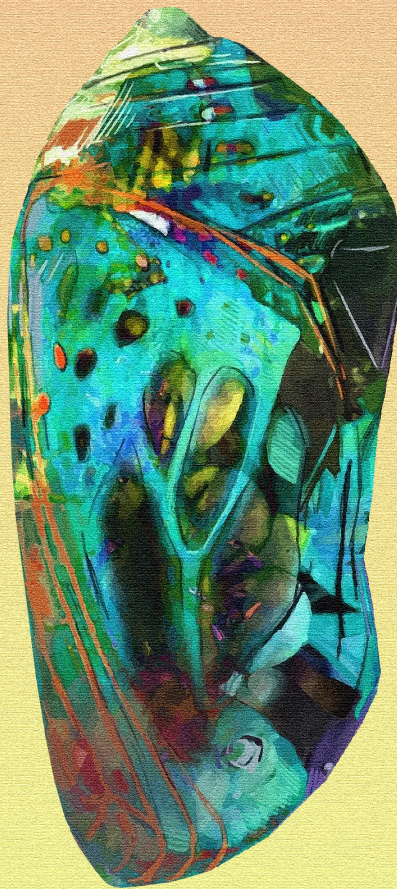



# YOUTH CLIMATE JUSTICE HANDBOOK

Status Report on Principles of  
International and Human Rights Law  
Relevant to Climate Change



## ABOUT THE SABIN CENTER FOR CLIMATE CHANGE LAW, COLUMBIA LAW SCHOOL

The Sabin Center for Climate Change Law develops legal techniques to fight climate change, trains law students and lawyers in their use, and provides the legal profession and the public with up-to-date resources on key topics in climate law and regulation. It works closely with the scientists at Columbia University's Climate School and with a wide range of governmental, non-governmental and academic organizations.

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## **NOTE:**

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## **I. INTRODUCTION**

1. The United Nations General Assembly has repeatedly discussed and recognized the threats posed by environmental degradation and climate change. On 29 March 2023, the General Assembly adopted Resolution A/77/76, through which it has requested from the International Court of Justice (“**ICJ**” or “**Court**”) – the principal judicial organ of the United Nations – an advisory opinion on the legal obligations of States in respect of climate change and the environment.
2. This status report aims to provide high-level guidance on the upcoming proceeding and the legal issues to be analyzed by the Court.<sup>1</sup> In the following sections, this status report will therefore address (i) advisory proceedings before the ICJ, including the Court’s jurisdiction and procedure (Section II), and (ii) key legal principles relevant to the request for an advisory opinion, including principles of international environmental law and international human rights law (Section III).

## **II. ADVISORY PROCEEDINGS BEFORE THE INTERNATIONAL COURT OF JUSTICE**

3. The ICJ adjudicates two types of proceedings: contentious cases and advisory proceedings. In a contentious case, the Court hears and adjudicates a legal dispute between two or more States. By contrast, in an advisory proceeding, the Court issues an advisory opinion on a legal question posed by an authorized body.
4. To date, the Court has rendered 28 advisory opinions since its establishment in 1948. Its predecessor, the Permanent Court of International Justice (“**PCIJ**”), delivered 27 advisory opinions between 1922 and 1939. The following sections describe the Court’s advisory jurisdiction, the procedure in an advisory proceeding, and the potential impact of an opinion rendered in such a proceeding.

### **A. The Advisory Jurisdiction of the Court Is Limited**

5. The U.N. Charter and the Statute of the Court limit the advisory jurisdiction of the Court. Specifically, the Court may only issue an advisory opinion if two requirements are satisfied: (i) the request for an advisory opinion was submitted by an authorized body competent to submit that request, and (ii) the request is for an opinion on a legal question. In issuing an advisory opinion, the Court must

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<sup>1</sup> This status report does not provide a comprehensive analysis, or advocate for or predict particular results. This status report also does not provide legal advice, or establish an attorney-client relationship with any recipient or reader.

determine that both of these requirements are satisfied.<sup>2</sup> As discussed below, both requirements are satisfied in the present case.

6. *First*, the request for an advisory opinion has been submitted by an authorized body with competence to make such a request. In this respect, Article 65(1) of the Statute of the Court states that

[t]he Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request.<sup>3</sup>

7. Article 96 of the U.N. Charter provides as follows:

1. The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.

2. Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities.<sup>4</sup>

8. Article 96(1) thus authorizes both the General Assembly and the Security Council to request an advisory opinion, without specifying that the request “aris[e] within the scope of their activities.” Nonetheless, when presented with a request from the General Assembly for an advisory opinion, the Court has considered whether such request falls within the competence of the General Assembly.<sup>5</sup> That competence is, as the Court recognized, extremely broad:

The Court would observe that Article 10 of the Charter has conferred upon the General Assembly a competence relating to “any questions or any matters” within the scope of the Charter, and that Article 11, paragraph 2, has specifically provided it with competence on “questions relating to the maintenance of international peace and security brought before it by any Member of the United Nations . . .

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<sup>2</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004 (9 July 2004), ¶ 15 (“It is for the Court to satisfy itself that the request for an advisory opinion comes from an organ or agency having competence to make it.”).

<sup>3</sup> Statute of the Court, Art. 65(1).

<sup>4</sup> U.N. Charter, Art. 96.

<sup>5</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004 (9 July 2004), ¶ 16 (“Although the above-mentioned provision states that the General Assembly may seek an advisory opinion ‘on any legal question,’ the Court has sometimes in the past given certain indications as to the relationship between the question the subject of a request for an advisory opinion and the activities of the General Assembly.”).

”and to make recommendations under certain conditions fixed by those Articles.<sup>6</sup>

9. The first jurisdictional requirement is satisfied in the present case. The request has been submitted by the General Assembly, which is authorized to submit such requests. Issues related to climate change and human rights fall within the scope of the U.N. Charter, and relate to the maintenance of international peace and security, as evidenced by the fact that the General Assembly has been seized of these issues on countless occasions.<sup>7</sup> Accordingly, the advisory opinion has been requested by an authorized body, and falls within the competence of that body.
10. *Second*, the authorized body must request an advisory opinion on a legal question. This requirement derives from Article 96 of the U.N. Charter, which authorizes the Court to issue an advisory opinion on a “legal question.”<sup>8</sup> This requirement is reiterated in the Statute of the Court<sup>9</sup> and Rules of the Court.<sup>10</sup> In its most recent advisory opinion, the Court assessed the nature of the request as follows:

In the present proceedings, the first question put to the Court is whether the process of decolonization of Mauritius was lawfully completed having regard to international law when it was granted independence following the separation of the Chagos Archipelago. The second question relates to the consequences arising under international law from the continued administration by the United Kingdom of the Chagos Archipelago. **The Court considers that a request from the General Assembly for an advisory opinion to examine a situation by reference to international law concerns a legal question.**<sup>11</sup> (Emphasis added)

11. In other words, “questions ‘framed in terms of law and rais[ing] problems of international law . . . are by their very nature susceptible of a reply based on law.’”<sup>12</sup> Moreover, the Court has repeatedly emphasized that “the fact that a

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<sup>6</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004 (9 July 2004), ¶ 17.

<sup>7</sup> See, e.g., U.N. General Assembly Resolution A/76/L.75, 28 July 2022.

<sup>8</sup> U.N. Charter, Art. 96.

<sup>9</sup> Statute of the Court, Art. 65. See also *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, ICJ Reports 2019 (25 February 2019), ¶ 55 (“The Court’s jurisdiction to give an advisory opinion is based on Article 65, paragraph 1, of its Statute which provides that “[t]he Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request.”).

<sup>10</sup> Rules of the Court, Art. 102.

<sup>11</sup> *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, ICJ Reports 2019 (25 February 2019), ¶ 58.

<sup>12</sup> *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, ICJ Reports 2010 (22 July 2010), ¶ 25 (citing *Western Sahara*, Advisory Opinion, ICJ Reports 1975 (16 October 1975), p. 18, ¶ 15).



question has political aspects does not suffice to deprive it of its character as a legal question.”<sup>13</sup>

12. The present request is framed in terms of international law, and specifically asks the Court about the existence and scope of States’ legal obligations under international law. The present request thus appears to satisfy the second jurisdictional requirement for an advisory opinion.

#### **B. The Court Has Discretion**

13. Even if the aforementioned jurisdictional requirements are satisfied, the Court retains discretion as to whether or not to issue an advisory opinion. This discretion is enshrined in Article 65(1) of the Statute:

The Court **may** give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request.<sup>14</sup> (Emphasis added)

14. In addressing its discretion, the Court has emphasized that “[a] reply to a request for an [advisory] opinion should not, in principle, be refused.”<sup>15</sup> More specifically:

It is well settled in the Court’s jurisprudence that when a request is made under Article 96 of the Charter by an organ of the United Nations or a specialized agency for an advisory opinion by way of guidance or enlightenment on a question of law, the Court should entertain the request and give its opinion unless there are “compelling reasons” to the contrary.<sup>16</sup>

15. The determination as to whether there are “compelling reasons” to refuse to issue an advisory opinion may require the Court to consider (*inter alia*) (i) whether the requesting organ was interfering in the activities of another United Nations organ, (ii) whether the organ is attempting to secure a resolution to a dispute without the

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<sup>13</sup> *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, ICJ Reports 2010 (22 July 2010), ¶ 27.

<sup>14</sup> Statute of the Court, Art. 65(1).

<sup>15</sup> *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, ICJ Reports 1951 (28 May 1951), pp. 15, 19.

<sup>16</sup> *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Order*, 1989 ICJ Reports (14 June 1989), p. 191. See also *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, ICJ Reports 2010 (22 July 2010), ¶ 30 (“[T]he consistent jurisprudence of the Court has determined that only “compelling reasons” should lead the Court to refuse its opinion in response to a request falling within its jurisdiction”) (citing *Judgments of the Administrative Tribunal of the I.L.O. upon Complaints Made against the U.N.E.S.C.O.*, Advisory Opinion, ICJ Reports 1956 (23 October 1956), p. 86; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004 (9 July 2004), p. 156, ¶ 44).

consent of the disputing States, or (iii) whether the request concerns matters within the domestic jurisdiction of a State. Notably, however, the ICJ has never exercised its discretion to refuse to issue a requested advisory opinion. Its predecessor, the PCIJ, did so on only one occasion. In the *Status of Eastern Carelia* case, the PCIJ observed that the question concerned an “actual dispute” between two States over territory,<sup>17</sup> and that the request for an advisory opinion thus constituted an attempt to secure a judgment resolving the dispute, without the consent of one of the disputing States.<sup>18</sup> The PCIJ “therefore f[ound] it impossible to give its opinion on a dispute of this kind.”<sup>19</sup>

16. Here, the resolution seeking an advisory opinion was adopted by consensus. Nonetheless, any States opposed to the issuance of an advisory opinion may argue that there are compelling reasons for the Court not to issue the requested advisory opinion. For instance, opponents may (i) criticize the motives of States that supported the request in the General Assembly,<sup>20</sup> (ii) assert that any opinion issued by the Court would have no practical effect,<sup>21</sup> or (iii) argue that the Court is not in a position to predict or address the effects of climate change. The Court has previously rejected similar arguments, dismissing as irrelevant the alleged motives of particular States, or speculation about the future impact of an opinion.<sup>22</sup>

### C. The Applicable Rules of Procedure

17. The Statute and Rules of the Court establish the procedural rules that apply to advisory proceedings, which are similar to those that apply to contentious cases,

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<sup>17</sup> *Status of Eastern Carelia*, Advisory Opinion, PCIJ Third Ordinary Session (23 July 1923), p. 27.

<sup>18</sup> See *Status of Eastern Carelia*, Advisory Opinion, PCIJ Third Ordinary Session (23 July 1923), p. 28 (“Such consent, however, has never been given by Russia. On the contrary, Russia has, on several occasions, clearly declared that it accepts no intervention by the League of Nations in the dispute with Finland.”).

<sup>19</sup> *Status of Eastern Carelia*, Advisory Opinion, PCIJ Third Ordinary Session (23 July 1923), p. 28.

<sup>20</sup> See, e.g., *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, ICJ Reports 2010 (22 July 2010), ¶ 32 (“One argument, advanced by a number of participants in the present proceedings, concerns the motives behind the request. . . . According to those participants, . . . the opinion of the Court was being sought not in order to assist the General Assembly but rather to serve the interests of one State and that the Court should, therefore, decline to respond.”).

<sup>21</sup> See, e.g., *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, ICJ Reports 2010 (22 July 2010), ¶ 34 (“It was also suggested by some of those participating in the proceedings that [the request for an advisory opinion] gave no indication of the purpose for which the General Assembly needed the Court’s opinion and that there was nothing to indicate that the opinion would have any useful legal effect. This argument cannot be accepted. The Court has consistently made clear that it is for the organ which requests the opinion, and not for the Court, to determine whether it needs the opinion for the proper performance of its functions”).

<sup>22</sup> See, e.g., *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, ICJ Reports 2010 (22 July 2010), ¶¶ 32–35.

with certain modifications.<sup>23</sup> In particular, the Statute and Rules of the Court dictate that the advisory proceeding will unfold as follows.

18. Submission of the request. The U.N. Secretary-General<sup>24</sup> must submit to the Court “a written request containing an exact statement of the question upon which an opinion is required, and accompanied by all documents likely to throw light upon the question.”<sup>25</sup>
19. Notice of the request. The Court will subsequently provide notice through the Registry, or the permanent administrative secretariat of the Court, which handles all communications to and from the Court. Specifically, “[t]he Registrar shall forthwith give notice of the request for an advisory opinion to all states entitled to appear before the Court.”<sup>26</sup>
20. Special notice of deadlines for submissions. The Court will also notify States and international organizations that are “likely to be able to furnish information on the question, that the Court will be prepared to receive, within a time-limit to be fixed by the President, written statements, or to hear, at a public sitting to be held for the purpose, oral statements relating to the question.”<sup>27</sup> The States that are entitled to appear before the Court are the States Parties to the Statute of the Court.<sup>28</sup> This direct communication is usually sent to the international organization that submitted the request (i.e., the General Assembly), and the member States thereof (i.e., all General Assembly Member States). Notably, international non-governmental organizations will not have the same rights as intergovernmental organizations; any submission by an international non-governmental organization “is not to be considered as part of the case file,” but will instead “be treated as publications readily available” —i.e., as any other document in the public domain.<sup>29</sup>
21. Request for permission to intervene. If a State or international governmental organization did not receive the aforementioned special notice, that State or

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<sup>23</sup> See Rules of the Court, Art. 102(2) (“The Court shall also be guided by the provisions of the Statute and of these Rules which apply in contentious cases to the extent to which it recognizes them to be applicable. For this purpose, it shall above all consider whether the request for the advisory opinion relates to a legal question actually pending between two or more States.”). See also ICJ Handbook, p. 84.

<sup>24</sup> In the event that the request was not made by a U.N. organ, the request would be sent by “the chief administrative officer of the body authorized to make the request.” See Rules of the Court, Art. 104.

<sup>25</sup> ICJ Statute, Art. 65(2).

<sup>26</sup> ICJ Statute, Art. 66(1).

<sup>27</sup> ICJ Statute, Art. 66(2).

<sup>28</sup> ICJ Statute, Art. 35(1) (“The Court shall be open to the states parties to the present Statute.”). The Court has made exceptions under particular circumstances. For instance, although Palestine is not considered a State entitled to appear before the Court, the Court determined that Palestine could provide submissions in the case concerning *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.

<sup>29</sup> Practice Directions of the Court, Practice Direction XII.

organization may request to present a written or oral submission, and the Court will decide upon that request.<sup>30</sup>

22. Written submissions by authorized States and international organizations. As noted above, the President of the Court will establish a deadline for written submissions. The time limits for such submissions are generally shorter than those that apply in contentious proceedings, but the rules allow for flexibility.<sup>31</sup> On average, the Court has provided two months for States to file written submissions (in English or French) on a request for an advisory opinion.<sup>32</sup> However, authorized States and international organizations can request extensions.<sup>33</sup>
23. Comments on written submissions. The Statute of the Court provides that “States and organizations having presented written or oral statements or both shall be permitted to comment on the statements made by other states or organizations in the form, to the extent, and within the time-limits which the Court, or, should it not be sitting, the President, shall decide in each particular case.”<sup>34</sup>
24. Oral proceedings. The Court may, and nearly always does, hold an oral proceeding during which authorized States and international organizations may make oral submissions.<sup>35</sup>
25. Delivery of advisory opinion. The Court is required to “deliver its advisory opinions in open court, notice having been given to the Secretary-General and to the representatives of Members of the United Nations, of other states and of international organizations immediately concerned.”<sup>36</sup> Members of the Court may append declarations or separate or dissenting opinions to the advisory opinion.

#### **D. The Potential Impact of an Advisory Opinion**

26. By their nature, advisory opinions delivered by the Court are not binding. Nonetheless, an advisory opinion may have a significant impact, including because (*inter alia*): (i) the prestige and authority of the Court is attached to its

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<sup>30</sup> See ICJ Statute, Art. 66(3) (“Should any such state entitled to appear before the Court have failed to receive the special communication referred to in paragraph 2 of this Article, such state may express a desire to submit a written statement or to be heard; and the Court will decide.”).

<sup>31</sup> See ICJ Handbook, p. 86.

<sup>32</sup> See ICJ Handbook, p. 86.

<sup>33</sup> See, e.g., *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971 (21 June 1971); *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, ICJ Reports 1996 (8 July 1996); *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development*, Advisory Opinion, ICJ Reports 2012 (1 February 2012).

<sup>34</sup> ICJ Statute, Art. 66(4).

<sup>35</sup> See Rules of the Court, Art. 105.

<sup>36</sup> ICJ Statute, Art. 67.

advisory opinions; (ii) the Court's reasoning with respect to the existence and scope of principles of international law is widely viewed as authoritative; (iii) States and other actors may rely on an advisory opinion in the context of domestic or international litigation, or in policy discussions; and (iv) the delivery of an advisory opinion may generate publicity. For these and other reasons, advisory proceedings may prompt or contribute to significant changes and developments in international and/or domestic law and policy.<sup>37</sup>

### III. LEGAL PRINCIPLES RELEVANT TO THE REQUEST FOR AN ADVISORY OPINION

27. The request for an advisory opinion in the present case poses the following questions:

(1) 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;

(2) 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:

(a) 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?

(b) Peoples and individuals of the present and future generations affected by the adverse effects of climate change?

28. The request thus asks the Court to answer a set of questions about the existence and content of existing international law as it relates to environmental harm.

29. Article 38(1) of the Statute of the Court establishes the sources of international law that the Court is required to apply, and states that:

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

(a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

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<sup>37</sup> For example, the advisory opinion in the case concerning *Legal Consequences for States of the Continued Presence of South Africa in Namibia* was one of a series of steps that ultimately led to the recognition by South Africa of Namibia's independence.

(b) international custom, as evidence of a general practice accepted as law;

(c) the general principles of law recognized by civilized nations;

(d) subject to the provisions of Article 59, 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.<sup>38</sup>

30. The primary sources of international law that the Court shall apply are:
- a. Treaties – i.e., written international agreements concluded between two or more States;<sup>39</sup>
  - b. Customary international law – i.e., principles established through widespread and consistent State practice and corresponding *opinio juris*; and
  - c. General principles of law – i.e., basic rules and principles that are common to most jurisdictions.
31. As a subsidiary source, the Court may consider judicial decisions and commentary from preeminent scholars and commentators.
32. In order to answer the questions posed above, the Court will evaluate the foregoing sources to determine what, if any, relevant obligations exist under international law, and the scope of those obligations. This status report is not intended to conduct that exercise, which will require exhaustive study. Instead, the sections that follow identify key relevant principles of international environmental law (Section A), key relevant principles of international human rights law (Section B), and issues of intergenerational equities (Section C).

#### **A. Relevant Principles of International Environmental Law**

33. The request for an advisory opinion pertains to a series of principles of international environmental law which are in turn derived from principles of customary international law and treaty law.
1. *Customary International Law*
    - a. Transboundary Harm

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<sup>38</sup> Statute of the Court, Art. 38(1).

<sup>39</sup> Vienna Convention on the Law of Treaties, Art. 2 (“‘treaty’ means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation”).

34. Almost none of the contemporary environmental threats to the international community concern one country in isolation; they all have cross-border impacts.<sup>40</sup> The principle of transboundary harm mandates that States ensure that the activities carried out within their jurisdictions do not harm the environment and territory of other States.<sup>41</sup> It applies precisely when harm has occurred in the territory of—or in other places under the jurisdiction of control of—a State other than the State of origin, whether or not the impacted State shares a common border.<sup>42</sup>
35. The International Law Commission’s (“ILC”) Draft Articles on Prevention of Transboundary Harm from Hazardous Activities provide that transboundary harm occurs when the following four elements are present: (i) a physical relationship between the activity concerned and the damage caused; (ii) human causation; (iii) a certain threshold of severity that calls for legal action; and (iv) transboundary movement of the harmful effects. To comply with the principle’s mandate, States must (*inter alia*): (i) prevent significant transboundary harm or minimize the risk thereof; (ii) cooperate in good faith to prevent significant transboundary harm or minimize the risk thereof; (iii) take legislative, administrative and other measures to establish monitoring mechanisms; (iv) seek prior authorization for new or changes to activities that can cause transboundary harm; (v) rely on risk assessments of possible transboundary harm, including environmental impact assessment; (vi) timely notify of the risk and assessment, and transmit all relevant information to the States potentially affected; (vii) consult other States impacted on measures to prevent significant transboundary harm or minimize the risk thereof; (viii) exchange relevant information and inform the public likely to be affected; (ix) prepare contingency plans for responding to emergencies; and (x) notify of an emergency of transboundary harm.<sup>43</sup>
36. The transboundary principle can be found in numerous treaty preambles, as well as in the operative text of several treaties. Treaty preambles that include the transboundary principle include the U.N. Framework Convention on Climate Change (“UNFCCC”), the 1972 London Convention, the Convention on Long-range Transboundary Air Pollution (“LRTAP”), and the 1985 Vienna Convention for the Protection of the Ozone Layer. The principle is also referenced in Article 3 of the Convention on Biological Diversity (“CBD”) and the United Nations

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<sup>40</sup> Jutta Brunnée, *The Responsibility of States for Environmental Harm in a Multinational Context-Problems and Trends*, 34(3) LES CAHIERS DE DROIT 827 (1993).

<sup>41</sup> See *The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)*, PCA Case No. 2013-19, Award (12 July 2016), ¶ 941 (“The corpus of international law relating to the environment . . . requires that States ‘ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control.’”).

<sup>42</sup> ILC Draft articles on Prevention of Transboundary Harm from Hazardous Activities (2001), Art. 2(c).

<sup>43</sup> *Id.*, Arts. 3-18.

