

**INTERNATIONAL COURT OF JUSTICE**

**OBLIGATIONS OF STATES IN RESPECT OF CLIMATE CHANGE**

**(REQUEST FOR AN ADVISORY OPINION)**

**WRITTEN STATEMENT OF THE KINGDOM OF THE NETHERLANDS**

**21 MARCH 2024**

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## 1. Introduction

- 1.1 In Resolution 77/276, adopted on 29 March 2023, the General Assembly of the United Nations decided, in accordance with Article 96 of the Charter of the United Nations ('UN Charter'), to request the International Court of Justice ('the Court') to render an advisory opinion pursuant to Article 65 of the Statute of the Court, on the following questions ('Request'):

*“Having particular regard to the Charter of the United Nations, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the United Nations Framework Convention on Climate Change, the Paris Agreement, the United Nations Convention on the Law of the Sea, the duty of due diligence, the rights recognized in the Universal Declaration of Human Rights, the principle of prevention of significant harm to the environment and the duty to protect and preserve the marine environment,*

- (a) *What are the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for present and future generations;*
- (b) *What are the legal consequences under these obligations for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment, with respect to:*
- (i) *States, including, in particular, small island developing States, which due to their geographical circumstances and level of development, are injured or specially affected by or are particularly vulnerable to the adverse effects of climate change?*
- (ii) *Peoples and individuals of the present and future generations affected by the adverse effects of climate change?”*

- 1.2 In its Order of 20 April 2023, the Court initially designated 20 October 2023 as the time limit within which written statements on the questions may be presented to it by the United Nations and its Member States entitled to appear before the Court, in accordance with Article 66, paragraph 2, of the Statute of the Court. In its Order of 4 August 2023, the Court, following the request for an extension of the time limits, extended the deadline for the submission of written statements to 22 January 2024 and for the submission of written comments on written statements to 22 April 2024. Following requests for additional extensions of the time limits, the Court, in its Order of 15 December 2023, further extended the time limit for the submission of

written statements to 22 March 2024 and for the submission of written comments on written statements to 24 June 2024.

- 1.3 As the Kingdom of the Netherlands ('the Kingdom')<sup>1</sup> is a Member State of the United Nations and by virtue of Article 92 of the UN Charter also a Party to the Statute of the Court, it wishes to avail itself of the opportunity afforded by the Orders of the Court of 20 April, 4 August and 15 December 2023, respectively, to submit a written statement further to the Request.
- 1.4 For the purposes of the present advisory proceedings, the Kingdom leaves it to the discretion of the Court to satisfy itself that it has advisory jurisdiction and that it may exercise this jurisdiction with respect to the Request, in accordance with Article 65, paragraph 1, of the Statute of the Court and Article 102 of the Rules of Court.

## **2. The atmosphere and climate change**

- 2.1 The atmosphere is a shared natural resource that can be defined as "the envelope of gases surrounding the Earth".<sup>2</sup> The atmosphere is divided into several layers, each of which plays a unique role in ensuring a habitable environment for current and future generations. It is characterized as an exhaustible and depletable resource.<sup>3</sup> This characterization stems from the realization that human activities can significantly alter its composition and integrity. The introduction of harmful substances or energy into the atmosphere can cause three distinct but related problems, designated by the International Law Commission ('ILC') as "common concerns of humankind"<sup>4</sup>: transboundary air pollution, ozone depletion and changes in atmospheric conditions.<sup>5</sup> Changes in atmospheric conditions have been caused by increasing anthropogenic emissions of greenhouse gases ('GHGs') resulting in higher concentrations of such gases in the atmosphere over time. Higher levels of such emissions result in a higher retention of energy, leading to an increase in the global temperature. In short: global warming.<sup>6</sup>

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<sup>1</sup> The Kingdom of the Netherlands wishes to emphasize that the 'Kingdom of the Netherlands' comprises of the European part of the Kingdom, as well as a group of islands in the Caribbean part of the Kingdom (consisting of Aruba, Curaçao, the Dutch part of Sint Maarten, Bonaire, Sint Eustatius and Saba).

<sup>2</sup> Draft guidelines on the Protection of the Atmosphere, with commentaries, adopted by the International Law Commission at its seventy-second session, UN Doc. A/76/10 (2021) (hereinafter 'ILC Draft guidelines on the Protection of the Atmosphere'), Preamble.

<sup>3</sup> *Idem.*, Commentary to the Preamble, para. 1.

<sup>4</sup> *Idem.*, Preamble.

<sup>5</sup> *Idem.*, General commentary, para. 2.

<sup>6</sup> IPCC, 2018, 'Framing and Context' in *Global Warming of 1.5°C: An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty*, V. Masson-Delmotte, P. Zhai, H.-O. Pörtner et al. (eds) (hereinafter 'IPCC, 2018, 'Framing and Context'), p. 51.

2.2 The Intergovernmental Panel on Climate Change ('IPCC') defines global warming as "an increase in combined surface air and sea surface temperatures averaged over the globe and over a 30-year period".<sup>7</sup> In its reports,<sup>8</sup> the IPCC has underlined that human activities, principally through emissions of GHGs, "have unequivocally caused global warming" and that global emissions of GHGs have continued to increase.<sup>9</sup> Human influences through, for example, emissions of GHGs, have warmed the atmosphere, the ocean and land. The consequences thereof include sea level rise, increasing temperatures, ocean acidification, glacial retreat and related impacts, salinization, land and forest degradation, loss of biodiversity, and desertification,<sup>10</sup> leading to weather and climate extremes in every region across the globe, causing adverse effects for both nature, and human health and livelihoods.<sup>11</sup>

2.3 In the United Nations Framework Convention on Climate Change ('UNFCCC'), climate change and its adverse effects are acknowledged as a "common concern of humankind".<sup>12</sup> The UNFCCC defines climate change as "a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods".<sup>13</sup> The adverse effects of climate change are, subsequently, defined as

changes in the physical environment or biota resulting from climate change which have significant deleterious effects on the composition, resilience or productivity of natural and managed ecosystems or on the operation of socio-economic systems or on human health and welfare.<sup>14</sup>

2.4 The ultimate objective of the UNFCCC is to stabilize concentrations of GHGs in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time-frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.<sup>15</sup> The Kyoto Protocol to the United

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<sup>7</sup> IPCC, 2018, 'Framing and Context', *supra* note 6, p. 51.

<sup>8</sup> With respect to climate change science, the Kingdom of the Netherlands takes the work of the IPCC as the basis for this written statement.

<sup>9</sup> IPCC, 2023, 'Summary for Policymakers' in *Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, H. Lee and J. Romero (eds) (hereinafter 'IPCC, 2023, 'Summary for Policymakers'), Section A.1.

<sup>10</sup> Report of the COP on its sixteenth session, 'The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention', Decision 1/CP.16, UN Doc. FCCC/CP/2010/7/Add.1 (15 March 2011) (hereinafter 'Decision 1/CP.16, UN Doc. FCCC/CP/2010/7/Add.1'), para. 25.

<sup>11</sup> IPCC, 2023, 'Summary for Policymakers', *supra* note 9, Section A2.1.

<sup>12</sup> United Nations Framework Convention on Climate Change (adopted in 1992) 1771 UNTS 107 (hereinafter 'UNFCCC'), Preamble.

<sup>13</sup> *Idem.*, Article 1(2).

<sup>14</sup> *Idem.*, Article 1(1).

<sup>15</sup> UNFCCC, Article 2.

Nations Framework Convention on Climate Change ('Kyoto Protocol') was developed in pursuit of the ultimate objective of the UNFCCC.<sup>16</sup> As scientific evidence on climate change increased and its adverse effects became increasingly clear, so did the urgent need to intensify the combat against climate change. Subsequently, the Paris Agreement to the United Nations Framework Convention on Climate Change ('Paris Agreement', 'the Agreement') concretized the objective of holding global warming "well below 2°C [...] and pursuing efforts to limit the temperature increase to 1.5°C",<sup>17</sup> by aiming to "reach global peaking of greenhouse gas emissions as soon as possible".<sup>18</sup>

2.5 The UNFCCC, Kyoto Protocol and Paris Agreement encompass provisions that underscore that individual and collective efforts are necessary to attain the above-described objectives. Such efforts are, amongst others, included in Article 4 of the UNFCCC and Article 1, paragraph 1, of the Paris Agreement, referring to, amongst others, mitigation and adaptation measures, as well as finance flows.

2.6 Mitigation and adaption are considered the cornerstones in achieving the objective of preventing or adapting to dangerous human interference with the climate system.<sup>19</sup> The IPCC has defined mitigation as an "anthropogenic intervention to reduce the sources of greenhouse gases or enhance their sinks",<sup>20</sup> and adaptation as an "adjustment in natural or human systems in response to actual or expected climatic stimuli or their effects, which moderates harm or exploits beneficial opportunities".<sup>21</sup>

2.7 The equal importance of mitigation measures and adaptation measures in the context of climate change has also been recognized by the Dutch Supreme Court in the *Urgenda* case.<sup>22</sup> In its judgment, the Dutch Supreme Court held that

although it is correct that the consequences of climate change can be mitigated by taking adaptation measures, it has not been demonstrated or made plausible that the potentially

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<sup>16</sup> See Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted in 1997) 2302 UNTS 162 (hereinafter 'Kyoto Protocol'), Preamble: "[I]n pursuit of the ultimate objective of the Convention as stated in its [UNFCCC] Article 2".

<sup>17</sup> Paris Agreement to the United Nations Framework Convention on Climate Change (adopted in 2015) 3156 UNTS 79 (hereinafter 'Paris Agreement'), Article 2(1).

<sup>18</sup> *Idem.*, Article 4(1).

<sup>19</sup> UNFCCC, Article 2.

<sup>20</sup> IPCC, 2001, 'Working Group III: Mitigation' in *Climate Change 2001: Synthesis Report. A Contribution of Working Groups I, II, III to the Third Assessment Report of the Intergovernmental Panel on Climate Change*, R.T. Watson and the Core Team (eds), p. 294.

<sup>21</sup> IPCC, 2007, 'Definition of key terms' in *Climate Change 2007: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change*, M.L. Parry et al. (eds), p. 6.

<sup>22</sup> Supreme Court of the Netherlands, 20 December 2019, ECLI:NL:HR:2019:2007 (*The State v. Urgenda*), para. 5.6.2. (hereinafter '*Urgenda* case').

disastrous consequences of excessive global warming can be adequately prevented by such measures. This finding also implies that even if account is taken of the fact that the State is taking adaptation measures, mitigation measures that reduce emissions [...] are urgently needed, also for the Netherlands.<sup>23</sup>

2.8 The Kingdom considers climate change, together with pollution and biodiversity loss, as the triple planetary crisis. The Kingdom believes that these three crises and their adverse effects need to be addressed in a holistic and integrated manner.<sup>24</sup> This should be the general framework for all international efforts in this respect. Below, the Kingdom will outline the obligations of States with regard to efforts that address climate change. With respect to the United Nations Convention on the Law of the Sea ('UNCLOS') and the duty to protect and preserve the marine environment, the Kingdom wishes to refer to its submissions in the advisory proceedings with respect to the Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law (Case No. 31), currently pending before the International Tribunal for the Law of the Sea ('ITLOS').<sup>25</sup>

### **3. Mitigation of climate change**

3.1 As outlined above, mitigation and adaptation measures form the cornerstones of global efforts against climate change. The aim of mitigating climate change and its adverse effects is to control global warming through the regulation of the concentrations of GHGs in the atmosphere. The implementation of mitigation measures would normally involve the reduction or limitation of emissions of GHGs, but could, to a certain extent, also be achieved by alternative measures, such as the removal of carbon dioxide ('CO<sub>2</sub>') from the atmosphere, for example by way of carbon capture and storage, or sustainable forest management.

3.2 The obligation to develop, adopt and implement mitigation measures finds its origin in several sources of international law, including treaties and customary international law. Several agreements specifically address climate change, such as the UNFCCC, the Kyoto Protocol and the Paris Agreement (Part A). The emission of substances that contribute to climate change is also regulated in other agreements addressing atmospheric pollution, such as the 1999

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<sup>23</sup> *Urgenda* case, *supra* note 22, para. 7.5.2.

<sup>24</sup> Written statement of the Kingdom of the Netherlands submitted on 16 June 2023 to the International Tribunal for the Law of the Sea with respect to the Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law (Case No. 31), para. 2.1.

<sup>25</sup> This concerns the written statement of the Kingdom of the Netherlands submitted on 16 June 2023, the oral statement of the Kingdom of the Netherlands presented on 25 September 2023, and the letter sent to the International Tribunal for the Law of the Sea on 2 October 2023 with respect to the Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law (Case No. 31).

Gothenburg Protocol to Abate Acidification, Eutrophication and Ground-level Ozone ('Gothenburg Protocol') and the 2016 Kigali Amendment to the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer ('Kigali Amendment to the Montreal Protocol') (Part B). The obligation to develop, adopt and implement mitigation measures may also flow from international human rights law (Part C) and, finally, from customary international law, such as norms related to the prevention of transboundary harm and the right to life (Part D).

**A. Mitigation obligations arising from climate change related agreements**

3.3 Agreements specifically addressing climate change are the UNFCCC, the Kyoto Protocol, and the Paris Agreement. All three instruments include provisions relating to the efforts that need to be undertaken to mitigate climate change and its adverse effects. Despite differences in formulation of mitigation efforts in the different climate change instruments, the core remains the same: mitigation efforts are required to achieve the objectives of the instruments as described in Paragraph 2.4 of this written statement. Below, the Kingdom will focus on the obligations flowing from the UNFCCC and the Paris Agreement both to which the Kingdom is a Party.<sup>26</sup> This is without prejudice to the importance of the Kyoto Protocol and the 2012 Doha Amendment to the Kyoto Protocol, to which the Kingdom is also a Party.<sup>27</sup>

3.4 Under the UNFCCC, Parties committed themselves to “[F]ormulate, implement, publish and regularly update national and, where appropriate, regional programmes containing measures to mitigate climate change” so as to achieve the objective of the UNFCCC.<sup>28</sup> Furthermore, the so-called Annex I countries ('developed country Parties', including the Kingdom), committed themselves to “adopt national [...] policies and take corresponding measures on the mitigation of climate change”.<sup>29</sup> Besides Parties having to identify their own policies and practices to encourage activities leading to higher levels of reduction of anthropogenic emissions of GHGs, they shall periodically update, publish and make available to the Conference of the Parties ('COP') the “national inventories of anthropogenic emissions by sources and removals

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<sup>26</sup> Whereas the Kingdom of the Netherlands is party to the UNFCCC and the Paris Agreement, the UNFCCC and the Paris Agreement have only entered into force for the European part of the Netherlands and therefore do not apply to the Caribbean part of the Netherlands, nor to the autonomous countries within the Kingdom of the Netherlands (Aruba, Curaçao and Sint Maarten).

<sup>27</sup> The Kingdom will not focus on the Kyoto Protocol, because the substantive commitments under the Kyoto Protocol expired in 2020. More specifically, the Kyoto Protocol covered the period from 2008-2013 (the first commitment period), whereas the Doha Amendment to the Kyoto Protocol (adopted in 2012) 3377 UNTS (hereinafter 'Doha Amendment') covered the second commitment period, which ran from 2013-2020. See in this respect Kyoto Protocol, Article 3, para. 1, and Annex B. See also Doha Amendment, Article 1, under a, defining a second commitment period from 2013 through 2020.

