developing area of international law.

34. Finally, with regards to avenues of recourse for peoples and individuals, the commentaries to article 36 of the ILC Articles on State Responsibility provide that a State may claim financially assessable damage suffered by its nationals within the framework of diplomatic protection.[53] It may also be possible for peoples and individuals to exercise their rights before national or regional courts on the basis of rules of international law.

Future generations

35. Thailand is guided by the principle of sustainable development, of which environmental protection is an integral part of.[54] This principle takes the interests of both present and future generations into account in a State's actions, including through due diligence, sustainable utilisation, and the conservation of natural resources. It is best understood as an umbrella concept guiding specific legal principles and concepts,[55] both in international and domestic law, which may include the obligation of due diligence, the public trust doctrine, and the common heritage of humankind.

36. A component of sustainable development necessarily takes into account the needs and interests of future generations-best summarised by the concept of intergenerational equity. This is a guiding principle in the UNFCCC.[56] However, the normative content of this principle remains open-textured, and there are doubts surrounding the legal force of intergenerational equity in conferring specific justiciable rights for future generations, and thus conferring a legal obligation upon States, either through a duty of care or on a trusteeship-like basis, to generations unborn.[57]

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[52] *Daniel Billy and others v Australia* (Torres Strait Islanders Petition) [2019] CCPR/C/135/D/3624/2019 is an example of a successful case. For an overview of cases, see United Nations Environment Programme (2023) *Global Climate Litigation Report: 2023 Status Review* Nairobi.

[53] Commentaries to art.36 of the ILC Articles on State Responsibility, 5.

[54] This is recognized, *inter alia*, by Principle 4 of the Rio Declaration: "In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it". Protection of the environment as a part of sustainable development is also referred to in *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* [1997] ICJ Rep 7, 140.

[55] See, for example, the discussion in Vaughan Lowe, 'Sustainable Development and Unsustainable Arguments', *International Law and Sustainable Development: Past Achievements and Future Challenges* (1999) 19-37. "And as the [sustainable development] concept is applied by tribunals and others its content, and its effect upon the application of other norms, gradually becomes clearer" and that "[s]ustainable development appears to entail what has been called a 'holistic' approach to the resolution of disputes".

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

[57] See, for example, the discussion in Lowe (n 51), 17: "the principle of intergenerational equity… is a chimera [...] Who are the beneficiaries? What are their rights of actions? What are the duties of the trustees?"; Catherine Redgwell, 'Principles and Emerging Norms Concepts in International Law', *The Oxford Handbook of International Climate Change Law* (OUP 2016), 199: "at best inter-generational equity may be said to constitute a 'guiding principle' in the application of substantive norms, including existing treaty obligations, under international law"; Malgosia Fitzmaurice, Meagan Wong and Joseph Crampin, 'Intergenerational Equity', *International Environmental Law* (Edward Elgar 2022), 100-103.

37. There are several challenges to determining the legal consequences for future generations. First, they are an ill-defined, indeterminate, and overly broad class of people who do not currently exist and are without *locus standi*. Such class of people are currently devoid of any obligations and it would seem illogical for them to be conferred justiciable rights. While the Court certainly may bear the interests of future generations in mind in its adjudication of cases, a specific class of people, with specific rights, should be demonstrated to trigger a cause of action.

38. Second, at present, there seems to be a paucity of state practice to support the concept of intergenerational equity in international law. Admittedly, the domestic laws[58] and judicial decisions[59] of domestic courts in certain States recognise the need to protect the environment for the *interests* of future generations, but this is not yet sufficient to constitute widespread State practice; in fact, numerous cases hold the contrary view.[60] Furthermore, it is respectfully suggested that recognition of the *interests* of future generations may have to be distinguished from the *standing* of future generations-the letter which is required to bring a cause of action in international law.[61] Finally, while references to 'future generations' are frequently found in MEAs,[62] they are usually enshrined in the preamble-thus suggesting their nature as a guiding principle and not a legal obligation.

39. The Court, in its advisory opinion on *Nuclear Weapons*, rightly recognises that "the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, *including generations unborn*".[63] However, the Court made this statement in the context of recognising the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control; it does not go as far as to recognise that there are legal consequences with respect to future generations.

