Ezio Costa Cordella
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(Editors)

State Responsibilities in the Climate Crisis: Legal Standards and Global Litigation

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STATE RESPONSIBILITIES IN THE CLIMATE CRISIS: LEGAL STANDARDS AND GLOBAL LITIGATION

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The Role of Law in Achieving Climate Justice: A Call for Accountability and Equity

EZIO COSTA CORDELLA[1]
& PILAR MORAGA SARIEGO[2]

1. ON BEING JUST

Does justice matter when facing the climate crisis? Some argue that this crisis is primarily a technical challenge, one that can be managed through adjustments in energy production, land use, and other practices. This perspective frames climate change as a problem of governance and innovation: with the right technologies and sustainable practices, the crisis can be mitigated without fundamentally altering the underlying structures of society.

For those in positions of power, whether political, economic or social, significant change is often seen as a threat to their influence and status, leading them to resist it. Politicians may justify this resistance by framing it as a pragmatic approach, arguing that radical shifts could lead to social upheaval, violence, and instability. They claim that the disruptions of deep societal change would ultimately harm the most vulnerable, especially the

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poor, who are often disproportionately affected by crises. Thus, avoiding large-scale transformation is presented as a means of safeguarding social order.

However, millions around the world hold a different view, and are calling for a profound rethinking of our relationship with nature, our models of economic development, and even the very structure of our societies. These demands for transformative change are often dismissed as idealistic or impractical, sidelined in the name of so-called pragmatism. This dominant narrative suggests that people wish to maintain the conveniences and advancements of modernity, that capitalism has brought undeniable development, and that minor adjustments will suffice to preserve the environment without fundamentally disrupting our way of life.

Yet this so-called pragmatism fails to account for the justice dimension of the climate crisis. Neglecting justice means overlooking the existing inequities and forms of violence embedded in the status quo, which already foster instability and suffering. Focusing solely on stability without addressing justice not only perpetuates these injustices but also risks inciting further social unrest as inequalities deepen. True pragmatism in facing the climate crisis requires acknowledging that a sustainable and peaceful transition cannot be achieved without a commitment to justice. Ignoring this element may only lead to further outbreaks of instability, potentially more volatile ones.

To address this problem from a truly pragmatic point of view, the idea of climate justice emerged. Climate justice breaks through the ideological problem described above and brings basic values to forefront of the conversation, taking into consideration that climate change is a profound social and ethical issue that exacerbates existing inequalities.

A basic notion of climate justice demands to understand that while the impacts of climate change are global, they are not felt equally. Vulnerable communities, often those least responsible

for greenhouse gas emissions, are bearing the worst effects of the crisis.

Climate justice seeks to address these imbalances, ensuring that the ecological transition toward a low-carbon future does not perpetuate or deepen social inequities. At its core, it emphasizes the need for a transition that is fair, equitable, and inclusive. This means prioritizing the rights and needs of those most affected by climate change, such as indigenous peoples, developing states, and marginalized communities. The ecological transition is framed as one that must ensure that economic opportunities, environmental benefits, and protections are shared equitably and that the sacrifices required for climate mitigation do not disproportionately impact those who are already disadvantaged.

This is not merely a moral, political, or technical discussion. The law has a crucial role to play in advancing climate justice—a role that, until now, has been underexplored.

2. CLIMATE JUSTICE AND THE LAW

One of the fundamental assumptions of law function is the pursuit of justice. By establishing norms and mediating conflicts, law creates a framework for order and justice, enabling societies to grow and adapt while grounded in fairness. Law seeks to establish fairness, protect rights, and ensure accountability, guiding society toward equitable outcomes. This inherent focus on justice shapes how laws are crafted, interpreted, and applied, reinforcing the law's role as a foundation within society.

While there are various approaches to justice, certain core ideas remain constant. These foundational principles, such as fairness, equality, and accountability, form the basis of diverse justice systems worldwide. Different societies may interpret and apply justice uniquely, yet these shared ideals provide a common ground, guiding the law's pursuit of a balanced and equitable society. Justice is essential for the stability of human relationships

and the maintenance of peace. When individuals feel that their rights are protected and that disputes are resolved equitably, society becomes more cohesive and resilient, laying the groundwork for lasting peace.

Justice is something that not only fits in idealistic or radical approaches; a real pragmatic approach would be incomplete without considering justice properly. Practical solutions that overlook fairness and equity fail to address the root causes of conflict and inequality and have a huge risk of being ineffective. Justice ensures that pragmatic decisions are not only effective but also sustainable, as they account for the rights and well-being of all parties involved.

Among the foundational principles of justice is the recognition that life has intrinsic value, a notion expressed as human dignity when it comes to individuals. Dignity implies not only an acknowledgment of each person's inherent worth but also demands an attitude of respect and protection for life in all its forms. Justice further introduces the concept of responsibility: we are accountable to one another, not only in our immediate actions but also in the broader consequences of those actions. This sense of responsibility, toward both our social relationships and our environment, is essential to a framework of justice that considers the collective welfare and the impact of each decision on others.

With dignity as a core value, but also considering recognition, capabilities, and autonomy, the protection of human rights becomes central to the pursuit of justice. As societies have evolved, the recognition and protection of fundamental rights have become vital for maintaining social cohesion and ensuring that all individuals are afforded equal protections and opportunities. Human rights not only embody an aspirational vision of fairness but also translate into tangible protections such as access to healthcare, education, safe living conditions, a healthy environment, and freedom from discrimination, among others. This dual nature, both aspirational and practical, makes human rights a powerful tool for advancing justice in real-world contexts.

However, human rights have traditionally been conceptualized without considering the climate and ecological crises, necessitating a rethinking of these rights in the face of increasingly frequent and severe environmental disruptions. These crises challenge existing frameworks, urging us to consider how rights can be protected and adapted to promote justice and resilience amidst widespread ecological and societal upheaval. In this new context, we must expand our understanding of human rights to address the unique and profound impacts of climate and ecological destabilization on communities worldwide.

A fundamental issue within current frameworks is the challenge of establishing responsibility. Responsibility is central to justice, reinforcing the notion that individuals, institutions, and states must be accountable for their actions. Justice encompasses not only rights and entitlements but also the duties and obligations we have toward others and towards society as a whole. This reciprocity ensures that justice is balanced, fostering a system where actions have consequences and fairness is preserved.

In the face of the climate and ecological crisis, we are witnessing widespread negligence, often with a lack of direct accountability for that negligence. State obligations represent a critical area where such negligence is particularly evident. When states fail to act on their duty to protect citizens, they neglect their role in upholding justice and human rights. Similarly, harmful actions taken without due consideration of their consequences constitute negligence. In both cases, the state's failure compromises public welfare and erodes societal stability.

Courts have a vital role in scrutinizing both the actions and inactions of state negligence. In times of crisis, the judiciary bears the responsibility of reasserting the rule of law, applying it fairly to safeguard individuals from harm. By holding states accountable, courts reinforce the principle that justice remains active and relevant, especially during periods of heightened vulnerability and uncertainty.

In such critical moments, it is the law and not soft governance or purely economic measures that must serve as the primary instrument of governance. Law provides a structured, enforceable framework that protects rights, ensures accountability, and delivers justice. Unlike voluntary commitments or market-based solutions, legal frameworks offer a solid foundation for addressing the root causes of crises and preventing negligence.

This book seeks to contribute to the discussion on state responsibility in the face of the climate and ecological crisis. It brings together insights from renowned law professors and environmental lawyers from across the globe who share a common concern: how law can be a vehicle for justice, and how that justice can function effectively in a time of climate and ecological crisis.

3. THE ROLE OF INTERNATIONAL COURTS IN ACHIEVING CLIMATE JUSTICE

International courts have emerged as critical forums for addressing the legal dimensions of the climate crisis. They provide a mechanism through which states, civil society, and other actors can seek clarity on the legal obligations related to climate change and hold states accountable for their actions or inactions. By issuing advisory opinions, courts like the ICJ and ITLOS contribute to the development of international norms and help shape the global response to climate change.

The request for advisory opinions from international courts reflects a growing recognition of the need for clear legal guidance on state responsibilities concerning climate change. The ICJ's advisory opinion request, submitted by Vanuatu and supported by over 130 countries, represents a landmark effort to address the legal gaps in international climate law. **In Chapter 1, "The Law of State Responsibility and its Applicability to the ICJ AO on Climate Change" Aditi Shetye and José Daniel Rodríguez Orúe's** analysis of this request highlights the potential of the ICJ to shape the principles of state responsibility and equity in the context of

climate change. As the authors explain, the ICJ's interpretation of climate-related obligations could serve as a precedent for future cases and shape the evolving landscape of climate litigation while offering a pathway for states to understand their responsibilities in a more structured and legally binding manner.

By addressing questions such as the extent of states' obligations to mitigate climate impacts and the reparations owed to those affected, the ICJ can provide a framework that aligns with principles of justice and equity, Shetye and Rodríguez Orúe argue. The chapter looks into the legal foundations of state responsibility, drawing connections between customary international law, the duty to prevent transboundary harm, and the obligations set out under the Paris Agreement.

In parallel with the ICJ's work, the ITLOS advisory opinion has shed light on how international maritime law can address climate-related challenges. **Chapter 2, "Small Island Developing States and Climate Justice: The Role of International Advisory Opinions in Addressing Vulnerabilities", by Alana Malinde S.N. Lancaster,** details the legal reasoning behind the ITLOS opinion, which asserts that states have a responsibility to prevent marine pollution caused by greenhouse gas emissions. This interpretation extends the scope of UNCLOS, emphasizing the interconnectedness of the ocean and climate systems and recognizing the specific vulnerabilities of SIDS.

Lancaster argues that the ITLOS opinion is a crucial step toward creating a more integrated approach to international climate governance. By recognizing the rights of SIDS and highlighting the obligations of states under the law of the sea, the opinion provides a legal basis for holding larger emitters accountable for the impacts of their actions on marine environments. This focus on the ocean-climate nexus illustrates the importance of considering various legal frameworks in the pursuit of climate justice, underscoring the role of international courts in shaping a cohesive response to the climate crisis.

The advisory opinions from the ICJ and ITLOS are not isolated contributions; they represent a broader trend of international courts engaging with climate issues to create a more cohesive and integrated global legal framework. As Alana Lancaster notes, the ITLOS opinion complements the pending deliberations at the Inter-American Court of Human Rights (IACtHR), establishing synergies between multiple areas of international law, such as human rights, environmental law, and the law of the sea. This interconnected approach is crucial for addressing the multi-dimensional nature of the climate crisis.

Shetye and Rodríguez Orúe add a consideration about how the ICJ's potential interpretation could draw from the Advisory Opinion of the International Tribunal for the Law of the Sea, which acknowledges the obligation of states to protect the marine environment for future generations. Climate change is inherently an issue of intergenerational equity, as the actions (or inactions) of current generations will profoundly shape the planet's habitability for those yet to be born. The principle of intergenerational equity is embedded in various international instruments, such as the Rio Declaration and the Paris Agreement, but its practical application in legal cases has remained limited. By addressing this principle directly, the ICJ has the opportunity to strengthen the normative foundation for protecting future generations. This would entail interpreting existing international legal principles in a way that emphasizes the duty of states to take preventive measures against climate harm, even if the full effects of their actions will not be felt for decades or centuries.

In addition to providing normative guidance, international courts also play a symbolic role in affirming the moral imperatives of climate action. As Alana Lancaster argues, the involvement of international courts in climate matters sends a powerful message to the global community about the importance of upholding the rule of law in the fight against climate change. By framing climate obligations in legal terms, courts can help transform moral responsibilities into actionable legal duties, making it harder for states to ignore their commitments under international law.

In Chapter 3, "Use of Advisory Opinions In Environmental Protection: An Analysis of Africa's Engagement with the ICJ AO Process", Nomasango and Nomakoshi Masiye-Moyo provide an in-depth analysis of the ICJ's potential to shape international climate law through advisory opinions, particularly its recent engagement with questions of state obligations in addressing climate change. The authors contextualize this development as a landmark opportunity for the ICJ to provide legal clarity on critical issues such as intergenerational equity, loss and damage, and the just energy transition. The chapter emphasizes the importance of this advisory process, given the severe and far-reaching impacts of climate change on global communities, particularly in Africa, which faces unique vulnerabilities due to limited resources and infrastructure.

Nevertheless, Masiye-Moyo also critically examines the participation of various international actors in these advisory proceedings, including African nations and organizations like the African Union. Despite Africa's high vulnerability to climate impacts, the chapter points to a notable absence of African state submissions to the ICJ, raising concerns about underrepresentation in shaping legal outcomes that will directly impact the continent. This gap, the authors argue, reflects a missed opportunity for African states to assert their perspectives on state responsibilities in mitigating climate harm and to advocate for stronger protections for vulnerable populations.

Additionally, the chapter addresses the controversial involvement of organizations such as the Organization of the Petroleum Exporting Countries (OPEC), whose submissions could potentially defend fossil fuel interests. This presence, according to the authors, risks diluting the intent of the advisory opinion process, as it contrasts with the efforts of states and organizations advocating for stronger environmental protections. The author underscores that, while advisory opinions are non-binding, they carry significant weight in influencing international norms and guiding domestic climate policies.

4. STATE RESPONSIBILITIES AND THE PROTECTION OF HUMAN RIGHTS DURING THE ECOLOGICAL TRANSITION

As the world moves toward an ecological transition, the responsibility of states to protect human rights becomes increasingly urgent. The impacts of climate change threaten a wide range of rights, including the right to life, the right to health, the right to food and water, and the right to a clean, sustainable, and healthy environment. States have an obligation under international law to take measures to protect these rights, especially for those populations most vulnerable to the effects of climate change.

State responsibilities in the context of climate change are grounded in both human rights law and environmental law. The duty to prevent harm, a well-established principle in international law, obliges states to take precautionary measures to prevent environmental damage that could have transboundary effects. This duty is particularly relevant in the context of climate change, where the actions of one state can have significant impacts on the environment and human rights of people in other states.

In Chapter 4, "Limiting State Discretion: A Principled Due Diligence Framework for Preventing Human Rights Violations Arising from Climate Change", José Daniel Rodriguez Orué states that a key component of state responsibilities during the ecological transition is the principle of due diligence, which requires states to take reasonable measures to prevent harm and protect the rights of those affected by climate impacts. The author argues that existing international frameworks, such as the Paris Agreement, often grant states considerable discretion in implementing climate commitments. However, this discretion has led to insufficient progress, making it imperative to adopt a more stringent framework based on the principle of due diligence.

A significant argument made by Rodriguez is how due diligence can be operationalized as a tool to limit state discretion while still

respecting the differentiated responsibilities and capacities of each country. By drawing on examples from international human rights and environmental law, the author proposes a framework where due diligence is characterized by three elements: foreseeability of harm, capacity to act, and reasonableness of measures taken. This approach allows for flexibility while holding states accountable for both mitigating emissions and adapting to climate impacts in ways that prioritize the protection of human rights.

The chapter also highlights recent legal developments, including cases before international courts, that underscore the importance of systemic integration across legal regimes. The author advocates for harmonizing environmental, climate, and human rights obligations under a unified due diligence standard, arguing that this integration is crucial to ensuring state accountability. By employing due diligence as a principled standard, the chapter envisions a more effective alignment of state actions with global climate and human rights goals.

As states navigate the challenges of climate adaptation, the integration of human rights protections into climate policies is essential. Climate adaptation refers to the measures taken to adjust systems and communities to the anticipated effects of climate change, such as building resilient infrastructure, improving water management, and developing early warning systems for extreme weather events. However, adaptation measures must be designed and implemented in a way that respects the rights of affected populations, ensuring that no one is left behind in the transition process.

In Chapter 5, "Climate Refugees and Non Territorial Autonomy", Jorge Piñera Álvarez and Antoni Abat i Ninet explore how the principle of state responsibility applies to the issue of climate-induced migration. They argue that states have a duty to provide protection and support to those displaced by climate impacts, such as sea-level rise, desertification, and extreme weather events. However, they note that current international legal frameworks are inadequate for addressing the complex

realities of climate migration, as existing refugee law does not recognize the status of climate refugees.

Their chapter explores the legal lacunae that exist in the protection of climate migrants and calls for the development of new legal instruments that explicitly address the needs of those displaced by environmental changes. They propose an expanded interpretation of existing human rights frameworks to include climate-related displacement, emphasizing that states must uphold the principle of non-refoulement and provide access to basic rights for displaced populations.

Piñera Álvarez and Abat i Ninet also highlight the importance of recognizing the right to self-determination for communities displaced by climate change. This includes ensuring that relocation efforts are carried out in a manner that respects the cultural and social identity of affected populations. They explore examples of states that have implemented proactive measures, such as Kiribati's "Migration with Dignity" program, which seeks to preserve the cultural identity of its people even as rising sea levels threaten their homeland.

A rights-based approach also emphasizes the importance of public participation in the decision-making process. Ensuring that affected communities have a voice in shaping adaptation measures is crucial for addressing the specific needs and concerns of different groups. International human rights bodies have increasingly recognized the intersection between climate change and human rights, providing a platform for individuals and communities to seek redress for climate-related harms. The role of the Inter-American Court of Human Rights (IACtHR) is particularly noteworthy in this regard. The IACtHR has been asked to issue an advisory opinion on the climate obligations of states, focusing on the impact of climate change on the rights of indigenous peoples, children, and future generations. This request highlights the evolving understanding of how human rights law can be applied to address the impacts of climate change and protect those most at risk.

The engagement of human rights bodies in climate-related cases provides a critical avenue for holding states accountable when their actions—or inactions—violate the rights of affected communities. For example, cases like the 2021 ruling of the German Federal Constitutional Court, which held that Germany's climate law was insufficient in protecting the rights of future generations, demonstrate how human rights arguments can be used to push for more ambitious climate action. These precedents have inspired similar cases in other jurisdictions, emphasizing the role of the judiciary in ensuring that states meet their human rights obligations in the context of climate change.

In **Chapter 6, "Climate Change and Legal Responsibility: Examining Liability Frameworks in Environmental Law", María Valeria Berros** explores the intersection of tort law and environmental law within the context of climate change. The chapter begins by analyzing traditional civil liability principles, which have typically focused on direct, individual harm linked to identifiable actors and specific causal chains. Berros highlights how the diffuse, long-term nature of climate change challenges these traditional frameworks, as climate-related damages impact not only individuals but also ecosystems, future generations, and collective resources.

The chapter delves into the evolution of liability paradigms—from responsibility to solidarity and, most recently, to security. These paradigms reflect shifts in how law addresses risks and liabilities, moving from individual accountability to collective risk-sharing mechanisms, and finally, to a security-based approach that incorporates precaution. Berros explains that this shift is essential to address modern environmental challenges, such as climate change, where risk is pervasive and often uncertain. The precautionary principle, which encourages proactive measures in the face of scientific uncertainty, has emerged as a vital element of environmental law, particularly relevant in climate contexts where conventional causation theories fall short.

Berros also discusses how environmental law has adapted to the complexity of climate change by incorporating collective, preventive, and precautionary principles. Rather than focusing solely on monetary compensation after harm occurs, environmental law increasingly emphasizes restoration and preventive actions, such as impact assessments and regulatory oversight. The chapter argues that these adjustments are crucial for a legal system that can address large-scale, uncertain environmental risks. The chapter concludes by considering climate change as a "hybrid" issue that transcends traditional legal boundaries and requires a pluralistic approach. As climate litigation grows, legal systems worldwide must adapt to integrate scientific knowledge, protect future generations, and recognize new legal subjects, such as ecosystems and the climate system itself, as entities in need of protection. Berros suggests that this evolution reflects a fundamental shift in how law approaches responsibility and accountability in the face of complex global environmental challenges.

Chapter 7, "An Analysis of the Obligations of States for an Effective Loss and Damage Funding Mechanism, in light of the principle of common but differentiated responsibilities" by Macarena Martinic Cristensen provides an in-depth analysis of the responsibilities of states in financing loss and damage resulting from climate change. She examines how the principle of common but differentiated responsibilities (CBDR), a foundational aspect of international environmental law, underpins the need for equitable financing mechanisms. She argues that despite growing acknowledgment of loss and damage as a distinct pillar of climate action, funding efforts have thus far fallen short in addressing the full scope of this issue, particularly for the world's most vulnerable communities.

The chapter begins by contextualizing the concept of loss and damage within global climate governance, highlighting the IPCC's findings on the devastating, often irreversible impacts of climate change on ecosystems and human societies. Martinic Cristensen notes that vulnerable populations, including those affected by intersecting social and environmental disadvantages, receive these

impacts. The chapter traces the evolution of international efforts to establish dedicated funding for loss and damage, including the Warsaw Mechanism and the recently established Loss and Damage Fund. However, she critiques these mechanisms for their voluntary nature and lack of clear accountability for high-emitting countries, emphasizing the disparity between global commitments and the urgent needs of affected communities.

The author further explores the CBDR principle as a pathway toward fairer financing structures, urging that it be strengthened to ensure that developed countries—those historically responsible for the bulk of emissions—contribute more substantially to financing efforts. She argues that the principle of CBDR, rooted in the 1992 Rio Declaration, must be applied to the Loss and Damage Fund in a way that reflects the actual historical contributions and economic capacities of each state. By operationalizing this principle, Martinic Cristensen envisions a funding framework that effectively addresses the financial and technical needs of developing countries.

The chapter concludes by underscoring the importance of a just approach to loss and damage financing, where developed states assume greater responsibility not only for direct contributions but also in facilitating access to resources for vulnerable communities. The author calls for a commitment to transparency, accountability, and inclusive decision-making within the Fund's governance, advocating that this approach is critical to closing the gap between climate justice rhetoric and action.

5. THE IMPERATIVE OF INTERNATIONAL COOPERATION AND INTERNAL DELIBERATION TO ADDRESS CLIMATE JUSTICE

Achieving climate justice and protecting human rights during the ecological transition requires a coordinated global response. While international courts and national governments have crucial

roles to play, international cooperation is essential for addressing the transboundary nature of climate impacts. The Paris Agreement represents a significant step toward such cooperation, with its provisions for climate finance, technology transfer, and capacity-building aimed at supporting developing countries in their climate efforts. However, as is argued in this volume, much more needs to be done to translate these commitments into tangible action.

In **Chapter 8, "International Liability of States for Acts and Omissions Causing Significant Damage to the Climate System and Other Elements of the Environment" Marisol Anglés-Hernández** highlights the role of multilateral negotiations in shaping state responsibilities and the importance of maintaining a cooperative spirit in international climate discussions. She discusses the challenges of balancing national interests with the collective need to protect the global climate system, noting that States often face tensions between their short-term economic priorities and the long-term goals for sustainable development. Anglés-Hernández calls for a renewed emphasis on the principles of solidarity and mutual aid, suggesting that international cooperation must be strengthened through mechanisms that ensure accountability and transparency in the implementation of climate commitments.

While the principles of due diligence, human rights protection, and climate resilience are central to state responsibilities, their implementation faces significant challenges. One of the most pressing issues is the gap between legal commitments and practical actions. Despite the existence of international treaties like the Paris Agreement and the recognition of human rights in climate policies, many countries struggle to translate these commitments into effective domestic measures.

This implementation gap is often a result of conflicting interests within states, where economic priorities such as industrial growth, fossil fuel production, or extractive industries can hinder the adoption of ambitious climate policies. Marisol Anglés-Hernández explores how major greenhouse gas-emitting countries, including the United States, have at times resisted binding international

obligations for fear of economic repercussions. This resistance is compounded by the influence of powerful industries, such as fossil fuel corporations, which lobby against stricter regulations and delay climate action.

The author also highlights how international negotiations can sometimes become arenas of power struggle, where the interests of economically powerful states can overshadow the needs of vulnerable populations. This dynamic poses a challenge to achieving genuine climate justice, as it risks perpetuating existing inequalities in the distribution of climate impacts. Her chapter calls for greater transparency and inclusivity in international climate negotiations, advocating for mechanisms that ensure that the voices of marginalized communities, particularly those in the Global South, are heard and respected in global decision-making processes.

Alongside state actions, the role of civil society and non-state actors is crucial in advancing climate justice and holding governments accountable. Environmental NGOs, community organizations, and human rights groups have been at the forefront of advocating for stronger climate policies and providing support to those most affected by climate change. Their work is often essential in bridging the gap between international legal standards and local implementation. The contributions in this volume emphasize that the advocacy of civil society organizations can drive legal reforms and shape the outcomes of climate litigation.

In **Chapter 9, "Defending the Defenders: State Responsibilities to Respect Climate Justice, Rule of Law, and Rights of Counsel in Climate Litigation Worldwide", Marie-Claire Cordonier-Segger et al**. discuss the increasing role of strategic climate litigation, where civil society groups and affected individuals use the courts to challenge government actions or inactions that violate their rights. These legal actions not only seek to redress specific grievances but also aim to set precedents that can guide future climate governance.

In this chapter, the authors explore the escalating challenges faced by climate defenders, particularly environmental lawyers and advocates involved in climate litigation. The chapter underscores that while climate litigation has grown significantly as a tool for climate justice, those involved in these cases increasingly face threats from both state and non-state actors. These pressures range from strategic lawsuits against public participation (SLAPPs) to direct violence, all of which aim to suppress advocacy and limit access to justice. This dynamic is especially concerning as climate litigators play a vital role in pushing for state accountability under the Paris Agreement and related international frameworks.

Cordonier-Segger and her co-authors emphasize the urgent need for protective measures to safeguard climate defenders. They highlight recent developments, such as the appointment of a UN Special Rapporteur on Environmental Defenders, as encouraging steps, but argue that more robust international support and protection mechanisms are essential. The chapter concludes with a call for strengthened rule of law in climate litigation and the establishment of networks and resources to support climate litigators worldwide. By protecting those who advocate for climate justice, the authors argue, the international community can reinforce the foundations of the Paris Agreement and ensure that the law remains a tool for equitable and effective climate action.

6. CONNECTING CLIMATE JUSTICE TO BROADER ETHICAL AND LEGAL PRINCIPLES

Climate justice is closely tied to broader ethical principles such as equity, intergenerational justice, and the right to development. The Paris Agreement, for example, acknowledges that the impacts of climate change must be addressed in a way that respects human rights, particularly the rights of those most vulnerable to climate impacts. This requires states to not only reduce their greenhouse gas emissions but also to provide financial and technical support

to countries and communities that are less equipped to cope with the impacts of climate change.

Chapter 10, "Climate Obligations of States from the Perspective of Climate Justice" by Susana Borràs Pertinat, explores the evolution of climate justice, tracing its roots back to the environmental justice movements of the 1980s, which highlighted how marginalized communities disproportionately suffered from environmental harms. In the context of climate change, the concept of justice expands to address global inequities: those least responsible for emissions—such as poorer countries and vulnerable populations—are often the most affected by its consequences. Borràs Pertinat highlights dimensions of climate justice, including distributive justice, which calls for a fair allocation of responsibilities, and procedural justice, which ensures that all affected groups have a voice in climate governance.

Borràs-Pertinat critically analyzes the current international climate agreements, such as the Paris Agreement, noting that while they incorporate aspects of climate justice, they often lack enforceable mechanisms to hold states accountable for these commitments. She argues that without stronger legal frameworks grounded in justice, climate policies will continue to fall short in addressing the needs of vulnerable populations. The author advocates for integrating human rights and reparative measures into climate law, suggesting that states with historical emissions should provide financial and technological support to those who are disproportionately impacted.

In **Chapter 11, "The Duty to Protect the Intrinsic Value of Nature to Tackle the Climate Crisis"** Silvia Bagni explains why a crucial aspect of achieving climate justice involves shifting from an anthropocentric paradigm to an ecocentric perspective that recognizes the intrinsic value of nature. This paradigm shift is essential for fostering a relationship between humanity and the natural world that respects ecological limits and acknowledges the interconnectedness of human and environmental well-being. The author argues that the failure of contemporary environmental law

lies in its inability to move beyond a narrow focus on human needs and suggests that legal systems must evolve to recognize nature as a legal entity deserving of rights and protection for its own sake.

Bagni's analysis draws from a diverse range of cultural perspectives, including indigenous philosophies, religious traditions, and scientific understandings, to build a case for a more holistic legal framework. For instance, she discusses how indigenous communities often view nature as a living being with which humans maintain a relationship of reciprocity. This perspective contrasts sharply with the Western dualistic vision that separates humans from nature and treats the environment as a resource to be exploited. Bagni explores how these differing worldviews converge in the emerging concept of "Earth Jurisprudence", a legal philosophy that calls for laws that align with the natural systems of the Earth.

This shift toward recognizing the rights of nature is not merely theoretical; it has practical implications for how climate justice can be achieved. The author explores examples of national and international legal developments that reflect this ecocentric approach, such as the Ecuadorian Constitution's recognition of the rights of nature. She argues that this approach can inform international efforts to address climate change, suggesting that legal frameworks like the Convention on Biological Diversity should be expanded to include provisions that recognize and protect the ecological systems that support life on Earth.

7. LOOKING FORWARD: THE PATH TO A JUST TRANSITION

The contributions in this volume present a holistic vision of how law and policy can be harnessed to achieve climate justice. They highlight the critical role of international courts in clarifying legal obligations, the responsibility of states to protect human rights, and the importance of a collaborative approach that includes the voices of civil society and vulnerable communities. Together, these

insights form a roadmap for addressing the complex challenges of the climate crisis while ensuring that the transition toward sustainability is equitable and just.

As this volume demonstrates, the journey toward a reasonable and peaceful ecological transition is multifaceted and requires the concerted efforts of states, international courts, civil society, and affected communities.

The concept of a "just transition" has become central to these efforts, referring to the process of shifting to a low-carbon economy in a way that is fair and equitable for all stakeholders, particularly workers and communities that have historically depended on carbon-intensive industries. The idea of a just transition is built on the recognition that the shift to a sustainable economy must not replicate the inequalities and injustices of the past. Instead, it should create new opportunities for economic inclusion, social equity, and environmental protection, recognizing vulnerabilities and the value of life in it different forms.

The chapters in this book collectively argue that the principles of climate justice should guide this transition, ensuring that the rights and dignity of all people are respected. This includes acknowledging the historical responsibilities of developed countries to provide support for adaptation and mitigation in developing countries, as well as ensuring that those who have been most affected by climate change are at the forefront of decision-making processes.

By embracing the principles outlined in this volume, the international community can move closer to realizing a world where ecological balance and human rights coexist in harmony, where the burdens of climate change are shared fairly, and where future generations inherit a planet that is healthy, just, and resilient. The journey ahead is challenging, but with the collective commitment to climate justice, it is possible to build a foundation for a sustainable and peaceful future.

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Evolving Law of State Responsibility for Climate Accountability through ICJ's Advisory Opinion on Climate Change

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INTRODUCTION

For decades, the world has known the causes of climate change and the significant harm it produces to ecosystems and humankind now and for centuries into the future. Despite this knowledge, those most responsible have failed to take necessary action to prevent and minimise significant damage to the climate system, the environment and the full enjoyment of human rights. Thus, the catastrophic and often irreversible adverse effects of climate change continue to increase in severity and frequency with every additional increment in global temperature.

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The industrialised States that have reaped the benefits of the climate crisis have not sufficiently cut down on their greenhouse gas (GHG) emissions and have persistently resisted and worked against attempts to ensure that they provide reparations for the climate harm they have caused.[3] If international law is to hold any legitimacy in the eyes of those States and peoples that see climate change as an existential threat, it must be interpreted and applied in a way that effectively addresses the systemic injustices underlying both the causes of climate change and the unequal distribution of its impacts. At the very least, this requires applying existing legal principles of state responsibility for wrongful conduct and determining the relevant reparations owed to those States and peoples disproportionately affected by climate change.

In this respect, the 2023 request by the United Nations General Assembly (UNGA) for an Advisory Opinion (AO) from the International Court of Justice (ICJ/Court) on the legal obligations of states concerning climate change[4] provides a significant opportunity for the development of international law in alignment with the existing legal principles of equity and responsibility. This piece sets out the relevant applicable laws in accordance with the UNGA resolution and further examines the rationale for why and how the Court should apply and interpret these fundamental international legal principles (see section 3), considering the nature of the conduct and harm involved to determine which

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3 For instance, United Nations Framework Convention on Climate Change (UNFCCC). *Report of the Conference of the Parties on Its Twenty-First Session, Held in Paris from 30 November to 13 December 2015*. FCCC/CP/2015/10/Add.1. Accessed October 10, 2024. https://unfccc.int/resource/docs/2015/cop21/eng/10a01.pdf#page=2.

4 United Nations General Assembly. "Request for an advisory opinion of the International Court of Justice on the obligations of States in respect of climate change" Resolution Adopted by the General Assembly on 29 March 2023 (A/RES/77/276). https://documents.un.org/doc/undoc/ltd/n23/094/52/pdf/n2309452.pdf [Hereafter the UNGA Resolution A/RES/77/276].

international laws apply.[5] Such an approach would clarify multiple sources of law addressing State responsibility in the context of climate change.

While the specialised climate regime has driven efforts to tackle climate change, its negotiating history[6] shows significant gaps in addressing broader State obligations from a justice perspective.[7] Therefore, legal reasoning and interpretation extending beyond the text of these agreements are essential to safeguard human rights from the adverse effects of climate change. The request, in this regard, centres on clarifying States' obligations under international law, particularly regarding GHG emissions, which contribute to significant transboundary harm.[8] Thus, it poses two main questions:

> 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;

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5 See the chapeau paras 2 -8 of the UNGA resolution with special focus on 5,6,7,8 through which the UNGA expects the court to examine all the treaties and conventions mentioned therein and the relevant principles of customary international law. https://documents.un.org/doc/undoc/ltd/n23/094/52/pdf/n2309452.pdf.

6 World Resources Institute. "Statement: Lack of Trust in Funding Stymies Progress at Bonn Climate Talks." *World Resources Institute*, June 15, 2023. https://www.wri.org/news/statement-lack-trust-funding-stymies-progress-bonn-climate-talks; also see Overseas Development Institute (ODI). "Turning Up the Heat in Dubai: Six Things to Watch at COP28." ODI, 2023. https://odi.org/en/insights/turning-up-the-heat-in-dubai-six-things-to-watch-at-cop28/; United Nations Framework Convention on Climate Change (UNFCCC). *COP28 Agreement Signals Beginning of the End of the Fossil Fuel Era.* UNFCCC, 2023. Accessed October 10, 2024. https://unfccc.int/news/cop28-agreement-signals-beginning-of-the-end-of-the-fossil-fuel-era.

7 United Nations General Assembly. "Right to Development." A/79/168, Adopted by the General Assembly on 17 July 2024.

8 Chapeau paragraphs of the UNGA Resolution A/RES/77/276 https://documents.un.org/doc/undoc/ltd/n23/094/52/pdf/n2309452.pdf.

> b. What are the legal consequences under these obligations for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment, with respect to:
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> (i) States, including, in particular, small island developing States, which due to their geographical circumstances and level of development, are injured or specially affected by or are particularly vulnerable to the adverse effects of climate change?
>
> (ii) Peoples and individuals of the present and future generations affected by the adverse effects of climate change?[9]

This paper argues that State conduct which is causing and contributing to significant harm to the climate system constitutes a breach of various obligations under international law, especially the duty to prevent transboundary environmental harm and the duty to respect human rights.[10] These breaches cause harm and are attributable to States, thus triggering their international responsibility and applicable legal consequences.[11] All in all, we argue that what is essentially before the ICJ is an interpretative choice which must be informed by the principles of equity and Common but Differentiated Responsibilities and Respective Capabilities (CBDRC). Such interpretation will provide the building blocks for a new legal framework of climate accountability, one that recognizes the imperial and colonial patterns that have

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9 United Nations General Assembly. Resolution Adopted by the General Assembly on 29 March 2023 (A/RES/77/276).

10 See generally, Center for International Environmental Law (CIEL). *Memo on Legal Consequences*. Pages 4-8. Accessed October 10, 2024. https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2024/20240320_18913_na-2.pdf. World Youth for Climate Justice and Pacific Islands Students Fighting Climate Change. *Youth Climate Justice Handbook: Legal Memorandum*. Accessed October 10, 2024. https://static1.squarespace.com/static/5f063a0c8f53b604aed84729/t/6451028c46350d670c523691/1683030671041/handbook_legal_memorandum-en.pdf. [Hereinafter, *Youth Climate Justice Handbook*].

11 CIEL Memo On Legal Consequences Pg. 4-8. Available at: Https://Climatecasechart.Com/Wp-Content/Uploads/Non-Us-Case-Documents/2024/20240320_18913_Na-2.Pdf.

led to global environmental collapse and the disproportionate suffering of the world's most vulnerable and impoverished communities.

Section 2 provides a general overview of the law of state responsibility for internationally wrongful acts and analyses its applicability to climate change. Section 3 brings to light the ICJ's role in progressively developing international law and the key principles it should consider in its analysis of the responsibility question. Finally, Section 4 concludes by arguing that the ICJ ought to acknowledge the historical responsibility of those States most responsible for causing climate change and determine the relevant legal consequences arising from such responsibility under international law.

1. INTERNATIONAL RESPONSIBILITY OF STATES FOR CAUSING HARM TO THE CLIMATE SYSTEM

A State is responsible under international law when an act or omission attributable to it breaches its international obligations.[12] International responsibility ensues certain legal consequences depending on the nature of the breach.[13] When a breach causes

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12 Part I, Chapter 1-2 International Law Commission. *Responsibility of States for Internationally Wrongful Acts, 2001.* Adopted by the Commission at its fifty-third session and submitted to the General Assembly as part of the Commission's report. In *Yearbook of the International Law Commission*, 2001, vol. II (Part Two). Text reproduced in General Assembly Resolution 56/83 of 12 December 2001, corrected by document A/56/49(Vol. I)/Corr.4.

13 Part I, Chapter 3-4 International Law Commission. *Responsibility of States for Internationally Wrongful Acts, 2001.* Adopted by the Commission at its fifty-third session and submitted to the General Assembly as part of the Commission's report. In *Yearbook of the International Law Commission*, 2001, vol. II (Part Two). Text reproduced in General Assembly Resolution 56/83 of 12 December 2001, corrected by document A/56/49(Vol. I)/Corr.4.

harm, reparations in the form of restitution, compensation and satisfaction are owed to the injured State or group of States.[14] Irrespective of harm, responsibility carries with it a secondary obligation of cessation of the wrongful conduct.[15] Internationally wrongful acts can be composite,[16] that is, constituted by a series of acts or omissions, and can be committed by a group of States.[17]

To adequately analyse the applicability of the law of state responsibility for causing harm to the climate system, we must first determine (i) the international obligation that is breached, and (ii) whether such breach can be attributable to a State or group of States. In this context, we consider two key international obligations under customary international law that have been, and are being breached, by States in the context of climate change: the duty to prevent transboundary environmental damage and the duty to respect human rights.

2. BREACH OF AN INTERNATIONAL OBLIGATION

The duty to prevent transboundary environmental harm is an obligation of conduct by which States must ensure that activities within their jurisdiction or control do not cause harm to the

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14 Part II, Chapter 1-2 International Law Commission (ILC). Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries. U.N. Doc. A/56/10, 2001 [Hereinafter ILC, Draft Articles On State Responsibility, With Commentaries]. See also Pulp Mills on the River Uruguay (Argentina v. Uruguay). Separate Opinion, ICJ Reports 2010, 80, para. 122.

15 ILC, Draft Articles On State Responsibility, With Commentaries. See also Pulp Mills on the River Uruguay (Argentina v. Uruguay). Separate Opinion, ICJ Reports 2010, 80, para. 122.

16 Article 14 And 15 ILC, *Draft Articles on State Responsibility*, With Commentaries, At P. 59-64.

17 ILC, Draft Articles On State Responsibility, With Commentaries. See also Pulp Mills on the River Uruguay (Argentina v. Uruguay). Separate Opinion, ICJ Reports 2010, 80, para. 122.

environment of other States.[18] As a duty of diligent conduct, it requires adopting reasonable measures considering foreseeable risks of significant transboundary harm.[19] For such a duty to be complied with suffices to demonstrate that a State has acted in due diligence in preventing such harm, and not that the harm is prevented. Logically, thus, a breach of such duty would not rest on the harm occurring, but rather, on the lack of reasonable measures taken to prevent it. When applied to climate change, due diligence is informed by regime-specific principles[20], such as CBDRC, prevention, precaution, and highest possible ambition. In the context of global environmental collapse, reasonable measures would include, at minimum, reducing GHG emissions in a way proportionate to a State's historical contributions, development level, and existing financial and technological capabilities[21], in line with the Paris Agreement's 1.5°C temperature guardrail.

Although all States are required to undertake mitigation efforts, the timeframe and intensity of doing so is differentiated. This is because some States have developmental needs that must be met, while others, in addition to their mitigation efforts, must also

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18 Pulp Mills on the River Uruguay (Argentina v. Uruguay). Separate Opinion, ICJ Reports 2010 ICJ Rep 14, [101].

19 Peters, Anne, Heike Krieger, and Leonhard Kreuzer, eds. *Due Diligence in the International Legal Order: Dissecting the Leitmotif of Current Accountability Debates*. Oxford: Oxford University Press, 2020. at 78, 19.

20 Rajamani, Lavanya. "Due Diligence in International Climate Change Law." In *Due Diligence in the International Legal Order*, edited by Heike Krieger, Anne Peters, and Leonhard Kreuzer, 1st ed. Oxford: Oxford University Press, 2020. Online ed, Oxford Academic, 18 February 2021; Voigt, Christina. "The Climate Change Dimension of Human Rights Obligations." *SSRN Scholarly Paper*, 3 May 2021. https://doi.org/10.2139/ssrn.3840631.

21 In this sense, ITLOS has recently highlighted that States with greater scientific, technical, economic, and financial capabilities must act with a higher degree of diligence in preventing transboundary environmental harm arising from GHG emissions. International Tribunal for the Law of the Sea (ITLOS). *Climate Change and International Law* (Advisory Opinion, 21 May 2024), ITLOS Reports 2024.

bear historical responsibility for causing climate change as they have greater resources and capabilities at their disposal. In this regard, the Intergovernmental Panel on Climate Change (IPCC) has explicitly recognised that "unequal historical and ongoing contribution" to GHG emissions has raised the temperature above 1.1°C during the pre-industrial period[22] as well as since the Industrial Revolution.[23] Thus, there is scientific consensus on the deep inequalities regarding the respective contributions of different countries and those that are disproportionately affected by the negative impacts of climate change. As both the United Nations Framework Convention on Climate Change (UNFCCC) and the Paris Agreement underscore, historically responsible States have a legal obligation to lead in ambition when it comes to reducing their GHG emissions.[24]

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[22] Global warming, one component of the changing climate, "is the long-term heating of Earth's surface observed since the pre-industrial period (between 1950 and 1990) due to human activities, primarily fossil fuel burning." NASA, "Global Warming vs. Climate Change," available at: https://climate.nasa.gov/global-warming-vs-climate-change/; also see ClientEarth. *ITLOS Advisory Opinion: Legal Briefing*. https://www.clientearth.org/media/c1spsafh/itlosao_legal-briefing_final.pdf.

[23] "Human activities, principally through emissions of greenhouse gases, have unequivocally caused global warming, with global surface temperature reaching 1.1°C above 1850-1900 in 2011-2020. Global greenhouse gas emissions have continued to increase, with unequal historical and ongoing contributions arising from unsustainable energy use, land use and land-use change, lifestyles and patterns of consumption and production across regions, between and within countries, and among individuals (high confidence)" Intergovernmental Panel on Climate Change (IPCC). *Sixth Assessment Report (AR6), Synthesis Report (SYR), Summary for Policymakers (SPM)*. 2023. Accessed October 10, 2024. https://www.ipcc.ch/report/ar6/syr/.

[24] United Nations Framework Convention on Climate Change (UNFCCC). "Article 3.1." https://unfccc.int/resource/docs/convkp/conveng.pdf. and Paris Agreement, preamble. Accessed October 10, 2024. https://unfccc.int/sites/default/files/english_paris_agreement.pdf.

Considering the above, we understand that the duty to prevent environmental damage is breached when a State fails to take reasonable measures to prevent or minimise harm to the climate system by reducing its GHG emissions in a way proportional to the diligence required based on its specific circumstances, capabilities, and historical responsibilities. Since industrialised and historically responsible States have a heightened level of diligence, insufficient mitigation and consistent emissions increases breach this duty and trigger international responsibility.

At the same time, a breach of the duty to prevent transboundary harm can simultaneously comport a breach of the obligations to respect and protect human rights.[25] These duties are rooted in customary international law and specific human rights treaties and are applicable to climate change mitigation[26] and adaptation.[27] Essentially, they require States to abstain from conduct that results in breaches of human rights (respect) and adopt positive measures to ensure they are not violated (protect).

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[25] See, broadly, the American Convention on Human Rights "Environment and Human Rights" (State obligations concerning the environment within the framework 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) https://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm; Inter-American Court of Human Rights (IACtHR). *Advisory Opinion OC-23/17 on the Environment and Human Rights.* Series A No. 23. https://www.corteidh.or.cr/docs/opiniones/seriea_23_ing.pdf.

[26] Verein KlimaSeniorinnen Schweiz and Others v. Switzerland. App. no. 53600/20, European Court of Human Rights (ECtHR), 9 April 2024; Committee on the Rights of the Child. *Sacchi et al. v. Argentina.* No. 107/2019, 23 September 2019; Committee on the Rights of the Child. *General Comment No. 26 on Children's Rights and the Environment, with a Particular Focus on Climate Change*, 22 August 2023.

[27] Human Rights Committee. *Daniel Billy et al. v. Australia.* No. 3624/2019, Communication of 13 May 2019.

These obligations also imbue the level of diligence required from all States and provide greater insight into measures that can be deemed reasonable to both prevent transboundary environmental harm and protect human rights in the context of climate change. These measures include the reduction of GHG emissions aimed at preventing a rise in global average temperature beyond levels capable of producing serious and irreversible adverse effects on human rights.[28] Varying capacities here, too, will determine the way in which such reductions are implemented, but they do not exempt any State from complying with this duty, which stems from universal human rights.

To that end, the UNGA resolution requesting the AO addresses this issue (raised in the paragraph above) in question (a*)* and more specifically in question (b*)*. Question (a*)* refers to the conduct of States to protect climate systems from "anthropogenic emissions"[29]

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[28] Verein KlimaSeniorinnen Schweiz and Others v. Switzerland. App. no. 53600/20, European Court of Human Rights (ECtHR), 9 April 2024 at 546; International Tribunal for the Law of the Sea (ITLOS). *Climate Change and International Law* (Advisory Opinion, 21 May 2024), ITLOS Reports 2024 at 241-242.

[29] The Intergovernmental Panel on Climate Change (IPCC) glossary refers to anthropogenic emissions as "Emissions of greenhouse gases (GHGs), precursors of GHGs and aerosols caused by human activities. These activities include the burning of fossil fuels, deforestation, land use and land use changes (LULUC), livestock production, fertilisation, waste management, and industrial processes." https://apps.ipcc.ch/glossary/

of "greenhouse gases"[30] (i.e. "human activity,"[31] specifically "historical and ongoing contributions arising from unsustainable energy use, land use and land-use change, lifestyles and patterns of consumption and production across regions..."[32]). Thus, in answering question (a), the Court is asked to "clarify the obligations of States" that govern this conduct. Moreover, the chapeau paragraphs of the resolution enshrine relevant treaties and obligations of customary international law that the Court must consider. Thus, the combination of both the questions in the operative paragraph and the corpus juris in the chapeau paragraphs identify the "acts and omissions" of States, i.e. the relevant conduct of a State that has resulted in a change of the climate system causing harm to a State or individuals. Furthermore, question (*b)* refers to and explicitly recognises the conduct of States "over time concerning activities that contribute to climate change and its adverse effects". Thus, the conduct described in question (b) sets a higher threshold – and is a subset – of the conduct described in question (a) and the preambular paragraph 5 of the resolution. Thus, only the acts and omissions of a State relevant to activities leading to "significant harm" can be held as negligible acts rather than natural catastrophic acts in the form of climate change and its adverse effects. Question (b)

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30 The IPCC glossary refers to GHGs as "Gaseous constituents of the *atmosphere*, both natural and *anthropogenic*, that absorb and emit radiation at specific wavelengths within the spectrum of radiation emitted by the Earth's surface, by the atmosphere itself, and by clouds. This property causes the *greenhouse effect*. Water vapour (H_2O), *carbon dioxide (CO2), nitrous oxide (N2O), methane (CH4)* and *ozone (O3)* are the primary GHGs in the Earth's atmosphere. Human-made GHGs include *sulphur hexafluoride (SF6), hydrofluorocarbons (HFCs), chlorofluorocarbons (CFCs)* and *perfluorocarbons (PFCs)*; several of these are also O_3-depleting (and are regulated under the *Montreal Protocol*)." https://apps.ipcc.ch/glossary/.

31 IPCC. *Sixth Assessment Report (AR6), Synthesis Report (SYR), Summary for Policymakers (SPM)*, 2023 at A1.

32 IPCC. *Sixth Assessment Report (AR6), Synthesis Report (SYR), Summary for Policymakers (SPM)*, 2023 at A1.

specifically asks the Court to opine on legal consequences in case States have breached their obligations, as clarified in question (a), by "their acts or omissions" and caused "significant harm" to the climate system. Thus, the "relevant conduct" at stake comprises the acts and omissions of States or groups of States, alone and in combination, which have led to cumulative greenhouse gas emissions at levels causing significant harm to the climate system or other aspects of the environment.

2.1. Attribution of Such Breaches to a State or Group of States

Attribution of these internationally wrongful acts can be straightforward, especially concerning those States and former imperial powers that have reaped the benefits of industrialisation that has caused climate change. Specifically, we consider that the Court should highlight the lack of sufficient, timely and appropriate mitigation measures by historically responsible States and how that constitutes a clear, direct collective breach of the no-harm rule. In this exercise, the Court can nurture its findings of fact[33] through the advances of attribution science.[34]

Taking into consideration the language of the AO request, as explained above,[35] the Court should consider "acts and omissions of States or groups of States, alone and in combination, which

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33 Mbengue, Makane Moïse. "Scientific Fact-Finding by International Courts and Tribunals." *Journal of International Dispute Settlement* 3, no. 3 (2012): 523. https://doi.org/10.1093/jnlids/ids021.

34 Rachel A. James et al., "Attribution: How is it relevant for Loss and Damage Policy and Practice", en *Loss and Damage from Climate Change: Concepts, Methods and Policy Options*, eds. Reinhard Mechler et al. (New York: Springer, 2019), p. 118; Friederike E. L. Otto et al., "The attribution question", *Nature Climate Change 6 (2016)*:816, doi: 10.1038/nclimate3089.

35 The authors contend that the comprehensive nature of the resolution dictates that the questions are not vague and unambiguous. Therefore, in this case, there are no compelling reasons for the Court to reformulate the questions. Reformulating the questions would indeed go against

have led to cumulative greenhouse gas emissions at levels causing significant harm to the climate system or other aspects of the environment" as the conduct that breaches no-harm rule in the context of climate change. Such conduct is a series of acts and omissions that have been ongoing over time and which, taken together, constitute a composite act[36] under the law of state responsibility. This includes the cumulative anthropogenic GHG emissions of State-owned corporations; state "acts" in the form of support through fossil fuel subsidies, cement production, Land Use, Land-Use Change and Forestry (LULUCF);[37] or "omissions" such as inadequate regulation of actors that contributed to GHG emissions within the State's jurisdiction and territories under their control.[38]

At the same time, we acknowledge that the attribution of harm to a specific breach may be more complex. However, the ICJ should apply rules of general and relative causality, rather than rigid specific causality. This is because, by virtue of its non-contentious character, the ICJ would not be compelled, in the exercise of its advisory jurisdiction, to condemn the behaviour of any State. Instead, the Court, through its AO, should issue a statement of law that certain State conduct is susceptible to trigger international responsibility and provide grounds for claiming cessation

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equity and climate justice and consequently against the arguments made in this article.

36 Article 14 And 15 ILC, Draft Articles On State Responsibility, With Commentaries, at pg. 59-64.

37 See carbon brief research Evans, Simon. "Revealed: How Colonial Rule Radically Shifts Historical Responsibility for Climate Change." *Carbon Brief*, September 9, 2021. available at: https://www.carbonbrief.org/revealed-how-colonial-rule-radically-shifts-historical-responsibility-for-climate-change/#:~:text=In%20Carbon%20Brief's%20new%20analysis,of%20the%20global%20historical%20total.

38 Evans, Simon. "Revealed: How Colonial Rule Radically Shifts Historical Responsibility for Climate Change." *Carbon Brief*, September 9, 2021; Article 8 ILC, Draft Articles On State Responsibility, With Commentaries, at pg. 47.

and reparations. Such findings can then inform negotiation processes under the UNFCCC and emerging legal frameworks on responsibility and reparations.[39]

With regards to the duties to respect and protect human rights, we highlight here that these obligations are owed erga omnes and are of an extraterritorial nature, especially in the context of transboundary environmental harm.[40] In this sense, the ICJ has noted that "international human rights instruments are applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory," especially when such treaties have no provision expressly restricting their territorial application.[41] This includes the "conduct of a State … which has effects beyond its territory."[42] On this issue, the Court would be advised to follow its previous jurisprudence and that of UN human rights treaty

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39 James et al.,Attribution: "How is it relevant for Loss and Damage Policy and Practice", en *Loss and Damage from Climate Change: Concepts, Methods and Policy Options*, eds. Reinhard Mechler et al. (New York: Springer, 2019), p. 118; Friederike E. L. Otto et al., "The attribution question," *Nature Climate Change 6 (2016)*:816, pg. 117. doi: 10.1038/nclimate3089.

40 The American Convention on Human Rights "*Environment and Human Rights"* (State obligations concerning the environment within the framework 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) https://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm; Inter-American Court of Human Rights (IACtHR). *Advisory Opinion OC-23/17 on the Environment and Human Rights*. Series A No. 23. Accessed October 10, 2024. https://www.corteidh.or.cr/docs/opiniones/seriea_23_ing.pdf.

41 International Court of Justice. *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem: Advisory Opinion of 19 July 2024*, paras 99 and 101

42 International Court of Justice. *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*: Advisory Opinion of 19 July 2024 para 101.

bodies[43] and domestic jurisprudence[44] and confirm that such

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[43] Committee on Economic, Social and Cultural Rights. *General Comment No. 26 (2022) on Land Rights and Economic, Social, and Cultural Rights.* E/C.12/GC/26, January 24, 2023.; Committee on the Rights of the Child, *Sacchi et al v Argentina*, No. 107/2019, 23 September 2019. The authors do not consider that the standards on extraterritoriality developed by the ECHR in *Duarte* are rooted in legal principles, but rather, respond to political convenience. To confirm this precedent, the ICJ would be effectively negating access to justice for human rights violations in an interstate context (see below footnote 40).

[44] Domestic courts, especially in the global south countries have not only relaxed standing in climate change and environmental cases but have also established comprehensive jurisprudence taking into consideration wider duties of States to protect human rights from adverse effects of environmental damage and climate harm especially in cases of "protecting rights of present and future generations" as specifically pointed in question (b) of the UNGA resolution. For example, *Goa Foundation v. Union of India,* (2014) 6 SCC 590. The Supreme Court of India ruled that the public trust doctrine extends to all natural resources for which the state is a trustee for the people, especially for future generations; see also Navahine F., a Minor, by and through her Natural Guardian, et al. v. Department of Transportation, State of Hawai'i, et al. *In the Circuit Court of the First Circuit, State of Hawai'i.* Case No. 1CCV-22-0000631, Settlement Agreement, June 20, 2024; *Dejusticia v Colombia Corte Suprema de Justicia de Colombia* [Supreme Court of Justice of Colombia] (Bogotá 5 April 2018) STC 4360-2018, *DG Khan Cement Co Ltd v Government of Punjab Through Its Chief Secretary, Lahore*, Supreme Court of Pakistan (15 April 2021) CP1290-L/2019; *H Carlos Schneider S/A Commércio e Indústria e Outro v Ministério Público Federal Superior Tribunal de Justiça* [Superior Court of Justice of Brazil] (Brasília 23 October 2007) Recurso Especial no 650.728/SC (2d Panel), *Juliana v United States United States Court of Appeals* (9 Circuit) (17 January 2020) Case No 18-36082 DC, No 6:15-cv-01517-AA, *Leghari v Federation of Pakistan* Lahore High Court (25 January 2018) Case WP No 25501/2015. *Maria Khan and Others v Federation of Pakistan and Others* Lahore High Court (14 February 2019) Application No 8960 of 2019, *Ministério Público Federal v Ogata Superior Tribunal de Justiça* [Superior Court of Justice of Brazil] (Brasília 14 October 2008) *Netherlands v Urgenda Foundation Gerichtshof* Den Haag [The Hague Court of Appeal] (9 October 2018) Case No 200.178.245/01 ECLI:NL:GHDHA:2018:2591. *Netherlands v Urgenda Foundation Hoge*

extraterritorial breaches of international human rights law also entail international responsibility and require specific reparations, including guarantees of non-recurrence.

2.2. Legal Consequences

Though the Court will not determine specific legal consequences owed to any State, the authors believe its findings on international responsibility for harm to the climate system will nevertheless strengthen political negotiations regarding reparations for damage suffered by States and peoples. Specifically, the Court could clarify, for example, that political agreements concerning financing for loss and damage do not and cannot constitute reparations in the form of compensation if this financing is given conditionally, such as in the form of loans.[45]

3. THE ICJ'S ROLE IN INTERPRETING CLIMATE RESPONSIBILITY

The questions posed by the General Assembly to the Court reflect a need for legal clarity regarding the obligations States have under international law to protect the climate system and the human rights of present and future generations from climate harm. Because the law is not clear, the ICJ will have to "find" the

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Raad der Nederlanden [Supreme Court of the Netherlands] (The Hague 20 December 2019) Case No 19/00135 ECLI:NL:HR: 2019:2006; *Oposa v Secretary of the Department of Environment and Natural Resources (Factoran)* Supreme Court of the Philippines (Manila 30 July 1993) (1994) 33 ILM 173, *Urgenda Foundation v Netherlands Rechtbank* den Haag [The Hague District Court] (24 June 2015) Case No C/09/456689 / HA ZA 13-1396 ECLI:NL:RBDHA:2015:7145. *Waweru, Mwangi (joining) and others v Kenya* High Court of Kenya (2 March 2006) Misc Civil App No 118 of 2004.

45 Debt for Climate. "History." *Debt for Climate*, 2023. https://www.debtforclimate.org/history.

applicable legal rules through various interpretative techniques, especially that of systemic integration. This exercise is not foreign to the Court, which has, for example, determined the crystallisation of customary international law (like the no-harm rule),[46] and significantly, in the past, has developed the law of state responsibility[47] and international environmental law.[48]

Because the authors understand that the task of the Court is to state the existing law and apply it to climate change, and not to create new legal standards, the following sections highlight key principles and historical facts that should inform the Court's interpretation. For this, we will address: (i) the importance of integrating relevant principles from interacting regimes, and (ii) the need for the Court to acknowledge the interrelations between imperialism, colonialism and the causes and impacts of climate change. Finally, (iii) we reflect on the interpretative choice that the Court faces on this question.

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46 *Advisory Opinion on the Legality of the Threat and Use of Nuclear Weapons* (1996); *Pulp Mills on the River Uruguay* (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010, p. 14. *Certain Activities Carried Out by Nicaragua in the Border Area* (Costa Rica v. Nicaragua) and *Construction of a Road in Costa Rica along the San Juan River* (Nicaragua v. Costa Rica), Judgment, I.C.J. Reports 2015.

47 SC, James Crawford, "The International Court of Justice and the Law of State Responsibility," in Christian J. Tams, and James Sloan (eds), *The Development of International Law by the International Court of Justice* (Oxford, 2013; online edn, Oxford Academic, 23 Jan. 2014), https://doi.org/10.1093/acprof:oso/9780199653218.003.0005.

48 Fitzmaurice, Malgosia, "The International Court of Justice and International Environmental Law," in Christian J. Tams, and James Sloan (eds), *The Development of International Law by the International Court of Justice* (Oxford, 2013; online edn, Oxford Academic, 23 Jan. 2014), https://doi.org/10.1093/acprof:oso/9780199653218.003.0015.

3.1. The Importance of Integrating Relevant Principles from Interacting Regimes

Considering the explicit and non-exhaustive language of the request, the Court ought to follow its established practice and apply systemic integration of other relevant sources of law when interpreting questions.[49] Indeed, obligations of States in the context of climate change arise from treaty and customary international law, as well as general principles of law and principles of public international law.[50] Because the issue of responsibility for harm to the climate system must be addressed from a climate justice perspective,[51] these obligations and those that that arise from the UNFCCC and the Paris Agreement[52] should be interpreted harmoniously and integrated systematically[53] in light of general rules of international law.[54]

In similar advisory proceedings on climate change, some States argued that specific obligations arising from the UNFCCC and Paris Agreement operate in "self-contained legal regimes" (lex specialis rule) while mandating specific governance structures,[55] thus leading to their own "ethos"[56] and the inapplicability of

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49 This principle, also refered as "systemic integration" is codified in Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT).

50 See generally the UNGA resolution.

51 See UNGA resolution on Right to Development.

52 See the chapeau paras 2 -8 of the UNGA resolution with a special focus on 5,6,7,8 through which the UNGA expects the court to examine all the treaties and conventions mentioned therein and the relevant principles of customary international law. https://documents.un.org/doc/undoc/ltd/n23/094/52/pdf/n2309452.pdf

53 Article 31(3)(c) of the Vienna Convention on the Law of Treaties.

54 See generally, McLachlan, Campbell. "The Principle of Systemic Integration." *International and Comparative Law Quarterly* 54, no. 2 (2005): 279-320. https://doi.org/10.1093/iclq/lei004.

55 ITLOS AO paras 219-224.

56 International Law Commission (ILC). Report on "Fragmentation Of International Law: Difficulties Arising From The Diversification And

other obligations related to climate change.[57] With respect to the applicability of the duty to prevent pollution to the marine environment due to GHG emissions, ITLOS reiterated that treaties should be interpreted in light of rules of international law to ensure the goal of a specialised regime is not frustrated.[58]

Specifically, the Court should interpret the rules of State responsibility in the context of climate change through the lens of equity, which is both a principle of international law and a core principle of the climate change regime. In this regard, the ICJ has recognized that equity requires that the Court interprets applicable rules to achieve an equitable solution.[59] In the climate regime, the principle of CBDRC, as an operationalisation of equity acknowledges differences in states both due to their (i) historical responsibility in causing climate change, and (ii) varying capacities to prevent or minimise climate change. Both in the UNFCC and in the Paris Agreement, CBDRC informs differentiation of obligations between States based on these criteria. Therefore, we believe that an interpretation of the rules of state responsibility for harm to the climate system would also need to follow this approach to reflect differences based on culpability and capacity.

Expansion Of International Law" 18 July 2006. https://legal.un.org/ilc/documentation/english/a_cn4_l702.pdf.

57 United Nations Convention on the Law of the Sea (UNCLOS). "Part XII, Article 194: Measures to Prevent, Reduce, and Control Pollution of the Marine Environment: 1. States shall take, individually or jointly as appropriate, all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities, and they shall endeavour to harmonize their policies in this connection" https://www.un.org/depts/los/convention_agreements/texts/unclos/part12.htm.

58 ITLOS AO paras 219-224; also see McLachlan, Campbell. "The Principle of Systemic Integration." *International and Comparative Law Quarterly* 54, no. 2 (2005): 279-320. https://doi.org/10.1093/iclq/lei004.

59 Fisheries Jurisdiction, I. C.J. Reports 1974, paras. 69. & 78.

To surmise, given the character of the obligations that will be clarified under question (a) that arise from not only customary international law but also treaties, the Court is the most appropriate authority to ensure that the legal texts of specialised regimes make sense within the context of the system and for the purposes they were adopted.[60] Thus, by the same virtue of the "process of legal interpretation, [the Court] performs an integrating task within the legal system."[61] Analysing if and how notions of state responsibility are applicable to climate change requires, at minimum, that the Court's interpretation follows notions of equity, burden-sharing and CBDRC.

3.2. Reckoning with the Colonial Imprints of International Law and its Relationship with Climate Change

Additionally, we consider that for the ICJ's ruling to hold any sense of legal, historical and political legitimacy, the Court must acknowledge the colonial and imperial roots and dynamics of international law and international rulemaking, which are of utmost importance when determining State responsibility in the climate context.[62] This is because the political and economic causes of climate change are deeply tied to imperial and colonial

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60 McLachlan, Campbell. "The Principle of Systemic Integration." *International and Comparative Law Quarterly* 54, no. 2 (2005): at 286. https://doi.org/10.1093/iclq/lei004.

61 McLachlan, Campbell. "The Principle of Systemic Integration." *International and Comparative Law Quarterly* 54, no. 2 (2005): at 286. https://doi.org/10.1093/iclq/lei004.

62 Jurema, Bernardo, and Elias König. "State Power and Capital in the Climate Crisis: A Theory of Fossil Imperialism." In *Confronting Climate Coloniality: Decolonizing Pathways for Climate Justice*, edited by Farhana Sultana, 62-77. New York: Routledge, 2025. https://doi.org/10.4324/9781003465973-5. ; also see UN special report on "Contemporary forms of racism, racial discrimination, xenophobia and related intolerance" A/Res/77/549 (2022) available at: https://documents.un.org/doc/undoc/gen/n22/651/88/pdf/n2265188.pdf.

patterns of exploitation,[63] which have also shaped and have been enabled by international law.[64] In the context of decolonisation, the ICJ has reiterated that the right to self-determination is "one of the essential principles of contemporary international law"[65] of erga omnes character.[66] Therefore, the Court has also observed that any impediment to realising such right should be brought to an end[67] and the failure to do so would attract State responsibility.[68]

The disproportionate share of atmospheric GHG emissions by certain developed States become significantly higher when emissions from their present and former colonies and colonial territories are cumulatively attributed to these colonial powers.[69]

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63 Sultana, Farhana. "Urgency, Complexities, and Strategies to Confront Climate Coloniality and Decolonize Pathways for Climate Justice." In *Confronting Climate Coloniality: Decolonizing Pathways for Climate Justice*, edited by Farhana Sultana, 1-22. New York: Routledge, 2025. https://doi.org/10.4324/9781003465973-1.

64 See, generally, Anghie, A. (2005). *Imperialism, Sovereignty and the Making of International Law* (Cambridge Studies in International and Comparative Law), 111, Cambridge: Cambridge University Press. doi:10.1017/CBO9780511614262 102; M. Koskenniemi, *The Gentle Civilizer of Nations: the Rise and Fall of International Law 1870-1960* (2001); A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (2005); L. Eslava, M. Fakhri and V. Nesiah (eds.), *Bandung, Global History and International Law* (2017) .

65 International Court of Justice. *East Timor (Portugal v. Australia)*, ICJ Reports, 1995. https://www.icj-cij.org/case/84.

66 **International Court of Justice**. *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, "respect for the right to self-determination is an obligation *erga omnes*, all States have a legal interest in protecting that right…" . https://www.icj-cij.org/case/169.

67 **International Court of Justice**. *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem: Advisory Opinion of 19 July 2024*, paras 99 and 101

68 **International Court of Justice**. *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*. https://www.icj-cij.org/case/169.

69 The carbon brief analysis by S. Evans has show the quantification of historical emissions to former colonial powers. As a group, the

In this context, most of the former colonies, especially countries in Africa, Asia, the Pacific, the Caribbean, and Latin America were considered "sacrifice zones," as the global processes that drove anthropogenic GHG emissions were based on systemic racism and colonialism and relied on extraction of natural resources, industrialisation, and consumption patterns that led to emissions in those territories.[70] Recognising these climate injustices, the corrected record of cumulative historical emissions, and the latest IPCC reports are crucial to contextualise legal discussions of international responsibility and climate change.

To ignore these realities is to legitimise and deepen the economic and political structures created by colonial powers and imposed through international law.[71] Breaking free from colonial and imperial patterns, which are so deeply embedded in the

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EU+UK collectively ranks second for emissions within its own borders (375GtCO2, 14.7% of the global total). This climbs by nearly a third after adding colonial emissions, to 478GtCO2 and 18.7% of the global total – just behind the US. The UK ranks fourth in the world when accounting for colonial emissions – jumping ahead of its former colony India. Including emissions under British rule in 46 former colonies, the UK is responsible for nearly twice as much global warming as previously thought (130GtCO2 and 5.1% of the total, instead of 76GtCO2 and 3.0%). The largest contributions to the UK's colonial emissions are from India (13GtCO2, cutting its own total by 15%), Myanmar (7GtCO2, -49%) and Nigeria (5GtCO2, -33%). The Netherlands accounts for nearly three times as much warming when accounting for colonial emissions (35GtCO2 and 1.4% of the total, rather than 13GtCO2 and 0.5%). This is largely due to LULUCF emissions in Indonesia, under Dutch rule, of 22GtCO2.

70 UN special report on "Contemporary forms of racism, racial discrimination, xenophobia and related intolerance" A/Res/77/54 9(2022) para. 4 available at: https://documents.un.org/doc/undoc/gen/n22/651/88/pdf/n2265188.pdf.

71 Anghie, A. (2005). *Imperialism, Sovereignty and the Making of International Law* (Cambridge Studies in International and Comparative Law), 111, Cambridge: Cambridge University Press. doi:10.1017/CBO9780511614262 102.

concepts and processes that shape international law, requires first acknowledging this systemic violence of the law as an instrument of power, and then re-signifying, correcting and ensuring that the path forward does not repeat mistakes of the past.[72]

3.3. The Interpretative Choice on International Responsibility before the ICJ

Before the ICJ is essentially an interpretative choice between two extremes and a hard-to-find common ground. Because States will plead before the Court in line with their interests, as is common in climate negotiations, we can expect that major polluters and countries in the Global North will stand their ground and repel any notion of responsibility or liability for the harm they have caused. At the same time, we can anticipate that those States most vulnerable to climate change will present arguments on the applicability of duties rooted in customary international law, argue for strict polluter responsibility and claim compensation for past, present and future damage caused by substandard conduct.

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72 "To ignore the history of international law is to overlook how the past is reflected in present day international law. Ignoring history would put us at risk of masking deep-rooted problems that stubbornly persist into the present time, lead us to promoting a guise of neutrality in the face of histories that have given peoples impaired starting points, and putting too much focus on simple fixes without an accounting for the past. It is well accepted that historic wrongdoing is at least a contributing cause to global poverty and inequality and to difficulties that some states have in developing societies that give their citizens opportunities to realize their potential. Historic wrongdoing has detrimentally affected the qualities of institutions in a society, which in turn affects wealth, resources, opportunities, and life chances in a society." Linarelli, John, Margot E Salomon, and Muthucumaraswamy Sornarajah, "Confronting the Pathologies of International Law: From Neoliberalism to Justice," *The Misery of International Law: Confrontations with Injustice in the Global Economy* (Oxford, 2018; online edn, Oxford Academic, 24 May 2018), h[ttps://doi.org/10.1093/oso/9780198753957.003.0002](https://doi.org/10.1093/oso/9780198753957.003.0002).

In this respect, we highlight that the main role of the Court in this context is deciding on a politically and legally contentious issue which can then trickle down to political negotiation, policymaking and litigation.[73] To guide the Court's choice, we have put forth the relevant legal principles that should guide the Court's decision. Because the Court has been so influential in conceiving the no-harm rule as a customary duty, and due to limited room to claim inapplicability because of a lex specialis regime,[74] we anticipate that the Court will extend its application to the conduct outlined in section 2 of this paper.

Moreover, considering that climate change is a "common concern of mankind"[75] and, thus, poses a threat to global peace and security, the Court must recognize that the climate crisis is not just environmental but deeply intertwined with historical inequalities rooted in colonialism and imperialism.[76] By clarifying States' obligations and emphasising climate justice, the Court can provide a constructive legal framework to support global stability, ensuring that international law remains a powerful tool for equity and accountability in combating climate change.

CONCLUSION

The existing frameworks of State responsibility within international law, though well-established, are underexplored by authoritative law-making bodies and the judiciary in the context of the complexities of climate change. Historically, high-level

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73 Daniel Bodansky, "The Role of the International Court of Justice in Addressing Climate Change: Some Preliminary Reflections," *Arizona State Law Journal 49 (2017)*:692, https://arizonastatelawjournal.org/wp-content/uploads/2017/09/Bodansky_Pub.pdf.

74 ITLOS AO (2024) paras 137, 222, 224.

75 United Nations Framework Convention on Climate Change (UNFCCC). "Preamble."

76 Debt for Climate. "History." *Debt for Climate*, 2023. https://www.debtforclimate.org/history.

climate negotiations which contribute to these frameworks do not adequately capture the historical and cumulative nature of emissions and their disproportionate impacts on vulnerable populations. For instance, traditional notions of State responsibility tend to overlook historical contributions to greenhouse gas emissions, favouring current emissions as the basis for accountability. This approach undermines the principles of equity and CBDRC, which are central to addressing global climate issues.

Without explicitly clarifying these frameworks to address historical emissions, we risk perpetuating impunity for States and actors who have disproportionately contributed to the climate crisis. As highlighted above, high-income countries bear the greatest responsibility for excess historical GHG emissions, while Global South nations bear the brunt of its impacts. Ignoring this imbalance could result in not only further environmental degradation but also a loss of legitimacy for international law and institutions tasked with managing global governance. The continued failure to address such imbalances reflects a continuation of climate colonialism, where the most vulnerable pay the price for a crisis they did not cause.

In this opinion, the Court plays a pivotal role in clarifying State obligations concerning climate change. It could either reinforce these unequal systems or, conversely, lay a legal path towards equity and complement the law applicable to the negotiating process. Regardless of the path the Court chooses to take, this AO will influence future climate negotiations, particularly on issues of pivotal significance, such as loss and damage. To be on the right side of history, the Court must not only interpret the law but also apply it in ways that prevent the replication of systemic inequalities, ensuring that those historically responsible bear the legal consequences of their actions.

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Full Seas, Floods & Fortunes? Fathoming The Impact of the ITLOS Advisory Opinion to Climate Justice for Climate Vulnerable Populations in Large Ocean States

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1. INTRODUCTION

Climate change as a phenomenon has been known to humankind (wo)mankind since the work of nineteenth century scientists such as Tyndall,[2] Fourier,[3] and Arrhenius[4] linked anthropogenic emissions of greenhouse gases (GHGs)—primarily carbon dioxide (CO2) from the combustion of fossil fuels—to an unnatural heating of the atmosphere. Today, climate change is a

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2 Tyndall, John, (1863). "On Radiation Through the Earth's Atmosphere," *Lond. Edinb. Dublin Philos. Mag. J. Sci.* 25 (XXVII), pp. 200–206.

3 Fourier, Jean Baptiste Joseph (1827). "Memoire sur Les Températures du Globe Terrestre et des Espaces Planétaires," *Mém. L'acad. R. Sci. L'inst. Fr.,* (7) pp. 569–60; Fourier, Jean Baptiste Joseph (1824). "Résumé Theorique des Proprietés de la Chaleur Rayonnante," *Ann. Chim. Phys.* (27), pp. 236–281.

4 Arrhenius, Svante (1896). "On The Influence of Carbonic Acid in the Air Upon the Temperature of the Ground" *Lond. Edinb. Dublin Philos. Mag. J. Sci.* 41 (XXXI.), pp. 237–276; Arrhenius, Svante (1908). *Worlds in the Making: The Evolution of the Universe* (Translation). New York: Harper & Bros.

"common concern of humankind,[5] and is undeniably the most pressing ecological and human rights issue of the Anthropocene,[6] as the phenomenon's complex and interconnected nature[7] has made it one of the triple planetary crises.[8] Additionally, climate change serves as a compounding factor to the other two planetary crises of biodiversity loss and pollution, and these intersections are increasingly triggering competition over natural resources. Climate related disruptions have led to insecure livelihoods,[9] climate migration,[10]

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5 U.N. General Assembly (1988, 6 December). *Protection of Global Climate for Present and Future Generations of Mankind.* Resolution 43/53 of December 6, 1988. Available at: https://www.ipcc.ch/site/assets/uploads/2019/02/UNGA43-53.pdf

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7 Rittel, Horst W. J. and Webber, Melvin M. (1973). "Dilemmas in A General Theory of Planning" *Policy Sciences* (4), pp. 155–169; Incropera, Frank P. (2015). *Climate Change: A Wicked Problem,* New York: Cambridge University Press; Sun, Jiazhe and Yang, Kaizhong (2016). "The Wicked Problem of Climate Change: A New Approach Based on Social Mess and Fragmentation" *Sustainability* (8) 1312.

8 United Nations, (2022). *What is the Triple Planetary Crisis?* United Nations Climate Change. Available at: https://unfccc.int/blog/what-is-the-triple-planetary-crisis; Hellweg, Stefanie et al., (2023). "Life-cycle Assessment to Guide Solutions for the Triple Planetary Crisis." *Nature Reviews Earth & Environment*, 4(7) , pp. 471–486.

9 Human Rights Committee, Daniel Billy and others v. Australia, UN Doc CCPR/C/135/D/3624/2019, (2022), Available at: https://www.ohchr.org/en/press-releases/2022/09/australia-violated-torres-strait-islanders-rights-enjoy-culture-and-family [Torres Strait Islands case].

10 Human Rights Committee, Teitiota v. New Zealand, CCPR/C/127/D/2728/2016 (7 January 2020), available at: https://www.ohchr.org/en/press-releases/2020/01/historic-un-human-rights-case-opens-door-climate-change-asylum-claims [Teitiota case]. See also, Lyons, Kate, (2020), *Climate Refugees Can't Be Returned Home, Says Landmark UN Human Rights Ruling*, The Guardian Available at: https://www.theguardian.com/world/2020/jan/20/climate-refugees-cant-be-returned-home-

and climate insecurity,[11] particularly in fragile (and conflict affected settings) such as the Small Island Developing States (SIDS).[12] Comprising a group of highly vulnerable and highly motivated States, SIDS have blazed the trailed internationally by requesting two of the three advisory opinions on climate change.

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says-landmark-un-human-rights-ruling; Farbotko, Carol, and Lazrus, Heather, (2012). "The First Climate Refugees? Contesting Global Narratives of Climate Change in Tuvalu" *Global Environmental Change* 22 (2), p. 382; Rouquette, Pauline, (2023, 11 November). *Australia Offers Refuge to Tuvaluans as Rising Sea Levels Threaten Pacific Archipelago, France 24*. Available at: https://www.france24.com/en/asia-pacific/20231111-australia-offers-refuge-to-tuvaluans-as-rising-sea-levels-threaten-pacific-archipelago; Escalante, Katherine, (2024, 8 July). *Indigenous Guna People of Panama to be Relocated Due to Climate Change*, Climate Refugees. Available at: https://www.climate-refugees.org/spotlight/2024/7/08/guna-planned-relocation#:~:text=Indigenous%20Guna%20People%20of%20Panama%20to%20be%20Relocated%20Due%20to%20Climate%20Change,-Katherine%20Escalante&text=Off%20Panama's%20Caribbean%20coast%20lies,home%20is%20in%20severe%20danger; Human Rights Watch, (2023, 31 July). *"The Sea is Eating the Land Below Our Homes" Indigenous Community Facing Lack of Space and Rising Seas Plans Relocation*, Human Rights Watch. Available at: https://www.hrw.org/report/2023/07/31/sea-eating-land-below-our-homes/indigenous-community-facing-lack-space-and-rising#6846; Bower, Erica, (2024, 29 May). *Panama Completes First Climate-Related Relocation: Government Needs Policy to Safeguard Rights for Affected Communities*, Human Rights Watch. Available at: https://www.hrw.org/news/2024/05/29/panama-completes-first-climate-related-relocation.

11 UNDP, (2023, 1 September) "What is Climate Security and Why is it Important?" UNDP. Available at: https://climatepromise.undp.org/news-and-stories/what-climate-security-and-why-it-important. See also Busby, Joshua W. (2021). "Beyond Internal Conflict: The Emergent Practice of Climate Security," *Journal of Peace Research*, 58 (1), pp. 186–194.

12 UN Office of the High Representative for the Least Developed Countries, *Landlocked Developing Countries and Small Island Developing States* (OHRLLS) (n.d.). *About SIDS*. Available at: https://www.un.org/ohrlls/content/about-small-island-developing-states; UN Office of the High Representative for the Least Developed Countries, *Landlocked Developing Countries and Small Island Developing States* (OHRLLS) (n.d.). *List of SIDS*. Available at: https://www.un.org/ohrlls/content/list-sids.

While these trilogy of advisory opinions before the International Tribunal for the Law of the Sea (ITLOS), the Inter-American Court of Human Rights (IACtHR) and the International Court of Justice (ICJ) represent the future of climate litigation and State responsibility, their avant-garde approach is couched in the context of international climate law, and other external rules such as the law of the sea, international biodiversity law international human rights law, and international investment law.

The use of advisory opinions[13] arose during the creation of the first international standing court, the Permanent Court of International Justice (PCIJ), and was not without controversy, as it was felt that the functions of courts and tribunals lay in the settlement of disputes, and the clarification of legal questions generally to natural or legal persons on a point of law.[14] To address this concern, the advisory power conceived for the PCIJ, and followed by the majority of other courts with the jurisdiction to give advisory opinions, is to place the power to request advisory opinions within organs that cannot be parties[15] in contentious cases to avoid conflicts with the

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13 There had been other bodies with advisory functions, such as the International Bureau of the U.P.U., Art. 15 of the 1874 Convention; the International South American Postal Bureau, Art. 2 of the 1911 Montevideo Convention; the International Commission for Air Navigation, Art. 34 of the 1919 Aerial Navigation Convention. These and other bodies were bodies concerned with rather technical questions and will not be treated in the present context. But for international courts and tribunals, *cf.* Frowein, Jochen A. and Oellers-Frahm, Karin (2006) "Art. 65." In: Zimmermann, Andreas, Tomuschat, Christian and Oellers-Frahm, Karin (eds). *The Statute Of The International Court Of Justice – A Commentary*. London: Oxford University Press.

14 Oellers-Frahm, Karin, (2012). "Lawmaking Through Advisory Opinions?" In: *International Judicial Lawmaking: On Public Authority and Democratic Legitimation in Global Governance*. Berlin, Heidelberg: Springer Berlin Heidelberg, pp. 69–98.

15 Oellers-Frahm, Karin, (2012). "Lawmaking Through Advisory Opinions?" In: *International Judicial Lawmaking: On Public Authority and Democratic Legitimation in Global Governance*. Berlin, Heidelberg: Springer Berlin Heidelberg, pp. 69–98.

contentious power of the court, as the advisory function should not substitute the contentious jurisdiction. While this remains the case for the ICJ, there is no such restriction by the IACtHR nor the ITLOS (though this has raised some controversy).[16] ITLOS derives its power to grant advisory opinions from the UNCLOS,[17] as well as its Rules,[18] and the Inter-American Court from the Pact of San José.[19] While not meant to be binding, advisory opinions have

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16 *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission* (SRFC), 2015 ITLOS Rep 4. See, Holst Roland, Rozemarijn, J. (2023). "Taking the Current When It Serves: Prospects and Challenges for an ITLOS Advisory Opinion on Oceans and Climate Change." *Review of European, Comparative & International Environmental Law* 32(2), pp. 217–225; Barnes, Richard. (2022). "An Advisory Opinion on Climate Change Obligations under International Law: A Realistic Prospect?" *Ocean Development and International Law* 53(2–3), pp. 180–213. See further the position of China in its Written Statement to the ITLOS : ITLOS (2023). *Written Statement by the People's Republic of China.* In: Writtenn Proceedings of the Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law, (Hamburg, Germany), pp. 2 - 11. Available at: https://www.itlos.org/fileadmin/itlos/documents/cases/31/written_statements/1/C31-WS-1-8-China__transmission_ltr._.pdf

17 United Nations Convention on the Law of the Sea, 1833 U.N.T.S. 397, 21 ILM 1261 (1982), (adopted on December 10, 1982, and entered into force on November 1, 1994) [UNCLOS]. Article 191 by the Assembly of the International Sea-Bed Authority; Articles 156–60, especially and Article159(10) and Article 191 by the Sea-Bed Disputes Chamber of ITLOS to give an advisory opinion as to whether a proposal before the Assembly is in conformity with the Convention.

18 International Tribunal for the Law of the Sea, Rules of the Tribunal, ITLOS/8 (2009, 17 March), Article 138 (1). Available at: https://www.itlos.org/fileadmin/itlos/documents/basic_texts/Itlos_8_E_17_03_09.pdf,allows the Tribunal to give an advisory opinion on a legal question if a treaty related to the purposes of UNCLOS specifically provides for the submission to the Tribunal of a request for such an opinion.

19 Pact of San José, 1144 UNTS 144 (No 17955); ILM (1970) 99. Under article 64 of Pact of San José 1969, the Inter-American Court of Human Rights can give Advisory Opinions regarding the interpretation of the

historically had an impact on the development of international law and can influence the "power" of the court or tribunal flowing from that function,[20] as well as influencing the deliberations of regional courts.[21] This is perhaps why arguments have been raised for discretion by the ICJ with respect to giving advisory opinions when the subject is politically controversial,[22] such as global,[23] or national[24] security,

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Convention. In contrast to judgments of the Court, which are binding (Articles 67–8), Article 64 does not provide for these opinions to be binding. However, the jurisprudence of the Court seems to suggest that the Court may at times rely on its advisory opinions when addressing cases in the contentious jurisdiction. See Bailliet, Cecilia M., (2018). "The Strategic Jurisprudence of The Inter-American Court of Human Rights: Rejection of Requests for an Advisory Opinion." *Braz. J. Int'l L.* (15), p. 255; Contesse, Jorge, (2021). "Inter-State Cases in Disguise under Inter-American Human Rights Law: Advisory Opinions as Inter-State Disputes." *Völkerrechtsblog*. Available at: https://voelkerrechtsblog.org/de/inter-state-cases-in-disguise-under-inter-american-human-rights-law/; Pasqualucci, Jo M., (2002). "Advisory practice of the Inter-American Court of Human Rights: Contributing to the Evolution of International Human Rights Law" *Stan. J. Int'l L.* (38), p.241; Trindade, Antonio Augusto Cancado, (2003). "The Developing Case Law of the Inter-American Court of Human Rights." *Hum. Rts. L. Rev.* (3), p. 1.

20 See Lando, Massimo, (2023). "Advisory Opinions of the International Court of Justice in Respect of Disputes." *Colum. J. Transnat'l L.* (61), p. 67.

21 Kiss, Alexandre, (2001). "The Impact of Judgments and Advisory Opinions of the PCIJ-ICJ on Regional Courts of Human Rights." *Liber Amicorum Judge Shigeru Oda*, Brill, pp.1469–1489.

22 See Aust, Anthony, (2010). "Advisory Opinions." *Journal of International Dispute Settlement*,. 1 (1), pp. 123–151.

23 Request for an Advisory Opinion the *Legality of the Threat or Use of nuclear weapons In Armed Conflict*, (1996) ICJ Rep 226; 110 ILR 163.

24 Request for an Advisory Opinion on the *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem* (2024, 19 July). Available at: https://www.icj-cij.org/sites/default/files/case-related/186/186-20240719-adv-01-00-en.pdf. See also, United Nations. *Legal Analysis and Recommendations on Implementation of the International Court of Justice*, Advisory Opinion, *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory,*

disputed territories[25] and statehood,[26] and as was argued in the past, the topic of climate change. However, A.D. 2023 became the year when the international community could no longer deny the role that judicial bodies would have in address the greatest threat to *Homo sapiens sapiens* in this epoch.

Until this watershed era in history, the response of international law and policy was steeped in the near universal endorsement of the United Nations Framework Convention on Climate Change (UNFCCC)[27] at the 1992 Rio Conference.[28] While the Rio Conference was noteworthy for the incorporating Global South States[29] into global environmental policy, this involvement even in

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including East Jerusalem. Available at: https://www.un.org/unispal/document/position-paper-commissionof-inquiry-18oct24/.

25 Request for an *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, (2004). International Court of Justice (ICJ), 9 July 2004, ICJ Rep 136; 129 ILR 37, 207.

26 Request for an Advisory Opinion in *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (2010, 22 July). Available at: https://www.icj-cij.org/sites/default/files/case-related/141/141-20100722-ADV-01-00-BI.pdf

27 United Nations Framework Convention on Climate Change, May 9, 1992, S. Treaty Doc No. 102-38, 1771 U.N.T.S. 107. Available at https://unfccc.int/resource/docs/convkp/conveng.pdf [UNFCCC]

28 United Nations Conference on Environment and Development, Rio de Janeiro, Brazil, (1992, 3–14 June). Available at: https://www.un.org/en/conferences/environment/rio1992. Three global agreements known as the Rio Conventions were adopted at the Summit: the United Nations Framework Convention on Climate Change (UNFCCC), the United Nations Convention on Biological Diversity, 1760 UNTS 79, 31 ILM 818 (1992) [CBD] and the United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, 1954 UNTS 3, 33 ILM 1328 (1994), [2000] ATS 18 [UNCCD], which work together to ensure that land, oceans, climate, and biodiversity benefit from a joint approach to restore our balance with nature.

29 The distinction between the 'Global South' and 'Global North,' terms favored by many scholars and policymakers, is based on economic inequalities, but crucially for this Chapter, it must be noted that the

hammering out the tenets of the Paris Agreement[30] in 2015, has been far from satisfactory. The UNFCC and its sister instruments have however become the mainstays of the climate regime with the overarching goal to:

> "…stablise greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system…allow ecosystems to adapt naturally to climate change… and to enable economic development to proceed in a sustainable manner…"[31]

This goal is significantly buttressed by the Paris Agreement, which aims to strengthen the global response to the threat of climate change in the context of sustainable development,[32]by *inter alia* pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels,[33] increasing climate adaptation and resilience[34] by enhancing climate finance for climate-resilient development, the just transition,[35] and loss and damage.[36] However, despite twenty-three years of diplomacy mainly at the infamous annual Conference of the Parties (CoPs), it is unequivocal that the anthropogenic influence continues to trigger widespread

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'Global South' is not a homogeneous group of countries, and that legal development and legal capacity vary by country. The list of G77 + China countries can be used to determine if a country is in the Global South (See the website of the Finance Center for South-South Cooperation. Available at: http://www.fc-ssc.org/en). For further discussion on the analytical value of these categories see Haug, Sebastian et al., (2021). "The 'Global South' in the Study of World Politics: Examining a Meta Category." *Third World Quarterly*. 49 (2), p.1923.

30 Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104. Available at https://unfccc.int/sites/default/files/english_paris_agreement.pdf [Paris Agreement]

31 UNFCCC, Art 2.

32 Paris Agreement, 2 (1).

33 Paris Agreement, 2 (1) (a).

34 Paris Agreement, 2 (1) (b).

35 Paris Agreement, 2 (1) (c).

36 Paris Agreement, Art 8.

and rapid changes in the atmosphere, oceans, cryosphere and biosphere[37] which could potentially trigger multiple climate tipping points[38] (i.e., a critical threshold beyond which biophysical systems reorganizes, often abruptly and/or irreversibly).[39] One of the environments which is being negatively impacted by climate change, but are also critical to regulating and slowing climate change is the ocean,[40] as well as the adjoining coastal marine areas. These interactions are especially important for SIDS, as given their size, geographies, and histories, their land, coast, and marine components require management collectively as a single unit, under the concept of the ridge to reef (R2R) approach.[41]

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37 IPCC, (2021). Summary for Policymakers. In: Masson-Delmotte, V. et al. (Eds.). *Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change.* AR6.WGI.SPM.A1. Cambridge, U.K. and New York, NY, USA: Cambridge University Press, p. 4. Available at: https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_SPM.pdf.

38 See for example, Armstrong McKay, David I. et al., (2022). "Exceeding 1.5 C Global Warming Could Trigger Multiple Climate Tipping Points" *Science* 377 (6611), p. 7950; Wunderling, Nico, et al., (2023). "Global Warming Overshoots Increase Risks of Climate Tipping Cascades in a Network Model." *Nature Climate Change* (13), pp. 175–82.

39 Chen, D., (2021). "Framing, Context, and Methods." In: Masson-Delmotte, V. (Ed.). *Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change.* Cambridge, U.K. and New York, NY, USA: Cambridge University Press, p. 202. Available at: https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_Chapter01.pdf

40 Morgera, E. et al., (2023). "Ocean-based Climate Action and Human Rights Implications under the International Climate Change Regime." *The International Journal of Marine and Coastal Law* 38 (3), p. 411–446.

