INTERNATIONAL COURT OF JUSTICE

OBLIGATIONS OF STATES IN RESPECT OF CLIMATE CHANGE

(REQUEST BY THE UNITED NATIONS GENERAL ASSEMBLY FOR AN ADVISORY OPINION)

WRITTEN COMMENTS

THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

12 AUGUST 2024

TABLE OF CONTENTS

CHAPTER I: INTRODUCTION 1

CHAPTER II: INTERPRETATION OF QUESTION A 3

CHAPTER III: THE CLIMATE CHANGE TREATIES 6

A. Introduction 6

B. Article 4 of the Paris Agreement 6

1) Article 4(1) 7

2) Article 4(2) 9

3) Article 4(3) 12

4) Summary 13

C. The relationship between the three Climate Change Treaties 14

CHAPTER IV: THE PREVENTION PRINCIPLE 16

CHAPTER V: OTHER SUGGESTED RULES OF CUSTOMARY INTERNATIONAL LAW 21

CHAPTER VI: UNCLOS 23

CHAPTER VII: INTERNATIONAL HUMAN RIGHTS LAW 27

A. International human rights treaties 27

B. Suggested right to a clean, healthy and sustainable environment 35

CHAPTER VIII: THE RELATIONSHIP BETWEEN THE CLIMATE CHANGE TREATIES AND OTHER SOURCES OF INTERNATIONAL LAW 38

A. Identification of principal obligations 38

B. Harmonious interpretation of different rules of international law 38

CHAPTER IX: INTERPRETATION OF QUESTION B 45

CHAPTER X: CONCLUSION 48

CHAPTER I: INTRODUCTION

1. In these Written Comments, the United Kingdom ('**the UK**') addresses:

   1.1. the interpretation of Question A (**Chapter II** below);

   1.2. the Climate Change Treaties (**Chapter III** below);

   1.3. the prevention principle and the due diligence standard (**Chapter IV** below);

   1.4. other suggested rules of customary international law ('**CIL**') said to be of relevance to Question A (**Chapter V** below);

   1.5. the United Nations Convention on the Law of the Sea ('**UNCLOS**') (**Chapter VI** below);

   1.6. international human rights law (**Chapter VII** below);

   1.7. the relationship between the Climate Change Treaties and other relevant rules of international law (**Chapter VIII** below); and

   1.8. the interpretation of Question B (**Chapter IX** below).

2. In its conclusion, the UK summarises the answers which, in its respectful submission, the Court should give to Questions A and B as properly interpreted (**Chapter X** below).

3. The UK focuses in these Written Comments on what it considers to be the key issues for the Court to address arising out of the Written Statements. The UK seeks to assist the Court by providing a framework with which to approach the task before it.

4. In adopting this responsive approach, the UK maintains the submissions that it has already made, including on topics that it does not address in these Written Comments. This includes its submissions on the various provisions of the Complementary Treaties that are responsive to Question A (addressed in the UK's Written Statement in Chapter III(D)).

5. Consistently with this approach, these Written Comments do not address every point made by other participants. The UK should not be treated as having accepted the content

or relevance of any such point or any document (whether contained in Written Statements, annexes or expert reports) put forward by other participants unless it expressly says so. This includes any allegation made against the UK, whether legal or factual in nature (such as references to the UK's alleged historical emissions). These not only fall outside the scope of the Request, but, crucially, are made without any attempt to analyse the degree and effect of the UK's considerable efforts in recent decades in respect of, in particular, mitigation of its own emissions and the financing of the mitigation and adaptation initiatives of other States.

6. Across the 90 Written Statements submitted by other participants, there are a large number of issues raised that are evidently beyond the scope of the Request. Whilst the UK will not burden the Court with an identification and analysis of each of those issues, the UK appreciates that the Court will be alive to such issues being beyond the scope of the Request.

7. The UK's participation and submissions in these proceedings reflect the significant priority it places upon global cooperation, within the international rules-based system and through international climate negotiations, to tackle the climate emergency and create a world free from poverty on a liveable planet. The UK emphasises the urgency of the climate crisis, which cannot be meaningfully addressed without coordinated global action. To that end, the UK is committed to working with States at the forefront of the climate crisis and ensuring that every State plays its part in meeting the collective challenge, including by complying with its own obligations.

CHAPTER II: INTERPRETATION OF QUESTION A

8. The UK maintains the observations made in its Written Statement regarding the scope of the Court's enquiry (at paragraphs 26-27), and now emphasises the following points:

   8.1. These proceedings involve a Request to the Court to give guidance concerning States' existing international law "*obligations … to ensure the protection of the climate system … from anthropogenic emissions of greenhouse gases*".[1]

   8.2. The Request does not ask the Court to opine on any obligations that may have existed at earlier points in time or that may be developed in the future. Nor does the Request ask the Court to opine on international law obligations of a more general or different character that could be engaged in a dispute to which climate change is relevant as a matter of fact.

   8.3. That was the basis upon which the Request was made, and it was the basis upon which the Request received such overwhelming support from States that it was approved by the United Nations General Assembly ('**the General Assembly**') by consensus.

9. Despite assurances previously provided,[2] a small number of participants have invited the Court to address whether the conduct of certain States is, and has been over time, in principle consistent with international law.[3] That approach is outside the scope of Question A, which asks the Court to identify the obligations of all States to ensure the

---

[1] See, e.g., Written Statements of Australia, paras. 1.30-1.31 (Question A "*invites the court to consider existing obligations of all States to ensure the protection of the climate system … By addressing the existing obligations of States, the opinion will clarify the scope of those obligations*" (emphasis in original)); Barbados, para. 127 ("*the Court should answer this Request on the basis of international law as it exists … notwithstanding the prevailing policy considerations*"); United Arab Emirates ('**UAE**'), para. 15 ("*the questions should be understood as focusing on the clarification of the current state of international law and obligations of States*"). See also Argentina, para. 35; Brazil, para. 10; Denmark, Finland, Iceland, Norway and Sweden ('**Nordic countries**'), para. 11; Germany, para. 13; Organization of the Petroleum Exporting Countries ('**OPEC**'), para. 8; Portugal, para. 33; Republic of Korea, para. 4; Sierra Leone, para. 2.4; Slovenia, para. 11; Timor-Leste, paras. 12, 82.

[2] Video address from Vanuatu's Minister of Climate Change, 'UNGA ICJ Climate Resolution Co-Sponsorship' (26 February 2023) <https://www.vanuatuicj.com/latest-news>, at 1 minute 55 seconds ("*we need to ensure all Member States feel comfortable that this initiative is not intended to name or shame any particular nation*").

[3] See, e.g., Written Statements of Burkina Faso, paras. 251-261, 273-336; Commission of Small Island States on Climate Change and International Law ('**COSIS**'), paras. 95, 149; Egypt, paras. 297-387; Kiribati, paras. 90-106, 171, 174-177, 186, 206; Melanesian Spearhead Group ('**MSG**'), paras. 298-301; Organisation of African Caribbean and Pacific States ('**OACPS**'), paras. 131-132, 138-158; Vanuatu, paras. 1, 6-7, 20, 131-157, 195, 484, 500-535, 643-644.

protection of the climate system.[4] It is also outside the scope of Question B, for the reasons given in the UK's Written Statement[5] and further developed in **Chapter IX** below. Question B similarly asks the Court to identify specific legal obligations, not to address the conduct of certain States.

10. As to the applicable law, consistent with the Court's approach in other advisory proceedings, the UK has focused on "*the most directly relevant applicable law*",[6] namely the Climate Change Treaties and the Complementary Treaties.[7] In particular:

10.1. States have created specific legal regimes that address States' obligations to ensure the protection of the climate system from anthropogenic greenhouse gas ('**GHG**') emissions. It is these regimes that should form the basis of the Court's answer to Question A.[8] Consistently with this, the General Assembly has recognised the United Nations Framework Convention on Climate Change ('**UNFCCC**')[9] and the Paris Agreement[10] as the "*primary international, intergovernmental forums for negotiating the global response to climate change*".[11]

10.2. The principal obligations of States under existing international law to ensure the protection of the climate system from anthropogenic GHG emissions are found in the Climate Change Treaties, specifically the Paris Agreement.

---

[4] See Written Statements of Australia, para. 1.29; European Union ('**EU**'), paras. 21, 38, 44-46; France, para. 11.

[5] UK Written Statement, paras. 133-138.

[6] *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226 ('***Nuclear Weapons***'), para. 34.

[7] This approach is supported in the Written Statements of, among others, Brazil, para. 10; Canada, para. 11; Japan, para. 8; South Africa, paras. 16-17.

[8] See Written Statements of Australia, paras. 1.32, 2.2, 2.61-2.62 (the UNFCCC and Paris Agreement "*are the principal sources of States' international obligations to protect the climate system from anthropogenic emissions of greenhouse gases. In answering the question before the Court, it is these treaties that are of central importance*" (para. 2.62)); EU, para. 58 ("*the international legal obligations pertaining most specifically to emissions, namely those laid down in the Paris Agreement, the UNFCCC and its Kyoto Protocol, are of central importance to the Court's analysis*"). See also Brazil, para. 10; Canada, paras. 10-11; China, para. 20; France, paras. 11, 13; Germany, para. 14; Japan, paras. 10-13; Latvia, para. 16; New Zealand, paras. 21, 30; South Africa, para. 17; Timor-Leste, para. 83; UAE, para. 17; United States of America ('**USA**'), para. 1.3.

[9] (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107 (**UN Dossier No. 4**).

[10] (adopted 12 December 2015, opened for signature 22 April 2016, entered into force 4 November 2016) 3156 UNTS 79 (**UN Dossier No. 16**).

[11] UNGA Res 77/165 (21 December 2022) UN Doc A/RES/77/165 (**UN Dossier No. 135**), preamble para. 2.

10.3. There are also several Complementary Treaties that address anthropogenic GHG emissions within more specific parameters. UNCLOS[12] also contains relevant obligations.

11. The UK recognises that other branches of international law, such as international human rights law, may in a much more general sense, and depending on the particular facts and circumstances, have a bearing on climate change-related issues and disputes. Such other branches of international law are not, however, responsive to Question A. The UK's position remains that, to the extent that the treaties, instruments or principles referred to in the Chapeau to the Request do not contain existing "*obligations ... to ensure the protection of the climate system ... from anthropogenic emissions of greenhouse gases*", they should not form part of the Court's answer to Question A.[13]

[12] (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (**UN Dossier No. 45**).

[13] The UK's approach is therefore consistent with the Written Statements of, among others, Australia, paras. 1.32, 3.58; France, paras. 13-14, 111; Japan, paras. 8-11; New Zealand, paras. 21, 30, 114; Timor-Leste, para. 83; UAE, paras. 16-17. By contrast, the UK does not agree with Saudi Arabia that the Court "*need look no further than the specialized treaty regime on climate change*" (para. 1.9; see also paras. 1.7-1.8 and 3.3).

CHAPTER III: THE CLIMATE CHANGE TREATIES

A. Introduction

12. The Climate Change Treaties are rightly a consistent feature of participants' responses to Question A in their Written Statements.[14] In those responses there are different views on two key issues: **first**, the proper characterisation and interpretation of the core mitigation provision in Article 4 of the Paris Agreement; and **secondly**, the legal relationship between the three Climate Change Treaties, namely the UNFCCC, the Kyoto Protocol[15] and the Paris Agreement. The UK sets out its position on the first issue in **Section B** below, and on the second issue in **Section C**.

B. Article 4 of the Paris Agreement

13. The important aspects of Article 4 of the Paris Agreement for the purposes of Question A are its first three paragraphs.[16] They are accordingly given prominence in the Written Statements of other participants.[17] The issue of characterisation that has arisen is whether each of those paragraphs contains any legal obligation at all, and, if so, whether it is an 'obligation of conduct' or an 'obligation of result'. The Court has previously recognised these classifications.[18] It has also recognised the relationship

---

[14] See, e.g., Written Statements of African Union, paras. 50-52, 123ff; Antigua and Barbuda, paras. 151-170, 230-297; Australia, paras. 2.1-2.62; Brazil, paras. 32-49; Burkina Faso, paras. 112-132; China, paras. 20ff; Dominican Republic, paras. 4.21-4.32; Ecuador, paras. 3.66-3.85; EU, paras. 67, 90ff; France, paras. 22ff; Germany, paras. 42-64; India, paras. 19ff; Iran, paras. 31ff; International Union for Conservation of Nature ('**IUCN**'), paras. 92-151; Kuwait, paras. 7-59; Latvia, paras. 16-38; Mauritius, paras. 90-127; New Zealand, paras. 21-77; Nordic countries, paras. 45-63; OPEC, paras. 61-87; Republic of Korea, paras. 17-23; Samoa, paras. 141ff; Seychelles, paras. 68-96; Singapore, paras. 3.27-3.43; Solomon Islands, paras. 59ff; South Africa, paras. 62-128; Timor-Leste, paras. 94ff; Tonga, paras. 138ff; UAE, paras. 105ff; USA, paras. 3.1-3.45; Vanuatu, paras. 397-441.

[15] (adopted 11 December 1997, opened for signature 16 March 1998, entered into force 16 February 2005) 2303 UNTS 162 (**UN Dossier No. 11**).

[16] See UK Written Statement, para. 67. Article 4(1)-(3) is also quoted therein.

[17] See, e.g., Written Statements of African Union, paras. 103-104, 131-133; Antigua and Barbuda, paras. 232-277; China, paras. 46-50; Ecuador, paras. 3.78-3.81; EU, paras. 137-159; France, paras. 26ff; Kuwait, paras. 31-42; Latvia, paras. 26-32; New Zealand, paras. 53-61; OPEC, paras. 64-80; Seychelles, paras. 70-96; Timor-Leste, paras. 106ff; Tonga, paras. 146ff; Vanuatu, paras. 409-418.