<sup>28</sup> UNFCCC, Article 4(1)(b).

<sup>29</sup> *Idem.*, Article 4(2)(a).

by sinks of all greenhouse gases”,<sup>30</sup> as well as the policies adopted and measures taken to mitigate climate change.<sup>31</sup>

3.5 In achieving the ultimate objective of the UNFCCC,<sup>32</sup> and so as to implement the mitigation provisions of the UNFCCC through the actions above, Parties shall be guided by, *inter alia*, the principles enlisted in Article 3 of the UNFCCC. These principles relate to, amongst others, protecting the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities;<sup>33</sup> taking precautionary measures;<sup>34</sup> promoting sustainable development;<sup>35</sup> and cooperating so as to promote a supportive and open international economic system that would lead to sustainable economic growth and development for all Parties.<sup>36</sup>

3.6 With the Paris Agreement, Parties agreed on subsequent goals that need to be achieved in the global response to the threats posed by climate change. These goals aim to hold “the increase in the global average temperature to well below 2°C above pre-industrial levels” and pursue “efforts to limit the temperature increase to 1.5°C above pre-industrial levels”,<sup>37</sup> “increasing the ability to adapt to the adverse impacts of climate change and foster climate resilience and low GHG emissions development”,<sup>38</sup> as well as “making finance flows consistent with a pathway towards low GHG emissions and climate-resilient development”.<sup>39</sup> In the implementation of the Paris Agreement, account must be taken of “equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances”.<sup>40</sup>

3.7 The objective of the Paris Agreement of achieving the long-term temperature goal, as set out in Article 2 of the Paris Agreement, is developed in Article 4, paragraph 1, in terms of action that Parties need to undertake to “aim to reach global peaking of GHG emissions as soon as possible”. Such rapid reductions are undertaken through, for example, mitigation efforts.

3.8 The obligation to mitigate is laid down in Article 4, paragraph 2, of the Paris Agreement. In accordance with this provision, each Party has the obligation to “pursue domestic mitigation

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<sup>30</sup> UNFCCC, Article 4(1)(a).

<sup>31</sup> *Idem.*, Article 4(2)(a).

<sup>32</sup> *Idem.*, Article 2.

<sup>33</sup> *Idem.*, Article 3(1).

<sup>34</sup> *Idem.*, Article 3(2).

<sup>35</sup> *Idem.*, Article 3(4).

<sup>36</sup> *Idem.*, Article 3(5).

<sup>37</sup> Paris Agreement, Article 2(1)(a).

<sup>38</sup> *Idem.*, Article 2(1)(b).

<sup>39</sup> *Idem.*, Article 2(1)(c).

<sup>40</sup> *Idem.*, Article 2(2).

measures, with the aim of achieving the objectives of such contributions” and to this end shall “prepare, communicate and maintain successive nationally determined contributions” (‘NDC’ or ‘NDCs’).<sup>41</sup> Every Party’s successive NDC needs to represent progression “beyond the Party’s then current NDC and reflect its highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances”,<sup>42</sup> in a non-regressive manner. The progression in NDCs could be reflected in, for example, more stringent quantitative emission reduction or limitation commitments with respect to GHGs over time.

3.9 Parties are under the obligation to communicate an NDC every five years.<sup>43</sup> In communicating their contributions, Parties are required to provide the information necessary for clarity, transparency and understanding.<sup>44</sup>

3.10 Pursuant to Article 13, paragraph 7, under b, of the Paris Agreement, each Party shall regularly provide the information necessary “to track progress made in implementing and achieving its nationally determined contribution under Article 4 of the Agreement” in light of building mutual trust and confidence, and promoting the effective implementation of the Paris Agreement.

3.11 Article 14, in conjunction with Article 4, paragraph 9, of the Paris Agreement introduces a “global stocktake”. To promote the effective implementation of the Agreement, the global stocktake is conducted by the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement (‘CMA’), and encompasses the periodic stocktaking of the implementation of the Paris Agreement in order to “assess the collective progress towards achieving the purpose of this Agreement and its long-term goals”.<sup>45</sup> The first global stocktake was undertaken in 2023, with subsequent stocktakes being conducted every five years.<sup>46</sup> Parties shall be informed by the outcome of the global stocktake in updating and enhancing actions and support with the relevant provisions of the Agreement, as well as in enhancing international cooperation for climate action. The collective progress is tracked on the basis of, for example, reports and communications from Parties, and reports of the IPCC.<sup>47</sup> The information taken into account relates to, amongst others, mitigation efforts undertaken by Parties,<sup>48</sup> as well as an assessment

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<sup>41</sup> Paris Agreement, Article 4(2).

<sup>42</sup> *Idem.*, Article 4(3).

<sup>43</sup> *Idem.*, Article 4(9).

<sup>44</sup> *Idem.*, Article 4(8).

<sup>45</sup> *Idem.*, Article 14(1).

<sup>46</sup> *Idem.*, Article 14(2).

<sup>47</sup> CMA, ‘Matters relating to Article 14 of the Paris Agreement and paragraphs 99-101 of decision 1/CP.21’, Decision 19/CMA.1, UN Doc. FCCC/PA/CMA/2018/3/Add.2 (19 March 2019), para. 37.

<sup>48</sup> See, for example, Paris Agreement, Articles 13(7)(a), 4(7), 4(15), and 4(19).

of the overall effect of NDCs of Parties, including the information referred to in Article 13, paragraph 7, under b, of the Paris Agreement.<sup>49</sup>

3.12 At the 2023 Climate Change Summit in Dubai, the COP to the Paris Agreement, in its first global stocktake, underlined that despite “overall progress on mitigation, adaptation and means of implementation and support, Parties are not yet collectively on track towards achieving the purpose of the Paris Agreement and its long-term goals”.<sup>50</sup> Parties were encouraged to raise ambition and action in this decade with respect to mitigation, adaptation, means of implementation and support, loss and damage, and response measures.<sup>51</sup> Furthermore, Parties also recognized that “limiting global warming to 1.5 °C with no or limited overshoot requires deep, rapid and sustained reductions in global greenhouse gas emissions of 43 per cent by 2030 and 60 per cent by 2035 relative to the 2019 level and reaching net zero carbon dioxide emissions by 2050”.<sup>52</sup>

3.13 Besides supporting the effective implementation of the Agreement through the global stocktake, Article 14, paragraph 3, of the Paris Agreement also emphasizes the importance of the global stocktake with respect to “enhancing international cooperation for climate action”, underscoring the necessity of collectively taking measures to combat climate change. The emphasis on international cooperation for climate action reflects, in the view of the Kingdom, the duty to cooperate. With respect to climate change, this duty can be considered to be reflected in the UNFCCC,<sup>53</sup> the Kyoto Protocol,<sup>54</sup> and the Paris Agreement.<sup>55</sup> The Preamble of the UNFCCC states that “the global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response, in accordance with their common but differentiated responsibilities and respective capabilities in their social and economic circumstances”.<sup>56</sup> The reflection of the duty to cooperate pertains to, for example, the promotion of equity amongst States in climate governance,<sup>57</sup> cooperation in technology development and transfer,<sup>58</sup> and capacity building efforts.<sup>59</sup>

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<sup>49</sup> The sources of input for the global stocktake can be found in CMA, ‘Modalities, procedures and guidelines for the transparency framework for action and support referred to in Article 13 of the Paris Agreement’, Decision 18/CMA.1, UN Doc. FCCC/PA/CMA/2018/3/Add.2 (19 March 2019), para. 36.

<sup>50</sup> CMA, ‘Outcome of the first global stocktake’, draft Decision -/CMA.5, UN Doc. FCCC/PA/CMA/2023/L.17 (13 December 2023), para. 2.

<sup>51</sup> *Ibid.*

<sup>52</sup> *Idem.*, para. 27.

<sup>53</sup> UNFCCC, Preamble and Articles 3, 4, 5, 6, 7 and 9.

<sup>54</sup> Kyoto Protocol, Articles 2, 10, and 13.

<sup>55</sup> Paris Agreement, Preamble and Articles 6, 7, 8, 10, 11, 12 and 14.

<sup>56</sup> UNFCCC, Preamble.

<sup>57</sup> *Idem.*, Article 3(1).

<sup>58</sup> UNFCCC, Article 4(1)(c); Paris Agreement, Article 10.

<sup>59</sup> UNFCCC, Article 9(2)(d); Paris Agreement, Article 11.

3.14 In summary, the Kingdom is of the view that it is imperative that States develop, adopt and implement a mitigation policy. A State could comply with this obligation through, for example, becoming a Party to and complying with the UNFCCC and/or the Paris Agreement, including by preparing, communicating and maintaining progressively formulated and non-regressive NDCs with the intention of achieving the aims as enshrined in the UNFCCC and the Paris Agreement.<sup>60</sup> Given the common interest of all Parties in compliance with these obligations, in particular those enshrined in Article 4 of the UNFCCC and Article 4 of the Paris Agreement, it is the *opinio juris* of the Kingdom that these obligations are applicable *erga omnes partes* (as further discussed in Section 3.D of this written statement). The Kingdom conducts a mitigation policy in accordance with the two foregoing obligations. Moreover, the Kingdom would like to emphasize the integral importance of the duty of all States and Parties to the above-mentioned agreements to cooperate in this regard in good faith.

***B. Mitigation obligations arising from agreements addressing transboundary atmospheric pollution and ozone depletion***

3.15 In addition to agreements specifically addressing climate change, other multilateral environmental agreements (‘MEAs’) addressing transboundary atmospheric pollution require the adoption and implementation of policies and measures that contribute to the mitigation of climate change, such as the Gothenburg Protocol and the Kigali Amendment to the Montreal Protocol, with the Kingdom being a Party to both agreements.<sup>61</sup>

3.16 The Gothenburg Protocol, adopted under the 1979 Convention on Long-range Transboundary Air Pollution, sets national emission ceilings for 2010 up to 2020 for four pollutants: sulphur dioxide (‘SO<sub>2</sub>’), nitrogen oxides (‘NO<sub>x</sub>’), volatile organic compounds (‘VOCs’) and ammonia (‘NH<sub>3</sub>’), thereby building on previous Protocols that addressed sulphur emissions, such as the 1985 Helsinki Protocol on the Reduction of Sulphur Emissions or their Transboundary Fluxes by at least 30 percent, the 1991 Geneva Protocol concerning the Control of Emissions of Volatile Organic Compounds or their Transboundary Fluxes, and the 1988 Sofia Protocol concerning the Control of Emissions of Nitrogen Oxides or their Transboundary Fluxes.

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<sup>60</sup> Paris Agreement, Articles 4(2) and 4(3).

<sup>61</sup> Whereas the Kingdom of the Netherlands is Party to these instruments, these instruments have only entered into force for the European part of the Netherlands and therefore do not apply to the Caribbean part of the Netherlands, nor to the autonomous countries within the Kingdom of the Netherlands (Aruba, Curaçao and Sint Maarten).

### 3.17 The objective of the Gothenburg Protocol is

to control and reduce emissions of sulphur, nitrogen oxides, ammonia and volatile organic compounds that are caused by anthropogenic activities and are likely to cause adverse effects on human health, natural ecosystems, materials and crops, due to acidification, eutrophication or ground-level ozone as a result of long-range transboundary atmospheric transport, and to ensure, as far as possible, that in the long term and in a stepwise approach, taking into account advances in scientific knowledge, atmospheric depositions or concentrations do not exceed [the levels included in annex I].<sup>62</sup>

3.18 The Gothenburg Protocol prescribes that “each Party having an emission ceiling in any table in annex II shall reduce and maintain the reduction in its annual emissions in accordance with that ceiling and the timescales specified”.<sup>63</sup> The Gothenburg Protocol was amended in 2012, establishing legally binding emissions reduction commitments for 2020 and beyond for SO<sub>2</sub>, NO<sub>x</sub>, NH<sub>3</sub>, VOCs and fine particulate matter, such as black carbon.<sup>64</sup> The IPCC has observed that

MEAs dealing with transboundary air pollution, such as the Convention on Long-Range Transboundary Air Pollution (CLRTAP) and its implementing protocols, which regulate non-GHGs like particulates, nitrogen oxides and ground-level ozone, can also have potential benefits for climate change mitigation.<sup>65</sup>

3.19 And it observed, furthermore, that

studies have indicated that rigorous air quality controls targeting short-lived climate forcers, like methane, ozone and black carbon, could slow global mean temperature rise by about 0.5°C by mid-century [...]. Steps in this direction were taken with 2012 amendments to the CLRTAP Gothenburg Protocol (initially adopted in 1999) to include black carbon, which is an important driver of climate change in the Arctic region.<sup>66</sup>

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<sup>62</sup> Protocol to Abate Acidification, Eutrophication and Ground-level Ozone to the 1979 Convention on Long-range Transboundary Air Pollution (adopted in 1999) 2319 UNTS 80 (hereinafter ‘Gothenburg Protocol’), Article 2.

<sup>63</sup> *Idem.*, Article 3(1).

<sup>64</sup> See, for example, Executive Body Decision 2012/1, UN Doc. ECE/EB.AIR/111/Add.1 and Executive Body Decision 2012/2, UN Doc. ECE/EB.AIR/111/Add.1, of the Executive Body of the 1979 Convention on Long-Range Transboundary Air Pollution.

<sup>65</sup> IPCC, 2022, ‘International Cooperation’ in *Climate Change 2022: Mitigation of Climate Change. Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, P.R. Shukla, J. Skea, A. Al Khourdajie et al. (eds) (hereinafter ‘IPCC, 2022, ‘International Cooperation’), p. 1496.

<sup>66</sup> IPCC, 2022, ‘International Cooperation’, p. 1496.

3.20 Another relevant agreement is the Kigali Amendment to the Montreal Protocol, with which Parties committed themselves to (further) limit the use of hydrochlorofluorocarbons ('HFCs').<sup>67</sup> HFCs are GHGs that are purely anthropocentric in origin and more potent than CO<sub>2</sub> in terms of their global warming potential.<sup>68</sup> Therefore, any limitation thereto is to be considered a mitigation effort in the context of climate change, aiming to prevent further global temperature rise, and thus pursuing the objectives of the UNFCCC and the Paris Agreement. This is all the more so because under the Kigali Amendment to the Montreal Protocol, Parties to the Montreal Protocol are required to gradually reduce use of HFCs by 80-85 percent by the late 2040s and, according to the United Nations Environmental Programme ('UNEP'), phasedown of HFCs is expected to avoid up to 0.5°C of global temperature rise by 2100.<sup>69</sup> In the words of UNEP, this "encompasses a truly unparalleled contribution to climate mitigation efforts, and the single largest contribution the world has made towards keeping the global temperature rise 'well below' 2 degrees Celsius".<sup>70</sup>

3.21 Other legal frameworks might be relevant as well in relation to mitigating climate change and its adverse effects. For example, as the Kingdom argued in its submissions to the ITLOS in the advisory proceedings on the Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law (Case No. 31),<sup>71</sup> the UNCLOS can be considered a 'living treaty' with a 'framework nature', ensuring the coordination and harmonization between the Convention and other relevant existing or future legal instruments and frameworks relating to climate change that may affect the marine environment.<sup>72</sup> As such, the UNCLOS is relevant as well in relation to the mitigation of climate change. The open and integrative character of the UNCLOS is not only reflected in the general obligation to protect and preserve the marine environment as enshrined in Article 192, that is substantiated by Article 194 as well as by related provisions, such as those on specific sources of pollution, but also through the integration of different legal regimes to substantiate these provisions.<sup>73</sup>

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<sup>67</sup> Kigali Amendment to the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer (adopted in 2016) 3288 UNTS.