Convention on the Law of the Sea (“UNCLOS”). Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration explicitly adopted avoiding transboundary harm as a general principle of international law. Principle 2 provides 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.<sup>44</sup>

(i) Obligation to Exercise Due Diligence

37. The duty to avoid transboundary harm is a due diligence obligation, imposing standards of State conduct.<sup>45</sup> It requires States to protect persons or activities beyond their territories to prevent harmful events and outcomes. The duty to prevent transboundary harm originates from the fact that harm has resulted from such activity, requiring States to exercise due diligence in anticipating, preventing, or mitigating harm.
38. The ICJ confirmed this concept in 1949 in the case concerning *Corfu Channel (United Kingdom v. Albania)* when referring to a State’s obligation to not knowingly allow its territory to be used for acts contrary to the rights of other States.<sup>46</sup> Moreover, the arbitral tribunal in the *Trail Smelter Case (United States v. Canada)* concluded that:
- Under the principles of international law, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.<sup>47</sup>
39. The advisory opinion on the *Legality of Nuclear Weapons* and the separate opinion of Judge Weeramantry in the case concerning *Gabcikovo-Nagymaros (Hungary/Slovakia)* underline that States are only required to prevent harm caused as a result of an active disposition on or over their territory, which does not include

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<sup>44</sup> Report of the United Nations Conference on Environment and Development (“Rio Declaration”) (1992), Principle 2.

<sup>45</sup> See *The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)*, PCA Case No. 2013-19, Award (12 July 2016), ¶ 944.

<sup>46</sup> *Corfu Channel (U.K. v. Alb.)*, ICJ Reports 1949 (9 April 1949).

<sup>47</sup> *Trail Smelter case (United States, Canada)*, Awards, Reports on International Arbitral Awards Vol. III (16 April 1938 and 11 March 1941), pp. 1905–82.



the omission of protective measures.<sup>48</sup> The principle of no harm is breached only when the State of origin has not acted diligently concerning its own activities and those of actors under its jurisdiction.<sup>49</sup>

40. The judgments of the Court in the cases concerning *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* and *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* provide some, though not entirely consistent, guidance as to the substantive and procedural aspects of the due diligence measures demanded of State actors under the principle.<sup>50</sup>

(ii) Obligation to Conduct an Environmental Impact Assessment

41. An environmental impact assessment (“EIA”) guides decision-making, including the objectives of: (i) ensuring that environmental effects should be taken into account before decisions are taken to allow activities to be carried out; (ii) providing for the implementation of national environmental impact assessment procedures; and (iii) encouraging reciprocal procedures for notification, information exchange and consultation on activities likely to have significant transboundary effects.<sup>51</sup> The 1991 Espoo Convention requires that parties of origin must notify affected parties of certain proposed activities likely to cause a significant adverse transboundary impact and requires discussion between concerned parties.<sup>52</sup>
42. An EIA is required by international law for environmentally harmful activities which may have transboundary consequences. Principle 17 of the Rio Declaration states that:

Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a

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<sup>48</sup> See *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996 (8 July 1996), ¶ 29; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Separate Opinion of Vice-President Weeramantry, ICJ Reports 1997 (25 September 1997).

<sup>49</sup> Rishika Rishabh, *Responsibility v. Sovereignty: Transboundary Environmental Harm*, 4 INT’L J.L. MGMT. & HUMAN 598 (2021).

<sup>50</sup> See e.g., *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, ICJ Reports 2010 (20 April 2010); *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, ICJ Reports 2015 (16 December 2015).

<sup>51</sup> *Environmental Impact Assessment*, Decision 14/25 of the Governing Council of UNEP (17 June 1987); see also *International co-operation in the field of the environment*, U.N. General Assembly Res. 42/184 (11 December 1987).

<sup>52</sup> Espoo Convention on Environmental Impact Assessment in a Transboundary Context (25 February 1991; in force 10 September 1997), Art. 2(1), (4) and (5).

significant adverse impact on the environment and are subject to a decision of a competent national authority.<sup>53</sup>

43. Principle 17 was adopted in (i) the ICJ's ruling on New Zealand's application to the ICJ concerning the resumption by France of underground nuclear testing (1995),<sup>54</sup> (ii) the case concerning the Gabčíkovo-Nagymaros project (1997),<sup>55</sup> (iii) the dispute between Ireland and the United Kingdom concerning the Mox Plant (2001),<sup>56</sup> and (iv) the *Pulp Mills* case.<sup>57</sup> These judgments and decisions indicate an increasing recognition that international law requires the prior preparation of an EIA before a state engages in or permits an activity that may have severe adverse impacts on the environment.

(iii) Obligation to Notify and Consult in Good Faith

44. The ILC Draft Articles on Prevention of Transboundary Harm adopt establish requirements relating to the dispersal of information to environmental impacts of activities, and provide that where an assessment of risk has taken place and indicates a risk of significant transboundary harm, the State of origin:

Shall provide the State likely to be affected with timely notification of the risk and the assessment and shall transmit to it the available technical and all other relevant information on which the assessment is based.<sup>58</sup>

States concerned shall enter into consultation, at the request of any of them, with a view to achieving acceptable solutions regarding measures to be adopted in order to prevent significant transboundary harm or at any event to minimize the risk thereof.<sup>59</sup>

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<sup>53</sup> Rio Declaration (1992), Principle 17.

<sup>54</sup> Relevant in this case is the opinion of Judge Weeramantry, who stated that the requirement to carry out an environmental impact assessment was "gathering strength and international acceptance, and has reached the level of general recognition at which the ICJ should take notice of it." See *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France)*, Judge Weeramantry Dissenting Opinion, ICJ Reports 1995 (22 September 1995), p. 344.

<sup>55</sup> The ICJ in this case found a requirement by law that the parties carry out a continuing environmental assessment of the projects' impacts on the environment. Judge Weeramantry's opinion (the majority) stated that "the[] provisions were clearly not restricted to EIA before the project commenced, but also included the concept of monitoring during the continuance of the project." See *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Vice-President Weeramantry Separate Opinion, ICJ Reports 1997 (25 September 1997), pp. 111-112.

<sup>56</sup> *MOX Plant (Ireland v. United Kingdom)*, Provisional Measures Order, ITLOS Reports 2001 (3 December 2001).

<sup>57</sup> *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, ICJ Reports 2010 (20 April 2010).

<sup>58</sup> ILC Draft articles on Prevention of Transboundary Harm from Hazardous Activities (2001), Art. 8(1).

<sup>59</sup> ILC Draft articles on Prevention of Transboundary Harm from Hazardous Activities (2001), Art 9(1).

45. The duty of notification was established in Principle 19 of the Rio Declaration, which requires that States must consult and negotiate with States potentially affected by significant transboundary damage.<sup>60</sup> Such consultations must be conducted promptly and in good faith in order to inform States that may be affected by significant environmental damage due to activities carried out within a State's jurisdiction.<sup>61</sup>
46. The principle of good faith in consultations and negotiations establishes certain restrictions regarding the implementation of such activities. In particular, States must not authorize or execute the activities in question while the parties are consulting and negotiating. The principle of good faith also provides that certain procedural obligations must be followed to ensure proper participation and consultation of parties.
47. The ICJ recognized the principle of good faith in the *Pulp Mills* case, when it indicated that "as long as the procedural mechanism for co-operation between the parties to prevent significant damage to one of them is taking its course, the State initiating the planned activity is obliged not to authorize such work and, *a fortiori*, not to carry it out;" to the contrary, "there would be no point to the co-operation mechanism . . . [and] the negotiations between the parties would no longer have any purpose."<sup>62</sup> Nevertheless, the Court notes that this prohibition does not mean that the activities can only be implemented with the prior consent of any potentially affected States.
48. In the *Lake Lanoux Arbitration (France v. Spain)*, the arbitral tribunal determined that the prior consent of the potentially affected States could not be "established as a custom, even less as a general principle of law."<sup>63</sup> Instead, it could only be understood as a requirement that could be claimed if it were established in a treaty.<sup>64</sup> The ICJ has also underscored that the obligation to negotiate does not entail the duty to reach an agreement. Once the negotiating period has ended, the State can proceed with construction at its own risk.<sup>65</sup> Therefore, this Court considers that, although States must conduct consultation and negotiation procedures as methods of cooperation in the face of possible transboundary harm, States do not necessarily have to reach an agreement, nor is the prior consent of

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<sup>60</sup> Rio Declaration (1992), Principle 19.

<sup>61</sup> *State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and Personal Integrity: Interpretation and Scope of Articles 4(1) and 5(1) in Relation to Articles 1(1) and 2 of the American Convention on Human Rights*, Advisory Opinion OC-23/17 (Requested by the Republic of Colombia), IACtHR (15 November 2017), ¶ 187.

<sup>62</sup> Cf. *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, ICJ Reports 2010 (20 April 2010), ¶¶ 144, 147.

<sup>63</sup> *Lake Lanoux Arbitration (France v. Spain)*, 12 R.I.A.A. 281; 24 I.L.R. 101 (16 November 1957), p. 25.

<sup>64</sup> *Lake Lanoux Arbitration (France v. Spain)*, 12 R.I.A.A. 281; 24 I.L.R. 101 (16 November 1957).

<sup>65</sup> *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, ICJ Reports 2010 (20 April 2010).

the potentially affected States required to initiate the execution of a project, unless this obligation is explicitly established in a treaty applicable to the matter in question.

49. In 2001, the ITLOS prescribed provisional measures ordering Ireland and the United Kingdom to cooperate and, for that purpose, to “enter into consultations forthwith” to exchange further information on the possible consequences for the Irish Sea arising out of the commissioning of the MOX plant.<sup>66</sup>
50. The obligation to consult when there is a risk of a harmful effect on the environment is now widely recognized by customary international law, and the failure to engage in consultation may violate the principles of good faith under international law. The decision in the *Lake Lanoux* arbitration supports this view, which was further elaborated by the ICJ in the *Fisheries Jurisdiction* case, and reflected in the ITLOS’ order in the *MOX* case.<sup>67</sup>

b. Precautionary Principle

51. Where there is scientific uncertainty, the precautionary principle provides guidance in the development and application of international environmental law. The precautionary principle aims to reduce or eliminate potential risks; it accomplishes this by (i) banning activities that have or may have negative effects on other countries or areas and (ii) implementing actions aimed at promoting a margin of safety in case of possible threats or damages.<sup>68</sup> The precautionary principle is reflected in Principle 15 of the Rio Declaration, which provides that:

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.<sup>69</sup>

52. However, the definition of the principle remains contested and varies by country depending on cultural values and socio-economic interests. Despite these uncertainties, the precautionary principle has been incorporated in many international environmental treaties since 1989 and can be found in more than 60 multilateral treaties covering a myriad of environmental issues such as: the

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<sup>66</sup> *MOX Plant (Ireland v. United Kingdom)*, Provisional Measures Order, ITLOS Reports 2001 (3 December 2001).

<sup>67</sup> See generally *Lake Lanoux Arbitration (France v. Spain)*, 12 R.I.A.A. 281; 24 I.L.R. 101 (16 November 1957); *Fisheries Jurisdiction (United Kingdom v. Iceland)*, Merits, Judgment, ICJ Reports 1974 (25 July 1974); *MOX Plant (Ireland v. United Kingdom)*, Provisional Measures Order, ITLOS Reports 2001 (3 December 2001).

<sup>68</sup> David VanderZwaag, *The Precautionary Approach in Coastal/Ocean Governance: Beacon of Hope, Seas of Confusion and Challenges*, MARINE & ENVIRONMENTAL LAW INSTITUTE (2018).

<sup>69</sup> Rio Declaration (1992), Principle 15.

conservation and the protection of the marine environment;<sup>70</sup> persistent organic pollutants;<sup>71</sup> the protection of the ozone layer;<sup>72</sup> biodiversity conservation;<sup>73</sup> transboundary watercourses;<sup>74</sup> and many others. The UNFCCC incorporates the precautionary principle specifically under Article 3, paragraph 3, reaffirming Principle 15 of the Rio Declaration where it states that:

The Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effect. 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, taking into account that policies and measures to deal with climate change should be cost-effective so as to ensure global benefits at the lowest possible cost..<sup>75</sup>

53. The development of scientific knowledge is essential in implementing the precautionary principle within the framework of the climate regime. For example, the Intergovernmental Panel on Climate Change (IPCC), established by the UNEP and the World Meteorological Organization in 1988, for the purpose of providing scientific guidance on counteracting climate change resulting from the emission of carbon dioxide and other greenhouse gases, publishes periodic reports to justify increased measures to mitigate and adapt to the effects of climate change.
54. International courts and tribunals have been reluctant to accept that the precautionary principle has status as customary international law.<sup>76</sup> The principle

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<sup>70</sup> See Convention on the Protection of the Marine Environment of the North-East Atlantic (“OSPAR Convention”) (1992); Convention on the Protection of the Marine Environment of the Baltic Sea (“Helsinki Convention”) (1992); U.N. Fish Stocks Agreement (1995); London Protocol to the Convention on the Prevention of Pollution by Dumping of Wastes (1996); Cartagena Protocol on Biosafety to the Convention on Biological Diversity (2000); and Stockholm Convention on Persistent Organic Pollutants (2001).

<sup>71</sup> See Stockholm Convention on Persistent Organic Pollutants (2001), recognizing the precautionary principle as an objective in its Preamble.

<sup>72</sup> See Vienna Convention for the Protection of the Ozone Layer (1985). It does not use the word “precautionary principle,” but its preamble instead contains the concept of precautionary measures, stating that, because of the “potentially harmful impact on human health and the environment through modification of the ozone layer,” precautionary action must be taken at both the national and international levels. It also points out that precautionary measures should be based on relevant scientific and technical considerations. See also Montreal Protocol on Substances that Deplete the Ozone Layer (1987). It does not use the phrase “precautionary principle” either, but defines the obligations of signatories in a manner that reflects the precautionary idea and specific ways of implementing the principle.

<sup>73</sup> See Convention on Biological Diversity (1992), where in its preamble it states “[w]here there is a threat of significant reduction or loss of biological diversity, lack of full scientific certainty should not be used as a reason for postponing measures to avoid or minimize such a threat.”

<sup>74</sup> See Convention of the Protection and Use of Transboundary Watercourses and International Lakes (1992), Art. 2, ¶ 5(a).

<sup>75</sup> UNFCCC (1992), Art. 3(3).

<sup>76</sup> Philippe Sands, *PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW* (2d. ed. 2003), p. 279.

was first raised before the ICJ by New Zealand in 1995, in a request concerning French nuclear testing.<sup>77</sup> New Zealand relied extensively on the precautionary principle, which it described as “a very widely accepted and operative principle of international law,” which shifted the burden onto France to prove that the proposed tests would not give rise to environmental damage.<sup>78</sup> Five intervening states (Australia, Micronesia, the Marshall Islands, Samoa, and the Solomon Islands) also invoked the principle. In its order dismissing New Zealand’s application, the ICJ noted that its *Nuclear Tests* judgements “dealt exclusively with atmospheric nuclear tests,” such that “it is not possible for the Court now to take into consideration questions relating to underground nuclear tests.”<sup>79</sup> Although the ICJ did not resolve the question of the status of precautionary principle in international law, the case provided some important insights into the principle. For instance, in his dissenting opinion, Judge Weeramantry acknowledged that the precautionary principle had gradually gained wide support in international environmental law and that with regard to the burden of proof, France was obligated to provide countervailing evidence to that presented by New Zealand; Judge Koroma agreed with this position, stating that France should bear the burden of proof.<sup>80</sup>

55. In *Gabčíkovo-Nagymaros (Hungary v. Slovakia)*, Hungary argued that its postponement of the dam project was based on the precautionary principle, under which countries had the obligation to prevent possible hazards.<sup>81</sup> Although the ICJ recognized that new developments in international environmental law could be a basis for the performance or non-performance of controversial treaties, it did not

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<sup>77</sup> See generally *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court’s Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case*, Order, ICJ Reports 1995 (22 September 1995). In the original case, Australia and New Zealand had initiated proceedings based upon France’s atmospheric nuclear tests in the South Pacific. Australia claimed that its sovereignty had been violated, and New Zealand claimed that its marine ecosystem and even the atmosphere had been contaminated by radioactive materials. See *Nuclear Tests (Australia v. France)*, Judgment, ICJ Reports 1974 (20 December 1974); *Nuclear Tests (New Zealand v. France)*, Judgment, ICJ Reports 1974 (20 December 1974).

<sup>78</sup> *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court’s Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case*, New Zealand’s Request for an Examination of the Situation (21 August 1995), pp. 53–54. See also *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court’s Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case*, Order, ICJ Reports 1995 (22 September 1995), ¶¶ 5, 34.

<sup>79</sup> See *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court’s Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case*, Order, ICJ Reports 1995 (22 September 1995), ¶ 63.

<sup>80</sup> See *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court’s Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case*, Dissenting Opinion of Judge Weeramantry, ICJ Reports 1995 (22 September 1995); *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court’s Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case*, Dissenting Opinion of Judge Koroma, ICJ Reports 1995 (22 September 1995).

<sup>81</sup> *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, ICJ Reports 1997 (25 September 1997).

take a position on whether countries could use the precautionary principle to justify steps to protect transnational resources; further, the ICJ sidestepped the question of whether the precautionary principle should be part of customary international law.<sup>82</sup>

56. Even though the ICJ acknowledged that the concerns expressed by Hungary were related to an essential interest of the State, the Court found that Hungary had not proved that “a real ‘grave’ and ‘imminent’ ‘peril’ existed in 1989” or that measures taken by Hungary were the only possible response.<sup>83</sup> The ICJ found that there were serious uncertainties concerning future harm to freshwater supplies and biodiversity, but that these “could not, alone, establish the objective existence of a “peril” in the sense of a component element of a state of necessity.”<sup>84</sup> This pronouncement, however, was prior to the Rio Declaration.
57. The case concerning *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* reversed the trend within international environmental law of incorporating a broad reading of the precautionary principle. When invoking the principle, tribunals had called for a lower standard of proof of environmental harm or, more radically, argued that the burden of the proof in environmental cases lay with the defendants rather than the plaintiffs.<sup>85</sup> In its judgment, the ICJ rejected both of these readings, leaving only a vaguely defined and weak precautionary principle.<sup>86</sup> Specifically, the ICJ stated that “[w]hile a precautionary approach may be relevant in the interpretation and application of the provisions of the Statute,<sup>[87]</sup> it does not follow that it operates as a reversal of the burden of proof.”<sup>88</sup> The ICJ then found that Argentina had failed to meet its burden of proof for all the environmental harms it claimed were likely to occur: “In the absence of convincing evidence that this is not an isolated episode, but rather a more enduring problem, the Court is not in a position to conclude that Uruguay has breached the provision of the 1975 Statute.”<sup>89</sup> The ICJ ruled that while Uruguay had violated its

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<sup>82</sup> See generally *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, ICJ Reports 1997 (25 September 1997).

<sup>83</sup> *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, ICJ Reports 1997 (25 September 1997), p. 39.

<sup>84</sup> *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, ICJ Reports 1997 (25 September 1997), p. 39.

<sup>85</sup> Daniel Kazhdan, *Precautionary Pulp: Pulp Mills and the Evolving Dispute between International Tribunals over the Reach of the Precautionary Principle*, 38 *ECOLOGY L.Q.* 527 (2011).

<sup>86</sup> Daniel Kazhdan, *Precautionary Pulp: Pulp Mills and the Evolving Dispute between International Tribunals over the Reach of the Precautionary Principle*, 38 *ECOLOGY L.Q.* 527 (2011).

<sup>87</sup> See Statute of the River Uruguay (Uruguay-Argentina), 1295 UNTS 340 (26 February 1975), Art. 1. This is a treaty that Argentina and Uruguay adopted in order to create a mechanism to rationally use the River Uruguay.

<sup>88</sup> *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, ICJ Reports 2010 (20 April 2010), p. 71, ¶ 164.

<sup>89</sup> *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, ICJ Reports 2010 (20 April 2010), pp. 90–91, ¶ 228.

procedural obligations, the permit for the pulp mill did not violate any substantive obligations.<sup>90</sup>

58. The *Southern Bluefin Tuna* case,<sup>91</sup> administered by the ITLOS, constitutes a significant example where absence of scientific certainty was used as an excuse for failing to stop a potential harmful activity. In 1999, the ITLOS (under a dispute among Australia, New Zealand, and Japan) requested the parties to immediately refrain from conducting an experimental fishing program (“EFP”) of southern bluefin tuna (“SBT”), which Japan had unilaterally commenced. Australia and New Zealand claimed that under the UNCLOS, parties to a treaty should comply with the precautionary principle when considering an activity that might cause serious or irreparable damage to the environment. and In the event of scientific uncertainties in the links between actions and their consequences, caution should be exercised when making decisions or taking actions that could affect the environment. In addition, Australia and New Zealand demanded that Japan fish SBT in compliance with the precautionary principle. Japan, on the other hand, questioned whether the precautionary principle was actually part of customary international law.<sup>92</sup>
59. The tribunal adopted its order in the face of scientific uncertainties. Particularly, the tribunal held that the parties to the treaty should act prudently to ensure that effective conservation measures were taken in order to prevent serious harm to the SBT stock. In its order, the ITLOS tribunal does not expressly refer to the precautionary approach, but it is apparent that it was applied.<sup>93</sup> Ultimately, however, the order was not sufficient to cement the precautionary principle’s status in customary international law.
60. In the *Mixed Oxide Fuel (MOX) Plant* case, the ITLOS clarified the extent and limits in the use of the precautionary approach. ITLOS clarified that delineating any limitations of the precautionary principle aids in reducing its overuse, and therefore, any potential for diminished legitimacy. The *MOX Plant* case concerned hazardous waste activities and was a dispute involving marine pollution between the United Kingdom and Ireland, in which , amongst other provisional measures, Ireland requested that the ITLOS stop the United Kingdom from releasing the MOX plant’s radioactive waste into the Irish Sea. In its order, the ITLOS emphasized the requirement to indicate the seriousness of the potential harm to the marine environment. In this case, Ireland had failed to meet this necessary

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<sup>90</sup> *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, ICJ Reports 2010 (20 April 2010).

<sup>91</sup> *Southern Bluefin Tuna (New Zealand v. France; Australia v. Japan)*, Provisional Measures, Order, ITLOS Case No. 3 (1999), 38 ILM 1624, ICGJ 337 (ITLOS 1999) (27 August 1999).

<sup>92</sup> *Southern Bluefin Tuna (New Zealand v. France; Australia v. Japan)*, Provisional Measures, Order, ITLOS Case No. 3 (1999), 38 ILM 1624, ICGJ 337 (ITLOS 1999) (27 August 1999).