[18] *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Judgment) [2010] ICJ Rep 14 ('***Pulp Mills***'), paras. 186-187; *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) [2015] ICJ Rep 665 ('***Costa Rica v Nicaragua***'), Sep. Op. Donoghue, para. 9. See also *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v Chile)* (Judgment) [2018] ICJ Rep 507, para. 87 where the Court observed that "*generally*" an obligation to negotiate does not imply an obligation to reach an agreement but that "*[w]hen setting forth an obligation to negotiate, the parties may … establish an 'obligation to achieve a precise result*'".

between an 'obligation of conduct' and the standard of due diligence to be met in order to fulfil such an obligation.[19]

1) Article 4(1)

14. Article 4(1) does not fall within the scope of Question A. This is because, properly interpreted in accordance with the rule reflected in Article 31 of the Vienna Convention on the Law of Treaties ('**VCLT**'),[20] Article 4(1) does not give rise to "*obligations of States under international law*" as referred to in Question A.

15. Article 4(1) records that:

> *"In order to achieve the long-term temperature goal set out in Article 2, Parties aim to reach global peaking of greenhouse gas emissions as soon as possible, recognizing that peaking will take longer for developing country Parties, and to undertake rapid reductions thereafter in accordance with best available science, so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century, on the basis of equity, and in the context of sustainable development and efforts to eradicate poverty."*

16. There are two key points in respect of Article 4(1).

17. The **first** is that Article 4(1) must be interpreted in the context of the temperature goal set forth in Article 2, to which Article 4(1) expressly refers.

17.1. Article 2(1) of the Paris Agreement identifies the "*aims*" of the treaty. Article 2(1)(a) sets out the temperature goal:

> *"This Agreement, in enhancing the implementation of the Convention, including its objective, aims to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty, including by:*
>
> *(a) Holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing*

[19] *Pulp Mills*, para. 187.

[20] (adopted 22 May 1969, opened for signature 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

that this would significantly reduce the risks and impacts of climate change".

17.2. That "*aim*" is an articulation of the object and purpose of the Paris Agreement insofar as mitigation is concerned, rather than a legal obligation undertaken by the Parties to that Agreement. This is confirmed by Article 3, which describes Article 2 as having "*set out*" the "*purpose of this Agreement*".

17.3. The UK recognises that the temperature goal has enormous significance. Since the 'Glasgow Climate Pact' in 2021, successive Conferences of the Parties ('**COPs**')[21] have accordingly recognised that "*the impacts of climate change will be much lower at the temperature increase of 1.5 °C compared with 2 °C*" and resolved to pursue "*efforts to limit the temperature increase to 1.5 °C*".[22] The plain terms of Article 2(1)(a), read with the chapeau in Article 2(1), demonstrate, however, that the temperature goal is not an obligation. It records the Parties' collective purpose, rather than imposing any obligation on each Party or the Parties in pursuit of that common purpose.

18. Further, neither the concept nor the content of 'best available science' changes this analysis. The UK accepts that 'best available science' is relevant to the application of obligations that are governed by a due diligence standard,[23] as the International Tribunal for the Law of the Sea ('**ITLOS**') has confirmed.[24] However, Articles 2(1)(a) and 4(1) of the Paris Agreement do not impose any obligation upon States, still less one to which a due diligence standard applies. 'Best available science' cannot be used to modify the terms of a treaty, which, in the case of Articles 2(1)(a) and 4(1), make clear

[21] For a description of the COPs under the Climate Change Treaties, see UK Written Statement, paras. 18.1-18.2.

[22] UNFCCC, Decision 1/CP.26 (13 November 2021) UN Doc FCCC/CP/2021/12/Add.1 (**UN Dossier No. 163**), para. 16; UNFCCC, Decision 1/CMA.3 (13 November 2021) UN Doc FCCC/PA/CMA/2021/10/Add.1 (**UN Dossier No. 173**), para. 21; UNFCCC, Decision 1/CP.27 (20 November 2022) UN Doc FCCC/CP/2022/10/Add.1 (**UN Dossier No. 167**), para. 7; UNFCCC, Decision 1/CMA.4 (20 November 2022) UN Doc FCCC/PA/CMA/2022/10/Add.1 (**UN Dossier No. 174**), para. 8; UNFCCC, Decision 1/CMA.5 (13 December 2023) UN Doc FCCC/PA/CMA/2023/16/Add.1, para. 4.

[23] *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*, ITLOS Case No. 31, UK Written Statement, paras. 67, 68(b); UK Oral Submissions, ITLOS/PV.23/C31/18/Rev.1, pp. 33 (line 11) - 39 (line 27).

[24] *Responsibilities and Obligations of States with respect to Activities in the Area* (Advisory Opinion) [2011] ITLOS Rep 10 ('***Activities in the Area***'), para. 117; *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law* (Advisory Opinion), ITLOS Case No. 31, 21 May 2024 ('**ITLOS Advisory Opinion (Case No. 31)**'), para. 243.

that the temperature goal is not binding. Instead, 'best available science' is a factor to consider when assessing which measures should be taken to comply with obligations (discussed below) that are subject to a due diligence standard.[25]

19. The **second** point is that the terms of Article 4(1) are consistent with those of Article 2(1)(a). Article 4(1) identifies specific steps that the Parties to the Paris Agreement "*aim*" to take: in particular, "*to reach global peaking of [GHG] emissions as soon as possible*" and "*to undertake rapid reductions thereafter in accordance with best available science*". In this way, Article 4(1) provides further detail as to the object and purpose of the Paris Agreement already set out in Article 2(1)(a). The terms of Article 4(1) do not, however, oblige the Parties to do (or refrain from doing) anything, consistently with the terms of Article 2(1)(a).

20. Articles 2(1)(a) and 4(1) express the aims of the Paris Agreement without themselves containing obligations. The obligations undertaken by States in pursuit of those aims are contained in other provisions, including in particular Articles 4(2) and 4(3).

2) Article 4(2)

21. Article 4(2) of the Paris Agreement does contain binding obligations that fall within the scope of Question A. It provides that:

> *"Each Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve. Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions."*

The obligations set out in the first and second sentences of Article 4(2) complement each other, but they are distinct.

First sentence

22. As set out above, the first sentence provides that "*Each Party shall prepare, communicate and maintain successive nationally determined contributions that it*

[25] ITLOS Advisory Opinion (Case No. 31), para. 212.

intends to achieve". The use of the mandatory term "*shall*" confirms that the first sentence contains a binding obligation. Furthermore:

22.1. Each Party to the Paris Agreement is required to take specific steps in respect of nationally determined contributions ('**NDCs**'), namely to prepare them, to communicate them and to maintain them.

22.2. The use of the word "*successive*" confirms that this is not a one-off endeavour. States must prepare, communicate and maintain NDCs on a periodic basis. Article 4(9) then specifies the period so far as the communication of NDCs is concerned, namely "*every five years*". Once a Party has communicated its first NDC, the obligation to maintain it is ongoing, and the preparation of the next one must evidently commence in good time in order for it to be communicated at a five-year interval.

22.3. The procedural obligation to prepare, communicate and maintain successive NDCs is an 'obligation of result'. Compliance requires preparation, communication within the relevant period,[26] and maintenance to be achieved. Best efforts to achieve that preparation, communication and maintenance, whether judged on the basis of the standard of due diligence or otherwise, will not constitute compliance. Nor does the concept of "*common but differentiated responsibilities and respective capabilities, in the light of different national circumstances*" ('**CBDR-RC-DNC**') have any specific relevance or application to the obligation to prepare, communicate and maintain NDCs.

22.4. A Party is not obliged to achieve the content of any one or more of its NDCs. Instead, Article 4(2) imposes an 'obligation of conduct' in respect of their achievement governed by the due diligence standard. This is apparent from the reference in the first sentence to a Party preparing, communicating and maintaining NDCs that it "*intends to achieve*". This is plainly not an 'obligation of result'. This interpretation is further supported by the terms of the second

[26] See UNFCCC, Decision 1/CP.21 (13 December 2015) UN Doc FCCC/CP/2015/10/Add.1 (**UN Dossier No. 155**), para. 25, which requires NDCs to be communicated at least 9-12 months in advance of the relevant COP session.

sentence, which requires Parties to take domestic measures "*with the aim of achieving the objectives of such contributions*".

22.5. That each NDC must be one that the relevant State "*intends to achieve*" places particular emphasis on the need for each Party to perform its obligation of conduct in respect of its NDCs in good faith, consistently with the more general principle of good faith reflected in Article 26 of the VCLT. This means that if a State's NDC contains a projection or proposal that it does not intend to achieve, then that State will be responsible for a breach of the first sentence of Article 4(2) of the Paris Agreement.

Second sentence

23. The second sentence of Article 4(2) provides that "*Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions*". This obliges Parties to pursue domestic measures in implementation of the emission reduction targets and other mitigation pledges set out in their NDCs. Furthermore:

23.1. This is also an 'obligation of conduct'. It is also subject to a due diligence standard. The language of "*pursuit*" of "*domestic measures*" that are to be defined by each Party allows Parties a degree of flexibility that is consistent with such a classification.

23.2. This interpretation is consistent with the Court's conclusion in the *Pulp Mills* judgment that an obligation to adopt regulatory or administrative measures is appropriately classified as an 'obligation of conduct' governed by the due diligence standard.[27] The classification is even more appropriate in the case of the second sentence of Article 4(2), given that the Parties are subject to the less demanding obligation to "*pursue*" rather than "*adopt*" domestic measures.

23.3. In Article 4(2), the expression "*aim of achieving the objectives*" means that such measures must be targeted towards and appropriate for the achievement of the objectives identified in the relevant NDC.

[27] *Pulp Mills*, para. 187.

3) Article 4(3)

24. Article 4(2) refers to "*successive*" NDCs. Article 4(3) then develops that as follows:

> *"Each Party's successive nationally determined contribution will represent a progression beyond the Party's then current nationally determined contribution and reflect its highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances."*

25. By these terms, the Paris Agreement does not prescribe the specific content of a Party's NDCs. Instead, each Party is afforded discretion as to what precise measures it envisages in its NDCs. Complementing the obligation in Article 4(2) to prepare, communicate and maintain successive NDCs, the function of Article 4(3) is to identify the relevant standards governing the content of each successive NDC produced by a particular Party. Those standards are twofold:

25.1. **first**, an NDC is required to be a "*progression*" beyond the previous iteration;

25.2. **secondly**, and most significantly, it is required to reflect a Party's "*highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances*".

26. These considerations are supplemented by Article 14(3), which explains the relevance of the outcome of the Global Stocktake to the content of Parties' NDCs.[28] The requirement to "*undertake and communicate ambitious efforts*" and for those efforts to "*represent a progression over time*" is also reinforced by Article 3.

27. Like the obligation in Article 4(2) concerning the achievement of NDCs, Article 4(3) is an 'obligation of conduct'. In this case, Article 4(3)'s own terms specify the intensity of the standard of due diligence that is required to satisfy it. In particular:

27.1. The concepts of "*progression*" and "*highest possible ambition*" are objective. A Party will not satisfy the standards prescribed by Article 4(3) if, objectively, a

[28] Paris Agreement (**UN Dossier No. 16**), Art. 14(3) provides that: "*The outcome of the global stocktake shall inform Parties in updating and enhancing, in a nationally determined manner, their actions and support in accordance with the relevant provisions of this Agreement, as well as in enhancing international cooperation for climate action*."

new NDC does not "*represent a progression*" from the previous one or if, again objectively, it does not "*reflect its highest possible ambition*", reflecting CBDR-RC-DNC.

27.2. A Party may use relevant concepts or considerations reflected in the Paris Agreement's terms, in particular 'best available science',[29] to inform its assessment of the measures that it should include in its NDC to comply with the due diligence standard set by the terms of Article 4(3).[30]

28. The UK further recognises that the transparency and review requirements for NDCs have an important function in ensuring Parties' accountability in respect of compliance with Articles 4(2) and 4(3) of the Paris Agreement.[31] So too do Parties' obligations regularly to provide information necessary to track progress in implementing and achieving their NDCs and to participate in the facilitative multilateral consideration of progress. This multilateral process considers implementation and achievement of NDCs and involves a technical expert review of the information submitted by Parties.[32] These procedural obligations are 'obligations of result' (see paragraph 22.3 above).

4) Summary

29. The UK submits that the key mitigation obligations in Article 4 of the Paris Agreement are: (i) for each Party to prepare and communicate an NDC that it intends to achieve every five years and to maintain it in the interim; (ii) for each NDC, objectively, to represent a progression beyond the previous one and reflect a Party's highest possible ambition, reflecting CBDR-RC-DNC; and (iii) for each Party to pursue domestic measures with the aim of achieving the objectives of its NDCs. Those obligations are supported by further obligations to other Parties: (i) to provide the information necessary to track progress made in implementing and achieving NDCs; and (ii) to

[29] 'Best available science' is itself referenced in Paris Agreement (**UN Dossier No. 16**), Art. 4(1).

[30] See further para. 18 above.

[31] See in particular Paris Agreement (**UN Dossier No. 16**), Arts. 4(8), 4(12) and 4(13). See further UK Written Statement, paras. 69-71.

[32] See in particular Paris Agreement (**UN Dossier No. 16**), Arts. 13(7)(b) and 13(11). See also UK Written Statement, para. 71 and fn. 135 and paras. 79-82.

participate in a review process assessing Parties' implementation and achievement of their NDCs.