<sup>68</sup> IPCC, 2007, 'Technical Summary' in *Climate Change 2007: The Physical Science Basis. Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change*. S. Solomon, D. Qin, M. Manning et al. (eds), p. 28.

<sup>69</sup> United Nations Environment Programme, 'About Montreal Protocol', available at [www.unep.org/ozonaction/who-we-are/about-montreal-protocol](http://www.unep.org/ozonaction/who-we-are/about-montreal-protocol) (accessed on 9 January 2024).

<sup>70</sup> *Ibid.*

<sup>71</sup> This concerns the written statement of the Kingdom of the Netherlands submitted on 16 June 2023, the oral statement of the Kingdom of the Netherlands presented on 25 September 2023, and the letter sent to the International Tribunal for the Law of the Sea on 2 October 2023 with respect to the Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law (Case No. 31).

<sup>72</sup> Written statement of the Kingdom of the Netherlands submitted on 16 June 2023 to the International Tribunal for the Law of the Sea with respect to the Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law (Case No. 31), para. 3.1.

<sup>73</sup> *Idem.*, para. 3.2.

3.22 As demonstrated by the Kingdom in its submissions to ITLOS, other instruments contributing to the mitigation (of the adverse effects of) climate change can be found within the frameworks of, for example, the International Maritime Organization ('IMO') and the International Civil Aviation Organization ('ICAO').<sup>74</sup> For instance, with respect to air pollution from ships, Annex VI of the International Convention for the Prevention of Pollution from Ships ('MARPOL') limits the main airborne pollutants released into the environment from ocean-going ships and prohibits deliberate emissions of ozone depleting substances from ships. Chapter 4 of Annex VI of MARPOL specifically regulates the energy efficiency of ships and sets rules for reducing the carbon intensity of ships per ton cargo carried, with the aim to reduce emissions of GHGs from international shipping. With respect to air pollution from civil aviation, ICAO and its Member States under the 1944 Convention on International Civil Aviation have recognized the "critical importance of providing continuous leadership to international civil aviation in limiting or reducing its emissions that contribute to global climate change".<sup>75</sup> In this regard, ICAO and its Member States have agreed to a long-term aspirational goal of zero-net CO<sub>2</sub> emissions from aviation by 2050, encouraging ICAO Member States to regulate aviation emissions. In addition, ICAO has, for example, adopted a Carbon Offsetting and Reduction Scheme for International Aviation ('CORSIA'), which regulates the emissions from international aviation. CORSIA aims to minimize market distortion, while respecting the special circumstances and respective capabilities of ICAO Member States. Furthermore, under the Convention, the organization also sets environmental requirements for aviation pollution through various regulations regarding aircraft infrastructure.<sup>76</sup>

### ***C. Mitigation obligations under international law relating to human rights***

3.23 According to the Kingdom, international human rights law equally requires States to take measures to mitigate global warming. The subject-matter of international human rights law is the protection of "the equal and inalienable rights of all members of the human family", as derived from "the inherent dignity of the human person".<sup>77</sup> Accordingly, human rights instruments require States to respect, protect, and fulfil human rights, and in doing so bestow such rights directly on individuals, peoples, and groups.

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<sup>74</sup> See, for example, Written statement of the Kingdom of the Netherlands submitted on 16 June 2023 to the International Tribunal for the Law of the Sea with respect to the Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law (Case No. 31), paras. 6.1-6.4.

<sup>75</sup> International Civil Aviation Organization, 'Consolidated statement of continuing ICAO policies and practices related to environmental protection – climate change', Resolution A41-21 (2021), p. 1.

<sup>76</sup> Convention on International Civil Aviation (adopted in 1944) 15 UNTS 295, Volume I and II of Annex 16.

<sup>77</sup> Universal Declaration of Human Rights (adopted in 1948) UNGA Res 217 A(III), Preambular para. 1; International Covenant on Civil and Political Rights (adopted in 1966) 999 UNTS 171 (hereinafter 'ICCPR'), Preambular para. 1; International Covenant on Economic, Social and Cultural Rights (adopted in 1966) 993 UNTS 3, Preambular para. 2.

3.24 The protection of the climate system is not as such the subject-matter of human rights instruments. Human rights instruments do not include explicit obligations for States to take mitigation measures with respect to climate change, nor do they address climate change. Similarly, instruments relating to climate change do not, in their operative parts, address human rights – the Paris Agreement does so only in its Preamble: “Acknowledging that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights”.<sup>78</sup>

3.25 Notwithstanding the absence of such express references, the adverse effects of climate change, as caused by anthropogenic emissions of GHGs, do have an impact on the effective enjoyment of human rights.

3.26 The United Nations Special Rapporteur on Human Rights and the Environment has set out that the detrimental effects of climate change extend to the rights to life, health, food, water and sanitation, a healthy environment, an adequate standard of living, housing, property, self-determination, development and culture.<sup>79</sup> The Supreme Court of the Netherlands has held in its judgment in the *Urgenda* case that the consequences of climate change affect the right to life, and the right to respect for private and family life.<sup>80</sup>

3.27 In this written statement, the Kingdom will address in particular these rights, while noting that the adverse effects of climate change potentially affect more rights, including, but not limited to, the right to a clean, healthy and sustainable environment, as recognized by the United Nations Human Rights Council and the United Nations General Assembly.<sup>81</sup>

*i. The obligation to develop, adopt, and implement a mitigation policy under international law relating to human rights*

3.28 International human rights law requires States to respect, protect, and fulfil the human rights of everyone within their jurisdiction.<sup>82</sup> Article 2, paragraph 1, of the International Covenant on Civil and Political Rights (‘ICCPR’), which is mirrored in similar terms in the respective Articles 1 of the American Convention on Human Rights and the European Convention on

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<sup>78</sup> Paris Agreement, Preamble.

<sup>79</sup> Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, UN Doc. A/74/161 (15 July 2019) (hereinafter ‘UN Doc. A/74/161’), paras. 26-27.

<sup>80</sup> *Urgenda* case, *supra* note 22, para. 5.6.2.

<sup>81</sup> United Nations Human Rights Council, Resolution 48/13, UN Doc. A/HRC/RES/48/13 (18 October 2021), Operative para. 1; United Nations General Assembly, Resolution A/76/300, UN Doc. A/RES/76/300 (28 July 2022), Operative para. 1.

<sup>82</sup> ICCPR, Article 2(1); American Convention on Human Rights (1969), Article 1; European Convention on Human Rights (1950) (hereinafter ‘ECHR’), Article 1.

Human Rights (‘ECHR’), provides, *inter alia* that “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant”. Insofar as international human rights law requires States to take measures to combat climate change, as is addressed below, this obligation therefore applies to all individuals within their jurisdiction, as that term is interpreted and applied by relevant courts and treaty bodies.

3.29 The obligation to respect and ensure the rights in the ICCPR imposes both negative and positive obligations on Parties.<sup>83</sup> The obligation to respect human rights requires States to refrain from interferences with rights (negative obligations), while the obligation to ensure rights requires States to actively protect and realise rights (positive obligations). Generally, this means that, with respect to rights such as the rights to life and respect for private and family life, States must refrain from interferences with those rights, and must take measures to actively protect those rights of anyone within their jurisdiction.

3.30 If a real and immediate risk to the effective enjoyment of the rights to life and to respect for private and family life arises, States must take reasonable and appropriate measures to protect the rights of those within their jurisdiction.<sup>84</sup> This corresponds with the obligation as enshrined in Article 2, paragraph 2, of the ICCPR that in respecting and ensuring the rights in the ICCPR, each State Party needs to take “the necessary steps [...] to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant”. Such measures could relate to climate change measures that are necessary to protect the rights of those within the jurisdiction of States, as will be shown below.

3.31 Climate science, as set out above, incontrovertibly shows that the detrimental effects of climate change pose a threat to human rights. According to the Human Rights Committee, climate change constitutes one of the “most pressing and serious threats to the ability of present and future generations to enjoy the right to life”.<sup>85</sup> In the case of *Billy et al. v. Australia*, it considered that “the obligation of States Parties to respect and ensure the right to life extends to reasonably foreseeable threats and life-threatening situations that can result in loss of life”, and that “such threats may include adverse climate change impacts”.<sup>86</sup> According to the Committee on the

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<sup>83</sup> United Nations Human Rights Committee, General comment No. 31, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13 (26 May 2024), para. 6.

<sup>84</sup> *Urgenda* case, *supra* note 22, paras. 5.2.2, 5.3.2, 5.6.2; ECtHR, *Cengiz Kılıç v. Turkey*, no. 16192/06, § 62, 6 December 2011; ECtHR, *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 130, ECHR 2014; ECtHR, *Tătar v. Romania*, no. 67021/01, § 88, 27 January 2009; United Nations Human Rights Committee, *Daniel Billy et al. v. Australia*, UN Doc. CCPR/C/135/D/3624/2019 (21 July 2022) (hereinafter ‘*Billy et al. v. Australia*’), para. 8.9.

<sup>85</sup> United Nations Human Rights Committee, General comment No. 36, *Article 6: Right to Life*, UN Doc. CCPR/C/GC/36 (3 September 2019), para. 62.

<sup>86</sup> *Billy et al. v. Australia*, *supra* note 84, para. 8.3.

Rights of the Child, “it is generally accepted and corroborated by scientific evidence that the carbon emissions originating in the State party contribute to the worsening of climate change, and that climate change has an adverse effect over the enjoyment of rights by individuals”.<sup>87</sup>

3.32 In the *Urgenda* case, the Supreme Court of the Netherlands, also having regard to the relevant rules of international law relating to climate change, held that “the genuine threat of dangerous climate change [...] constitutes a ‘real and immediate risk’ [...] that the lives and welfare of Dutch residents could be seriously jeopardized”.<sup>88</sup> It considered, in the context of the ECHR, that “[t]he mere existence of a sufficiently genuine possibility that the risk will materialise means that suitable measures must be taken” to protect the rights to life and to respect for private and family life.<sup>89</sup> According to the Kingdom, this applies more generally to the rights to life and to respect for private and family life, also under other human rights treaties and customary international law.

3.33 According to the Special Rapporteur on Human Rights and the Environment, the right to a clean, healthy, and sustainable environment is also at issue due to the adverse effects of climate change.<sup>90</sup> The right to a clean, healthy and sustainable environment was recognized by the United Nations General Assembly as a human right.<sup>91</sup> In this Resolution, the United Nations General Assembly notes that this right is related to other rights and existing international law.<sup>92</sup> The United Nations General Assembly furthermore affirms that the promotion of the right “requires the full implementation of the multilateral environmental agreements under the principles of international environmental law”.<sup>93</sup> The right to a clean, healthy and sustainable environment was only recently recognized at the global level, and has, as yet, not been reflected in a legally binding instrument. Its contents are, furthermore, yet to be fully determined.

3.34 It is the position of the Kingdom that support for the right to a clean, healthy and sustainable environment serves a fair and inclusive transition, as well as a reduction in climate vulnerability.<sup>94</sup> According to the Kingdom, the right to a clean, healthy and sustainable

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<sup>87</sup> United Nations Committee on the Rights of the Child, *Chiara Sacchi et al. v. Argentina*, UN Doc. CRC/C/88/D/104/2019 (22 September 2021), para. 10.9.

<sup>88</sup> *Urgenda* case, *supra* note 22, para. 5.6.2 (quote from the unofficial translation into English, by the Supreme Court).

<sup>89</sup> *Ibid.*

<sup>90</sup> Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, recommending to recognize the human right to a safe, clean, healthy and sustainable environment, climate report, UN Doc. A/74/161, 19 July 2018, paras. 43-44.

<sup>91</sup> United Nations General Assembly, Resolution A/76/300, UN Doc. A/Res/76/300 (28 July 2022), Operative para. 1.

<sup>92</sup> *Idem.*, Operative para. 2.

<sup>93</sup> *Idem.*, Operative para. 3.

<sup>94</sup> Government of the Kingdom of the Netherlands, *Policy note: human Rights, democracy, the international legal order* (9 November 2023), available at [www.government.nl/binaries/government/documenten/policy-notes/2023/11/09/policy-note-human-rights-democracy-and-international-legal-order/EN+-+Policy+document+Human+Rights+-+Democracy+-+the+International+Legal+Order.pdf](http://www.government.nl/binaries/government/documenten/policy-notes/2023/11/09/policy-note-human-rights-democracy-and-international-legal-order/EN+-+Policy+document+Human+Rights+-+Democracy+-+the+International+Legal+Order.pdf) (accessed on 19 March 2024).

environment links international environmental law to international human rights law. It acknowledges that the effective respect, protection, and fulfilment of human rights is contingent on a healthy environment as affirmed in Resolution 76/300 of the United Nations General Assembly.

3.35 Accordingly, in the view of the Kingdom, States are required to protect those within their jurisdiction against the adverse effects of climate change, by means of reasonable and appropriate measures of protection. This obligation can be characterized as one of conduct, not of result.<sup>95</sup> In light of the obligation of Parties to take “the necessary steps [...] to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant” enshrined in Article 2, paragraph 2, of the ICCPR, this obligation must be understood, especially when interpreted in light of the international legal obligations set out in the previous sections, to require the development, adoption, and implementation of a mitigation policy. In discharging this obligation, every State must do its part.<sup>96</sup> For the Netherlands, this included, according to the Supreme Court of the Netherlands, pursuing and achieving specific reductions in emissions of GHGs.<sup>97</sup>

*ii. Procedural guarantees*

3.36 International human rights law further imposes procedural obligations with respect to the mitigation policies and measures of States. This means that States must put in place procedural safeguards for the protection of human rights. For example, with regard to the rights to life and to respect for private and family life, States must, amongst others, take into account whether due weight has been accorded to the interests of individuals in the decision-making process regarding such measures.<sup>98</sup>

3.37 With regard to such procedural rights, the European Court of Human Rights has determined that

where a State must determine complex issues of environmental and economic policy, the decision-making process must firstly involve appropriate investigations and studies in order to allow them to predict and evaluate in advance the effects of those activities which might damage the environment and infringe individuals’ rights and to enable them to strike a fair balance between the various conflicting interests at stake [...]. The importance of public access to the

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<sup>95</sup> ECtHR, *Marian Stoicescu v. Romania*, no. 12934/02, § 59, 16 July 2009.

<sup>96</sup> *Urgenda* case, *supra* note 22, paras. 6.3-6.5.

<sup>97</sup> *Idem.*, paras. 7.1-7.6.2.

