

**INTERNATIONAL COURT OF JUSTICE**

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

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**WRITTEN STATEMENT OF NEW ZEALAND**

**22 MARCH 2024**

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## SECTION 1: INTRODUCTION

### PART 1: THE QUESTIONS POSED TO THE COURT BY THE GENERAL ASSEMBLY

1. In accordance with the Court's Orders of 20 April 2023 and 4 August 2023,<sup>1</sup> New Zealand presents this Written Statement to furnish information on the questions submitted to the Court in General Assembly resolution 77/276, adopted on 29 March 2023.
2. Those questions are as follows:

“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?”

### PART 2: GENERAL CONTEXT

#### 2.1 Scientific consensus is the Earth is warming, and the emissions of GHGs from human activity is the principal cause

3. The IPCC's most recent Sixth Assessment Report reflects unequivocally that the Earth is warming at an unprecedented rate, and that the emissions of greenhouse gases ('GHGs') from human activity is the principal cause.<sup>2</sup> Global surface temperatures in the previous decade were 1.1°C higher than in the second half of the 19<sup>th</sup> century.<sup>3</sup> Earth

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<sup>1</sup> *Obligations of States in Respect of Climate Change (Request for Advisory Opinion)*, Order of 20 April 2023 and Order of 4 August 2023.

<sup>2</sup> Synthesis Report of the IPCC Sixth Assessment Report (AR6), Summary for Policymakers (2023). There has been a reasonably consistent scientific consensus from the late 1980s that human activities are substantially increasing atmospheric concentrations of the greenhouse gases and this is leading to dangerous warming of the atmosphere: see for example, Jager J., Ferguson H.L., *Climate Change: Science, Impact and Policy - Proceedings of the Second World Climate Conference* Cambridge University Press, 1990, pp 497-499.

<sup>3</sup> Synthesis Report, *ibid* at A.1.

has experienced “widespread and rapid changes in the atmosphere, ocean, cryosphere and biosphere”, and all regions have been affected by climate change.<sup>4</sup>

4. Observed effects of climate change include sea-level rise, losses in ecosystems, and increased frequency and intensity of weather extremes including heatwaves, heavy precipitation, droughts, and tropical cyclones.<sup>5</sup> These effects impact people, through exposure to extreme weather events and consequent mortality, acute food insecurity, such as food production from fisheries and aquaculture, severe water scarcity, increased occurrence of climate-related food and water-borne diseases and incidence of vector-borne diseases, mental health challenges and trauma, loss of livelihoods and culture, human displacement, destruction and loss of homes, infrastructure, property, and income.<sup>6</sup>
5. The IPCC’s reports make clear that adverse impacts from climate change will continue to intensify, and the extent to which they do so will depend on how quickly and deeply emissions of GHGs are reduced. The AR6 Synthesis Report emphasises the “urgency of near-term integrated climate action” and says “climate change is a threat to human well-being and planetary health (very high confidence). There is a rapidly closing window of opportunity to secure a liveable and sustainable future for all (very high confidence)... The choices and actions implemented in this decade will have impacts now and for thousands of years (high confidence).”<sup>7</sup>
6. In the outcome of the first global stocktake of 13 December 2023,<sup>8</sup> amongst other things, Parties to the Paris Agreement (**‘the PA’**):<sup>9</sup>
  - a. reaffirmed the PA temperature goal 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;
  - b. underscored that the impacts of climate change will be much lower at the temperature increase of 1.5°C compared with 2°C and resolved to pursue efforts to limit the temperature increase to 1.5°C;

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<sup>4</sup> *ibid* at A.2.

<sup>5</sup> *ibid* at A.2.1 and A.2.3.

<sup>6</sup> *ibid* at A.2.1-A.2.7.

<sup>7</sup> *ibid* at C.1.

<sup>8</sup> Decision -/CMA.5. See also, UNFCCC, *Technical dialogue of the first global stocktake – Synthesis report by the co-facilitators on the technical dialogue* (2023).

<sup>9</sup> *Paris Agreement* 3156 UNTS 79 (opened for signature 12 April 2016, entered into force 4 November 2016) [PA].

- c. Noted with significant concern that, despite progress, global GHG emissions trajectories are not yet in line with the temperature goal of the PA and there is a rapidly narrowing window for raising ambition and implementing existing commitments in order to achieve it.
- d. Recognised the need for deep, rapid and sustained reductions in GHG emissions in line with 1.5 °C pathways.

## 2.2 Climate change is impacting New Zealand and the Pacific

- 7. In New Zealand, climate change is increasing risks to safety and security and exacerbating existing vulnerabilities. Climate-related risks are already affecting New Zealand's financial system and economy. Two-thirds of New Zealanders live in areas prone to flooding and rising sea levels.<sup>10</sup> The warming seas around New Zealand are adversely impacting our marine life.<sup>11</sup>
- 8. New Zealand's climate is strongly influenced by heat and moisture carried by the ocean, and especially the Southern Ocean. A recently published study analyses the profound impact of GHG emissions on Antarctica, including the effects on sea ice, ice shelves, glaciers, marine biodiversity, and extreme weather events.<sup>12</sup> The study concluded it is virtually certain that continued GHG emissions will lead to larger and more frequent events leading to an increasing lack of winter ice and ice shelf collapse.<sup>13</sup> This will have global consequences, as well as consequences for New Zealand. As one of our prominent scientists has said, "New Zealand is ... in the firing line of a more energetic ocean/atmosphere system, capable of delivering more intense storm and rain events, with increasing frequency".<sup>14</sup>
- 9. Indigenous peoples are particularly affected by climate change impacts. Increasing climate risks are projected to exacerbate existing vulnerabilities and social inequalities and inequities, including inequalities between indigenous and non-indigenous peoples.<sup>15</sup>

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<sup>10</sup> New Zealand Ministry for the Environment & Stats NZ (2023). *New Zealand's Environmental Reporting Series: Our atmosphere and climate 2023*.

<sup>11</sup> Cornwall et al, 'Predicting the impacts of climate change on New Zealand's seaweed-based ecosystems' *New Zealand Journal of Botany*, 17 May 2023.

<sup>12</sup> Siegert et al, 'Antarctic extreme events' *Frontiers in Environmental Science*, 8 August 2023.

<sup>13</sup> *ibid* at [11].

<sup>14</sup> Dr Natalie Robinson, Antarctic Oceanographer, NIWA at: <https://www.sciencemediacentre.co.nz/2023/08/09/climate-change-is-taking-a-toll-on-every-aspect-of-antarctica-expert-reaction/>.

<sup>15</sup> Intergovernmental Panel on Climate Change (IPCC), *Climate Change 2022: Impacts, Adaptation, and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel ('WGII 2022 Report')*, Chapter 11 at p.1583.

10. Tokelau, a country located halfway between Hawaii and New Zealand, is comprised of three small coral atolls generally less than three metres above high tide, and is of special significance to New Zealand because of our constitutional and historical ties. Tokelau is particularly vulnerable to climate change impacts because of its geography and reliance on the ocean for the economy, culture, and livelihoods of its people.
11. New Zealand, alongside the other members of the Pacific Islands Forum, has recognised climate change as the single greatest threat to the livelihoods, security and well-being of the peoples of the Pacific.<sup>16</sup> As Small Island Developing States (SIDS), Pacific States are particularly vulnerable to climate change impacts, including temperature increases, more frequent and severe tropical cyclones, storm surges, droughts, changes in rainfall, sea level rise, coral bleaching and invasive species.<sup>17</sup>
12. The ocean, which covers around 70 percent of the Earth's surface and represents its largest carbon sink, is critical to addressing the climate crisis.<sup>18</sup> Across the Pacific region, the ocean is linked to identity. It underpins cultures, communities and ways of life. Economies rely on the ocean, through fisheries and aquaculture, tourism and shipping; livelihoods are closely linked to the sustainable use of marine resources; and culture and recreation take shape around the ocean and its shores. The collective ambition of the members of the Pacific Islands Forum is that all Pacific peoples live in a sustainably managed Blue Pacific Continent, while steadfastly maintaining resilience to environmental threats.<sup>19</sup>
13. Pacific countries are at the forefront of efforts to secure this collective ambition. Pacific Islands Forum Leaders have endorsed the 2050 Strategy for the Blue Pacific Continent,<sup>20</sup> and have issued declarations on sea-level rise in relation to maritime zones and statehood that support the maintenance of maritime zones and continuity of statehood in light of climate change-related sea-level rise.<sup>21</sup> New Zealand has made focussed efforts to support the climate change needs of the Pacific region, with at least 50% of New Zealand's NZD 1.3 billion international climate finance commitment for 2022 to 2025 supporting the Pacific.

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<sup>16</sup> *Boe Declaration on Regional Security*, Pacific Islands Forum (2018).

<sup>17</sup> WGII 2022 Report, *supra* n.15 at Chapter 15, p. 2045.

<sup>18</sup> *State of the Global Climate 2022* World Meteorological Organization WMO-No 1316 ('WMO Report') at 4.

<sup>19</sup> *2050 Strategy for a Blue Pacific Continent* Pacific Islands Forum Secretariat (2022).

<sup>20</sup> *ibid.*

<sup>21</sup> *Declaration on Preserving Maritime Zones in the Face of Climate Change-related Sea-Level Rise*, Pacific Islands Forum (2021); *Declaration on the Continuity of Statehood and the Protection of Persons in the Face of Climate Change-Related Sea-Level Rise*, Pacific Islands Forum (2023).

### **2.3 Collective global action is required to respond to the threats posed by climate change**

14. Climate change is a shared global problem that can only be addressed effectively with a shared global solution. There is an urgent need to mitigate anthropogenic climate change through global emissions reductions and removals. Unilateral actions by individual States are unlikely, on their own, to avoid dangerous warming of the atmosphere. An effective and sustainable response requires a collective, global effort.
15. States have agreed to deliver this effective and sustainable response through the climate change treaty regime established by the United Nations Framework Convention on Climate Change ('UNFCCC')<sup>22</sup> and the PA. That regime is delicately balanced and reflects the result of decades of difficult but successful multilateral negotiation. It provides a framework for delivering necessary emissions reductions and removals, adaptation measures, climate finance, capacity building and technology transfer, and for averting, minimising and responding to loss and damage. It establishes an institutional architecture for monitoring compliance with the obligations and commitments made by Parties, for resolving disputes that may arise, and for ongoing cooperation through negotiations in, and decisions of, the Conference of the Parties to the UNFCCC ('COP') and the Conference of the Parties Serving as the Meeting of the Parties to the PA ('CMA').
16. The climate change treaty regime is of vital importance as the centrepiece of an effective global response to climate change based on state consent, cooperation and inclusive public participation, underpinned by the principles of equity and common but differentiated responsibilities and respective capabilities ('CBDR-RC') in light of different national circumstances.<sup>23</sup>

### **2.4 These proceedings provide a significant opportunity for the Court to provide clarity and coherence to the current state of international law with respect to climate change**

17. The question invites the Court to clarify the legal obligations and consequences applicable to the collective global effort to avoid dangerous anthropogenic climate change. In doing so, the Court is guided by Article 38 of the Statute of the Court and may apply international conventions; international custom; the general principles of law

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<sup>22</sup> *United Nations Framework Convention on Climate Change* 1771 UNTS 107 (opened for signature 4 June 1992, entered into force 21 March 1994) [UNFCCC].

<sup>23</sup> New Zealand is committed to collective action under the UNFCCC and the PA. Amongst other measures, it is playing its part in mitigation efforts with an ambitious commitment to reduce net GHG emissions by 2030 to 50% of gross 2005 levels. It is also playing its part on finance: for the period 2022-2025, New Zealand has committed NZ\$1.3 billion in grant-based climate finance (a four-fold increase on its 2019-2022 commitment); it has also committed NZ\$20 million of dedicated loss and damage finance for developing countries. And it is contributing technical and capacity support to developing countries to assist in the response to climate change.



recognized by civilized nations; and judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

18. New Zealand acknowledges that States are likely to take different approaches in their submissions and may have conflicting views on certain elements of the question. It is, however, clear that – in requesting the advisory opinion – United Nations member States have a shared objective of seeking clarity and coherence in their understanding of international law with respect to climate change in order to support the collective global effort to respond to climate change and lift ambition. With that in mind, the Court will be cognisant of the need to support the climate change treaty regime as the key legal framework for addressing global climate change.<sup>24</sup> While States have a range of co-existing obligations that bear on their response to climate change, the Court is urged to interpret those obligations in a holistic and mutually supportive way. Such an approach is principled and, as explained below, consistent with the ordinary rules of treaty interpretation.

### **PART 3: THE STRUCTURE OF NEW ZEALAND'S WRITTEN STATEMENT**

19. New Zealand's submission on part (a) of the question begins with a detailed description of the climate treaty regime, including how it is designed to balance the complex range of factors and interests that States have grappled with through decades of negotiations. This is followed by submissions on how wider environmental law, including other international treaties and customary international law, relate to the climate change treaty regime. New Zealand's statement under part (a) concludes with submissions on the relevance of international human rights law to climate change.
20. New Zealand's submission on part (b) of the question begins with an outline of how the climate treaty regime itself establishes mechanisms to support States affected by climate change and to support the peaceful settlement of disputes. This is followed by submissions addressing state responsibility in the climate change context.

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<sup>24</sup> The centrality of the UNFCCC and the PA to States' climate change efforts was a key theme in the explanations of position after adoption of resolution A/RES/77/276 as recorded in the Official Records of the General Assembly, 64<sup>th</sup> and 65<sup>th</sup> plenary meetings, Wednesday 29 March 2023, A/77/PV.64 and A/77/PV.65.

## SECTION 2

### QUESTION A: THE OBLIGATIONS OF STATES

#### PART 1: THE CLIMATE CHANGE TREATY REGIME

##### 1.1 Overview

21. The UN climate change treaty regime, which includes the 1992 UNFCCC, the 1998 Kyoto Protocol (**'the KP'**),<sup>25</sup> and the 2015 PA (collectively **'the climate change treaty regime'**), is the key multilateral framework which defines the nature and scope of the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of GHGs for present and future generations. Indeed, the climate change treaty regime was negotiated with the objective of defining States' obligations in the collective effort to protect the climate system and other parts of the environment from anthropogenic emissions of GHGs.
  