C. The relationship between the three Climate Change Treaties

30. The question of how the three Climate Change Treaties (the UNFCCC, the Kyoto Protocol and the Paris Agreement) relate to each other is answered by the rule reflected in Article 30 of the VCLT. This is the rule that governs the relationship between successive treaties with the same subject matter.

31. This rule applies to the Climate Change Treaties as follows:

    31.1. For those UNFCCC Parties that are party to the Paris Agreement,[33] the effect of Article 30(3)-(4) of the VCLT is that the UNFCCC (as the earlier treaty) continues to apply only to the extent that its provisions are compatible with those of the Paris Agreement (as the later treaty). As elaborated upon immediately below, the UK does not view the mitigation provisions of the UNFCCC as incompatible with those of the Paris Agreement. Therefore both treaties continue to apply, and neither is subordinate to the other. However, if and to the extent it might be asserted or held that an incompatibility exists, the provisions of the Paris Agreement would prevail.

    31.2. In general terms, the Paris Agreement gives greater specificity to the framework obligations and commitments laid down in the UNFCCC and is thus compatible with it. This is illustrated by the fact that several provisions of the Paris Agreement refer to the provisions of the UNFCCC and seek to implement or develop them.[34]

    31.3. There are some elements of the Paris Agreement that are a deliberate departure from or material development of the UNFCCC. The most notable of those is the shift from the Annex-based system. More specifically as regards mitigation

[33] 195 of 198 Parties to the UNFCCC are also Parties to the Paris Agreement. Iran, Libya and Yemen are Parties to the UNFCCC and have signed but not yet ratified the Paris Agreement.

[34] See Paris Agreement (**UN Dossier No. 16**), Arts. 1, 2(1), 4(14), 5(1), 5(2), 7(7)(b), 9(1), 9(8), 9(9), 10(3), 10(5), 11(2), 11(5), 13(3)-(5), 16(1), 16(5), 17(1)-(2), 18(1), 19(1), 22, 23(1), 24 and 28(3).

obligations, under the UNFCCC (and the Kyoto Protocol, discussed in the next paragraph) the intensity of a Party's mitigation obligations varied depending on whether or not a Party was included in Annex I to the UNFCCC. In contrast, in the Paris Agreement, the mitigation obligations in Article 4 bind all Parties but apply differently in certain respects to reflect a Party's CBDR-RC-DNC (as discussed above).[35] The focus is thus on a Party's actual capability, rather than on any abstract and general characterisation of that Party as developed, in transition or developing.[36] This difference in approach does not render the Paris Agreement incompatible with the UNFCCC. Rather, it enhances the implementation of the UNFCCC by providing for more robust mitigation obligations applicable to all Parties to the Paris Agreement.

31.4. The same analysis applies to the relationship between the Kyoto Protocol and the Paris Agreement, save that, in practical terms, the limited temporal scope of the Kyoto Protocol's mitigation provisions means that the obligations that would have been most relevant to Question A are no longer in operation.[37]

[35] See paras. 24-25, 27 and 29 above.

[36] See UK Written Statement, paras. 141-142.

[37] The Kyoto Protocol's second commitment period expired in 2020; no third commitment period was agreed: see UK Written Statement, para. 60.

CHAPTER IV: THE PREVENTION PRINCIPLE

32. There is an issue in dispute as to whether there is any rule of CIL imposing any obligation on States to ensure the protection of the climate system from anthropogenic GHG emissions. Some participants refer to and rely upon in this context a rule known as the 'prevention principle'.[38] At least two participants also refer to a purportedly distinct 'duty of due diligence'.[39]

33. The UK accepts that there is a rule of CIL with the content identified by the Court in its 2010 judgment in *Pulp Mills*. In that judgment, the Court stated that a State is obliged "*to 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*"[40] and that a State's compliance with that obligation is to be assessed by reference to the due diligence standard.[41] Although the Court had previously said in *Nuclear Weapons* that a more "*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*" formed part of the "*corpus of international law*",[42] the scope and content of the rule was not determined until 2010 in the *Pulp Mills* judgment.

[38] See, e.g., Written Statements of African Union, paras. 90-99; Albania, paras. 65-93; Antigua and Barbuda, paras. 125-142, 298-346; Bahamas, paras. 92-104; Bangladesh, paras. 88-95; Barbados, paras. 133-150; Belize, paras. 31-63; Burkina Faso, paras. 171-182; Chile, paras. 35-39; Colombia, paras. 3.13ff; COSIS, paras. 80-96; Costa Rica, paras. 40ff; Ecuador, paras. 3.18-3.31; Egypt, paras. 83ff; Grenada, paras. 38-41; IUCN, paras. 307ff; Kenya, paras. 5.3ff; Mauritius, paras. 189-192; Mexico, paras. 40ff; Micronesia, paras. 53ff; Namibia, paras. 49-61; Nauru, paras. 26-33; Nepal, para. 26; Netherlands, paras. 3.52ff; OACPS, paras. 96ff; Pakistan, paras. 29-39; Palau, paras. 14-17; Parties to the Nauru Agreement Office ('**PNAO**'), paras. 37-46; Philippines, paras. 55ff; Republic of Korea, paras. 32-37; Romania, paras. 98-108; Saint Lucia, paras. 66-68; Saint Vincent and the Grenadines, paras. 98-108; Samoa, paras. 87-130; Seychelles, paras. 97-133; Sierra Leone, paras. 3.10ff; Singapore, paras. 3.1-3.20; Solomon Islands, paras. 146-162; Spain, paras. 6-8; Sri Lanka, paras. 95-98; Switzerland, paras. 14-47; Thailand, paras. 7-14; UAE, paras. 90-102; Uruguay, paras. 89ff; Vanuatu, paras. 235ff; Viet Nam, paras. 25-29.

[39] Written Statements of Costa Rica, para. 37; Vanuatu, paras. 206, 235.

[40] *Pulp Mills*, para. 101; affirmed in *Costa Rica v Nicaragua*, para. 118.

[41] *Pulp Mills*, para. 101; see also paras. 187, 197, 204-206, 209, 223 and 265 in the context of the Court's interpretation of the treaty at issue in that case, the 1975 Statute of the River Uruguay.

[42] *Nuclear Weapons*, para. 29.

34. Like several other participants,[43] the UK considers that this rule of CIL has no application in the context of protecting the climate system from anthropogenic GHG emissions.[44] The UK emphasises three points:

34.1. The **first** is that the 'prevention principle' must be understood against the background of the factual circumstances in which it was developed by courts, tribunals and treaties. As several participants have observed,[45] this rule of CIL was developed to apply to transboundary harm, usually in a bilateral context. It was not developed to address a species of harm that is global in its impact, with the harm emanating from diffuse sources and being felt in diffuse ways and places.

34.2. The **second** point is that the content of the rule is incapable of being engaged in respect of harm to the global climate system arising from anthropogenic GHG emissions. The rule requires a State to act with due diligence to "*avoid activities … causing significant damage to the environment of another State*". Causation and the identification of harm caused by one State to another are specifically included as part of the content of the primary rule. However, there is no single or agreed scientific methodology to link the GHG emissions of individual States with particular damage to the environment of any particular States.[46]

34.3. The **third** point, which is related to the first two, is that Question A refers to the protection of the "*climate system*", meaning one global system, not to damage to the environment of any one or more States. The prevention principle as articulated by the Court is thus in any event not responsive to Question A.

[43] See, e.g., Written Statements of China, paras. 128-129; India, para. 17; New Zealand, paras. 96-103; Nordic countries, para. 71; OPEC, para. 87; USA, paras. 4.15ff. Compare also Australia, para. 4.10; Indonesia, para. 61; Japan, para. 11.

[44] The UK's position is that ITLOS' analysis at para. 252 of the ITLOS Advisory Opinion (Case No. 31) is specific to the application of UNCLOS, Art. 194(2) to anthropogenic GHG emissions and has no relevance to the prevention principle. The relevance of the ITLOS Advisory Opinion is further discussed in **Chapter VI** below.

[45] See, e.g., Written Statements of Australia, para. 4.10; New Zealand, paras. 96, 101-102; Nordic countries, para. 70; USA, paras. 4.5, 4.15-4.21. See also Bahamas, para. 98; EU, para. 308; France, para. 58.

[46] See further UK Written Statement, para. 137.4.3.

35. To the extent that the Court finds that the 'prevention principle' nonetheless applies to protecting the climate system from anthropogenic GHG emissions, the UK's alternative position is as follows:

35.1. As the Court held in the *Pulp Mills* judgment, the 'prevention principle' is an 'obligation of conduct' that is governed by a due diligence standard.[47] It requires States to adhere to a standard of conduct, rather than attain any particular result. In general, it obliges a State to "*deploy adequate means, to exercise best possible efforts, to do the utmost*"[48] to prevent environmental damage to another State. The precise steps that will be required to satisfy the 'prevention principle' will naturally depend on the facts and circumstances,[49] including the degree of risk of harm.[50] At the very least, it will require a State to formulate and implement policies to prevent the relevant harm, including through legislative and administrative measures, as well as exercising a "*certain level of vigilance in their enforcement*".[51]

35.2. In the specific context of harm caused by anthropogenic GHG emissions, the Climate Change Treaties are of particular relevance, as a range of participants have recognised.[52] The UK's position is that the agreement of States represented

[47] *Pulp Mills*, para. 101; see also paras. 187, 197, 204-206, 209, 223 and 265 in the context of the Court's interpretation of the treaty at issue in that case, the 1975 Statute of the River Uruguay. See also *Costa Rica v Nicaragua*, Sep. Op. Donoghue, para. 9.

[48] *Activities in the Area*, para. 110; see also para. 131; *Request for Advisory Opinion Submitted by the Sub-Regional Fisheries Commission* (Advisory Opinion) [2015] ITLOS Rep 4, para. 129; ITLOS Advisory Opinion (Case No. 31), para. 233.

[49] *Costa Rica v Nicaragua*, Sep. Op. Donoghue, para. 10 ("*whether the State of origin has met its due diligence obligations must be answered in light of the particular facts and circumstances*"); Sep. Op. Dugard, para. 11 ("*due diligence is a more open-textured obligation that could potentially be satisfied in a number of different ways*").

[50] *Activities in the Area*, para. 117 (noting that the due diligence standard "*may … change in relation to the risks involved in the activity*" and "*has to be more severe for the riskier activities*"). See also ITLOS Advisory Opinion (Case No. 31), para. 239.

[51] *Pulp Mills*, para. 197, describing Art. 41 of the 1975 Statute of the River Uruguay as "*an obligation which entails not only the adoption of appropriate rules and measures [as expressly referenced in that article], but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as the monitoring of activities undertaken by such operators, to safeguard the rights of the other party*".

[52] See, e.g., Written Statements of Australia, para. 4.11; Bangladesh, para. 136; Colombia, para. 3.20; Egypt, paras. 105, 118ff; EU, para. 319; IUCN, paras. 358ff; Kuwait, paras. 72-75; Mauritius, para. 193; New Zealand, paras. 104-107; Nordic countries, paras. 72-74; Romania, paras. 106, 110; Samoa, para. 139; Sierra Leone, para. 3.19; Singapore, paras. 3.3, 3.11, 3.19-3.20; Spain, para. 7; Switzerland, paras. 43-45; UAE, paras. 91, 98-102; USA, paras. 4.22-4.28.

by the Climate Change Treaties would define the standard of due diligence required in the application of any CIL rule in the context of environmental damage arising from anthropogenic GHG emissions. In this connection, the UK observes that the UNFCCC's Preamble recalls States' "*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*".[53] The "*general obligation*"[54] that later crystallised in the form of the 'prevention principle' was thus clearly in contemplation at the time that the UNFCCC was being drafted.

35.3. Accordingly, the Climate Change Treaties and any CIL rule applicable in the context of anthropogenic GHG emissions and climate change would not give rise to parallel regimes operating simultaneously with different content. This would be neither practical nor principled. Indeed, "*[i]t is a generally accepted principle 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*".[55] Thus, both the treaty regime and any CIL rule would lead to the same result, namely the application of the specific obligations in the Climate Change Treaties, consistently with the principles of harmonisation and systemic integration.[56]

36. Further, and in any event, there is no "*duty of due diligence*" that operates on a "*stand-alone*" basis, whether as a rule of CIL or otherwise.[57] This is to misapprehend the character and function of the concept of due diligence. It is not itself an obligation or

[53] UNFCCC (**UN Dossier No. 4**), preamble para. 8.

[54] *Nuclear Weapons*, para. 29. See para. 33 above.

[55] International Law Commission ('**ILC**'), 'Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (2006) UN Doc A/61/10 ('**Fragmentation Conclusions**'), p. 408 (Conclusion 4).

[56] Fragmentation Conclusions, pp. 407-408 (Conclusions 1-4), 413 (Conclusion 17). See also ILC, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law – Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi' (13 April 2006) UN Doc A/CN.4/L.682 ('**Fragmentation Report**'), paras. 37, 410-413.

[57] Cf. Vanuatu Written Statement, para. 206. See also Costa Rica Written Statement, para. 37.

duty. Instead, as the Court has recognised,[58] it is a standard of conduct, which acts as a tool for assessing compliance with the obligation in question.

[58] *Costa Rica v Nicaragua*, paras. 104, 153 and 168 ("*obligation to exercise due diligence in preventing significant transboundary harm*"); Sep. Op. Donoghue, paras. 1 ("*States have an obligation under customary international law to exercise due diligence in preventing significant transboundary environmental harm*") and 8 (referring to "*a standard of due diligence in the prevention of significant transboundary environmental harm*" and "*an obligation to exercise due diligence in preventing significant transboundary environmental harm*"); Sep. Op. Dugard, paras. 7 ("*The duty of due diligence therefore is the standard of conduct required to implement the principle of prevention*") and 9 ("*Due diligence is the standard of conduct that the State must show at all times to prevent significant transboundary harm*").