<sup>93</sup> *Southern Bluefin Tuna (New Zealand v. France; Australia v. Japan)*, Provisional Measures, Order, ITLOS Case No. 3 (1999), 38 ILM 1624, ICGJ 337 (ITLOS 1999) (27 August 1999).



threshold in demonstrating the urgency and seriousness of the potential harm. The position of the ITLOS under this circumstance aligned with a narrow and stringent approach, applying the precautionary principle following the interpretation contained in the Montreal Protocol's Principle 15.<sup>94</sup> The principle indicates that in order to invoke the precautionary approach, the harm to be prevented cannot be general, but has to be identifiable and clear. Furthermore, the threat must pose serious or irreversible damage to the environment.<sup>95</sup>

61. Although the ITLOS rejected Ireland's request for provisional measures, it assigned the burden of proof in environmental hazard cases to the country taking the actions that might cause the hazards (i.e., the United Kingdom). In other words, the country must prove that its actions were harmless or the precautionary principle would apply.
62. The precautionary approach is also present in the 2011 Seabed Disputes Chamber Advisory Opinion on the Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area<sup>96</sup> on seabed mining activities. In the Advisory Opinion, the Chamber supported a proactive and precautionary approach to seabed mining. When addressing the question whether States that sponsor mining operators may carry different responsibilities and potential liability in case of environmental harm, the Chamber stated that the paramount importance of the marine environment for humanity transcends the economic differences of States. As such, the responsibilities and liability of sponsoring States apply equally to all States, whether developing or developed, and to find otherwise "would jeopardize uniform application of the highest standards of protection of the marine environment, the safe development of activities in the Area and protection of the common heritage of mankind."<sup>97</sup>

c. Duty to Cooperate

63. International cooperation is at the core of effective environmental policies and represents one of the foundations of international law.<sup>98</sup> The duty to cooperate is not only a well-established general principle of international law, but also one of

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<sup>94</sup> *MOX Plant (Ireland v. United Kingdom)*, Provisional Measures Order, ITLOS Reports 2001 (3 December 2001).

<sup>95</sup> Yoona Cho, *Precautionary Principle in the International Tribunal for the Law of the Sea*, 10(1) SUSTAINABLE DEVELOPMENT LAW & POLICY 64.

<sup>96</sup> *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion, Seabed Disputes Chamber, Case No. 17, ITLOS Reports 2011 (1 February 2011).

<sup>97</sup> *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion, Seabed Disputes Chamber, Case No. 17, ITLOS Reports 2011 (1 February 2011), p. 54.

<sup>98</sup> Christina Leb, *Implementation of the general duty to cooperate*, in RESEARCH HANDBOOK ON INTERNATIONAL WATER LAW (Stephen C. McCaffrey, et al. eds., 2019), p. 96. Maria Antonia Tigre, PRINCÍPIO DA COOPERAÇÃO, PRINCÍPIOS DE DERECHO AMBIENTAL Y AGENDA 2030 (Y. Aguila et. al., eds., 2019).

the most significant norms of contemporary international environmental law.<sup>99</sup> It is affirmed in virtually all international environmental agreements of bilateral and regional application, international instruments, as well as the jurisprudence of courts and tribunals, treaty bodies, and other international institutions.<sup>100</sup> The cooperation principle has a relatively long history and can be seen as the backbone for the peaceful relations between nation States, and relates, in general terms, to the implementation of a treaty's objectives or to specific commitments under a treaty.<sup>101</sup> Cooperation is especially relevant to combating global problems such as climate change, which requires joint efforts and is a logical consequence of the interdependency of countries.<sup>102</sup> The duty to cooperate has been invoked, among other things, in relation to the environment, human rights, development, and dispute settlement.

64. Over the past century, the duty to cooperate has transformed from a "law of coexistence" to a "law of cooperation."<sup>103</sup> The previous connotation was centered on rules of abstention aimed at identifying limits to state sovereignty. Moreover, it was linked to the obligation to refrain from interfering in the sovereignty sphere of others (*sic utere tuo alienum non laedas*).<sup>104</sup>
65. The set of principles and rules included in the Charter of the United Nations<sup>105</sup> is commonly considered one of the vital treaty sources from which this general principle can be derived. The Charter reflects the agreement of its now 193 Member States in the legally binding rules governing their conduct. In addition to its mandate to maintain international peace and security, the U.N. has as its objective the achievement of "international co-operation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental

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<sup>99</sup> Christina Leb, *One step at time: International law and the duty cooperate in the management of shared water resources*, 40 WATER INT'L 21, 23 (2015).

<sup>100</sup> Philippe Sands, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW (1995), pp. 190–194. See also Cooperation in the Field of the Environment Concerning Natural Resources Shared by Two or More States, Draft Decision ("**UNEP Draft Principles**") (1978). See also, e.g., *The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)*, PCA Case No. 2013-19, Award (12 July 2016), ¶ 984 ("Article 197 of the [U.N.] Convention [on the Law of the Sea] requires States to cooperate on a regional basis to formulate standards and practices for the protection and preservation of the marine environment.").

<sup>101</sup> Patricia Wouters, *Dynamic cooperation in International Law and the Shadow of State Sovereignty in the Context of Transboundary Waters*, 3 ENV. LIABILITY 88 (2013).

<sup>102</sup> Christina Leb, COOPERATION IN THE LAW OF TRANSBOUNDARY WATER RESOURCES (James Crawford & John S. Bell eds., 2013).

<sup>103</sup> Erik Franckx & Marco Benatar, *The "Duty" to Co-Operate for States Bordering Enclosed or Semi-Enclosed Seas*, 31 CHINESE (TAIWAN) YB INT'L L & AFF 66 (2013).

<sup>104</sup> Erik Franckx & Marco Benatar, *The "Duty" to Co-Operate for States Bordering Enclosed or Semi-Enclosed Seas*, 31 CHINESE (TAIWAN) YB INT'L L & AFF 67 (2013).

<sup>105</sup> See generally, U.N. Charter (1945).

freedoms for all without distinction as to race, sex, language, or religion.”<sup>106</sup> The U.N. system generally provides examples that illustrate the role of international law in the iterative process of cooperation. The U.N. was established based on an international treaty, with a mandate to maintain international peace and security and promote international cooperation.<sup>107</sup> The Charter establishing the U.N. is an outcome of State cooperation.

66. In the field of international environmental law, the recognition that State cooperation was required for the sustainable management of the natural environment and any related issues led to a number of treaties on international cooperation and joint action, most notably those adopted in the context of the 1992 U.N. Conference on Environment and Development in Rio,<sup>108</sup> including the Convention on Biological Diversity,<sup>109</sup> and the U.N. Framework Convention on Climate Change.<sup>110</sup> These conventions contain rules on settling disputes and establish financial mechanisms to assist those countries that do not have the necessary means to comply with the obligations set out in the conventions.
67. The cooperation principle is particularly significant in environmental law contexts where States must protect the natural environment for a common or shared resource.<sup>111</sup> In this specific context, the Charter of Economic Rights and Duties of States provides in Article 3 that: "In the exploitation of natural resources shared by two or more countries, each State must cooperate on the basis of a system of information and prior consultations in order to achieve the optimum use of such resources without causing damage to the legitimate interest of others."<sup>112</sup> The duty to cooperate then becomes particularly relevant when States (i) expect to derive benefits that would otherwise be unachievable, and (ii) need to seek engagement and collaboration with States that are in a position to assist them in order to realize additional gains.
68. A clear example of the necessity of State cooperation is the fight against climate change and its biggest cause: burning fossil fuels, which contributes to the climate crisis by producing large quantities of greenhouse gasses that remain trapped in the atmosphere. The results of global warming are rising sea levels, melting ice caps, and biodiversity loss. Climate change threatens the lives of all people

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<sup>106</sup> U.N. Charter (1945), Art. 1(3).

<sup>107</sup> U.N. Charter (1945), Art. 1.

<sup>108</sup> See generally Rio Declaration (1992).

<sup>109</sup> See generally Convention on Biological Diversity ("CBD") (1992).

<sup>110</sup> See generally U.N. Framework Convention on Climate Change ("UNFCCC") (1992).

<sup>111</sup> See Charter of Economic Rights and Duties of States (1974), Art. 3. This is also underlined in the Advisory Opinion OC-23/17 (15 November 2017) requested by the Republic of Colombia to the Interamerican Court of Human Rights.

<sup>112</sup> U.N. General Assembly, Resolution 3281 (XXIX): Charter of Economic Rights and Duties of States (12 December 1974), Art. 3.

worldwide since access to food, water, and shelter are collectively dependent on biodiversity and healthy ecosystems.<sup>113</sup>

69. In the international climate change regime, cooperation is referred to in all three of the principal governing instruments. The 1992 UNFCCC refers to cooperation in several provisions, including its Preamble as well as Articles 3, 4, 5, 6, 7, and 9.<sup>114</sup> The 1997 Kyoto Protocol references international cooperation in Articles 2, 10, and 13,<sup>115</sup> and the 2015 Paris Agreement refers to international cooperation in its Preamble and Articles 6, 7, 8, 10, 11, 12, and 14.<sup>116</sup> Beyond the broad and abstract appeal to cooperation, these instruments also give real meaning to the duty: the UNFCCC, for example, provides that developed countries should take the lead in combating climate change by facilitating capacity building, offering financial support and transferring technology to developing countries;<sup>117</sup> the Paris Agreement affirms that the nationally determined contributions need to rely on international cooperation to be effective, and that States need to be as ambitious as they can both in reducing their emissions and in supporting other States to do that.<sup>118</sup> Apart from mitigation goals, it also foresees a role for cooperation in strengthening national adaptation efforts.<sup>119</sup> Beyond the pursuit of more equitable burden-sharing, cooperation has other functions under the climate change regime. Indeed, Article 12 of the Paris Agreement provides for cooperative efforts around climate change education, awareness, public participation, and public access to information.<sup>120</sup>
70. As is evident from its provision in these instruments, cooperation between States and other actors should play a critical and multidimensional role in tackling the various challenges presented by climate change.<sup>121</sup> The UNFCCC framework provides an example of how international law can also be used to support or strengthen the role of relatively “weaker” States in the process of international cooperation.<sup>122</sup> In fact, not all States have the resources to take the necessary measures to mitigate or adapt to the effects of climate change, while other States have the resources to do more in the fight against this common global challenge.

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<sup>113</sup> World’s Youth for Climate Justice, *Human rights in the face of the climate crisis: a youth-led initiative to bring climate justice to the International Court of Justice* (2d. ed. 2022).

<sup>114</sup> UNFCCC (1992), Preamble, Arts. 3–7, 9.

<sup>115</sup> Kyoto Protocol to the United Nations Framework Convention on Climate Change (“**Kyoto Protocol**”) (1998), Arts. 2, 10, 13.

<sup>116</sup> Paris Agreement (2015), Preamble, Arts. 6–8, 10–12, 14.

<sup>117</sup> UNFCCC (1992), Art. 3(1).

<sup>118</sup> Paris Agreement (2015), Art. 6, 6(2).

<sup>119</sup> Paris Agreement (2015), Art. 7.

<sup>120</sup> Paris Agreement (2015), Art. 12.

<sup>121</sup> Jason Rudall, *The Obligation to Cooperate in the Fight against Climate Change*, 23 INTERNATIONAL COMMUNITY LAW REVIEW 184 (2021).

<sup>122</sup> See generally UNFCCC (1992).

Cooperation can help bridge this gap, calling on more developed countries to take the lead in combating climate change and its harmful effects, including through providing technical and financial assistance to developing countries to meet the costs of adaptation.<sup>123</sup>

71. The general obligation to cooperate has also been translated into more specific commitments through techniques designed to ensure information sharing. These specific commitments include rules on environmental impact assessments; rules ensuring that neighboring states receive necessary information (requiring information exchange, consultation, and notification); the provision of emergency information; and transboundary enforcement of environmental standards.<sup>124</sup>
72. The extent to which these commitments are interrelated is reflected, for example, in Principle 7 of the 1978 UNEP Draft Principles, which states that: “Exchange of information, notification, consultation and other forms of cooperation regarding shared natural resources are carried out on the basis of the principle of good faith and in the spirit of good neighborliness.”<sup>125</sup>
73. These procedural obligations arising under the duty to cooperate should be viewed as independent from, and complementary to, other fundamental environmental principles, such as the no harm principle and the precautionary principle. They can be useful to inform the due diligence obligations of States once there is “risk of significant harm,” and can come into play where there is a transboundary “adverse effect.” But violating each of these obligations can give rise to international State responsibility, due to their independent nature.<sup>126</sup>
74. The ICJ has further clarified the independence nature of procedural obligations. For example, in the *Pulp Mills case*, the Court recognized that States’ “procedural” obligations have an independent existence and can be violated regardless of any violation of their “substantive” obligations.<sup>127</sup> Some authors have noted that this approach shifts the emphasis from a “‘negative’ duty to avoid harm to a ‘positive’ duty” to cooperate, requiring States to take concrete steps to protect a shared resource even if no significant harm is caused or is likely to be caused.<sup>128</sup>

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<sup>123</sup> Developed States committed to approximately 100 billion dollars per year of financial assistance in accordance with the principle of common but differentiated responsibilities. See, e.g., UNFCCC, *Decision of the Contracting Parties*, FCCC/CP/2015/10/Add.1 (12 December 2015), ¶ 54.

<sup>124</sup> Maria Antonia Tigre, PRINCÍPIO DA COOPERAÇÃO, PRINCÍPIOS DE DERECHO AMBIENTAL Y AGENDA 2030 (Y. Aguila et. al., eds., 2019).

<sup>125</sup> UNEP Draft Principles (1978), Art. 7.

<sup>126</sup> Tamar Meshel, *Unmasking the Substance behind the Process: Why the Duty to Cooperate in International Water Law is Really a Substantive Principle*, 47 DENV. J. INT’L L. & POL’Y 29 (2018).

<sup>127</sup> *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, ICJ Reports 2010 (20 April 2010).

<sup>128</sup> Jutta Brunnée, *Procedure and Substance in International Environmental Law: Confused at a Higher Level?*, 5(6) ESIL (June 2016).

d. Principle of Solidarity

75. Under the principle of solidarity, States assist other States without expectations of reciprocity, to “achieve a shared goal or to recover from a critical situation.”<sup>129</sup> Therefore, solidarity may refer to the practice of States in response to dangers or events (negative solidarity) or to the creation of joint rights and obligations (positive solidarity).<sup>130</sup> According to the U.N. General Assembly, solidarity is a “fundamental value, by virtue of which global challenges must be managed in a way that distributes costs and burdens fairly, in accordance with basic principles of equity and social justice, and ensures that those who suffer or benefit the least receive help from those who benefit the most.”<sup>131</sup>
76. The principle of solidarity is recognized in treaty law and other international instruments,<sup>132</sup> and is in different stages of development in the branches of international law in which it is present (including international human rights and environmental law).<sup>133</sup> In international environmental law, “solidarity is instrumental in achieving common objectives through differentiated obligations.”<sup>134</sup> Moreover, “solidarity rights” emerging from the dynamics of interdependence among States and decolonization are increasingly being discussed and recognized, such as the rights to development, peace, and a healthy environment.<sup>135</sup>

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<sup>129</sup> Danio Campanelli, *Principle of Solidarity*, in MAX PLANCK ENCYCLOPEDIAS OF INTERNATIONAL LAW (2018).

<sup>130</sup> Karel Wellens, *Revisiting Solidarity as a (Re-)Emerging Constitutional Principle: Some Further Reflections*, in *Solidarity: A Structural Principle of International Law*, 213 BEITRÄGE ZUM AUSLÄNDISCHEN ÖFFENTLICHEN RECHT UND VÖLKERRECHT 4 (2010).

<sup>131</sup> See, *inter alia*, U.N. General Assembly, *Resolution on the Promotion of a democratic and equitable international order*, A/RES/59/193 (18 March 2005) and Resolution A/RES/59/204 (23 March 2004).

<sup>132</sup> For example, Article 3(b) of the 1994 United Nations Convention to Combat Desertification (UNCCD), recognizes that “the Parties should, in a spirit of international solidarity and partnership, improve cooperation and coordination at subregional, regional and international levels, and better focus financial, human, organizational and technical resources where they are needed.” Moreover, the U.N. Millennium Declaration (8 September 2000), adopted by the U.N. General Assembly, stipulates that “[s]olidarity. Global challenges must be managed in a way that distributes the costs and burdens fairly in accordance with basic principles of equity and social justice. Those who suffer or who benefit least deserve help from those who benefit most.”

<sup>133</sup> Karel Wellens, *Revisiting Solidarity as a (Re-)Emerging Constitutional Principle: Some Further Reflections*, in *Solidarity: A Structural Principle of International Law*, 213 BEITRÄGE ZUM AUSLÄNDISCHEN ÖFFENTLICHEN RECHT UND VÖLKERRECHT 4 (2010).

<sup>134</sup> Karel Wellens, *Revisiting Solidarity as a (Re-)Emerging Constitutional Principle: Some Further Reflections*, in *Solidarity: A Structural Principle of International Law*, 213 BEITRÄGE ZUM AUSLÄNDISCHEN ÖFFENTLICHEN RECHT UND VÖLKERRECHT 13 (2010).

<sup>135</sup> Petra Minnerop, Naomi Roht-Arriaza, & Sara C Aminzadeh, *Solidarity Rights (Development, Peace, Environment, Humanitarian Assistance)*, in MAX PLANCK ENCYCLOPEDIAS OF INTERNATIONAL LAW (2018).

77. Solidarity is a cross-cutting principle of international climate change law.<sup>136</sup> Article 3.2 of the UNFCCC stipulates that “the specific needs and special circumstances of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change, and of those Parties, especially developing country Parties, that would have to bear a disproportionate or abnormal burden under the Convention, should be given full consideration.”<sup>137</sup> According to Theresa Thorp, this reflects a notion of distributive fairness, that encompasses “the debt relationship that binds those with assets (active solidarity) with those who suffer (passive solidarity).”<sup>138</sup> Indeed, solidarity as enshrined in article 3.2 of the UNFCCC is a central *lex specialis* principle of climate change law.<sup>139</sup> Solidarity also justifies financial commitments made by developed States to developing and least developed States in the context of climate change,<sup>140</sup> to aid mitigation and adaptation measures,<sup>141</sup> as well as addressing loss and damage.<sup>142</sup>
78. In the context of climate change law, solidarity (together with the principles of equity, cooperation, and sustainable development) also serves as basis for other relevant principles of international environmental law, such as the principle of intergenerational equity, and common but differentiated responsibilities and respective capabilities.<sup>143</sup> Consequently, those who have benefited the most from the causes of anthropogenic climate change are expected to aid those that have benefited the least, or are disproportionately affected from it, without expectations of reciprocity. As such, developed countries are bound to cover more costs and burdens than those imposed on developing countries. At the same time, present generations who benefit from greenhouse gas (“GHG”) emissions are asked to make important sacrifices in benefit of generations to come.

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<sup>136</sup> Theresa Thorp, *Climate Justice: A Constitutional Approach to Unify the Lex Specialis Principles of International Climate Law*, 8(3) UTRECHT LAW REVIEW 7–37 (2012).

<sup>137</sup> UNFCCC (1992), Art. 3.2.

<sup>138</sup> Theresa Thorp, *Climate Justice: A Constitutional Approach to Unify the Lex Specialis Principles of International Climate Law*, UTRECHT LAW REVIEW, 8(3) UTRECHT LAW REVIEW 7–37 (2012).

<sup>139</sup> *Ibid.*

<sup>140</sup> UNHRC, *Report of the Independent Expert on human rights and international solidarity, International solidarity and climate change*, A/HRC/44/44 (1 April 2020).

<sup>141</sup> Paris Agreement, Arts. 2(1)(c), 4(4), 9, and 10.

<sup>142</sup> See UNFCCC, *Funding arrangements for responding to loss and damage associated with the adverse effects of climate change, including a focus on addressing loss and damage*, Decision -CP.27 -/CMA.4 (20 November 2022), proposed under agenda item 8(f) of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement at its fourth session; see also UNFCCC, *Santiago network for averting, minimizing and addressing loss and damage under the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts*, Decision -/CMA.4 (19 November 2022), proposed under agenda item 7 of the Conference of the Parties at its twenty-seventh session.

<sup>143</sup> See Angela Williams, *Solidarity, Justice and Climate Change Law*, 10 MELBOURNE J. INT. LAW 493–508, 503 (2009).

e. Principle of Common, But Differentiated Responsibilities and Respective Capabilities

79. The principle of common but differentiated responsibilities and respective capabilities (hereinafter “CBDR”) is a cornerstone of international environmental law. It originates from the general principle of international equity. As such, the CBDR recognizes “that the special needs of developing countries must be taken into account in the development, application and interpretation of rules of international environmental law.”<sup>144</sup> As its name suggests, CBDR comprises two distinct elements, namely that: (i) States have a common responsibility to protect the environment, and (ii) owing to their contribution to an environmental problem and degree of development, States have differentiated responsibilities and abilities to respond to an environmental threat.<sup>145</sup> In practice, the CBDR principle implies that States must comply with their common obligations to protect the environment, but in a differentiated manner which will be determined based on the State’s contribution to an environmental problem and its ability to respond to such a problem.
80. The CBDR is recognized in various international instruments pertaining to the protection of the environment,<sup>146</sup> including the UNFCCC, the Kyoto Protocol, and the Paris Agreement. As a general principle of the climate change legal regime, Article 3(1) of the UNFCCC provides that States should “protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof.”<sup>147</sup>
81. Most notably, the climate change regime sets out operative criteria to implement such a principle in the compliance with the international obligations pertaining to the protection of the climate system, establishing a sliding scale of State parties and differentiated obligations deriving from such categorization.<sup>148</sup> In this sense, Article 4 of the UNFCCC provides for common and differentiated obligations.<sup>149</sup> In general, all States party to such a Convention have a duty to cooperate in

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<sup>144</sup> Philippe Sands and Jacqueline Peel, *PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW* (3d ed. 2012), p. 233.

<sup>145</sup> *Ibid.*

<sup>146</sup> See, *inter alia*, Declaration of the United Nations Conference on the Human Environment (16 June 1972); Rio Declaration (1992); United Nations Convention on the Law of the Sea (10 December 1982); UNFCCC (1992); Kyoto Protocol (1997); and Paris Agreement (2015).

<sup>147</sup> UNFCCC (1992), Art. 3(1).

<sup>148</sup> See UNFCCC, *Annex I: Developed States or Those in Transition to a Market Economy*; see also UNFCCC, *Non-Annex I: Developing States and Least Developed Countries*.

<sup>149</sup> UNFCCC (1992), Art. 4.



preventing and addressing climate change through mitigation and adaptation measures. However, developed States who have also contributed the most to climate change (Annex I) must take the lead in advancing mitigation to limit GHG emissions as well as adaptation measures. This logic is also replicated in the Kyoto Protocol, which introduced novel obligations for Annex I State Parties, but did not “introduce any new commitments for Parties not included in Annex I.”<sup>150</sup> The Paris Agreement reaffirmed this principle as a bedrock of climate change law, setting out in its Article 2.2 that the treaty must be implemented “to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.”<sup>151</sup> However, the Paris Agreement no longer divides countries into two distinct categories. For example, in applying the CBDR principle, the Paris Agreement recognizes that developed country Parties “should continue taking the lead by undertaking economy-wide absolute emission reduction targets,” developing country Parties “should continue enhancing their mitigation efforts,” and “least developed countries and small island developing States may prepare and communicate strategies, plans and actions for low greenhouse gas emissions development reflecting their special circumstances.”<sup>152</sup>

82. When referring to the common responsibility derived from each State’s contribution to the harm caused by climate change, the Committee on the Rights of the Child (“**CRC Committee**”), found in *Sacchi et al vs. Argentina*, that “in accordance with the principle of common but differentiated responsibility...the collective nature of the causation of climate change does not absolve the State party of its individual responsibility that may derive from the harm that the emissions originating within its territory may cause to children, whatever their location.”<sup>153</sup> The U.N. Special Rapporteur on Human Rights and the Environment has also referred to the CBDR principle, stating that “wealthy States must contribute their fair share towards the costs of mitigation and adaptation in low income countries,” through grants and not loans, given that basic principles of justice are violated when poor countries are forced to pay for “the costs of responding to climate change when wealthy countries caused the problem.”<sup>154</sup>
83. The Inter-American Commission on Human Rights, in its Resolution on the Climate Emergency, has also highlighted that, under the CBDR principle, “those

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<sup>150</sup> Kyoto Protocol (1997), Art. 10.

