



# Human rights in the face of the climate crisis:

**a youth-led initiative to bring climate justice to the International Court of Justice**



**Human rights in the face of the climate crisis: a youth-led initiative to bring climate justice to the  
International Court of Justice**

**Author:**

World's Youth for Climate Justice

**Co-Authors:**

Samira Ben Ali (Normandy Chair for Peace)  
Olubusayo Adetona (University of Strathclyde)  
Lianne Baars (Leiden University)  
Erica Bower (Stanford University)  
Anna-Mira Brandau (University of Oxford)  
Heloise Coche (University of St Louis)  
Cristina Esanu (University of St Louis)  
Aoife Fleming (Leiden University)  
Nina Hamasaki (University of Tasmania)  
Luna Jalocha (University of St Louis)  
Charlotte Joppart (University of St Louis)  
Hannah Lawrence (University of Tasmania)  
Caitlin MacPherson (University of Strathclyde )  
Robbie McAdam (University of Strathclyde)  
Shannon Peters (PACE University)  
Olivia Richard (Normandy Chair for Peace)  
Manon Rouby (University of Strathclyde)  
Jule Schnakenberg (University of Aberdeen)  
Aditi Shetye (University of Strathclyde)  
Daniil Ukhorskiy (University of Oxford)  
Hannah Whitley (University of Strathclyde)  
Amanda Zerbe (Stanford University)

**Editors:**

Jule Schnakenberg, Aoife Fleming, Daniil Ukhorskiy, Aditi Shetye, Lianne Baars

July 2021



**Executive Summary**

This report is a collaboration from students from 8 different universities and one institution around the world who all believe in legal pathways as one way to address the inequity arising from the climate crisis, and has been co-edited by World’s Youth for Climate Justice (WYCJ) in collaboration with the Normandy Chair for Peace (NCP).



## **Table of Contents**

<b>Introduction</b>	<b>6</b>
<b>World’s Youth for Climate Justice</b>	<b>9</b>
<b>State of our Planet</b>	<b>11</b>
1. The human impacts of the climate crisis	<b>12</b>
1.1. Introduction	12
1.2. Global progress towards GHG emission mitigation	13
1.3. Background on the role of human rights	16
1.3.1. The connection between human rights and climate change	16
1.3.2. Human rights in climate change litigation	17
1.4. Climate change and human rights in Vanuatu	18
1.4.1. Vanuatu’s climate disaster proneness	19
1.4.2. Vanuatu’s human rights approach to the climate crisis	19
<b>The Advisory Opinion and the Paris Agreement</b>	<b>21</b>
2. The Advisory Opinion in the context of the UNFCCC	<b>22</b>
2.1. Obligations under the Paris Agreement	22
<b>An Advisory Opinion by the ICJ</b>	<b>26</b>
3. Requesting an ICJ Advisory Opinion on climate change and human rights	<b>28</b>
3.1. The legal question	28
3.2. Relationship to General Assembly Mandate and Function	29
3.2.1. Mandate of the UNGA	30
3.2.2. Supporting the UNGA in its functioning	33
<b>State Obligations: Climate Change and Human Rights</b>	<b>35</b>
4. Sources of Law	<b>36</b>
4.1. Treaty law	36
4.1.1. American Convention on Human Rights	38
4.1.2. African Charter on Human and Peoples’ Rights	38
4.1.3. European Convention on Human Rights	39
4.2. Jurisprudence from Courts and Tribunals	39
4.2.1. Inter-American Court of Human Rights	40
4.2.2. Inter-American Commission on Human Rights	43
4.2.2.1. Hearing on Climate Change before the Inter-American Commission on Human Rights	43
4.2.2.2. Inuit Climate Change Petition	43
4.2.3. African Commission on Human and Peoples’ Rights	44
4.2.4. Other references by regional courts	47
4.2.5. European Court of Human Rights	49



4.2.5.1. Introduction	50
4.2.5.2. Articles 2 and 8 ECHR	50
4.2.5.3. Future prospects	52
4.2.5.4. Conclusion	53
4.2.6. Conclusion on regional human rights courts	53
4.2.7. ITLOS	54
4.2.7.1. Introduction	55
4.2.7.2. ITLOS and climate change	56
4.2.7.3. Environmental principles	57
4.2.7.3.a. Precautionary principle	57
4.2.7.3.b. Duty of cooperation	59
4.2.7.4. Conclusion on ITLOS case law	60
4.3 Customary Law	60
<b>Background of the Court</b>	<b>61</b>
5. The International Court of Justice	<b>62</b>
5.1. The Court's Influence on International Environmental Law	62
5.2. The Court's Influence on International Human Rights Law	65
<b>Climate action through law</b>	<b>68</b>
6. Youth leading the way	<b>69</b>
6.1. Standing on the shoulders of those before us	69
6.1.1. The campaign for an ICJ Advisory Opinion on nuclear weapons	70
6.2. The potential impact of an Advisory Opinion on Human Rights and Climate Change	70
<b>Bibliography</b>	<b>72</b>
<b>Primary Sources</b>	<b>72</b>
<b>Other Primary Sources</b>	<b>76</b>
<b>Secondary Sources</b>	<b>77</b>
<b>Other Secondary Sources</b>	<b>83</b>
<b>Contributors</b>	<b>85</b>
<b>Editors</b>	<b>85</b>



## Introduction

The United Nations High Commissioner for Human Rights, Michele Bachelet, alerted states in an open-letter to the necessity for human-rights based climate action at the 25th COP to the UNFCCC: “the economies of all nationals; the institutional, political, social and cultural fabric of every State; and the rights of all people - and future generations - will be impacted.”<sup>1</sup>

The connection between climate change and human rights is now well established.<sup>2</sup> Climate change has been shown to exacerbate pre-existing inequalities and human rights challenges such as poverty, well-being, inequality, gender relations, and many others,<sup>3</sup> and to affect vulnerable groups most acutely. Children, whose rights are set out in the Convention on the Rights of the Child,<sup>4</sup> are a poignant example of a vulnerable group who have contributed least to historic greenhouse gas-emissions. The World Health Organisation found that annually 1.7 million children under the age of 5 die due to environmental damage,<sup>5</sup> and the Human Rights Council affirmed that millions of children worldwide grow up deprived of parental care due to natural disasters caused by climate change.<sup>6</sup> These examples expose the horrifying range of children’s rights that are affected by climate change, such as the right to life, family life, and health.

---

<sup>1</sup> OHCHR, ‘Open-Letter from the United Nations High Commissioner for Human Rights to Member States on priorities for human rights-based climate action at the 25th Conference of the Parties to the United Nations Framework Convention on Climate Change’ (Geneva, 27 November 2019) <[https://www.ohchr.org/Documents/Issues/ClimateChange/UNFCCCOP25\\_OpenletterfromHCMemberStates\\_Nov2019.pdf](https://www.ohchr.org/Documents/Issues/ClimateChange/UNFCCCOP25_OpenletterfromHCMemberStates_Nov2019.pdf)> accessed 20 January 2021.

<sup>2</sup> See for example, International Council on Human Rights Policy ‘Climate Change and Human Rights: A Rough Guide’ (Geneva 2008) <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1551201](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1551201)> accessed 22 January 2021; OHCHR, ‘Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights’ (Geneva 2009); John H. Knox ‘Climate Change and Human Rights Law’ (2009) 50:1 Virginia Journal of International Law, 164; and Siobhan McInerney-Lankford, Mac Darrow and Lavanya Rajamani ‘Human Rights and Climate Change: A Review of the International Legal Dimensions’ (17 March 2011) World Bank <<https://documents.worldbank.org/en/publication/documents-reports/documentdetail/903741468339577637/human-rights-and-climate-change-a-review-of-the-international-legal-dimensions>> accessed 18 January 2021.

<sup>3</sup> OHCHR ‘Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights’ (Geneva, 15 January 2009) A/HRC/10/61.

<sup>4</sup> UN Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (UNCRC).

<sup>5</sup> WHO, ‘Don’t Pollute My Future! The Impact Of The Environment On Children’s Health’ (2017) <<https://apps.who.int/iris/bitstream/handle/10665/254678/WHO-FWC-IHE-17.01-eng.pdf?sequence=1>> accessed 18 January 2021.

<sup>6</sup> UNHRC, ‘Rights of the child: realizing the rights of the child through a healthy environment’ (5 October 2020) UN Doc A/HRC/45/L.48/Rev.1.



Climate change is a threat to a range of substantive rights, such as the right to food and housing.<sup>7</sup> The Human Rights Council has frequently stated that massive violations of the right to food are already occurring today, particularly in developing countries, and that these violations are related in part to climate change and its related impacts.<sup>8</sup> The Special Rapporteur on the Human Rights of Internally Displaced Persons has also identified five climate-related reasons that lead to mass-displacement, such as increased frequency of extreme weather events, slow onset events, sinking of small island states, and violence and armed conflict due to scarcity of resources.<sup>9</sup>

In 2013, the Yale Center for Environmental Law and Policy published a [report](#) entitled “Climate Change and the International Court of Justice: Seeking an Advisory Opinion on Transboundary Harm from the Court”. The Report was prepared with the purpose of supporting a campaign initiated by the Republic of Palau and the Republic of the Marshall Islands in 2011 to secure an advisory legal opinion from the International Court of Justice (“ICJ”) on transboundary harm arising from climate change.