<sup>98</sup> ECtHR, *Taşkın and Others v. Turkey*, no. 46117/99, § 118, ECHR 2004-X.

conclusions of such studies and to information which would enable members of the public to assess the danger to which they are exposed is beyond question [...]. Lastly, the individuals concerned must also be able to appeal to the courts against any decision, act or omission where they consider that their interests or their comments have not been given sufficient weight in the decision-making process.<sup>99</sup>

- 3.38 The Kingdom submits that such standards apply equally to policies and measures relating to the mitigation of climate change. This means, by way of example, that States must continuously review the effects of (intended) mitigation policies and measures to ensure that overall emissions reduction or limitation targets of GHGs are met.
- 3.39 In addition, in a context where the Netherlands had amended its mitigation policy by reducing mitigation ambitions and choosing less ambitious pathways of reaching long-term ambitions, the Supreme Court of the Netherlands held in the *Urgenda* case that human rights law imposed an obligation to provide sufficient reasoning for such decision.<sup>100</sup> This includes reasoning which explains how such lowering of ambitions is compatible with the aim of 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.
- 3.40 Finally, States must ensure procedural environmental rights, including on access to information, public participation in decision-making, and access to justice. These rights are implicit in substantive human rights,<sup>101</sup> and are reflected in the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters ('Aarhus Convention') and the 2003 Kyiv Protocol on Pollutant Release and Transfer Registers ('Kyiv Protocol to the Aarhus Convention'), both to which the Kingdom is a Party.<sup>102</sup> Another regional instrument in the realm of procedural human rights in environmental matters is the 2018 Escazú Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean ('Escazú Agreement'). Furthermore, the Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters, set up by the

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<sup>99</sup> *Hatton and Others v. the United Kingdom* [GC], no. 36022/97, § 119, ECHR 2003-VIII.

<sup>100</sup> *Urgenda* case, *supra* note 22, paras. 6.5 and 7.4.6.

<sup>101</sup> *Hatton and Others v. the United Kingdom* [GC], no. 36022/97, § 119, ECHR 2003-VIII.

<sup>102</sup> Whereas the Kingdom of the Netherlands is party to the Aarhus Convention and to the Kyiv Protocol to the Aarhus Convention, these instruments have only entered into force for the European part of the Netherlands and therefore do not apply to the Caribbean part of the Netherlands, nor to the autonomous countries within the Kingdom of the Netherlands (Aruba, Curaçao and Sint Maarten).

UNEP in 2010, indicated the willingness of States at a global level to more thoroughly engage the public at all levels to protect and manage the environment and related resources.<sup>103</sup>

3.41 The Parties to the Aarhus Convention recognize “that adequate protection of the environment is essential to human well-being and the enjoyment of basic human rights, including the right to life itself” and that the environment needs to be protected and improved “for the benefit of present and future generations”. To enable this,

citizens must have access to information, be entitled to participate in decision-making and have access to justice in environmental matters, and acknowledging in this regard that citizens may need assistance in order to exercise their rights.<sup>104</sup>

3.42 The objective of the Kyiv Protocol to the Aarhus Convention is to enhance public access to information through the establishment of coherent, integrated, nationwide pollutant release and transfer registers “which could facilitate public participation in environmental decision-making as well as contribute to the prevention and reduction of pollution of the environment”.<sup>105</sup>

3.43 Whereas the Escazú Agreement included “climate change sources aimed at building national capacities” as an example of environmental information systems that Parties have to put in place,<sup>106</sup> there is no explicit reference to ‘climate’ or ‘climate change’ in the Aarhus Convention or in the Kyiv Protocol to the Aarhus Convention. However, the definition of “environmental information” in Article 2, paragraph 3, of the Aarhus Convention is broad and its list is not exhaustive, encompassing “any information in written, visual, aural, electronic or any other material form on”: (a) the state of elements of the environment; (b) factors affecting or likely to affect the elements of the environment; and (c) the state of human health and safety and conditions of life insofar as these are or may be affected by the elements on (a) and (b).<sup>107</sup> Because of the effects of climate change on the environment, this can be understood to include information related to climate change. Also, the ‘release’ of ‘pollutants’ under the Kyiv Protocol to the Aarhus Convention can be understood to refer to anthropogenic emissions of GHGs.<sup>108</sup>

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<sup>103</sup> United Nations Environment Programme, ‘Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters’ (26 February 2010), adopted by the Governing Council of the United Nations Environment Programme in Decision SS.XI/5, part A.

<sup>104</sup> Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (adopted in 1998) 2161 UNTS 447 (hereinafter ‘Aarhus Convention’), Preamble.

<sup>105</sup> Kyiv Protocol on Pollutant Release and Transfer Registers to the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (adopted in 2003) 2629 UNTS 119 (hereinafter ‘Kyiv Protocol to the Aarhus Convention’), Article 1.

<sup>106</sup> Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (adopted in 2018) 3397 UNTS (hereinafter ‘Escazú Agreement’), Article 6(3)(g).

<sup>107</sup> Aarhus Convention, Article 2(3).

<sup>108</sup> Kyiv Protocol to the Aarhus Convention, Articles 2(7) and 2(8).

3.44 The Kingdom is, furthermore, of the view that States, by ensuring such procedural environmental rights, contribute to the implementation of Article 6 of the UNFCCC and Article 12 of the Paris Agreement, relating to public participation and public access to information, thereby promoting education, training, and public awareness in environmental matters.<sup>109</sup>

#### ***D. Customary international law relating to the mitigation of climate change***

3.45 In this Section, it will be considered first whether any of the climate change treaties referred to above contain a rule which, “while conventional or contractual in its origin, has since passed into the general *corpus* of international law, and is now accepted as such by the *opinion juris*, so as to have become binding even for countries which have never, and do not, become Parties even to the Convention”,<sup>110</sup> notably the obligation to develop, adopt and implement a mitigation policy, as enshrined in Article 4 of the UNFCCC and Article of the 4 Paris Agreement. It will also be considered in this Section whether other rules have passed into the general *corpus* of international law, such as the obligation to prevent significant transboundary harm and the obligation to protect the atmosphere.

3.46 In the *North Sea Continental Shelf Cases*, the Court affirms that a norm-creating treaty provision may come to form a rule of customary international law.<sup>111</sup> The ILC has also stated that “a treaty rule can, after adoption, come to reflect a general rule on the basis of subsequent practice”.<sup>112</sup> In this respect, the Court has stated that such process “constitutes indeed one of the recognized methods by which new rules of customary international law may be formed”.<sup>113</sup>

3.47 Regarding the character of such a treaty provision, the Court clarified that “it would in the first place be necessary that the provision concerned should, at all events potentially, be of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law”.<sup>114</sup> Neither the UNFCCC nor the Paris Agreement provide for the possibility to derogate from the provisions concerned in particular cases or as between particular parties by agreement, nor for the faculty of making reservations.<sup>115</sup>

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<sup>109</sup> See also Aarhus Convention, Article 3(3) and Escazú Agreement, Article 10(2).

<sup>110</sup> *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)*, Judgement *I.C.J. Reports* 1969 (hereinafter ‘*North Sea Continental Shelf Cases*’), para. 71.

<sup>111</sup> *Idem.*, para 71.

<sup>112</sup> Draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*), with commentaries, adopted by the International Law Commission at its sixty-third session, UN Doc. A/77/10 (2022) (hereinafter ‘*ILC Draft conclusions on jus cogens*’), commentary to Conclusion 5, para. 8.

<sup>113</sup> *North Sea Continental Shelf Cases*, *supra* note 110, para. 71.

<sup>114</sup> *Idem.*, para. 72.

<sup>115</sup> UNFCCC, Article 24; Paris Agreement, Article 27.

3.48 The Court also considered that “even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself”.<sup>116</sup> As of 1 January 2024, there are 198 Parties to the UNFCCC and 195 Parties to the Paris Agreement.<sup>117</sup> It would thus appear that participation in the UNFCCC is (near) universal. Three States Parties to the UNFCCC did not ratify the Paris Agreement, of which two submitted an intended NDC nonetheless.<sup>118</sup> It would thus, furthermore, appear that this practice is clearly “extensive and virtually uniform”.<sup>119</sup> According to the Court, the practice should have occurred “in such a way as to show general recognition that a rule of law or legal obligation is involved”.<sup>120</sup> It is the *opinio juris* of the Kingdom that the obligation to develop, adopt and implement a mitigation policy has become a norm of customary international law.

3.49 It is also the *opinio juris* of the Kingdom that the obligation to develop, adopt and implement a mitigation policy is an obligation owed towards the international community as a whole, consistent with its opinion that Article 4 of the UNFCCC and Article 4 of the Paris Agreement are applicable *erga omnes partes* (see Section 3.A, paragraph 3.14). In its 1970 decision in the *Barcelona Traction* case, the Court established that obligations owed towards the international community as a whole “are the concern of all States [and that], [i]n view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*”.<sup>121</sup> These obligations arise from common interests of States rooted in their shared values.<sup>122</sup>

3.50 In *Gabčíkovo-Nagymaros Project*, the Court stressed the “great significance that it attaches to respect for the environment, not only for States but also for the whole of mankind”.<sup>123</sup> In its work on the law on State responsibility, the ILC has considered the legal consequences of conduct that presents a threat “to the survival of States and their peoples and the most basic human values”<sup>124</sup> and the breach of obligations “of essential importance for the safeguarding

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<sup>116</sup> *North Sea Continental Shelf Cases*, *supra* note 110, para. 73.

<sup>117</sup> UNFCCC, ‘Paris Agreement – Status of Ratification’, available at [www.unfccc.int/process/the-paris-agreement/status-of-ratification](http://www.unfccc.int/process/the-paris-agreement/status-of-ratification) (accessed on 20 February 2024).

<sup>118</sup> NDC Partnership, ‘NDC Content’, available at [www.ndcpartnership.org/knowledge-portal/ndc-content](http://www.ndcpartnership.org/knowledge-portal/ndc-content) (accessed on 20 February 2024).

<sup>119</sup> *North Sea Continental Shelf Cases*, *supra* note 110, para. 74.

<sup>120</sup> *Ibid.*

<sup>121</sup> *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Judgment, *I.C.J. Reports* 1970, para. 33.

<sup>122</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Provisional Measures, Order of 23 January 2020, *I.C.J. Reports* 2020, para. 41.

<sup>123</sup> *Case concerning Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment, *I.C.J. Reports* 1997 (hereinafter ‘*Gabčíkovo-Nagymaros Project*’), para. 53; *Pulp Mills on the River Uruguay, (Argentina v. Uruguay)*, Judgment, *I.C.J. Reports* 2010 (hereinafter ‘*Pulp Mills on the River Uruguay*’), para. 193.

<sup>124</sup> See Draft Articles on the Responsibility of States for Internationally Wrongful Acts, Report of the International Law Commission on the work of its fifty-third session, 23 April – 1 June and 2 July – 10 August 2001, Official Records of the General Assembly, Fifty-sixth session, Supplement No.10, UN Doc. A/56/10 (hereinafter ‘ARSIWA’), Commentary to Article 40, para. 3.

and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas”.<sup>125</sup>

3.51 As the IPCC has outlined, the survival of humanity is at stake due to climate change and its adverse effects. For example, the IPCC stated that approximately 50-75% of the “human population could be exposed to periods of ‘life-threatening climatic conditions’ arising from coupled impacts of extreme heat and humidity by 2100”.<sup>126</sup> The Parties to the UNFCCC and the Paris Agreement have acknowledged that climate change is the “common concern of humankind”.<sup>127</sup> The corresponding obligations, in particular the obligation to develop, adopt and implement a mitigation policy, should thus, in the view of the Kingdom, be considered the concern of all States and obligations *erga omnes*.

3.52 In addition to the obligation to develop, adopt and implement a mitigation policy, there are other rules that have passed into the general *corpus* of international law and are applicable in the context of climate change. The Court has observed that the *corpus* of international law contains obligations of States in respect of the prevention of significant harm to the environment. In *Pulp Mills on the River Uruguay*, the Court summarized the state of the law in the context of transboundary harm as follows:

The Court points out that the principle of prevention, as a customary rule, has its origins in the due diligence that is required of a State in its territory. It is “every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States”.<sup>[128]</sup> A State is thus 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.<sup>129</sup>

3.53 In *Legality of the Threat or Use of Nuclear Weapons*, the Court had determined that this obligation extends to areas beyond the limits of national jurisdiction. The Court stated that

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<sup>125</sup> *Yearbook of the International Law Commission*, 1976, Vol. II, UN Doc. A/CN.4/SER.A/1976/Add.1 (Part Two), Article 19(d) at p. 96 and para. 32 at p. 109; See also ILC Draft conclusions on *jus cogens*, *supra* note 112, commentary to Conclusion 23, para. 15.

<sup>126</sup> IPCC, 2022, ‘Working Group II Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change’ in *Climate Change 2022: Impacts, Adaptation and Vulnerability*, H.-O Pörtner, D.C. Roberts, M. Tignor et al. (eds), p. 922-923.

<sup>127</sup> UNFCCC, Preamble; Paris Agreement, Preamble.

<sup>128</sup> *Corfu Channel (United Kingdom v. Albania)*, Merits, Judgment, *I.C.J. Reports* 1949, p. 22.

<sup>129</sup> *Pulp Mills on the River Uruguay*, *supra* note 123, para. 101; See also *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, *I.C.J. Reports* 2015 (hereinafter ‘*Costa Rica v. Nicaragua/Nicaragua v. Costa Rica*’), paras. 104 and 118.

the existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.<sup>130</sup>

3.54 Furthermore, the Arbitral Tribunal in the *Iron Rhine Arbitration* found that where significant harm to the environment may be caused, “there is a duty to prevent, or at least mitigate, such harm”.<sup>131</sup> The Tribunal stated that this duty does not only apply in a transboundary context, but also to areas within the national jurisdiction of States.<sup>132</sup>

3.55 In the view of the Kingdom, this obligation does not only apply to significant harm caused by activities which take place in the territory of a State and it also does not only apply to significant harm caused to the environment of another State or an area beyond the limits of national jurisdiction, but also to:

- a. Significant harm caused by activities which take place under the control of a State outside its territory (in another State or in an area beyond the limits of national jurisdiction);
- b. Significant harm caused to the environment of shared natural resources, such as the atmosphere.

3.56 With respect to the meaning of ‘significant harm’, the Kingdom would like to refer to the considerations of the ILC that

the term “significant” is not without ambiguity and a determination has to be made in each specific case. It involves more factual considerations than legal determination. It is to be understood that “significant” is something more than “detectable” but need not be at the level of “serious” or “substantial”. The harm must lead to a real detrimental effect on matters such as, for example, human health, industry, property, environment or agriculture in other States. Such detrimental effects must be susceptible of being measured by factual and objective standards.<sup>133</sup>

3.57 It has been recognized by the Court that the obligation to prevent significant harm is not absolute. In *Pulp Mills on the River Uruguay*, the Court considered that

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<sup>130</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *I.C.J. Reports* 1996 (I) (hereinafter ‘*Legality of the Threat or Use of Nuclear Weapons*’), para. 29.

<sup>131</sup> *In the Arbitration regarding the Iron Rhine (“IJzeren Rijn”) Railway (the Kingdom of Belgium v. the Kingdom of the Netherlands)* PCA Case No. 2003-02, Award (24 May 2005), para. 59.

<sup>132</sup> *Idem.*, paras. 222-223.