<sup>151</sup> Paris Agreement (2015), Art. 2(2).

<sup>152</sup> Paris Agreement (2015), Art. 4.

<sup>153</sup> U.N. Committee on the Rights of the Child, *Decision adopted by the Committee under the Optional protocol to the Convention on the Rights of the Child on a communications procedure, concerning communication No. 104/2019 (Sacchi et al. v. Argentina)*, CRC/C/88/D/104/2019 (22 September 2021), ¶ 10.10.

<sup>154</sup> UNHRC, *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, A/74/161 (2019), ¶¶ 26 and 68.

States that have greater financial capacity must provide the guarantees to provide greater technical and logistical capacity to the States that have a greater degree of impact on climate change, as well as less financial and infrastructure capacity to face the climate emergency.”<sup>155</sup> In this sense, the principle interacts with other relevant norms of international law, such as the principle of cooperation, under which “States that are in a position to do so should contribute to covering the costs of mitigation and adaptation of States prevented from doing so, in accordance with the principle of common but differentiated responsibilities.”<sup>156</sup> Additionally, the Commission emphasized that human rights obligations “should not be neglected because of the multi-causal nature of the climate crisis, as all States have common but differentiated obligations in the context of climate action.”<sup>157</sup>

f. Equity Under International Environmental Law

84. As a general principle of public international law, equity allows the international community to take into account considerations of justice and fairness in the establishment, operation or application of a rule of law.<sup>158</sup> On this matter, the ICJ has recognized that “the legal concept of equity is a general principle directly applicable as law” which demands from the Court interpreting the relevant rules of international law to achieve an equitable solution<sup>159</sup> derived from the applicable law.<sup>160</sup> Therefore, equity plays a role as an interpretative method for “infusing elements of reasonableness and ‘individualized’ justice whenever the applicable law leaves a margin of discretion to the court.”<sup>161</sup>
85. Equity is generally present—both explicitly and implicitly—in treaties and declarations pertaining to the protection of the environment or its elements, which treaties refer to (i) the equitable use of environmental resources, (ii) the protection of future generations, and (iii) sustainable development.<sup>162</sup> For example, the Rio

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<sup>155</sup> Inter-American Commission on Human Rights, *Climate Emergency: Scope of Inter-American Human Rights Obligations*, Resolution No. 3/2 (2021), Point I.7.

<sup>156</sup> *Ibid.*, Point II.11.

<sup>157</sup> *Ibid.*, Point II.15.

<sup>158</sup> Philippe Sands and Jacqueline Peel, *PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW* (3d ed. 2012), p. 119.

<sup>159</sup> See *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, Judgment, ICJ Reports 1969 (20 February 1969), ¶ 71; *Factory at Chorzow (Germany v. Poland)*, 1927 PCIJ (ser. A), No. 9 (26 July 1927), ¶ 82.

<sup>160</sup> *Fisheries Jurisdiction (United Kingdom v. Iceland)*, Merits, Judgment, ICJ Reports 1974 (25 July 1974), ¶¶ 69 and 78.

<sup>161</sup> Francesco Francioni, *Equity in International Law*, in *MAX PLANCK ENCYCLOPEDIAS OF INTERNATIONAL LAW* (2020), ¶ 7. See also *Frontier Dispute (Burkina Faso v. Mali)*, Judgment, ICJ Reports 1986 (22 December 1986), ¶ 28.

<sup>162</sup> See, e.g., UNFCCC (1992), Art. 3; Paris Agreement (2015), preamble & Arts. 2.2 & 4; Convention on Biological Diversity (22 May 1992), preamble; Declaration of the United Nations Conference on the Human Environment (1972), Principles 1 & 12; Rio Declaration (1992), Principles 6 and 3; Johannesburg Declaration on Sustainable Development (2002), ¶ 24.

Declaration provides that “the right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.”<sup>163</sup> Most notably, the principle of common but differentiated responsibilities and respective capabilities is considered an operationalization of general equity in international environmental law, because it acknowledges factual differences between States which require differentiated approaches in the compliance of international obligations.<sup>164</sup>

86. Several scholars have highlighted the centrality of equity in addressing climate change through the law, while also showcasing the political tensions that arise when discussing issues of justice and fairness in the context of the climate crisis.<sup>165</sup> Article 3(1) of the UNFCCC establishes that State Parties should “protect the climate system for the benefit of present and future generations of humankind, based on equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof.”<sup>166</sup> Therefore, the Framework Convention includes considerations of justice and fairness in the application of its provisions, by encouraging developed States to take the lead in climate action and acknowledging the importance of the disproportionate impacts of climate change in developing States.
87. Moreover, the Paris Agreement shall “be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.”<sup>167</sup> Therefore, GHG emissions should be limited to achieve a long-term temperature goal, on the “basis of equity, and in the context of sustainable development and efforts to eradicate poverty.”<sup>168</sup>
88. It must be highlighted that equity is not only central in international environmental law but is also a principle present in national climate change policies, especially as it relates to equality and non-discrimination in international

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<sup>163</sup> Rio Declaration (1992), Principle 3.

<sup>164</sup> U.N. Secretary General, *Gaps in international environmental law and environment-related instruments: towards a global pact for the environment*, A/73/419 (30 November 2018), ¶ 21.

<sup>165</sup> See, e.g., ILA, *Report of the ILA’s Committee on Legal Principles Relating to Climate Change* (2014), Draft Art. 4; Chukwumerije Okereke, *Climate Justice and the international regime*, 1(3) WIREs CLIMATE CHANGE 462 (8 June 2010); Henry Shue, *Global Environment and International Inequality*, INTERNATIONAL AFFAIRS (1999); Eric Neumayer, *In Defence of Historical Accountability for Greenhouse Gas Emissions*, ECOLOGICAL ECONOMICS, No. 33 (2000); Theresa Thorp, *Climate Justice: A Constitutional Approach to Unify the Lex Specialis Principles of International Climate Law*, UTRECHT LAW REVIEW, 8(3) UTRECHT LAW REVIEW 7–37 (2012).

<sup>166</sup> UNFCCC (1992), Art. 3(1).

<sup>167</sup> Paris Agreement (2015), Art. 2(2).

<sup>168</sup> *Ibid*, Art. 4.

human rights law.<sup>169</sup> On this matter, the U.N. Office of the High Commissioner for Human Rights (“OHCHR”) has highlighted that ensuring equity in climate action is a key human rights obligation in the face of climate change.<sup>170</sup> This requires “that efforts to mitigate and adapt to the impacts of climate change should benefit people in developing countries, indigenous peoples, people in vulnerable situations and future generations.”<sup>171</sup>

g. Obligation to Provide Remedies for Human Rights Violations  
Arising from Climate Change

89. Climate change mitigation measures must comply with human rights principles.<sup>172</sup> Justice Guha Roy has pointed out, social life is “unthinkable” without the timeless premise “[t]hat a wrong done to an individual must be redressed by the offender himself or by someone else against whom the sanction of the community may be directed.”<sup>173</sup> Shelton has observed that “remedies are not only about making the victim whole; they express opprobrium to the wrongdoer from the perspective of society as a whole” and thus “affirm, reinforce, and reify the fundamental values of society.”<sup>174</sup>
90. Thus, any legal system prevails when remedies are provided by the adjudicator to the victims upon whom any injury has been inflicted. In international human rights law, the right to a remedy is a substantive right that is well-established

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<sup>169</sup> In this sense, the U.N. Special Rapporteur on the promotion and protection of human rights in the context of climate change has recognized that “the intersection of gender with race, class, ethnicity, sexuality, indigenous identity, age, disability, income, migrant status and geographical location often compound vulnerability to climate change impacts, exacerbate inequity and create further injustice.” See U.N. General Assembly, *Report of the Special Rapporteur on the promotion and protection of human rights in the context of climate change; Promotion and protection of human rights in the context of climate change mitigation, loss and damage and participation*, A/77/226 (26 July 2022), ¶ 29. See also, OHCHR, FREQUENTLY ASKED QUESTIONS ON HUMAN RIGHTS AND CLIMATE CHANGE: FACT SHEET NO. 38 (2021), pp. 38, 42.

<sup>170</sup> OHCHR, FREQUENTLY ASKED QUESTIONS ON HUMAN RIGHTS AND CLIMATE CHANGE: FACT SHEET NO. 38 (2021), p. 33.

<sup>171</sup> OHCHR, FREQUENTLY ASKED QUESTIONS ON HUMAN RIGHTS AND CLIMATE CHANGE: FACT SHEET NO. 38 (2021), p. 42.

<sup>172</sup> Anne Kling, *Climate Change and human rights – Can the courts fix it?*, HEINRICH BÖLL STIFTUNG.

<sup>173</sup> Justice S.N. Guha Roy, *Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law?*, 55(4) AMERICAN JOURNAL OF INTERNATIONAL LAW 863 (1961).

<sup>174</sup> Dinah Shelton, *The Right to Reparations for Acts of Torture: What Right, What Remedies?*, 17(2) TORTURE 96 (2007), p. 96.

through both custom<sup>175</sup> and treaties.<sup>176</sup> In this respect, the European Court of Human Rights (“ECtHR”) has emphasized that the purpose of human rights law is “[to guarantee] not rights that are theoretical or illusory but rights that are practical and effective.”<sup>177</sup> Similarly, the African Commission on Human and Peoples’ Rights has stressed that “[t]he rights and freedoms of individuals enshrined in the [African] Charter can only be fully realized if governments provide structures which enable them to seek redress if they are violated.”<sup>178</sup> The Inter-American Court of Human Rights has similarly held that “a full and

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<sup>175</sup> See *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, U.N. General Assembly Res. 60/147 (16 December 2005), Annex, Principles 1(b), 2, 3 and (pertaining to gross violations of international human rights law and international crimes) 11. See also *Moiwana Village v. Suriname*, 124 IACtHR (Ser. C) (2005), ¶ 169. See further Dinah Shelton, *REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW* (2d ed. 2010), p. 103.

<sup>176</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966; entered into force 23 March 1976), 999 UNTS 171, Art. 14; American Convention on Human Rights (22 November 1969), 1144 UNTS 123, Arts. 1, 8 and 25; Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (2021), Art. 13. Since 2008, the Human Rights Council and its Special Procedures Mechanisms have been actively involved in addressing the human rights impacts of climate change. The Council has held two-panel discussions on human rights and climate change, which was also the theme of the 2010 Social Forum. The following resolutions on human rights and climate change have been issued to date:

- Resolution 7/23 (March 2008): The Council expressed concern that climate change “poses an immediate and far-reaching threat to people and communities around the world” and requested OHCHR to prepare a study on the relationship between climate change and human rights (A/HRC/10/61).
- Resolution 10/4 (March 2009): The Council noted that “climate change-related impacts have a range of implications, both direct and indirect, for the effective enjoyment of human rights ...” and that such effects “will be felt most acutely by those segments of the population who are already in a vulnerable situation ...”
- Resolution 18/22 (September 2011): The Council affirmed that human rights obligations, standards, and principles have the potential to inform and strengthen international and national policy-making in the area of climate change, promoting policy coherence, legitimacy, and sustainable outcomes. They called for a seminar to address the adverse impacts of climate change on the full enjoyment of human rights and a summary report of the seminar (A/HRC/20/7).
- Resolution 26/27 (July 2014): The Council emphasized the need for all States to enhance international dialogue and cooperation to address the adverse impacts of climate change on the enjoyment of human rights including the right to development. It called for dialogue, capacity building, mobilization of financial resources, technology transfer, and other forms of cooperation to facilitate climate change adaptation and mitigation, in order to meet the special needs and circumstances of developing countries.
- Resolution 29/15 (July 2015): The Council emphasized the importance of continuing to address the adverse consequences of climate change for all and called for a panel discussion and analytical study on the impacts of climate change on the enjoyment of the right to health.

<sup>177</sup> See, for example, *Airey v. Republic of Ireland*, 32 Eur Ct HR Ser. A, 2 EHRR 305 (1979). See also Stephen Humphreys, *Introduction: Human Rights and Climate Change*, in *HUMAN RIGHTS AND CLIMATE CHANGE* (2010), p. 11 (suggesting that the absence of a remedy for climate change victims would significantly undermine the hegemonic status (or aspiration) of human rights law).

<sup>178</sup> *Jawara v. The Gambia (Communication Nos. 147/95, 149/96)*, ACHPR 17 (2000), ¶ 74.

adequate reparation cannot be reduced to the payment of compensation to the victims or their families, since, depending on the case, rehabilitation measures, satisfaction and guarantees of non-repetition are also necessary.”<sup>179</sup> In the context of climate change, specifically, the requirement for a remedy is a “key organising concept.”<sup>180</sup>

91. With the link between human rights violations and the adverse impacts of climate change has been unequivocally established,<sup>181</sup> it becomes necessary to highlight the remedies that are available in such circumstances. Given the state of the climate crisis and the threat it imposes to the enjoyment of established human rights,<sup>182</sup> there is recognition in climate change law of “the right to remedy” when there is a violation of human rights due to the adverse effects of climate change.<sup>183</sup> Thus, “redress for injury is central to a human rights approach to climate change, and indeed is a basic axiom of justice.”<sup>184</sup>
92. Victims of human rights violations—including those associated with climate change—are entitled to access remedial institutions and procedures affording

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<sup>179</sup> See, e.g., *Herrera Espinoza et al. v. Ecuador*, Judgment, 316 IACtHR (Ser. C) (2016), ¶ 314. See also U.N. Human Rights Committee, *General Comment No. 31*, CCPR/C/21/Rev.1/Add. 13 (26 May 2004), ¶ 2; Margaretha Wewerinke-Singh, *Remedies for Human Rights Violations Caused by Climate Change*, 9(3) CLIMATE LAW 224–243 (2019); Ilias Bantekas and Lutz Oette, *INTERNATIONAL HUMAN RIGHTS LAW AND PRACTICE* (2nd ed., 2013), p. 92.

<sup>180</sup> See James R Crawford, *Responsibility to the International Community as a Whole*, 8(2) IND. J. GLOBAL LEGAL STUD. 303, 313 (2001); Benedict Kingsbury, *Sovereignty and Inequality*, 9 EUR.J.INT’LL. 599, 599 (1998); Christopher G. Weeramantry, *UNIVERSALISING INTERNATIONAL LAW* (2004), p. 38 (“Whether we like it or not, the sovereign state system provides the basis of current international law”); UNFCCC (1992), Preamble (“Reaffirming the principle of sovereignty of States in international cooperation to address climate change”); U.N. Human Rights Council, *Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights*, A/HRC/10/61 (15 January 2009).

<sup>181</sup> The UNGA recognizes the right to a clean, healthy and sustainable environment as a human right. See UNHRC, *The human right to a safe, clean, healthy and sustainable environment*, A/HRC/48/L.23/Rev.1 (2021). In the Torres Strait Case, the UNHRC has found that Australia’s failure to adequately protect indigenous Torres Islanders against adverse impacts of climate change violated their rights to enjoy their culture and be free from arbitrary interferences with their private life, family and home. See U.N. Human Rights Committee, *Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning communication No. 3624/2019*, CCPR/C/135/D/3624/2019 (22 September 2022); Paris Agreement (2015), Preamble. See also Glasgow Climate Pact (2021), Decision 1/CP.26 and Decision 1/CMA.3, preambular ¶ 6.

<sup>182</sup> See U.N. Human Rights Council, *Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights*, A/HRC/10/61 (15 January 2009). The report comments on five thematic areas: (a) the relationship between the environment and human rights; (b) implications of the effects of climate change for the enjoyment of specific rights; (c) vulnerabilities of specific groups; (d) human rights implications of climate change-induced displacement and conflict; and (e) human rights implications of measures to address climate change.

<sup>183</sup> See Margaretha Wewerinke-Singh, *Remedies for Human Rights Violations Caused by Climate Change*, 9(3) CLIMATE LAW 224–243, 226 (2019).

<sup>184</sup> *Ibid.*, p. 2; see also Margaretha Wewerinke-Singh, *STATE RESPONSIBILITY, CLIMATE CHANGE AND HUMAN RIGHTS UNDER INTERNATIONAL LAW* (2019).

them a fair hearing and, ultimately, substantive redress.<sup>185</sup> The importance of access to independent judicial or quasi-judicial bodies that can adjudicate human rights violations is such that the element of enforceability is sometimes included in the notion of legal rights.<sup>186</sup> Without this element, the obligations of states are all too easily mischaracterized as voluntary commitments that may be upheld or disregarded at will.<sup>187</sup>

93. Providing access to justice on environmental matters is a procedural obligation.<sup>188</sup> In this sense, the Inter-American Court of Human Rights (“IACtHR”) has established that “access to justice permits the individual to ensure that environmental standards are enforced and provides a means of redressing any human rights violations that may result from failure to comply with environmental standards, and includes remedies and reparation.”<sup>189</sup> Consequently, States are bound to “guarantee that the public have access to remedies conducted in accordance with due process of law to contest any provision, decision, act or omission of the public authorities that violates or could violate obligations under environmental law; to ensure the full realization of the other procedural rights . . . and to redress any violation of their rights as a result of failure to comply with obligations under environmental law.”<sup>190</sup>
94. Referring specifically to effective remedies that must be provided for human rights violations arising from climate change, the OHCHR has also recognized that access to justice must be guaranteed to those who suffer violations to their climate-related human rights, so that they have access to “meaningful remedies,” including judicial and other mechanisms.<sup>191</sup> Similarly, the IACtHR has considered

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<sup>185</sup> *Ibid.*

<sup>186</sup> Morris Ginsberg, *ON JUSTICE IN SOCIETY* (1965), p. 74.

<sup>187</sup> See Dinah Shelton, *The Right to Reparations for Acts of Torture: What Right, What Remedies?*, 17(2) *TORTURE* 96 (2007), p. 96.

<sup>188</sup> UNECE, *Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (“Aarhus Convention”)* (25 June 1998), Art. 9; *Regional Agreement on Access to Information, Public Participation and Access to Justice in Environmental Matters in Latin America and the Caribbean (“Escazú Agreement”)* (4 March 2018), Art. 8.

<sup>189</sup> *State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and Personal Integrity: Interpretation and Scope of Articles 4(1) and 5(1) in Relation to Articles 1(1) and 2 of the American Convention on Human Rights*, Advisory Opinion OC-23/17 (Requested by the Republic of Colombia), IACtHR (15 November 2017), ¶ 234; Maria Antonia Tigre & Natalia Urzola, *The 2017 Inter-American Court’s Advisory Opinion: changing the paradigm for international environmental law in the Anthropocene*, 12(1) *J. HUM. RTS. & ENVT.* 24 (2021).

<sup>190</sup> *State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and Personal Integrity: Interpretation and Scope of Articles 4(1) and 5(1) in Relation to Articles 1(1) and 2 of the American Convention on Human Rights*, Advisory Opinion OC-23/17 (Requested by the Republic of Colombia), IACtHR (15 November 2017), ¶ 237.

<sup>191</sup> OHCHR, *FREQUENTLY ASKED QUESTIONS ON HUMAN RIGHTS AND CLIMATE CHANGE: FACT SHEET NO. 38* (2021), p. 32.

that “States should take appropriate measures to ensure that individuals and communities affected by human rights abuses and violations under their jurisdiction have access to effective redress mechanisms, including the accountability of companies and the determination of their criminal, civil or administrative responsibility. In case of violation of rights as a result of environmental damage, States have the obligation to make full reparation to the victims, which implies the restoration of the environment as a mechanism of integral restitution and guarantee of non-repetition.”<sup>192</sup>

95. It must be clarified that domestic authorities are primarily responsible to ensure that human rights are enforced within their jurisdiction, and therefore States must ensure effective domestic remedies for addressing human rights violations arising from climate change. Where these remedies are not available, or are not effective in practice, universal and regional human rights systems might be triggered for victims of human rights violations caused by climate change.<sup>193</sup>

h. Good Faith

96. The notion of good faith reflects legal and extra-legal elements, such as honesty, fairness, and reasonableness. Although the meaning of the principle of good faith in international law is ambiguous and controversial in theory and practice, good faith in international law has manifold roles in the creation, interpretation, and performance of treaties as well as in the creation and performance of international obligations derived from other sources of international law. In this sense, good faith is a fundamental principle of international law.
97. Recent cases brought before the ICJ have elaborated the principle of good faith in fulfilment of a duty of cooperation, and have revealed the substance of the principle under concrete circumstances related to sustainable development and, more specifically, to sustainable management of shared resources in international law. In the *Gabčíkovo-Nagymaros Project* case, within the realm of cooperation in the use of the shared water resources contemplated by the 1977 Treaty between the parties, the Court called upon the parties to re-negotiate and re-establish the joint regime in good faith under the rule of *pacta sunt servanda*, taking into consideration newly developed environmental norms even after the construction began. The Court indicated that “[w]hat is required in the present case by the rule *pacta sunt servanda* as reflected in Article 26 of the Vienna Convention of 1969 on the Law of Treaties, is that the Parties find an agreed solution within the co-operative context of the Treaty.”<sup>194</sup> The Court construed good faith under Article 26, such that “[t]he

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<sup>192</sup> Inter-American Commission on Human Rights, *Climate Emergency: Scope of Inter-American Human Rights Obligations*, Resolution No. 3/2 (2021), Point II.14.

<sup>193</sup> See U.N. Human Rights Committee, *Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning communication No. 3624/2019*, CCPR/C/135/D/3624/2019 (21 July 2022).

<sup>194</sup> *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, ICJ Reports 1997 (25 September 1997), ¶ 142.



principle of good faith obliges the Parties to apply the 1977 Treaty in a reasonable way and in such a manner that its purpose can be realized.”<sup>195</sup> For the Court, the cooperative context of the 1977 Treaty was meant to re-establish the joint regime for the common utilization of the shared water resources.

i. Public Participation

98. Public participation refers to the ability of citizens representing different perspectives to inform governmental decision making.<sup>196</sup> Public participation rights in private decision making, such as within corporations, are far rarer. The perspectives that a participating public can bring to bear on governmental decision making include both those of the affected public and those of experts and researchers in a variety of fields who operate independently of the government.<sup>197</sup> Thus, public participation serves a variety of purposes from increasing the legitimacy of governmental decisions to ensuring that substantively, the government has not missed or ignored an important aspect, impact, or unintended consequence of the decision under consideration.<sup>198</sup> This has been recognized as a right in many international human rights instruments such as the Universal Declaration on Human Rights<sup>199</sup> and the International Covenant on Civil and Political Rights.<sup>200</sup>
99. In the cross-pollination between human rights law and international environmental law, public participation has been an important element in environmental decision-making for several decades. It has been enshrined in international environmental law via such instruments as the 1992 Rio Declaration<sup>201</sup> and the 1998 UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters

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<sup>195</sup> *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, ICJ Reports 1997 (25 September 1997), ¶ 142.