Almost a decade later, the umbrella-organisation World’s Youth for Climate Justice is pursuing an ICJ Advisory Opinion on state’s human rights obligations in relation to the climate crisis. This civil society campaign was started by students from the University of the South Pacific who have rapidly grown a powerful coalition pursuing the Advisory Opinion.

The Yale brief inspired the World’s Youth for Climate Justice (WYCJ) to write a report on its climate justice campaign. The purpose of the report is to provide a platform for academics and law students to discuss the nature and impacts of a potential Advisory Opinion, as well as to analyse the legitimacy, justification, and broader legal and societal implications of the Advisory Opinion. Since the 2011 efforts by Palau and the Marshall Islands, there have been significant global developments towards a consensus on the threat of anthropogenic climate change, the need for climate action and, more recently, the role of litigation.<sup>10</sup> Nonetheless, discussions on the equity of dealing with the impacts of the climate crisis are

---

<sup>7</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art. 11.

<sup>8</sup> UNHRC, ‘Report of the Special Rapporteur Ambeyi Ligabo on the promotion and protection of the right to freedom of opinion and expression’ (28 Feb 2008) UN Doc A/HRC/7/14; UNHRC, ‘Report of the Special Rapporteur Margaret Sekaggya on the situation of human rights defenders’ (12 February 2009) UN Doc A/HRC/10/12;

UNHRC, ‘Report of the United Nations High Commissioner for Human Rights on the situation of human rights and the activities of her Office in the Democratic Republic of the Congo’ (10 January 2011) UN Doc A/HRC/16/27; See also OHCHR ‘UN Special Procedures Facts and Figures 2011’ (Geneva, 2012).

<sup>9</sup> OHCHR, ‘Report of the United Nations High Commissioner for Human Rights: Analytical study on the relationship between human rights and the environment’ (16 December 2011) UN Doc A/HRC/19/34, para 52.

<sup>10</sup> There have been important climate focused human rights developments since the brief to support such a focus. See Jacqueline Peel & Hari M. Osofsky, ‘A Rights Turn in Climate Change Litigation?’ (2018) 7(1) *Transnational Environmental Law* 37-67.



progressing at a glacial pace. This is why the youth-led campaign for an ICJ Advisory Opinion is one promising pathway to contribute to the development of international law.

The legal question the WYCJ is seeking an Advisory Opinion on is along the lines of “*What are the obligations of states under international law to protect the rights of present and future generations against the adverse effects of climate change?*”

This report is produced by students from universities all over the world who have used their academic resources to dive into the questions of the ICJ Advisory Opinion campaign, and who, through their work, have provided a powerful collaborative effort in support of the WYCJ Campaign. We are deeply impressed with their curiosity and attention to detail and are grateful for their time, effort, and commitment.

Disclaimer: We have collectively put together materials that the judges are likely to take into consideration when deliberating the question. We believe that this collection convincingly demonstrates that the ICJ has a sufficient and legitimate basis both in law and evidence to engage with the questions. Yet, it is important to acknowledge that states will be allowed to make written and oral submissions and can further increase and add to the material which the court will be considering. Therefore, we do not claim that report is exhaustive. Rather, it provides a solid starting point for further deliberations.

In addition, the question posed above is one proposed by WYCJ. The legal question that could be posed to the ICJ will be the subject of negotiations among States at the UN General Assembly



## **World's Youth for Climate Justice**

Human exploitation, extraction and consumption of resources has been out of control for decades, and this comes at a dire cost. Global heating, sea level rise, more frequent and intense extreme weather events, and biodiversity decline do not happen in a vacuum. These are just some of the climate crisis impacts that are now directly infringing on our basic human rights.

The human rights of people living in communities on the frontline of the climate crisis are already being impacted, and violated today. The rights to life, housing, food, and health are infringed by climate change impacts every day. Vulnerable groups such as women, children, Indigenous people, the elderly, people living in poverty, and other marginalized groups are facing the brunt of this crisis. All this has been reiterated countless times and articulated by Indigenous leaders, community organizers, activists, youth, elders, academia, and some politicians. Despite these efforts, global society continues to implement sustainable solutions at no more than a glacial pace.

In 2011, the climate-vulnerable Pacific Island states of Palau and the Marshall Islands attempted to take climate change to the International Court of Justice. They were seeking clarifications on the obligations of states to cut greenhouse gas emissions to avoid transboundary harm. Palau's attempts were unsuccessful. A few years later, states from all over the world ratified the Paris Agreement, which invites states to voluntarily commit to emission reduction targets. So far, states' contributions have not been ambitious enough to reach the 1.5 degree-target agreed upon in Paris. Moreover, the Paris Agreement does not create binding obligations on adaptation or loss and damage<sup>11</sup>, and the relationship to human rights is limited to a preambular reference.<sup>12</sup>

In 2019, 27 law students from The University of the South Pacific were inspired by Palau's initiative and came together to form the Pacific Islands Students Fighting Climate Change. They have built upon Palau's campaign with a new focus: human rights and climate change. In the same year the PISFCC's proposal was tabled by the Vanuatu government at the Pacific Island Forum. There, the 18 Member States of the Pacific Island Forum noted positively the proposal for a United Nations General Assembly resolution seeking an Advisory Opinion from the International Court of Justice on climate change and human rights.

---

<sup>11</sup> Lavanya Rajamani, 'The 2015 Paris Agreement: Interplay Between Hard, Soft and Non-Obligations' (2016) 28(2) *Journal of Environmental Law* 337-358.

<sup>12</sup> See further Alan Boyle, 'Climate Change, The Paris Agreement and Human Rights' (2018) 67(4) *The International and Comparative Law Quarterly* 759-777.



Although a crucial step in the right direction, in order for the resolution to be successful there must be a simple majority vote by the 193 member states of the UN. Recognizing this reality, the ICJ Advisory Opinion campaign has grown beyond the Pacific where Pacific youth and partners are working tirelessly to galvanize support both regionally and internationally. Youth from around the world have united in this mission under the youth-led umbrella-organisation World's Youth for Climate Justice (WYCJ).

We believe that an Advisory Opinion on climate change from the ICJ will not just summarize states' existing obligations with regards to human rights and climate change, but can also deliver a progressive interpretation of those obligations and make global progress toward intergenerational equity and climate justice. The ICJ Advisory Opinion campaign is a concrete and well-justified catalyzer for more ambitious climate action.

We are grateful for all the work civil society and youth leaders from around the world are doing for climate justice, and seek to use our collective megaphone for the progressive development of climate justice.

**Join us in our journey to take the world's biggest problem to the World's Highest Court.**

For more information on World's Youth for Climate Justice, please visit: [www.wy4cj.org](http://www.wy4cj.org).



**State of**

**our**

**Planet**



## 1. The human impacts of the climate crisis

### Key takeaways:

- Climate change has a significant impact on small island states and vulnerable groups
- Recent trends depict higher intensity and frequency of climate and weather extremes resulting from the increase in the average global temperature
- Human Rights are impacted and violated by climate change, and several recent court cases have accepted this
- Vanuatu is particularly affected by the impacts of climate change; its citizens are experiencing the consequences disproportionately

By: Hannah Whitley (University of Strathclyde), Manon Rouby (University of Strathclyde), Robbie McAdam (University of Strathclyde), Aditi Shetye (University of Strathclyde), Olubusayo Adetona (University of Strathclyde), Caitlin MacPherson (University of Strathclyde), Daniil Ukhorskiy (University of Oxford)

### 1.1. Introduction

Small Island States are currently experiencing significant impacts from a wide range of climate hazards. The rise in sea-levels has led to the disappearance of several low-lying Pacific Islands along with severe erosion. Coastal aquifers, which are often the primary source of freshwater for islands, are facing decreased water quality from salinization due to both sea-level rise and increased flooding from coastal storms. Extended periods of drought have consequently threatened water security whilst changes to ocean conditions have led to population declines in fisheries across the world.

Climate change threatens the realisation of sustainable development and, on a more profound scale, the future of humanity.<sup>13</sup> Indeed, climate change threatens the livelihoods of all people, since we are collectively dependent on biodiversity and healthy ecosystems such as access to food, water, and shelter.<sup>14</sup>

Burning fossil fuels contributes to the climate crisis by producing large quantities of greenhouse gases that remain trapped in the atmosphere. The results of a warming earth are rising sea levels, melting ice caps, and biodiversity loss. These effects are symptomatic of climate change, and pose a great threat to our lives, and our planet.<sup>15</sup>

At present, global temperatures are currently increasing at 0.2°C per decade due to past and ongoing anthropogenic emissions.<sup>16</sup> Recent trends depict higher intensity and frequency of climate and weather extremes resulting from global warming, and that warming is generally higher over land than over oceans.<sup>17</sup>

## 1.2. Global progress towards GHG emission mitigation

*“There are millions of people all around the world who are already suffering from the impacts of climate change. Denying this fact could be interpreted by some to be a crime against humanity.”*

– Ian Fry, Tuvalu representative for the COP25 climate change talks.