41 Lancaster, Alana Malinde S. N., (2025, forthcoming). "Between the Devil & The Deep Blue Sea: Can Ridge-to-Reef Initiatives & Man and the Biosphere Reserves Foster Resilience in Small-scale Fisheries for the CARICOM & OECS Caribbean?" *Review of European, Comparative & International Environmental Law.*

Both the ocean, its biodiversity, and coastal marine environments—known as blue[42] and teal[43] carbon—have been

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[42] Wylie, Lindsay, Sutton-Grier, Ariana E., and Moore, Amber, (2016). "Keys to successful blue carbon projects: Lessons Learned from Global Case Studies," *Marine Policy* (65) pp. 76–84; Bindoff, Nathaniel. L., et al., "Chapter 5: Changing Ocean, Marine Ecosystems and Dependent Communities." In: IPCC (2016). *Special Report on the Ocean and Cryosphere in a Changing Climate* (*SROCC Report)*, pp. 447–587. Available at: https://www.ipcc.ch/srocc/chapter/chapter-5/; Hilmi, Nathalie., et al., (2021). "The Role of Blue Carbon in Climate Change Mitigation and Carbon Stock Conservation," *Frontiers in Climate* (3), p. 710546.; Macreadie, Peter I., et al., (2021). "Blue Carbon as a Natural Climate Solution," *Nature Reviews: Earth and Environment*, (2), pp. 826–839; Macreadie, Peter I. et. al. (2022) "Operationalizing Marketable Blue Carbon." *One Earth* 5(5), pp. 485 - 492; Martin, Angela et al., (2016). "Blue Carbon – Nationally Determined Contributions Inventory." In The Nature Conservancy, IUCN, GRID-Arendal, Conservation International and World Wildlife Fund (2016). *Coastal Blue Carbon Ecosystems: Opportunities for NDCs*. Norway: GRID-Arendal. Available at: https://www.grida.no/publications/378

[43] Dundas, Steven J., et al., (2020). "Integrating Oceans into Climate Policy: Any Green New Deal Needs a Splash of Blue," *Conservation Letters* 13 (5), p. e12716; Zinke, Laura, "The Colours of Carbon," *Nature Reviews Earth & Environment* 1 (3), p. 141; Nahlik, A. M., and Fennessy, M. S., (2016). "Carbon Storage in US Wetlands," *Nature Communications* 7 (1), p. 1; Malerba, Martino E., et al., (2022). "Methane and Nitrous Oxide Emissions Complicate the Climate Benefits of Teal and Blue Carbon Wetlands." *One Earth* 5 (2), p. 1336. Teal carbon is especially relevant in small island settings, where the connection between land and marine ecosystems is more intimate. See Lancaster, Alana Malinde S. N., (2025 forthcoming). "Between the Devil & The Deep Blue Sea: Can Ridge-to-Reef Initiatives & Man and the Biosphere Reserves Foster Resilience in Small-scale Fisheries for the CARICOM & OECS Caribbean?" *Review of European, Comparative & International Environmental Law*; Buckholtz, Alison (2023). "Barbados: Blueprint for Climate Resilience" *International Finance Corporation*. Available at: https://www.ifc.org/en/stories/2023/barbados-blueprint-climate-resilience#:~:text=To%20confront%20this%20challenge%2C%20the,key%20element%20of%20that%20response.

scientifically established as a solution to climate change.[44] Central to this solution, is the role of the ocean as a carbon and heat sink, and the concomitant threat that climate change poses to the ocean and its biodiversity undertaking this function.[45] As a body of water, the ocean plays a role both as a carbon and heat sink, as it sequesters and absorbs excess heat, carbon dioxide and other greenhouse gases from the atmosphere.[46] Conservative estimates have found that the ocean sequesters approximately a quarter of anthropogenic carbon dioxide, with the storage of carbon occurring in the seawater itself[47] the seabed,[48] and marine

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44 Hoegh-Guldberg, Ove. et al., (2023). "The Ocean as a Solution to Climate Change: Updated Opportunities for Action." *High Level Panel for a Sustainable Ocean Economy*. Washington, DC: World Resources Institute. Available at: https://oceanpanel.org/wp-content/uploads/2023/09/Full-Report_Ocean-Climate-Solutions-Update-1.pdf; Hoegh-Guldberg, Ove. et al., (2019). "The Ocean as a Solution to Climate Change: Five Opportunities for Action." *High Level Panel for a Sustainable Ocean Economy*. Washington, DC: World Resources Institute. Available at: https://oceanpanel.org/publication/ocean-solutions-to-climate-change.

45 See Wewerinke-Singh, Margaretha and Viñuales, Jorge E (2024, 7 June). *More than a Sink The ITLOS Advisory Opinion on Climate Change and State Responsibility.*. In: Debate: The ITLOS Advisory Opinion on Climate Change. *Verfassungsblog*. Available at: https://verfassungsblog.de/more-than-a-sink/ .

46 Thurber, A. R. et al., (2014). "Ecosystem Function and Services Provided by the Deep Sea," *Biogeosciences* 11 (14), p. 3941–3963.

47 Intergovernmental Panel on Climate Change (IPCC), (2022). *The Ocean and Cryosphere in a Changing Climate: Special Report of the Intergovernmental Panel on Climate Change*, Cambridge, U.K.: Cambridge University Press. pp. 450–455. Available at: https://www.ipcc.ch/srocc/download/.

48 Cavan, Emma L., and Hill, Simeon. L., (2022). "Commercial Fishery Disturbance of the Global Ocean Biological Carbon Sink." *Global Change Biology* (28), p. 1212.

biodiversity including plankton,[49] fish,[50] and marine mammals.[51] Marine sequestration is complemented by that of coastal marine ecosystems, which absorb carbon dioxide through photosynthesis in tidal marshes, seagrass beds, and mangroves at a rate up to two times faster than forests per unit area and store it for longer periods, both in the plants themselves and also in the sediments below them.[52] This is impressive, since these ecosystems cover only 0.2% of the ocean area,[53] as opposed to oceans which cover approximately 71% of the Earth's surface.[54] In terms of heat sequestration, the top layer of the ocean has absorbed ninety-one per cent of the additional heat created by anthropogenic climate change since 1950,[55] and can absorb and retain heat at over a

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49 Sabine, Christopher L., et al., (2004). "The Oceanic Sink for Anthropogenic CO_2," *Science* 305 (5682), p. 367.

50 Falciani, Jonathan E., Grigoratou, Maria and Pershing, Andrew J., (2022). "Optimizing Fisheries for Blue Carbon Management: Why Size Matters," *Limnology and Oceanography*. 67 (S2), p. S171; Bianchi, Daniele. et al., (2021). "Estimating Global Biomass and Biogeochemical Cycling of Marine Fish With and Without Fishing." *Science Advances* 7 (41), p. eabd7554

51 Savoca, Matthew S. et al., (2021). "Baleen Whale Prey Consumption Based on High-Resolution Foraging Measurements." *Nature* (599), p. 85; Pearson, Heidi C., et al. (2023). "Whales in the Carbon Cycle: Can Recovery Remove Carbon Dioxide?" *Trends in Ecology & Evolution* 38 (3), pp. 238-249; Meynecke, Jan-Olaf, et al. (2023). "Do Whales Really Increase the Oceanic Removal of Atmospheric Carbon?" *Frontiers in Marine Science* (10), p. 1117409

52 United Nations, (2021). *The Second World Ocean Assessment,* Vol I, p. 360. Available at: https://www.un.org/regularprocess/sites/www.un.org.regularprocess/files/2011859-e-woa-ii-vol-i.pdf

53 United Nations, (2021). *The Second World Ocean Assessment,* Vol I, p. 360. Available at: https://www.un.org/regularprocess/sites/www.un.org.regularprocess/files/2011859-e-woa-ii-vol-i.pdf

54 Shiklomanov, Igor, (1993). *World Freshwater Resources in Water in Crisis: A Guide to the World's Freshwater Resources*, Peter H. Gleick (Ed.). p. 13–24.

55 IPCC, (2013). *Climate Change 2013: The Physical Science Basis. Contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Climate* Change. Cambridge, United Kingdom and New York,

thousand times greater than the atmosphere.[56] This means that the ocean holds more heat than the Earth's atmosphere,[57] but its expert role in heat retention has also had the corresponding effect of more than doubling global ocean temperatures since 1993.[58]

Despite the crucial role of the ocean and coastal marine ecosystems and of marine biodiversity in climate mitigation and adaptation,[59] and the increasing recognition of important linkages with the Kunming-Montreal Global Biodiversity Framework,[60]

NY, USA Cambridge University Press, p. 260. Available at: https://www.ipcc.ch/site/assets/uploads/2018/02/WG1AR5_all_final.pdf; See also Fox-Kemper, B., Hewitt, H. T., and Xiao, C., "Ocean, Cryosphere and Sea Level Change." In: Masson-Delmotte, V. et al., (Eds.). *Climate Change 2021: The Physical Science Basis, Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change.* Cambridge, United Kingdom and New York, NY, USA Cambridge University Press, p. 1228. Available at: https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_Chapter09.pdf

56 IPCC, (2013). *Climate Change 2013: The Physical Science Basis. Contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Climate* Change. Cambridge, United Kingdom and New York, NY, USA Cambridge University Press, p. 260. Available at: https://www.ipcc.ch/site/assets/uploads/2018/02/WG1AR5_all_final.pdf.

57 NASA, *Global Climate Change - Vital Signs of the Planet, 'Ocean Warming.'* Available at: https://climate.nasa.gov/vital-signs/ocean-warming/.

58 Intergovernmental Panel on Climate Change (IPCC), (2022). *The Ocean and Cryosphere in a Changing Climate: Special Report of the Intergovernmental Panel on Climate Change*, Cambridge, U.K.: Cambridge University Press. p. 8. Available at: https://www.ipcc.ch/srocc/download/.

59 See United Nations General Assembly (2017, 5 December). *Oceans and The Law of the Sea*, Resolution A/RES/72/73 of December 5, 2017, para. 197. Available at: https://documents.un.org/doc/undoc/gen/n17/421/90/pdf/n1742190.pdf; Lutz, Steven, (2021). Why Protect Ocean Biodiversity? In: Presentation for the Webinar Series 'Policy Lates' 2021, Royal Society of Biology. Available at: https://www.youtube.com/watch?v=aZG5butO7CM&t=3s.

60 Streck, Charlotte, (2023). "Synergies between the Kunming-Montreal Global Biodiversity Framework and the Paris Agreement: The Role of Policy Milestones, Monitoring Frameworks and Safeguards." *Climate Policy* 23(6), pp. 800–811.

the ocean was largely been overlooked in international climate negotiations until UNFCCC CoPs 25 and 26.[61] This lacuna is also exacerbated by the negative impacts of climate change on the ocean, including ocean warming, deoxygenation, and acidification.[62] These impacts on the ocean are also resulting in the increased concentrations of greenhouse gases in the atmosphere, and their absorption into the ocean,[63] catalysing more frequent and intense extreme weather events, and marine heatwaves.[64] These impacts are predicted to further increase into the future, causing a plethora of biological and socio-economic

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61 Morgera, Elisa et al., "Ocean-based Climate Action and Human Rights Implications under the International Climate Change Regime." *The International Journal of Marine and Coastal Law* 1, pp. 1-36

62 Intergovernmental Panel on Climate Change (IPCC), (2022). *The Ocean and Cryosphere in a Changing Climate: Special Report of the Intergovernmental Panel on Climate Change*, Cambridge, U.K.: Cambridge University Press. p. 8. Available at: https://www.ipcc.ch/srocc/download/ . See also United Nations Climate Change (n.d). *Ocean Action under the UNFCCC*. Available at: https://unfccc.int/topics/ocean/ocean-action-under-the-unfccc; Yadav, Siddharth Shekhar, and Gjerde, Kristina Maria, (2020). "The Ocean, Climate Change and Resilience: Making Ocean Areas Beyond National Jurisdiction More Resilient to Climate Change and Other Anthropogenic Activities." *Marine Policy* (122), p. 104184.

63 UNESCO, (2023, 16 October). *The "Three Horsemen" of Climate-linked Biodiversity Loss: Why Improving Ocean Observing is Crucial for Life Below Water*. Available at: https://www.unesco.org/en/articles/three-horsemen-climate-linked-biodiversity-loss-why-improving-ocean-observing-crucial-life-below. See also, Intergovernmental Panel on Climate Change (IPCC), (2022). *The Ocean and Cryosphere in a Changing Climate: Special Report of the Intergovernmental Panel on Climate Change*, Cambridge, U.K.: Cambridge University Press. pp. 450–455. Available at: https://www.ipcc.ch/srocc/download/.

64 Li, Changyu, et al., (2024). "The Ocean Losing Its Breath Under The Heatwaves." *Nature Communications* 15(1), p. 6840; Oliver, Eric CJ, et al., (2021). "Marine Heatwaves." *Annual Review of Marine Science* (1), pp. 313–342; Marin, Maxime, et al., (2022). "Local Drivers of Extreme Upper Ocean Marine Heatwaves Assessed Using a Global Ocean Circulation Model." *Frontiers in Climate* (4), p. 788390.

impacts.[65] Additionally, these threats are also the major climate-driven stressors affecting marine biodiversity on a global scale, which are occasioning related losses and damages to nature, people, communities, and States in vulnerable situations.[66] This latter category includes SIDS, whose economies[67] and people are the most dependent on the ocean,[68] since they contain 20% of the world's biodiversity, and 40% of the world's coral reefs,[69] but have

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65 Smith, Kathryn E. et al., (2023). "Biological Impacts of Marine Heatwaves." *Annual Reviews in Marine Science* (15), pp. 119–145.

66 Morgera, Elisa and Lennan, Mitchell (2023). "Introduction: Applying a Human Rights Lens to the Ocean-Climate Nexus," *The International Journal of Marine and Coastal Law* (1), p p. 1–7; Morgera, Elisa et al., (2023). "Ocean-based Climate Action and Human Rights Implications under the International Climate Change Regime." *The International Journal of Marine and Coastal Law* 1, pp. 1-36; Morgera, Elisa and Lennan, Mitchell (2022). "Strengthening Intergenerational Equity at the Ocean-Climate Nexus: Reflections on the UNCRC General Comment No. 26+," *Environmental Policy and Law* 52(5–6), p. 445; Lennan, Mitchell, and Morgera, Elisa (2022). "The Glasgow Climate Conference (COP26)" *The International Journal of Marine and Coastal Law,* 37(1), pp.137–151.

67 International Trade Centre (2024) *Fast Facts: Small Island Developing States*. Available at https://www.intracen.org/news-and-events/news/fast-facts-small-island-developing-states#:~:text=The%20total%20land%20area%20of,of%20the%20world's%20coral%20reefs

68 Tokunaga, Kanae, et al. (2021). *Ocean risks in SIDS and LDCs*. Ocean Risk and Resilience Action Alliance (ORRAA), Stockholm Resilience Centre and Global Resilience Partnership. Available at: https://oceanrisk.earth/wp-content/uploads/2022/12/ORRAA-Ocean-Risks.pdf; McField, Melanie (2017). "Impacts of climate change on coral in the coastal and marine environments of Caribbean Small Island Developing States (SIDS)" Caribbean Marine Climate Change Report Card: Science Review, pp. 52-59. Available at: https://crfm.int/~uwohxjxf/images/6._Coral.pdf .

69 International Trade Centre (2024) *Fast Facts: Small Island Developing States*. Available at https://www.intracen.org/news-and-events/news/fast-facts-small-island-developing-states#:~:text=The%20total%20land%20area%20of,of%20the%20world's%20coral%20reefs

historically contributed the least to the climate crisis.[70] Despite this, SIDS face the paradox of being the first to experience the most intense negative impacts of climate change,[71] which will endure for longer and in more severe pathways which are hugely disproportionate[72] to their capacity to be resilient to climate impacts.[73]

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70 IPCC (2023). *Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*. Geneva, IPCC, p. 184, A 2.3, B 3.1. Available at: https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_FullVolume.pdf.

71 Kelman, Ilan, and West, Jennifer J. (2009). "Climate Change and Small Island Developing States: A Critical Review." *Ecological and Environmental Anthropology* 5(1). Available at: https://cdn.serc.carleton.edu/files/getsi/teaching_materials/climate_change/climate_change_small_island.pdf; Cashman, Adrian, and Nagdee, Mohammad R., (2017). "Impacts of Climate Change on Settlements and Infrastructure in the Coastal and Marine Environments of Caribbean Small Island Developing States (SIDS)," *Science* Review, pp. 155 – 173. Available at: https://assets.publishing.service.gov.uk/media/5a82c330ed915d74e623781c/11._Settlements_and_Infrastructure_combined.docx.pdf.

72 UN Office of the High Representative for the Least Developed Countries, *Landlocked Developing Countries and Small Island Developing States* (OHRLLS) (n.d.). *On the Frontline of Climate Crisis, Worlds Most Vulnerable Nations Suffer Disproportionately***.** Available at: https://www.un.org/ohrlls/news/frontline-climate-crisis-worlds-most-vulnerable-nations-suffer-disproportionately.

73 Morgera, Elisa and Lennan, Mitchell (2022). "Strengthening Intergenerational Equity at the Ocean-Climate Nexus: Reflections on the UNCRC General Comment No. 26+," *Environmental Policy and Law* 52(5–6), p. 445; Lennan, Mitchell, and Morgera, Elisa (2022). "The Glasgow Climate Conference (COP26)" *The International Journal of Marine and Coastal Law,* 37(1), pp.137–151.

SIDS are spread across the Caribbean,[74] Atlantic, Indian Ocean, and South China Sea (AIS), Pacific, and the African continent,[75] and have been recognized by the United Nations (U.N.) since 1992. Their vulnerability and mechanisms for coping with the challenging environmental conditions created by climate change and the other triple planetary crises are increasingly deepening, as impacts such as sea level rise, subsidence, droughts, and tropical storms intensify and become more frequent.[76] On the other hand, the importance of the ocean to their economies and climate mitigation, as well the threats to it from climate change, was underscored by SIDS in their recent blueprint for action, the Antigua and Barbuda Agenda.[77] The majority of SIDS are "large ocean states"[78] since the ocean territory – the exclusive economic

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74 Sarfati, Diana, et al., (2019). "Cancer Control in Small Island Nations: From Local Challenges to Global Action," *The Lancet Oncology* 20(9), pp. e535–e536.

75 Vousdoukas, Michalis I., et al., (2023). "Small Island Developing States Under Threat by Rising Seas Even in a 1.5° C Warming World." *Nature Sustainability* 6 (12), pp. 1552–1564.

76 Duncan, Natricia, (2024, 18 July). *Caribbean Leaders Call for 'Marshall Plan' to Help Rebuild After Hurricane Beryl*, The Guardian. Available at: https://www.theguardian.com/world/article/2024/jul/18/caribbean-leaders-marshall-plan-rebuild-hurricane-beryl; Tang, Brian, (2024, 2 July). *Hurricane Beryl hit the island of Carriacou, Grenada, on July 1, 2024, with 150 mph sustained winds. NOAA Hurricane Beryl's rapid intensification, Category 5 winds so early in a season were alarming: Here's why more tropical storms are exploding in strength*, The Conversation. Available at: https://theconversation.com/hurricane-beryls-rapid-intensification-category-5-winds-so-early-in-a-season-were-alarming-heres-why-more-tropical-storms-are-exploding-in-strength-233780.

77 The Antigua and Barbuda Agenda for Small Island Developing States: A Renewed Declaration for Resilient Prosperity, UNGA A/78/L.80 (2024, 20 June). paras 29, 30 (b), 32 D (a) (iii). Available at: http://www.undocs.org/A/78/L.80.

78 Santos, Catarina Frazão, et. al., (2022). "A Sustainable Ocean for All."1(1) *npj Ocean Sustainability* (1), p. 1; Andrew Hume, et al., (2021). "Towards An Ocean-Based Large Ocean States Country Classification." *Marine Policy* (134) 104766; Ellsmoor, James (2023). Mar/April). *Small*

zone (EEZ) under their control – is on average, twenty eight times their land mass.[79] This means despite comprising 0.5% of the planetary land mass, their combined EEZ and associated resources count for 19.1% of the global total.[80]The impacts on the ocean of the increased frequency and intensity of hazards induced by climate change is exacerbating social, cultural, and ecological aspects of life for peoples and communities in SIDS, which cumulatively raise a broad suite of climate security challenges.[81] These factors are complicated by unsustainable debt levels[82] originating from colonization, extractivism, and the idiosyncrasies of the international financial system, which altogether affect access to the development and private financing necessary for climate resilience and adaptation projects. Consequently, huge swathes of vulnerable populations in SIDS,[83] including women, children,

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Island States or Large Ocean Nations?, Caribbean Beat Magazine (175). Available at: https://www.caribbean-beat.com/issue-175/small-island-states-or-large-ocean-nations-green#axzz7yGC0VaGW; Chan, Nicholas (2018). ""Large Ocean States": Sovereignty, Small Islands, and Marine Protected Areas in Global Oceans Governance." Global Governance: A Review of Multilateralism And International Organizations 24(4), p.q` 537.

79 Jinuah, Li, (2023, 9 August). *Small Island Developing States Including St Vincent in Hot Water*, St Vincent Times. Available at: https://www.stvincenttimes.com/small-island-developing-states-including-st-vincent-in-hot-water/.

80 United Nations General Assembly (2024). *The Antigua and Barbuda Agenda for Small Island Developing States: A Renewed Declaration for Resilient Prosperity*, Resolution UNGA A/78/L.80 of June 20, 2024, para 3. Available at: http://www.undocs.org/A/78/L.80.

81 Busby, Joshua W.(2021). "Beyond Internal Conflict: The Emergent Practice of Climate Security," *Journal of Peace Research* 58(1), p. 186–194.

82 Lindsay, Courtney, Wilkinson, Emily and Bishop, Matt (2024, July 9), *Debt-Disaster-Debt: Hurricane-Damaged Islands Are Being Saddled With Loans They Cannot Afford*, The Conversation. Available at: https://theconversation.com/debt-disaster-debt-hurricane-damaged-islands-are-being-saddled-with-loans-they-cannot-afford-234194.

83 United Nations (2024). *Small Island Developing Countries 'Do Not Have the Luxury of Time', Speaker Warns International Conference, Urging Action by*

persons with disabilities, Indigenous and Afro-descendant peoples, and other vulnerable groups,[84] are perpetually at risk from climate-induced natural disasters.

In combination, these circumstances have meant that SIDS experience increased vulnerabilities, climate injustices,[85] and frustration with the inefficiencies of the official climate diplomacy process in addressing issues of crucial importance to them. Within this context, on the eve of the CoP 26, the governments of Antigua & Barbuda and Vanuatu signed the Agreement[86] Establishing the Commission of Small Island States on Climate Change and International Law.[87] This Agreement marked a significant turning

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States Which Caused Climate Change. Available at: https://press.un.org/en/2024/dev3462.doc.htm.

84 Lancaster, Alana Malinde S. N., (2025, forthcoming). Decolonising Tenure Rights in the CARICOM & OECS Caribbean: [Re]-assessing the Role of International Legal Instruments," *Asian Journal of International Law* 15(1), p. 1–45.

85 Lancaster, Alana Malinde S.N., Nurse, Britney G. and Young Marshall, Ayanna (2025, forthcoming) "Ocean-Based Solutions As Tools For Achieving Climate Justice: Some Reflections From the Perspective Of Vulnerable States & Peoples." In: Doughty-Wagner, Freya, Atapattu, Sumudu and Xavier de Oliveira Jr., Enéas (eds.), *The Fourth Environmental Era: Climate Justice* (Delaware: Vernon Press)

86 Agreement for the Establishment of the Commission of Small Island States on Climate Change and International Law (COSIS) (2021, 31 October). Available at: https://www.cosis-ccil.org/storage/documents/I-56940-08000002805c2ace.pdf [Agreement Establishing COSIS]. Founding members are Antigua and Barbuda and Tuvalu, with Republic of Palau, Niue, Vanuatu St. Lucia St. Vincent and the Grenadines, and St. Kitts and Nevis later acceding. Membership is open to any member of the Alliance of Small Island States (AOSIS). See Ronald Sanders (2024, 17 October). *Small States Should Maximize International Law to Fight for Justic*e, Caribbean News Global. Available at: https://caribbeannewsglobal.com/small-states-should-maximise-international-law-to-fight-for-justice/

87 Commission of Small Island States on Climate Change and International Law (COSIS) (n.d.). *COSIS*. Available at: https://www.cosis-ccil.org/.

point in international law,[88] as one of its most notable features authorized the Commission to request an advisory opinion from the International Tribunal for the Law of the Sea (ITLOS).[89]

2. THE ADVISORY OPINION OF THE INTERNATIONAL TRIBUNAL ON THE LAW OF THE SEA: CONFIRMING STATE OBLIGATIONS AT THE OCEAN CLIMATE NEXUS

On December 12, 2022, COSIS by unanimous decision,[90] submitted a Request[91] to ITLOS on two legal questions on the specific obligations of State Parties to the United Nations Convention on the Law of the Sea (the 'UNCLOS'), including under Part XII:

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

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88 Freestone, David, Barnes, Richard, and Akhavan, Payam, (2022). "Agreement for the Establishment of the Commission of Small Island States on Climate Change And International Law (COSIS)" *The International Journal of Marine and Coastal Law* 37(1), p. 166–178; Barnes, Richard, (2022). "An Advisory Opinion on Climate Change Obligations Under International Law: A Realistic Prospect?" *Ocean Development & International Law* 53(2–3), p. 180–213.

89 Agreement Establishing COSIS, Article 3(3).

90 Agreement Establishing COSIS, Article 3 (5).

91 ITLOS, *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law* (Request for Advisory Opinion Submitted to the Tribunal) (2022, 12 December) Available at: https://www.itlos.org/fileadmin/itlos/documents/cases/31/Request_for_Advisory_Opinion_COSIS_12.12.22.pdf.

b) to protect and preserve the marine environment in relation to climate change impacts, including ocean warming and sea level rise, and ocean acidification?

Seventeen months later, the Tribunal handed down a one hundred-and fifty-three-page opinion,[92] complemented by Individual Declarations of five Judges.[93] After confirming its jurisdiction over the Request, the Tribunal ruled that greenhouse gas emissions cause "deleterious effects on the marine environment"[94] such as climate change (ocean warming and sea level rise)[95] and ocean acidification,[96] and therefore constitute pollution within the context of the UNCLOS. Additionally, the Tribunal addressed several key questions regarding climate mitigation, and explained the relationship between obligations

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92 International Tribunal for the Law of the Sea, Advisory Opinion in Case No. 31, Request submitted to the Tribunal by the Commission of Small Island States on Climate Change and International Law, May 21, 2024. Available at: https://www.itlos.org/fileadmin/itlos/documents/cases/31/Advisory_Opinion/C31_Adv_Op_21.05.2024_orig.pdf [ITLOS Advisory Opinion, Case 31]

93 ITLOS Advisory Opinion, Case 31, Declaration of Judge Jesus. Available at : https://www.itlos.org/fileadmin/itlos/documents/cases/31/Advisory_Opinion/C31_Adv_Op_21.05.2024_decl_Jesus_rev.pdf; ITLOS Advisory Opinion, Case 31, Declaration of Judge Pawlak. Available at: https://www.itlos.org/fileadmin/itlos/documents/cases/31/Advisory_Opinion/C31_Adv_Op_21.05.2024_decl_Pawlak_orig.pdf; ITLOS Advisory Opinion, Case 31, Declaration of Judge Kulyk. Available at : https://www.itlos.org/fileadmin/itlos/documents/cases/31/Advisory_Opinion/C31_Adv_Op_21.05.2024_decl_Kulyk_orig.pdf; ITLOS Advisory Opinion, Case 31, Declaration of Judge Kittichaisaree. Available at: https://www.itlos.org/fileadmin/itlos/documents/cases/31/Advisory_Opinion/C31_Adv_Op_21.05.2024_decl_Kittichaisaree_orig.pdf; ITLOS Advisory Opinion, Case 31, Declaration of Judge Infante Caffi. Available at: https://www.itlos.org/fileadmin/itlos/documents/cases/31/Advisory_Opinion/C31_Adv_Op_21.05.2024_decl_Infante_Caffi_orig.pdf

94 ITLOS Advisory Opinion, Case 31, Para 161.

95 ITLOS Advisory Opinion, Case 31, Para 175.

96 ITLOS Advisory Opinion, Case 31, Paras 178.

under the Convention, climate law and other "external rules of law" such as international biodiversity law and *en passant*, international human rights law.[97] Most potently, the Opinion also clarified the due diligence nature of the obligations under the UNCLOS-regime to prevent marine pollution and to protect the marine environment. Further, it underscored the need for the precautionary approach, the use of best available science[98] and the importance of a synergistic interpretation between international climate law, the law of the sea and other areas of law, which are required to achieve the ultimate goal set in the UNFCCC some twenty-three years ago.

The Tribunal adopted a broad approach to treaty interpretation[99] since, even though UNCLOS did not contain a list of marine pollutants, as with other instruments such as Regional Seas Programme agreements[100] discussed in the next Section, the UNCLOS provided cumulative critFwhich could be used to define "marine pollution". Accordingly, the Tribunal reasoned the release of anthropogenic GHG emissions into the atmosphere constitute "pollution of the marine environment" within the meaning of the UNCLOS,[101] which imposed specific obligations on States to take

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97 ITLOS Advisory Opinion, Case 31, Para 66.

98 Torre-Schaub, Martha (2024, 6 June). *Why Climate Science Matters for International Law*. In: Debate: The ITLOS Advisory Opinion on Climate Change. *Verfassungsblog*. Available at: https://verfassungsblog.de/why-climate-science-matters-for-international-law/.

99 Merkouris, Panos (2024, 16 June). *'Relevant Rules' as Normative Environment Harmony vs Cacophony in the ITLOS Advisory Opinion on Climate Change*. In: Debate: The ITLOS Advisory Opinion on Climate Change. *Verfassungsblog*. Available at: https://verfassungsblog.de/relevant-rules-as-normative-environment/.

100 For example, the Protocol Concerning Pollution from Land-Based Sources and Activities to the Convention for the Protection and the Development of the Marine Environment of the Wider Caribbean Region [LBS Protocol

101 UNCLOS, Art. 1(1) (4). See also Papanicolopulu, Irini (2023, 30 November). *The Climate Change Advisory Opinion Request at the ITLOS.*. In: Advisory Opinions on Climate Change: Leading from the Bench?

all necessary measures to prevent, reduce, and control marine pollution from GHG emissions in consonance with UNCLOS,[102] and harmonize their policies in this regard.[103] In coming to this conclusion, opined that a determination of what constituted necessary measures "should be determined objectively" taking into account among other things, "the best available science."[104] Further, the Tribunal also found congruence between the goal of net-zero emissions under the Paris Agreement,[105] and the due diligence obligations[106] imposed under Article 194 (1) of UNCLOS.[107] This could be seen as a concerted effort by the Tribunal, to weave an interlocking and coherent framework between the international law of the sea, the rules under the UNFCCC regime, in particular the Paris Agreement, and the best available science contained in reports of scientific bodies such as the IPCC[108] and IBPES.[109] In this regard, the Tribunal reasoned that "scientific and technological information, relevant

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Questions of International Law. Available at: https://www.qil-qdi.org/the-climate-change-advisory-opinion-request-at-the-itlos/.

102 UNCLOS, Article 194 (1).

103 ITLOS Advisory Opinion, Case 31, Para 178.

104 ITLOS Advisory Opinion, Case 31, Para 243.

105 Paris Agreement, Article 4(1).

106 ITLOS Advisory Opinion, Case 31, Para 235.

107 ITLOS Advisory Opinion, Case 31, Para 200.

108 For example IPCC (2023). *Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*. Geneva, IPCCB. Available at: https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_FullVolume.pdf andIntergovernmental Panel on Climate Change (IPCC), (2022). *The Ocean and Cryosphere in a Changing Climate: Special Report of the Intergovernmental Panel on Climate Change*, Cambridge, U.K.: Cambridge University Press. Available at: https://www.ipcc.ch/srocc/download/.

109 IPBES and IPCC (2021). *IPBES-IPCC Co-Sponsored Workshop on Biodiversity And Climate Change : Scientific Outcome*. Available at: https://files.ipbes.net/ipbes-web-prod-public-files/2021-06/20210609_scientific_outcome.pdf; IPBES/ Brondízio, Eduardo S, et. al., (eds) (2019). *Global Assessment Report of the Intergovernmental Science-Policy Platform on*

international rules and standards"[110] were among the factors which influenced due diligence obligations. However, the Tribunal was emphatic that these standards may also vary in accordance with the principle of common and differentiated responsibilities which underpins the UNFCCC regime.[111]

The second question posed by COSIS is equally significant as the first question for SIDS given their high levels of biodiversity, endemism and ocean space. The Tribunal found that Article 192 of UNCLOS also "impose[d] a general obligation on States Parties to protect and preserve the marine environment"[112] This obligation "applies to all maritime areas" and to tackle any form of degradation of the marine environment, including high risks of serious and irreversible harm posed by the impacts of climate change (such as ocean warming and sea level rise, and ocean acidification).[113] The Tribunal also reaffirmed the due diligence approach which underscores the under UNCLOS, as well as its implementing instruments[114] to cooperate on scientific research *including* on marine pollution caused by anthropogenic GHG emissions.[115] Finally, obligations incumbent on parties can

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*Biodiversity and Ecosystem Service*s. Bonn : IPBES Secretariat. Available at: https://zenodo.org/records/6417333

110 ITLOS Advisory Opinion, Case 31, Para 239.

111 UNFCCC, Art 3.

112 ITLOS Advisory Opinion, Case 31, Para 400.

113 ITLOS Advisory Opinion, Case 31, Para 400.

114 United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (1995), 34 ILM 1542, Articles 6 – 9. Available at: https://www.un.org/oceancapacity/sites/www.un.org.oceancapacity/files/files/Projects/UNFSA/docs/unfsa_text-eng.pdf; Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction (adopted June 19, 2023), Articles 17 – 22.. Available at: https://documents.un.org/doc/undoc/ltd/n23/177/28/pdf/n2317728.pdf.

115 Advisory Opinion 31, Paras 312–- 320.

potentially include the restoration of degraded marine habitats and ecosystems[116]" and that State parties ensure non-State actors under their jurisdiction or control adhere to measures necessary to protect and preserve the marine environment.[117] As will be discussed in the next Section, the role of State parties and non-State actors in the intersection of business and human rights, along with the role international investment law plays in t "regulatory chilling"[118] is increasingly a topic of critical importance across several areas of law.[119] This relationship has been advanced significantly within

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116 Advisory Opinion 31, Para 386.

117 Advisory Opinion 31, Para 396.

118 Tienhaara, Kyla (2018). "Regulatory Chill in a Warming World: The Threat To Climate Policy Posed By Investor-State Dispute Settlement" *Transnational Environmental Law* 7 (2), p. 229

119 For example, United Nations (2011). *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, Available at: https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf [UNGPs]; United Nations Committee on the Rights of the Child (2023). *General Comment No. 26, CRC/C/GC/26. Children's Rights and the Environment with a Special Focus on Climate Change*. Available at: https://www.ohchr.org/en/documents/general-comments-and-recommendations/crccgc26-general-comment-no-26-2023-childrens-rights [General Comment 26]; Human Rights Council (2024). *Investors, Environmental, Social and Governance Approaches and Human* Rights. Resolution A/HRC/56/55 od May 2, 2024. Available at : https://www.ohchr.org/en/documents/thematic-reports/ahrc5655-investors-environmental-social-and-governance-approaches-and ; European Parliament, *Directive on Corporate Sustainability Due Diligence,* Directive 2024/1760 of June 13, 2024. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L_202401760

the context of the Latin American and Caribbean Region by both treaty[120] and judicial[121] processes.

Overwhelming therefore, the Opinion dispelled some of the apprehension swirling over the consequences on international law of three advisory opinions emanating from judicial bodies of varying mandates.[122] Additionally, it was a remarkable addition to the two strongest expressions on climate-related issues by international judicial bodies to date: the decision of the Human Rights Council in the *Torres Islanders* case,[123] which addressed State responsibility for climate adaptation and *Teitiota*,[124] which

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120 Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (signed 27 September 2018; entered into force 22 April 2021). Available at: https://treaties.un.org/doc/Treaties/2018/03/20180312%2003-04%20PM/CTC-XXVII-18.pdf. [Escazú.Agreement]

121 See Inter-American Court of Human Rights, Case of the Miskito Divers (Lemoth Morris et al.) v Honduras, August 31, 2021. Available at: https://www.corteidh.or.cr/docs/casos/articulos/seriec_432_ing.pdf; Inter-American Court of Human Rights , Case of the Community La Oroya v Peru, Preliminary Objections, Merits, Reparations and Costs, November 27, 2023. Available at: https://www.corteidh.or.cr/docs/casos/articulos/seriec_511_esp.pdf; Inter-American Court of Human Rights, Case of Vera Rojas et. al. v Chile, Preliminary Objections, Merits, Reparations, and Costs, October 1, 2021. Available at: https://www.corteidh.or.cr/docs/casos/articulos/seriec_439_ing.pdf

122 Peel, Jacqueline (2024, 24 May). *Unlocking UNCLOS How the ITLOS Advisory Opinion Delivers a Holistic Vision of Climate-relevant International Law*. In: Debate: The ITLOS Advisory Opinion on Climate Change. *Verfassungsblog*. Available at: https://verfassungsblog.de/unlocking-unclos/.

123 Human Rights Committee, Daniel Billy and others v. Australia, UN Doc CCPR/C/135/D/3624/2019, (2022), Available at: https://www.ohchr.org/en/press-releases/2022/09/australia-violated-torres-strait-islanders-rights-enjoy-culture-and-family. [Torres Strait Islands case].

124 Human Rights Committee, Teitiota v. New Zealand, CCPR/C/127/D/2728/2016 (7 January 2020). Available at: https://www.ohchr.org/en/press-releases/2020/01/historic-un-human-rights-case-opens-door-climate-change-asylum-claims [Teitiota case].

laid down seminal principles on climate refugees. These are complemented by the recent findings by the European Court of Human Rights in the *KlimaSeniorinnen* case,[125] which is expected to fan the flames of litigation on State responsibility for climate change in the European Union. As Rocha proffers, the Opinion is a small but important step which could be both "impactful" and "pave the way for a strong advisory opinion from the International Court of Justice (ICJ) and change the course of future global negotiations on climate change."[126] Despite these bright spots, a key area of "external rules" to which the Tribunal flirted with, but did not dive deeply into, was that of international human rights law, and by extension, issues of international children's rights law[127] and

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125 European Court of Human Rights, Verein KlimaSeniorinnen Schweiz and Others v. Switzerland, Grand Chamber Case 53600/20, April 9, 2024. Available at**:** https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-233206%22]}. In its judgement, the Grand Chamber cited materials from both international and regional systems, including the U.N. General Assembly, the Human Rights Council, the Human Rights Committee, the Committee on the Rights of the Child, the Committee on the Elimination of Discrimination Against Women, the Committee on Economic, Social and Cultural Rights, and both the the Inter-American and African systems.

126 Rocha, Armando (2024, 27 May). *A Small But Important Step A Bird's-Eye View of the ITLOS Advisory Opinion on Climate Change and International Law*. In: Debate: The ITLOS Advisory Opinion on Climate Change. *Verfassungsblog*. Available at: https://verfassungsblog.de/a-small-but-important-step/. See also Payne, Cymie (2024, 4 June). *Finding Light in Dark Places Specific Obligations for Climate Change and Ocean Acidification Mitigation*. In: Debate: The ITLOS Advisory Opinion on Climate Change. *Verfassungsblog*. Available at: https://verfassungsblog.de/itlos-climate-ocean-acidification-mitigation/.

127 United Nations Committee on the Rights of the Child (2023). *General Comment No. 26, CRC/C/GC/26. Children's Rights and the Environment with a Special Focus on Climate Change*. Available at: https://www.ohchr.org/en/documents/general-comments-and-recommendations/crccgc26-general-comment-no-26-2023-childrens-rights [General Comment 26]; See Sheilds et. al. (2023). "Children's Human Right to Be Heard at the Ocean-climate Nexus" *The International Journal of Marine and Coastal*

intergenerational equity.[128] Instead they emphasized international climate law[129] marine pollution,[130] aviation law,[131] ozone depletion[132]

Law (1), pp 1 – 36; Morgera, Elisa and Sheilds, Sophie (2024). Integrating the General Comment 26 on Children's Rights and a Healthy Environment in the implementation of the Global Biodiversity Framework. One Ocean Hub. Policy Brief (February 2, 2024). Available at: https://oneoceanhub.org/wp-content/uploads/2024/02/Policy-Brief-integrating-the-General-Comment-26-on-Childrens-Rights-.12.02.24_2-.pdf.

128 Maastricht Principles on The Human Rights of Future Generations (adopted February 3, 2023). Available at: https://www.rightsoffuturegenerations.org/the-principles. See Open Global Rights (n.d). *About the Maastricht Principles on the Human Rights of Future Generations*. Available at: https://www.rightsoffuturegenerations.org/; Sandra Liebenberg (2024, 24 September). The Maastricht Principles: Safeguarding the Human Rights of Future Generations. *Open Global Rights*. Available at https://www.openglobalrights.org/maastricht-principles-safeguarding-human-rights-future-generations/

129 United Nations Framework Convention on Climate Change, May 9, 1992, S. Treaty Doc No. 102-38, 1771 U.N.T.S. 107. Available at https://unfccc.int/resource/docs/convkp/conveng.pdf [UNFCCC]; Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 2303 U.N.T.S. 162; Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104. Available at https://unfccc.int/sites/default/files/english_paris_agreement.pdf [Paris Agreement]

130 1978 Protocol Relating to the 1973 International Convention for the Prevention of Pollution from Ships (including Annexes, Final Act and 1973 International Convention), 1340 UNTS 61, [1988] ATS 29, 17 ILM 546 (1978)

131 1944 Convention on International Civil Aviation, 15 UNTS 295, UN Doc. 7300/9

132 Montreal Protocol on Substances that Deplete the Ozone Layer is 26 I.L.M. 1541, 1550 (1987); Kigali Amendment is the Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer, (adopted October 15, 2016; entry into force January 1, 2019). See Purohit, Pallav, et al. (2022). "Achieving Paris climate goals calls for increasing ambition of the Kigali Amendment." *Nature Climate Change* 12 (4), pp. 339-342.

and international biodiversity law.[133] According to the Tribunal, these rules are not *lex specialis* to UNCLOS, but exist independently, and do not supersede, conflict or frustrate UNCLOS. They are however important when giving meaning to the terms of the treaty. This approach is welcomed, as it signals the Tribunal's acceptance of mutually reinforcing rules of law,[134] and also raises the question as to what the bounds of "UNCLOS as a living instrument."[135] It also suggests that the Tribunal was giving a respectful space to other judicial bodies which would have the chance to interrogate these "rules" in more detail. As an example of the latter, Voight has argued that ITLOS failed to consider norms and standards in the Paris Agreement,[136] relating to the preparation, communication and implementation of nationally determined

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133 United Nations Convention on Biological Diversity, 1760 UNTS 79, 31 ILM 818 (1992)

134 See Lancaster, Alana Malinde S.N, et. al. (2023, 18 December). *Joint Submission to the Inter-American Court of Human Rights, Request for an Advisory Opinion on the Climate Emergency Submitted by Colombia and Chile.* Caribbean Environmental Law Unit, Faculty of Law, The University of the West Indies (Cave Hill Campus/One Ocean Hub/RenewTT/ Global Network for Human Rights & the Environment Caribbean Region/International Law Association Caribbean Branch, Paras 25 – 27. Available at: https://corteidh.or.cr/sitios/observaciones/OC-32/9_caribbean_environmental.pdf; Morgera, Elisa et. al (2024, 22 March). Legal Note by the One Ocean Hub, International Court of Justice Obligations of States in Respect of Climate Change (Request for Advisory Opinion), Paras 5-4. Available at: https://oneoceanhub.org/wp-content/uploads/2024/03/One-Ocean-Hub-Submission-ICJ-Advisory-Opinion-on-Climate-Change-25.03.24.pdf; Morgera, Elisa (2023). *Written Statement of the One Ocean Hub (OOH),* International Tribunal for the Law of the Sea, Case No. 31, Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law (Request for Advisory Opinion submitted to the Tribunal, Paras 3 – 4. Available at: https://www.itlos.org/fileadmin/itlos/documents/cases/31/written_statements/4/C31-WS-4-10-OOH.pdf

135 ITLOS Advisory Opinion, Case 31, Para 130.

136 ITLOS Advisory Opinion, Case 31, Para 222.

contributions (NDCs),[137] as well as the wider framework such as Decision 6/CMA.3[138] and the Global Stocktake.[139] Additionally, Voigt reasoned that the Tribunal could have elaborated more on the complementary relationships between the Straddling Stocks Agreement and the CBD[140] and the wider UNCLOS and CBD regimes, including the BBNJ Agreement and the Kunming-Montreal Global Biodiversity Framework. This is a formidable argument, and as will be highlighted in Section 4, these are areas which will by necessity need to be interrogated in more detail by the ICJ, given the scope of the questions placed to them by the U.N.

Another notable silence in the ITLOS Opinion is the role of international human rights law at the ocean-climate nexus. This is despite illustrations of the linkages in statements by U.N Special Rapporteurs,[141]

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137 Voigt, Christina (2024, 29 May). *ITLOS and the Importance of (Getting) External Rules (Right) in Interpreting UNCLOS*. In: Debate: The ITLOS Advisory Opinion on Climate Change. *Verfassungsblog*. Available at: https://verfassungsblog.de/itlos-and-the-importance-of-getting-external-rules-right-in-interpreting-unclos/.

138 UNFCCC, Conference of the Parties serving as the meeting of the Parties to the Paris Agreement, Report of the Conference of the Parties (Glasgow: 31 October to 13 November 2021), Decision 6/CMA.3, FCCC//PA/CMA/2021/10/Add., March 8, 2022, p. 3. . Available at: https://unfccc.int/sites/default/files/resource/CMA2021_10_Add3_E.pdf.

139 UNFCCC, Conference of the Parties serving as the meeting of the Parties to the Paris Agreement, Fifth Session First Global Stocktake (United Arab Emirates: 30 November to 12 December 2023), 3FCCC/PA/CMA/2023/L.17, December 13, 2023. Available at: https://unfccc.int/sites/default/files/resource/cma2023_L17_adv.pdf

140 ITLOS Advisory Opinion, Case 31, Para 388.

141 ITLOS (2023). *Written Statement by the UN Special Rapporteurs on Human Rights & Climate Change (Ian Fry), Toxics & Human Rights (Marcos Orellana), and Human Rights & the Environment (David Boyd)*. In: Written Proceedings of the Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law, (Hamburg, Germany), paras 15–26. Available at: https://www.itlos.org/fileadmin/itlos/documents/cases/31/written_statements/4/C31-WS-4-1_Amicus_Brief_UN_Special_Rapporteurs.pdf .

NGOs,[142] international organizations,[143] as well as the SIDS of Nauru,[144] the Federated States of Micronesia[145] and Timor-Leste,[146] and their

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142 ITLOS (2023). *Written Statement by ClientEarth.* In: Written Proceedings of the Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law, (Hamburg, Germany), paras 86–96. Available at: https://www.itlos.org/fileadmin/itlos/documents/cases/31/written_statements/4/C31-WS-4-3-ClientEarth.pdf

143 ITLOS (2023). *Written Statement by the African Union.* In: Written Proceedings of the Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law, (Hamburg, Germany), paras 47–48. Available at: https://www.itlos.org/fileadmin/itlos/documents/cases/31/written_statements/2/C31-WS-2-7-African_Union.pdf; ITLOS (2023). *Written Statement by the United Nations Environment Programme.* In: Written Proceedings of the Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law, (Hamburg, Germany), paras 71–76. Available at: https://www.itlos.org/fileadmin/itlos/documents/cases/31/written_statements/2/C31-WS-2-6-UNEP.pdf.

144 ITLOS (2023). *Written Statement by the Republic of Nauru.* In: Written Proceedings of the Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law, (Hamburg, Germany), paras 53, 57–65. Available at: https://www.itlos.org/fileadmin/itlos/documents/cases/31/written_statements/1/C31-WS-1-22-Nauru.pdf

145 ITLOS (2023). *Written Statement by the Federated States of Micronesia.* In: Written Proceedings of the Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law, (Hamburg, Germany), paras 63–65. Available at: https://www.itlos.org/fileadmin/itlos/documents/cases/31/written_statements/1/C31-WS-1-30-FS_Micronesia_01.pdf.

146 ITLOS (2023). *Oral Pleadings by the Democratic Republic of Timor-Leste.* In: Verbatim Records of the Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law, (Hamburg, Germany), ITLOS/PV.23/C31/14/rev.1 (September 20, 2023) a.m., pp. 7, 8, 11. Available at: https://www.itlos.org/fileadmin/itlos/documents/cases/31/Oral_proceedings/verbatim_records_rev/ITLOS_PV23_C31_14_Rev.1_E.pdf

Global South partner, Chile[147] (who in conjunction with Colombia requested the advisory opinion from the IACtHR). Instead the tribunal chose dropped the possibility of considering this body of rules like a depth charge,[148] without making further substantial statements. While this has attracted the ire of some publicists,[149] as it is a missed opportunity to underscore the moral imperative of human rights,[150] as well as the nexus between the UNCLOS framework and the human right to a clean, healthy, and sustainable ocean,[151] it was evident that human rights preoccupied the

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147 ITLOS (2023). *Written Statement by the Republic of Chile.* In: Written Proceedings of the Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law, (Hamburg, Germany), paras 69-70 Available at: https://www.itlos.org/fileadmin/itlos/documents/cases/31/written_statements/1/C31-WS-1-20-Chile_01.pdf; ITLOS (2023). *Oral Pleadings by the Republic of Chile.* In: Verbatim Records of the Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law, (Hamburg, Germany), ITLOS/PV.23/C31/7/rev.1, (September 14 2023) a.m., pp. 2, 11-13. Available at: https://www.itlos.org/fileadmin/itlos/documents/cases/31/Oral_proceedings/verbatim_records_rev/ITLOS_PV23_C31_7_Rev.1_E.pdf .

148 ITLOS Advisory Opinion, Case 31, Para. 66

149 See for example, Desierto, Diane, (2024, 3 June). "'Stringent Due Diligence,' Duties Of Cooperation And Assistance To Climate Vulnerable States, and the Selective Integration of External Rules in the ITLOS Advisory Opinion on Climate Change and International Law," *EJIL:Talk! Blog.* Available at: https://www.ejiltalk.org/stringent-due-diligence-duties-of-cooperation-and-assistance-to-climate-vulnerable-states-and-the-selective-integration-of-external-rules-in-the-itlos-advisory-opinion-on-climate-change-and-inte/

150 See Papanicolopulu, Irini, (2018). *International Law and the Protection of People at Sea,* Oxford*:* Oxford University Press. See also, Lennan, Mitchell and Morgera, Elisa (Eds.) (2023). "Special Issue: Ocean-based Climate Action and Human Rights," *International Journal of Marine and Coastal Law* 38 (3). Available at: https://brill.com/view/journals/estu/38/3/estu.38.issue-3.xml?language=en

151 Bennett, Nathan J., Morgera, Elisa, and Boyd, David, (2024). "The Human Right to A Clean, Healthy and Sustainable Ocean." *Ocean Sustainability* 3(1), pp. 1 – 5

thinking of some of the Judges in their individual Declarations.[152] On the other hand, Freestone et al., appear to suggest that the mere mention of human rights by the Tribunal is adequate, as States are bound by human rights commitments, which are not necessary to explain obligations under UNCLOS. They further reasoned that an exploration of the relevance of these set of rules would've "been counterproductive, [as well as] undermin[e] the clarity and coherence of the core findings of the Tribunal."[153] These are tenuous arguments at best, given the literal importance of the sea of rights which climate impacts rob the vulnerable States (and their peoples) that spearheaded the Request. Further, this argument does not make clear the distinction between international human rights law, and the other rules examined by the Tribunal in their explanations of the law of the sea regime. Additionally, as illustrated by the sharp increase in climate justice claims worldwide in many national and regional courts, [154]States are found wanting in their human rights commitments. This includes commitments in regard to many communities and large numbers of marginalized groups—such as children, women, girls, and gender minorities, Indigenous and Afrodescendant

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152 ITLOS Advisory Opinion, Case 31, Declaration of Judge Infante Caffi, Para 4. Available at: https://www.itlos.org/fileadmin/itlos/documents/cases/31/Advisory_Opinion/C31_Adv_Op_21.05.2024_decl_Infante_Caffi_orig.pdf ; ITLOS Advisory Opinion, Case 31, Declaration of Judge Pawlak, Paras 1- 7. Available at: https://www.itlos.org/fileadmin/itlos/documents/cases/31/Advisory_Opinion/C31_Adv_Op_21.05.2024_decl_Pawlak_orig.pdf.

153 Freestone, David, et. al., (2024). "Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law, Case 31," *The International Journal of Marine and Coastal Law* (1), pp. 1–12.

154 Setzer Joanne and Higham Catherine (2024). *Global Trends in Climate Change Litigation: 2024 Snapshot.* (London: Grantham Research Institute on Climate Change and the Environment, London School of Economics and Political Science). Available online: https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2024/06/Global-trends-in-climate-change-litigation-2024-snapshot.pdf

peoples, those with disabilities, and increasingly those who have been displaced by climate events and found in abundance in SIDS globally. Finally, as underscored in Section 1, SIDS are heavily reliant on the ocean, and many of these marginalised, vulnerable groups have close connections to the coastal and island communities impacted by the deleterious effects identified by the Tribunal. These effects cause negative impacts on the economies, culture, and the populations of the SIDS which brought the Request, and as Bennett et. al and Desierto emphasise,, there is now a well-established legal nexus between human rights and environmental protection through the right to a healthy, safe, and sustainable environment, including the ocean.[155] There are therefore obvious linkages between human rights law and the law of the sea, and as set down in the Preamble of UNCLOS[156] this applies particularly in the case of Global South States.

However as will be discussed in the next Section, Freestone et al., are correct in stating that both the Inter-American Court on Human Rights (which has already made groundbreaking

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155 Bennett, Nathan J., Morgera, Elisa, and Boyd, David, (2024). "The Human Right to A Clean, Healthy and Sustainable Ocean." *Ocean Sustainability* 3(1), pp. 1 – 5; Desierto, Diane, (2024, 3 June). "'Stringent Due Diligence,' Duties Of Cooperation And Assistance To Climate Vulnerable States, and the Selective Integration of External Rules in the ITLOS Advisory Opinion on Climate Change and International Law," *EJIL:Talk! Blog*. Available at: https://www.ejiltalk.org/stringent-due-diligence-duties-of-cooperation-and-assistance-to-climate-vulnerable-states-and-the-selective-integration-of-external-rules-in-the-itlos-advisory-opinion-on-climate-change-and-inte/. See also, Knox, John, H. (2023, 31 July). *Introduction to Symposium on UN Recognition of the Human Right to a Healthy Environment* In: UN Recognition of the Human Right to a Healthy Environment**.** *AJIL Unbound*. Available at: https://doi.org/10.1017/aju.2023.25.

156 UNCLOS, Fifth Preambular Paragraph" "… the realization of a just and equitable international economic order which takes into account the interests and needs of mankind as a whole and, in particular, the special interests and needs of developing countries, whether coastal or land-locked …"

statements on the importance of human rights in the marine environment in Advisory Opinion 23/2017), and the International Court of Justice will have cause to dive into the human rights-ocean-climate nexus. Both of these will be instructive for safeguarding the rights and securing climate justice for vulnerable populations in large ocean states.

3. THE ROLE OF THE OPINION OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS ON RIGHTS-BASED CONSIDERATIONS FOR VULNERABLE STATES & PEOPLES AT THE OCEAN CLIMATE NEXUS

The Inter-American Court of Human Rights (IACtHR) is particularly well placed to contribute substantially to the understanding of State obligations, and their legal consequences, in the current climate emergency.[157] Given the wealth of the Court's jurisprudence, this includes the justiciability of global climate change issues within the context of the developments within the Inter-American System.[158] The Court's impressive, and often innovative repertoire lies in the fact that within the sphere of judicial bodies with the jurisdiction to grant advisory opinions, it has perhaps the widest scope, matched closely only by that of the African

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157 Feria-Tinta, Monica (2023, 30 November). *An Advisory Opinion on Climate Emergency and Human Rights Before the Inter-American Court of Human* Rights. In: Advisory Opinions on Climate Change: Leading from the Bench? *Questions of International Law.* Available at: https://www.qil-qdi.org/an-advisory-opinion-on-climate-emergency-and-human-rights-before-the-inter-american-court-of-human-rights/.

158 On the impact of the Inter-American system doctrines and jurisprudence on the Human Rights Committee see, Feria-Tinta, Monica, (2021). "Climate Change as a Human Rights Issue: Litigating Climate Change." In: Alogna, Ivano, Bakker, Christine, Gauci, Jean-Pierre (Eds.), *The Inter-American System of Human Rights and the United Nations Human Rights Committee in Climate Change Litigation: Global Perspectives.* Leiden: Brill.

Court on Human and Peoples' Rights (ACtHPR).[159]The IACtHR serves a diversity of Latin American States including the majority of Spanish-speaking States of Central and South America, and very few English-speaking Caribbean States, including sixteen SIDS,[160] Brazil and Suriname.[161] Its jurisdiction is complemented by the Inter-American Commission on Human Rights, a principal and autonomous organ of the Organization of American States (OAS)

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159 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (9 June 1988), Art. 4. Available at: https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-establishment-african-court-human-and . This Article gives power to Court to give advisory opinions at the request of "a member state of the OAU, the OAU, its organs, or any African organization recognized by the OAU upon any legal matter relating to the Charter or any other relevant human rights instruments, provided that the subject matter of the opinion is not related to a matter being examined by the Commission. See Pieter van der Mei, Anne (2005). "The Advisory Jurisdiction of the African Court on Human and Peoples' Rights." African Human Rights Law Journal (5) 27.

160 Antigua & Barbados, The Bahamas, Barbados, Belize, Cuba, Commonwealth of Dominica, Dominican Republic, Grenada, Guyana, Haiti (also a least developed country (LDC)), Jamaica, Saint Christopher (St. Kitts) and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname, and Trinidad & Tobago.See Lancaster, Alana Malinde S.N, et. al. (2023, 18 December). *Joint Submission to the Inter-American Court of Human Rights, Request for an Advisory Opinion on the Climate Emergency Submitted by Colombia and Chile.* Caribbean Environmental Law Unit, Faculty of Law, The University of the West Indies (Cave Hill Campus/ One Ocean Hub/RenewTT/Global Network for Human Rights & the Environment Caribbean Region/International Law Association Caribbean Branch, Paras 17 – 24. Available at: https://corteidh.or.cr/sitios/observaciones/OC-32/9_caribbean_environmental.pdf;

161 Twenty States have recognized the contentious jurisdiction of the Court, including as follows: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, and Uruguay. See Inter-American Court of Human Rights (n.d.). *Inter-American Court of Human Rights.* Available at: https://www.corteidh.or.cr/que_es_la_corte.cfm?lang=en

whose mission is to promote and protect human rights in the American hemisphere[162] and investigate allegations of human rights violations in the hemisphere. Under its parent instrument, the Pact of San José,[163] organs of the OAS may request advisory opinions from the Court, "within their respective spheres of competence,"[164] as can any Member State of the OAS. In regard of the latter, as utilized by the Republics of Columbia and Chile in their Joint Request,[165] States may consult the Court for interpretations of the Convention, but also for the interpretation of other treaties concerning the protection of human rights in the American States and regarding the compatibility of domestic law with these international instruments.[166] The Court's jurisdiction requirement further allows for States which are non-parties to the Pact, as well as those who have not accepted the contentious jurisdiction of the Court, to make requests.[167] Some authors have opined that the Court's expansive competence implies the possibility of overlap between a its contentious and advisory procedure,[168] but this is

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162 Inter-American Commission on Human Rights (n.d.). *Inter-American Commission on Human Rights*. Available at: https://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/mandate/what.asp.

163 American Convention on Human Rights (Pact of San José, Costa Rica), (signed November 22, 1969; entry into force, July 18, 1978), OAS Treaty Series No. 36, 1144 UNTS 123. Available at: https://treaties.un.org/doc/Publication/UNTS/Volume%201144/volume-1144-I-17955-English.pdf [Pact of San José]

164 Pact of San José, Article 64.

165 Inter-American Court on Human Rights, Request for An Advisory Opinion on the Climate Emergency and Human Rights Submitted to the Inter-American Court of Human Rights by the Republic of Colombia and the Republic of Chile, January 9, 2023. Available at: https://www.corteidh.or.cr/docs/opiniones/soc_1_2023_en.pdf.

166 Pact of San José, Article 64.

167 Pact of San José, Article 64.

168 Oellers-Frahm, Karin, (2012). "Lawmaking Through Advisory Opinions?" In: *International Judicial Lawmaking: On Public Authority and Democratic Legitimation in Global Governance*. Berlin, Heidelberg: Springer Berlin Heidelberg, pp. 69–98.

balanced by the Court's discretionary power as whether or not to give an opinion which conflicts with contentious case(s). Over its history, the Court has declined requests,[169] primarily involving politically sensitive issues, *inter alia*, alleged incompatibility of national legislation with the Pact of San José,[170] the prohibition of corporal punishment of children,[171] the availability of judicial remedies for persons sentenced to death penalty,[172] and due process rights relating to the impeachment of the President of Brazil.[173]

Generally, in contrast the track record of ITLOS and the ICJ, the IACtHR's advisory opinions have had a strong legal effect on State parties, since as stated in Advisory Opinion 16/99 "all

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169 See Bailliet, Cecilia M.. (2008). "The Strategic Prudence of The Inter-American." *Human Rights* 19 (1); Lima, Lucas Carlos and Lucas Mendes, Felippe, (2021). "The Expansion of the Inter-American Court of Human Rights' Jurisdiction Through Advisory Opinions." *Anuario Mexicano de Derecho Internacional* (21), pp. 125–166.

170 Inter-American Court on Human Rights, Resolution of the Inter-American Court of Human Rights on the Request for an Advisory Opinion by Costa Rica on Law No. 4556 (May 8, 1970), May 10, 2005.

171 Inter-American Court on Human Rights, Resolution of the Inter-American Court of Human Rights on the Request for an Advisory Opinion by the Inter-American Commission of Human Rights, January 27, 2009.

172 Inter-American Court on Human Rights, Resolution of the Inter-American Court of Human Rights on the Request for an Advisory Opinion by the Inter-American Commission of Human Rights, June 24, 2005. See Sergio Ramirez (2005). "La Pena de Muerte en la Convencion Americana sobre Derechos Humanos y en la Jurisprudencia de la Corte Interamericana." *Boletin Mexicano de Derecho Comparado*, (114). Available at: https://www.redalyc.org/articulo.oa?id=42711403.

173 Inter-American Court on Human Rights, Resolution of the Inter-American Court of Human Rights on the Request for an Advisory Opinion by the OAS Secretary General, 23 June 2016. See Daly, Tom Gerald (2017). "Brazilian 'Supremocracy' and the Inter- American Court of Human Rights: Unpicking an Unclear Relationship." In: Fortes, Pedro et al., (Eds.). *Law and Policy in Latin America*. London: Palgrave Macmillan U.K.

Member States should follow its proclaimed opinions as they have "undeniable legal effects."[174] In practice therefore, advisory opinions have been a vehicle through which the Inter-American *system*[175] can contribute to the judicial expansion of human rights protections and the strengthening of treaty obligations,[176] including pronouncements on core human rights issues on which there has not been any contentious litigation. Examples which will be germane to the Court's examination of the Request by Colombia and Chile are their opinions on the legal status and

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174 Inter-American Court on Human Rights, The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99, October 1, 1999, para 48. Available at: https://www.corteidh.or.cr/docs/opiniones/seriea_16_ing.pdf. See Aceves, William J. (2000). "The Right of Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law. Advisory Opinion OC-16-99." *American Journal of International Law*, pp. 555-563

175 The American States, in the exercise of their sovereignty and in the framework of the Organization of American States, adopted a series of international instruments that have become the foundation of a regional system of human rights promotion and protection, known as the Inter-American System for the Protection of Human Rights. This System recognizes and defines the rights enshrined in those instruments and establishes obligations with the purpose of promoting and protecting such rights. In addition, two organs were created through this System with the intention to safeguard those rights: The Inter-American Commission of Human Rights and the Inter-American Court of Human Rights. See Inter-American Court of Human Rights (n.d.). *Inter-American Court of Human Rights*. Available at: https://www.corteidh.or.cr/que_es_la_corte.cfm?lang=en

176 Ramírez, Walter Arévalo, and Andrés Rousset Siri, (2023). "Compliance with Advisory Opinions in the Inter-American Human Rights System." *AJIL Unbound*, (117), p. 300.

rights of the child,[177] on the [marine]environment,[178] and the rights of vulnerable groups adjusted to present-day conditions which were not been considered at the time of the negotiation and signing of the Pact of San José,[179] (e.g., on gender equality,[180] and migrants[181]). Within this context, on January 9, 2023, Chile and Colombia jointly filed a Request to the IACtHR for an advisory opinion to "clarify the scope of the States' obligations […] to respond to the climate emergency within the framework

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177 Inter-American Court on Human Rights, Juridical Condition and Human Rights of the Child, Advisory Opinion OC-17/2002, August 28, 2002. Available at: https://www.corteidh.or.cr/docs/opiniones/seriea_17_ing.pdf.

178 Inter-American Court on Human Rights, The Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity: Interpretation and Scope of Articles 4(1) And 5(1) in Relation to Articles 1(1) And 2 of the American Convention On Human Rights), Advisory Opinion OC-23/17, November 15, 2017. Available at: https://www.corteidh.or.cr/docs/opiniones/seriea_23_ing.pdf.

179 Ramírez, Walter Arévalo, and Andrés Rousset Siri, (2023). "Compliance with Advisory Opinions in the Inter-American Human Rights System," P. 298-302, 300.

180 Inter-American Court on Human Rights, Gender Identity, and Equality and Non-discrimination with Regard to Same-Sex Couples, State Obligations in Relation to Change of Name, Gender Identity, and Rights Deriving from a Relationship Between Same-Sex Couples (Interpretation and Scope of Articles 1(1), 3, 7, 11(2), 13, 17, 18 and 24, in Relation to Article 1, of the American Convention on Human Rights), Advisory Opinion OC-24/17, November 24, 2017. Available at: https://www.corteidh.or.cr/docs/opiniones/seriea_24_esp.pdf . See Carrillo-Santarelli, Nicolás (2018). "Gender Identity, and Equality and Non-Discrimination of Same Sex Couples." *American Journal of International Law* 112 (3), pp. 479-485

181 Inter-American Court on Human Rights, Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, September 17, 2003. Available at: https://www.corteidh.or.cr/docs/opiniones/seriea_18_ing.pdf

of international human rights law."[182] The Request stressed the relevance of the proceedings beyond the Americas, perhaps based on the celebrated nature of the Court's Advisory Opinion 23/17.[183] Further, the Court to establish Inter-American standards which accelerate the response to the climate emergency[184] and establish how States need "to respond to the climate emergency within the framework of international human rights law, paying special attention to the differentiated impacts of this emergency on individuals from diverse regions and population groups, as well as on nature and on human survival on our planet."[185]

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182 Inter-American Court on Human Rights, Request for An Advisory Opinion on the Climate Emergency and Human Rights Submitted to the Inter-American Court of Human Rights by the Republic of Colombia and the Republic of Chile, January 9, 2023, p. 1. Available at: https://www.corteidh.or.cr/docs/opiniones/soc_1_2023_en.pdf.

183 See Tigre, Maria Antonia (2023). "International Recognition of the Right to a Healthy Environment: What Is the Added Value for Latin America and the Caribbean?" *AJIL Unbound* (117), pp. 184 – 188; Tigre, Maria Antonia and Urzola, Natalia, (2021). "The 2017 Inter-American Court's Advisory Opinion: Changing the Paradigm for International Environmental Law in the Anthropocene." *Journal of Human Rights and the Environment* 12(1), pp. 24–50; Papantoniou, Angeliki (2018). "Advisory Opinion on the Environment and Human Rights." *American Journal of International Law* 112 (3), pp. 460-466; Siwior, Przemyslaw, (2021). "The Inter-American Court of Human Rights Advisory Opinion OC-23/17 on the Relationship between Human Rights and the Environment." *Rev. Eur. & Comp. L.* (46), p. 177.

184 Inter-American Court on Human Rights, Request for An Advisory Opinion on the Climate Emergency and Human Rights Submitted to the Inter-American Court of Human Rights by the Republic of Colombia and the Republic of Chile, January 9, 2023, p. 5. Available at: https://www.corteidh.or.cr/docs/opiniones/soc_1_2023_en.pdf.

185 Inter-American Court on Human Rights, Request for An Advisory Opinion on the Climate Emergency and Human Rights Submitted to the Inter-American Court of Human Rights by the Republic of Colombia and the Republic of Chile, January 9, 2023, p. 1. Available at: https://www.corteidh.or.cr/docs/opiniones/soc_1_2023_en.pdf.

It is therefore pellucid, that the requesting States intended for the opinion to clearly and definitively render an interpretation of the OAS's human rights in regard to climate obligations in LAC, and also serve as an inspiration for other international, regional, and domestic courts or treaty bodies.[186] Further, building on the ITLOS Opinion, the IACtHR is expected to deepen or establish the linkages between international human rights law, international climate law, and given the diverse ecosystems found in the Americas, both international biodiversity law and the law of the sea. The Court had already made authoritative statements in regard to the latter in Opinion 23/17,[187] with respect to pollution in the under the Convention Area of the Regional Seas Programme (RSP)[188] for the Wider Caribbean Region—the

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186 For example, since 2004, the Inter-American Court has repeatedly held that when a State has ratified an international treaty such as the American Convention, its judges, as part of the State, are also bound by such Convention. In other words, the Judiciary must exercise a sort of "conventionality control" between the domestic legal provisions which are applied to specific cases and the American Convention on Human Rights. See Inter-American Court on Human Rights, Case of Almonacid-Arellano et al. v Chile, Preliminary Objections, Merits, Reparations and Costs, Judgment, Sept. 26, 2006, at para. 124. Available at: https://www.corteidh.or.cr/docs/casos/articulos/seriec_154_ing.pdf

187 Inter-American Court on Human Rights, The Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity: Interpretation and Scope of Articles 4(1) And 5(1) in Relation to Articles 1(1) And 2 of the American Convention On Human Rights), Advisory Opinion OC-23/17, November 15, 2017. Available at: https://www.corteidh.or.cr/docs/opiniones/seriea_23_ing.pdf.

188 UNEP (n.d.). *UNEP Regional Seas Programme.* Available at: https://www.unep.org/topics/ocean-seas-and-coasts/regional-seas-programme#:~:text=Since%201974%2C%20the%20programme%20has,regional%20approach%20to%20environmental%20action.&text=The%20UNEP%20Regional%20Seas%20Programme,since%20its%20establishment%20in%201974.&text=Programme%20is%20an%20action%2Doriented,local%20communities%20and%20indigenous%20peoples. See Johnston, D. M., and

Cartagena Convention[189]framework—which broadly overlaps with the competence of the Court.[190] The Regional Seas Programme provides a unique institutional framework that facilitate progress towards the attainment of ocean-related Sustainable Development Goals (SDG) targets. Cartagena and its three protocols operate within the framework of UNCLOS, and further offer an enabling environment for the implementation of Part XII of UNCLOS, including the legal framework for the conservation and sustainable use of oceans and their resources. There are significant linkages between the Cartagena framework and other mutually supportive instruments[191] such as the Convention on Biological Diversity[192] and also, the Ramsar Convention.[193] Cartagena's three Protocols on Oil Spills,[194]Specially Protected Areas & Wildlife (SPAW)[195]

Enomoto, L. M. G., (1981). "Regional Approaches to the Protection and Conservation of the Marine Environment." In: Johnston, D. M. (Ed.), The Environmental Law of the Sea, IUCN, 285, p. 324–37. https://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1810&context=gjicl

189 Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, with Annex and Protocol Concerning Cooperation in Combating Oil Spills in the Wider Caribbean Region (adopted in Cartagena on 24 March 1983 and entered into force on 11 October 1986), 1506 United Nations Treaty Series 157. Available at: https://www.car-spaw-rac.org/IMG/pdf/cartagena-convention.pdf [Cartagena Convention].

190 As defined in Article 1 (1) of the Cartagena Convention.

191 See Barker, David, R (2002). "Biodiversity Conservation in the Wider Caribbean Region," *Rev. Eur. Comp. & Int'l Envtl. L.* (11), p. 74.

192 See Sheehy, B., (2003). "International marine environment law: A case study in the Wider Caribbean Region," 16 *Geo. Int'l Envtl. L. Rev.* 441.

193 1971 Convention on Wetlands of International Importance especially as Waterfowl Habitat (Consolidated text, incorporating amendments in 1982 and 1987) 996 UNTS 245, 11 ILM 963 (1972), TIAS 11084.

194 Protocol Concerning Co-operation and Development in Combating Oil Spills in the Wider Caribbean Region, (1983, 24 March). Available at:

195 Protocol Concerning Specially Protected Areas and Wildlife to the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, (1990, 18 January). In: 1

and Land Based Activities (LBS Protocol),[196] enjoy wide regional endorsement in LAC, and the latter two are especially critical to the R2R approach fundamental to managing the interconnected land-seas systems of SIDS. Accordingly, the nexus between the SPAW and the LBS Protocol – the Class I Waters defined in Annex III of the LBS – includes marine protected areas categorised under SPAW. This integrated approach is important for addressing the management and conservation of blue and teal carbon ecosystems, including those up to six metres (in complementarity with the Ramsar Convention), as well as those further in the ocean.

Another critical nexus underpinning the R2R approach for SIDS is that of the third Rio agreement of the United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (UNCCD).[197] While this agreement may have been outside the scope of the UNCLOS, climate accelerated events such as drought, saltwater intrusion and subsidence plague SIDS, while catalysing an increase in land-based pollutants entering the marine environment. Therefore the interconnected land-sea nature of SIDS exacerbates the likelihood of being impacted by drought and desertification-related issues, with corresponding effects on terrestrial and marine ecosystems, as well as their biodiversity. Further, given the economic and cultural reliance on these resources, they systemic changes will inevitably affect the human rights of Indigenous and Afro-descendant peoples with

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Y.B. *INT'L Envtl L. 44*. Available at: https://www.car-spaw-rac.org/IMG/pdf/spaw-protocol-en.pdf.

196 Protocol Concerning Pollution from Land-Based Sources and Activities to the Convention for the Protection and the Development of the Marine Environment of the Wider Caribbean Region, (1999, 6 October). Available at: https://www.unep.org/cep/resources/policy-and-strategy/lbs-protocol-text

197 United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, 1954 UNTS 3, 33 ILM 1328 (1994), [2000] ATS 18 [UNCCD],

close connection with them, including pheasants,[198] small-scale fishers and farmers. Happily, the IACtHR has already given some thought to these intersections in Advisory Opinion 23/17, and the inclusion in the Request of the impacts of the "proliferation of droughts, floods, landslides and fires"[199] provides an opportunity to deepen this inter-relationship. Further the Court has addressed the violation of the right to a healthy environment in Advisory Opinion 23/17and confirmed in the *Lhaka Honhat*[200] and the *La Oroya*[201]cases, therefore chrystalising the nexus between

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198 United Nations General Assembly (2018). *United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas,* Resolution A/C.3/73/L.30 of September 28, 2018. See definition in Art. 1. Available at: https://digitallibrary.un.org/record/1661560?ln=en [UNDROP]. Human Rights Council, *Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development*, Working Group 3, Resolution A/HRC/54/L.11 of October 9, 2023. Available at https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/54/L.11. See Morgera, Elisa and Nakamura, Julia (2022). "Shedding a Light on the Human Rights of Small-scale Fishers: Complementarities and Contrasts between the UN Declaration on Peasants' Rights and the Small-Scale Fisheries Guidelines." In: Alabrese, Mariagrazia et. al. *The United Nations' Declaration on Peasants' Rights*. Oxfordshire: Routledge.

199 Inter-American Court on Human Rights, Request for An Advisory Opinion on the Climate Emergency and Human Rights Submitted to the Inter-American Court of Human Rights by the Republic of Colombia and the Republic of Chile, January 9, 2023, p. 1. Available at: https://www.corteidh.or.cr/docs/opiniones/soc_1_2023_en.pdf.

200 Inter-American Court of Human Rights, Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v Argentina, February 6, 2020. Available at: https://www.corteidh.or.cr/docs/casos/articulos/seriec_400_ing.pdf.

201 Inter-American Court of Human Rights, Case of La Oroya Community v Peru, November 27, 2023. Available at: https://www.corteidh.or.cr/docs/casos/articulos/seriec_511_esp.pdf. See Saldaña, José, (2024, 11 April). "'People from La Oroya vs Peru, Inter-American Court of Human Rights: How Effective is International Law to Protect the Environment in Extractive Contexts?" *EJIL:Talk! Blog*. Available at: https://www.ejiltalk.org/people-from-la-oroya-vs-peru-inter-american-

internationational marine law, the law of the sea and international human rights law. This was the first by an international judicial body, and a deviation from the historic trend of treating them separately in international law. Arguably this approach was cautiously embraced by ITLOS in their incorporation of "external rules" into their Opinion.

Within this context, the Court can add to the legal obligations that arise at the 'ocean-climate nexus' examined by ITLOS, such as clarifying human rights standards relevant to the R2R approach in the context of climate change. To this end, the Court can further develop a harmonious interpretation of the law of the sea and international biodiversity law, together with international climate change law and human rights law. Additionally, the Court can consolidate its findings in Opinion 23/17 on the human right to a healthy ocean, as the importance of the marine environment to LAC States and Caribbean SIDS was underscored in many submissions at the Hearings held in April and June.[202] This includes (but is not limited to) the role of the ocean in the protection of the human right to culture, children's human right to play,[203] everyone's right to food[204] and the rights to life, health

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court-of-human-rights-how-effective-is-international-law-to-protect-the-environment-in-extractive-contexts/; Trincado Vera, Patricio (2024, 24 May). "The Right to a Healthy Environment in La Oroya v. Peru: A Landmark Judgement of the IACtHR" *OpinioJuris*. Available at: https://opiniojuris.org/2024/05/25/the-right-to-a-healthy-environment-in-la-oroya-v-peru-a-landmark-judgement-of-the-iacthr/; Boyd, David (2024). "Landmark Court Decision on Right to a Healthy Environment: La Oroya v Peru" *GNHRE*. Available at: https://gnhre.org/?p=17944

202 See for example, Inter-American Court for Human Rights (2023, 18 December). *Written Observations on Behalf of Barbados*, para 112, Available at: https://corteidh.or.cr/sitios/observaciones/OC-32/2_Barbados.pdf

203 Strand, Mia, et al. (2023). "Protecting Children's Rights to Development and Culture by Re-Imagining "Ocean Literacies"." *The International Journal of Children's Rights* 31 (4), pp 941-975.; Lancaster, Mitchell and Nurse, 2024

204 See for example, Inter-American Court for Human Rights (2023, 18 December). *Amicus Brief Submitted to the Inter-American Court of Human*

and livelihoods. Importantly, this Court's Advisory Opinion will allow for further clarification of the content and obligations arising from the human right to a healthy environment, already recognised as an autonomous right by Court in Opinion 23/17[205] when addressing threats to the marine environment of the Wider Caribbean Region. This will be potentially an example of the scaling up of regional action to the global level, especially given the increasing calls to embed the right in the human rights system.[206] The lACtHR's opinion can also clarifying fundamental questions of State obligations in relation to human rights impacts by climate change on people protected by the Pact, including the most vulnerable, which may be transformative in its own right, as well as in regard to the questions which the ICJ will have to tackle. This includes the questions posed on the obligations in regard to "… peoples and individuals of the present and future generations affected by … climate change."[207]

The Request is also an opportunity to expand on the Court's recent pronouncements on business and human rights in

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*Rights by Oxfam America*Available at: https://corteidh.or.cr/sitios/observaciones/OC-32/17_oxfam_america.pdf

205 Inter-American Court on Human Rights, The Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity: Interpretation and Scope of Articles 4(1) And 5(1) in Relation to Articles 1(1) And 2 of the American Convention On Human Rights), Advisory Opinion OC-23/17, November 15, 2017, para. 62. Available at: https://www.corteidh.or.cr/docs/opiniones/seriea_23_ing.pdf.

206 Puentes Raiño, Astrid, Boyd, David and Knox, John (2024), "The Right to a Healthy Environment Must Be Embedded in the Human Rights System. *La Croix International*. Available at: https://international.la-croix.com/laudato-si/the-right-to-a-healthy-environment-must-be-embedded-in-the-human-rights-system.

207 International Court of Justice, Request for an Advisory Opinion, Obligations of States in Respect of Climate Change, March 29, 2023, p. 8. Available at: https://www.icj-cij.org/sites/default/files/case-related/187/187-20230412-app-01-00-en.pdf

the *Miskito Divers* case,[208] where the Court examined human rights violations resulting from Honduras' failure to regulate, supervise, and oversee the practice of dangerous activities by private companies in the deep diving lobster fishing industry. The ruling's significance is twofold: first, it mandated Honduras (and therefore States) to regulate the fishing industry (and therefore *other* business activities) with regards to their duty to respect human rights, and second, sets business and human rights standards to be taken by companies operating in LAC, under the Pact and for the States which have adopted it. These standards include mandatory human rights regulations, prevention and redress, policies, due diligence and grevience procedures, and effective remedies. In this context, States and corporate entities are required to take preventive measures to protect the human rights of their workers, as well as measures aimed at preventing their activities from having a negative impact on the communities in which they operate or on the environment. This judgement, will have implications for national legislation on corporate, commercial and investment law[209] approaches within LAC, and is directly

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208 Inter-American Court of Human Rights, Case of the Miskito Divers (Lemoth Morris et al.) v Honduras, August 31, 2021. Available at: https://www.corteidh.or.cr/docs/casos/articulos/seriec_432_ing.pdf. See Zorob, Maysa and Candray, Hector (2022, 21 March). "Justice for Miskito Divers: A Turning Point For Business and Human Rights Standards from the Inter-American Court of Human Rights" Open Global Rights. Available at: https://www.openglobalrights.org/justice-for-miskito-divers-a-turning-point-for-business-and-human-rights-standards/

209 See for example, U.N. General Assembly (2021). *Report on Human Rights-compatible International Investment Agreements (IIAs),* Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, UNGA Resolution A/76/238 of July 27, 2021). Available at: https://www.ohchr.org/en/documents/reports/a76238-report-human-rights-compatible-international-investment-agreements-iias; U.N. General Assembly (2023). *Investors, Environmental, Social and Governance Approaches and Human Rights*, Working Group on the Issue of Human Rights and Transnational Corporations and Other Business

buttressed by provisions in the Escazú Agreement relating to the right to a healthy environment,[210] the precautionary principle[211] access to environmental information,[212] public participation,[213] access to justice,[214] and redress measures.[215] Additionally, as Ituarte-Lima and Mares point out, there is "interplay between … [these] … innovations and EU economic law, including the Corporate Sustainability Due Diligence Directive (CSDDD), forest legislation, and free trade agreements.[216]

In addition to the possibility of the development of unchartered frontiers in law and policy at the ocean-climate nexus, the decision of the Court to acquiesce to the Request, also triggered the widest form of *amicus* participation in its history (and of the three judicial bodies asked to consider the climate question). Underpinned by Article 44 of the Pact, this wide berth with respect to participation is a clear indicator of the primacy of the Opinion to the Court. In preparation for its deliberations, the Court permitted a diversity of stakeholders, ranging from States, State organisations, Inter American organisations, international organs and organisations, communities, civil society, non-governmental organisations, academic institutions, persons in civil society and businesses[217]

Enterprises, Resolution A/HRC/56/55 of May 2, 2024). Available at: https://www.ohchr.org/en/documents/thematic-reports/ahrc5655-investors-environmental-social-and-governance-approaches-and

210 Escazú Agreement, Art. 4(1)

211 Escazú Agreement, Article 3 (f)

212 Escazú Agreement, Articles 5 & 6

213 Escazú Agreement, Article 7

214 Escazú Agreement, Article 8

215 Escazú Agreement, Article 8 (3) (g)

216 Ituarte-Lima, Claudia, and Radu Mares. (2024). "Environmental Democracy: Examining the Interplay between the Escazu Agreement's Innovations and EU Economic Law" Earth *System Governance* (21): 100208.

217 Inter-American Cort of Human Rights (n.d.). *Observations on the Request for Advisory Opinion*. Available at: https://www.corteidh.or.cr/observaciones_oc_new.cfm?nId_oc=2634

to submit oral and written testimony, and held two specially convened Hearings in Barbados[218] and Brazil.[219] *Amici* were able to put forward their perspectives on the six themes in the Request, with accompanying questions (some of which duplicate others in separate headings), which altogether are "impressively extensive, holistic, and complex."[220] Kahl proffers that this suite of questions would afford the IACtHR the opportunity to apply the principle of common but differentiated responsibilities to inform new regional human rights standards in the climate change change context.[221] The first theme in the Request focuses on duties of prevention and guaranteeing human rights "in relation to the climate emergency," "taking into account the 'obligation to guarantee the right to a healthy environment.'"[222] The second theme has a revolves largely around access to information, an

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218 Inter-American Cort of Human Rights (n.d.). *One Hundred and Sixty-Sixth Regular Session of the Inter-American Court, Barbados.* Available at: https://www.corteidh.or.cr/tablas/166POS-Barbados/index.html; See One Ocean Hub (2024, 16 May). "Contributing to the Historic Hearings on the Climate Emergency of the Inter-American Court of Human Rights in Barbados" *One Ocean Hub.* Available at: https://oneoceanhub.org/contributing-to-the-historic-hearings-on-the-climate-emergency-of-the/

219 Inter-American Court of Human Rights (n.d.). *One Hundred and Sixty-Seventh Regular Session of the Inter-American Court, Brazil.* Available: https://www.corteidh.or.cr/tablas/167POS-Brasil/index.html

220 Riemer, Lena and Scheid, Luca (2024, 18 January). *Leading the Way The IACtHR's Advisory Opinion on Human Rights and Climate Change. Verfassungsblog.* Available at: https://verfassungsblog.de/leading-the-way/

221 Kahl, Verena (2023, 10 March). *Warming Up: The Chilean and Colombian Request for an Inter-American Advisory Opinion on the Climate Emergency and Human Rights. Verfassungsblog.* Available at: https://verfassungsblog.de/warming-up/.

222 Inter-American Court on Human Rights, Request for An Advisory Opinion on the Climate Emergency and Human Rights Submitted to the Inter-American Court of Human Rights by the Republic of Colombia and the Republic of Chile, January 9, 2023, pp. 8 – 9.

important pillar in Rio Principle 10 rights,[223] and is notable and significant link between the IACtHR's advisory opinion and the ICJ's. This is because in addition to questions revolving around the interpretation of Article 13, "derived from the obligations" under 4(1) and 5(1) of the American Convention, these must be read in light of Articles 5 and 6 of the Escazú Agreement. Escazú is a viewed as a landmark agreement in transforming environmental decision-making, integrating democracy and human rights and protecting environmental defenders.[224] Despite relating to LAC States, it is not an Inter-American instrument whose dispute settlement mechanism includes the jurisdiction of the ICJ.[225] This is therefore a clear point of intersection between the opinions of the IACtHR and the ICJ, which the respective courts will be bound to consider. Thirdly, the questions pivot to "the differentiated obligations of States in relation to the rights of children and

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223 Inter-American Court on Human Rights, Request for An Advisory Opinion on the Climate Emergency and Human Rights Submitted to the Inter-American Court of Human Rights by the Republic of Colombia and the Republic of Chile, January 9, 2023, pp. 9 – 10..

224 See Etemire, Uzuazo, (2023). "The Escazú Agreement: Public Access to Environmental Information and the Goal of a Sustainable Future," *Journal of Energy & Natural Resources Law* 41(1), p. 71–91; Etemire, Uzuazo, (2023). "Public Voices and Environmental Decisions: The Escazú Agreement in Comparative Perspective," *Transnational Environmental Law* 12 (1), p. 175–199; López-Cubillos, Sofía, et al., (2022). "The Landmark Escazú Agreement: An Opportunity to Integrate Democracy, Human Rights, and Transboundary Conservation." *Conservation Letters* 15(1), p. e12838; Stec, Stephen, and Jerzy Jendrośka, (2019). "The Escazú Agreement and the Regional Approach to Rio Principle 10: Process, Innovation, and Shortcomings." *Journal of Environmental Law* 31(3), p. 533–545; Pánovics, Attila, (2021). "The Escazú Agreement and the Protection of Environmental Human Rights Defenders." *Pecs J. Int'l & Eur. L.,* p. 23; De Silva, Lalanath, (2018). "Escazú Agreement 2018: A Landmark for the LAC Region." *Chinese Journal of Environmental Law* 2(1), p. 93–98.

225 Escazú Agreement, Article 19

the new generations in light of the climate emergency."[226] This is yet another node of connectivity between the IACtHR and ICJ opinions, as both will have to examine the impacts of the climate emergency on children as "the most vulnerable in the long term."[227] In a way, the IACtHR has already revealed the bent of their thinking on this issue in the *La Oroya case*, but incorporating aspects of General Comment 26 into their judgment,[228] so it remains to be seen the extent the Court will build on this, as well as whether the ICJ will consider their findings when they interrogate the intergenerational elements of the questions posed to them (see Section 4). The fourth theme relates to the general topic of State obligations arising from consultation procedures and judicial proceedings owing to the climate emergency, which refers to the interpretation of Articles 8 and 25 of the American Convention in providing "adequate and timely protection and redress for the impact on human rights of the climate emergency."[229] The sixth theme focuses on shared and differentiated human rights obligations and responsibilities of States in the context of the climate emergency.[230]

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226 Inter-American Court on Human Rights, Request for An Advisory Opinion on the Climate Emergency and Human Rights Submitted to the Inter-American Court of Human Rights by the Republic of Colombia and the Republic of Chile, January 9, 2023, p. 10..

227 See International Court of Justice, Request for an Advisory Opinion, Obligations of States in Respect of Climate Change, March 29, 2023, Questions, Para (a), (b) (ii).

228 Inter-American Court of Human Rights, Case of La Oroya Community v Peru, November 27, 2023, paras 14, 243, 9

229 Inter-American Court on Human Rights, Request for An Advisory Opinion on the Climate Emergency and Human Rights Submitted to the Inter-American Court of Human Rights by the Republic of Colombia and the Republic of Chile, January 9, 2023, p. 11.

230 Inter-American Court on Human Rights, Request for An Advisory Opinion on the Climate Emergency and Human Rights Submitted to the Inter-American Court of Human Rights by the Republic of Colombia and the Republic of Chile, January 9, 2023, p. 12 – 13.

The fifth theme is significant for the LAC Region, and its SIDS in particular, as it focuses on obligations of protection of environmental defenders including Indigenous and Afro-descendant communities.[231] First off, Latin America is the roughest region to be an environmental defender,[232] a fact which inspired the depth of their protection within the Escazú Agreement.[233] Second, as mentioned previously, the Agreement is a significant nexus between the regimes of the IACtHR and the ICJ, which is buttressed by the Inter American system's Protocol

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231 Inter-American Court on Human Rights, Request for An Advisory Opinion on the Climate Emergency and Human Rights Submitted to the Inter-American Court of Human Rights by the Republic of Colombia and the Republic of Chile, January 9, 2023, p. 11 – 12.

232 See Global Witness (2023). *Standing Firm: The Land and Environmental Defenders on the Frontlines of the Climate Crisis* (London: Global Witness 2023). Available at : https://media.business-humanrights.org/media/documents/GW_Defenders_Standing_Firm_EN_September_2023_Web_AW.pdf; ; Global Witness (n.d.). *Land and Environment Defenders.* Available at: https://www.globalwitness.org/en/campaigns/environmental-activists/; Radwin, Maxwell (2023 14 September). "Latin America Most Dangerous Place for Environmental Defenders, Report Says" *Mongabay.* Available at: https://news.mongabay.com/2023/09/latin-america-most-dangerous-place-for-environmental-defenders-report-says/; Koop, Fermín (2003, 13 September). "Latin America Remains the deadliest Region for Environmental Defenders" *Dialogue Earth.* Available at: https://dialogue.earth/en/justice/379339-latin-america-remains-the-deadliest-region-for-environmental-defenders/; Crellin, Zac (2023, 13 September). "Latin America Worst Region for Environment Defenders — NGO." D*W.* Available at: https://www.dw.com/en/latin-america-worst-region-for-environment-defenders-ngo/a-66794944.

233 Escazú Agreement, Article 9. See Pánovics, Attila (2021). "The Escazú Agreement and the Protection of Environmental Human Rights Defenders." *Pecs J. Int'l & Eur. L.* p. 23; Cavallo, Gonzalo Aguilar (2022). "Environmental Defenders-Escazu Agreement and the Inter-American Standards in Chile." *Veredas do Direito* (19), p. 67; Foster, Kendrick (2021). "Protecting Latin America's Environmental Defenders." *Harvard International Review* 42 (3), p. 22–28.

of San Salvador,[234] which underscores a suite of economic, social, and cultural rights critically impacted by the climate crisis. For the Members of the English-speaking Caribbean, Escazú and the Protocol of San Salvador are also bolstered by the Charter of Civil Society[235] for the Caribbean Community (CARICOM),[236] a non-binding human rights declaration with some participatory elements, which has regrettably not been operationalised by States in its twenty-six-year history.[237] A strong statement from the IACtHR would be welcomed not only as a means of providing recourse by defenders from the inaction of States, State actors and big business.[238] Indigenous and Afro-descendant peoples, are among the most vulnerable and marginalised peoples globally, and within the LAC context they both have been subject to the most atrocious abuses to their human rights,[239] the latter being especially topical

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234 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, entered into force Nov. 16, 1999, OAS Treaty Series No. 69; 28 ILM 156

235 Caribbean Community, Charter of Civil Society, 1997. Available at: https://caricom.org/documents/12060-charter_of_civil_society.pdf .

236 The Caribbean Community (CARICOM) is a political and economic union located in the Americas, which comprises fifteen full Members and five associate Members. Full Members of CARICOM are Antigua & Barbuda, The Bahamas, Barbados, Belize, The Commonwealth of Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, Saint Lucia, St. Christopher (St. Kitts) & Nevis, St. Vincent & the Grenadines, Suriname, and Trinidad & Tobago. The union also comprises five associate Members: Anguilla, Bermuda, The [British] Virgin Islands, Cayman Islands, and the Turks & Caicos Islands

237 Kristina Hinds (2024). "Looking into CARICOM's Soul: The Charter of Civil Society." *The Round Table* 113 (1), pp. 43-55.