<sup>196</sup> Sanne Akerboom & Robin Kundis Craig, *How law structures public participation in environmental decision making: A comparative law approach*, 32(3) ENVIRONMENTAL POLICY AND GOVERNANCE, 232–246 (2022); Caron Chess & Kristen Purcell, *Public participation and the environment: Do we know what works?*, 33(16) ENVIRONMENTAL SCIENCE & TECHNOLOGY, 2685–2692 (1999); Anna Wesselink, Jouni Paavola, Oliver Fritsch, & Ortwin Renn, *Rationales for public participation in environmental policy and governance: Practitioners' perspectives*, 43(11) ENVIRONMENT & PLANNING A: ECONOMY AND SPACE, 2688–2704 (2011).

<sup>197</sup> Sanne Akerboom & Robin Kundis Craig, *How law structures public participation in environmental decision making: A comparative law approach*, 32(3) ENVIRONMENTAL POLICY AND GOVERNANCE, 232–246 (2022).

<sup>198</sup> Salim Momtaz & William Gladstone, *Ban on commercial fishing in the estuarine waters of New South Wales, Australia: Community consultation and social impacts*, 28(2-3) ENVIRONMENTAL IMPACT ASSESSMENT REVIEW, 319–342 (2008); see also Ciaran O’Faircheallaigh, *Public participation and environmental impact assessment: Purposes, implications, and lessons for public policy making*, 30(1) ENVIRONMENTAL IMPACT ASSESSMENT REVIEW, 19–27 (2010).

<sup>199</sup> Universal Declaration on Human Rights (1948), Art. 21.

<sup>200</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966; entered into force 23 March 1976), 999 UNTS 171, Art. 25.

<sup>201</sup> Rio Declaration (1992), Principle 10.

(“**Aarhus Convention**”).<sup>202</sup> It has also been recognized in the Stockholm Convention on Persistent Organic Pollutants,<sup>203</sup> the Convention on Biological Diversity,<sup>204</sup> the United Nations Convention to Combat Desertification<sup>205</sup>, and the United Nations Framework Convention on Climate Change.<sup>206</sup> At a regional level, the Escazú Agreement enshrines the right of every person of present and future generations to live in a healthy environment and to sustainable development.<sup>207</sup> It is the Economic Commission for Latin America and the Caribbean’s (“**ECLAC**”) first environmental treaty as well as the world’s first agreement with provisions on human rights defenders in environmental matters, an issue of particular importance in the region due to risks for advocates and activists.<sup>208</sup>

100. Public participation has three components: the right to participate in environmental decision-making processes, the right to information concerning the environment and activities affecting it, and the right of access to justice.<sup>209</sup> The most significant development of promoting public participation in international environmental law was the adoption of the Aarhus Convention.<sup>210</sup> It was a major step forward in the field of procedural environmental rights. For the first time the interlinked rights of access to information, public participation, and access to justice were addressed in a comprehensive way in a single international treaty and is widely accepted<sup>211</sup> as the leading example of the implementation of principle 10 of the Rio Declaration on Environment and Development.<sup>212</sup>
101. The adoption of this established that sustainable development can be achieved only through the involvement of all stakeholders, linking government accountability and environmental protection. It sets out the key elements of public participation and its provisions have become widely recognized as a benchmark for environmental democracy. The key elements include access to environmental

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<sup>202</sup> Aarhus Convention (25 June 1998), Arts. 6–8.

<sup>203</sup> Stockholm Convention on Persistent Organic Pollutants (2001), Art. 10.

<sup>204</sup> CBD (1992), Art. 14(1).

<sup>205</sup> United Nations Convention to Combat Desertification (1994), Arts. 3, 5.

<sup>206</sup> UNFCCC (1992), Art. 6(a).

<sup>207</sup> Escazú Agreement (4 March 2018), Art. 3.

<sup>208</sup> “*Escazú Agreement Takes Effect, Enshrining Right to Sustainable Development*,” IISD SDG KNOWLEDGE HUB (26 April 2021).

<sup>209</sup> Tori Chai, “*The Importance of Public Participation*,” YORK UNIVERSITY ENVIRONMENTAL JUSTICE AND SUSTAINABILITY CLINIC (1 April 2016).

<sup>210</sup> See *supra* at note 202.

<sup>211</sup> Forty-six states and the EU are Parties to this Convention, along with transitioning economies including those from Central Asia (Kazakhstan, Kyrgyzstan, Tajikistan, and Turkmenistan) and Caucasian countries (namely Armenia, Azerbaijan and Georgia). All other former Soviet countries such as Ukraine, Belarus, and the Republic of Moldova are also Parties to the Convention. In addition, most Balkan non-EU countries, such as Albania, Bosnia and Herzegovina, Montenegro, Serbia, and the former Yugoslav Republic of Macedonia, are also Parties.

<sup>212</sup> Patricia Birnie and Alan Boyle, *INTERNATIONAL LAW AND THE ENVIRONMENT* (2001), p. 262.

information, early and ongoing involvement of the public in decision-making, broad scope of participation, transparent and user-friendly processes, an obligation on authorities to take account of public input, a supportive infrastructure, and an effective means of enforcement/appeal.

## 2. *Treaty Law*

102. The UNFCCC<sup>213</sup> and the Paris Agreement<sup>214</sup> notably foreground three shared principles of international environmental law: common, but differentiated responsibilities, cost lowering, and the primacy of states as actors.<sup>215</sup> Comparing the UNFCCC to the Paris Agreement reveals the continuities and evolutions of each of these principles.<sup>216</sup>
103. The UNFCCC and the Paris Agreement both recognize that state parties share a common goal in reducing GHG emissions, and that each state party has *sui generis* responsibilities towards achieving that goal. This phrase was first articulated in the UNFCCC, which divided the global community into three tranches of responsibility: Annex I, Annex II, and developing countries.<sup>217</sup> High-income nations are commanded to commit themselves to bear greater responsibility for historical GHG emissions, as well as to facilitate financial flows to developing nations. The UNFCCC lists several geoeconomic conditions that may differentiate a state party's commitments.<sup>218</sup> The Paris Agreement highlights the heightened challenges and greater leeway granted to "[t]he least developed countries and *small island developing States*" (alteration in original) (emphasis added).<sup>219</sup> The treaties recognize both individual state actors and their collective capacity to reduce GHG emissions.
104. Both treaties seek to lower costs through efficacious financial flows from high-income nations to lower income nations, increased transparency, and technology sharing. The UNFCCC requires high-income nations to commit "additional financial resources" to low-to-middle-income nations.<sup>220</sup> Similarly, the Paris Agreement beseeches high-income nations to support financially low-to-middle-

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<sup>213</sup> See generally UNFCCC (1992).

<sup>214</sup> See Paris Agreement (2015).

<sup>215</sup> See David Hunter, *International Environmental Law*, American Bar Association, 19(1) INSIGHTS ON LAW AND SOC'Y (5 January 2021) (listing ten principles of international environmental law).

<sup>216</sup> The principles discussed in this memo are non-exhaustive. See *id.*

<sup>217</sup> See UNFCCC (1992), Art. 4, pp. 23-24 (defining Annex I countries to include high-income nations, plus post-Soviet states, Annex II consisting of the same countries as Annex I minus the post-Soviet states, and developing countries to encompass all other party states).

<sup>218</sup> See *id.*, Art. 4, pp. 8-9 (including notably "small island countries").

<sup>219</sup> *Id.*

<sup>220</sup> See UNFCCC (1992), Art. 4(3).

income nations.<sup>221</sup> The UNFCCC and the Paris Agreement both see increased transparency as a means of lowering information costs and promoting effective governance.<sup>222</sup> Parties to the UNFCCC are committed to sharing technology and scientific information that will reduce the magnitude of climate change's effects.<sup>223</sup> The Paris Agreement advances the UNFCCC's commitments by beseeching high-income nations to make technological transfers to low-to-middle-income countries.<sup>224</sup> Both treaties evince an underlying belief in the importance of cost lowering across financial, information, and technological flows.

105. Both treaties prioritize state actor agency. In Article 4 of the UNFCCC, individual state actors are the agents through which any cooperative framework may emerge.<sup>225</sup> Each State's pledges to reduce its GHG emissions are expressed in its "nationally determined contributions" ("NDCs"). These treaties both treat the nation-state as the fundamental unit of agency for GHG reduction and climate change cooperation.

#### **B. Relevant Principles of International Human Rights Law**

106. The request for an advisory opinion poses questions about States' obligations in respect of the climate system and the environment. By their nature, these questions implicate the connection between international environmental law and international human rights law,<sup>226</sup> a well-established body of international law comprised of many obligations derived from treaty and customary international law. The Court has previously recognized this connection, as follows:

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<sup>221</sup> See Paris Agreement (2015), Art. 4(5) ("Support shall be provided to developing country Parties for . . . implementation . . . recognizing that enhanced support for developing country Parties will allow for higher ambition in their actions.").

<sup>222</sup> Paris Agreement (2015), Art. 13(1) ("[T]o promote effective implementation, an enhanced transparency framework for action and support, with built-in flexibility which takes into account Parties' different capacities and builds upon collective experience is hereby established"); UNFCCC (1992), Art. 11(2) ("The financial mechanism shall have an equitable and balanced representation of all Parties *within a transparent system of governance*" (emphasis added)).

<sup>223</sup> UNFCCC (1992), Art. 4, p. 6.

<sup>224</sup> Paris Agreement (2015), Art. 13(9) ("Developed country Parties *shall*, and other Parties that provide support should, provide information on financial, technology transfer and capacity-building support provided to developing country Parties . . ." (emphasis added)).

<sup>225</sup> See UNFCCC (1992), Art. 4, pp. 4-5.

<sup>226</sup> See, e.g., U.N. Environment Programme, *Declaration of the United Nations Conference on the Human Environment*, in *Report of the United Nations Conference on the Human Environment*, A/CONF.48/14/Rev. 1 (1972), Principle 1 ("Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations."); U.N. Environment Programme, *Report of the United Nations Conference on the Human Environment*, A/CONF.48/14/Rev. 1 (1972), p. 3 ("Both aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights – even the right to life itself").

The Court also recognizes that the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.<sup>227</sup>

107. Because harm to the environment may threaten human health and quality of life, States' obligations with respect to the environment are inherently tied to their human rights obligations. The following sections identify and briefly discuss certain human rights principles that are relevant to and inform States' obligations with respect to the environment.

1. *Right to life*

108. The right to life is a well-established principle of treaty law and customary international law.<sup>228</sup> The International Covenant on Civil and Political Rights ("ICCPR"), which is the foundational multilateral human rights treaty, codifies this right:

Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.<sup>229</sup>

109. The U.N. Human Rights Committee is a body of independent experts charged with monitoring the implementation of the ICCPR, and the Committee issues authoritative interpretations of the rights codified therein. In this respect, the

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<sup>227</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996 (8 July 1996), ¶ 29. See also *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Vice-President Weeramantry Separate Opinion, ICJ Reports 1997 (25 September 1997), p. 91 (describing the protection of the environment as a "sine qua non for numerous human rights such as the right to health and the right to life itself").

<sup>228</sup> Universal Declaration of Human Rights (1948), Art. 3; ICCPR (1966), Art. 6; Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (2021), Art. 2; African Charter on Human and People's Rights (1981), Art. 4; Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003), Art. 4; African Charter on the Rights and Welfare of the Child (signed July 1990; entered into force 29 November 1999), Art. 5; Arab Charter on Human Rights (2004), Arts. 5, 6; American Declaration of the Rights and Duties of Man (1948), Art. 1; American Convention on Human Rights (22 November 1969), 1144 UNTS 123, Art. 4; Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women "Convention of Belém do Pará" (1994), Art. 4; U.N. Human Rights Committee, *General Comment No. 36 on Article 6: right to life*, CCPR/C/GC/36 (30 October 2018); African Commission on Human and People's Rights, *General Comment No. 3 On The African Charter On Human And Peoples' Rights: The Right To Life* (2015).

<sup>229</sup> ICCPR (1966), Art. 6(1). See also Universal Declaration of Human Rights (1948), Art. 3 ("Everyone has the right to life, liberty and security of person.").

Committee has affirmed that the right to life includes a corresponding obligation on the part of States to protect such right:

[T]he right to life cannot be properly understood if it is interpreted in a restrictive manner, and . . . the protection of that right requires States parties to adopt positive measures to protect the right to life.<sup>230</sup>

110. Furthermore, the Human Rights Committee has expressly recognized that the obligation to protect the right to life encompasses obligations with respect to the environment:

The duty to protect life also implies that States parties should take appropriate measures to address the general conditions in society that may give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity. These general conditions may include . . . degradation of the environment.<sup>231</sup>

111. More specifically:

Environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life. **The obligations of States parties under international environmental law should thus inform the content of article 6 of the Covenant, and the obligation of States parties to respect and ensure the right to life should also inform their relevant obligations under international environmental law.** Implementation 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. **States parties should therefore ensure**

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<sup>230</sup> U.N. Human Rights Committee, *Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3624/2019*, CCPR/C/135/D/3624/2019 (22 July 2022). See also, e.g., *Understanding Human Rights and Climate Change*, Submission of the Office of the High Commissioner for Human Rights to the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change (2021), p. 13 (“All States have committed to respect, protect, promote, and fulfil the right to life. This entails, at the very least, that States should take effective measures against foreseeable and preventable loss of life.”); *Osman v. the United Kingdom*, Judgment, Reports 1998-VIII (28 October 1998), p. 3159, § 115; *L.C.B. v. the United Kingdom*, Judgment, Reports of Judgments and Decisions 1998-III (9 June 1998), p. 1403, § 36; *Paul and Audrey Edwards v. the United Kingdom*, no. 46477/99, Judgment, ECHR 2002-II (13 March 2002), § 54; *İlhan v. Turkey [GC]*, no. 22277/93, Judgment, ECHR 2000-VII (27 June 2000), § 91; *Kılıç v. Turkey*, no. 22492/93, Judgment, ECHR 2000-III (28 March 2000), § 62; and *Mahmut Kaya v. Turkey*, no. 22535/93, Judgment, ECHR 2000-III (28 March 2000), § 85.

<sup>231</sup> U.N. Human Rights Committee, *Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning communication No. 3624/2019*, CCPR/C/135/D/3624/2019 (22 July 2022), ¶ 8.3.

**sustainable use of natural resources, develop and implement substantive environmental standards,** conduct environmental impact assessments and consult with relevant States about activities likely to have a significant impact on the environment, provide notification to other States concerned about natural disasters and emergencies and cooperate with them, provide appropriate access to information on environmental hazards and pay due regard to the precautionary approach.<sup>232</sup> (Emphasis added)

112. Importantly, the Committee has also recognized that “the obligation of States parties to respect and ensure the right to life **extends to reasonably foreseeable threats and life-threatening situations that can result in loss of life**”<sup>233</sup> (emphasis added). “[S]uch threats may include adverse climate change impacts,” as “environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life.”<sup>234</sup>
113. Furthermore, a State’s obligations are not purely territorial, but extend beyond the State’s national borders:

States parties must take appropriate measures to protect individuals against deprivation of life by other States, international organizations and foreign corporations operating within their territory or in other areas subject to their jurisdiction. They must also take appropriate legislative and other measures to ensure that all activities taking place in whole or in part within their territory and in other places subject to their jurisdiction, but having a direct and reasonably foreseeable impact on the right to life of individuals outside their territory, including activities taken by corporate entities based in their territory or subject to their jurisdiction.<sup>235</sup>

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<sup>232</sup> U.N. Human Rights Committee, *Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning communication No. 3624/2019*, CCPR/C/135/D/3624/2019 (22 July 2022), ¶ 8.3.

<sup>233</sup> U.N. Human Rights Committee, *Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning communication No. 3624/2019*, CCPR/C/135/D/3624/2019 (22 July 2022), ¶ 8.3.

<sup>234</sup> U.N. Human Rights Committee, *Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning communication No. 3624/2019*, CCPR/C/135/D/3624/2019 (22 July 2022), ¶ 8.3.

<sup>235</sup> U.N. Human Rights Committee, *General Comment No. 36 on Article 6: right to life*, CCPR/C/GC/36 (30 October 2018), ¶ 22. See also U.N. Human Rights Committee, *General Comment No. 31*, CCPR/C/21/Rev.1/Add. 13 (26 May 2004), ¶ 10; U.N. Human Rights Committee, *Concluding observations: United Kingdom of Great Britain and Northern Ireland* (2008), ¶ 14; U.N. Human Rights Committee, *Decision adopted by the Committee under article 5(4) of the Optional Protocol, concerning communication no. 2285/2013 (Yassin et al. v. Canada)* (26 July 2017), ¶ 6.5; U.N. Human Rights Committee, *Concluding observations on the 6th periodic report of Canada* (2015), ¶ 6; U.N. Human Rights Committee, *Concluding observations on the 6th periodic report of Germany* (2012), ¶ 16; U.N. Human Rights Committee, *Concluding observations on the 4th periodic report of the Republic of South Korea* (2015), ¶ 10.

114. In short, the authoritative interpreter of the ICCPR has confirmed that one of the principal human rights obligations – namely, the obligation to protect the right to life – encompasses duties to prevent harm to the environment, including through climate change.<sup>236</sup> Such obligation has likewise been recognized by courts and tribunals in the context of domestic<sup>237</sup> and international<sup>238</sup> litigation.

## 2. Right to self-determination

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<sup>236</sup> Interpretations of other human rights treaties are in accord. See, e.g., *General Comment No. 3 On The African Charter On Human And Peoples' Rights: The Right To Life* (2015), ¶ 41 (“The right to life should be interpreted broadly. The State has a positive duty to protect individuals and groups from real and immediate risks to their lives caused either by actions or inactions of third parties. In cases where the risk has not arisen from malicious or other intent then the State’s actions may not always be related to criminal justice. Such actions include, inter alia, preventive steps to preserve and protect the natural environment and humanitarian responses to natural disasters, famines, outbreaks of infectious diseases, or other emergencies.”).

<sup>237</sup> See, e.g., *Urgenda Foundation v. the Netherlands*, Judgment, Dutch Supreme Court (Hoge Raad), No. 19/00135, ECLI:NL:HR:2019:2006 (20 December 2019); *Milieudefensie et al. v. Royal Dutch Shell plc*, Judgment, Hague District Court, C/09/571932 (26 May 2021) (appeal pending); *VZW Klimaatzaak v. Kingdom of Belgium and Others*, Civ. [Tribunal of First Instance] Bruxelles (4th ch.), Case 2015/4585/A (17 June 2021) (appeal pending) (holding that by failing to take sufficient climate action to protect the life and privacy of the plaintiffs, the defendants were in breach of their obligations under Articles 2 and 8 of the European Convention on Human Rights); *Ashgar Leghari v. Federation of Pakistan*, Order Sheet, Lahore High Court, W.P. No. 25501/2015 (4 September 2015) (holding the national government had violated the fundamental rights of its citizens, including the right to life, by failing to implement adaptation measures recommended in the 2012 National Climate Policy and Framework); *Subhash Kumar v. State of Bihar*, Judgment, Supreme Court of India, AIR 1991 SC 420 (1 September 1991) (holding that the right to a safe environment was integral to the right to life under Article 21 of the Indian Constitution); *I.L. v. Italian Ministry of the Interior and Attorney General at the Court of Appeal of Ancona*, Judgment, Supreme Court of Cassation – Second Civil Section, n. 5022/2021 (24 February 2021).

<sup>238</sup> See, e.g., *Yanomami v. Brazil*, Case 7615, Inter-Am. Ct. H.R., Resolution No. 12/85, OAS/Ser. L/V/II.66 (5 March 1985) (finding that Brazil had violated the rights to life, liberty and personal security of the Yamomani Indians by failing to take measures to prevent environmental degradation); *Budayeva and Others v. Russia*, 2008-II Eur. Ct. H.R. 267 (2008), ¶¶ 128–130, 133 and 159 (holding states must also take reasonable measures to protect citizens against the reasonably foreseeable effects of natural disasters); U.N. Human Rights Committee, *Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning communication No. 2751/2016 (Portillo Cáceres and Others v. Paraguay)*, CCPR/C/126/D/2751/2016 (25 July 2019); *Öneryildiz v. Turkey*, Judgment, 2002-XII Eur. Ct. H.R. 79 (2004); *Kawas-Fernández v. Honduras*, Judgment, 196 Inter-Am. Comm'n H.R. (Ser. C) (3 April 2009), ¶ 148; *Özel and Others v. Turkey*, 2016-II Eur. Ct. H.R. 364 (2015), ¶¶ 170–171 and 200; *Social and Economic Rights Centre (SERAC) and Centre for Economic and Social Rights (CESR) v. Nigeria*, Communication No. 155/96, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.] (27 October 2001), ¶ 67; U.N. Human Rights Committee, *View adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2728/2016 (Teitiota v. New Zealand)*, CCPR/C/127/D/2728/2016 (24 October 2019), ¶ 9.9; U.N. Human Rights Committee, *Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning communication No. 3624/2019*, CCPR/C/135/D/3624/2019 (22 July 2022).



115. The right to self-determination is a fundamental human right, which has been recognized by the ICJ,<sup>239</sup> and which is codified in the U.N. Charter, Article 1 of which provides:
- The Purposes of the United Nations are: . . .
2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.<sup>240</sup>
116. The right to self-determination is likewise codified in the ICCPR:
- All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.<sup>241</sup>
117. The right to self-determination encompasses the requirement to ensure the full enjoyment of subsidiary rights, including social, cultural, and economic rights.<sup>242</sup> Such subsidiary rights include the right to life, adequate food, water, health, adequate housing, productive use and enjoyment of property, cultural practices and traditions.
118. Environmental degradation and climate change affect and potentially infringe upon these subsidiary rights. In particular, GHG emissions threaten natural environments, endanger human life, imperil food and water systems, and undermine the ability of peoples to enjoy suitable standards of living.<sup>243</sup> Furthermore, a people cannot exercise sovereignty over natural resources when the environment that bears those resources is not healthy and is therefore less capable, or entirely incapable, of producing those resources.<sup>244</sup> The risk is

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<sup>239</sup> See *East Timor (Portugal v. Australia)*, Judgment, ICJ Reports 1995 (30 June 1995), ¶ 29; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971 (21 June 1971).

<sup>240</sup> U.N. Charter, Art. 1.

<sup>241</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966; entered into force 23 March 1976), 999 UNTS 171, ¶ 1. See also International Covenant on Economic, Social and Cultural Rights (11 December 1966), 993 UNTS 3, Art. 1, ¶ 1–2 (“All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. 2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.”).

<sup>242</sup> See Tekau Frere, *Climate Change and Challenges to Self-Determination: Case Studies from French Polynesia and the Republic of Kiribati*, 129 YALE LAW J. (2020).