Desperate pleas for action followed by statements of regret and disappointment are becoming standard

---

<sup>13</sup> Valerie Masson-Delmotte and others, ‘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’, (IPCC 2014) <[https://www.ipcc.ch/site/assets/uploads/sites/2/2019/06/SR15\\_Full\\_Report\\_High\\_Res.pdf](https://www.ipcc.ch/site/assets/uploads/sites/2/2019/06/SR15_Full_Report_High_Res.pdf)> accessed 12 May 2021.

<sup>14</sup> Secretariat of the Convention on Biological Diversity, ‘Connecting Biodiversity and Climate Change Mitigation and Adaptation. Key Messages from the Report of the Second Ad Hoc Technical Expert Group on Biodiversity and Climate Change’ (Secretariat of the Convention on Biological Diversity 2009) <<https://www.cbd.int/doc/publications/cbd-ts-41-en.pdf>> accessed 12 May 2021.

<sup>15</sup> IPCC, (n 13).

<sup>16</sup> Ibid.

<sup>17</sup> Ibid.



practice for many at UN Climate Change Conferences, and the 2019 talks in Madrid were no exception. Activists and representatives of Indigenous peoples and states particularly vulnerable to climate change have expressed frustration at the consistent lack of ambition expressed and progress made as a result of push back from major polluters. The frustration felt is understandable given the scientific consensus on the impact climate change is having on human life and how that impact is predicted to grow in the coming decades.

A UNDRR report shows that there has been a “staggering rise” in the number of extreme weather events in the last 20 years which have been primarily driven by rising global temperatures. Between 2000 and 2019 there were 7,248 major natural disasters across the world, which killed 1.23 million people and cost the global economy \$2.97 trillion. This was significantly greater than the previous 20-year period, 1980-1999 which recorded 4,212 natural disasters, claiming 1.19 million lives and creating losses of \$1.63 trillion to the global economy. We can no longer continue to think that climate change related deaths are an issue to be addressed in the future. An overwhelming and ever-increasing body of evidence shows that climate change already has a death toll and its impacts have long been a reality for many.

During COP25 in Madrid, Aliioaiga Feturi Elisaia, Head of the Samoan Delegation, presented his powerful opening speech on the rising sea level and the pressure it places on Small Island Developing States.

*“The world has witnessed in recent times epic occurrences of horrific disasters from climate change and national hazard risks unprecedented in the 74-year history of the United Nations. Tornadoes, bushfires, earthquakes, flooding, droughts – all have resulted in countless loss of lives and untold suffering, and sets back for years the development of some countries.”<sup>18</sup>*

Aliioaiga Feturi Elisaia stressed the devastating impacts of climate change on the very survival of SIDS and this message must prompt action before it is too late.

Even if emissions are reduced in the coming decades in accordance with the goals of the 2015 Paris Agreement many countries are still expected to experience more frequent and longer droughts. Currently 3.6 billion people across the globe live in areas which experience water scarcity for at least one month per year. However this is predicted to increase to 4.8-5.7 billion people by 2050 according to the UN World Water Development Report. Future competition for water resources is expected to be ‘unprecedented’ and

---

<sup>18</sup> Aliioaiga Feturi Elisaia, ‘Statement at the High Level Segment of COP25’ (11 December 2021) <[https://unfccc.int/sites/default/files/resource/SAMOA\\_cop25cmp15cma2\\_HLS\\_EN.pdf](https://unfccc.int/sites/default/files/resource/SAMOA_cop25cmp15cma2_HLS_EN.pdf)> accessed 21 May 2021



will undoubtedly surpass political boundaries.<sup>19</sup> Climate change-related disruption of weather systems and increasing temperature and precipitation fluctuations pose a direct threat to global food security. For example late 2015 to early 2016 saw one of the strongest El Niño events to date which saw areas of Ethiopia endure less than half of normal precipitation levels. This resulted in significant droughts and widespread crop failure leading to more than 10 million people in Ethiopia requiring food aid. The impacts of climate change on food production are predicted to be increasingly detrimental with livestock farming projected to suffer graver impacts than crop production. This is concerning as according to the FAO food production systems will have to produce 50% more food by 2050 to sustain the increasing global population.<sup>20</sup>

20 - 30% of species are at increased risk of extinction if increases in global average warming exceed 1.5 to 2.5°C above the 1980-1999 temperature. In order to prevent these devastating impacts on biodiversity, states must work towards keeping global temperatures below 2°C as this will inevitably flatten the curve of climate change risk to biodiversity.

At the COP25 in Madrid, Zhang Xinsheng, President of International Union for Conservation of Nature (IUCN) highlighted the negative impacts of Ocean Deoxygenation and the devastating impact it has on marine biodiversity. Continuing trends show that if temperature increase exceeds 3.5°C, 40-70% of global species would face extinction. States must take action to avoid these devastating impacts or as Zhang Xinsheng concluded in her opening speech at COP25 *‘If we take better care of nature, nature will take better care of us.’*

The effects of climate change exacerbate socio-economic and environmental challenges that prompt migration while also increasing the number and severity of humanitarian crises that drive it. A 2018 report by the World Bank estimates that by 2050 three regions (Latin America, sub-Saharan Africa, and Southeast Asia) will produce 143 million climate refugees.<sup>21</sup> This issue is expected to impact Pacific islands especially hard. With sea levels rising 12 millimetres per year, eight islands have already been submerged and another two are following close behind. It is estimated that by 2100 we will have lost 48

---

<sup>19</sup> UNESCO, ‘The United Nations World Water Development Report 2018: Nature-based Solutions for Water’ (2018) <<https://www.unwater.org/publications/world-water-development-report-2018/>> accessed 12 May 2021.

<sup>20</sup> Priyadarshi Shukla and others, ‘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 (IPCC 2019) <<https://www.ipcc.ch/site/assets/uploads/sites/4/2021/02/210202-IPCCJ7230-SRCCL-Complete-BOOK-HRES.pdf>> accessed 12 May 2021, chapter 5.

<sup>21</sup> The World Bank. Rigaud, K. and others. “Groundswell: Preparing for Internal Climate Migration” (2018) <<https://openknowledge.worldbank.org/handle/10986/29461>> accessed 12 May 2021.



islands to rising ocean levels which will leave all the people living there displaced.<sup>22</sup> The issue of climate refugees was considered by the UN Human Rights Committee in the landmark *Teitiota* decision, ruling that governments cannot return people to countries where their lives might be threatened by climate change.<sup>23</sup>

These impacts highlight the devastating effects of climate change which will be felt across the globe. These effects will not only damage fragile ecosystems across the world but will have a devastating impact on human populations. This ultimately highlights the importance of state action through their commitments under the Paris Agreement, and the importance of the submission of ambitious NDCs at the COP26. States in the Global North carry great responsibility as there is still need for adaptation and mitigation efforts to insure that the climate debt owed by the developed countries to the developing countries does not increase further. This inequity highlights the unjust nature of climate change as states who contributed least will be the ones who suffer the greatest consequences. This inherent inequity between the people producing climate change and the people feeling the effects of climate change is a universal wrong that needs to be righted.<sup>24</sup>

### **1.3. Background on the role of human rights**

#### **1.3.1. The connection between human rights and climate change**

States have the duty to respect, protect, and fulfill human rights<sup>25</sup>. There are two primary ways in which the connection to climate change manifests itself. First, in jurisdictions where an autonomous right to a healthy environment is not recognised<sup>26</sup> courts have noted the impacts of climate change on other rights, such as the right to life, health, or a private and family life. Second, climate change is a direct and unequivocal threat to the right to a healthy environment, where such a concept is recognised.<sup>27</sup>

---

<sup>22</sup> John Podesta ‘The climate crisis, migration, and refugees’ (2019) Report in Brookings Blum Roundtable, “2020 and beyond: Maintaining the bipartisan narrative on US global development” <<https://www.brookings.edu/research/the-climate-crisis-migration-and-refugees/>> accessed 12 May 2021.

<sup>23</sup> UNHRC ‘Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2728/2016’ (2020) CCPR/C/127/D/2728/2016.

<sup>24</sup> Edith Brown Weiss, *Intergenerational Equity* (Oxford Public International Law, February 2013) <<https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1421>> accessed 12 May 2021.

<sup>25</sup> UNHRC, ‘General Comment No. 3: The nature of States’ parties’ obligations (art. 2, para. 1, of the Covenant)’ (1990) E/1991/23.

<sup>26</sup> *Kyrtatos v Greece* [2003] ECHR 41666/98 (ECtHR, 22 August 2003).