<sup>133</sup> ILC Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities, with commentaries, adopted by the International Law Commission at its fifty-third session, UN Doc. A/77/10 (2001) (hereinafter ‘ILC Draft Articles on the Prevention of Transboundary Harm’), commentary to Article 2, para. 4.

the obligation to “preserve the aquatic environment, and in particular to prevent pollution by prescribing appropriate rules and measures” is an obligation to act with due diligence in respect of all activities which take place under the jurisdiction and control of each party. It is an obligation which entails not only the adoption of appropriate rules and measures, 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.<sup>134</sup>

3.58 The obligation to prevent significant transboundary harm is a ‘compound obligation’. Such an obligation comprises several separate obligations arising during the life-cycle of an activity, involving cooperation with potentially affected States.<sup>135</sup> In particular, a State is required to evaluate the environmental impacts of a planned activity under its jurisdiction or control.<sup>136</sup> If the assessment indicates significant environmental impacts or a risk of such impacts, the State must notify potentially affected states as well as exchange information and conduct consultations in good faith on the potential environmental impacts of the planned activity with potentially affected States.<sup>137</sup> States must also monitor the environmental impacts of activities that are being carried out under its jurisdiction or control; exchange information and conduct consultations with States affected by any such impacts; develop contingency plans for responding to emergencies; and notify potentially affected States of any such emergencies.<sup>138</sup>

3.59 With regard to the atmosphere, similar qualifications of the obligation to prevent significant harm can be found in the Draft Guidelines on the Protection of the Atmosphere of the ILC.<sup>139</sup> Pursuant to Guideline 3 of the ILC,

States have the obligation to protect the atmosphere by exercising due diligence in taking appropriate measures, in accordance with applicable rules of international law, to prevent, reduce or control atmospheric pollution and atmospheric degradation.

3.60 The ILC points to differing views pertaining to whether or not the obligation to protect the atmosphere is an obligation *erga omnes*.<sup>140</sup> The Kingdom is of the view that Guideline 3 reflects an obligation that applies *erga omnes*.

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<sup>134</sup> *Pulp Mills on the River Uruguay*, *supra* note 123, para. 197.

<sup>135</sup> *Idem.*, para. 77; See also ILC Draft Articles on Prevention of Transboundary Harm, *supra* note 133, Article 4.

<sup>136</sup> *Fisheries Jurisdiction case (UK v. Iceland)* Decision on Jurisdiction, *I.C.J. Reports* 1974 (hereinafter ‘*Fisheries Jurisdiction*’), para. 72; *Pulp Mills on the River Uruguay*, *supra* note 123, para. 281; *MOX Plant (Ireland v. United Kingdom)*, (Provisional Measures, Order of 3 December 2001) ITLOS Reports 2001 (hereinafter ‘*MOX Plant*’), para. 89(b).

<sup>137</sup> *Costa Rica v. Nicaragua/Nicaragua v. Costa Rica*, *supra* note 129, para. 104.

<sup>138</sup> *MOX Plant*, *supra* note 136, para. 89(a); *Fisheries Jurisdiction*, *supra* note 136, para. 72.

<sup>139</sup> ILC Draft guidelines on the Protection of the Atmosphere, *supra* note 3, Guideline 3.

<sup>140</sup> *Idem.*, commentary to Guideline 3, para. 5.

3.61 In the commentary on Guideline 3, the ILC states that it is applicable to both the transboundary and the global context.<sup>141</sup> The ILC then notes that

[in] the context of transboundary atmospheric pollution, the obligation of States to prevent significant adverse effects is firmly established as customary international law, as confirmed, for example, in the Commission's articles on prevention of transboundary harm from hazardous activities and by the jurisprudence of international courts and tribunals. However, the existence of this obligation in customary international law is still somewhat unsettled for global atmospheric degradation.<sup>142</sup>

3.62 In the formulation of Guideline 3, the ILC makes a distinction between the state of customary international law in the context of transboundary atmospheric pollution and the state of law in the context of atmospheric degradation. The latter encompasses the modification of the composition of the atmosphere by anthropogenic emissions of GHGs.

3.63 It would appear that the anthropogenic emissions of GHGs into the atmosphere in and by themselves are not a hazardous activity as understood by the ILC in its Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities.<sup>143</sup> Article. The ILC defines the concept of "risk of causing significant transboundary harm" as encompassing a low probability of causing disastrous transboundary harm or a high probability of causing significant transboundary harm. In the words of the ILC,

the definition refers to two types of activities under these articles. One is where there is a low probability of causing disastrous harm. This is normally the characteristic of ultrahazardous activities. The other one is where there is a high probability of causing significant harm. This includes activities which have a high probability of causing harm which, while not disastrous, is still significant. But it would exclude activities where there is a very low probability of causing significant transboundary harm. The word "includes" is intended to highlight the intention that the definition is providing a spectrum within which the activities under these articles will fall.<sup>144</sup>

3.64 The cumulative anthropogenic emissions of GHGs into the atmosphere over (a long period of) time by numerous, diverse and separate activities would thus not seem to be one of the types of hazardous activities identified by the ILC. This does not, however, detract from the gradually

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<sup>141</sup> ILC Draft guidelines on the Protection of the Atmosphere, *supra* note 3, commentary to Guideline 3, para. 2.

<sup>142</sup> *Idem.*, para. 8.

<sup>143</sup> ILC Draft Articles on the Prevention of Transboundary Harm, *supra* note 133, Article 2(a).

<sup>144</sup> *Idem.*, commentary to Article 2, para. 3.

and relatively recently evolved scientific understanding that there is a high probability of extreme weather events and slow onset events causing disastrous harm resulting from the unabated continuation of such emissions nor does it detract from the fact that this requires the urgent attention of the international community.

3.65 In the view of the Kingdom, however, the obligation to prevent significant (transboundary) harm may also be applicable to significant harm caused to the climate system or other parts of the environment. Depending on the nature of a particular activity, it may cause or create a risk of causing significant harm through anthropogenic emissions of GHGs into the atmosphere over their life-cycle, such as the operation of a power station generating electricity by using fossil fuels, or activities aiming to reduce the concentration of GHGs in the atmosphere, such as stratospheric aerosol injection. The permission and/or carrying out of such an activity requires the climate effects to be taken into account. Such an activity may even qualify as a hazardous activity, as defined by the ILC, such as stratospheric aerosol injection.

3.66 Pursuant to Guideline 3 of the ILC, States have the obligation to exercise due diligence with the aim of protecting the atmosphere, by taking appropriate measures to prevent, reduce or control atmospheric degradation. The obligation to protect the atmosphere has been modelled on Article 192 of the UNCLOS, which obliges States to protect and preserve the marine environment.<sup>145</sup> The phrasing “prevent, reduce or control” follows similar formulations in both Article 3, paragraph 3, of the UNFCCC (“anticipate, prevent or minimize”) and Article 194, paragraph 1, (“prevent, reduce and control”) of the UNCLOS.<sup>146</sup> In the *South China Sea Arbitration*, the Arbitral Tribunal considered that Article 192 of the UNCLOS translates to a ‘positive’ duty to prevent or mitigate significant harm to the environment and a ‘negative’ obligation not to degrade the marine environment.<sup>147</sup>

3.67 It is the view of the Kingdom that the atmosphere is a shared resource. At the 1972 United Nations Conference on the Human Environment, the international community had already declared that “[t]he natural resources] of the earth, including the air [...] must be safeguarded for the benefit of present and future generations through careful planning or management, as

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<sup>145</sup> Third Report of the Special Rapporteur on the protection of the atmosphere, UN Doc. A/CN.4/692 (25 February 2016) (hereinafter ‘UN Doc. A/CN.4/692’), para. 12.

<sup>146</sup> ILC Draft guidelines on the Protection of the Atmosphere, *supra* note 3, commentary to Guideline 3, para. 7.

<sup>147</sup> *In the matter of the South China Sea Arbitration before an Arbitral Tribunal constituted under Annex VII of the United Nations Convention on the Law of the Sea (Republic of the Philippines v. People’s Republic of China)*, PCA Case No. 2013-19, Award (12 July 2016), para. 941; This has also been underlined in the written statement of the Kingdom submitted on 16 June 2023 to the International Tribunal for the Law of the Sea with respect to the Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law (Case No. 31), para. 4.3.

appropriate”.<sup>148</sup> In his second report, the Special Rapporteur for the Protection of the Atmosphere stated that

the areas beyond jurisdiction and sovereignty of any State, generally referred to as the “global commons”, are assumed to include the high seas, outer space and the global atmosphere. Although the concept of the atmosphere, which is not area-based, does not conform to that of “areas beyond the limits of national jurisdiction”, it is nonetheless clear that the atmosphere existing above those areas is now covered by principle 21 of the Stockholm Declaration.”<sup>149</sup>

3.68 The obligation to protect the atmosphere is an obligation of conduct<sup>150</sup> requiring the exercise of due diligence by taking appropriate measures to prevent such harm, taking into account that due diligence is a concept that is variable and dynamic. According to the International Tribunal for the Law of the Sea,

the content of “due diligence” obligations may not easily be described in precise terms. Among the factors that make such a description difficult is the fact that “due diligence” is a variable concept. It may change over time as measures considered sufficiently diligent at a certain moment may become not diligent enough in light, for instance, of new scientific or technological knowledge. It may also change in relation to the risks involved in the activity.<sup>151</sup>

3.69 Moreover, in the view of the Kingdom, the obligation to protect the atmosphere in the global context is a ‘compound obligation’, similar to the obligation to prevent significant transboundary harm. In particular, a State is required to evaluate the environmental impacts of a planned activity under its jurisdiction or control, and to implement the associated procedural obligations referred to in Paragraph 3.58 of this Section, as appropriate.

3.70 In *Pulp Mills on the River Uruguay*, the Court found that the obligation to conduct an environmental impact assessment forms part of the due diligence obligation and is a requirement under international law.<sup>152</sup> The ILC extends this obligation to the atmosphere as follows:

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<sup>148</sup> United Nations General Assembly, *United Nations Conference on the Human Environment*, UN Doc. A/RES/2994, (adopted in 1972) (hereinafter ‘Stockholm Declaration’), Principle 2.

<sup>149</sup> Second Report of the Special Rapporteur on the Protection of the Atmosphere, UN Doc. A/CN.4/681 (2 March 2015), para. 56.

<sup>150</sup> *Pulp Mills on the River Uruguay*, *supra* note 123, para. 187; See also *Responsibilities and obligations of States with respect to activities in the Area*, (Advisory Opinion, 1 February 2011), ITLOS Reports 2011 (hereinafter ‘*Responsibilities and obligations of States with respect to activities in the Area*’), para. 110.

<sup>151</sup> *Responsibilities and obligations of States with respect to activities in the Area*, *supra* note 150, para. 117.

<sup>152</sup> *Pulp Mills on the River Uruguay*, *supra* note 123, para. 204.

States have the obligation to ensure that an environmental impact assessment is undertaken of proposed activities under their jurisdiction or control which are likely to cause significant adverse impact on the atmosphere in terms of atmospheric pollution or atmospheric degradation.<sup>153</sup>

3.71 The existing international legal framework related to environmental impact assessments is predominantly focused on the transboundary context,<sup>154</sup> which renders application to emissions of GHGs difficult as “harm arising out of creeping pollution and pollution from multiple sources [...] have their own particular features”.<sup>155</sup> Emissions of GHGs of individual entities operating within a larger industrial sector are often minimal or negligible, whereas the collective emissions of the sector might in fact pass the threshold of significant adverse impact.<sup>156</sup> Addressing the wider environmental, social and economic impacts of particularly polluting industries requires a more proactive approach. Environmental impact assessments at the project level, as well established in customary environmental law, may fall short in capturing the full scope of these impacts. In the context of mitigating climate change, the Kingdom considers strategic environmental impact assessments more appropriate. Strategic impact assessments are already well recognized in various international instruments, such as in the 2003 Kyiv Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context, including for certain thermal power stations and other combustion installations.<sup>157</sup>

3.72 The conduct of a strategic environmental impact assessment is contingent on the scale and nature of an industrial sector. In the determination of the scale and characteristics of the industrial sectors to be included, particular weight should be granted to scientific insights. This is in line with the reasoning of the Court in *Gabčíkovo-Nagymaros Project*, where it made reference to the development of new norms and standards “owing to new scientific insights and

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<sup>153</sup> ILC Draft guidelines on the Protection of the Atmosphere, *supra* note 3, Guideline 4.

<sup>154</sup> See, for example, Convention on Environmental Impact Assessment in a Transboundary Context (adopted in 1991) 1989 UNTS 309; See also Kyiv Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context (adopted in 2003), 2685 UNTS 140 (hereinafter ‘Kyiv Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context’).

<sup>155</sup> *Yearbook of the International Law Commission*, 2002, Vol. II, UN Doc. A/CN.4/SER.A/2002/Add.1 (Part Two), para. 447 at p. 91.

<sup>156</sup> IPCC, 2022, ‘Emissions Trends and Drivers’ in *Climate Change 2022: Mitigation of Climate Change. Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, S. Dhakal, J.C. Minx, F.L. Toth et al. (eds), Section 2.4.2.

<sup>157</sup> Kyiv Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context’, Article 4 read in conjunction with Annex I, para. 2; See also Agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (adopted in 2023), Part IV, in particular Article 39; United Nations Educational, Scientific and Cultural Organization, ‘Operational Guidelines for the Implementation of the World Heritage Convention’, WHC.23/01 (24 September 2023), Article 118bis; Annex I of the Decision Adopted by the COP to the Convention on Biological Diversity at its Sixth Meeting, UN Doc. UNEP/CBD/COP/6/20 (2002), VI/7, pp. 93-112.

growing awareness of the risks for mankind, for present and future generations”.<sup>158</sup> The Court considered that such new norms and standards should be taken into consideration “not only when States contemplate new activities but also when continuing with activities begun in the past”.<sup>159</sup>

3.73 In *Pulp Mills on the River Uruguay*, the Court underlined that “it is by cooperating that the States concerned can jointly manage the risk of damage to the environment [...] so as to prevent the damage in question”.<sup>160</sup> The duty to cooperate is a fundamental principle underlying international environmental law,<sup>161</sup> and especially important for the issue of global warming considering its characterization of common concern of humankind. Guideline 8 of the Draft Guidelines on the Protection of the Atmosphere stipulates:

- i. States have the obligation to cooperate, as appropriate, with each other and with relevant international organizations for the protection of the atmosphere from atmospheric pollution and atmospheric degradation.
- ii. States should cooperate in further enhancing scientific and technical knowledge relating to the causes and impacts of atmospheric pollution and atmospheric degradation. Cooperation could include exchange of information and joint monitoring.<sup>162</sup>

3.74 In her separate opinion in *Whaling in the Antarctic*, Judge *ad hoc* Charlesworth points to a duty of cooperation “reflecting the overarching object and purpose of the [International] Convention [for the Regulation of Whaling]” and asserts that the concept of a duty to cooperate “derives from the principle that the conservation and management of shared resources and the environment must be based on shared interest, rather than the interest of one party”.<sup>163</sup> Principle 27 of the Rio Declaration had also recognized this, stating that “States and people shall cooperate in good faith and in the spirit of partnership in the fulfilment of the principles embodied in this Declaration”, and in “the further development of international law in the field of sustainable development”.<sup>164</sup>

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<sup>158</sup> *Gabčíkovo-Nagymaros Project*, *supra* note 123, para. 140.

<sup>159</sup> *Ibid.*

<sup>160</sup> *Pulp Mills on the River Uruguay*, *supra* note 123, para. 77.