<sup>243</sup> U.N. Human Rights Council, *Resolution 16/11: Human Rights and the Environment*, A/HRC/RES/16/11 (12 April 2011), p. 2.

<sup>244</sup> See also *Res. 1803 (XVII), Permanent Sovereignty over Natural Resources*, U.N. General Assembly Res. 1803 (14 December 1962) (establishing rights and restrictions for national sovereignty over natural resources).

increased for small island developing States, the territory of which is physically threatened by rising sea levels.<sup>245</sup> Indeed, islander and indigenous communities are at risk of forcible relocation, which could cause loss of personal and cultural identity, loss of physical connection with ancestral land, and loss of effective nationality.<sup>246</sup> Accordingly, the right to self-determination – and States’ obligations thereunder – is inherently linked to climate change and environmental degradation.<sup>247</sup>

### 3. *Right to healthy environment*

119. The right to a healthy environment has been recognized in various treaties, including the African Charter on Human and People’s Rights,<sup>248</sup> the Arab Charter on Human Rights,<sup>249</sup> the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters,<sup>250</sup> Protocol of San Salvador to the American Convention on Human Rights,<sup>251</sup> the Escazú Agreement,<sup>252</sup> and the Charter of Fundamental Rights of the European Union.<sup>253</sup>
120. Furthermore, various international courts and U.N. organs and agencies have recognized the right to a healthy environment, including (i) the U.N. General Assembly, which has recognized “the right to a clean, healthy and sustainable environment as a human right;”<sup>254</sup> (ii) the UNHRC, which took note of “the right to a clean, healthy and sustainable environment as a human right that is important

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<sup>245</sup> See Tekau Frere, *Climate Change and Challenges to Self-Determination: Case Studies from French Polynesia and the Republic of Kiribati*, 129 YALE LAW J. (2020).

<sup>246</sup> U.N. Charter, Art. 15(2).

<sup>247</sup> U.N. Human Rights Council, *Report of the Human Rights Council on its tenth session*, A/HRC/10/29 (2009) (recognizing that self-determination is one of the human rights most affected by climate change).

<sup>248</sup> African Charter on Human and People’s Rights (1981), Art. 24.

<sup>249</sup> Arab Charter on Human Rights (2004), Art. 38.

<sup>250</sup> Aarhus Convention (25 June 1998), preamble.

<sup>251</sup> Protocol of San Salvador to the American Convention on Human Rights (22 November 1969), 1144 UNTS 123, Art. 11. See also *State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and Personal Integrity: Interpretation and Scope of Articles 4(1) and 5(1) in Relation to Articles 1(1) and 2 of the American Convention on Human Rights*, Advisory Opinion OC-23/17 (Requested by the Republic of Colombia), IACtHR (15 November 2017), ¶ 79 (the right to a healthy environment under Article 11 of the San Salvador Protocol protects individuals and collectives, including future generations, and can be used to hold States responsible for cross-border violations that are within their “effective control”).

<sup>252</sup> See Escazú Agreement (4 March 2018), Arts. 1 and 4 (the first environmental treaty of Latin America and the Caribbean; entered into force on 22 April 2021).

<sup>253</sup> Charter of Fundamental Rights of the European Union (2000), Art. 37 (providing that a high level of environmental protection must be integrated in EU policies).

<sup>254</sup> U.N. General Assembly, *The Human Right to a Clean, Healthy and Sustainable Environment*, A/RES/76/300 (28 July 2022).

for the enjoyment of human rights;<sup>255</sup> (iii) the U.N. Special Rapporteur on Human Rights and the Environment;<sup>256</sup> (iv) the IActHR, which found that certain logging activities violated indigenous communities' right to a healthy environment;<sup>257</sup> and (v) the African Commission on Human and People's Rights.<sup>258</sup> Most recently, the UNHRC expressly recognized the right to a clean, healthy and sustainable environment as a human right in a resolution adopted in April 2023.<sup>259</sup>

121. The right to a healthy environment also enjoys constitutional protection in 110 States,<sup>260</sup> and domestic courts have enforced such rights.<sup>261</sup>

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<sup>255</sup> UNHRC, *Resolution adopted by the Human Rights Council on 8 October 2021: The human right to a clean, healthy, and sustainable environment*, HRC/RES/48/13 (8 October 2021).

<sup>256</sup> UNHRC, *Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, A/HRC/37/59 (24 January 2018), ("States should ensure a safe, clean, healthy and sustainable environment in order to respect, protect and fulfill human rights.").

<sup>257</sup> *Indigenous Communities of the Lhaka Honhat Association v. Argentina*, Judgment, 400 IActHR (Ser. C) (6 February 2020), ¶ 289.

<sup>258</sup> *Social and Economic Rights Action Center & the Center for Economic and Social Rights v. Nigeria* (Communication No. 155/96) (pollution caused by the oil industry violated the Ogoni people's right to a healthy environment under Art. 24 of the African Charter).

<sup>259</sup> See UNHRC, *Human Rights Council Adopts Eight Resolutions, Extends Mandates on Sale and Sexual Exploitation of Children, Iran, Democratic People's Republic of Korea, Belarus, and Syria* (4 April 2023).

<sup>260</sup> UNHRC, *Right to a healthy environment: good practices; Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, A/HRC/43/53 (30 December 2019). See also, e.g., *Conseil d'Etat, 6ème et 1ère sous-sections réunies, mentionné aux tables du recueil Lebon*, No. 243802 (5 July 2004), Arts. 1, 2, 5; Basic Law for the Federal Republic of Germany in the revised version published in the Federal Law Gazette Part III, classification number 100-1, as last amended by the Act of 28 June 2022 (28 June 2022), Article 20a (unofficial translation: "'Mindful also of its responsibility toward future generations, the state shall protect the natural foundations of life and animals by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order'").

<sup>261</sup> See, e.g., *Dover District Council v. CPRE Kent*, Judgment, [2017] UKSC 79 (6 December 2017) (appeal taken from Eng.) (referring to the Aarhus Convention to affirm the existence of the human right to a healthy environment); *Francisco Chahuan Chahuan v. Empresa Nacional de Petróleos, ENAP S.A.*, Judgment, Case No. 5888-2019 (28 May 2019) (adjudicating Chile's failure to address industrial air pollution in the Quintero-Puchuncaví region constituted a violation); *Cour Administrative d'Appel de Nantes, 2ème Chambre*, No. 07NT03775 (1 December 2009) (holding the State liable for activities that produced water contamination); *Decision 7 C 30/17*, German Federal Administrative Court (27 February 2018); *Ruling on Modification to Ethanol Fuel Rule*, Supreme Court of Mexico (Second Chamber), Amparo 610/2019 (22 January 2020) (relying on the Ramsar Convention on Wetlands of International Importance to determine if the destruction of a mangrove forest violated the constitutional right to a healthy environment); *Ashgar Leghari v. Federation of Pakistan*, Lahore High Court, W.P. No. 25501/201 (April 2015) (finding the government violated the National Climate Change Policy of 2012 and the Framework for Implementation of Climate Change Policy (2014-2030) by failing to meet goals set by the policies, and reasoning that the constitutional rights to life and human dignity (under articles 9 and 14 of the Constitution) included the right to a healthy and clean environment); *Urgenda Foundation v. the Netherlands*, Judgment, Dutch Supreme Court (Hoge Raad), No.

122. It is self-evident that climate change and environmental degradation implicate and infringe the right to a healthy environment.

4. *Right to health*

123. The right to health is codified in various international instruments and treaties, including the following:

- a. Universal Declaration of Human Rights: “Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family.”<sup>262</sup>
- b. International Covenant on Economic, Social and Cultural Rights (“ICESCR”): “1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. 2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for: . . . (b) The improvement of all aspects of environmental and industrial hygiene.”<sup>263</sup>
- c. Convention on the Rights of the Child: “States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health.”<sup>264</sup>
- d. African Charter on Human and Peoples’ Rights: “Every individual shall have the right to enjoy the best attainable state of physical and mental health that they are able to achieve.”<sup>265</sup>
- e. European Social Charter: “Everyone has the right to benefit from any measures enabling him to enjoy the highest possible standard of health attainable.”<sup>266</sup>

124. The U.N. Committee on International Economic, Social and Cultural Rights—i.e., the treaty body charged with monitoring the implementation of the ICESCR—has provided extensive guidance on the right to health. In particular, the Committee has clarified that the right to health encompasses a “wide range of socio-economic factors that promote conditions in which people can lead a healthy life, and

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19/00135, ECLI:NL:HR:2019:2006 (20 December 2020), ¶ 5.7.1. (“the Netherlands had an obligation ‘to do its part’ in order to prevent dangerous climate change, even if it is a global problem”); *Future Generations v. Ministry of the Environment*, Decision Supreme Court of Colombia, No. 11001 22 03 000 2018 00319 00 (5 April 2018); *Gloucester Resources Limited v. Minister of Planning*, Decision, New South Wales Land and Environment Court, [2019] NSWLEC 7 (8 February 2019), ¶ 698.

<sup>262</sup> Universal Declaration of Human Rights (1948), Art. 25.

<sup>263</sup> International Covenant on Economic, Social and Cultural Rights (1966), Art. 12.

<sup>264</sup> Convention on the Rights of the Child, 1577 UNTS 3 (20 November 1989), Art. 24.

<sup>265</sup> African Charter on Human and People’s Rights (1981), Art. 16.

<sup>266</sup> European Social Charter (1961), Art. 11.

extends to the underlying determinants of health, such as . . . access to safe and potable water and adequate sanitation . . . and a healthy environment.”<sup>267</sup>

125. The right to health entails corresponding obligations for States, which obligations encompass duties related to the environment. For example, in order to fulfill their obligation to *respect* the right to health, States should “refrain from unlawfully polluting air, water and soil, e.g. through industrial waste from State-owned facilities, from using or testing nuclear, biological or chemical weapons if such testing results in the release of substances harmful to human health.”<sup>268</sup> Pursuant to the obligation to *protect* the right to health, States are in violation if they “fail . . . to enact or enforce laws to prevent the pollution of water, air and soil by extractive and manufacturing industries.”<sup>269</sup> And pursuant to the obligation to *fulfil* the right to health, States are required to “adopt measures against environmental and occupational health hazards and against any other threat as demonstrated by epidemiological data,” including “national policies aimed at reducing and eliminating pollution of air, water and soil, including pollution by heavy metals such as lead from gasoline.”<sup>270</sup>
126. Consistent with these principles, international bodies,<sup>271</sup> domestic courts,<sup>272</sup> and tribunals have recognized that the guarantee of a right to health includes an obligation by States to protect people from the impacts of environmental degradation.

## 5. *Right to private and family life*

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<sup>267</sup> U.N. Committee on Economic, Social, and Cultural Rights, *General Comment No. 14, The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights)* (2000), ¶ 4. See also *id.* at ¶ 11.

<sup>268</sup> U.N. Committee on Economic, Social, and Cultural Rights, *General Comment No. 14, The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights)* (2000), ¶ 34.

<sup>269</sup> U.N. Committee on Economic, Social, and Cultural Rights, *General Comment No. 14, The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights)* (2000), ¶ 51.

<sup>270</sup> U.N. Committee on Economic, Social, and Cultural Rights, *General Comment No. 14, The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights)* (2000), ¶ 36.

<sup>271</sup> See, e.g., *Social and Economic Rights Action Centre (SERAC) & Centre for Economic and Social Rights (CESCR) v. Nigeria*, Communication 115/96, African Commission on Human and Peoples’ Rights [Afr. Comm’n H.P.R.] (27 October 2001); *Marangopoulos Found. for Human Rights v. Greece*, Complaint No. 30/2005, European Committee of Social Rights, Case Document No. 1 (23 March 2005; registered 4 April 2005).

<sup>272</sup> See, e.g., *Gbemre v. Shell Petroleum Development Company Nigeria Limited and Others*, Judgment, suit FHC/B/CS/53/05 (14 November 2005).

127. The right to private and family life is recognized in various treaties, including the ICCPR and the European Convention on Human Rights. Article 17 of the ICCPR codifies this right as follows:
1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
  2. Everyone has the right to the protection of the law against such interference or attacks.<sup>273</sup>
128. The right to private and family life has been interpreted broadly, so as to include varying conceptions of the family and home in different cultures. In this respect, the Human Rights Committee has clarified that “[t]he term ‘home’ in English, ‘manzel’ in Arabic, ‘zhùzhái’ in Chinese, ‘domicile’ in French, ‘zhilische’ in Russian and ‘domicilio’ in Spanish, as used in article 17 of the Covenant, is to be understood to indicate the place where a person resides or carries out his usual occupation.”<sup>274</sup>
129. Importantly, the right to private and family life entails a corresponding obligation on the part of the State:
- States parties must prevent interference with a person’s privacy, family or home that arises from conduct not attributable to the State, at least where such interference is foreseeable and serious.<sup>275</sup>
130. The Committee has expressly recognized the interconnection between the right to private and family life and the environment. Specifically, in May 2019, eight Australian nationals—all of whom were residents of the Torres Strait region—submitted a complaint alleging that Australia violated their rights as well as the rights of their children as protected by the ICCPR.<sup>276</sup> The authors of the complaint noted that the indigenous peoples of the Torres Strait Islands are among the most vulnerable to the impacts of climate change. They alleged that Australia had failed to implement adaptation measures to protect the habitability of the islands against the effects of climate change, and particularly sea level rise, and that Australia has failed to mitigate the impact of climate change, including by failing to reduce its greenhouse gas emissions. With respect to their rights under the ICCPR, the authors of the complaint argued that climate change had already affected their

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<sup>273</sup> ICCPR (1966), Art. 17.

<sup>274</sup> U.N. Human Rights Committee, *CCPR General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation* (1988), ¶ 5.

<sup>275</sup> U.N. Human Rights Committee, *Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning communication No. 3624/2019, CCPR/C/135/D/3624/2019* (21 July 2022), ¶ 8.9.

<sup>276</sup> U.N. Human Rights Committee, *Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning communication No. 3624/2019, CCPR/C/135/D/3624/2019* (21 July 2022).

private, family and home life, because they faced the prospect of having to abandon their homes due to sea level rise.

131. In July 2022, the Committee issued its decision,<sup>277</sup> and observed that the authors had already sought relief in the domestic judicial system, but that “the highest court in Australia has ruled that state organs do not owe a duty of care for failing to regulate environmental harm.”<sup>278</sup> However, the Committee found that Australia “[wa]s and has been in recent decades among the countries in which large amounts of greenhouse gas emissions have been produced.”<sup>279</sup> The Committee then reasoned that Australia had violated the authors’ right to private and family life, reasoning as follows:

The Committee considers that when climate change impacts – including environmental degradation on traditional [indigenous] lands in communities where subsistence is highly dependent on available natural resources and where alternative means of subsistence and humanitarian aid are unavailable – have direct repercussions on the right to one’s home, and the adverse consequences of those impacts are serious because of their intensity or duration and the physical or mental harm that they cause, then the degradation of the environment may adversely affect the well-being of individuals and constitute foreseeable and serious violations of private and family life and the home. The Committee concludes that the information made available to it indicates that by failing to discharge its positive obligation to implement adequate adaptation measures to protect the authors’ home, private life and family, the State party violated the authors’ rights under article 17 of the Covenant.<sup>280</sup>

132. Thus, the obligation to protect private and family life may be violated by States that fail to adequately address the causes and effects of climate change.

6. *Right to seek, receive, and impart information*

133. International treaty law codifies the right to seek, receive, and impart information. For example, Article 19 of the ICCPR provides as follows:

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<sup>277</sup> U.N. Human Rights Committee, *Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning communication No. 3624/2019*, CCPR/C/135/D/3624/2019 (21 July 2022).

<sup>278</sup> U.N. Human Rights Committee, *Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning communication No. 3624/2019*, CCPR/C/135/D/3624/2019 (21 July 2022).

<sup>279</sup> U.N. Human Rights Committee, *Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning communication No. 3624/2019*, CCPR/C/135/D/3624/2019 (21 July 2022).

<sup>280</sup> U.N. Human Rights Committee, *Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning communication No. 3624/2019*, CCPR/C/135/D/3624/2019 (21 July 2022), ¶ 8.12.

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.<sup>281</sup>

134. International instruments have recognized that these rights are inherently linked to States' duties in respect of climate change and the protection of the environment.<sup>282</sup> For example, the Rio Declaration on Environment and Development emphasizes that:

States should cooperate to strengthen endogenous capacity-building for sustainable development by improving scientific understanding through exchanges of scientific and technological knowledge, and by enhancing the development, adaptation, diffusion and transfer of technologies, including new and innovative technologies.

Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective

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<sup>281</sup> ICCPR (1966), Art. 19. *See also* UDHR (1948), Art. 19 ("Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers"), Art. 27 ("1. Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.").

<sup>282</sup> *See, e.g., Stockholm Declaration of the United Nations Conference on the Human Environment*, in *Report of the United Nations Conference on the Human Environment*, A/CONF.48/14/Rev. 1 (1972), Principle 19 ("Education in environmental matters, for the younger generation as well as adults, giving due consideration to the under-privileged, is essential in order to broaden the basis for an enlightened opinion and responsible conduct by individuals, enterprises and communities in protecting and improving the environment in its full human dimension. It is also essential that mass media of communications avoid contributing to the deterioration of the environment, but, on the contrary, disseminate information of an educational nature, on the need to protect and improve the environment in order to enable man to develop in every respect"); *see also* Protocol on Strategic Environmental Assessment to the Espoo Convention ("**Kyiv (SEA) Protocol**") (2003), Art. 8(1) ("1. Each Party shall ensure early, timely and effective opportunities for public participation, when all options are open, in the strategic environmental assessment of plans and programmes.").



access to judicial and administrative proceedings, including redress and remedy, shall be provided.<sup>283</sup>

135. In this respect, 46 States have ratified the Aarhus Convention (discussed above), which codifies a series of binding obligations to provide information on issues related to the environment.<sup>284</sup>
136. Consistent with these international principles, domestic courts have issued rulings requiring the disclosure of information on the effects of climate change and States' activities related thereto.<sup>285</sup>

#### 7. *Right to effective remedy*

137. A critical element of human rights law is the right to an effective remedy. This right is recognized in many international instruments and treaties, including the Universal Declaration on Human Rights and the ICCPR.<sup>286</sup>

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<sup>283</sup> Rio Declaration (1992), Principles 9–10.

<sup>284</sup> See Aarhus Convention (25 June 1998), Art. 1 (“In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention”), Art. 2 (“Environmental information” means any information in written, visual, aural, electronic or any other material form on: (a) The state of elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites, biological diversity and its components, including genetically modified organisms, and the interaction among these elements; (b) Factors, such as substances, energy, noise and radiation, and activities or measures, including administrative measures, environmental agreements, policies, legislation, plans and programmes, affecting or likely to affect the elements of the environment within the scope of subparagraph (a) above, and cost-benefit and other economic analyses and assumptions used in environmental decision-making; (c) The state of human health and safety, conditions of human life, cultural sites and built structures, inasmuch as they are or may be affected by the state of the elements of the environment or, through these elements, by the factors, activities or measures referred to in subparagraph (b) above”), Art. 3(3) (“Each Party shall promote environmental education and environmental awareness among the public, especially on how to obtain access to information, to participate in decision-making and to obtain access to justice in environmental matters.”).

<sup>285</sup> See, e.g., *Greenpeace France v. France*, Case No. 20216119 (16 December 2021); (*B.U.N.D.*) *e.V. v. Minister for Commerce and Labor on behalf of Federal Republic of Germany*, Order, [2006] VG 10 A 215.04 (2 March 2006) (rejecting the government’s argument that information on German export credit activities did not constitute “environmental information”); *Natural Resources Defense Council v. EPA*, Case No. 1:18-cv-11227 (2d Cir. 2018).

<sup>286</sup> See, e.g., Universal Declaration of Human Rights (1948), Art. 8 (“Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.”); International Covenant on Civil and Political Rights (adopted 16 December 1966; entered into force 23 March 1976), 999 UNTS 171, Art. 2 (outlining the ICCPR’s provision of the right to an effective remedy); International Convention on the Elimination of All Forms of Racial Discrimination (21 December 1965), Art. 6 (“States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of

racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.”); U.N. Convention against Torture (10 December 1984), Art. 14 (“1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation. 2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.”); Rome Statute, Art. 68 (titled “Protection of the victims and witnesses and their participation in the proceedings”); *id.*, Art. 75 (titled “Reparations to victims”); Hague Convention IV Respecting the Laws and Customs of War on Land (18 October 1907), Art. 3 (“A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.”); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (8 June 1977), Art. 91 (“A Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.”); African Charter on Human and People’s Rights (1981), Art. 7 (“Every individual shall have the right to have his cause heard. This comprises: The right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; The right to be presumed innocent until proved guilty by a competent court or tribunal; The right to defence, including the right to be defended by counsel of his choice; The right to be tried within a reasonable time by an impartial court or tribunal. No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.”); American Convention on Human Rights (22 November 1969), 1144 UNTS 123, Art. 25 (“1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties. 2. The States Parties undertake: a. to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state; b. to develop the possibilities of judicial remedy; and c. to ensure that the competent authorities shall enforce such remedies when granted.”); Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (2021), Art. 13 (“Right to an effective remedy [–] Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”); Charter of Fundamental Rights of the European Union (2000), Art. 47 (“Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.”); *see also* Declaration of Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (16 December 2005) and U.N. General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, Res. 60/147 (16 December 2005), by which the Assembly adopted the recommended text (“Scope of Obligation: 3. The

138. This right—based upon the general principle of *ubi ius ibi remedium* (“for every wrong, the law provides a remedy”)—applies in the context of climate change.<sup>287</sup> The OHCHR summarized the application as follows:

The Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and other human rights instruments require States to guarantee effective remedies for human rights violations. Climate change and its impacts, including sea level rise, extreme weather events, and droughts have already inflicted human rights harms on millions of people. For States and communities on the frontline, survival itself is at stake. **Those affected, now and in the future, must have access to meaningful remedies including judicial and other redress mechanisms.**

139. The scope of the obligation is broad:

The obligations of States in the context of climate change and other environmental harms extend to all rights-holders and to harm that occurs both inside and beyond boundaries. States should be accountable to rights-holders for their contributions to climate change including for failure to adequately regulate the emissions of businesses under their jurisdiction regardless of where such emissions or their harms actually occur.<sup>288</sup>

140. Further, States are required to take adequate measures to ensure effective remedies against private actors—e.g., businesses and industries that cause or contribute to environmental harm.<sup>289</sup>

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obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law, includes, inter alia, the duty to: (a) Take appropriate legislative and administrative and other appropriate measures to prevent violations; (b) Investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law; (c) Provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice, as described below, irrespective of who may ultimately be the bearer of responsibility for the violation; and (d) Provide effective remedies to victims, including reparation, as described below.”).

<sup>287</sup> *Understanding Human Rights and Climate Change*, Submission of the Office of the High Commissioner for Human Rights to the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change (2021).

<sup>288</sup> *Understanding Human Rights and Climate Change*, Submission of the Office of the High Commissioner for Human Rights to the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change (2021), ¶ 3.