238 Lehne Cerrón, María Emilia (2024, 1 November). "Political Will: The Missing Ingredient in Protecting the Environment and Environmental Defenders" *EJIL:Talk! Blog*. Available at: https://www.ejiltalk.org/political-will-the-missing-ingredient-in-protecting-the-environment-and-environmental-defenders/

239 See for example, Inter-American Court of Human Rights, Case of the Saramaka People v Suriname, November 28, 2007. Available at: https://www.corteidh.or.cr/docs/casos/articulos/seriec_172_ing.pdf; Inter-

for SIDS in LAC as a result of colonisation and the Trans-Atlantic slave trade.[240] Found in the largest concentration in LAC,[241] the culture of Afro-descendant peoples has developed through *sui generis* processes[242] for which they have sought legal recognition in the context of international human rights law, primarily within the InterAmerican human rights system.[243] The Court has recognised Afro-descendant peoples as a group of right holders distinct from Indigenous peoples within the context of the Americas.[244]

American Court of Human Rights, Case of the Moiwana Community v Suriname, June 15, 2005. Available at: https://www.corteidh.or.cr/docs/casos/articulos/seriec_124_ing.pdf; Inter-American Court of Human Rights, Case of the Kichwa Indigenous People of Sarayaku v Ecuador, June 27, 2012. Available at: https://corteidh.or.cr/docs/casos/articulos/seriec_245_ing.pdf; Inter-American Court of Human Rights, Case of the Kaliña and Lokono Peoples v. Suriname, November 25, 2015. Available at: https://www.corteidh.or.cr/docs/casos/articulos/seriec_309_ing.pdf; Inter-American Court of Human Rights, Case of the Xucuru Indigenous People and its members v Brazil, February 5, 2018. Available at: https://www.corteidh.or.cr/docs/casos/articulos/seriec_346_esp.pdf.

240 Valcárcel Rojas, Roberto, et al. (2020). "Slavery of Indigenous People in the Caribbean: An Archaeological Perspective." *International Journal of Historical Archaeology* 24 (3), pp. 517-545.

241 UN OHCHR (n.d.) "People of African Descent." Available at: https://www.ohchr.org/sites/default/files/Documents/Issues/Racism/PAD.pdf

242 Zapata Olivella, M. (1997). *La Rebelión De Los Genes. El Mestizaje Americano En La Sociedad Futura.* Altamir

243 Inter-American Court of Human Rights, Case of the Saramaka People v Suriname, November 28, 2007. Available at: https://www.corteidh.or.cr/docs/casos/articulos/seriec_172_ing.pdf. See Sánchez, J. H. A., (2022). "Latin American International Law and Afro-Descendant Peoples," *American Journal of International Law* (116), p.334.

244 See Inter-American Court of Human Rights, Garífuna Triunfo de la Cruz Community v Honduras, October 8, 2015. Available at: https://www.corteidh.or.cr/docs/casos/articulos/seriec_305_ing.pdf; See Inter-American Court of Human Rights, Garífuna Punta Piedra Community and its Members v. Honduras, October 5, 2015. Available at: https://www.corteidh.or.cr/docs/casos/articulos/seriec_304_ing.

However, there are arguments that the cultural approach adopted by the IACtHR to territorial claims raises inconsistencies and problem areas, which can reinforce the structural discrimination faced by Afro-descendant peoples in LAC.[245] Equally, Caribbean States[246] have a diversity of Indigenous peoples[247] who like

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pdf. See Inter-American Court of Human Rights, Afro-descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v Colombia, November 20, 2013. Available at: https://www.corteidh.or.cr/docs/casos/articulos/seriec_270_ing.pdf; Inter-American Court of Human Rights, Case of the Moiwana Community v Suriname, June 15, 2005. Available at: https://www.corteidh.or.cr/docs/casos/articulos/seriec_124_ing.pdf; Case of Aloeboetoe et al. v. Suriname, September 10, 1993. Available at: https://www.corteidh.or.cr/docs/casos/articulos/seriec_15_ing.pdf; Inter-American Court of Human Rights, Case of Aloeboetoe et al. v. Suriname, December 4, 1991. Available at: https://www.corteidh.or.cr/docs/casos/articulos/seriec_11_ing.pdf..

245 A E Dulitzky (2010). "When Afro-descendants Became Tribal Peoples: The inter-American Human Rights System and Rural Black Communities" *UCLA J. Int'l L. Foreign Aff.* (15), pp. 29, 30, 48 - 60

246 Belize, Guyana and Suriname are home to some of the largest surviving populations of indigenous peoples in the Caribbean. Other Caribbean countries still inhabited by indigenous groups include the Commonwealth of Dominica, St. Vincent and the Grenadines, Jamaica, Grenada, Trinidad and Tobago, Cuba, Dominica, Dominican Republic, and Puerto Rico. See International Organization for Migration (IOM) (2023). *Invisible Movements: Recommendations for Facilitating the Cross-Border Migration of Indigenous Peoples in the Caribbean* (Geneva: IOM), p. 1, Available at: https://programamesocaribe.iom.int/sites/default/files/indigenous_final_digital.pdf.

247 These include both the original inhabitants of the LAC Region, as well as Maroons, who were descendants of Africans brought to the Americas in the transatlantic slave trade, but who escaped from slavery, by either escape or manumission and formed their own settlements. They can establish distinct communities such as in Jamaica and Suriname, or mix with Indigenous peoples, eventually evolving into separate creole cultures such as the Garifuna of St. Vincent and the Grenadines, Belize and Honduras and the Mascogos in Coahuila, Mexico. See Palacio, Joseph (1992). "The Sojourn Toward Self Discovery Among Caribbean

their Latin American counterparts are marginalised,[248] but have significant connections with the ocean and coastal marine environment. This suite of questions will therefore give the Inter American Court the opportunity to explore the linkages between self-determination and climate change,[249] as well as add to their burgeoning jurisprudence on Indigenous and Afro-descendant peoples. It is noteworthy that internationally, the IACtHR is the judicial entity which has had the most experience in interrogating these issues, and their judgements have also considered the impact of international agreements such as the Convention on Biological Diversity on human rights and natural resource use.[250] Given the marginalisation of these peoples, the historic pillaging of their traditional knowledge, and the contemporary recognition of the need to integrate this knowledge[251] into

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Indigenous Peoples." *Caribbean Quarterly* 38 (2-3) 55-72; Wilson, Samuel M. (1993). *The Cultural Mosaic of the Indigenous Caribbean.* In *Proceedings of the British Academy.* Vol. 81)Oxford : Oxford University Press)

248 Lancaster, Alana Malinde S. N., (2025, forthcoming). Decolonising Tenure Rights in the CARICOM & OECS Caribbean: [Re]-assessing the Role of International Legal Instruments," *Asian Journal of International Law* 15(1), p. 1–45

249 Pascoe, Sophie (2015). "Sailing the Waves on Our Own: Climate Change Migration, Self-Determination and the Carteret Islands." *QUT L. Rev.* (15), p. 72.; Bordner, Autumn Skye (2019). "Climate Migration & Self-Determination." Colum. Hum. Rts. L. Rev. (51), p. 183; Jones, Naiomi (2023). "Prospects for Invoking the Law of Self- Determination in International Climate Litigation." *Review of European, Comparative & International Environmental Law* (32), p. 250.

250 Inter-American Court of Human Rights, Case of the Saramaka People v Suriname, November 28, 2007. Available at: https://www.corteidh.or.cr/docs/casos/articulos/seriec_172_ing.pdf

251 Niner, Holly J., et al. (2024). "Reflections on the Past, Present, and Potential Futures of Knowledge Hierarchies in Ocean Biodiversity Governance Research." *Frontiers in Marine Science* 11, p. 1347494; Strand, Mia, et. al. (2024). Co-Producing Sustainable Ocean Plans With Indigenous And Traditional Knowledge Holders. Washington, D.C.: World Resources Institute. Available at: https://oceanpanel.org/publication/indigenous-knowledge/

climate and biodiversity solutions, it is perhaps left solely to this Court to make these critical linkages. It should be underscored that Indigenous and local knowledge features prominently in the recent BBNJ Agreement,[252] which envisions their participation in decision making, as well as the safeguarding of Indigenous, traditional and local tl knowledge in marine genetic resources (MGRs),[253] environmental impact assessments (EIAs),[254] and area-based management tools (ABMTs).[255] Therefore, this is a loose connection in the ITLOS Opinion which can tightened by the IACtHR, and can provide Parties to of the BBNJ Agreement with guidance in advance it coming into force.[256] This will support the instrument's successful implementation, as well as reinforcement across the "external rules" referenced by the Tribunal.

Additionally, for SIDS, the IACtHR can consolidate many of the findings of the ITLOS, as well as flesh out the human rights aspects of the ocean-climate nexus, which were eschewed in Advisory Opinion 31. This includes an expansion on the ridge to reef (R2R) approach**,** already identified in Opinion 23/17 as crucial for communities which are economically dependent for their survival on environmental resources from the marine environment, forested areas and river basins.[257] The Court

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252 See, Preambular Paragraphs 7 & 8, Arts. 7(j), 7(k), 13, 19(2), 19 (3), 19 (4) (c), 19 (4) (j), 21 (1), 21(2 (c), 21(2)(c) (iii), 24(3), 25(5), 31(1) (a) (ii), 31(1) (a) (iv), 31(1) (b), 31(1) (c), 32 (3), 35, 37(4) (a), 37(4) (c), 41 (2), 44(1) (b), 48 (3), 48 (4), 49 (2), 51(3) (c) and 52 (6) (c).

253 Article 13

254 Articles 31(1) (a) (ii), 31(1) (a) (iv), 31(1) (b), 31(1) (c)

255 Articles 19 (3), 19 (4) (c), 19 (4) (j), 21 (1), 21(2 (c), 21(2)(c) (iii)

256 See Gjerde, Kristina M., et al. (2022). "Getting Beyond Yes: Fast-Tracking Implementation of the United Nations Agreement for Marine Biodiversity Beyond National Jurisdiction." *npj Ocean sustainability* 1 (1), p. 6.

257 Inter-American Court on Human Rights, The Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity: Interpretation and Scope of Articles 4(1) And

observed that biodiversity loss can be exacerbated by the effects of climate change, which may result in "saltwater flooding, desertification, hurricanes, erosion and landslides, leading to scarcity of water supplies and affecting food production from agriculture and fishing, as well as destroying land and housing."[258] Further, LAC's exceptional marine resources, including blue and teal carbon ecosystems mediate interactions between land, sea and estuarine ecosystems, and are critical components of nature-based solutions.[259] The Court within this context can clarify specific human rights standards for the conduct of States, both individually and collectively, which consider the increased vulnerability of SIDS posed by the climate emergency.[260] Standards such as these will be critical for ocean dependent communities, since these ecosystems

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5(1) in Relation to Articles 1(1) And 2 of the American Convention On Human Rights), Advisory Opinion OC-23/17, November 15, 2017, para. 67.

258 Inter-American Court on Human Rights, The Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity: Interpretation and Scope of Articles 4(1) And 5(1) in Relation to Articles 1(1) And 2 of the American Convention On Human Rights), Advisory Opinion OC-23/17, November 15, 2017, para. 67, as cited in footnotes 125 and 126

259 UNFCCC, "Report of the Conference of the Parties on its Twenty-Seventh Session, held in Sharm el-Sheikh from 6 to 20 November 2022 - Decision 1/CP.27 Sharm el-Sheikh Implementation Plan", FCCC/CP/2022/10/Add.1 (17 March 2023); CBD Decision XV/4, Kunming-Montreal Global Biodiversity Framework, CBD/COP/DEC/15/4 (19 December 2022)

260 See Lancaster, Alana Malinde S.N, et. al. (2023, 18 December). *Joint Submission to the Inter-American Court of Human Rights, Request for an Advisory Opinion on the Climate Emergency Submitted by Colombia and Chile.* Caribbean Environmental Law Unit, Faculty of Law, The University of the West Indies (Cave Hill Campus/One Ocean Hub/RenewTT/Global Network for Human Rights & the Environment Caribbean Region/International Law Association Caribbean Branch, Paras 25 – 27. Available at: https://corteidh.or.cr/sitios/observaciones/OC-32/9_caribbean_environmental.pdf

host ecological functions linked to enhanced fisheries and other marine resources, coastal tourism, aquaculture, and mariculture. These are also fundamental to the States and peoples of the LAC, but equally in many Global South States. Notably, these ecosystems are also the basis for debt for nature regimes currently underway in SIDS including Barbados[261] and Belize[262] and debt for climate regimes as proposed by Barbados.[263] They also support both the Global Biodiversity Framework and the Paris targets, while providing a basis for more just and equitable approaches to ocean

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261 The Nature Conservancy, (2022, 21 September). *The Nature Conservancy Announces Its Third Global Debt Conversion in Barbados.* Available at: https://www.nature.org/en-us/newsroom/tnc-announces-barbados-blue-bonds-debt-conversion/; Wakefield Adhya, Sarah (2022, 21 September). *Barbados Commits to Ambitious Ocean Conservation.* The Nature Conservancy. Available at: https://www.nature.org/en-us/what-we-do/our-insights/perspectives/barbados-blue-bond-ocean-conservation/

262 The Nature Conservancy, (2021, 4 November). *How Belize is Transforming the Caribbean.* Available at: https://www.nature.org/en-us/what-we-do/our-insights/perspectives/belize-transforming-caribbean-blue-bond/

263 Jones, Marc (2024, 25 July). *Barbados Debt-for-Climate Swap Nears as EIB, IDB Finalise Guarantees.* Reuters. Available at: https://www.reuters.com/sustainability/sustainable-finance-reporting/barbados-debt-for-climate-swap-nears-eib-idb-finalise-guarantees-2024-07-25/#:~:text=Climate%20Change-,Barbados%20debt%2Dfor%2Dclimate%20swap%20nears,as%20EIB%2C%20IDB%20finalise%20guarantees&text=LONDON%2C%20July%2025%20(Reuters),million%20guarantee%20for%20the%20plan. White, Natasha and Duarte, Esteban (2023, 10 November). *European Investment Bank to Back Barbados Debt-for-Climate Swap.* Bloomberg. Available at: https://www.bloomberg.com/news/articles/2023-11-10/european-investment-bank-to-back-barbados-debt-for-climate-swap; Savage, Rachael (2023, 10 November). *Barbados 'Debt-for-Climate' Swap Backed by $300 mln EIB, IADB Guarantee – Statement.* Reuters. Available at: https://www.reuters.com/sustainability/sustainable-finance-reporting/barbados-debt-for-climate-swap-backed-by-300-mln-eib-iadb-guarantee-statement-2023-11-10/

governance.[264] In addition to this, the main coastal marine areas of LAC are couched within the RSP framework for the Wider Caribbean Region, the Opinion can deepen our understanding of the concept of transboundary harm and due diligence through a human rights lens, as elucidated in Opinion 23/17 and by ITLOS. In this regard, the Court has already emphasised that "when transboundary harm or damage occurs, … if there is a causal link between the action that occurred within its territory and the negative impact on the human rights of persons outside its territory, [t]he exercise of jurisdiction arises when the State of origin exercises effective control over the activities that caused the damage and the consequent human rights violation."[265] This is arguably another part of the 'missing' link in the ITLOS Opinion with respect to international human rights, would be likely to influence other international courts and quasi-judicial organs' approach to similar questions.[266]

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264 Bennett, Nathan J., et al. (2023). "Environmental (In) Justice in the Anthropocene Ocean." *Marine Policy* (147), 105383

265 Inter-American Court on Human Rights, The Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity: Interpretation and Scope of Articles 4(1) And 5(1) in Relation to Articles 1(1) And 2 of the American Convention On Human Rights), Advisory Opinion OC-23/17, November 15, 2017, para. 104(h)

266 For example, in Committee on the Rights of the Child, *Sacchi et al. v. Argentina (dec.),* 22 September 2021, CRC/C/88/D/104/2019. See Feria-Tinta, Monica (2023, 30 November). *An Advisory Opinion on Climate Emergency and Human Rights Before the Inter-American Court of Human* Rights. In: Advisory Opinions on Climate Change: Leading from the Bench? *Questions of International Law*, footnote 36. For a discussion on *Sacchi et al.* and the impact of the Inter-American Court of Human Rights' analysis in Advisory Opinion No 23, see Feria-Tinta, Monica (2022). "The Future of Environmental Cases in the European Court of Human Rights.' In: Kobylarz, Natalia and Grant, Evadne. *Human Rights and the* Planet. Cheltenham: Edward Elgar.

While, the Inter-American System has been the most avant-garde purveyor of basic social and economic rights (including in the context of environmental degradation) justiciable under the Pact,[267] Feria-Tinto posits that a much-needed area of clarification by the Inter-American Court will be in the protection of the right to life in the context of the climate emergency. This right, identified by the requesting States,[268] has long been examined by the European Court of Human Rights,[269] but within the context of vulnerable [SIDS] and their peoples. To date, the most comprehensive examination has been in the *Torres Strait Islanders* case by the UN Human Rights Committee withn the context of the first legal action brought by climate-vulnerable inhabitants of low-lying islands against a [Global North] State[270] Despite the noteworthiness of the case in setting up several ground-breaking precedents for international law and climate justice, it left the role of this right with some uncertainty, especially as it relates to mitigation and loss & damage measures. The latter is particularly critical to vulnerable States, since losses and damages undermines

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267 Feria-Tinta, Monica (2007). "Justiciability of Economic, Social and Cultural Rights in the Inter-American System of Protection of Human Rights: Beyond Traditional Paradigms and Notions" *Human Rights Quarter*ly 29, pp. 431-459.

268 The second theme of questions in the Inter-American Court on Human Rights, Request for An Advisory Opinion on the Climate Emergency and Human Rights Submitted to the Inter-American Court of Human Rights by the Republic of Colombia and the Republic of Chile, January 9, 2023, pp. 9 -10

269 López Ostra v Spain, European Court of Human Rights, App No 16798/90, A/303-C, [1994] ECHR 46, (1995)

270 Feria-Tinta, Monia (2022, 27 September). "Torres Strait Islanders: United Nations Human Rights Committee Delivers Ground-Breaking Decision on Climate Change Impacts on Human Rights." *EJIL Talk!*. Available at: https://www.ejiltalk.org/torres-strait-islanders-united-nations-human-rights-committee-delivers-ground-breaking-decision-on-climate-change-impacts-on-human-rights/

the right to development of individuals and communities,[271] and exacerbates inequalities with respect to the full and effective enjoyment of human rights.[272] In Opinion 23/17, the Court relied on its long-standing jurisprudence to establish both positve and negative obligations, such as the (positve) assurance of the free and full exercise of human rights, which requires States to take all appropriate measures to protect and preserve the right to life.[273] This language is remarkably similar to the conclusions of the ITLOS with respect to the obligations at the ocean-climate nexus, and therefore raise considerations as to the human rights aspects critical to vulnerable States and peoples. Additionally, the Court has held that no person may be deprived of his or her life arbitrarily (a negative obligation).

The Court in *Yakye Axa Indigenous Community v Paraguay*,[274] the right to life in Article 4 of the Pact was regarded as containing

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271 U.N. General Assembly (2024). *Right to Development, Climate Justice: Loss and Damage*. Resolution A/79/168 of July 17, 2024. Available at: https://documents.un.org/doc/undoc/gen/n24/211/94/pdf/n2421194.pdf.

272 United Nations Secretary General (2024). *Analytical Study on the Impact of Loss and Damage from the Adverse Effects of Climate Change on the Full Enjoyment of Human Rights, Exploring Equity-Based Approaches and Solutions to Addressing the Same*. A/HRC/57/30, Report of the Secretary-General , Advance Edited Version of August 28, 2024. Available at: https://www.ohchr.org/en/documents/thematic-reports/ahrc5730-analytical-study-impact-loss-and-damage-adverse-effects-climate; U.N. Human Rights, Office of the High Commissioner, Human Rights and Loss and Damage: Key Messages. Available at: https://www.ohchr.org/sites/default/files/documents/issues/climatechange/information-materials/2023-key-messages-hr-loss-damage.pdf..

273 Inter-American Court on Human Rights, The Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity: Interpretation and Scope of Articles 4(1) And 5(1) in Relation to Articles 1(1) And 2 of the American Convention On Human Rights), Advisory Opinion OC-23/17, November 15, 2017, para 108

274 See Inter-American Court of Human Rights, Case of Yakye Axa Indigenous Community v Paraguay, June 17, 2005. Available at: https://

basic economic, social and cultural rights which include being able to exercise traditional activities for subsistence such as hunting, fishing and Indigenous agrarian systems, and access to natural resources deeply connected with the cultural identity of aboriginal communities.[275]Otherwise, in *Sawhoyamaxa Indigenous Community v Paraguay276* the Court also emphasized the duty of States to guarantee the creation of conditions that may be necessary in order to prevent violations of the right to life. This approach taken by the Court in the context of establishing the link between environmental degradation and the right to life will be crucial to the proper understanding of the right to life today.[277] An elaboration by the Court of these tests within the climate emergency context, would be instructive for both LAC States and SIDS, both for Indigenous populations as considered in these cases, as well as Afro-descendant and traditional local communities. These include fisherfolk pheasants and other coastal artisans, who are increasingly marginalised by tourism, extractive industries and the pivot to the blue economy, often forcing them to become environmental defenders.[278] These vulnerable peoples are often between the devil and the deep blue

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www.corteidh.or.cr/docs/casos/articulos/seriec_125_ing.pdf

275 See Inter-American Court of Human Rights, Case of Yakye Axa Indigenous Community v Paraguay, June 17, 2005, para 162.

276 See Inter-American Court of Human Rights, Case of Sawhoyamaxa Indigenous Community v Paraguay, March 29, 2005. Available at: https://www.corteidh.or.cr/docs/casos/articulos/seriec_146_ing.pdf

277 Feria-Tinta, Monica (2023, 30 November). *An Advisory Opinion on Climate Emergency and Human Rights Before the Inter-American Court of Human* Rights. In: Advisory Opinions on Climate Change: Leading from the Bench? *Questions of International Law.* Available at: https://www.qil-qdi.org/an-advisory-opinion-on-climate-emergency-and-human-rights-before-the-inter-american-court-of-human-rights/.

278 John Mussington and Another (Appellants) v Development Control Authority and 2 Others (Respondents) (Antigua and Barbuda) [2024] UKPC 3. Available at: https://www.jcpc.uk/cases/jcpc-2021-0116.html; Eastern Caribbean Supreme Court, Case No. 290 of 2021, Grenada Land Actors Inc. (GLA) v The Physical Planning and Development Authority,

sea, as the marginalisation oftentimes compounds the effect of climate on their heavy reliance on coastal and ocean resources. The IACtHR's clarification of the law can contribute substantially to the understanding of this fundamental rights to livelihoods, established spiritual and cultural practices beyond the Americas, which given the global distribution of SIDS, can be instructive to the ICJ's Opinion in the providing internationally guiding principles for SIDS and other States.

4. PULLING IT ALL TOGETHER? WHAT ROLE IS THERE FOR THE INTERNATIONAL COURT OF JUSTICE'S OPINION IN UNDERSCORING STATE OBLIGATIONS TO VULNERABLE STATES & PEOPLES?

SIDs have long set their sights in the ICJ as a forum to seek guidance on State responsibility for the vexing challenge of climate change, and to hold accountable the States most responsible for the climate dilemna. Already in 2002, the Pacific island State of Tuvalu, an archipelago comprising three reef islands and six atolls, had lost three of its uninhabited islands[279] to sea level rise, and

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Singapore Heng Sheng Pty Grenada Ltd, The Hartman Group Ltd, and Range Developments Grenada Ltd, October 2 – 3, 2024.

279 The islands of Tebua Tarawa and Abanuea. For a present day, ongoing example, see Federal Court of Australia, Pabai Pabai & Anor v Commonwealth of Australia, VID622/**2021**, (pending).Available at: https://www.fedcourt.gov.au/services/access-to-files-and-transcripts/online-files/pabai-v-australia. The case wasbrought by two Torres Strait Island elders becaue " … large parts of islands could be uninhabitable by 2050 if urgent action is not taken on the climate crisis …" See Reinecke, Isabelle (2023, 8 October). "'A Court among the Coconut Palms: When Justice Came to Visit the Torres Strait." *The Guardian*. Available at: https://www.theguardian.com/environment/2023/oct/09/climate-change-class-action-world-first-australia-torres-strait-boigu-island; Australian Associated Press (2024, 29 April). "'My country would disappear': climate crisis could force Torres Strait Islanders from homes within 30 years." *The Guardian*. Available at: https://www.

faced the threat of becoming the first populated island to disappear into the murky depths of the Pacific.[280] Frustrated with the refusal of The United States (U.S.), Australia and other industralised nations to sign the Kyoto Protocol,[281] the Government of Tuvalu proposed to bring a case in the contentious jurisdiction, against the U.S. in particular.[282] While the case never materialised, by 2011, Tuvalu's sister Pacific SIDS Palau, along with the Marshall Islands, announced the intention to call on the U.N. General Assembly to request an advisory opinion from the ICJ.[283] However, like the previous attempt by Tuvalu, these initiatives encountered various forms of resistance from major emitting countries, leading to the shelving of these proposals.[284] Despite this near twenty year delay, it was the third attempt by yet another Pacific SIDS, Vanuatu,

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theguardian.com/australia-news/2024/apr/29/torres-strait-island-elders-climate-change-class-action.

280 Jacobs, Rebecca Elizabeth (2005) "Treading Deep Waters: Substantive Law Issues in Tuvalu's Threat to Sue the United States in the International Court of Justice." *Pacific. Rim Law & Policy Journal* (14), p. 104.

281 Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 2303 U.N.T.S. 162.

282 Jacobs, Rebecca Elizabeth (2005) "Treading Deep Waters: Substantive Law Issues in Tuvalu's Threat to Sue the United States in the International Court of Justice." *Pacific. Rim Law & Policy Journal* (14), pp. 104 - 105.

283 United Nations (2011, 22 September). *Palau Seeks UN World Court Opinion on Damage Caused by Greenhouse Gases.* Available at: https://news.un.org/en/story/2011/09/388202.

284 Peel, Jacqueline and Nay, Zoe (2023, 3 April). "The UN is Asking the International Court of Justice for Its Opinion on States' Climate Obligations. What Does This Mean?" *The Conversation.* Available at: https://theconversation.com/the-un-is-asking-the-international-court-of-justice-for-its-opinion-on-states-climate-obligations-what-does-this-mean-202943; Wewerinke-Singh, Margaretha, Garg, Ayan and Hartmann, Jacques (2023, 30 November). *The Advisory Proceedings on Climate Change before the International Court of* Justice. In: Advisory Opinions on Climate Change: Leading from the Bench? *Questions of International Law.* Available at: https://www.qil-qdi.org/the-advisory-

that resulted in a core group of sixteen States tabling a Draft Resolution to the U.N. General Assembly in December 2022.[285] Under Vanuatu's leadership,[286] this Resolution[287] would eventually snowball into the unprecedented decision in March 29, 2023 by the U.N. General Assembly to refer to the ICJ questions aimed at clarifying the rights and obligations of states under international law in relation to the adverse effects of climate change.

Perhaps the critical ingredient this third time in addition to determination on the part of SIDS, is that the effort was supported by the yeoman service of twenty-seven law students, come youth activists, from The University of the South Pacific (USP). In 2019 these students formed the Pacific Island Students Fighting Climate Change (PISFCC),[288] and worked with the Vanuatu government in the campaign to the ICJ. Their influence is evidenced in the mention of "present and future generations" *twice* in the questions posed to the ICJ:

> "Having particular regard to the Charter of the United Nations, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights,

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proceedings-on-climate-change-before-the-international-court-of-justice/

285 Wilkinson, Emily, Bishop, Mark and Sánchez Castillo-Winckels (2022, 4 November). "Why a Chain of Tiny Pacific Islands Wants an International Court Opinion on Responsibility for the Climate Crisis" *The* Conversation. Available at: https://theconversation.com/why-a-chain-of-tiny-pacific-islands-wants-an-international-court-opinion-on-responsibility-for-the-climate-crisis-193595

286 United Nations (2023, 29 March). *General Assembly Adopts Resolution Requesting International Court of Justice Provide Advisory Opinion on States' Obligations Concerning Climate Change.* Available at: https://press.un.org/en/2023/ga12497.doc.htm

287 U.N. General Assembly (2023). *Request for an Advisory Opinion of the International Court of Justice on the Obligations of States in respect of climate change.* Resolution A/77/L.58 of March 1, 2023. Available at: https://documents.un.org/doc/undoc/ltd/n23/063/82/pdf/n2306382.pdf

288 Pacific Islands Students Fighting Climate Change. Available at: https://www.pisfcc.org/

> the United Nations Framework Convention on Climate Change, the Paris Agreement, the United Nations Convention on the Law of the Sea, the duty of due diligence, the rights recognized in the Universal Declaration of Human Rights, the principle of prevention of significant harm to the environment and the duty to protect and preserve the marine environment,

(a) What are the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for present and future generations?

(b) What are the legal consequences under these obligations for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment, with respect to:

(i) States, including, in particular, small island developing States, which due to their geographical circumstances and level of development, are injured or specially affected by or are particularly vulnerable to the adverse effects of climate change?

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

As with the ITLOS Opinion, this Request was yet another historic first, as it was co-sponsored by one hundred and five States, and it was the first occasion that the General Assembly remitted an advisory opinion to the ICJ with unanimous State

support.[289] As the recent communication[290] from the Court illustrates, the perseverance on the part of the Pacific SIDS was well worth the wait, since as the opinion has attracted one hundred and ten Statements, from ninety-eight from States and twelve organisations to be tendered at the Oral Hearings in December 2024. A further four States and one organisation have submitted Statements but will not participate in the oral phase. The distribution of these Statements is unsurprisingly skewed to the Global South, including SIDS: Africa (17), Asia Pacific (33), the Americas (24), and Europe (14), (including a joint Statement from 5 Nordic States). The occasion also marked the first time many Global States appeared before the ICJ, illustrating another new chapter in global climate affairs.

From the outset, it is patent, that unlike the Request to ITLOS, the ICJ is at the very minimum tasked with examining the links between climate change, international human rights law, international children's rights law, international environmental law and the law of the sea. This will almost certainly take the Court out of its conservative comfort zone, as it has not had many cases – advisory or contentious – of this nature on its docket. While the Court has significant experience with the law of the sea, this has mainly been with respect to fisheries issues,[291] maritime

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289 Peel, Jacqueline and Nay, Zoe (2023, 3 April). "The UN is Asking the International Court of Justice for Its Opinion on States' Climate Obligations. What Does This Mean?" *The Conversation*. Available at: https://theconversation.com/the-un-is-asking-the-international-court-of-justice-for-its-opinion-on-states-climate-obligations-what-does-this-mean-202943

290 International Court of Justice (2024, 8 November). Obligations of States in respect of Climate Change (Request for Advisory Opinion) - Public hearings to be held from Monday 2 to Friday 13 December 2024. Available at: https://www.icj-cij.org/sites/default/files/case-related/187/187-20241108-pre-01-00-en.pdf

291 See for example, International Court of Justice, Fisheries Jurisdiction cases (Federal Republic of Germany v. Iceland), August 17, 1972 and February 2, 1973. Available at : https://www.icj-cij.org/case/56;

delimitation[292] and competing maritime claims between States.[293] Its experience with specifically environmental issues is sparsem and is largely confined to the issue of whaling,[294] atmospheric pollution,[295] transboundary pollution of watercourses,[296] and land degradation.[297]

International Court of Justice, Fisheries Jurisdiction (United Kingdom v. Iceland), February 2, 1973 and July 25, 1974. Available at: https://www.icj-cij.org/case/55 ; Fisheries (United Kingdom v. Norway), December 18, 1951. Available at: https://www.icj-cij.org/case/5.

292 See for example, International Court of Justice, North Sea Continental Shelf cases (Federal Republic of Germany/Netherlands), February 20, 1969. Available athttps://www.icj-cij.org/case/52; International Court of Justice, North Sea Continental Shelf cases (Federal Republic of Germany/Denmark), February 20, 1969. Available at: https://www.icj-cij.org/case/51.

293 See for example, International Court of Justice, Minquiers and Ecrehos (France/United Kingdom), November 17, 1953. Available at: https://www.icj-cij.org/case/17; International Court of Justice, Sovereignty over the Sapodilla Cayes/Cayos Zapotillos (Belize v. Honduras), pending. Available at: https://www.icj-cij.org/case/185; International Court of Justice, Arbitral Award of 3 October 1899 (Guyana v. Venezuela), pending. Available at: https://www.icj-cij.org/case/171.

294 International Court of Justice, Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), March 31, 2014. Available at: https://www.icj-cij.org/case/148

295 International Court of Justice, Aerial Herbicide Spraying (Ecuador v. Colombia), Case discontinued September 13, 2013. Available at: https://www.icj-cij.org/case/138; International Court of Justice, Nuclear Tests Cases (Australia v. France), December 20, 1974. Available at: https://www.icj-cij.org/case/58 and International Court of Justice, Nuclear Tests Cases (New Zealand v. France), December 20, 1974. Available at: https://www.icj-cij.org/case/59.

296 International Court of Justice, Pulp Mills on the River Uruguay (Argentina v. Uruguay), April 20, 2010. Available at: https://www.icj-cij.org/case/135.

297 International Court of Justice, Certain Phosphate Lands in Nauru (Nauru v. Australia), June 26, 1992. Available at: https://www.icj-cij.org/case/80 .

Nevertheless, in 1993, pursuant to its Statute,[298]a Special Chamber was established to deal specifically with environmental matters, but was disbanded as it had never been used. However, this Advisory Opinion could in time put an end to this drought and require the ICJ to reestablish the Chamber. That being said, the expectations of the body considered to be the world's premier court are high, as their remit, unlike the ITLOS and IACtHR, is not bridled to law of the sea or human rights issues. The Court's jurisdiction extends to "any question of international law"[299] including the "the interpretation of … treat[ies][300] and "the existence of any fact which, if established, would constitute a breach of an international obligation."[301] As such, if it chooses, the Court can blaze its own trail, while building on the jurisprudence of both ITLOS and the IACtHR Opinions (this latter opinion is likely to be published before the ICJ's), as well as the jurisprudence of other international[302] and national courts.[303]

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298 Statute of the International Court of Justice (ICJ), 33 UNTS 993, Article 26(1) of the ICJ Statute

299 Statute of the International Court of Justice (ICJ), 33 UNTS 993, Article 36 (2) (b)

300 Statute of the International Court of Justice (ICJ), 33 UNTS 993, Article 36 (2) (a)

301 Statute of the International Court of Justice (ICJ), 33 UNTS 993, Article 36 (2) (c)

302 For example, the European Court of Human Rights and the African Court of Human and Peoples' Rights. See Suedi, Yusra and Fall, Marie (2024). "Climate Change Litigation before the African Human Rights System: Prospects and Pitfalls." *Journal of Human Rights Practice* 16 (1), pp. 146-159; Boshoff, Elsabé (2024). "The Prospects and Challenges of Litigating Climate Change Before African Regional Human Rights Bodies." *Climate Litigation and Justice in Africa* 125-152; Adelman, Sam (2021). "Climate change litigation in the African system." Available at: https://wrap.warwick.ac.uk/id/eprint/138917/7/WRAP-climate-change-litigation-African-system-Adelman-2021.pdf .

303 Statute of the International Court of Justice (ICJ), 33 UNTS 993, Art 38(1) (c) allows the Court to draw on "the general principles of law recognized by civilized nations". For a global snapshot, see Setzer Joanne and Higham Catherine (2024). *Global Trends in Climate Change*

As elucidated by Morgera et. al.,[304] a key role which the ICJ can play is the unifier of sorts by underscoring that international legal rules must be interpreted and applied in the context of "the entire legal system prevailing at the time of the interpretation."[305] This fundamental principle of treaty interpretation[306] is understood as systemic integration[307] which includes the concept of mutual supportiveness. This has been characterised as an interpretative

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Litigation: 2024 Snapshot. (London: Grantham Research Institute on Climate Change and the Environment, London School of Economics and Political Science). Available online: https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2024/06/Global-trends-in-climate-change-litigation-2024-snapshot.pdf.

304 Morgera, Elisa et. al (2024, 22 March). Legal Note by the One Ocean Hub, International Court of Justice Obligations of States in Respect of Climate Change (Request for Advisory Opinion), Paras 5-4. Available at: https://oneoceanhub.org/wp-content/uploads/2024/03/One-Ocean-Hub-Submission-ICJ-Advisory-Opinion-on-Climate-Change-25.03.24.pdf;

305 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, at 16, para. 53.

306 Article 31(3)(c) Vienna Convention on the Law of Treaties [VCLT], (adopted in Vienna on 23 May 1969 and entered into force on 27 January 1980), 1155 United Nations Treaty Series, at 331.

307 See for example, McLachlan, Campbel (2008). "The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention on the Law of Treaties" International Comparative Law Quarterly (4), p.279. The principle of systemic integration was reiterated by the ICJ and by other international courts or dispute settlement bodies on several occasions: amongst many, see Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America), Judgment, ICJ Reports 2003, at 161, para. 41; European Court of Human Rights (ECtHR), Loizidou v Turkey (Judgement on the Merits) App. No. 15318/89, December, 18 1996, para 43; United States—Import Prohibition of Certain Shrimp and Shrimp Products, October, 12 1998, (WTO Appellate Body) WT/DS58/AB/R paras 130-134; China—Measures related to the Exportation of Various Raw Materials, July 5, 2011, (WTO Panel) WT/DS394/R WT/DS395/R WT/DS398/R, para 7.364.

tool[308] which is aims to prevent and solve normative conflicts,[309] or foster and strengthen synergies amongst different regimes of international law.[310] Given the complex and compounding nature of climate change outlined in the Introduction of this Chapter, it is arguable that a systemic interpretation of the rules of international law can more effectively respond to the interlinked triple planetary crises,[311] by helping fulfil the core objects and purposes of all relevant international regimes.[312] For a start, reference to "climate system and other parts of the environment" in the UNGA Resolution requesting an Advisory Opinion from the Court appears to invite an exploration of the connections between various ecosystems as done to a large extent by the IPCC,[313] and

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308 Pavoni, Riccardo (2010). "Mutual Supportiveness as a Principle of Interpretation and Law-Making: A Watershed for the 'WTO-and-Competing-Regimes' Debate?" *European Journal of International Law* (21) 649.

309 Matz-Luck, Nele (2006). "Harmonization, Systemic Integration, and Mutual Supportiveness as Conflict-Solution Techniques: Different Modes of Interpretation as a Challenge to Negative Effects of Fragmentation" Finnish Yearbook of International Law (17), p. 43.

310 See Dupuy, Pierre-Marie and Viñuales, Jorge E. (2015). *International Environmental Law.* Cambridge: Cambridge University Press, 2 nd Edition. p. 393, citing Pavoni, Riccardo (2010). "Mutual Supportiveness as a Principle of Interpretation and Law-Making: A Watershed for the 'WTO-and-Competing-Regimes' Debate?" *European Journal of International Law* (21), pp. 654-5.

311 Young, Margaret A. (ed.) (2011). *Saving Fish Trading Fish: The Interaction between Regimes in International Law.* Cambridge: Cambridge University Press, pp. 3-5.

312 See for example International Law Commission (2006). *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UN Doc A/CN.4/L.682, April 13, 2006, para. 412. Available at: https://documents.un.org/doc/undoc/ltd/g06/610/77/pdf/g0661077.pdf.

313 For example, Intergovernmental Panel on Climate Change (IPCC), (2022). *The Ocean and Cryosphere in a Changing Climate: Special Report of the Intergovernmental Panel on Climate Change*, Cambridge, U.K.: Cambridge University Press. pp. 450–455. Available at: https://www.ipcc.ch/srocc/

also to engage in an identification of the relevant rules and that States are left with a significant degree of discretion as to the means of implementation.[314] As set out in the ITLOS Opinion, this will include the law of the sea, international fisheries law, international climate law, international biodiversity law, and in terms of the IACtHR's Opinion, international human rights law, international children's rights law, business and human rights, international investment law. The IACtHR's can also contribute to the international environmental law on issues such as the ridge to reef approach, desertification and land degradation. Given current and projected experiences as a result of climate change, this systematic approach will be both favourable and critical for SIDS.[315]

Two more important areas encompassed in the Questions asked to the ICJ will be of fundamental importance to SIDS and vulnerable peoples. The first, is the "moral imperative" to address the impacts of loss and damage from the adverse effects of climate change on equity, and on the full enjoyment of human rights.[316] Loss and damage has a tortured history within the UNFCCC-

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download/; Masson-Delmotte, V. (Ed.). *Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change.* Cambridge, U.K. and New York, NY, USA: Cambridge University Press, p. 202. Available at: https://www.ipcc.ch/report/sixth-assessment-report-working-group-i/

314 Morgera, Elisa and Lennan, Morgera (2024). "Ensuring Mutual Supportiveness of the Paris Agreement with other Multilateral Environmental Agreements: A Focus on Ocean-Based Climate Action." In Zahar, Alexander (ed.), *Research Handbook on the Law of the Paris Agreement.* Cheltenham: Edward Elgar, p. 362.

315 Collins, Matthew, et al. (2024). "Emerging Signals of Climate Change from the Euator to the Poles: New Insights into a Warming World." *Frontiers in Science* (2).

316 See United Nations Secretary General (2024). *Analytical Study on the Impact of Loss and Damage from the Adverse Effects of Climate Change on the Full Enjoyment of Human Rights, Exploring Equity-Based Approaches and Solutions to Addressing the Same.* A/HRC/57/30, Report of the Secretary-General , Advance Edited Version of August 28, 2024. Available at:

framework, as despite thirty years of determined lobbying by SIDS which finally resulted in an Agreement at COP27[317] there is no universally adopted definition. Generally understood as the negative impacts of climate change that occur despite, or in the absence of, mitigation and adaptation, SIDS have already suffered loss & damage and future losses and damages will appear with the increase in global warming.[318] While Parties have agreed on the establishment of the Fund, there remain many grey areas with respect to loss and damage, including the need to integrate human rights principles into the trusteeship and administration of the Fund.[319] Additionally, as underscored by Working Group

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https://www.ohchr.org/en/documents/thematic-reports/ahrc5730-analytical-study-impact-loss-and-damage-adverse-effects-climate

317 UNFCCC (2022). Decision -/CP.27 -/CMA.4, Funding arrangements for responding to loss and damage associated with the adverse effects of climate change, including a focus on addressing loss and damage1. Available at: https://unfccc.int/sites/default/files/resource/cma4_auv_8f.pdf. See, UNFCCC (2022, 20 November). COP27 Reaches Breakthrough Agreement on New "Loss and Damage" Fund for Vulnerable Countries. Available at: https://unfccc.int/news/cop27-reaches-breakthrough-agreement-on-new-loss-and-damage-fund-for-vulnerable-countries; Harvey, Fiona, et. al. (2022, 20 November). "Cop27 Agrees Historic 'Loss and Damage' Fund for Climate Impact in Developing Countries" *The Guardian*. Available at: https://www.theguardian.com/environment/2022/nov/20/cop27-agrees-to-historic-loss-and-damage-fund-to-compensate-developing-countries-for-climate-impacts; Harvey, Fiona and Lakhani, Nina (2022, 19 November). "Rich nations relent on climate aid to poor at Cop27" *The Guardian*. Available at: https://www.theguardian.com/environment/2022/nov/19/cop27-divisions-and-splits-threaten-deal-to-tackle-climate-crisis

318 IPCC (2018). *Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty*. Cambridge, UK and New York, NY, USA: Cambridge University Press. Available at: https://www.ipcc.ch/site/assets/uploads/sites/2/2022/06/SR15_Full_Report_HR.pdf.

319 U.N. General Assembly (2024). *Right to Development, Climate Justice: Loss and Damage*. Resolution A/79/168 of July 17, 2024. Available at: https://

II to the IPCC's Sixth Assessment Report, loss & damage has a disproportionate impact on SIDS. This extends to the most vulnerable groups in their populations including Indigenous and Afro-descendant peoples, people of low socio-economic status, migrants, the elderly, women and children.[320] In July 2024, the Special Rapporteur on the Right to Development highlighted in his Report, that among other things, climate change-related loss & damage, undermines the right to development of individuals and communities, making it a fundamental part of the remediation pillar of the climate justice framework.[321] The "rainbow response"[322] proposed by the Special Rapporteur to address these disparities, touches and concerns climate finance other than that for mitigation, adaptation, capacity building and technology transfer. This was not comprehensively addressed in the ITLOS Opinion, and it remains to be seen if, or the extent to which the IACtHR is prepared to pronounce on the topic.

Additionally, as Gusman posits, the advisory opinion can provide "an unprecedented opportunity for international human rights law to play a pivotal role in the adjudication of claims related to non-economic loss and damage as well as ensure gender equality as a mainstay in climate justice."[323] In this regard, the ICJ can build upon the findings of the *Torres Islanders* case in regard to the loss of social, economic and environmental rights related to the ocean, including customary and traditional knowledge, the right

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documents.un.org/doc/undoc/gen/n24/211/94/pdf/n2421194.pdf .

320 https://www.ipcc.ch/report/sixth-assessment-report-working-group-ii/

321 U.N. General Assembly (2024). *Right to Development, Climate Justice: Loss and Damage*. Resolution A/79/168 of July 17, 2024. Available at: https://documents.un.org/doc/undoc/gen/n24/211/94/pdf/n2421194.pdf .

322 U.N. General Assembly (2024). *Right to Development, Climate Justice: Loss and Damage*. Resolution A/79/168 of July 17, 2024, p. 18. Available at: https://documents.un.org/doc/undoc/gen/n24/211/94/pdf/n2421194.pdf .

323 Gusman, Johanna L. (2024). "The Climate Crisis And Cultural Loss: Addressing Non-Economic." Geography (2nd ed, Elsevier, Amsterdam, 2024) p. 197.

to culture, displacement and the right to self-determination, the right to food, nutrition and culturally appropriate food, the right to play and the right to education.[324] Secondly, the links between loss and damage and inter-generational equity, are also paired with intra-generational equity for children and youth across the world. The dimension of intra-generational equity both from the perspective of those alive today, and within future generations[325] is fundamental to many contemporary environmental concerns about common pool resources.[326] This includes those most

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[324] Strand, Mia, et al. (2023). "Protecting Children's Rights to Development and Culture by Re-Imagining "Ocean Literacies"." *The International Journal of Children's Rights* 31 (4), pp 941-975

[325] Kverndokk, Snorre, and Adam Rose (2008). "Equity and Justice in Global Warming Policy." SSRN, p. 170.

[326] Lancaster Salmon, Alana Malinde S.N. , et. al. (2022). "De La Pesca al Cultivo del Medio Marino: El Caso Exitoso de la Gestión Comunitaria en Mayreau, Cayos de Tobago y San Vincente y Las Granadinas.' In: Saavedra-Díaz, Lina and María Claudia Díazgranados, (Eds.) *Comunidades Con Voz : El Futuro de la Pesca Artesanal en Latinoamérica y el Caribe* (Santa Martha, Columbia : Universidad del Magdalena), pp. 1 – 33, Available at: https://www.conservation.org.co/media/Comunidades-con-Voz.pdf; Xu, Jiuping, et al. (2019). "Intergenerational Equity Based Optimal Water Allocation for Sustainable Development: A Case Study on the Upper Reaches of Minjiang River, China." *Journal of Hydrology* (568), pp. 835-848; Botto-Barrios, Darlin and Saavedra-Díaz, Lina M. (2020). "Assessment of Ostrom's Social-Ecological System Framework for the Co-management of Small-Scale Marine Fisheries in Colombia: From Local Fishers' Perspectives." *Ecology & Society* 25 (1); Cox, Michael, Arnold, Gwen and Villamayor Tomás, Sergio (2010). "A Review of Design Principles for Community-Based Natural Resource Management." *Ecology and Society* 15 (4). Ostrom, Elinor (1990). *Governing the Commons: The Evolution of Institutions for Collective Action.* Cambridge: Cambridge University Press; Ostrom, Elinor (1992). "Community and the Endogenous Solution of Commons Problems." *Journal of Theoretical Politics* 4 (3), pp. 343-351; Ostrom, Elinor (2002). "Reformulating the Commons." *Ambiente & sociedade*, pp. 5-25.

environmentally vulnerable[327] from climate change[328] and the impacts at the ocean-climate nexus. Intra-generational equity has been a key element of the agenda of the Global South under the rubric of the new international order since the 1970s[329] and encompasses an interstate dimension, as highlighted in *Certain Phosphate Lands in Nauru*.[330] The argument by Nauru – a SIDS – for compensation from the U.K., because of the despoilation and devastation of the environment for lucrative phosphate mining that rendered 75% of the island uninhabitable,[331] mirrors the arguments which are now being raised by SIDS in regard to loss and damage from climate change and its impacts at the ocean-climate nexus.[332]

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327 Shelton, Dinah (2010). "Intergenerational Equity." In: Wolfrum, Rüdiger and Kojima, Chie. *Solidarity: A Structural Principle of International Law*. Berlin, Springer Heidelberg, pp. 123-168; Vojnovic, Igor (1995). "Intergenerational and Intragenerational Equity Requirements for Sustainability" *Environmental Conservation* 22 (3), pp. 223-228.

328 Rayner, Steve and Malone, Elizabeth L (2001). "Climate Change, Poverty, and Intragenerational Equity: The National Level." *International Journal of Global Environmental Issues* 11 (2), pp. 175-202.

329 Maggio, Gregory F (1996). "Inter/intra-generational Equity: Current Applications Under International Law for Promoting The Sustainable Development of Natural Resources." *Buff. Environmental Law Journal* (4), pp. 161; Chowdhury, Subrata Roy (1992). "Intergenerational Equity: Substratum of the Right to Sustainable Development." In: Chowdhury, Subrata Roy , Denters, Erik M.G. and de Waart, Paul J.I.M. *The Right to Development in International Law*. Amsterdam: Brill Nijhoff, pp. 233-257.

330 International Court of Justice, Certain Phosphate Lands in Nauru (Nauru v. Australia), June 26, 1992. Available at: https://www.icj-cij.org/case/80 .

331 Weeramantry, Christopher G. (1992) *Nauru: Environmental Damage under International Trusteeship*, Melbourne, New York: Oxford University Press.

332 Benjamin, Lisa and Thomas, Adele (2023). "The Unvirtuous Cycle of Loss And Damage: Addressing Systemic Impacts of Climate Change in Small Islands from a Vulnerability Perspective." *Review of European, Comparative & International Environmental Law* 32 (3), pp. 390-402.; Thomas, Adelle and Benjamin, Lisa (2023). "Climate Justice and Loss

Inter-generational equity, on the other hand, in particular the rights of future generations, was addressed in the *Torres Islanders* case. Courts, and indeed many Western legal regimes have been reluctant to recognise the rights of future generations,[333] and indeed there has often been fierce resistance to considering the rights of children as independent litigants.[334] While General Comment 26, as well as its early endorsement by the IACtHR[335] and Panama's Supreme Court,[336] recognise to importance of past, present and future generations, its position in international law is therefore less certain. However, as stated previously, in 2023, the non-binding Maastricht Principles on The Human Rights of Future Generations were adopted as a means of correcting the neglect of human rights law with respect to future generations. [337] Globally, this is

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and Damage: Hurricane Dorian, Haitians and Human Rights." *The Geographical Journal* 189 (4), pp. 584-592.; Benjamin, Lisa, Thomas, Adelle and Haynes, Rueanna (2018). "An 'Islands' COP'? Loss and Damage at CoP23." *Review of European, Comparative & International Environmental Law* 27 (3), pp. 332-340; Thomas, Adelle, and Benjamin, Lisa (2018). "Management of Loss and Damage in Small Island Developing States: Implications for a 1.5 C or Warmer World." *Regional Environmental Change* 18 (8), pp. 2369-2378; Pekkarinen, Veera, Toussaint, Patrick and van Asselt, Harro (2019). "Loss and Damage After Paris: Moving Beyond Rhetoric." *CCLR* (13), p. 31.

333 Kotzé, Louis J (2023). "The Right to a Healthy Environment and Law's Hidden Subjects. *AJIL Unbound* 117, pp. 194-198.

334 Reference Aditi's Chapter in this Book

335 Inter-American Court of Human Rights, Case of La Oroya Community v Peru, November 27, 2023, paras 14, 243, 9

336 Supreme Court of Panama, Callejas v. Law No 406, November 27, 2023, pp. 186 – 187. ;.Available at: https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2023/20231127_22969_judgment.pdf

337 See Humphreys, Stephen (2022). Against Future Generations." *European Journal of International Law* 33 (4), pp. 1061-1092; Wewerinke-Singh, Margaretha, Ayan Garg, and Shubhangi Agarwalla (2023). "In Defence of Future Generations: A Reply to Stephen Humphreys." *European Journal of International Law* 34 (3), pp. 651-668; Lawrence, Peter (2023). "International Law Must Respond to the Reality of Future Generations:

significant, as 16 % of global population are considered children and youth, a figure which is projected to increase by another 7 % by 2030.[338] These figures make the involvement of children and youth in global policy and decision making a *sine qua non*, and with the majority of these youth are located in the Global South including SIDS, [339] a pronouncement on inter-generational equity by the ICJ will be expected. The ICJ has ample scientific and statistical evidence, supported by calls to global action such as the recent Pact for the Future[340] to ensure that the type of advocacy illustrated by Pacific youth in supporting this journey of the advisory opinion to the Court, be given clarity and scope which can guide States in their obligations to both present and future generations.

A Reply to Stephen Humphreys." *European Journal of International Law* 34 (3), pp. 669-682; Humphreys, Stephen (2023). "Taking Future Generations Seriously: A Rejoinder to Margaretha Wewerinke-Singh, Ayan Garg and Shubhangi Agarwalla, and Peter Lawrence." *European Journal of International Law* 34 (3), pp. 683-696.

338 United Nations (2020). *World Youth Report: Youth Social Entrepreneurship and the 2023 Agenda*. New York: U.N. Department of Economic and Social Affairs. Available at: https://www.un.org/development/desa/youth/wp-content/uploads/sites/21/2020/07/2020-World-Youth-Report-FULL-FINAL.pdf ; See United Nations (n.d.). International Youth Day 12 August. Available at: https://www.un.org/en/observances/youth-day#:~:text=Today%2C%20there%20are%201.2%20billion,cent%2C%20to%20nearly%201.3%20billion.

339 United Nations (2020). *World Youth Report: Youth Social Entrepreneurship and the 2023 Agenda*. New York: U.N. Department of Economic and Social Affairs, p. 40

340 United Nations (2024). *Pact for the Future, Global Digital Compact and Declaration on Future Generations*, Summit of the Future Outcome Documents. Available at: https://www.un.org/sites/un2.un.org/files/sotf-the-pact-for-the-future.pdf.

5. CONCLUSION

"We at the height are ready to decline.

There is a tide in the affairs of men
Which, taken at the flood, leads on to fortune;
Omitted, all the voyage of their life
Is bound in shallows and in miseries.
On such a full sea are we now afloat;
And we must take the current when it serves,
Or lose our ventures."

William Shakespeare, *Julius Caesar*, Act 4, Scene 2 (269–276)

These celebrated words from one of the Bard's most famous play serves as an allegory for the climate crisis, its impacts and the urgent need for new era of international climate policy. It also captures the potential of significance of the trilogy of advisory opinions analysed in this Chapter. As humankind teeters precipitously at the height of our decline, these historic, David and Goliath themed actions in the world's preeminent courts and tribunals are a tide, which for vulnerable States and peoples can be significant instruments in the toolbox aimed at reversing their prevailing fortunes within the climate (and multilateral) regime. As such, ITLOS has afforded States with a sea full of possibilities on which there can be collective action to ensure we steer the 'ship' out of the shallows and into a sea of fortune. Within this context, omissions or missed opportunities will be fatal, binding us to the "shallows and … miseries." As Roland Holst states of the ITLOS advisory opinion, we must take the current as it serves.[341] I will add that an even greater potential, and urgent imperative lies with both the IACtHR and the ICJ, as their opinions have much to offer and will usher in a new era of international climate cooperation beyond what has been possible at the CoPs and

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[341] Roland Holst, Rozemarijn J (2023). "Taking the Current When It Serves: Prospects and Challenges for an ITLOS Advisory Opinion on Oceans and Climate Change." *Review of European, Comparative & International Environmental Law* 32 (2), p. 217.

existing multilateral processes. If missed, we will lose our ventures and condemn our next generation to a living hell on Earth.

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Use of Advisory Opinions In environmental protection: An Analysis of Africa's engagement with the ICJ AO process

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1. INTRODUCTION TO THE INTERNATIONAL COURT OF JUSTICE (ICJ)

It is clear that the climate crisis has resulted in severe and novel challenges, destroying lives as well as livelihoods in its wake.[3] International law is an arena that has not been spared, with lawyers,

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2 Legal Teaching Assistant at the University of the Witwatersrand.

3 IPCC (2022). "Poverty, Livelihoods and Sustainable Development. In: Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change". Birkmann, J., E. Liwenga, R. Pandey, E. Boyd, R. Djalante, F. Gemenne, W. Leal Filho, P.F. Pinho, L. Stringer, and D.Wrathall, H.-O. Pörtner, D.C. Roberts, M. Tignor, E.S. Poloczanska, K. Mintenbeck, A. Alegría, M. Craig, S. Langsdorf, S. Löschke, V. Möller, A. Okem, B. Rama (eds.)]. Available at https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_Chapter08.pdf Cambridge University Press, Cambridge, UK and New York, NY, USA, pp. 1171–1274, at 1180.

academics, and judicial officers globally debating the role and the usefulness of the law in solving this crisis.[4] There is strong interest in the role of local and international courts, not only in holding perpetrators of environmental and climate injustice accountable,[5] but also in developing the law in a manner that protects our planet and gives credence to the human, environmental, and socio-economic rights of all global citizens.[6] These efforts are highlighted primarily through a recognition of the plethora of judicial decisions and cases stemming from a global wave of climate litigation.[7] This is in addition to the increased number of international conventions and domestic statutes that highlight principles related to environmental protection, the mitigation of biodiversity loss, the development of a just energy transition, and the protection of indigenous communities.[8]

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4 Lopez-Claros, Augusto; Dahl Arthur L. and Groff (s), Maja (2020) "Strengthening the International Rule of Law." In: *Global Governance and the Emergence of Global Institutions for the 21st Century,* UK: Cambridge University Press. pp. 208 - 235.

5 Murcott, Melanie (2015). "The Role Of Environmental Justice In Socio-Economic Rights Litigation" South African Law Journal (132) , No. 4, pp875 – 908 at 878. Avaliable at: Https://Journals.Co.Za/Doi/Abs/10.10520/Ejc-61531f49e.

6 *Ibid.*

7 Over 900 cases have been recorded by the Sabin Centre in the field of climate litigation globally, see Sabin Centre for Climate Change Law, *The Global Climate Change Litigation Database.* Available at https://climatecasechart.com/.

8 Kyoto Protocol to the United Nations Framework Convention on Climate Change, adopted Dec. 10, 1997, entered into force Feb. 16, 2005, 2303 U.N.T.S. 162. Available at: https://unfccc.int/resource/docs/convkp/kpeng.pdf; Paris Agreement to the United Nations Framework Convention on Climate Change, adopted Dec. 12, 2015, entered into force Nov. 4, 2016, T.I.A.S. No. 16-1104. Available at: https://unfccc.int/files/essential_background/background_publications_htmlpdf/application/pdf/conveng.pdf ;.United Nations Convention on the Law of the Sea (UNCLOS), 1982. Adopted on 10 December 1982. Available at: https://www.un.org/depts/los/convention_agreements/convention_overview_convention.htm;Basel Convention on the

A major breakthrough in environmental jurisprudence has been achieved through the UN General Assembly's (UNGA) recent resolution requesting the International Court of Justice (ICJ) to hand down an advisory opinion on climate change.[9] The resolution has been hailed as an opportunity to gain legal certainty regarding state obligations in relation to climate change.[10] It has placed the issues of loss and damage, possibilities for mitigation and adaptation, intergenerational equity, and a just energy transition on the stage of an international forum.[11] Considering various relevant legal conventions and principles, the court has been asked and is required to make the following determinations:

> "(a) What are the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for present and future generations?
>
> (b) What are the legal consequences under these obligations for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment, with respect to: (i) States, including, in particular, small island developing States, which due to their geographical circumstances and level of development, are injured or especially affected by or are particularly vulnerable to the adverse effects of climate change? (ii) Peoples and individuals of the present and future generations affected by the adverse effects of climate change?"[12]

Control of Transboundary Movements of Hazardous Wastes and Their Disposal, 1989. Adopted on 22 March 1989. Available at: https://www.basel.int

9 United Nations General Assembly (2023). Resolution Resolution A/77/L.58. Available at: https://www.icj-cij.org/sites/default/files/case-related/187/187-20230630-req-03-00-en.pdf.

10 UN environment Programme, (2023). *UN resolution billed as a turning point in climate justice.* Available at: https://www.unep.org/news-and-stories/story/un-resolution-billed-turning-point-climate-justice .

11 *Ibid.*

12 *Ibid.*

Several states as well as international organizations, organs, and bodies made applications to the court to be given an opportunity to make submissions before it in relation to the advisory opinion on the obligations of states in respect of climate change. On September 20th, 2023, the International Court of Justice empowered the African Union, Caribbean and Pacific States (OACPs), the Organization of the Petroleum Exporting Countries (OPEC), and the Melanesian Spearhead Group and the Forum Fisheries Agency, at their request, to tender their submissions to the ICJ.[13]What is alarming is that by giving organisations such as OPEC a platform to make submissions, the court is inviting arguments geared towards buttressing the fossil fuel infrastructure that is significantly contributing to climate change impacts. Such organisations have strong incentives to ensure that the oil producing nations they represent maintain their profit-making structures.[14]

This places the interests of such organisations in stark non-compliance with the bona fide spirit and purpose of the opinion process, with its aim to tackle climate change impacts. This state of affairs is all the more concerning given the low representation of African states that made submissions to the court.[15]

At this point, the legal proceedings are still underway, however this chapter seeks to outline the use of Advisory Opinions in

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13 International Court of Justice. *The Court authorizes the Organisation of African, Caribbean and Pacific States, the Melanesian Spearhead Group and the Forum Fisheries Agency to participate in the proceedings.* Available at: https://www.icj-cij.org/node/203121.

14 Elwerfelli, Ali, Benhin, James (2018). " Oil a Blessing or Curse: A Comparative Assessment of Nigeria, Norway and the United Arab Emirates." *Theoretical Economics Letters* (8), p. 1136-1160 at 1138. Available at : https://www.scirp.org/pdf/TEL_2018041915213041.pdf .

15 Olivia Rumble (2024). *The ICJ Climate Liability Opinion: Why Are African Countries So Quiet?*. Available at https://africanclimatewire.org/2024/04/the-icj-climate-liability-opinion-why-are-african-countries-so-quiet/

environmental protection and to examine Africa's engagement with these types of processes generally, particularly in the context of the limited number of African states that made submissions in relation to the above resolution.[16] The chapter begins with a background of Africa's environmental governance and legal engagement from the context of international and regional law. It then discusses the makeup and processes of the ICJ, and the reasons why Africa should participate in such proceedings given its vulnerability to climate change, stressing the importance of future engagement in such processes.

2. AFRICA'S ENVIRONMENTAL GOVERNANCE AND LEGAL ENGAGEMENT

2.1. Overview of International Law and Regional Law

With the apparent escalation of the climate and environmental crisis, the role and significance of international and regional environmental laws has been placed under much scrutiny. This is in part owing to the leisurely nature of the international legal system's response to the environmental and climate predicament at hand.[17] Nonetheless, the gradual pace of this international response does not diminish the significance of advancements undertaken[18] through principles of international law, customary international law (CIL), regional conventions and international

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16 *Ibid.*

17 Harrison, James (2023) "Significant International Environmental Law Developments: 2022-2023" *Journal of Environmental Law* (35)[3] 468. https://doi.org/10.1093/jel/eqad028.

18 See Harrison, James (2023) "Significant International Environmental Law Developments: 2022-2023" *Journal of Environmental Law* (35)[3] 468. https://doi.org/10.1093/jel/eqad028

treaties; all which mould and influence environmental and climate state responsibilities including those of African States.[19]

2.1.1 Regional Law and African State Engagement

Commitment to environmental protection has been observed at a regional level by African states through multilateral treaties such as the Lusaka Agreement on Co-operative Enforcement Operations,[20] and the African Convention on the Conservation of Nature and Natural Resources (Maputo Convention).[21] Additionally, regional response to the environmental and climate crisis also manifests itself in the establishment of regional sustainable development programmes such as the New Partnership for Africa's Development (NEPAD). NEPAD aims to co-ordinate the Africa's growth and development.[22]

Furthermore, NEPAD established its Action Plan for Environment Protection Initiative, which specifically focuses on the fight against climate change in Africa by contextualising the problems associated with climate change within Africa through

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19 Bodansky, Daniel (1995) "Customary (And Not So Customary) International Environmental Law" *Indiana Journal of Global Legal Studies* (7)[3] p.106. https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1060&context=ijgls

20 Lusaka Agreement on Co-operative Enforcement Operations Directed at Illegal Trade in Wild Fauna and Flora, adopted on Sept. 8, 1994, entered into force on Dec. 10, 1996. Avaliable at https://lusakaagreement.org/wp-content/uploads/2013/12/LA-Final-Act-upd.pdf .

21 African Convention on the Conservation of Nature and Natural Resources, adopted July 11, 2003. Available at https://au.int/en/treaties/african-convention-conservation-nature-and-natural-resources .

22 New Partnership for Africa's Development Action Plan for the Environmental Initiative (2003) p.112. Available at: https://au.int/en/organs/nepad.

vulnerability evaluations and adaptation strategies.[23] The Maputo Convention is a binding regional convention on state parties and its main objectives are the enhancement of environmental protection, fostering sustainable use of resources, and the coordination of policies towards the achievement of its objectives.[24] The Convention accordingly imposes a fundamental obligation on state parties to not only adopt but also implement all necessary measures including preventative steps and the application of the precautionary principle towards the fulfilment of its objectives.[25] Through the imposition of such state responsibility, the Maputo Protocol essentially highlights and emphasises the 'due diligence obligations' owed by state parties to the Convention.[26] Approximately forty-five African states have signed the Maputo Convention, and some have made national strides towards its implementation through policy and legislation.

Arguably, South Africa has responded legislatively to the Maputo Convention through its enactment of the National Environmental Management Act (NEMA).[27] NEMA aims to provide for co-operative environmental governance and the development of frameworks which promote sustainable development.[28] Botswana's response to the Maputo Convention can be seen through its environmental policies and legislative frameworks. The Botswana Wildlife Conservation Policy (WCP) of 1986 aims to manage wildlife resources in a sustainable manner through commercial

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23 New Partnership for Africa's Development Action Plan for the Environmental Initiative (2003) p.112. Available at: https://au.int/en/organs/nepad.

24 African Convention on the Conservation of Nature and Natural Resources, Article II.

25 African Convention on the Conservation of Nature and Natural Resources, Article IV.

26 Strydom, Hennie (2015) "Introduction to regional environmental law of the African Union" In: Scholtz, Werner; Verschuuren, Jonathan. *Regional Environmental Law*", Edward Elgar Publishing, 33.

27 National Environment Management Act 107 of 1998.

28 National Environmental Management Act, 107 of 1998, preamble.

regulation.[29] Additionally, the Wildlife Conservation and National Parks Act of 1992 reinforces the sustainable management and utilisation of wildlife resources.

Section 39 of the WCNP Act provides for permits and licencing regulations on a variety of conditions such as for educational purposes with respect to the killing and hunting of wildlife animals.[30] This legislative step by the Botswana state fulfils the regional obligation under Art IX of the Maputo Convention which obliges states to "adopt legislation regulating all forms of taking, including hunting, capture and fishing and collection of whole or parts of plants"[31] and that the "conditions and procedures for the issue of such permits ought to be appropriately regulated."[32]

2.1.2. International Law and African State Engagement

International law is comprised of various sources including CIL as a general practice that is accepted as law, international treaties and conventions and general principles. As one of the four limitations on state sovereignty and non-interference, international treaties and conventions entail states voluntarily committing themselves to adherence to certain international

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29 Mulale.K and; Hambira, W.L (2015) "An overview of the policy and legislative framework for the management of rangelands in Botswana and implications for sustainable development." *WIT Transactions on Ecology and the Environment,* p.575. https://www.witpress.com/elibrary/wit-transactions-on-ecology-and-the-environment/102/17294

30 Section 39 of the Wildlife Conservation and National Parks Act, No. 28 of 1992, Laws of Botswana. Available at: https://botswanalaws.com/StatutesActpdf/1992Actpdf/WILDLIFE%20CONSERVATION%20AND%20NATIONAL%20PARKS%20ACT,%2028%20OF%201992.pdf .

31 African Convention on the Conservation of Nature and Natural Resources, Article IX 3(a).

32 African Convention on the Conservation of Nature and Natural Resources, Article IX 3(a).

obligations.[33] According to the Vienna Convention on the Law of Treaties (VCLT), treaties are defined as international law governed written agreements between states.[34] A state only assumes the status of a state party to an international treaty when the international treaty is in force and the relevant state has consented to be bound by the stipulations of the international treaty.[35] There are various ways in which consent to a treaty can be given, namely acceptance, accession, approval, and ratification.[36] Through any of these consent methods, the treaty accordingly becomes binding upon the state party that has consented to it.

With respect to international environmental law, scholarly engagements have indicated treaties and international agreements to be the 'preeminent method of international environmental law-making.'[37] African states are a part of various environmental law agreements including the Convention on Biological Diversity (CBD) to which over forty African states are parties[38], the Convention on International Trade in Endangered Species

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33 United Nations Forum on Forests Ad hoc expert group on Consideration with a View to Recommending the Parameters of a Mandate for Developing a Legal Framework on All Types of Forests (2004) "An Overview of International Law" Working Paper p.3. https://www.un.org/esa/forests/wp-content/uploads/2014/12/background-3.pdf

34 Article 2(1)(a) of the Vienna Convention on the Law of Treaties, adopted May 23, 1969, entered into force Jan. 27, 1980, 1155 U.N.T.S. 331. Available at: https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf .

35 Vienna Convention on the Law of Treaties, Arti le 2(1)(g).

36 Vienna Convention on the Law of Treaties, Article 2(1)(b).

37 Bodansky, Daniel (1995) "Customary (And Not So Customary) International Environmental Law" *Indiana Journal of Global Legal Studies* 7(3) p.106. https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1060&context=ijgls

38 Kameri-Mbote, Patricia and; Cullet, Phillippe "Biological Diversity Management in Africa: Policy Perspectives" (1999) International Environmental Law Research Centre Working Paper 2 p.2. https://www.ielrc.org/content/w9902.pdf

of Wild Fauna and Flora (CITES)[39], the Convention to Combat Desertification (CCD) to which approximately fifty African states[40] are party to as well as the Paris Agreement.[41]

The objectives of the CBD include the conservation of biological diversity[42], and to this effect its provisions impose an obligation on contracting parties to cooperate with other member states to the treaty in the conservation and sustainable use of biodiversity.[43] Additionally, state parties are obligated, subject to their capacity, to create strategies and plans for the conservation and sustainable use of biological diversity.[44] Thus, African states including but not limited to Angola, Botswana, Democratic Republic of Congo, South Africa, Zambia, and Zimbabwe as contracting parties to the CBD[45] are enjoined to cooperate with each other and other member states towards the joint objectives enumerated in the CBD as well as to take measures towards the development of strategies necessary for the conversation and sustainable use of biological diversity as stipulated in Article 6(a) of the CBD.

Entered into force on the 4th of November 2016, the Paris Agreement was adopted by over 196 countries.[46] The primary objective of the agreement aims to "strengthen the global response

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39 Kameri-Mbote, Patricia and; Cullet, Phillippe "Biological Diversity Management in Africa: Policy Perspectives" (1999) International Environmental Law Research Centre Working Paper 2 p.3. https://www.ielrc.org/content/w9902.pdf

40 Kameri-Mbote, Patricia and; Cullet, Phillippe "Biological Diversity Management in Africa: Policy Perspectives" (1999) International Environmental Law Research Centre Working Paper 2 p.3. https://www.ielrc.org/content/w9902.pdf

41 Paris Agreement on Climate Change (2015).

42 Convention on Biological Diversity (1992), Article 1.

43 Convention on Biological Diversity, Article 5.

44 Convention on Biological Diversity, Article 6(a).

45 See list of member states https://www.cbd.int/information/parties.shtml (accessed 9 October 2024.)

46 United Nations Climate Change "The Paris Agreement" Available at: https://unfccc.int/process-and-meetings/the-paris-

to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty"[47] Among the obligations imposed by the Paris Agreement is the duty for state parties to take "ambitious efforts" towards achieving the objectives outlined in the Agreement and to communicate these efforts.[48]

Apart from treaties, customary international law (CIL) as well as the general principles of environmental international law, including the "polluter pays, prevention, precautionary" principles,[49] serve a guiding role at the least.

Customary international law (CIL) refers to universally applicable international law norms arising from either regular practice or patterns of behaviour.[50] Dupuy et al opine that there are various reasons that CIL owes its importance to; namely, the non-implementation of treaties and conventions, the fact that treaties are only binding upon states that consent to them and lastly that "custom is important to conciliate a range of environmental and non-environmental interests (e.g. trade, human rights, investment, armed action) governed by different treaties."[51]

African states' response to the domestic incorporation of international law, whether customary in nature or in respect of treaty

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agreement#:~:text=The%20Paris%20Agreement%20is%20a,force%20on%204%20November%202016.

47 The Paris Agreement on Climate Change, Article 2.

48 The Paris Agreement on Climate Change, Article 3.

49 Masiye-Moyo, Nomasango (2024). "The Elephant in the Room: Anticipating Africa's Muted Voice in the ICJ's Advisory Opinion on Climate Change". Avaliable at: https://naturaljustice.org/the-elephant-in-the-room-anticipating-africas-muted-voice-in-the-icjs-advisory-opinion-on-climate-change/ .

50 Paust, Jordan J (2006) "The Importance of Customary International Law During Armed Conflict." *ILSA Journal of International & Comparative Law* (Vol. 12), p. 602

51 Dupuy, Pierre-Marie; Le Moli Ginevra and Viñuales, Jorge E "Customary International Law and the Environment" (2018) Cambridge Centre for Environment, Energy and Natural Resource Governance (C-EENRG), Working Paper 2018 p. 3-4.

law, has been varied, with some taking either a monist or dualist approach to its incorporation and others incorporating a fusion of the two. A monist approach entails domestic and international law be treated as "interrelated aspects of one legal structure"[52]. Under this approach, international law automatically forms a part of domestic law. Additionally, monism typically requires that in matters characterised by conflicting legal approaches, preference be given to international law.[53] Kenya uses a monist application in respect of CIL, wherein its Constitution provides that "the general rules of international law shall form part of the law of Kenya."[54]

On the other hand, under dualism, international laws are seen as an entirely separate legal system from domestic laws.[55] In dualist states, domestic laws typically take precedence over international laws and the latter are often utilised as an interpretative source of the law with persuasive force in the interpretation of domestic laws.[56] International law under this approach is regarded as being

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52 Shale, I (2019) "Historical perspective on the place of international human rights treaties in the legal system of Lesotho: Moving beyond the monist-dualist dichotomy" *African Human Rights Law Journal* (19) p.196. http://dx.doi.org/10.17159/1996-2096/2019/v19n1a10

53 Shale, I (2019) "Historical perspective on the place of international human rights treaties in the legal system of Lesotho: Moving beyond the monist-dualist dichotomy" *African Human Rights Law Journal* (19) p.196. http://dx.doi.org/10.17159/1996-2096/2019/v19n1a10

54 The Constitution of Kenya (2010), section 2(5).

55 Mutubwa, Wilfred (2019) "Monism or Dualism: The Dilemma in The Application of International Agreements Under the South African Constitution" (2019) *Journal of Conflict Managment and Sustainable Development* (3)[1] p27. https://journalofcmsd.net/wp-content/uploads/2019/06/international-law-article-MUTUBWA-May-2019.pdf

56 Shale, I (2019) "Historical perspective on the place of international human rights treaties in the legal system of Lesotho: Moving beyond the monist-dualist dichotomy" *African Human Rights Law Journal* (19) p.196. http://dx.doi.org/10.17159/1996-2096/2019/v19n1a10

incorporated into the domestic legal system only if preceded by express legislative enactment[57], or parliamentary approval.

Some African countries have utilised the dualist approach to incorporate international treaty and convention law into their national laws.

For instance, section 231(4) of the South African Constitution provides that:

> "Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament. An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3)."

Depending on the approach taken by African states in the incorporation of international law into their jurisdictions, environmental international law pronouncements can either be of a binding effect equivalent to that of the municipal law or of interpretative value.

3. THE MAKEUP AND PROCESSES OF THE ICJ

The International Court of Justice was created at the tail end of the Second World War in 1945 to act as a beacon for the peaceful resolution of disputes amongst states.[58] This judicial forum is the highest court in the world, and the chief judicial organ of the

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57 Shale, I (2019) "Historical perspective on the place of international human rights treaties in the legal system of Lesotho: Moving beyond the monist-dualist dichotomy" *African Human Rights Law Journal* (19) p.197. http://dx.doi.org/10.17159/1996-2096/2019/v19n1a10

58 International Court of Justice. Available at: https://www.icj-cij.org/history.

United Nations.[59] Its prestige is highlighted by the numerous respected inputs that the court has made in the development of public international law since its inception.[60] In terms of Article 38(1), of statute of the International Court of Justice, the purpose of the Court is, *inter alia* to make findings and resolve cases in line with international law.[61] It does so through the employment and enforcement of international treaties, covenants, and agreements; customary international laws, the general principles of law as well as court decisions.[31]

The jurisdictional powers of the court are largely highlighted under Articles 34–38 as well as 65-68 of the statute of the International Court of Justice.[62] In terms of the empowering provisions the court has a binary jurisdiction. In contentious matters, the court makes determinations that are largely legal in nature upon consensus between the parties with respect to their submissions to the judicial authority.[63]

The secondary function of the judicial organ largely has to do with advisory proceedings. In such cases the court is required to hand down a judicial statement on specific legal questions tendered to it, at the instance of United Nations organs or the General Assembly.[64]

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59 Ogbodo, S. Gozie (2012) "An Overview of the Challenges Facing the International Court of Justice in the 21st Century" *AnnualSurvey of International & Comparative Law* (18) , Iss 1, p. 93 -113. access link https://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1159&context=annlsurvey

60 AUST, Anthony (2010) " Advisory Opinions " *Journal of International Dispute Settlement*, (1)p. 123–151 at 132. Access link https://academic.oup.com/jids/article/1/1/123/879380 .

61 Statute of the International Court of Justice, 1945, in the United Nations Charter, 24 October 1945, 1 UNTS XVI. Available at https://www.icj-cij.org/statute.

62 Ibid.

63 See Article 36 of the Statute of the ICJ.

64 In terms of Articles 96 of the United Nations Charter and 35 of the ICJ Statute.

Such questions would range from those borne out of disputes between states,[65] or they may take the form of a more theoretical approach, by asking conceptual legal questions on an international legal issue.[66] In some other instances the court may be enjoined to review the determinations of specific administrative tribunals.

These judicial statements or opinions are not tantamount to findings of the court as expressly articulated under Article 59 of the ICJ Statute.[67] Instead, advisory proceedings fall outside the ambit of disputes between states and res judicata does not apply to them, consequently they do not yield a "final and non-appealable judgment precluding relitigation of the same claim between the same parties".[68]

The binding or non-binding nature of such opinions has therefore been the subject of much debate in the arena of international law and policy. The court's advisory opinions are not binding. The requesting organ, agency or organization remains free to decide, as it sees fit, what effect to give to these opinions. As a general rule the advisory opinions are not binding on the parties in question, however the judicial statements serve an important role in their contribution to influencing the jurisprudence of international law and providing legal clarity and on ambiguous and complex questions of law. Their role and influence is therefore

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65 Green, Fergus. (2008). *Fragmentation In Two Dimensions: The ICJ's Flawed Approach To Non-State Actors And International Legal Personality.* Available at: https://law.unimelb.edu.au/__data/assets/pdf_file/0011/1683182/Green.pdf .

66 *Ibid.*

67 Of the Statute of the ICJ.

68 ILO. *The binding legal effect of ICJ advisory opinions.* Avaliable at file:///Users/nomasangomasiyemoyo/Downloads/wcms_899567%20(3).pdf.

largely in relation to their use as a vehicle for diplomacy and to aid in peace making.[69]

Some academics have argued that the discretion that parties requesting such an opinion have to reject or accept the court's opinion renders the advisory function of the court inadequate and ineffective in influencing state behaviour.[70] This is worsened by the fact that this court process does not have enforcement mechanisms, imbibed in its powers to force the compliance of a specific state or organisation with its determinations, interpretations or findings. As a consequence some of the court's opinions have been implemented, whilst others have merely been recognised or tacitly accepted.

To this point Myrto Stavridi, holds that,

> "the lack of binding effect is mitigated by the fact that advisory opinions constitute an authoritative pronouncement of international law by the ICJ. It is also clear from the fact that the ICJ itself cites its advisory opinions in its contentious judgments, demonstrating that advisory opinions are considered as valid precedent. In addition, through intra-judicial dialogue, advisory opinions are taken into consideration and possibly given effect by other national or international courts". [71]

To date the court has made approximately 29 determinations in relation to its advisory opinion proceedings, with many more

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69 International Court of Justice. *Advisory Jurisdiction* Available at : https://www.icj-cij.org/advisory-jurisdiction#:~:text=Despite%20having%20no%20binding%20force,help%20to%20keep%20the%20peace.

70 Sthoege , Eran. (2023) How do States React to Advisory Opinions? Rejection, Implementation, and what Lies in Between. *AJIL Unbound , (117)* pp 292 – 297.

71 Myrto Stavridi (2024). "The Advisory Function of the International Court of Justice: Are States Resorting to Advisory Proceedings as a "Soft" Litigation Strategy?". Available at : https://jpia.princeton.edu/news/advisory-function-international-court-justice-are-states-resorting-advisory-proceedings-%E2%80%9Csoft%E2%80%9D .

opinions pending before it, including the opinion relating state responsibilities in respect to the consequences of climate change.[72]

4. WHY IS IT IMPORTANT FOR AFRICAN STATES TO PARTICIPATE IN THE ICJ PROCESS?

4.1. Africa's Specific Vulnerability to the Climate Crisis

The boom of fossil fuel expansion and the extractive industry in Africa as well as globally has resulted in a triple planetary crisis (air pollution, water pollution and bio-diversity crises).[73] The consequence of these crises is the increase in the occurrence of environmental damage and climate injustice globally in a number of jurisdictions.[74] When assessing the scope and scale of the root causes of this state of affairs, scientists have found that they are a myriad of contributory factors which range from on and offshore oil and gas exploration and extraction,[75] (e.g. exploration and extraction of LNg, and liquified gas),[76] mining of critical and high-priced minerals (such as gold, diamonds, copper, cobalt, or

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72 ICJ. "Judgments, Advisory Opinions and Orders". Avaliable at https://www.icj-cij.org/decisions.

73 Wang a ,Jiannan and Azam, Waseem. (2024) Natural resource scarcity, fossil fuel energy consumption, and total greenhouse gas emissions in top emitting countries. *Geoscience Frontiers* (15).pp 1-15. Avaliable at https://www.sciencedirect.com/science/article/pii/S1674987123002244#ab010.

74 Ibid.

75 Albeldawi ,Mohammad (2023). Environmental impacts and mitigation measures of offshore oil and gas activities . *Developments in Petroleum Science* (78) pp 313-352. *Available* at https://www.sciencedirect.com/science/article/abs/pii/B9780323992855000028.

76 Delaine McCullough. "The Problems with Liquefied Natural Gas Tthere is no time to waste on false climate solutions like LNG" . Avaliable at https://oceanconservancy.org/blog/2024/06/13/problems-liquefied-natural-gas/.

coal),[77] and other interrelated human activities in the sectors of construction, transportation, and agriculture.[78]

These actions have greatly added to the production of greenhouse gas emissions (GHGs), with the global measurements for greenhouse gasses measuring at 37.15 billion tonnes CO- just in 2022 and averaging approximately 50 billion tonnes each year.[79] The rise in ghg emissions has resulted in an increase in global temperatures, a rise in sea levels, and the occurrence of natural disasters such as floods,[80] fires,[81] droughts,[82] etc. particularly in Africa. [83] The disasters in turn impact the communities in the jurisdictions that experience them, their health, access to clean air and water, food security, standard of living, housing, incomes, culture, and human dignity.[84] The exploitation of fossil fuels and

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77 David P. Edwards et al (2013). Mining and the African Environment. *Policy Perspective* (7) 3 pp 147 -337 at 303 . Avaliable at: https://conbio.onlinelibrary.wiley.com/doi/epdf/10.1111/conl.12076.

78 *Ibid.*

79 Our World in Data "CO2 emissions: our data sources". Avaliable at: https://ourworldindata.org/explorers/co2?time=latest&country=~OWID_WRL&Gas+or+Warming=CO%E2%82%82&Accounting=Production-based&Count=Per+country&Relative+to+world+total=false.

80 Vedaste Iyakaremye, Gang Zeng and Guwei Zhang (2020). Changes in extreme temperature events over Africa under 1.5 and 2.0C global warming scenarios. *International Journal of Climatology* pp 1-19 at 3. Avaliable at: https://www.researchgate.net/profile/Vedaste-Iyakaremye/publication/344771299_Changes_in_extreme_temperature_events_over_Africa_under_15_and_20C_global_warming_scenarios/links/6380dafc48124c2bc66c3e6d/Changes-in-extreme-temperature-events-over-Africa-under-15-and-20C-global-warming-scenarios.pdf.

81 State and Trends In Adaptation Report (2022). "Climate Risks in Africa" . Avaliable at: https://gca.org/wp-content/uploads/2023/01/GCA_State-and-Trends-in-Adaptation-2022_Climate-Risks-in-Africa.pdf .

82 *Ibid.*

83 *Ibid.*

84 Field, T.-L. (2021). Chapter 8: Climate Change Litigation in South Africa: Firmly Out of the Starting Blocks. In Climate Change Litigation: Global Perspectives (pp. 173–198); Also see: Baptista, D. M. S., Farid, M., Fayad, D., Kemoe, L., Lanci, L. S., Mitra, P. M., Muehlschlegel, T.

other related resources consequently pose a severe threat to the fundamental human rights of African people.[85]

According to the IPCC Sixth Assessment Report, climate change poses severe risks to Africa including a decline in,

> "marine ecosystem health and [the] livelihoods of coastal communities… food production from crops, livestock and fisheries…. [a rise in] mortality and morbidity from increased heat and infectious diseases (including vector-borne and diarrhoeal diseases…. [and] reduced economic output and growth, and increased inequality and poverty rates)".[86]

Due to this dire state of affairs, the international community has demanded a reduction in global temperatures below 2.0 degrees Celsius in order to revert to temperatures experienced prior to industrialisation (thereby stabilizing temperatures at 1.5 degrees Celsius).[87] With humanity facing threats of near

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S., Okou, C., Spray, J. A., Tuitoek, K., & Unsal, F. D. 'Climate Change and Chronic Food Insecurity in Sub-Saharan Africa' (2022) IMF Departmental Paper at. 2;

85 Environment Rights.org. " The right to food". Available at: https://environment-rights.org/rights/right-to-food/#:~:text=As%20mentioned%20earlier%2C%20land%2C%20water,availability%20of%20food%20in%20markets.

86 IPCC (2022). "Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change. [Trisos, C.H., I.O. Adelekan, E. Totin, A. Ayanlade, J. Efitre, A. Gemeda, K. Kalaba, C. Lennard, C. Masao, Y. Mgaya, G. Ngaruiya, D. Olago, N.P. Simpson, and S. Zakieldeen,: Africa. In: Climate Change 2022: H.-O. Pörtner, D.C. Roberts, M. Tignor, E.S. Poloczanska, K. Mintenbeck, A. Alegría, M. Craig,

S. Langsdorf, S. Löschke, V. Möller, A. Okem, B. Rama (eds.)]. Cambridge University Press, Cambridge, UK and New York,NY, USA.

Avaliable at: https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_Chapter09.pdf pp. 1285–1455 at 1302 .

87 Vedaste Iyakaremye, Gang Zeng and Guwei Zhang (2020). Changes in extreme temperature events over Africa under 1.5 and 2.0C global warming scenarios. *International Journal of Climatology* pp 1-19 at 2. Avaliable at: https://www.researchgate.net/profile/Vedaste-Iyakaremye/

extinction as a result of these 'crises', a number of conventions and legal protections have been promulgated to mitigate their consequences. However, thirty years after the signing of the United Nations Framework Convention on Climate Change (UNFCCC), the Kyoto Protocol of 1997,[88] and the Paris Agreement soon after in 2015,[89] Africa remains no closer to sustainable solutions that shift it from its insecure position. The latter two international conventions mentioned outlined international carbon dioxide emissions objectives, allowing countries like China, Japan, Australia, to set targets, making way for the ninety countries that have set net zero emissions targets.[90]

No clearer is the dire situation of Africa's vulnerability, than in the assessment of its growing jurisprudence in environmental and climate litigation to fight against the consequences of climate change.[91] These range from suits aimed at interdicting the

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publication/344771299_Changes_in_extreme_temperature_events_over_Africa_under_15_and_20C_global_warming_scenarios/links/6380dafc48124c2bc66c3e6d/Changes-in-extreme-temperature-events-over-Africa-under-15-and-20C-global-warming-scenarios.pdf.

88 Kyoto Protocol to the United Nations Framework Convention on Climate Change, adopted Dec. 10, 1997, entered into force Feb. 16, 2005, 2303 U.N.T.S. 162. Available at: https://unfccc.int/resource/docs/convkp/kpeng.pdf .

89 of the Paris Agreement to the United Nations Framework Convention on Climate Change, adopted Dec. 12, 2015, entered into force Nov. 4, 2016, T.I.A.S. No. 16-1104. Available at: https://unfccc.int/files/essential_background/background_publications_htmlpdf/application/pdf/conveng.pdf

90 Climatewatch. "Net Zero Tracker". Available at; https://www.climatewatchdata.org/net-zero-tracker.

91 Earthlife Africa Johannesburg v Minister of Environmental Affairs and Others (65662/16) [2017] ZAGPPHC 58; [2017] 2 All SA 519 (GP) (8 March 2017); Friends of Lake Turkana Trust & Others v. Attorney General & 4 Others [2020] eKLR; Centre for Environmental Rights and Others v. Minister of Environmental Affairs and Others, (20814/2014) [2017] ZAGPPHC 1207; Save Lamu et al. v. National Environmental Management Authority and Amu Power Co. Ltd; Gbemre v. Shell

displacement of indigenous populations due to mining activities (like those of the San people of Botswana or Hilioum of Namibia), mitigating against water scarcity, the consequences of flooding, air pollution and oil spills, or the negative impacts experienced on the health of communities due to fossil fuel extraction and production activities.

Oil, for instance, has been a foundational component of the current global energy matrix, with crude oil said to account for at least 30% of the international energy system prior to the onset of the COVID-19 pandemic.[92]

While a number of scientists, conservationists and environmental activists, concur that this fossil fuel in particular is "more of a curse than a blessing," there are still a number of governmental actors, as well community members who anticipate that oil profits will result in widespread economic and social development in their jurisdictions.[93] The East African Crude Oil Pipeline, is a good example of this paradoxical landscape: the energy project is set to cover areas of Uganda and Tanzania, stretching approximately 1,445 kilometers and threatening to cause lasting damage to water resources in both countries (particularly the Lake Victoria Basin, which currently provides water, and food resources to over forty million people in the region).[94]

Petroleum Development Company of Nigeria Ltd. and Others (Friends of the Earth Nigiria).

92 Andrews ,Nathan et al (2021). Oil, fsheries and coastal communities: A review of impacts on the

[e]nvironment, livelihoods, space and governance *Energy Research & Social Science* (75) pp1-15. Avaliable at: https://www.academia.edu/80292471/Oil_fisheries_and_coastal_communities_A_review_of_impacts_on_the_environment_livelihoods_space_and_governance .

93 International Crisis Group. "Oil or Nothing: Dealing with South Sudan's Bleeding Finances". Avaliable at: https://www.crisisgroup.org/africa/horn-africa/south-sudan/305-oil-or-nothing-dealing-south-sudans-bleeding-finances.

94 StopEacop. Avaliable at: https://www.stopeacop.net/for-nature.

Litigation was launched at the East African Court of Justice by the Africa Institute for Energy Governance, together with a number of other NGOs and civil society organisations seeking to acquire injunctions to halt the development of the pipeline.[95] The applicants argued that the pipeline would contravene fundamental regional and international covenants linked to the protection of environmental and human rights, adaptation and mitigation, and the protection of Lake Victoria.[96] The court dismissed this application, ruling that the matter was filed out of time, however there is a strong ongoing civil society campaign against the project as well as an appeal that has been launched against the decision of the court as handed down on the 29th of November 2023.[97]

In the precedent setting case of Okpabi et al. v. Royal Dutch Shell and others, 42,500 Nigerian citizens initiated suit against the company, with the purpose of seeking compensation for the alleged environmental degradation and human rights violations perpetrated the company's Nigerian subsidiary in the Niger Delta.[98] This matter was litigated before English courts, where the parent company was registered, with the view to create legal precedents for parental responsibility where subsidiary companies cause environmental damage.

There is therefore a marked rise, in legal actions, aimed at ensuring corporate and state accountability for environmental degradation, with the issue of compensation and reparations,

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95 Application No. 29 of 2020 (Arising from Reference No. 39 of 2020) Centre for Food and Adequate Living Rights (CEFROHT) Limited & 3 Others vs. The Attorney General of the Republic of Uganda, The Attorney General of the United Republic of Tanzania, and The Secretary General of the East African Community

96 Natural Justice, AFIEGO, CEFROHT, CSL (2024). Available at: https://naturaljustice.org/east-african-court-of-justice-to-hear-appeal-against-eacop-project-tomorrow/.

97 Ibid.

98 Okpabi et al. v. Royal Dutch Shell and others [2021] UKSC 3 para 32-35.

guiding this process.[99] International law has recognised the right to reparations, from an African context, the African Charter holds that where the court makes a finding of a contravention of human rights by a state, it may instruct that, "the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party". [100]

Similarly this recognition can be found in other related areas of human rights, related to sovereignty of African states, similarly, the African Charter makes reference to this right in Article 21(2), which holds that, "in case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation." [101] Other international judicial bodies such as the ICC have also handed down judgements , in favour of reparations and compensation for human rights violations albeit not expressly for environmental cases.[102]

There is therefore a fertile environment for the same right to be recognised in relation to environmental degradation and climate change consequences. This sentiment finds support in the field of environmental justice, where lawyers and community members are strongly pushing reparations in environmental cases. [103] This is particularly true in the context of African states who have contributed the least to the climate crisis , in respect of

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99 African Court of Human and Peoples' Rights, Ligue Ivorienne de Droits Del'Homme (LIDHO) and Others v Republic of C^ote d'Ivoire, Application No 041/0216, Judgment, 5 September 2023.