<sup>161</sup> Stockholm Declaration, *supra* note 148, Principle 24; Rio Declaration on Environment and Development, in the Report of the United Nations Conference on Environment and Development, UN Doc. A/CONF.151/26 (Vol. 1) (adopted in 1992) (hereinafter ‘Rio Declaration’), Principle 7; *Mox Plant*, *supra* note 136, para. 82; *Pulp Mills on the River Uruguay*, *supra* note 123, para. 122.

<sup>162</sup> ILC Draft guidelines on the Protection of the Atmosphere, *supra* note 3, Guideline 8.

<sup>163</sup> *Whaling in the Antarctic (Australia v. Japan: New Zealand Intervening)*, Merits, Separate Opinion of Judge *ad hoc* Charlesworth, *I.C.J. Reports* 2014, para. 13.

<sup>164</sup> Rio Declaration, *supra* note 161, Principle 27.

3.75 Finally, the Kingdom notes that the international human rights standards set out above derive not only from treaty law, but also from custom. The right to life is of a customary nature,<sup>165</sup> as is the obligation to protect that right – which is one of the main sources of international human rights law which includes an obligation to develop, adopt and implement a mitigation policy.

#### 4. Adaptation to climate change

4.1 While mitigation policies and measures intend to mitigate the adverse effects of climate change, adaptation measures focus on the process of adjusting to the current and future adverse effects of climate change with the aim of reducing the vulnerability of physical and biological systems to climate change.<sup>166</sup> Adaptation presupposes that a certain degree of global warming is inevitable and that the international community must prepare itself for the resulting global changes in physical and biological systems. For certain adverse effects, particularly those that already felt or will be felt in the very near future, adaptation may be a quick and appropriate response. Such adverse effects could include flooding or decreased water availability in certain regions, increased ecosystem changes and increased damage from floods, storms, and forest fires. Adaptation measures can take a variety of forms and as such there is no ‘one size fits all’ approach. Taking the example of sea level rise, which is of particular relevance to both the European and Caribbean parts of the Kingdom, adaptation could be achieved through the maintenance of natural barriers, such as dunes or mangrove forests, the creation of buffer areas for water, and the construction and reinforcement of man-made sea barriers. In this regard, the Kingdom has indicated in the advisory proceedings on the Request for an Advisory Opinion by the Commission on Small Island States on Climate Change and International Law (Case No. 31) that adaptation measures could, for example, include the construction of sea barriers against coastal erosion.<sup>167</sup> In addition, some adaptation efforts, such as reforestation, may simultaneously serve mitigation purposes.

4.2 The importance of adaptation efforts is reflected in several sources of international law, including instruments directly related to climate change, such as the UNFCCC, Kyoto Protocol, and Paris Agreement (Part A). Furthermore, the need to take adaptation measures may also

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<sup>165</sup> ICTY, *Prosecutor v. Blaškić* (IT-94/14-A), Judgment, 29 July 2004, para. 143; ICTY, *Prosecutor v. Kordić and Čerkez* (IT-95-14/2-A), Judgment, 17 December 2004, para. 106; ACHPR, *Ally Rajabu et al. v. Tanzania*, No. 007/2019, Judgment, 28 November 2019, para. 113, footnote 33; IACmHR: *Victims of the Tugboat ‘13 de Marzo’ v. Cuba*, Case 11.436, Report 47/96, Merits, 16 October 1996, para. 79; United Nations Human Rights Committee, General comment 29, *Art. 4: Derogations during a State of Emergency*, UN Doc. CCPR/C/21/Rev.1/Add.11 (31 August 2001), para. 11.

<sup>166</sup> IPCC, 2022, ‘Summary for Policymakers’ in *Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, H.-O. Pörtner, D.C. Roberts, M. Tignor, et al. (eds), p. 20.

<sup>167</sup> Written statement of the Kingdom of the Netherlands submitted on 16 June 2023 to the International Tribunal for the Law of the Sea with respect to the Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law (Case No. 31), para. 4.8.

flow from international human rights law (Part B). Finally, with respect to customary international law, certain conclusions can be drawn with respect to adaptation and its relation with principles flowing from climate change law as well as international human rights law (Part C).

***A. Adaptation obligations arising from climate change related agreements***

- 4.3 The UNFCCC requires Parties, along with mitigation policies and measures, to identify options for, and make commitments to, adapting to the adverse effects of climate change. Pursuant to Article 2, the stabilization of GHGs at a level that would prevent dangerous anthropogenic interference with the climate system is to be achieved within an adequate timeframe that allows ecosystems to adapt naturally to climate change. According to Article 3, paragraph 3, of the UNFCCC, mitigation policies and measures should take into account adaptation. Several commitments of Parties listed in Article 4 of the UNFCCC also address adaptation. These commitments include that Parties, taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances, shall cooperate in preparing for adapting to the impacts of climate change.<sup>168</sup> These commitments also include that Parties shall formulate, implement, publish and regularly update national and where appropriate regional programmes containing measures to facilitate adequate adaptation to climate change.<sup>169</sup>
- 4.4 The Kyoto Protocol was intended to further assist States with adapting to the adverse effects of climate change. Pursuant to Article 10 of the Kyoto Protocol, all Parties, taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances, shall formulate, implement, publish and regularly update national and, where appropriate, regional programmes to facilitate adequate adaptation to climate change.<sup>170</sup> Whereas Parties included in Annex I were required to submit information on action taken in this respect, the Parties not included in Annex I had to seek to include information on this in their national communications insofar as appropriate.<sup>171</sup> The Kyoto Protocol also facilitated the development and deployment of technologies that increased resilience to the impacts of climate change. Notably, the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol ('CMP') was granted the task of ensuring that the share of proceeds resulting from the Clean Development Mechanism set up under the Kyoto

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<sup>168</sup> UNFCCC, Article 4(e).

<sup>169</sup> *Idem.*, Article 4(b).

<sup>170</sup> Kyoto Protocol, Article 10(b)(i).

<sup>171</sup> *Idem.*, Article 10(b)(ii).

Protocol was used to assist developing States, Party to the Kyoto Protocol, that are particularly vulnerable to the adverse effects of climate change to meet the costs of adaptation.<sup>172</sup>

4.5 Parties have affirmed that adaptation must be addressed with the same level of priority as mitigation and adopted, to this end, the Cancun Adaptation Framework.<sup>173</sup> In light of different national circumstances and respective capabilities, it was agreed that adaptation efforts should include a country-driven, gender sensitive approach, that is transparent and fully participatory, taking into account vulnerable groups, communities and ecosystems.<sup>174</sup> As part of the Cancun Adaptation Framework, an Adaptation Committee was established that served the promotion of the implementation of enhanced action on adaptation in a coherent manner under the UNFCCC.<sup>175</sup> Over the years, initiatives related to adaptation increased and new instruments started to reflect the need for equal approaches towards adaptation and mitigation policies and measures.

4.6 The Paris Agreement further elevates the importance of the need to adapt to climate change and seeks to place adaptation on a more equal footing with mitigation.<sup>176</sup> In Article 7, the Paris Agreement establishes “the global goal on adaptation”, which is

to enhance adaptive capacity, strengthen resilience and reduce vulnerability to climate change, with a view to contributing to sustainable development and ensuring an adequate response in the context of the long-term temperature goal of the Agreement.

4.7 Article 7 of the Paris Agreement furthermore recognizes that

the current need for adaptation is significant and that greater levels of mitigation can reduce the need for additional adaptation efforts, and that great adaptation needs can involve greater adaptation costs.<sup>177</sup>

4.8 Article 7 of the Paris Agreement also acknowledges the intrinsic link between adaptation and mitigation, and demonstrates that adaptation cannot be regarded in isolation from mitigation. It flows from this that, on the basis of Article 7, paragraph 9, of the Paris Agreement, Parties are required, as appropriate, to engage in adaptation planning processes and the implementation of

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<sup>172</sup> Kyoto Protocol, Article 12(8).

<sup>173</sup> Decision 1/CP.16, UN Doc. FCCC/CP/2010/7/Add.1, *supra* note 10, para. 2(b).

<sup>174</sup> *Idem.*, para 12.

<sup>175</sup> *Idem.*, para. 20.

<sup>176</sup> Recognition of the need to adapt is integrated throughout the Paris Agreement in provisions beyond Article 7. See, for example, Paris Agreement, Articles 4, 5, 6, 9, 10, 11, 12, 14.

<sup>177</sup> Paris Agreement, Article 7(4).

actions, including the development or enhancement of relevant, plans, policies and/or contributions. These may include “the implementation of adaptation actions, undertakings and/or efforts”,<sup>178</sup> “the process to formulate and implement national adaptation plans”,<sup>179</sup> “the assessment of climate change impacts and vulnerability with a view to formulating nationally determined prioritized actions”,<sup>180</sup> “monitoring and evaluating and learning from adaptation plans, policies, programmes and actions”,<sup>181</sup> and “building the resilience of socioeconomic and ecological systems”.<sup>182</sup>

4.9 Furthermore, each Party to the Paris Agreement should, as appropriate, submit and periodically update an adaptation communication, which may include its priorities, implementation and support needs, plans and actions.<sup>183</sup> These adaptation communications may be submitted in conjunction with other communications, including NDCs or national communications.<sup>184</sup> The global stocktake under the Paris Agreement is also intended to evaluate the adaptation efforts undertaken, including by reviewing the adequacy and effectiveness of adaptation and support provided for adaptation, as well as the overall progress made in achieving the global goal on adaptation.<sup>185</sup> While Section 3 of this statement demonstrated that mitigation policies and measures will not be effective without global action, adaptation may often be achieved through various actions at the local level. Although the Paris Agreement therefore emphasizes in Article 7, paragraph 5, that adaptation should follow a country-driven approach, it also highlights that international cooperative efforts on enhancing adaptation actions may be useful. Such international cooperative efforts may take the form of making technology available and assisting developing States that are particularly vulnerable to the adverse effects of climate change in meeting the costs of adaptation. The Paris Agreement, furthermore, underscores the relevance for national adaptation plans to take into account vulnerable groups, communities and ecosystems, with a view to, where appropriate, “integrating adaptation into relevant socioeconomic and environmental policies and actions”.<sup>186</sup>

4.10 It is in this vein that, in conjunction with Article 4, paragraph 1, under e, of the UNFCCC, on the basis of Article 7, paragraphs 6 and 7, of the Paris Agreement, Parties should strengthen their cooperation in relation to the adaptation efforts undertaken to address the adverse effects of climate change. According to Article 7, paragraph 7, of the Paris Agreement, Parties should

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<sup>178</sup> Paris Agreement, Article 7(9)(a).

<sup>179</sup> *Idem.*, Article 7(9)(b).

<sup>180</sup> *Idem.*, Article 7(9)(c).

<sup>181</sup> *Idem.*, Article 7(9)(d).

<sup>182</sup> *Idem.*, Article 7(9)(e).

<sup>183</sup> Paris Agreement, Article 7(10).

<sup>184</sup> *Idem.*, Article 7(11).

<sup>185</sup> Paris Agreement, Article 7(14).

<sup>186</sup> *Idem.*, Article 7(5).

in this regard, and taking into account the Cancun Adaptation Framework in relation to adaptation efforts, amongst others, share information, good practices, experiences and lessons learned, strengthen institutional arrangements and scientific knowledge on climate, and assist developing Parties in identifying effective adaptation practices, needs and challenges.<sup>187</sup> Furthermore, on the basis of Article 7, paragraph 8, of the Paris Agreement, United Nations specialized organizations and agencies are also encouraged to support the efforts of Parties to implement the actions referred to in Article 7, paragraph 7, taking into account the elements of Article 7, paragraph 5, referred to above.

4.11 Through the enhanced transparency framework established on the basis of Article 13 of the Paris Agreement, Parties should, as appropriate, provide information related to climate change and adaptation required under Article 7 of the Paris Agreement.<sup>188</sup> Although this provision is not phrased in mandatory terms, it does facilitate the recognition of adaptation efforts taken by Parties, striving for mutual trust and confidence on effective implementation.

4.12 The Paris Agreement does not require the adoption of specific adaptation measures. Parties may use a wide range of instruments to enhance adaptation and identify a combination of arrangements suitable to their national preferences. In this respect, the implementation of adaptation measures will depend on the technological, economic and administrative capacities of States, taking into consideration the global goal on adaptation of enhancing adaptive capacity, strengthening resilience and reducing vulnerability to climate change.

4.13 For example, as elaborated upon in the submissions of the Kingdom in the advisory proceedings on the Request for an Advisory Opinion by the Commission on Small Island States on Climate Change and International Law (Case No. 31) pending before ITLOS, the international community, including coastal States as well as all States with respect to the Area, are responsible for the implementation of adaptation policies and measures to enhance climate resilience of the marine environment. Such policies and measures may vary from State to State, depending on state-specific circumstances, including the conditions of their natural environment and their socio-economic status, taking into consideration the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances. As for the European part of the Kingdom, of which a substantial part is situated below sea level, it requires the Netherlands to consider how to continue to manage its coast with sand nourishment in the coming decades, in order to guarantee the safety of the

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<sup>187</sup> Paris Agreement, Article 7(7)(a)-(e).

<sup>188</sup> *Idem.*, Article 13(8).

Netherlands in the future. As for the Caribbean part of the Kingdom, which has some of the most pristine coral reefs in the world, the focus could be on the resilience of these reefs to protect them against ocean warming and ocean acidification. As explained in the submission of the Kingdom to ITLOS, an example of a collective measure enhancing the climate resilience of the marine environment is the designation and management of marine protected areas, as well as other area-based management tools, including in accordance with the Agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction ('BBNJ').

4.14 While it remains at the discretion of States to determine when and which specific adaptation measures are to be taken, States are, taking into consideration the duty to cooperate, encouraged to undertake efforts to help and assist each other, and in particular developing States, in implementing adaptation measures.<sup>189</sup> This collective obligation can be met by participating in climate change related agreements, and by contributing to the initiatives flowing from these and related instruments, such as the funds established for this purpose. An example of a fund that has been established in this regard, first under the Kyoto Protocol and now under the Paris Agreement, is the Adaptation Fund. The Adaptation Fund was set up to support adaptation projects and programmes in developing States that are particularly vulnerable to the adverse effects of climate change. The Adaptation Fund is to be financed by a levy of proceeds under Article 6, paragraph 4, of the Paris Agreement, through the Clean Development Mechanism that stimulates emission reductions, as well as through voluntary pledges by governments and private donors.<sup>190</sup>

#### ***B. Adaptation obligations under the international law relating to human rights***

4.15 Similar to what was set out above in relation to mitigation, human rights instruments do not include explicit obligations for States to develop, adopt and implement adaptation policies and measures with respect to the adverse effects of climate change. However, because the effective enjoyment of human rights can be impacted by the consequences of anthropogenic climate change, as alluded to in Section 3 above, and because such consequences pose a real and immediate threat to rights and the effective enjoyment thereof, States must take reasonable and appropriate measures to protect human rights. Reasonable and appropriate measures of protection include the adoption of adaptation policies and measures to protect everyone within the State's jurisdiction against the adverse effects of climate change.

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<sup>189</sup> See, for example, Paris Agreement, Article 9.