22. Increased scientific understanding of the problem of anthropogenic climate change throughout the 1970s and 1980s<sup>26</sup> prompted a series of resolutions from the United Nations General Assembly (**'UNGA'**), each entitled *'protection of global climate for present and future generations of mankind'* that led to the establishment of an Intergovernmental Negotiating Committee for a Framework Convention on Climate Change (**'the INC'**).<sup>27</sup> The UNGA resolutions, together with the 1990 Ministerial Declaration at the Second World Climate Conference,<sup>28</sup> make clear the intention of member States to address the need for collective action to combat climate change through the proposed framework convention. The report of the first meeting of the INC records that many negotiating countries stressed *"the importance of addressing the issue of global climate change [through the framework convention] in an integrated and comprehensive manner."*<sup>29</sup>
  
23. The UNFCCC reflects the agreement reached by States through the INC process. The preamble records that *"change in the Earth's climate and its adverse effects are a common concern of humankind"*,<sup>30</sup> and emphasises that *"the global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and*

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<sup>25</sup> Kyoto Protocol to the United Nations Framework Convention on Climate Change 2303 UNTS 162 (opened for signature 16 March 1998, entered into force 16 February 2005) [KP].

<sup>26</sup> See, for example, the 1979 World Climate Conference, the 1980 establishment of the World Climate Research Programme, the 1985 Villach Conference, and the 1988 establishment of the IPCC.

<sup>27</sup> Resolution 43/53 of 5 December 1988, Resolution 44/207 of 22 December 1989, Resolution 44/212 of 21 December 1990.

<sup>28</sup> UN Doc A/45/696/Add.1.

<sup>29</sup> UN Doc A/AC.237/6, 8 March 1991.

<sup>30</sup> UNFCCC, preambular paragraph 1.

*appropriate international response...".*<sup>31</sup> Article 3 provides that *"Parties should protect the climate system for the benefit of present and future generations of humankind"*. Article 2 provides that the objective of the Convention and any related legal instruments is to *"achieve the stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system."*

24. The KP and the PA are "related instruments" adopted under the UNFCCC and in pursuit of the same objective. They represent an evolution of the scope and nature of States' obligations, but maintain the same objective as the UNFCCC, namely the stabilisation of GHG concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.<sup>32</sup>
25. The KP was negotiated in recognition that the obligations on developed country Parties under the UNFCCC were inadequate to achieve the ultimate objective of the Convention.<sup>33</sup> Paragraph 2 to the preamble of the KP expressly provides that it was adopted *"in pursuit of the ultimate objective of the [UNFCCC] as stated in its Article 2."*
26. The PA was similarly adopted to enhance the implementation of the UNFCCC, including its objective.<sup>34</sup> It was negotiated in recognition of the need for significant reductions in global emissions to achieve the ultimate objective of the UNFCCC and at the conclusion of *"a comprehensive process to enable the full, effective and sustained implementation of the Convention through long-term cooperative action."*<sup>35</sup> The PA aims to strengthen the global response to the threat of climate change, including by defining in quantitative terms, based on best available science, what is required to achieve the qualitative objective of the UNFCCC, namely *"holding the increase in the global average temperature to well below 2 degrees Celsius above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5 degrees Celsius above pre-industrial levels."*<sup>36</sup>
27. The climate change treaty regime is widely ratified.<sup>37</sup> It is the sole international legal regime specifically negotiated with the objective of preventing dangerous anthropogenic interference with the climate system, and the result of near continuous

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<sup>31</sup> UNFCCC, preambular paragraph 6.

<sup>32</sup> See the preambles to both the KP and the PA.

<sup>33</sup> Berlin Mandate, Decision 1/CP.1.

<sup>34</sup> PA, Article 2.

<sup>35</sup> 2007 Bali Action Plan, Decision 1/CP.13 para.1. The Action Plan was the start of a process within the UNFCCC system to defined *"a shared vision for long-term cooperative action, including a long-term global goal for emission reductions."* That process resulted in the 2009 Copenhagen Accord, Decision 2/CP.15 and the 2010 Cancun Agreements, Decision 1/CP.16.

<sup>36</sup> PA, Article 2(a).

<sup>37</sup> The UNFCCC has been ratified by 198 countries, the KP by 192 counties, and the PA by 195 countries.

multilateral negotiation since the first sessions of the INC for the framework convention in 1991. That work did not end at COP21 in Paris in 2015 but continues within the multilateral institutional architecture established by the climate change treaty regime that enables, indeed requires, the Parties to cooperate in the development and implementation of more detailed rules and procedures through the COP, the CMA, and the Conference of the Parties serving as the meeting of the Parties to the KP ('CMP').

28. The climate change treaty regime thus benefits from the legitimate authority of state consent, as the product of decades of multilateral negotiation. It seeks to balance multiple competing interests in a highly complex policy environment.<sup>38</sup> The complexities and competing interests arise from the following unique circumstances, amongst others:
- a. First, all States both contribute to and risk harm from anthropogenic climate change, but the contribution and risk is shared unequally and inequitably, with the least developed States, including small island developing States, having contributed least to atmospheric GHGs but facing the greatest risk of harm from climate change and having the least capacity to adapt.
  - b. Second, only collective global mitigation measures will achieve the necessary emissions reductions to avoid dangerous anthropogenic climate change. Save for the top six emitters, all States have emissions that individually constitute less than 2% of global emissions.<sup>39</sup> Because it is the cumulative emissions of all States that contribute to climate change, all States must work collectively to reduce their emissions.
  - c. Third, the mitigation measures needed to avoid dangerous anthropogenic interference with the climate system involve global economic, social and political transformations that touch on human activities across all sectors of society.<sup>40</sup>

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<sup>38</sup> See A/AC.237/18 (Part II), Report of the IGC in respect of its Fifth Session, 30 April – 9 May 1992 at [32] – [33], recording the view of most delegations that the UNFCCC was “a carefully balanced package” agreed through “a spirit of determination, cooperation and accommodation by all delegations”.

<sup>39</sup> Climate Watch/WRI data: <https://www.wri.org/insights/interactive-chart-shows-changes-worlds-top-10-emitters>.

<sup>40</sup> The complexity of the issues raised by the regulation of climate change is well summarised in Alan Boyle and Catherine Redgwell, *Birnie, Boyle and Redgwell's International Law and the Environment* (4<sup>th</sup> ed, Oxford University Press, Oxford, 2021) at 380: “...controlling greenhouse gas emissions goes to the heart of energy, transport, agricultural, and industrial policy in all developed states and increasingly in developing ones too. Moreover, the role of carbon sinks means that deforestation, protection of natural habitats and ecosystems, sea-level rise, and sovereignty over natural resources are also important elements of the problem, within the broader context of sustainable development.”

- d. Fourth, some of the adverse impacts of climate change are unavoidable and, as a result, States will still need to adopt adaptation measures alongside mitigation measures.
  - e. Fifth, some developing States, including least developed countries and small island developing States, may require financial and technical support to be able to deliver necessary mitigation and adaptation measures, and – irrespective of the adequacy of collective measures to mitigate climate change and irrespective of domestic adaptation measures – may also require financial and technical support to address loss and damage caused by extreme weather events and slow onset events associated with climate change.
  - f. Sixth, because of the necessity for collective global action, mechanisms are needed to provide confidence to each State that other States are delivering on collective commitments and that there is no ‘free-riding’.
29. The balancing of these complexities and interests is reflected in the detailed matrix of obligations that appear in the climate change treaty regime and in its evolution over time. The regime has become more detailed, more broad-based, and “bottom-up”. That evolution is a result of the increasing complexity of the problem of climate change and the outcome of detailed and careful negotiations between States as to the most effective, equitable and achievable way to address that problem, having regard to the competing national interests at stake.<sup>41</sup> The climate change treaty regime therefore represents a “package deal” from which no reservations are permitted<sup>42</sup> precisely because no individual part of the package can be severed from the whole without unbalancing the agreements reached.
30. While other rules and principles of international law may bear upon the operation of the climate change treaty regime they do not, in New Zealand’s view, displace it or undermine its centrality in the framework of legal obligations relevant to the question the Court has been asked to address.

## 1.2 The United Nations Framework Convention on Climate Change

31. The UNFCCC was adopted on 9 May 1992 and entered into force on 21 March 1994. It is a framework convention so does not seek to prescribe detailed obligations relating to

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<sup>41</sup> See ‘Evolution of the United Nations Climate Regime’ in Daniel Bodansky, Jutta Brunnée, and Lavanya Rajamani, *International Climate Change Law* (Oxford University Press, Oxford, 2017).

<sup>42</sup> UNFCCC Article 24; KP Article 26; PA Article 27.

all aspects of States' responses to climate change. Instead, it anticipates that detailed obligations may be negotiated in related instruments and establishes an objective, guiding principles and some broad obligations relating to mitigation, adaptation, reporting and finance. While the objective and guiding principles remain key features of the climate change treaty regime, some of the obligations in the UNFCCC have been superseded by the KP and/or PA.

32. Article 2 provides that the objective of the UNFCCC is to “*achieve the stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system*”.
33. Article 3 establishes that in their actions to achieve the objective of the UNFCCC and implement its provisions, Parties shall be guided by a number of “principles”, as summarised below:
  - a. The Parties should protect the climate system on the basis of equity and in accordance with CBDR-RC;
  - b. Developed country Parties should take the lead in combating climate change and its adverse effects;
  - c. Parties should take precautionary measures to anticipate, prevent, or minimise the causes of climate change and mitigate its adverse effects;
  - d. The Parties should promote sustainable development in their policies to protect the climate system;
  - e. The Parties should cooperate to promote sustainable economic growth and avoid arbitrary or unjustifiable discrimination or disguised restrictions on international trade.
34. Article 4 contains a set of legally-binding general and differentiated obligations on Parties. As for the general obligations, all Parties have obligations to, *inter alia*: develop, update, and publish national inventories of anthropogenic emissions;<sup>43</sup> formulate, implement, update national measures to mitigate climate change by addressing anthropogenic emissions and measures to facilitate adaptation;<sup>44</sup> promote and cooperate

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<sup>43</sup> UNFCCC, Article 4(1)(a).

<sup>44</sup> UNFCCC, Article 4(1)(b).

with regard to a number of associated objectives;<sup>45</sup> and to report on progress of implementation.<sup>46</sup> In undertaking these obligations, Parties are to take into account their CBDR-RC and their specific development priorities, objectives and circumstances.<sup>47</sup>

35. As for the differentiated obligations, Parties are divided into Annex I Parties (broadly, developed countries), Annex II Parties (Annex I countries minus countries with economies in transition) and Parties that do not appear in either list (known as ‘non-Annex I Parties’).
- a. Annex I Parties have additional obligations including adopting national policies and taking corresponding measures on the mitigation of climate change. These policies and measures will demonstrate that developed countries are taking the lead in modifying longer-term trends in anthropogenic emissions,<sup>48</sup> and complying with more stringent reporting requirements.<sup>49</sup> In addition, Annex I Parties agreed to a non-binding goal to return their emissions to 1990 levels by the year 2000.<sup>50</sup>
  - b. Annex II Parties are required to provide finance and technology to developing countries to meet their obligations to implement measures and report on implementation;<sup>51</sup> assist developing country Parties that are particularly vulnerable to the adverse effects of climate change in meeting costs of adaptation;<sup>52</sup> and take practicable steps to support access for developing country Parties to technologies and capacity-building to enable implementation of the Convention.<sup>53</sup>
  - c. The performance by developing country Parties of their commitments under the Convention is expressly dependent on the performance by developed country Parties of their obligations to provide financial and technical support.<sup>54</sup>

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<sup>45</sup> UNFCCC, Article 4(1)(c)-(i).

<sup>46</sup> UNFCCC, Article 4(1)(i) and Article 12.

<sup>47</sup> UNFCCC, Article 4(1).

<sup>48</sup> UNFCCC, Article 4(2)(a).

<sup>49</sup> UNFCCC, Article 4(2)(b) and Article 12.

<sup>50</sup> UNFCCC, Article 4(2)(b).

<sup>51</sup> UNFCCC, Article 4(3).

<sup>52</sup> UNFCCC, Article 4(2).

<sup>53</sup> UNFCCC, Article 4(5).

<sup>54</sup> UNFCCC, Article 4(7).

36. Articles 5 and 6 impose obligations on Parties to support research into and systematic observation of climate change, and to promote and cooperate in education, training and public awareness of climate change.
37. Articles 7 – 10 establish the institutional building blocks for global climate governance: it establishes the COP as the supreme body of the UNFCCC, establishes a Secretariat, and establishes two subsidiary bodies, the Subsidiary Body for Scientific and Technological Advice and the Subsidiary Body for Implementation.
38. Article 11 establishes a financial mechanism for the provision of financial resources on a grant or concessional basis, including for the transfer of technology. It is accountable to the COP which is required to agree upon arrangements for operationalising the mechanism. The COP has, under this provision, established the Global Environment Facility, the Green Climate Fund, alongside the Special Climate Change Fund, the Least Developed Countries Fund, the Adaptation Fund and the Standing Committee on Finance.

### 1.3 The Kyoto Protocol

39. The KP was adopted on 11 December 1997 and entered into force on 16 February 2005. Building on the UNFCCC, the KP strengthened the commitments of Annex I countries to reduce emissions of the seven GHGs listed in Annex A. The centrepiece of this strengthening was the legally-binding Article 3 commitment by Annex I countries to reduce their GHG emissions to a specified percentage of 1990 levels in consecutive commitment periods. Annex B prescribed the relevant percentages for the first commitment period (2008 – 2012) with the second and subsequent commitment periods to be determined by the CMP.
40. To facilitate the achievement of national targets, the KP introduced three cooperative mechanisms. First, emissions trading between Annex I countries was permitted.<sup>55</sup> Second, the Clean Development Mechanism was established<sup>56</sup> whereby Annex I countries could implement projects that reduced emissions in non-Annex I Parties in exchange for certified emission reductions ('CERs'). Third, Joint Implementation was permitted,<sup>57</sup> allowing an Annex I country to implement projects that reduced emissions, improved energy efficiency or increased investment in clean technology in other Annex I countries in return for emission reduction units ('ERUs').