100 Article 63(1) of the African Charter on Human and Peoples' Rights, Oct 21, 1986. Adopted Jun 27, 1981, Avaliable at: https://achpr.au.int/en/charter/african-charter-human-and-peoples-rights.

101 *Ibid.*

102 Lubanga (ICC-01/04-01/06-3129-AnxA), Appeals Chamber, 3 March 2015; Order for Reparations, Katanga (ICC-01/04-01/07-3728-tENG), Trial Chamber-II, 24 March 2017.

103 Perez-Leon-Acevedo, Juan Pablo (2024). Reparations in environmental cases: should the International Criminal Court consider the Inter-American Court of Human Rights' jurisprudence? *Journal of International*

the historic emission of Ghg's in comparison to heavier polluters such as America and China.[104]

The ICJ Advisory process consequently allows African states an opportunity to place environmental climate matters that are of specific priority and importance to the context of the continent, at the forefront of discussions on state accountability for climate change impacts. The court is requested, among other things, to outline the legal consequences and recourse that arise when a State or multiple States fail to meet their international obligations related to climate change. In this respect two fundamental outcomes are anticipated. The former is that the unlawful conduct must come to an end and the latter is that there must be a wide array of remedies available to States that have experienced harm due to another State's violation of its international obligations. These remedies should be effective, ensuring that the harm is fully addressed with concrete and measurable reparations.

Dispute Settlement (15) pp 377–403 at 378. Avaliable at: https://academic.oup.com/jids/article/15/3/377/7624170.

104 African Development Bank. "Climate Change in Africa" . Available at: https://www.afdb.org/en/cop25/climate-change-africa.

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S. Langsdorf, S. Löschke, V. Möller, A. Okem, B. Rama (eds.)]. Cambridge University Press, Cambridge, UK and New York,NY, USA.

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Limiting State Discretion: A Principled Due Diligence Framework for Preventing Human Rights Violations Arising from Climate Change

JOSÉ DANIEL RODRÍGUEZ ORUÉ [1]

INTRODUCTION

Time is running out. On July 22, 2024, the Climate Clock ticked below five years.[2] This is how much time humanity has to prevent irreversible, catastrophic, destructive climate change. But States are barely doing enough, and it may soon be too late.

Our world is warming faster than at any point in recorded history. The emissions of greenhouse gases (GHG) that have accumulated in our atmosphere after centuries of burning fossil fuels trap the sun's heat, leading to global warming and climate change.[3] Despite this knowledge, GHG emissions continue to steadily increase.[4]

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2 Bevan Hurley, "*Climate Clock ticks down: Five years left to limit temperature rise to 1.5C"* The Independent (London, 22 July 2023).

3 IPCC, AR6 Synthesis Report: Climate Change 2023.

4 Ibid [A.1].

The increased climate variability, extreme weather events, and slow-onset events caused by climate change translate into very real harm to human beings. This includes forced displacement; loss of land and culture for indigenous and tribal communities; resource-related conflict; gender violence; child mortality; and food and water insecurity, to name a few.[5] Rights especially affected by climate change comprise the rights to life, personal integrity, health, healthy environment, cultural identity, property, food, and water.[6] Climate change is fundamentally an issue of equity. Those who have least contributed to climate change will, nevertheless, be disproportionately affected by it.[7]

The architecture of the climate regime puts special emphasis on national discretion and obligations of conduct. The main goal of the regime is stabilising atmospheric GHG concentrations "at a level that would prevent dangerous anthropogenic interference with the climate system."[8] This goal has been further crystallised in article 2 of the Paris Agreement (PA), [9] which sets goals for (a) holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels; (b)

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5 See, generally, Intergovernmental Panel on Climate Change (IPCC), *Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (H-O Pörtner and others eds, Cambridge University Press 2022).

6 Inter-American Court of Human Rights, *The Environment and Human Rights*, Advisory Opinion OC-23/17, (ser A) [66] (15 November 2017); 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*, U.N. Doc. A/77/226 (26 July 2022), [88].

7 IPCC, AR6 Synthesis Report (n 2) [A.2].

8 UNFCCC 1992, art. 2.

9 Lavanya Rajamani, *"Due Diligence in International Climate Change Law*" in in Heike Krieger, Anne Peters, and Leonhard Kreuzer (eds), *Due Diligence in the International Legal Order* (Oxford, 2020; online edn, Oxford Academic, 18 February 2021) 171.

increasing the ability to adapt to the adverse impacts of climate change and foster climate resilience; and (c) making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development.[10]

This framework lays out two fundamental duties. *Mitigation*, which refers to reducing GHG emissions (i.e. the causes of climate change), and *adaptation*, which seeks to reduce vulnerability and increase resilience in the face of expected adverse impacts of climate change. Historically, climate change obligations have evolved from prescriptive language to lax and non-prescriptive language.[11] In this sense, the PA gives great discretion to States in defining how much, in what way, and by when they will reduce their GHG emissions. Deference awarded to States has understandably led to a lack of ambition[12] and implementation.[13] With States' current climate commitments, global warming is predicted to increase to 2.5°C-2.9°C above pre-industrial levels by the end of the century, [14] significantly above the scientific recommendations for a safe limit,[15] and well above the agreed temperature limits in the PA.[16]

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10 Paris Agreement 2015, art 2.

11 Rajamani (n 8) 173.

12 UNFCCC, *"Nationally Determined Contributions under the Paris Agreement: Synthesis Report by the Secretariat"* (14 November 2023) UN Doc FCCC/PA/CMA/2023/12.

13 UNEP, *"Emissions Gap Report 2023: Broken Record – Temperatures hit new highs, yet world fails to cut emissions (again)"* (2023); UNEP, *"Emissions Gap Report 2024: No more hot air … please!"* (2024); UNFCCC, *"Draft-Decision -/CMA.5: The UAE Consensus"* (13 December 2023) UN Doc FCCC/PA/CMA/2023/L.17, [3].

14 UNFCCC, *"Nationally Determined Contributions under the Paris Agreement"* (n 11).

15 IPCCC, *Global Warming of 1.5°C: An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty* (Masson-Delmotte V and others eds, 2018, In Press).

16 PA, art 2.

At the same time, the regime provides for differentiation between States in terms of responsibilities and obligations, acknowledging that they have contributed in different degrees to climate change and have different capacities to grapple with it.[17] This operationalisation of the general principle of equity is known as the principle of Common but Differentiated Responsibilities and Respective Capabilities (CBDRC).

States must also comply with their obligations to prevent transboundary environmental harm (under customary international law) and prevent human rights violations (under the applicable treaty regime and customary international law). All these preventive duties are obligations of conduct, which do not require States to achieve an expected result but rather demand that they employ their best efforts towards achieving a goal or preventing a specific outcome.[18] Importantly, under Public International Law, these duties are to be performed under a standard of *due diligence*.[19] Due diligence qualifies State behaviour by defining the expected care owed to States, interests and rights.[20] This standard consolidated in international law in

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17 Article 3 of the UNFCC states that "the 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 responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof". The Paris Agreement references this principle in its preamble "In pursuit of the objective of the Convention, and being guided by its principles, including the principle of equity and common but differentiated responsibilities and respective capabilities, in the light of different national circumstances."

18 Maria Monnheimer, *"The Origins of Due Diligence in International Law*" in Due Diligence Obligations in International Human Rights Law (Cambridge University Press, 2021) 94.

19 Björnstjern Baade, "*Due Diligence and the Duty to Protect Human Right"* in Krieger, Peters, and Kreuzer (eds) (n 8) 97.

20 Anne Peters, Heike Krieger, and Leonhard Kreuzer (eds), *"Due Diligence in the International Legal Order: Dissecting the Leitmotif of Current*

the late 19th and early 20th centuries,[21] and was first formulated with regard to the obligations to protect foreign nationals and their properties.[22] From its inception, due diligence has been tied to the attribution of the wrongful conduct of private actors under the jurisdiction of a State.[23] Over the course of the 20th and 21st centuries, due diligence has been adapted to other preventive duties, including the prevention of transboundary environmental harm[24] and the prevention of human rights violations.[25] In all its variations, the articulation of the due diligence standard restrains State discretion in choosing the appropriate measures to comply with preventive duties considering regime-specific principles.

This paper acknowledges that to have any real chance of addressing climate change through international law, State discretion must be urgently curtailed such that States have clear obligations to mitigate and adapt to climate change. As a starting point, I posit that due diligence is the most flexible device allowing for the coexistence and complementarity of differentiation in the climate regime and universalism in human rights law. Differences in vulnerabilities to, capacities for and contributions to the climate problem must be, therefore, considered in the way human rights obligations concerning climate change are implemented but not in how primary duties are conceived.

Accordingly, this paper takes on the challenge of offering a coherent due diligence standard that may contribute to protecting

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Accountability Debates" in Krieger, Peters, and Kreuzer (eds) (n 8) 2; Monnheimer (n 17) 78, 94.

21 Peters (n 19) 4; Jorge E. Viñuales, *"Due Diligence in International Environmental Law: A Fine-grained Cartography*" in Heike Krieger, Anne Peters, and Leonhard Kreuzer (eds) (n8).

22 Giulio Bartolini, "*The Historical Roots of the Due Diligence Standard*," in Heike Krieger, Anne Peters, and Leonhard Kreuzer (eds), (eds) (n 8) 25.

23 Monnheimer (n 17) 83.

24 International Law Association (ILA), Study Group on Due Diligence in International Law, *'Second Report'* (July 2016) 1.

25 Ibid.

universal human rights, achieving climate goals, and preserving differentiation. I argue that, by integrating the relevant normative expectations of these three regimes, State discretion can be significantly limited in a principled way. This analysis is especially timely given the advisory opinion proceedings on climate change before the International Court of Justice (ICJ)[26] and the Inter-American Court of Human Rights (IACtHR),[27] as well as pending climate cases before the European Court of Human Rights (ECtHR).[28]

Section 1 explores the fragmentation of international law and analyses how systemic integration can shape a cohesive due diligence standard for preventing human rights violations arising from climate change. Section 2 addresses the ways in which the elements of due diligence operate with respect to the preventive duties of International Environmental Law (IEL), International Climate Change Law (ICCL) and International Human Rights Law (IHRL). Section 3 offers a framework for due diligence obligations in the context of climate change by identifying the content and scope of the elements of the due diligence standard through systemic integration applicable to mitigation and adaptation.

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26 Republic of Colombia and the Republic of Chile, *Request for an Advisory Opinion on the Climate Emergency and Human Rights,* Submitted to the IACtHR (9 January 2023).

27 United Nations General Assembly, *"Resolution Requesting an Advisory Opinion from the International Court of Justice on the Obligations of States with Respect to Climate Change"* (29 March 2023) UN Doc A/77/L.58.

28 Registrar of the European Court of Human Rights, *"Application alleging failure to take effective measures to meet climate-change commitments and to protect the applicant's health is notified to the Government of Austria, Müllner v Austria*" (ECHR 172 (2024), 1 July 2024).

1. FRAGMENTATION OF INTERNATIONAL LAW AND THE CHALLENGE OF SYSTEMIC INTEGRATION

1.1. Introduction

The proliferation of different disciplines within international law presents a considerable challenge for States, victims and interpreting bodies. Applying international law to a complex problem like climate change requires considering interacting duties and standards from different regimes to provide interpretations that are both coherent and comprehensive.

As a first step, this Section addresses the problem of fragmentation of international law (Section 1.2), explains how systemic integration may resolve this issue (Section 1.3), argues why mitigation and adaptation to climate change must be conceptualised as human rights duties (Section 1.4), highlights the tension between differentiation in the climate regime and universalism in the human rights regime (Section 1.5), and analyses and critiques recent attempts to resolve this issue through human rights case law (Section 1.6). A brief conclusion summarises the key findings of the Section (Section 1.7).

1.2. Understanding Fragmentation

1. The fragmentation of international law is a phenomenon characterized by the development of specific legal norms and principles across different branches of international law. This increased dramatically in the past century.[29] In 2006, the International Law Commission recognised "it difficult

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[29] ILC, *"Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission"* UN Doc A/CN.4/L.702 (18 July 2006) [4].

to imagine today a sphere of social activity that would not be subject to some type of international legal regulation."[30]

2. The problem with fragmentation is that such expansion has been uncoordinated, focused on specific problems, and not concerned with overall coherence with other branches of international law.[31] This is further complicated by a lack of hierarchy in the sources of international law, which then allows for the occurrence of norm conflict when obligations pertaining to the same issue overlap and contradict.[32]
3. Because of this proliferation of international regimes, there are many instances in which obligations in one field overlap with obligations in another. Climate change is a perfect example of this, because to adequately deal with its causes and impacts multiple (if not all) regimes of international law may interact. For the purposes of this paper, I will be centring my analysis on the preventive duties that lie at the heart of the horizontal and vertical relationships between States and States and individuals in IEL, ICCL and IHRL.

1.3. The Challenge of Systemic Integration

International law should be interpreted as a coherent rule system. When norms bear on the same issue they should "be interpreted so as to give rise to a single set of compatible obligations. "[33] This is known as the principle of *systemic integration* and is codified in Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT).

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30 Ibid.
31 Ibid.
32 Ibid.
33 Ibid [14].

International obligations operate and are interpreted "within the framework of the entire legal system."[34] Accordingly, when analysing complex phenomena like climate change, relying only on the special treaty regime to define State obligations would transgress basic rules of treaty interpretation. Therefore, other relevant treaties, customary obligations and general principles of international law must be considered when interpreting a specific duty.[35]

Because the PA is not *lex specialis*,[36] evaluating international obligations in the context of climate change necessitates systemic integration of principles and norms from different regimes.[37] This is expressly acknowledged in climate treaties, which recognise that customary international law[38] and human rights law[39] operate in tandem with States' climate treaty obligations. Symbiotically, obligations under IEL and ICCL inform and are informed by those contained in IHRL.[40]

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34 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276* (1970) (Advisory Opinion) [1971] ICJ Rep 31, [53].

35 *Oil Platforms (Islamic Republic of Iran v United States of America) (Preliminary Objection)* [1996] ICJ Rep 817, [41].

36 *Climate Change and International Law* (Advisory Opinion, 21 May 2024) ITLOS Reports 2024 [137, 222, 224].

37 ILC, *"Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law"* (Report of the Study Group of the International Law Commission, finalized by Martti Koskenniemi, 13 April 2006) UN Doc A/CN.4/L.682.

38 The preamble of the UNFCCC recalls that "States have, in accordance with the Charter of the United Nations and the principles of international law … 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."

39 The preamble of the PA acknowledges that "Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights".

40 CCPR, *"General Comment No 36 on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life"* CCPR/C/GC/36 [62].

1.4. Mitigation and Adaptation as Prevention of Human Rights Violations

Mitigation refers to "actions or activities that limit emissions of greenhouse gases (GHGs) from entering the atmosphere and/or reduce their levels in the atmosphere." They include "reducing the GHGs emitted from energy production and use … land use, and methods to mitigate warming, for example, by carbon sinks which remove emissions from the atmosphere."[41]

Adaptation means ensuring that ecological, social and economic systems are resilient to climate change impacts. In human systems, it is the process "of adjustment to actual or expected climate and its effects in order to moderate harm or take advantage of beneficial opportunities." [42] In natural systems, it is "the process of adjustment to actual climate and its effects."[43] Notwithstanding the catastrophic consequences of climate change, this means people should still be able to live with dignity, not just survive.

A lack of timely and adequate adaptation and mitigation can amount to severe human rights violations. Conceptualising mitigation and adaptation as preventive duties under human rights law considerably raises normative expectations of all States in addressing climate change. This is because human rights-oriented due diligence is more demanding than that required for preventing transboundary environmental harm.[44]

At the same time, mitigation and adaptation require reorienting national development paths over time, which may paradoxically

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41 IPCC, *Climate Change 2022: Mitigation of Climate Change. Working Group III Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (Priyadarshi R Shukla and Jim Skea eds, Cambridge University Press 2022).

42 IPCC, *Climate Change 2022: Impacts, Adaptation and Vulnerability* (n 4) 5.

43 Ibid.

44 Margaretha Wewerinke-Singh, *"State Responsibility, Climate Change and Human Rights under International Law*" (European University Institute, 2018) 11.

limit developing States' capacity to fulfil basic human rights. Therefore, States must "avoid negative social and economic consequences for developing country Parties" when responding to climate change.[45]

1.5. Human Rights and Climate Change: Between Differentiation and Universalism

States differ in their contribution of emissions, their capacity to tackle climate change and their vulnerability to the harm it produces.[46] Acknowledging these differences, and to ensure maximum participation of States, *differentiation* is employed in climate change treaties.[47] In this way, the principle of CBDRC acknowledges the historical responsibility of industrialised nations in causing climate change,[48] and the different technological and economic capacities available States to adequately prevent or minimise climate change and its effects.[49]

Differentiation in ICCL rests both on capacities and contributions to harm.[50] After all, resources and capacities available to States are "directly linked to their GHG emissions."[51] Indeed, "the main contributors to the problem have reaped immense economic benefits and thus have the greatest responsibility to solve the problem."[52]

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45 UNFCCC, *"Decision 1/CP.16: The Cancun Agreements"* (15 March 2011) UN Doc FCCC/CP/2010/7/Add.1 [8].

46 Lavanya Rajamani, *Differential Treatment in International Environmental Law* (Oxford University Press 2006) 197.

47 Ibid 178.

48 UNFCCC, preamble.

49 UNFCCC, preamble.

50 Rajamani (n 8) 174-173.

51 Ibid 175.

52 Special Rapporteur on human rights and the environment, *"Human rights obligations relating to the enjoyment of a safe, clean, healthy and*

In contrast, human rights are *universal*. All States must respect, protect and fulfil human rights, because every human being, by virtue of their existence, deserves the same degree of respect to their dignity.[53] The claim of universality is not without significant cultural, political, and economic challenges, which cannot be covered in depth in this paper. Suffice it to say that IHRL is a language of minimum expectations applicable to all States, and although a few examples of differentiation exist, they only apply to the implementation of a limited set of rights.[54]

This signals an important tension. If mitigation and adaptation are indeed human rights duties, can the differentiation of their design in the climate regime still operate along universal human rights duties? In other words, how may CBDRC and human rights universalism be harmoniously integrated? This paper posits that the best answer to these questions that cohere with principles of international law is to clarify and evolve the due diligence standard.

1.6. Attempts At Systemic Integration of the Climate and Human Rights Regimes

Due diligence is characterised by a general indeterminacy in its content, and so several scholars have pointed to the difficulties of arriving at an abstract, objective definition.[55] From its inception, due diligence has been transformed from the abstract to the concrete through international adjudication. This has allowed the

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sustainable environment: A safe climate" (David Boyd, 15 July 2019) UN Doc A/74/161, [26].

53 Jack Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press 2013).

54 CESCR, *"General Comment No 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)"* E/1991/23.

55 See, for example, Viñuales (n 20) 111.

enhancement of the required legal standards, raising the overall level of accountability as circumstances change.[56]

In the context of IEL, due diligence stems from the customary duty to prevent transboundary environmental harm.[57] Under this obligation, States must "take all appropriate measures to prevent significant transboundary harm or at any event to minimize the risk thereof."[58] This standard requires that a State "exercise [the] best possible efforts, to do the utmost, to obtain this result,"[59] using "all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State."[60] The type of risk and harm to be prevented is thus of a qualified severity.[61]

Due diligence is also the relevant standard under which States must perform their obligations of conduct under the ICCL. The specialised treaty regime on climate change embeds the due diligence standard with specific normativity.[62] This means taking into account the purpose, goals and principles of the treaty regime (i.e. the long-term temperature goal, the expectations of

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56 ILA (n 23) 3; Adedayo Akingbade, *"Due Diligence in International Law: Cause for Optimism?*" in *The Irish Yearbook of International Law*, Volume 15, 2020 (Hart Publishing 2023) 22.

57 Viñuales (n 20) 117; *Pulp Mills on the River Uruguay* (Argentina v Uruguay) (Judgment) [2010] ICJ Rep 14, [101].

58 ICL, "*Draft Articles on the Prevention of Transboundary Harm Resulting from Hazardous Activities*" (2001) UN Doc A/56/10, art. 3; *Trail Smelter Arbitration* (United States v Canada) (1938 and 1941) III RIAA 1905 [1965].

59 ITLOS Seabed Disputes Chamber, *Advisory Opinion on the Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (1 February 2011) ITLOS Report 2001, 10, [110-112].

60 *Pulp Mills on the River Uruguay* (Argentina v Uruguay) (Judgment) [2010] ICJ Rep 56, [101].

61 ILC (n 57), Commentary art. 3.

62 Rajamani (n 8); Christina Voigt, *"The Climate Change Dimension of Human Rights Obligations*" (May 3, 2021)

progression and highest possible ambition, and differentiation through CBDRC).[63]

Under IHRL, States have general duties of respect and protection. The duty to protect rights entails positive obligations, requiring adoption of measures to ensure rights are protected. From this obligation stems a duty to prevent human rights violations, which must be complied with under a standard of due diligence.[64] The *Osman* test, developed by the ECtHR, has been influential in defining the diligence standard. It requires plaintiffs to demonstrate that "authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk."[65] A similar standard has been integrated in the jurisprudence of the IACtHR,[66] the African Commission on Human and Peoples Rights,[67] the Human Rights Committee (CCPR),[68] and several other human rights bodies.[69] Across regimes, this standard has been extended to cases dealing

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63 Rajamani (n 8) 172-173; Voigt (n 61) 164.

64 Baade (n 18) 92.

65 *Osman v United Kingdom* (1998) 29 EHRR 245, [116].

66 IACtHR, *The Environment and Human Rights* (n 5) [120].

67 Social and Economic Rights Action Center (SERAC) and the Center for Economic and Social Rights (CESR) v Nigeria, Communication No 155/96 (2001) AHRLR 60 (ACHPR 2001), [52].

68 CCPR, *"General Comment No 36 on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life"* CCPR/C/GC/36, 2.

69 See, e.g., CRC, *"General Comment No 26 (2023) on Children's Rights and the Environment with a Special Focus on Climate Change"* UN Doc CRC/C/GC/26 (22 August 2023) [69].

with violations that arise due to environmental harm[70] and is often related to State responsibility for the conduct of private parties.[71]

The intersection of these preventive duties requires that interpreting bodies systemically integrate the relevant principles of each regime, understanding how they inform the applicable due diligence standard. Recent examples show, however, that this exercise has been insufficient.

1.6.1. The CCPR's Approach in Teitiota v. New Zealand and Billy v. Austalia

Ioane Teitiota v. New Zealand was the first climate change case to be decided by an international human rights body. It essentially dealt with the applicability of the prohibition of expulsion (*non-refoulement*) to the case of Ioane Teitiota, a Kiribati national, who had sought asylum in New Zealand due to the impacts of climate change in his life and that of his family.[72]

In *Teitiota* the CCPR analysed alleged breaches of the right to life and prohibition of refoulement relating to climate displacement due to the decreased habitability of Kiribati. In its decision, the Committee decided that "the right to life cannot be properly understood if it is interpreted in a restrictive manner, and that the protection of that right requires States' parties to adopt positive measures" in response to "reasonably foreseeable threats and life-threatening situations that can result in loss of life." It also determined that "climate change and unsustainable

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70 *Öneryıldız v Turkey* (2004) 41 ECtHR, [101]. IACtHR, *Case of the Inhabitants of La Oroya v Peru, Preliminary Objections, Merits, Reparations and Costs*, Judgment of 27 November 2023, Series C No 511; *SERAC and CESR v Nigeria*, (n 66).

71 Patricia de Toledo Lugon Arantes, *"The Due Diligence Standard and the Prevention of Racism and Discrimination*" (2021) 68 Netherlands International Law Review 412.

72 CCPR, *Ioane Teitiota v. New Zealand*, Communication No 2728/2016, 24 October 2019.

development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life."[73]

At the same time, the Committee accepted that "sea level rise is likely to render Kiribati uninhabitable" but that "the time frame of 10 to 15 years … could allow for intervening acts by Kiribati, with the assistance of the international community, to take affirmative measures to protect and, where necessary, relocate its population."[74] In other words, because Kiribati was adapting to climate change, it could possibly prevent and reduce the threats to the right to life of the applicant in the future. New Zealand, therefore, was not bound by non-refoulement and was entitled to return the plaintiff to Kiribati. Only if and when attempts to curtail the projected inhabitability of their State fail will Kiribatians be entitled to asylum; their lives will be *sufficiently threatened* by climate change. This reasoning is problematic, because most climate impacts caused by past emissions are already irreversible, and escape what can be reasonably minimised through adaptation.

Such precedent was unfortunately reiterated by the CCPR in *Billy v. Australia* in 2022. The Committee considered that the plaintiffs did not show that they "faced or presently face adverse impacts of their own health or a real and reasonably foreseeable risk of being exposed to a situation of physical endangerment or extreme precarity that could threaten the right to life," and that Australia was constructing a sea wall to counter the effects of sea level rise.[75] Therefore, the Committee said it could not conclude that the adaptation measures were insufficient enough to pose a threat to right to life.[76] The Committee focused solely on possible risk reduction through future adaptation, but failed to consider

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73 Ibid [9.4].

74 Ibid [9.12].

75 CCPR, *Daniel Billy et al v Australia*, Communication No 3624/2019, 13 May 2019. [8.6].

76 Ibid [8.7].

how "further delays or non-action in mitigation measures by the State Party will continue to risk the lives of the citizens."[77]

Paradoxically, the Committee determined that, with respect to the rights to culture and private life, the impacts of climate change on the islanders were reasonably foreseeable, and that the State had not mitigated such risk because it failed to adopt timely adaptation measures.[78] The distinction for determining a breach of one right but not another, for the same conduct, is inconsistent with previous Committee decisions regarding breaches of the right to life *vis-a-vis* environmental protection.[79]

Although these decisions are moving in the right direction, they are nevertheless insufficient. They reflect either the unwillingness or inability of the Committee to grasp the irreversibility of climate change impacts and their full implications for violating rights, the operation of the duty to prevent rights violations and its relation to parallel preventive duties, aswell as the the international responsibility that might result from their breach.

1.6.2. The ECtHR's Approach in Verein KlimaSeniorinnen v. Schweiz

In *Verein KlimaSeniorinnen v. Schweiz*, the ECtHR confirmed that, for the prevention of human rights violations in the context of climate change, "what is important, and sufficient to engage the responsibility of the State, is that reasonable measures which the domestic authorities failed to take could have had a real prospect

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77 Ibid, separate opinion of Committee member Duncan Laki Muhumuza (dissenting).

78 *Teitiota* (n 71).

79 CCPR, *"Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No 2751/2016: Norma Portillo Cáceres et al v Paraguay*" (20 September 2019) UN Doc CCPR/C/126/D/2751/2016.

of altering the outcome or mitigating the harm."[80] Applied to climate change, this standard must be understood in light of Article 3.3 of the UNFCC, which says "States should take measures to anticipate, prevent or minimise the causes of climate change and mitigate its adverse effects."[81] In doing so, States must reflect their highest possible ambition, align mitigation and adaptation to the goals of the climate regime, and rely on the best available science. Although significantly more appropriate than the CCPR's approach, the Strasbourg Court fails to make any reference to historical responsibility of industrialised States, or generally, to any notion of burden sharing between States, effectively putting aside the CBDRC principle when assessing the conduct of industrialised States.

1.7. Conclusion

Reconciling State conduct to simultaneously prevent climate change and human rights violations is complicated by the fragmentation of international law. Overlap of international obligations requires systemic integration, which is better employed by articulating the due diligence standard applicable to preventing human rights violations in the context of climate change. This allows enough flexibility so that differentiation and universality may be mutually reinforced. Recent attempts at making such reconciliations have nevertheless been insufficient in comprehensively integrating the different principles and normative elements of the due diligence standard, requiring further exploration.

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80 *Verein KlimaSeniorinnen Schweiz and Others v Switzerland* App no 53600/20 (ECtHR, 9 April 2024) [444].

81 Ibid.

2. OPERATIONALISING DUE DILIGENCE ACROSS REGIMES

2.1. Introduction

As a second step for proposing a systemically integrated human rights due diligence standard, this section identifies how due diligence operates across overlapping regimes and how legal principles inform its implementation. This analysis of existing legal principles across the three regimes (IEL, ICCL and IHRL) demonstrates how they could be evolved and applied through human rights law (Section 3).

This section begins by describing the characteristics of due diligence (2.2), then provides an overview of the common elements of due diligence as shaped by adjudication and scholarly debate (2.3). To conclude, I summarise the principles and normative elements that should be considered when elaborating an integrated due diligence standard (2.4).

2.2. Characteristics of Due Diligence

Due diligence is a flexible standard. It is, by nature, context specific. It changes with the capacities of the State, and the magnitude and foreseeability of the risk.[82] Moreover, this standard is in constant evolution.[83] It is dynamically adjusted by changing circumstances, evolving scientific knowledge and changing State capacities.[84] Additionally, due diligence must be performed in a continuous manner.[85]

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82 *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (n 58) [117].

83 ILA (n 23) 2.

84 Ibid.

85 Viñuales (n 20) 113.

Finally, due diligence "is a concept sitting in the (blurry) boundaries between law and morality, and between law and politics."[86] It is imbued with a value judgement – determining what, in each case, is "due," appropriate, or reasonable.[87] Because of this feature, the scope of the due diligence standard "is, to a great extent, a product of judge-made law through evolutive treaty interpretation."[88] Indeed, since its inception, the standard has been concretised and modified through judicial interpretation.[89]

2.3. The Elements of Due Diligence and their Articulation Across Regimes

Three elements of the due diligence standard are common across disciplines of international law: (i) *foreseeability* of the risk of harm, (ii) *capacity* to take preventive measures, and (iii) the adoption of *reasonable* measures to mitigate risk or prevent harm.[90]

First, for a State's duty to act diligently to arise, it must or should be aware of the existence of a risk of harm; this risk must be *foreseeable*.[91] Foreseeability relates to knowledge of the potential harm, and the nature and magnitude of the risk involved.[92] Diligence is needed when "a risk has to be controlled or contained, in order to prevent harm and damage done to another actor or a public interest."[93] Risks emerge from various sources, including private and public conduct, forces of nature, and technological advances.[94]

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86 Peters (n 19) 3.
87 Ibid 2.
88 Lugon Arantes (n 70) 412.
89 Baade (n 18) 101.
90 Monnheimer (n 17) 116–141.
91 Baade (n 18) 98, 101.
92 Bartolini (n 21) 38, and Baade (n 18) 101.
93 Peters (n 19) 2.
94 Ibid.

Second, States are only required to exercise the diligence corresponding to the means at their disposal.[95] Therefore, *capacities* shape the degree of diligence required.[96] Capacities include the institutional, financial and technological resources available to a State, and may also refer to control over territory. Even if deference is awarded to States due to limited resources, minimum standards of protection remain,[97] and thus States are not exempt from their international obligations.[98]

Third, a State acts diligently if it employs measures that are deemed *reasonable* to respond to a risk or harm. [99] Reasonableness is the test that determines the appropriate reaction to a given risk.[100] "Unreasonableness" often refers to a deficient, arbitrary, or absurd reaction to a risk[101], like knowingly increasing the magnitude and / or likelihood of the risk of harm. Reasonableness can only be determined on a case-by-case basis, because it depends on the type, magnitude and severity of the risk and the capacity at hand to properly counter it. However, States are expected to justify their choice of means through sufficient evidence.[102]

Due diligence is defined by reference to the content of the obligation[103] and its interpretation.[104] Through this exercise, the standard's level of abstraction is lowered.[105] To draw upon key parameters and principles in shaping a standard that integrates different areas of law in the context of the climate crisis, I will

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95 Bartolini (n 21) 35.
96 Monnheimer (n 17) 121-123.
97 Peters (n 19) 5, Bartolini (n 21) 37.
98 Monnheimer (n 17) 126.
99 Ibid. 130 and 131.
100 Ibid. 131
101 Ibid. 131.
102 Joanna Kulesza, *"Human Rights Due Diligence"* (2021) 30 William & Mary Bill of Rights Journal 69; Monnheimer (n 17) 133.
103 Monnheimer (n 17), 98.
104 Peters (n 19) 3.
105 Baade (n 18) 101.

explain how these three elements are articulated in IEL, ICCL and IHRL.

2.3.1. Foreseeability

a. IEL

States must identify activities susceptible of causing significant transboundary harm.[106] For the severity of harm to be foreseeable, States must know or should have known that an activity "has the risk of significant harm."[107] Knowledge about the type of harm can be obtained through environmental impact assessments, scientific reports, and through international cooperation with other concerned States. Scientific certainty, however, is not required to trigger the no-harm rule because due diligence is required "where there are plausible indications of potential risks" of significant harm.[108] The precautionary principle is therefore key for assessing the foreseeability that a given activity presents a risk of significant harm and thus triggers diligent conduct.[109]

b. ICCL

Foreseeability means having the prior knowledge to both mitigate and adapt to climate change. Regarding mitigation, the international community has been aware, since at least the 1980s, that the accumulation of GHG emissions is the main cause of dangerous anthropogenic climate change. Ever since, States have adopted multiple treaties and policies to reduce such emissions, acknowledging that the risk of catastrophic irreversible harm is already materialising at an accelerating rate. This is further documented by IPCC reports on the impacts of climate change.

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106 ILC (n 57) Commentary art. 3 [5].

107 Ibid.

108 Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area (n 58) [131].

109 ILC (n 57) Commentary Article 10 [6].

Accordingly, States cannot claim that harm resulting from GHG emissions is unforeseeable.

Regarding climate change adaptation, States must have awareness "that conditions have changed or are about to change, and that action is required to return to, maintain, or achieve a desired state."[110] Two types of uncertainties are prevalent regarding adaptation: those inherent to the randomness of future phenomena, and those caused by lack of knowledge.[111] The first are insuperable, but the second will reduce, though not disappear, due to increased scientific knowledge.[112] IPCC projections over specific time and under temperature scenarios for each region can therefore provide a baseline for determining adaptation needs. Reducing uncertainty also requires that States actively identify and assess risk exposure to future climate change scenarios and climate vulnerability.[113]

In any case, like in general IEL, due diligence in the climate regime is triggered by "plausible indications of potential risk" of significant harm[114], and not by scientific certainty.

c. IHRL

Obligations to prevent human rights violations arise only when States know or ought to know of a specific risk.[115] When human rights may be violated due to environmental harm, scientific certainty is also not required to trigger due diligence; States must

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110 Jonathan Verschuuren, '*Introduction to Climate Change Adaptation'* in Jonathan Verschuuren (ed), *Research Handbook on Climate Change Adaptation Law* (Research Handbooks in Climate Law series, Edward Elgar Publishing 2022) 7.

111 Ibid 10.

112 Ibid.

113 Least Developed Countries Expert Group, *National Adaptation Plans: Technical Guidelines for the National Adaptation Plan Proces*s (UNFCCC Secretariat, Bonn 2012) 54-55.

114 ITLOS, *Climate Change and International Law* (n 35) [131].

115 Maria Monnheimer, "*Applying the Due Diligence Framework to the Field of Human Rights Protection*," in Monnheimer (n 17) 204.

actively obtain knowledge of risks.[116] States must therefore take preventive action when they know or should know of activities that generate a widespread risk,[117] provided that there are plausible indicators that such a risk could cause environmental damage.[118] When certain populations are disproportionately exposed to risks due to environmental harm, States must gather information on the specific vulnerabilities at hand. [119]

2.3.2. Capacities

a. IEL

The degree of care expected in preventing transboundary environmental harm corresponds with varying capacities; States with greater capacities must exercise a higher degree of diligence.[120] Nevertheless, all States are expected to perform vigilance and monitor hazardous activities in their territory.[121]

b. ICCL

Mitigation and adaptation targets should not be disproportionately burdensome or impossible to achieve.[122] Accordingly, States with greater capacities and resources must act with a higher degree of diligence,[123] while States with lesser capacities must progressively increase their ambition as their

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116 Ibid.

117 *Tătar v Romania* (2009) ECtHR [101].

118 IACtHR, *La Oroya v Peru* (n 69) [127].

119 IACtHR, *Differentiated Approaches Regarding Certain Groups of Persons Deprived of Liberty* (Interpretation and Scope of Articles 1.1, 4.1, 5, 11.2, 12, 13, 17.1, 19, 24, and 26 of the American Convention on Human Rights and Other Instruments Concerning the Protection of Human Rights), Advisory Opinion OC-29/22, 30 May 2022, Series A No 29 [251]. Similarly, see Monnheimer (n 114) 205, 217.

120 ILC (n 57) Commentary Article 3 [17].

121 Ibid.

122 Voigt (n 61) 166.

123 ITLOS, *Climate Change and International Law* (n 58) [227].

capacities increase over time.[124] Relevant factors that may modulate what can reasonably be demanded of a State include its scientific, technical, economic, and financial capabilities.[125]

c. IHRL

Protecting human rights requires States to mobilise great amounts of financial resources but lacking such resources cannot exempt States from such duty.[126] Therefore, measures taken to protect rights should not impose a "disproportionate burden"[127] upon States. Varying capacities and the degree in which they alter expected standards of care is particularly relevant when protecting Economic, Social and Cultural Rights (ESCR), which require considerable resource allocation.[128] The concepts of "minimum core," and "immediate obligations" nevertheless reinforce the conclusion that varying capacities do not absolve States from exercising due diligence in protecting rights. "Minimum core" refers to the essential elements of a right that must be protected irrespective of a State's capabilities, reflecting a minimum standard of protection.[129] "Immediate obligations" require "adopting effective measures in order to guarantee access, without discrimination, to the benefits recognized for each right."[130]

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124 Paris Agreement, arts. 3 and 4.4.

125 ITLOS, *Climate Change and International Law* (n 58) [241].

126 Monnheimer (n 116) 223.

127 IACtHR, *Case of the Xákmok Kásek Indigenous Community v Paraguay, Merits, Reparations and Costs*, Judgment of 24 August 2010, Series C No 214, [188], and *Case of the Sawhoyamaxa Indigenous Community v Paraguay, Merits, Reparations and Costs*, Judgment of 29 March 2006, Series C No 146, [155].

128 Monnheimer (n 114) 226.

129 CESCR, *"General Comment No 3: The Nature of States Parties' Obligations* (Art. 2, Para. 1, of the Covenant)."

130 IACtHR, *Case of Poblete Vilches et al. v Chile, Merits, Reparations and Costs*, Judgment of 8 March 2018, Series C No 349 [104].

Immediate obligations include non-retrogression in levels of protection and non-discrimination.[131] Limited resources are also not an excuse for lack of compliance with duties of progressive realisation, because they require States to make use of "maximum available resources," ensuring that limited resources are used efficiently and effectively in progressively realising ESCR.[132]

2.3.3. Reasonableness

a. IEL

States must use "all means available" to ensure that activities under their jurisdiction do not cause significant damage to the environment of other States.[133] Reasonable measures include, at minimum, carrying out environmental impact assessments (EIAs).[134] States may also adopt and implement national legislation incorporating accepted international standards which serve as a reference point for determining the suitability of measures.[135]

Culpability also modulates what is reasonably expected of a State in preventing transboundary environmental harm,[136] and therefore States of origin must take more costly and effective

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131 *'General Comment No 3: The Nature of States Parties' Obligations* (n 128).

132 Ibid.

133 *Pulp Mills on the River Uruguay* (n 59) [101].

134 *Certain Activities carried out by Nicaragua in the Border Area* (Costa Rica v Nicaragua) Judgment [2015] ICJ Rep 665, *Construction of a Road in Costa Rica along the San Juan River (*Nicaragua v Costa Rica) Judgment [2015] ICJ Rep 706 [104].

135 ILC (n 57) art. 3, Commentary.

136 Ibid art. 10, Commentary [9]. OECD Council, *"Recommendation of the Council on Principles Concerning Transfrontier Pollution*" C(72)128 (14 November 1974) and *'Rio Declaration on Environment and Development*' (adopted 14 June 1992) UN Doc A/CONF.151/26 (vol I) Principle 16.

preventive measures.[137] Finally, the riskier the activity or the degree of harm, the higher the diligence expected.[138]

b. ICCL

States must do all they can to reduce GHG emissions.[139] The alignment of mitigation measures with the climate regime's objectives is a first indicator for determining their reasonableness.[140] Here, the applicable standard of care is that of "stringent due diligence," which must seek, at minimum, to limit warming below the 1.5°C temperature threshold laid out in Article 2 of the PA.[141]

Mitigation measures should also consider the "best available science," which includes the scientific consensus reflected in IPCC reports.[142] Discretion is narrow due to the severe magnitude of the risk concerned; diligence is stringent and "highly demanding."[143] Reasonable measures in this context include, at minimum: i) adopting and implementing legislation, administrative procedures, and an enforcement mechanism necessary to regulate polluting activities in question; ii) monitoring that this system functions efficiently, in order to achieve the intended objective; iii) ensuring that non-state actors comply with required measures; and iv) performing an EIA for all public and private activities which may cause harm to the climate system.[144]

Additionally, a State's "highest possible ambition", in defining their NDCs as per article 4.3 of the PA, can be quantitatively

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137 ILC (n 57) art. 10, Commentary [9].

138 Ibid art. 3, Commentary [18].

139 Ibid [241].

140 See Rajamani (n 18) and Voigt (n 70).

141 See, in the context of prevention of pollution to the marine environment ITLOS, *Climate Change and International Law* (n 58) [241-242], and in the context of human rights protection, a "reduced margin of appreciation" in *KlimaSeniorinnen* (n 79) [549].

142 ITLOS, *Climate Change and International Law* (n 58) [208].

143 Ibid [257].

144 *Mutatis mutandis*, Ibid [3.1].

determined considering existing capacities, the viability and cost of mitigation measures, and resources needed to meet concurring obligations. It would thus be reasonably expected that at the very least, States perform such an assessment and ensure that its conclusions guide the setting and implementation of GHG emission reduction targets.

Such targets must also integrate notions of historical contribution to the climate problem, in application of CBDRC.[145] Therefore, the floor for action is that which is "fair," but what is expected of all States is the maximum achievable target with existing capabilities.[146] That is, the highest possible ambition of historical emitters cannot go below what would be fair (or proportional) to their historical cumulative GHG emissions. Determining how States account for historical responsibility in their reduction targets ultimately rests upon the States themselves[147],but is something each State should factor in when determining the measures required to mitigate and adapt to climate change.

At the same time, preventing transboundary environmental harm in the context of climate change requires that historical polluters provide adequate and sufficient funding for mitigation and adaptation and contribute to capacity building in States and communities most affected by harm to the climate system. This includes building forecasts of climatic variability and exposure to hazards. This responds to the interrelation between mitigation and adaptation in the context of preventing transboundary environmental harm. By financing adaptation measures abroad, historical polluters comply with their duty to prevent

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145 Theresa Thorp, "*Climate Justice: A Constitutional Approach to Unify the Lex Specialis Principles of International Climate Law*" (2012) 8(3) Utrecht Law Review 7-37.

146 Voigt (n 70).

147 See, e.g, Lavanya Rajamani et al., *"National 'Fair Shares' in Reducing Greenhouse Gas Emissions within the Principled Framework of International Environmental Law*" (2021) 21(8) Climate Policy 983–1004.

transboundary environmental harm because they are reducing or minimising the effects of the harm they have caused through their conduct.

For its part, adaptation requires "an immense, coordinated effort, to adapt all the policies and laws … in such a way that the society at large will be prepared for the climatic changes and associated extreme weather events."[148] Like with mitigation, reasonable measures will vary depending on the special circumstances and needs of a specific State or region, but include, at minimum, measures that address generalised risk exposure (like reducing vulnerabilities through poverty eradication and improvements in housing and infrastructure) and specific risk mitigation (like building irrigation systems, sea walls, maintaining critical infrastructure).[149] States must consider "the degree of economic efficiency, environmental sustainability, technical feasibility, administrative/legal admissibility and social acceptability of such measures."[150]

The PA provides guidance on what may characterise the reasonableness of adaptation measures, like participation of vulnerable communities, transparency, use of best available science, and of traditional knowledge.[151] National Adaptation Plans (NAPs) should seek to enhance adaptive capacity, strengthen resilience and reduce vulnerability to climate change "with a view to contributing to sustainable development and ensuring an adequate adaptation response."[152] For this, States must (i) assess climate change impacts and vulnerabilities of people, places and

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148 Verschuuren (n 109) 3.

149 Roda Verheyen, *"Adaptation to the Impacts of Anthropogenic Climate Change – The International Legal Framework*" (2002) 11 Review of European Community & International Environmental Law 130.

150 Ibid 132.

151 Paris Agreement, art. 7.5.

152 Ibid.

ecosystems; (ii) monitor and evaluate adaptation measures; (iii) and build resilience of socioeconomic and ecological systems.[153]

Finally, reasonable adaptation measures should not lead to maladaptation, which is the result of implementing policies that increase vulnerability.[154] At the same time, adaptation measures may lead to more GHG emissions or a reduction of carbon intake.[155] Adaptation policies are closely related to development measures, and therefore any assessment the reasonableness of the measures adopted should acknowledge that "economic and social development and poverty eradication are the first and overriding priorities of the developing country Parties."[156]

c. IHRL

Even though States generally have discretion in their choice of means when preventing rights violations,[157] "at times only one available measure may be sufficiently effective" to protect rights from a specific risk.[158] When preventing human rights violations in the context of environmental harm, due diligence requires States to take necessary measures and utilise all available means to prevent significant environmental harm.[159] This includes, at minimum, legislative, judicial and administrative measures,[160] supervision and oversight of the private sector, contingency

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153 Ibid, art. 7(9).

154 Verschuuren (n 109) 3.

155 Ibid 9.

156 UNFCCC, "*Draft decision -/CP.16 Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention*" (Advance unedited version).

157 *López Ostra v Spain* (ECtHR, 1995) Series A no 303-C, [51].

158 *Budayeva and Others v Russia* App no 15339/02 (ECtHR, 20 March 2008) [102]

159 IACtHR, *La Oroya v Peru* (n 69) [157].

160 IACtHR, *The Environment and Human Rights*, (n 5) [54]; CCPR, *'General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenan*t' (26 May 2004) CCPR/C/21/Rev.1/Add.13 [7-8].

plans,[161] and informing the population at risk."[162] When a specific individual or group of persons is known to be disproportionately exposed to a certain risk, due diligence is especially stringent.[163]

2.4. Conclusion

Several general conclusions can be extracted from how due diligence operates across these three regimes. First, States must produce the necessary information to adequately act in due diligence. In all cases, the precautionary principle informs when due diligence is triggered - scientific certainty is not required to employ preventive measures.

Second, capacities of States determine the level of diligence required. Although measures that are impossible or impose disproportionate burdens are unreasonable, States with less capacities are not exempted from complying with preventive duties.

Third, reasonableness of measures is defined by the objective sought by the specific preventive duty and is constrained by regime specific principles.

Fourth, the greater a State's responsibility in causing harm, the greater its expected preventative diligence.

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161 IACtHR, *La Oroya v Peru* (n 69) [126].

162 Ibid 152; *Mileva and Others v Bulgaria* App nos 43449/02 and 21475/04 (ECtHR, 25 November 2010) [98].

163 IACtHR, *Differentiated Approaches Regarding Certain Groups of Persons Deprived of Liberty* (n 118).

3. DUE DILIGENCE IN PREVENTING HUMAN RIGHTS VIOLATIONS ARISING FROM CLIMATE CHANGE

3.1. Introduction

The articulation of the due diligence standard across regimes restrains State discretion by defining what is reasonable and the extent to which capacities and culpability may modulate the applicable standard of care. This final section builds on the work of the findings from the previous sections to propose a systemically integrated due diligence framework to prevent rights violations arising from climate change.

This requires integrating the different ways the relevant principles of each regime inform the three elements of the due diligence standard (Section 3.2). By bringing them together, I arrive at a principled human rights framework for preventing human rights violations in the context of climate change, raising the bar for climate action (Section 3.3). A small conclusion highlights the main features of this unified standard (Section 3.3).

3.2. Guiding principles of interacting regimes

The principle of systemic integration in treaty interpretation enables reference to general principles of law that help make sense of the applicable rules "particularly in those cases in which the rules intersect or appear to conflict."[164] The due diligence standard in preventing human rights violations due to climate change is determined by relevant principles of the IEL, CCL and HRL. These are: (i) prevention; (ii) precaution; (iii) use of the best available science; (iv) CBDRC and equity; (v) progression and non-regression; (vi) highest possible ambition; (vii) maximum

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[164] Campbell McLachlan KC, *The Principle of Systemic Integration in International Law* (Oxford University Press 2024). [2.190]

available resources, and (viii) non-discrimination. Together, these principles indicate the interpretative parameters that should guide a holistic due diligence standard.

3.3.1. Foreseeability

No State could allege that they lack knowledge of the human rights impacts that emitting GHG or failing to adapt to the impacts of climate change would cause. The issue of foreseeability should therefore not be significant for triggering diligent conduct because the knowledge of the risk to breaches of human rights due to a State's acts or omissions is already publicly known, and States either contribute to the creation of that risk or tolerate it from private sources. A generalised risk to the population at large justifies the adoption of preventive measures to protect rights (general human rights due diligence). Observing the precautionary principle, due diligence is required when there are activities that indicate widespread risk.[165]

The establishment of the knowledge of a specific risk with regards to a specific State, individual or group of individuals may be nevertheless relevant on a case-by-case basis when establishing international responsibility and determining victim status. Regarding adaptation, States must compile relevant data on which populations, ecosystems and regions are disproportionately affected by climate change. At the same time, States can no longer ignore that, due to the nature of climate change impacts, certain population groups (such as people living in poverty, children, the elderly, women, indigenous communities, and those who depend on fishing and farming) and regions (especially those prone to flooding, desertification, and generally islands and coastal towns) are more vulnerable due to their heightened exposure to climate change impacts. Arguably, then, all States have a general awareness

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165 *KlimaSeniorinnen* (n 79) [509].

of the risks posed by climate change, as well as to where, how and to whom they affect.

3.3.2. Capacities

All States must take measures to tackle climate change and protect rights, but "the taking of those measures is determined by the State's own capabilities."[166] Disproportionately burdensome or impossible measures are not required.[167] States with greater capabilities must operate under a heightened standard of due diligence in mitigating climate change.[168] States with lesser capacities are expected to progressively increase their ambition in mitigation measures[169] and make use of "maximum available resources" so that limited resources are used efficiently and effectively.[170] Effective and low-cost mitigation measures are already available to all States.[171] Additionally, developing States must ensure the essential elements of the rights protected[172] without non-discrimination and limiting non-retrogression in levels of emissions reduction.[173]

Capacities also determine the applicable standard of care for preventing human rights violations through adaptation measures. Capacity will greatly determine the extent to which a State can increase its adaptive ability and the resilience of its human and

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166 Ibid [442].

167 *Xákmok Kásek* (n 126) [188] and Voigt (n 70) 166.

168 *Climate Change and International Law* (n 82) [227, 241].

169 Paris Agreement, arts. 3 and 4.4.

170 *"General Comment No 3: The Nature of States Parties Obligations"* (n 128)

171 IPCC, 2023: *Summary for Policymakers. In: Climate Change 2023: Synthesis Report.* Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change [Core Writing Team, H. Lee, and J. Romero (eds.)]. IPCC, Geneva, Switzerland, 24.

172 *"General Comment No 3: The Nature of States Parties Obligations"* (n 128)

173 Ibid.

non-human systems. Even so, a lack of capacity is not an exception from the duty to prevent violations of rights. Indeed, all States, irrespective of capacity, must adopt minimum, reasonable measures to adapt to climate change and prevent rights violations. Developing and less developed States have flexibility in ensuring adaptation in the long-term, through the progressive realisation of ESCER. But here too, States are required to employ "maximum available resources" so that limited resources are used efficiently and effectively in progressively realising these rights.[174]

3.3.3. Reasonable measures

Reasonableness of mitigation measures, when analysed through the lens of preventing human rights violations, is shaped by alignment with the goals of the PA, their justification on the best available science, capacities, culpability, and their consideration of human rights impacts.

When protecting rights and limiting warming, due to the gravity of the risk, State discretion is very narrow, because measures adopted must be suitable for achieving the overall goals of the PA. States have a "reduced margin of appreciation, but, as for their choice of means, States should be accorded a wide margin of appreciation."[175] Mitigation measures must be "aimed at preventing an increase in GHG concentrations in the Earth's atmosphere and a rise in global average temperature beyond levels capable of producing serious and irreversible adverse effects on human rights;" for example, warming below the 1.5°C temperature threshold laid out in the PA.[176] Adaptation measures must increase adaptive capacity, strengthen resilience and reduce vulnerability to climate change. This requires States to (i) assess

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174 *"General Comment No 3: The Nature of States Parties Obligations"* (n 128)

175 *KlimaSeniorinnen* (n 156) [543].

176 Ibid [546]; ITLOS, *Climate Change and International Law* (n 58) [241-242].

climate change impacts and vulnerabilities of people, places and ecosystems; (ii) monitor and evaluate adaptation measures; (iii) and build resilience of socioeconomic and ecological systems.[177]

Additionally, measures must be determined and assessed against the best available science. This is an evolving concept, and thus the diligence expected is modulated as knowledge of the risk evolves. In the context of climate change, the reports of the IPCC synthesise the relevant scientific consensus States must consider in formulating their mitigation and adaptation measures.

CBDRC requires that capacities and culpability determine what can be reasonably expected of a State. Those with higher capacities and historical contributions to climate change must act under a higher standard of care, and vice versa. In ensuring ESCR, developing and less developed States must make use of the maximum available resources in mitigating and adapting to climate change. This requires ensuring essential levels of protected rights and their progressive realisation. This expectation of progressiveness is tied to the requirement of non-retrogression, which is also relevant when determining a State's Nationally Determined Contribution under the PA.

Finally, States must assess the human rights impacts of mitigation and adaptation measures. This is because these measures essentially require comprehensively modifying existing economic and development models, which may affect livelihoods, especially in those States and communities least responsible for, but most affected by, climate change.

Rights-based mitigation strategies must therefore seek to achieve a "just transition," a transition to a human rights economy that is fair, equitable, inclusive and sustainable.[178] This requires, inter alia, "fostering equitable access to the benefits of

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177 PA, art. 7(9).

178 ILO, *"Guidelines for a Just Transition towards Environmentally Sustainable Economies and Societies for All"* (2 February 2016) 1.

the transition process as well as fair distribution of its burdens, … protecting the rights of workers and communities affected by the ecological transformation from impacts on their livelihoods," and ensuring job security through training, social protection, and job creation.[179] Essentially, this means "shifting economic models to those that create wellbeing of people and planet, gender equality, and the reduction of inequalities and that are not simply concerned with GDP."[180]

Rights-based adaptation strategies must foster equitable access to the benefits of adaptation and a fair distribution of its burdens, so that existing inequalities and vulnerabilities are narrowed and not widened by the proposed solutions. Because certain population groups are generally more vulnerable to climate change, reasonableness in adaptation measures requires factoring in considerations of non-discrimination. This demands that disproportionately affected communities participate in relevant decision making, and that targeted, specific approaches in minimising their vulnerabilities are implemented (such as reducing inequality, poverty, and age, gender, race and ethnic discrimination), and that decisions consider traditional and indigenous knowledge.[181]

3.4. Conclusion

Through systemic integration of the relevant principles of international environmental law, climate change law and human rights law, a broader, comprehensive standard of conduct is elucidated. Under this principled framework, a balance is struck between protection of rights, preservation of differentiation, and achievement of climate goals. Ultimately, this unified standard raises normative expectations of all States and identifies key

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179 Ibid 2.
180 Ibid 2.
181 PA, art. 7.5.

"reasonable measures" that can prevent human rights violations in the context of climate change.

CONCLUSION

To adequately grapple with the existential threat of climate change, State duties must be conceived in a way that balance equity, the protection of rights and the achievement of climate goals. Courts have progressively translated the abstract due diligence standard into expected "reasonable" measures. When analysing what must be urgently done to prevent rights violations and tackle the climate problem, both States and courts must clarify the applicable standard of conduct, because circumstances have significantly changed, and the window for meaningful action is rapidly closing.

Further scholarly exploration of relevant regime interactions is urgently required, as there is a plurality of bodies of law that determine what States must and can do to prevent climate change and protect rights, especially international investment law and international economic law.

In this paper, I offer a first attempt to concretise a standard of diligent conduct rooted in minimums but, importantly, constrained by legal principles of three overlapping bodies of law crucial for the protection of both human rights and our climate system.

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Climate refugees and non-territorial autonomy

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INTRODUCTION

This chapter is not concerned with a phenomenon that might occur in the coming years or a crisis that is only beginning to emerge. Rather, it deals with an existing reality, one whose effects are already being experienced and felt across the globe. At the time of writing, Hurricane Helene has devastated various areas of Central America, North America, and the Caribbean, while Hurricane Milton threatens the region. Earlier in 2024, the Persian Gulf experienced severe floods, with several states recording nearly a year's worth of rain in just one day. In Africa, floods and landslides have left hundreds dead and displaced, notably in Ethiopia and Nigeria. Similar extreme weather events have taken place in Asia and Oceania, in countries such as India and Papua New Guinea. Lastly, in Central Europe, floods have caused dramatic scenes in the Czech Republic, Poland, and Romania, and more recently, in Bosnia and Herzegovina. Moreover, this reality is likely to worsen in the upcoming years.[3]

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3 Ripple, William J. et al. (2024). "The 2024 state of the climate report: Perilous times on planet Earth." *BioScience*, p. 1. https://doi.org/10.1093/biosci/biae087.

At the beginning of this century, Norman Myers predicted that there would be over 200 million climate refugees on the planet.[4] While this prediction has been both widely cited and equally treated with scepticism,[5] most recent estimates present an equally alarming picture. Forecasts vary from 25 million to over 1 billion climate-induced migrants by 2050, moving either within their own borders or across countries, on a permanent or temporary basis.[6] In fact, according to scientific evidence, different types of climate-related impacts trigger different patterns of migration.[7]

On the one hand, in recent years, extreme weather events such as floods, hurricanes, storms, typhoons, or cyclones, among others, are becoming a constant occurrence. All these phenomena have negative short-term impacts and the urgency of the situation leaves evacuation as the only viable option. However, this movement is often temporary, with people returning as soon as conditions permit.[8]

On the other hand, slow-onset events such as sea-level rise, droughts, desertification or coastal erosion, which are closely related to climate change and environmental degradation, may seem imperceptible in the short term. However, they are in fact taking place and may have devastating impacts in the medium or long term. Small Island Developing States (SIDS)

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4 Myers, Norman (2001). "Environmental refugees: a growing phenomenon of the 21st century." *Philosophical Transactions of the Royal Society of London*, (357), p. 609. https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1692964/pdf/12028796.pdf.

5 Kent, Avidan and Behrman, Simon (2018). *Facilitating the Resettlement and Rights of Climate Refugees. An Argument for Developing Existing Principles and Practices*, Abingdon: Routledge, p. 1-2.

6 IOM (2024). *A Complex Nexus*. Available at: https://www.iom.int/complex-nexus.

7 Kälin, Walter and Schrepfer, Nina (2012). *Protecting People Crossing Borders in the Context of Climate Change: Normative Gaps and Possible Approaches*, Geneva: UNHCR, p. 13-17.

8 Rosignoli, Francesca (2022). *Environmental Justice for Climate Refugees*, Abingdon: Routledge, p. 1.

are the paradigmatic example of those suffering these slow-onset events which, in the upcoming years, will make many islands uninhabitable. The Carteret Islanders, who are often mentioned as the world's first climate refugees, are the main example of people forced to leave their lands as a consequence of sea-level rise.[9] Likewise, many small islands such as the Maldives, the Marshall Islands, Kiribati or Tuvalu, will be at risk of being completely flooded and, consequently, uninhabitable if sea-level rises by 1 meter.[10] Research has revealed that five uninhabited islands in the Solomon Islands have been completely submerged, while six others have lost at least 20% of their land. Some of these islands have experienced losses of up to 55% and 62%, with at least two villages being entirely destroyed by coastal erosion.[11] Other countries have already implemented relocation programmes such as Kiribati's "Migration with Dignity." However, slow-onset events do not only affect the SIDS. Bangladesh is expected to lose 17% of its land by 2050 triggering around 20 million climate refugees,[12] while, according to the United Nations (UN), 50 million people

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9 Behrman, Simon and Kent, Avidan (2018). "Overcoming the Legal Impasse? Setting the Scene." In: Behrman, Simon and Kent, Avidan (Eds.). '*Climate Refugees.' Beyond the Legal Impasse?*, Abingdon: Routledge, p. 3.

10 Biermann, Frank and Boas, Ingrid (2008). "Protecting Climate Refugees: The Case for a Global Protocol." *Environment: Science and Policy for Sustainable Development*, (50) 6, p. 10. http://dx.doi.org/10.3200/ENVT.50.6.8-17

11 Albert, Simon et al. (2016). "Interactions between sea-level rise and wave exposure on reef island dynamics in the Solomon Islands." *Environmental Research Letters* (11), p. 2. https://iopscience.iop.org/article/10.1088/1748-9326/11/5/054011/pdf.

12 Ahmed, Bayes (2018). "Who takes responsibility for the climate refugees?" *International Journal of Climate Change Strategies and Management*, (10) 1, p. 7. https://www.emerald.com/insight/content/doi/10.1108/IJCCSM-10-2016-0149/full/pdf?title=who-takes-responsibility-for-the-climate-refugees.

are expected to be displaced due to desertification during this decade.[13]

Despite the margin of error of current estimates due to factors like population growth, temperature increase, economic development or the impacts of climate change such as sea level rise, as well as the different patterns of migration, all scenarios agree on a general trend: the deleterious effects of climate change and environmental degradation may force millions to leave their lands and migrate to other places.[14] Although the common denominator is that climate-induced migrants rarely cross state borders when migrating,[15] with complete states vanishing underwater or becoming uninhabitable due to extreme temperatures or desertification, in many cases, cross-border migration will become the only option. And this is the point at which the worrying reality becomes a problem.

"Climate refugees are a *de facto* problem without a *de jure* solution."[16] In other words, there is no legal instrument that specifically addresses this crisis currently affecting millions of people and which will become one of the most alarming crises in the

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13 Behrman, Simon and Kent, Avidan (2018). "Overcoming the Legal Impasse? Setting the Scene." In: Behrman, Simon and Kent, Avidan (Eds.). '*Climate Refugees.' Beyond the Legal Impasse?*, Abingdon: Routledge, p. 3.

14 Biermann, Frank and Boas, Ingrid (2008). "Protecting Climate Refugees: The Case for a Global Protocol." *Environment: Science and Policy for Sustainable Development*, (50) 6, p. 10. http://dx.doi.org/10.3200/ENVT.50.6.8-17.

15 Ionesco, Dina; Mokhnacheva, Daria and; Gemenne, François (2016). *The Atlas of Environmental Migration*, Abingdon: Routledge; Rigaud, Kanta Kumari et al. (2018). *Groundswell: Preparing for Internal Climate Migration*, New York: The World Bank.

16 Docherty, Bonnie and Giannini, Tyler (2009). "Confronting rising tide: proposal for convention on climate change refugees." *Harvard Environmental Law Review*, (33) 2, p. 357. https://climate.law.columbia.edu/sites/default/files/content/5c3e836f23a774ba2e115c36a8f72fd3e218.pdf.

next decades. There is a legal penumbra recognised internationally by both the academic doctrine and various international organisations such as the International Organisation for Migration (IOM) and the United Nations High Commissioner for Refugees (UNHCR), which have repeatedly recommended the creation of legal frameworks to address this reality. For instance, more than a decade ago, former UNHCR and current UN Secretary General Antonio Guterres declared that the "international community must devise new protection mechanisms for climate refugees."[17] Despite the calls from different international organisations, the numerous proposals and the progress made, there is still a legal lacuna concerning climate refugees which needs to be filled.

Therefore, this chapter helps shed light on the legal penumbra surrounding climate-induced migrants. To do so, it begins by outlining the debate over the terminology to refer to these people, concluding the section by explaining why, in our opinion, the term that should be used is climate refugees. Next, the different potentially applicable legal frameworks are explained, highlighting that none of them adequately protect climate refugees. In response to this legal lacuna, three of the main proposals made by scholars are analysed, and we contend that, in our view, the best possibility for protecting climate refugees is the expansive interpretation of Article 1 of the 1951 Convention Relating to the Status of Refugees (1951 Refugee Convention). Finally, we propose the potential application of a structure to channel the agreement between the host state and climate refugees as a nation, while protecting the right of self-determination and the territorial integrity of the hosting nation.

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17 Allix, Gregoire (2009). *La distinction entre réfugiés et déplacés est dépassée.* Available at: https://www.lemonde.fr/le-rechauffement-climatique/article/2009/12/15/antonio-guterres-la-distinction-entre-refugies-et-deplaces-est-depassee_1280843_1270066.html.

1. CONCEPTUALISING CLIMATE REFUGEES

1.1. The Issue of Terminology: An Overview of the Struggles

The earliest connection between migration and the deleterious effects of climate change or environmental degradation can be traced back to 1948, when Vogt warned that the solution devised for those displaced in Europe after World War II would be simple in comparison to the challenges posed by "ecological displaced persons."[18] In the following years, different authors coined various terms to refer to people forced to leave their lands due to effects of climate change or environmental degradation, but it was not until 1985 when the first formal definition was introduced. It was then when Essam El-Hinnawi defined "environmental refugees" as "those people who have been forced to leave their traditional habitat, temporarily or permanently, because of a marked environmental disruption (natural and/or triggered by people) that jeopardised their existence and/or seriously affected the quality of their life."[19] Since this moment, many other terms have been used to describe those who are forced to leave their lands due to the effects of climate change. However, there have been two distinct phases in academic doctrine regarding how to refer to these individuals.

The first phase had the objective of restricting the number of beneficiaries to ensure aid reached the most vulnerable.[20] In this line, a dichotomy between forced and voluntary movement was introduced. Suhrke and Visentin, for instance, suggested a distinction between "environmental migrants" and

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18 Vogt, William (1948). Road To Survival. New York: William Sloane Associates, Inc., p. 107.

19 El-Hinnawi, Essam (1985). *Environmental refugees*. Nairobi: United Nations Environment Programme (UNEP), p. 4.

20 Rosignoli, Francesca (2022). *Environmental Justice for Climate Refugees*, Abingdon: Routledge, p. 11.

"environmental refugees." According to them, environmental refugees are those who were displaced as a consequence of a sudden, drastic and irreversible environmental change, while "environmental migrants" were those who were relocated by their own choice from their land.[21] While other authors emphasised this dichotomy, Docherty and Giannini introduced a distinction between those displaced by sudden and irreversible extreme events and those fleeing the impacts of climate change. They argued that given the global nature of climate change and the fact that human activities contribute directly to it, the international community should accept responsibility to protect those forced to leave their homes due to human-caused harms.[22]

In a similar line of reasoning, other authors introduced a tripartite notion of environmental refugees.[23] On the one hand, Diane Bates proposed three categories based on the type of environmental harm suffered by those who fled their habitat. She distinguished between "disaster refugees," who flee from either natural disasters or human-induced catastrophes; "expropriation refugees," who are displaced due to anthropogenic expropriation of their ecosystems; and "deterioration refugees," who flee their habitat as a consequence of the gradual degradation of their environment caused by human activity.[24] On the other hand, Renaud et al. proposed the

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21 Suhrke, Astri, and Visentin, Annamaria (1991). "The environmental refugee: A new approach." *Ecodecision*, (2), p. 73–74.

22 Docherty, Bonnie and Giannini, Tyler (2009). "Confronting rising tide: proposal for convention on climate change refugees." *Harvard Environmental Law Review*, (33) 2, p. 361-372. https://climate.law.columbia.edu/sites/default/files/content/5c3e836f23a774ba2e115c36a8f72fd3e218.pdf.

23 Rosignoli, Francesca (2022). *Environmental Justice for Climate Refugees*, Abingdon: Routledge, p. 12.

24 Bates, Diane C. (2002). "Environmental Refugees? Classifying Human Migrations Caused by Environmental Change." *Population and Environment*, (23) 5, p. 470. https://gambusia.zo.ncsu.edu/readings/Bates2002PopEnv.pdf.

creation of three subcategories based on the degree of necessity. First, they considered "environmentally motivated migrants," who choose to relocate to avert worsening circumstances. Second, they categorised "environmentally forced migrants" who are those compelled to leave to avoid the worst impacts. Finally, they coined the term "environmental refugees" to refer to those people who escape the worst.[25] In other words, they distinguished between those who leave to pre-empt the worse, to avoid the worst and those who flee the worst.[26]

Despite these efforts to try to determine the personal scope of application of those deserving the highest level of protection, this first phase of research did not manage to create a common working definition.[27] Most of the terms used during this phase used the term refugee, which began to disappear after the year 2010. This shift can be explained by the change in stance of the UNHCR. While António Guterres stated that the international community needed to find mechanisms to protect climate refugees, by 2009, a UNHCR report affirmed that the "UNHCR has serious reservations with respect to the terminology and notion of environmental refugees or climate refugees. These terms have no basis in international refugee law."[28]

From this point onward, the second phase of the debate regarding the terminology used to refer to those forced to migrate due to the negative impacts of climate change focused on removing

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25 Renaud, Fabrice et al. (2007). *Control, Adapt or Flee How to Face Environmental Migration?* Bonn: UNU Institute for Environment and Human Security, p. 11-12.

26 Rosignoli, Francesca (2022). *Environmental Justice for Climate Refugees*, Abingdon: Routledge, p. 12.

27 Rosignoli, Francesca (2022). *Environmental Justice for Climate Refugees*, Abingdon: Routledge, p. 12.

28 UNHCR (2009). *Climate change, natural disasters and human displacement: a UNHCR perspective.* Geneva: UNHCR, p. 8.

the term "refugee" from academic and policymaking circles.[29] In this regard, one of the most relevant examples of this approach is found in the draft treaty proposed by researchers at the Centre de Recherches Interdisciplinaires en Droit de l'Environnement de l'Aménagement et de l'Urbanisme (CRIDEAU) and the International Centre for Comparative Environmental Law (CIDCE, its French acronym). In their Draft Convention, they suggest using the term "environmentally-displaced persons" and define them as "individuals, families and populations confronted with a sudden or gradual environmental disaster that inexorably impacts their living conditions and results in their forced displacement, at the outset or throughout, from their habitual residence and requires their relocation and resettlement."[30] This is one of the broadest definitions, as it aims to include within its scope both people fleeing sudden- and slow-onset disasters, as well as those displaced both within and across borders.

Another argument of the scholars who support this position is that the legal categories such as "migrant" or "refugee" fail to capture the complexity of modern human mobility, especially in the context of climate change. They argue that climate displacement due to climate change effects must be analysed from both a (de)colonial and climate justice perspective. Fröhlich, Baldwin and Rothe, instead of using the term climate refugees, propose describing these individuals as "displacees of a globalised network of intersecting mobility regimes fuelled by fossil fuel extraction."[31] This reframing places capitalism and fossil fuel-based infrastructures at the heart of climate-related displacement,

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29 Gemenne, François (2017). "The refugees of the Anthropocene." In Mayer, Benoît and Crépeau, François (Eds.). *Research handbook on climate change, migration and the law.* Cheltenham: Edward Elgar.

30 Prieur et al. (2008). "Draft convention on the international status of environmentally-displaced persons." *Revue Européenne de Droit de l'Environnement,* (4), p. 397. https://www.persee.fr/doc/reden_1283-8446_2008_num_12_4_2058.

31 Baldwin, Andrew; Fröhlich, Christiane and; Rothe, Delf (2019). "From climate migration to anthropocene mobilities: Shifting the debate."

thus emphasising that the Global North continues to benefit from greenhouse gas emissions and resource extraction, while climate-induced migration from the Global South increases.

In a similar line, Betts introduces the concept of "survival migrants" as a way to address the challenges faced by vulnerable populations. He complements the decolonial perspective by focusing on those populations' lack of access to fundamental rights necessary for survival, and argues that survival migrants are those forced to leave their countries due to existential threats that cannot be resolved domestically. He contends that these threats are not solely based on environmental factors but on the absence of basic rights in the migrants' home countries, justifying the need for international protection for their survival.[32]

While other authors have proposed alternatives, some still support using the term "climate refugees." Biermann and Boas, who first coined the term, define climate refugees as "people who have to leave their habitats, immediately or in the near future, because of sudden or gradual alterations in their natural environment related to at least one of three impacts of climate change: sea-level rise, extreme weather events, and drought and water scarcity."[33] Their reasoning for using the term "refugee" lies in the fact that people forced to leave their homes due to climate change or environmental disasters experience similar consequences to those faced by the refugees recognised by the 1951 Refugee Convention. Therefore, they contend that climate refugees should also be recognised with a term that conveys the seriousness of their reality, and advocate for the use of appropriate

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Mobilities, (14) 3, p. 291. https://doi.org/10.1080/17450101.2019.1620510.

32 Betts, Alexander (2013). *Survival Migration. Failed Governance and the Crisis of Displacement*. New York: Cornell University Press, p. 23.

33 Biermann, Frank and Boas, Ingrid (2010). "Preparing for a warmer world: towards a global governance system to protect climate refugees." *Global Environmental Politics*, (10) 1, p. 67. https://doi.org/10.1007/978-3-642-28626-1_15.

language that accurately reflects the challenges faced by all displaced individuals, rather than diminishing their experiences with weaker terminology.[34] Other authors have echoed this nomenclature and expanded on the argument from a critical historical perspective[35] or based on the idea of re-politicising the debate.[36]

1.2. Why Climate Refugees?

The controversy surrounding this terminology has sparked significant debate among researchers, policymakers, and affected communities themselves. The current trend is that the term "climate refugees" is a legal misnomer and must be rejected.[37] As previously noted, even the major agencies and institutions dedicated to refugees and migrants, such as the UNHCR or the IOM, strongly reject the term, asserting that it lacks a foundation in international refugee law. However, after careful consideration, we strongly disagree with the dominant position and argue, for various reasons, that "climate refugees" is, in fact, the most appropriate term.

Before presenting our arguments, we will begin by clarifying who we refer to as climate refugees. To do so, we draw on the

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34 Biermann, Frank and Boas, Ingrid (2008). "Protecting Climate Refugees: The Case for a Global Protocol." Environment: Science and Policy for Sustainable Development, (50) 6, p. 13. http://dx.doi.org/10.3200/ENVT.50.6.8-17.

35 Kent, Avidan and Behrman, Simon (2018). *Facilitating the Resettlement and Rights of Climate Refugees. An Argument for Developing Existing Principles and Practices*, Abingdon: Routledge, p. 46-53.

36 Gemenne, François (2017). "The refugees of the Anthropocene." In Mayer, Benoît and Crépeau, François (Eds.). *Research handbook on climate change, migration and the law*. Cheltenham: Edward Elgar, p. 396.

37 Rosignoli, Francesca (2022). *Environmental Justice for Climate Refugees*, Abingdon: Routledge, p. 15; Kent, Avidan and Behrman, Simon (2018). *Facilitating the Resettlement and Rights of Climate Refugees. An Argument for Developing Existing Principles and Practices*, Abingdon: Routledge, p. 53.

definition by Kent and Behrman, who consider climate refugees "those people who will be forced to cross an international boundary as a result of the fact that climate change has directly or indirectly made, or will make, their habitats no longer liveable."[38] This is a very restrictive definition that excludes from its scope individuals affected by rapid-onset events or non-climate change environmental events, such as earthquakes. Likewise, this term would not apply to individuals who have suffered the effects of climate change, but have not crossed their country's borders. In short, it is a term that could only be applied to individuals in a situation of extreme necessity due to the effects of climate change who have crossed an international border.

This restrictive scope is justified for two reasons. First, it relates to the personal scope of the alternative terms that have been proposed. Although terms like "survival migrants" or "environmentally-displaced persons" are championed for being highly inclusive, it is difficult to imagine states agreeing to apply such expansive terms, guaranteeing rights to such broad groups. In this respect, the term "climate refugees," as defined by Kent and Behrman, has the advantage of being much more restrictive, and therefore more appealing to states. Similar considerations could be applied to other terms, such as "migrants" or "displaced persons." These are broader concepts that lack a definition established through a treaty and have the advantage of being less controversial. In the case of displaced persons, the term implies forced displacement, but in a much broader sense than "climate refugees," as the displacement could result from factors such as rapid-onset events or natural disasters.[39] Furthermore, one of the benefits of using the term "climate refugees" is that

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38 Kent, Avidan and Behrman, Simon (2018). *Facilitating the Resettlement and Rights of Climate Refugees. An Argument for Developing Existing Principles and Practices*, Abingdon: Routledge, p. 44.

39 Kent, Avidan and Behrman, Simon (2018). *Facilitating the Resettlement and Rights of Climate Refugees. An Argument for Developing Existing Principles and Practices*, Abingdon: Routledge, p. 52-53.

it acknowledges the seriousness of the subjects' situation, their agency, and the validity of their claim for protection in a way that labels like "migrants" or "displaced persons" fail to convey.[40]

Similarly, the fact that the term does not apply to individuals who have not been affected by the deleterious effects of climate change or environmental degradation, or to those who have not crossed their country's borders, should not pose any issue in principle. In the case of the former, for those compelled to leave their homes due to sudden-onset events, such as earthquakes or volcanic eruptions, human rights norms would apply. In the case of the latter — those who remain within their country's borders — human rights are also applicable, as well as certain soft-law instruments like the Guiding Principles on Internal Displacement.[41]

In line with this, it is important to highlight an issue related to the current reality. The world, particularly the Global North, is experiencing a period of securitisation of migration in which, following the Schmittian dichotomy, immigrants are viewed as political enemies. [42] In this context, a key principle of international law is that states have ultimate discretion over the admission of foreign nationals, except by one exception applicable to refugees. Parties to the 1951 Refugee Convention are required to assess all asylum claims made at their borders or within their territories and are prohibited from returning asylum seekers and refugees to locations where they are likely to face serious harm according to the principle of non-refoulement. Consequently, there is a strong rationale for defining climate refugees as such, as this aligns with

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40 Kent, Avidan and Behrman, Simon (2018). *Facilitating the Resettlement and Rights of Climate Refugees. An Argument for Developing Existing Principles and Practices*, Abingdon: Routledge, p. 56-60.

41 Kent, Avidan and Behrman, Simon (2018). *Facilitating the Resettlement and Rights of Climate Refugees. An Argument for Developing Existing Principles and Practices*, Abingdon: Routledge, p. 44.

42 Schmitt, Carl (2018). *Der Begriff des Politischen*. Berlin: Duncker Humblot.

the only recognised category of foreign nationals to whom states are obligated to extend protection.[43]

This leads to the argument that the term "climate refugees" is a legal misnomer and should be rejected. In this regard, several authors have advocated for the idea of adjusting the outdated UN terminology to accommodate different types of refugees.[44] Similarly, from a critical historical perspective, there are several examples that demonstrate that there is no single, immutable definition of a refugee based on the definition provided by the 1951 Refugee Convention. First, this idea is supported by the fact that the 1967 Protocol Relating to the Status of Refugees (1967 Protocol) already expanded the personal scope of the definition to eliminate the temporal and geographical restrictions that were initially imposed. In this sense, it overcame the Eurocentric definition that focused on individuals affected by World War II in Europe. Moreover, there are specific categories of refugees created *ad hoc* for particular contexts, such as "war refugees" defined in the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War or the so-called "Palestine Refugees," who are currently protected by the United Nations Relief and Works Agency.

At a regional level, there are also other instruments, such as the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (1969 OAU Convention) and the 1984 Cartagena Declaration on refugees (Cartagena Declaration) in Latin America, that provide broader definitions of the term

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43 Kent, Avidan and Behrman, Simon (2018). *Facilitating the Resettlement and Rights of Climate Refugees. An Argument for Developing Existing Principles and Practices*, Abingdon: Routledge, p. 45.

44 Biermann, Frank and Boas, Ingrid (2008). "Protecting Climate Refugees: The Case for a Global Protocol." *Environment: Science and Policy for Sustainable Development*, (50) 6, p. 13. http://dx.doi.org/10.3200/ENVT.50.6.8-17; Biermann, Frank (2018). "Global Governance to Protect Climate Refugees." In: Behrman, Simon and Kent, Avidan (Eds.). '*Climate Refugees.' Beyond the Legal Impasse?*, Abingdon: Routledge.

"refugee." In this sense, in addition to the issues addressed by the original definition of the 1951 Refugee Convention and the modified version by the 1967 Protocol, these definitions expand the personal scope to include individuals fleeing "events or circumstances seriously disturbing public order." It is important to note that climate refugees could fit within this definition, as it is not unreasonable to assert that the deleterious effects of climate change and environmental degradation can be seen as disruptive or threatening elements to public order. Consider, for instance, what could disturb public order more than the disappearance of a state submerged underwater.

Concerning the idea that the term "climate refugees" is a legal misnomer, one of the main arguments is that climate refugees do not fit the definition provided by the 1951 Refugee Convention because they lack both the elements of "persecution" and "alienage."[45] Regarding the latter, as we mentioned earlier, the definition of "climate refugees" that we propose is restrictive and would only apply to those individuals who cross national boundaries. In fact, data shows that there is a growing trend of climate refugees crossing national borders,[46] a trend that may increase in the following years. As for what concerns the former, in the context of the Anthropocene, "climate change is a form of political persecution" against the most vulnerable.[47] From a climate justice perspective, the devastating effects of climate

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45 McAdam, Jane (2012). *Climate change, forced migration, and international law*. Oxford: Oxford University Press; Rosignoli, Francesca (2022). *Environmental Justice for Climate Refugees*, Abingdon: Routledge, p. 37-38.

46 Apap, Joanna and Harju, Sami James (2023). *The concept of 'climate refugee.' Towards a possible definition*. Available at: https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/698753/EPRS_BRI(2021)698753_EN.pdf.

47 Gemenne, François (2017). "The refugees of the Anthropocene." In Mayer, Benoît and Crépeau, François (Eds.). *Research handbook on climate change, migration and the law*. Cheltenham: Edward Elgar; Rosignoli, Francesca (2022). *Environmental Justice for Climate Refugees*, Abingdon: Routledge, p. 13.

change and environmental degradation are mostly suffered by the most vulnerable in the Global South. These adverse effects have been produced by the polluting Global North states that are responsible for greenhouse gas emissions, global warming and, consequently, of climate change and environmental degradation that cause forced displacement. In other words, the governments of Global North countries are effectively persecuting millions by failing to dedicate their collective resources to combat global warming. As a result, the individuals most at risk from threats like sea level rise are not receiving the necessary support to protect their homes and lands. By knowingly contributing to global warming, these countries expose individuals to the harmful effects of climate change, leading to a situation of persecution which could fall under the scope of application of the 1951 Refugee Convention.[48]

On a similar line, climate refugees could also be considered people persecuted for reasons of their membership in a particular social group formed by persons who lack the political power and means to protect their own environment from the adverse effects of climate change and environmental degradation.[49] According to the World Bank database from 2014, just 10 countries account for 69% of the world's total CO2 emissions.[50] However, Global South countries have barely contributed to these emissions and, in contrast, are especially affected by the deleterious effects of climate change. Thus, we could consider the citizens of these countries

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48 Cooper, Jessica B. (1998). "Environmental refugees: meeting the requirements of the refugee definition." *New York University Environmental Law Journal*, (6) 2, p. 502-520.

49 Cooper, Jessica B. (1998). "Environmental refugees: meeting the requirements of the refugee definition." *New York University Environmental Law Journal*, (6) 2, p. 521-526.

50 Ahmed, Bayes (2018). "Who takes responsibility for the climate refugees?" *International Journal of Climate Change Strategies and Management*, (10) 1, p. 6. https://www.emerald.com/insight/content/doi/10.1108/IJCCSM-10-2016-0149/full/pdf?title=who-takes-responsibility-for-the-climate-refugees.

as members of a social group being persecuted by Global North countries who are the primary contributors to climate change and its adverse effects.

2. THE LEGAL PENUMBRA

As previously mentioned, "displacement due to climate change is a *de facto* problem currently lacking a *de jure* solution."[51] The legal lacuna consists in the fact that there is currently no legal instrument that specifically addresses climate refugees. This governance gap means no institution has the mandate to protect climate refugees, there is a lack of liability mechanisms to sanction those responsible of causing this crisis, and no legal instruments are foreseen to guarantee the survival of the nations' cultures and rights to self-determination and self-governance.[52]

However, Kent and Behrman argue that describing the situation as "no man land" or as a "legal hole" could be inaccurate and misleading.[53] In this line, there are some legal instruments or frameworks that could be relevant and applicable to addressing the reality of climate refugees. These potentially applicable legal frameworks have been categorised into three groups: 1)

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51 Docherty, Bonnie and Giannini, Tyler (2009). "Confronting rising tide: proposal for convention on climate change refugees." *Harvard Environmental Law Review*, (33) 2, p. 357. https://climate.law.columbia.edu/sites/default/files/content/5c3e836f23a774ba2e115c36a8f72fd3e218.pdf.

52 Kent, Avidan and Behrman, Simon (2018). *Facilitating the Resettlement and Rights of Climate Refugees. An Argument for Developing Existing Principles and Practices*, Abingdon: Routledge, p. 27-28.

53 Kent, Avidan and Behrman, Simon (2018). *Facilitating the Resettlement and Rights of Climate Refugees. An Argument for Developing Existing Principles and Practices*, Abingdon: Routledge, p. 9-10; Behrman, Simon and Kent, Avidan (2018). "Overcoming the Legal Impasse? Setting the Scene." In: Behrman, Simon and Kent, Avidan (Eds.). '*Climate Refugees.' Beyond the Legal Impasse?*, Abingdon: Routledge, p. 6.

mitigation-related rules; 2) adaptation-related rules; and 3) protection-related laws.[54]

2.1. Applicable Legal Frameworks

2.1.1. International Environmental Law and Climate Change Rules

Following Kälin and Schrepfer's categorisation, the norms related to climate change can be considered mitigation norms. In this sense, as Kent and Behrman point out, "the relevance of mitigation rules to climate-induced migration is straightforward; the mitigation of climate change will reduce or eliminate the reasons for migration."[55] The main examples of these norms related to preventing climate change through the implementation of policies aimed at reducing greenhouse gas emissions are the United Nations Framework Convention on Climate Change (UNFCCC), the Kyoto Protocol, and the Paris Agreement. Although the goal of reducing emissions is the same in all three cases, the strategies differ. The UNFCCC establishes the obligation for states to reduce their emissions, the Kyoto Protocol sets legally binding targets, and the Paris Agreement introduces the principle of progression, which implies that states must establish a series of targets every five years that they need to meet and improve upon in subsequent years.

Apart from these, the International Tribunal for the Law of the Sea (ITLOS) has already recognised the importance of other legal instruments, such as the United Nations Convention on the

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54 Kälin, Walter and Schrepfer, Nina (2012). *Protecting People Crossing Borders in the Context of Climate Change: Normative Gaps and Possible Approaches*, Geneva: UNHCR, p. 13-17.

55 Kent, Avidan and Behrman, Simon (2018). *Facilitating the Resettlement and Rights of Climate Refugees. An Argument for Developing Existing Principles and Practices*, Abingdon: Routledge, p. 11.

Law of the Sea, in the mitigation efforts of states.[56] Furthermore, Kent and Behrman highlight other legal instruments, such as the Montreal Protocol on Substances that Deplete the Ozone Layer, which are also relevant in this context. Likewise, although it can be considered an instrument more related to adaptation rules, they also emphasise the possibility of using UNFCCC-related funds to compensate the costs associated with hosting climate refugees in receiving countries. [57] In a similar vein, other scholars have advocated for the use of international environmental law principles, such as the Common but Differentiated Responsibilities principle or the "polluter pays" principle (among others),[58] whose importance was even recognised by the ITLOS in its advisory opinion number 31.[59]

As already stated, although some scholars believe that climate change rules may provide the appropriate framework for addressing the climate refugee crisis due to their aim of eliminating, or, at the very least, reducing climate change, they do not appear to be the best option. These norms have been in effect for several years, and thus far, they have not provided the expected results. Not only that, but all indications suggest that significant changes

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56 Piñera Álvarez, Jorge (2024). *El primer paso hacia la luz de una verdadera justicia climática.* Available at: https://agendaestadodederecho.com/luz-de-una-verdadera-justicia-climatica/.

57 Kent, Avidan and Behrman, Simon (2018). *Facilitating the Resettlement and Rights of Climate Refugees. An Argument for Developing Existing Principles and Practices,* Abingdon: Routledge, p. 12-16.

58 See, instance: Prieur et al. (2008). "Draft convention on the international status of environmentally-displaced persons." *Revue Européenne de Droit de l'Environnement,* (4), p. 397. https://www.persee.fr/doc/reden_1283-8446_2008_num_12_4_2058; Eckersley, Robyn (2015). "The common but differentiated responsibilities of states to assist and receive 'climate refugees.'" *European Journal of Political Theory,* (14) 4, p. 493. https://doi.org/10.1177/1474885115584830.

59 Piñera Álvarez, Jorge (2024). *El primer paso hacia la luz de una verdadera justicia climática.* Available at: https://agendaestadodederecho.com/luz-de-una-verdadera-justicia-climatica/.

in achieving their objectives are unlikely in the coming years and that the effects of climate change may intensify.[60] Additionally, there is no international environmental law rule or any climate change rule that specifically addresses climate-induced migration.

2.1.2. Human Rights Law

Human rights law is probably, together with international refugee law, the main example of protection-related rules according to Kälin and Schrepfer's categorisation. This legal framework has been comprehensively analysed in the context of climate-induced migration. In this sense, it is frequently argued that the most significant advantage of human rights law is its broad scope of protection. Given the *jus cogens* nature of human rights, climate refugees are protected and safeguarded irrespective of their nationality, and, in some cases, even in spite of states' unwillingness to protect them. The "foreignness" element that being a refugee implies does not preclude the human rights application, and, indeed, the universal *jus cogens* nature of human rights makes those rights the only legal framework through which climate refugees can claim protection in many occasions.[61] In fact, it does not seem difficult to link the deleterious effects of climate change to specific human rights, such as the right to life, human dignity, the right to family life, the right to a healthy environment, and the only collective human right, the right to self-determination — so much so that the European Court of

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60 Ripple, William J. et al. (2024). "The 2024 state of the climate report: Perilous times on planet Earth." *BioScience*, p. 1. https://doi.org/10.1093/biosci/biae087.

61 Kent, Avidan and Behrman, Simon (2018). *Facilitating the Resettlement and Rights of Climate Refugees. An Argument for Developing Existing Principles and Practices*, Abingdon: Routledge, p. 19.

Human Rights (ECHR) has already addressed this in its judgment in *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland.*[62]

However, the applicability of Human Rights to the reality faced by climate refugees has some shortcomings. On the one hand, in order to receive protection through this legal framework, climate refugees need to demonstrate the direct and the imminent nature of a threat to human rights.[63] For instance, The Inuit petition to the Inter-American Court of Human Rights (IACHR) was unsuccessful in 2007 due to its inability to establish a direct causal connection between pollution originating in Canada and the USA and the human rights violations experienced by the petitioners and their communities.[64] As shown in this example, this direct and immediate effect does not always reflect the reality of climate refugees because the devastating effects that climate change have on their lives may take years to materialise. On the other hand, another relevant limitation of human rights law concerning climate refugees is that, despite its *jus cogens* nature, it does not regulate the admission of climate refugees into another state, nor their right to remain legally there.[65] Therefore, the most essential need of climate refugees is not protected by human rights law. As previously highlighted, the ultimate discretion of states when it comes to managing their borders still remains an obstacle for the recognition of some rights.

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62 European Court of Human Rights, Application no. 53600/20, Verein KlimaSeniorinnen Schweiz and Others v. Switzerland, April 9, 2024.

63 McAdam, Jane (2011). *Climate Change Displacement and International Law: Complementary Protection Standards*. Geneva: UNHCR, p. 50-52.

64 Inter-American Commission on Human Rights, Decision to Petition Nº P-1413-05, November 16, 2006.

65 Kälin, Walter and Schrepfer, Nina (2012). *Protecting People Crossing Borders in the Context of Climate Change: Normative Gaps and Possible Approaches*, Geneva: UNHCR, p. 34.

2.1.3. International Refugee Law

International refugee law, as previously mentioned, is another key example of protection-related regulations. It has the advantage of being a *jus cogens* legal framework that would grant climate refugees the highest degree of protection. The primary example of this legal framework is the 1951 Refugee Convention and the 1967 Protocol that expands its scope. According to Article 1 of the Refugee Convention, refugees are defined as those who "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, are outside the country of their nationality and are unable or, owing to such fear, unwilling to avail themselves of the protection of that country; or who, not having a nationality and being outside the country of their former habitual residence as a result of such events, are unable or, owing to such fear, unwilling to return to it."[66]

Climate refugees do not currently receive protection under the 1951 Refugee Convention, due to the fact their displacement is not directly linked to any form of persecution. Similarly, the 1951 Refugee Convention is designed to protect refugees from their own states, as well as from non-state actors operating within them.[67] However, in the case of climate refugees, there is an interesting situation where the state itself may also be a victim of the devastating effects of climate change and environmental degradation. For instance, consider a SIDS that is projected to disappear in the coming years due to rising sea levels. This creates

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66 Convention relating to the Status of Refugees. Adopted on 28 July 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly resolution 429 (V) of 14 December 1950, Article 1, (Universal). https://www.unhcr.org/media/convention-and-protocol-relating-status-refugees.