<sup>190</sup> United Nations Climate Change, 'Adaptation Fund', available at <https://unfccc.int/Adaptation-Fund> (accessed on 23 February 2024).

4.16 The Human Rights Committee, in *Billy et al. v. Australia*, concluded that

by failing to discharge its positive obligation to implement adequate adaptation measures to protect the authors' home, private life and family, the State party violated the authors' rights under Article 17 of the Covenant [the right to privacy].<sup>191</sup>

4.17 The Supreme Court of the Netherlands considered, in this respect, that

[t]he obligation pursuant to Articles 2 and 8 ECHR [the rights to life, and to private and family life and home] to take appropriate steps to counter an imminent threat may encompass both mitigation measures (measures to prevent the threat from materialising) or adaptation measures (measures to lessen or soften the impact of that materialisation).<sup>192</sup>

4.18 Which adaptation policies and measures are reasonable and appropriate to address the threat posed by climate change is dependent on local circumstances, such as geographical characteristics of a specific area and the specific groups impacted by climate change. From the perspective of human rights, it is key that everyone within a State's jurisdiction is protected against the threats to their rights posed by the adverse effects of climate change in a practical and effective way.

4.19 The Human Rights Committee determined in *Billy et al. v. Australia*, in relation to the need of sea barriers as adaptation measures, that the respondent State was required to

continue its implementation of measures necessary to secure the communities' continued safe existence on their respective islands; and monitor and review the effectiveness of the measures implemented and resolve any deficiencies as soon as practicable.<sup>193</sup>

4.20 As highlighted above, such a case-specific approach, sensitive to local circumstances, should also take account of particular vulnerabilities to the consequences of climate change of certain groups. In this respect, Human Rights Council Resolution 47/24 on human rights and climate change underlined that the adverse effects of climate change are felt more acutely by those in vulnerable situations owing to factors, such as geography, poverty, gender, age, indigenous or minority status where applicable, national or social origin, birth or other status and disability.<sup>194</sup>

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<sup>191</sup> *Billy et al. v. Australia*, *supra* note 84, para. 8.12.

<sup>192</sup> *Urgenda* case, *supra* note 22, para. 5.3.2.

<sup>193</sup> *Billy et al. v. Australia*, *supra* note 84, para. 11.

<sup>194</sup> Human Rights Council, Resolution 47/24 on human rights and climate change, UN Doc. A/HRC/RES/47/24 (14 July 2021).

4.21 In *Billy et al. v. Australia*, the Human Rights Committee recalled that, in the context of indigenous peoples, “the enjoyment of culture may relate to a way of life which is closely associated with territory and the use of its resources, including such traditional activities” and that the protection of the right to enjoy one’s culture as enshrined in Article 27 of the ICCPR “is directed towards ensuring the survival and continued development of the cultural identity”. With regard to the adverse effects of climate change, the Human Rights Committee considered that timely adequate adaptation measures need to be taken to

protect the authors’ collective ability to maintain their traditional way of life, to transmit to their children and future generations their culture and traditions and use of land and sea resources discloses a violation of the State party’s positive obligation to protect the authors’ right to enjoy their minority culture.<sup>195</sup>

4.22 In accordance with States’ obligations to respect, protect and fulfil the human rights of everyone within their jurisdiction, and due to the nature of measures which are geared towards the adaptation to the adverse effects of climate change, the obligation to develop, adopt and implement adaptation policies and measures is geographically limited to areas within the States’ jurisdiction, irrespective of whether it concerns sovereign territory or the extraterritorial exercise of effective control over areas outside their own territory. This observation is without prejudice to obligations with respect to assisting other States in their efforts to adapt to climate change.

### ***C. Customary international law relating to adaptation to climate change***

4.23 With respect to customary international law relating to climate change and adaptation, the Kingdom wishes to note that a State must take appropriate measures, in line with the duty to prevent significant transboundary harm as referred to in Section 3, to ensure that, in undertaking adaptation efforts no harm is caused to the territory of another State or areas beyond the limits of national jurisdiction. In this respect, international cooperation may be warranted. Such international cooperation could take the form of agreements between States that are geographically located near one another when, for example, adaptation efforts affect a transboundary watercourse. Cross-border cooperation could also enhance of adaptation efforts in two or more countries. Furthermore, adaptation efforts that are beneficial for one State may sometimes be more easily carried out in another State. It is the view of the Kingdom that while

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<sup>195</sup> *Billy et al. v. Australia*, *supra* note 84, para. 8.14.

it remains at the discretion of States to determine when and which adaptation measures are to be taken, States have a duty to cooperate in this respect.

4.24 With respect to customary international law relating to climate change adaptation and human rights, the Kingdom notes that the human rights standards, set out above in Paragraphs 4.15-4.22, derive not only from treaty law, but also from custom. The right to life is of a customary nature,<sup>196</sup> as is the obligation to protect that right – which is one of the main sources of human rights law which includes an obligation to take adaptation measures.

## **5. Legal consequences of significant harm to the climate system and other parts of the environment**

5.1 Question (b) concerns the legal consequences of significant harm to the climate system and other parts of the environment. The question makes a distinction between any such legal consequences with respect to:

- 1) *States, including, in particular, small island developing States, which due to their geographical circumstances and level of development, are injured or specially affected by or are particularly vulnerable to the adverse effects of climate change; and*
- 2) *Peoples and individuals of the present and future generations affected by the adverse effects of climate change.*

5.2 Below, the Kingdom will present its view in relation to the first part of question (b) related to injured or specifically affected States, followed by the second part of question (b) related to affected peoples and individuals.

### ***A. Injured States, Specifically Affected States and Particularly Vulnerable States***

5.3 With respect to the first part of question (b), the Kingdom considers it relevant to distinguish between:

- i. Significant harm that is caused by an internationally wrongful act; and
- ii. Significant harm that is caused despite compliance by States with international law.

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<sup>196</sup> ICTY, *Prosecutor v. Blaškić* (IT-94/14-A), Judgment, 29 July 2004, para. 143; ICTY, *Prosecutor v. Kordić and Čerkez* (IT-95-14/2-A), Judgment, 17 December 2004, para. 106; ACHPR, *Ally Rajabu et al. v. Tanzania*, No. 007/2019, Judgment, 28 November 2019, para. 113, footnote 33; IACmHR, *Victims of the Tugboat '13 de Marzo' v. Cuba*, Case 11.436, Report 47/96, Merits, 16 October 1996, para. 79; United Nations Human Rights Committee, General comment 29, *Art. 4: Derogations during a State of Emergency*, UN Doc. CCPR/C/21/Rev.1/Add.11 (31 August 2001), para. 11.

- i. *Significant harm to the climate system or other parts of the environment that is caused by an internationally wrongful act*

5.4 Under the law of State responsibility, an injured State is entitled to invoke the responsibility of another State for the breach of an international obligation by the latter State.<sup>197</sup> A State is, amongst others, considered to be an injured State if the obligation concerned is owed to: (a) that State individually; or (b) a group of States including that State or the international community as a whole and that State is specially affected by the breach. In addition, any State other than the injured State may invoke the responsibility of another State if the international obligation is owed to: (a) a group of States including that State and the obligation is established for the protection of the collective interest of the group (obligation *erga omnes partes*); or (b) the international community as a whole (obligation *erga omnes*).<sup>198</sup> According to the Draft Articles on the Responsibility of States for Internationally Wrongful Acts ('ARSIWA'), there is no additional category of States that is particularly vulnerable, such as those particularly vulnerable to the adverse effects of climate change.

5.5 There is an internationally wrongful act of a State when conduct consisting of an act or omission is: (a) attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State.<sup>199</sup> This includes breach of obligations owed under the MEAs and human rights treaties discussed above.

5.6 With respect to the question on legal consequences, the Kingdom considers it relevant that the state of scientific knowledge with respect to the climate system has evolved, in particular following the establishment of the IPCC, and that an international scientific consensus with respect to climate change had not emerged before the 1980s. It also considers that the international community has responded reasonably to the evolving findings of the IPCC, including by the adoption of the UNFCCC and by the continued international cooperation under that Convention, including in particular the adoption of the Paris Agreement. The contemporary obligations of States under international law with respect to climate change, including the prevention of significant harm, are to be viewed in that context.

5.7 The Kingdom therefore considers that a State can comply with its due diligence obligations to protect the atmosphere and to prevent significant (transboundary) harm with respect to the anthropogenic emissions of GHGs into the atmosphere by the development, adoption and

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<sup>197</sup> ARSIWA, *supra* note 124, Article 42.

<sup>198</sup> *Idem.*, Article 48.

<sup>199</sup> *Idem.*, Article 2.

implementation of a mitigation policy, for example by participating in the UNFCCC and progressively implementing that Convention as well as associated agreements, including the compliance with any binding commitments incumbent on it. The Kingdom accordingly also considers that a State cannot be found to have breached this due diligence obligation by the anthropogenic emissions of GHGs under its jurisdiction or control before the emergence of a sufficient scientific understanding of the causes of climate change and its adverse effects.

- 5.8 If a State, however, does not act in compliance with its due diligence obligations to protect the atmosphere and to prevent significant (transboundary) harm resulting from the anthropogenic emissions of GHGs into the atmosphere, it will be responsible under international law for the resulting significant harm to the climate system and other parts of the environment. Responsibility cannot only be invoked by any injured State, but also by any other State because the obligation to prevent such harm to shared natural resources, such as the atmosphere, is an obligation *erga omnes*.
- 5.9 As to the content of such responsibility, any injured State is entitled to claim cessation of the internationally wrongful act, assurances and guarantees of non-repetition, and reparation for injury.<sup>200</sup> Any other State is entitled to claim such as well, albeit that the other State can only claim reparation for injury in the interest of the injured State or of the beneficiaries of the obligation breached.<sup>201</sup>
- 5.10 Injury includes any damage, whether material or moral, *caused* by the internationally wrongful act of a State.<sup>202</sup> For the purposes of reparation of injury under Articles 30 and 31 of the ARSIWA, the establishment of a causal link between the anthropogenic emissions of GHGs into the atmosphere and the occurrence of specific harm constitutes a specific challenge. However, as the ILC observed, the allocation of injury or loss to a wrongful act is, in principle, a legal process, and not only a historical or causal process. Furthermore, causality in fact is a necessary but not a sufficient condition for reparation, and a sufficient causal link is one that is not too remote or not consequential. This brings into play factors, such as foreseeability, directness or proximity.<sup>203</sup>
- 5.11 Bearing in mind the complexities of the causes and effects of climate change, which have only been understood relatively recently and are still not yet fully understood, the law of State responsibility would not seem to provide a compelling legal basis for one State to claim

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<sup>200</sup> ARSIWA, *supra* note 124, Articles 30 and 31.

<sup>201</sup> *Idem.*, Article 48(2).

<sup>202</sup> *Idem.*, Article 31(2).

<sup>203</sup> *Idem.*, Commentary to Article 31, para. 10.

reparation from another State for significant harm to the climate system and other parts of the environment.

5.12 However, these considerations with respect to causality only relate to reparation for significant harm resulting from climate change. They do not prevent a State from availing itself of the law of State responsibility to invoke the responsibility of another State for an internationally wrongful act flowing from a breach of its climate-change related obligations, including for reparation for injury.

5.13 For the purposes of the adoption and implementation of mitigation and adaptation measures (injunctive relief) to prevent (further) significant harm and/or related procedural injury, such as a failure to take into account climate impacts in an environmental impact assessment of a specific activity, it would not be necessary to establish a causal link with the occurrence of specific harm.<sup>204</sup> As regards causality, it would be sufficient to demonstrate that such an activity may cause significant harm through anthropogenic emissions of GHGs into the atmosphere in the course of its life-cycle.

5.14 Irrespective of the occurrence of significant harm to the climate system or other parts of the environment, the Kingdom wishes to add that, in light of its view that the obligation to develop, adopt and implement mitigation policies and measures is an obligation *erga omnes* (see Paragraph 3.14 above), it follows that a breach of this obligation can be invoked by any State.<sup>205</sup>

*ii. Significant harm to the climate system or other parts of the environment that is caused despite compliance by States with international law*

5.15 With respect to the occurrence of incidents involving hazardous activities despite compliance by a State with its obligations, the ILC considered that

it is important [...] that those who suffer harm or loss as a result of such incidents involving hazardous activities are not left to carry those losses and are able to obtain prompt and adequate compensation.<sup>206</sup>

5.16 Although the anthropogenic emissions of GHGs into the atmosphere are not a hazardous activity as understood by the ILC in and by themselves (see Paragraph 3.63 above), and

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<sup>204</sup> Elena Kosolapova. 'Interstate Liability for Climate Change-related Damage' (Eleven International Publishing 2013), pp. 160-161.

<sup>205</sup> ARSIWA, *supra* note 124, Article 48.

<sup>206</sup> ILC Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities with commentaries, adopted by the International Law Commission at its fifty-eighth session, UN Doc. A/61/10 (2006), General Commentary, para. 3.

significant harm to the climate system and other parts of the environment resulting from such emissions does not constitute an ‘incident’ as understood by the ILC in its Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities, this consideration bears relevance with respect to loss associated with climate change impacts.

5.17 In spite of mitigation and adaptation policies and measures, such loss associated with climate change impacts occurs and is expected to increase in the future. The international community is aware of this. At the 2012 Climate Change Summit, the COP recognized that

the need to strengthen international cooperation and expertise in order to understand and reduce loss and damage associated with the adverse effects of climate change, including impacts related to extreme weather events and slow onset events.<sup>207</sup>

5.18 It further agreed that “comprehensive, inclusive and strategic responses are needed to address loss and damage associated with the adverse effects of climate change”.<sup>208</sup>

5.19 At the Climate Change Summit in 2013, the COP acknowledged that loss and damage associated with the adverse effects of climate change includes, and in some cases involves more, than that which can be reduced by adaptation.<sup>209</sup> It also established the Warsaw International Mechanism for Loss and Damage

to address loss and damage associated with impacts of climate change, including extreme events and slow onset events, in developing countries that are particularly vulnerable to the adverse effects of climate change.<sup>210</sup>

5.20 At the 2015 Climate Change Summit, the COP adopted the Paris Agreement. The Paris Agreement contains a provision on loss and damage in Article 8. Pursuant to Article 8, paragraph 1, the Parties to the Paris Agreement

recognize the importance of averting, minimizing and addressing loss and damage associated with the adverse effects of climate change, including extreme weather events and slow onset events, and the role of sustainable development in reducing the risk of loss and damage.

5.21 And pursuant to Article 8, paragraph 3, the Parties to the Paris Agreement should

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<sup>207</sup> COP, Decision 3/CP.18, UN Doc. FCCC/CP/2012/8/Add.1 (2012), Preamble, second recital.

<sup>208</sup> *Idem.*, para. 4.

<sup>209</sup> COP, Decision 2/CP.19, UN Doc. FCCC/CP/2013/10/Add.1 (2013), Preamble, second recital.

<sup>210</sup> *Idem.*, para. 1.

enhance understanding, action and support, including through the Warsaw International Mechanism, as appropriate, on a cooperative and facilitative basis with respect to loss and damage associated with the adverse effects of climate change.

5.22 At the same time, the COP agreed that “Article 8 of the Agreement does not involve or provide a basis for any liability or compensation”.<sup>211</sup> This may have been perceived as a disclaimer, but the scope of this understanding is limited to Article 8 and the understanding thus does not extend to the obligations of a State under other provisions of the Paris Agreement nor to its obligations under any other agreements or customary international law.