<sup>27</sup> Inter-American Court on Human Rights Advisory Opinion, *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) of the American Convention on Human Rights), Advisory Opinion OC-23/17 of November 15, 2017, Series A, No. 23.



On that matter, the environment provides humans with multiple endowments: “*clean air to breathe; clean water to drink; food to eat; fuels for energy; protection from storms, floods, fires and drought; climate regulation and disease control; and places to congregate for aesthetic, recreational and spiritual enjoyment*”.<sup>28</sup> These environmental services, often referred to as ecosystem services, are considered to be the core of human’s well being and essential to human rights’ enjoyment. Consequently, many rights recognised by international and domestic law possess environmental dimensions. There is no exhaustive list of these rights and they come in diverse nature. For example, the right to health, the right to life, the right to an adequate standard of living and the right to adequate housing, are all potentially affected by poor environmental conditions, and in this sense a good environment”.<sup>29</sup>

Climate change is the largest, most pervasive, threat to the environment, and its negative consequences have repercussions on the full enjoyment of human rights. On that point, the Fifth Assessment Report (AR5) by the Intergovernmental Panel on Climate Change (IPCC) unequivocally states that “*human influence on the climate system is clear, and recent anthropogenic emissions of greenhouse gases are the highest in history*”.<sup>30</sup> It adds that “*recent climate changes have had widespread impacts on human and natural systems*”.<sup>31</sup>

### 1.3.2. Human rights in climate change litigation

The negative impacts of climate change on the Earth’s ecosystem have recognised consequences for the enjoyment of human rights. “*Human rights such as the rights to health, food, water, housing, self-determination and even the right to life are threatened by climate change*”.<sup>32</sup> Consequently, climate change litigation has been using human rights law against governments and other duty-bearers. For example, in 2019, the Dutch Supreme Court held in *Urgenda*, that the Netherlands' inadequate climate policies violated Articles 2 and 8 of the European Convention on Human Rights (ECHR).<sup>33</sup>

---

<sup>28</sup> UNEP and Sabin Center for Climate Change Law (Columbia Law School), 'Climate Change And Human Rights' (United Nations Environment Programme 2015)  
<[https://web.law.columbia.edu/sites/default/files/microsites/climate-change/climate\\_change\\_and\\_human\\_rights.pdf](https://web.law.columbia.edu/sites/default/files/microsites/climate-change/climate_change_and_human_rights.pdf)> accessed 24 November 2020.

<sup>29</sup> John Knox, ‘Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment’ (2018) UN Doc A/HRC/37/59.

<sup>30</sup> Pachauri and others, (n ) 2.

<sup>31</sup> Ibid.

<sup>32</sup> Bridget Lewis, *Environmental Human Rights and Climate Change, Current Status and Future Prospects, Introduction to Environmental Human Rights and Climate Change* (Springer Nature Singapore 2018) 1-14.

<sup>33</sup> *Urgenda Foundation v. State of the Netherlands* [2019] High Court Netherlands 19/00135.



A promising example could be the first climate change case before the European Court of Human Rights in 2020, brought by four children and two young adults from Portugal against 33 European countries.<sup>34</sup> In a nutshell, the plaintiffs claim that they face unprecedented risks to their lives and livelihoods and accuse the defendants of contributing to climate change and failing to take any effective measures against it. This, the plaintiffs say, violates their rights to life, privacy and non-discrimination under the ECHR. The Court, in requesting responses from Contracting Parties, has also added the consideration of Article 3 - the prohibition of torture - making it the first court in the world to do so. This signals a dramatic shift, from its previous position that considered a claim based on Article 3 in relation to environmental damage to be “*manifestly ill founded*”.<sup>35</sup>

Litigation has contributed to recognizing the human rights impacts of a changing climate, and it has become a key feature in the fight against climate change and the protection of the environment. Even more importantly, “*human rights-based approaches to climate change are now considered to be useful in helping to identify vulnerable individuals and groups, articulating impacts and balancing competing priorities*”.<sup>36</sup>

---

<sup>34</sup> Paul Clark and others, ‘Climate change and the European Court of Human Rights: the Portuguese Youth Case’ (2020) EJIL Talk  
<<https://www.ejiltalk.org/climate-change-and-the-european-court-of-human-rights-the-portuguese-youth-case/>>  
accessed 01 July 2021.

<sup>35</sup> *Lopez Ostra v Spain* App no 16798/90 (ECtHR, 09 December 1994).

<sup>36</sup>International Council on Human Rights Policy (n 2).



## 1.4. Climate change and human rights in Vanuatu

Vanuatu, located in the South Pacific is a 12,190 km<sup>2</sup> archipelago consisting of 83 volcanic islands<sup>37</sup> that belong to the Melanesian sub-region of Oceania and is divided into six provinces—Malampa, Penama, Sanma, Shefa, Tafea, and Torba—comprising different groups of islands.<sup>38</sup> The economy primarily depends on agriculture, fisheries and other marine resources. Due to its geographical location, its climate is strongly influenced by ocean-atmosphere interactions which are often manifested by extreme weather events.

### 1.4.1. Vanuatu's climate disaster proneness

Vanuatu is considered as the 'world's most vulnerable nation' on the World Risk Index.<sup>39</sup> Disasters such as landslides, earthquakes, flooding, storm surges, cyclones, prolonged drought and wet periods are quite common throughout the archipelago. According to the IPCC report; the population of Vanuatu is vulnerable to involuntary displacement due to both sudden-onset and slow-onset disasters, which are expected to become more prevalent in the future due to climate change. These impacts—alongside ocean acidification, and saltwater intrusion—have a direct impact on Vanuatu rather than the threat of rising sea levels.<sup>40</sup> It is observed that climate variability has disrupted crop production resulting in food scarcity thus

---

<sup>37</sup> Daniel. Petz and Justin Ginnetti 'Neglected displacement: human mobility in pacific disaster risk management and climate change adaptation mechanisms' (2013) Geneva: Norwegian Refugee Council/International Displacement Monitoring Centre

<<https://environmentalmigration.iom.int/neglected-displacement-human-mobility-pacific-disaster-risk-management-and-climate-change-adaptation>> accessed 12 May 2021.

<sup>38</sup> Nikita Perumal, 'The place where I live is where I belong: community perspectives on climate change and climate-related migration in the Pacific island nation of Vanuatu', (2018) 13(1) *Island Studies Journal*, 45-64.

<sup>39</sup> Matthias Garschagen and others, 'World Risk Report 2015' (United Nations University Institute for Environment and Human Security and Bündnis Entwicklung Hilft 2015) 11, 46; Department of Economic and Social Affairs, 'Vanuatu National Assessment Report: 5 Year Review of the Mauritius Strategy for Further Implementation of the Barbados Programme of Action for Sustainable Development' (UN 2010) 6–7.

<sup>40</sup> Michael Parry and others, 'Climate Change 2007: Impacts, Adaptation and Vulnerability Contribution of Working Group II to the Fourth Assessment Report of the IPCC' (IPCC 2007)

<[https://www.ipcc.ch/site/assets/uploads/2018/03/ar4\\_wg2\\_full\\_report.pdf](https://www.ipcc.ch/site/assets/uploads/2018/03/ar4_wg2_full_report.pdf)> accessed 12 May 2021; Rajendra Pachauri and others, 'Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change' (IPCC 2014) <<https://www.ipcc.ch/report/ar5/syr/>> accessed 12 May 2021, 10–11, 15, 69.



threatening food security.<sup>41</sup> Additionally, the low-lying coastal areas of the country are susceptible to rising sea levels along with the issues mentioned earlier.

Several studies focusing throughout Pacific Islands surmise and analyse the concept of ‘climate migration’. It is also argued that “*climate change may induce and force migration from a large number of Pacific Island countries...*”<sup>42</sup>

#### 1.4.2. Vanuatu’s human rights approach to the climate crisis

As compared to the other Pacific SIDS, Vanuatu has comprehensive climate change adaptation policies, and established a dedicated climate change ministry. Vanuatu’s new National Climate Change and Displacement Policy is one of the world’s most progressive policies on climate-driven displacement. Despite the government’s efforts, human rights violations cannot be prevented unless global emissions are mitigated. “*Where land that is fundamental to indigenous or cultural ways of life becomes uninhabitable and relocation is the only option, even dignified, planned, and supported migration will still result in a violation of the rights to land, culture and self-determination.*”<sup>43</sup> Thus an integrated approach to human rights and climate change law can enhance accountability for mitigation actions that, ultimately, reduce some of the risks of climate displacement in states like Vanuatu.<sup>44</sup> Moreover, the adoption of the Paris Agreement<sup>45</sup> has confirmed that obligations under climate change law on the one hand and human rights law on the other need to be complied with in an integrated manner.<sup>46</sup> International Human Rights Law provides obligations to protect peoples and individuals against forced displacement resulting from climate change that complements and reinforces obligations contained in international climate change law.<sup>47</sup>

Climate change adaptation comprises efforts by states, regional governments, civil society actors, and individuals to adjust ‘natural or human systems in response to actual or expected climatic stimuli or

---

<sup>41</sup> Julie Webb and others ‘Tools for CBA: lessons from NGO collaboration in Vanuatu’ (2015), 43(4) *Coastal Management*, 407-423.