CHAPTER V: OTHER SUGGESTED RULES OF CUSTOMARY INTERNATIONAL LAW

37. Other participants have relied upon various additional principles in response to Question A, including, most pertinently in the climate change context, common but differentiated responsibilities ('**CBDR**'), intergenerational equity, the polluter-pays principle, and the precautionary principle. Several participants appear to submit that one or more of these principles are binding independently of any treaty, as freestanding rules of CIL.[59]

38. The correct position is that none of these postulated principles is a rule of CIL.[60] Rather, these principles are limited to and must always be interpreted within the framework of the specific treaty or other instrument of which they form part. Each principle may be articulated in multiple different ways, and may be found in different forms in various multilateral environmental agreements.[61] These principles do not have the same meaning or implications in all treaties, and must be applied in each case with sensitivity to the precise terms of the relevant treaty.

39. Even if one or more of the postulated principles were standalone rules of CIL, binding independently of any treaty, they would not fall within the scope of Question A, because none of these principles provides in itself an obligation "*to ensure the protection of the climate system … from anthropogenic emissions of greenhouse gases*". At most, if treated as rules of CIL, they might inform the interpretation of the obligations that do come within the scope of Question A.[62] Even then, such CIL rules would not meaningfully add to the interpretation of the specific treaty provisions that are responsive to Question A. For example, when interpreting provisions of the Paris Agreement, it is the carefully calibrated articulation of CBDR-RC-DNC in that treaty

[59] See, e.g., Written Statements of Bangladesh, para. 129; Barbados, paras. 229-245, 262-269; Brazil, paras. 27-29; Costa Rica, paras. 56-57, 92(e), 114; Ecuador, paras. 3.43-3.49; France, para. 246; Grenada, para. 42; IUCN, para. 388; Micronesia, paras. 63-64, 68, 77; Namibia, paras. 62, 77; Saint Vincent and the Grenadines, paras. 103-108, 122-127; Solomon Islands, paras. 58, 132-134; Uruguay, paras. 103-109, 143; Vanuatu, para. 482; Viet Nam, para. 16.

[60] See, e.g., Written Statements of EU, para. 187; Germany, para. 79; Indonesia, para. 63; Japan, paras. 24-25; Kuwait, paras. 65-71; Nordic countries, para. 76; OPEC, para. 88; Thailand, paras. 36-41.

[61] See, e.g., ITLOS Advisory Opinion (Case No. 31), para. 213 (a "*precautionary approach*" is "*implicit*" in the provisions of UNCLOS dealing with pollution of the marine environment).

[62] See VCLT, Art. 31(3)(c). See further **Chapter VIII** below.

(i.e., "*common but differentiated responsibilities and respective capabilities, in the light of different national circumstances*") which is relevant, rather than any more generally formulated, universally applicable CIL 'rule' of CBDR.

40. By contrast, the UK of course does accept that principles or concepts expressly identified in the Climate Change Treaties are relevant to the interpretation and implementation of those treaties, subject in each case to the specific treaty terms addressing the scope of their content and relevance.[63]

41. The UK also joins other participants in emphasising the important role of cooperation in the implementation of the Climate Change Treaties, as reflected for instance in Article 12 of the Paris Agreement.[64]

[63] See, e.g., UNFCCC (**UN Dossier No. 4**), Art. 3; Paris Agreement (**UN Dossier No. 16**), Art. 2(2).

[64] See, e.g., Written Statements of Argentina, para. 45; Australia, paras. 4.2, 4.6; Brazil, para. 67; China, paras. 3, 40, 83; Colombia, para. 3.60; Democratic Republic of the Congo ('**DRC**'), para. 225; Germany, para. 13; Iran, para. 84; Mauritius, para. 206; Mexico, para. 74; Netherlands, para. 3.13; New Zealand, paras. 14-16, 76-77; Nordic countries, para. 4; Portugal, para. 165; Republic of Korea, para. 39; Romania, para. 39; Samoa, paras. 149, 163; Sierra Leone, paras. 3.27-3.28; Singapore, para. 3.25; Solomon Islands, paras. 116-117, 121-122; UAE, paras. 80-89; USA, para. 1.14.

CHAPTER VI: UNCLOS

42. Since the UK prepared its Written Statement, ITLOS has delivered its advisory opinion in Case No. 31 concerning the Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law. In that case, COSIS invited the Tribunal to identify "*the specific obligations of State Parties to [UNCLOS], including under Part XII*" in two respects:[65]

> *"(a) to prevent, reduce and control pollution of the marine environment in relation to the deleterious effects that result or are likely to result from climate change, including through ocean warming and sea level rise, and ocean acidification, which are caused by anthropogenic greenhouse gas emissions into the atmosphere?*
>
> *(b) to protect and preserve the marine environment in relation to climate change impacts, including ocean warming and sea level rise, and ocean acidification?"*

43. The two questions that were before ITLOS are not equivalent to the terms of the Request before the Court. However, the Tribunal's advisory opinion usefully discusses the obligations in Part XII of UNCLOS that are relevant to Question A, namely Articles 192, 194, 207, 212, 213 and 222.[66] It does so in the specific context of anthropogenic GHG emissions. Given the obvious relevance of the subject matter of the advisory opinion, and given that ITLOS is a body on which States Parties to UNCLOS conferred jurisdiction to address disputes concerning its interpretation and application,[67] the UK invites the Court to consider the ITLOS Advisory Opinion (Case No. 31) to be highly relevant, insofar as it addresses the interpretation of UNCLOS provisions falling within the scope of Question A.

44. In that context, the UK draws the Court's attention to the following key findings in the ITLOS Advisory Opinion (Case No. 31):

---

[65] See ITLOS Advisory Opinion (Case No. 31), para. 3.

[66] See UK Written Statement, para. 119.

[67] UNCLOS (**UN Dossier No. 45**), Art. 288(1) and Annex VI (ITLOS Statute), Art. 21; see also the limitations on that jurisdiction set out in UNCLOS, Arts. 297 and 298.

44.1. The Tribunal recognised the relevance of three of the Complementary Treaties identified by the UK in the context of anthropogenic GHG emissions, namely MARPOL and its Annex VI, Annex 16 to the Chicago Convention, and the Montreal Protocol (see paragraphs 79-82).[68]

44.2. The Tribunal confirmed the relevance of Article 31(3)(c) of the VCLT to the interpretation of Part XII of UNCLOS, and specifically referred to the UNFCCC and the Paris Agreement as "*[r]elevant international rules and standards*" in determining "*necessary measures*" for the purposes of Article 194(1) of UNCLOS and as relevant to the interpretation of UNCLOS in the context of anthropogenic GHG emissions more generally (see paragraphs 135, 214 and 222-224).

44.3. The Tribunal confirmed that the questions that had been submitted to it (asking it to identify "*specific obligations*" relating to anthropogenic GHG emissions and climate change) did not permit it to address any question of responsibility of particular States Parties to UNCLOS, as had been urged upon it by several participants in those proceedings (as in this case)[69] (see paragraphs 145-146).

44.4. Similarly, the Tribunal indicated that questions relating to the consequences of sea-level rise for base points or baselines, for claims, rights or entitlements to maritime zones established under UNCLOS, for maritime boundaries, and for any obligations corresponding to any of these matters, were outside the scope of

[68] International Convention for the Prevention of Pollution from Ships (adopted 2 November 1973, opened for signature 15 January 1974), as amended by Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships (adopted 17 February 1978, opened for signature 1 June 1978, entered into force 2 October 1983) 1340 UNTS 61 ('**MARPOL**'); Convention on International Civil Aviation (signed 7 December 1944, entered into force 4 April 1947) 15 UNTS 295 ('**the Chicago Convention**'); Montreal Protocol on Substances that Deplete the Ozone Layer (adopted 16 September 1987, entered into force 1 January 1989), 1522 UNTS 3 (**UN Dossier No. 26**) ('**the Montreal Protocol**'). As to these Complementary Treaties, see UK Written Statement, paras. 83-102.

[69] See para. 9 and fn. 3 above.

the advisory proceedings, despite the Tribunal being urged by some participants to address those questions (as in this case)[70] (see paragraphs 149-150).

44.5. Consistently with the submissions of the UK and many other States before ITLOS and in these proceedings,[71] the Tribunal concluded that anthropogenic GHG emissions into the atmosphere constitute pollution of the marine environment for the purposes of Article 1(1)(4) of UNCLOS (see paragraph 179).

44.6. When determining "*necessary measures*" for the purposes of Article 194(1) of UNCLOS, the Tribunal found that 'best available science' (including in relation to the 1.5°C temperature goal) plays a crucial role, but does not alone determine what is "*necessary*" for the purposes of Article 194(1); instead, there are a range of relevant factors to be taken into account (see paragraph 212); the same analysis applies to Article 194(2) (see paragraph 250).

44.7. The Tribunal concluded that Article 194(1) of UNCLOS is an 'obligation of conduct', which requires States Parties to act with 'due diligence' in taking necessary measures, and that 'due diligence' is a "*standard*" which is "*stringent*" in this context (see paragraphs 232-243).

44.8. The Tribunal similarly characterised Articles 192 and 194(2) of UNCLOS as 'obligations of conduct' to be assessed by reference to the due diligence standard as applicable in the context of anthropogenic GHG emissions (see paragraphs 244-258 and 395-400).

---

[70] See, e.g., Written Statements of Burkina Faso, paras. 345, 396; COSIS, paras. 71-72; Costa Rica, paras. 125-127; Dominican Republic, para. 4.40; El Salvador, paras. 55-58; Kiribati, para. 191; Liechtenstein, paras. 77-78; Marshall Islands, para. 105; Micronesia, paras. 114-117; Nauru, paras. 12-13; OACPS, paras. 176, 194; Pacific Islands Forum Secretariat, paras. 22-24; PNAO, para. 57; Solomon Islands, paras. 208-213; Tonga, paras. 233-236; Tuvalu, paras. 81-82, 90, 149; Vanuatu, para. 588.

[71] UK Written Statement, paras. 111-116. See also, e.g., Written Statements of Antigua and Barbuda, paras. 387-391; Argentina, para. 48; Australia, para. 3.4; Bahamas, paras. 118-120; Bangladesh, paras. 98-99; Barbados, para. 185; Burkina Faso, para. 146; Canada, para. 19; Chile, paras. 44, 49; Cook Islands, paras. 171-174; COSIS, paras. 99-100; Costa Rica, para. 69; DRC, paras. 215-216; Ecuador, paras. 3.88-3.89; Egypt, para. 279; France, para. 101; IUCN, paras. 183-186; Kenya, para. 5.43; Latvia, para. 40; Marshall Islands, para. 46; Mauritius, paras. 144, 154(a); Micronesia, paras. 94-98; PNAO, paras. 26-29; Portugal, para. 66; Republic of Korea, para. 25; Saint Lucia, para. 70; Sierra Leone, para. 3.124; Singapore, paras. 3.45-3.50; Solomon Islands, para. 205; Timor-Leste, paras. 221-222; Tonga, paras. 222-223; Vanuatu, paras. 446, 448.

44.9. The Tribunal emphasised the importance of the duty of cooperation, finding that it is an integral part of the obligations under Articles 192 and 194 of UNCLOS, and is also given specific effect in Articles 197, 200 and 201 of UNCLOS (see paragraph 299).

CHAPTER VII: INTERNATIONAL HUMAN RIGHTS LAW

A. International human rights treaties

45. As the UK observed in its Written Statement, claims invoking international human rights law in cases involving particular factual circumstances related to climate change fall to be considered on their individual facts, as is the case for other claims of breach of human rights. A State may be responsible for a breach of human rights if, on the facts of the particular case, the requirements of jurisdiction, admissibility, applicability, and breach are all satisfied.[72]

46. There are specific difficulties associated with each of these elements in human rights claims concerning mitigation of anthropogenic GHG emissions. This can be illustrated by reference to two human rights treaty provisions addressed by many participants in the present proceedings, Article 6 (the right to life)[73] and Article 17 (the right not to be subjected to arbitrary or unlawful interference with privacy, family, or home)[74] of the International Covenant on Civil and Political Rights ('**ICCPR**'),[75] as follows:

46.1. Article 6(1) provides that:

> *"Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."*

[72] UK Written Statement, paras. 125-126.

[73] See, e.g., Written Statements of African Union, paras. 204-206, 292, 299(a)(vi); Albania, paras. 96(a), 102; Antigua and Barbuda, para. 190; Bahamas, paras. 145-146, 162; Bangladesh, para. 108; Barbados, paras. 162-163, 203-204; Bolivia, para. 14; Burkina Faso, para. 219; Chile, para. 127; Colombia, paras. 3.68, 3.70; COSIS, para. 135; DRC, para. 155; Ecuador, paras. 3.109-3.111; Egypt, paras. 206-211; EU, paras. 232-233, 267; France, paras. 124, 136; Germany, paras. 87-89, 110; Indonesia, paras. 36-38; IUCN, paras. 473-474, 493, 499, 524; Kenya, paras. 5.54-5.57; Kiribati, paras. 163-164; Liechtenstein, paras. 36-41; Marshall Islands, paras. 47-48, 86, 110; Mauritius, paras. 171-172; Micronesia, paras. 80, 134; MSG, paras. 265-272; Namibia, paras. 108-112; Nepal, para. 31; Netherlands, paras. 3.29-3.32; New Zealand, para. 112; OACPS, para. 121; Philippines, paras. 106(d)-(e); Portugal, para. 74; Republic of Korea, paras. 28-29; Sierra Leone, paras. 3.61-3.68; Singapore, para. 3.77; Slovenia, paras. 26-27; Solomon Islands, paras. 165-170; Switzerland, para. 59; Thailand, paras. 26-27; Tonga, paras. 243, 247-250; Tuvalu, paras. 99, 101; Uruguay, paras. 112-113; USA, paras. 4.43-4.49; Vanuatu, paras. 220-221, 343-348.