5.23 At the 2022 Climate Change Summit, the COP as well as the CMA noted

the increasing urgency of enhancing efforts to avert, minimize and address loss and damage associated with the adverse effects of climate change in the light of continued global warming and its significant impacts on vulnerable populations and the ecosystems on which they depend.<sup>212</sup>

5.24 And they decided

to establish new funding arrangements for assisting developing countries that are particularly vulnerable to the adverse effects of climate change, in responding to loss and damage [and], in the context of establishing the new funding arrangements [...], to establish a fund for responding to loss and damage whose mandate includes a focus on addressing loss and damage.<sup>213</sup>

5.25 At the 2023 Climate Change Summit, the COP as well as the CMA agreed that the purpose of the Loss and Damage Fund is

to assist developing countries that are particularly vulnerable to the adverse effects of climate change in responding to economic and noneconomic loss and damage associated with the adverse effects of climate change, including extreme weather events and slow onset events.<sup>214</sup>

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<sup>211</sup> COP, Decision 1/CP.21, UN Doc FCCC/CP/2015/10/Add.1 (2015), para. 51.

<sup>212</sup> COP, Decision 2/CP.27, UN Doc. FCCC/CP/2022/10/Add.1 (2022), Preamble, second recital; CMA, Decision 2/CMA.4, UN Doc. FCCC/PA/CMA/2022/10/Add.1 (2022), Preamble, second recital.

<sup>213</sup> COP, Decision 2/CP.27, UN Doc. FCCC/CP/2022/10/Add.1 (2022), paras. 2 and 3; CMA, Decision 2/CMA.4, UN Doc. FCCC/PA/CMA/2022/10/Add.1 (2022), paras. 2 and 3.

<sup>214</sup> COP, ‘Operationalization of the new funding arrangements, including a fund, for responding to loss and damage referred to in paragraphs 2–3 of decisions 2/CP.27 and 2/CMA.4’, draft Decision -/CP.28 (2023), Annex 1, para. 2; CMA, ‘Operationalization of the new funding arrangements, including a fund, for responding to loss and damage referred to in paragraphs 2–3 of decisions 2/CP.27 and 2/CMA.4’, draft Decision -/CMA.5, Annex 1, para. 2.

- 5.26 And they urged “developed country Parties to continue to provide support and encourage other Parties to provide, or continue to provide support, on a voluntary basis, for activities to address loss and damage”.<sup>215</sup>
- 5.27 In the view of the Kingdom, in the light of these considerations, the international community has a collective responsibility, and States a duty to cooperate, so as to avert, minimize and address loss and damage associated with the adverse effects of climate change. The COP and the CMA have accepted this responsibility, as demonstrated by their actions outlined above.
- 5.28 First, it appears from these actions that they are guided by the recognition that States, including, in particular, the small island developing States referred to in the first part of question (b), are particularly vulnerable to the adverse effects of climate change due to their geographical circumstances and level of development. This is reflected in the relevant decisions, such as those on the operationalization of funding arrangements, including the Loss and Damage Fund, for responding to loss and damage associated with the adverse effects of climate change.
- 5.29 It appears, furthermore, from these actions that they are guided by the understanding that States have common but differentiated responsibilities and respective capabilities, in the light of national circumstances, as reflected in the relevant decisions, such as those of the 2023 Climate Change Summit (see Paragraph 5.25 above). In this respect, the Kingdom notes that it has pledged 15 million Euros to contribute to the Loss and Damage Fund, on top of the Dutch annual contribution of 1.8 billion Euros to overall climate finance in developing States.
- 5.30 Finally, these actions can be considered to reflect the principle of equity, which the Court as a legal concept considers “a direct emanation from the idea of justice”.<sup>216</sup> Both the principles of *intergenerational* equity and *intragenerational*, or international, equity in international environmental law are derivatives of this notion.<sup>217</sup> The temporal dimension of equity is well reflected in international law, with direct references in international agreements,<sup>218</sup> and judicial statements.<sup>219</sup> Several judges have pointed towards a possible evolution of the principle of

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<sup>215</sup> COP, ‘Operationalization of the new funding arrangements, including a fund, for responding to loss and damage referred to in paragraphs 2–3 of decisions 2/CP.27 and 2/CMA.4’, draft Decision -/CP.28 (2023), para. 12; CMA, ‘Operationalization of the new funding arrangements, including a fund, for responding to loss and damage referred to in paragraphs 2–3 of decisions 2/CP.27 and 2/CMA.4’, draft Decision -/CMA.5 (2023), para. 12.

<sup>216</sup> *Concerning the Continental Shelf (Tunisia v. Libyan Arab Jamahiriya)*, Judgment, *I.C.J. Reports* 1982, para. 71.

<sup>217</sup> UN Doc. A/CN.4/692, *supra* note 145, para. 71.

<sup>218</sup> See for example, UNFCCC, Article 3; Stockholm Declaration, *supra* note 148, Principles 1 and 2; Rio Declaration, *supra* note 161, Principle 3; Convention on Biological Diversity (adopted in 1992) 1760 UNTS 79, Preamble, Article 2

<sup>219</sup> *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 130, para. 29; *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, *supra* note 123, para. 140.

intergenerational equity towards a general principle of international law,<sup>220</sup> which would grant the principle autonomous legal binding force.<sup>221</sup> The contemporary, international dimension of equity was a point of contention during the negotiating process of the UNFCCC, as alternative provisions explicitly contain a reference to both intergenerational and intragenerational equity.<sup>222</sup> Still, equity among States is reflected in the concept of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances,<sup>223</sup> and may be inferred from the reference to the eradication of poverty as “an indispensable requirement for sustainable development”.<sup>224</sup>

### ***B. Peoples and individuals of the present and future generations***

- 5.31 The second part of question B refers to the legal consequences with respect to peoples and individuals of the present and future generations affected by the adverse effects of climate change. Such legal consequences for peoples and individuals are principally governed by international human rights law.
- 5.32 Even if peoples and individuals of the present and future generations affected by the adverse effects of climate change cannot invoke the responsibility of a state for an internationally wrongful act in accordance with the inter-State rules reflected in the ARSIWA, significant harm to the climate system and other parts of the environment may constitute a violation of their human rights. With respect to violations of international human rights law, the Kingdom will first set out the obligation to provide reparation to individuals and groups whose human rights have been violated as a consequence of States’ failure to adequately address climate change and its adverse effects, and, second, relocation as a result of the adverse effects of climate change.
- 5.33 In contrast to the law on State responsibility as reflected in the ARSIWA, revolving around the responsibility of a State *vis-à-vis* another State, the violation of human rights principally entails the responsibility of a State *vis-à-vis* individuals or groups within its jurisdiction. In this respect, while the reparations required to remedy human rights violations may in certain circumstances reflect the reparations offered in the ARSIWA, the rules under human rights law with respect to

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<sup>220</sup> *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court’s Judgement of 20 December 1974 in the Nuclear Tests (New Zealand/France) Case*, Dissenting opinion of Judge Weeramantry, Order of 22 September 1995, *I.C.J. Report* 1995, p. 341; *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Merits, Separate Opinion Judge Cançado Trindade, *I.C.J. Reports* 2010, paras. 106-108.

<sup>221</sup> *Reservations to the Convention on Genocide*, Advisory Opinion, *I.C.J. Reports* 1951, p. 23.

<sup>222</sup> Report of the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change on the Work of Its Fourth Session, UN Doc. A/AC.237/15 (29 January 1992), p. 27.

<sup>223</sup> UNFCCC, Preamble; Paris Agreement, Preamble.

<sup>224</sup> United Nations General Assembly, ‘Transforming our World: the 2030 Agenda for Sustainable Development’, UN Doc. A/RES/70/1 (2015), Preamble.

reparation have developed in order to guarantee practical and effective remedies for victims of human rights violations.<sup>225</sup>

5.34 First, individuals have a right to reparation for human rights violations, and States have a corresponding obligation to grant reparation. If a human rights violation is found at the domestic level, this obligation is part of the right to an effective remedy for human rights violations.<sup>226</sup> If a violation of human rights is found at the international level by an international court or treaty body, the obligation to provide reparation flows from that finding itself. The Court found in this respect, in its Opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, that reparation for human rights violations had to be provided to “all the natural or legal persons concerned”.<sup>227</sup> The type of reparation required depends on the violation at issue.

5.35 The primary obligation, when providing reparation, is to provide restitution. The Court, when considering reparation for human rights violations in its Opinion on *The Construction of a Wall*, cited the Permanent Court of International Justice’s findings in *Factory at Chorzów*, that “[t]he essential principle contained in the actual notion of an illegal act [...] is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed”.<sup>228</sup> The European Court of Human Rights has held to the same effect, describing the obligation to make reparation as “the primary obligation resulting from the Court’s initial judgment, namely *restitutio in integrum*”.<sup>229</sup> In the event that restitution is materially impossible, there is an obligation to compensate victims of human rights violations.<sup>230</sup>

5.36 In respect of the precise content of an ‘effective remedy’ at the domestic level, although a definition is not included in human rights treaties and differs per jurisdiction or human rights system, it is commonly understood that providing an effective remedy entails both a procedural dimension, such as access to justice,<sup>231</sup> and a substantive dimension, relating to substantive redress or relief.<sup>232</sup> As the focus in the second question posed to the Court is placed on secondary

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<sup>225</sup> Compare with ARSIWA, *supra* note 124, Article 55.

<sup>226</sup> ICCPR, Article 2(3)(a): “Each State Party to the present Covenant undertakes: (a) to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, [...]”; See, for example, ECHR, Article 13.

<sup>227</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, *I.C.J. Reports* 2004 (hereinafter ‘*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*’), para. 152.

<sup>228</sup> *Ibid.*; *Factory at Chorzów, Merits, Judgment No 13, 1928, P.C.I.J., Series A, No. 17*, p. 47.

<sup>229</sup> ECtHR, *Kavala v. Türkiye* [GC], no. 28749/18, § 175, ECHR 2022.

<sup>230</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *supra* note 227, para. 153.

<sup>231</sup> Aarhus Convention, Article 9; Escazú Agreement, Article 8(3)(f).

<sup>232</sup> ECHR, Article 41; ICCPR, Articles 2(3) and 9(5).

rules of international law, the Kingdom will focus on the substantive dimension below related to substantive redress or relief.

5.37 An example of redress provided with regard to human rights in the context of climate change is the *Billy et al. v. Australia* communication before the Human Rights Committee, in which the Committee found a violation of the rights under Articles 17 and 27 of the ICCPR. It ordered the Respondent State to provide an effective remedy under Article 2, paragraph 3, under a, of the ICCPR which requires the Respondent State to make full reparation to individuals whose rights have been violated.<sup>233</sup> The Committee underscored that the State Party is obliged to, *inter alia*:

Provide adequate compensation, to the authors for the harm that they have suffered; engage in meaningful consultations with the authors' communities in order to conduct needs assessments; continue its implementation of measures necessary to secure the communities' continued safe existence on their respective islands; and monitor and review the effectiveness of the measures implemented and resolve any deficiencies as soon as practicable. The State party is also under an obligation to take steps to prevent similar violations in the future.<sup>234</sup>

5.38 Second, the Kingdom notes that due to the adverse effects of climate change, such as sea-level rise, low-lying islands may become permanently uninhabitable or that some islands might even disappear,<sup>235</sup> which would lead to an increase of climate-change displaced persons who cannot be relocated within the boundaries of their own State. In view of sea-level rise resulting from climate change, the Kingdom, with low-lying parts of its territory in Europe as well as the Caribbean, may have to consider the relocation of its people.

5.39 The Human Rights Committee underscored this in its view in *Teitiota v. New Zealand*, stating that

both sudden-onset events (such as intense storms and flooding) and slow-onset processes (such as sea level rise, salinization, and land degradation) can propel cross-border movement of individuals seeking protection from climate change-related harm.<sup>236</sup>

5.40 And that it is of the view that

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<sup>233</sup> *Billy et al. v. Australia*, *supra* note 84, para. 11.

<sup>234</sup> *Ibid.*

<sup>235</sup> IPCC, 2019, 'Sea-Level Rise and Implications for Low-Lying Islands, Coasts and Communities' in *IPCC Special Report on the Ocean and Cryosphere in a Changing Climate*, H.-O Pörtner, D.C. Roberts, V. Masson-Delmotte et al (eds), Section 4.1.3.

<sup>236</sup> *Ioane Teitiota v. New Zealand*, Views adopted by the Human Rights Committee under Article 5(4) of the Optional Protocol, concerning communication No. 2728/2016\*,\*\*,\*\*\*, para. 9.11.

without robust national and international efforts, the effects of climate change in receiving states may expose individuals to a violation of their rights under articles 6 or 7 of the Covenant, thereby triggering the *non-refoulement* obligations of sending states.<sup>237</sup>

5.41 As the Kingdom outlined above, States are under the obligation to respect, protect and fulfil the human rights of those within their jurisdiction under international human rights law. International human rights law thus sets out minimum standards of treatment that States must afford to individuals within their territory or jurisdiction. However, should States no longer be in a position to safeguard the effective enjoyment of the human rights of individuals within their jurisdiction due to the adverse effects of climate change, such as the effects of sea-level rise – leading to the uninhabitability of the islands or the complete disappearance thereof – the question arises what legal framework applies to persons seeking a safe haven elsewhere.

5.42 International refugee law, as it stands today, would not seem applicable in the context of climate change as it is not designed to protect climate-change displaced persons; in particular, the 1951 Refugee Convention and its 1967 Protocol do not recognise climate change (or environmental degradation for that matter) as grounds for refugee status.<sup>238</sup>

5.43 In light of this, international human rights law may provide a relevant legal framework for protecting climate-displaced persons. The relevance of international human rights law in this context might be, amongst others, that: (i) it sets out minimum standards of treatment that States must afford to individuals within their territory or jurisdiction; (ii) it affords a legal basis for individuals to seek protection in another State; and (iii) it requires, in case of relocation, minimum standards of treatment which must be observed in the host State. However, international law does not attribute to persons displaced due to climate change the right of access to states of which they are not citizens.

5.44 The Kingdom considers that States have a duty to cooperate to ensure that such persons are accommodated elsewhere. This is a collective responsibility of the international community as a whole. In the view of the increasing likelihood of climate displacement in the near future, the Kingdom considers that the matter of climate-change displaced persons should be placed high on the international agenda. In this respect, the Netherlands attaches great importance to the

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<sup>237</sup> *Ioane Teitiota v. New Zealand*, Views adopted by the Human Rights Committee under Article 5(4) of the Optional Protocol, concerning communication No. 2728/2016\*,\*\*,\*\*\*, para. 9.11.

<sup>238</sup> Convention Relating to the Status of Refugees (adopted in 1951) 189 UNTS 137, Article 1(a).

work of the UNFCCC Task Force on Displacement,<sup>239</sup> and the work of the ILC on sea level rise, more particularly in relation to the protection of persons.

Respectfully,



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<sup>239</sup> The mandate of the UNFCCC Task Force on Displacement was subsequently extended at the recommendation by the Executive Committee of the Warsaw International Mechanism for Loss and Damage in 2018, COP Decision 1/CP.21, para. 49.