<sup>289</sup> *Understanding Human Rights and Climate Change*, Submission of the Office of the High Commissioner for Human Rights to the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change (2021), ¶ 8.

### C. Intergenerational Equities

141. International law recognizes that environmental protection is an obligation owed to present and future generations alike. Thus, intergenerational equity requires that the development of a State should not compromise the needs and aspirations of future generations. In this sense, the principle of intergenerational equity “defines the rights and obligations of present and future generations with respect to the use and enjoyment of natural and cultural resources, inherited by the present generation and to be passed on to future generations in no worse condition than received.”<sup>290</sup>
142. The notion of intergenerational equity has been extensively developed in international instruments related to environmental conservation and climate change<sup>291</sup>. For instance, the Stockholm Declaration establishes that mankind “has a solemn responsibility to protect and improve the environment for present and future generations” for which natural resources, including air, water, land, flora and fauna must be preserved for their benefit “through careful planning or management.”<sup>292</sup> Likewise, the Rio Declaration recognizes, in its Principle 3, that “the right to development should be exercised in a manner which equitably meets the developmental and environmental needs of present and future generations.”<sup>293</sup>
143. In the present section, relevant aspects of the principle of intergenerational equity will be covered, namely: 1) intergenerational equity and sustainable development; 2) intragenerational and intergenerational equity; and 3) the rights of future generations.

1. *Intergenerational Equity and Sustainable Development*

144. According to the Bruntland Report, sustainable development refers to “the ability to make development sustainable to ensure that it meets the needs of the present without compromising the ability of future generations to meet their own

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<sup>290</sup> Catherine Redgwell, *Principles and Emerging Norms in International Law: Intra- and Inter-generational Equity*, in PART III CLIMATE CHANGE – PRINCIPLES AND EMERGING NORMS CONCEPTS IN INTERNATIONAL LAW, in CH. 9, THE OXFORD HANDBOOK OF INTERNATIONAL CLIMATE CHANGE LAW (2009).

<sup>291</sup> See, *inter alia*, International Convention for the Regulation of Whaling, 2 UST 720, 59 Stat. 1716, T.I.A.S. 1849, [57 UNTS 73] (1946), Preamble; Convention Concerning the Protection of the World Cultural and Natural Heritage, 27 UST 37, TIAS 8226, [1037 UNTS 151] (1972), Art. 4; Convention on International Trade in Endangered Species of Wild Fauna and Flora, 993 UNTS 243 (1975), Preamble; Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention), 38 ILM 517, [25 I.L.M. 1396] (1999), Art. 1; and Escazú Agreement (4 March 2018), Arts. 1 and 3(g).

<sup>292</sup> *Stockholm Declaration of the United Nations Conference on the Human Environment*, in *Report of the United Nations Conference on the Human Environment*, A/CONF.48/14/Rev. 1 (1972), Principles 1 and 3.

<sup>293</sup> Rio Declaration (1992), Principle 3.

needs.”<sup>294</sup> It is a “process of change in which the exploitation of resources, the direction of investments, the orientation of technological development, and institutional change are made consistent with future as well as present needs” which has three core pillars (environmental, social and economic).<sup>295</sup>

145. Sustainable development and intergenerational equity are deeply interlinked. If States are to protect the environment to guarantee the rights of generations to come, then their development model cannot be one based on the exploitation of finite natural resources beyond planetary boundaries. Therefore, as Weiss argues, “the procedural and substantive duties that have been articulated to ensure sustainable development may be regarded as implementing the principle of intergenerational equity.”<sup>296</sup> This is also supported by the phrasing of the Stockholm and Rio Declarations noted above. Additionally, in its universal recognition of the right to a healthy environment, the United Nations General Assembly has also recognized that “sustainable development, in its three dimensions (social, economic and environmental), and the protection of the environment, including ecosystems, contribute to and promote human well-being and the full enjoyment of all human rights, for present and future generations.”<sup>297</sup> Consequently, sustainable development is a condition for achieving intergenerational equity.

## 2. *Intra-generational Equity and Intergenerational Equity*

146. Intra-generational equity refers to equity in the distribution of the benefits and burdens of development within the existing generations of humanity. In this sense, Principle 5 of the World Declaration on the Environmental Rule of Law provides that “there shall be a fair and equitable access to and sharing of the benefits of ecosystem services. In the event of pollution, there shall be a fair and equitable sharing of pollution burdens. Natural resources shall be managed so that that they are used as economically as achievable, through high efficiency and avoidance of waste.”<sup>298</sup>
147. On this matter, the International Law Association’s (“ILA”) Legal Principles Relating to Climate Change establish that “present generations in developing States have a legitimate expectation of equitable access to sustainable development. This recognizes that to the extent that per capita emissions in

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<sup>294</sup> Report of the World Commission on Environment and Development: *Our Common Future*, A/42/427 (1987), ¶ 27.

<sup>295</sup> *Ibid.*, ¶¶ 27–30.

<sup>296</sup> Edith Brown Weiss, *Intergenerational Equity*, in MAX PLANCK ENCYCLOPEDIAS OF INTERNATIONAL LAW (2009).

<sup>297</sup> U.N. General Assembly, *The Human Right to a Clean, Healthy and Sustainable Environment*, A/76/L.75 (26 July 2022), p. 2.

<sup>298</sup> IUCN, *World Declaration on the Environmental Rule of Law* (2016), Principle 5.

developing countries are still low, these will grow, within reason and in a sustainable manner, to meet their social and development needs.”<sup>299</sup> When applied to inter-State relations, it has been argued that the CBDR principle is in fact an expression of intra-generational equity.<sup>300</sup> Within States, intra-generational equity has been linked to the eradication of poverty, and more broadly, to “equal access to common resources to be shared by humankind over time, rather than just the distribution of private property.”<sup>301</sup>

### 3. *Rights of Future Generations*

148. The rights of future generations, including in respect of the environment, are also recognized in treaty and in case law.

#### a. Treaty Law

149. Several international treaties recognize that environmental preservation is an obligation owed to present and future generations alike. The preamble of the Convention on Biological Diversity states the sustainable use of biological diversity must occur “in a way and at a rate that does not lead to the long-term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations.”<sup>302</sup> For its part, the World Heritage Convention recognizes that “the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage referred to in Articles 1 and 2 and situated on its territory, belongs primarily to that State . . . .”<sup>303</sup> Moreover, Article 2.5(c) of the U.N. Economic Commission for Europe (“UNECE”) Convention on the Protection and Use of Transboundary Watercourses and International Lakes provides that “water resources shall be managed so that the needs of the present generation are met without compromising the ability of future generations to meet their own needs.”<sup>304</sup>

150. Intergenerational equity is also present in the international treaties pertaining to climate change. The UNFCCC provides that States Parties should “protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated

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<sup>299</sup> ILA, *Report of the ILA’s Committee on Legal Principles Relating to Climate Change* (2014), Draft Art. 4.

<sup>300</sup> See Catherine Redgwell, *Principles and Emerging Norms in International Law: Intra- and Inter-generational Equity*, in PART III CLIMATE CHANGE – PRINCIPLES AND EMERGING NORMS CONCEPTS IN INTERNATIONAL LAW, in CH. 9, THE OXFORD HANDBOOK OF INTERNATIONAL CLIMATE CHANGE LAW (2009).

<sup>301</sup> U.N. Secretary General, *Report on the Intergenerational solidarity and the needs of future generations*, A/68/322, (15 August 2013), ¶ 18.

<sup>302</sup> CBD (1992), preamble.

<sup>303</sup> World Heritage Convention (1972), Art. 4

<sup>304</sup> Convention on the Protection and Use of Transboundary Watercourses and International Lakes (1992), Art. 2(5)(c).

responsibilities and respective capabilities.”<sup>305</sup> More specifically, the Paris Agreement provides that, in taking action to combat climate change, States should “respect, promote and take into account their respective obligations relating to human rights ... and intergenerational equity.”<sup>306</sup>

(i) Convention of the Rights of the Child

151. The U.N. Convention on the Rights of the Child<sup>307</sup> (“UNCRC”) is widely ratified.<sup>308</sup> As one author noted, the UNCRC is “probably the first universal treaty to include several references to the environment.”<sup>309</sup> The UNCRC’s treaty body is the CRC Committee. Made up of eighteen independent experts, the Committee “monitors implementation of the [UNCRC and its Optional Protocols] by its States parties.”<sup>310</sup> UNICEF (the United Nations Children’s Fund) is the primary international agency tasked with protecting children’s rights. Climate change’s impacts on children are dire, and as one set of authors wrote, “the effect of climate change on the rights of children to optimal survival and development is immeasurable and requires a concerted international effort to reverse its impending catastrophic consequences.”<sup>311</sup> Particularly relevant to a discussion of climate change in context of the UNCRC are the following:<sup>312</sup>
- a. Article 2: the right to freedom from discrimination;
  - b. Article 3: the principle that all institutions should work with the best interests of the child as “a primary consideration;”
  - c. Article 6: the right to life, survival, and development;
  - d. Article 12: the right to express one’s views and to have those views be given “due weight in accordance with the age and maturity of the child;” and
  - e. Article 24: the right to the “highest attainable standard of health.”
152. Notably, the Committee has identified four of these five articles – Articles 2, 3, 6, and 12 – as lenses through which the entire UNCRC should be viewed.<sup>313</sup> Finally,

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<sup>305</sup> UNFCCC (1992), Art. 3.

<sup>306</sup> Paris Agreement (2015), preamble.

<sup>307</sup> Convention on the Rights of the Child, 1577 UNTS 3 (20 November 1989).

<sup>308</sup> See U.N. Office of the High Commissioner for Human Rights, *U.N. Treaty Body Database: Ratification Status for CRC - Convention on the Rights of the Child*, U.N. HUM. RTS. TREATY BODIES.

<sup>309</sup> Susana Sanz-Caballero, *Children’s Rights in a Changing Climate: A Perspective from the United Nations Convention on the Rights of the Child*, 13 ETHICS IN SCI. & ENV’T POL. 1, 4 (2013), *supra* note 362, p. 3.

<sup>310</sup> U.N. Office of the High Commissioner for Human Rights, *Committee on the Rights of the Child*.

<sup>311</sup> Jeffrey L. Goldhagen et al., *Rights, Justice, and Equity: A Global Agenda for Child Health and Wellbeing*, 4 LANCET CHILD ADOLESCENT HEALTH 80, 85 (2020).

<sup>312</sup> Convention on the Rights of the Child, 1577 UNTS 3 (20 November 1989).

<sup>313</sup> U.N. Committee on the Rights of the Child, *General Comment No. 5 (2003): General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6)*, CRC/GC/2003/5 (2003), ¶ 12.

it is also worth stating that this list is by no means exhaustive. Various sources have emphasized other articles as particularly relevant for climate change.<sup>314</sup> What's more, UNICEF has stated that "[b]ecause of the inter-connected and inter-related nature of rights, . . . virtually *all* children's rights may be affected by the climate crisis, potentially impacting the effective implementation of the [UNCRC] as a whole" (emphasis added).<sup>315</sup>

(a) Article 2: The Right to Freedom from  
Discrimination

153. Article 2 is closely tied to other treaties and also presents unique climate change-related claims, so this section is split into two subsections accordingly. The first discusses Article 2 and its requirements writ large, and the second focuses on Article 2's relationship with climate change.
154. Article 2's Meaning Writ Large. Article 2 of the UNCRC sets forth a prohibition on discrimination on a variety of bases. The text is "broadly comparable" to antidiscrimination provisions in previous human rights treaties, such as "the Universal Declaration of Human Rights [(‘UDHR’)], the International Covenant on Civil and Political Rights [(‘ICCPR’)], and the International Covenant on Economic, Social and Cultural Rights [(‘ICESCR’)]."<sup>316</sup> Article 2 is "directly justiciable and may be invoked by victims of discrimination as an immediately realizable right," though this fact may be tempered by the UNCRC's allowance of gradual realization of rights.<sup>317</sup>

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<sup>314</sup> See, e.g., UNICEF, *THE CHALLENGES OF CLIMATE CHANGE: CHILDREN ON THE FRONT LINE* (2014), pp. 48-49 (hereinafter "UNICEF, CHALLENGES") (listing and providing explanations of climate change's connection with fourteen different Articles); UNICEF, *THE CLIMATE CRISIS IS A CHILD RIGHTS CRISIS: INTRODUCING THE CHILDREN'S CLIMATE RISK INDEX* (2012), p. 111 (hereinafter "UNICEF, CLIMATE CRISIS") (reporting a bit shorter of a list than the source *supra*); Katharina Ruppel-Schlichting et al., *Climate Change and Children's Rights: An International Law Perspective*, in *CLIMATE CHANGE: INTERNATIONAL LAW AND GLOBAL GOVERNANCE* 349, 364 (Oliver C. Ruppel et al. eds., 2013) (listing Articles 2, 3, 6, 12, 24, and 29).

<sup>315</sup> UNICEF, *CLIMATE CRISIS*, *supra* note 314, p. 111 (emphasis modified).

<sup>316</sup> Gerison Lansdown, *Article 2: The Right to Non-Discrimination*, in *MONITORING STATE COMPLIANCE WITH THE UN CONVENTION ON THE RIGHTS OF THE CHILD: AN ANALYSIS OF ATTRIBUTES* 11, 12 (Ziba Vaghri et al. eds., 2022).

Notably, the UNCRC version "potentially strengthens the jurisdictional accountability of States Parties by removing the [ICCPR provision] that individuals must be living within the territory and subject to the state jurisdiction and requires only that they are within the jurisdiction of the state." *Id.* In practice, "[w]hat matters for the State's jurisdiction is the authority or responsibility *de facto* rather than *de jure* of the State Party." See Samantha Besson, *The Principle of Non-Discrimination in the Convention on the Rights of the Child*, 13 INT'L J. CHILDREN'S RTS. 433, 450 (2005).

<sup>317</sup> Samantha Besson, *The Principle of Non-Discrimination in the Convention on the Rights of the Child*, 13 INT'L J. CHILDREN'S RTS. 433, 450 (2005), *supra* note 316, pp. 454-455.



155. This article “requires States actively to identify individual children and groups of children the recognition and realization of whose rights may demand special measures.”<sup>318</sup>
156. One author described Article 2 as “foresee[ing] two kinds of obligations which complement each other”: “duties of respect” and “duties of result.”<sup>319</sup> Duties of respect are “rather passive or negative,” forbidding the State from discriminatory policies, while duties of result “go further and are more active or positive. . . . They imply that the State take all necessary measures to ensure for each child a discrimination-free enjoyment of all Convention rights.”<sup>320</sup> What’s more, States may need to take action beyond mere legislation; antidiscrimination requirements may necessitate “administration and resource allocation, as well as educational measures to change attitudes in the media and the private sphere.”<sup>321</sup>
157. Article 2 and Climate Change. Article 2, the UNCRC’s antidiscrimination provision, can be construed as protecting children from the effects of climate change on at least two bases. First, due to climate change’s unequal impacts based on various demographics, such as disability, States’ failure to address climate change results in disparate treatment based on these classifications. Second, inaction on climate change violates a still-emerging legal theory: the idea that Article 2 protects children from discrimination on the basis of their status *as* children.
158. Climate change’s impacts will not be felt evenly among children worldwide. Rather, “climate change will increasingly have a disproportionate effect on the rights of specific groups of vulnerable children, including displaced children, children living in poverty, indigenous children, and children with developmental disabilities.”<sup>322</sup> Additionally, within countries, different geographical areas are expected to experience different levels of climate change.<sup>323</sup> Several of these various categories (e.g., children with disabilities) are explicitly mentioned in Article 2.<sup>324</sup> Due to those various categorizations alone, the unequal burden in climate effects means that a failure by a state to work to combat climate change

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<sup>318</sup> U.N. Committee on the Rights of the Child, *General Comment No. 5 (2003): General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6)*, CRC/GC/2003/5 (2003), *supra* note 313, ¶ 12.

<sup>319</sup> Samantha Besson, *The Principle of Non-Discrimination in the Convention on the Rights of the Child*, 13 INT’L J. CHILDREN’S RTS. 433, 450 (2005), *supra* note 317, p. 454 (emphasis omitted).

<sup>320</sup> *Id.*

<sup>321</sup> *Id.*

<sup>322</sup> Jeffrey L. Goldhagen et al., *Rights, Justice, and Equity: A Global Agenda for Child Health and Wellbeing*, 4 LANCET CHILD ADOLESCENT HEALTH 80, 85 (2020), *supra* note 311, p. 85.

<sup>323</sup> See UNICEF, CLIMATE CRISIS, *supra* note 314, p. 12 (mapping locations expected to have “[o]verlapping” climate change effects).

<sup>324</sup> Convention on the Rights of the Child, 1577 UNTS 3 (20 November 1989), Art. 2.

can be considered an acquiescence to discriminatory policies, in direct violation of Article 2 of the UNCRC.

159. One currently developing framework is the idea that Article 2 protects children from discrimination based on their status *as* children. This idea, as of right now, “still [has] limited explicit recognition at [the] national and international level.”<sup>325</sup> Notably, however, a climate-change-focused case<sup>326</sup> currently pending before the ECtHR raises the claim of discrimination against children – likely “the first time that youth has been invoked as a ground for discrimination at the level of international human rights law.”<sup>327</sup> It is also worth noting that back in 2014, UNICEF stated that the right to non-discrimination under Article 2 “can be threatened if decisions do not recognize the special needs of children.”<sup>328</sup>
160. Within the context of Article 2, such a claim would fall under the ban on discrimination on the basis of some “other status.” The argument would be that, since “there is ample evidence that children are more prone to the harmful health and other negative effects of climate change than adults,”<sup>329</sup> policies that exacerbate climate change are therefore discriminatory against children. Indeed, even back in 2014, UNICEF reported that “[e]ven leaving aside natural disasters, children are already suffering most from the adverse health consequences of a warmer world, accounting for up to four in five of all illnesses, injuries and deaths attributable to climate change.”<sup>330</sup>

(b) Article 3: The Best Interests of the Child

161. Due to differing opinions over the proper interpretation of Article 3, this section is split into two subsections: one about the Article itself and another about the Article’s intersection with climate change.
162. Interpretation of Article 3. Article 3 requires that “[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”<sup>331</sup> The Committee has stated that “public or private social welfare institutions” should be interpreted “to mean all

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<sup>325</sup> Aoife Daly et al., *UN Convention on the Rights of the Child, Article 2 and Discrimination on the Basis of Childhood: The CRC Paradox?*, 91 NORDIC J. INT’L L. 419, 420 (2022).

<sup>326</sup> *Agostinho v. Portugal and 32 Other States*, App. No. 39371/20 (currently pending before the Grand Chamber of the Eur. Ct. of Hum. Rts.).

<sup>327</sup> Aoife Daly, *Climate Competence: Youth Climate Activism and Its Impact on International Human Rights Law*, 22 HUM. RTS. L. REV., p. 19 (2022).

<sup>328</sup> UNICEF, *CHALLENGES*, *supra* note 314, p. 48.

<sup>329</sup> Karin Arts, *Children’s Rights and Climate Change*, in *CHILDREN’S RIGHTS AND SUSTAINABLE DEVELOPMENT: INTERPRETING THE UNCRC FOR FUTURE GENERATIONS* (Claire Fenton-Glynn ed., 2019), pp. 216, 218.

<sup>330</sup> UNICEF, *CHALLENGES*, *supra* note 314, p. 1. For more information on climate change’s disproportionate impact on children, see generally *id.*

<sup>331</sup> Convention on the Rights of the Child, 1577 UNTS 3 (20 November 1989).

institutions whose work and decisions impact on children and the realization of their rights[,]" including institutions whose work impacts the environment.<sup>332</sup> The definition of "best interests" may be intentionally vague.<sup>333</sup> Finally, the Committee has stated that "[t]he words 'shall be' place a strong legal obligation on States and mean that States may not exercise discretion as to whether children's best interests" should be taken into account.<sup>334</sup>

163. The Committee has stated that the right presented by Article 3 is a "threefold concept," composed of a "substantive right," a "fundamental, interpretative legal principle," and a "rule of procedure."<sup>335</sup> The substantive right is the right of children to have their best interests "assessed and taken as a primary consideration," and the legal principle states that "[i]f a legal provision is open to more than one interpretation, the interpretation which most effectively serves the child's best interests should be chosen."<sup>336</sup> Finally, the rule of procedure requires, at least in part, that decision-making entities evaluate their potential choices' impacts on children.<sup>337</sup>

164. That being said, at least some scholars have pushed back on the first of those three aspects: "'a plain reading of the text does not support the view that Article 3(1) [CRC] contains a right,' nor a directly applicable right (self-executing) that can be invoked before a court."<sup>338</sup> One such scholar explained the correct application as follows:

[B]est interests need to be assessed by decision-makers as part of a process where rules of procedure will be applied so that the best interest principle acts as one of the foundations for a substantive

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<sup>332</sup> U.N. Committee on the Rights of the Child, *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, CRC/C/GC/14 (29 May 2013), ¶ 26.

<sup>333</sup> See generally Francesca Ippolito, *The Best Interests of the Child: Another String to the Environmental and Climate Protection Bow?*, 89 QUESTIONS INT'L L. 7, 7-9 (2022) (discussing the term "best interests of the child").

<sup>334</sup> U.N. Committee on the Rights of the Child, *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, CRC/C/GC/14 (29 May 2013), *supra* note 332, ¶ 36.

<sup>335</sup> U.N. Committee on the Rights of the Child, *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, CRC/C/GC/14 (29 May 2013), *supra* note 332, ¶ 6.

<sup>336</sup> *Id.*, ¶¶ 6(a)-(b)

<sup>337</sup> *Id.*, ¶ 6(c).

<sup>338</sup> Francesca Ippolito, *The Best Interests of the Child: Another String to the Environmental and Climate Protection Bow?*, 89 QUESTIONS INT'L L. 7 (2022), *supra* note 333, pp. 9-10 (footnote omitted) (quoting Ursula Kilkelly, *The Best Interests of the Child: A Gateway to Children's Rights?*, in IMPLEMENTING ARTICLE 3 OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD: BEST INTERESTS, WELFARE AND WELL-BEING (Elaine E. Sutherland & Lesley-Anne Barnes Macfarlane eds., 2016), pp. 51, 57).

right: the guarantee that this principle will be applied whenever a decision is to be taken concerning a child or a group of children.<sup>339</sup>

165. Furthermore, such decisions must be made with an eye toward not only short-term solutions but also longer-term effects.<sup>340</sup> Finally, it is worth noting that Article 3 has been criticized as “paternalistic.”<sup>341</sup> Such concerns (to whatever extent they have merit) may indicate the importance of combining Article 3’s work with a focus on Article 12’s requirements on taking children’s opinions into account when making decisions.
166. Article 3 and Climate Change. A 2022 article by Professor Francesca Ippolito<sup>342</sup> offers a discussion of Article 3’s relationship with climate change. Discussing the procedural elements of Article 3, she wrote:
- When the [best interest of the child] principle functions as a procedural positive obligation as to environmental and climate change issues it encompasses the State’s duty to incorporate it in all relevant environmental policies, programmes and projects as well as to integrate it in all environmental legislative, administrative and judicial proceedings, in practice, in impact assessments, in the duty of cooperation and in budgeting.<sup>343</sup>
167. What’s more, Ippolito added that this aspect of Article 3 could also apply to States’ regulatory framework for “ensur[ing] that the business sector complies with international climate mitigation standards and respect[s] children’s rights.”<sup>344</sup> Interestingly, Ippolito also noted that “[t]he reporting system of the CRC and the practice of its monitoring body could be used with reference to the Paris Agreement to better specify due diligence regulatory obligations and would arguably contribute to widely amending national laws and policies.”<sup>345</sup>
168. With respect to Article 3’s role as an interpretive tool, “the best interests of the child should be employed as ‘cross-cutting standards’ in order to illustrate their relevance for substantive provisions of the [UNCRC] and the active measures States need to take to implement the obligation both for individual children and

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<sup>339</sup> *Id.*, p. 10.