[74] See, e.g., Written Statements of Barbados, para. 202; Burkina Faso, para. 219; Chile, para. 127; DRC, para. 155; Ecuador, paras. 3.115-3.118; EU, paras. 239, 267; France, paras. 124, 217; IUCN, para. 474; Kenya, paras. 5.78-5.79; Kiribati, paras. 165, 167, 202-203; Marshall Islands, para. 86; Micronesia, paras. 134-135; Netherlands, paras. 3.29-3.30, 4.16, 5.37; New Zealand, paras. 112, 117; OACPS, para. 122; Sierra Leone, para. 3.61; Solomon Islands, paras. 167-168, 180-185; Switzerland, para. 59; Tuvalu, para. 99; Vanuatu, paras. 349-357.

[75] (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (**UN Dossier No. 49**).

46.2. According to the United Nations Human Rights Committee ('**HRC**'), Article 6(1) requires Parties to adopt positive measures to protect the right to life from reasonably foreseeable threats and life-threatening situations that can result in loss of life.[76] The HRC has interpreted this requirement as an obligation for Parties to take "*all appropriate*" or "*reasonable*" positive measures "*that do not impose disproportionate burdens*".[77]

46.3. Article 17 provides that:

> *"1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.*
>
> *2. Everyone has the right to the protection of the law against such interference or attacks."*

46.4. The HRC has interpreted Article 17 to impose positive obligations on Parties,[78] to "*prevent interference with a person's privacy, family or home that arises from conduct not attributable to the State … where such interference is foreseeable and serious*."[79] Thus, the HRC has indicated that Parties are required to adopt "*adequate*" or "*appropriate*" positive measures,[80] including to "*prevent serious interference with the privacy, family and home of individuals under their jurisdiction*" threatened by environmental damage.[81]

---

[76] HRC, *Billy v Australia* (21 July 2022) UN Doc CCPR/C/135/D/3624/2019, para. 8.3. As explained in UK Written Statement, para. 127.3, the findings of breach in *Billy v Australia* concerned failure to take adaptation measures; the claims concerning failure to take mitigation measures were not upheld.

[77] HRC, *Portillo Cáceres v Paraguay* (25 July 2019) UN Doc CCPR/C/126/D/2751/2016, para. 7.3; HRC, *López Martínez v Colombia* (2 June 2020) UN Doc CCPR/C/128/D/3076/2017, paras. 9.2-9.3. See also *Billy v Australia*, para. 8.3.

[78] Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (3rd edn, OUP 2013) ('**Joseph and Castan**'), para. 16.15.

[79] *Billy v Australia*, para. 8.9; see also para. 8.10.

[80] *Billy v Australia*, para. 8.12; *Portillo Cáceres v Paraguay*, para. 7.8. See also HRC, *Pereira v Paraguay* (14 July 2021) UN Doc CCPR/C/132/D/2552/2015, paras. 8.3-8.4.

[81] *Billy v Australia*, para. 8.9.

46.5. To make a complaint under the Optional Protocol to the ICCPR[82] in respect of either provision, the author or authors must establish that they are personally and actually affected by the act or omission at issue (the victim requirement)[83] and are within the territory and subject to the jurisdiction of the respondent State (the jurisdiction requirement).[84]

46.6. Any claim that a particular State's failure to adopt measures to mitigate GHG emissions has personally and actually affected the author and caused a violation of their rights under Article 6 or Article 17 will face the difficulty[85] that climate change was not and is not caused by the anthropogenic GHG emissions emanating from any one State.[86] Nor can the adverse impacts of climate change be attributed to the anthropogenic GHG emissions emanating from any one State.[87] Ensuring the protection of the climate system through mitigation of GHG emissions requires the action of all States. Establishing that harm or the imminent danger of harm, of which an individual complains in a particular case, is attributable to and caused by the conduct of the respondent State, or could have been prevented by that State's adoption of the mitigation measures at

[82] As noted at fn. 279 of its Written Statement, the UK (in common with many other Parties to the ICCPR and ICESCR) is not party to either the Optional Protocol to the ICCPR (**UN Dossier No. 50**) or the Optional Protocol to the ICESCR (**UN Dossier No. 53**).

[83] Joseph and Castan, para. 3.01. See also HRC, *Bordes v France* (22 July 1996) UN Doc CCPR/C/57/D/645/1995, paras. 5.4-5.5 (to satisfy the victim requirement, the author mut demonstrate that "*an act or omission has already adversely affected [their] enjoyment*" of the relevant right or that "*there is a real threat of such result*" and that such threat is "*imminent*").

[84] See ICCPR (**UN Dossier No. 49**), Art. 2(1). As set out at fn. 283 of the UK Written Statement, the Court in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136 ('***Wall* Advisory Opinion**'), paras. 109-111, has recognised limited exceptions to States' territorial jurisdiction under the ICCPR (where a State is in occupation of the territory, its agents have carried out arrests on the territory of another State, or its consulate has confiscated a passport). The claim by some participants that the extraterritorial application of the ICCPR (and ICESCR) is more extensive is addressed at para. 50 below.

[85] To the extent that it suggests otherwise, the judgment of the European Court of Human Rights ('**ECtHR**') in *Verein Klimaseniorinnen Schweiz v Switzerland* (ECtHR [GC], App. No. 53600/20, Judgment (9 April 2024)) should be approached with caution for the reasons given at para. 52 below. The UK also notes that the Committee on the Rights of the Child ('**CRC**') in its view in *Sacchi v Argentina* (21 September 2021) UN Doc CRC/C/88/D/104/2019, para. 10.14 and in the related views in the parallel complaints brought by the same authors against Brazil, France, Germany and Turkey, found the victim and jurisdiction requirements satisfied in claims concerning alleged failures to mitigate GHG emissions. The UK considers these aspects of the views wrongly decided, for the reasons given at para. 50 below.

[86] See para. 34.2 above. See also UK Written Statement, paras. 126, 137.4.1-137.4.3.

[87] As set out in the UK Written Statement, paras. 137.4.1-137.4.3.

issue, will thus always involve serious difficulties. These will arise whether the claim is made under Article 6 or Article 17.[88]

46.7. The same impediments would apply to any complaint brought by one State against another under Article 41 of the ICCPR.

47. Any claims by individuals under the International Covenant on Economic, Social and Cultural Rights ('**ICESCR**')[89] of failure to adopt mitigation measures in breach of, for example, Article 11 (the right to an adequate standard of living) or Article 12 (the right to the highest attainable standard of physical and mental health) – addressed by many participants[90] – would face the same difficulties in satisfying the requirements of victim status,[91] applicability[92] and causation of breach.[93] Again, the same impediments would apply to any complaint brought by one State against another under Article 10 of the Optional Protocol to the ICESCR.

48. The right of peoples to self-determination has also been addressed by a number of participants by reference to common Article 1(1) of the ICCPR and ICESCR, or Article

[88] In the only view given by the HRC to date in a complaint concerning failure to adopt mitigation and adaptation measures, *Billy v Australia*, the HRC did not (as noted above) uphold the claim that Australia had breached the authors' rights under ICCPR (**UN Dossier No. 49**), Arts. 6 and 17 by failing to mitigate GHG emissions. See UK Written Statement, para. 127.3.

[89] (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (**UN Dossier No. 52**).

[90] See, e.g., Written Statements of African Union, paras. 210-211; Albania, para. 96(c); Antigua and Barbuda, paras. 191-194; Bahamas, paras. 147-153, 189; Bangladesh, para. 109; Bolivia, para. 14; Cook Islands, paras. 212, 218-222; Egypt, paras. 221-227; EU, paras. 234, 267; France, para. 124; Iran, para. 134; IUCN, paras. 475-476, 494; Kenya, paras. 5.58-5.65, 5.76; Liechtenstein, paras. 42-44, 48-65; Madagascar, para. 61; Mauritius, paras. 173-183; Micronesia, para. 80; Namibia, paras. 83-107; Nepal, para. 31; New Zealand, para. 112; Philippines, paras. 106(h)-(j); Portugal, paras. 76-77; Sierra Leone, paras. 3.69-3.87; Singapore, paras. 3.78-3.79, 3.85, 3.92; Solomon Islands, paras. 198-199, 225.1-225.2; Switzerland, para. 59; Thailand, para. 27; Tuvalu, para. 100; USA, paras. 4.50-4.53; Vanuatu, paras. 366-376.

[91] See, e.g., Committee on Economic, Social and Cultural Rights ('**CESCR**'), *S.C. v Italy* (7 March 2019) UN Doc E/C.12/65/D/22/2017, paras. 6.14, 6.16 (conduct must have "*affected*" the author and the evidence must "*substantiate the existence of [a] link*" between that conduct and the harm, which is "*a probable, or at least a reasonable, link*" and not "*speculative*"); CESCR, *Fernández v Spain* (8 October 2018) UN Doc E/C.12/64/D/19/2016, para. 6.5 (conduct must have "*in some way affected*" the author's right). See also CESCR, *Makinen Pankka v Spain* (1 March 2019) UN Doc E/C.12/65/D/9/2015, para. 8.4; CESCR, *Flores v Ecuador* (4 October 2017) UN Doc E/C.12/62/D/14/2016, para. 9.11.

[92] See, e.g., *S.C. v Italy*, paras. 6.17 and 6.18.

[93] See, e.g., CESCR, *López Albán v Spain* (11 October 2019) UN Doc E/C.12/66/D/37/2018, para. 12.2 (conduct "*led to*" and "*perpetuated*" the harm).

1(2) of the UN Charter and customary international law, or all of these sources.[94] Many also refer to the provisions in common Article 1(2), that "*[a]ll peoples may, for their own ends, freely dispose of their natural wealth and resources*" and may "*not be deprived of [their] own means of subsistence*".[95] The UK notes that the HRC has held that the claims of "*peoples*" under Article 1(1) of the ICCPR are not justiciable under the Optional Protocol to the ICCPR,[96] and likewise "*peoples*" do not have standing under Article 2 of the Optional Protocol to the ICESCR.

49. In any event, plainly Articles 1, 6 and 17 of the ICCPR and Articles 1, 11 and 12 of the ICESCR, like all of the other provisions of those treaties, were not designed to address mitigation of anthropogenic GHG emissions to protect the climate system.[97] Human rights entail obligations between a specific duty bearer (a State) and a specific right-holder (an individual, a group of individuals or a people). They do not lend themselves to claims by any such right-holder concerning protection of the climate system from anthropogenic GHG emissions which emanate from activities in all States and from international shipping and aviation. Furthermore, in some instances, the exploitation or use of fossil fuels may be characterised by those invoking rights to self-determination and sovereignty over natural resources as the exercise of such rights,[98] or as necessary

[94] See, e.g., Written Statements of African Union, para. 198; Albania, para. 96(b); Antigua and Barbuda, para. 195; Bahamas, paras. 154-157; Bangladesh, paras. 120-122; Barbados, para. 328; Burkina Faso, paras. 201, 208; Cook Islands, paras. 315, 342-349; COSIS, paras. 67, 74-78; Costa Rica, para. 71; Dominican Republic, paras. 4.44-4.46; EU, paras. 235-238; IUCN, para. 480; Kenya, paras. 5.66-5.68; Kiribati, paras. 136-140, 168-169, 193-195; Liechtenstein, paras. 27-33, 74; Madagascar, paras. 59-60; Mauritius, paras. 167-169; Micronesia, paras. 80, 82; MSG, paras. 233-245; Nauru, paras. 37-40; OACPS, paras. 65-71; Philippines, paras. 106(a)-(c); Saint Lucia, paras. 39(i)-(ii); Saint Vincent and the Grenadines, para. 109; Sierra Leone, paras. 3.61, 3.88-3.99, 3.102; Singapore, para. 3.81; Solomon Islands, paras. 170-173; Timor-Leste, paras. 333-345; Tuvalu, paras. 75-93; Vanuatu, paras. 288-307, 338.

[95] See, e.g., Written Statements of African Union, para. 198(b); Albania, para. 96(b); Bahamas, para. 157; Bangladesh, paras. 120, 122; Barbados, para. 328; Burkina Faso, paras. 201, 204-206; Cook Islands, paras. 344-349; COSIS, para. 137; Costa Rica, paras. 71-72; EU, paras. 236, 238, 266; Kenya, para. 5.66; Liechtenstein, paras. 27, 32; Madagascar, para. 59; Mauritius, para. 167; Micronesia, para. 82; MSG, para. 236; Nauru, paras. 41-44; OACPS, paras. 67-68; Philippines, para. 106(a); Sierra Leone, para. 3.98; Sri Lanka, para. 99; Timor-Leste, paras. 336-338; Tuvalu, paras. 81, 94-95; Vanuatu, paras. 293-307.

[96] Joseph and Castan, para. 7.24.

[97] UK Written Statement, para. 122. The UK has limited its discussion to the international human rights treaties listed in the Chapeau to the Request, but maintains the same position in respect of all international human rights treaties.