<sup>42</sup> John Campbell and Olivia Warrick, ‘Climate change and migration issues in the Pacific’ United Nations Economic and Social Commission for Asian and the Pacific / International Labour Organization.’ (2014) <<https://www.ilo.org/dyn/migpractice/docs/261/Pacific.pdf>> accessed 12 May 2021.

<sup>43</sup> Article 3, United Nations Declaration on the Rights of Indigenous Peoples, UN General Assembly Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Agenda Item 68, Supp No 49, (2 October 2007, adopted 13 September 2007); UNGA A/RES/61/295 (UNDRIP).

<sup>44</sup> Margaretha Wewerinke and Tess Van Geelen, ‘Protection of climate displaced persons under International Law: A case study from Mataso Island, Vanuatu’ (2019) *Melbourne Journal of International Law Vol 19*(2).

<sup>45</sup> Paris Agreement, (opened for signature 16 February, entered into force 4 November 2016) UNTS I-54113.

<sup>46</sup> K. McNamara & C. Gibson, “‘*We Do Not Want to Leave Our Land*’”: *Pacific Ambassadors at the United Nations Resist the Category of “Climate Refugees”*” (2009) 40 *Geoforum* 475, 478–9; N. Perumal (n 38) 45.

<sup>47</sup> Margeretha Wewerinke, ‘The Role of the UN Human Rights Council in Addressing Climate Change’ (2014) 8 *Human Rights and International Legal Discourse* 10.



effects’ in order to ‘moderate harm or exploit beneficial opportunities’.<sup>48</sup> Those groups within SIDS that are politically, economically and socially marginalised have a low adaptive capacity, requiring concerted international action to enable them to adapt to the effects of climate change.<sup>49</sup> The legal and policy implications of climate change-related migration cut across many different fields, including human rights, development, humanitarian assistance, asylum, immigration and the environment.<sup>50</sup>

---

<sup>48</sup> Pachauri, (n 40) 87.

<sup>49</sup> Ibid.

<sup>50</sup> Jane McAdam, ‘*Climate Change Displacement and International Law: Complementary Protection Standards*’ (May 2011) UNHCR Legal and Protection Policy Research, Division of International Protection, 7.



# The Advisory Opinion and the Paris Agreement



## 2. The Advisory Opinion in the context of the UNFCCC

### Key takeaways:

- The adoption of the Paris Agreement was a milestone in international efforts to address climate change but it has not lived up to its aims
- The widespread acceptance of the Paris Agreement by nearly every member of the international community, including major emitters, provides further legitimacy to an overarching international law norm requiring states to take mitigation and adaptation measures in relation to climate change.

By: Nina Hamasaki (University of Tasmania) & Hannah Lawrence (University of Tasmania)

In seeking an Advisory Opinion, it is essential to consider existing international climate change covenants, in particular the Paris Agreement.<sup>51</sup> The adoption of the Paris Agreement was a milestone in international efforts to address climate change but current greenhouse gas emission pledges have yet to live up to its aims.

### 2.1. Obligations under the Paris Agreement

The Paris Agreement was opened for signature on 22 April 2016, and entered into force on 4 November 2016. The Paris Agreement built on the Kyoto Protocol and the United Nations Framework Convention on Climate Change (UNFCCC).<sup>52</sup> Of the 197 parties to the UNFCCC, 191 parties have ratified the Paris Agreement.<sup>53</sup> Significantly, the United States withdrew from the Paris Agreement under the Trump administration on November 4, 2020 but has since rejoined under President Biden on 19 February 2021.<sup>54</sup>

---

<sup>51</sup> United Nations, Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) 54113 UNTS.

<sup>52</sup> Kyoto Protocol to the United Nations Framework Convention on Climate Change (signed 11 December 1997, entered into force 16 February 2005) 2303 UNTS 162; United Nations Framework Convention on Climate Change (signed 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107 (UNFCCC).

<sup>53</sup> UNFCCC, 'Paris agreement: status of ratification' <<https://unfccc.int/process/the-paris-agreement/status-of-ratification>> accessed 12 May 2021.

<sup>54</sup> Lavanya Rajamani and Jutta Brunnée, 'The Legality of Downgrading Nationally Determined Contributions under the Paris Agreement: Lessons from the US Disengagement', *Journal of Environmental Law*, Volume 29, Issue 3, November 2017, 537–551 <<https://academic.oup.com/jel/article/29/3/537/4318807>> accessed 12 May 2021.



The history of international climate change regimes, including the Paris Agreement, demonstrates overarching global recognition and agreement that climate change is anthropogenic and that it needs to be resolved by global collective action. The Paris Agreement demonstrates recognition of the need for states to take collective action on climate change:<sup>55</sup> and it continues to provide a basis for states to ‘*strengthen the global response to the threat of climate change*’.<sup>56</sup>

The primary aim of the Paris Agreement is to:

*“[hold] the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change”.*<sup>57</sup>

To achieve this aim, the Paris Agreement establishes a system of nationally determined contributions (NDCs) whereby state parties make pledges regarding their emissions reductions targets which are submitted to a public NDC registry.<sup>58</sup>

The Paris Agreement is a legally binding instrument. However, it includes both binding and non-binding obligations. Article 4(2) of the Paris Agreement provides that, ‘[e]ach Party shall prepare, communicate and maintain successive nationally determined contributions, every five years’.<sup>59</sup> Parties are bound to prepare and submit NDC’s. However, the content of each NDC is non-binding. Parties submitted their NDCs in 2015 and 2020. The next round of NDCs will be submitted to the NDC registry in 2025. Some states include financial commitments in their NDCs and some provide that mitigation reductions are dependent on receiving financial assistance.

---

<sup>55</sup> Cara A. Horowitz, ‘Paris Agreement’, International Legal Materials Vol. 55, No. 4 (2016), Cambridge University Press Stable, 740-755 <<https://www.jstor.org/stable/10.5305/intelegamate.55.4.0740>> accessed 13 May 2021.

<sup>56</sup> UNFCCC, Nationally determined contributions under the Paris Agreement Synthesis Report by the Secretariat, 26 February 2021, FCCC/PA/CMA/2021/2, 4.

<sup>57</sup> Paris Agreement art 2(a).

<sup>58</sup> NDC Registry Website ‘All NDCs’, <<https://www4.unfccc.int/sites/NDCStaging/Pages/All.aspx>> accessed 12 May 2021.

<sup>59</sup> Paris Agreement art 4(2); UNFCCC Website, ‘Nationally Determined Contributions (NDCs)’ <<https://unfccc.int/process-and-meetings/the-paris-agreement/nationally-determined-contributions-ndcs/nationally-determined-contributions-ndcs#eq-2>> accessed 12 May.



### **Is the Paris Agreement achieving its aims?**

The Paris Agreement provided important recognition of the need for global climate action, and some state courts have upheld NDC obligations at a domestic level. However, as they exist today, the individual NDCs are insufficient to meet the aims of the Paris Agreement. Even if all states fully implemented their current NDC's, global warming would still continue well above the 1.5-2°C target.<sup>60</sup> In order to reach the 1.5°C target all parties to the Paris Agreement would need to dramatically reduce their emissions by 2030 compared to the current NDC levels.<sup>61</sup> The Paris Agreement's NDC reporting framework has fallen short of its intended objectives due to the voluntary content of NDC's and the lack of strong enforcement mechanisms (amongst others).<sup>62</sup>

#### **4.4. The significance of the Paris Agreement for an ICJ Advisory Opinion**

The Paris Agreement must not be overlooked when calling for an ICJ Advisory Opinion on climate change. Although NDC's under the Paris Agreement are voluntary and non-binding, the Paris Agreement certainly does influence climate action. The Paris Agreement demonstrates collective action, it includes binding procedural requirements as well as normative expectations, and NDC's have been upheld in domestic Courts.<sup>63</sup>

Further, the Paris Agreement undeniably represents a historic milestone of collective state action. The widespread acceptance of the Paris Agreement by nearly every member of the international community, including major emitters, provides further legitimacy to an overarching international law norm requiring states to take mitigation and adaptation measures in relation to climate change.

The Paris Agreement demonstrates global acknowledgement of increasing climate change impacts and it is a backdrop for the ICJ identifying more ambitious duties on states to combat climate change. An ICJ

---

<sup>60</sup> UNEP, 'Emissions Gap Report 2020' (2020) <<https://www.unep.org/emissions-gap-report-2020>> accessed 12 May 2021.

<sup>61</sup> Wei, YM., Han, R., Wang, C. *et al.* Self-preservation strategy for approaching global warming targets in the post-Paris Agreement era. *Nat Commun* 11, 1624 (2020). <<https://doi.org/10.1038/s41467-020-15453-z>> accessed 12 May 2021.