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<sup>55</sup> KP, Articles 4 and 17.

<sup>56</sup> KP, Article 12.

<sup>57</sup> KP, Article 6.



41. The detailed rules for the implementation of the Protocol were adopted at COP7 in Marrakesh in 2001, and are referred to as the ‘Marrakesh Accords’.<sup>58</sup> Commitments for a second commitment period (2012 – 2020) were agreed in the Doha Amendment to the KP in 2012,<sup>59</sup> but that amendment did not receive sufficient ratifications to enter into force until 31 December 2020, the same day the second commitment period ended.
42. The KP had very limited success in achieving global emissions reductions. That was in part due to its narrow focus only on the emissions of Annex I Parties.<sup>60</sup> The obligations it imposed on States have, for all material purposes, been superseded by the PA. As discussed below, the lessons learned from the KP influenced the design of the PA, resulting in a legal instrument that:
  - a. imposes mitigation obligations on all Parties, not just Annex I Parties;
  - b. relies on nationally determined mitigation pledges rather than top-down targets;
  - c. imposes obligations of conduct, rather than obligations of result; and
  - d. subjects international cooperative mechanisms to close scrutiny to ensure they deliver an overall mitigation in global emissions.

## 1.4 The Paris Agreement

43. The PA is the legal instrument which now sets the framework for international climate action, building on the objective and principles of the UNFCCC. As discussed below, the PA facilitates ongoing cooperation between Parties through negotiation and implementation under the CMA and through subsidiary bodies.

### 1.4.1 The nature of the Paris Agreement

44. While a legally-binding treaty, the PA is characterised by a mix of legally-binding obligations and non-legally-binding commitments,<sup>61</sup> all of which contribute to achieving

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<sup>58</sup> Decisions taken at CMP.1.

<sup>59</sup> Decision 1/CMP.8.

<sup>60</sup> Alan Boyle and Catherine Redgwell, *supra* n.40 at 391.

<sup>61</sup> “The Paris Agreement contains the full spectrum of provisions, from hard law to soft law and even ‘non-law’, provisions that do not have standard setting or normative content but which play a narrative building and context setting role.” Patt, A., L. Rajamani, P. Bhandari, A. Ivanova Boncheva, A. Caparrós, K. Djemouai, I. Kubota, J. Peel, A.P. Sari, D.F. Sprinz, J. Wettstad, 2022: International cooperation. In IPCC, 2022: *Climate Change 2022: Mitigation of Climate Change. Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, Cambridge University Press, Cambridge, UK and New York, NY, USA.

its purpose. Nonetheless, the distinction is legally significant: obligations are legally-binding on the Parties whereas commitments have no legally-binding effect, but Parties are expected to, and do, take their commitments seriously and seek to abide by them.

45. The PA contains obligations and commitments relating to a range of matters, including mitigation, adaptation, finance, capacity building and technology transfer, transparency, loss and damage, and institutional matters. As a 'package deal' each of these aspects is relevant to every other aspect. Accordingly, although not all of the PA is directed specifically at the obligations of Parties to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of GHGs for present and future generations, the PA as a whole seeks to achieve that objective and all parts of the PA are relevant to it.
46. That said, in the discussion that follows, New Zealand will highlight those aspects of the PA that are most obviously relevant to the question before the Court.

#### **1.4.2 Principles and goals of the Paris Agreement**

47. As set out in the preamble, the PA was adopted in pursuit of the objective of the UNFCCC and is guided by its principles, including CBDR-RC. However, to reflect the dynamic nature of national circumstances, the PA added "in light of different national circumstances" to the CBDR-RC principle. This addition marked a move away from the strict bifurcation of responsibilities as between developed and developing countries towards a more broad-based approach.<sup>62</sup>
48. Article 2 provides that the Agreement:  
"aims to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty, including by:  
(a) Holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change;  
(b) Increasing the ability to adapt to the adverse impacts of climate change and foster climate resilience and low greenhouse gas emissions development, in a manner that does not threaten food production; and  
(c) Making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development."
49. These aims have a collective character.<sup>63</sup> They do not create specific obligations for Parties, but they are relevant to the interpretation of each of the provisions of the PA

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<sup>62</sup> Bodansky, Brunnee, Rajamani, *supra* n.41 at p.219.

<sup>63</sup> Rajamani L, Werksman J. *The legal character and operational relevance of the Paris Agreement's temperature goal*. Phil. Trans. R. Soc. A 376: 20160458 (2018).

because they reflect the “object and purpose” of the treaty. This includes the temperature goal in Article 2(1)(a) (**‘the temperature goal’**).

50. The temperature goal is important because it reflects the scientific consensus at the time of the adoption of the PA.<sup>64</sup> In essence, it is the quantification of the qualitative objective of the UNFCCC: to avoid dangerous anthropogenic interference with the climate system, States committed to a collective aim of limiting warming 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.
51. It is a fundamental rule of both treaty and customary international law that “*every treaty in force is binding upon the parties to it and must be performed by them in good faith*”.<sup>65</sup> Article 31(1) of the Vienna Convention on the Law of Treaties accordingly provides as the basic rule of interpretation that: “*a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*”. The obligation of good faith has also been described as requiring application of treaties in a manner that does not frustrate their object and purpose.<sup>66</sup>
52. Article 3 of the PA affirms that Parties are required to perform certain obligations, “*with a view to achieving the purpose of the PA.*” In this context, the Article 2 temperature goal, does not create obligations, but does inform how Parties should interpret their obligations under the PA. Specifically, among other things, Parties should be satisfied that the performance of their obligations under Article 4 contributes to the collective achievement of the temperature goal.<sup>67</sup>

### 1.4.3 Mitigation obligations

53. Article 4 of the PA imposes obligations on Parties, central of which is the obligation to prepare, communicate and maintain successive nationally determined contributions

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<sup>64</sup> In the IPCC’s Second (1996), Third (2001) and Fourth (2007) Assessment Reports, the dangers of anthropogenic warming beyond 2°C were made increasingly clear. The IPCC’s AR5 Synthesis Report (2014) provided evidence that risks were more likely to be avoided at 1.5°C warming. The science has since moved on such that the scientific consensus now suggests that warming of 2°C is likely to carry substantially greater risks of adverse outcomes than 1.5°C: see the IPCC Special Report: Global Warming of 1.5°C (2018).

<sup>65</sup> *Vienna Convention on the Law of Treaties*, Article 26. See also paragraph 3 of the preamble: “Noting that the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognized.” For a discussion of the customary nature of the principle in Article 26, see: International Law Commission, *Yearbook of the International Law Commission, 1966, Vol II*, at p.211 (paragraphs 1 and 2).

<sup>66</sup> International Law Commission, *supra* n.65 at p.211 (paragraph 4); see also the other authorities cited in paragraph 2 of the same document.

<sup>67</sup> Practically this will be satisfied if the State has turned its mind to the temperature goal, and has prepared and communicated an NDC that is informed by the outcomes of the global stocktake and represents what it considers to be an effective contribution to the achievement of the temperature goal, in light of CBDR-RC in light of different national circumstances.

(NDCs) on at least a five-yearly basis.<sup>68</sup> In communicating their NDCs, all Parties are required to provide information necessary for clarity, transparency and understanding.<sup>69</sup> Parties must then pursue domestic mitigation measures with the aim of achieving the objectives of such contributions. Article 4 also reflects commitments relating to the ambition of NDCs.

*i. Obligations relating to NDCs*

54. Article 4 confers a discretion on Parties to determine the content and ambition of their own NDCs. As such, Article 4 represents a rejection of the KP's "top down" targets in favour of nationally determined "bottom-up" pledges. Article 4 does not prescribe any algorithm or method for determining the content and ambition of NDCs, but leaves this to each Party to determine through its own national process. That said, in preparing an NDC, each Party is required to:

a. interpret and perform their obligations in good faith and in a manner that does not defeat the object and purpose of the PA; and

b. ensure their NDC is informed by the outcome of the global stocktake referred to in Article 14 of the PA.<sup>70</sup>

55. The global stocktake is a five-yearly decision of the CMA, taking stock of the implementation of the Agreement to assess the collective progress towards achieving its purpose and its long-term goals. The first global stocktake decision was taken in November 2023 at COP28 (Decision -/CMA.5) and contains wide-ranging observations and exhortations relating to the implementation of the PA which Parties are legally required to take into account when updating and enhancing their actions and support under Article 4.

56. Parties have also made non-legally binding commitments in respect of the content and ambition of their NDCs. It is a matter for each Party to determine how its NDCs will deliver on its commitments, including:

a. The commitment in Article 3 of the PA to prepare, communicate and maintain successive NDCs with the view to achieving the purpose of the Agreement, including the temperature goal;

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<sup>68</sup> PA, Articles 4(2) and 4(9).

<sup>69</sup> PA, Article 4(8). See also Decision 1/CP.21 and Decision 4/CMA.1.

<sup>70</sup> PA, Articles 4(9) and 14(3).

- b. The collective commitment in Article 4(1) of the PA to reach global peaking of GHGs as soon as possible and to undertake rapid reductions thereafter so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of GHGs in the second half of this century, on the basis of equity, and in the context of sustainable development and efforts to eradicate poverty;
  - c. The commitment in Article 4(3) of the PA to ensure that a Party's NDC reflects its highest possible ambition, reflecting its CBDR-RC, in the light of different national circumstances;
  - d. The commitment in Article 4(3) of the PA to ensure that each successive NDC represents a progression beyond the Party's then current NDC;
  - e. The commitment of developed country Parties in Article 4(4) of the PA to continue taking the lead by undertaking economy-wide absolute emission reduction targets, and the collective recognition in Article 4(1) of the PA that peaking of emissions will take longer for developing countries.
57. Because NDCs are “nationally determined” and are to be prepared in the light of different national circumstances, Parties are entitled to have regard to a wide range of other factors when setting their NDCs. But they are still required to ensure compliance with their obligations under the PA, and should deliver on their commitments, when preparing and communicating their NDCs.
58. In this regard, it is relevant to note paragraphs 27 and 28 of Decision 1/CP.21,<sup>71</sup> which accompanied the adoption of the PA, and paragraphs 6 and 7 of Annex I to Decision 4/CMA.1,<sup>72</sup> which provides further guidance in relation to the mitigation section of Decision 1/CP.21. Both decisions seek the provision, together with a Party's NDC, of information to facilitate clarity, transparency and understanding, including how the Party considers that its NDC is fair and ambitious in the light of its national circumstances and how the NDC contributes towards achieving the objective of the UNFCCC as set out in its Article 2. Decision 4/CMA.1 seeks additional information including:
- a. Fairness considerations, including reflecting on equity;

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<sup>71</sup> Decision 1/CP.21, 'Adoption of the Paris Agreement', FCCC/CP/2015/10/Add.1.

<sup>72</sup> Decision 4/CMA.1, 'Further guidance in relation to the mitigation section of decision 1/CP.21', FCCC/PA/CMA/2018/3/Add.1.

- b. How the Party has addressed Article 4, paragraph 3, of the PA (successive NDCs will represent a progression beyond the current NDC and reflect highest possible ambition, reflecting its CBDR-RC, in the light of different national circumstances);
  - c. How the Party has addressed Article 4, paragraph 4, of the PA (developed countries should continue taking the lead by undertaking economy-wide absolute emission reduction targets and developing countries should continue to enhance mitigation efforts and are encouraged to move towards economy-wide targets);
  - d. How the NDC contributes towards Article 2, paragraph 1(a), and Article 4, paragraph 1, of the PA (the PA temperature goal and the aim to reach global peaking of emissions as soon as possible with rapid reductions thereafter so as to achieve net-zero emissions in the second half of this century).
59. The inclusion of these matters in the relevant decisions of the COP and CMA reflects the fact that they are matters that the PA itself requires a Party to address when preparing and communicating its NDC. On account of the “bottom up” approach adopted in the PA, each Party determines for itself how to address those matters, (i.e. the content and ambition of its NDC), as informed by consecutive global stocktakes. In this way, the achievement of the PA’s goals through NDCs is iterative. Parties must have regard not just to their own national circumstances when determining subsequent contributions, but also, as is implicit through the global stocktake process, the contributions that other Parties have communicated, and the cumulative effect of all contributions when measured against what is required collectively to achieve the purpose of the PA.
- ii. Obligations relating to the delivery of NDCs*
60. Article 4(2) of the PA also imposes obligations to pursue domestic mitigation measures with the aim of achieving the objectives of NDCs. Such mitigation measures may involve a combination of emissions reductions and removals.<sup>73</sup> States may also utilise cooperative mechanisms established under Article 6 of the PA.<sup>74</sup>
61. The Article 4(2) obligation to pursue domestic mitigation measures is an obligation of conduct, not result. The PA does not oblige Parties collectively to achieve the temperature goal or individually to achieve the objectives of their NDC. Article 4(2) does however require domestic controls (including policies, legislation and/or administrative controls) which, in conjunction with any utilisation of cooperative approaches, are reasonably capable of delivering the objectives of the NDC. It also

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<sup>73</sup> Under PA, Article 5(1), States should also take action to conserve and enhance sinks and reservoirs of GHGs.

