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RESPONSE TO CONSULTATION ON THE STRATEGY OF THE OFFICE FOR ENVIRONMENTAL PROTECTION (OEP)

Submitted by email: consultations@theoep.org.uk

About us

Plan B.Earth ("Plan B") is a charitable incorporated organisation, registered with the Charity Commission, with the charitable purpose of holding the UK Government to account for its commitment under the Paris Agreement on Climate Change, and specifically the UK Government's international law obligation to cooperate to uphold the objectives of the [Paris Agreement](#), which are as follows (Article 2(1)):

- “(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.”**

Plan B welcomes the establishment of OEP.

OEP's climate change remit

The Draft Strategy emphasises the importance of the relationship with the Committee on Climate Change (“CCC”):

“The Environment Act recognises the particular importance of avoiding any overlap between the exercise of our functions and those of the CCC.”

It is equally important, we suggest, to avoid any underlap concerning Government accountability to the public for action and inaction on the climate emergency ([recognised as such by the UK Parliament on 1 May 2019](#)).

The OEP's role in relation to the climate emergency is defined, we suggest, by the following considerations.

First, the CCC is an advisory body and unlike the OEP (as the Draft Strategy notes) has no mandate to hold the Government to account.

Second, the Climate Change Act 2008 ("CCA") is itself limited in scope. It does not, for example, address either:

- The UK's consumption emissions (ie the carbon embedded in goods imported from, say, China, but consumed in the UK); or
- The UK's financial support for the global carbon economy.

Third, monitoring and reporting on climate change *adaptation* plans is not excluded from OEP's remit. The Environment Act 2021, s.29(3) only treats as "a matter within the remit of the Committee on Climate Change" the following section of the CCA:

- Part 1 [the 2050 carbon target and carbon budgeting]
- Sections 34-36 [advice and progress reports on carbon budgets]
- Section 48 [regulations for carbon trading schemes].

Part 4 of the CCA, concerning adaptation, is not referred to.

Fourth, the CCA does not refer to the 1.5°C temperature goal which the UK is committed to.

Why focus on 1.5°C?

Plainly the OEP has a remit beyond the climate crisis.

But the evidence suggests that without urgent and radical action to limit warming to 1.5°C, all other environmental goals will be jeopardised. Maintaining the 1.5°C limit is therefore the *sine qua non* of environmental protection and the OEP must ensure the UK Government plays its part - all the more important given the UK's current role as President of the COP process (through to COP27).

The UK Government's own [Net Zero Strategy](#), for example, published in October 2021, intimates at the existential threat implicit in breaching that threshold:

“People are rightly concerned, with the latest IPCC report showing that if we fail to limit global warming to 1.5°C above pre-industrial levels, the floods and fires we have seen around the world this year will get more frequent and more fierce, crops will be more likely to fail, and sea levels will rise driving mass migration as millions are forced from their homes. Above 1.5°C we risk reaching climatic tipping points like the melting of arctic permafrost – releasing millennia of stored greenhouse gases – meaning we could lose control of our climate for good.

But the good news is that there is, still, a path to avoid catastrophic climate change.” [Executive Summary, p.14, emphasis added]

The focus of COP26 in Glasgow, OEP will recall, was on [“keeping 1.5°C alive”](#).

The northern summer of 2021 was a stark reminder that even with the current level of 1.2°C warming, the devastating impacts of the climate crisis are no longer confined to the future or to ‘over there’: row upon row of people prostrate [in cooling centres](#) in Canada and North America; the floods which [decimated whole villages](#) in Germany, France and Luxembourg; the [raging infernos around Mediterranean](#) beaches; the [roads turned into rivers in London](#) and around the UK.

The implications of crossing 1.5°C do not bear thinking about it, but here are some specific examples of the risks according to the peer-reviewed science:

- [Threat to global food security](#)

Peer-reviewed research, [Increasing risks of multiple breadbasket failure under 1.5 and 2 °C global warming](#), concludes:

“Risks of simultaneous crop failure ... increase disproportionately between 1.5 and 2 °C, so surpassing the 1.5 °C threshold will represent a threat to global food security.”