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[58] See, for example, art.74(1) of the Constitution of Poland; art.41(1) of the Argentinian Constitution; the Preambles, art.42 (Environment), art.201 (Principles of public finance), and the preambles of the Kenyan Constitution; Environmental Protection and Management Act 2019, sect. 3 (1) (a) of Antigua and Barbuda.

[59] See, for example, Colombia, Supreme Court, STC 4360-2018 of 5 April 2018; Australia, *Gray v. Minister for Planning*, [2006] NSWLEC 720; South Africa, *Fuel Retailers Association of South Africa v. Director-General, Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province, and others*, [2007] ZACC 13, 10 BCLR 1059. The commentaries to the preambles of the ILC Draft Guidelines on Protection of the Atmosphere discusses this point.

[60] See, for example, Canada, *La Rose v. Her Majesty the Queen*, T-1750-19, judgement of 27 October 2020, 2020 FC 1008, where the Federal Court dismissed a lawsuit for the plaintiff's failure to state a reasonable cause of action; *Ridhima Pandey v. Union of India* (Application No. 187/2017).

[61] The Filipino case of *In re Minors Oposa* recognises the present generation's right to sue for recognition of future generations' rights; however, its decision remains isolated in case law. Its reasoning was not followed in the Bangladeshi courts in the case of *Farooque v Government of Bangladesh* (1997) 49 DLR (AD) 1. See *Minors Oposa v Secretary of the Department of Environment and Natural Resources, Supreme Court of the Philippines*, 30 July 1993, reproduced in 33 ILM (1994), 173.

[62] See, for example, the 2015 Paris Agreement; the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora; 1979 Bonn Convention on the Conservation of Migratory Species of Wild Animals. The ILC's guidelines on Protection of the Atmosphere (2021) also included the reference to "future generations of humankind" in the preambles.

[63] *Nuclear Weapons* (n 3), 29, emphasis added.

40. That said, developments related to climate change are occurring at a rapid pace, and international environmental law may evolve quickly to meet new challenges on the ground. There is ample room for progressive development with regard to a legal class of "future generations" in international law to which obligations are owed, but such a position currently seems premature. If there is the progressive development in this area, it would be the role of States to determine its normative content.

41. To summarise, while Thailand is guided firmly by the principle of sustainable development and intergenerational equity as a guiding principle in international law, it remains doubtful as to the existence of a specific legal obligation owed to an indeterminate class of peoples and individuals of future generations.

V. Conclusion

42. In conclusion, Thailand submits the following:

    a. Under the customary law principle of prevention, States have the obligation to ensure that actors under its jurisdiction and control protect the climate system and other parts of the environment from anthropogenic emissions of GHGs. This is an obligation of due diligence, which is an obligation of conduct.

    b. States also have a direct obligation to protect the climate system and other parts of the environment, in accordance with customary international law and treaties that they are party to.

    c. The content of the due diligence obligation should take into account other rules of international law, including the principle of common but differentiated responsibilities and international human rights law.

    d. The determination of legal consequences for breaching these obligations for States that have caused significant harm to the climate system and other parts of the environment with respect to other *States* should be guided by the ILC Articles on State Responsibility.

    e. In determining the legal consequences for breaching these obligations for States that have caused significant harm to the climate system and other parts of the environment with respect to *peoples and individuals of the* ***present*** *generation*, relevant international human rights law and principles should be taken into account.

    f. In determining the legal consequences for breaching these obligations for States that have caused significant harm to the climate system and other parts of the environment with respect to *peoples and individuals of* ***future*** *generations*, due regard should be given to the principle of sustainable development and the needs and interests of future generations as encapsulated by the concept of intergenerational equity. However, in current

international law, it may be premature to definitively establish legal consequences for the future generation as such.

43. Finally, while Thailand acknowledges that the Court's advisory opinion on this question, as well as written statements by States, have no binding force in international law, Thailand welcomes the role of the ICJ in bringing legal clarity on the scope of the *lex lata*. It recognises the urgency of taking climate action for a sustainable future, and remains committed to strengthening the international legal climate framework. The advisory opinion of the court will be instrumental in varying respects, from informing States' negotiations on climate change and States' endeavour towards the codification and progressive development of international environmental law, to spurring global efforts in adopting measures to combat climate change. In short, it will be of monumental importance in advancing the international community's common goal to protect the environment for the benefit of humankind.

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