<sup>74</sup> PA, Article 6 and see Paris Rulebook decisions: Decisions 6, 7 and 8 of CMA.4.

entails reasonable steps to implement and enforce such controls with the aim of meeting the objectives of the NDC. The combined obligations in Article 4(2) of the PA thereby set a standard of conduct which in effect, is equivalent to a due diligence standard.<sup>75</sup>

#### **1.4.4 Co-operative mechanisms for implementation and support**

62. The PA specifies three “means of implementation and support”<sup>76</sup> that are intended to facilitate the achievement of the objective of the UNFCCC and the purpose of the PA: finance; technology development and transfer; and capacity building. Access to finance and technology, and the availability of sufficient capacity impacts what a Party is capable of achieving as its “highest possible ambition” and therefore affects the extent to which Parties are able collectively to meet the temperature goal of the PA and protect the climate system and other parts of the environment from anthropogenic emissions of GHGs. Indeed, the ambition in the NDCs of a significant number of developing country Parties are explicitly conditional on receipt of adequate support to deliver that ambition.<sup>77</sup>
63. As for finance, Article 2(1) includes, as an objective of the PA, the goal of “[m]aking finance flows consistent with a pathway towards low GHG emissions and climate-resilient development”.<sup>78</sup> That objective is supported by:
- a. Article 9(1) of the PA, which places an obligation on developed country Parties to provide financial resources to developing country Parties with respect to both mitigation and adaptation, in continuation of their existing obligations under the Convention; and
  - b. Article 9(2) of the PA, which encourages developing country Parties to provide such support voluntarily (noting that Article 9(3) records the expectation that developed country Parties will continue to take the lead in mobilising climate finance as part of a global effort).
64. The PA does not quantify the scale of finance to be provided by developed to developing countries. However, in paragraphs 53 and 114 of Decision 1/CP.21, the COP:

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<sup>75</sup> That is, States in compliance with the PA will be meeting a due diligence standard; See also Voigt C, ‘*The Paris Agreement: What is the standard of conduct for parties?*’ QIL, Zoom-in 26 (2016), 17-28. For the avoidance of doubt, it is not New Zealand’s position that there is a distinct legal duty of diligence under the PA.

<sup>76</sup> PA, Article 14(1).

<sup>77</sup> Climate Watch data shows 136 Parties have submitted NDCs with some degree of conditionality: [https://www.climatewatchdata.org/ndcs-explore?category=finance\\_and\\_support](https://www.climatewatchdata.org/ndcs-explore?category=finance_and_support); see also Pauw WP, Castro P, Pickering J, Bhasin S (2019) *Conditional nationally determined contributions in the Paris Agreement: foothold for equity or achilles heel?* Clim Policy.

<sup>78</sup> PA, Article 2(1)(c).

- a. reaffirmed its goal for developed countries, in the context of meaningful mitigation actions and transparency on implementation, to collectively provide and mobilise USD\$100 billion annually by 2020, and extended this goal through to 2025, in the performance of their obligations under the UNFCCC and under Article 9(1) of the PA; and
  - b. agreed, before 2025, to set a new collective quantified goal from a floor of USD\$100 billion per year, taking into account the needs and priorities of developing countries.
65. By decisions of the COP<sup>79</sup> and CMA,<sup>80</sup> the Parties agreed that the relevant financial entities under the UNFCCC would also serve the PA.<sup>81</sup>
66. As for technology development and transfer: Article 10 of the PA sets out a long-term vision on the importance of fully realising technology development and transfer in order to improve resilience to climate change and to reduce GHG emissions. It requires all Parties to “*strengthen cooperative action on technology development and transfer*” and empowers the Technology Mechanism and the Financial Mechanism of the UNFCCC to support collaborative approaches to support research and development, and facilitating access to technology, in particular for early stages of the technology cycle, to developing country Parties.
67. Article 10(6) requires support, including financial support to be provided to developing country Parties for the implementation of Article 10, including for strengthening cooperative action on technology development and transfer at different stages of the technology cycle.
68. As for capacity building: Article 11 of the PA encourages a wide range of capacity building activities<sup>82</sup> and requires those Parties engaging in the enhancement of capacity in developing countries to communicate regularly on their actions and measures.<sup>83</sup> Article 11(5) provides that capacity-building activities “*shall be enhanced through appropriate institutional arrangements to support the implementation of this Agreement, including the appropriate institutional arrangements established under the [UNFCCC] that*

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<sup>79</sup> Decision 1/CP.21 para 58 and 63.

<sup>80</sup> Decision 14/CMA.1 and Decision 19/CMA.1.

<sup>81</sup> *ibid* para.38.

<sup>82</sup> PA, Article 11(1).

<sup>83</sup> PA, Article 11(4).



*serve this Agreement*". Decision 1/CP.1, which accompanied the PA, established the Paris Committee on Capacity-building, with the aim to "address gaps and needs, both current and emerging, in implementing capacity-building in developing country Parties and further enhancing capacity-building efforts, including with regard to coherence and coordination in capacity-building activities under the Convention."

#### **1.4.5 Oversight and transparency**

69. The PA's "bottom up" self-differentiated approach to climate mitigation approaches is, importantly, paired with a rigorous system of oversight to ensure the effective implementation of, among other things, Parties' mitigation obligations and commitments, and the monitoring of the means of implementation and support.<sup>84</sup>
70. Article 4(13) of the PA requires Parties to account for their NDCs by reporting on anthropogenic emissions and removals in accordance with guidance adopted by the COP and, in so doing, promote, among other things, environmental integrity, transparency, and completeness.<sup>85</sup> Article 13 builds on that obligation to establish an enhanced transparency framework for action and support including flexibilities for developing country Parties in light of their capacities.<sup>86</sup>
71. The purpose of the framework for action is:<sup>87</sup>
- "to provide a clear understanding of climate change action in the light of the objective of the Convention as set out in its Article 2, including clarity and tracking of progress towards achieving Parties' individual nationally determined contributions under Article 4, and Parties' adaptation actions under Article 7, including good practices, priorities, needs and gaps, to inform the global stocktake under Article 14."
72. The purpose of the framework for support is:<sup>88</sup>
- "to provide clarity on support provided and received by relevant individual Parties in the context of climate change actions under Articles 4, 7, 9, 10 and 11, and, to the extent possible, to provide a full overview of aggregate financial support provided, to inform the global stocktake under Article 14."
73. By Article 13(7), all Parties are required to provide information including a national inventory report of anthropogenic emissions by sources and removals by sinks of GHGs, prepared in accordance with good practice methodologies accepted by the Intergovernmental Panel on Climate Change and agreed upon by the CMA.<sup>89</sup> By Article 13(8), developed country Parties are required to provide information on financial,

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<sup>84</sup> Patt et al. (2022), *supra* n.61 at pp 1468 – 1470.

<sup>85</sup> PA, Article 4(13).

<sup>86</sup> Operationalised through Decisions 1 and 5/CMA.3.

<sup>87</sup> PA, Article 13(5).

<sup>88</sup> PA, Article 13(6).

<sup>89</sup> See Decision 4/CMA.1, Decision 18/CMA.1, and Decision 5/CMA.1.

technology transfer and capacity-building support provided to developing country Parties under Articles 9, 10 and 11 of the PA. By Article 13(11), both types of information are subject to a technical expert review which considers the Party's implementation and achievement of its NDC and any support provided. Parties must also participate in a facilitative, multilateral consideration of progress with respect to efforts under Article 9, and its respective implementation and achievement of its nationally determined contribution.

74. As part of the oversight architecture, the enhanced transparency framework is complemented by:
- a. A five-yearly global stocktake to assess the collective progress towards achieving the purpose of the PA and its long-term goals.<sup>90</sup> The global stocktake is critical to identifying any 'ambition gap' (i.e. the gap between mitigation pledges contained in NDCs and the achievement of the temperature goal) and iteratively increasing ambition in subsequent NDC rounds.
  - b. A mechanism to facilitate implementation of, and promote compliance, with the provisions of the PA.<sup>91</sup> That mechanism, known as the Paris Agreement Implementation and Compliance Committee ('PAICC'), is a facilitative, non-adversarial expert committee which operates under modalities and procedures adopted by the CMA.<sup>92</sup>
75. The oversight regime in the PA ensures that Parties are properly informed as to progress towards the collective achievement of the temperature goal and understand the collective level of ambition required to achieve it. That information is important to the functioning of the PA overall, as it informs Parties' performance of their obligation to prepare and communicate further NDCs. It also facilitates dialogue on 'fair share' and may help identify so-called 'free-riding' if it occurs.

#### ***1.4.6 Conclusion: a comprehensive framework for global action on climate change***

76. The UNFCCC and the PA set up a framework for ongoing cooperation. Indeed, the climate change treaty regime is premised on the understanding that:<sup>93</sup>

"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

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<sup>90</sup> PA, Article 14; and see Decision -/CMA.5.

<sup>91</sup> PA, Article 15.

<sup>92</sup> Decision 1/CP.21 paras 102-3 and Decision 20/CMA.1.

<sup>93</sup> UNFCCC preamble, para 6.

common but differentiated responsibilities and respective capabilities and their social and economic conditions”.

77. The institutional arrangements established under the UNFCCC and PA are critical to the achievement of the temperature goal and the protection of the climate system and other parts of the environment from anthropogenic emissions of GHGs for present and future generations. They enable ongoing dialogue and negotiation in the COP, CMA, subsidiary bodies and other institutions to address emerging issues as they arise, to negotiate rules, and to reach consensus-based outcomes. That architecture for ongoing cooperation is critical to the ability of the UNFCCC and the PA to retain the authority of state consent that underpins its legal force.

## **PART 2: OBLIGATIONS RELATING TO INTERNATIONAL TRANSPORTATION**

### **2.1 The UNFCCC/Paris Agreement is supplemented by other regimes designed to regulate emissions that cannot be addressed at the national level**

78. The UNFCCC does not distinguish between sources of GHG emissions by sector, but it also does not specifically provide for how States are to regulate emissions from the international shipping and aviation sectors which, by their nature, cannot be regulated at a national level. The KP recognised this and included an obligation for Annex I Parties to:<sup>94</sup>

“...pursue limitation or reduction of emissions of greenhouse gases not controlled by the Montreal Protocol from aviation and marine bunker fuels, working through the International Civil Aviation Organization and the International Maritime Organization, respectively.”

79. The PA does not specifically address international aviation and shipping emissions. The temperature goal therefore encompasses emissions from all sources. However, Decision 18/CMA.1 provides that international aviation and shipping emissions are not to be counted in national GHG reports.

### **2.2 International shipping**

80. The International Maritime Organization (IMO) agreement which regulates pollution from ships, the International Convention for the Prevention of Pollution from Ships (MARPOL),<sup>95</sup> includes an Annex VI which addresses air pollution from ships.<sup>96</sup> Parties to MARPOL amended Annex VI in 2011 to include measures aimed at the reduction of GHG emissions from ships. States are cooperating to this end at the IMO, and in July 2023 the Marine Environment Protection Committee of the IMO adopted a revised

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<sup>94</sup> KP, Article 2(2).

<sup>95</sup> Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships 1973 1340 UNTS 61 (entered into force 2 October 1983).

<sup>96</sup> MARPOL Annex VI.

strategy on the reduction of GHG emissions from ships.<sup>97</sup> The strategy includes an aim of “enhancing IMO's contribution to global efforts by addressing GHG emissions from international shipping. International efforts in addressing GHG emissions include the Paris Agreement and its goals...”<sup>98</sup>

## 2.3 International aviation

81. The International Civil Aviation Organization (ICAO) was established by the 1944 Convention on International Civil Aviation (the Chicago Convention).<sup>99</sup> Under the Chicago Convention, ICAO has the mandate to adopt international standards and procedures with respect to aviation,<sup>100</sup> and the ICAO Council has established a Committee on Aviation Environmental Protection (CAEP) for the purpose, *inter alia*, of assisting in the development of such standards and procedures on aircraft engine emissions.<sup>101</sup>
82. ICAO has adopted the Carbon Offsetting and Reduction Scheme for International Aviation (‘CORSIA’). CORSIA was established by ICAO Resolution A41-22. Although ICAO Resolutions are not binding, Contracting States are required to implement the scheme in accordance with the Standards and Recommended Practices which are now adopted as an annex to the Chicago Convention.<sup>102</sup> The scheme sets 2019 emissions as a baseline and requires airlines and other aircraft operators to purchase carbon credits to offset any emissions growth beyond 2019 levels. To ensure reliability and robustness, ICAO has published CORSIA Emissions Unit Eligibility Criteria<sup>103</sup> and a list of CORSIA Eligible Emissions Units.<sup>104</sup> The scheme has been divided into three phases: two initial voluntary phases (2021 – 2023; 2024 – 2026) and a mandatory phase commencing in 2027.
83. In 2022, the ICAO Assembly adopted resolution A41-21, as a consolidated statement of continuing ICAO policies and practices related to climate change.<sup>105</sup> The resolution

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<sup>97</sup> 2023 IMO Strategy on Reduction of GHG Emissions from Ships, Resolution MEPC.377(80), Annex 1, adopted 7 July 2023.

<sup>98</sup> *ibid* paragraph 1.10(1).

<sup>99</sup> Convention on International Civil Aviation 15 UNTS 295 (adopted 7 December 1944, entered into force 4 April 1947) [Chicago Convention].

<sup>100</sup> Chicago Convention, Article 37.

<sup>101</sup> ICAO Council, C-WP/13520.

<sup>102</sup> Annex 16, Vol IV.

<sup>103</sup> [www.icao.int/environmental-protection/CORSIA/Documents/ICAO\\_Document\\_09.pdf](http://www.icao.int/environmental-protection/CORSIA/Documents/ICAO_Document_09.pdf).

<sup>104</sup> [www.icao.int/environmental-protection/CORSIA/Documents/TAB/CORSIA%20Eligible%20Emissions%20Units\\_March2023.pdf](http://www.icao.int/environmental-protection/CORSIA/Documents/TAB/CORSIA%20Eligible%20Emissions%20Units_March2023.pdf).

<sup>105</sup> Resolution A41-21 ‘Consolidated statement of continuing ICAO policies and practices related to environmental protection – Climate change’.

includes a long-term global aspirational goal for international aviation which is in support of the PA's temperature goal:<sup>106</sup>

"ICAO and its Member States are encouraged to work together to strive to achieve a collective long-term global aspirational goal for international aviation (LTAG) of net-zero carbon emissions by 2050, in support of the Paris Agreement's temperature goal, recognizing that each State's special circumstances and respective capabilities (e.g. the level of development, maturity of aviation markets, sustainable growth of its international aviation, just transition, and national priorities of air transport development) will inform the ability of each State to contribute to the LTAG within its own national timeframe."