<sup>62</sup> William Nordhaus, 'The Climate Club: How to Fix a Failing Global Effort,' *Foreign Affairs* 2020 99(3) 10-17, 13.

<sup>63</sup> Lennart Wegener, Can the Paris Agreement Help Climate Change Litigation and Vice Versa? *Transnational Environmental Law*, (2020) 9(1), 17-36. <<https://www.cambridge.org/core/journals/transnational-environmental-law/article/can-the-paris-agreement-help-climate-change-litigation-and-vice-versa/5740A983674D197C6F070B081ADAB400>> accessed 12 May 2021.



Advisory Opinion on climate change could further encourage parties to the Paris Agreement to commit to a level of emissions reductions that more accurately coincides with the aims of the Paris Agreement. This is necessary to prevent dangerous anthropogenic interference with the climate system.



**An  
Advisory  
Opinion  
by the ICJ**



## ICJ Advisory Opinion in a nutshell:

### What the UN says:

An advisory opinion is legal advice provided to the United Nations or a specialized agency by the International Court of Justice, in accordance with Article 96 of the UN Charter. The General Assembly and the Security Council may request Advisory Opinions on "legal questions arising within the scope of their activities".

Source: [www.un.org](http://www.un.org)

Unlike judgments of the ICJ in contentious proceedings, Advisory Opinions are not binding at law. Nonetheless, due to the status of the ICJ as the highest court in the world they “*carry great legal weight and moral authority*”.<sup>64</sup> They are often an instrument of preventive diplomacy and help to keep the peace. In their own way, Advisory Opinions also contribute to the “*clarification and development of international law and thereby to the strengthening of peaceful relations between states*.”<sup>65</sup> In the *Nuclear Weapons* Advisory Opinion, the Court stated that the “purpose of the advisory function is not to settle – at least directly – disputes between States, but to offer **legal advice** to the organs and institutions requesting the opinion.”<sup>66</sup>

---

<sup>64</sup> International Court of Justice, Advisory Jurisdiction <<https://www.icj-cij.org/en/advisory-jurisdiction>> accessed 12 May.

<sup>65</sup> Ibid.

<sup>66</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, 11 (July 8), at 15.



### 3. Requesting an ICJ Advisory Opinion on climate change and human rights

#### Key takeaways:

- The legal question WYCJ asks centers on human rights obligations, and in particular intergenerational equity
- Climate change and its effects on human rights fall within the mandate of the UNGA.
- An ICJ Advisory Opinion on states' obligations would assist the UNGA in the performance of its functions.

By: Anna-Mira Brandau (University of Oxford) and Shannon Peters (PACE University)

#### 3.1. The legal question

The legal question posed to the Court by the UN General Assembly (UNGA) is subject to negotiations in one of the six UNGA Committees.

This negotiation process is likely to happen behind closed doors, since only state parties are allowed to contribute to the formulation of the resolution, which will contain the question being sent to the Hague. For WYCJ it is important that this question is ambitious, and does not leave room for the judges to evade answering the question and clarifying current international law.

The question WYCJ suggests to be submitted to the ICJ for its Advisory Opinion is:

*What are the obligations of states under international law to protect the rights of present and future generations against the adverse effects of climate change?<sup>67</sup>*

---

<sup>67</sup> **Disclaimer:** WYCJ - as a coalition of civil society and youth organization - will continue to advocate for a legal question that reflects the highest possible ambition and climate justice principles. The above question is a draft question from the early days of our work. A team of youth campaigners, legal scholars and other stakeholders aim to continuously develop the question with a view to enhance it and make it more robust for the Court's considerations.

This question asks the Court to consider substantive issues of international climate, environmental and international human rights law. Those two areas of international law operate currently in a separate manner. By integrating them, the Court would play a useful role in developing and clarifying international law and the obligations arising for States- the traditional subjects of international law. The language of ‘obligations to protect’ thereby asks the Court to express its opinion on the full range of human rights obligations arising in the environmental context. The emphasis on the rights of present and future generations asks the court to elaborate on the intergenerational quality of climate change. Through its explanation, the Court would not just provide legal clarification but could also contribute to a change of consciousness and these developments can in turn catalyse new and needed actions.<sup>68</sup>

The question further offers the opportunity for the Court to cement consensus on the scientific evidence of climate change. The Advisory Opinion would provide an excellent forum to endorse the best scientific findings on anthropogenic climate change, including but not limited to the Special Report of the Intergovernmental Panel on Climate Change on Global Warming of 1.5 °C.

By doing so, the Court would not just provide impetus and guidance for domestic, regional and international adjudication, but also advice in order to guide the UNGA as an organ of the United Nations system in the performance of its function.

This section explains the following features of the question:

1. The relationship of the question to the mandate and functions of the United Nations General Assembly (UNGA)
2. The framing of the question

### **3.2. Relationship to General Assembly Mandate and Function**

The UNGA is the body requesting the Advisory Opinion from the ICJ. The analysis presented in this part will outline that (i) the UNGA has the mandate to do so, and that (ii) the Advisory Opinion will assist the UNGA in the performance of its function.

---

<sup>68</sup> Philippe Sands, ‘Climate Change and the Rule of Law: Adjudicating the Future in International Law’, Public Lecture at the Supreme Court of the United Kingdom (17 September 2015) <<https://www.supremecourt.uk/docs/professor-sands-lecture-on-climate-change-and-the-rule-of-law.pdf>> accessed 24 November 2020, 11.



### 3.2.1. Mandate of the UNGA

The *prima facie* competence of the UNGA to request an Advisory Opinion from the ICJ is entailed in Article 65.1 of the ICJ Statute and Article 96.1 of the UN Charter. The former states that “*the Court may give an advisory opinion on any legal question at the request of whichever body may be authorized by or in accordance with the Charter of the United Nations to make such a request.*” Article 96.1 of the UN Charter provides that “*the General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.*”

From these provisions follow the general competence of the UNGA to request an Advisory Opinion on *any legal question*. Despite the clear wording of Article 96.1 UN Charter, in the *Nuclear Weapons* Advisory Opinion, an attempt was made to argue that the UNGA may ask for an Advisory Opinion on a legal question only within the scope of its activities. The Court refrained from answering whether this interpretation of Article 96.1 was correct or not, because the question presented fell within the scope of the UNGA’s competence in any event.<sup>69</sup>

The same is true for the present question, as an examination of the UN Charter and the practice of the UNGA demonstrates.

Article 10 UN Charter deals with the competences of the UNGA and states:

“The General Assembly may discuss *any questions or any matters within the scope of the present Charter* or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided for in Article 12, may *make recommendations* to the Members of the United Nations or the Security Council or both on any such question or matters.” (*emphasis added*)

Article 10 entails two important specifications regarding the competences of the UNGA. First, the term “make recommendations”, which encompasses making resolutions, including such resolutions to request an Advisory Opinion from the ICJ.<sup>70</sup>

Second, Article 10 defines the breadth of the UNGAs competence by stressing that it extends over the entire “*scope of the present Charter*”. The scope of the Charter can be derived from Articles 1 and 2 UN Charter and extend from international peace and security to international cooperation in solving

---

<sup>69</sup> *Nuclear Weapons*, Advisory Opinion, (n 66) para 11.

<sup>70</sup> Eckart Klein and Stefanie Schmal, ‘The General Assembly, Functions and Power, Article 10’, in Bruno Simma et al. (eds), *The Charter of the United Nations: A Commentary, Volume I*, (3rd edition, Oxford University Press 2012) 478.



international problems. It can hardly be argued that climate change does not qualify as an international/global problem.

According to Article 2.7 UN Charter, does the scope of the UN-Charter find its limits in “*matters which are essentially within the domestic jurisdiction of states.*” This limitation however has been narrowly interpreted as allowing interventions for the purposes of upholding human rights violations.<sup>71</sup> It therefore follows that even the human rights framework of the given question is covered by the scope of the Charter and thus by the competence of the UNGA.

This finding is in line with the UNGA’s previous considerations of the issue of climate change and human rights (environment in general) (see below) and with Article 11 UN Charter.

According to Article 11, the UNGA may also discuss and make recommendations with regard to any question relating to the maintenance of international peace and security. This competence is not to be understood as limiting the general scope of competence established in Article 10 UN Charter (Article 11.4 UN Charter).

Different UN organs have repeatedly stressed and outlined the relevance of climate change in peace and security considerations. So stressed the former Secretary-General Ban KI-moon in a debate hosted by the UN Security Council, that “issues of energy and climate change can have implications for peace and security”.<sup>72</sup> In a similar debate on climate change and security in September 2011, a number of delegates recognized a relationship between climate change and international peace and security.<sup>73</sup> The current General-Secretary, Mr António Guterres, made climate change one of his highest priorities. In a landmark speech in December 2020, he states that “*making peace with nature is the defining task of the 21<sup>st</sup> century. It must be the top, top priority for everyone, everywhere*”.<sup>74</sup>

---

<sup>71</sup> Ibid.