[98] See, e.g., Written Statements of Timor-Leste, paras. 146-157, 339-345; Tonga, paras. 178-193. See also Saudi Arabia, para. 4.16.

to meet human rights obligations.[99] These complexities are addressed – and are best addressed – by the Climate Change Treaties.[100]

50. The UK further notes that several participants have suggested that the ICCPR and ICESCR have extensive extraterritorial application[101] beyond the accepted exceptions to territorial jurisdiction recognised by the Court in the *Wall* Advisory Opinion.[102] They draw on, *inter alia*, Advisory Opinion OC-23/17 of the Inter-American Court of Human Rights ('**IACtHR**'),[103] and the views of the CRC in *Sacchi v Argentina.* The Court should not, however, depart from the primarily territorial approach to jurisdiction, for the following reasons:

50.1. The jurisprudence of regional courts and human rights bodies is not consistent. The ECtHR in *Duarte Agostinho v Portugal*, consistently with its own earlier jurisprudence, rejected the applicants' claim that they fell within the jurisdiction of the 32 respondent States other than the Party where they lived (Portugal) by reason of the alleged failures of those other respondent States to take measures to limit or reduce anthropogenic GHG emissions.[104] The ECtHR rightly noted that the applicants' approach to extraterritorial jurisdiction, given "*the multilateral dimension of climate change*", would mean that "*almost anyone adversely affected by climate change wherever in the world he or she might feel its effects could be brought within the jurisdiction of any Contracting Party for the purposes of Article 1 of the Convention in relation to that Party's actions or*

[99] See, e.g., Written Statements of Timor-Leste, paras. 330-331, 344-345, 352; Tonga, paras. 178-193, 272. See also African Union, para. 105(b) (fossil fuels "*often remain central to economic development and human well-being*"); OPEC, paras. 49-58, 81.

[100] Both Timor-Leste and Saudi Arabia refer to the Climate Change Treaties in this context, at (respectively) para. 341 and paras. 4.16-4.19. See also Timor-Leste, paras. 149-157.

[101] See, e.g., Written Statements of African Union, paras. 206-209; Antigua and Barbuda, paras. 349-355; Bahamas, paras. 170-171; Burkina Faso, paras. 192, 239; Cook Islands, paras. 185-194, 320-329; DRC, paras. 183-189, 324; Ecuador, paras. 3.111-3.114; Kiribati, paras. 155-162; MSG, paras. 257-262; Namibia, para. 93; Tuvalu, para. 102; Vanuatu, paras. 334-336.

[102] [2004] ICJ Rep 136, paras. 109, 111. See fn. 84 above.

[103] IACtHR, *The Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity: Interpretation and Scope of Articles 4(1) and 5(1) in Relation to Articles 1(1) and 2 of the American Convention on Human Rights)*, Advisory Opinion OC-23/17 (15 November 2017), Series A No. 23 ('**IACtHR Advisory Opinion OC-23/17**').

[104] ECtHR [GC], *Duarte Agostinho v Portugal*, App No. 39371/20, Decision (9 April 2024) ('***Duarte***'), paras. 195-214.

omissions to tackle climate change".[105] This would lead to a "*critical lack of foreseeability of the Convention's reach*" which "*could not be accommodated under the Convention*".[106] This reasoning applies equally to the ICCPR and ICESCR, with their wide coverage and membership.

50.2. The IACtHR's Advisory Opinion OC-23/17 did not specifically concern GHG emissions.[107] Furthermore, if its approach to extraterritorial jurisdiction (that "*potential victims of the negative consequences*" of activities carried out in the territory or under the jurisdiction of a State Party are within that State's jurisdiction [108]) was applied to protection of the climate system from anthropogenic GHG emissions, it would give rise to the problems of potentially limitless claims and lack of foreseeability of reach of the human rights treaties, as identified by the ECtHR in *Duarte*.

50.3. The CRC in *Sacchi v Argentina*, which did involve claims concerning failure to mitigate GHG emissions, relied on the IACtHR's Advisory Opinion OC-23/17 in finding the jurisdiction requirement satisfied. However, the CRC held the complaints inadmissible for failure to exhaust domestic remedies. It did not grapple with the difficulties identified by the ECtHR in *Duarte* or any of the other issues addressed in this Chapter. In any event, the Court is not obliged to base its own approach on that of the CRC or any other human rights body.[109]

[105] *Duarte*, para. 206.

[106] *Duarte*, para. 206.

[107] As noted by a number of participants, the IACtHR is currently considering a request for an advisory opinion on the Climate Emergency and Human Rights made by Chile and Colombia. See, e.g., Written Statements of African Union, para. 36; Antigua and Barbuda, para. 4; Chile, para. 24; Colombia, para. 1.4; Cook Islands, paras. 15, 17; COSIS, para. 4; Dominican Republic, para. 1.7; Ecuador, para. 3.99; El Salvador, para. 10; Germany, para. 16; Indonesia, para. 22; Kenya, para. 4.15; Kiribati, para. 16; Madagascar, para. 12; Marshall Islands, para. 91; Mexico, paras. 18-19; New Zealand, para. 113; Nordic countries, para. 36; Portugal, para. 37; Saint Lucia, para. 16; Sierra Leone, para. 2.12; South Africa, para. 11; Sri Lanka, para. 14.

[108] IACtHR Advisory Opinion OC-23/17, paras. 102-103.

[109] *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* (Merits) [2010] ICJ Rep 639 ('***Diallo***'), para. 66.

50.4. Moreover, the HRC did not take such an approach in *Billy v Australia*. As set out by the UK in paragraph 127.4 of its Written Statement, the HRC affirmed that State Parties' obligations under the ICCPR are primarily territorial.[110]

51. Even if all of the hurdles to establishing victim status, jurisdiction and applicability set out above could be surmounted in a human rights claim alleging breach by failure to adopt mitigation measures, any determination by a treaty body or court of whether a Party had satisfied its obligations in such a case would need to take into account the margin of discretion. The margin of discretion recognises that, where the measures at issue involve weighing and striking a balance between competing interests – as mitigation measures always do – governments are best placed to evaluate the competing considerations, determine the optimum use of their resources and regulatory powers, and adopt the measures suited to their specific circumstances.[111] While such discretion is not unlimited, and its exercise must be compatible with the obligations of States Parties under the ICCPR and ICESCR,[112] the margin of discretion would allow States to tailor their measures to their capabilities and national circumstances.

52. Finally, the UK notes the ECtHR's recent judgment of 9 April 2024 in *Verein Klimaseniorinnen Schweiz v Switzerland*, in which it held that Switzerland had breached the right to respect for private and family life in Article 8 of the European Convention on Human Rights ('**ECHR**')[113] by failing to take certain mitigation measures.[114] The UK expresses reservations concerning the ECtHR's approach in that

[110] Referring to *Billy v Australia*, para. 7.6.

[111] See, as regards the ICESCR, CESCR, 'An Evaluation of the Obligation To Take Steps to the "Maximum of Available Resources" under an Optional Protocol to the Covenant: Statement' (21 September 2007) UN Doc E/C.12/2007/1, paras. 11-12; CESCR, *Calero v Ecuador* (26 March 2018) UN Doc E/C.12/63/D/10/2015, para. 12.1; CESCR, *Moreno Romero v Spain* (22 February 2021), UN Doc E/C.12/69/D/48/2018, para. 12.4. The HRC has rejected a 'margin of appreciation' and has not (as yet) adopted the CESCR's 'margin of discretion', but the UK submits an analogous approach can be discerned from its views: see, e.g., HRC, *Ilmari Länsman v Finland* (26 October 1994) UN Doc CCPR/C/52/D/511/1992, para. 9.4; HRC, *Jouni E. Länsman v Finland* (30 October 1996) UN Doc CCPR/C/58/D/671/1995, para. 10.5; HRC, *Mahuika v New Zealand* (27 October 2000) UN Doc CCPR/C/70/D/547/1993, paras. 9.6, 9.8; HRC, *Äärelä v Finland* (24 October 2001) UN Doc CCPR/C/73/D/779/1997, para. 7.6; HRC, *Howard v Canada* (26 July 2005) UN Doc CCPR/C/84/D/879/1999, paras. 12.10-12.11; HRC, *Poma Poma v Peru* (27 March 2009) UN Doc CCPR/C/95/D/1457/2006, para. 7.4; HRC, *Teitiota v New Zealand* (24 October 2019) UN Doc CCPR/C/127/D/2728/2016, para 9.3.

[112] *Moreno Romero v Spain*, para. 12.4.

[113] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) ETS 5.

[114] *Verein Klimaseniorinnen Schweiz v Switzerland*, paras. 558-573. Paras. 545-550 set out the mitigation obligations under ECHR, Art. 8.

case to victim status, applicability, causation and breach.[115] It also expresses reservations concerning the insufficient regard given to the central role of the Climate Change Treaties, in particular the Paris Agreement, in addressing reductions in anthropogenic GHG emissions.[116] In any consideration of the ECtHR's approach, the Court will need to be sensitive to "*the necessary clarity and the essential consistency of international law … [to which] States obliged to comply with treaty obligations are entitled*".[117] The wide coverage and membership of the ICCPR also militate against the ECtHR's approach.[118] In this regard, the UK further notes that the regional focus of regional human rights bodies can and does influence the approach taken by them on particular facts to very broadly worded rights. For that reason, their decisions may be of little help for the interpretation and application of the ICCPR and ICESCR.[119]

B. Suggested right to a clean, healthy and sustainable environment

53. A number of participants address a suggested right to a clean, healthy and sustainable environment.[120] The UK's position is that there is no existing CIL right to a clean,

---

[115] The approach to standing of associations (see paras. 499 and 502) effectively allows claims *actio popularis*, contrary to the well-established approach under international human rights treaties. The ECtHR's approach to applicability, causation and breach in the merits overlooked serious issues, including the requirements of real and imminent risk of harm and a causal connection (or sufficiently proximate causal connection) between the alleged failures and the applicants' rights engaging ECHR, Arts. 2 or 8. The ECtHR approach appears to differ from that of the HRC in *Billy v Australia*, where (as noted above) the HRC implicitly rejected the complaint that the right not to be subjected to arbitrary or unlawful interference with privacy in ICCPR, Art. 17 had been breached by a failure to adopt mitigation measures to reduce GHG emissions.

[116] The ECtHR seeks to prescribe measures concerning the progressive reduction in GHG emission levels in paras. 548 and 550 of *Verein Klimaseniorinnen Schweiz v Switzerland*, but does not set out any clear or agreed measures or guidelines for Parties to follow, as exist under the mechanisms set up under the Climate Change Treaties. It also (in para. 657) contemplates an oversight mechanism in parallel to those under the Climate Change Treaties.

[117] *Diallo*, para. 66. The Court made this statement in the context of the interpretation of comparable treaty provisions across human rights treaties, but it applies with equal force to the relationship between treaties with different subject matter.

[118] Some participants point out that their human rights obligations and development needs may require their GHG emissions to grow, which would be contrary to the ECtHR's approach in para. 548. See, e.g., Tonga Written Statement, paras. 271-272; see also OPEC Written Statement, paras. 49-58.

[119] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v United Arab Emirates*) (Preliminary Objections) [2021] ICJ Rep 71, para. 104.

[120] See, e.g., Written Statements of African Union, paras. 165, 192, 211; Albania, para. 96(c); Antigua and Barbuda, paras. 180-185, 196; Argentina, paras. 38, 50(c); Bangladesh, paras. 103, 110, 112; Barbados, paras. 160, 162, 164-165; Bolivia, paras. 17-20, 53, 65-66, 68; Burkina Faso, para. 219; Cameroon, paras. 27-28; Colombia, paras. 2.60-2.63, 3.67, 5.7; Costa Rica, paras. 75, 80-85, 92(g); Dominican Republic, para. 5.1(ii)(d); DRC, paras. 147-149, 152-154, 160-162; Ecuador, paras. 3.103-3.108, 4.23; El Salvador, paras. 42-43; Iran, paras.

healthy and sustainable environment. The criteria for the identification of a rule of CIL[121] are not met:

53.1. First, as regards the requirement of a general practice which is widespread, representative and consistent,[122] such treaty provisions as exist are not consistent as to their content and are not widespread. Article 11 of the Additional Protocol to the American Convention on Human Rights provides that "*[e]veryone shall have the right to live in a healthy environment*",[123] whereas Article 24 of the African Charter on Human and Peoples' Rights provides that "*[a]ll peoples shall have the right to a general satisfactory environment favourable to their development*".[124] There are no comparable provisions in the ICCPR, ICESCR or ECHR. The Parties to the ECHR have consistently failed to adopt an additional protocol containing such a right despite repeated proposals.[125]

53.2. Second, there is insufficient acceptance of any such right as law (*opinio juris*). Resolution 48/13 of the United Nations Human Rights Council ('**HR Council**')[126] and Resolution 76/300 of the General Assembly,[127] recognising a human right to a clean, healthy and sustainable environment, are not legally binding. As evidenced by the debate and voting record of these resolutions,

---

139-142; IUCN, paras. 460, 465, 481-484; Kenya, paras. 5.73-5.75, 5.82; Liechtenstein, paras. 45-47; Madagascar, paras. 61-63, 76; Mauritius, paras. 184-185; Mexico, paras. 86-103; Micronesia, paras. 78-79; MSG, paras. 283-289; Namibia, paras. 121-125; Nepal, para. 31; Philippines, paras. 54, 139(b); Portugal, paras. 69-72; Saint Vincent and the Grenadines, paras. 37, 123; Sierra Leone, paras. 3.61, 3.112-3.118; Slovenia, paras. 20-48; Solomon Islands, paras. 174-179; Spain, paras. 14-16; Sri Lanka, para. 94; Timor-Leste, para. 298; Tuvalu, paras. 98, 100; Vanuatu, paras. 378-396.

[121] Requiring "*a general practice that is accepted as law (opinio juris)*", as reflected in Art. 38(1)(b) of the ICJ Statute and ILC, 'Draft Conclusions on the Identification of Customary International Law, with Commentaries' (2018) UN Doc A/73/10 ('**CIL Conclusions**'), p. 124 (Conclusion 2).