### **PART 3: WIDER INTERNATIONAL ENVIRONMENTAL LAW**

#### **3.1 Applicable environmental law obligations are consistent with the climate change treaty regime**

84. Multilateral negotiations on the protection of the climate system and other parts of the environment from anthropogenic emissions of GHGs take place primarily within the context of the climate change treaty regime.<sup>107</sup> States have consistently acknowledged that the UNFCCC system is the primary forum for negotiating the global response to climate change.<sup>108</sup>
85. That said, climate change has effects on all parts of the environment, so the obligations on States arising from a range of other agreements which relate to the environment and arising from customary international law have also been referenced in the question on which the Court is asked to provide an opinion. Below, New Zealand addresses, non-exhaustively, a number of agreements and principles of customary international law.
86. In doing so, New Zealand emphasises that any parallel obligations, to the extent applicable, would be consistent with, rather than conflict with, the obligations under the climate change treaty regime. In New Zealand's view, therefore, it is not necessary to have regard to the rule of *lex specialis derogate lex generali* because that rule is only necessary where norms are in a relationship of conflict. Here the obligations under the UNFCCC and the PA and other international environmental law obligations to the extent applicable should be interpreted compatibly. That approach is consistent with the ordinary rules of treaty interpretation and advances the systemic integration of international law.<sup>109</sup> As the International Law Commission's Study Group on

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<sup>106</sup> *ibid* paragraph 7.

<sup>107</sup> Or, in relation to international shipping and aviation, within ICAO and the IMO.

<sup>108</sup> See, for example, preambular paragraph 2 of UNGA Resolutions A/RES/71/228, A/RES/72/219, A/RES/73/232, A/RES/74/219, A/RES/75/217, A/RES/76/205, and preambular paragraph 4 of A/RES/70/205.

<sup>109</sup> See Article 31(3)(c) of the *Vienna Convention on the Law of Treaties* and *Conclusions of the Study Group on Fragmentation*, International Law Commission, Annual Report 2006, Chapter XI, p.178 at [251(4)].

Fragmentation has recognised, “when several norms bear on a single issue, they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations”.<sup>110</sup>

### 3.2 Obligations under other international treaties

#### 3.2.1 *The United Nations Convention on the Law of the Sea*

87. As outlined above, climate change and ocean acidification are having, and will have, harmful effects on marine species, habitats, ecosystems, and biodiversity. Furthermore, the impacts of climate change and ocean acidification on the marine environment have been shown to interact with other human activities in the marine environment.<sup>111</sup>
88. The 1982 United Nations Convention on the Law of the Sea (“UNCLOS”)<sup>112</sup> is “the international basis on which to pursue the protection and sustainable development of the marine environment and coastal environment and its resources”.<sup>113</sup> It was established to be a comprehensive constitution for the oceans that would stand the test of time.<sup>114</sup> Part XII of UNCLOS has an objective of environmental protection. Article 192 provides that “States have the obligation to protect and preserve the marine environment”.<sup>115</sup> Article 194 requires State Parties to take measures necessary to prevent, reduce and control “pollution of the marine environment”.
89. The International Tribunal for the Law of the Sea is currently seized of a request for an advisory opinion on the following question:

“What are the specific obligations of State Parties to the United Nations Convention on the Law of the Sea (the “UNCLOS”), including under Part XII:

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

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<sup>110</sup> *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* Report of the Study Group of the International Law Commission A/CN.4/L.702, 18 July 2006, at p.105.

<sup>111</sup> Nerilie Abram and others “IPCC, 2019: Summary for Policymakers” in Hans-Otto Pörtner and others (eds) *IPCC Special Report on the Ocean and Cryosphere in a Changing Climate* (Cambridge and New York: Cambridge University Press, 2022) 3 at 12-13 and 22.

<sup>112</sup> United Nations Convention on the Law of the Sea 1833 UNTS (opened for signature 10 December 1982, entered into force 16 November 1992) [UNCLOS].

<sup>113</sup> *Agenda 21: Programme of Action for Sustainable Development* UN GAOR 46th Sess, Agenda Item 21, A/Conf 151/26 (1992) [Agenda 21] at [17.1].

<sup>114</sup> T B Koh of Singapore, President of the Third United Nations Conference on the Law of the Sea “A Constitution for the Oceans” (remarks, adapted from statements by the President on 6 and 11 December 1982 at the final session of the Conference at Montego Bay) (available at: [https://www.un.org/depts/los/convention\\_agreements/texts/koh\\_english.pdf](https://www.un.org/depts/los/convention_agreements/texts/koh_english.pdf), accessed 19 May 2023).

<sup>115</sup> UNCLOS, Article 192.

90. On 15 June 2023, New Zealand filed a written statement setting out its views on the answer to those questions. New Zealand does not repeat those views here but attaches the written statement at **Annex A** to these written observations. In short, UNCLOS imposes a relevant obligation on States to protect the ocean from dangerous levels of anthropogenic emissions of GHGs in the atmosphere. That obligation requires States to act with due diligence to minimise the risk of deleterious effects on the marine environment through the accumulation of anthropogenic GHG emissions, including through collective action in the performance of their duty to cooperate.
91. New Zealand's written statement records the view that the climate change treaty regime and UNCLOS are compatible regimes: the standard of due diligence required by the Convention is informed by the obligations under the UNFCCC and the PA.

### 3.2.2 *The Montreal Protocol*

92. The Montreal Protocol on Substances that Deplete the Ozone Layer (the Montreal Protocol) 1987 was adopted for the primary purpose of protecting the ozone layer from harmful depletion by chlorofluorocarbons (CFCs), halons and hydrochlorofluorocarbons (HCFCs). However, the preamble also acknowledged the "*potential climatic effects of emissions of these substances*". As a matter of fact, the IPCC confirms that the relevant substances have extremely high global warming potentials (GWP), up to 15,000 times as powerful as carbon dioxide.<sup>116</sup>
93. The Protocol imposes obligations on Parties that regulate the production, consumption and trade of CFCs, halons and HCFCs, with a view to their phase down over time and requires annual reports on the production, export and import of those substances.<sup>117</sup> The Kigali Amendment to the Montreal Protocol applies similar obligations to regulate the production, consumption and trade of hydrofluorocarbons (HFCs) which have a similarly high GWP.
94. On account of the global warming potential of the substances regulated by the Montreal Protocol and its Kigali Amendment, New Zealand considers that the instruments constitute obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of GHGs for present and future generations. The obligations support the objective of the

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<sup>116</sup> IPCC AR6 Working Group I Report, *Climate Change 2021: The Physical Science Basis*, Chapter 7.

<sup>117</sup> Notably, the reporting obligations under the UNFCCC and the PA exclude the requirement to report on emissions from substances regulated by the Montreal Protocol: see UNFCCC, Article 12(1)(a) and [unfccc.int/process-and-meetings/transparency-and-reporting/methods-for-climate-change-transparency/methodological-issues-relating-to-fluorinated-gases](https://unfccc.int/process-and-meetings/transparency-and-reporting/methods-for-climate-change-transparency/methodological-issues-relating-to-fluorinated-gases)

UNFCCC and the temperature goal of the PA. The UNFCCC Secretariat and Ozone Secretariat established under the Montreal Protocol collaborate closely.

### **3.2.3 Other treaties containing obligations relating to the protection and conservation of ecosystems, habitats, and areas.**

95. International environmental law contains a suite of obligations on States to protect and preserve ecosystems, habitats, and areas.<sup>118</sup> While those obligations are not directed at the protection of the climate or other parts of the environment from anthropogenic emissions of GHGs, in practice they require action by States that: a) take into account the effects of climate change; and b) provide significant mitigation co-benefits (e.g. through the protection of forest sinks, wetlands, and the marine environment). They can be interpreted as obligations that *contribute towards* ensuring the protection of the climate system and other parts of the environment from anthropogenic emissions of GHGs.

## **3.3 Obligations under customary international law**

### **3.3.1 The duty to prevent transboundary harm**

96. The duty States owe to one another to prevent significant transboundary environmental harm is well established at customary international law. The duty has however been established in relation to environmental harm which differs materially from that caused to the climate system and other parts of the environment from anthropogenic emissions of GHGs. There is no established norm of customary law specific to transboundary harm caused by climate change. This section describes the content of the established customary duty in general terms, identifies how harm caused by climate change differs from the established cases, and submits that, if the established duty were to apply in the climate change context, States' standard of conduct in relation to climate change-related transboundary harm would be that set out in the climate change treaty regime.

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<sup>118</sup> See, for example, obligations under the *Convention on Biological Diversity* 1760 UNTS 79 (opened for signature 5 June 1992, entered into force 29 December 1993); the *Convention on Wetlands of International Importance especially as Waterfowl Habitat* 996 UNTS 246 (entered into force 21 December 1975); 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* (opened for signature 20 September 2023). See also the obligation under Article 3 of the *Protocol on Environmental Protection to the Antarctic Treaty* which requires activities in the Antarctic Treaty area to be planned and conducted so as to avoid adverse effects on climate or weather patterns.



i. Scope of the customary duty

97. The duty is principle 21 of the Stockholm Declaration<sup>119</sup> and Principle 2 of the Rio Declaration.<sup>120</sup> It has been affirmed in numerous opinions and judgments of this Court.<sup>121</sup>

a. In the *Nuclear Weapons Advisory Opinion* the Court has affirmed that:<sup>122</sup>

“the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. 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.”

b. In the *Pulp Mills case*, the Court said:

“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” (*Corfu Channel (United Kingdom v. Albania), Merits, Judgment, I.C.J. Reports 1949*, p.22). 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. This Court has established that this obligation “is now part of the corpus of international law relating to the environment” (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996(I)*, p.242, para.29).”

98. The duty to prevent significant transboundary harm requires due diligence by States. A due diligence obligation is one of conduct, not of result.<sup>123</sup> It is not intended to guarantee that significant harm be totally prevented.<sup>124</sup>

99. The standard against which a State’s conduct should be examined “is that which is generally considered to be appropriate and proportional to the degree of risk in the particular instance”.<sup>125</sup> In its *Activities in the Area Advisory Opinion*, the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea observed that this standard will depend on the level of risk and activities involved, and may vary over time.<sup>126</sup> The

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<sup>119</sup> Report of the UN Conference on the Human Environment, Stockholm, 5-16 June 1972.

<sup>120</sup> Report of the UN Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992.

<sup>121</sup> In addition to the cases below, see *Gabcikovo-Nagymaros Project (Hungary/Slovakia) (Judgment)* [1997] ICJ Rep 7 (*Gabcikovo-Nagymaros Project*), at [53].

<sup>122</sup> *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 3, at [29].

<sup>123</sup> *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010*, p. 14 (*Pulp Mills*) at [77]; *Gabcikovo-Nagymaros Project*, *supra* n.121, at [140]; *Responsibilities and Obligations of States with respect to Activities in the Area* [2011] ITLOS Rep 10 (*Activities in the Area Advisory Opinion*) at [110 - 111]; *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC) (Advisory Opinion)* [2015] ITLOS Rep 4 (*SRFC Advisory Opinion*) at [129].

<sup>124</sup> ILC Draft Articles on Prevention of Transboundary Harm from Hazardous Substances, Report of the International Law Commission on the work of its fifty-third session, ILC Report (2001) GAOR A/56/10 at 153-154.

<sup>125</sup> *Draft Articles on Prevention of Transboundary Harm*, *supra* n.124 at [11].

<sup>126</sup> *Activities in the Area (Advisory Opinion)*, *supra* n.123 at [74].

Chamber concluded that due diligence requires a sponsoring State “to take [reasonably appropriate] measures within its legal system”.<sup>127</sup> The obligation has been described as requiring a State, “... to deploy adequate means, to exercise best possible efforts, to do the utmost...”<sup>128</sup> It entails a standard that takes into account evolving technology<sup>129</sup> and may also take differing means and capabilities into account.<sup>130</sup>

100. Due diligence may also import a duty to cooperate. In the *Pulp Mills* case this Court said that it is “by co-operating that the States concerned can jointly manage the risks of damage to the environment that might be created by the plans initiated by one or other of them, so as to prevent the damage in question”.<sup>131</sup> Depending on the context, the duty to cooperate may entail not only substantive obligations contained in applicable agreements, but also a requirement to take certain procedural actions, such as notification,<sup>132</sup> exchange of information,<sup>133</sup> consultations,<sup>134</sup> negotiation,<sup>135</sup> undertaking appropriate environmental assessments,<sup>136</sup> or giving due regard to the recommendations of competent organisations.<sup>137</sup> The duty to cooperate is a duty of an ongoing nature and is also an obligation of conduct, rather than an obligation of result.<sup>138</sup> As Judge Wolfrum said in his Separate Opinion in *The MOX Plant Case*: “The duty to cooperate denotes an important shift in the general orientation of the international legal order. It balances the principle of

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<sup>127</sup> *ibid* at [117]–[120].

<sup>128</sup> *SRFC Advisory Opinion*, *supra* n.124 at [129]; *Activities in the Area (Advisory Opinion)*, *supra* n.123 at [110].

<sup>129</sup> Alan Boyle and Catherine Redgwell, *supra* n.40 at p.148.

<sup>130</sup> *ibid* at p.149.

<sup>131</sup> *Pulp Mills*, *supra* n.123 at [77]; see also *Draft Articles on Prevention of Transboundary Harm*, *supra* n.124, commentary to preamble at [1].

<sup>132</sup> *Dispute over the Status and Use of the Waters of the Silala (Chile v Bolivia) (Judgment)* ICJ 1 December 2022 (*Silala (Chile v Bolivia)*) at [83].

<sup>133</sup> *MOX Plant (Ireland v. United Kingdom), Provisional Measures, Order of 3 December 2001*, ITLOS Reports 2001, p.95 at [84]; *Silala (Chile v Bolivia)*, *ibid* at [83].

<sup>134</sup> *Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v Singapore) (Provisional Measures Order)* [2003] ITLOS Rep 10 (*Johor (PMO)*) at p.27. *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua) (Judgment)* [2015] ICJ Rep 665 (*Border Area (Costa Rica v Nicaragua)*) at [173]: “The Court also notes Nicaragua’s commitment, made in the course of the oral proceedings, that it will cooperate with Costa Rica in assessing the impact of such works on the river. In this connection, the Court considers that, if the circumstances so require, Costa Rica will have to consult in good faith with Nicaragua, which is sovereign over the San Juan River, to determine the appropriate measures to prevent significant transboundary harm or minimize the risk thereof.”