<sup>72</sup> UN Security Council, 5663rd Meeting, U.N. Doc. S/PV.5663 (Apr. 17, 2007). The UK, as President of the UNSC during the debate, stated that “an unstable climate will exacerbate some of the core drivers of conflict, such as migratory pressures and competition for resources”; and that “today is about the world recognizing that there is a security imperative, as well as economic, development and environmental ones, for tackling climate change and for our beginning to build a shared understanding of the relationship between energy, climate and security” (at 2); China recognized that climate change has certain security implications, though it considered it fundamentally to be an issue of sustainable development (at 12); the delegate of Germany, who spoke on behalf of the European Union stated “today we know that there is a clear link between climate change and the need for conflict prevention” and that the “cost of action on climate change is far outweighed by the consequences of inaction. We need to give due consideration to the security implications of inaction and mitigate those risks” (Turkey, Croatia, Macedonia, Albania, Bosnia and Herzegovina, Montenegro, Serbia, Ukraine and Moldova also aligned themselves with the statement) (at 19-20).

<sup>73</sup> Among others: China, Indonesia and South Africa, see id. at 13-15.

<sup>74</sup> UNFCCC, UN Secretary General António Guterres, “Making peace with Nature is the Defining Task of the 21st century” (Speech at Columbia University, 02 December 2020) <<https://unfccc.int/news/un-secretary-general-making-peace-with-nature-is-the-defining-task-of-the-21st-century>> accessed 12 May 2021.



The UNGA itself also has a long history in putting climate change and its human rights implications on its agenda: the foundation was laid by its resolution series on the “Protection of Global Climate for Present and Future Generations”<sup>75</sup> as early as 1988, which can be seen as the conceptual origin of the question presented. Multiple resolution series followed, for example on “Harmony with Nature”<sup>76</sup> or general notions about the protection of the environment.<sup>77</sup>

The commitment of the UNGA to the protection of the environment and climate change in particular, has also been demonstrated by the adoption of the 2030 Agenda in 2015, which includes 17 sustainable development goals. Goal number 13 is called ‘climate action’ and asks UN member states to “take urgent action to combat climate change and its impacts”. One target following from this goal is the implementation of the United Nations Framework Convention of Climate Change and its subsequent protocols and agreements.<sup>78</sup> One of those agreements is the so-called Paris Agreement, which was adopted in 2015. It is the first international climate change agreement, that entails a direct reference to human rights by stating that:

*“Acknowledging that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity.”*

Even in its response to the current COVID-19 pandemic, the UNGA called on Member States to adopt a climate- and environment-sensitive approach to COVID-19 recovery efforts, including by aligning investment and domestic policies with the 2030 Agenda for Sustainable Development and the Paris Agreement.<sup>79</sup>

---

<sup>75</sup> Inter alia: UNGA A/RES/43/53 (6 December 1988); A/RES/50/50/115 (20 December 1995); UNGA A/RES/51/184 (16 December 1996); UNGA A/RES/52/199 (18 December 1997); UNGA A/RES/54/222 (22 December 1999); UNGA A/RES/56/199 (21 December 2001); UNGA A/RES/58/243 (23 December 2003); UNGA A/RES/59/234 (22 December 2004); UNGA A/RES/60/197 (22 December 2005); UNGA A/RES/61/201 (20 December 2006); UNGA A/RES/62/86 (10 December 2007); UNGA A/RES/63/32 (26 November 2008); UNGA A/RES/64/73 (7 December 2009); UNGA A/RES/65/159 (20 December 2010); UNGA A/RES/66/200 (22 December 2011); UNGA A/RES/67/210 (21 December 2012); UNGA A/RES/67/210 (12 March 2013); UNGA A/RES/68/212 (18 February 2014).

<sup>76</sup> United Nations, Harmony with Nature <<http://www.harmonywithnatureun.org>> accessed 12 May 2021.

<sup>77</sup> UN General Assembly Resolution A/RES/74/219 (27 January 2020).

<sup>78</sup> UN General Assembly Resolution A/RES/70/1 (21 October 2015).

<sup>79</sup> UN General Assembly Resolution A/RES/74/L.92 (10 September 2020).



The practice of the UNGA therefore demonstrates that climate change and its effects on human rights fall within its mandate.

It will now be outlined that an Advisory Opinion from the ICJ on states' obligations in this regard would assist the UNGA in the performance of its functions.

### 3.2.2. Supporting the UNGA in its functioning

According to Article 92 UN Charter and Article 1 of the ICJ Statute, the ICJ is the principal judicial organ of the United Nations.

The Court itself described and defined its tasks as assisting the other UN organs in the exercise of their functions. In the *Western Sahara Advisory Opinion*, the Court stressed that “*lending its assistance in the solution of a problem confronting the GA, the Court would discharge its functions as the principal judicial organ of the United Nations.*”<sup>80</sup>

In its later *Nuclear Weapons Advisory Opinion*, the Court stated that the “purpose of the advisory function is not to settle- at least directly- disputes between States, but to offer legal advice to the organs and institutions requesting the opinion.”<sup>81</sup>

As the subsection 3.2.1. above showed, the UNGA is on a general basis concerned with the issue of climate change and its impacts on human rights and the international community more generally. It follows that the requested Advisory Opinion dealing with those topics, would support the UNGA in exercising its functions.

The Court itself made clear that no further detail on how the Advisory Opinion would be useful for the UNGA is required:

“it is not for the Court itself to purport to decide whether or not an advisory opinion is needed by the Assembly for the performance of its functions. The General Assembly has the right to decide for itself on the usefulness of an opinion in the light of its own needs.”<sup>82</sup>

---

<sup>80</sup> *Western Sahara*, Advisory Opinion, 1975 I.C.J. 12, para 23.

<sup>81</sup> *Nuclear Weapons*, Advisory Opinion, (n 66) para 15.

<sup>82</sup> *Ibid.* para 16.



It has therefore been established that the request for the Advisory Opinion falls within the mandate of the UN General Assembly and that the Court would assist the UNGA in exercising its function by accepting the request for the opinion.



**State**

**Obligations:**

**Climate**

**Change and**

**Human Rights**



## 4. Sources of Law

### Key takeaways:

- The sources of law mentioned in Art 38 of the ICJ statute (namely treaty law, customary international law, general principles of international law, past judicial decisions, and academic writings) provide ample material for the judges to consider when formulating state obligations with regards to climate change and human rights.
- Jurisprudence of national, regional and international courts are likely to be taken into account by the ICJ judges.

Article 38 of the ICJ Statute outlines the sources of international law that the judges consider when drafting an Advisory Opinion. They are namely: treaty law, customary international law, general principles of international law, past decisions, and academic writings.<sup>83</sup>

### 4.1. Treaty law

By: Charlotte Joppart (University of St. Louis), Luna Jalocha (University of St. Louis) & Lianne Baars (Leiden University)

#### 4.1.1. International treaties

The Court will have several international covenants to consider in the drafting of an Advisory Opinion. Firstly, there are several international treaties on the environment and related matters such as the UN Framework Convention on Climate Change<sup>84</sup>, the Kyoto Protocol<sup>85</sup>, and the UN Convention on Biological Diversity.<sup>86</sup> Also other treaties make reference to the environment. The Convention on the Rights of the Child requires “*States to pursue the full realization of the right of the child to the enjoyment of the highest*

---

<sup>83</sup> United Nations, Statute of the International Court of Justice (26 June 1945, entered into force 24 October 1945) <<https://www.icj-cij.org/en/statute>> Article 38, accessed 12 May 2021.

<sup>84</sup> United Nations Framework Convention on Climate Change, May 9, 1992 1771 U.N.T.S. 107, 165; S. Treaty Doc No. 102-38 (1992); U.N. Doc. A/AC.237/18 (Part II)/Add.1; 31 I.L.M. 849 (1992).

<sup>85</sup> Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997 37 I.L.M. 22 (1998); 2303 U.N.T.S. 148; U.N. Doc FCCC/CP/1997/7/Add.1.

<sup>86</sup> United Nations, Convention on Biological Diversity (signed 5 June 1992, entered into force 26 December 1993) 1760 UNTS 79 (CBD).



*attainable standard of health taking into consideration the dangers and risks of environmental pollution.*<sup>87</sup> Another example are the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR): “*States have an obligation to enact legal and institutional frameworks to protect human rights against the effects [of climate change]. This is true regardless of whether the state is responsible for those effects because (...) the ICCPR and ICESCR both include obligations to protect human rights from harms caused by third parties.*”<sup>88</sup>

The Preamble of the Paris Agreement provides that “*parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights*”.<sup>89</sup> The joint report ‘Delivering on the Paris Promises: Combating Climate Change while Protecting Rights’ by several civil society organisations finds that “*All states that negotiated the [Paris] Agreement are already parties to more than one core human rights treaty and bear international legal obligations to respect, fulfill, and protect the rights of people.*”<sup>90</sup> Therefore human rights protection in mitigation and adaptation under the Paris Agreement should be double-secured by other treaties. The judges at the ICJ will look to the Paris Agreement, as well as other treaties in their process of drafting an Advisory Opinion.