[122] CIL Conclusions, p. 135 (Conclusion 8(1)).

[123] Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights: Protocol of San Salvador (adopted 17 November 1988; entered into force 16 November 1999) OAS Treaty Series No. 69, Art. 11.

[124] (adopted 27 June 1981; entered into force 21 October 1986) 1520 UNTS 217, Art. 24.

[125] See Council of Europe (Steering Committee for Human Rights (CDDH) – Drafting Group on Human Rights and Environment (CDDH-ENV)), '[DRAFT] REVISED CDDH Report on the Need for and Feasibility of a Further Instrument or Instruments on Human Rights and the Environment' (29 April 2024) Doc. No. CDDH-ENV(2023)06REV4, para. 12.

[126] HR Council Res 48/13 (8 October 2021) UN Doc A/HRC/RES/48/13 (**UN Dossier No. 279**).

[127] UNGA Res 76/300 (28 July 2022) UN Doc A/RES/76/300 (**UN Dossier No. 260**).

many States, including the UK, made clear that their vote in favour did not mean that they accepted that any such right had emerged in CIL.[128] Similarly, in the context of these proceedings, many participants do not accept that there is any such customary right.[129]

[128] The UK's Explanation of Vote to UNGA Res 76/300 stated that "*the recognition of [the] right in the resolution is without due regard to the usual formation of international human rights law and without prejudice to the United Kingdom's legal position. There is no international consensus on the legal basis of the human right to a clean, healthy and sustainable environment, and we do not believe that it has yet emerged as a customary right*": see UNGA 97th Plenary Meeting (28 July 2022) UN Doc A/76/PV.97, p. 11. The UK's Explanation of Vote to HR Council Res 48/13 was in similar terms: HR Council 48th Session, Summary Record of the 43rd Meeting (8 October 2021) UN Doc A/HRC/48/SR.43, para. 83; UK Government, 'UN Human Rights Council 48: Explanation of Vote on the Right to a Clean, Healthy and Sustainable Environment' (8 October 2021) <https://www.gov.uk/government/speeches/un-human-rights-council-48-explanation-of-vote-on-the-right-to-a-safe-clean-healthy-and-sustainable-environment>. See also Explanations of Vote to HR Council Res 48/13 of Poland and Japan: UN Doc A/HRC/48/SR.43, paras. 76-77; Statement by Norway: HR Council 48th Session, Summary Record of the 45th Meeting (11 October 2021) UN Doc A/HRC/48/SR.45, para. 84; Voting Record and Explanations of Vote to UNGA Res 76/300 of, e.g., Belarus (UN Doc A/76/PV.97, p. 13), Canada (id., pp. 12-13), China (id., p. 18), Egypt (id., p. 17), India (id., pp. 15-16), Israel (id., p. 17), Japan (id., p. 13), New Zealand (id., pp. 13-14), Nicaragua (id., p. 9), Norway (id., p. 14), Pakistan (id., pp. 7-8), Russian Federation (id., pp. 6-7), and USA (id., pp. 14-15).

[129] See, e.g., Written Statements of Canada, para. 24; EU, para. 262; Germany, para. 104; Indonesia, para. 43; New Zealand, para. 114; Tonga, para. 244; USA, paras. 4.39, 4.54-4.58. See also Latvia, para. 64 (noting "*the lack of consensus on whether the right to a clean, healthy and sustainable environment is already established as a rule of customary international law*").

CHAPTER VIII: THE RELATIONSHIP BETWEEN THE CLIMATE CHANGE TREATIES AND OTHER SOURCES OF INTERNATIONAL LAW

A. Identification of principal obligations

54. Several participants have described the Climate Change Treaties as *lex specialis* on the question of obligations relating to anthropogenic GHG emissions.[130] That label may refer to several different concepts, as observed by the ILC Study Group's Fragmentation Report.[131] It is not clear that the participants that have referred to *lex specialis* each intended to use it in the same way.

55. The UK agrees that that the Climate Change Treaties contain the principal obligations of States under international law to protect the climate system from anthropogenic GHG emissions. The UK does not, however, consider that the label of *lex specialis* is likely to assist the Court in answering Question A, where (i) the Court is asked to identify obligations responsive to its terms and (ii) there are obligations beyond the Climate Change Treaties that are also responsive, namely those contained in the Complementary Treaties and UNCLOS.

B. Harmonious interpretation of different rules of international law

56. The starting point for consideration of the relationship between the Climate Change Treaties and other sources of international law is the rule reflected in Article 31(3)(c) of the VCLT.[132]

57. The UK accepts, for example, that certain rules of international law applying to the Parties to some of the Climate Change Treaties, Complementary Treaties and UNCLOS

---

[130] See, e.g., Written Statements of Japan, para. 14; Kuwait, paras. 8, 60-64; OPEC, paras. 9, 15, 22; Republic of Korea, paras. 14, 51; Russian Federation, pp. 8, 20; Saudi Arabia, paras. 4.95, 5.5-5.10; South Africa, paras. 14-15; Timor-Leste, paras. 86-93. Other participants have also addressed the issue: see, e.g., Colombia, para. 3.9; Cook Islands, paras. 135-142; Costa Rica, para. 32; Egypt, para. 73; New Zealand, para. 86; Samoa, paras. 131-139; Switzerland, para. 68; Vanuatu, para. 517.

[131] See Fragmentation Report, paras. 56-58, 67. See also ILC, 'Topical Summary of the Discussion Held in the Sixth Committee of the General Assembly during its Sixty-first Session, Prepared by the Secretariat' (23 January 2007) UN Doc A/CN.4/577/Add.1, noting, at para. 17, the views of some Sixth Committee representatives that the use of "*vague expressions*" in the Fragmentation Conclusions "*reflected the fact that the general system of international law did not provide clear guidance on how to resolve possible conflicts of norms*".

[132] Fragmentation Report, para. 420, noting that the "*systemic nature of international law has received clearest formal expression*" in VCLT, Art. 31(3)(c).

should be "*taken into account*" in accordance with the rule reflected in Article 31(3)(c) of the VCLT for the purposes of interpreting those treaties. This does not mean that the rule of international law being taken into account is itself applied.[133] Nor does it mean that once the mandatory interpretive exercise is conducted, any particular meaning must be reached.[134] It does not entail displacement of the primary treaty rule. It only requires that in interpreting the primary rule, the other relevant rule is taken into account.

58. Any rule to be "*taken into account*" must be "*relevant*". Whether a particular rule is relevant has two dimensions.

58.1. First, temporal. Whether a court or tribunal is to take into account the international rules in existence at the time of the conclusion of the treaty or at the time the interpretive exercise is taking place depends on discerning the intention of the parties to that treaty on that question at the time that the treaty entered into force.[135]

58.2. Second, content. A "*relevant*" rule may, for example, provide a contemporary interpretation of the ordinary meaning of a term.[136] Relevant rules may be rules of treaty law or rules of CIL,[137] but there is a need for caution in accepting without reservation the relevance of a rule from one area of international law to the interpretation of a treaty from another area.

59. Applying these considerations, the UK's position on "*relevant rules*" in this context is as follows:

59.1. The Climate Change Treaties, Complementary Treaties and Part XII of UNCLOS are likely to constitute "*relevant rules*" for interpreting each other. In

[133] Richard Gardiner, *Treaty Interpretation* (2nd edn, OUP 2015) ('**Gardiner**'), pp. 320-323.

[134] Alexander Orakhelashvili, 'Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights' (2003) 14 EJIL 529, p. 537.

[135] *Dispute Regarding Navigational and Related Rights (Costa Rica v Nicaragua)* (Judgment) [2009] ICJ Rep 213, paras. 63-70. The VCLT's drafting history supports this interpretation. See Gardiner, pp. 295-298; Ian Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn, Manchester UP 1984), pp. 138-140; Fragmentation Report, paras. 475-478; Fragmentation Conclusions, p. 415 (Conclusion 22). See also Rosalyn Higgins, 'Time and the Law: International Perspectives on an Old Problem' (1997) 46 ICLQ 501, pp. 517-519.

[136] Mark E Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff 2009) ('**Villiger**'), p. 432.

[137] ITLOS Advisory Opinion (Case No. 31), para. 135.

its recent Advisory Opinion in Case No. 31 (addressed in **Chapter VI** above), ITLOS held that the relationship between the provisions of Part XII of UNCLOS and external rules was governed by the provisions of UNCLOS that referred to external rules (its "*rules of reference*") and Article 31(3)(c) of the VCLT. It opined that the relevant external rules were to be found, in particular, in the "*extensive treaty regime addressing climate change*" (see at paragraphs 134-137). This "*extensive treaty regime*" includes the Climate Change Treaties and the Complementary Treaties. It is likely that the same is true in reverse, so far as the criterion of relevance is concerned, and also that the Climate Change Treaties and Complementary Treaties constitute "*relevant rules*" for interpreting each other.

59.2. By contrast, in light of their different subject matter, international human rights treaties are unlikely to constitute "*relevant rules*" for the purposes of interpreting provisions of the Climate Change Treaties, Complementary Treaties and Part XII of UNCLOS. The UK recognises that international human rights treaties may be relevant in specific cases concerning particular factual circumstances related to climate change.[138]

59.3. If, contrary to the UK's case set out at paragraph 34 above, the prevention principle is an applicable rule of CIL in respect of the protection of the climate system from anthropogenic GHG emissions, the UK accepts that it would be "*relevant*" to the interpretation of provisions of the Climate Change Treaties and Complementary Treaties pursuant to the rule reflected in Article 31(3)(c) of the VCLT. The UK has already set out that it considers that the content of this principle is relevant when considering States' obligations under Article 194(2) of UNCLOS, irrespective of whether it applies in respect of the protection of the climate system from anthropogenic GHG emissions.[139]

[138] See Chapter VII above. Reciprocally, the recitals to the Paris Agreement (**UN Dossier No. 16**) refer to the fact that "*Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights*": preamble para. 11.

[139] See ITLOS Advisory Opinion (Case No. 31), UK Written Statement, para. 65.

60. Further, the rule to be taken into account must also be "*applicable in the relations between the parties*". This can be straightforwardly applied in the context of rules that have the status of CIL. As set out in **Chapter IV** above, the UK accepts that there is a rule of CIL with the content identified by the Court in the *Pulp Mills* judgment. The UK's position is that the prevention principle does not apply to the protection of the climate system from anthropogenic GHG emissions. If and to the extent that the Court reaches a contrary conclusion, the UK accepts that the prevention principle may in principle be a relevant rule to take into account when interpreting provisions of the treaties responsive to Question A. However, for the reasons explained above at paragraph 35, the conduct required in application of the CIL rule would in any event be that specified by the provisions of the Climate Change Treaties.

61. The position is less straightforward in the context of determining whether a treaty-based rule is "*applicable in the relations between the parties*". Three main approaches have been taken to the meaning of this phrase.[140] The first requires that all of the parties to the treaty being interpreted are also party to the treaty containing the relevant rule to be taken into account as part of the interpretation.[141] The second is that "*between the parties*" permits reference to another treaty provided that the parties in dispute are parties to that other treaty.[142] The third allows to be taken into account those rules that can reasonably be considered to express the common intentions or understandings of all parties to the treaty being interpreted as to the meaning of the term concerned, even if they have not consented to be bound by those rules.[143]

62. The UK considers that the terms of the interpretive rule reflected in Article 31(3)(c) support the first interpretation, but not the other two. This would mean, by way of

[140] Fragmentation Report, paras. 470-472; Gardiner, pp. 311-317.

[141] World Trade Organization ('**WTO**') Dispute Settlement Body, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291-3/R (29 September 2006), para. 7.68. In that case a WTO Panel held that the phrase "*applicable in the relations between the parties*" means "*the rules of international law applicable in the relations between the States which have consented to be bound by the treaty which is being interpreted, and for which that treaty is in force*", and accordingly held that "*the relevant rules of international law*" for the purposes of VCLT, Art. 31(3)(c) did not include a particular treaty unless all Parties to the WTO treaties (i.e. the treaties which were being interpreted in that case) were also party to that particular treaty. See also Villiger, p. 433.

[142] Fragmentation Report, para. 472; Gardiner, p. 314.

[143] Joost Pauwelyn, 'The Role of Public International Law in the WTO: How Far Can We Go?' (2001) 95 AJIL 535, p. 576; Gardiner, pp. 316-317.

illustration, that, subject to the particular provision in question being a "*relevant rule*" (which will ultimately be context-specific) and to the important temporal dimension explained above, so far as concerns only the requirement to be "*applicable in the relations between the parties*": (i) the UNFCCC[144] might be taken into account in interpreting the Paris Agreement[145] and the Montreal Protocol;[146] (ii) the Paris Agreement might be taken into account in interpreting the Doha Amendment,[147] MARPOL[148] and the Gothenburg Protocol to the Convention on Long-Range Transboundary Air Pollution;[149] (iii) the UNFCCC and the Montreal Protocol might be taken into account in interpreting the Doha Amendment; and (iv) the UNFCCC and the Montreal Protocol might be taken into account in interpreting MARPOL. The UK notes that whilst the treaties listed first in each of these examples might be taken into account in the interpretation of the treaties listed subsequently in each example, the requirement within Article 31(3)(c) that a rule be "*applicable in the relations between the parties*" before it can be used as an interpretive aid means that the converse will not be the case. Similarly, it would not be permissible to interpret any of the Climate Change Treaties

[144] For the Parties to the UNFCCC, see: United Nations Treaty Collection ('**UNTC**'), 'United Nations Framework Convention on Climate Change: Status', UNTS Registration No. 30822 (31 July 2024) <https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800431ce&clang=_en>.