<sup>135</sup> *Gabčíkovo-Nagymaros Project*, *supra* n.121 at [141]; *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America) (Judgment)* [1984] ICJ Rep at [112].

<sup>136</sup> *Border Area (Costa Rica v Nicaragua)* *supra* n.134 at [173]; *Silala (Chile v Bolivia)*, *supra* n.132 at [83]; *South China Sea Arbitration (Republic of the Philippines v the People’s Republic of China (Award))* PCA 2013-19, 12 July 2016 (*South China Sea Arbitration (Award)*) at [988].

<sup>137</sup> *Whaling in the Antarctic (Australia v Japan, New Zealand Intervening) (Judgment)* [2014] ICJ Rep 226 at [83] and [240].

<sup>138</sup> *The “Enrica Lexie” Incident (Italian Republic v Republic of India) (Award)* PCA 2015-28, 21 May 2020 (*Enrica Lexie (Award)*) at [723]; *Silala (Chile v Bolivia)*, *supra* n.132 at [129].

*sovereignty of States and thus ensures that community interests are taken into account vis-à-vis individualistic State interests.”*<sup>139</sup>

ii. *Distinguishing features of the climate change context*

101. Harm to the climate system and other parts of the environment from anthropogenic emissions of GHGs differs from cases where transboundary environmental harm has been raised. Such cases have involved:

- a. Polluting activity on the territory of State A, in relation to which State A has both knowledge of the risk of harm and the capacity to control that risk.
- b. Harmful effects on the territory of State B caused by the transboundary migration of pollution onto the territory of State A.

102. The harm caused by anthropogenic emissions of GHGs can be distinguished from those cases for a number of reasons, including:

- a. The harm arises from the cumulative GHG emissions contributed by all States in all parts of the world since the start of the industrial revolution.
- b. As a result, all States are simultaneously contributors to, and experience harmful effects from, climate change caused by anthropogenic emissions of GHGs.
- c. A single contributing State has no capacity to control past emissions (including emissions that pre-dated scientific knowledge of the harmful effects of anthropogenic GHGs) and has no capacity to control the current and future emissions of others.
- d. The causative link between emissions from State H and the effects experienced by State Q is considerably harder to demonstrate.

iii. *The customary duty in light of the climate change treaty regime*

103. The preamble to the UNFCCC recalls that States have: “*the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other*

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<sup>139</sup> See the Separate Opinion of Judge Wolfrum in *The MOX Plant Case*, *supra* n.133. The International Court of Justice has spoken of “a growing awareness of the risks for mankind – for present and future generations – of pursuit of [human] interventions at an unconsidered and unabated pace” on the environment which has triggered the development of new norms and standards in that field: *Gabcíkovo-Nagymaros Project*, *supra* n.122 at [140]. See also *Pulp Mills*, *supra* n.124 at [281].

*States or of areas beyond the limits of national jurisdiction.*"<sup>140</sup> While this indicates States had the customary international law duty in mind when developing the climate change treaty regime, it does not evidence state practice endorsing the direct application of the customary international law duty in the context of climate change. Moreover, there is no established norm of international customary law specific to transboundary harm caused by climate change which requires States to regulate GHG emissions to prevent harm to other States.

104. In any case, if the obligation to prevent transboundary harm were to be applied to the climate change context (and there are significant unresolved questions about whether it is appropriate to do so), the standard of due diligence required would be determined by reference to widely agreed standards of conduct reflecting state practice.
105. In the case of climate change, such widely agreed standards of conduct are found exclusively in the climate change treaty regime. In New Zealand's view, to the extent the obligation to prevent transboundary harm applies in a climate change context, good faith compliance with the obligations under the UNFCCC and the PA and good faith engagement in ongoing negotiations in the climate change treaty system would constitute the necessary standards of conduct for States in relation to climate change-related transboundary harm. The climate change treaty system is the forum in which the international community cooperates with a view to addressing climate change. The temperature goal is based on best available science and represents the international community's articulation of what is necessary at the global level to avoid dangerous anthropogenic climate change. The PA, as a whole, is designed to achieve that goal. The measures required of States by the PA reflect the international community's view on what steps are required by States to prevent significant transboundary harm from climate change.
106. Some commentators have explicitly described the climate change treaty regime as representing "...the agreed standard of due diligence for the parties...".<sup>141</sup> And there are evident parallels between what is required by a standard of due diligence and what is required by the UNFCCC and PA.<sup>142</sup> There is no consistent state practice to suggest

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<sup>140</sup> See also UNGA Resolution 44/207, which encouraged the negotiation of a framework convention: "4. ...reaffirms [States'] responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction and to play their due role in preserving and protecting the global and regional environment in accordance with their capacities and specific responsibilities".

<sup>141</sup> Alan Boyle and Catherine Redgwell, *supra* n.40 at 362.

<sup>142</sup> These include: i) the parallel between taking differing means and capabilities into account when assessing the standard of due diligence and the UNFCCC guiding principle of CBDR-RC in light of national circumstances, as incorporated into the PA; ii) the parallel between the due diligence requirement of exercising best possible efforts to "do the utmost" and the commitment for NDCs to reflect a Party's "highest possible ambition".

that the customary rule of prevention of transboundary harm could impose a standard of conduct on States that is not already realised through compliance with UNFCCC and PA obligations.<sup>143</sup>

107. Consistent with Article 31(3)(c) of the Vienna Convention on the Law of Treaties, and as the ILC's Study Group on Fragmentation has also identified, the principle of systemic integration calls for attention to be given to the rules of customary international law and general principles of law applicable in relations between the parties, when interpreting a treaty.<sup>144</sup> Any customary duty relevant to climate change should therefore be consistent with and support the interpretation of the obligations in the UNFCCC and the PA as set out above, so as to reflect the importance of NDCs being prepared, communicated and maintained in a manner that contributes to the collective achievement of the temperature goal. Importantly, custom would also reinforce the duty to cooperate through the climate change treaty system as discussed above.<sup>145</sup>

### ***3.3.2 The precautionary approach is embedded in the climate change treaty regime***

108. The principle of prevention is closely linked to the precautionary approach. The International Tribunal for the Law of the Sea has noted "*a trend towards the precautionary approach forming part of customary international law*".<sup>146</sup> While there are various formulations of the precautionary approach, at its most basic expression it is a requirement for States to act with "prudence and caution" where there are significant risks to the environment. Principle 15 of the Rio Declaration requires that:<sup>147</sup>

"In order to protect the environment, the precautionary approach shall be widely applied by states according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."

109. That formulation found expression in the Ministerial Declaration for the Second World Climate Conference<sup>148</sup> and appears as a guiding principle in Article 3(3) of the UNFCCC. As such, New Zealand takes the view that the precautionary approach is embedded in the climate change treaty regime and its parallel application under customary international law does not impose additional or different obligations.

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<sup>143</sup> Mayer observes for example that state practice would not support identification of "a customary obligation requiring states to implement mitigation action consistent with either temperature target" in Mayer, Benoit, 'Customary Obligations', *International Law Obligations on Climate Change Mitigation* (Oxford, 2022; online edn, Oxford Academic, 17 Nov. 2022), p 125.

<sup>144</sup> International Law Commission, Annual Report 2005, Chapter XI, p. 87 at [470].

<sup>145</sup> Paragraphs 74 and 75.

<sup>146</sup> *Area Advisory Opinion*, *supra* n.126 para 135. And see *Southern Bluefin Tuna Cases (New Zealand v Japan; Australia v Japan)* ITLOS order of 27 August 1999, paras 77-80.

<sup>147</sup> *supra* n.120.

<sup>148</sup> *supra* n.26 at paras 7 and 8.

## PART 4: INTERNATIONAL HUMAN RIGHTS LAW

### 4.1 Overview

110. The international human rights law framework includes the core UN human rights treaties,<sup>149</sup> and customary international law as reflected in, *inter alia*, parts of the Universal Declaration on Human Rights ('UDHR').<sup>150</sup> That framework is supplemented in some regions by regional human rights conventions including the European Convention on Human Rights, the American Convention on Human Rights, the African Charter on Human and Peoples' Rights, and the Arab Charter on Human Rights.
111. Broadly speaking, human rights can be divided into civil and political rights, social and economic rights, and group rights.
- a. As regards civil and political rights, States have an obligation to respect and to ensure to all individuals within their territory and subject to their jurisdiction the rights recognised by the core UN human rights conventions to which they are party. The extent of any positive obligation to ensure the enjoyment of such rights is dependent on the right in question.
  - b. As regards social and economic rights, States have an obligation to take steps individually and through international assistance and cooperation with a view to achieving progressively the full realisation of the rights recognised in the relevant conventions to which they are party.
  - c. As regards group rights, such as the right to self-determination and the rights of indigenous peoples, the scope of the obligations on States is right-specific.

### 4.2 Climate change is capable of interfering with the enjoyment of human rights

112. The impacts of climate change are capable of serious interference with the enjoyment of a wide range of civil and political rights, social and economic rights, and group rights.<sup>151</sup>

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<sup>149</sup> International Covenant on Civil and Political Rights ('ICCPR'); International Covenant on Economic and Social Rights ('ICESCR'); Convention on the Elimination of All Forms of Discrimination Against Women ('CEDAW'); International Convention on the Elimination of All Forms of Racial Discrimination ('ICERD'), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('CAT'), Convention on the Rights of the Child ('CRC'), International Convention on Protection of the Rights of All Migrant Workers and Members of Their Families ('ICMRW').

<sup>150</sup> J. Crawford, *Brownlie's Principle of Public International Law* (8th edition, 2012), Oxford University Press at p.636.

<sup>151</sup> See e.g. the Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy, and sustainable environment, '*Mapping Human Rights Obligations Relating to the Enjoyment of a Safe, Clean and Healthy and Sustainable Environment – Focus report on human rights and climate change*'

More frequent and severe weather events such as floods, heatwaves, droughts, wildfires and storms as well as slow-onset events including increased temperature, desertification, loss of biodiversity, glacial retreat, sea-level rise, and an increased risk of vector-borne disease could, in specific circumstances to specific individuals, threaten rights including: the right to life<sup>152</sup> the right to be free from arbitrary interference with privacy, family life, and home life,<sup>153</sup> rights to enjoy one's culture<sup>154</sup>, the right to food, water and sanitation,<sup>155</sup> and the right to health.<sup>156</sup>

113. In recent years, UN treaty bodies<sup>157</sup> and Special Rapporteurs<sup>158</sup> have highlighted these actual or anticipated impacts to support the view that international human rights law requires States to take all reasonable measures to mitigate climate change through emissions reductions and removals. Certain obligations under human rights instruments have been relied on in domestic and regional courts to establish duties on States to mitigate climate change, with varying degrees of success.<sup>159</sup> The Grand Chamber of the European Court of Human Rights ('ECtHR') is currently considering three cases where such arguments are advanced.<sup>160</sup> The Inter-American Court of Human Rights ('IACtHR') is receiving submissions on an advisory opinion which will address the obligations on States under the American Convention on Human Rights to respond to climate change.<sup>161</sup> To date, however, there has been no decision from a UN treaty body or judgment from a regional human rights court authoritatively establishing the existence of a general obligation on States under international human rights law to mitigate climate change through emissions reductions and removals.

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OHCHR 2014; A/HRC/31/52, *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment* 1 February 2016.

<sup>152</sup> ICCPR, Art 6, GC36.

<sup>153</sup> ICCPR, Art 17.

<sup>154</sup> ICCPR, Art 27.

<sup>155</sup> ICESCR, Art 11.

<sup>156</sup> ICESCR, Art 12.

<sup>157</sup> UN Human Rights Committee General Comment 36, para 62; UN Child Rights Committee General Comment 26, paragraphs 95 – 98; Joint statement by the Committee on the Elimination of Discrimination against Women, the Committee on Economic, Social and Cultural Rights, the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, the Committee on the Rights of the Child and the Committee on the Rights of Persons with Disabilities '*Statement on Human Rights and Climate Change*' paras 10 – 11.

<sup>158</sup> See Daniel Boyd, Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy, and Sustainable Development, UN Doc A/74/161 (2019).

<sup>159</sup> See *Neubauer et al v Germany*, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Mar. 24, 2021, Case No. BvR 2656/18/1, BvR 78/20/1, BvR 96/20/1, BvR 288/20; *Urgenda Foundation (on behalf of 886 individuals) v The State of the Netherlands (Ministry of Infrastructure and the Environment)*, First instance decision, HA ZA 13-1396, C/09/456689, ECLI:NL:RBDHA:2015:7145, ILDC 2456 (NL 2015), 24th June 2015, Netherlands; The Hague; District Court.

<sup>160</sup> *Duarte Agostinho & Oths v Portugal & 32 Oths; Verein KlimaSnorinnen Schweiz & Oths v Switzerland; Carême v France*.

<sup>161</sup> *Request for Advisory Opinion on Climate Emergency and Human Rights to the Inter-American Court of Human Rights from the Republic of Colombia and the Republic of Chile*, 9 January 2023.

### 4.3 New Zealand does not consider that international human rights law imposes a generalised obligation on States to mitigate climate change through emissions reductions and removals

114. The international human rights law framework does not contain provisions requiring States to take steps to protect the climate system and other parts of the environment from anthropogenic climate change. Although there is some recognition of a right to a clean and healthy environment,<sup>162</sup> and some regional instruments expressly protect such a right,<sup>163</sup> New Zealand does not consider that the content of that right is sufficiently well defined to have achieved the status of customary international law.<sup>164</sup> The core UN human rights treaties have extremely limited references to environmental protection.<sup>165</sup>
115. That said, treaty bodies<sup>166</sup> and regional human rights courts<sup>167</sup> have interpreted certain rights in a manner that imposes obligations on States to take steps to protect the rights

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<sup>162</sup> Human Rights Council Resolution 48/13 18 October 2021, UN Doc A/HRC/RES/48/13; UNGA Resolution 76/300 1 August 2022, UN Doc A/RES/76/300.