67 Kent, Avidan and Behrman, Simon (2018). *Facilitating the Resettlement and Rights of Climate Refugees. An Argument for Developing Existing Principles and Practices*, Abingdon: Routledge, p. 21.

a dysfunctionality in which the state that is theoretically entitled to provide protection to its inhabitants is unable to do so because of its own impending disappearance.

In this realm, another important piece of the puzzle is the principle of non-refoulement. This principle "prohibits States from returning a refugee or asylum-seeker to territories where there is a risk that his or her life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion."[68] This principle has a temporary nature. In other words, once the risk to the refugee's life no longer exists, the protection is withdrawn. However, in the case of climate refugees, the situation would be different, as the danger is permanent. Therefore, the protection would never cease to exist.[69]

Following Betts' interpretation, this principle is not only applicable to those individuals who are outside their country of origin due to persecution or armed conflict, but to all individuals who are outside their country due to an existential threat for which they have no access to a domestic remedy or solution.[70] While no court has accepted a claim based on the reason for migration being environmental,[71] the UN Human Rights Committee has considered that climate change can be a sufficient reason to

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68 Lauterpacht, Elihu and Bethlehem, Daniel (2003). "The scope and content of the principle of *non-refoulement*: Opinion." In: Feller, Erika; Türk, Volker and; Nicholson, Frances (Eds.). *Refugee Protection in International Law*. Cambridge: Cambridge University Press, p. 149.

69 Eckersley, Robyn (2015). "The common but differentiated responsibilities of states to assist and receive 'climate refugees.'" *European Journal of Political Theory*, (14) 4, p. 493. https://doi.org/10.1177/1474885115584830.

70 Betts, Alexander (2013). *Survival Migration. Failed Governance and the Crisis of Displacement*. New York: Cornell University Press, p. 278.

71 Kent, Avidan and Behrman, Simon (2018). *Facilitating the Resettlement and Rights of Climate Refugees. An Argument for Developing Existing Principles and Practices*, Abingdon: Routledge, p. 23.

trigger the non-refoulement principle.[72] However, this principle would only be applicable when the timeframe remaining to declare uninhabitability does not allow the sending state to take action to protect its population.[73]

Apart from the 1951 Refugee Convention, other instruments such as the aforementioned 1969 OAU Convention and the Cartagena Declaration provide a wider definition of the term "refugee" by including "circumstances seriously disturbing public order" as a reason for fleeing. Likewise, the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa effectively protects those fleeing "natural or human made disasters." However, it only covers persons internally displaced in Africa.

2.1.4. Rules Concerning Statehood and Statelessness

The rules concerning statehood and statelessness, namely the 1954 Convention Relating to the Status of Stateless Persons (1954 Convention) and the 1961 Convention on the Reduction of Statelessness (1961 Convention) could also be considered protection-related rules. Apart from these legal instruments, Article 15 of the Universal Declaration of Human Rights states that "everyone has the right to a nationality."

As already recognised by the ITLOS on its advisory opinion number 31 and by the Working Group II contribution to the Intergovernmental Panel on Climate Change Sixth Assessment Report, in the coming years entire nations could disappear underwater and, consequently, entire populations could become

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72 Rosignoli, Francesca (2022). *Environmental Justice for Climate Refugees*, Abingdon: Routledge, p. 65.

73 Rosignoli, Francesca (2022). *Environmental Justice for Climate Refugees*, Abingdon: Routledge, p. 65.

stateless.[74] The aforementioned conventions establish rules granting some human rights to stateless persons and, among those, article 32 of the 1954 Convention establishes that states should facilitate the assimilation and naturalisation of stateless persons as far as possible.[75] In a similar vein, the 1961 Convention establishes a variety of circumstances in which nationality is granted to stateless persons. Nevertheless, most of those situations do not address or are not relevant in the case of those becoming stateless due to the effects of climate change.[76]

The primary issue with these treaties is that they do not account for situations where the statelessness situation arises due to climate change, such as when an entire state vanishes underwater. These laws were designed with scenarios in mind in which states either merged or split into new entities, like the reunification of Germany, the dissolution of the USSR or Yugoslavia or the separation of Czechoslovakia. However, the possibility of nations entirely disappearing due to the effects of climate change and environmental degradation was not anticipated when these conventions were drafted in the 1950s and 1960s.[77] Similarly, the human right to nationality is not absolutely protected since although the Universal Declaration of Human Rights establishes

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74 Piñera Álvarez, Jorge (2024). *El primer paso hacia la luz de una verdadera justicia climática*. Available at: https://agendaestadodederecho.com/luz-de-una-verdadera-justicia-climatica/.

75 Convention relating to the Status of Stateless Persons. Adopted on 28 September 1954 by a Conference of Plenipotentiaries convened by Economic and Social Council resolution 526 A (XVII) of 26 April 1954, Article 32, (Universal). https://www.unhcr.org/ibelong/wp-content/uploads/1954-Convention-relating-to-the-Status-of-Stateless-Persons_ENG.pdf.

76 Kent, Avidan and Behrman, Simon (2018). *Facilitating the Resettlement and Rights of Climate Refugees. An Argument for Developing Existing Principles and Practices*, Abingdon: Routledge, p. 24.

77 Kent, Avidan and Behrman, Simon (2018). *Facilitating the Resettlement and Rights of Climate Refugees. An Argument for Developing Existing Principles and Practices*, Abingdon: Routledge, p. 24.

that everyone has the right to nationality, there are no obligations in international law which compel states to grant nationality to stateless persons.[78]

2.1.5. Soft Law Instruments

Finally, there are numerous soft law instruments that could be applicable to the reality of climate refugees. Indeed, most of these instruments are the ones designed to effectively cover this issue. These soft law instruments, which include, among others, the Nansen Initiative, the Sendai Framework, the 1998 Guiding Principles on Internal Displacement, the Guidelines for Protecting People from Disasters and Environmental Change through Planned Relocation, and the New York Declaration, can be considered as mitigation, adaptation and protection rules in Kälin and Schrepfer categorisation. In a nutshell, there appears to be a growing dependence on the potential of soft law, with some scholars suggesting that soft law mechanisms are the only practical path forward.[79] These instruments are different in their scope, but they all share the objective of filling the legal lacuna. However, they have severe shortcomings. They are often vague and ineffective, and, while it is true that they in some cases they could be useful, especially if hard law mechanisms are designed upon them in the future, their non-binding nature reflect their inherent weaknesses.

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78 McAdam, Jane (2010). "'Disappearing States', Statelessness and the Boundaries of International Law." *University of New South Wales Law Research Paper*, (2), p. 13. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1539766#.

79 Schloss, Camilla (2018). "Cross-border displacement due to environmental disaster: a proposal for UN Guiding Principles to fill the legal protection gap." In: Behrman, Simon and Kent, Avidan (Eds.).'*Climate Refugees.' Beyond the Legal Impasse?*, Abingdon: Routledge.

3. FILLING THE LEGAL PENUMBRA

In recent years, several proposals have been put forward to address the legal lacuna concerning climate refugees. However, despite the efforts made by various scholars, these attempts have been unsuccessful, and to this day, the legal penumbra affecting climate refugees unfortunately remains. In this section, we highlight the two proposals we consider most relevant and discuss their weaknesses. We conclude by proposing what we believe is the best option to protect climate refugees, particularly in the context of the request for an advisory opinion from the International Court of Justice (ICJ) regarding states' obligations concerning climate change: the expansive interpretation of the 1951 Refugee Convention.

3.1. Proposals for a New Universal Convention[80]

A significant portion of the literature has focused on exploring the possibility of creating a new convention or universal treaty to protect climate-induced migrants. In this context, the most notable initiatives have been those proposed by Biermann and Boas in 2008,[81] Docherty and Giannini in 2009,[82] Hodgkinson

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80 This section is based on and summarises the proposal made by Prieur et al. For more information, please refer to the full article: Prieur et al. (2008). "Draft convention on the international status of environmentally-displaced persons." *Revue Européenne de Droit de l'Environnement*, (4), p. 395-406. https://www.persee.fr/doc/reden_1283-8446_2008_num_12_4_2058.

81 Biermann, Frank and Boas, Ingrid (2008). "Protecting Climate Refugees: The Case for a Global Protocol." *Environment: Science and Policy for Sustainable Development*, (50) 6, p. 10-16. http://dx.doi.org/10.3200/ENVT.50.6.8-17.

82 Docherty, Bonnie and Giannini, Tyler (2009). "Confronting rising tide: proposal for convention on climate change refugees." *Harvard Environmental Law Review*, (33) 2, p. 349-404. https://climate.law.columbia.edu/sites/default/files/content/5c3e836f23a774ba2e115c36a8f72fd3e218.pdf.

et al. in 2010,[83] and, especially, the proposal by Prieur et al. in 2008.[84] Since we consider this last proposal to be the most comprehensive, we focus our analysis on the Draft Convention on the International Status of Environmentally-Displaced Persons, which was elaborated by the CRIDEAU, the Centre of Research on persons' rights, thematic teams of the Institutional and Judicial Mutations Observatory from the Faculty of Law and Economic Science of the University of Limoges, and the CIDCE.

According to Prieur, the proposal is based on two preliminary considerations. First, it acknowledges a lack of political will, as well as legal obstacles, that prevent the reform of the 1951 Refugee Convention to extend refugee status to environmentally-displaced persons. Second, it contends that the 1951 Refugee Convention offers limited recognition of collective rights and applies only to individuals crossing national boundaries, which does not align with the reality of those fleeing the effects of climate change since these individuals are affected more collectively than individually and rarely cross international borders.[85] For these reasons, the proposed Draft Convention falls outside the scope of international refugee law.[86]

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83 Hodgkinson, David et al. (2010). "The Hour When the Ship Comes in: A Convention for Persons Displaced by Climate Change." *Monash University Law Review*, (36) 1, p. 69-120. https://bridges.monash.edu/articles/journal_contribution/The_Hour_When_the_Ship_Comes_In_A_Convention_for_Persons_Displaced_by_Climate_Change/10064414?file=18137564.

84 Prieur et al. (2008). "Draft convention on the international status of environmentally-displaced persons." *Revue Européenne de Droit de l'Environnement*, (4), p. 395-406. https://www.persee.fr/doc/reden_1283-8446_2008_num_12_4_2058.

85 Prieur, Michel (2018). "Towards an international legal status of environmentally displaced persons." In: Behrman, Simon and Kent, Avidan (Eds.). '*Climate Refugees.' Beyond the Legal Impasse?*, Abingdon: Routledge, p. 235.

86 Rosignoli, Francesca (2022). *Environmental Justice for Climate Refugees*, Abingdon: Routledge, p. 74.

The proposal adopts the term "environmentally-displaced persons," which broadens its scope and provides the advantage of covering all possible phenomena related to climate migration. This includes a wide range of scenarios, such as both sudden and gradual environmental disasters that lead to temporary or permanent displacement following natural or human-made catastrophes. It also addresses both cross-border and internal environmental displacements, while explicitly recognising collective rights. This makes the Convention a truly holistic and universal proposal that encompasses nearly all scenarios in which environmentally-displaced persons might find themselves.[87]

The Convention is governed by a series of principles outlined in its Article 4. These principles derive from various legal frameworks, including the principle of Common but Differentiated Responsibilities from international environmental law, as well as the principles of proportionality and effectiveness from public international law. It also introduces a new proximity principle, which emphasises that individuals should be relocated as closely as possible to their cultural area.

Additionally, the Convention establishes a set of rights applicable to all "environmentally-displaced persons." Notably, it includes tailored and specific rights for temporarily displaced individuals, such as the right to safe shelter, the right to reintegration, the right to return, and the right to prolonged shelter. For those permanently displaced, rights include the right to resettlement and the right to nationality, which addresses the issue of statelessness by allowing individuals to retain their original nationality until they acquire that of the host country. The Convention also incorporates collective rights, such as the right to family unity, rights recognised for minorities, and the right of a group to constitute itself collectively and maintain its collective identity.

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87 Rosignoli, Francesca (2022). *Environmental Justice for Climate Refugees*, Abingdon: Routledge, p. 74.

Regarding institutions, the Convention includes the establishment of the World Agency for Environmental-Displaced Persons and a High Authority composed of 21 experts empowered to make decisions on matters such as procedures for obtaining the status of environmentally-displaced persons, and amendments the Convention. Additionally, it proposes the creation of the World Fund for the Environmentally Displaced (WFED), which provides financial and material assistance for both the reception and return of environmentally displaced individuals. This assistance is available to both host states and countries of residence, as well as to other organisations outlined in the Convention.

Overall, this proposal is ambitious and holistic, addressing nearly all situations that environmentally displaced persons may face. It introduces new principles and strikes a balance between individual and collective rights, particularly emphasising the right of a group to constitute itself collectively and maintain its collective identity. The establishment of the WFED is a valuable tool for compensating displaced individuals. However, compensating host states that may sometimes be responsible of climate change and its adverse effects through their greenhouse gas emissions can be problematic and may lead to commodifying a humanitarian crisis. On the contrary, we believe that states contributing to climate change, and, consequently, climate-induced migration should have the obligation to host refugees based on the principle of Common but Differentiated Responsibilities, without expecting compensation.

In conclusion, short of acknowledging that it would be the ideal framework to protect climate refugees or, more broadly, environmentally-displaced persons (echoing Prieur's arguments), it is an aspirational proposal, since, as Prieur highlights regarding a potential reform of the 1951 Refugee Convention, there is insufficient political will to implement such an ambitious framework. In this regard, it is worth noting that the world is currently experiencing an era of securitisation of migration. In this sense, one only needs to look at the latest developments (or

setbacks) in migration policies within the European Union under the framework of the New Pact on Migration and Asylum.[88]

3.2. Piggy-Backing on the International Environmental Regime[89]

In a completely different approach, Kent and Behrman advocate for what they call piggy-backing on the international environmental regime. They argue that international environmental law is the most suitable framework for addressing the climate situation. They base their argument on the idea that initiating negotiations for a new treaty or reforming the 1951 Refugee Convention could lead to the establishment of a more restrictive mechanism than what could emerge from existing environmental law instruments. In this regard, they argue that the principles of environmental law are well-suited to provide a framework for addressing the issue of climate refugees. They contend that a matter so inherently linked to climate change should be regulated within this framework, and they point out that recent actions taken by the international community indicate that the path to resolving the legal lacuna lies within the UNFCCC.

Furthermore, they justify their stance by emphasising that environmental law, unlike human rights law, is rooted in collective rights, which better address the needs of climate refugees and the specific violence inflicted by climate change. "The type of violence described by the refugee Convention focuses on persecution against single individuals. However, such individual-based persecution ontologically differs from the violence of climate change that hits large and potentially indiscriminate

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88 Abat i Ninet, Antoni (2024). "Habemus Pactum: a preu de drets humans." *Quaderns IEE: Revista de l'Institut d'Estudis Europeus*, (3) 2, p. 148-161. https://doi.org/10.5565/rev/quadernsiee.83.

89 This section summarises Kent and Behrman's proposal. For more information refer to: Kent, Avidan and Behrman, Simon (2018). *Facilitating the Resettlement and Rights of Climate Refugees. An Argument for Developing Existing Principles and Practices*, Abingdon: Routledge, p. 73-160.

groups of people. (…) Such an individualised approach makes it challenging to identify duty bearers and right holders when it comes to the nebulous effects of climate change."[90]

Far from the idea of creating a new treaty, Kent and Behrman advocate for the establishment of what they refer to as a cross-governance model defined as a "formal, accommodating institutional setting, in which actors from different institutions, areas of expertise and perspective can operate (and cooperate) in a coordinated manner."[91] In other words, they aim to bridge the existing governance gap by taking advantage of various already existing legal frameworks, such as environmental law, human rights law, and international refugee law. They also emphasise the importance of cooperation among different institutions and international organisations, such as the IOM and UNHCR.

One of their main arguments for relying on the international environmental law regime is based on existing funding mechanisms. They believe that states need some form of incentive to accept climate refugees. In this context, they propose a compensation mechanism using UNFCCC funds to reimburse host countries. They argue that using these funds would accelerate the negotiation process and, since they are grounded in the principle of Common but Differentiated Responsibilities, the primary donors would be the states responsible for climate change, thereby establishing some form of liability.

The idea of addressing the legal lacuna through international environmental law is interesting. Identifying states as duty bearers and rights holders can help ensure the exercise of collective rights and protect the survival of the cultures of the communities most affected by climate change. Additionally, Kent and Behrman's

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90 Rosignoli, Francesca (2022). *Environmental Justice for Climate Refugees*, Abingdon: Routledge, p. 83.

91 Kent, Avidan and Behrman, Simon (2018). *Facilitating the Resettlement and Rights of Climate Refugees. An Argument for Developing Existing Principles and Practices*, Abingdon: Routledge, p. 152.

proposed cross-governance model is a strong solution for addressing the existing governance gap.

However, international environmental law is not the legal framework that best addresses the needs of climate refugees, as there is still no specific legal instrument that directly tackles them. Moreover, the proposed compensation mechanism raises significant concerns. While it could establish some liability for states responsible for climate change, compensating them for accepting migrants commodifies a humanitarian crisis. We reiterate that, in our view, the solution should involve compelling states to provide refuge rather than compensating them. Ultimately, we do not believe states would be willing to adopt such a system of collective rights. In contrast, while the ideal would be to ensure collective protection for refugees, as Kent and Behrman suggest, we believe that the most realistic approach today is to advocate for a more restrictive system that at least guarantees the individual rights of climate refugees.

3.3. Extensive Interpretation of the 1951 Refugee Convention and its 1967 Protocol

The final proposal analysed in this chapter involves an expansive interpretation of Article 1(A) of the 1951 Refugee Convention, aiming to provide legal accommodation for climate refugees and address the existing legal lacuna. It is acknowledged that the 1951 Refugee Convention and the 1967 Protocol are the primary legal instruments governing the movement of refugees and asylum seekers across international borders. In fact, the 1951 Refugee Convention has been one of the seminal texts of the post-World War II international human rights regime, signed in recognition of the dangers faced by individuals rendered homeless and stateless due to persecution.[92]

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92 Benhabib, Seyla (2020). "The End of the 1951 Refugee Convention? Dilemmas of Sovereignty, Territoriality, and Human Rights." *Jus Cogens*,

Consequently, it is the primary and most relevant source to provide a legal answer to the legal lacuna, although its real application and enforcement is, in the best case-scenario, dubious and tenuous. The factual, tremendous and tragic reality that the world faces in almost every humanitarian crisis leads even to questioning if the 1951 Refugee Convention or the asylum system have ended.[93]

States have consistently demonstrated their reluctance to enforce the 1951 Refugee Convention and uphold the protection of human beings, even though this necessarily entails a degree of progressive de-territorialisation. Through legal and political subterfuge, or simply brute force, states deny — through actions or omissions — the *jus cogens* and *erga omnes* nature of certain principles and provisions of the 1951 Refugee Convention. Refugees are treated as if they were mere human products rather than human beings, and the 1951 Refugee Convention as if it was voluntary rather than mandatory. A long and growing list of execrable factual examples of breaches of the 1951 Refugee Convention exists, such as the reported violations of refugee protections under the Biden Administration.[94] Likewise, violations have also taken form of legal bills and their enforcement, such as various aspects of Australia's asylum seeker policies,[95] the 2021 Danish Aliens Act, the treatment of migrants and refugees at

(2) 1, p. 82. https://doi.org/10.1007/s42439-020-00022-1.

93 Benhabib, Seyla (2020). "The End of the 1951 Refugee Convention? Dilemmas of Sovereignty, Territoriality, and Human Rights." *Jus Cogens*, (2) 1, p. 75. https://doi.org/10.1007/s42439-020-00022-1.

94 Wilkins, Brett. *Hundreds of Legal Experts Push Biden to Drop 'Punitive and Deadly' Sanctions*. Available at: https://www.commondreams.org/news/u-s-sanctions.

95 Human Rights Law Centre (2015). *UN finds Australia's treatment of asylum seekers violates the Convention Against Torture*. Available at: https://www.hrlc.org.au/news/un-finds-australias-treatment-of-asylum-seekers-violates-the-convention-against-torture.

Ellebæk (which is referred as an "immigrant centre" but which it is a prison in reality),[96] and the UK illegal Migration Act of 2023.

However, despite this bleak outlook, we believe that the inclusion of climate refugees within the scope of Article 1 of the 1951 Refugee Convention may trigger a process of subverting this situation. Opening the debate to a teleological interpretation of the definition of "refugee" will, in fact, reinforce the need to enforce the *jus cogens* and *erga omnes* character of the 1951 Refugee Convention. The justification for recognising *jus cogens* and *erga omnes* obligations for states under the 1951 Refugee Convention to accommodate climate refugees is drawn from its key function of protecting fundamental values (collective interests). In the case of climate refugees, this is clearly justified, not only for the migrants themselves but also for the states that may receive millions of forcibly displaced individuals who cannot return to their home countries because either these no longer exist (submerged) or have become uninhabitable (due to extreme temperatures or other climate change effects).[97]

Erga omnes obligations share the same substantive foundation, but their effects are primarily procedural, particularly in the context of remedies against alleged wrongdoing under general international law or actions brought before international courts and tribunals. Both concepts aim to strengthen the defences available to the international community against serious breaches of the international legal order, especially by enabling individual

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96 Abat i Ninet, Antoni (2018). "Human Dignity in Denmark." In: Becchi, Paolo and Mathis, Klaus (Eds.). *Handbook of Human Dignity in Europe*. Cham: Springer; Clante Bendixen, Michala (2023). *Ellebæk*. Available at: https://refugees.dk/en/facts/the-asylum-procedure-in-denmark/ellebaek/.

97 On *jus cogens* and *erga omnes* obligations see: de Wet, Erika (2013). "*Jus Cogens* and Obligations *Erga Omnes*." In Shelton, Dinah (Ed.). *The Oxford Handbook of International Human Rights Law*. Oxford: Oxford University Press, p. 541-561; Ragazzi, Maurizio (2000). *The Concept of International Obligations Erga Omnes*. Oxford: Oxford University Press.

states to act in the furtherance and maintenance of the common interests of humankind.

A second argument that justifies the expansive interpretation of Article 1 of the 1951 Refugee Convention is that a teleological interpretation rests within the judiciary and not within the will of states. This would increase the legitimacy of the legal accommodation of climate refugees. This approach appears to have greater potential for success, given the record of violations by states and their reluctance to enforce binding norms.

3.3.1. Judicial Activism

The legal uncertainty in which climate refugees find themselves creates an abnormal situation in which the teleological interpretation would be justified; however, it may open the door to judicial activism. This raises several questions: Should a court be activist in protecting forcibly displaced climate migrants and their human dignity? Or, on the contrary, is it preferable to uphold judicial restraint in order to safeguard the independence of judges and magistrates, despite the acknowledged legal ambiguity? Although the notion of judicial activism is indeterminate and gives rise to conflicting doctrinal definitions, this semantic uncertainty can be reduced by taking a literal interpretation of the concept. The word "activism" implies direct and perceptible action to achieve a result. The concept of "action" is very broad, but its definition is useful as it shows that activism remains tied to achieving a concrete result.[98]

Judicial activism is the interpretation and argumentation that a judge adopts for a concrete decision. Legality generally involves an activity (or inactivity) that provides legal interpretation rather

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98 Abat i Ninet, Antoni (2016). "The role of the judiciary in Egypt's failed transition to democracy." In: Scheinin, Martin; Krunke, Helle and; Aksenova, Marina (Eds.). *Judges as Guardians of Constitutionalism and Human Rights*, Cheltenham: Edward Elgar, p. 201-223.

than creates it (*ius dicere* and not *ius dare*). Justice Paul Mahoney defines judicial activism as a situation where "judges [modify] the law from what was previously or has been declared as existing legal sources, thereby substituting decisions with the sought-after decision, replacing the legislature (representative bodies)."[99] Under this definition, activism is not always negative. A court can enhance legal certainty, protect individual equality, correct mistakes made by other actors, including judges, and, most importantly for our purpose, shed light on a factual penumbra. Thus, according to the holistic understanding of our legal systems and rationales, there are no a-legal facts or situations, including in the case of forced climate refugees. This definition is not tied to a specific outcome but is instead limited to a form of improper legislation, heavily influenced by the common law system and the American legal tradition.[100]

We agree with Green when he indicates that judicial activism should be defined as the abuse of power exercised outside the limits of the judicial role. Judicial activism involves abuse because the result-driven action represents an overreach by the judge in the exercise of their duties.[101] Like Green, other doctrinal views link "action" and "result" in defining judicial activism. In this sense, Baxi acknowledges that in cases where a decision benefits the people, there is no judicial activism. He also asserts that a judge is not an activist in the sense of the "militant use of judicial power in service of fundamental rights."[102]

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99 Abat i Ninet, Antoni (2016). "The role of the judiciary in Egypt's failed transition to democracy." In: Scheinin, Martin; Krunke, Helle and; Aksenova, Marina (Eds.). *Judges as Guardians of Constitutionalism and Human Rights*, Cheltenham: Edward Elgar, p. 201-223.

100 Abat i Ninet, Antoni (2014). "L'activisme judiciaire, le prix de la transaction démocratique en Espagne." *Constitutional Forum*, (23) 3, p. 20. https://doi.org/10.21991/C99D4D.

101 Green, Craig (2009). "An Intellectual History of Judicial Activism." *Emory Law Journal*, (58) 5, p. 1222.

102 Koshla, Madhav (2009). "Addressing Judicial Activism in the Indian Supreme Court: Towards an Evolved Debate." *Hastings International &*

This definition of activism does not consider how the judge interprets the relevant legal provisions but focuses solely on the intention of the decision to play a socially transformative role. Consequently, a decision that fails to follow both precedents and standard legislative interpretation rules but promotes human rights would not be considered activist. Similarly, Cohn and Kremnitzer argue that a decision protecting constitutional values cannot be considered activism.[103] While this interpretation ties action and result to the definition of activism, we face two different spheres. Two facts, and the pursuit of a specific outcome by a judicial body, signify "activism," representing a form of excess that can be identified. However, this does not necessarily imply unsupervised power. A different question is whether judicial activism is justified, legitimate, necessary, or positive. At first glance, it seems that judicial protection and the enforcement of human rights would justify judicial activism, despite the risk it poses to democracy and the rule of law.[104]

Therefore, following the doctrine of Baxi, Cohn and Kremnitzer, the expansive interpretation of Article 1 of the 1951 Refugee Convention to address a legal lacuna cannot be considered judicial activism. Moreover, failing to address a claim based on the protection of human rights contradicts the right to effective protection by judges and courts.

Comparative Law Review, (55), p. 65. https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=4355&context=faculty_scholarship.

103 Cohn, Margit and Kremnitzer, Mordechai (2005). "Judicial Activism: A Multidimensional Model." *Canadian Journal of Law and Jurisprudence*, (18). https://papers.ssrn.com/sol3/papers.cfm?abstract_id=942476.

104 Cohn, Margit and Kremnitzer, Mordechai (2005). "Judicial Activism: A Multidimensional Model." *Canadian Journal of Law and Jurisprudence*, (18), p. 20. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=942476.

3.3.2. Teleological or Purposive Interpretation

Teleological or purposive interpretation refers to the third method of treaty interpretation mentioned in Article 31(1) of the Vienna Convention on the Law of Treaties (VCLT), which establishes that the ordinary (literal) meaning of a treaty's terms should be interpreted in the context of, and in light of, its object and purpose.[105] It is also referred to in Article 31(3)(b) which allows resorting to subsequent treaty practice and, hence, to changing circumstances. By purpose, we follow Villiger's general definition, where the object and purpose encompasses a combined whole of the term, including its aim, nature, and end.[106] In this sense, considering climate-induced migrants as refugees aligns with the aim (protecting transnational refugees), nature (humanitarian character, with the inclusion of new types of refugees helping to prevent this issue from becoming a source of tension between states), and the ultimate goal of the 1951 Refugee Convention (the protection of refugees, recognising that effective coordination of measures to address this issue depends on state cooperation).

Proposing a teleological interpretation of the 1951 Refugee Convention is not an extravagance. In fact, such an interpretation is frequently employed by international courts in treaty interpretation.[107] This method is often used in interpreting the constitutive treaties of international organisations and is commonly applied to international human rights treaties. Scholars note the "deep-rooted attachment" that certain international courts,

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105 Law No. 18232, Vienna Convention on the law of treaties concluded at Vienna on 23 May 1969, Article 31(1), (Universal), https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

106 Villiger, Mark E. (2009). *Commentary on the 1969 Vienna Convention on the Law of Treaties*, Leiden: Martinus Nijhoff Publishers.

107 Djeffal, Christian (2013). "Commentaries on the Law of Treaties: A Review Essay Reflecting on the Genre of Commentaries." *European Journal of International Law*, (24) 4, p. 1223–1238. https://doi.org/10.1093/ejil/cht071.

particularly human rights courts like the ECHR and the IACHR, have to the teleological method.[108]

Article 1.A (2),"definition of the term refugee," of the 1951 Refugee Convention, reads as follows:

> "As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is out-side the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it. In the case of a person who has more than one nationality, the term "the country of his nationality" shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national."

When considering the accommodation of climate refugees, we encounter an objective legal lacuna which is not attributable to the legislator but to the passage of time and the disconnect between the law and social reality, which creates conflicts unforeseen by the legislator. In this sense, despite the early mention by Vogt of "ecological displaced persons" in 1948, the climate effects were neither predictable in 1951 nor in 1967. This objective lacuna calls for a *praeter legem* interpretation of the various elements of the definition to address the failure to include cases or situations that should be covered, such as climate refugees. We have outlined the main elements of the definition above (see 2.2. Why Climate Refugees); however, it should also be noted that the first qualifying element of the definition is a "well-founded fear of being persecuted." This has led most scholars to focus on whether climate change can be understood as a form of persecution,

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108 Ammann, Odile (2020). *Domestic Courts and the Interpretation of International Law. Methods and Reasoning Based on the Swiss Example*, Leiden: Koninklijke Brill NV, p. 209-210.

thereby allowing climate refugees to be incorporated into the 1951 Refugee Convention's framework.

The first qualifiers of the definition of the term "refugee" are "persecution" and "alienage." We consider that both elements apply to defining climate refugees as victims of the effects of climate change and environmental degradation. Regarding persecution, the definition includes "membership of a particular social group," which can be associated with being a citizen of a Global South country suffering the effects caused by the states and corporations of the Global North.

In this sense, a victim is defined as "a person who, individually or collectively, has suffered harm, including physical or mental injury, emotional suffering, economic loss, or substantial impairment of their fundamental rights, through acts or omissions that violate criminal laws operative within member states, including those proscribing criminal abuse of power."[109] There is no doubt that climate refugees fit this definition and align with key principles of victimology. Victimology highlights that policy-making is often influenced by victims and victim groups.[110] Climate refugees are climate change victims who are seeking legal solutions, although they may not currently fit the attributes of the "ideal" victim — namely, weakness, vulnerability, dependency, and grotesqueness.[111] Although a part of the academic doctrine rejects the term "climate refugees" due to the victimhood it entails, by

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109 United Nations. *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*. General Assembly 40/34 of date 29 of November of 1985. Available at: https://www.ohchr.org/en/instruments-mechanisms/instruments/declaration-basic-principles-justice-victims-crime-and-abuse.

110 Walklate, Sandra (2007). "Perspectives on the Victim and Victimisation. Introduction to Part I." In: Walklate, Sandra (Ed.). *Handbook of Victims and Victimology*, Abigdon: Routledge, p. 11.

111 Schwöbel-Patel, Christine (2018). "The 'Ideal' Victim of International Criminal Law." *European Journal of International Law*, (29) 3, p. 703. https://doi.org/10.1093/ejil/chy056.

considering these groups as victims, we aim to prioritise the demands of millions of people from a global justice perspective, rather than imposing a symbolic identity that competes with the notion of the "ideal" victim. [112] In other words, this is a non-ideal proposal, whose implications are to provide a *jus cogens* protection to climate refugees.

Another qualifying element of the "refugee" definition is the impossibility of applying a domestic remedy to the situation that causes forced transnational migration. In the case of climate refugees, due to the physical disappearance of their home territory or the inability to sustain life there (due to extreme temperatures or other deleterious effects of climate change), the state cannot provide a remedy that allows the refugee to return home without suffering harm or risking their life. In this sense, the other core principle of the 1951 Refugee Convention — *non-refoulement* — should also be guaranteed due to the factual disappearance of the home state, preventing the refugee from returning.

The final aspect that qualifies the consideration of climate refugees under the normative definition provided by the 1951 Refugee Convention is the extreme necessity that refugees face. Again, it is clear that, due to the disappearance of their home territory or their inability to survive there, climate refugees fulfil this requirement. It is not that the home state of the climate refugee is unwilling to meet its international legal obligations; rather, it is simply unable to do so.

The concept of a state of necessity can be applied in two directions. On the one hand, the concept can be applied to climate refugees. In this context, refugees find themselves in a position of extreme necessity that forces them to migrate. A straightforward way to explain this variant of necessity is by applying the Kantian principle of necessity: "That whose connection with the actual is

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112 Schwöbel-Patel, Christine (2018). "The 'Ideal' Victim of International Criminal Law." *European Journal of International Law*, (29) 3, p. 724. https://doi.org/10.1093/ejil/chy056.

determined in accordance with general conditions of experience is (exists) necessarily."[113]

In a syllogism, this could be expressed as follows: it is *empirically-causally necessary* that *p* if and only if it is incompatible with actual natural laws and the past history of the empirical world up until time *t*, that ¬*p*. If it is formally necessary that *p* then it is also empirically-causally necessary that *p*, but not *vice versa*. Moreover, given that every event has a cause, every actual event is relatively necessary in this sense. Actuality and material (empirical-causal) necessity, to this extent, coincide. At this point in Kant's argument, we have thus isolated a concept of material necessity that can be cognised, namely, that defined by the principle of necessity.[114]

The second aspect pertains to states that claim to be facing a situation of "extreme necessity" to justify their avoidance of fulfilling mandatory international law obligations. A pertinent example would be if Australia suddenly encountered hundreds of thousands of climate refugees seeking refuge within its borders and claimed "extreme necessity" as a reason to deny their entry. Indeed, the conditions could be considered as extreme, and the standards recognised by both the International Law Commission (ILC) and the ICJ regarding the non-fulfilment of human rights obligations may apply, particularly in the balancing test outlined in the provisionally adopted text of Article 33 of the ILC's Draft Articles on State Responsibility.[115] By normatively including climate

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113 Leech, Jessica (2021). "Kant on the Necessity of Necessity." *History of Philosophy & Logical Analysis*, (25) 1, p. 69. https://brill.com/view/journals/hpla/25/1/article-p66_4.xml.

114 Leech, Jessica (2021). "Kant on the Necessity of Necessity." *History of Philosophy & Logical Analysis*, (25) 1, p. 73-75. https://brill.com/view/journals/hpla/25/1/article-p66_4.xml.

115 Boed, Roman (2000). "State of necessity as a justification for internationally wrongful conduct." *Yale Human Rights and Development Law Journal*, (3) 1, p. 3. https://openyls.law.yale.edu/bitstream/handle/20.500.13051/5809/01_3YaleHumRts_DevLJ1_2000_.pdf?sequence=2&isAllowed=y.

refugees and providing legal rationalisation and procedural systematisation, we aim to mitigate the implications of "extreme necessity" by offering a viable and beneficial solution for states.

The next section of the paper proposes, first, the institutionalisation of Non-Territorial Autonomy (NTA) and its application to facilitate and rationalise the relationship between climate refugees and the host states. The NTA could provide a framework that protects both individuals and collectives, meaning self-determined nations or communities, while simultaneously preventing states that receive waves of migration from declaring a state of necessity to suspend the application of *jus cogens* norms.

4. NON-TERRITORIAL AUTONOMY

This section examines whether the theory of NTA can be applied to protect climate refugees from a collective rights perspective. This perspective seeks to guarantee their right of self-determination as individuals and collectively, as a nation, as a right integral to basic human rights and fundamental freedoms. The proposal aims to complement existing tools and propositions while shedding light on a phenomenon that, so far, has not received necessary attention in literature.[116]

Since NTA could be understood as self-rule of a group through a non-state entity in matters deemed vital for the maintenance and reproduction of their culturally distinctive features, it is reasonable to assert that NTA arrangements (non-state bodies) should play specific roles regarding language as one of the essential features of the communities they represent.[117]

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116 Kent, Avidan and Behrman, Simon (2018). *Facilitating the Resettlement and Rights of Climate Refugees.*

An Argument for Developing Existing Principles and Practices, Abingdon: Routledge, p. 28.

117 Đuric, Vladimir and Markovic, Vasilije (2023). "The Role of Law and Non-Territorial Autonomy Arrangements in the Implementation of

In the case of a whole nation being forced to migrate because of the deleterious effects of climate change and environmental degradation, whether because its territory has physically disappeared (submerged) or functionally become uninhabitable (due to extreme temperatures or desertification), NTA appears to be a viable option for maintaining and reproducing the distinctive aspects of the community. In fact, all indications suggest that NTA, including non-state bodies, would be perfectly applicable for protecting the transcendent elements of the minority and their rights. Additionally, since NTA encompasses several distinct forms, including consociationalism, cultural autonomy and juridical autonomy for religious communities, among others,[118] it is plausible that the climate refugee nations, as they become minorities in the host state(s), may influence these forms. If the main rationale behind the NTA is to provide a channel for self-rule of dispersed minorities[119], it also seems appropriate to explore the application and adaptation of NTA to the phenomenon of climate refugees from a collective perspective. Concerning its scope, NTA serves as a means for the diffusion of powers in order to preserve the unity of a state while respecting the diversity of its population. This is precisely where the interests of the host state flourish as the state unity and *ad hoc* recognition of a new minority may contribute to finding a suitable solution for both migrants and host states.

Linguistic Rights: A Comparative Perspective." In: Smith, David J.; Dodovski, Ivan and; Ghencea, Flavia (Eds.). *Realising Linguistic, Cultural and Educational Rights Through Non-Territorial Autonomy*, London: Palgrave Macmillan, p. 9.

118 Malloy, Tove H. (2021). "A new research agenda for theorizing non-territorial autonomy?" In: Malloy, Tove H. and Salat, Levente (Eds.). *Non-Territorial Autonomy and Decentralisation. Ethno-cultural diversity governance*, Abingdon: Routledge, p. 3.

119 Malloy, Tove H. (2021). "A new research agenda for theorizing non-territorial autonomy?" In: Malloy, Tove H. and Salat, Levente (Eds.). *Non-Territorial Autonomy and Decentralisation. Ethno-cultural diversity governance*, Abingdon: Routledge, p. 3.

Technically and legally, these models are structured around individual rights collectively exercised by members of the beneficiary group and overseen by institutions whose authority is determined by numerical representation.[120] It is indeed accurate to state that the term NTA encompasses a broad spectrum of meanings and interpretations. That is, there is not a singular standardised NTA model. However, this lack of specificity allows NTA to manifest in diverse forms, including cultural, personal, and functional autonomy. The understanding of these types or modalities of NTA varies, reflecting conceptual nuances in different approaches; yet, certain fundamental characteristics can still be identified.[121] Nevertheless, as Nimni remarks, the definition of NTA as a generic form of collective rights and collective representation across non-territorial lines allows for minority communities to be collectively represented in governance, while sharing a territorial space with other communities that are equally represented.[122]

Nothing seems to deter the application of NTA for new non-territorial emerging climate refugees' nations becoming minorities. On the contrary, the application of NTA for this case does not alter these prospects; instead, it opens a different scenario that reinforces the promising paradigm concerning state unity and political stability when facing climate refugee crisis.

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120 Malloy, Tove H. (2021). "A new research agenda for theorizing non-territorial autonomy?" In: Malloy, Tove H. and Salat, Levente (Eds.). *Non-Territorial Autonomy and Decentralisation. Ethno-cultural diversity governance*, Abingdon: Routledge, p. 4.

121 Djordjevic, Ljubica (2023). "The Many Faces of Minority Non-Territorial Autonomy." In: Andeva, Marina; Dobos, Balázs; Djordjevi- , Ljubica; Kuzmany, Börries and; Malloy, Tove H. (Eds.). *Non-Territorial Autonomy. An Introduction*, Cham: Palgrave Macmillan, p. 173.

122 Nimni, Ephraim (2015). "Minorities and the Limits of Liberal Democracy: Demoicracy and Non-Territorial Autonomy." In: Palermo, Francesco and Malloy, Tove H. (Eds.). *Minority Accommodation through Territorial and Non-Territorial Autonomy*, Oxford: Oxford University Press, p. 68.

Additionally, from an individual perspective, the NTA is also perceived as fostering personal autonomy and may be viewed as less disruptive to state unity, offering a promising paradigm for maintaining stability while addressing ethno-cultural demands.[123]

NTA is situated within what Malloy and Salat define as new paradigms. That is, approaches that challenge the monopolistic systems of the state by emphasising interactions between state and non-state actors. These paradigms suggest the possibility of competing claims to authority and question the state-centric view of governance concerning the devolution or diffusion of power.[124] Effective protection of climate refugee minorities in the host state necessarily requires interaction and agreement between states, likely in the form of an international treaty involving the institutions of both states. As an example of this practice, one could imagine that the Republic of Vanuatu disappears beneath the waters of the Pacific Ocean. The more than 300,000 inhabitants would become climate refugees. If Vanuatu signs an agreement with Australia to host these refugees, Vanuatu would transition from a *demos* to an *ethnos* in Australia. However, under the mechanism of NTA, the Vanuatuans would be able to protect the Bislama language within their community and maintain their political institutions. Using Benhabib's words, we believe that the *demos* of Vanuatu refers to the constitutional subject of a self-determining entity in whose name sovereignty is exercised. Regimes of sovereignty, including those that govern the movement of people across borders, define

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123 Malloy, Tove H. (2020). "A new research agenda for theorizing non-territorial autonomy?" In: Malloy, Tove H. and Salat, Levente (Eds.). *Non-Territorial Autonomy and Decentralisation. Ethno-cultural diversity governance*, Abingdon: Routledge.

124 Malloy, Tove H. and Salat, Levente (2020). "Towards new paradigms?" In: Malloy, Tove H. and Salat, Levente (Eds.). *Non-Territorial Autonomy and Decentralisation. Ethno-cultural diversity governance*, Abingdon: Routledge, p. 243.

the prerogatives as well as the obligations of such sovereign entities under international law.[125]

Climate refugees will be able to protect their right to self-determination. Implementing NTA principles can provide a framework for addressing these challenges and ensuring the rights and dignity of all individuals, irrespective of their identities. Thus, advocating for the application of NTA serves as a crucial step towards fostering inclusivity, equity, and respect for diversity in the new landscape. Vizi, Dobos and Shikova have analysed different NTA mechanisms and policies to develop new modalities for accommodating differences in the context of the growing challenges stemming from globalisation, regionalisation and European supranational integration.[126] These instruments aim to respond to the effects of deterritorialising the idea of self-determination and are therefore perfectly applicable to climate refugee nations.

We agree with Malloy and Palermo when they state that territorial autonomy and NTA can function as supplementary or complementary mechanisms for minority empowerment.[127] Indeed, the NTA recognition of the climate refugee nation by the host state can be established without altering the territorial distribution of the state, whether federal, regional or unitary.

On the other hand, the incentives for Australia to host and sign an agreement recognising NTA for the Vanuatuan, besides

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125 Benhabib, Seyla (2020). "The End of the 1951 Refugee Convention? Dilemmas of Sovereignty, Territoriality, and Human Rights." *Jus Cogens*, (2) 1, p. 75. https://doi.org/10.1007/s42439-020-00022-1.

126 Dodovski, Ivan (2021). "The emerging significance of non-territorial autonomy: A foreword." In: Vizi, Balázs; Dobos, Balázs and; Shikova, Natalija (Eds.). *Non-territorial autonomy as an instrument for effective participation of minorities*, Budapest and Skopje: Centre for Social Sciences and University American College Skopje, p. 7.

127 Malloy, Tove H. and Palermo, Francesco (Eds.) (2015). *Minority Accommodation through Territorial and Non-Territorial Autonomy*. Oxford: Oxford University Press.

fulfilling public international law *jus cogens* obligations and humanitarian reasons, include fostering a rational procedure that establishes the rights and obligations of the newcomers; limiting the political activity and minority rights of climate refugees within the scope of the NTA treaty; and encouraging other polluting states to adopt similar measures with future climate refugees.

The Lund Recommendations on Organisation for Security and Co-operation in Europe (The Lund Recommendations), which encourage member states to adopt non-territorial arrangements, may be a valid framework to initiate these agreements.[128] Despite the fact that these recommendations receive limited attention in national minority participation, NTA can serve as a conflict-preventive tool that may de-territorialise security concerns, while also acting as a democratisation tool that may promote justice.[129] The Lund Recommendations refer to NTA as self-governance in terms of exclusive jurisdiction, administrative authority and management as well as special legislative and judicial jurisdiction.[130] However, we agree with Malloy when she states that NTA is not confined to cultural agreements, meaning self-governance in regard to the maintenance and reproduction of culture.[131] NTA means all types of self-management that national

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128 OSCE High Commissioner on National Minorities (1999). *The Lund Recommendations on the Effective Participation of National Minorities in Public Life & Explanatory Note*. The Hague: OSCE High Commissioner on National Minorities.

129 Malloy, Tove H. (2009). "The Lund recommendations and non-territorial arrangements: Progressive de-territorialization of minority politics." *International Journal on Minority and Group Rights*, (16) 4, p. 665-679. https://brill.com/view/journals/ijgr/16/4/article-p665_13.xml.

130 OSCE High Commissioner on National Minorities (1999). *The Lund Recommendations on the Effective Participation of National Minorities in Public Life & Explanatory Note*. The Hague: OSCE High Commissioner on National Minorities, p. 26-27.

131 Stratilatis, Costas (2021). "Non-Territorial Autonomy and Territoriality: The Case of Cyprus." In: Vizi, Balázs; Dobos, Balázs and; Shikova, Natalija

minorities might handle.[132] The Lund Recommendations suggest areas of welfare, housing and childcare in addition to culture and education. Malloy also highlights economic sector areas, such as environment and energy.[133] Nonetheless, we believe that, in real terms, the competences under the NTA will exclusively depend on the agreement between the climate refugee nation and the hosting state, and these agreements will be modelled to specific circumstances and the timing of each scenario and the actors involved.

5. CONCLUSION

As the ravages of climate change worsen and the inexorable impact of its most severe effects continues to unfold, the UN confronts a momentous decision: how to protect the millions of people who will be forced to migrate as a result of the devastating effects of climate change and environmental degradation. The response to such a significant threat must, in any case, be proactive. That is, taken before the inevitable tragedy fully manifests. A legal or political reaction based solely on the situation as it unfolds would result in a humanitarian disaster unparalleled in human history, with the added danger of this crisis being replicated across the globe.

(Eds.). *Non-territorial autonomy as an instrument for effective participation of minorities*, Budapest and Skopje: Centre for Social Sciences and University American College Skopje, p. 53-90.

132 Malloy, Tove H. (2009). "The Lund recommendations and non-territorial arrangements: Progressive de-territorialization of minority politics." *International Journal on Minority and Group Rights*, (16) 4, p. 667. https://brill.com/view/journals/ijgr/16/4/article-p665_13.xml.

133 Malloy, Tove H. (2009). "The Lund recommendations and non-territorial arrangements: Progressive de-territorialization of minority politics." *International Journal on Minority and Group Rights*, (16) 4, p. 667. https://brill.com/view/journals/ijgr/16/4/article-p665_13.xml.

The legal accommodation of climate refugees is a matter of justice, fairness, and human rights. A preventive and rational approach to addressing the desperation of millions who have already lost and will lose their land and face anguish, with a catastrophic future looming and no hope on the horizon, demands the involvement of all. Quoting Camus, "*Il n'y a pas de vie valable sans projection sur l'avenir, sans promesse de mûrrisement et de progress.*"[134] What kind of future and promise will the people of Vanuatu have if there is no procedure or response to a devastating situation they did not cause?

This chapter has analysed various possibilities for the legal articulation of such a response in light of the legal penumbra we currently face. Among these alternatives, we contend that the proposal that would shed light and, therefore, should be adopted is an expansive interpretation of the 1951 Refugee Convention, for several reasons already outlined in this chapter, including the argument that the 1951 Refugee Convention faces a legitimacy crisis due to its lack of enforceability, as Benhabib and Nyabola argue.[135] We believe that including climate refugees within the 1951 Refugee Convention's definition could reinvigorate its relevance. In this context, we focus on the Greek meaning of "crisis" as "decision," rather than its alternative meaning, "discrimination."

Hannah Arendt argued that there is only one human right — the right to have rights — to be recognised as a member of a political community.[136] Let us not deprive millions of people of

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134 Camus, Albert (2009). *Actuelles. Écrits politiques.* Paris: Éditions Gallimard, p. 117.

135 Benhabib, Seyla (2020). "The End of the 1951 Refugee Convention? Dilemmas of Sovereignty, Territoriality, and Human Rights." *Jus Cogens*, (2) 1, p. 77. https://doi.org/10.1007/s42439-020-00022-1; Nyabola, Nanjala (2019). *The End of Asylum. A Pillar of the Liberal Order Is Collapsing—but Does Anyone Care?* Available at: https://www.foreignaffairs.com/world/end-asylum.

136 Arendt, Hannah (1962). *The Origins of Totalitarism*, New York and Cleveland: Meridian Books. The World Publishing Company, p. 298.

that right to have rights, and the very essence of belonging to a community, by failing to acknowledge the obvious: that they — or we — are climate refugees in need of protection and hope.

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The challenges presented by climate change at the nexus of tort law and environmental law[1]

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1. INTRODUCTION

The growing urgency of the climate crisis has led to a more detailed examination of the legal frameworks that pertain to environmental damage. In this context, climate change represents a critical juncture where various tools of liability converge, raising questions about the efficacy of both private and environmental law. Traditional civil liability—rooted in unlawful acts, damages, and causality—now faces the complex reality of global environmental damage affecting individuals, communities, ecosystems, and future generations.

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Environmental law, grounded in principles such as prevention, precaution, and liability, plays a pivotal role in addressing climate change. These principles not only shape the responsibilities of states and corporations but also highlight the evolving relationship between law and science. As scientific uncertainty and the plurality of knowledge grow, the legal system must adapt to better address the challenges posed by climate instability.

This article aims to explore the intersection between civil liability and environmental law, particularly in light of climate change. It will examine how traditional legal concepts, such as the "do-no-harm" principle, are expanded to address broader concerns, including the environment, climate, and future generations. Additionally, it considers the emergence of new legal subjects and the need for a collective approach on environmental damage. This analysis revisits the fundamental pillars of liability with the aim of elucidating the innovations required for contemporary environmental law to meet the demands of the climate challenge.

2. ENVIRONMENT, CLIMATE CHANGE AND LIABILITY

Environmental issues gained prominence in the late 20th century, following events that caused large-scale, often irreversible harm[3]. The intrinsic nature of this type of damages and its translation into the field of law is highly complex and poses a series of challenges that are further intensified in the face of climate change.

During this period, many countries, particularly in Latin America, began recognizing the right to a healthy environment

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[3] Rémond - Gouilloud presents these events as *the great fears,* highlighting several accidents related with mercury waste, oil, nuclear power stations explosion, chemical depots, etc. Rémond-Gouilloud, Martine (1994), *El derecho a destruir. Ensayo sobre el derecho del medioambiente*, Buenos Aires: Losada.

and addressing environmental damages[4]. This development consolidated environmental law, shifting from the segmented approach of natural resources law to a more holistic perspective. This shift can be appreciated when looking at how environmental damage intersects with traditional tort law, which focuses on individual harm, and the emerging collective rationality of environmental law, which emphasizes broader, collective harms. Both respond to different constitutive rationalities, which makes it necessary to delineate how they relate and function. On one hand, environmental law has been consolidated on the basis of a conglomerate of private and public rights that incorporate strategies for the protection of ecosystems. On the other hand, traditional tort law is structured by a self-sufficient and, especially in continental legal systems, codified system that was not designed for this type of collective problem. In the intersection between both systems, some problematic issues can be observed that account for the different rationalities from which they were built upon.

Environmental law, into which the problem of environmental damage is inserted, can be read as a regulation that, at a certain point, abandons the modern paradigm from which the law of civil liability was articulated.

It abandons or tries to avoid this modern paradigm and introduces new subjects such as future generations, nature and even the climate. It strengthens collective procedural techniques, which also generates the need to build a general theory in relation to collective goods. It leaves behind the idea of linear time, based on linking decisions from the present to the future, and also admits the inability of science to provide adequate causal links in cases where controversy and uncertainty are central. It also seeks to build a system based on prevention, precaution and restoration, leaving monetary compensation in the background.

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4 Cafferatta, Néstor (2020) "Constitucionalismo ambiental en América Latina", *Revista Digital AADC* (7), pp. 1-27.

These transformations are the result of the conversion of the various paradigms for the social treatment of risks. François Ewald draws up a kind of genealogy of the various paradigms and identifies three main ones: responsibility, solidarity and security[5].

These paradigms are structured as a result of various political, technical and philosophical dimensions. Each of the aforementioned stages corresponds to a specific historical period, which is useful in terms of analysis as it facilitates an understanding of the rationality that shapes each of them[6].

The paradigm of responsibility emerged in the 19th century, encapsulated by the French adage *pas de responsabilité sans faute ("no responsibility without fault")*. This principle holds that each

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5 For further information on this topic : Ewald, François (1986). *L'Etat Providence,* Grasset : Paris; Ewald, François (1992) « Responsabilité, solidarité, sécurité », *Risques. Assurance, droit, responsabilité* (10) Avril - Juin; Ewald, François (1996). « Philosophie de la précaution ». *L'Année sociologique* (46-2); Ewald, François (1997). « Le retour du malin génie. Esquisse d'une philosophie de la précaution ». In Godard, Olivier (dir.) *Le principe de précaution dans la conduite des affaires humains*, Paris : Editorial de la Maison des Sciences de l'homme; Ewald, François (2001) *Le principe de précaution* Paris : Que sais je? PUF; Ewald, François (2001) « La société du risque ». *Une nouvelle modernité ? Traitements de surface et exploration des profondeurs.* Paris : Cahier LaSer Descartes & Cie; Ewald, François (2005) « Responsabilité et socialisation du risque» Rapport public du Conseil d'Etat available at : https://www.conseil-etat.fr/publications-colloques/etudes/responsabilite-et-socialisation-du-risque-rapport-public-2005

6 By way of warning, the aforementioned author makes a clarification which we appropriate, in which he states *"...if the presentation according to a historical development has its pedagogical virtues, it runs the risk of being misleading insofar as it leads one to think that everything was transformed at the same time. The necessary systematicity in the presentation is not necessarily so in the facts. There are different regimes of responsibility according to species, cases, domains. They have different histories that do not necessarily obey the same chronologies..."*. Ewald, François (1992) « Responsabilité, solidarité, sécurité », *Risques. Assurance, droit, responsabilité* (10) Avril – Juin, p. 11. Translation from French by the author.

person is accountable for their own actions and that responsibility cannot be transferred to others. In this paradigm, the primary functions are to punish and compensate for the damage caused.

In this paradigm, the causal relationship is secondary and closely linked to authorship, and the possibility of self-regulation of human conduct. It is a matter of proving authorship on the basis of factual data.

The process of tracing the chain of events producing harm, using a cause-effect logic, reflects a reasoning articulated by the natural sciences. Initially, causation was considered through the lens of the set of conditions that enabled the damage, forming the *conditio sine qua non theory*. Over time, this approach was replaced by a series of individualizing theories that select -according to specific criteria- one of the conditions that contributed to the damage. Thus, the thesis of proximate cause, of the preponderant condition or of the balance and of the efficient cause are configured[7].

If we compare this framework with environmental issues, it becomes clear that the parameters that make it up are not adequate. The emphasis on the notion of fault, the relevance of a formal concept of unlawfulness, as well as the ways of thinking about the causal relationship do not address the complexity of environmental damage– particularly in climate-related cases.

Similarly, the concepts of compensation and punitive functions, so central to this paradigm, take on a secondary role in environmental matters, where the focus shifts to assigning greater transcendence to an *ex-ante* action.

The second paradigm is that of solidarity, which emerged towards the end of the 19th and the beginning of the 20th century as a result of the increasing prevalence of occupational accidents, as evidenced by Ewald's analysis. This paradigm required a

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7 Brebbia, Roberto (1975) *La relación de causalidad*. Rosario: Juris, Rosario.

new approach to respond to harmful events by considering the perspective of its distribution and viewing liability as a social fact.

Here, the idea of causality and attribution diverge; the subject's behavior is no longer the core of the system. Liability is no longer thought in terms of fault, but through the logic of attribution, supported by statistical and actuarial tools that make it possible to assess the regularity of risks beyond the behavior of individuals.

This paradigm establishes a collective risk prevention system based on solidarity, with insurance as its main instrument. Therefore, as the subjective attribution factor loses preponderance, the emergence of the objective attribution factor becomes more prominent, consolidating concepts such as created risk, equity, abuse of rights, and guarantees[8].

In this framework, the transcendental assumptions become the damage, with its requirement of certainty as a condition for compensation, and the causal relationship. The latter is no longer based on a retrospective analysis based on factual data, but incorporates the variable of regularity of the events. This is defined as the adequacy of the causal relationship.

The idea of risk prevention was translated by legal scholars as well as some legal systems as a new function of tort law[9], which consists of acting *ex ante*, in order to try to prevent potential damage. Thus, the paradigm of solidarity does not only refer to compensation but is also presented as a paradigm of prevention– a paradigm based on trust in scientific expertise to foresee and mitigate risks.

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8 It should be noted that the issue of the spread of objective attribution factors is not a subject to which F. Ewald has given express treatment, but his main focus of analysis is the expansion of risk sharing through the broadening of the insurance technique and the further development of the actuarial calculations that underpin it.

9 This is the case of the Argentine Civil and Commercial Code, which has introduced the functions of reparation and prevention of civil liability law since 2015.

The last paradigm is that of security, which emerged towards the end of the 20th century, based on the appearance of cases immersed in a context of scientific uncertainty or controversy, where the risk of serious or irreversible damage became prominent. A previously unknown vulnerability is configured for individuals, a sort of return to catastrophes, but no longer originating from nature, but from human activity itself, manufactured risks proliferate and become globalized[10]. Climate change is a clear example of such risks.

These cases, generally related to environmental and public health issues, denote the limits which cannot adequately manage these risks through individual or collective prevention methods based on predictability, despite differing perspectives on this.

The concept of individual prevention based on the notion of fault is insufficient. On the other hand, collective prevention, in which the figure of insurance is developed as a technique of distribution, has a series of difficulties that have to do with the impossibility of functioning of the actuarial technique that sustains it. This is due to the fact that the possibly risky factual hypotheses do not offer the notes of regularity required by statistics for the purpose of their calculability. The preventive function is made difficult by the lack of sufficient data and information and can only work on foreseeable risks: its constitutive pillars do not allow it to account for uncertainty.

The emergence of precautionary rationality could serve as a framework to complete the preventive task in cases in which we are working on the basis of possible and therefore unforeseeable

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[10] Beck, Ulrich (2007) *La sociedad del riesgo mundial*. Barcelona: Paidos; Beck, Ulrich (2002) *La sociedad del riesgo global*. Barcelona: Siglo XXI; Beck, Ulrich (1998) *La sociedad del riesgo. Hacia una nueva modernidad*. Barcelona: Paidos.

risks. One of the main legal translations of this rationality is the precautionary principle[11].

The hypotheses on which this new situation can be based raise questions about which it is either not possible to ascertain the consequences, as is the case with genetically modified organisms, for example, or where outcomes are contentious, as with electromagnetic fields.

These are problems in which uncertainty or controversy prevails and cannot be fully accounted for by expert knowledge. Uncertainty and controversy have a great influence on the causal link as well as on the existence of damage.

In the liability system, damage must be certain - irrespective of its present or future character - as a *sine qua non* condition for its compensability. On the other hand, the lack of certainty does not allow both the establishment of a causal relationship - as the first theses on the causal link proposed - or on regularities, due to the lack of information that supports the operation of statistics.

Thus, it is also a question of rethinking the relationship between science and law in order to construct or reconstruct risk management mechanisms and appropriate legal technologies. Scientific reasoning of the cause-effect type could no longer be followed by legal argumentation of the same type. This reasoning led to the establishment of a distinction between causation and fortuitous event as an element of rupture of the causal nexus, on the basis of which theories of causation were built. However, in cases immersed in a context of uncertainty or scientific controversy, a problem is generated in the causal relationship that allows referring to an indeterminate causality.

On this basis, more than reformulations, new formulations would be required that adopt this new rationality and that can

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11 For an analysis of the different principles of environmental law and their links, see: De Sadeleer, Nicolás (2002) *Environmental principles. From political slogans to legal rules*. Oxford: Oxford University Press.

translate it into regulations that underlie it. Climate change in particular, although attempted to be contested by denialist groups and governments, is already amply proven. However, there are different scenarios that respond to the measures and public policies that are adopted in terms of mitigation or adaptation. This instability in terms of the future scenarios brings a new element of complexity to the field of law.

3. LIABILITY AND ENVIRONMENTAL DAMAGE

Having reviewed the social frameworks of risk management–where law, particularly tort law, plays a central role–we can now examine how the environmental legal system is structured.

The issues of environmental damages highlights, as discussed in the previous section, the intersection where elements of tort law converge with the distinct rationality underlying environmental law.

The environmental issues are fundamentally integrated from the provisions of constitutional and legal reforms that address damages and related topics. Initially focused on compensation, the system has since evolved to include preventive and precautionary functions, challenging the traditional framework.

Monetary compensation, paired with sanctions, forms the basis of modern civil liability law as an ex-post action that addresses damage after it occurs. Viewing environmental issues solely through this lens confines the approach to a defensive strategy. However, within the framework of environmental rationality, compensation, far from being one of its axes, is only considered when other options have been discarded –especially when preventive or precautionary mechanisms are no longer viable because the risk has already materialized.

Due to the very nature of environmental damage, economic compensation alone is insufficient, making the restoration of the damaged asset a priority. Making the original "polluter pays"

principle shift toward strategies focused on prevention and precaution.

In many legal systems, environmental damage primarily entails an obligation to restore the environment, which is a central aspect of liability law. While restoration is the main objective, once the environmental damage has occurred, it is feasible only in cases where material or technological solutions are possible.

Moreover, restoration will always have a partial or relative character, as exact and complete reparation is impossible. The limit would be set by the principle of proportionality. It is considered that the optimal measures of reparation should be taken and should not be adopted if the cost of reparation exceeds the benefits of reparation or if alternative measures can be adopted.

However, compensation is postulated as a remedy of last resort in cases where restoration is not materially possible[12]. In such cases, pecuniary compensation becomes standard in the face of the material impossibility of recomposing and quantifying environmental damage.

With regard to the quantification of damage, a large number of theories have been developed that attempt to translate the damage caused to the environment, with all the complexity that this entails, into economic terms.

In general, environmental cases have a dual nature. On one hand, they are collective damages (known as pure environmental or ecological damages). On the other hand, they have an impact on the individual sphere (so-called indirect environmental damage). This duality raises questions about how to address both levels and which rules to apply[13]. In the case of collective damage, it would

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12 Besalú Parkinson, Aurora (2005) *Responsabilidad por daño ambiental.* Hammurabi: Buenos Aires.

13 The first pronouncement of the Argentinian Supreme Court in the leading case *Mendoza, Silvia Beatriz y otros c/ Estado Nacional y otros s/*

be limited to the rules of environmental regulation. However, in cases involving harm to human health, the challenge is different, as it is necessary to prove the impact of the environmental damage on specific individuals.

The concept of prevention is central to environmental law. Preventive rationality is constituted as a central aspect of the management of environmental risks of a certain or foreseeable nature. The idea is to take action in relation to the environment before the damage occurs. This is only possible if sufficient tools are available to make projections into the future. A series of techniques, such as actuarial calculations, statistics, information requirements, environmental impact assessments, governmental agencies for prior control, insurance and social security, public funds for compensation and compulsory insurance, recall, etc., are structured in response to this rationality.

The preventive rationality could be considered complete in its assembly with the precautionary rationality, which takes into account those factual hypotheses that could cause serious damage, but whose effective occurrence cannot be foreseen. But even if it is not foreseen, it is still necessary to act *ex-ante*.

Precaution is incorporated as one of the core principles of environmental law, at both national and international levels through an increasing number of regulations and treaties[14].

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daños y perjuicios (daños derivados de la contaminación ambiental del Río Matanza -Riachuelo" (M.1569 XL) includes a demarcation between both spheres. The Court decided to continue with the treatment of the case with respect to the collective damage caused by contamination of the Matanza-Riachuelo Basin, but not with respect to the individual damage of each of the affected parties who brought the action. In this last case they have to present their individual judicial claims in their competent courts according to their domiciles.

14 With regard to the notions of seriousness or irreversibility, it should be noted that in the different texts that have adopted the precautionary principle, there are dissimilar formulations. Some of them require the existence of seriousness or irreversibility indistinctly, for example, the

Like restoration, compensation and prevention, the rationality of precaution has its own mechanisms such as moratoriums, the construction of traceability systems, epidemiological surveillance, public hearings, the protection of those issuing alerts, the regulation of standards and minimum tolerance, etc.

The precautionary principle is presented as the way in which science and law are no longer related from the place of certainty but, on the contrary, from the problem of controversy, of doubt, and the absence of information. Assumptions about potential harm cannot be dismissed simply due to a lack of certainty. Law must therefore engage with uncertainty, presenting challenges that require transparency and careful consideration.

In cases of environmental damage, the requirement for damage certainty and causal adequacy may need reconsideration. It becomes important to explore the possibility of damage, meaning

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Rio Declaration on Environment and Development in its principle number 15 establishes that *"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*". There are definitions where both aspects are required, as in the case of the French law 95 - 101 « Renforcement de la Charte de l'Environnement » as well as the French Code de l'Environnement in its article L. 110-1. The definition proposed by UNESCO in February 2005 in its *Report of the Group of Experts on the Precautionary Principle* also incorporates an ethical criterion: *"When human activities run the risk of leading to morally unacceptable harm that is scientifically plausible but uncertain, various measures can be taken to avoid or reduce the possibility of such harm"*. UNESCO (2005) *Report of the Group of Experts on the Precautionary Principle*. Comisión Mundial de Ética del Conocimiento Científico y la Tecnología. Available at: https://unesdoc.unesco.org/ark:/48223/pf0000139578. This moral component is also highlighted by the International Union for Conservation of Nature. UICN (2005) *The Precautionary Principle in Biodiversity Conservation and Natural Resource Management. An issues paper for policy-makers, researchers and practitioners*. Cooney, Rosie. The World Conservation Union An issues paper for policy-makers, researchers and practitioners. Available at: https://portals.iucn.org/library/sites/library/files/documents/pgc-002.pdf

an examination of conditions that make it possible to establish certainty for compensability. Additionally, causation theories may need to be restructured to account for possible causal relationships in uncertain situations.

4. THE CHALLENGES RELATED TO CLIMATE CHANGE

Tort law is based on the principle of not harming others, while environmental law assumes that one should not harm the environment in an unjustified manner. But who exactly are the "others" protected by the principle of no-harm?

The proliferation of "others" who must not be harmed has already been the subject of reflection through the enumeration of an ever-growing group: future generations, nature, humanity, inhabitants, collectives with collective rights, animals, cultural heritage, society. This enumeration -merely enunciative- highlights the notable widening of the confines of the principle of no harm that has occurred in the last decade[15].

In turn, the growing number of norms and judicial approaches focused on climate change allows us to question the possibility of inserting it into this discussion: the climate system as an "other", an *alterum*, is also a recipient of the general principle of non-harming?

As a result, it is difficult to think that climate change can become a subject, and it is even difficult for law to grasp it as an object[16].

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15 De Lorenzo, Federico (2019). Repensar al "otro" (Reflexiones sobre el Derecho Civil). *Revista Jurisprudencia Argentina* (II-3), pp. 3-19; Falbo, Aníbal (2017). El término "habitantes" del artículo 41 de la Constitución Nacional excede a los seres humanos. *Revista Derecho Ambiental* (52), pp. 137-143.

16 Hermitte, Marie Angèle (2018). A chaque objet son sujet ! Les révolutions juridiques de la relation homme – nature. In : Gaillard, Emilie (dir.), *Agir en justice au nom des générations futures, une réalité grandissante, vecteur de paix*. In press.

How can it be considered a thing when we have no materiality, no location, and is it possible to treat it as an immaterial thing, and if so, how?

It is interesting to note that climate change has been categorized as a growing set of issues considered hybrid because it manifests itself out of a kind of imbroglio involving science, politics, economics, religion, technology, law, fiction[17]. This characterization is relevant if we consider the content of the agendas of the debate on global warming, in which these and other discourses appear, often in opposition to each other.

This issue is still difficult for the legal field to grasp. There are several reasons for this difficulty.

One of them is the complexity of working with the concept of climate change, which is a process, within the framework of existing legal categories that are based more on dichotomies such as thing/subject than on relationships and processes. In this sense, for example, it is easier to think of the issue as human's right to a sustainable climate or as an environmental asset. Another is the hitherto almost empty link between the causes and consequences of global warming in, for example, legal cases. Indeed, there are countless court cases in which deforestation is a central issue, or in which damage of various kinds is linked to major floods.

However, it is only recently that this gap in the articulation between environmental issues of these characteristics –which can be thought of in terms of motives and results– and climate change has begun to receive attention. Thus, for example, deforested territories are not only contributing to biodiversity loss and the consequences in terms of land use but also to the worsening of the climate situation. Similar reasoning would be viable in the case of flooding, which is seen as a palpable consequence of global warming.

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17 Latour, Bruno (1997). *Nous n'avons jamais été modernes. Essai d'anthropologie symétrique*. Paris: La Decouverte.

The relationship between the two concepts can be observed with greater clarity in the context of litigation[18]. In some recent legal cases, climate change is beginning to be discussed and debated with a series of peculiarities and characteristics that reflect the discrepancy between certain agreements and their effective implementation, as well as the social construction that exists on this issue in different parts of the world[19].

It is at this intersection that the filing of lawsuits takes center stage, both as a consequence of the failure to implement global agreements at the local level, and as a new way of thinking about the ecological issue that aims to be more inclusive. Could private law also approach this issue by considering the climate system as an "other" to be protected?

5. CLOSING REMARKS ABOUT CLIMATE CHANGE CHALLENGES

The growing impact of climate change has forced legal scholars and practitioners to reassess the traditional pillars of tort law.

Historically, liability has focused on unlawful acts or omissions, with damages tied to a clear causal relationship between the act and the damage. However, the climate crisis presents unique challenges, given its diffuse, long-term nature and the broad range of actors involved. This has necessitated a re-evaluation of core concepts such as causality, attribution, and even the scope of

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18 Case law in Latin America has been showing a number of cases in which this type of emerging linkage occurs: De Salles Cavedon-Capdeville, Fernanda et al. (2024) *An ecocentric perspective on climate litigation: Lessons from Latin America,* Journal of Human Rights Practice (16) 1.

19 There are studies that systematize climate litigation by sector, for example, those linked to infrastructure licensing. Medici Colombo, Gastón (2024) *La litigación climática sobre proyectos ¿Hacia un punto de inflexión en el control judicial.* Valencia: Tirant Lo Blanch.

liability. Consequently, the question arises as to whether traditional frameworks can adequately address environmental harm that affects not only individuals but ecosystems, future generations, and global commons.

A key issue is how to assign responsibility for climate change, which results from the cumulative emissions of multiple public and private actors over time. Unlike conventional tort cases where a direct link can be established between a defendant's conduct and the damage caused, the complex chain of causality in climate-related damage requires new legal interpretations. This has led to the revision of how the techniques related to tort law are applied to large-scale environmental disasters, where the boundaries of direct responsibility are blurred.

The principles of environmental law are also central to this re-evaluation, particularly in addressing climate change through responsibility, prevention, and precaution. International agreements, such as the Paris Agreement, have underscored the collective responsibility of nations to mitigate and adapt to climate change. This responsibility, however, extends beyond simple compensations for damage. The principle of prevention emphasizes proactive measures to avoid harm before it occurs, placing a heavier burden on states and corporations to implement climate mitigation and adaptation policies.

It is also important to consider the principle of precaution, which suggests that action should be taken in cases of scientific uncertainty, scientific controversy or even a lack of information. In light of the inherently unpredictable nature of climate impacts, it is imperative that precautionary measures be taken in decision-making processes, particularly in the context of high-risk activities such as fossil fuel extraction or deforestation. These principles reflect a shift from reactive to preventive justice, with the objective of safeguarding the environment even when the full extent of risks may not yet be clear.

The evolving climate crisis has prompted a variety of innovations in contemporary environmental law, reflecting a pluralistic

approach to legal frameworks. This pluralism is exemplified by the growing acknowledgment of novel legal entities, including ecosystems, future generations, and animals, which challenge the conventional anthropocentric paradigms of law[20]. Several countries have already moved towards granting legal rights to nature or to particular ecosystems highlighting the shift towards a more inclusive legal system[21].

Furthermore, there is an increasing responsiveness of environmental law to scientific developments. The incorporation of climate science into legal proceedings, including the use of climate models and data to ascertain causality, signifies a notable advancement. The concept of climate justice provides a conceptual space in which the various accountability tools, including tort law, environmental law and collective responsibility, can be seen to intersect. This intersection is critical in addressing the multifaceted nature of climate damage. The concept of liability, with its focus on unlawful acts or omissions, damages, and attributions, has traditionally been applied in the context of individual harm. However, its application to the climate context is far more complex. The pervasive character of environmental damage frequently renders conventional liability frameworks inadequate, as they are unable to accommodate the dispersed impact and prolonged nature of climate harm.

In environmental law, liability takes on a broader, more collective dimension. The principles of prevention and precaution are particularly relevant in addressing global climate challenges, as they promote actions that mitigate risks before they manifest themselves. The principle of liability ensures that states and

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[20] In previous work we have identified the main pathways for this type of rights recognition: Berros, María Valeria and Carman, María (2022) *Los dos caminos del reconocimiento de los derechos de la naturaleza en América Latina,* Revista Catalana de Dret Ambiental (13) 1: https://www.raco.cat/index.php/rcda/article/view/404063

[21] The Harmony with Nature UN Initiative offers an overview on the topic: http://www.harmonywithnatureun.org/

corporations are held accountable for their contributions to environmental degradation, while prevention and precaution encourage a forward-looking approach that prioritizes the reduction of future damage. Together, these principles form a broader framework for climate responsibility that transcends national boundaries and individual actors.

The above-mentioned remarks may be made regarding the manner in which climate change presents a challenge to both environmental law and tort law. An ongoing review of the prevailing legal systems and a critical analysis of the judicial decisions that have addressed these issues will facilitate the monitoring of the emerging legal transformations and innovations associated with this issue.

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An Analysis of the Obligations of States for an Effective Loss and Damage Funding Mechanism, in Light of the Principle of Common but Differentiated Responsibilities

MACARENA MARTINIC CRISTENSEN[1]

1. INTRODUCTION

The results of the latest report of the Intergovernmental Panel on Climate Change (IPCC) were both overwhelming and expected. Although there was evidence of progress in the climate ambitions and commitments of several countries, the latest report is proof that global efforts in this area are still not sufficient, or rather, have not been directed in the way they should be.

According to the report, "climate change has already caused substantial damages, and increasingly irreversible losses, in terrestrial, freshwater, cryospheric, and coastal and open ocean ecosystems,"[2] and has produced "irreversible damage of hundreds

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1 Coordinator of Empowerment and Public Participation at FIMA NGO. Lawyer from Universidad de Chile.

2 Intergovernmental Panel on Climate Change (IPCC). 2023. "Summary for Policymakers." *Climate Change 2023: Synthesis Report.* Edited by Hoesung Lee and José Romero, pp. 5. Available at: https://www.ipcc.ch/report/ar6/syr/summary-for-policymakers/.

of local losses of species, with mass mortality events recorded on land and in the ocean,"[3] among other harm.

Furthermore, the report made it clear that the consequences of climate change are, above all, a matter of injustice. According to the IPCC, "approximately 3.3 to 3.6 billion people live in contexts that are highly vulnerable to climate change."[4] This means that the widespread impacts of climate change are not felt or distributed equally.[5] While many of these vulnerabilities can originate from the particularities of the ecosystems on which people's livelihoods depend, there are also other vulnerabilities that intersect and create a higher level of exposure, such as gender, race, class, ethnicity, sexuality, indigenous identity, age, disability, income, migrant status, and geographical location, resulting in increased inequity and deeper injustices.[6] Alarming facts about this topic were revealed in the report. For instance, "[b]etween 2010 and 2020, human mortality from floods, droughts, and storms was 15 times higher in highly vulnerable regions compared to regions with very low vulnerability."[7]

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3 Intergovernmental Panel on Climate Change (IPCC). 2023. "Summary for Policymakers." *Climate Change 2023: Synthesis Report.* Edited by Hoesung Lee and José Romero, pp. 5. Available at: https://www.ipcc.ch/report/ar6/syr/summary-for-policymakers/.

4 Intergovernmental Panel on Climate Change (IPCC). 2023. "Summary for Policymakers." *Climate Change 2023: Synthesis Report.* Edited by Hoesung Lee and José Romero, pp. 5. Available at: https://www.ipcc.ch/report/ar6/syr/summary-for-policymakers/.

5 Intergovernmental Panel on Climate Change (IPCC). 2023. "Summary for Policymakers." *Climate Change 2023: Synthesis Report.* Edited by Hoesung Lee and José Romero, pp. 6. Available at: https://www.ipcc.ch/report/ar6/syr/summary-for-policymakers/.

6 United Nations (2022) *Report of the Special Rapporteur on the promotion and protection of human rights in the context of climate change.* Resolution A/77/226 of 26 of July, 2022, parr. 29. Available at: https://www.ohchr.org/en/documents/thematic-reports/a77226-promotion-and-protection-human-rights-context-climate-change.

7 United Nations (2022) *Report of the Special Rapporteur on the promotion and protection of human rights in the context of climate change.* Resolution

Despite the concerning global climate situation, progress by states in advancing actions on loss and damage has been limited. The former UN Special Rapporteur on the promotion and protection of human rights in the context of climate change noted "a significant disparity in efforts and a lack of commitment by states that have historically been the largest contributors to greenhouse gas emissions, resulting in negative impacts on the enjoyment of human rights."[8]

In this context, global climate governance has sought to define what qualifies as loss and damage, and, in order to address it, has established two main mechanisms: the 2013 Warsaw International Mechanism and the more recent Loss and Damage Fund. However, these mechanisms have still failed to assign responsibility to developed countries, which are the main contributors to the worsening of the climate crisis (the responsibility attribution dimension). These mechanisms have also failed to effectively address the losses and damages suffered by local communities in vulnerable situations facing the consequences of climate change (the climate justice dimension). To date, international initiatives to finance loss and damage remain in the realm of voluntary contributions, weak international cooperation, and a lack of clear mechanisms for compensation and responsibility attribution.

In the context of the debate surrounding the pursuit of justice in global climate action and the attribution of responsibility for climate loss and damage, this article examines the principle of common but differentiated responsibilities in order to define and specify the obligations of states—both developed and developing—

A/77/226 of 26 of July, 2022, pp. 22. Available at: https://www.ohchr.org/en/documents/thematic-reports/a77226-promotion-and-protection-human-rights-context-climate-change.

8 United Nations (2022) *Report of the Special Rapporteur on the promotion and protection of human rights in the context of climate change*. Resolution A/77/226 of 26 of July, 2022, pp. 22. Available at: https://www.ohchr.org/en/documents/thematic-reports/a77226-promotion-and-protection-human-rights-context-climate-change.

in addressing loss and damage. Correspondingly, the outlined obligations would imply a strengthening of the aforementioned principle in the global action of global climate governance. This will be explored through the existing instruments and norms already established by international governance, such as the United Nations Framework Convention on Climate Change, the Paris Agreement and the recently established Loss and Damage Fund.

2. THE LOSS AND DAMAGE PILLAR

There is no precise definition of loss and damage, mainly because the United Nations Framework Convention on Climate Change (UNFCCC) does not contain an explicit definition for the concept.

The origins of loss and damage are closely linked to what could be considered a demand for climate justice, which appeared in the proposal made in 1991 by the Alliance of Small Island States (AOSIS) during the fourth session of the Intergovernmental Negotiating Committee for the UNFCCC (INC 4), "where [the committee] introduced both the concept of climate-related damages and the political claim for an international fund to compensate when insurance for damages caused by climate change is not possible."[9]

Although the proposal was not considered, "it marked the beginning of a conversation aimed at transferring resources from states considered the largest contributors to climate change to those regarded as the most vulnerable."[10]

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9 Martínez Blanco, Adrián (2021). *Daños y Pérdidas: Una introducción al párrafo 51 y la compensación*, San José, Costa Rica: La Ruta del Clima, 1a. edición, pp. 11.

10 Martínez Blanco, Adrián (2021). *Daños y Pérdidas: Una introducción al párrafo 51 y la compensación*, San José, Costa Rica: La Ruta del Clima, 1a. edición, pp. 11.

For a long time, there was debate about whether loss and damage was an independent concept or whether it fell within the spectrum of the adaptation pillar.[11] Despite the fact that there are still actors today who deny it, consensus affirming the existence of the loss and damage pillar is growing. The concept appeared in the Paris Agreement's Article 8, separate from Article 7, which refers to adaptation. Hence, it is considered by a significant sector that loss and damage represents a third pillar of global climate action.[12] The aforementioned article states: "1. The Parties recognize the importance of avoiding, minimizing, and addressing losses and damages related to the adverse effects of climate change, including extreme weather events and slow-onset phenomena, and the contribution of sustainable development to reducing the risk of losses and damages."

The doctrine has referred to losses and damages as "the impacts that people cannot bear or adapt to, which cause irreparable damages or irreversible losses."[13] In other words, these are the negative consequences of climate change that occur despite, or in the absence of, adaptation—that is, when adaptation's limits are exceeded.

In general, there are two types of events that cause losses and damages: extreme events and slow-onset events. The former includes floods, landslides, cyclones, heatwaves, or storm surges. Slow-onset events, on the other hand, include rising sea levels, ocean acidification, glacier melting, land degradation, biodiversity loss, and desertification.[14]

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11 HB pp.5.

12 Martínez Blanco, Adrián (2021). *Daños y Pérdidas: Una introducción al párrafo 51 y la compensación*, San José, Costa Rica: La Ruta del Clima, 1a. edición, pp. 8.

13 Martínez Blanco, Adrián (2021). *Daños y Pérdidas: Una introducción al párrafo 51 y la compensación*, San José, Costa Rica: La Ruta del Clima, 1a. edición, pp. 6.

14 Parra, Francisco; Tavera, Esteban; Venegas, Nicole; and Mamani, Esther (2023). ¿Cómo comunicar las pérdidas y daños en América

On the other hand, losses and damages are economically classified as quantifiable and non-quantifiable. Quantifiable losses refer to aspects that are marketable and easily distinguishable in the market, associated with the loss of resources, goods, and services. Examples include income, livelihoods, employment, losses due to lack of tourism, businesses, etc. Material losses such as housing and infrastructure are also quantifiable. World Bank data estimates that up to two million people in Latin America fall into extreme poverty each year due to disasters, including those caused by climate change. Non-quantifiable losses, in principle, refer to loss of life, which is neither monetizable nor quantifiable, and are associated with individual and social losses such as health, displacement, and cultural and territorial losses (including traditions, languages, relevant symbolic territories, and others).[15]

However, despite the clarification of certain concepts related to the loss and damage pillar, their determination, attribution, and the mechanisms for their governance and financing remain subjects of ongoing debate.

3. THE PRINCIPLE OF COMMON BUT DIFFERENTIATED RESPONSIBILITIES, AS A MANIFESTATION OF CLIMATE JUSTICE

Determining what constitutes loss and damage is crucial for establishing responsibilities and eventual compensations. However, significant uncertainties are associated with attribution studies, and these uncertainties are generally greater for extreme events than for gradual ones, more so for some extreme events than for others and for some regions than for others. Therefore,

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Latina y el Caribe?: Una introducción para periodistas. Fundación Para la Información y Difusión del Cambio Climático Climate Tracker, pp.1.

15 UNFCCC (2013). Non-economic losses in the context of the work programme on loss and damage Technical paper, Bonn: UNFCCC, p. 3-4.

in the specific case of climate change—a global problem with multiple contributing factors—despite the historical emissions of the most industrialized nations, it has been particularly challenging to assign responsibility to a particular country for a specific loss or damage.[16] However, the latest IPCC report shows that extreme events and the vulnerability of certain regions will continue to increase. In this context, the principle of common but differentiated responsibilities takes on particular significance.

Article 2, paragraph 2 of the Paris Agreement states: "This Agreement will be implemented in a manner that reflects equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances."

The principle of common but differentiated responsibilities was adopted in the Rio Declaration at the Earth Summit in 1992 and acknowledges that while all countries have a responsibility to control greenhouse gas emissions, it is the industrialized countries that must take on specific targets, which would involve reducing GHG emissions by 40% compared to 1990 levels by 2020. This general principle has been embraced as a part of International Environmental Law and arises from the application of the principle of sovereign equality, which governs international relations between states.[17]

According to Borrás, the different levels of economic and technological development among states and their varying

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16 Susana Borras-Pentinat. "La Responsabilidad Climática sobre las Pérdidas y los Daños: La Deuda Climática Pendiente". En el libro "Justicia Climática. Visiones Constructivas desde el Reconocimiento de la Desigualdad". Tirant Lo Blanch. Año 2021. Página 366.

17 PUCP, 2021. El principio de responsabilidades comunes pero diferenciadas: análisis económico y de reparación ambiental en la implementación del Acuerdo de París. Available at: https://inte.pucp.edu.pe/noticias-y-eventos/noticias/el-principio-de-responsabilidades-comunes-pero-diferenciadas-analisis-economico-y-de-reparacion-ambiental-en-la-implementacion-del-acuerdo-de-paris/.

environmental responsibilities require diverse legal treatment to determine the respective obligations for environmental protection in order to achieve sustainable development. In the author's words, this principle contributes to achieving social, economic, and environmental justice through solidarity and cooperation among states to conserve, protect, and restore the health and integrity of the Earth's ecosystem and to compensate for the disadvantaged situation of developing countries caused by the pressures exerted by developed states on the environment.[18]

Andrea Lucas delves into substantive perspective by arguing that the term "common" expresses solidarity in climate protection and implies sharing obligations in a way that reflects equity. The foundational element is the integrity of the Earth and the consequent recognition of global responsibility for its care, which is a matter of interest for all of humanity and not a topic of particular jurisdiction for each state.[19]

Responsibility for losses and damages can be based on two considerations of unfair burden-sharing. First, countries' physical vulnerabilities to the effects of climate change are unevenly distributed around the world. Countries such as Tuvalu or Bangladesh are hardly responsible for greenhouse gas emissions but face the consequences of global warming, such as rising sea levels, for example. Yet, developed countries, like the United States or Western Europe, which have been proven to contribute more to emissions, are less exposed to the effects of climate change. Secondly, many countries that are climatically vulnerable are also economically vulnerable and do not have the same capacity for climate resilience. Both vulnerability and resilience are

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18 Borràs Pentinat, Susana (2004). "Análisis jurídico del principio de responsabilidades comunes, pero diferenciadas." Revista Seqüência (49), 153-195. https://periodicos.ufsc.br/index.php/sequencia/article/view/15227/13847. pp. 154.

19 Andrea Lucas Garín. "Cambio Climático en Chile. El Escenario Nacional frente al Acuerdo de París." Ediciones Universidad Finis Terrae. Año 2019. Página 48.

fundamental in determining losses and damages. Vulnerability equates to both physical and economic insecurity resulting from climate change, while resilience denotes the capacity for anticipation, absorption, or recovery from a particular hazardous event. Indeed, climate impacts increase vulnerability and, in turn, diminish resilience capacity, especially, according to the IPCC, in the most impoverished Small Island States, areas with water stress and food insecurity, and regions with high population densities concentrated in coastal areas.

In this regard, the UNFCCC contains numerous references to prioritizing vulnerable states—namely, the most impoverished countries, based on the principle of common but differentiated responsibilities. Although the regulation and institutionalization of losses and damages represent an advancement in identifying those responsible for and affected climate damage, they do not establish responsibility.

Susana Borras-Pentinat concludes that the principle of common but differentiated responsibilities seemed to pave the way for the attribution of responsibilities, but has been thwarted by the more industrialized countries.[20] She explains that, within the framework of the UNFCCC, discussions on how to establish mechanisms to address losses and damages in the context of climate change have been present in international negotiations for over 20 years, although with varying degrees of importance on the agenda.

A significant moment was when, in 1997, Brazil made a proposal to equitably share the burden of mitigation among industrialized countries, taking into account historical contributions to global warming, based on the idea that the calculation of per

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20 Susana Borras-Pentinat. "La Responsabilidad Climática sobre las Pérdidas y los Daños: La Deuda Climática Pendiente." En el libro "Justicia Climática. Visiones Constructivas desde el Reconocimiento de la Desigualdad." Tirant Lo Blanch. Año 2021. Páginas 380, 381, 382, 383 y 384.

capita emissions is a reflection of the offshored demand and consumption of the inhabitants of the Global North. However, the initiative failed.

Therefore, the previous attribution of responsibilities for greenhouse gas emissions, from both a temporal and spatial perspective, has not been adequately considered in the articulation of the new mechanism for losses and damages, rendering both the causes of climate damage and the corresponding responsibilities invisible, which only results in placing the greater burden of the consequences on climatically vulnerable countries.

For Borras-Pentinat, the responsibility of states for climate damages resulting from non-compliance with conventional international law, through the UNFCCC, remains uncertain due to relatively weak obligations, making the potential attribution of climate responsibility for non-compliance with the UNFCCC a contentious but legally plausible issue. She notes that, at the level of customary international law, non-compliance with a customary obligation can also trigger international responsibility. The rule of no harm is a widely recognized principle under international law and is also applicable in the context of climate change. No harm has also developed within the principle of common but differentiated responsibilities, which itself largely relies on the principle of no harm, but does not assign beyond what may be a moral responsibility of the more affluent countries responsible for greenhouse gas emissions.[21]

What is important, however, is to consider what Borras-Pentinat also describes as climate justice in the context of the correct application of the principle of common but differentiated responsibilities. She indicates that climate justice, in relation to climate losses and damages, entails the need to correct the negative

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[21] Susana Borras-Pentinat. "La Responsabilidad Climática sobre las Pérdidas y los Daños: La Deuda Climática Pendiente." En el libro "Justicia Climática. Visiones Constructivas desde el Reconocimiento de la Desigualdad." Tirant Lo Blanch. Año 2021. Páginas 372, 373 y 374.

consequences (climate damage) of a particular harmful behavior, providing a remedy either in the form of economic compensation or another means. This is referred to as "corrective justice:" one of the dimensions that integrates climate justice with an unchecked process of industrialized development, seeking to compensate for the enrichment obtained through historical, current, and/or offshored greenhouse gas emissions.[22]

In the words of Sabine Lavorel and Marta Torre-Schaub, climate justice cannot be separated from the principle of common but differentiated responsibilities stated in various international climate texts. This concept that warrants emphasis as it may open pathways toward new paradigms of responsibility.[23]

Both authors point out that the principle of common but differentiated responsibilities should then be able to be "deconstructed" according to the logic of climate justice, so that the scenario favoring the understanding of "shared irresponsibilities" is prohibited, allowing for a "co-construction" of new responsibilities.[24]

Following these authors, we then have two dimensions of the principle of common but differentiated responsibilities, in accordance with climate justice. The first dimension relates to the concept of responsibility itself. This involves not only ensuring compliance with existing rules, but, above all, distributing attribution in a way that makes shared responsibility effective while making responsible countries accountable. The central idea

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22 Susana Borras-Pentinat. "La Responsabilidad Climática sobre las Pérdidas y los Daños: La Deuda Climática Pendiente." En el libro "Justicia Climática. Visiones Constructivas desde el Reconocimiento de la Desigualdad." Tirant Lo Blanch. Año 2021. Página 379.

23 Sabine Lavorel et Marta Torre-Schaub. "La Justice Climatique. Prévenir, surmonter et réparer les inégalités liées au changement climatique." Editions Charles Léopold Mayer. Année 2023. Page 159.

24 Sabine Lavorel et Marta Torre-Schaub. "La Justice Climatique. Prévenir, surmonter et réparer les inégalités liées au changement climatique." Editions Charles Léopold Mayer. Année 2023. Page 164, 168.

is that there is also a greater responsibility where the centre of decision-making power is located.

The second dimension focuses on the common or multi-actor aspect, involving all actors, both at the international and national levels, so that climate responsibility can be specific and effective. It considers reinforcing democratic means and institutions to make public decisions more transparent, along with clean and responsible financing.

In this way, linking the principle of common but differentiated responsibilities with climate justice provides guidance for both the governance mechanisms of climate action and the states themselves, addressing, to date, two of the loss and damage pillar's main shortcomings: from a responsibility perspective, an inability to attribute losses, and, from a corrective perspective, an inability to ensure that the result of this attribution is redistributed to those who are most affected by the consequences of the climatic phenomenon that caused the losses and damages.

4. FINANCING LOSS AND DAMAGE: THE WARSAW MECHANISM AND THE LOSS AND DAMAGE FUND

The need for a mechanism that specifically addresses losses and damages through systematic and direct financing has been a continuous demand since the beginnings of global climate governance and the conception of the United Nations Framework Convention.[25] In 1991, the AOSIS put forward a proposal calling for the creation of an International Climate Fund "as a separate supplementary financial mechanism to assist developing and vulnerable countries facing the impacts of climate change," and an International Insurance Fund, financed by mandatory

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[25] Martínez Blanco, Adrián (2021). *Daños y Pérdidas: Una introducción al párrafo 51 y la compensación*, San José, Costa Rica: La Ruta del Clima, 1a. edición, pp. 12.

contributions from developed countries, to provide insurance against the consequences of sea level rise.[26]

Twelve years later, in December 2013, the Warsaw Mechanism was established at COP 19. While a call for a fund was not answered, for the first time, a structure was created to "address losses and damages related to the impacts of climate change, including extreme events and gradual phenomena, in developing countries that are particularly vulnerable to the adverse effects of climate change."[27] The mechanism would later be enshrined in Article 8 of the Paris Agreement.