- [Tropical regions of the world, home to 40% of the world’s population, too dangerous](#)

[According to peer-reviewed research](#), beyond 1.5°C warming, tropical regions of the world risk wet bulb temperatures in excess of 35°C, which is beyond the capacity of the human body to cool itself down and therefore beyond the limit of human endurance. Around 40% of the world’s population currently live in the tropics. Billions of people will face a choice: live where it is no longer safe to live, or leave.

- [Critical tipping points could be passed, leading to a “hothouse earth”](#)

In 2018, leading academics, including Johan Rockstrom and Hans Schellnhuber, considered the temperature threshold for crossing critical tipping points in the climate system in [Trajectories of the Earth System in the Anthropocene](#) and concluded:

“Our analysis suggests that the Earth System may be approaching a planetary threshold that could lock in a continuing rapid pathway toward much hotter conditions—Hothouse Earth ... Where such a threshold might be is uncertain, but it could be only decades ahead ...and ... it could be within the range of the Paris Accord temperature targets.”

The UK’s real contribution to maintaining the 1.5°C limit

Much attention has been given to the UK’s own “net zero” target. But as a post-industrial, service sector economy the UK’s primary contribution to the climate crisis is less its own production emissions (which are outsourced to China and elsewhere), and more the City of London’s support for the carbon economy around the world.

The NGO, Carbon Tracker, has estimated that a massive 15% of global carbon emissions are supported by the City of London (see [“UK Net Zero 2050 – good intentions, but aren’t we missing something?”](#)).

Emma Howard Boyd, Chair of the Environment Agency, has [highlighted research by Aviva that FTSE100 investments are driving the world towards 4°C warming](#):

“But, distressingly, [Aviva’s] analysis - calculated using Carbon Delta’s warming potential metric – said the FTSE 100 index as a whole is heading towards 3.9 degrees.”

According to Professor Jonas Rockstrom, one of the world’s most eminent climate scientists, as set out in [his interview with the Guardian in May 2019](#), 4°C warming implies the loss of billions of lives:

“Indeed, the consequences of a 4C warmer world are so terrifying that most scientists would rather not contemplate them, let alone work out a survival strategy.

Rockström doesn’t like our chances. “It’s difficult to see how we could accommodate eight billion people or even half of that,” he says. “There will be a rich minority of people who survive with modern lifestyles, no doubt, but it will be a turbulent, conflict-ridden world.””

Knowingly profiting from such an outcome is unlawful.

We urge the OEP to grasp the nettle of the UK’s financial support for the carbon economy and to hold the Government and others to account for aligning finance flows to the 1.5°C temperature goal of the Paris Agreement. It is critical that it does so.

Annex - Relevant legal principles

International Law

The No Harm Principle

The “no harm principle” is the foundation not just of international environmental law, but of international law generally. Recognising the interdependence of states’ rights and obligations, it consists of both a right and corresponding duty:

- a. the right of jurisdiction over a territory, its population and natural resources; and
 - b. the duty of non-intervention in the area of exclusive jurisdiction of other states.
- In the absence of such a principle the foundational concept of “national sovereignty” would have little meaning.

Its application to cross-border pollution was first considered by the Trail Smelter Arbitral Tribunal in 1941. Sulphur Dioxide emissions from a smelting plant in Canada (owned by a Canadian company) were causing substantial damage to land in the US. The Tribunal held the Government of Canada responsible for the damage on the basis that no state may permit activity on its territory which causes serious injury to another.

The United Nations Framework Convention on Climate Change (UNFCCC) directly invokes the principle in its Preamble, removing all doubt regarding its application to climate change:

“Recalling also that States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction ...”

Given the evidence of the impacts of breaching 1.5°C warming, with countries in the Global South and the tropical regions on the frontline, who have typically contributed least to the problem but who are exposed to disproportionate risk, knowingly pursuing policies inconsistent with the 1.5°C limit constitutes a violation of the no harm principle - the foundation of international law.

Genocide

Recognising that there is a disconnect between the ordinary understanding of the law of genocide and death and destruction arising from man-made climate change, it is nevertheless relevant to consider the potential application of the legal definition of genocide.