<sup>163</sup> African Charter on Human and Peoples' Rights, Art 24; Arab Charter of Human Rights Art 38; Protocol of San Salvador to the American Convention on Human Rights, Art 11.

<sup>164</sup> See New Zealand's Explanation of Vote delivered on 28 July 2022 after the adoption by the UN General Assembly of Resolution 76/300, UN Doc A/76/PV.97.

<sup>165</sup> Article 12 of ICESCR recognises that, as part of the progressive realisation of the right to health, States Parties shall take necessary measures relating to the improvement of all aspects of environmental and industrial hygiene.<sup>165</sup> Similarly, Article 24 of the CRC (right to health) requires consideration to be given to the dangers and risks of environmental pollution when taking appropriate measures to combat disease and malnutrition.

<sup>166</sup> See, for example:

- The Human Rights Committee, in *Portillo Cáceres v Paraguay* CCPR/C/126/D/2751/2016, decision of 25 July 2019, found that a State's failure to take action against environmental harm can violate its obligations to protect the rights to life and to private and family life under Articles 6 and 17 of the ICCPR. Although that case related to a particular situation where the relevant State had failed to enforce domestic law to prevent serious risks to individuals from the spraying of toxic agrochemicals, the HRC based its views on the wider principle expressed at paragraphs 26 and 62 of General Comment 36 on the Right to Life, where the HRC said that: "[i]mplementation of the obligation to respect and ensure the right to life, and in particular life with dignity, depends, inter alia, on measures taken by States parties to preserve the environment and protect it against harm, pollution and climate change caused by public and private actors."
- The Child Rights Committee, in General Comment 26, concluded that States have a due diligence obligation to take appropriate preventive measures to protect children against reasonably foreseeable environmental harm and violations of their rights, paying due regard to the precautionary principle.
- The African Commission on Human and Peoples' Rights, in General Comment 3 on the right to life, expressed the view that, in the exercise of their positive obligations to protect a dignified life, States are obliged to take preventative steps to preserve the natural environment.

<sup>167</sup> See, for example:

- The IACtHR, in its *Advisory Opinion OC-23/17 on the Environment and Human Rights* (15 November 2017) expressed the view that, to respect and ensure the rights to life and personal integrity, in the context of environmental protection, States must exercise due diligence to comply with their co-existing obligations under international environmental law, including: the obligation of prevention; the precautionary principle; the obligation of cooperation, and the procedural obligations relating to environmental protection. See also: *Kawas Fernández v. Honduras*, judgment of 3 April 2009, series C, No. 196, para. 148.
- The ECtHR, in *Pavlov & Oths v Russia* (application number 31612/09), judgment of 11 October 2022, affirmed the duty on Contracting Parties under Article 8 of the Convention to take adequate measures to prevent or



of those impacted by environmental harm. These cases typically involve specific situations where localised environmental harm creates serious risks for individuals living near, for example, the spraying of toxic agrochemicals or the release of toxic industrial emissions. New Zealand considers these cases do not support a general human rights obligation on States to mitigate climate change through emissions reductions and removals.

116. Consideration of human rights obligations in the climate change context requires recognition of the following distinctive features of climate change:

- a. First, international human rights law imposes obligations that are essentially territorial. That is, States have agreed they owe obligations to those within their territory and, exceptionally, to those outside their territory where they exercise effective control over a place or a person.<sup>168</sup> The territorial scope of obligations under the abovementioned interpretations of human rights law would not be at issue in cases where the source of pollution and those impacted by it are both within the jurisdiction and control of the same State. However, in the climate change context, the source of pollution and those impacted by it are both diffuse and lie predominantly outside the State's jurisdiction and control. The territorial State is unlikely to have control over the vast majority of the pollution contributing to the harm, and reductions of domestic emissions may have no effect in protecting those within their jurisdiction from the effects of climate change. The jurisdictional limits of international human rights law mean it is ill-equipped to address impacts on the enjoyment of human rights caused by the cumulative emissions of all States since the start of the industrial revolution. While some have argued for an extension of the rules governing extra-territorial jurisdiction in the climate change context,<sup>169</sup> such an extension would, in New Zealand's view, breach the principle of state consent and would be unsupported by authority.<sup>170</sup>
- b. Second, in the context of the jurisdictional limits to States' obligations under international human rights law, taking steps to mitigate climate change through

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reduce environmental pollution that affects the enjoyment of the right to private and family life. Also see: *Cordella and others v. Italy* (application Nos. 54414/13 and 54264/15), judgment of 24 January 2019, para. 157.

<sup>168</sup> See, for example, Human Rights Committee General Comment 31, para.10.

<sup>169</sup> This argument has been made by the Child Rights Committee in particular: see *Sacchi v Argentina* CRC/C/88/D104/2019 communication of 22 September 2021 at 10.5-10.7.

<sup>170</sup> New Zealand does not rule out the possibility of extra-territorial jurisdiction arising in certain cases of transboundary environmental harm, for example in the situation arising in the Aerial Herbicide Spraying case (*Ecuador v. Colombia*) where there was a single, definable source of pollution within the control of the State and the transboundary effects were experienced by a definable group of individuals in a definable area in the immediate vicinity of the national border. But that is very different to the climate change context.

emissions reductions and removals may not, in any given factual situation, be either i) necessary to ensure the relevant rights or progressively achieve their full realisation, or ii) reasonably likely to deliver that outcome:

- i. To the extent that international human rights law imposes positive obligations on States to take steps to protect the rights of those within their jurisdiction from interference by the adverse impacts of climate change, each State has a discretion as how best to achieve that protection. What is necessary to ensure relevant rights or progressively achieve their full realisation will always be fact-dependent. International human rights law is focused on the protection of rights of individuals and groups and not on the means of protection. It is not clear that, in the climate change context, mitigation measures are always necessary to ensure the enjoyment of rights. Other measures may secure the enjoyment of rights more effectively, for example, adaptation measures.
- ii. On account of the fact that climate change is caused by the cumulative emissions from all States since the start of the industrial revolution, mitigation measures by one State are not likely to be effective to ensure relevant rights or progressively achieve their full realisation to those within the State's jurisdiction. Put another way, an individual claiming a rights violation must show that the violation arose on account of an act or omission attributable to the relevant State. Where there is a tenuous causative link between the emissions from that State and specific impacts of climate change, it is not clear that such rights violations could be demonstrated on the basis that the State had failed to deliver its "fair share" of emissions reductions and removals (however that fair share may be calculated).
- c. Third, international human rights law is generally concerned with actual or imminent violations of rights rather than future or speculative violations.<sup>171</sup> While there are current impacts of climate change that affect the enjoyment of human rights, international human rights law does not obviously impose actionable obligations on States to take mitigation measures today to avoid the very serious human rights consequences that may arise from unmitigated climate change 30 years hence.

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<sup>171</sup> *E.W. et al. v The Netherlands* (429/1990); *Bordes and Temeharo v. France* (No 645/1995); *Aalbersberg v The Netherlands* (No 1440/2005).

d. Fourth, it is clear that a significant number of States contest the existence of a general obligation under international human rights law to make emissions reductions and removals. That is clear from the submissions of 32 States in the *Agostinho* proceedings in the ECtHR<sup>172</sup> and the submissions of States in response to the UNCRC's consultation on General Comment 26.<sup>173</sup>

117. New Zealand notes the views of the Human Rights Committee ('HRC') in the recent case of *Billy v Australia*.<sup>174</sup> In that communication, the HRC was invited to find that Australia had violated a number of Articles of the ICCPR by: i) failing to adopt adaptation measures, including building adequate infrastructure, to protect the authors' lives, home and culture against the impacts of climate change; and ii) failing to take adequate mitigation measures to reduce GHG emissions. The HRC found violations of Articles 17 and 27 of the ICCPR on account of the Australia's failure to take adequate adaptation measures but declined to make any finding with regard to the allegations regarding inadequate mitigation measures. This Court has said that the views of the HRC are to be given "great weight" on matters relating to the interpretation of the ICCPR.<sup>175</sup> In circumstances where the HRC has declined to find that States have general mitigation obligations under the ICCPR, that should be treated as significant.

118. For those reasons, New Zealand does not consider international human rights law currently imposes a generalised obligation on States to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of GHGs. That said, international human rights law may in certain circumstances be relevant to States' responses to climate change. Depending on the relevant factual context, it may require States to:

a. Ensure the enjoyment of procedural rights, including the right to participate in the State's decision-making process for rights-affecting decisions relating to climate change,<sup>176</sup> and the right of access to information<sup>177</sup> and procedural fairness in respect of such decisions.

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<sup>172</sup> *supra* n.160.

<sup>173</sup> States' submissions in response to UNCRC consultation on General Comment 26.

<sup>174</sup> *Daniel Billy and others v Australia* CCPR/C/135/D/3624/2019, decision of 18 September 2023.

<sup>175</sup> *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)*, Merits, Judgment, ICJ Reports 2010, p 639 at [66].

<sup>176</sup> See, for example, the Rio Declaration, Principle 10, ICCPR Art 25; UNDRIP Art 18, UNCRC Art 12; and see the rights protected by the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) and the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazu Convention).

<sup>177</sup> Rio Declaration, Principle 10, ICCPR Article 19.

- b. Consider any applicable human rights obligations when implementing climate change strategies.<sup>178</sup>

#### **4.4 Even if such a generalised obligation exists, it would require conduct aligned with that required by the climate change treaty regime**

119. If, contrary to New Zealand's position, international human rights law does impose a generalised obligation on States to mitigate climate change through emissions reductions and removals, that obligation should be interpreted consistently with States' obligations under the climate change treaty regime.
120. That approach accords with the ordinary rules of treaty interpretation as addressed at paragraph 86 above. It is also consistent with the approach of the HRC,<sup>179</sup> the ECtHR<sup>180</sup> and the IACtHR,<sup>181</sup> all of which have referred to co-existing obligations of international environmental law when construing the scope of human rights obligations under their relevant treaties.
121. While the existence, scope and content of positive obligations under international human rights law are dependent on the right at issue, any such obligations are ones of conduct, not result. New Zealand takes the view that any international human rights law obligation to mitigate GHG emissions through reductions and removals would be discharged through good faith compliance with co-existing obligations under the climate change treaty regime.
122. Indeed, in the climate change context, the mechanism through which States cooperate to promote and encourage respect for human rights<sup>182</sup> and take steps "through international assistance and co-operation... with the view to achieving progressively the full realization of...rights"<sup>183</sup> is the climate change treaty regime. The UN Human Rights Council's resolutions on climate change and human rights expressly acknowledge the centrality of the UNFCCC and the PA in framing the obligations of

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<sup>178</sup> See preamble to the PA: "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, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity".

<sup>179</sup> *Portillo Cáceres v Paraguay*, *supra* n.166 at paragraph 7.3 and footnote 7.

<sup>180</sup> *Tătar v Romania*, (Application No. 67021/01), judgment of 27 January 2009.

<sup>181</sup> IACtHR Advisory Opinion OC-23/17, *supra* n.161.

<sup>182</sup> UN Charter Article 1(3).

<sup>183</sup> ICESCR Article 2(1).

States to mitigate climate change and thereby to protect rights, including through decisions taken by the COP and CMA.<sup>184</sup>

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<sup>184</sup> HRC Resolutions A/HRC/RES/50/9; A/HRC/RES/47/24 etc.

## **SECTION 3**

### **QUESTION B: THE LEGAL CONSEQUENCES UNDER THESE OBLIGATIONS**

#### **PART 1: INTRODUCTION**

123. The obligations set out above in response to Part A of the question are designed to ensure a collective global response to climate change in pursuit of the temperature goal of the PA which avoids the worst impacts of anthropogenic climate change. However, it is clear that the adverse effects of climate change are already experienced across the globe, with SIDS being particularly vulnerable and affected. And it is clear that present and future generations will continue to be affected by the adverse effects of climate change even if the temperature goal is met.
124. Before considering the legal consequences for States whose acts or omissions constitute breaches of the obligations set out above, it is relevant first to consider the mechanisms in the climate change treaty regime which:
- a. seek to ensure support to vulnerable or specially affected States and people affected by harm to the climate system and other parts of the environment, irrespective of any legal consequences that may arise under the law of state responsibility;
  - b. encourage the implementation of, and compliance with, the commitments and obligations in the PA; and
  - c. support the peaceful settlement of disputes.
125. These mechanisms are relevant to the Court's understanding of the context in which the question in Part B arises.

#### **PART 2: THE CLIMATE CHANGE TREATY REGIME**

##### **2.1 Support under the climate change treaty regime for adaptation and loss and damage**

126. Both the UNFCCC and the PA contain obligations and commitments relating to adaptation, including the obligation on developed country Parties to assist developing country Parties that are particularly vulnerable to the adverse effects of climate change in meeting the costs of adaptation. The COP and CMA have facilitated the delivery of these obligations through the establishment of a number of mechanisms to support particularly vulnerable countries, including SIDS, in adapting to the impacts of climate change. These include (amongst other initiatives):

- a. The Least Developed Countries Expert Group (LEG), which advises on the preparation and implementation strategy for national adaptation programmes of action,<sup>185</sup> and advises on capacity-building needs, facilitates exchanges of information, and advises on mainstreaming adaptation plans into regular development planning.<sup>186</sup>
- b. The Nairobi Work Programme, which assists all Parties, in particular developing countries, including LDCs and SIDS, to improve understanding and assessment of impacts, vulnerability and adaptation, and to make informed decisions on adaptation actions.<sup>187</sup>
- c. The Cancun Adaptation Framework, which has the objective of *“enhancing action on adaptation, including through international cooperation and coherent consideration of matters relating to adaptation under the [UNFCCC].”* The Cancun Adaptation Framework has a number of functions, including planning and implementing adaptation actions, undertaking adaptation assessments, strengthening institutional capacities, building resilience of socio-economic and ecological systems, and undertaking measures to enhance understanding, coordination and cooperation with regard to climate change induced displacement, migration and planned relocation.<sup>188</sup>
- d. The Adaptation Committee, which provides technical support to Parties, enhances sharing of relevant knowledge including traditional knowledge, promotes engagement with relevant organisations to enhance adaptation, and provides information and recommendations to Parties and the COP.<sup>189</sup>
- e. The Glasgow-Sharm el-Sheikh work programme on the global goal<sup>190</sup> which seeks to enable full implementation of the PA towards achieving the adaptation goal, contributing to reviewing progress made on the adaptation goal as part of the global stocktake, enhancing national adaptation actions, enabling better communication of adaptation needs, and strengthening implementation of adaptation actions in vulnerable developing countries.<sup>191</sup>

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<sup>185</sup> Decision 29/CP.7, FCCC/CP/2001/13/Add.4.