Among the functions of the mechanism were improving knowledge and understanding of comprehensive risk management approaches to address losses and damages related to the adverse effects of climate change; and intensifying measures and support, including regarding financing, technology, and capacity-building, to address such losses and damages.[28] The mechanism has clearly cooperative objectives, such as promoting the collection, exchange, management, and use of relevant data and information,

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26 Martínez Blanco, Adrián (2021). *Daños y Pérdidas: Una introducción al párrafo 51 y la compensación*, San José, Costa Rica: La Ruta del Clima, 1a. edición, pp. 12.

27 United Nations Framework Convention on Climate Change (UNFCCC). 2014. "Report of the Conference of the Parties on its nineteenth session, held in Warsaw from 11 to 23 November 2013: Addendum, Part Two." Decision 2/CP.19. Parr. 5 Available at: https://unfccc.int/process-and-meetings/conferences/past-conferences/warsaw-climate-change-conference-november-2013/cop-19/cop-19-reports.

28 United Nations Framework Convention on Climate Change (UNFCCC). 2014. "Report of the Conference of the Parties on its nineteenth session, held in Warsaw from 11 to 23 November 2013: Addendum, Part Two." Decision 2/CP.19. Parr. 5. Available at: https://unfccc.int/process-and-meetings/conferences/past-conferences/warsaw-climate-change-conference-november-2013/cop-19/cop-19-reports.

and fostering dialogue, coordination, coherence, and synergy among all stakeholders.[29]

While the Warsaw Mechanism was a first step in addressing losses and damages, the demand for a specific fund to finance losses and damages in particularly vulnerable countries, funded by developed states considered responsible for exacerbating climate change, was not realized.

However, the calls of the AOSIS were finally heard at COP 27, where a historic decision was taken to establish a fund to address loss and damage caused by climate change, with a focus on mitigating its effects.[30] The meeting, which took place from November 6 to 18, 2022, created new financial mechanisms to "assist developing countries that are particularly vulnerable to the adverse effects of climate change" and to ensure that they have the necessary resources to address losses and damages.[31]

The creation of a fund specifically dedicated to addressing loss and damage responds to the worrying intensification of climate change impacts highlighted by the IPCC, and also answers the

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29 United Nations Framework Convention on Climate Change (UNFCCC). 2014. "Report of the Conference of the Parties on its nineteenth session, held in Warsaw from 11 to 23 November 2013: Addendum, Part Two." Decision 2/CP.19. Parr. 5. Available at: https://unfccc.int/process-and-meetings/conferences/past-conferences/warsaw-climate-change-conference-november-2013/cop-19/cop-19-reports.

30 United Nations Framework Convention on Climate Change (UNFCCC). 2023. "Report of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement on its fourth session, held in Sharm el-Sheikh from 6 to 20 November 2022: Addendum, Part Two." Decisions 1/CMA.4, 2/CMA.4, 3/CMA.4, 4/CMA.4, 5/CMA.4. parr.3 Available at: https://unfccc.int/event/cma-4.

31 United Nations Framework Convention on Climate Change (UNFCCC). 2023. "Report of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement on its fourth session, held in Sharm el-Sheikh from 6 to 20 November 2022: Addendum, Part Two." Decisions 1/CMA.4, 2/CMA.4, 3/CMA.4, 4/CMA.4, 5/CMA.4. parr.2 Available at: https://unfccc.int/event/cma-4.

still unmet need for climate justice: the creation of a financial structure that can provide adequate support to the communities most vulnerable to those impacts.[32]

The fund aims "to provide financing to address various challenges associated with the adverse effects of climate change, such as climate emergencies, rising sea levels, displacements, relocations, migrations, lack of climate information and data, and the need for climate-resilient reconstruction and recovery."[33] Additionally, it plans to support responses to economic and non-economic losses resulting from these effects, including complementary funding for immediate humanitarian actions following extreme climate events, as well as for medium- and long-term recovery processes and slow-onset events.

However, the implementation of the fund is still in its initial stages. Last year, a transition committee was established to hold five meetings to develop the launch of new loss and damage financing arrangements,[34] which were subsequently approved at COP 28 through resolutions 7/CP.27 and 2/CMA.4. Not without criticism, the same decision invited the World Bank to play the role of intermediary in the operationalization of the fund for

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[32] La Ruta del Clima. 2023. *Solicitud de Opinión Consultiva de la República de Chile y la República de Colombia sobre "Emergencia Climática y Derechos Humanos*," pp.10. Available at: https://corteidh.or.cr/sitios/observaciones/OC-32/5_ruta_clima.pdf.

[33] United Nations Framework Convention on Climate Change (UNFCCC). 2023. "Report of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement on its fourth session, held in Sharm el-Sheikh from 6 to 20 November 2022: Addendum, Part Two." Decisions 1/CMA.4, 2/CMA.4, 3/CMA.4, 4/CMA.4, 5/CMA.4. parr.2 Available at: https://unfccc.int/event/cma-4.

[34] United Nations Framework Convention on Climate Change (UNFCCC). 2023. "Report of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement on its fourth session, held in Sharm el-Sheikh from 6 to 20 November 2022: Addendum, Part Two." Decisions 1/CMA.4, 2/CMA.4, 3/CMA.4, 4/CMA.4, 5/CMA.4. parr.4 Available at: https://unfccc.int/event/cma-4.

a period of four years.[35] The World Bank, as the trustee of the fund, will need to facilitate direct access to the fund's resources for developing countries. It will be allowed, in its role as trustee, to invest the fund's contributions in capital markets, and needs to ensure that the fund receives contributions from various funding sources.[36]

Additionally, according to the approved proposal, the trustee will manage the fund in accordance with the decisions made by the board of the fund. An independent secretariat, accountable to the board, will also be established, headed by the executive director of the fund, selected by the board on the basis of merit and experience through an open and transparent process. The staff of these offices will need to maintain relationships with relevant stakeholders in their regions, to facilitate informed decision-making, loss and damage assessment, and planning in carrying out the functions of the secretariat.[37]

Regarding the operationalization, it was established that the fund must "have agile and simplified procedures, clear criteria, and straightforward processes, while maintaining high fiduciary

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35 United Nations (2023). O*perationalization of the new funding arrangements, including a fund, for responding to loss and damage referred to in paragraphs 2-3 of decision 2/CP.27 and 2/CM.4*. Decision 1/CP.28. Resolution FCCC/CP/2023/Add.1 of 6th of december, 2023., parr. 17. Available at: https://unfccc.int/sites/default/files/resource/1_CP.28.pdf.

36 United Nations (2023). *Operationalization of the new funding arrangements for responding to loss and damage and the fund established in paragraph 3 of decisions 2/CP.27 and 2/CMA.4. Report by the Transitional Committee.* Annex I. Resolution FCCC/CP/2023/9–FCCC/PA/CMA/2023/9 from 28 of November, 2023., parr. 20. Available at: https://unfccc.int/documents/632319.

37 United Nations (2023). *Operationalization of the new funding arrangements for responding to loss and damage and the fund established in paragraph 3 of decisions 2/CP.27 and 2/CMA.4. Report by the Transitional Committee.* Resolution FCCC/CP/2023/9–FCCC/PA/CMA/2023/9 of 28 of November, 2023., parr. 32-34. Available at: https://unfccc.int/documents/632319.

standards, as well as environmental and social safeguards, and levels of financial transparency, along with robust accountability mechanisms."[38]

Access modalities have also been defined, including the promotion of strengthening national responses to address loss and damage through country-led approaches, ensuring effective participation from all stakeholders—in particular, women, vulnerable communities, and indigenous peoples. According to the report, the fund must be sensitive to the priorities and circumstances of each requesting country,[39] fostering direct participation from states at subnational and local levels.[40] Developing countries receiving funding will be involved in all stages of the fund's program and project cycle.[41] In addition,

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38 United Nations (2023). *Operationalization of the new funding arrangements for responding to loss and damage and the fund established in paragraph 3 of decisions 2/CP.27 and 2/CMA.4. Report by the Transitional Committee.* Resolution FCCC/CP/2023/9–FCCC/PA/CMA/2023/9 of 28 of November, 2023., parr. 41. Available at: https://unfccc.int/documents/632319.

39 United Nations (2023). *Operationalization of the new funding arrangements for responding to loss and damage and the fund established in paragraph 3 of decisions 2/CP.27 and 2/CMA.4. Report by the Transitional Committee.* Annex II. Resolution FCCC/CP/2023/9–FCCC/PA/CMA/2023/9 from 28 of November, 2023., parr. 44. Available at: https://unfccc.int/documents/632319.

40 United Nations (2023). *Operationalization of the new funding arrangements for responding to loss and damage and the fund established in paragraph 3 of decisions 2/CP.27 and 2/CMA.4. Report by the Transitional Committee.* Annex II. Resolution FCCC/CP/2023/9–FCCC/PA/CMA/2023/9 from 28 of November, 2023., parr. 45. Available at: https://unfccc.int/documents/632319.

41 United Nations (2023). *Operationalization of the new funding arrangements for responding to loss and damage and the fund established in paragraph 3 of decisions 2/CP.27 and 2/CMA.4. Report by the Transitional Committee.* Annex II. Resolution FCCC/CP/2023/9–FCCC/PA/CMA/2023/9 from 28 of November, 2023., parr. 46. Available at: https://unfccc.int/documents/632319.

activities that prepare and strengthen national processes related to loss and damage may be supported.[42]

The board should establish various modalities to facilitate access to the fund's resources. These will include: (a) direct budget support to national governments or partnerships with entities equivalent to development banks; (b) access through subnational, national, and regional entities or in collaboration with other accredited funds; (c) international access through multilateral or bilateral entities; and (d) small grants to support communities, indigenous peoples, and vulnerable groups, including recovery after climate events.[43]

Resource allocation should be carried out through a system that considers the priorities and needs of developing countries vulnerable to climate change, while also assessing the affected communities and the magnitude of climate impacts in their specific national contexts. This system will avoid excessive concentration of support in certain regions and will be based on the best available data, as well as on the knowledge of indigenous and vulnerable communities regarding climate change and recovery cost estimates from relevant entities. Additionally, a minimum allocation percentage will be guaranteed for Least Developed Countries (LDCs) and Small Island Developing States (SIDS).[44]

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42 United Nations (2023). *Operationalization of the new funding arrangements for responding to loss and damage and the fund established in paragraph 3 of decisions 2/CP.27 and 2/CMA.4. Report by the Transitional Committee.* Annex II. Resolution FCCC/CP/2023/9–FCCC/PA/CMA/2023/9 from 28 of November, 2023., parr. 47. Available at: https://unfccc.int/documents/632319.

43 United Nations (2023). *Operationalization of the new funding arrangements for responding to loss and damage and the fund established in paragraph 3 of decisions 2/CP.27 and 2/CMA.4. Report by the Transitional Committee.* Annex II. Resolution FCCC/CP/2023/9–FCCC/PA/CMA/2023/9 from 28 of November, 2023., parr. 41. Available at: https://unfccc.int/documents/632319.

44 United Nations (2023). *Operationalization of the new funding arrangements for responding to loss and damage and the fund established in paragraph 3*

Regarding the implementation just initiated, the first meeting of the board of directors took place in April 2024, focusing on administrative matters. During this meeting, organizational issues were addressed, and the process for the operationalization of the fund, overseen by the World Bank as trustee, was discussed. While the board emphasized the importance of the transition committee-proposed governance instrument's safeguards and standards, which highlight fiduciary, integrity, environmental, and social principles that must be respected, important issues such as the details regarding access modalities for small grants directed at communities and vulnerable groups still require definition and were not addressed.[45]

The second meeting was held in August 2024, and various administrative topics were again discussed, including the process for selecting the executive director of the fund. However, the board did not make decisions regarding the operationalization of the fund by the World Bank or about access modalities, issues that were left for the next scheduled meeting in September 2024.

As we can see, two years after the decision to create a new financing mechanism, the fund is still under construction. While the work of the board of the fund is in its early stages, like in the case of the Warsaw Mechanism, we cannot identify a true realization of the principle of common but differentiated responsibilities. The agreements so far have not established criteria for identifying the main culprits of climate phenomena, and, therefore, contributors to the fund, nor are there intentions to establish quantitative methodologies that would allow for assessments of losses and

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of decisions 2/CP.27 and 2/CMA.4. Report by the Transitional Committee. Resolution FCCC/CP/2023/9–FCCC/PA/CMA/2023/9 from 28 of November, 2023., parr. 60. Available at: https://unfccc.int/documents/632319.

45 United Nations (2024). *Decisions of the Board – first meeting of the Board, 30 April to 2 May 2024.* Resolution FLD/B.1/11 24th of May, 2024. Available at: https://unfccc.int/event/first-meeting-of-the-board-of-the-fund-for-responding-to-loss-and-damage.

damages, criteria for the allocation of the fund, or which countries would be considered vulnerable.

Similar conclusions are reached by the "Guide on How to Communicate Losses and Damages in Latin America and the Caribbean," indicating that there is still no single methodology or information system that outlines what damages and losses are, nor how they can be quantified.[46] Additionally, it was defined contribution to the fund would be voluntary. Any country, regardless of its emissions output, can contribute whatever it can, which moves us away from the necessary paradigm of attributing responsibility.

Such a funding scenario not only does not align with the dimensions of the principle of common but differentiated responsibilities, but it also fails to reflect the obligations of states in this matter, as we will see next.

5. DESCRIPTION OF THE OBLIGATIONS OF STATES UNDER THE FUND AS A MECHANISM FOR THE FINANCING OF LOSS AND DAMAGE

We have already pointed out that the principle of common responsibilities is closely linked to climate justice. As Lavorel and Torre-Schaub held, defining obligations requires the "co-construction" of new responsibilities. It implies, on the one hand, the distribution of attribution in a way that makes shared responsibility effective and ensures those with power and authority can be effectively held accountable for their contribution to climate change, and, on the other hand, the integration of all actors, both at the international and national level, that are needed to make

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46 Parra, Francisco; Tavera, Esteban; Venegas, Nicole; and Mamani, Esther (2023). *¿Cómo comunicar las pérdidas y daños en América Latina y el Caribe?: Una introducción para periodistas*. Fundación Para la Información y Difusión del Cambio Climático Climate Tracker, pp.10.

climate responsibility effective. Thus, the creation of the fund as an international mechanism to finance the losses and damages of vulnerable countries and communities, while still improvable, represents a new scenario of obligations.

In this final section, we examine some of the obligations that arise for both developed states and "recipient states"—developing states, SIDS and LDCs—to ensure that the fund becomes an effective mechanism for redistributing resources and funding for loss and damage suffered by the communities most affected by and less resilient to climate change.

The outlined obligations are analysed in light of a critical review of the loss and damage financing mechanism addressed above. This review highlights the need for effective application of the principle of common but differentiated responsibilities.

5.1 Common Obligation to Respect, Minimize, and Address Losses and Damages

As previously mentioned, in Article 8 of the Paris Agreement, the parties explicitly recognize "the importance of avoiding, minimizing, and addressing losses and damages related to the adverse effects of climate change, including extreme weather events and slow-onset phenomena, and the contribution of sustainable development to reducing the risk of losses and damages." Thus, in principle, all signatory states commit to preventing and addressing losses and damages. This entails a series of obligations for both developed states and receiving states, even though the latter are not responsible.

In this regard, Andrea Lucas points out, the term "common" in this context expresses solidarity in climate protection and implies the sharing of obligations in a way that reflects equity,[47] while

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47 Andrea Lucas Garín. "Cambio Climático en Chile. El Escenario Nacional frente al Acuerdo de París." Ediciones Universidad Finis

considering each state's capacity to respond and the allocation of responsibility.

5.2 Developed countries: Ensure comprehensive, complete, and permanent financing for losses and damages

Under a framework of common but differentiated responsibilities, developed countries are attributed a greater share of responsibility for contributing to the global climate situation and, therefore, have obligations regarding mitigation, adaptation, and addressing losses and damages. Still, obligations stem from the assigned responsibility and should correspond to it.

The first and foremost obligation for developed countries within the fund is, of course, the monetary contribution—the amount of money estimated to compensate for losses and damages, which should theoretically add up to the total estimated losses and damages annually. However, to date, the committed funds remain well below what is needed[48] and still no real attribution of loss and damages has been made.

In this regard, Ian Fry, the Special Rapporteur on the promotion and protection of human rights in the context of climate change, stated in his report that states could increase their payment capacity by taxing companies and individuals that

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Terrae. Año 2019. Página 48.

48 "De acuerdo con un informe publicado por Loss and Damage Collaboration, 55 de las economías más vulnerables al clima sufrieron pérdidas de más de 500 mil millones de dólares entre 2000 y 2020, algo que podría aumentar en una cifra similar en la década siguiente. Según otros cálculos, el costo anual de las pérdidas y daños será de 400 mil millones de dólares para 2030." En: AIDA-Americas. (n.d.). Lo que debes saber de las pérdidas y daños de la crisis climática. Available at:https://aida-americas.org/es/blog/lo-que-debes-saber-de-las-perdidas-y-danos-de-la-crisis-climatica.

pollute.[49] Examples, provided by Oxfam, are taxes on shipping or on the use of fossil fuels. According to that organization, these types of actions would be realizations of the principle that the polluter pays, particularly by taxing the main culprits who have a greater capacity to pay.[50]

In addition, developed countries have an obligation to address loss and damage in a comprehensive manner, including non-economic loss and damage, such as the irreversible loss of ecosystems, and "intangible damage," which includes the loss of languages, sacred sites, ancestral practices and communal lifestyles that are no longer easily reproduced due to environmental change and continue to severely affect many communities.[51] This will also provide an active role for the state in which the damage occurs (the receiving state), as well as the assurance of a space for meaningful participation so that the voices of affected communities are effectively heard.

This means that funding must be diversified (cannot rely exclusively on the fund), and that the funding of states responsible

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49 United Nations (2022) *Report of the Special Rapporteur on the promotion and protection of human rights in the context of climate change*. Resolution A/77/226 of 26 of July, 2022, parr. 92. Available at: https://www.ohchr.org/en/documents/thematic-reports/a77226-promotion-and-protection-human-rights-context-climate-change.

50 Carty, Tracy and Walsh Lindsay (2022). Pendiente de pago, Por una financiación justa de las pérdidas y daños en una era marcada por los crecientes efectos del cambio climático, Oxford: Oxfam Internacional, p. 6. Available at: https://oxfamilibrary.openrepository.com/bitstream/handle/10546/621382/bp-fair-finance-loss-and-damage-060622-summ-es.pdf;jsessionid=0A0FBDF552376AF444FD517AE3EAADE8?sequence=17.

51 United Nations (2022) *Report of the Special Rapporteur on the promotion and protection of human rights in the context of climate change*. Resolution A/77/226 of 26 of July, 2022, parr. 59. Available at: https://www.ohchr.org/en/documents/thematic-reports/a77226-promotion-and-protection-human-rights-context-climate-change.

for damage must be sufficient to cover current and future damage needs, as recommended by the rapporteur.[52]

While such measures are completely compatible with the expectations for a varied fund as proposed by the transition committee and the board of management,[53] the operationalization of the fund still does not show clear signs in this direction and remains reliant on voluntary contributions.

Finally, according to the United Nations Office for Disaster Risk Reduction (UNDRR), many communities today depend on humanitarian actions, which are typically unpredictable and sporadic.[54] This leads us to the conclusion that funding provided by developed countries must be sustainable over the long term, so that it not only enables a country to recover from a "climate shock" caused by extreme weather events, but also systematically facilitates actions that strengthen its resilience and capacity to cope with slow-onset processes and damage caused by recurrent climate events.[55]

5.3 Obligations and Active Diligence of "Receiving States"

Although developing countries, SIDS, and LDCs (I will henceforth refer all three as "receiving states") may bear less responsibility—or no responsibility—for the consequences of

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52 United Nations (2022) *Report of the Special Rapporteur on the promotion and protection of human rights in the context of climate change*. Resolution A/77/226 of 26 oF July, 2022, parr. 90. Available at: https://www.ohchr.org/en/documents/thematic-reports/a77226-promotion-and-protection-human-rights-context-climate-change.

53 in Resolution FCCC/CP/2023/9–FCCC/PA/CMA/2023/9.

54 Panwar, Vikrant; Wilkinson, Emily; Nur, Lena (2023). *Financial arrangements for addressing losses and damages: A disaster risk reduction primer*. London: ODI. pp.15.

55 Panwar, Vikrant; Wilkinson, Emily; Nur, Lena (2023). *Financial arrangements for addressing losses and damages: A disaster risk reduction primer*. London: ODI. pp.6.

climate change in their jurisdictions, they are not exempt from obligations.

Article 8 of the Paris Agreement is not the only instrument from which obligations arise; there are obligations also emerge in light of protecting and ensuring human rights. In cases of suffering losses and damages due to climate change, these are linked to the right to a healthy environment, the right to life, and the rights to access to water and sanitation, food, health, and adequate housing, among others. These obligations arise from international instruments such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social, and Cultural Rights, the Convention on the Rights of the Child, and the Escazú Agreement, to name a few. In this way, and as articulated in the Paris Agreement, both developed states and receiving states have the obligation to respect, minimize, and address losses and damages; however, for receiving states, these obligations do not originate from a responsibility for climate change increase.

Therefore, the beneficiary states have to play an active role in the Loss and Damage Fund when ensuring an effective financing mechanism for losses and damages, in order to allow sufficient autonomy and decision-making power regarding where and how the financing is utilized according to their priorities and needs. In addition, there is no single way to anticipate all possible solutions to losses and damagees; instead, comprehensive solutions are complex, dynamic and context-specific.[56] Hence, the active involvement of the recipient state, and therefore the fulfilment of obligations by the developing states or "recipients," will determine the success or failure of the measures.

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[56] Bakhtaoui, Inès, et al. (2022). Operationalizing Finance for Loss and Damage: From Principles to Modalities, Stockholm: Stockholm Environment Institute, pp.2. Available at: https://www.sei.org/wp-content/uploads/2022/10/sei-report-loss-damage-shawoo-bakhtaoui-2022.pdf.

Moreover, according to a review conducted by the Stockholm Environmental Institute of the results of organizations that work to channel funding for adaptation, it turns out that vulnerability is rarely the primary reason for the allocation of funds at the national level; rather, allocation depends on the capacity of the fund recipient to channel the financing, along with the interests of the donor.[57]

In this way, one of the main procedural obligations of receiving states is to participate in the international mechanism of the fund with internal objectives: to raise issues of losses and damages that have occurred at the domestic level, to create spaces for local communities within the fund when necessary, to obtain resources that adequately address losses and damages, and ultimately, to direct them appropriately.

Therefore, not only is a positive obligation to ensure human and environmental rights necessary, but also an active role on the part of in developing states, SIDS, and particularly the communities most vulnerable to the effects of climate change, to ensure an adequate and targeted allocation that effectively responds to losses and damages.[58]

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57 Bakhtaoui, Inès, et al. (2022). Operationalizing Finance for Loss and Damage: From Principles to Modalities, Stockholm: Stockholm Environment Institute, pp.13. Available at: https://www.sei.org/wp-content/uploads/2022/10/sei-report-loss-damage-shawoo-bakhtaoui-2022.pdf.

58 Cabe mencionar que no queremos dar la impresión equivocada de sobrecargar a los Estados en desarrollo con trabajo adicional, especialmente en un contexto en el que buscamos trasladar la responsabilidad hacia los Estados desarrollados. Si bien algunos Estados en desarrollo ya han impulsado iniciativas de financiamiento propias basadas en mecanismos de seguro e instrumentos de manejo del riesgo, o bien, han liderado propuestas a nivel internacional para abordar el problema, como ha sido la solicitud consultiva sobre cambio climático, de la República de Vanatu ante la Corte Internacional de Justicia#, consideramos fundamental, para asegurar una asignación adecuada y focalizada que responda efectivamente a las pérdidas y daños en

5.3.1 Loss and Damage Assessment and Identification

Another primary obligation of receiving states is the assessment and identification of losses and damages so that these can be financed. To effectively channel funding, receiving states must focus on quantifying both economic and non-economic losses, allowing for a wide range of potential measures to address losses and damages.

The above is not an easy task. This is because the emphasis cannot be solely on economic or material damages; rather, non-economic losses are also fundamental. In many cases, this task will require economic, technological, or capacity-building support from the developed state identified as responsible, or from organizations in global climate governance, such as the Santiago Network. Thus, whether the state conducts the assessment and identification or participates in it will depend on the capacities of the receiving state in question.

Additionally, as agreed in the initial access modalities established in the decision, small international grants will be available to directly finance communities.[59] In this regard, the states that uphold the rights of individuals and communities affected by losses and damages will be able to redirect these international grants to provide support to those communities.

To fulfill the above obligation, receiving states must focus efforts on creating and updating national information systems that effectively address losses of land and ocean territories and their associated ecosystems, as well as losses and damages to

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los Estados en desarrollo, los SIDS y, en particular, las comunidades más vulnerables a los efectos del cambio climático, que los Estados beneficiarios ejerzan un rol activo en el Fondo de Pérdidas y Daños.

59 United Nations (2023). O*perationalization of the new funding arrangements, including a fund, for responding to loss and damage referred to in paragraphs 2-3 of decision 2/CP.27 and 2/CM.4*. Decision 1/CP.28. Resolution FCCC/CP/2023/Add.1 of 6th of December, 2023. Available at: https://unfccc.int/sites/default/files/resource/1_CP.28.pdf.

identified livelihoods and cultural and heritage systems.[60] With solid information of losses incurred, a country can subsequently request resources from the fund and better channel its allocation.[61]

The resulting information is essential not only for developing states to channel resources more effectively, but also for a crucial point in light of the realization of the principle of common but differentiated responsibilities, for the attribution of responsibilities by the fund. Once again, developed states must also consider supporting and creating information systems aimed at identifying losses and damages, as well as all information regarding the risks and resilience capacities of the ecosystems and livelihoods in affected areas.

5.3.2 Transparency in Loss and Damage Assessment and Identification

Article 13.1 of the Paris Agreement states that "[i]n order to build mutual trust and to promote effective implementation, an enhanced transparency framework for action and support is hereby established, with flexibility to reflect differing capacities of Parties and based on collective experience." The same article adds in paragraph 5 that the purpose of the transparency framework for measures is to provide a clear vision of the actions taken to address climate change in light of the objective of the convention.

Transparency is important to enable participation in loss and damage assessment, to identify the individuals and communities

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60 United Nations (2022) *Report of the Special Rapporteur on the promotion and protection of human rights in the context of climate change*. Resolution A/77/226 of 26 of July, 2022, pp. 22. Available at: https://www.ohchr.org/en/documents/thematic-reports/a77226-promotion-and-protection-human-rights-context-climate-change.

61 Panwar, Vikrant; Wilkinson, Emily; Nur, Lena (2023). *Financial arrangements for addressing losses and damages: A disaster risk reduction primer*. London: ODI. pp.15.

experiencing climate loss and damage, and to allow both states—developed and host—to be held accountable.

5.3.3 Obligation to Ensure Spaces for Meaningful Participation

According to Fry, there is a troubling disconnection in the decision-making process between those who continue to support or use fossil fuels and those who are most affected by the impacts of climate change.[62] For Fry, the disconnection is not only between those who are most affected by the impacts of climate change and those responsible for exacerbating the climate crisis, but also between those who actually participate in the decision-making processes related to climate actions and those who are underrepresented in political spaces.[63] According to Shalateck, "[t]he lack of participatory governance in climate financing issues at the international level is profoundly undemocratic in the most fundamental sense of democracy: by denying individuals as global citizens an equitable voice in decisions that affect their lives.[64]" As the climate crisis worsens, the former rapporteur describes actions for climate change as limited and urgently calls for the pursuit of new participation mechanisms.[65]

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62 United Nations (2022) *Report of the Special Rapporteur on the promotion and protection of human rights in the context of climate change*. Resolution A/77/226 of 26 of July, 2022, parr. 73. Available at: https://www.ohchr.org/en/documents/thematic-reports/a77226-promotion-and-protection-human-rights-context-climate-change.

63 United Nations (2022) *Report of the Special Rapporteur on the promotion and protection of human rights in the context of climate change*. Resolution A/77/226 of 26 of July, 2022, parr. 75. Available at: https://www.ohchr.org/en/documents/thematic-reports/a77226-promotion-and-protection-human-rights-context-climate-change.

64 Shalateck, Liane (2012). "Democratizing climate finance governance and the public funding of climate action." Democratization (19:5), p. 951-973. DOI: 10.1080/13510347.2012.709690. pp. 957.

65 United Nations (2022) *Report of the Special Rapporteur on the promotion and protection of human rights in the context of climate change*. Resolution

An approach based on the principle of common but differentiated responsibilities, as well as human rights, implies placing individuals and communities, rather than states, at the center of climate financing.[66] To achieve this, timely and effective participation spaces must be considered to democratize and channel resources toward effective solutions for a state's losses and damages, and also to other stakeholders, such as scientific and non-governmental organizations. This could involve establishing permanent multi-stakeholder bodies that decide on matters related to specific losses and damages at the local, regional, and national levels.

However, Article 12 of the Paris Agreement states that "Parties shall cooperate in taking measures to enhance education, training, awareness, and public participation and access to information on climate change." Thus, the obligation to provide effective citizen participation spaces is a common obligation for both developed and receiving states, as well as for the funding mechanisms themselves, which must promote cooperation between the two and the involvement of all stakeholders, especially affected local communities who usually don't have easy access to these spaces.

5.3.4 Monitoring Obligations

Additionally, it is important to consider mechanisms for monitoring funds received, including those directed by communities, to ensure their effectiveness. Reporting of the successes of the financing state and the challenges faced by the receiving state can also include the participation, in the form of monitoring and evaluation, of those who receive financing, to

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A/77/226 of 26 of July, 2022, parr. 74. Available at: https://www.ohchr.org/en/documents/thematic-reports/a77226-promotion-and-protection-human-rights-context-climate-change.

66 Shalateck, Liane (2012). "Democratizing climate finance governance and the public funding of climate action." Democratization (19:5), p. 951-973 . DOI: 10.1080/13510347.2012.709690. pp. 957.

strengthen their accountability, whether the fund is administered by the state or another international entity.[67] This could be a way of ensuring that funding meets real need.

Finally, not yet widely discussed within the framework of the fund meetings is a relevant access modality that will allow developing states to establish internal mechanisms for communities and affected groups to request state intervention. This will establish an active role for communities or groups that have been affected.

6. CONCLUSION

The analysis of financing mechanisms for losses and damages in the context of climate change reveals a profound need to reinforce the principle of common but differentiated responsibilities among states. The determination of losses and damages, the allocation and attribution of responsibilities, and effective financing for communities experiencing the most acute and irreversible impacts of climate change become minimum requirements in the context of climate justice, which is closely linked to this principle.

Despite significant advances in international discussions, the mechanisms implemented, particularly the Loss and Damage Fund, remain unsatisfactory in effectively attributing responsibilities to developed countries, which have historically contributed the most to the climate crisis, as well as in providing adequate resources for the most vulnerable and less resilient communities, despite both being included in the objectives for the creation of the mechanism.

The obligations identified for both developed states and receiving states are just part of the necessary obligations we believe

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67 Soanes, Marek, et.al (2017) Delivering real change Getting international climate finance to the local level,IIED Working Paper. London: IIED, p.13. Available at: https://www.iied.org/sites/default/files/pdfs/migrate/10178IIED.pdf.

are essential for the implementation of the Loss and Damage Fund mechanism for effective financing of these needs, in light of the principles of common but differentiated responsibilities. We especially emphasize that a financing mechanism for losses and damages that effectively attributes common but differentiated responsibilities and generates obligations for receiving states is needed.

However, while the Loss and Damage Fund is still in its initiation phase, the success of the funding mechanism will largely depend on the cooperation of states, both those that are held responsible for loss and damage and those that have a duty to respect, protect and fulfil human and environmental rights within their territories.

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International liability of states for acts and omissions causing significant damage to the climate system and other elements of the environment

MARISOL ANGLÉS-HERNÁNDEZ[1]

INTRODUCTION

According to the State of the Global Climate Report, 2023 was the warmest year on record, with the global average near-surface temperature at 1.45°C (with a margin of uncertainty of ± 0.12°C) above pre-industrial baseline levels. Ocean heat, sea level rise, Antarctic Ocean ice loss, and glacier retreat led to greater and more frequent extreme hydrometeorological events, which disproportionately affected socio-economic development, showing that the cost of climate inaction is higher than the cost of climate action.[2]

In this scenario, Resolution A/77/L.58 was adopted by consensus by the 193 countries that make up the United Nations General Assembly, promoted by Vanuatu and other Pacific Island countries, who requested the International Court of Justice (ICJ)

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2 WMO (2024). State of the Global Climate Report, 2023 World Meteorological Organization. Available at: https://library.wmo.int/records/item/68835-state-of-the-global-climate-2023.

for an advisory opinion on the obligations of States with respect to climate change. Two questions were raised, but for the purposes of this section, we will focus on the second:

> What are the legal consequences under these obligations for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment, with respect to:
>
> (i) States, including, in particular, small island developing States, which due to their geographical circumstances and level of development, are injured or specially affected by or are particularly vulnerable to the adverse effects of climate change?
>
> (ii) Peoples and individuals of the present and future generations affected by the adverse effects of climate change?[3]

Although it was a consensus resolution, some States, especially those most responsible for greenhouse gas emissions and the negative effects of climate change, showed some reluctance.[4] One example is the United States of America (USA), whose position was not in favor of addressing the responsibility of States for climate change at the ICJ; on the contrary, the representative of that country stressed that this process, far from helping to achieve climate objectives, could complicate the collective efforts that have been made by the international community. Specifically, he stated, "We believe that the launching of a judicial process — especially given the broad scope of the issues — is likely to accentuate disagreements and will not advance the ongoing diplomatic and negotiating processes. In light of these concerns, the United States disagrees that this initiative is the best approach to achieve our shared goals, and takes this opportunity to reaffirm

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3 United Nations (2023). *Request for an advisory opinion of the International Court of Justice on the obligations of States in respect of climate change*, Resolution A/77/L.58. Available at: https://documents.un.org/doc/undoc/ltd/n23/063/82/pdf/n2306382.pdf.

4 Boeglin, Nicolas (2023). *Emergencia climática: solicitud de opinión consultiva a la Corte Internacional de Justicia (CIJ)*. Available at: https://www.dipublico.org/120515/emergencia-climatica-solicitud-de-opinion-consultiva-a-la-corte-internacional-de-justicia-cij-adoptada/.

our view that diplomatic efforts are the best means to address the climate crisis."[5]

On the other side, the delegate of the European Union (EU) pointed out:

> The EU Strategy on Adaptation to Climate Change contains a strong international dimension, particularly in terms of increasing support, including financial, for climate resilience and preparedness and strengthening global engagement and exchanges … the EU is and will remain committed to scaling up assistance to developing countries that are particularly vulnerable to the adverse effects of climate change, in responding to loss or damage.
>
> The EU and its Member States appreciate the choice of engaging the Court through advisory proceedings whose non-contentious nature avoids disputes and encourages the continued pursuit, by the international community, of further ambitious and effective action, including through international negotiations, to tackle climate change.[6]

In recent years, due to its vertiginous expansion, international law reaches the most diverse forms of international activity, from trade to environmental protection, from human rights to scientific and technological cooperation. This has given rise to the creation of new multilateral organizations, both at the universal and regional levels; but it has also led to a greater specialization and fragmentation of public international law,[7] which is accompanied

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5 Hill, Nicholas (2024). Explanation of Position on Resolution Entitled Request for an advisory opinion of the International Court of Justice. US, United States Mission to the United Nations. Available at: https://usun.usmission.gov/explanation-of-position-on-resolution-entitled-request-for-an-advisory-opinion-of-the-international-court-of-justice/.

6 Skoog, Olof (2024). EU Statement – UN General Assembly: Resolution requesting an Advisory Opinion of the International Court of Justice on climate change. European External Action Service. Available at: https://www.eeas.europa.eu/delegations/un-new-york/eu-statement-%E2%80%93-un-general-assembly-resolution-requesting-advisory-opinion-international-court_en.

7 United Nations (2006). *Fragmentation of International Law: Difficulties arising from the diversification and expansion of International Law.* A/

by specialized legal norms, institutions and practices, along with their respective principles and rules of operation. Sometimes this situation can lead to bureaucratic processes, decisions, and, consequently, actions, in addition to giving way to conflicting decisions and, thus, delaying the implementation of concrete actions, affecting, from another perspective, the people who should benefit from the aforementioned specialization.

Under this scenario, the general rules of interpretation of treaties established in the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, adopted in 1969, take on special relevance, since their validity, as part of customary law, has been confirmed by the International Law Commission (ILC), as will be discussed infra.[4]

Undoubtedly, the question posed to the ICJ and analyzed here is complex and has diverse edges, since environmental justice, climate justice and the guarantee of human rights converge in it. Therefore, the arguments here are based on international law — mainly, the Charter of the United Nations, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the United Nations Convention on the Law of the Sea, the United Nations Framework Convention on Climate Change, the Paris Agreement and the principles of international law, in order to identify, from a deductive analysis and a hermeneutic exercise, if there is a legal basis to hold States responsible in this sense.

CN.4/L.702, p. 193. Available at: https://documents.un.org/doc/undoc/ltd/g06/628/63/pdf/g0662863.pdf.

1. THE GLOBAL CLIMATE SYSTEM AND THE EFFECTS CAUSED BY GREENHOUSE GASES

It is necessary to conceptualize the climate system and identify the possible actions and inactions that affect it in order to establish the terms of the international responsibility of States for the emission of Greenhouse Gases (GHG)[8] as a result of the combustion of fossil resources (coal, gas, and oil).

According to the Intergovernmental Panel on Climate Change (IPCC),[6] the climate system is an interactive system consisting of five major components: (i) atmosphere, (ii) hydrosphere, (iii) cryosphere, (iv) land surface, and (v) biosphere; all of them forced or influenced by various external mechanisms, the most important of which is the Sun. Also important are the direct effects of human activities on the climate system.[9] These activities are modifying the atmospheric composition and continental surface in ways that are likely to change the pace, and, perhaps, the direction of natural climatic change. Human impacts on climate differ from many natural processes because of the speed of the changes.[10]

Despite the evidence of the relationship between the burning of fossil fuels and the acceleration of climate change and the adoption in 1992 of the United Nations Framework Convention on Climate Change, it was not until the 26th Conference of the Parties, held in Glasgow in 2021, that these fuels were expressly mentioned and 46 countries committed themselves to gradually eliminate the use of coal as a source of energy. However, the main

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8 Greenhouse Gas Emissions include carbon dioxide, methane and nitrous oxide from all sources, including emissions and removals from land use, land use changes and forestry.

9 IPCC (2018). The Climate System: An Overview, Baede, A.P.M. (coord.). p. 87. Available at: https://www.ipcc.ch/site/assets/uploads/2018/03/TAR-01.pdf.

10 Henderson-Sellers, A. (2022). "The climate system." In Yotova, A. (Ed.). *Encyclopedia Life Support Systems*. Vol. III. UNESCO. Available at: https://www.eolss.net/sample-chapters/c12/E1-04-07-15.pdf.

polluters (Australia, USA, China and India) were not among the States who committed.

In addition, it has been estimated that the combined levels of coal, oil, and gas production being projected by 10 high-income countries alone would already exceed 1.5°C-consistent pathways for each fuel by 2040. Similarly, the trajectories of oil and gas production being planned by 12 countries with relatively lower levels of economic dependence on their production would exceed the respective 1.5°C consistent pathways by 2040.[11] This demonstrates the need for decisive cooperation from higher to lower-income countries to maintain the climate system, from an equity perspective, for life on the planet in all its forms.

2. THE CLIMATE REGIME AND ITS INTERACTION WITH THE PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW

The obligation to protect the environment and the climate system is linked to various principles of international law, and as stated in the Iron Rhine case (Belgium v. The Netherlands), States have an obligation to consider these principles in their environmental measures;[12] therefore, we consider it crucial to address the content of some of them in relation to the climate obligations of States.

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11 UNEP (2023). "2023 Report. The Production Gap Executive Summary". En *Phasing down or phasing up? Top fossil fuel producers plan even more extraction despite climate promises*, p. 5. Available at: https://productiongap.org/wp-content/uploads/2023/11/SEI_PGR2023_ExecSum_fnl_Spanish.pdf.

12 United Nations (2008). Award in the Arbitration regarding the Iron Rhine ("Ijzeren Rijn") Railway between the Kingdom of Belgium and the Kingdom of the Netherlands, decision of 24 May 2005. In *Reports of International Arbitral Awards*, Vol. XXVII, pp. 35-125. Available at: https://legal.un.org/riaa/cases/vol_XXVII/35-125.pdf.

2.1 Principle of Sovereignty over Natural Resources and the Principle of Responsibility Not to Cause Damage to the Environment of Other States[13]

These principles are based on the international customary standard of due diligence.[14] Although the foundation of these principles is found in soft law,[15] it has been through the hermeneutic exercise[16] and the principles' application that they have been incorporated into hard law, as part of the corpus of international environmental law.

An example of this is the reference in the 1982 United Nations Convention on the Law of the Sea to the sovereign right of States to exploit their natural resources following their environmental policies and their duty to protect and preserve the marine environment (article 193). It adds that States shall take all necessary measures to ensure that activities under their jurisdiction are carried out in a manner that does not cause damage to other States and that pollution arising from incidents or activities under their control does not spread beyond the areas where they exercise sovereign rights (Article 194. 2). The same is true of the 1992 Convention on Biological Diversity (Article 3).

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13 The United Nations General Assembly has pronounced on these principles in Resolution 2996 of 1972, on the international responsibility of States with regard to the environment, and Resolution 3281 of 1974, Charter of Economic Rights and Duties of States.

14 ICJ (2006). *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Provisional Measures,* International Court of Justice, para. 197.

15 Principle 21, Stockholm Declaration, 1972; Principle 2, Rio Declaration, 1992.

16 United Nations (1941). "Trail Smelter Case (United States v. Canada)." *Reports of International Arbitral Awards,* pp. 1905-1982; ICJ (1949). *The Corfu Channel Case. Judgment,* International Court of Justice, para. 22; ICJ (1996). *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion,* International Court of Justice, para. 29.

On climate issues, the UNFCCC states in its preamble 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.

Undoubtedly, the emission of GHGs in quantities exceeding the established limits causes damage to the environment and the climate system beyond the jurisdiction of the States that generate such emissions, which is why a more stringent regime of responsibility should be established for industrialized countries vis-à-vis developing countries.

2.2 Principle of Common but Differentiated Responsibilities

This principle is based on equal rights and obligations among States, under the principles of equity[17] and progressiveness.[18] Principle 7 of the 1992 Rio Declaration says, "in view of the different contributions to global environmental degradation [States] have common but differentiated responsibilities."

This principle was taken up in the preamble of the UNFCCC and in its Article 3.1, which states, "The 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

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17 Voigt, Christina (2014). Equity in the 2015 Climate Agreement, Lessons from Differential Treatment in Multilateral Environmental Agreements, *Climate Law*, 4, p. 64.

18 The Montreal Protocol on Substances that Deplete the Ozone Layer, adopted in 1987, established differentiated obligations to achieve the phase-out of ozone-depleting compounds in the stratosphere, based on specific timetables for developed and developing countries.

their common but differentiated responsibilities and respective capabilities … ."

Consequently, the study of the principle of Common but Differentiated Responsibilities should not be separated from the circumstances related to the economic and social development of the least favored States, since these circumstances determine the capacity of these countries to effectively comply with global environmental and climate objectives, and imply recognition of a differentiated responsibility between developed and developing countries with respect to environmental and climate impacts, as well as States' respective capacities to assume commitments to protect and restore the integrity of ecosystems and the security of the climate system.

As a result, and within the framework of the commitments regulated by the UNFCCC, Article 4.2 establishes that the developed country Parties and the other Parties included in Annex I commit, specifically, to adopting national policies and taking measures to mitigate climate change, limiting their anthropogenic GHG emissions and protecting and enhancing these gases' sinks and reservoirs.

Likewise, Article 2.2 of the Paris Agreement establishes that, "[it] will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances." And article 4.19 establishes that, "all Parties should strive to formulate and communicate long-term low greenhouse gas emission development strategies, mindful of Article 2 … ." However, the possibility of engaging international climate liability under these rules would require States to be a party to either the UNFCCC or the Paris Agreement. Many of the countries with the highest GHG emissions are not a party. Therefore, it is necessary to resort to other legal avenues to proceed accordingly.

2.3 Principle of Sustainable Development

The background to this principle is to be found in the report entitled Our Common Future, prepared in 1997, which refers to the human capacity to achieve "sustainable development," understood as development that meets the needs of the present without compromising the ability of future generations to meet their own needs.[19]

Since that document was published, the principle has been promoted by the United Nations through various declaratory and binding instruments. Among the first is the Stockholm Declaration, which establishes in Principle 1 that: "Man has the fundamental right to freedom, equality and adequate living conditions in an environment of a quality that enables him to lead a life of dignity and well-being, and he has a solemn obligation to protect and improve the environment for present and future generations … ." In addition, Principle 11 states that States should develop environmental policies aimed at increasing the current or future growth potential of developing countries without limiting that potential or hindering the achievement of better living conditions for all. Later, Principle 3 of the Rio Declaration states: "The right to development should be exercised in a manner that equitably meets the developmental and environmental needs of present and future generations."[20]

At the conventional level, this principle is taken up in the following instruments: UNFCCC, 1992, articles 2 and 3; Convention on Biological Diversity, 1992, Preamble and Articles 1 and 10;

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19 United Nations (1987). *Report of the World Commission on Environment and Development,* A/42/427. Available at: https://documents.un.org/doc/undoc/gen/n87/184/67/pdf/n8718467.pdf.

20 United Nations (1992). *Report of the United Nations Conference on Environment and Development (Rio de Janeiro 3-14 June)*, A/CONF.151/26 (Vol. I). Available at: https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_Vol.I_Declaration.pdf.

United Nations Convention to Combat Desertification in those countries experiencing serious drought and/or desertification, particularly in Africa, 1994, Preamble and Article 9.1.

Article 3.4 of the UNFCCC states: "The Parties have the right to sustainable development and should promote it. Policies and measures to protect the climate system from human-induced change should be appropriate to the specific conditions of each Party and integrated into national development programs, taking into account that economic growth is essential for the adoption of measures to address climate change."

Developed countries committed to mobilize $100 billion annually in climate finance for developing countries by 2020 and through 2025. The Organisation for Economic Co-operation and Development (OECD) reports that the commitment was met for the first time in 2022. Climate finance increased by 30 percent from 2021, with 60 percent of the total allocated to mitigation. The UNFCCC estimates that nearly $6 trillion is needed for developing countries' climate action plans by 2030, underscoring the need to massively scale up finance.[21]

Thus, we are almost five years away from achieving the goals adopted through the 2030 Agenda and the results show the need to strengthen international cooperation, based on a clear recognition of the responsibility that must be faced by the nations that have benefited most from the economic development model based on fossil resources.

Judge Weeramantry, in his dissenting opinion regarding the Gabcíkovo-Nagymaros case, decided by the ICJ, considered that the principle of sustainable development had come to hold only normative value. This is because both the right to development and the protection of the environment are relevant to contemporary

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[21] United Nations (2024). The Sustainable Development Goals Report 2024. Available at: https://unstats.un.org/sdgs/report/2024/The-Sustainable-Development-Goals-Report-2024.pdf.

international law, and the way to achieve harmonization between them is through the principle of sustainable development, which constitutes a legacy of humanity, with a decisive role in the service of international law, which involves aspects like human rights, State responsibility, environmental law, economic and industrial law, equity, territorial sovereignty, abuse of law, good neighborliness.[22]

2.4 Principle of International Cooperation

International cooperation is a key tool of international law for addressing complex problems, such as those related to environmental pollution and climate change.

In this regard, the Declaration on International Economic Cooperation and, in particular, the Revitalization of Economic Growth and Development of Developing Countries (A/RES/S-18/3) recognizes that all countries should take effective measures to protect and improve the environment in accordance with their respective capabilities and responsibilities, taking into account the specific needs of developing countries; but says the primary responsibility for adopting appropriate measures urgently lies with the developed countries, as they are the main source of pollution.

In turn, Principle 9 of the Rio Declaration states that: "States should cooperate in strengthening their own capacity to achieve sustainable development by increasing scientific knowledge through the exchange of scientific and technological know-how, and by intensifying the development, adaptation, diffusion and transfer of technologies, including new and innovative technologies.

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[22] Weeramantry, H. E. Judge C. G. (2017). "Achieving Sustainable Justice Through International Law." In Cordonier Segger, Marie-Claire & Weeramantry, H. E. Judge C. G. (eds.). *Sustainable Development Principles in the Decisions of International Courts and Tribunals, 1992-2012*, pp. 15-32. https://doi.org/10.1163/9789047414605_008.

Given the complexity of the climate system, attention to the climate crisis, whose effects are characterized by a supranational dimension (which does not respect borders and can therefore affect ecosystems, territories, living beings and infrastructure without distinction of the burden of responsibility for the problem), requires international cooperation for development and access to research and technology for clean energy and energy transition, as well as for capacity building and resilience, especially in the most vulnerable countries. It is also through international cooperation that assistance to developing countries can be strengthened, with the aim of using resources as effectively as possible to reduce vulnerabilities and enhance resilience.

2.5 Preventive Principle

Due to the irreversible nature of some environmental and climate damages and the costs associated with their repair, the preventive principle takes on a preponderant character, since preventing such damages from occurring is the best decision from any perspective. This principle is based on the State's obligation to monitor and take precautions for the goods and persons under its jurisdiction, to ensure that, under regular conditions, transboundary damage is not caused. This obligation is constituted by the set of "minimum standards" of diligent behavior required internationally.[23] At the national level, States translate this principle through the design of strategies and instruments ranging from environmental impact assessments, licenses and permits to the determination of liability regimes and the respective imposition of sanctions.

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[23] Drnas de Clément, Zlata (2001). "Los principios de prevención y precaución en materia ambiental en el sistema internacional y en el interamericano." In *Jornadas de Derecho Internacional*. Washington, D. C.: Organization of American States, p. 81.

Specifically, with respect to environmental impact assessment, Principle 17 of the Rio Declaration states: An environmental impact assessment shall be undertaken, as a national instrument, in respect of any proposed activity likely to have a significant adverse impact on the environment and which is subject to a decision by a competent national authority.

Among the treaties that have incorporated the preventive principle are: United Nations Convention on the Law of the Sea, 1982; UNFCCC, 1992; Convention on Biological Diversity, 1992; United Nations Agreement on Straddling and Highly Migratory Fishes, 1995; and Stockholm Convention on Persistent Organic Pollutants, 2001.

As for court pronouncements, in the Gabcíkovo-Nagymaros case the ICJ argued that, in the field of environmental protection, vigilance and prevention are necessary, given the often-irreversible nature of damage caused to the environment and the limitations inherent in the very mechanism for repairing that type of damage. And, that the need to reconcile economic development with environmental protection is duly expressed in the concept of sustainable development.[24]

These principles may therefore take various forms of a preventive nature,[25] ranging from the establishment of certain environmental standards, the implementation of environmental impact assessment procedures, the authorization of activities

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[24] ICJ (1997). *Gabcíkovo-Nagymaros Project (Hungary/Slovakia), Judgment,* International Court of Justice.

[25] In the opinion of the Permanent Court of Arbitration, duty to prevent, or at least mitigate, such harm, has now become a principle of general international law. This principle applies not only in autonomous activities but also in activities undertaken in implementation of specific treaties between the Parties. United Nations (2008). "Reports of International Arbitral Awards." *Award in the Arbitration regarding the Iron Rhine ("Ijzeren Rijn") Railway between the Kingdom of Belgium and the Kingdom of the Netherlands*, decision of 24 May 2005, Vol. XXVII, p. 59. Available at: https://legal.un.org/riaa/cases/vol_XXVII/35-125.pdf.

(licenses, permits), the expansion of access to information, and the determination of liability regimes to the imposition of sanctions.

3. INTERNATIONAL RESPONSIBILITY OF THE STATE FOR WRONGFUL ACTS

International responsibility is one of the most important aspects of international law; it is constantly being developed and is essentially of a customary nature. Since 1953, at the request of the United Nations General Assembly, the International Law Commission (ILC) — the body responsible for the progressive development of international law — has worked to expand laws regarding international responsibility, an effort that has resulted in the elaboration of the projects on Responsibility for the Commission of an International Wrongful Act and on Liability for Acts not Prohibited in International Law.

International responsibility means "all the forms of new legal relationship which may be established in international law by a State's wrongful act — irrespective of whether they are limited to a relationship between the State which commits the wrongful act and the State directly injured, or extend to other subjects of international law as well, and irrespective of whether they are focused on the guilty State's obligation to restore the rights of the injured State and to repair the damage caused, or whether they also involve the faculty of the injured State itself, or of other subjects, of imposing on the guilty State a sanction permitted by international law."[26]

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[26] Ago, Roberto (1971). "Third report on State responsibility. The internationally wrongful act of the State, source of international responsibility". In United Nations, *Yearbook of The International Law Commission*, Vol. II, Part One: Documents of the twenty-third session: Reports of the Special Rapporteurs and report of the Commission to the General Assembly, A/CN.4/246 and Add.1-3, 1973, p. 211.

Pursuant to the project regulating the international responsibility of states for wrongful acts, "[e]very internationally wrongful act of a State entails the international responsibility of that State.[27] There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) Is attributable to the State under international law; and (b) Constitutes a breach of an international obligation of the State."[28] It is important to note that the damage does not constitute a fundamental element for determining liability; likewise, it is relevant to identify omission as a constituent element of liability, since it ranges from the lack of due diligence to prevent the wrongful act to the absence of legislative development, in contravention of the provisions of the State's obligations in the international context.

Now, in order to determine whether a State act falls into the category of "internationally wrongful," recourse is had exclusively to international law, regardless of whether the act is permitted under the domestic law of the State in question. This principle has been reiterated on several occasions by international courts,[29] as well as by the Vienna Convention on the Law of Treaties; specifically, the principle says that a State may not invoke its domestic law as an excuse for non-compliance with its obligations towards other international actors,[30] since every treaty in force

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27 Article 1, United Nations (2002). *Responsibility of States for internationally wrongful acts,* General Assembly, A/RES/56/83, 28 January. Available at: https://documents.un.org/doc/undoc/gen/n01/477/97/pdf/n0147797.pdf?token=DpmU6uqkfWJwwNHw8Q&fe=true.

28 *Ibidem*, article 2.

29 Since 1932, the Permanent Court of International Justice has held that a State cannot rely on its internal legislation, not even on its own Constitution, to evade its international obligation, *cfr.* Permanent Court of International Justice (1932). *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, Advisory Opinion*, A. W. Sijthoff's Publishing Company, p. 24.

30 Article 27.1, Vienna Convention on the Law of Treaties, A/CONF.39/27 (1969), entered into force 27 October 1980.

binds the parties and must be complied with by them in good faith (*Pacta sunt servanda*).[31]

Also in the context of international human rights law, the State may incur liability for a wrongful act when internationally protected human rights are violated; for example, the work of a private individual may cause the international liability of the State, not for the acts properly attributed to it, but for lack of due diligence by the State to prevent the violation of rights in accordance with its obligations under international treaties to which it is a party. This is so because the State, in the framework of its duty to protect and guarantee, must ensure that the entities subject to its jurisdiction comply with the its regulations to avoid human rights violations that can then be imputed to the State itself.

In the American region, the Inter-American Court of Human Rights (IACHR) has ruled that the obligation of the member states of the American Convention on Human Rights (ACHR) to prevent the violation of recognized rights implies all those measures of a legal, political, administrative and cultural nature that promote their safeguarding and ensure that possible violations of such rights are assessed as illegal acts and, where appropriate, the corresponding sanctions are imposed, including the obligation to compensate the victims who have suffered the violation.[32]

However, in accordance with the United Nations Framework Convention on Climate Change, it would be expected to have a legal basis based on the principles of equity, common but differentiated responsibilities, and respective capabilities, considering different national circumstances, to address climate responsibility based on the magnitude and nature of GHG production.

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31 *Ibidem*, article 26.

32 IACHR (2009). Case of González et al. ("Cotton Field") v. Mexico Judgment of November 16, 2009 (Preliminary Objection, Merits, Reparations, and Costs), Inter-American Court of Human Rights, para. 252.

The size and nature of the global production gap also raise the question of how it can be closed in a managed and equitable way, especially given that countries are expected to uphold "the principle of equity and common but differentiated responsibilities and respective capabilities, in light of different national circumstances" under the UNFCCC framework.

4. LEGAL CONSEQUENCES OF THE INTERNATIONALLY WRONGFUL ACT

From a perspective of climate justice with a redistributive approach, States that have made abusive and unlimited use of a common good, such as the atmosphere, must respond with actions aimed at mitigating and adapting to climate change, both within their jurisdictions and beyond them, through international cooperation, especially with respect to the countries most vulnerable to the negative effects of the phenomenon, many of them island nations, whose territorial vulnerability motivates the forced displacement of those who struggle to safeguard their lives.

If we take into account the international obligation of States not to cause damage with their activities beyond their jurisdiction, and given that the climate system does not respect borders, it is clear that this obligation is violated when GHGs are emitted into the atmosphere, as a common good, in quantities that cause damage to other countries.

Consequently, the States responsible for the highest GHG emissions, in addition to reducing GHG emissions to the atmosphere to a level that does not compromise the security of the climate system, should assume the costs of remediation for the affected countries, as well as invest in the development of cleaner technologies that they must share with the most vulnerable countries to contribute to a more just and equitable energy transition. The latter are generally at a disadvantage in terms of the development and implementation of scientific and technological advances, and are sometimes highly dependent on

fossil fuel consumption, which also compromises their health and contributes to environmental and climate degradation.

What lies at the heart of the problem of GHG emissions by large emitters is the complexity of demonstrating the causal link. But beyond this procedural requirement, the relationship between human rights, climate change and vulnerability emerges, as evidenced by the Human Rights Council's call on States to develop, strengthen and implement policies to protect the rights of people in vulnerable situations in response to climate change, as well as to promote the effective participation of people in vulnerable situations through the design of policies, plans and mechanisms, in climate-related decision-making and disaster risk reduction and management at the community, local, national and international levels.[33]

This requires financial resources and technical and human capacities to provide infrastructure, institutions, trained personnel, and specialized equipment, etc., which is impossible in many vulnerable countries but could become a reality with the financial cooperation of large GHG emitters as a way to reduce the inequalities and climate injustice that have contributed to the causes of the climate change.[34]

The historical and current responsibility for the climate emergency lies mainly with the richest countries; therefore, in addition to committing to reducing their own emissions, these countries must provide decisive financial and technical support

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[33] United Nations (2021). Human rights and climate change. Human Rights Council. A/HRC/RES/47/24. Available at: https://documents.un.org/doc/undoc/gen/g21/199/69/pdf/g2119969.pdf.

[34] Anglés Hernández, Marisol et al. (2024). *Amicus Curiae presentado por el Observatorio del Sistema Interamericano de Derechos Humanos en el marco de la Solicitud de opinión consultiva sobre emergencia climática y derechos humanos presentada ante la Corte Interamericana de Derechos Humanos de la República de Colombia y la República de Chile, el 09 de enero de 2023*. Available at: https://corteidh.or.cr/sitios/observaciones/OC-32/10_obs_UNAM.pdf.

to less developed countries through international cooperation in order to reduce the vulnerability and risks to which those countries are exposed.[35] The design and implementation of adaptation, mitigation and damage remediation strategies with a human rights-based approach would contribute both to the prevention and mitigation of potential adverse effects and to respect for States' legal obligations, derived from various climate instruments, such as the UNFCCC and the Paris Agreement, and human rights, such as the ACHR and the Protocol of San Salvador. Otherwise, the human rights of affected people will continue to be undermined, exacerbating social injustices for those least responsible for the climate emergency.

5. INTERNATIONAL MECHANISM FOR LOSS AND DAMAGE RELATED TO THE IMPACTS OF CLIMATE CHANGE

References to irreversible losses and irreparable damage due to climate change first appeared in climate policy developed for States as part of mitigation and adaptation measures. However, although there is consensus among the international community that climate change threatens the enjoyment of multiple human rights,[36] and that islands or less developed countries are much more exposed to losses and damages and, therefore, less responsible for the climate problem, to date it has not been possible to make the

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35 Villavicencio-Calzadilla, Paola (2021). "La mitigación del cambio climático y la justicia climática: Aprender del pasado para mirar al futuro." In Borràs-Pentinat, Susana y Villavicencio-Calzadilla, Paola. (Eds.), *Justicia climática. Visiones constructivas desde el reconocimiento de la desigualdad*, Valencia: Tirant lo blanch, p. 141.

36 United Nations (2016). *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, Human Rights Council, A/HRC/31/52, para. 22. Avalaible at: https://undocs.org/es/A/HRC/31/52.

major GHG emitters assume their responsibility and consequently pay attention to the reparations arising from such causes.

After a couple of years of deliberations, the International Mechanism for Loss and Damage Related to Climate Change Impacts was achieved, adopted at the UNFCCC COP 19, held in November 2013. This Mechanism is a tool that promotes the implementation of approaches to address loss and damage in an integrated and coherent manner, including extreme events and gradual events, in developing countries, mainly, with three objectives:

(i) Enhancing knowledge and understanding of comprehensive risk management approaches to address loss and damage associated with the adverse effects of climate change, including slow onset impacts, by facilitating and promoting:[37]

- Action to address gaps in the understanding of and expertise in approaches to address loss and damage associated with the adverse effects of climate change;
- Collection, sharing, management, and use of relevant data and information, including gender-disaggregated data;
- Provision of overviews of best practices, challenges, experiences, and lessons learned in undertaking approaches to address loss and damage.

(ii) Strengthening dialogue, coordination, coherence, and synergies among relevant stakeholders by:

- Providing leadership and coordination and, where appropriate, oversight under the UNFCCC on the assessment and implementation of approaches to

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37 United Nations (2023). Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts. Available at: https://unfccc.int/topics/adaptation-and-resilience/workstreams/loss-and-damage/warsaw-international-mechanism.

address loss and damage associated with extreme events and to slow onset events related to the adverse effects of climate change;

- Fostering dialogue, coordination, coherence, and synergies among all relevant stakeholders, institutions, bodies, processes, and initiatives outside the Convention, to promote cooperation and collaboration across relevant work and activities at all levels.

(iii) Enhancing action and support, including finance, technology, and capacity-building, to address loss and damage associated with the adverse effects of climate change, to enable countries to undertake actions, including:

- Providing technical support and guidance on approaches to address loss and damage associated with climate change impacts, including extreme events and slow onset events;
- Providing information and recommendations for consideration by the COP when providing guidance relevant to reducing the risks of loss and damage where necessary, including to the operating entities of the financial mechanism of the CMNUCC, as appropriate;
- Facilitating the mobilization and advancement of expertise, and enhancement of support, including finance, technology, and capacity building, to strengthen existing approaches, and, where necessary, facilitate the development and implementation of additional approaches to address loss and damage associated with climate change impacts, including extreme weather events and slow onset events.

The Mechanism has an executive committee in charge of pursuing these objectives, through a work plan prepared by a group of experts, which establishes specific goals and activities to

be developed. The year 2023 marked the first ten years since the creation of the Mechanism, during which three work programs were developed and implemented. The initial program (2015-2017), the second program (2018-2022), and, currently underway, the third program (2023-2028).[38]

In 2022, an evaluation was made of the work of the executive committee regarding the progress of the Mechanism during the 2017-2022 period, in which the work program focused on five thematic areas: (a) slow-onset events; (b) non-economic losses; (c) comprehensive risk management; (d) migration, displacement, and human mobility; and, (e) action and support, including funding, technology, and training.[39] For each of these areas, a group of experts was appointed. The evaluation concluded that progress in these areas is differentiated because unequal attention has been given to each.

Initiated in 2014, the formation of groups of experts on various topics, such as disaster prevention, climate prediction, insurance, migration, biodiversity conservation, and preservation of cultural heritage, etc., has made it possible to generate information channels with large populations. These channels include civil society, intergovernmental organizations, and the private sector.[40]

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38 United Nations (2023). The Executive Committee of the Warsaw International Mechanism for Loss and Damage. Available at: https://unfccc.int/wim-excom.

39 Johansson, Angelica et al. (2022). "Evaluating progress on loss and damage: an assessment of the Executive Committee of the Warsaw International Mechanism under the UNFCCC." *Climate Policy* (22), 9-10, pp. 1199-1212. Available at: https://doi.org/10.1080/14693062.2022.2112935.

40 United Nations (2024). Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts. First 10 years of the Mechanism. Available at: https://unfccc.int/topics/adaptation-and-resilience/workstreams/loss-and-damage/warsaw-international-mechanism#First-10-years-of-WIM.

During the Mechanism's ten-year history, a lack of support for the efforts of developing countries to combat climate change has become evident. It has been revealed that these countries need to be supported with special financial and technical assistance by groups of experts in order to gain access to the necessary tools to face climate losses and damages. In this regard, in 2020 the Mechanism collaborated with the Green Climate Fund (GCF), an entity part of the UNFCCC, to clarify and propose the procedure for developing countries to access financial assistance from this fund.

In addition, in compliance with paragraph 48 of decision 1/CP.21, adopted at COP 21 of the Conference of the Parties to the UNFCCC, the executive committee adopted a resolution proposing the establishment of a Fiji Risk Transfer Clearinghouse, which will serve to protect and safeguard information associated with insurance and risk transfer, to facilitate the development and implementation of comprehensive risk management strategies by the States' parties.[41]

The success of this Mechanism depends on the will of the developed countries. They must work more actively to mitigate the losses and damages caused by climate change in order to substantially meet the objectives of the Mechanism.

FINAL THOUGHTS

The increase in global temperature and the frequency and intensity of extreme weather events are unquestionable evidence for climate change, which affects many areas of life and economic development for nations. Vulnerable countries, including island

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41 United Nations (2016). Report of the Conference of the Parties on its twenty-first session, held in Paris from 30 November to 13 December 2015. Addendum. Part two: Action taken by the Conference of the Parties at its twenty-first session, FCCC/CP/2015/10/Add.1. Available at: https://unfccc.int/documents/9097#beg.

states, often see disproportionate damage, and their populations are exposed to greater risks and effects, both for present and future generations. There is even the possibility of the disappearance of these geographical spaces.

The international climate change regime, which emerged with the adoption of the UNFCCC, has attempted to provide a regulatory response to the climate phenomenon; however, after more than three decades, it is clear that the efforts made by international law have not been sufficient. Even today, there is no consensus among the community of nations on how to address climate impacts; countries such as the USA prefer diplomatic schemes and the EU promotes financial mechanisms for adaptation, but they both avoid addressing climate effects head-on and with all the legal implications included in the international responsibility of States.

The climate system is complex and is in constant interaction; the influence of various factors has a negative impact on its health, and human activities are one of the factors that cause the most damage. Therefore, it is urgent to modify development patterns, mainly of the strongest economies, who have benefited from a development model based on coal, gas and oil, towards other energy sources. In addition to modifying the use of their energy matrix, those States must support developing countries to move towards sustainable development.

The principles of international law that have permeated international environmental and climate law show an interdependency between due diligence, the use of natural resources in jurisdictional spheres, the duty to prevent environmental damage, sustainable development, and the Common but Differentiated Responsibilities, whose indisputable force and value has made possible a transition from soft law to hard law and the hermeneutic exercise carried out by the courts. Consequently, the normative force of these principles is assumed, the content of which underlies much of the behavior expected of the States with the highest GHG emissions in the face of the planetary climate crisis to which they have contributed

disproportionately, affecting multiple human rights, especially in the most vulnerable countries.

After half a century of work on the international responsibility of States for wrongful acts, there is consensus on the assumptions that lead a State to become responsible, and among them is the violation of protected rights, such as the multiple human rights associated with the climate system, such as life, health, water, and development, to name a few. Thus, those who generate GHG emissions in quantities that exacerbate the negative effects of climate change should assume their responsibility to reduce such emissions and contribute to repairing the damage caused, in recognition of a debt to certain nations and individuals.

Assuming responsibility would imply that developed countries commit, in addition to reducing their emissions, to providing technical and financial support to the countries most affected by climate change, to reduce the vulnerability and risks to which they are exposed. This would contribute to improving the exercise of multiple human rights and would reduce the climate injustice that is increasing day by day, under the cover of long diplomatic negotiations disguised as "aid," which must be transformed into recognition of responsibility and compensation for climate damages.

One of the achievements of the international climate regime has been the International Mechanism for Loss and Damage Related to the Impacts of Climate Change; however, ten years after its creation, it has not been able to address with necessary urgency the way to respond to urgent situations that compromise the lives and security of people. It is an instrument that depends entirely on the will of the States and the priorities that they assign to its operation.

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Defending the Defenders: State Responsibilities to Respect Climate Justice, Rule of Law and Rights of Counsel in Climate Litigation Worldwide

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INTRODUCTION

Policy, regulation and litigation on climate change have gained considerable attention as strategies to advance progressively higher ambition in, also implementation of, and compliance with the 2015 Paris Agreement under the United Nations Framework Convention on Climate Change (UNFCCC).[7] However, as reports and guidance from international human rights bodies, courts and tribunals are making increasingly clear, if States and all stakeholders do not also take responsibility to protect the rights of litigants and counsel, respect for climate justice, human rights and the rule of law itself may also suffer, with grave consequences worldwide.

As recognised by States in their Paris Agreement Preamble, "climate change is a common concern of humankind" and Parties should "respect, promote and consider their respective

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7 United Nations (2015). *Paris Agreement to the United Nations Framework Convention on Climate Change*. Adopted December 12, 2015. FCCC/CP/2015/L.9/Rev.1. Available at: https://unfccc.int/sites/default/files/english_paris_agreement.pdf. United Nations (1992). *United Nations Framework Convention on Climate Change*. Adopted 9 May 1992. FCCC/INFORMAL/84. Available at: https://unfccc.int/resource/docs/convkp/conveng.pdf. See also Marie-Claire Cordonier Segger and Christina Voigt, eds, (2024). *Courage, Contributions and Compliance: The Routledge Handbook of Climate Law and Governance*, Routledge.

obligations on... climate justice"; in this respect throughout the Paris Agreement, Parties emphasize and rely on public participation in climate action at all levels.[8] As a crucial element of this commitment to public participation, more climate litigation is being brought before judicial and quasi-judicial courts and other authorities than ever before. Cases involving material issues of climate science, policy, or law have, by some estimates, more than doubled in the last six years passing a staggering 2,666 cases in 55 jurisdictions worldwide compared to 884 in only 24 jurisdictions in 2017.[9] In international courts and tribunals, 2024 has been described as the "Year of Climate Change."[10] Groundbreaking decisions have been requested from, and in some cases provided by, the European Court of Human Rights,[11] the Inter-American Court of Human Rights,[12] the International Tribunal Law of the Sea,[13] and others, including an Advisory Opinion of the International Court of Justice, and these important decisions hold

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8 Marie-Claire Cordonier Segger and Christina Voigt, eds, (2024). *Courage, Contributions and Compliance: The Routledge Handbook of Climate Law and Governance*, Routledge.

9 Grantham Research Institute on Climate Change and the Environment (2024). In: Setzer, J; Higham, C (Eds.). *Global Trends in Climate Change Litigation: 2024 Snapshot.* Available at: https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2024/06/Global-trends-in-climate-change-litigation-2024-snapshot.pdf.

10 Hamilton, Rebecca (2024). *The 'Year of Climate' in International Courts.* Available at: https://www.justsecurity.org/93942/climate-change-international-courts/.

11 European Court of Human Rights, Verein Klimaseniorinnen Schweiz and Others v Switzerland (2024), Application No. 53600/20, April 9, 2024.

12 Inter-American Court of Human Rights (2024). *Order of the President of the Inter-American Court of Human Rights February 22, 2024 – Request for Advisory Opinion OC-32 On Climate Emergency and Human Rights Presented by the Republic of Chile and the Republic of Colombia.* Available at: https://corteidh.or.cr/docs/asuntos/solicitud_22_02_2024_eng.pdf.

13 International Tribunal on the Law of the Sea (2024). *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law (No 31)* (Advisory Opinion of 21

the potential to greatly clarify the climate change obligations of States and their responsibilities in many respects.[14]

Given the dynamic trends in climate litigation globally, one would expect that access to climate justice has also been exponentially enhanced. Yet, such an optimistic outlook could further obscure deeply concerning challenges that are emerging to constrain access on climate justice and the rule of law worldwide. Globally, reports suggest that human rights, environmental, indigenous, and other activists seeking rapid and effective climate action on many levels are being increasingly targeted by governments and non-State actors – locally, nationally and internationally. Such persecution at best restricts the civic space for advocacy on climate change and, at worst, threatens the lives, families, and communities of those seeking climate justice and their lawyers. The gravity of the situation is such that the United Nations appointed a Special Rapporteur on Environmental Defenders in June 2022,[15] pursuant to the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention).[16]

May 2024) ITLOS Reports 2024, paragraphs 66, 122, 243, 252, 270, 283, 311.

14 icj.org (2024). *Obligations of States in respect of Climate Change*. Available at: https://www.icj-cij.org/case/187.

15 UNECE (2022), *List of Decisions and Major Outcomes of the Third Extraordinary Session*. AC/ExMoP-3/Inf.2. Available at: https://unece.org/sites/default/files/2022-06/ExMoP3_List_of_outcomes_24_June_as%20adopted.pdf.

16 UNECE (1998), *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*. Adopted 25 June 1998. United Nations, Treaty Series, Vol. 2161, p. 477. Available at: https://treaties.un.org/doc/Treaties/1998/06/19980625%2008-35%20AM/Ch_XXVII_13p.pdf. See also UNECE (2021), *Decision VII/9 on a rapid response mechanism to deal with cases related to article (3) of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters*. ECE/MP.PP/2021/2/Add.1. Available at: https://unece.org/sites/default/files/2022-01/Aarhus_MoP7_Decision_on_RRM_E.pdf.

As noted by the Special Rapporteur:

> "The environmental emergency that we are collectively facing, and that scientists have been documenting for decades, cannot be addressed if those raising the alarm and demanding action are criminalized for it."[17]

Such concern finds troubling echoes in the news of the crackdown on Ugandan students expressing concern over the controversial East African Crude Oil Pipeline, a fossil fuel project currently under development under the auspices of TotalEnergies,[18] or a four-year prison sentence imposed on defendants after peaceful protests in the United Kingdom.[19] In the broad spectrum of disputes related to climate change, the defence of human rights, or the pursuit of more sustainable development alternatives, the climate litigators bringing such cases on behalf of their clients play a uniquely crucial role in promoting access to climate justice. In a manner, they are testing State responsibility for, and commitment to, the rule of law itself. Lawyers act as intermediaries between those with claims, often civil society activists, and the law-making and judicial authorities of their States, yet for 'playing by the rules' and advancing their clients' concerns in court, they can find themselves targets for both State and non-State actors reluctant to respond to increasingly

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17 UN Special Rapporteur on Environmental Defenders under the Aarhus Convention (2024), *State repression of environmental protest and civil disobedience: A major threat to human rights and democracy*. Forst, M. Available at: https://unece.org/sites/default/files/2024-02/UNSR_EnvDefenders_Aarhus_Position_Paper_Civil_Disobedience_EN.pdf.

18 Canineu, Maria Laura (2024). *Environment Defenders Face New Wave of Oppression*. Available at: https://www.hrw.org/news/2024/04/29/environment-defenders-face-new-wave-oppression.

19 UN Special Rapporteur on Environmental Defenders under the Aarhus Convention (2024), *Statement regarding the four-year prison sentence imposed on Mr. Daniel Shaw for his involvement in peaceful environmental protest in the United Kingdom*. Forst, M (eds.). Available at: https://unece.org/sites/default/files/2024-07/ACSR_C_2024_26_UK_SR_EnvDefenders_public_statement_18.07.2024.pdf.

grave climate challenges. Indeed, these lawyers who defend their clients—clients who themselves are defenders of a stable global climate system—can become the victims of a wide-ranging arsenal of repressive actions. Who will stand up for, and defend, these climate litigators themselves?

This brief chapter considers the interactional role of the Advisory Opinion requests and domestic litigation in the evolving UNFCCC Paris Agreement regime, exploring the need to encourage legal action across diverse jurisdictions as a key element of public participation to encourage progressively more ambitious and prompt global response to the threat of climate change. Then, through a brief survey of recent trends in rights-based climate litigation, the chapter underlines a growing body of case law and legal scholarship at the intersection of climate change, human rights and other international law on sustainable development. The final part of the paper focuses on State responsibilities to ensure respect for rule of law and for the rights of climate justice 'defenders,' including their legal representation, providing illustrative examples of documented rule of law challenges faced by climate litigators in different regions of the world. Finally, initial conclusions are offered calling for further inter-actional legal research and highlighting the urgent need for new measures to advance rule of law in climate litigation as a responsibility of States and other stakeholders worldwide going forward.

1. THE PARIS AGREEMENT: A CATALYST FOR PUBLIC PARTICIPATION THROUGH CLIMATE LITIGATION

Anthropogenic climate change is widespread, rapid, and intensifying, as noted by the Intergovernmental Panel on Climate Change (IPCC) which compiles evidence from thousands

of scientific studies worldwide.[20] The adoption of the Paris Agreement under the UNFCCC in 2015 is a key element of global response to the real and pressing challenge of climate change.[21] Many efforts are now underway to implement and comply with the treaty objectives, influencing legal and policy reforms through public participation and advocacy at all levels, and also contributing to interactional developments in the international regime on climate change, including through rising engagement in successively larger and more strident global Conferences of the Parties to the UNFCCC (COP).[22]

As recognised in their Paris Agreement Preamble, Parties should "respect, promote and consider their respective obligations on... climate justice".[23] In this respect, throughout the Paris Agreement, Parties emphasize and rely on public participation in climate law, policy and action at all levels. Indeed, the Agreement's innovative hybrid architecture combines procedural pledge and review obligations with substantive elements, in a manner that was deliberately designed to enable and require bottom-up pressure from civil society, including through litigation, to drive

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20 Intergovernmental Panel on Climate Change (2021). *Climate change widespread, rapid, and intensifying*. IPCC. Available at: https://www.ipcc.ch/2021/08/09/ar6-wg1-20210809-pr/.

21 United Nations (2015). *Paris Agreement to the United Nations Framework Convention on Climate Change*. Adopted December 12, 2015. FCCC/CP/2015/L.9/Rev.1. Available at: https://unfccc.int/sites/default/files/english_paris_agreement.pdf.

22 Cordonier Segger, Marie-Claire, "Advancing the Paris Agreement on Climate Change for Sustainable Development" (2017) Cambridge Journal of International and Comparative Law Vol 5 / 2, 202; Cordonier Segger, M.-C. and Saito, Y., "Innovative Legal Measures for Climate Change Response in the Green Economy: Integrating Opportunity, Equity and Inclusion" (2013) World Bank Legal Review 5.

23 United Nations (2015). *Paris Agreement to the United Nations Framework Convention on Climate Change*. Adopted December 12, 2015. FCCC/CP/2015/L.9/Rev.1. Available at: https://unfccc.int/sites/default/files/english_paris_agreement.pdf.

increasing ambition over time.[24] The transparency framework (Article 13), global stocktake (Article 14), and implementation/ compliance mechanism (Article 15) create what is known as a 'ratcheting mechanism' that depends on active engagement from social movements, NGOs, and public interest litigators to function effectively.[25] This design reflects both practical necessity and normative choice - as international courts and tribunals have recognized, including in the 2024 ITLOS Advisory Opinion's finding that climate change obligations require "ongoing effort" from States, meaningful progress on climate action requires robust domestic accountability mechanisms.[26] Climate litigation serves as a crucial bridge between international commitments and national implementation, with international, regional and national courts increasingly willing to scrutinize government climate policies against Paris Agreement benchmarks.[27] This judicial oversight role, supported by civil society mobilization, provides practical effect to the Agreement's transparency and

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24 Marie-Claire Cordonier Segger and Christina Voigt, eds, (2024). *Courage, Contributions and Compliance: The Routledge Handbook of Climate Law and Governance*, Routledge; Campbell-Duruflé, Christopher, "Clouds or Sunshine in Katowice? Transparency in the Paris Agreement Rulebook" (2018) Carbon & Climate Law Review 12 (3), 209-217

25 Campbell-Duruflé, Christopher, "Clouds or Sunshine in Katowice? Transparency in the Paris Agreement Rulebook" (2018) Carbon & Climate Law Review 12 (3), 209-217; Campbell-Duruflé, Christopher, "Accountability or Accounting? Elaboration of the Paris Agreement's Implementation and Compliance Committee at COP 23" (2018) Climate Law 8 (1-2), 1-38

26 International Tribunal on the Law of the Sea (2024). *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law (No 31)* (Advisory Opinion of 21 May 2024) ITLOS Reports 2024, paragraphs 66, 122, 243, 252, 270, 283, 311.

27 Campbell-Durufle, Christopher and Atapattu, Sumudu Anopama, "The Inter-American Court's Environment and Human Rights Advisory Opinion: Implications for International Climate Law" (2018) Climate Law 8 (3-4), 321; Wolfgang Kahl and Marc-Philippe Weller, eds, (2021). *Climate Change Litigation: A Handbook,* Bloomsbury.

review provisions while advancing its underlying object and purpose in relation to climate justice. Mounting threats to climate litigators, therefore, strike at core elements of Paris Agreement regime implementation, potentially undermining efforts to catalyse rapid emissions reductions and meet temperature goals, to support adaptation and resilience, and to redirect financial flows towards more sustainable development alternatives.

An increasingly determined commitment to climate litigation appears to be spreading across jurisdictions, as is seen by rising cases populating academic databases, even as youth and other activism on climate change also gains momentum.[28] Climate litigation is also evolving in several notable ways. Of interest, much climate litigation has taken a human rights turn with domestic courts increasingly recognizing impacts of climate change on fundamental rights of people, such as the right to life.[29] Certain cases have underlined the need for ambitious law and policy reform in relation to climate mitigation, as well as adaptation and resilience, including to defend the human right to a clean, healthy, and sustainable environment and to protect individual rights, prompting courts to hold governments and corporations accountable for their contributions to climate change. Further, climate litigation has expanded into international arenas, leading to historically important requests for advisory opinions on human rights violations linked to climate change being requested in, for instance, regional human rights bodies, as well as a crucial international tribunal decisions on, for instance, the importance of State responsibilities in relation to law of the sea.

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[28] See, e.g., climatecasechart.com. *Sabin Center for Climate Litigation Database.* Available at: https://climatecasechart.com/.

[29] See, e.g., Supreme Court of the Netherlands, The State of the Netherlands v Urgenda Foundation, The Supreme Court of the Netherlands, Case number: 19/00135, December, 20, 2019; Bundesverfassungsgericht, Neubauer et al v Germany, Case No 1 BvR 2656/18, 1 BvR 96/20, BvR 78/20, BvR 288/20, March 24, 2021.

At the same time and in opposition, there is a rising trend in the strategic use of litigation to silence public engagement on climate change issues, including with the mobilization of Strategic Litigation Against Public Participation (SLAPP) law suits,[30] among other forms of legal pressure and lawfare in the climate arena according to some studies.[31]

Such trends underscore the global recognition of climate change as a pressing human rights concern, highlighting the need for clarity and frameworks to strengthen accountability at an international level. They also illustrate the growing legal and moral imperatives surrounding climate action, reinforcing the relevance and strength of the international treaty regime and its growing epistemic community in shaping global responses to the climate crisis.[32]

While studies suggest that global climate litigation has been increasing since 2015,[33] there is less scholarship available

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30 SLAPP refers to lawsuits brought by individuals and organisations to pressure public interest litigation with less resources into silence. Earth Rights (2022). *As Climate Crisis Intensifies, Fossil Fuel Companies Seek to Silence their Critics*. Available at: https://earthrights.org/media_release/as-climate-crisis-intensifies-fossil-fuel-companies-seek-to-silence-their-critics/. See also Cornell Law School (2022). *SLAPP Suit*. Available at: https://www.law.cornell.edu/wex/slapp_suit.

31 Handmaker, Jeff (2019). "Researching Legal Mobilisation and Lawfare." *ISS Working Papers* No. 641, p. 6. Available at: https://hdl.handle.net/1765/115129.

32 Cordonier Segger, Marie-Claire, Voigt, Christina, and Rao, Tejas (2025). "Advancing the Legal Research, Capacity, and Awareness for Climate Law and Governance." In: Cordonier Segger, M.-C. and Voigt, C., eds, *Routledge Handbook of Climate Law and Governance: Courage, Contributions and Compliance*, Routledge, p. 409–416.

33 United Nations Environment Programme (2023). *Global Climate Litigation Report: 2023 Status Review*. Available at: https://www.unep.org/resources/report/global-climate-litigation-report-2023-status-review; Jacqueline Peel and Hari M. Osofsky, eds, (2017). *Climate Change Litigation: Regulatory Pathways to Cleaner Energy,* Cambridge University Press; Francesco Sindico and Makane Moïse Mbengue, eds, (2021).

examining Paris Agreement implementation from the lens of the rights of climate litigators—those lawyers and advocates defending against human rights violations stemming from anthropogenic climate change. It is possible that, as international regimes are strengthened to address global climate threats, these 'defenders of the (climate) defenders' are empowered to leverage international legal frameworks and courts in their pursuit of climate justice. By focusing on the human rights of individuals and communities affected by climate change, litigators may also be able to argue for the accountability and protection driving systematic change.

International recognition of responsibility, from this perspective, not only enhances the role of litigators in combatting climate change through the courts, but also reinforces the intrinsic link between climate action and human rights in international law and in the settlement of international disputes. Parties to the Paris Agreement have developed, over time, a system of governance to strengthen cooperation on the global challenges of climate change.[34] The evolution of the international climate change regime, through the provisions of the UNFCCC, the Kyoto

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Comparative Climate Change Litigation: Beyond the Usual Suspects, Springer Nature.

34 IPCC AR6 WG III (2022). "Summary for policymakers." In: *Climate Change 2022: Mitigation of Climate Change. Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* at SPM 59, for E.3.3. "Climate-related litigation, for example by governments, private sector, civil society and individuals is growing, with a large number of cases in some developed countries, and with a much smaller number in some developing countries, and in some cases, has influenced the outcome and ambition of climate governance." Available at: P56_Doc_3_Approved_Summary_for_Policymakers.pdf (ipcc.ch).

Protocol,[35] and the Paris Agreement[36] is evident in the modalities and guidelines reflected in the Katowice climate package.[37] In 1990, the United Nations initial mandate on climate change was to establish a single intergovernmental negotiating process for the preparation of an effective framework convention on climate change, and this resulted in the signing of the United Nations Framework Convention on Climate Change in 1992 joined by 165 countries to serve as a platform for international climate action.[38] In 1995, States embarked on further negotiations to strengthen a global response to climate change, and the Kyoto Protocol[39] was adopted at COP3 in December 1997.[40] International negotiations continued with the adoption of the Paris Agreement in December 2015, as the "most recent and most comprehensive multilateral

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35 United Nations (2005). *Kyoto Protocol to the United Nations Framework Convention on Climate Change*. Adopted December 11, 1997. FCCC/CP/1997/L.7/Add.1. Available at: https://unfccc.int/documents/2409.

36 United Nations (2015). *Paris Agreement to the United Nations Framework Convention on Climate Change*. Adopted December 12, 2015. FCCC/CP/2015/L.9/Rev.1. Available at: https://unfccc.int/sites/default/files/english_paris_agreement.pdf.

37 UNFCCC (n.d.). *The Katowice Climate Package*. Available at: https://unfccc.int/process-and-meetings/the-paris-agreement/the-katowice-climate-package/katowice-climate-package.

38 unfccc.org. *United Nations Climate Change -_History of the Convention*. Available at: https://unfccc.int/process/the-convention/history-of-the-convention#Essential-background.

39 United Nations (2005). *Kyoto Protocol to the United Nations Framework Convention on Climate Change*. Adopted December 11, 1997. FCCC/CP/1997/L.7/Add.1. Available at: https://unfccc.int/documents/2409.

40 unfccc.org. *United Nations Climate Change – History of the Convention*. Available at: https://unfccc.int/process/the-convention/history-of-the-convention#Essential-background . The Kyoto Protocol legally binds developed/Annex 1 countries with emission reduction targets and the rules of implementation, the Marrakesh Accords were adopted at COP7 in 2001.

climate treaty,"[41] and by 2023 the Paris Agreement had become legally binding for 195 of the 198 Parties who have ratified the UNFCCC.[42] As explained elsewhere, the Paris Agreement focuses on worldwide response to the challenge of climate change, fostering more sustainable development and efforts to eradicate poverty by *inter alia*; holding the increase in global average temperatures to well below 2°C above pre-industrial levels while also attempting to keep temperatures from increasing above 1.5°C from those same pre-industrial levels; securing adaption and resilience; and changing the direction of financial flows.[43] The treaty prescribes implementation reflecting "equity and the principle of common but differentiated responsibilities and respective capabilities according to different national circumstances."[44] Under the

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41 Voigt, Christina (2023). "The power of the Paris Agreement in international climate litigation." *Review of European, Comparative & International Environmental Law 32*(2), p. 238. Available at: https://doi.org/10.1111/reel.12514.

42 Voigt, Christina (2023). "The power of the Paris Agreement in international climate litigation." *Review of European, Comparative & International Environmental Law* (32), p. 238. Available at: https://doi.org/10.1111/reel.12514. See also unfccc.int. *Paris Agreement – Status of Ratification.* Available at: https://unfccc.int/process/the-paris-agreement/status-of-ratification. For further reading see Cordonier Segger, Marie-Claire (2016), "Advancing the Paris Agreement on Climate Change for Sustainable Development" *Cambridge Journal of International and Comparative Law 5*(2). https://doi.org/10.4337/cilj.2016.02.03.

43 United Nations (2015). *Paris Agreement to the United Nations Framework Convention on Climate Change.* Adopted December 12, 2015. FCCC/CP/2015/L.9/Rev.1. Article 2(1)(a). Available at: https://unfccc.int/sites/default/files/english_paris_agreement.pdf. See also Voigt, Christina and Young, Lydia (2025), "The UNFCCC, the Paris Agreement and Legal Obligations for Climate Action." In: Cordonier Segger, Marie-Claire and Voigt, Christina (Eds.). *Routledge Handbook of Climate Law and Governance, Courage, Contributions and Compliance*, London: Routledge, 1st Edition.

44 United Nations (2015). *Paris Agreement to the United Nations Framework Convention on Climate Change.* Adopted December 12, 2015. FCCC/

treaty, countries prepare Nationally Determined Contributions (NDCs) to the global response to climate change by pledging to undertake climate mitigation and adaptation actions towards the 1.5°C limit and by fulfilling their pledges in five-year increments.[45] These pledges of NDC mitigation and adaptation actions are incentivized by significant financial, technological, and capacity-building mechanisms, as well as educational and other cooperative measures of the Agreement.[46] Mutual trust and confidence to promote effective implementation is achieved by the transparency framework, periodic global stocktakes and a collaborative implementation and compliance mechanism.[47] The transparency framework depends on active public participation, especially in democracies. As noted by experts, these prescriptive components serve to establish standards of conduct by States, although they have not yet been significantly explored by courts through climate litigation.[48]

By linking international human rights law and climate change, as further experts have noted, the Paris Agreement calls for the protection of human rights when Parties take action to address

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CP/2015/L.9/Rev.1. Article 2(2). Available at: https://unfccc.int/sites/default/files/english_paris_agreement.pdf.

45 . United Nations (2015). *Paris Agreement to the United Nations Framework Convention on Climate Change*. Adopted December 12, 2015. FCCC/CP/2015/L.9/Rev.1. Articles 2-8. Available at: https://unfccc.int/sites/default/files/english_paris_agreement.pdf.

46 [. United Nations (2015). *Paris Agreement to the United Nations Framework Convention on Climate Change*. Adopted December 12, 2015. FCCC/CP/2015/L.9/Rev.1. Articles 9-12. Available at: https://unfccc.int/sites/default/files/english_paris_agreement.pdf.

47 United Nations (2015). *Paris Agreement to the United Nations Framework Convention on Climate Change*. Adopted December 12, 2015. FCCC/CP/2015/L.9/Rev.1. Articles 13-15. Available at: https://unfccc.int/sites/default/files/english_paris_agreement.pdf.

48 Voigt, Christina (2023). "The power of the Paris Agreement in international climate litigation" *Review of European, Comparative & International Environmental Law 32*(2), p. 242. Available at: https://doi.org/10.1111/reel.12514.

climate change.[49] A rights-based approach to climate change, they argue, is necessary by drawing first on the impact of climate change on the enjoyment of rights and secondly on the infringement of rights caused by the adverse effects of climate change.[50] With climate litigation as one of the fastest-growing areas of climate action, such proposals are attracting increasing support.[51] Indeed, landmark climate litigation cases have seen judges framing a rights perspective for States to become more ambitious in their climate obligations.[52]

At this international level, this trend is even more important. Significantly, in 2024 the Paris Agreement[53] has been directly applied in advisory opinions issued by various international courts

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49 Atapattu, Sumudu (2025). "Linking International Human Rights Law and Climate Change." In: Cordonier Segger, Marie-Claire and Voigt, Christina (Eds.). *Routledge Handbook of Climate Law and Governance, Courage, Contributions and Compliance*. London: Routledge, 1st Edition.

50 Atapattu, Sumudu (2025). "Linking International Human Rights Law and Climate Change." In: Cordonier Segger, Marie-Claire and Voigt, Christina (Eds.). *Routledge Handbook of Climate Law and Governance, Courage, Contributions and Compliance*. London: Routledge, 1st Edition.