Article II of the Convention on the Prevention and Punishment of the Crime of Genocide states:

“In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;**
- (b) Causing serious bodily or mental harm to members of the group;**
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part ...” [emphasis added]**

Countries which pursue policies inconsistent with the 1.5°C warming, do so knowing the consequences will be not only death and devastation, but are likely to include the destruction of whole peoples, countries and regions of the world.

It is sometimes suggested that man-made climate change cannot constitute genocide, irrespective of the consequences, because there is no intent: even if whole countries, peoples and regions of the world are destroyed by rising emissions that is an “unintended consequence”. But therein lies a misunderstanding of the legal concept of “intent”. Intent, as a legal term, does not necessarily imply wish or desire. It implies reasonable foreseeability of the consequences of harm. And it is reasonably foreseeable that policies and investment that drive warming beyond 1.5°C and towards 4°C will, at the very least, “[cause] serious bodily or mental harm to members of [identifiable] group[s]”.

The precautionary principle

Principle 15 of the UN General Assembly’s Rio Declaration on Environment and Development states:

“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.”

The principle is restated in the UN Framework Convention on Climate Change, Article 3(3):

“In their actions to achieve the objective of the Convention and to implement its provisions, the Parties shall be guided, inter alia, by the following: (3) The Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures ...”

The polluter pays principle

The “polluter-pays-principle” (“PPP”) is not only a principle of law and justice, it is a principle of economics to ensure the market accounts for the costs of environmental damage.

The UK is one of the 37 members of the Organisation for Economic Co-operation and Development (OECD). An OECD paper on the PPP from 1992 states:

“The Polluter-Pays Principle (PPP) was adopted by OECD in 1972 as an economic principle for allocating the costs of pollution control ...

Under the 1972 and 1974 OECD Recommendations(1)(2), the Polluter-Pays Principle means that the polluter should bear the "costs of pollution prevention and control measures", the latter being "measures decided by public authorities to ensure that the environment is in an acceptable state" ...

In 1991, OECD adopted a Recommendation on the use of economic instruments (5) which states that sustainable and economically efficient management of environmental resources requires the internalisation of pollution prevention, control and damage costs (15). After 20 years' discussion, the need to internalise damage costs was clearly acknowledged in a formal act of the Organisation. A year previously, at the Forum on International Environmental Law in Siena, government legal experts had already supported application of the Polluter-Pays Principle to environmental damage. This trend is gradually coming about with greater use of economic instruments that charge polluters pro rata to the pollution released. Levying a pollution charge or tax at an appropriate level internalises the cost of the damage ...

The trend outlined above indicates that the Polluter-Pays Principle has gradually -- but not yet completely -- become identified with the principle of full internalisation of the external costs of pollution. Ultimately, it seems likely that a polluter will have to bear if not all at least most of the costs that pollution may cause, and increasing use will be made of economic instruments, compensatory mechanisms and fines with a view to fully implement the PPP. The revenue will help to strengthen the environmental and other policies of governments.”

Principle 22 of the Stockholm Declaration commits states to further developing international law ‘regarding liability and compensation for the victims of pollution and other environmental damage’.

The Rio Declaration 1992, Principle 16, states that:

“National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution.”

The PPP implies that Governments should ensure that polluters bear the costs of climate change loss and damage, thereby aligning the market to the collective good.

But that is not happening. To the contrary, fossil fuels continue to be subsidised, distorting the market, while those suffering climate change loss and damage, in the UK and beyond, generally have no recourse to proper compensation and reparation.

Human Rights and Domestic Law provisions

The Right to Life (and other Convention Rights)

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The UN High Commissioner for Human Rights, Michelle Bachelet, has said of the climate crisis:

“The world has never seen a threat to human rights of this scope”

The Paris Agreement, which the UK Government, advanced, signed and ratified, makes explicit the link between government actions on climate change and their human rights obligations:

“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”.

More specifically, the Government has an obligation under the HRA to take practical and effective measures to safeguard the lives and family lives of those within the jurisdiction, so that such rights are enjoyed without discrimination on any ground.

The HRA, section 6(1) states:

“It is unlawful for a public authority to act in a way which is incompatible with a Convention right”.

Art. 2 of the European Convention on Human Rights (“ECHR”) provides:

“Everyone’s right to life shall be protected by law [...]”