<sup>186</sup> Decision 29/CP.7, FCCC/CP/2001/13/Add.4, paragraph 9.

<sup>187</sup> Decision 2/CP.11, FCCC/CP/2005/5/Add.1.

<sup>188</sup> FCCC/CP/2010/7/Add.1, paragraph 14.

<sup>189</sup> FCCC/CP/2010/7/Add.1, paragraph 20.

<sup>190</sup> Decision 7/CMA.3, FCCC/PA/CMA/2021/10/Add.3.

<sup>191</sup> Decision 7/CMA.3, FCCC/PA/CMA/2021/10/Add.3, paragraph 7.

127. These mechanisms are supported by the commitment by developed countries to, in the context of meaningful mitigation actions and transparency on implementation, provide and mobilise \$100 billion p.a. for developing countries by 2020, while seeking to achieve a balance between support for mitigation and adaptation.<sup>192</sup> Parties have also agreed to set a new collective quantified goal for climate finance under the CMA before 2025.<sup>193</sup>
128. Similarly, the COP and the CMA have both established mechanisms to assist vulnerable countries avert, minimise and respond to loss and damage, including:
- a. The Warsaw International Mechanism for Loss and Damage (WIM), under the Cancun Adaptation Framework, 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>194</sup> The WIM is mandated to enhance knowledge and understanding of risk management approaches to address loss and damage, strengthen dialogue and coordination among stakeholders, and enhance action and support, including finance, technology and capacity-building to address loss and damage.
  - b. The Santiago Network for averting, minimizing and addressing loss and damage, with the purpose of catalysing technical assistance of relevant entities.<sup>195</sup> In 2022, it was decided that the institutional structure of the Santiago Network would include a hosted secretariat, an Advisory Board, and a network of member organisations, bodies, networks and experts.
  - c. In 2022, the CMA acknowledged the “urgent and immediate need” for financial resources to assist developing countries that are particularly vulnerable to the adverse effects of climate change in responding to loss and damage. It decided to establish new funding arrangements for loss and damage and to establish a fund for responding to loss and damage. Based on recommendations from a Transitional Committee established by the CMA,<sup>196</sup> the CMA/COP adopted a decision on 1 December 2023, operationalising the loss and damage fund and funding arrangements.<sup>197</sup>

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<sup>192</sup> Decision 2/CP.15, paragraph 8.

<sup>193</sup> Decision 1/CP.21, paragraph 53.

<sup>194</sup> Decision 2/CP.19, paragraph 1.

<sup>195</sup> Decision 2/CP.25; Decision 2/CMA.2.

<sup>196</sup> Decision 2/CMA.4.

<sup>197</sup> FCCC/CP/2023/L.1.



129. Accordingly, the climate change treaty regime seeks to provide support to countries injured or specially affected by or particularly vulnerable to the adverse effects of climate change, irrespective of any legal consequences that might flow from a State's acts or omissions that cause harm to the climate system or other parts of the environment. That is consistent with the collaborative nature of a climate change treaty regime based on the principles of cooperation and equity.

## **2.2 Support for implementation of, and compliance with, the PA**

130. As discussed in Part A, the PA contains a number of features to encourage compliance and review of Parties' progress in delivering on their obligations and commitments. Alongside the technical expert review and the facilitative, multilateral consideration of progress under Article 13(11), Article 15 of the PA established the PAICC, an expert-based committee with a mandate to promote compliance with the provisions of the PA through facilitative, transparent, non-adversarial and non-punitive methods.

131. The modalities and procedures for the PAICC were adopted by the CMA in decision 20/CMA.1. Paragraph 22(a) of the Annex to that decision provides that the Committee will initiate consideration of issues in cases where a Party has not:

- a. communicated or maintained a nationally determined contribution (NDC) under Article 4 of the PA, based on the most up-to-date status of communication in the public registry referred to in Article 4, paragraph 12, of the PA;
- b. submitted a mandatory report or communication of information under Article 13, paragraphs 7 and 9, or Article 9, paragraph 7, of the PA;
- c. participated in the facilitative, multilateral consideration of progress; or
- d. submitted a mandatory communication of information under Article 9, paragraph 5, of the PA.

132. Paragraph 22(b) of the Annex provides that the Committee may also engage in a consideration of issues, with the consent of the Party, in cases of significant and persistent inconsistencies of the transparency information provided by a Party with the modalities, procedures and guidelines for reporting.

133. The Committee thus has a mandate to address failures to implement and/or comply with certain provisions of the PA, whether or not those provisions are legally-binding

and whether or not the failure to implement or comply entails the international legal responsibility of the Party.

### 2.3 Dispute resolution under the climate change treaty regime

134. Article 14 of the UNFCCC, applied *mutatis mutandis* to the PA by Article 24 of the PA, provides for disputes concerning the interpretation or application of the instruments to be settled through “*negotiation or any other peaceful means*” chosen by the disputing parties. Parties may elect by declaration for their disputes to be submitted to the International Court of Justice or to an arbitral tribunal. If no election is made, then “*the dispute shall be submitted, at the request of any of the parties to the dispute, to conciliation.*” As very few Parties have elected to resolve their disputes through submission to the International Court of Justice or to an arbitral tribunal, the default method of dispute resolution is conciliation.<sup>198</sup>
135. Conciliation is a non-binding, party-led, flexible method of dispute resolution which can be suitable for bilateral or multi-party disputes. It enables Parties to raise and resolve disputes relating to the performance of both legally binding obligations and non-legally binding commitments. While conciliation is more effective when all relevant Parties are participating, conciliation under the UNFCCC and PA is not dependent on the consent of all Parties: see Article 14(6) of the UNFCCC.
136. While conciliation may involve the consideration of the legal consequences that flow from a Party’s acts or omissions within the scope of the Agreement, and a recommendatory award may reach conclusions on those legal consequences, conciliation: i) is not limited to disputes relating to the interpretation or application of legally-binding elements of the PA; and ii) can have no binding consequences in terms of state responsibility.
137. For those Parties who have not made declarations accepting the jurisdiction of this Court or an arbitral tribunal, conciliation is the exclusive procedure for the settlement of disputes relating to the interpretation or application of the UNFCCC and PA.

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<sup>198</sup> Article 14 of the UNFCCC provides that “[a]dditional procedures relating to conciliation shall be adopted by the Conference of the Parties, as soon as practicable, in an annex on conciliation.” No such annex has been adopted. In November 2023, a draft prepared by a Panel of Experts appointed by the International Council of Commercial Arbitration was circulated for consideration by States.

## PART 3: THE LEGAL CONSEQUENCES IN RESPECT OF OTHER STATES

### 3.1 Application of the rules of state responsibility is complicated by the climate change context

138. The customary rules of state responsibility apply to determine the legal consequences where States cause harm to other States through a failure to comply with their binding international legal obligations.
139. Broadly speaking, the ILC's Articles on the Responsibility of States for Internationally Wrongful Acts ('**ARSIWA**') codify customary international law on state responsibility. Materially, ARSIWA provides that:
- a. There is an internationally wrongful act of a State when (in the absence of circumstances precluding wrongfulness)<sup>199</sup> conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State.<sup>200</sup>
  - b. There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.<sup>201</sup>
  - c. Every internationally wrongful act of a State entails the international responsibility of that State.<sup>202</sup>
  - d. An internationally wrongful act gives rise to the legal consequences set out in Part Two of ARSIWA, including the obligations of non-repetition and reparation,<sup>203</sup> and the right for the victim state(s) to take lawful countermeasures within the limits permitted by international law.<sup>204</sup>
140. Application of the ordinary rules of state responsibility in the climate change context is likely to be complicated. New Zealand does not explore those complications in detail here but highlights the following issues that would need to be addressed:
- a. First, States have assumed a range of legally binding obligations and non-legally binding commitments to protect the climate system and other parts of the

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<sup>199</sup> ARSIWA Part One, Chapter V.

<sup>200</sup> ARSIWA, Article 2.

<sup>201</sup> ARSIWA, Article 12.

<sup>202</sup> ARSIWA, Article 1.

<sup>203</sup> ARSIWA, Articles 30 – 31.

<sup>204</sup> ARSIWA, Part Three, Chapter II.

environment from anthropogenic emissions of GHGs. While the effective operation of the climate change treaty regime and the effective pursuit of the temperature goal depends on good faith compliance with all such obligations and commitments, legal consequences under the law of state responsibility will only flow from non-compliance with legally binding obligations and will not flow from failures to deliver on commitments.

- b. Second, States' legal obligations to protect the climate system and other parts of the environment from anthropogenic emissions of GHGs are generally obligations of conduct rather than result. That is, there is no automatic legal consequence flowing from acts or omissions that cause significant harm to the climate system and other parts of the environment. States may be found to have acted consistently with their obligations notwithstanding the fact they have contributed to significant harm.<sup>205</sup>
- c. Third, while ARSIWA provides for circumstances where there is a plurality of injured<sup>206</sup> and responsible<sup>207</sup> States, and contemplates a contribution-based approach to reparations,<sup>208</sup> it is not clear that the drafters of ARSIWA envisaged a situation (or that there is sufficient state practice with *opinio juris* to support the identification of customary norms) where: i) all States are injured to varying degrees; ii) all States are contributors to the injury to varying degrees; iii) some contributions to the injury are the result of internationally lawful acts; and iv) some contributions to the injury are the result of internationally wrongful acts. In these circumstances, attribution, causation and contribution are likely to be very difficult and highly contested issues.
- d. Fourth, the available remedy would depend on the source of law that has been breached (each treaty regime may prescribe different remedies) and the availability and nature of any remedy will depend on the existence of a competent court or tribunal with jurisdiction to award such a remedy.

#### **PART 4: THE LEGAL CONSEQUENCES IN RESPECT OF PRESENT AND FUTURE GENERATIONS AFFECTED BY THE ADVERSE EFFECTS OF CLIMATE CHANGE**

141. International law typically has horizontal effect only, imposing obligations on States as

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<sup>205</sup> See by analogy *South China Sea Arbitration (Award)*, *supra* n.136, paragraphs 972-975.

<sup>206</sup> ARSIWA, Article 46.

<sup>207</sup> ARSIWA, Article 47.

<sup>208</sup> ARSIWA, Article 39.

regards other States. Exceptions to the horizontal effect of international law arise: i) in monist systems, where international law is automatically part of domestic law and may be enforceable against the State by a person with legal standing in domestic courts; ii) in dualist systems, where international law is incorporated in domestic law in a manner that is enforceable against the State; and iii) in relation to international human rights obligations which generate vertical obligations on the State to people within its jurisdiction. Here, New Zealand focuses on the third of these categories.

142. As set out in Part A, New Zealand doubts that international human rights law imposes a generalised obligation on States to mitigate climate change through emissions reductions and removals. If that is wrong, the legal consequences would depend on the source of the obligation that is breached and the rules governing remedies under the relevant treaty or customary international law.
143. In relation to the rights of future generations, New Zealand notes that both international environmental law and international human rights law has for some time emphasised the importance of future generations in decision making. They are expressly mentioned in the Stockholm Declaration, UNFCCC, the Rio Declaration, the United Nations Convention to Combat Desertification, the Convention on Biological Diversity, the Aarhus Convention, and in the UNGA Declaration on the right to a clean, healthy and sustainable environment.<sup>209</sup> They are embodied in the UNCLOS principle of “common heritage of [hu]mankind”.<sup>210</sup> And they are discussed in the dissenting opinion of Judge Weeramantry in the Advisory Opinion on the Legality of the Use of Nuclear Weapons,<sup>211</sup> and in Advisory Opinion OC-23/17 by the IACtHR.<sup>212</sup> These references acknowledge that current generations are the temporary custodians or *kaitiaki* of a precious resource that should be enjoyed and cared for by future generations.
144. In discharging their obligations to protect the environment States are acting to achieve outcomes that will be in the interests of present and future generations. However, New Zealand does not consider that international law currently prescribes any specific legal consequences with respect to future generations, for States who, through their internationally wrongful acts, fail to protect the climate system or other parts of the environment from anthropogenic GHGs.

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<sup>209</sup> *supra* n.162, paragraphs 9 and 13.

<sup>210</sup> UNCLOS, Article 136; Jaeckel, A. et al, *Conserving the Common Heritage of Humankind – Options for the deep-seabed mining regime*, Marine Policy 78 (2017) 150-157.

<sup>211</sup> *Advisory Opinion on the Legality of the Use of Nuclear Weapons* (1996) ICJ Rep 226.

<sup>212</sup> IACtHR Advisory Opinion OC-23/17, *supra* n.161 at [59].

## SECTION 4 CONCLUSION

145. Through this advisory opinion, the Court has an opportunity to bring clarity and coherence to international climate change law. In doing so, it can help to ensure ongoing compliance with international obligations, lift ambition, and inspire action.
146. Climate change is an issue that is unprecedented in human history for the complexity and scale of the response it demands at all levels. It is an issue that cannot be addressed except by effective cooperation, and on the basis of a careful balancing of principles, interests, and capacities. It demands policy responses from governments and other entities, and requires behavioural changes from individuals. It also demands an international legal response that is capable of embracing this complexity and range of factors.
147. States have grappled with, and continue to grapple with, this challenge through decades of negotiations. The resulting legal framework in the climate change treaty regime is accordingly adaptive to this context. This opinion that States have asked of the Court by an unprecedented consensus will be essential to ensuring that all States are clear about what their obligations are, and how those obligations operate to enable States to achieve their stated collective objectives in responding to climate change.

Carl Reaich  
International Legal Adviser  
Ministry of Foreign Affairs and Trade, New Zealand