51 Atapattu, Sumudu (2025), "Linking International Human Rights Law and Climate Change." In: Cordonier Segger, Marie-Claire and Voigt, Christina (Eds.). *Routledge Handbook of Climate Law and Governance, Courage, Contributions and Compliance*. London: Routledge, 1st Edition.

See further Wadiwala, Zunaida Moosa, "The Impact of Climate Change on Human Rights and the Legal Obligations of States to Protect Them – A Comparative Jurisdictional Analysis." *Carbon & Climate Law Review* (17).

52 Cherkaoui, Ayman and Wadiwala, Zunaida Moosa (2025). "The Urgency of Global Response to Climate Change." In: Cordonier Segger, Marie-Claire and Voigt, Christina (Eds.). *Routledge Handbook of Climate Law and Governance: Courage, Contributions and Compliance*. London: Routledge, 1st Edition. See also IPCC (2022). "Summary for Policymakers." *Climate Change 2022: Mitigation of Climate Change. Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*. Available at: https://www.ipcc.ch/report/ar6/wg3/downloads/report/IPCC_AR6_WGIII_SummaryForPolicymakers.pdf.

53 United Nations (2015). *Paris Agreement to the United Nations Framework Convention on Climate Change*. Adopted December 12, 2015. FCCC/

and tribunals. In April, the Inter-American Court of Human Rights (IACtHR) held hearings for Advisory Opinions on climate change and human rights.[54] Also in April, and a first for the European Court of Human Rights (ECtHR), three climate rulings were issued,[55] most notably that of *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*.[56]

As has been discussed elsewhere, SDG 13 commits to urgent action on climate change, but with a rare footnote, the UN also acknowledges "that the United Nations Framework Convention on Climate Change is the primary international, intergovernmental forum for negotiating the global response to climate change."[57] However, 'primary' by no means suggests 'only,' a point recently underscored by the International Tribunal on the Law of the Sea in its comprehensive and unanimous 2024 *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate*

CP/2015/L.9/Rev.1. Articles 2-8. Available at: https://unfccc.int/sites/default/files/english_paris_agreement.pdf.

54 Inter-American Court of Human Rights (2024). *Order of the President of the Inter-American Court of Human Rights February 22, 2024 – Request for Advisory Opinion OC-32 On Climate Emergency and Human Rights Presented by the Republic of Chile and the Republic of Colombia*. Available at: https://corteidh.or.cr/docs/asuntos/solicitud_22_02_2024_eng.pdf. See also: Cordonier Segger, Marie-Claire (2024) "Climate Courage, Contributions and Compliance in the Context of the Sustainable Development Goals" in Cordonier Segger, Marie-Claire and Voigt, Christina (Eds.). *Routledge Handbook of Climate Law and Governance: Courage, Contributions and Compliance*. London: Routledge, 1st Edition.

55 European Court of Human Rights *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, Application No. 53600/20, April 9, 2024; *Carême v France*, Application No. 7189/21, April 9, 2024; *Duarte Agostinho and Others v Portugal and 32 Others*, Application No. 39371/20, April 9, 2024.

56 European Court of Human Rights *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, Application No. 53600/20, April 9, 2024.

57 United Nations (2015). *Transforming our World: The 2030 Agenda for Sustainable Development*. A/RES/70/1. SDG 13.1-13.B. Available at: https://documents.un.org/doc/undoc/gen/n15/291/89/pdf/n1529189.pdf.

Change and International Law, which also recognized at 66 that "climate change represents an existential threat and raises human rights concerns" and at 122 that "climate change is recognized internationally as a common concern of humankind."[58] In its 2024 *Advisory Opinion on Climate Change*, the International Tribunal on the Law of the Sea conclusively found that at 311 that:

> "The obligation of cooperation… requires States to make an ongoing effort to formulate and elaborate rules, standards and recommended practices and procedures. The adoption of a particular treaty, such as the UNFCCC or the Paris Agreement, does not discharge a State from its obligation to cooperate, as the obligation requires an ongoing effort on the part of States in the development of new or revised regulatory instruments, in particular in light of the evolution of scientific knowledge."[59]

For effective responses to climate change under international law, such interactional forms of international law-making under framework treaties are proving essential.[60] Many countries plan to reform their laws and institutions across diverse economic, environmental, and social sectors in order to respond to the challenges of climate mitigation, resilience, technology, finance,

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58 International Tribunal for the Law of the Sea (2024). Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Chage and International Law (No. 31). ITLOS Reports 2024 Advisory Opinion, May 21, 2024. Paragraphs 66, 122,243, 252,270,283,311. Available at: https://itlos.org/en/main/cases/list-of-cases/request-for-an-advisory-opinion-submitted-by-the-commission-of-small-island-states-on-climate-change-and-international-law-request-for-advisory-opinion-submitted-to-the-tribunal/.

59 International Tribunal for the Law of the Sea (2024). Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Chage and International Law (No. 31). ITLOS Reports 2024 Advisory Opinion, May 21, 2024. Paragraphs 66, 311. Available at: https://itlos.org/en/main/cases/list-of-cases/request-for-an-advisory-opinion-submitted-by-the-commission-of-small-island-states-on-climate-change-and-international-law-request-for-advisory-opinion-submitted-to-the-tribunal/.

60 Brunnée, Jutta, and Toope, Stephen, (2013). *Legitimacy and Legality in International Law.* Cambridge: Cambridge University Press.

and accountability.[61] Indeed, as noted by CISDL studies, 169 countries explicitly state their intention to undertake legal and institutional reforms, out of 186 countries with NDCs published online by the UNFCCC registry, and over 60 stress specifically the need for legal and institutional capacity-building in order to achieve their NDCs.[62]

Of importance, the International Court of Justice (ICJ) has also been requested to render an Advisory Opinion in 2024 with potentially far-reaching consequences on the future of climate responsibility.[63]

2. LEGAL MOBILIZATION AND LAWFARE IN CLIMATE LITIGATION AND ACTIVISM

Law and litigation can serve as strategic tools in social movements, and this is also becoming evident in the context of climate action. To drive changes in the climate movement,[64] activists, scientists, NGOs, youth, and legal practitioners are

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61 See for instance Kibugi, Robert, (2013). *Mainstreaming Climate Change into Public Policy Functions: Legal Options to Reinforce Sustainable Development of Kenya* Fla A & M UL Rev (8), p. 205; Kibugi, Robert, (2015). "Legal Options for Mainstreaming Climate Change Disaster Risk Reduction in Governance for Kenya." In: Kheng-Lian, Koh (Ed.). *Adaptation to Climate Change: ASEAN and Comparative Experiences,* WSPC, p. 409–431.

62 McDermott, Maeve and Zambianchi, Valeria (2021). "Report on the Importance of Legal and Institutional Reforms in the Nationally Determined Contributions (NDCs) of the Paris Agreement." Available at: https://www.climatelawgovernance.org/wp-content/uploads/2021/11/CISDL-CLGI-NDC-Research-Briefing-11-3-21.pdf.

63 icj.org (2024). *Obligations of States in respect of Climate Change.* Available at: https://www.icj-cij.org/case/187.

64 There is growing tendency to seek pathways to tackle climate change amidst fears that the Paris Agreement targets will not be reached by States NDCs, mitigation and adaptation attempts alone.

bringing cases to address climate change.[65] As some scholars suggest, trends towards 'legal mobilization' and 'lawfare' in the sphere of environmental and climate justice may provide an indication of the strategic manner in which the law is being deployed to press for stronger responses to climate change on the one hand, and to silence climate litigators on the other hand.[66] Legal mobilization is the use of legal process to mitigate climate change with one example as the Urgenda case in the Netherlands in which a Dutch activist group succeeded in a civil court to force the Dutch government to adopt more stringent climate policies.[67] With the growing number of climate cases in different jurisdictions globally, and with the introduction of novel causes of action, there are a growing number of cases where legal mobilization efforts are visible. Characterized by some as 'hero litigators' for their role in initiating climate litigation,[68] lawyer(s) advocate for climate justice by deploying litigation or other legal tool and by activating media through, for instance, press conferences on developments in their court case, to raise public awareness of the dangers of climate change.[69] As another example, in *Verein KlimaSeniorinnen*

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65 Handmaker, Jeff (2019). "Researching Legal Mobilisation and Lawfare." *ISS Working Papers* No. 641 Available at: https://hdl.handle.net/1765/115129.

66 Handmaker, Jeff (2019). "Researching Legal Mobilisation and Lawfare." *ISS Working Papers* No. 641 Available at: https://hdl.handle.net/1765/115129.

67 Handmaker, Jeff (2019). "Researching Legal Mobilisation and Lawfare." *ISS Working Papers* No. 641 Available at: https://hdl.handle.net/1765/115129.

68 Lin, J. and Peel, J. (2022). "The Farmer or Hero Litigator? Modes of Climate Litigation in the Global South." In: Rodríguez-Garavito, César (Ed.). *Open Global Rights: Litigating the Climate Emergency: How Human Rights, Courts, and Legal Mobilization Can Bolster Climate Action*, Cambridge: Cambridge University Press. p. 187–205.

69 Lin, J. and Peel, J. (2022). "The Farmer or Hero Litigator? Modes of Climate Litigation in the Global South." In: Rodríguez-Garavito, César (Ed.). *Open Global Rights: Litigating the Climate Emergency: How*

Schweiz and Others v. Switzerland,[70] the ECtHR adjudicated a case in which climate change was linked to human rights violations, ruling that the respondent Swiss State's failure to implement sufficient measures to combat climate change violated the applicants' Article 8 rights to private and family life[71] of the European Convention of Human Rights (ECHR).[72]

Lawfare, in the climate change discourse in legal spaces, is seen as a legitimate form of legal instrumentalism against civic actors, legal, and human rights advocates by government, corporate, and other actors "to suppress or constrain civic power and influence."[73] In lawfare, for instance, SLAPP suits are being deployed to undermine lawyers—those who defend the defenders—attempting to fight climate change. [74] As scholars have noted, the Tim Crosland contempt-of-court trial may offer one example of how climate protestors, charged with criminal offences following acts of intentional civil disobedience with only 'climate necessity' as a defence.[75] Mr Crosland, an unregistered barrister as well as director of Plan B, had, in 2020, published prior to its release the outcome of the very high-profile Plan B v Secretary of State for Transport (the 'Heathrow' case) thereby breaching an order of

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Human Rights, Courts, and Legal Mobilization Can Bolster Climate Action, Cambridge: Cambridge University Press. p. 187–205.

70 European Court of Human Rights, Verein KlimaSeniorinnen Schweiz and Others v. Switzerland, Application No. 53600/20, April 9, 2024.

71 Council of Europe (1953). *European Convention on Human Rights (As Amended)*. Adopted 4 November 1950. Article 8. Available at: https://www.echr.coe.int/documents/d/echr/Convention_ENG.

72 European Court of Human Rights, Verein KlimaSeniorinnen Schweiz and Others v. Switzerland, Application No. 53600/20, April 9, 2024,paragraph 24.

73 European Court of Human Rights, Verein KlimaSeniorinnen Schweiz and Others v. Switzerland, Application No. 53600/20, April 9, 2024, paragraph 5.

74 As defined earlier in this chapter.

75 Higham, Catherine (2021).*The emerging use of the law as a vehicle for climate protest.* Available at: https://www.lse.ac.uk/granthaminstitute/news/the-emerging-use-of-the-law-as-a-vehicle-for-climate-protest/.

the Supreme Court.[76] As another example, in February 2021 a South African High Court ruled in favour of three environmental attorneys in a case which involved a novel SLAPP defence.[77] In an action initiated by mining companies claiming defamation, the attorneys as defendants in the lawsuit raised a please in relation to the potential SLAPP nature of the litigation against them, claiming in effect that this amounted to an abuse of judicial process to *inter alia* silence the attorney defendants, violating their right to freedom of expression.[78]

3. THREATS TO CLIMATE LITIGATORS WORLDWIDE

If climate litigation can disrupt entrenched political and economic interests, it can be perceived as a threat to State and non-State actors wishing to preserve the *status quo*. According to reports, in many regions of the world the rapid rise of climate litigation is leading to significant backlash. Anti-climate cases, cases that have been brought to courts with a view to delay or nullify

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76 The Supreme Court of the United Kingdom, *Her Majesty's Attorney General v Crosland*, [2021] UKSC 15, May 10, 2021..See also: The Supreme Court of the United Kingdom, *R (on the application of Friends of the Earth Ltd and others) v Heathrow Airport Ltd*, [2020] UKSC 52, December 16, 2020.

77 South Africa Western Cape High Court, Mineral Sands Resources (Pty) Ltd and Another v Reddell and Others; Mineral Commodities Limited and Another v Dlamini and Another; Mineral Commodities Limited and Another v Clarke, (7595/2017; 14658/2016; 12543/2016) [2021] ZAWCHC 22; [2021] 2 All SA 183 (WCC); 2021 (4) SA 268 (WCC), February, 9, 2021.

78 South Africa Western Cape High Court, Mineral Sands Resources (Pty) Ltd and Another v Reddell and Others; Mineral Commodities Limited and Another v Dlamini and Another; Mineral Commodities Limited and Another v Clarke, (7595/2017; 14658/2016; 12543/2016) [2021] ZAWCHC 22; [2021] 2 All SA 183 (WCC); 2021 (4) SA 268 (WCC), February, 9, 2021.

emerging climate policies,[79] are one example of such backlash. Of immediate concern in this paper, however, is the backlash against climate litigators themselves. Climate litigators, often deploying rights-based approaches (rights of future generations, right to a sustainable, clean and healthy environment) face similar threats as human rights defenders. Their increasing prominence as 'targets' for State and non-State actors has been highlighted in a 2016 Report on the situation of environmental human rights defenders[80] by the abovementioned UN Special Rapporteur on Environmental Defenders.[81] As documented by the UN Special Rapporteur, and by civil society organizations such as Front Line Defenders, laureates of the 2018 United Nations Human Rights Prize,[82] it is possible that such threats are rising. To understand this trend and its implications, it is important to examine the normative framework under which climate litigators operate, prior to considering a few illustrative examples that offer unique insights into the threats faced by defenders.

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79 United Nations Environment Programme (2023). *Global Climate Litigation Report: 2023 Status Review* p. 70. Available at: https://www.unep.org/resources/report/global-climate-litigation-report-2023-status-review.

80 United Nations (2016). *Situation of human rights defenders: note by the Secretary-General.* Resolution A/71/281 of August 3, 2016. Available at: https://digitallibrary.un.org/record/840291?ln=fr&v=pdf.

81 UNECE (2022), *List of Decisions and Major Outcomes of the Third Extraordinary Session.* AC/ExMoP-3/Inf.2. Available at: https://unece.org/sites/default/files/2022-06/ExMoP3_List_of_outcomes_24_June_as%20adopted.pdf.

82 frontlinedefenders.org, *About Us: The Front Line Defenders Story.* Available at: https://www.frontlinedefenders.org/en/who-we-are.

4. UNDERLYING THE ACTION OF LITIGATORS AS CLIMATE JUSTICE DEFENDERS

To consider the potential impacts of pressures to silence climate litigators through disrespect for rule of law on international climate litigation, and the underlying State responsibilities, there are several essential starting points.

First, climate litigators routinely appeal to a wider range of human rights when litigating. Described as human rights-based climate litigation, the use of human rights in climate litigation is an approach that has gained considerable traction in recent years. A study of 112 court cases that relied (in whole or in part) on human rights arguments found that this rights turn towards human rights-based climate litigation is pushing the frontlines of climate accountability.[83] One upcoming case in this direction which is attracting worldwide attention involves the request made in January 2023 by Colombia and Chile for an Advisory Opinion from the Inter-American Court of Human Rights in order to clarify the scope of States' obligations in responding to the climate emergency within the framework of human rights.[84] Growing case law on the application of the *right to a sustainable, clean and healthy environment* or the *right of future generations*[85] is contributing to

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83 Savaresi, Annalisa and Setzer, Joana (2021). "Mapping the Whole of the Moon: An Analysis of the Role of Human Rights in Climate Litigation." Social Sciences Research Network. Available at: https://dx.doi.org/10.2139/ssrn.3787963.

84 Inter-American Cout of Human Rights (2023). *Request for an advisory opinion on the Climate Emergency and Human Rights submitted by the Inter-American Court of Human Rights by the Republic of Colombia and the Republic of Chile.* Available at: https://corteidh.or.cr/docs/opiniones/soc_1_2023_en.pdf.

85 Botsford, Polly (2024). *Climate crisis: 'right to healthy environment' fills causal gap in climate litigation.* Available at: https://www.ibanet.org/Climate-crisis-right-to-healthy-environment-fills-causal-gap-in-climate-litigation.

strengthening the interconnectedness between human rights and climate action.

Beyond upholding the rights of others, climate litigators are themselves entitled to have their individual and professional rights upheld. Article 3 of the Universal Declaration of Human Rights states that "everyone has the right to life, liberty and the security of person"[86] while articles 6 (1) and 9 (1) of the International Covenant on Civil and Political Rights further specify this right.[87] The Declaration on Human Rights Defenders, adopted in 1988, elaborates on the application of these binding human rights as they relate to the special status of defenders.[88] Aside from enjoying inalienable human rights, many suggest, defenders are also entitled to exercise rights more specific to their activity, such as (*inter alia*): the right to seek the protection and realization of human rights at the national and international levels; the right to conduct human rights work individually and in association with others; the right to submit to governmental bodies and agencies and organizations concerned with public affairs criticism and proposals; and the right to offer and provide professionally qualified legal assistance or other advice and assistance in defence

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86 United Nations (1948). *Universal Declaration of Human Rights*. A/RES/217(III)[A]. Ratified December 10, 1948. Article 3. Available at: https://www.un.org/sites/un2.un.org/files/2021/03/udhr.pdf.

87 United Nations (1966). *International Covenant on Civil and Political Rights*. 2200A(XXI). Ratified December 16, 1966. Articles 6(1) and 9(1). Available at: https://www.ohchr.org/sites/default/files/ccpr.pdf.

88 United Nations (1998). *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*. A/RES/53/144. Ratified December 9, 1998. Available at: https://www.ohchr.org/sites/default/files/Documents/Issues/Defenders/Declaration/declaration.pdf.

of human rights.[89] In the aforementioned 2016 Report,[90] the Special Rapporteur highlighted other legal instruments, such as the Rio Declaration on Environment and Development[91] and the Aarhus Convention,[92] which emphasize the right of environmental human rights defenders to participate in the conduct of public affairs. This right may be particularly important in the context of climate action.

Yet, despite recognition of climate litigators' right to personal security, the right to pursue their activity for the common good, as well as their focus on human rights as a way to push forward the climate agenda, recent reports suggest that these 'defenders' can become victims of protean threats by State and non-State actors. The cases outlined below are, unfortunately, simply an illustrative selection: a non-exhaustive overview of such threats.

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89 United Nations (1998). *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms.* A/RES/53/144. Ratified December 9, 1998. Articles 1, 5, 8 and 9(3)(c). Available at: https://www.ohchr.org/sites/default/files/Documents/Issues/Defenders/Declaration/declaration.pdf.

90 United Nations (2016). Situation of human rights defenders: note by the Secretary-General. Resolution A/71/281 of August 3, 2016. Available at: https://digitallibrary.un.org/record/840291?ln=fr&v=pdf

91 United Nations (1992). *The Rio Declaration on Environment and Development.* A/CONF.151/26 (Vol.I). Ratified August 12, 1992. Available at: https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_Vol.I_Declaration.pdf.

92 UNECE (1998), *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters.* Adopted 25 June 1998. United Nations, Treaty Series, Vol.2161, p.477. Available at: https://treaties.un.org/doc/Treaties/1998/06/19980625%2008-35%20AM/Ch_XXVII_13p.pdf.

5. DEFENDING CLIMATE LITIGATORS FROM LAWFARE

5.1. Reports on Corporations – Chevron-Texaco USA

Since 2015, according to studies, over 420 climate litigation cases have been filed against corporations and trade associations.[93] Such cases may include charges of climate-washing, the "polluter pays" principle and "turning off the taps" arguments, which target the flow of finance to areas that hinder climate objectives. According to some studies, unfavourable court decision in a climate litigation case reduces firm value by -0.41% on average,[94] and the largest stock market responses were for cases filed against Carbon Majors reducing firm value by -0.57% following case filings, and by -1.50% following the unfavourable judgements.[95] In this light, scholars argue, polluting companies could be liable for trillions in damages from climate lawsuits, and are consequently taking action to reduce the financial risk of climate litigation, and this can involve leveraging borderline mechanisms against

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93 Grantham Research Institute on Climate Change and the Environment (2024). *Global Trends in Climate Change Litigation: 2024 Snapshot.* Setzer, J. and Higham, C. (Eds.). Available at: https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2024/06/Global-trends-in-climate-change-litigation-2024-snapshot.pdf.

94 Grantham Research Institute on Climate Change and the Environment; Centre for Climate Change Economics and Policy Working Paper (2023). *Impacts of climate litigation on firm value.* Sato, M; Gostlow, G; Higham, C; Setzer, J; Venmans, F (Eds.). p. 1. Available at: https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2023/05/working-paper-397_-Sato-Gostlow-Higham-Setzer-Venmans.pdf.

95 Grantham Research Institute on Climate Change and the Environment; Centre for Climate Change Economics and Policy Working Paper (2023). *Impacts of climate litigation on firm value.* Sato, M; Gostlow, G; Higham, C; Setzer, J; Venmans, F (Eds.). p. 1. Available at: https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2023/05/working-paper-397_-Sato-Gostlow-Higham-Setzer-Venmans.pdf.

climate litigators.[96] As noted by monitors, the vast majority of 2023 litigation cases against private companies and trade associations were filed in the United States, over 129 reported cases.[97] They underline that US oil and gas giant Chevron could be liable for up to $8.5 trillion alone, which could be net value destroying.[98] However, less attention is given to the human rights lawyer who represented Indigenous Peoples against Chevron.

In 1993, reports suggest, Steven Donziger began representing 30,000 indigenous Ecuadorians and farmers in a class action lawsuit against Chevron-Texaco. From 1964 to 1990, Texaco (which merged with Chevron in 2001) had allegedly spilled more than 16 million gallons of crude oil, and 18 billion gallons of polluted wastewater into the Amazon rainforest. As reports underlined, after years of fighting over jurisdiction questions and the causal link between environmental pollution and health issues impacting Indigenous peoples, Donziger and the plaintiffs won their case in 2011. An Ecuadorian court ruled that Chevron was "responsible for vast contamination," awarding $18 billion in damages, "the largest judgment ever awarded in an environmental

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96 Wetzer, Thom; Stuart-Smith, Rupert and Dibley, Arjuna (2024). "Climate risk assessments must engage with the law." *Science* (383), p. 152–154. Available at: https://doi.org/10.1126/science.adj0598. See also: University of Oxford (2024). *Investors are 'flying blind' to risk of climate lawsuits*. Available at: https://www.ox.ac.uk/news/2024-01-12-investors-are-flying-blind-risk-climate-lawsuits.

97 Grantham Research Institute on Climate Change and the Environment; Centre for Climate Change Economics and Policy Working Paper (2023). *Impacts of climate litigation on firm value*. Sato, M; Gostlow, G; Higham, C; Setzer, J; Venmans, F (Eds.). p. 2. Available at: https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2023/05/working-paper-397_-Sato-Gostlow-Higham-Setzer-Venmans.pdf.

98 Wetzer, Thom; Stuart-Smith, Rupert and Dibley, Arjuna (2024). "Climate risk assessments must engage with the law." *Science* (383), p. 152-154. Available at: https://doi.org/10.1126/science.adj0598. See also: University of Oxford (2024). *Investors are 'flying blind' to risk of climate lawsuits*. Available at: https://www.ox.ac.uk/news/2024-01-12-investors-are-flying-blind-risk-climate-lawsuits.

lawsuit." Chevron appealed, arguing that the Ecuador judgment was illegitimate, and in 2018, an international tribunal ruled in favour of Chevron.[99] Chevron is now seeking $800 million of legal costs from Ecuador,[100] a country whose gross domestic product is about half of Chevron's stock-market value. Reports also suggest that Chevron has engaged in a targeted and punitive campaign against Steven Donziger. Indeed, in 2011, Chevron sued Donziger and civil society actors in a US court for $60 million in damages. According to reports, Chevron accused Donziger of extortion under the Racketeer Influenced and Corrupt Organizations Act (RICO)—a law initially created to fight the Mafia. During the trial, the reports underline, Donziger refused to comply with a court order to hand over his electronic devices to Chevron, arguing that such a disclosure could violate attorney-client confidentiality. He was convicted of contempt of court after the judge exceptionally appointed a private law firm to represent the government, arbitrarily detained for almost three years under house arrest, and spent several months in prison.[101] In 2021, the UN Human Rights Council Working Group on Arbitrary Detention urged the United States Government to remedy Donziger's situation.[102] This petition

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99 Permanent Court of Arbitration (Second Track Award, 2018). Chevron Corporation and Texaco Petroleum Company v The Republic of Ecuador. [2009–23]. Available at: https://jusmundi.com/en/document/decision/en-chevron-corporation-and-texaco-petroleum-company-v-the-republic-of-ecuador-ii-third-interim-award-on-jurisdiction-and-admissibility-monday-27th-february-2012.

100 Permanent Court of Arbitration (Pending). Chevron Corporation and Texaco Petroleum Company v The Republic of Ecuador. [2009–23]. Available at: https://jusmundi.com/en/document/decision/en-chevron-corporation-and-texaco-petroleum-company-v-the-republic-of-ecuador-ii-third-interim-award-on-jurisdiction-and-admissibility-monday-27th-february-2012.

101 Amnesty International (2024). *USA: Environmental Lawyer Must be Pardoned.* Available at: https://www.amnesty.org/en/documents/amr51/8145/2024/en/.

102 Human Rights Council Working Group on Arbitrary Detention (2021). *Opinion No.24/2021 concerning Steven Donziger (United States of America).*

was unsuccessful. In 2024, various civil society organizations including Amnesty International, Action Network and Amazon Watch asked President Biden to pardon the environmental lawyer.[103] This request was unanswered.

The case of Steven Donziger exemplifies what some have called Strategic Litigation Against Public Participation lawsuits (SLAPP), which are growing in numbers and pose serious impediments to the work of climate litigators, as mentioned above.[104] In this study case, reports suggest, SLAPP methods were activated not only to press for dismissal of the charges against Chevron but also to exhaust Steven Donziger's finances and dedication. It appears that such tactics were deployed to divert attention from Chevron's responsibility in the pollution of the Amazon rainforest to the lawyer's legal defamation case.

Indeed, as mentioned above, SLAPP lawsuits can be detrimental to climate litigators and climate action more broadly, infringing upon the right to public participation as enshrined in the Aarhus Convention and the Escazu Convention. However, solutions are available. For instance, governments on many levels have taken measures to limit their use. In the United States, thirty-one States have passed anti-SLAPP legislation.[105] In March 2024, the

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Opinion A/HRC/WGAD/2021/24 of October 1, 2024. Available at: https://www.ohchr.org/sites/default/files/2021-11/A_HRC_WGAD_2021_24_AdvanceEditedVersion.pdf.

103 Amazon Watch (2024). *NGO Sign-On Letter Calling on Biden to Pardon Donziger*. Available at: https://amazonwatch.org/assets/files/2024-04-ngo-letter-to-biden-re-donziger.pdf.

104 Earth Rights (2022), *The Fossil Fuel Industry's Use of SLAPPs and Judicial Harassment in the United States*. Available at: https://earthrights.org/wp-content/uploads/SLAPP-Policy-Brief-2022.pdf. See also: Earth Rights (2022). *As Climate Crisis Intensifies, Fossil Fuel Companies Seek to Silence their Critics*. Available at: https://earthrights.org/media_release/as-climate-crisis-intensifies-fossil-fuel-companies-seek-to-silence-their-critics/.

105 International Center for Not-for-Profit Law (2018). *U.S. Current Trend: Strategic Lawsuits Against Public Participation*. Available at: https://www.icnl.org/our-work/us-program/slapp.

European Council passed a law to "protect persons who speak out on matters of public interest against abusive lawsuits meant to silence them."[106] Anti-SLAPP legislation can effective in protecting defenders. In May 2016, Resolute Forest Products, a Canadian logging company, brought a lawsuit for $100 million against Greenpeace, accusing the organisation of violating RICO—the same act that has been used against Donziger.[107] According to reports, the company argued that by criticizing its logging in Canada's arctic forests, Greenpeace had defamed Resolute Forest Products by advertising sensational misinformation untethered to facts or science. However, Greenpeace succeeded in its motion to dismiss—partly because California, where the lawsuit was filed because the Greenpeace employees who had allegedly defamed the company were based in San Francisco, had robust anti-SLAPP laws in place. However, this is not the case everywhere. It is possible that in many jurisdictions, access to climate justice is being severely limited by retaliatory measures taken by private companies.

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106 Council of the European Union (2024). *Directive (EU) 2024/1069 of the European Parliament and of the Council of 11 April 2024 on protecting persons who engage in public participation from manifestly unfounded claims or abusive court proceedings ('Strategic lawsuits against public participation').* Directive (EU) 2024/1069. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L_202401069. See also: Council of the European Union (2024). *Anti-SLAPP: Final green light for EU law protecting journalists and human rights defenders.* Available at: https://www.consilium.europa.eu/en/press/press-releases/2024/03/19/anti-slapp-final-green-light-for-eu-law-protecting-journalists-and-human-rights-defenders/.

107 United States District Court, Northern District of California. Resolute Forest Products, Inc. and Others v Greenpeace International and Others, Case No. 17-cv-02824-JST.

6. DEFENDING CLIMATE LITIGATORS FROM PERSECUTION

6.1. Reports of Government Detention – Vietnam

Aside from murder, another serious threat climate litigators face is governmental persecution. One illustrative example is found in Vietnam, although many others exist. According to reports, despite its international commitments on climate action the Government of Vietnam has recently persecuted six climate activists who were working on the country's shift away from coal dependency.[108] Among those highlighted in recent students is is Dang Dinh Bach, an environmental lawyer who founded the Law and Policy of Sustainable Development Research Centre, a non-governmental organization addressing environmental protection and public health. As part of his engagement, Dang Dinh Bach contributed to a review of the country's Environmental Protection Law, helped Vietnam adopt its first legislation limiting production and import of plastics, advocated for the ban of asbestos and worked to scale back the country's coal expansion plans. He also trained over 100 young lawyers to close the capacity gap in environmental lawyering, which has been identified as a major impediment to climate action worldwide. Reports underline that Dang Dinh Bach was arrested in June 2021 and has been detained ever since. Vietnam justified Bach's arrest by bringing criminal charges of alleged tax evasion and avoidance—in particular, the failure to account for foreign funding.[109]

In June 2024, the UN Human Rights Council Working Group on Arbitrary Detention documented multiple unfair trial,

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[108] standwithbach.org. *#StandWithBach.* Available at: https://www.standwithbach.org/.

[109] standwithbach.org. *About Bach — #StandWithBach.* Available at: https://www.standwithbach.org/about.

hearing and detention practices.[110] For instance, they underline, Bach was held incommunicado for the vast majority of his pre-trial detention between 24 June 2021, and his trial date on 24 January 2022. As the UN Opinion notes, "[a]t least three other environmental leaders have been arrested in Vietnam in the course of seven months on charges related to tax evasion. All have received heavy prison sentences."[111] The veracity of these charges is questionable, with reports suggesting that the Vietnamese government is using dubious legal strategies to convict climate litigators. Bach was condemned to a five-year sentence—more than the three-year sentence required by the prosecutor. He is still imprisoned (at the time of writing), and the UN's strongly-worded Opinion asks Vietnam "to release Bach immediately and issue reparations."[112] Despite the support of the Vietnamese Climate Defenders Coalition—a group of thirty international and regional environmental, climate justice, and human rights organizations[113]—as well as a global campaign to release him, the

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110 UN Human Rights Council Working Group on Arbitrary Detention (2023). *Opinion No. 22/2023 concerning Đặng Đình Bách (Viet Nam).* A/HRC/WGAD/2023/22. May, 26, 2023. Available at: https://www.ohchr.org/sites/default/files/documents/issues/detention-wg/opinions/session96/A-HRC-WGAD-2023-22-VietNam-Advance-Edited-Version.pdf.

111 UN Human Rights Council Working Group on Arbitrary Detention (2023). *Opinion No. 22/2023 concerning Đặ ng Đình Bách (Viet Nam).* A/HRC/WGAD/2023/22. May, 26, 2023. Available at: https://www.ohchr.org/sites/default/files/documents/issues/detention-wg/opinions/session96/A-HRC-WGAD-2023-22-VietNam-Advance-Edited-Version.pdf.

112 UN Human Rights Council Working Group on Arbitrary Detention (2023). Opinion No. 22/2023 concerning Đ- ng Đình Bách (Viet Nam). A/HRC/WGAD/2023/22. May, 26, 2023. Available at: https://www.ohchr.org/sites/default/files/documents/issues/detention-wg/opinions/session96/A-HRC-WGAD-2023-22-VietNam-Advance-Edited-Version.pdf.

113 standwithbach.org. *About Bach — #StandWithBach.* Available at: https://www.standwithbach.org/about. See also VCDC (2024). *Joint Submission on Vietnam's 4th-Cycle Universal Periodic Review.* Available at: https://

Vietnamese government has refused to comply. This case study is illustrates a particular type of persecution, which some scholars call smart repression by governments deploying other legal tools at their disposal to obstruct climate action.

6.2. Reports of State-Corporate Collusion - India

According to reports, among the challenges faced by climate litigators the weaponization of financial regulations and law enforcement agencies has emerged as a sophisticated form of harassment in India. This may be evident in cases involving major infrastructure and extractive projects, where environmental and other lawyers face systematic pressure through both legal and administrative means.[114] The targeting of these lawyers can involve multiple state agencies working in concert, using foreign contribution regulations as a tool to restrict and intimidate climate litigators.

Reports have been shared about the case of Ritwick Dutta, founder of the Legal Initiative for Forest & Environment (LIFE), which illustrate the intensity of these pressures. After successfully representing petitioners in several high-profile environmental cases, including litigation against Adani Group operations, Dutta is reported to have faced severe repercussions. In September 2022, his office was raided by the Central Board of Direct Taxes (CBDT), followed by India's Central Bureau of Investigation (CBI) registering a case against him in April 2023 for alleged violations of India's Foreign Contribution Regulation Act.[115] The 34-page confidential government report specifically highlighted

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uprdoc.ohchr.org/uprweb/downloadfile.aspx?filename=12933&file=EnglishTranslation.

114 Roy, Brototi and Martinez-Alier, Joan (2019). "Environmental Justice Movements in India: An Analysis of the Multiple Manifestations of Violence." *Ecology, Economy and Society–the INSEE Journal* 2(1).

115 The Hindu (2023). CBI Registers case against environmental lawyer Ritwick Dutta. Available at: https://www.thehindu.com/news/

his involvement in cases against Adani projects, suggesting he was "denying energy security to citizens of the nation."[116] Despite the allegations, reports suggest that court records demonstrate glaring factual errors in the government's claims—for instance, accusing Dutta of "agitating local farmers" in Gujarat when he had never visited the project site, and attributing court appearances to him in cases where he hadn't actually appeared.[117] This is not a new phenomenon, particularly for projects involving the Adani group.[118]

As scholars have noted, the targeting of climate litigators through financial regulations has become a concerning pattern in India, mirroring tactics previously used against organizations like Greenpeace and Amnesty International. Over 600 eminent citizens have issued a solidarity statement against such governmental pressure tactics.[119] Despite receiving international recognition through the Right Livelihood Award (often called the Alternative Nobel Prize) in 2021, reports suggest that LIFE and Dutta continue to face harassment. This case study illustrates how state agencies can be mobilized against climate litigators, particularly when their work challenges powerful corporate interests. The use of foreign contribution regulations as a weapon

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national/cbi-books-noted-environmental-lawyer-ritwik-dutta-for-fcra-violation/article66766186.ece.

116 Newslaundry (2024). Used foreign funds to oppose Adani project': I-T report on Ritwick Dutta. Available at: https://www.newslaundry.com/2023/04/27/used-foreign-funds-to-oppose-adani-project-i-t-report-on-ritwick-dutta.

117 Union of India and Ors. v. Ritwick Dutta, see connected FIR No.RC2202023E0013, April 13, 2013.

118 Kohli, Kanchi (2014). "Envisioning environmental futures: Conversations around socio-ecological struggles and industrialization in Mundra, India." In: Fakier, Khayaat, and Ehmke, Ellen (Ed.). *Socio-Economic Insecurity in Emerging Economies,* London: Routledge, 1st Edition.

119 The solidarity statement is available at: https://www.scribd.com/document/594049192/Solidarity-Statement-Against-IT-Searches.

against environmental defenders has, as noted by his fellow lawyers, created a chilling effect,[120] potentially deterring lawyers from taking on controversial climate cases and highlighting the urgent need for protective mechanisms for climate litigators in India.

7. DEFENDING CLIMATE LITIGATORS FROM MURDER

7.1. Reports of Red-Tagging and State Violence - Philippines

Climate litigators in the Philippines face an increasingly hostile environment where, according to reports, the convergence of state forces and corporate interests create a particularly dangerous landscape for environmental advocacy. The United Nations High Commissioner for Human Rights has reported that despite the Philippine government's creation of various task forces and committees to address violence against activists, it has "failed to ensure transparent, independent, effective investigations and prosecutions in the vast majority of cases" involving killings of human rights defenders.[121] This institutional failure, scholars suggest, is particularly evident in hotspot regions like Mindanao, Negros Island, the Cordillera Administrative Region, Palawan, and Bataan.

As one example, reports highlight the case of Attorney Juan Macababbad, who was murdered in 2021 for his role in cases of land conflict opposing mining, plantations, and other damaging

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120 BarandBench (2024). "The 'chilling effect' of Ritwick Dutta's case could stifle the fight for environmental justice." Available at: https://www.barandbench.com/columns/the-chilling-effect-of-ritwick-duttas-case-could-stifle-the-fight-for-environmental-justice.

121 UN High Commissioner for Human Rights (2020), *Situation of Human Rights in the Philippines*, Human Rights Council, UN Doc A/HRC/44/22

industries on the lands of indigenous peoples.[122] A documented defender noted by the International Union for the Conservation of Nature (IUCN) and others, Attorney Juan Macabaddad was himself Indigenous. Several sources underline that Indigenous Peoples among others continue to be disproportionately targeted, accounting for 49% of total murders.[123]

Further, reports from the case of Eden Marcellana and Eddie Gumanoy illustrates the severe consequences of this systemic failure. According to the case, the lawyers and defenders were abducted and killed in April 2003 while conducting a legal fact-finding mission on alleged civilian killings in Mindoro Oriental.[124] Despite their families immediately filing complaints before the Department of Justice, Commission on Human Rights, and both houses of Congress, justice remained elusive. More than five years after their deaths, the UN has underlined, no one had been indicted or prosecuted. The Human Rights Committee has found that this prolonged failure to investigate and prosecute amounts to a denial of justice and a breach of the Philippines' obligations under international law.[125] The Committee emphasizes that the State's duty includes not just investigation, but also "initiation and pursuit of criminal proceedings to establish responsibility" and provision of appropriate compensation.[126]

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122 Sprenger, Antoinette (2021). *Murder of human and environmental rights lawyer in the Philippines*. Available at: https://www.iucn.nl/en/news/murder-of-human-and-environmental-rights-lawyer-in-the-philippines/.

123 Global Witness (2024). Land and Environmental Defenders Report 2024: Missing Voices. Available at: https://www.globalwitness.org/en/campaigns/environmental-activists/missing-voices/.

124 Marcellana and Gumanoy v. The Philippines, Communication No. 1560/2007, U.N. Doc. CCPR/C/94/D/1560/2007 (2008).

125 Marcellana and Gumanoy v. The Philippines, Communication No. 1560/2007, U.N. Doc. CCPR/C/94/D/1560/2007 (2008).

126 Marcellana and Gumanoy v. The Philippines, Communication No. 1560/2007, U.N. Doc. CCPR/C/94/D/1560/2007 (2008).

A culture of impunity persists today through the practice of red-tagging—where legal representatives and investigators of climate change defenders are falsely labelled as communists or terrorists, placing them at serious risk of extrajudicial violence. This practice, reports suggest, has intensified under President Duterte's administration, particularly with the passage of the Anti-Terrorism Act of 2020, which critics argue could be used to suppress legitimate environmental advocacy.[127] According to reviewers, fragmented and palliative nature of the government's response—creating multiple overlapping task forces without addressing root causes—has failed to protect defenders. Moreover, scholars suggest, the Commission on Human Rights, which should serve as the primary protector of defenders' rights, has been politically weakened and lacks prosecutorial powers.[128] This institutional framework, coupled with the commodification of natural resources through investment-focused mining and forestry laws, may be creating what observers call a "minefield of climate litigation" where defenders must carefully navigate between corporate interests, state violence, and a justice system that rarely delivers accountability.

7.2. Reports of Violence from Illegal Non-State Actors – Brazil

As a final case study, it is possible to explore the pressures exercised by illegal non-State actors on climate litigators. In 2019, Human Rights Watch investigated how deforestation in the Brazilian Amazon is driven largely by criminal networks that use violence against defenders, arguing that the Brazilian government

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127 Marcellana and Gumanoy v. The Philippines, Communication No. 1560/2007, U.N. Doc. CCPR/C/94/D/1560/2007 (2008).

128 Valdez, Amiel Ian A (2021). "Defending the Defenders: Upholding the Right to Effective

Remedy of Environmental Defenders in the Philippines." *Ateneo Law Journal 66*(1), p. 176–207.

is failing to protect activists and the rainforest itself.[129] The Amazon plays a vital role as a global forest carbon sink.[130] However, when deforested or scorched, it can become a carbon source by releasing many tons of carbon dioxide back into the atmosphere.[131] In 2024, 11 million hectares of the Amazon were lost to significant fires.[132] Under Jair Bolsonaro's presidency, reports suggest that governmental and private bodies scaled up the exploitation of the Amazon's resources (iron ore, tin, copper, gold, oil, gas, land for soy and cattle farming) to increase profits.[133] This exploitation, scholars argue, was matched by a marked increase in the activity of criminal networks in the Amazon.[134] They note that transnational criminal organizations (TCOs) drive illegal deforestation in the Amazon through schemes including the production of coca and

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129 Human Rights Watch (2019). *Rainforest Mafias: How Violence and Impunity Fuel Deforestation in Brazil's Amazon.* Wilkison, D.; Knox, M.; Baum, D. (Eds.). Available at: https://www.hrw.org/report/2019/09/17/rainforest-mafias/how-violence-and-impunity-fuel-deforestation-brazils-amazon.

130 Gatti, Luciana, et al. (2021). "Amazonia as a carbon source linked to deforestation and climate change." *Nature 595*, p. 388–393. Available at: https://doi.org/10.1038/s41586-021-03629-6.

131 Gatti, Luciana et al. (2021). "Amazonia as a carbon source linked to deforestation and climate change." *Nature 595*, p. 388–393. Available at: https://doi.org/10.1038/s41586-021-03629-6.

132 The Amazon Environmental Research Institute (IPAM) (2024). *Fire in Brazil in 2024: The Land Portrait of the Burned Area in the Biomes.* Alencar, A; Arruda, V; Martenexen, F; Rosa, E; Vélez-Martin, E; Pinto, L; Duverger, S; Monteiro, N; Silva, W (Eds.), p. 3. Available at: https://ipam.org.br/wp-content/uploads/2024/10/NT_Fogo_Fundiario_ENG_v01.pdf.

133 Perez, Richard (2021). "Deforestation of the Brazilian Amazon Under Jair Bolsonaro's Reign: A Growing Ecological Disaster and How It May Be Reduced." *University of Miami Inter-American Law Review 52*(2), p. 193–235. Available at: https://repository.law.miami.edu/umialr/vol52/iss2/7.

134 Souza, Luiz, et al. (2021). "Violence and Illegal Deforestation: The Crimes of 'Environmental Militias' in the Amazon Forest." *Capitalism, Nature, Socialism* 33. Available at: https://doi.org/10.1080/10455752.2021.1980817.

investment in gold mining.[135] According to reports in September 2024, Brazil's environmental and federal law enforcement agencies launched a joint operation in the Kayapó territory in (Paráthat state), finding that fires had been started in the area to clear sites for illegal mining.[136] As reports explain, therefore, Amazon deforestation is a direct consequence of the activities of criminal groups such as Brazil's Comando Vermelho and the Primeiro Comando da Capital, both well-known TCOs.[137]

For decades, scholars have documented the work of Brazilian environmentalists, especially from the Indigenous communities of the Amazon, leading a fierce fight against the degradation of their forests, rivers and natural resources.[138] However, reports suggest, this engagement places them on the frontlines of intimidation and threats by criminal networks. According to Global Witness, 401 environmental and land defenders were killed between 2012 and 2023.[139] In 2022 and 2023, respectively 34 and 25 defenders were assassinated, half of whom were Indigenous.[140] Death threats,

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135 Souza, Luiz et al. (2021). "Violence and Illegal Deforestation: The Crimes of 'Environmental Militias' in the Amazon Forest." *Capitalism, Nature, Socialism* 33. Available at: https://doi.org/10.1080/10455752.2021.1980817.

136 The Amazon Environmental Research Institute (IPAM) (2024), *Fire in Brazil in 2024: The Land Portrait of the Burned Area in the Biomes*. Alencar, A; Arruda, V; Martenexen, F; Rosa, E; Vélez-Martin, E; Pinto, L; Duverger, S; Monteiro, N; Silva, W (eds.), p. 3. Available at: https://ipam.org.br/wp-content/uploads/2024/10/NT_Fogo_Fundiario_ENG_v01.pdf.

137 Randolph, Kirk (2023). *To Protect the Amazon, Target Transnational Criminal Networks*. Available at: https://www.usip.org/publications/2023/08/protect-amazon-target-transnational-criminal-networks.

138 Fishman, Andrew (2021). *Brazil's Indigenous Groups Mount Unprecedented Protest Against Destruction of the Amazon*. Available at: https://theintercept.com/2021/08/28/brazil-amazon-indigenous-protest/.

139 Global Witness (2024). *Land and Environmental Defenders Report 2024: Missing Voices*, p. 17. Available at: https://www.globalwitness.org/en/campaigns/environmental-activists/missing-voices/.

140 Global Witness (2024). *Land and Environmental Defenders Report 2024: Missing Voices*, p. 12-25. Available at: https://www.globalwitness.org/

disappearances, intimidation are among the techniques used by criminal networks to stop lawyers and others from investigating their activities, many argue. Indeed, a recent report by OECD Watch[141] highlights the failing of the Brazilian government in tackling violence against defenders:

> "By failing to put in place an adequate normative framework for the protection of the environment and human rights and to enforce this framework effectively, including by ensuring remedy and accountability for infringements, the government is creating and fuelling the conditions for conflict and violence. (...) Not only has Brazil failed to tackle the root causes of conflict, but it has in fact periodically passed (...) legislation that (...) render Environmental and Human Rights Defenders even more vulnerable. The prospect of regularization of mining activities on indigenous territories under bill 191/2020 (...) caused irregular mining to increase on these territories under a renewed sense of impunity, fuelling more conflict and violence."[142]

In an interview with the non-governmental organization Lawyers for Lawyers, Nauê Bernardo Pinheiro, Brazilian lawyer specializing in strategic litigation at the Supreme Court on climate change confirmed that "human rights and environmental lawyers can be subject to life threats, strategic lawsuits against public litigation (SLAPP), and financial risks."[143] According to the report, while not directly harassed (yet), Pinheiro has been

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en/campaigns/environmental-activists/missing-voices/.

141 OECD Watch (2022). *Threats to Environmental and Human Rights Defenders in Brazil: Legal and Policy Gaps.* Available at: https://www.oecdwatch.org/wp-content/uploads/sites/8/2022/03/Bridging-Brazilian-governance-gaps-Environmental-and-human-rights-defenders-2.pdf.

142 OECD Watch (2022). *Threats to Environmental and Human Rights Defenders in Brazil: Legal and Policy Gaps*, p.14. Available at: https://www.oecdwatch.org/wp-content/uploads/sites/8/2022/03/Bridging-Brazilian-governance-gaps-Environmental-and-human-rights-defenders-2.pdf.

143 LawyersForLawyers (2024). *Interview with Nauê Bernardo Pinherio, Brazilian environmental lawyer specialising in strategic litigation at the Supreme Court on environmental law and climate change.* Available at: https://lawyersforlawyers.org/en/interview-with-naue-bernardo-pinheiro-

warned to remain cautious and knows colleagues who had to flee Brazil as a result of being targeted, emphasizing the importance of meeting the material needs of targeted lawyers: "For example, if they need to flee Brazil, it is crucial that they have access to a network that can help them leave the country and provide funds to start over. He considers (...) [that] his work with major NGOs affords him greater protection. Many environmental and human rights lawyers in Brazil do not have this privilege."[144]

This study case underlines that lawyers can be the target of criminal networks, in addition to being subject to government harassment and pressures from the private sector. It should be noted that most of the time, these threats coexist and climate litigators have to advance cautiously on what can be called the minefield of climate litigation.

Indeed, among the various risks that climate litigators face in their work, murder stands as the most definitive threat. In 2024, Global Witness released its annual report titled "the violent erasure of land and environmental defenders."[145] While the report provides figures on the broader category of environmental defenders (not necessarily climate litigators), its findings suggest that climate litigators also face the threat of murder.[146] According to the report, leading industries driving killings in 2023 included those in

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brazilian-environmental-lawyer-specializing-in-strategic-litigation-at-the-supreme-court-on-environmental-law-and-climate-change-2/.

144 LawyersForLawyers (2024). *Interview with Nauê Bernardo Pinherio, Brazilian environmental lawyer specialising in strategic litigation at the Supreme Court on environmental law and climate change*. Available at: https://lawyersforlawyers.org/en/interview-with-naue-bernardo-pinheiro-brazilian-environmental-lawyer-specializing-in-strategic-litigation-at-the-supreme-court-on-environmental-law-and-climate-change-2/.

145 Global Witness (2024). *Land and Environmental Defenders Report 2024: Missing Voices*. Available at: https://www.globalwitness.org/en/campaigns/environmental-activists/missing-voices/.

146 It is the authors' shared view that an environmental lawyer who litigates against a company displacing indigenous peoples in the Amazon to drill oil is also a climate litigation lawyer.

mining and extractives sectors—a sector heavily intertwined with climate action—e.g., the continued exploitation of fossil fuels, extraction of key minerals for the energy transition, etc. In 2023, the report suggests, 196 land or environmental defenders were killed, 166 of whom in Latin America alone.[147] The report finds that Colombia has the highest number of murders, followed by Brazil, Honduras, Mexico, and the Philippines.[148] It is notable that Colombia, host of the CBD COP 16 in Cali, committed to focus on nature defenders through its theme of "Peace with Nature" as well as its own Biodiversity Action Plan, which shed light on those people protecting the land.[149]

According to the report, another most dangerous place on Earth for defenders is Asia. Between 2012 and 2023, 468 were murdered, mainly in the Philippines, with additional cases in India, Indonesia and Thailand.[150] While the Global Witness report notes that establishing a direct relationship between the murder of a lawyer or another climate defender and specific corporate interests remains difficult, they also suggest that extractives remain the biggest industry driver by far.[151] Latin America and Asia are core exporters of minerals vital for clean energy technologies (nickel, tin, rare-earth, etc.), and many are concerned that the

147 Global Witness (2024). *Land and Environmental Defenders Report 2024: Missing Voices,* p. 4. Available at: https://www.globalwitness.org/en/campaigns/environmental-activists/missing-voices/.

148 Global Witness (2024). *Land and Environmental Defenders Report 2024: Missing Voices,* p. 4. Available at: https://www.globalwitness.org/en/campaigns/environmental-activists/missing-voices/.

149 CBD COP16 (2023). *Ministry of Environment opens citizen consultation on plan to protect the country's biodiversity by 2030.* Available at: https://www.cop16colombia.com/es/en/consulta-ciudadana-plan-biodiversidad/.

150 Global Witness (2024). *Land and Environmental Defenders Report 2024: Missing Voices.* Available at: https://www.globalwitness.org/en/campaigns/environmental-activists/missing-voices/.

151 Global Witness (2024). Land and Environmental Defenders Report 2024: Missing Voices. Available at: https://www.globalwitness.org/en/campaigns/environmental-activists/missing-voices/.

global transition to a low-carbon economy could paradoxically exacerbate the risk of murder for climate defenders.

8. DEFENDING THE DEFENDERS – CONCLUSIONS AND FUTURE DIRECTIONS

The Paris Agreement, its emphasis on transparency and public participation, and its catalyzing effects on human rights-based climate litigation has raised the level of global aspiration toward international access to climate justice and the rule of law. Each case brings opportunities for best practice and successful jurisprudence that global climate litigators can draw from. However, the inverse can also be the case—as opponents of climate ambition develop new retaliatory measures and engage in climate change 'lawfare.'

As has been examined, climate litigators, like other environmental and human rights defenders worldwide, may be targeted in order to silence their voices and discourage future action. This risk must be considered and conquered, as the Paris Agreement, ITLOS, and human rights tribunals call for scaled-up government and corporate responses to climate change. Seen in the selection of case studies, political ideology, personal freedoms, economic development, and commitment to rule of law appear unable to stop States and non-State actors from targeting climate litigators; the seriousness of the threats range from lawfare and intimidation, to persecution and imprisonment, to murder. The challenges, and the responsibility of States in this regard, needs to be recognized and the appointment of a new UN Special Rapporteur on Environmental Defenders in 2022 is an encouraging sign of rising concern, and willingness to investigate.[152]

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[152] UNECE (2022). *List of Decisions and Major Outcomes of the Third Extraordinary Session.* AC/ExMoP-3/Inf.2. Available at: https://unece.org/sites/default/files/2022-06/ExMoP3_List_of_outcomes_24_June_as%20adopted.pdf.

Global climate litigation is at a crossroads. While varying methodologies have been developed in legal scholarship to define climate litigation and scholars may differ in their counts, a growing number of jurisdictions are reporting what can broadly be classified as climate litigation cases.[153] To ensure that climate litigators can bring climate justice where it is warranted, further research is needed into the threats climate litigators face, systematic investigations into malicious retaliatory measures, best practices in human rights-based climate litigation, and especially, the most effective strategies being deployed to strengthen rule of law in the face of such threats to the lawyers themselves, and by extension their clients, as defenders of a stable global climate system.

Further, it may be important to engage the global climate law community, for instance through the annual Climate Law and Governance Days during the UNFCCC COPs, to enhance transparency through the monitoring, reporting and verification of climate litigation.[154] By supporting networks for affected climate litigators, sharing good practice, catalysing knowledge exchange and strengthening capacity amongst the climate law community, there is the chance to respond to the urgent need to further operationalize the Paris Agreement[155] and improve international access to climate justice.

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153 Grantham Research Institute on Climate Change and the Environment (2024). *Global Trends in Climate Change Litigation: 2024 Snapshot.* Setzer, Joanna and Higham, Catherine, eds, p. 2. Available at: https://www.lse.ac.uk/granthaminstitute/publication/global-trends-in-climate-change-litigation-2024-snapshot/.

154 Climate Law and Governance Initiative (2024). Available at: https://www.climatelawgovernance.org/.

155 United Nations (2015). *Paris Agreement to the United Nations Framework Convention on Climate Change.* Adopted December 12, 2015. FCCC/CP/2015/L.9/Rev.1. Available at: https://unfccc.int/sites/default/files/english_paris_agreement.pdf.

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Climate obligations of States from the perspective of climate justice

SUSANA BORRÀS-PENTINAT[1]

1. INTRODUCTION

Anthropogenic climate change is one of the greatest challenges and threats of the 21st century[2]. As the Assessment Report (AR6) of the Intergovernmental Panel on Climate Change (hereafter IPCC) points out, the current warming of the climate system is unequivocal and human activities in the unsustainable economic development model are the main cause[3]. Indeed, greenhouse gas (hereafter GHG) emissions, mainly from the burning of fossil fuels such as oil, gas and coal, have caused the global temperature to rise by approximately 1.1°C above pre-industrial levels. At

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2 Gardiner, Stephen, Caney, D. Jamieson, H. Shue (eds) (2010), *Climate Ethics: Essential Readings*. Oxford University Press, Oxford.

3 IPCC (2022), *Climate Change 2022: Impacts, Adaptation, and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* [H.-O. Pörtner, D.C. Roberts, M. Tignor, E.S. Poloczanska, K. Mintenbeck, A. Alegría, M. Craig, S. Langsdorf, S. Löschke, V. Möller, A. Okem, B. Rama (eds.)]. Cambridge University Press, p. 52ss.

the current rate of GHG emissions, global temperatures could continue to rise in the coming decades, reaching the point of no return[4]. Meanwhile, current policies are not only insufficient to achieve the Paris Agreement's primary objective of limiting the global average temperature increase to well below 2°C and doing everything possible to keep it below 1.5°C, but would also lead to a warming of 2.8°C by the end of the century.[5]

The consequences of global warming include increasingly frequent and severe extreme weather events such as droughts, heavy rains, floods, cyclones, heat waves and fires, rising sea levels, warming and acidifying oceans, rapidly shrinking glaciers and shrinking Arctic and Antarctic ice sheets. Some of these climate impacts are already visible around the world and are causing the destruction and loss of homes and livelihoods (such as access to safe food and clean water), and the onset of physical and mental health problems in people. They are claiming thousands of lives each year and forcing millions to move to new areas within or outside their countries and to abandon their homes, their families, and their culture. Moreover, each additional increase in temperature increases the frequency and magnitude of these impacts, which, if not reversed, will become increasingly intense and violent, causing not only major human and material losses, but also irreversible damage that will affect all life on the planet.[6]

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4 Lenton, Timothy M., Rockström, Johan, Gaffney, Owen, Rahmstorf, Stefan, Richardson, Katherine, Steffen, Will & Schellnhuber, Hans Joachim (2019), "Climate tipping points — too risky to bet against. The growing threat of abrupt and irreversible climate changes must compel political and economic action on emissions", in *Nature* 575, p. 592-595. See also Armstrong McKay, David I. *et al.* (2022), "Exceeding 1.5°C global warming could trigger multiple climate tipping points", in *Science* 377. DOI:10.1126/science.abn7950.

5 *Cit. supra.*

6 Armstrong McKay, David I. *et al.*, *Exceeding 1.5°C global warming could trigger multiple climate tipping points, cit. supra.*

Climate change undoubtedly represents a global challenge with major ethical and political implications that highlight the debate on the close relationship between human rights, unequal development and climate change. This raises the question of the corresponding duties of protection and care that States should assume, especially with regard to those people who are already facing climate impacts from contexts of multidimensional vulnerability.[7] The Paris Agreement[8] itself recognises that, although climate change is global and affects all of humanity:

> "(...) in taking measures to address it, Parties should respect, promote and take into account their respective obligations relating to human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and persons in vulnerable situations and the right to development, as well as gender equality, women's empowerment and intergenerational equity."

Although there is an explicit recognition of those groups that require greater protection of their rights, the Agreement does not convey the 'unjust' nature of unequal human situations as well as the fact that the intensification of climate collapse increases their fragilities, intersecting with pre-existing multidimensional vulnerabilities and exposing these injustices, all propitiated by a civilisational dynamic with a clear Western-centric bias. The concept of vulnerability, according to the IPCC, is:

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7 The concept of multidimensional vulnerability has been established by the United Nations, which has proposed the development and application of a Multidimensional Vulnerability Index (MVI). The MVI is a vital tool to help less developed states access concessional finance, improve their national long-term planning, repay their debts and/or subscribe to insurance and compensation schemes for climate disasters. See Multidimensional Vulnerability Index and the Final Report of High-Level Panel on the Development of a Multidimensional Vulnerability Index. Available at: https://www.un.org/ohrlls/mvi.

8 United Nations (2015), Paris Agreement as contained in the report of the conference of the parties in its twenty-first session, FCCC/CP/2015/10/Add.1, United Nations Treaty Series, vol. 3156, p. 23.

> "(...) the propensity or predisposition to be adversely affected. Vulnerability encompasses a variety of concepts and elements, including sensitivity or susceptibility to harm and lack of capacity to cope and adapt".[9]

Climate vulnerability is therefore determined not only by geographic exposure to risk or climate impact, but also by the socio-economic factors and/or conditions that affect a given population. In this sense, it is worth noting here that no human being or population group is naturally vulnerable. According to Flores-Sandí:

> "(...) are the conditions and factors of exclusion or discrimination that cause many persons and groups of persons to live in a situation of vulnerability and low enjoyment of human rights. For this reason, the appropriate term is people or groups made vulnerable or in a situation of vulnerability. These are all those populations that, due to stigma and discrimination, live in a situation of inequality, and according to this, all people can be made vulnerable at some point in time".[10]

Adequately addressing situations of vulnerability requires the adoption of protective measures by identifying climate obligations and their justiciability in the global context of climate emergency. Along these lines, advisory opinions have been requested from three international tribunals in order to determine the climate obligations of states. One of the advisory opinions was requested from the International Tribunal for the Law of the Sea, which

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9 R. Ara Begum, R. Lempert, E. Ali, T.A. Benjaminsen, T. Bernauer, W. Cramer, X. Cui, K. Mach, G. Nagy, N.C. Stenseth, R. Sukumar, P. Wester (2022), *2022: Point of Departure and Key Concepts. In: Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* [H.-O. Pörtner, D.C. Roberts, M. Tignor, E.S. Poloczanska, K. Mintenbeck, A. Alegría, M. Craig, S. Langsdorf, S. Löschke, V. Möller, A. Okem, B. Rama (eds.)]. Cambridge University Press, Cambridge, UK and New York, NY, USA, p. 121-196.

10 Flores-Sandí, Grettchen (2012), "Gestión de la accesibilidad y derecho a la salud", *Acta Médica Costarricense,* 54(3), p. 181-188. Available at: https://www.redalyc.org/articulo.oa?id=43423197010.

delivered its judgment on 21 May 2024. In its opinion, the Tribunal recognises that climate change is a form of marine pollution and that States have an obligation to take all necessary measures to prevent, reduce and control marine pollution caused by GHG emissions and their adverse effects on the marine environment.

The other two applications still pending are the request for an Advisory Opinion, submitted in January 2023 by Chile and Colombia before the Inter-American Court of Human Rights[11] and the advisory opinion requested before the International Court of Justice (ICJ). The main objective of the former is to "clarify the scope of state obligations with respect to the climate emergency, considering international human rights law". This request covers a wide range of questions, and explores the state's obligations to prevent and guarantee in the face of a climate emergency, including, with a strong Escazú influence, the state's obligations in terms of access to information (especially regarding active transparency), consultation and access to justice, the provision of effective judicial remedies, as well as the obligations to protect and prevent environmental and territorial defenders. It also mentions the differential obligations of States with respect to the rights of children and new generations in the face of climate emergencies. In this way, the Inter-American Court of Human Rights has a new opportunity to reaffirm its position on Economic, Social, Cultural and Environmental Rights and their interrelation with the climate phenomenon.[12]

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11 Solicitud de Opinión Consultiva sobre Emergencia Climática y Derechos Humanos a la Corte Interamericana de Derechos Humanos de la República de Colombia y la República de Chile, 9 de enero de 2023. Available at: https://www.minrel.gob.cl/minrel/site/docs/20230118/20230118172718/solicitud_corte_idh.pdf.

12 Tarre, Patricia (2023), "La solicitud de Opinión Consultiva sobre la Emergencia Climática: Una oportunidad para que la Corte IDH aclare el deber de mitigar", in *Agenda Estado de Derecho*. 2023/03/17. Available at: https:// agendaestadodederecho.com/opinion-consultiva-sobre-la-emergencia-climatica/.

The request to the ICJ, which was made through a UN General Assembly Resolution, seeks the Court's advisory opinion on "the obligations of States" to protect the climate balance "for present and future generations". The resolution was initiated by Vanuatu, one of the Pacific countries most vulnerable to the impacts of climate change, and co-sponsored by more than 130 countries. The resolution seeks the ICJ's opinion on the legal consequences that states should face for their "acts and omissions that have caused significant damage to the climate system and other elements of the environment", particularly harming small island developing states, which like Vanuatu, "because of their geographical circumstances and level of development, are particularly affected by or vulnerable to the adverse effects of climate change". It also highlights the power of civil society, insofar as this resolution was the result of popular mobilisation, especially pressure from Pacific Island law students.

All these initiatives highlight the need to protect the rights and needs of those most exposed to and most affected by climate change, including those of future generations. To this end, it is necessary to understand not only the vulnerability of rights, but also to identify the climate obligations and, especially, the responsibilities that may arise as a result of these pronouncements by international courts, which are key to contributing to the establishment of the legal basis for achieving 'climate justice'.

In this vein, this chapter is a prospective analysis of how this legal basis for a climate justice perspective can be determined. Thus, firstly, the progress from environmental justice to climate justice is explained, and secondly, the concept and dimensions of climate justice are addressed. Thirdly, it analyses how there has been a process of humanisation of the international climate change regime and the climatization of human rights as the climate emergency has intensified. Then, fourthly, it identifies what the climate obligations of states might be from a climate justice perspective. And finally, it reflects on what are the main obstacles to achieving climate justice, which has led to an increase in climate litigation in many parts of the world, pending a clear

determination of states' legal obligations. Final reflections conclude this chapter on the legal obligations of states in light of climate justice.

2. FROM ENVIRONMENTAL JUSTICE TO CLIMATE JUSTICE: THE CLAIMS OF INEQUALITY

The notion of 'justice' is a fundamental part of the social contract, crucial to leaving no one behind, and to foster a moral articulation of interconnected economic growth, social inclusion and environmental sustainability[13]. The link between the concept of justice and the environment has its roots in the civil resistance movement that emerged in the United States in the 1980s, which focused its demands on the protection of health and the environment[14] from toxic waste disposal in the most impoverished and racialised, mainly African American, communities.[15]

This initial environmental justice movement, focusing on environmental discrimination, has evolved to integrate not only the consequences of the unfair distribution of environmental

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13 UNDP (2023), Justicia y Desarrollo Sostenible: El testeo del indicador global de acceso a justicia en el marco de una encuesta nacional de pobreza, Ciudad Autónoma de Buenos Aires: Programa de las Naciones Unidas para el Desarrollo-PNUD, 27 de junio de 2023, p. 20. Available at: ttps://www.undp.org/es/argentina/publicaciones/justicia-y-desarrollo-sostenible.

14 Golden, Dylan (1998), "Book Review: Camacho, David E., Environmental Injustices, Political Struggles: Race, Class, and the Environment", *UCLA Journal of Environmental Law and Policy*, p. 131-136.

15 Bullard, Robert D. (1993), "Anatomy of environmental racism and the environmental justice movement", in *Confronting Environmental Racism: Voices from the grassroots* 15, p. 15-39. See also Cole, Luke W., Foster, Sheila R. (2001), *From the Ground Up: Environmental Racism and the Rise of the Environmental Justice Movement*. Vol. 34. New York: NYU Press and McGurty, Eileen Maura (1997), "From NIMBY to civil rights: The origins of the environmental justice movement", in *Environmental History*, 2.3, p. 301-323.

harms and benefits, but also to expose their underlying causes, thus connecting the three central dimensions of justice, namely distributive, procedural, and recognitive.[16]

Although the distributive aspects of justice can be seen as an indication of injustice, i.e. that environmental harm is disproportionately suffered by certain groups in society, Schlosberg points out that these groups or individuals must be recognised before any redistribution can take place.[17] This also applies to the procedural dimension of justice—if a group or individual is to be protected, they must be recognised. Recognitive justice refers to the existence of social structures that reinforce unjust outcomes in society, recognising that some cultural and institutional norms and practices may inherently give unequal representation to certain groups, depriving them of common benefit and/or protection. Distributive justice, meanwhile, considers the fair and equitable distribution of environmental goods and benefits to all people, with the aim of understanding how environmental harms or benefits are experienced in society.[18] Finally, procedural justice focuses on the fact that participation in decision-making is not always equal, and some groups and individuals may be excluded. Alongside these dimensions of environmental justice, McCauley and Heffron add restorative justice as a fourth dimension of justice aimed at correcting historical trajectories of development that have created structural forms of injustice.[19] Thus, restorative

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16 Schlosberg, David (2007), Defining Environmental Justice: Theories, Movements, and Nature, Vol. 9780199286.

17 *Ibid.*

18 Hughes, Sara, Hoffmann, Matthew (2020), "Just urban transitions: Toward a research agenda", in *Wiley Interdisciplinary Reviews: Climate Change*. See also Bellver Capella, Vicente (1997), "El movimiento por la justicia ambiental. Entre el ecologismo y los derechos humanos", in *Anuario de Filosofía del Derecho*, no.13-14, p. 327-348.

19 McCauley, Darren, Heffron, Raphael (2018), "Just transition: Integrating climate, energy and environmental justice", in *Energy Policy*, 119, p. 1-7.

justice aims to restore dignity to those affected,[20] and to be an alternative to litigation related to loss and damage.[21]

The integration of these dimensions in the context of the institutional framework makes it necessary to think about the concept of environmental justice in a broader way. In this sense, according to UNDP, three pillars can be identified in relation to environmental justice: (1) normative frameworks at international, national and local levels that, with a human rights approach, go beyond the mere criminalisation of those who commit environmental crimes; (2) strengthened institutions to monitor, control and implement environmental regulations that have access mechanisms for all communities and sectors; and (3) effective access to justice for all stakeholders when environmental rights are violated.[22]

Thus, environmental justice is a concept that has been evolving towards the search for "equitable treatment and involvement of people of all races, cultures, nations and socio-economic backgrounds in the development, implementation and enforcement of environmental programmes, laws and policies".[23] Furthermore, in its implementation it requires accountability in

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20 Thompson, Allen, Otto, Friederike E.L. (2015), "Ethical and normative implications of weather event attribution for policy discussions concerning loss and damage", in *Climate Change*, 133, p. 439-451.

21 Robinson, Stacy-Ann, Carlson, D'Arcy (2021), "A just alternative to litigation: applying restorative justice to climate-related loss and damage", in *Third World Quarterly*, p. 1-12.

22 United Nations Development Programme (UNDP) (2014). Environmental Justice comparative Experiences in Legal Empowerment. Available at: https://www.undp.org/publications/environmental-justice-comparative-experiences-legal-empowerment. Also see United Nations Development Programme (UNDP) (2022). "Environmental justice: securing our right to a clean, healthy and sustainable environment." Available at: ttps://www.undp.org/publications/environmental-justice-securing-our-right-clean-healthy-and-sustainable-environment.

23 UNDP (2022), *ibidem,* p. 13.

environmental matters, and focuses on the respect, protection and enforcement of environmental rights, as well as the promotion of the rule of environmental law. Based on these postulates, the concept of 'climate justice' has emerged.

3. CLIMATE JUSTICE AND THE MULTIDIMENSIONAL VULNERABILITIES

While there is no univocal concept of 'climate justice'[24], it has generally been understood as a concept underpinned by the principles of equity, non-discrimination, equal participation, transparency, fairness, accountability and access to justice. This includes issues of equity and equality within a nation, between nations and between generations.[25]

The term climate justice was first used in a 1999 report entitled Greenhouse Gangsters vs. Climate Justice by the San Francisco-based group Corporate Watch.[26] This report was primarily an examination of the oil industry and its disproportionate political influence, but it also made a first attempt to define a multi-faceted approach to climate justice, including the following aspects: analysing the causes of global warming and holding corporations to account; opposing the destructive impacts of oil exploitation, and supporting affected communities, including those most affected by the increased incidence of climate-related disasters; looking at environmental justice movements and organised work to achieve strategies to support a just transition away from fossil fuels; reversing challenging corporate globalisation and the

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24 *Ibid.*

25 Okereke, Chukwumerije (2010), "Climate justice and the international regime", in *Wiley Interdisciplinary Reviews: Climate Change* 1.3: 462-474. Available at: https://doi.org/10.1002/wcc.52.

26 Kenny Bruno, Joshua Karliner and China Brotsky (1999), *Greenhouse Gangsters vs. Climate Justice*, Transnational Resource & Action Center, San Francisco.

disproportionate influence of international financial institutions such as the World Bank and the World Trade Organisation. Thus, Corporate Watch understood that:

> "Climate justice means, first and foremost, eliminating the causes of global warming and allowing the Earth to continue to nurture our lives and the lives of all living things. This means radically reducing emissions of carbon dioxide and other greenhouse gases.
>
> Climate justice means opposing the destruction caused by greenhouse gases at every step of the production and distribution process, from a moratorium on new oil exploration to stopping the poisoning of communities by refinery emissions, from drastic domestic reductions in automobile emissions to the promotion of efficient and effective public transport".[27]

Years later, it was the International Bar Association that adopted the following definition of climate change justice in 2014:

> "To ensure communities, individuals and governments have substantive legal and procedural rights relating to the enjoyment of a safe, clean, healthy and sustainable environment and the means to take or cause measures to be taken within their national legislative and judicial systems, where necessary, at regional and international levels, to mitigate sources of climate change and provide for adaptation to its effects in a manner that respects human rights".[28]

The Summary for Policy Makers of Working Group II of the Intergovernmental Panel on Climate Change stated, as part of its Sixth Assessment Report, that climate justice:

> "(…) generally, includes three principles: distributive justice, which refers to the allocation of burdens and benefits among people, nations and generations; procedural justice, which refers to who decides and participates in decision-making; and

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27 *Ibid.*

28 "Achieving Justice and Human Rights in an Era of Climate Disruption," INT'L BAR ASS'N (July 2014), Available at: file://sbs2k8/RedirectedFolders/accintern/My%20Documents/Downloads/Climate%20Change%20Justice%20and%2 0Human%20rights%20report%20full.pdf

> recognition, which entails basic respect, strong commitment and fair consideration of diverse cultures and perspectives".[29]

According to a 2022 report by the Intergovernmental Panel on Climate Change, "climate justice encompasses justice that links development and human rights to achieve a rights-based approach to addressing climate change".[30] In this regard, according to the latest update of its Sixth Assessment Report published in March 2023, it argues (1) that activities that prioritise equity, climate justice, and inclusion lead to more sustainable outcomes and promote resilient development; (2) that scaling up climate action will mobilise high and low-cost options needed to combat climate change, especially in the energy and infrastructure sectors (high confidence); and (3) that climate justice movements have in many cases had positive results and will have a catalytic effect on climate governance ambition (medium confidence).

It is clear from the above that the issue of justice intersects with climate change in a number of ways. The first is that climate change represents itself as a justice problem arising from the unequal distribution of its adverse effects across countries and generations, different contributions to GHG emissions, different degrees of exposure to the consequences of climate change, and unequal capacities to adapt to climate impacts or access climate solutions. Second, the term 'justice' is an essential component of the notion of climate justice, which brings together a range of issues related to the legal protection of those in contexts of multidimensional vulnerability to the adverse effects of climate change.

Building on the postulates of environmental justice discussed above, climate justice, according to Newell et al., is characterised by (1) accountability for generating climate change and its

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29 IPCC (2022) p. 7. Available at: https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_SummaryForPolicymakers.pdf

30 *Ibid.*

impacts, or (2) the effects of responses to climate change.[31] That is, it is linked to the so-called 'triple injustices' of climate change, namely the unequal distribution of impacts, the unequal responsibility for climate change and the unequal costs associated with mitigation and adaptation,[32] where those least responsible for greenhouse gas emissions are also the most vulnerable to its impacts and the most disadvantaged by responses to climate change.[33] Therefore, climate justice specifically requires not only establishing responsibilities for the causes of climate change, but also for the strategies for mitigation and adaptation to be just, they must primarily aim to benefit the most threatened populations and nations with the greatest needs.

Some authors, such as Brown Weiss[34], Meyer[35], or Knappe and Renn[36], add the intergenerational dimension of justice to highlight the duties one generation have to another, particularly in relation to climate change, and concerning the obligations towards the young and children who are already living (or about

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31 Newell, Peter, Srivastava, Shilpi, Naess, Lars Otto, Torres Contreras, Gerardo A., Price, Roz (2021), "Towards transformative climate justice: An emerging research agenda", in *WIREs Climate Change*, Volume 12, Issue 6.

32 Roberts, J. Timmons, Parks, Bradley C. (2015), "A climate of injustice: global inequality, north-south politics, and climate policy", in *Global Environmental Accord*, vol. 1, The MIT Press.

33 Krause, Dunja (2018) "Transformative approaches to address climate change and achieve climate justice", in *Routledge Handbook of Climate Justice*, Routledge.

34 Brown Weiss, Edith (2008), "Climate Change, Intergenerational Equity, and International Law", in *Vermont Journal of Environmental Law*, vol. 9, p. 615-627.

35 Meyer, Lukas H. (2021), "Intergenerational justice", in *The Stanford Encyclopedia of Philosophy*, Summer Edition.

36 Knappe, Henrike, Renn, Ortwin (2022), "Politicization of intergenerational justice: how youth actors translate sustainable futures", in European Journal of Futures Research, 10, p. 6. See also Caney, Simon (2018), "Justice and future generations", in *Annual Review of Political Science*, 21(1), p. 475-493.

to be born), whose current and future lives are adversely affected by rapidly changing environmental conditions.

Considering these previous ideas, climate justice allows precise reflection on these inequalities and means to address them. Climate justice focuses on the causes and consequences of inequalities, while paying special attention to how climate change affects people and their rights in different, unequal, and disproportionate ways, as well as in repairing the resulting injustices in a fair and equitable manner. Thus, climate justice is often understood either as justice related to responsibility for climate change and its impacts or as justice concerning the effects of responses to climate change. Following Farhana Sultana, climate justice represents a critical perspective that challenges dominant discourses built from oppression, grounded in solidarity and collective action,[37] in order to address inequalities that cause greater exposure, risk, and lower capacity for climate resilience.

As an example of situations of inequality in a context of climate impact, during Hurricane Katrina in August 2005 in the U.S., 51% of the victims were African American and 42% were white, in a country where African Americans make up 16% of the population and whites compose 70% (in Louisiana, the most affected state, African Americans represent 32% of the population and whites 62%). In New Orleans, the largest city in Louisiana, this translates to a mortality rate 1.7 to 4 times higher for African Americans over 18 years old compared to whites of the same age.[38]

Thus, age, race, gender, class, among other factors, help to understand why the climate crisis is a multidimensional crisis and,

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37 Sultana, Farhana (2022), "Critical climate justice", in *The Geographical Journal*, 188, p. 118-124.

38 Elliot, James R., Pais, Jeremy (2006), "Race, class, and Hurricane Katrina: Social differences in human response to disaster", in *Social Science Research*, p. 295-321; Park, Yoosun, Miller, Joshua (2006), "The social ecology of Hurricane Katrina: Re-writing the discourse of 'natural' disasters", in *Smith College Studies in Social Work*, p. 9-24.

above all, a crisis of inequality. Furthermore, understanding the realities of inequality that contribute to climate vulnerabilities is essential in order to articulate a legal framework that is sensitive to the basis of climate justice, informed of the causes and consequences of climate change, its perpetrators and its victims, and that provides mechanisms for protection and reparation for climate-related damages and losses, in order to restore justice in the context of climate emergency. In this sense, the roots of this climate crisis are interconnected with the issue of environmental justice, encompassing a wide variety of economic and social realities, making it artificial to treat them separately. Economic and social inequalities are linked to the causes of the climate emergency, as they jointly arise from a colonial and capitalist process characterized by the concentration and dominance of power. Very often, these inequalities are based on personal and social factors (race, social class, gender, ethnicity, and origin), creating a context of greater vulnerability to the risks and effects of climate change.[39] At the same time, climate justice, like the environmental justice movement, emphasizes the importance of empowering individuals and groups who are particularly affected by environmental degradation and who are at greater risk of suffering from it, including indigenous peoples, women, children, the elderly, people with disabilities, and those living in poverty.[40] However, climate justice also introduces a somewhat novel component to environmental justice, which is the role of youth advocating for intergenerational equity.

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39 Godfrey, Phoebe C. (2012), "Introduction: Race, Gender & Class and Climate Change", in *Race, Gender & Class*, p. 3-11.

40 United Nations (2017). Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment. Resolution A/HRC/34/49 of 19 January 2017. Available at: www.ohchr.org/en/documents/thematic-reports/ahrc3449-report-special-rapporteur-issue-human-rights-obligations.

Consequently, the effects of climate change are often mediated by other factors such as poverty, existing infrastructure, and the responsiveness of political authorities, interacting with existing inequalities and vulnerabilities, producing what Leichenko and O'Brien refer to as 'double exposure'.[41] Additionally, the extraction of fossil fuels and the industry built around it often directly harm the same interests (such as health and access to land) that are affected by greenhouse gas emissions.

For this reason, climate change and its effects cannot be explained and addressed from an abstract or homogeneous standpoint, especially without considering justice, equity, and rights as the foundation of climate justice.

Nevertheless, and despite the importance of determining these multidimensional vulnerabilities that intersect with climate change, they have hardly influenced the articulation of legal obligations arising from the international climate regime, which has traditionally developed apart from the social dimensions of climate change. Only following the Paris Agreement has this dynamic begun to reverse, leading to a progressive 'humanization' of the climate legal framework.

4. THE PROCESSES OF HUMANIZATION OF THE INTERNATIONAL CLIMATE CHANGE REGIME AND THE CLIMATIZATION OF HUMAN RIGHTS

At a formal level, the concept of climate justice has already found some legal reflection: when the Rio de Janeiro Declaration of 1992[42] and the United Nations Framework Convention on Climate

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41 Leichenko, Robin, O'Brien, Karen (2008), *Environmental Change and Globalization: Double Exposures*, New York: Oxford University Press.

42 UN General Assembly, *Report of the United Nations Conference on Environment and Development*, Rio de Janeiro, 3-14 June 1992, Annex I:

Change (UNFCCC)[43] both recognised of the principle of common but differentiated responsibilities. This principle acknowledges the historical differences in the contributions of developed and developing countries to global environmental issues, as well as the differences in their contributions to greenhouse gas emissions and their respective economic and technical capacities to address these problems.

Nevertheless, despite the growing importance of the concept of climate justice, it has not always been taken into account. However, the need to determine the climate obligations of states at the international level has informed two processes of interaction between human rights and climate change, namely: the humanization of the international climate regime and the climatization of human rights.

Regarding the first process, the humanization of the international climate regime, the Preamble of the Paris Agreement (2015)[44] recognizes the interconnection between climate change and various human rights, such as the right to health, the rights of indigenous peoples, gender equality, and the right to development.

The climatization of human rights occurs through the understanding that a safe climate is a vital element of the right to a healthy environment and is essential for human life and well-being.

The UN Special Rapporteur on Human Rights and the Environment, in his 2018 report, emphasized that human rights require states to establish effective laws and policies to reduce greenhouse gas emissions, in line with the framework principles

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Rio Declaration on environment and development, A/CONF.151/26 (Vol. I) 12 August 1992.

43 *Cit. Supra.*

44 *Cit. Supra.*

on human rights and the environment.[45] In his 2019 report, the same Special Rapporteur warned about the global climate emergency, the effects of climate change on the enjoyment of human rights, and the human rights obligations related to climate change, highlighting the situation of populations that are socially, economically, culturally, politically, and institutionally marginalized, including those whose vulnerability is caused by poverty, gender, age, disabilities, geography, or cultural or ethnic context.[46]

In that same year, 2019, the Committee on the Elimination of Discrimination against Women, the Committee on Economic, Social and Cultural Rights, the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, the Committee on the Rights of the Child, and the Committee on the Rights of Persons with Disabilities jointly issued a declaration recognizing that:

> "...State parties have obligations, including extra-territorial obligations, to respect, protect and fulfil all human rights of all peoples. Failure to take measures to prevent foreseeable human rights harm caused by climate change, or to regulate activities contributing to such harm, could constitute a violation of States' human rights obligations."[47]

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45 Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, 24 January 2018, A/HRC/37/59. Available at: https://documents.un.org/doc/undoc/gen/g18/017/42/pdf/g1801742.pdf.

46 Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, 15 July 2019, A/74/161. Available at: https://documents.un.org/doc/undoc/gen/n19/216/42/pdf/n1921642.pdf.

47 Joint Statement on "Human Rights and Climate Change", HRI/2019/1: Committee on the Elimination of Discrimination Against Women, Committee on Economic, Social and Cultural Rights, Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, Committee on the Rights of the Child, Committee on the Rights of Persons with Disabilities, 16 September 2019. Available

It has been precisely in this process of climatization of human rights that significant advances have been made in the link between environmental degradation, the climate crisis, and human rights. Thus, on October 2, 2021, the United Nations Human Rights Council recognized "the right to a safe, clean, healthy, and sustainable environment as an important human right for the enjoyment of human rights"[48]. In this Resolution, it is also stated that:

> "…the effects of climate change (…) interfere with the enjoyment of a safe, clean, healthy, and sustainable environment, and that environmental damage has negative repercussions, both direct and indirect, on the effective enjoyment of all human rights," and that "environmental degradation, climate change, and unsustainable development are some of the most urgent and serious threats to the ability of present and future generations to enjoy human rights, including the right to life."

From the first process, we derive the obligation of states to adopt effective measures to mitigate climate change and ensure that all individuals have the capacity to adapt to the climate crisis. However, from the climatization of human rights, there is also the duty of care and due diligence that states have towards individuals to prevent harm and ensure overall well-being in a context of climate emergency, especially considering the need to guarantee the right to a healthy and clean environment, which is undoubtedly part of this duty of care.

While both processes—the humanization of the international climate regime and the climatization of human rights—have contributed to the strengthening of human rights, their reinterpretation through the lens of climate justice may allow for the identification of states' climate obligations, as will be analysed in the following section.

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at: https://www.ohchr.org/en/statements/2019/09/five-un-human-rights-treaty-bodies-issue-joint-statement-human-rights-and.

48 UN Res. A/HRC/48/L.23/Rev.1/. See also Resolution adopted by the General Assembly on 28 July 2022, A/RES/76/300, 28th July 2022.

5. CLIMATE JUSTICE AND THE IDENTIFICATION OF STATES' CLIMATE OBLIGATIONS

The incorporation of the climate justice paradigm into the aforementioned processes allows for the identification of a series of legal obligations for states, particularly regarding individuals in vulnerable situations who are more exposed to climate risks and damages and are disproportionately affected by climate change.

In the task of identifying states' climate obligations from the perspective of climate justice, it is essential to consider the dimensions of environmental justice, as previously examined, in a context of climate emergency.[49]

In this regard, the analysis should be conducted from (1) the distributive dimension, which allows for the identification of obligations aimed at ensuring equity in the distribution of atmospheric resources and the assumption of climate debt; (2) the recognition dimension, where the establishment of climate obligations takes into account socio-structural climate vulnerability (the weight of inequalities); (3) the procedural dimension, which determines obligations that guarantee equity in the administration of justice to resolve disputes and allocate resources (democratic participation); and (4) the restorative dimension, which includes obligations to protect the rights of victims of climate change (the right to know, the right to justice, and the right to reparation).

Thus, from each of these dimensions of climate justice, the four categories of climate obligations attributable to states are articulated, which this study will now examine: distributive climate obligations derived from the burdens and benefits of climate change; recognition climate obligations; procedural climate obligations; and restorative climate obligations (responsibility and reparation).

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[49] Social and ethic dimension: Equity- Fairness Non- discrimination Recognition of Injustice Solidarity Dignity Responsibility Bali Principles on Climate Justice (International Climate Justice Network 2002).

5.1. Distributive climate obligations: from emission rights to mitigation obligations

This dimension of justice deals with how the costs and benefits of climate change are calculated and how social goods and harms are allocated, from a temporal and spatial perspective.[50] According to Ikeme, it could be summarized at three levels: the distribution of impacts, the distribution of responsibility, and the distribution of costs and benefits.[51] However, all these levels, which reflect distributive inequalities, are characterized by the fact that they all converge in their temporal and spatial nature and in the content that substantiates unjust distribution, contributing to a distributive conflict that has not yet been legally resolved.

a) The temporal and spatial nature of distribution

From this perspective, it is important to consider that the climate crisis has historical roots that persist to this day.[52] Between 1850 and 2002, Global North countries emitted three times more greenhouse gas emissions than Global South countries,[53] where approximately 85% of the world's population resides. Even today, the average CO2 emissions (metric tons per capita) of populations

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50 McCauley, Darren, Heffron, Raphael, Hannes, Stephan, Jenkins, Kirsten (2013), "Advancing Energy Justice: The Triumvirate of Tenets", in *International Energy Law Review*, 32.3, p. 107-110.

51 Ikeme, Jekwu (2003), "Equity, environmental justice and sustainability: incomplete approaches in climate change politics", in *Global Environmental Change*, 13, p. 195-206.

52 Meyera, Lukas H., Roserb, Dominic (2017), "Climate justice and historical emissions", in *Intergenerational Justice*, Routledge, p. 469-494.

53 The Global South is a term often used to identify regions within Latin America, Asia, Africa and Oceania. Other terms used have been "Third World" and "Periphery", denoting regions outside Europe and North America, most (though not all) of these countries are low-income and, often, politically or culturally marginalized; the rest being the countries of the Global North (often equated with developed countries). See Anand, Ruchi (2017). *International Environmental Justice: A North-South Dimension* (1st ed.). Routledge, p. 1.

in countries most vulnerable to the impacts of climate change,[54] such as Mozambique (0.3), Malawi (0.1), and Zimbabwe (0.9), are insignificant compared to the average emissions of a person in the United States (15.5), Canada (15.3), Australia (15.8), or the United Kingdom (6).[55]

Injustice is not only caused by per capita emissions, but also, according to data from the Global Carbon Project, there is a significant difference between territorial emissions (those generated within the same territory) and consumption emissions (which include the emissions associated with imported consumer goods, not accounted for in the global emissions total).[56] For example, in 2018, the European Union (EU) was responsible for 9% of global emissions at a territorial level and 12% at a consumption level. This is linked to the outsourcing of production: between 2002 and 2019, the EU more than quadrupled imports from China, which, in the latter year, accounted for 20.5% of EU imports. Therefore, it is not valid to have a positive view of emissions that may be reduced at the territorial level without considering the external responsibility of the EU, especially now, with such a globalized and outsourced economy in the Global South.[57]

From a spatial perspective, the distribution of climate impacts leans towards regions with lower adaptive capacity. According to Neil Adger, the impacts of climate change are and will be differentiated spatially and socially, contributing in both cases

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54 Puaschunder, Julia (2020), "Mapping climate justice", in *Governance & Climate Justice: Global South & Developing Nations*, p. 23-38.

55 Hargrove, Andrew, Qandeel, Mais, Sommer, Jamie M. (2019), "Global governance for climate justice: A cross-national analysis of CO2 emissions", in *Global Transitions*, 1, p. 190-199.

56 CO2 emissions data are sourced from the Global Carbon Project: Global Carbon Project. (2020). Supplementary data from Global Carbon Budget 2020 (Version 1.0) [Data set]. Global Carbon Project. https://doi.org/10.18160/gcp-2020.

57 Puaschunder, Julia (2020), *cit. supra.*

to the poorest suffering disproportionate impacts, with many surviving on less than 2 dollars a day and generating almost no greenhouse gas emissions[58]. Thus, Africa will be the most affected, with climate damages amounting to several percentage points of its gross domestic product in the event of a 2°C increase in average global temperature. In Asia, around one billion people face risks from reduced agricultural yields, diminished water supply, and increased extreme weather events.[59]

b) The substantive nature of distribution

The substantive analysis of distribution allows for the consideration of injustice in the allocation of burdens arising from the division of remaining emissions, mitigation and adaptation costs, including lost opportunities and compensation for those who have been unjustly harmed.[60] That is, from a climate justice perspective, it is not enough to analyse greenhouse gas emissions, but we must also analyse the unequal distribution of benefits and privileges generated by the economic growth responsible for increasing precariousness among large sectors of the population, the climate crisis, and countless injustices. This analysis helps to determine that the costs of actions to mitigate or adapt to climate change should fall proportionately on those who have played the largest role in contributing to these damages. Moreover, those who have benefited from an injustice that causes harm to others

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58 Adger, Neil (2001), "Social Capital and Climate Change", in *Tyndall Centre for Climate Change Research Working Paper* 8. Norwich, UK: University of East Anglia.

59 Schneider, S.H., S. Semenov, A. Patwardhan, I. Burton, C.H.D. Magadza, M. Oppenheimer, A.B. Pittock, A. Rahman, J.B. Smith, A. Suarez, F. Yamin. *Assessing Key Vulnerabilities and the Risk from Climate Change*, in *Climate Change 2007: Impacts, Adaptation and Vulnerability.* M.L. Parry, O.F. Canziani, J.P. Palutikof, P.J. van der Linden, and C.E. Hanson, eds. Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change. Cambridge, UK: Cambridge University Press, 2007, pp. 790ss.

60 Moss, Jeremy (ed.) (2018), *Climate Change and Justice*, Cambridge: CUP.

have a duty to compensate them for the value of the benefit obtained, whether through the recognition of losses and damages caused[61] or through the carbon debt that wealthier countries owe to poorer ones.[62]

The material analysis of distributive inequality reveals how the current economic system and consumption patterns are characterized by a concentration of power, exercised by those responsible for environmental degradation and injustices, creating a sacrifice zone and a privilege zone. The sacrifice zone, as Bullard explains, represents "a problem of Environmental Justice and exposes how inequitable environmental burdens have been concentrated in marginalized sectors of society based on socioeconomic status and race, primarily".[63] Similarly, the 2022 Report by the United Nations Special Rapporteur on human rights and the environment on the right to a non-toxic environment states that, while "all human beings are exposed to pollution and toxic chemicals, there is compelling evidence that the burden of pollution falls disproportionately on people, groups, and communities that already bear the weight of poverty, discrimination, and systemic marginalization", with women, children, minorities, migrants, indigenous peoples, the elderly, and people with disabilities bearing increased vulnerability.[64] The Rapporteur also highlights that some communities are extremely

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61 Roberts, Erin, Huq, Saleemul (2015), "Coming Full Circle: The History of Loss and Damage Under the UNFCCC", in *International Journal of Global* Warming 8.2, p. 141-157 and Roberts, Erin, Pelling, Mark (2019), "Loss and Damage: An Opportunity for Transformation?", in *Climate Policy*, p. 1-14.