Art. 8 ECHR provides:

“Everyone has the right to respect for his private and family life, his home and his correspondence [...]”

Art. 14 ECHR provides:

“The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

As recognised by the Supreme Court in *Rabone v Pennine Care NHS Trust*, Art. 2 imposes both a negative duty on the state to refrain from taking life and a positive duty to protect life.

The ECtHR emphasised this principle in *Öneryildiz v Turkey* ECtHR:

“In this connection, the Court reiterates that Article 2 ... lays down a positive obligation on States to take appropriate steps to safeguard the lives of those within their jurisdiction ... The Court considers that this obligation must be construed as applying in the context of any activity, whether public or not, in which the right to life may be at stake, and a fortiori in the case of industrial activities, which by their very nature are dangerous ... Where the

Convention institutions have had to examine allegations of an infringement of the right to the protection of life in such areas, they have never ruled that Article 2 was not applicable.”

The Grand Chamber of the European Court of Human Rights, helpfully summarised its case law on the positive obligations arising under Article 2 in its recent judgment, *Nicolae Virgiliu Tănase v Romania*. Positive obligations include the primary substantive procedural obligation to put in place an appropriate legislative and administrative framework, including the making of regulations to compel institutions, whether private or public, to adopt appropriate measures for the protection of people’s lives:

“This substantive positive obligation entails a primary duty on the State to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life ...

It also requires the State to make regulations compelling institutions, whether private or public, to adopt appropriate measures for the protection of people’s lives ...” (emphasis added)

It follows that the Government is under a legal obligation to take legal and administrative measures to align the actions of those within the jurisdiction to the 1.5°C limit.

Strasbourg itself is yet to rule on a climate change case, but has fast-tracked a case brought by 13 Portuguese children. The courts of other Convention parties, however, have considered the principles.

In 2015 a Dutch Court of first instance, in a judgment subsequently upheld by the Dutch Court of Appeal and Supreme Court, ruled:

“If, and this is the case here, there is a high risk of dangerous climate change with severe and life-threatening consequences for man and the environment, the State has the obligation to protect its citizens from it by taking appropriate and effective measures.”

In July 2020 the Supreme Court of Ireland stated, in ruling against the Irish government’s climate change policies:

“Climate change is undoubtedly one of the greatest challenges facing all states ...

Climate change is already having a profound environmental and societal impact in Ireland and is predicted to pose further risks to the environment, both in Ireland and globally, in the future. While the challenges of climate change will affect all sectors of society, it is acknowledged that the impact will be felt most severely in developing countries ...

It can, however, safely be said that the consequences of failing to address climate change are accepted by both sides as being very severe with potential significant risk both to life and health throughout the world but also including Ireland ...”

Although the court ruled that Friends of the Irish Environment could not, in isolation, advance a rights-based claim, it emphasised that had the claim been brought by individuals “it would have been necessary” for the Court to consider whether Government climate measures (or the lack of them) amounted to a breach of the right to life:

“[I]t is important, in saying that, to fully acknowledge that there may well be cases, which are environmental in nature, where constitutional rights and obligations may be engaged. Indeed, this case provides a good example. Had standing been established or had similar proceedings been brought by persons who undoubtedly had standing, then it would have been necessary for this Court to consider the circumstances in which climate change measures (or the lack of them) might be said to interfere with the right to life or the right to bodily integrity.”

Negligence / Duty of Care

Given the implications of breaching the 1.5°C limit, pursuing a course of action inconsistent with that limit is negligent and potentially actionable in certain circumstances.

The criminal offence of Gross Negligence Manslaughter may also be relevant.

Rationality

Given the implications of breaching the 1.5°C limit, which include the loss of the conditions which make the planet habitable, pursuing a course of action inconsistent with that limit is irrational.

Fiduciary Duties

In September 2021, research by UCL concluded that “nearly 60% of both oil and fossil methane gas and almost 90% of coal must remain in the ground by 2050 in order to keep global warming below 1.5°C”.

Since the value of the shares in fossil fuel companies, for example, is based in large part on the values of their reserves and the assumption that they will be usable, action to limit warming to 1.5°C implies a collapse in value of those shares.

Investments in fossil fuels by pension fund administrators, for example, may constitute a breach of fiduciary duties.



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