[145] For the Parties to the Paris Agreement, see: UNTC, 'Paris Agreement', UNTS Registration No. 54113 (31 July 2024) <https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280458f37&clang=_en>.

[146] For the Parties to the Montreal Protocol, see: UNTC, 'Montreal Protocol on Substances that Deplete the Ozone Layer', UNTS Registration No. 26369 (31 July 2024) <https://treaties.un.org/Pages/showDetails.aspx?objid=080000028003f7f7&clang=_en>.

[147] (adopted 8 December 2012, entered into force 31 December 2020) 3377 UNTS No 30822 (**UN Dossier No. 14**). For the Parties to the Doha Amendment, see: UNTC, 'Doha Amendment to the Kyoto Protocol', UNTS Registration No. 30822 (31 July 2024) <https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280346e7e&clang=_en>.

[148] For the Parties to MARPOL, see: UNTC, 'Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1973', UNTS Registration No. 22484 (31 July 2024) <https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280291139&clang=_en>.

[149] (adopted 30 November 1999, entered into force 17 May 2005) 2319 UNTS 80. For the Parties to the Gothenburg Protocol, see: UNTC, 'Protocol to the 1979 Convention on Long-range Transboundary Air Pollution to Abate Acidification, Eutrophication and Ground-level Ozone', UNTS Registration No. 21623 (31 July 2024) <https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280020abc&clang=_en>.

by reference to the ICCPR,[150] the ICESCR,[151] the ECHR[152] or any other regional human rights treaty, because, even leaving aside any lack of relevance, not all of the parties to any of the Climate Change Treaties are party to any of those human rights treaties.

63. The UK recognises that there may be scope for a *de minimis* practical exception to the position that a rule to be drawn on for interpretive purposes must be applicable in the relations between all of the parties to the rule to be interpreted. Such an exception may arise where the degree of lack of applicability is so insignificant that failing to take the relevant rule into account would be overly formalistic. This would, for instance, allow for a situation where one or a very small number of States had not yet had an opportunity to ratify the treaty to be taken into account. However, if there were to be evidence that even one such State had taken an active decision not to be bound by that treaty, the UK considers that it would not be appropriate to treat it as a rule "*applicable in the relations between the parties*" to the treaty being interpreted. An example of the application of such a *de minimis* exception is the use of the Paris Agreement to interpret UNCLOS, in circumstances where 169 of the 170 Parties to UNCLOS have also ratified the Paris Agreement. The only exception is Yemen, which has been affected by years of conflict.[153] Whether or not such a *de minimis* exception is capable of applying would ultimately need to be determined on a case-by-case basis and would depend on the rule being interpreted, the rule invoked as an interpretive aid, any available reasons for the non-application of that latter rule to the entirety of the States party to the rule being interpreted, and how many such States were not party to the rule being invoked as an

[150] For the Parties to the ICCPR, see: UNTC, 'International Covenant on Civil and Political Rights', UNTS Registration No. 14668 (31 July 2024) <https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280004bf5&clang=_en>.

[151] For the Parties to the ICESCR, see: UNTC, 'International Covenant on Economic, Social and Cultural Rights', UNTS Registration No. 14531 (31 July 2024) <https://treaties.un.org/Pages/showDetails.aspx?objid=080000028002b6ed&clang=_en>.

[152] For the Parties to the ECHR, see: UNTC, 'Convention for the Protection of Human Rights and Fundamental Freedoms', UNTS Registration No. 2889 (31 July 2024) <https://treaties.un.org/Pages/showDetails.aspx?objid=080000028014a40b&clang=_en>.

[153] See ITLOS Advisory Opinion (Case No. 31), paras. 72, 155 (there referring to 169 Parties to UNCLOS, 168 of which are Parties to the Paris Agreement). San Marino acceded to UNCLOS on 19 July 2024, bringing the total Parties to UNCLOS to 170, 169 of which are Parties to the Paris Agreement (including San Marino).

interpretive aid. The UK respectfully submits that such matters cannot sensibly be addressed in the abstract in the context of this Advisory Opinion.

CHAPTER IX: INTERPRETATION OF QUESTION B

64. The Written Statements make clear that the interpretation of Question B is a matter in dispute. There are, in essence, three positions: (i) the Question refers the Court to the secondary rules concerning the responsibility of States for internationally wrongful acts;[154] (ii) the Question invites the Court to identify the provisions of the Climate Change Treaties that are applicable where States "*have … caused significant harm to the climate system*";[155] and (iii) a hybrid approach involving aspects of each the first two approaches.[156]

65. The UK maintains its position as set out in its Written Statement at paragraphs 133-138. Question B, objectively interpreted, invites the Court to identify the obligations responsive to Question A that apply specifically to "*States where they … have caused significant harm to the climate system and other parts of the environment*". That is not a matter addressed by secondary rules of international law concerning the responsibility of States for internationally wrongful acts.[157] It is addressed by the Climate Change Treaties, which identify the legal consequences of such conduct in the form of primary

[154] See, e.g., Written Statements of African Union, paras. 225ff; Albania, paras. 129-144; Antigua and Barbuda, paras. 529ff; Bahamas, paras. 233ff; Bangladesh, paras. 144-147; Barbados, paras. 271-278; Brazil, paras. 78-99; Burkina Faso, paras. 265-272; Chile, paras. 104ff; Colombia, paras. 4.5ff; COSIS, paras. 146ff; Costa Rica, paras. 95ff; DRC, paras. 253ff; Ecuador, paras. 4.2ff; Egypt, paras. 287ff; El Salvador, paras. 50-51; IUCN, paras. 24-27, 529ff; Kenya, paras. 2.7, 6.85ff; Kiribati, paras. 178ff; Latvia, paras. 74ff; Madagascar, paras. 67ff; Marshall Islands, paras. 55ff; Mauritius, paras. 208ff; Micronesia, paras. 120ff; MSG, paras. 291ff; Namibia, paras. 128ff; OACPS, paras. 143ff; Palau, paras. 4, 19-24; Peru, paras. 92ff; Philippines, paras. 110-132; Saint Lucia, paras. 84-95; Saint Vincent and the Grenadines, paras. 128ff; Samoa, paras. 187ff; Sierra Leone, paras. 3.134-3.149; Singapore, paras. 4.1ff; Solomon Islands, paras. 229ff; Sri Lanka, para. 104; Thailand, paras. 29-31; Tuvalu, paras. 112ff; Uruguay, paras. 155ff; USA, paras. 5.1-5.12; Vanuatu, paras. 485ff.

[155] See, e.g., Written Statements of EU, paras. 326ff; Japan, paras. 40-45; OPEC, paras. 10(2), 96ff; Saudi Arabia, paras. 6.3-6.8; Slovenia, paras. 7, 12, 14-15; South Africa, paras. 14, 20, 129-131; UK, paras. 133-138. See also China, paras. 139-142; Indonesia, paras. 74-86; Kuwait, paras. 3(4), 82ff.

[156] See, e.g., Written Statements of Australia, paras. 5.4-5.10; Canada, paras. 30-35; Dominican Republic, paras. 4.57-4.67; France, paras. 170ff; India, paras. 80-90; Iran, paras. 154-165; Liechtenstein, para. 80; Netherlands, paras. 5.3ff; New Zealand, paras. 126ff; Nordic countries, paras. 100-109; Portugal, paras. 109ff; Republic of Korea, paras. 42-49; Russian Federation, pp. 16-18; Switzerland, paras. 72-81; Timor-Leste, paras. 354-374; Tonga, paras. 285-312; Viet Nam, paras. 42-52.

[157] See EU Written Statement, para. 355 ("*the effects of significant harm caused by anthropogenic greenhouse gas emissions are to be addressed by the specific global mechanisms of the Paris Agreement, such as the Loss and Damages Fund … Thereby, the general customary rules of the ARSIWA would not be applicable*"); France Written Statement, paras. 170, 174-175.

treaty obligations.[158] It is those specific treaty obligations which are responsive to Question B.

66. Nor is Question B an invitation for the Court to determine whether the conduct of certain States or groups of States is, in principle or otherwise, consistent with international law,[159] or whether a particular State qualifies as an injured State.[160] Question B invites the Court only to identify, in general terms, the obligations within the Climate Change Treaties that can be characterised as applicable where States "*have caused significant harm to the climate system*".[161]

67. The UK considers that the approach taken by certain participants in favour of Question B involving issues of State responsibility reinforces the UK's position in its Written Statement. In particular, the submission made by a small number of participants[162] that Question B asks the Court to determine State responsibility for the totality of harm caused by historic GHG emissions gives rise to the precise impediments identified in the UK's Written Statement.[163] Specifically, harm from GHG emissions is indirect; the obligations responsive to Question A were not in existence over much of the period in which human activities have resulted in GHG emissions; and, as reiterated in paragraph 34.2 above, there is currently no single or agreed scientific methodology to attribute climate change to the emissions of individual States or to attribute extreme events leading to harm for particular States caused by climate change to the GHG emissions

---

[158] See, to similar effect, Australia Written Statement, para. 5.10 (the Climate Change Treaties "*include mechanisms … for States Parties to cooperate to address issues of loss and damage associated with the adverse effects of climate change, which is consistent with the reality that there are real obstacles to addressing issues of loss and damage under the principles of State responsibility*").

[159] See, e.g., France Written Statement, para. 173, referring to the statement by the Vanuatu Minister of Climate Change, that "*we need to ensure all Member States feel comfortable that this initiative is not intended to name or shame any particular nation*".

[160] Contrary to the positions in, e.g., Written Statements of African Union, paras. 239ff; Egypt, paras. 336-341; Kiribati, paras. 179, 186; Tuvalu, paras. 120-125.

[161] See, to similar effect, EU Written Statement, para. 65 (advisory proceedings "*should not be understood as inviting the Court to make general statements as to the international responsibility of certain States or categories of States, vis-à-vis other, in particular vulnerable, States*"); France Written Statement, para. 175 ("*question b)… does not require the actions or omissions in question to be "unlawful" and focuses on the "significant damage" caused*").

[162] See, e.g., Written Statements of Burkina Faso, paras. 251-261, 273-336; COSIS, paras. 95, 149; Egypt, paras. 297-387; Kiribati, paras. 90-106, 171, 174-177, 186, 206; MSG, paras. 298-301; OACPS, paras. 131-132, 138-158; Vanuatu, paras. 1, 6-7, 20, 131-157, 195, 484, 500-535, 643-644.

[163] UK Written Statement, para. 137.4.

of any particular State.[164] While any analysis of historical GHG emissions by reference to the rules concerning the responsibility of States for internationally wrongful acts would necessarily be afflicted by these difficulties, the much more pragmatic approach of Question B, and of the relevant provisions of the Climate Change Treaties, is to focus on primary rules that oblige the relevant States to take specific actions, including in respect of the provision and mobilisation of support to assist States, where needed, in their mitigation and adaptation actions.[165] As the UK noted in its Written Statement,[166] failure to comply with such obligations could lead to State responsibility for breach of those obligations.

68. Finally, and for the avoidance of any doubt, the UK's position is not that the rules relating to the responsibility of States for internationally wrongful acts could have no application on the facts of particular cases involving harm arising from anthropogenic GHG emissions, albeit that if they did, significant issues of causation and attribution would inevitably arise. The UK's position is that those rules are not responsive to Question B, as a matter of the proper interpretation of the terms of that question.

[164] For the avoidance of doubt, the UK reiterates that, as set out in fn. 294 of the UK Written Statement, it does not accept that such harm can be attributed to any particular State or particular group of States for the purposes of the law of State responsibility, including for the reasons already explained in para. 137.4 of that Statement.

[165] UK Written Statement, paras. 137-138.

[166] UK Written Statement, para. 134.

CHAPTER X: CONCLUSION

69. For the reasons set out in the UK's Written Statement and above, the UK respectfully submits that:

69.1. the obligations of States "*to ensure the protection of the climate system … from anthropogenic [GHG] emissions*" and thus responsive to Question A are set out in:

69.1.1. Articles 4(2), 4(3), 4(8), 4(9), 4(13), 13(7)(b) and 13(11) of the Paris Agreement (as addressed in paragraphs 66-71 and 81-82 of the UK Written Statement and in paragraphs 21-29 above);

69.1.2. Chapters 1-4 of Part II of Volume IV of Annex 16 to the Chicago Convention (as addressed in paragraphs 86-91 of the UK Written Statement);

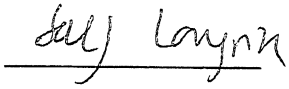
69.1.3. Articles 1(1), 4(1), 4(2), 5(4), 6(1) and 17 of MARPOL and Chapters 2 and 4 of Annex VI of MARPOL (as addressed in paragraphs 98-99 of the UK Written Statement);

69.1.4. Articles 2-2J, 4, 4B, 5 and 7 of the Montreal Protocol (as addressed in paragraphs 101-102 of the UK Written Statement);

69.1.5. Articles 3-7 of the Gothenburg Protocol, insofar as these provisions apply to pollutants which are precursors to GHGs (as addressed in paragraphs 104-105 of the UK Written Statement); and

69.1.6. Articles 192, 194, 207, 212, 213 and 222 of UNCLOS (as addressed in paragraph 119 of the UK Written Statement and paragraph 44 above); and

69.2. the obligations that apply specifically to "*States where they … have caused significant harm to the climate system and other parts of the environment*" for the purposes of Question B are set out in Articles 4(2), 4(3), 7(9) and 9(1) of the Paris Agreement, in addition to Articles 4(1)(b), 4(1)(e), 4(3) and 4(5) of the UNFCCC (as addressed in paragraphs 145, 150-151, 152.3.2, 155, and 158.1 of the UK Written Statement).



Sally Langrish

Representative of the United Kingdom of Great Britain and Northern Ireland

12 August 2024