62 Moss, Jeremy (ed.) (2018), *cit. supra.*

63 **Bullard, Robert D. (2000),** *Dumping in Dixie: Race, Class, and Environmental Quality***, Westview Press, 3rd (Third) edition.**

64 A/HRC/49/53: Right to a clean, healthy and sustainable environment: the non-toxic environment - Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, 12 January 2022, p. 7-8. See also Lopes de Souza, Marcelo (2021), "'Sacrifice zone':

exposed to pollution and toxic substances in their places of residence, leading them to be referred to as "sacrifice zones", which would include populations affected by both the causes (anthropogenic activities generating GHGs) and consequences of climate change (risks, disasters, damages, and losses resulting from climate change). Specifically, the sacrifice zones are described as:

> "[A] place where residents suffer devastating consequences to their physical and mental health and violations of their human rights as a result of living in pollution hotspots and highly contaminated areas. The climate crisis is creating a new category of sacrifice zones due to the uncontrolled emission of greenhouse gases, as the lands of these communities have become, and continue to become, uninhabitable due to extreme weather events or slow-onset disasters, such as droughts and rising sea levels".[65]

Privilege zones, on the other hand, are those associated with populations in countries that have benefited from the economic development driven by fossil fuels and colonialism, and now occupy privileged positions, with the best capacities to adapt to the negative effects of the development they have helped create and from which they have benefited, including, among other things, a changed climate. This privilege zone also includes, for example, the few multinational corporations—around one hundred globally (known as carbon majors)—responsible for 71% of global GHG emissions since 1988, which contribute to global warming.[66] More generally, the following paradox arises: the richest 10% of the world's population (privilege zone) produces nearly as many GHG emissions as the poorest 90% (sacrifice zone) .[67] According to Oxfam, while this richest 10%

The environment–territory–place of disposable lives", in *Community Development Journal*, Vol. 56, Issue 2, p. 220–243.

65 A/HRC/49/53, *Ibid.*

66 Carbon Disclosure Project, *The Carbon Majors Database*. See also GRAIN, IATP (2018), *Emissions Impossible—How Big Meat and Dairy Are Heating up the Planet.*

67 Motesharrei, Safa, Rivas, Jorge, Kalnay, Eugenia et al. (2016), "Modelling sustainability: population, inequality, consumption, and bidirectional

of the world causes 50% of emissions, it also concentrates 52% of the world's wealth. The poorest 50% of the world contributes approximately 10% of global emissions and receives around 8% of global income. According to Diffenbaugh and Burke, most impoverished countries are significantly poorer because of climate change, while most wealthy countries are richer thanks to it.[68] Undoubtedly, wealth increases the capacity for adaptation and resilience, and in turn, the carbon footprint. All this means that the concentration of power rests with the main contributors to climate change, who are relatively insulated from its impacts but legitimize their decisions through the power they hold, creating serious repercussions for the majority of the population living in sacrifice zones, which are identified with the world's poorest populations.

Furthermore, the foundation of this GHG-emitting economic system lies in extractivism, which has not only environmental but also negative economic and social consequences for the states that supply fossil fuels and now bear significant eco-social impacts. For example, in July 2020, the Environmental Justice Atlas recorded 310 conflicts related to the extraction of minerals and coal, a total representing 35% of all environmental conflicts in the Latin American region,[69] with a worrying increase in violence against human rights and environmental defenders who denounce the effects of large-scale industrial extractive projects on human health, biodiversity loss, land grabbing, and water pollution. Indigenous community members are particularly vulnerable to this violence.[70]

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coupling of the Earth and Human Systems", in *Natural Science Review*, 3(4), p. 470-494.

68 Diffenbaugh, Noah S., Burke, Marshall (2019), "Global warming has increased global economic inequality", in *PNAS* 116, p. 9808-9813.

69 *Environmental Justice Atlas*. Available at: https://ejatlas.org/.

70 Global Witness (2022), *A decade of resistance*. Available at: https://www.globalwitness.org/es/decade-defiance-es/.

All these realities stemming from the climate crisis (and its unequal effects) are linked to two historical systems and projects that remain relevant today: capitalism and colonialism. Both have been decisive in generating inequality and in shaping the systemic nature of the climate crisis, and it is essential to consider them not only to better understand the political challenge the climate crisis represents but also to demand the shifting of climate burdens onto those responsible for the crisis.

In this context, it is essential to recognize that the impacts are disproportionately borne by those who have traditionally been socially, economically, and politically excluded from the benefits of modern society. These impacts are largely felt in the most impoverished—or "developing"—countries (according to UNFCCC terminology[71]), where the politically and historically constructed economic and social inequities within their communities exacerbate the increasingly severe effects of climate change. Moreover, scientists are revising their estimates, warning that even current levels of atmospheric warming will lead to much greater population exposure to rising sea levels and coastal flooding than previously predicted. In this sense, countries that have contributed the least to increasing the risk of these effects—and whose adaptive capacity has been diminished due to slavery, colonialism, and neoliberal economic policies—should not be left to bear the greatest climate costs.

In short, the benefits of the current lifestyle, production, and consumption patterns of present generations, especially the most privileged in the Global North, are in conflict with the rights of present generations, mostly in the Global South, and also in conflict with the rights of future generations,[72] who also share these sacrifice zones.

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71 United Nations Framework Convention on Climate Change, New York, 9th May 1992, UNTS, vol. 1771, No. 30822, p. 107.

72 Page, Edward A. (2007), *Climate Change, Justice and Future Generations*. Edward Elgar Publishing, Cheltenham.

Thus, in determining legal obligations, restoring justice from a distributive perspective would require placing the greatest burdens on Global North countries in terms of climate action, including the transfer of resources and technology from the North to the South to facilitate the adaptation of Southern countries. This determination is based not only on ethical principles but also on one of the key principles of the UNFCCC, the "Common but Differentiated Responsibilities and Respective Capabilities" (CBDR-RC) (Article 3.1), also included in the Paris Agreement, which states that "The Parties should protect the climate system... in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change." This means that, while all countries are obligated to take action against climate change, the type of actions they take will depend on their different national circumstances. In other words, this CBDR-RC principle requires that (1) States historically responsible for emissions and environmental damage must be accountable for the solution(s) to these issues; (2) States with greater financial and technological capacity should bear a larger share of the burden of action; (3) And the responsibility for climate change should be a shared burden, requiring non-state actors to address the moral, financial, and governance gaps.

The articulation of these obligations is justified in order to meet the primary objective of the UNFCCC, which is "the stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system" (Article 2). Article 4.2 of the Convention establishes that Annex I Parties commit to adopting national policies and implementing the corresponding measures to mitigate climate change by limiting anthropogenic GHG emissions and protecting carbon sinks. Additionally, Article 3 emphasizes the need to prevent harm, particularly highlighting the precautionary principle, which states that "the lack of full scientific certainty should not be used as a reason for postponing such measures".

In this regard, it is worth citing the Vienna Convention on the Law of Treaties (1969),[73] according to which Article 2 of the UNFCCC must be interpreted literally (Article 31.1). This means there is an obligation to prevent dangerous anthropogenic interference with the climate system, and this obligation is attributed to Annex I Parties. Furthermore, these same Parties must refrain from actions that could defeat the purpose and objective of the treaty (Article 18).[74]

5.2. Climate Obligations of Recognition

The dimension of recognition is related to both the procedural and distributive dimensions, but it focuses specifically on the recognition of difference, in line with Nancy Fraser's concept.[75] Recognition refers to an ideal reciprocal relationship between subjects, in which each sees the other as an equal. In other words, this dimension of climate justice involves identifying individuals in contexts of vulnerability, which can be exacerbated. Recognition entails identifying and understanding differences, as well as protecting them. In this regard, it requires acknowledging how the current human-induced global temperature rise has already caused unprecedented changes to the climate system, with severe consequences for people and ecosystems in all regions of the planet. These impacts disproportionately affect the poorest, most vulnerable, and historically marginalized communities—primarily in highly vulnerable regions of the Global South.

Indeed, this population represents a much larger and more diverse group that has long been, and continues to be, exploited and sacrificed in the development processes that have led to

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73 United Nations (1969), Vienna Convention on the Law of Treaties, United Nations, Treaty Series, vol. 1155, p. 331, 23 May 1969.

74 UNFCCC (1992), *Cit, supra.*

75 Fraser, Nancy (2000), "Rethinking Recognition", in *New Left Review*, 3: 107.

climate change. Given their pre-existing disadvantage, as well as their geographic exposure to climate vulnerability[76], this population faces an even more vulnerable context due to the added burden of feedback loops from the capitalist economy on the global climate. Thus, as previously noted in the distributive dimension of climate justice, despite contributing little to climate change and already suffering from the exploitative processes that drive it, the majority of the world's population will bear the worst effects, lacking the sufficient capacities and resources to cope with its impacts.

As previously analysed, the condition of climate vulnerability is determined by intersecting factors and situations of privilege. Among the most vulnerable to climate change are members of minority and indigenous groups, the elderly, people with chronic illnesses and disabilities, and low-income individuals living in marginalized areas.[77] Socio-structural discrimination, unequal power relations, and eco-dependence shape the capacities and resilience of individuals to the effects of climate change. For example, climate change will make it more difficult for women and girls to fulfil their socially assigned roles of collecting water, food, and fuel for their households in the poorest countries. Likewise, indigenous and native peoples, who are closely tied to the natural

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76 As the IPCC has already pointed out, almost half of the world's population now lives in areas that are highly exposed and vulnerable to climate change and see their lives and livelihoods highly threatened. See Parry, Martin L., Canziani, Osvaldo F., Palutikof, Jean P., Van Der Linden, Paul J., Hanson, Clair E. (eds) (2007), IPCC, *Climate Change 2007: Impacts, Adaptation and Vulnerability*. Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change, Summary for Policymakers, eds., Cambridge University Press, Cambridge, p. 7-22.

77 Islam, S. Nazrul, Winkel, John (2017), "Climate change and social inequality", in *DESA Working Paper*, No. 152.

environment, are likely to experience disproportionate physical losses as well as spiritual losses and loss of well-being.[78]

Moreover, people in these communities will lack the resources to adapt to climate change and cushion its blows. There is concern, therefore, that intranational socioeconomic disparities between affluent and disadvantaged groups could enter a self-reinforcing vicious cycle due to the impacts of climate change, where initial inequality causes disadvantaged groups to suffer disproportionately, leading to even greater inequality afterward. Evidence of this reality can be seen, for example, in the fact that eight of the ten countries most affected by the quantifiable impacts of extreme weather events in 2019 belonged to the low- to lower-middle-income category, and half were least-developed countries.[79]

From the perspective of climate justice, recognition must have significant legal implications, as acknowledged in Article 3.2 of the UNFCCC, which states that the varying degrees to which Parties will be affected by climate change and by the measures to implement the Convention should:

> "(…) take full account of 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".[80]

The obligation of recognition also entails respecting, promoting, and considering obligations related to human rights and the legal protection of vulnerable groups: the rights of indigenous peoples, rural and farming communities, migrants, children, persons with

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78 Baird, Rachel (2008), "The impact of climate change on minorities and indigenous peoples", in *Minority Rights Group International,* London, p. 1-12.

79 Relief Web. *Global climate risk index 2021.* Available at: https://reliefweb.int/report/world/global-climate-risk-index-2021.

80 *Cit. supra.*

disabilities, and those in vulnerable situations, as well as the right to development, gender equality, the empowerment of women, and intergenerational equity.

5.3. Procedural Climate Obligations

The procedural dimension of climate justice constitutes a normative judgment about the fairness of the decision-making process. It fundamentally aims to ensure that decision-making processes are fair, accountable, and transparent, even in the context of responding to climate change through mitigation and adaptation actions. Fair procedures are important for regulating the distribution of goods and climate financing, following the principles of transparency and accountability. This can include access to information, access to and meaningful participation in decision-making, the absence of bias from decision-makers, and access to legal procedures. In general, procedural justice focuses on identifying who plans and formulates standards, laws, policies, and decisions, and who is included and can voice opinions in those processes.[81] That is, this dimension of climate justice allows us to establish that the distribution of costs and benefits of atmospheric resources can only be equitable, and therefore just, if it derives from a process agreed upon by all parties. Thus, this process, recalling Rawls, must be as broad as possible to be just and generate a fair outcome. Therefore, a decision-making process is considered fair if it is based on a democratic foundation in which all affected individuals have the opportunity to be informed and participate, express their opinions, and influence decisions.

Specifically, procedural justice applied to climate change would include: the ability of developing countries to participate in

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81 Oxfam/PlanAdapt, IDRC (2020), *Guide on Climate Justice in Gender and Youth Engagement*. See also Gauna, Eileen (1998), "The environmental justice misfit: public participation and the paradigm paradox", in *Stanford Environmental Law Journal*, 17 (1), p. 1-87.

the UNFCCC,[82] the legitimacy of the norm adoption processes,[83] transparency as a procedural norm,[84] and the capacity to politically articulate their own opinions and interests.[85] Considering these elements, at a global level, however, there has been an asymmetric concentration of political and economic power, which has been a significant cause of the various ongoing crises, including the climate crisis. The distribution of power influences how goods (e.g., clean air), environmental issues (e.g., pollution), and, above all, decision-making are valued and distributed within national borders.[86] In this sense, there are a number of generic procedural barriers to effective participation that reduce the likelihood that developing countries can enhance the responsiveness of climate change negotiations to their fundamental concerns. Inequalities in capacity and participation mean that most governments of developing countries are not even able to be continuously present throughout the negotiation process, let alone adequately represent the interests of their citizens in areas where the demands and needs for legal and scientific knowledge are high.[87] Thus, in

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82 Paavola, Jouni, Adger, W. Neil (2006), "Fair adaptation to climate change", in *Ecological Economics*, 56, p. 594-609. See also Tomlinson, Luke (2015), *Procedural Justice in the United Nations Framework Convention on Climate Change*, Springer International Publishing, Cham.

83 Biermann, Frank, Gupta, Aarti (2011), *Accountability and legitimacy in earth system governance: a research framework*, in *Ecological Economics*, 70, p. 1856-1864.

84 Brandstedt, Eric, Brülde, Bengt (2019), "Towards a theory of pure procedural climate justice", in *Journal of Applied Philosophy*, 36, p. 785-799.

85 Grasso, Marco, Sacchi, Simona (2015), "Impure procedural justice in climate governance systems", in *Environmental Values*, 24, p. 777-798.

86 Adger, W. Neil *et al.* (2011), "This must be the place: underrepresentation of identity and meaning in climate change decision-making", in *Global Environmental Politics*, 11 (2), p. 1-25.

87 Newell, Peter, Srivastava, Shilpi, Naess, Lars Otto, Torres Contreras, Gerardo A., Price, Roz (2020), *Towards Transformative Climate Justice: Key Challenges and Future Directions for Research*, IDS Working Paper 540, Brighton: Institute of Development Studies, p. 41 ss.

order to increase their participation in the response to climate change, countries in the Global South, which have remained on the periphery of the decision-making process, argue that the justice or fairness of an outcome depends on the legitimacy of the process followed and, therefore, on the respect and realization of procedural justice.

Among the procedural climate obligations that States must assume are the following: (1) to assess climate impacts and make the information public; (2) to facilitate meaningful participation in climate policy negotiations and decision-making, also protecting the rights to freedom of expression and association; and (3) to provide access to remedies in the event of suffering damages from climate impacts.

5.4. Climate Restoration Obligations: Responsibilities and Reparations

The most vulnerable states to climate change have long argued that it is the industrialized countries and their history of overexploitation and pollution that are responsible for the climate crisis. Consequently, it is they who should address the problem and compensate for the resulting damages, based on the recognition of their responsibilities as perpetrators of climate harm. In this regard, it is necessary to establish the legal determination to transition from the ethical-moral question to the effectiveness of these responsibilities.

In this sense, the foundation lies in Public International Law, through a well-established principle that states, "Any violation of an international obligation that has caused harm entails the duty to adequately repair it." This principle has been proclaimed on various occasions by international jurisprudence.[88] Thus, the

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[88] For example, the Permanent International Court of Justice in the Morocco Phosphate Case (Preliminary Objections), 1938 P.C.I.J. Series A/B, No. 74 or in the Chorzow Factory Case (Merits), 1928, P.C.I.J.

climate emergency is attributed to the developed Annex I States, which are failing to comply with the conventional normative postulates of the UNFCCC. They also violate the customary obligation contained in Principle 21 of the Stockholm Declaration[89] and Principle 2 of the 1992 Rio Declaration on Environment and Development,[90] which states that states have the "responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or areas beyond the limits of national jurisdiction". The lack of control by states over activities producing greenhouse gas emissions in their territory or under their control causes significant climate harm to other states, thereby violating international law.

Thus, the legal implications of the restorative dimension are determined by interpreting rights and obligations in the context of the climate emergency in light of various responsibilities and vulnerabilities. This specifically involves: asserting climate rights and duties; differentiated treatment in the common commitment; compensations/reparations for losses and damages (restorative justice); and the determination of responsibilities.

a) Responsibilities in Climate Solutions

Specifically, the equitable allocation of responsibilities and solutions is a central issue in the Paris Agreement,[91] which highlights "the intrinsic relationship between measures, responses, and impacts generated by climate change and equitable access

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Series A, No. 17, Series A/B, No. 74 or in the Chorzow Factory Case (Merits), 1928, P.C.I.J. Series A, No. 17. Also, the International Court of Justice in: The Corfu Canal Case (Merits), I.C.J. Reports 1949; the Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), I.C.J. Reports 1986, or the Case concerning the Gab- íkovo-Nagymaros Project (Hungary/ Slovakia) I.C.J. Reports 1997, among others.

89 UN General Assembly, *United Nations Conference on the Human Environment*, A/RES/2994, UN General Assembly, 15 December 1972.

90 *Cit. supra.*

91 United Nations *Treaty Series*, vol. 3156.

to sustainable development and poverty eradication." Thus, the implementation of this Agreement is directed at all countries, which must commit to taking actions to reduce greenhouse gas emissions in terms of mitigation and to improve the resilience of national societies in terms of adaptation, by submitting their 'Nationally Determined Contributions' in order to achieve the common goal of keeping the increase in global average temperature below 2°C and to pursue efforts to limit it to 1.5°C above pre-industrial levels. The universality of climate action and commitment seems to be balanced by the need for this implementation to be based on "the principles of equity and common but differentiated responsibilities and respective capacities, in light of different national circumstances." Therefore, according to Article 5, "support shall be provided to Parties that are developing countries for the implementation of this Article." Additionally, it is assumed that "least developed countries and small island developing states may prepare and communicate strategies, plans, and measures… that reflect their special circumstances" (Article 6); and finally, that "in implementing this Agreement, Parties shall take into account the concerns of those Parties whose economies are most affected by the impacts of response measures, particularly those that are developing countries" (Article 4.15).

One possibility for legally translating climate justice would be based on the need for international law to provide legal frameworks that address the direct effects of climate change, such as droughts, floods, energy security, water scarcity, food scarcity, poverty, and unemployment, particularly recognizing the current circumstances of small island states, which bear a disproportionate burden of the effects of climate change, and the need to protect the human rights of their peoples. This stems from the principle of assigning responsibilities for climate change to countries based on their historical emissions, which is not the case in the Paris Agreement, where universally shared actions are expected, overlooking inequalities as a starting point. These responsibilities, primarily assigned to privileged states, should predetermine legal responses to climate change, including the

need to incorporate financing and compensation mechanisms as part of the international climate change regime and ensure the equitable distribution of the global burden of climate action based on the unequal load.

The IPCC itself, in its latest reports, has found that delays in emission reductions will greatly worsen not only the impacts of climate change but also climate injustices.[92] The 1.5-degree report, for example, emphasizes that climate change is a matter of ethics and calls on society to address the human rights of the dispossessed, "including their rights to water, housing, food, health, and life".[93] In other words, it is about translating the ethical objective into one that is legally just.

The previous comments evoke an idea of climate justice, in terms of climate debt, which involves assigning countries responsibilities proportional to their historical emissions, in accordance with the principle of common but differentiated responsibilities. This includes recognizing the historical differences in the contributions of privileged countries to global environmental issues, as well as differences in their contributions to greenhouse gas emissions and their respective economic and technical capacities to address these problems. Adaptation is not possible nor is it likely to occur in contexts of climate vulnerability. Therefore, the determination of responsibilities through the recognition of climate debt has two fundamental implications for achieving climate justice: repairing the damages caused by climate change and redistributing the resources necessary for mitigating and adapting to its effects.

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92 IPCC (2022), *cit. supra.*

93 IPCC (2019), *Climate Change and Land: an IPCC special report on climate change, desertification, land degradation, sustainable land management, food security, and greenhouse gas fluxes in terrestrial ecosystems* [P.R. Shukla, J. Skea, E. Calvo Buendia, V. Masson-Delmotte, H.- O. Pörtner, D. C. Roberts, P. Zhai, R. Slade, S. Connors, R. van Diemen, M. Ferrat, E. Haughey, S. Luz, S. Neogi, M. Pathak, J. Petzold, J. Portugal Pereira, P. Vyas, E. Huntley, K. Kissick, M. Belkacemi, J. Malley, (eds.)].

These consequences derive from one of the principles of environmental law, namely the 'polluter pays' principle, which asserts that burdens should be borne in proportion to how much an agent has emitted.[94] This would imply, under certain conditions, holding agents accountable for their actions. However, in its application within the climate change regime, certain issues arise, such as the difficulty of establishing a causal link between the emitter and the damage, especially when there are many emitters historically and currently contributing to global warming. There is also the ignorance that their emissions could cause these effects, due to a lack of scientific evidence. While it is difficult to specify exactly when ignorance can no longer be claimed as excusable, what is important, according to Singer, is that there are limits to how far one can claim excusable ignorance.[95] Furthermore, based on climate justice, it would be fair to attribute burdens to those who were excusably ignorant of the harms caused by their emissions, particularly if those emitters sufficiently benefited from them. The general idea is that, although someone may reasonably complain that it is unfair to penalize them for having contributed without fault to a harm, their argument significantly weakens if it can be shown that the harmful activity has provided them with benefits. If they have benefited, making them pay would not be so burdensome and might not leave them in a worse position than if they had not emitted.[96]

Another objection regarding the evasion of responsibilities relates to the fact that historical emitters are no longer alive, and it would be unjust to assign these historical responsibilities to present actors. In response to this argument, it is argued that the emissions occurred within a state, which is responsible for the

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94 Shue, Henry (2014), *Climate Justice: Vulnerability and Protection*, Oxford: Oxford University Press, p. 182-186.

95 Singer, Peter (2002), *One World: The Ethics of Globalization*, Yale University press, p. 34.

96 Gosseries, Axel (2004), "Historical Emissions and Free-Riding", in *Ethical Perspectives* 11 (1), p. 36-41.

activities carried out in its territory or under its control. Thus, what a state emitted in the past, that same state should pay for now. Additionally, the previous argument based on the benefits of industrialization is sufficient to respond to this objection, in the sense that certain states currently and in the future enjoy the benefits derived from previous emission-generating activities and, therefore, have the obligation to pay at least part of the costs incurred in their production.[97]

In any case, unlike what the Paris Agreement proposes, the allocation of responsibilities cannot be unfairly shifted to the most impoverished populations, who cannot and should not bear the cost of greenhouse gas emissions, especially if a decent standard of living cannot be guaranteed.

b) Climate Reparations

Another way to legally translate climate justice is to assume the consequent climate reparations for those identified as responsible for generating the climate emergency. In terms of reparations, one of the crucial points at COP21 in 2015 was the inclusion of loss and damage in the Paris Agreement[98] as an independent pillar of mitigation and, primarily, adaptation (Art. 8), in contrast with how it had been previously conceived. In Article 8, States recognize the importance of avoiding, minimizing, and addressing loss and damage, and they take on the discretionary obligation to improve understanding, action, and support on a cooperative and facilitative basis regarding loss and damage. It is important, however, to remember that Article 8 of the Paris Agreement does not imply or give rise to any form of legal responsibility or

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97 Neumayer, Eric (2000), "In defence of historical accountability for greenhouse gas emissions", in *Ecological Economics* 33 (2), p. 189. Also see Shue, Henry (2014), *Climate Justice: Vulnerability and Protection.* Oxford University Press, p. 186; Gosseries, Axel, *ibid.,* p. 41-55.

98 Mace, M.J., Verheyen, Roda (2016), "Loss, Damage and Responsibility after COP21: All Options Open for the Paris Agreement", *in Review of European, Comparative and International Environmental Law,* 25: 197-214. https://doi.org/10.1111/reel.12172.

compensation.[99] Therefore, support for climate loss and damage remains entirely voluntary, focusing on financing without the expected assumption of climate responsibilities by privileged states. Additionally, any reference to loss and damage is carefully omitted in Article 9, which is dedicated to financing, where it is clarified that:

> "Financial resources provided to developing countries should enhance the implementation of their policies, strategies, regulations, and action plans and measures to address climate change with respect to both mitigation and adaptation, thus contributing to the achievement of the purpose of the Agreement, as defined in Article 2."

In this sense, it does not appear that the postulates of the Rio Declaration of 1992 have been followed, and once again, the responsibilities of debtors are rendered invisible, despite the reference to "climate justice" in the preamble of the Paris Agreement.

The obligation of climate reparations, however, is justified by the principles of equity and fair treatment. The principle of fair treatment would imply that those who have contributed most to a harmful problem and have reaped its benefits have the obligation to rectify it.[100] According to Henry Shue, in the context of development and the environment, the onset of global warming due to the process of industrialization, which has enriched the Global North but not the South, serves as a clear example of this principle.[101] In response to those who argue that the current generation of industrialized states should not be held responsible for the damages caused by previous generations, Shue argues that contemporary generations are reaping the benefits of wealthy industrial societies and have continued to contribute to global

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99 See UNFCCC 'Decision 1/CP.21, Adoption of the Paris Agreement' UN Doc FCCC/CP/2015/10/Add.1 (29 January 2016) para 51.

100 Shue, Henry (1999), "Global environment and international inequality", in *International Affairs*, 75(3), p. 531-545.

101 *Ibidem.*

warming despite being aware of its harmful consequences.[102] In other words, as previously mentioned, the countries that have received the bulk of the historical benefits of industrialization and have enjoyed the greatest revenues from oil and gas extraction must bear the burden of financing reparations for the benefit of the most affected low-income countries, which have generally contributed little to the serious and lasting consequences of climate change. Thus, the wealthiest countries, according to Duus-Otterström, have a positive duty of assistance.[103]

With regards to the "principle of equity", this principle would be determined by the greater capacity to pay of certain parties. When applied to the climate crisis, this principle places the burden of equity on high-income countries, which are the most capable of paying for adaptation to the climate crisis, rather than on low-income countries, which are the least able to afford to become more resilient to climate risks. Furthermore, this principle also assigns at least part of the responsibility to large corporations engaged in the extraction and sale of fossil fuels. Additionally, Shue argues that this principle serves to prevent those who are already in worse situations from deteriorating further, as equity demands that individuals with less than enough for a decent human life receive what they need. Thus, countries implementing industrial processes harmful to the climate cannot ask low-income countries, which are poor largely because they have not industrialized, to make sacrifices to rectify the problem.[104]

Consequently, climate reparations would require raising funds and material resources from the governments of the countries primarily historically responsible for the climate crisis, including large fossil fuel extraction corporations for their role in contributing to climate change. These corporations have not only

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102 *Ibidem.*

103 Duus-Otterström, Göran (2014), "The problem of past emissions and intergenerational debts", in *Critical Review of International Social and Political Philosophy,* 17 (4), p. 448-469.

104 Shue, Henry (2014), *Climate Justice: Vulnerability and Protection, cit. supra.*

benefited economically over time but have also led campaigns for many years to deny the existence of human-induced climate change, funding scientists and lobbying groups, and when it became impossible to deny climate change's existence, they argued that the extraction and use of fossil fuels were not the cause.[105]

According to Chapman and Ahmed, these reparations would not consist of monetary compensation, but rather the provision of financial aid, resource transfer, and technical knowledge to vulnerable and low-income countries, as well as requiring all countries, particularly industrialized nations, to adopt carbon-free energy policies and ambitious climate actions.[106] This would be the accepted line by states in the Paris Agreement; however, neither the ethical-moral aspect of justice nor the transfer of resources is achieved. Additionally, it should be noted that decarbonization proposals can have a counterproductive effect, contributing to the persistence of climate injustice, especially when they involve false solutions imbued with progressive and egalitarian principles, such as the so-called "just transition" that seeks to decarbonize while ensuring "no one is left behind" without addressing the costs of decarbonization for sacrifice zones. To the extent that the transition from fossil fuels to less carbon-intensive forms of energy, such as solar and wind power, currently involves the extraction of a large amount of critical minerals for this task.

In this sense, the IPCC Report on Climate Change and Land[107] emphasizes the ethical complexity of both the impacts of climate change and the responses for mitigation and adaptation, as some proposed solutions for carbon reduction on land threaten

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105 Oreskes, Naomi, Conway, Eric M. (2010), *Merchants of Doubt: How a Handful of Scientists Obscured the Truth on Issues from Tobacco Smoke to Global Warming*. New York: Bloomsbury Press.

106 Chapman, Audrey R., Ahmed, A. Karim (2021), "Climate Justice, Humans Rights, and the Case for Reparations", in *Health Human Rights*, 23(2), p. 81-94.

107 IPCC (2018), *cit. Supra.*

to worsen climate injustice at local and regional levels unless great care is taken. Once again, the shadow of the climate aporia resurfaces when the supposed climate solutions appear to reproduce the systemic structures of inequality.

Ultimately, from this dimension of climate justice, the legal obligations that should be assigned to states (Annex I) include: the obligation to significantly reduce and/or eliminate the negative impact of climate change on human rights; the obligation to provide greater international support to Parties that are developing countries for the implementation of their adaptation measures [Article 7(13), Paris Agreement]; the obligation regarding the mobilization of climate finance, development and transfer of technologies, capacity building, long-term strategy, loss and damage, and to conserve and enhance the protection of greenhouse gas sinks and reservoirs, etc., as also outlined in the Agreement. In this sense, it is expected that this financial assistance will continuously increase in accordance with Article 9(3), and developed countries are obligated to communicate the details of the financial assistance provided to developing countries [Articles 9(5) and 9(7), Paris Agreement].

Additionally, another obligation is to provide greater international support to Parties that are developing countries for the implementation of their adaptation measures in accordance with Article 7(13) of the Paris Agreement. Similarly, the obligation regarding the mobilization of climate finance, development and transfer of technologies, capacity building, long-term strategy, loss and damage, and conserving and enhancing the protection of greenhouse gas sinks and reservoirs, etc., is also addressed in the Paris Agreement.

6. PERSISTENT BARRIERS TO ACHIEVING CLIMATE JUSTICE

Despite everything mentioned above, the truth is that the lack of transparency and inclusion in negotiations and climate

plans throughout international climate change negotiations has distanced the obligations of developed states from the concept of climate justice. While the Paris Agreement lays the groundwork for a transformation towards low carbon dioxide (CO2) emission development models, primarily for industrialized countries, and aims to strengthen the adaptive capacity and resilience of developing countries, its implementation is subject to various mechanisms ranging from economic resource transfers to voluntary commitments for reducing Nationally Determined Contributions (NDCs). While the most vulnerable countries have been demanding more financial and technical assistance from wealthy nations for decades, the reality is that in 2019-2020, the total contribution of climate-specific financing was only USD 40.2 billion, in stark contrast to the subsidies provided by states to fossil fuels (USD 7 trillion in 2022).[108] According to the UNEP Adaptation Gap Report for 2023, the costs of adaptation and financing needs for developing countries amount to approximately USD 387 billion annually for this decade.[109]

In this regard, there are still significant power differences among states, but transnational economic and power structures also play an important role in the concepts of justice and the environment that shape international climate governance. According to Okereke, "the conceptions of justice that closely

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[108] OECD (2021), *Amounts mobilised from the private sector for development.* Available at: https://www.oecd.org/dac/financing-sustainable-development/development-finance-standards/mobilisation.htm. See also OECD (2021), *Climate Finance Provided and Mobilised by Developed Countries: Aggregate Trends Updated with 2019 Data*, Climate Finance and the USD 100 Billion Goal, OECD Publishing, Paris, https://doi.org/10.1787/03590fb7-en and OECD (2022), *Aggregate Trends of Climate Finance Provided and Mobilised by Developed Countries in 2013-2020,* https://doi.org/10.1787/d28f963c-en.

[109] United Nations Environment Programme (2023). *Adaptation Gap Report 2023: Underfinanced. Underprepared. Inadequate investment and planning on climate adaptation leaves world exposed.* Nairobi. https://doi. org/10.5911 7/20.500.11822/43796.

align with the dominant neoliberal economic system" underpin the entire UNFCCC framework.[110] Thus, this author posits that there exists a 'climate colonialism' and 'carbon imperialism' that reflect the injustice of a North that demands the Global South leave its fossil resources underground for the sake of ambitious climate goals, while many wealthy countries continue to increase their use or export of oil and gas.[111] For many, achieving climate justice for the South involves dismantling the architecture and norms of global governance, the origins of which trace back to colonial relations between the North and the South.

The achievement of climate justice for the Global South also does not seem to be realized through so-called 'climate litigation,' despite the fact that it has been an increasing trend in many countries in recent years.[112]

According to UNEP, a case falls under the category of climate justice as long as it meets two requirements: (1) it must be substantiated before a judicial body (administrative instances are exceptionally considered in the count), and (2) the facts or legal claims must explicitly reference a law, public policy, or action directly related to climate change.[113] In general, climate litigation can be classified into the following categories: (1) violation of fundamental rights recognized in international instruments, constitutions, or domestic laws, as a result of insufficient mitigation and/or adaptation policies;[114] (2) domestic implementation of

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110 Okereke, Chukwumerije (2007). *Global Justice and Neoliberal Environmental Governance: Ethics, Sustainable Development and International Co-Operation* (1st ed.). Routledge. https://doi.org/10.4324/9780203940747, p. 115.

111 *Ibidem.*

112 Vilchez Moragues, Pau de (2022). "Panorama de litigios climáticos en el mundo", in *Anuario de la Facultad de Derecho de la Universidad Autónoma de Madrid*, p. 347-382.

113 UNEP (2023). Global Climate Litigation Report: 2023 Status Review. Nairobi.

114 The UN Committee on the Rights of the Child's Decision on Sacchi v Argentina, Communication 104/2019 Chiara Sacchi et al v. Argentina

commitments made upon ratifying international treaties (the most common being the UNFCCC and the Paris Agreement); (3) extractive projects for which claims are often made regarding adverse global effects that have occurred or may occur in terms of emissions, procedural flaws in environmental impact assessments, such as insufficient or non-existent access to information and/or public participation; (4) corporate liability;[115] (5) insufficient publication of climate information and/or greenwashing; and (6) lack of adaptation to the consequences of climate change.[116]

All of these litigations are part of a growing trend of cases in which plaintiffs seek to hold states or corporations accountable for inadequate climate action based on constitutional and human rights. However, the main question is whether climate justice can be achieved through these litigations. On the one hand, in most of these lawsuits, a reaffirmation of the protection of the rights of groups in a context of vulnerability is achieved, through the determination of the corresponding obligations of States to establish legal frameworks in accordance with the context of climate emergency. But, on the other hand, its dimension is usually internal, without transcending in a relationship between industrialized States and States in contexts of high vulnerability.[117]

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et al.

115 A Court in the Netherlands has ordered the oil and gas company Shell to comply with the Paris Agreement and reduce its carbon dioxide emissions by 45% by 2030 compared to 2019 levels. This is the first time that a court has found that a private company is subject to an obligation under the Paris Agreement. See *Milieudefensie et al. v. Royal Dutch Shell plc.*, C/09/571932 (The Hague District Court 2021).

116 Human Rights Committee 'Views Adopted by the Committee under Article 5 (4) of the Optional Protocol, Concerning Communication No. 3624/2019' UN Doc CCPR/C/135/D/3624/2019 (22 September 2022) (*Daniel Billy* Decision).

117 Thus, as of October 2021, 83 such cases had been filed with national agencies and another 19 cases with regional or international agencies. See Setzer, Joana, Higham, Catherine (2021), *Global trends in climate change litigation: 2021 snapshot*. London: Grantham Research Institute

Hence the importance of the intervention of international courts to achieve a boost a "justice-centred approach to climate change"[118] through international law.

7. CONCLUDING REMARKS

From the perspective of climate justice, the aim is to explain the unequal exposure to the effects of climate change, the differential responsibility for causing it, and the exclusions in decision-making, revealing that the planetary crisis involves climate discrimination and demands a common but differentiated responsibility. In this sense, climate justice offers new legal and political approaches to address climate change, which necessarily implies its inclusion in all dimensions when determining the legal obligations of states regarding climate change.

Thus, the integration of the various dimensions of climate justice generally requires linking human rights and development to address the pre-existing vulnerabilities and inequalities that contribute to climate change and are exacerbated by it. This means prioritizing those most vulnerable to climate impacts to ensure that no one is left behind and to guarantee fair and inclusive decision-making, especially for individuals and groups traditionally excluded from these processes. Incorporating climate justice necessitates investing in people-centred laws and institutions to enable ambitious climate action and equitably distribute the costs and benefits of climate mitigation and adaptation measures. Finally, it involves creating justice systems

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on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science.

118 *See* International Bar Association (2014), *Climate Change Justice and Human Rights Task Force Report: Achieving Justice and Human Rights in an Era of Climate Disruption*, p. 46. Available at: https://www.ibanet.org/PresidentialTaskForceClimateChangeJustice2014Report.aspx.

capable of resolving climate-related conflicts (such as climate litigation), while also protecting the rights of individuals and communities, including the rights of future generations.

In the process of identifying these climate obligations, the consideration of climate justice not only responds to a moral imperative but also serves as a requirement for articulating just climate action. The advisory opinions sought from international courts are undoubtedly a significant opportunity to integrate climate justice, thereby reinforcing the justiciability of human rights amid the climate emergency, resulting in an innovative effort that requires a deeper understanding of the relationship between human rights, unequal development, and climate change. Consequently, the legal obligations of states (and by extension, corporate actors under their jurisdiction and/or control) would focus on the duty of care and due diligence, as well as the prevention of violations of fundamental rights in contexts of climate vulnerability. This can ensure a true human rights perspective, helping to raise the ambitiousness and the level of obligations and outcomes in climate action. Climate justice, in all its dimensions, demands a comprehensive consideration of impacts and, as concluded by the IPCC,[119] should take into account ancestral knowledge and social justice—central elements for arriving at effective solutions (the restorative dimension of climate justice). This necessarily requires placing individuals and communities at the centre of climate action (the recognition dimension of climate justice), sharing benefits and burdens equitably and justly (the distributive dimension of climate justice), and ensuring that decisions regarding climate change are participatory, transparent, and accountable (the procedural dimension of climate justice).

Despite all these aspirations for justice, the irreversible climate situation does not seem to disturb the privileged zone, and the legal dimension of climate justice—incorporating climate rights

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119 IPCC (2022), *cit. Supra.*

and responsibilities to protect populations in sacrifice zones—remains unfulfilled. Without legal responses that are sensitive to these situations and that hold the most industrialized countries accountable for reducing greenhouse gas emissions, while simultaneously recognizing the different contributions and priorities of countries, a new opportunity to meet the demands of the climate and humanitarian emergency will be lost. Now, it is up to international jurisdiction to reverse these dynamics and advance towards climate justice.

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The duty to protect the intrinsic value of Nature to tackle the climate crisis

SILVIA BAGNI[1]

1. INTRODUCTION: WHAT IS NATURE?

In 1982, the UN General Assembly (UNGA) adopted the *World Charter for Nature* through a resolution.[2] The Charter was extremely ambitious for the time. Firstly, it proclaimed that Nature should be respected for its own sake (art. 1); and secondly, it adopted a holistic perspective on the relationship between humans and Nature, recognizing both that mankind is part of Nature and that "man's needs can be met only by ensuring the proper functioning of natural systems" (art. 6). The Charter, however, was non-binding and "intended to exert political and moral, but not legal, force".[3]

This is the first and sole example of a legal document adopted by international institutions to protect "Nature". Since 1972, when the first UN Conference on Human Environment was convened, the word "environment" has been used instead in international law to represent Nature, framed in a subordinate relationship with human interests towards development.[4] A safe and healthy "environment" has been recently recognized as a human right (UN Resolution A/76/L.75, *The human right to a clean, healthy and*

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2 A/RES/37/7, 28th of October 1982.

3 Wood, Harold W. (1985). "The United Nations World Charter for Nature: The Developing Nations' Initiative to Establish Protections for the Environment." *Ecology Law Quarterly*, 12(4), pp. 977-996, at p. 982.

4 Refer to UNEP history here: https://www.unep.org/environmental-moments-unep50-timeline.

sustainable environment, 26 July 2022), and many scholars agree on the concept of "environmental constitutionalism", a new wave of constitutional theory which incorporates the environment into national constitutions, both as a value, a duty, and a right.[5]

Nor is "Nature" a scientific concept. Cunningham and Cunningham, in their seminal book on ecology, *Environmental Science: A Global Concern*, use "environment" as a scientific concept to define "the circumstances or conditions which surround an organism or a group of organisms".[6] Similarly, in *Ecology: A Very Short Introduction*, Ghazoul writes that "ecology deals with interactions among organisms and their *environment*"[7] (stress added).

Organisms (individuals) lie at the bottom of the complex system of organization of every ecosystem, up to the Earth System, which also includes populations (species), communities, ecosystems, landscapes, biomes and the biosphere. "Nature" is the common word used to represent this totality; the Oxford Dictionary defines the term as, "The phenomena of the physical

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5 Boyd, David R. (2012). *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment*, Vancouver: UBC Press; May, James R., and Daly, Erin (2013). *Global Environmental Constitutionalism*, Cambridge: Cambridge University Press; Kotzé, Luis J. (2016). *Global Environmental Constitutionalism in the Anthropocene*, Portland, Oregon: Hart Publishing; Amirante, Domenico (2022). "Environmental Constitutionalism Through the Lens of Comparative Law: New Perspectives for the Anthropocene." In Amirante, Domenico, and Bagni, Silvia (eds), *Environmental Constitutionalism in the Anthropocene: Values, Principles and Actions*, New York/London: Routledge, p. 148; Viola, Pasquale (2022). "From the Principles of International Environmental Law to Environmental Constitutionalism: Competitive or Cooperative Influences?" In: Amirante, Domenico, and Bagni, Silvia (eds), *Environmental Constitutionalism in the Anthropocene: Values, Principles and Actions*, New York/London: Routledge, p. 140.

6 Cunningham, William P., and Cunningham, Mary Ann (2015). *Environmental Science. A Global Concern*, New York: McGraw Hill, 13th ed., p. 14.

7 Ghazoul, Jaboury (2020). *Ecology: A Very Short Introduction*, Oxford: OUP, p. 4.

world collectively; *esp.* plants, animals, and other features and products of the earth itself, as opposed to humans and human creations". This Oxford English Dictionary definition adheres to the Western dualistic vision of Nature as separate from humans. This common definition is the reason why many anthropologists criticize the expression, " the rights of Nature", considering it a new form of cultural colonialism.[8] In fact, "Nature" is a word that does not exist in many indigenous languages, which usually refer to the concept of *Pacha Mama*, or Mother Earth, as the female spirit or the Mother Goddess, who gave rise to life for almost all ancient people in the world.[9] The Ecuadorian Constitution, in art. 71, recognizes legal personhood to "*la Naturaleza, o Pacha Mama*", maintaining the double significant, Spanish and Kichua. However, the definition of Nature's rights is based on the Western concept of the Earth System: "Nature, where life is reproduced and occurs, has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes".

Notwithstanding the central role of the "environment" in the last two decades, a general movement for the recognition of the rights of *Nature* has been growing, attracting more and more scholars from all over the world, with the aim of fostering a "transformative change"[10] in the legal paradigm, from the

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8 Descola, Philippe (2013). *L'ecologia degli altri. L'antropologia e la questione della natura*, Roma: Linaria, Roma, p. 118. See also Ricca, Mario (2012). "Natura inventata e natura implicita nel diritto. Incursioni interculturali." In: Marrone, Gianfranco (a cura di). *Semiotica della natura (natura della semiotica)*, Milano: Mimesis, p. 309 ss., in part. p. 303.

9 Campbell, Joseph (2013). *Goddesses: Mysteries of the Feminine Divine*, Novato: New World Library.

10 The UN Environmental Programme applies the theory of change systematically in its works: https://www.unep.org/evaluation-office/our-evaluation-approach/theory-change#:~:text=The%20Theory%20of%20Change%20of,can%20lead%20to%20the%20next. For some

anthropocentric to a bio- or ecocentric paradigm.[11] This legal movement was inspired by Earth Jurisprudence, a philosophical and ethical theory elaborated by Thomas Berry. His many books and articles about the need for an ecological reorientation of our entire religious and cultural order, written from the 1970s onwards, are strikingly topical, almost prophetic. The starting point of his argumentation reads, "Our human destiny is integral with the destiny of the earth".[12] He supports the idea that we share universal coding with the grass, stones, other animals, the Earth, stars and the other planets, expressed in the curvature of the Universe, which possesses an impressive regenerative and creative energy. After denying this primordial nature for centuries, with the arrogance of attempting to prosper alone, humanity must rediscover Nature and listen to the guidance of that inner coding. Doing so can still allow for a harmonious life on earth built on an egalitarian basis for all humans and non-humans.

Recently, Earth Jurisprudence has developed into an attractive legal proposal, mainly thanks to Cormac Cullinan, a South African

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applications see: SOER (The European Environment State and Outlook) 2020 or the HDI (Human Development Index) Report 2020.

11 Rights of Nature literature is very wide. See, among the most recent publications: García Ruales, Jenny et al. (eds) (2024). *Rights of Nature in Europe: Encounters and Visions*, New York/London: Routledge; Acosta, Alberto, and Viale, Enrique (2024). *La naturaleza sí tiene derechos, aunque algunos no lo crean*, Ciudad Autónoma de Buenos Aires: Siglo XXI Editores; Martínez Dalmau, Rubén, and Pedro Bueno, Aurora (eds) (2023). *Debates y perspectivas sobre los derechos de la naturaleza. Una lectura desde el Mediterráneo*, Valencia: Pireo Editorial; Fuentes Sáenz de Viteri, Leonel (2023). *Los derechos de la naturaleza: Fundamentos, teoría constitucional y exigibilidad jurisdiccional en el Ecuador*, Quito: CEP; T-n-sescu, Mihnea (2022). *Understanding the Rights of Nature: A Critical Introduction*, Bielefeld: Transcript.

12 Berry, Thomas (1990). *The Dream of the Earth*, San Francisco: Sierra Club Edition, p. XIV; Berry, Thomas (2009). *The Sacred Universe: Earth, spirituality, and religion in the twenty-first century*, New York: Columbia University Press, p. 81 and p. 135.

lawyer. With his best-selling *Wild Law: A Manifesto for Earth Justice,*[13] Cullinan tried to strengthen and further develop Berry's ideas. The aim is to build up a new legal framework, applicable both to humans and non-humans, in a way that could guarantee an opportunity to exist and develop to every species, respecting the ecological interaction between all the elements that compose the Earth's ecosystem. He speaks of "wild law", in the sense that the law should reflect the natural rules that govern "wildness", usually considered to fall outside the law. The premise of his argumentation is that Nature must be considered as a whole, and human beings as part of Nature, whereas the actual legal paradigm puts man above all other creatures and separates him from Nature, as an autonomous and independent subject.[14] This false postulate is the cause of the current social and environmental crisis, one that the global legal order is unable to tackle. We need a complete shift in our understanding of what "law" is, who it is for, and for which goals it must be implemented, but we also need to rediscover how to communicate, feel empathy and care for Nature and other beings—"*sentipensar*" with the Earth, in Escobar's words.[15]

The holistic and inclusive origins of Earth Jurisprudence, together with the formal use of the word "*naturaleza*" in the Ecuadorian constitution, represent the reasons for choosing the word "Nature" instead of "environment", as a useful significant for an intercultural approach to a monistic relationship between human and natural beings, inclusive of both indigenous knowledge, religious traditions, and the Earth Sciences.

After explaining "what is Nature", this article will revindicate a legal duty for the States and for every human being to protect Nature for its own sake. After a brief normative reconstruction

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13 Cullinan, Cormac (2011). *Wild Law: A Manifesto of Earth Justice*, Vermont: Chelsea Green, 2nd edition.

14 Cullinan, Cormac (2011). *Wild Law: A Manifesto of Earth Justice*, Vermont: Chelsea Green, 2nd edition., p. 59.

15 Escobar, Arturo (2014). *Sentipensar con la tierra. Nuevas lecturas sobre desarrollo, territorio y diferencia*, Medellín: Ediciones UNAULA.

of the dysfunctionality of the current legal framework and its inability to tackle climate change and the ecological crisis (§ 2), arguments in favor of the protection of Nature for its intrinsic value will be given, drawing on anthropological approaches to ancestral cosmovisions and religions, and on the Western Earth Sciences (§ 3). To pinpoint that the arguments described in § 3 are normative, the concept of "formant" will be used. Following Sacco's definition, a formant is a set of rules and propositions for the solution of a legal problem, or to regulate a legal institute, in a specific order and at a given historical moment.[16] Through the concept of legal formants, comparative lawyers consider the law through the lens of legal pluralism, renouncing an ethnocentric understanding of the phenomenon. In § 4, the progressive implementation of the ecosystem approach within the legal framework of the UN Convention on Biological Diversity (CBD) will be analyzed. Finally, an overview of recent case law that has recognized a duty for the State to protect Nature for its intrinsic value will be discussed (§ 5). In the conclusion, some reflections on the anthropocentric-ecocentric diatribe will be offered (§ 6).

2. RISE AND FALL OF ENVIRONMENTAL LAW

The climate, and more generally the environment, have been considered as relevant legal topics only in recent times. With regards to the climate, the first international treaty that put forth comprehensive measures to tackle climate change at a global level was the 1992 UN Framework Convention on Climate Change (UNFCCC).

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16 Rodolfo, Sacco (1991). "Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II)." *The American Journal of Comparative Law*, 39(1), pp. 1-34.

In the UNFCCC, climate is defined as "climate system"[17]. This expression shows that the international community was aware of the interdependence between the many biotic and abiotic elements that contribute to the stability of the climate. Moreover, the ultimate objective of the Convention ("the stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system", art. 2) demonstrates that climate change was not considered "unnatural" *per se*, but only as regards to its anthropogenic origins, as human activities had been producing extreme changes on the climate system at unprecedented rate compared with the prior periods in the history of the Earth. In Bhargava's words: "Humans are one living organism that have interactions with all forms of ecosystems. Humans have inculcated the ability to alter organisms and interfere with the energy flows within an ecosystem. In this way an ecosystem is altered as a whole".[18]

The complexity of the problems related to the human contamination of the environment is due to the interdependent relations which characterize the Earth System as a whole and with its components in this formulation. This awareness very soon gave way however to a sectorial approach to climate and environmental crisis, justified on the concept of "sustainable development". In fact, the 1992 Rio Declaration on Environment and Development opens with this statement: "Human beings are at the centre of concerns for sustainable development" (art. 1), while the second principle affirms 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".

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17 Art. 1 UNFCCC: "'Climate system' means the totality of the atmosphere, hydrosphere, biosphere and geosphere and their interactions".

18 Bhargava, R.N. et al. (2016). *Ecology and Environment*, New Delhi: Energy and Resources Institute, p. 1.

Since the 1987 Brundtland Report, UN has been supporting the myth of "sustainable development" as an unquestionable truth.[19] Environmental law, far from focusing only on the protection of nature from overexploitation and the depletion of resources, aims to support economic growth, notwithstanding minimum environmental protections.

The history of environmental law since the Rio Declaration and the UNFCCC shows that the legal approach to the protection of the climate and the environment was defined following two presumptions: 1) the universality of the western idea of Nature separated from human beings, considered as an object, a set of resources and goods to be exploited for the human sake and economic growth; and 2) the prevalent use of compensation, mitigation and adaptation measures, and the fragmentation of sustainable development goals into multiple, separate, quantitative targets imposed by a growth-without limits developmental agenda,[20] ignoring the ecosystem approach and the interdependence of each variable of the planetary boundaries framework.[21]

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19 Rist, Gilbert (2008). *The History of Development: From Western Origins to Global Faith*, London & New York: Zed Books, p. 25 ff.

20 In the article *Law, Time and Oxymora*, Neuwirth argues that sustainable development is an oxymoron, underlining the contradiction between economic growth and the preservation of the environment: Neuwirth, Rostam (2019). "Law, Time and Oxymora. A Synaesthetic Exploration of the Future Role of Customary Global Law." *Revista general de derecho público comparado*, (16). See also Rist, Gilbert (2008). *The History of Development: From Western Origins to Global Faith*, London & New York: Zed Books, 3rd ed., p. 174; Kothari A. et al. (2019). "Crisis as opportunity: finding pluriversal paths." In: Klein, Elise, and Morreo, Carlos Eduardo (eds). *Postdevelopment in Pratice. Alternatives, Economies, Ontologies*, London-New York: Routledge, p. 105.

21 Kotzé, Louis J., and Duncan, French (2018). "The Anthropocentric Ontology of International Environmental Law and the Sustainable Development Goals: Towards an Ecocentric Rule of Law in the Anthropocene." *Global Journal of Comparative Law*, 7(1), pp. 5-36, in part. p. 8. See also Ito, Mumta, Montini, Massimiliano, and Bagni, Silvia

International environmental law has duly followed this narrative, building a paradigm based on the compensation of damages and on precautionary and preventive principles, which, far from excluding human activity because of its possible negative consequences for the environment, only impose duties of compliance to the legally determined limits of contamination. Michele Carducci criticizes this approach in the following terms: "il diritto del presente è stato qualificato 'disfunzionale', nella misura in cui esso, rispetto alle dinamiche degli ecosistemi e della biodiversità, protegge l'ambiente non dallo sfruttamento, bensì per lo sfruttamento, minando alla radice la stessa possibilità di risultati effettivi di salvaguardia ecosistemica. Il suo fine primario resta la manipolazione umana della natura, mentre quello della protezione naturale permane secondario e subalterno".[22]

While natural systems flow in cycles, human-engineered systems often go in one direction: extraction, consumption, and disposal. The combined health of all ecosystems on the earth will ultimately determine human habitability, as humans are but one part of the earth's extensive webs and cycles.[23]

(2024). "Towards an EU fundamental charter for the Rights of Nature. Integrating nature, people, economy." In: García Ruales, Jenny et al. (eds), *Rights of Nature in Europe. Encounters and Visions*, Abingdon-New York: Routledge, pp. 281-302, in part. 283 f.; Collins, Linda (2021). *The ecological constitution: Reframing environmental law*, New York/London: Routledge, p. 3-4.

22 "The current environmental legal system has been described as 'dysfunctional', because it protects the environment not from exploitation but for exploitation, with respect to the dynamics of ecosystems and biodiversity, undermining at its roots the possibility of reaching results in the ecosystem protection. Its primary purpose remains the human manipulation of nature, while that of natural protection remains secondary and subordinate". Carducci, Michele (2018). "«Demodiversità» e futuro ecologico." In: Bagni, Silvia (coord.), *How to govern the ecosystem? A multidisciplinary approach*, Bologna: Dipartimento di Scienze giuridiche, p. 65.

23 Bhargava, R.N. et al. (2016). *Ecology and Environment*, New Delhi: Energy and Resources Institute, p. 17.

3. THE DUTY TO PROTECT NATURE IN THE CULTURAL FORMANT

The normativity of the rights of Nature paradigm can be explained in terms of "cultural formant". The "cultural formant" refers to the representation of the relationship between man and Nature that a people or community pass down to future generations. This definition of "cultural formant" draws inspiration from studies on the anthropology of Nature, a branch of anthropology created by the French school of Lévi-Strauss disciples: Philippe Descola and Bruno Latour, and in Latin America, Eduardo Viveiros de Castro. They have turned the starting point of anthropology (man) upside down, devoting themselves to the study of cultures where man has always been an integral part of Nature.

Western thought is based on the dichotomy Nature v. Culture, which postulates an immeasurable difference between the human being and other living and non-living entities. Consequently, the ontological prevalence of man over other entities (Nature) is recognized precisely because of "culture" as a set of technical abilities, of language, abstraction, and symbolic representation that man develops through social living and uses as instruments of intermediation with Nature. This clear break between the two concepts is relatively recent, although today it is deeply rooted in Western thinking.[24] Nature is thought by the West as uniform and explainable according to the scientific method; every other version of the relationship between man and Nature is a deforming attempt to explain reality. For Descola, this opposition between Nature and Culture is far from universal[25]. Naturalism, as he defines the Western vision, is only one of the possible ontologies of the relationship between man and Nature, so that to measure

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[24] Vidali, Paolo (2022). "L'idea di Natura in Occidente." In: Ghilardi, Marcello, Pasqualotto, Giangiorgio, and Vidali, Paolo, *L'idea di natura tra Oriente e Occidente*, Brescia: Morcelliana Editrice, pp. 11-89.

[25] Descola, Philippe (2021). *Oltre natura e cultura*, Milano: Raffaello Cortina Editore, trad. it., p. 44.

every other cosmology with this meter, even admitting a certain relativism, remains a veiled form of ethnocentrism.

Using his own ethnographic studies and the literature produced by many other colleagues, Descola identifies four set of structures used by human beings to define the relationship between the self and others: animism, totemism, naturalism and analogism. Each one applies a different process of identification of the self with respect to the other, which can be conceived as including humans and non-humans. Depending on which is the prevalent cultural element influencing the process of identification, it is possible to recognize three different cultural formants: the chthonic, the religious, and the scientific.

3.1. The chthonic cultural formant

In Latin America, the concepts of *sumak kawsay* (in Kichua), *suma qamaña* (in aymara), or *küme mogen* (in Mapudungun), translated in Spanish as *buen vivir*, postulate the harmony between the individual, the community and Nature as the precondition of good life.

"Saber vivir implica estar en armonía con uno mismo. Vivir Bien es vivir en comunidad, en hermandad y especialmente en complementariedad. Es una vida comunal, armónica y autosuficiente. Vivir Bien significa complementarnos y compartir sin competir, vivir en armonía entre las personas y con la naturaleza. Es la base para la defensa de la naturaleza, de la vida misma y de la humanidad toda".[26]

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[26] Huanacuni Mamani, Fernando (2010). *Buen Vivir/Vivir Bien. Filosofía, políticas, estrategias y experiencias regionales andinas*, Lima: Coordinadora Andina de Organizaciones Indígenas, p. 34.

Elisa Loncón, from the Mapuche people, states: "El küme mogen es un principio de interdependencia, el estar bien individual depende del bienestar del colectivo y viceversa".[27]

Mapuche cultural roots are strictly related to the earth, as their own name shows. In Mapudungun, the language of the Mapuche, "*Mapu*" means "earth" and "*Che*" means "person", so the Mapuche are literally the "People of the Earth".

The "*Mapu Kimün*", or Mapuche Knowledge, is based on the ideas of circularity and interdependency. In the words of the *Ngenpin* (wise man) Armando Marileo Lefío:

> "According to our ancestors' outlook, the diverse elements that constitute our worldview interact and depend on each other in a holistic and systemic manner. Inhabitants, land, nature, and powers belonging to both the natural and the supernatural dimensions coexist, producing harmony and equilibrium in the '*Nag Mapu*'".[28]

Humanity belongs to the earth, as do all the other elements, dead or alive, spiritual or material. The Mapuche have an integral epistemology of life, time and space, generating the deep sense of respect that they feel for Nature and the environment, considered "as a communal good, a means of interrelation and a sharing space with all creatures sustained by it".

Before the Spanish conquest, many Andean peoples belonged to the Incan Empire. The *Tawantinsuyu* extended from the southern part of Colombia to the Cuzco, Bolivia, and the northern territories of Chile and Argentina. In this cultural tradition, too, there is a very strong connection between humans and Nature. The essence of this worldview is to be found in the four elements

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27 Loncón Antileo, Elisa (2022). "El Buen vivir: un paradigma para la vida, el equilibrio entre los pueblos y la Madre Tierra." *El Mostrador*. Available at: https://www.elmostrador.cl/destacado/2022/03/08/el-buen-vivir-un-paradigma-para-la-vida-el-equilibrio-entre-los-pueblos-y-la-madre-tierra/.

28 Lefío Ngenpin, Armando Marileo, *The Mapuche universe. Equilibrium and harmony*. Available at: http://www.mapuche.info/mapuint/mapuniv030530.html.

that, in a harmonious relationship, generate life in the entire Universe: water, air, earth, fire. Everything on earth is permeated by the creative energy of these elements and, therefore, each entity is related with the others. Human beings should be able to communicate with each single element of the world, from stones to mountains and forests, because they share the same constitutive elements.

Pacha Mama is the whole, where time and space are fused: "The Pacha Mama is a framework made up of both the human and nonhuman: people do not occupy it – they are a constitutive part of it. It is ecological and social at the same time".[29]

Even changing continents, it is possible to encounter words and concepts similar to those analyzed so far, for instance among the Maori (*iwi*) tribes of Aotearoa New Zealand. The tribes and the State accepted the document *Te Kawa or Te Urewera*,[30] in which indigenous communities resolve to revitalize their relationship with *Te Urewera* (an almost unexploited forest area on the east coast of the northern island). In the document we find the fundamental principles that represent the relationship with the forest following the indigenous cosmovision. Human beings are intrinsically embedded with Nature: they are not superior, nor can they be considered separate from Nature. Nature is mother, so she demands respect. The principles of *Te Kawa or Te Urewera* echo those of *sumak kawsay*: *papatūānuku* (environment) represents balance; *mauri* (life), requires people to be generous in the community; *tapu-wai* corresponds to resilience; *ahua* (character) is the commitment to the realization of the common good, as "all things are bound together, everything is connected"; *tatai* (the inheritance) indicates time, the relationship between the past and

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[29] Gudynas, Eduardo (2018). "Religion and cosmovisions within environmental conflicts and the challenge of ontological openings." In: Berry, Evan, and Albro, Robert (eds), *Church, Cosmovision and the Environment: Religion and Social Conflict in Contemporary Latin America*, New York: Routledge, pp. 225-247, in part. p. 232.

[30] Available at: https://www.ngaituhoe.iwi.nz/te-kawa-o-te-urewera.

the future, therefore the inter-generational balance; and *whanau, manuhiri and tanata whenua* represent discipline, the ability to control the impulse of domination over other living beings, as "no creatures should believe they belong only to themselves".

Even in African ontologies, the relationship between man and Nature is a far cry from the great division of the two in the Western tradition. For example, Amadou Hampâté Bâ, referring to the African traditions of Fulani and Bambara, describes the traditional doctrine of *Bembaw-sira*, which frames the existence of each person (*Maa*) within the natural world. Each person has a multiple nature, as he carries within himself the polymorphic spirit of the Universe. Because of its constitutive internal complexity, each person is in constant contact with the external world, so that the living community is conceived as unique and interdependent: "The concept of the unity of life goes hand in hand with the fundamental notions of balance, exchange, and interdependence. *Maa*, who contains in himself an element of all existing things, is called to become a guarantor of the equilibrium of the outer world, and even of the cosmos".[31] Even within this tradition the Earth is considered as a Mother, a living being that welcomes the divine spirit. As a result, no one, not even the king, can own the earth, nor can it be sold or bought.[32]

3.2. The religious cultural formant

Many religious doctrines offer their believers an interconnected vision of the relationship between human beings and Nature,

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[31] Imhotep, Asar (2020). *Aspects of African Civilization (Person, Culture, Religion),* pp. 1-48, translation of Hampâté Bâ, Amadou (1972). *Aspects de la civilisation africaine: personne, culture, religión*, Paris: Présence africaine, p. 6. Available at: https://www.academia.edu/43495135/Aspects_of_African_Civilization.

[32] Imhotep, Asar (2020). *Aspects of African Civilization (Person, Culture, Religion)*, p. 43.

enhancing a holistic view and justifying the moral and legal obligation to respect and take care of Nature.

In the Christian Bible God recognizes man as the dominus of creation, giving him the power to govern over all the creatures of Eden. At least, this is the most common interpretation of the Genesis. However, the last three Catholic Popes have been trying to foster a different interpretation of the relationship between man and Nature on a more egalitarian and solidary basis. In the Encyclical Letter "*Laudato si'*: On Care for Our Common Home"[33] Pope Francis states that "Given the complexity of the ecological crisis and its multiple causes, we need to realize that solutions will not emerge from one single way of interpreting and transforming reality. Respect must also be shown to the various cultural riches of different peoples, their art and poetry, their interior life and spirituality" (§ 63). Thus, religious and cultural worldviews can be useful to better understand the problem, and to find new solutions. In the *Laudato si'*, Pope Francis speaks about the original harmony that existed between man and Nature, and invites readers to interpret Genesis in a more correct way, proposing that Genesis cannot be understood as a blank mandate for mankind to dominate the earth, but as call for responsibility, care, and protection of the earth (§ 67-68). Human beings are not superior, and every life has intrinsic value. Pope Francis underlines "that everything is interconnected, and that genuine care for our own lives and our relationships with nature is inseparable from fraternity, justice and faithfulness to others" (§ 70).

As all other Abrahamic faiths, Islam manifests a typical anthropocentrism, which recognizes humans as the noblest of all creatures. However, even if a mastery over creation is recognized,

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[33] See Colella, Luigi (2022). "Integral Ecology and Environmental Law in the Anthropocene: The Perspective of the Catholic Church." In: Amirante, Domenico and Bagni, Silvia (eds), *Environmental Constitutionalism in the Anthropocene: Values, Principles and Actions*, New York/London: Routledge, p. p. 13 ff.

Islamic ethic also foresees obligations of trusteeship towards nature.[34]

In Hindu ethical and religious texts, the notion of Dharma "permeates the whole cosmic order that sustains everything, whether animate or inanimate".[35] Dharma presupposes the interconnectedness and interdependence between man and Nature, as rights and obligations serve to guarantee the cosmic order and are addressed to all creatures of the universe.[36] "Hinduism transcends the human/non-human boundaries".[37] All life is sacred, because the Divine is present everywhere. This conception produces effects also on the duties of the State towards Nature. Before British colonization, the management of the environment by the king was directed by Hindu religious precepts and the duties the king had towards Nature corresponded to the idea of trust: the king was not the owner of land, but a trustee who had obligations of protection and care. With the British occupation, environmental religious ethic was abandoned, and after Independence, development turned to be the prime objective of State's policies. However, the Hinduization of the State by PM Narendra Modi includes today also the revival of Hindu ethic to address climate change.[38]

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34 Lokhandwala, Zainab (2022). "Environmental Ethics in Islam and Greener Shifts Away from Fossil Fuel Dependence in the Middle East." In: Amirante, Domenico and Bagni, Silvia (eds), *Environmental Constitutionalism in the Anthropocene: Values, Principles and Actions*, New York/London: Routledge, p. 90.

35 Saryal, Rajnish (2022). "Ecological crisis. The Self, State and the Hindu Ethics." In: Amirante, Domenico and Bagni, Silvia (eds), *Environmental Constitutionalism in the Anthropocene: Values, Principles and Actions*, New York/London: Routledge, p. 33.

36 The Mahābhārata (109.10) says: "Dharma exists for the welfare of all beings. Hence, that by which the welfare of all living beings is sustained, that for sure is dharma."

37 *Idem*, p. 36.

38 Saryal, Rajnish (2018). "Climate Change Policy of India: Modifying the Environment" *South Asia Research*, 38(1), pp. 12-13.

In the *2009 Hindu Declaration on Climate Change*, adopted by spiritual leaders at the Parliament of the World's Religions, in Melbourne, Australia, the Earth was defined as the Universal Mother.[39] In 2015, the Hindu religious community released another declaration, in which they urge Hindus to take action, as "The Śrīmad Bhāgavatam (11.2.41) states, 'Ether, air, fire, water, earth, planets, all creatures, directions, trees and plants, rivers and seas, they are all organs of God's body. Remembering this a devotee respects all species'".[40]

Finally, even if Buddhist's ethical rules do not explicitly indicate a specific attitude of human beings towards the environment, it is possible to synthesize the main principles of this religion into an environmental ethic. In large part thanks to the principle of interconnectedness of all the elements within the cosmos: "Two foundational laws underlie the nature of these processes, according to Buddhist thought. The first is the law of interdependence, or co-arising of all phenomena, an understanding that all beings and events are co-determined, co-created, co-produced by multiple factors, causes, and conditions".[41] This is supported by the Buddhist precept to respect all forms of life and do no harm.[42]

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39 https://iefworld.org/hindu_cc.

40 Bhumi Devi Ki Jai! (2015). *A Hindu Declaration on Climate Change*. Available at: https://iefworld.org/hindu_cc.

41 Kaza, Stephanie (2018). "Buddhist Environmental Ethics: An Emergent and Contextual Approach." In: Cozort, Daniel, and Shields, James Mark (eds). *The Oxford Handbook of Buddhist Ethics*, Oxford: Oxford Handbooks, p. 435.

42 Buono, Enrico (2022). "The Noble Eightfold Path in the Anthropocene: Buddhist Perspectives on Environmental Constitutionalism." In: Amirante, Domenico and Bagni, Silvia (eds), *Environmental Constitutionalism in the Anthropocene: Values, Principles and Actions*, New York/London: Routledge, p. 113 ff.

3.3. The scientific cultural formant

In the Western world, the divide between humans and Nature has recently been overcome thanks to the development of a new science. Ecology was born in the XIX century with the extraordinary work of Alexander von Humboldt, who for the first time studied and understood nature as a totality, with integrity and harmony among all its living and non-living elements.[43] The word "ecology" was first coined by Ernst Haeckel in a book published in 1866, where he defined ecology as "the whole science of the relations of the organism to the environment, including, in the broad sense, all the 'conditions of existence'",[44] referring to the whole Earth System.

The science of ecology has shifted the Western scientific paradigm from anthropocentric to ecocentric. "Ecocentrism is considered the encompassing idea that disrupts the human/nature divide and considers the relationships between organisms and the healthy interaction of all components of ecosystems, including human beings".[45]

An ecosystem is a complex relational concept: it represents the conditions of existence for all its living components, but at the same time, the harmonic balance of all the parts is the condition of existence of the ecosystem. This means that there is an interdependent relationship between the survival of the whole and that of its parts. And the same interdependency exists even among the various minor ecosystems and the whole Earth System.

Ecology overcomes the human/nature divide by introducing the ecosystem approach, then used in many other disciplines.

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43 von Humboldt, Alexander (1846-1865). *Cosmos: essai d'une description physique du monde*, Milano: Turati, 2ème ed., 5 voll.

44 Haeckel, Ernst (1866). *Generelle Morphologie der Organismen*, Berlin: Georg Reimer, p. 286.

45 De Vido, Sara (2021). "A Quest for an Eco-centric Approach to International Law: the COVID-19 Pandemic as Game Changer." *Jus Cogens* (3), pp. 105-117, at p. 110.

Between the end of the XX century and the first half of the XXI, many sciences completely revolutionized their foundations inspired by the system approach: consider quantum physics or the theory of relativity.[46] Notwithstanding, the legal approach to the environmental crisis still remains inspired by the economic value the environment could provide for humans, and not by the ecosystem value of all the natural components of the Earth System.

The misrepresentation rising from the common root of the two words, "ecology" and "economic," from "eco," derived from the Greek *oikos* (home), is very well explained by Ferdinando Boero: "The ecologist movement proposed another view, based on the results of another eco-science: ecology. Economy deals with the economic capital, whereas ecology deals with the natural capital. Unfortunately, the two eco-sciences underwent parallel developments, with scant intersections, in spite of Malthus, the economist that inspired the first theoretical ecologist, Charles Darwin, who used the term 'the economy of nature' to label what Haeckel later called 'ecology' (Boero 2015)".[47]

The rules of "human" economy should conform to the rules of "natural" economy, since human economy depends on natural resources and energies. Consequently, economics should be an adaptive science. Similarly, from the legal perspective, the laws of humans should adapt to the laws of (living) nature, as they are universal and valid in any part of the universe. Eduardo Gudynas describes this process of adaptation in terms of "mandato ecológico".[48]

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46 Capra, Fritjof, and Luisi, Pier Luigi (2014). *The Systems View of Life: A Unifying Vision*, Cambridge: Cambridge University Press.

47 Boero, Ferdinando (2018). "Nature and the Governance of Human Affairs." In: Bagni, Silvia (coord.). *How to govern the ecosystem?*, Dipartimento di Scienze giuridiche: Bologna, 2018, p. 47.

48 Gudynas, Eduardo (2009). *El mandato ecológico: Derechos de la Naturaleza y políticas ambientales en la nueva Constitución*, Quito: Abya Yala.

4. THE ECOSYSTEM APPROACH WITHIN THE LEGAL FRAMEWORK OF THE UN CONVENTION ON BIOLOGICAL DIVERSITY (CBD)

The ecosystem approach is a soft law international principle, which aims to become binding,[49] in particular within the framework of the Convention on Biological Diversity (CBD), as a matrix to take political strategies and actions to defend biodiversity.[50]

The text of the convention seems inspired by the ecosystem approach; take for instance the preamble: "Conscious of the intrinsic value of biological diversity and of the ecological, genetic, social, economic, educational, cultural, recreational and aesthetic values of biological diversity and its components...".[51] Also, the definition of "biological diversity" in art. 2 is evidently based on ecology and considers the interdependence of all elements of the Earth System: "'Biological diversity' means the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems".

However, the idea of biological diversity is not mainstream within the CBD, as there is an evident competition with the concept of "biological resources", which includes "genetic resources, organisms or parts thereof, populations, or any other biotic component of ecosystems with actual or potential use or value for humanity". So, the convention tries to balance instances where biological diversity is protected as a critical element of the

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49 De Lucia, Vito (2019). *The Ecosystem Approach in International Environmental Law: Genealogy and Biopolitics*, New York/London: Routledge.

50 Futhazar, Guillaume (2021). "The Normative Nature of the Ecosystem Approach: A Mediterranean Case Study." *Transnational Environmental Law*, 10(1), pp. 109-133, at p. 110.

51 See Carducci, Michele (2020). "La ricerca dei caratteri differenziali della 'giustizia climatica'." *DPCE Online* (2), p. 1345, p. 1361 ff.

Earth System, while recognizing the principle of sovereign State rights over their own biological resources.

Annex A of the 2000 *Report of the fifth meeting of the Conference of the Parties to the Convention on Biological Diversity* (UNEP/CBD/COP/5/23) for the first time offers a definition of the concept: "An ecosystem approach is based on the application of appropriate scientific methodologies focused on levels of biological organization, which encompass the essential structure, processes, functions and interactions among organisms and their environment" (p. 104).[52]

At the 7th Conference of the Parties, Member Countries considered that the implementation of the ecosystem approach to achieve the objectives of the Convention should be considered a priority and they also published guidelines for better understanding the approach (COP 7 Decision VII/11, point 2).

The 10th Conference of the Parties adopted the Strategic Plan for Biodiversity 2011-2020, which included the so-called Aichi Biodiversity Targets, five strategic areas divided into twenty objectives to give greater impetus to the implementation of the Convention. The strategy stated that its vision was "…a world of 'Living in harmony with nature' where by 2050, biodiversity is valued, conserved, restored and wisely used, maintaining ecosystem services, sustaining a healthy planet and delivering benefits essential for all people" (COP 10 Decision X/2, point 11). The expression "Living in harmony with nature" translates

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[52] About the ecosystem approach see also: Kay, James J., and Regier, Henry A. (2000). "Uncertainty, Complexity, and Ecological Integrity: Insights from an Ecosystem Approach." In: Crabbé, Philippe et al. (eds). *Implementing Ecological Integrity: Restoring Regional and Global Environmental and Human Health*, Dordrecht: Kluwer, NATO Science Series, Environmental Security, pp. 121-156; Kay, James J. et al. (1999). "An ecosystem approach for sustainability: addressing the challenge of complexity." *Futures*, 31(7), pp. 721-742; Norberg, Jon (2004). "Biodiversity and ecosystem functioning: A complex adaptive systems approach." *Limnol. Oceanogr.*, 49 (4, part 2), pp. 1269-1277.

the ecosystem approach into philosophical-political terms within the framework of the CBD.

The 15th Conference of the Parties adopted, on 18 December 2022, the new Kunming-Montreal Global Biodiversity Framework (GBF), with revised targets for 2050. The GBF recognizes the interdependence of the concepts of "living in harmony with nature", "ecosystem approach" and "ecosystem services":

> "Nature embodies different concepts for different people, including biodiversity, ecosystems, Mother Earth, and systems of life. Nature's contributions to people also embody different concepts, such as ecosystem goods and services and nature's gifts. Both nature and nature's contributions to people are vital for human existence and good quality of life, including human well-being, living in harmony with nature, living well in balance and harmony with Mother Earth. The framework recognizes and considers these diverse value systems and concepts, including, for those countries that recognize them, rights of nature and rights of Mother Earth, as being an integral part of its successful implementation".[53]

Moreover, and for the first time, the GBF includes Mother Earth Centric Actions[54] among the collective actions to be enhanced with financial resources from the GBF fund, following Target 19 among the Global Targets for 2030.

As the White Paper "Ecocentrism in the Global Biodiversity Framework" illustrates, there are already many National Biodiversity Strategies and Action Plans (NBSAPs), which recognize the intrinsic value of Nature (Spain, Australia, Slovenia, Fiji and Aotearoa New Zealand).[55] The NBSAPs are the national

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53 Sec. 7, lett. b), CBD/COP/DEC/15/4, 19 December 2022. Available at: https://www.cbd.int/doc/decisions/cop-15/cop-15-dec-04-en.pdf.

54 "Ecocentric and rights-based approach enabling the implementation of actions towards harmonic and complementary relationships between peoples and nature, promoting the continuity of all living beings and their communities and ensuring the non-commodification of environmental functions of Mother Earth" (note 13 GBF).

55 Earth Law Center (ELC), Rights of Mother Earth, Lawyers for Nature, End Ecocide Sweden, and Keystone Species Alliance (2024).

instruments foreseen by the GBF with which each State describes its strategy to implement its specific commitments within the GBF. Thus, the recognition of the intrinsic value of Nature is already binding for those States which have mentioned it in their NBSAPs.

5. NATIONAL CASE LAW ON THE INTRINSIC VALUE OF NATURE

In this section, different national cases that have recognized the intrinsic value of Nature will be analyzed. Ecuadorian case law will not be taken into consideration, as Ecuadorian judges are obliged to implement the Constitution, that at art. 71 recognizes *Pacha Mama* as a subject of rights. Here, the cases selected will refer to legal orders that have not still legally incorporated Nature's rights.

The first decision ever about the protection of the intrinsic value of Nature was the 1972 case *Sierra Club v. Morton* by the US Supreme Court. Even if the petition was rejected, in their dissenting opinions Justices Douglas and Blackmun argued in favor of an extension of legal standing to Nature: "Contemporary public concern for protecting nature's ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation. *See* Stone, Should Trees Have Standing? – Toward Legal Rights for Natural Objects, 45 S.Cal.L.Rev. 450 (1972). This suit would therefore be more properly labeled as *Mineral King v. Morton*".[56]

Ecocentrism in the Global Biodiversity Framework. Rights of Nature/Mother Earth, Mother Earth Centric Actions, and the Intrinsic Value of Nature in the Global Biodiversity Framework and NBSAPs. Available at: https://static1.squarespace.com/static/55914fd1e4b01fb0b851a814/t/66fc15972d808310fe64250c/1727796635329/Advisory+Whitepaper+COP16_Final.pdf.

[56] 405 U. S. 742.

It seems noteworthy to cite the whole paragraph of the dissenting opinion to appreciate how modern and innovative the justices' ideas were for the early 1970s:

> "So it should be as respects valleys, alpine meadows, rivers, lakes, estuaries, beaches, ridges, groves of trees, swampland, or even air that feels the destructive pressures of modern technology and modern life. The river, for example, is the living symbol of all the life it sustains or nourishes—fish, aquatic insects, water ouzels, otter, fisher, deer, elk, bear, and all other animals, including man, who are dependent on it or who enjoy it for its sight, its sound, or its life. The river as plaintiff speaks for the ecological unit of life that is part of it. Those people who have a meaningful relation to that body of water—whether it be a fisherman, a canoeist, a zoologist, or a logger—must be able to speak for the values which the river represents, and which are threatened with destruction".[57]

The richest set of case law in the field of Nature's rights has been produced in Colombia, starting with Judgment T-622 of 10 November 2016 by the Colombian Constitutional Court on the recognition of the river Atrato as a legal entity. The Court begins its reasoning acknowledging that there are several possible interpretations of the environmental guarantees in the Colombian Constitution: anthropocentric, biocentric and ecocentric (§ 5.6 ff.). "*Finalmente, el enfoque ecocéntrico parte de una premisa básica según la cual la tierra no pertenece al hombre y, por el contrario, asume que el hombre es quien pertenece a la tierra, como cualquier otra especie [...] En consecuencia, esta teoría concibe a la naturaleza como un auténtico sujeto de derechos que deben ser reconocidos por los Estados y ejercidos bajo la tutela de sus representantes*" (§ 5.9). The judge recognizes that the ecocentric perspective is fully grounded in the Colombian Constitution and goes hand in hand with cultural pluralism: "*Se trata de ser conscientes de la interdependencia que nos conecta a todos los seres vivos de la tierra; esto es, reconocernos como partes integrantes del ecosistema global -biósfera-, antes que a partir de categorías normativas de dominación, simple explotación o utilidad. Postura que cobra especial relevancia en el constitucionalismo colombiano, teniendo en cuenta el*

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57 405 U.S. 743.

principio de pluralismo cultural y étnico que lo soporta, al igual que los saberes, usos y costumbres ancestrales legados por los pueblos indígenas y tribales" (§ 5.10).

After this cornerstone judgment, many Colombian courts at all levels have recognized rivers and ecosystems as subjects of law.[58]

In India, the first two relevant cases were the Writ Petitions (PILs) No.126 of 2014, sent. 20 March 2017 and No.140 of 2015, sent. 30 March 2017, decided by the Supreme Court of Uttarakhand, which granted legal status to the Ganga and Yamuna Rivers and their respective source glaciers.

In the first judgment, the Court recognized the Ganga and Yamuna Rivers with the status of person, "subserving the needs and faith of the society". The Court considered that the Hindu population is deeply connected with the rivers, which have provided half of India's population with physical and spiritual sustenance since time immemorial. They ensure the physical and spiritual well-being of the communities they flow through, from the mountains to the sea. They are defined as living entities.

In the second judgment, the Court dwells in much greater details on the ecosystem relationship between humans and Nature. The ecological aspect is elevated above the cultural one, which is still present in the references to the veneration of trees as symbols of deities in both Hindu religion and Buddhist philosophy. The Court openly declares its adherence to the new philosophy of the Earth: "The Courts are duty bound to protect the environmental ecology under the 'New Environment Justice Jurisprudence'". The Court's activism is affirmed: "Besides our constitutional and legal duties, it is our moral duty to protect the environment and ecology". It does not only recognize that rivers and lakes have

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58 See the following databases: Harmony with Nature "Rights of Nature Law and Policy" (http://www.harmonywithnatureun.org/rightsOfNature/); the Eco Jurisprudence Monitor (https://ecojurisprudence.org/); Garn "Rights of Nature Timeline" (https://www.garn.org/rights-of-nature-timeline/).

an intrinsic right not to be polluted, but also equates harm to the person and harm to nature ("Polluting and damaging the rivers, forests, lakes, water bodies, air and glaciers will be legally equivalent to harming, hurting and causing injury to persons"). Finally, the statute of rights recognized to natural entities follows, almost to the letter, the Ecuadorian art. 71 const.: "Rivers, Forests, Lakes, Water Bodies, Air, Glaciers and Springs have a right to exist, persist, maintain, sustain and regenerate their own vital ecology systems. The rivers are not just water bodies. They are scientifically and biologically living", and shortly afterwards "We must recognize and bestow Constitutional legal rights to the 'Mother Earth'." After all, the Ganga River is worshipped by Hindus as 'Ganga Mata', or Mother Ganga.

The two abovementioned judgments have been challenged in the Supreme Court of India, which stayed the High Court orders on 7 July 2017, denying the ecosystem approach adopted by the Uttarakhand Supreme Court.

The High Court of Punjab and Haryana, in case *CWP No.18253 of 2009 & other connected petitions*, delivered on 2 March 2020, declared Sukhna Lake as a legal entity for its survival, preservation and conservation. All the citizens of U.T. Chandigarh have been declared *in loco parentis* to the human of the Sukhna Lake, on *parens patriae* prerogatives by the Court. The lake had long been suffering from water degradation (aquatic weeds), soil degradation (siltation), and loss of riparian fauna and flora, partly due to illegal constructions carried out in the area surrounding the lake.

The Court recalls the existence of a duty of the Government and of the Court to protect the environment, based on the doctrine of public trust. In the Supreme Court precedents that are recalled, this doctrine is based on ecological arguments, as well as on an ecosystem interpretation of Article 21 of the Indian Constitution on the right to life. The lake is considered an ecosystem, whose untimely extinction must be prevented. The Courts are duty

bound to protect the lake under the 'New Environment Justice Jurisprudence' and also under the principles of *parens patriae*.

The judge, however, also connects the legal duty to the cultural formant: "Besides our constitutional and legal duties, it is our moral duty to protect the environment and ecology". "In holy Guru Granth Sahebji, it is written that *'Pavan paani dharati aakas ghar mandar har bani*', ("Air, water, earth and sky are God's home and temple")", showing the pluralistic and inter-legal nature of the Indian legal system, based on precedents, but also on customs and local traditions.

On 30 January 2019 (Writ Petition No. 13989/2016), the High Court of Bangladesh, in a very long and articulated decision, recognized the Turag River as a living entity, with a view to extending this status to all rivers in the country. Recognizing that the rivers are the life of the Nation (the Riverine Bangladesh), Justice Md. Ashraful Kamal used all forms of legal instruments to deter and penalize those involved in the destruction of the lifeline of the Nation, widely referring to other foreign cases on Nature's rights.

In 2021, the Supreme Court of Pakistan ruled in favor of prohibiting the construction and expansion of cement plants in environmentally vulnerable areas in the Provincial Government of Punjab. The Court places the defense of environment before sustainable development ("there are serious threats to environment in the Negative Area, especially to the underground water aquifer that needs to be first recharged before any sustainable development in the area can take place" § 16). Moreover, the Court affirms a duty to protect nature for its intrinsic value: "Also, the environment needs to be protected in its own right. There is more to protecting nature than a human centered rights regime".

Coming back to India, in 2022, the Madras High Court, in the cases W.P.(MD)Nos.18636 of 2013 and 3070 of 2020, about the illegitimacy of punishments inflicted to public officers who were meant to be guardians of the forest, recognized legal personhood

to Nature.[59] Justice Srimathy assumes a very critical attitude towards the "sustainable development approach" to the ecological crisis. For instance, she criticizes the compensation measures: "And we attempt to pacify the destruction with the words like 'compensatory afforestation' and it is like giving sanction to kill all wild tigers and replace them by farming the same population in captivity, which is absolutely against 'Nature'" (§ 19). "Under the guise of sustainable development, the human should not destroy nature. If sustainable development finishes off all our biodiversity and resources, then it is not sustainable development it is sustainable destruction. The phrases like 'sustainable development', 'the polluter pays', 'the precautionary principle' shall not be allowed anymore." (§ 20). As direct consequence of the rights of Mother Earth, "The State Government and the Central Government are directed to protect the 'Mother Nature' and take appropriate steps to protect Mother Nature in all possible ways".

On April 18, 2024, the Supreme Court of India, in the case of the State of Telangana v. Mohd. Abdul Qasim, regarding the protection of the Andhra Pradesh Forest, assumed a definite position in favor of the recognition of rights of Nature.

While the anthropocentric and human rights approach is persistent in the Indian constitution ("Article 48A of the Constitution of India, 1950 imposes a clear mandate upon the

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59 "§ 23. The past generations have handed over the 'Mother Earth' to us in its pristine glory and we are morally bound to hand over the same Mother Earth to the next generation. It is right time to declare / confer juristic status to the "Mother Nature". Therefore this Court by invoking "*parens patriae* jurisdiction", (parent of the nation jurisdiction) is hereby declaring the "Mother Nature" as a "Living Being" having legal entity / legal person / juristic person / juridical person / moral person / artificial person having the status of a legal person, with all corresponding rights, duties and liabilities of a living person, in order to preserve and conserve them. They are also accorded the rights akin to fundamental rights / legal rights / constitutional rights for their survival, safety, sustenance and resurgence in order to maintain its status and also to promote their health and wellbeing".

State as a Directive Principle of State Policy, while Article 51A(g) correspondingly casts a duty upon a citizen to protect and improve the natural environment including forests, lakes, rivers and wildlife and to have compassion for fellow living creatures"), Justice M. M. Sundresh, J. makes extensively use of ecosystem arguments. Firstly, he declares that he uses a broad concept of environment, including "both [the] animate and inanimate" (§ 27). Then, he takes a stance in favor of a change from an anthropocentric to an ecocentric paradigm: "Man is bound by nature's law. Therefore, the need of the hour is to transform from an anthropocentric approach to a ecocentric approach which will encompass a wider perspective in the interest of the environment". This wider perspective implies the recognition of rights of Nature.

Finally, in 2024, the Superior Court of Justice of Loreto, Peru, ruled in favor of recognizing a duty of the State to recognize the intrinsic value of the Marañón River and its inherent rights, including the right to exist, flow, and remain free of contamination. Even if the Court admits that the Peruvian legal order has not incorporated the rights of Nature's paradigm, it affirms that "*existen diversos instrumentos internacionales ratificados por el Estado, así como de la jurisprudencia del Tribunal Constitucional que permiten complementar el contenido tradicional el derecho al medio ambiente equilibrado, con el reconocimiento de una dimensión ecocéntrica, y por lo tanto, considerar el valor intrínseco de las entidades naturales en la toma de decisiones de forma autónoma y plenamente justiciable*" (page 23 of the decision). The Peruvian Constitutional Tribunal had already recognized that the Peruvian constitutional framework allows for the consideration of the intrinsic value of the environment, independently from human interests, in the decision 322/2023, *exp. n. 03383-2021-PA/TC Loreto Willian Navarro Sajami y otro* (§§ 40, 41 y 42).

6. CONCLUSIONS

In this essay, we have tried to demonstrate that there is abundance of binding legal arguments for the recognition of States' duty to protect Nature for its intrinsic value and, therefore, to grant to Nature legal personhood and inherent rights, such as the rights to exist, regenerate, thrive, and evolve, among others.

First, we have recognized that Nature has been considered a relevant legal concept only recently (§ 1). An intercultural approach to the concept of Nature by decision-makers is a key point to achieve a sustainable and just future. As the IPBES Methodological assessment of the diverse values and valuation of nature[60] clearly states, "Nature is understood by IPBES and by the assessment in an inclusive way, encompassing multiple perspectives and understandings of the natural world, such as biodiversity and the perspectives of indigenous peoples and local communities who use and embody concepts like Mother Earth".[61] Key Message 8 of the Assessment states, "Transformative change needed to address the global biodiversity crisis relies on shifting away from predominant values that currently over-emphasize short term and individual material gains, to nurturing sustainability-aligned values across society" (p. 6). Envisioning alternative futures that are inclusive of diverse worldviews, knowledge systems and values includes living well in harmony with Mother Earth (p. 7).

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60 IPBES (2022). *Methodological Assessment Report on the Diverse Values and Valuation of Nature of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services*. Balvanera, P., Pascual, U., Christie, M., Baptiste, B., and González-Jiménez, D. (eds.). IPBES secretariat, Bonn, Germany. https://doi.org/10.5281/zenodo.6522522.

61 IPBES (2022). *Summary for policymakers of the methodological assessment regarding the diverse conceptualization of multiple values of nature and its benefits, including biodiversity and ecosystem functions and services (assessment of the diverse values and valuation of nature)*, p. 3. Available at: https://www.ipbes.net/document-library-catalogue/summary-policymakers-methodological-assessment-regarding-diverse.

Since the end of the 1960s, international law has used the concept of "environment" to build a discipline on the protection of natural elements and systems, only so long as they had significant value for humans' interests. The anthropocentric paradigm of environmental law, together with its subordination to liberal economic theories, are the main reasons for its failure to tackle current climate and ecological crises (§ 2). In contrast, a shift to an ecocentric legal paradigm, which considers the interdependence between humans, non-humans and the geo-bio-chemical cycles as the basis of life on our planet, is seen to be necessary to reach the environmental goals on which the international community has agreed with the UNFCCC and CBD.

An important legitimation of the legal recognition of the intrinsic value of Nature comes from the cultural formant, which has been divided into three different approaches: the chthonic, the religious and the scientific (§ 3). All of them support a holistic view of the relationship between humanity and Nature, overcoming the typical divide within Western society. The new paradigm can be defined through an "ecocentric approach", which has assumed legal value and binding relevance at international level within the CBD framework (§ 4).

Finally, in the last decade, in addition to the obligations arising from the CBD, many national courts have been recognizing a State duty to protect Nature per se, using arguments taken by the cultural formant, international law and foreign precedents (§ 5).

Throughout this essay, we have been claiming that Nature must be protected for its intrinsic value. However, as a final reflection, we would like to underline that the shift to an ecocentric paradigm still pursues an anthropocentric goal of legislation. The climate and ecological crisis have demonstrated humans' vulnerability as a species, faced with the consequences produced by our irresponsible denial of the ecosystem principle. Guaranteeing Nature's intrinsic rights is the only way to protect our species from extinction.

"To preserve Nature, thus, is a crucial issue. Not in the interest of Nature, but in our interest".[62]

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62 Boero, Ferdinando (2018). "Nature and the Governance of Human Affairs." In: Bagni, Silvia (coord.). *How to govern the ecosystem?*, Dipartimento di Scienze giuridiche: Bologna, 2018, p. 53.

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