<sup>340</sup> *Id.*

<sup>341</sup> Milka Sormunen, *The Best Interests of the Child in Human Rights Practice: An Analysis of Domestic, European and International Jurisprudence*, Ph.D. dissertation, University of Helsinki (12 March 2021), p. 19.

<sup>342</sup> Francesca Ippolito, *The Best Interests of the Child: Another String to the Environmental and Climate Protection Bow?*, 89 QUESTIONS INT’L L. 7 (2022), *supra* note 333.

<sup>343</sup> *Id.*, pp. 11–12 (footnotes omitted).

<sup>344</sup> *Id.*, p. 15.

<sup>345</sup> *Id.*, p. 14.

for children as a group.”<sup>346</sup> In the context of climate change, this way of thinking means that States should “choose the interpretation that advances” children’s rights, such as those that prioritize “reduced GHG emissions allocating also ‘sufficient technical and financial resources to effectively mitigate the negative impacts of environmental pollution on children.’”<sup>347</sup>

(c) Article 6: Survival and Development

169. UNCRC Article 6 states that children have the right to survival and development. Importantly, “[t]he right to survival carries with it a more positive connotation than the right to life alone. It means the right to have positive measures taken by States in order to extend the life of the child.”<sup>348</sup> The right to survival and development, notably, has been interpreted by the Committee to include Article 24’s right to a healthy environment: “the right to survival and development can only be implemented in a holistic manner, through the enforcement of all the other provisions of the Convention, including . . . [the right to] a healthy and safe environment.”<sup>349</sup> Along similar lines, at least one expert has written that “the right to life is inextricably linked to the right to survival, requiring measures to increase life expectancy as well as those that protect against and mitigate the consequences of climate change.”<sup>350</sup>
170. Climate change clearly threatens these rights. As quoted previously, one set of authors has stated that “the effect of climate change on the rights of children to optimal survival and development is immeasurable and requires a concerted international effort to reverse its impending catastrophic consequences.”<sup>351</sup>

(d) Article 12: Expressing Opinions and Being Heard

171. Article 12 enshrines the right of children to express their opinions and be listened to, not only in legislatures but also in courts. Children have been outspoken in their support for action to curb climate change, but this activism has all too often

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<sup>346</sup> *Id.*, pp. 17–18 (footnotes omitted) (quoting Karl Hanson & Laura Lundy, *Does Exactly What It Says on the Tin?: A Critical Analysis and Alternative Conceptualisation of the So-Called “General Principles” of the Convention on the Rights of the Child*, 25 INT’L J. CHILDREN’S RTS. 285, 299 (2017)).

<sup>347</sup> *Id.*, p. 18 (quoting U.N. Committee on the Rights of the Child, *Concluding observations on the fifth periodic report of Mongolia*, CRC/C/MNG/CO/5 (12 July 2017), ¶ 35(b)).

<sup>348</sup> Susana Sanz-Caballero, *Children’s Rights in a Changing Climate: A Perspective from the United Nations Convention on the Rights of the Child*, 13 ETHICS IN SCI. & ENV’T POL. 1, 4 (2013).

<sup>349</sup> U.N. Committee on the Rights of the Child, *General Comment No. 7 (2005): Implementing child rights in early childhood*, CRC/C/GC/7/Rev.1 (10 September 2006), ¶ 10.

<sup>350</sup> Ziba Vaghri, *Article 6: The Rights to Life, Survival, and Development*, in MONITORING STATE COMPLIANCE WITH THE UN CONVENTION ON THE RIGHTS OF THE CHILD: AN ANALYSIS OF ATTRIBUTES 11, 12 (Ziba Vaghri et al. eds., 2022), *supra* note 316, pp. 31, 35.

<sup>351</sup> Jeffrey L. Goldhagen et al., *Rights, Justice, and Equity: A Global Agenda for Child Health and Wellbeing*, 4 LANCET CHILD ADOLESCENT HEALTH 80, 85 (2020), *supra* note 311, p. 85.

faced steady resistance from key decision-making entities. One particularly widespread conception of Article 12's requirements comes from what has been referred to as the "Lundy Model."<sup>352</sup> Under this framework, "successful implementation of Article 12 requires consideration of the implications of four separate factors: Space, Voice, Audience, and Influence."<sup>353</sup>

172. Crucially, "[t]okenistic inclusion of a few youth in adult-dominated forums does not qualify as proper child participation."<sup>354</sup> Rather, "it is important that [young people's] participation be a sustainable part of ongoing government processes and in every aspect of government functioning, with the views of children given due weight in accordance with their age and maturity."<sup>355</sup> Some youth parliaments represent successful implementations of that principle—particularly those with "follow-up mechanisms in place to implement the outcomes of [government officials'] consultations with children, clear channels for the decisions of child parliaments and councils to influence the proceedings of parliamentary bodies, and feedback to inform the children of the impact of their participation."<sup>356</sup>
173. Finally, it is worth mentioning at least a couple of the other (many) ways that children have advocated for better policies addressing climate change. Perhaps most famously, children around the world have gone on various "school strikes for climate," an idea made famous by Greta Thunberg.<sup>357</sup> In the legal realm, meanwhile, children have launched legal challenges in countries across the globe, "invoking the legal obligations of States to restore a stable climate system and protect their fundamental rights."<sup>358</sup> They have also filed claims in international courts.<sup>359</sup>

(e) Article 24: Health; Environment and Health

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<sup>352</sup> See, e.g., Ziba Vaghri, *Climate Change, an Unwelcome Legacy: The Need to Support Children's Rights to Participate in Global Conversations*, 28 CHILDREN, YOUTH AND ENV'TS. 104, 108 (2018) (using the term "Lundy Model").

<sup>353</sup> Laura Lundy, 'Voice' Is Not Enough: Conceptualising Article 12 of the United Nations Convention on the Rights of the Child, 33 BRITISH EDUC. RSCH. J. 927, 932 (2007).

<sup>354</sup> Ziba Vaghri, *Climate Change, an Unwelcome Legacy: The Need to Support Children's Rights to Participate in Global Conversations*, 28 CHILDREN, YOUTH AND ENV'TS. 104, 108 (2018), *supra* note 352, p. 108.

<sup>355</sup> *Id.*, p. 109.

<sup>356</sup> *Id.*

<sup>357</sup> There have been a number of such strikes. See, e.g., "School Strike for Climate: Protests Staged Around the World," BBC (24 May 2019); Damien Gayle, "Fridays for Future School Climate Strikes Resume Across the World," THE GUARDIAN (25 March 2022, 10:29 AM).

<sup>358</sup> Our Children's Trust et al., *State Obligations Regarding Children's Rights and Climate Change*, Submission to U.N. Committee on the Rights of the Child (2016 Day of General Discussion).

<sup>359</sup> See, e.g., *Recent Case, Sacchi v. Argentina*, 135 HARV. L. REV. 1981, 1983 (2022); *Agostinho v. Portugal*, App. No. 39371/20 (currently pending before the Grand Chamber of the ECtHR).

174. Article 24(1) states that children have the right to “the enjoyment of the highest attainable standard of health.”<sup>360</sup> Meaningfully, Article 24(2)(c) mandates in part that States “tak[e] into consideration the dangers and risks of environmental pollution” when working to ensure proper food and water access.<sup>361</sup> As one author noted regarding Article 24, “the right to life is necessarily linked to and dependent on the physical environment.”<sup>362</sup> Notably, “[t]he Committee has . . . stressed that environmental interventions taken by states to address threats to children’s health should also address climate change, ‘as this is one of the biggest threats to children’s health and exacerbates health disparities.’”<sup>363</sup> Because climate change poses such a large threat to children, the Committee has stated that “States should . . . put children’s health concerns at the centre of their climate change adaptation and mitigation strategies.”<sup>364</sup>
175. Climate change and children’s health are inextricably linked. As one group of authors stated, “climate change [is] among the most substantial challenges to child health and paediatric [sic] health professionals.”<sup>365</sup> On that subject, UNICEF has explained that “[t]he bulk of global burden of disease associated with climate change affects children, especially young children. Climate change can also damage or disrupt access to essential health services and clinics.”<sup>366</sup> It is also worth specifically noting that “[a]ir pollution also directly contributes to increased respiratory diseases amongst children and therefore challenges the fulfilment of a child’s right to health.”<sup>367</sup>
176. In 2022, the Committee held that it had jurisdiction over transboundary harms, at the very least in the climate context, stating: “the collective nature of the causation of climate change does not absolve the State party of its individual responsibility that may derive from the harm that the emissions originating within its territory

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<sup>360</sup> Convention on the Rights of the Child, 1577 UNTS 3 (20 November 1989), *supra* note 307, Art. 24(1).

<sup>361</sup> *Id.*, Art. 24(2)(c).

<sup>362</sup> Susana Sanz-Caballero, *Children’s Rights in a Changing Climate: A Perspective from the United Nations Convention on the Rights of the Child*, 13 ETHICS IN SCI. & ENV’T POL. 1, 4 (2013) *supra* note 348, p. 4.

<sup>363</sup> John Tobin, *Article 24. The Right to Health*, in THE UN CONVENTION ON THE RIGHTS OF THE CHILD: A COMMENTARY 902, 948 (quoting U.N. Committee on the Rights of the Child, *General Comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24)*, CRC/GC/15 (17 April 2013), ¶ 50).

<sup>364</sup> U.N. Committee on the Rights of the Child, *General Comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24)*, CRC/GC/15 (17 April 2013), *supra* note 363, ¶ 50.

<sup>365</sup> Jeffrey L. Goldhagen et al., *Rights, Justice, and Equity: A Global Agenda for Child Health and Wellbeing*, 4 LANCET CHILD ADOLESCENT HEALTH 80, 85 (2020), *supra* note 311, p. 82.

<sup>366</sup> UNICEF, CLIMATE CRISIS, *supra* note 314, p. 111.

<sup>367</sup> UNICEF, CHALLENGES, *supra* note 314, p. 48.

may cause to children, whatever their location.”<sup>368</sup> In so doing, the Committee turned away from a jurisdictional test based on “state control over the petitioners,” instead relying on a “causality-based test.”<sup>369</sup>

b. ICJ Case Law

177. International jurisprudence has recognized that the protection of the environment concerns both present and future generations. In this sense, in its *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, the ICJ recognized that the environment is not a mere abstraction, but represents the living space, the quality of life, and the very health of human beings, including generations yet unborn.<sup>370</sup> The IACtHR has also reaffirmed that the collective dimension of the right to a healthy environment includes present and future generations.<sup>371</sup>
178. In his separate opinion in the *Pulp Mills Case*, Judge Antonio Cançado Trindade referred to the long-term temporal dimension of international law, particularly when referring to environmental conservation; he stated that human beings relate in space (the environment) and time (past and future), “in respect of which they have obligations.”<sup>372</sup> For Judge Cançado Trindade, taking into account the temporal dimension of international law is also imperative in recognizing indigenous cosmovisions that see a performance of their duty to transmit their culture to future generations in their conservation and preservation of the land,<sup>373</sup> echoing the jurisprudence of the IACtHR in *Myagna (Sumo) Awas Tingni V. Nicaragua*.<sup>374</sup>
179. The Committee on Economic Social and Cultural Rights has also recognized that the notion of sustainability for the enjoyment of economic, social, and cultural

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<sup>368</sup> U.N. Committee on the Rights of the Child, *Decision adopted by the Committee under the Optional protocol to the Convention on the Rights of the Child on a communications procedure, concerning communication No. 104/2019 (Sacchi et al. v. Argentina)*, CRC/C/88/D/104/2019 (22 September 2021), ¶ 10.10. The case in which this decision was rendered was named *Sacchi v. Argentina*. *Id.*

<sup>369</sup> *Recent Case, Sacchi v. Argentina*, 135 HARV. L. REV. 1981 (2022), *supra* note 359, p. 1983.

<sup>370</sup> *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, ICJ Reports 1996 (8 July 1996), ¶ 39.

<sup>371</sup> *State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and Personal Integrity: Interpretation and Scope of Articles 4(1) and 5(1) in Relation to Articles 1(1) and 2 of the American Convention on Human Rights*, Advisory Opinion OC-23/17 (Requested by the Republic of Colombia), IACtHR (15 November 2017).

<sup>372</sup> *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Separate Opinion of Judge Cançado Trindade, ICJ Reports 2010 (20 April 2010), ¶ 114.

<sup>373</sup> *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Separate Opinion of Judge Cançado Trindade, ICJ Reports 2010 (20 April 2010).

<sup>374</sup> *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment, 79 IACtHR (Ser. C) (31 August 2001).



rights implies that such rights are accessible to present and future generations.<sup>375</sup> This implies adopting urgent measures to mitigate and adapt to climate change.<sup>376</sup>

180. Intergenerational equity has also been invoked by the U.N. Human Rights Committee in two cases concerning the protection of human rights in the face of the climate crisis. In *Teitiota v. New Zealand*, the Committee noted that environmental degradation, climate change, and unsustainable development are among the most pressing and serious threats to the ability of present and future generations to enjoy the right to life.<sup>377</sup> Additionally, in *Torres Straits Islanders v. Australia*, the Committee recognized that the principle of intergenerational equity imposes a duty on present generations to act as responsible stewards of the planet and to ensure the right of future generations to meet their developmental and environmental needs.<sup>378</sup> In this regard, the Committee highlighted that Australia's failure to take adequate and timely adaptation measures negatively impacted the intergenerational dimension of indigenous peoples' right to culture.<sup>379</sup>

### c. Climate Litigation

181. Domestic rulings have also recognized intergenerational equity as a cross-cutting principle in climate action, and its invocation has been a persuasive argument for national courts to raise climate ambition of States.<sup>380</sup> In the *Oposa v. Factoran* (1992) case, the plaintiffs were minors who were acting on their own behalf, but also on behalf of unborn generations. In this regard, the Philippine Supreme Court held that the plaintiffs had standing to bring such a claim based on the concept of intergenerational responsibility, according to which each generation must preserve the rhythm and harmony of nature for the full enjoyment of a healthy and balanced ecology for future generations. Consequently, the Court ruled that the assertion by minors of their right to a healthy environment constituted, at the

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<sup>375</sup> U.N. Committee on Economic, Social, and Cultural Rights, *General Comment No. 15, The right to water (articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)* (2002), ¶ 28.

<sup>376</sup> OHCHR, FREQUENTLY ASKED QUESTIONS ON HUMAN RIGHTS AND CLIMATE CHANGE: FACT SHEET NO. 38 (2021), p. 57.

<sup>377</sup> U.N. Human Rights Committee, *Ioane Teitiota v. New Zealand*, Admissibility and Merits Views, No. 2728/2016, CCPR/C/127/D/2728/2016 (23 September 2020), ¶ 9.4.

<sup>378</sup> U.N. Human Rights Committee, *Daniel Billy et al. v. Australia*, Admissibility and Merits Views, No. 3624/2019, CCPR/C/135/D/3624/2019 (22 September 2022), ¶ 5.8.

<sup>379</sup> *Ibid.*, ¶ 8.14.

<sup>380</sup> See, e.g., *Neubauer et al. v. Germany*, Order on the Constitutional Complaint, Bundesverfassungsgericht [BVerfG] (German Federal Constitutional Court), Case No. BvR 2656/18/1, BvR 78/20/1, BvR 96/20/1, BvR 288/20 (24 March 2021); *Lozano Barragán and others v. Presidency of the Republic of Colombia and others*, Sala Cas. Civil CSJ Colombia, No. STC4360-2018 (5 April 2018); and Second District Judge in Administrative Matters Specialized in Economic Competition, Broadcasting and Telecommunications Mexico, Amparo Indirecto 104/2020 (17 November 2020).

same time, the fulfillment of their obligation to ensure the protection of said right for future generations.<sup>381</sup>

182. In the *Future generations v. Ministry of the Environment* (2018) case, the Colombian Supreme Court of Justice ordered the government to take concrete measures against deforestation in the Amazon, recognizing that the effects of deforestation would imply an increase in GHG emissions in Colombia, and therefore in its temperature, thus violating the human rights of future generations. For the Colombian Supreme Court, future generations are subject to constitutional protection. The Court interpreted that unborn subjects “deserve to enjoy the same environmental conditions enjoyed by us.”<sup>382</sup> In this regard, the Supreme Court considered that the environmental rights of future generations have anthropocentric (the ethical duty of solidarity of the species) and ecocentric (the intrinsic value of nature) justifications.<sup>383</sup> Both foundations lead to the establishment of an obligatory relationship between present and future generations, which translates into a limitation of the freedom of present generations, as well as the imposition of new burdens of environmental care.<sup>384</sup>
183. In the specific case, the Supreme Court found that deforestation in the Amazon between 2015 and 2016 increased by 44%, generating a serious and imminent damage to present and future generations, insofar as it “uncontrollably unleashed the emission of carbon dioxide, producing the greenhouse effect.”<sup>385</sup> The Supreme Court analyzed this situation in light of different environmental principles, including intergenerational equity. Thus, it determined an “obvious transgression” of intergenerational equity, since “the temperature in the year 2041 will be 1.6C and in 2071 up to 2.14C, being future generations . . . those who will be directly affected, unless the present ones reduce the rate of deforestation to zero.”<sup>386</sup> For the above reasons, the Supreme Court ordered government authorities to establish a program to reduce the rate of deforestation in the Amazon to address climate change.
184. In the case of *Raja Zahoor Ahmed v. Capital Development Authority* (2015), the Supreme Court of Pakistan ruled that several conversions of residential properties to commercial ones were unlawful, and noted the relevance for climate awareness in urban planning to guarantee the rights of future generations. Specifically, the

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<sup>381</sup> *Oposa et al. v. Fulgencio S. Factoran, Jr. et al.*, Supreme Court of the Philippines, G.R. No. 101083 (30 July 1993).

<sup>382</sup> *Andrea Lozano Barragán, Victoria Alexandra Arenas Sánchez, José Daniel Rodríguez Peña y otros Vs. Presidencia de la República, Ministerios de Ambiente y Desarrollo Sostenible y de Agricultura y Desarrollo Rural y otros*, Sala Cas. Civil CSJ Colombia, No. STC4360-2018 (5 April 2018), ¶¶ 11.1-11.3.

<sup>383</sup> *Ibid.*, ¶ 5.2.

<sup>384</sup> *Ibidem.*

<sup>385</sup> *Ibid.*, ¶ 11.

<sup>386</sup> *Ibid.*, ¶ 11.

Court noted that “climate-resilient development in cities of all sizes is crucial for improving the well-being of people and increasing the life opportunities of future generations.”<sup>387</sup>

185. Moreover, intergenerational equity has also been a relevant argument made against regressive environmental policies.<sup>388</sup> In this sense, the Pennsylvania Supreme Court ruled in *Robinson Township v. Commonwealth* that Pennsylvania's Act 13 of 2012, which amended the State's Oil and Gas Act, violated several human rights of the plaintiffs. Among other relevant environmental regressions, the challenged Act limited the authority of local governments to regulate oil and gas operations. In its ruling, the Pennsylvania Supreme Court indicated that “the Commonwealth's obligations as trustee to conserve and maintain the public natural resources for the benefit of the people, including generations yet to come, create a right in the people to seek to enforce the obligations.”<sup>389</sup> In this sense, the Court found that “the exploitation of the Marcellus Shale Formation will produce a detrimental effect on the environment, on the people, their children, and future generations, and potentially on the public purse, perhaps rivaling the environmental effects of coal extraction.”<sup>390</sup> For this reason, the Court ruled that several articles of legislative reform violated the environmental rights clause of the Constitution of Pennsylvania.<sup>391</sup>
186. In Germany, several young people argued before the Federal Constitutional Court that the 55% emission reduction target for 2030 (postulated in the federal climate law) was insufficient and in violation of their human rights, as well as the central objective of the Paris Agreement. In *Neubauer et al. v. Germany* (2021), the Federal Court ruled that the State must set its emission reductions considering the long-term impact that such reductions may have on the rights of future generations.<sup>392</sup> Thus, an unambitious reduction would imply, in the future, a disproportionate restriction of the rights of the German population compared to the restrictions

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<sup>387</sup> *Raja Zahoor Ahmed v. Capital Development Authority*, Order, Supreme Court of Pakistan, [1996] PLD 569 (20 May 2022), ¶ 9.

<sup>388</sup> See, e.g., *In the Matter of the Application of Hawai'i Electric Light Company, Inc. for Approval of a Power Purchase Agreement for Renewable Dispatchable Firm Energy and Capacity*, Opinion of the Court by Eddins, J., Docket No. 2017–0122, SCOT-22-0000418 (13 March 2023).

<sup>389</sup> *Robinson Township v. Commonwealth of Pennsylvania*, Decision, Pennsylvania Supreme Court, [2013] 83 A.3d 901 (19 December 2013), ¶ 12.

<sup>390</sup> *Ibidem*.

<sup>391</sup> In 1971, Pennsylvania had introduced a constitutional amendment recognizing the environmental rights of current and future generations: “the people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people”. Pennsylvania Constitution (1971), Art. I, § 27.

<sup>392</sup> *Neubauer et al v. Germany*, Bundesverfassungsgericht [BVerfG] (German Federal Constitutional Court), 1 BvR 3084/20 (2021), ¶ 92.

imposed on the rights of present generations.<sup>393</sup> In its reasoning, the Federal Court understood that the younger generation of people who sued the German government would be those who would bear the bulk of the costs arising from climate change. Thus, the court pointed out that the costs will not be paid by the polluters of the past, but by future generations of taxpayers as the “damage caused by climate damage is intergenerational damage.”<sup>394</sup> In this regard, the court considered that, in view of the worsening climate crisis and the risks it entails for human dignity and the natural foundations of life, it is to be expected that a climate protection law, in responsibility towards future generations, should at least take the necessary precautions so that—as far as possible and proportionate—no further GHGs are released.<sup>395</sup> For these reasons, the Federal Court found that the climate ambition of the German legislation violated the human rights of the plaintiffs, as it did not reflect the highest possible ambition in the reduction of GHG emissions.<sup>396</sup>

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<sup>393</sup> *Ibid.*, ¶¶ 191–199.

<sup>394</sup> *Ibid.*, ¶ 40.

<sup>395</sup> *Ibid.*, ¶ 110.

<sup>396</sup> *Ibid.*, ¶ 130.