---

<sup>87</sup> UNHRC, Report of the United Nations High Commissioner for Human Rights (n 9) para 25.

<sup>88</sup> UNEP and Sabin Center for Climate Change Law (Columbia Law School) (n 28) 32.

<sup>89</sup> Paris Agreement (12 December 2015) adopted at the twenty-first Conference of the Parties to the United Nations Framework Convention on Climate Change in Paris (UNFCCC). “While preambular text cannot create new legal obligations on its own, this limit is of little significance. The preambular language of the Paris Agreement regarding human rights refers to existing human rights obligations that parties have entered into previously. Therefore, the preamble is highly relevant to the interpretation of the entire agreement as these obligations are relevant in the context of climate change.” From CIEL (Center for International Environmental Law), IWGIA (International Working Group for Indigenous Affairs), RFN (Rainforest Foundation Norway), CARE, WEDO, AIPP (Asia Indigenous Peoples Pact), ITUC (International Trade Union Confederation), ‘Delivering On The Paris Promises: Combating Climate Change While Protecting Rights’ (2017) <<https://unfccc.int/sites/default/files/903.pdf>> accessed 25 November 2020, 5.

<sup>90</sup> Ibid 7.



#### 4.1.1. American Convention on Human Rights

Article 11 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (“Protocol San Salvador”) expressly recognises the right to a healthy environment:

*“1. Everyone shall have the right to live in a healthy environment and to have access to basic public services.*

*2. The State Parties shall promote the protection, preservation, and improvement of the environment”.*

In light of the case-law analyzed below, this right should also be considered to be included among the economic, social and cultural rights protected by Article 26 of the American Convention on progressive development:

*“The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.”*

#### 4.1.2. African Charter on Human and Peoples’ Rights

The main source of law concerning human rights at the African level is the African Charter on Human and Peoples’ Rights. Since its adoption 30 years ago, the Charter has formed the basis for individuals to allege violations of specific human rights in the African continent.

Articles 1 and 2 of the Charter enshrine the principle of responsibility of the States and grant freedoms, rights and duties to people and the obligation to adopt measures to ensure the enjoyment of them. In addition to this, Article 24 states that *“All peoples shall have the right to a general satisfactory environment favourable for their development”*. This article specifically recognises the right of a good and satisfactory environment, which enables peoples’ right to develop.



### 4.1.3. European Convention on Human Rights

The Convention for the Protection of Human Rights and Fundamental Freedoms, or the European Convention on Human Rights (ECHR) is a regional human rights treaty under the realm of the Council of Europe.<sup>91</sup> 16 protocols have amended it since its adoption in 1950.

The right to a healthy environment is not encompassed within the ECHR. In international law, the recognition of this right commenced with the first principle of the 1972 Stockholm Declaration.<sup>92</sup> As the ECHR was adopted *before* 1972, the right to a healthy environment was not incorporated into it.<sup>93</sup> The inclusion of the right in an additional protocol has since been proposed by the Parliamentary Assembly,<sup>94</sup> but these proposals have not yet yielded anything, as the Committee of Ministers has denied them all.<sup>95</sup>

## **4.2. Jurisprudence from Courts and Tribunals**

Climate change, as a matter of public concern, has received increased attention from international courts and tribunals over the past few years. This section will focus on the case-law and the positions regarding climate change of the Inter-American Court of Human Rights, the African Court on Human and Peoples' Rights, and the International Tribunal on the Law of the Sea. The ICJ is likely to look towards the work of regional human rights courts in its deliberations on the Advisory Opinion.

---

<sup>91</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (signed 4 November 1950, entered into force 3 September 1953, as amended) (ECHR).

<sup>92</sup> 1972 Stockholm Declaration of the United Nations Conference on the Human Environment' (1972) UN Doc A/CONF.48/14.

<sup>93</sup> Marie-Catherine Petersmann, 'Narcissus' Reflection in the Lake: Untold Narratives in Environmental Law Beyond the Anthropocentric Frame' (2018) 30 *Journal of Environmental Law* 248.

<sup>94</sup> See e.g. Parliamentary Assembly of the Council of Europe, 'Drafting an additional protocol to the European Convention on Human Rights concerning the right to a healthy environment' (2009) Recommendation 1885.

<sup>95</sup> Svitlana Kravchenko and John E Bonine, 'Interpretation of Human Rights for the Protection of the Environment in the European Court of Human Rights' (2012) 25 *Pacific McGeorge Global Business & Development Law Journal* 245.



#### 4.2.1. Inter-American Court of Human Rights

The jurisprudence from the Inter-American Court of Human Rights highlights the importance of environmental protection. In *Salvador Chiriboga v. Ecuador*<sup>96</sup>, the Court recognises that the preservation of the environment represents a legitimate public interest.

Even more to the point is that Court's Advisory Opinion OC-23/17 of November 15, 2017, issued in response to a request made by the State of Colombia concerning State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity recognized in Articles 4 and 5 of the American Convention on Human Rights, in relation to Articles 1(1) and 2 of this Convention.<sup>97</sup> First, the Court highlights that the right to a healthy environment is an autonomous right, protecting the components of the environment, such as forests, rivers, seas and others, even in the absence of certainty or evidence about the risk to individual persons. It is about protecting nature and the environment, not only because they are essential for human life or because of the effects their deterioration could provoke on other rights, such as health, life or personal integrity, but also for their usefulness for other living organisms on the planet, which deserve to be protected and respected. The right to a healthy environment as an autonomous right is thus different from the environmental content that arises from the protection of other rights, such as the right to life or to personal integrity. In that respect, in *Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina*<sup>98</sup>, the Court examines for the first time in a contentious case the rights to a healthy environment autonomously, based on Article 26 of the American Convention.

Second, the Court asserts that environmental damages can affect all human rights. Indeed, their full enjoyment depends on a favorable environment. Some human rights are more affected than others to certain types of environmental harm, among which the rights to life, to personal integrity, to private life, to health, to access to water and food, to housing, to participate in cultural life, to property and the right not to be forcibly displaced. All these essential human rights cannot properly be guaranteed if the environment is not protected and respected. This statement of the Court emphasizes the interdependence and indivisibility between human rights, the environment and sustainable development. The importance of the protection, preservation and improvement of the environment, contained in Article 11 of the

---

<sup>96</sup> Inter-American Court on Human Rights, *Salvador Chiriboga v. Ecuador*, Judgment of May 6, 2008, Serie C, No. 179.

<sup>97</sup> Inter-American Court on Human Rights, *The Environment and Human Rights* (n 27)

<sup>98</sup> Inter-American Court on Human Rights, *Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina*, Judgment of February 6, 2020. Series C, No. 400.



Protocol of San Salvador, as an essential human right related to the right to life with dignity of Article 4 of the American Convention on Human Rights, was already brought out in *Pueblos Kaliña y Lokono v. Surinam*<sup>99</sup>, but in this Advisory Opinion, the Court affirms it in a strong and confident manner. The Court therefore recognizes the existence of an irrefutable relationship between the protection of the environment and the realization of other human rights.

As a consequence, in order to respect and guarantee the right to a healthy environment and all essential human rights related to it, especially the rights to life and integrity of the people under their jurisdiction, States must prevent significant environmental damages, inside or outside their territory. They have special obligations to meet with respect to the risk of environmental degradation. They must conduct studies on environmental impacts; regulate and supervise the activities under their jurisdiction that may cause a significant damage to the environment; establish a contingency plan, in order to have security measures and procedures to minimize the possibility of major environmental accidents; and mitigate the significant environmental damages that may have occurred. Moreover, States must act in compliance with the precautionary principle to protect human rights against possible serious and irreversible damage to the environment, even in the absence of scientific knowledge and certainty.

Finally, States have appropriate obligations in relation to the protection of Indigenous and local communities, which are particularly affected by climate change and environmental degradation. In *Pueblo Indígena Kichwa de Sarayaky v. Ecuador*<sup>100</sup>, the Court reminds the obligation for governments to perform studies of environmental impact, explaining that, where appropriate, studies must be carried out in cooperation with the peoples concerned, in order to assess the social, spiritual, cultural and environmental incidence that projects of development could have on the concerned communities. Also, in *Pueblos Kaliña y Lokono v. Surinam*<sup>101</sup>, the Court asserts that States must respect, preserve and maintain the practices of Indigenous and local communities that involve traditional lifestyles relevant to the conservation and sustainable use of biological diversity. The customary use of biological resources must be protected and encouraged, in accordance with the traditional cultural practices that are compatible with the requirements of conservation or sustainable use. In that sense, in *Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina*<sup>102</sup>, the Court condemned the illegal logging and the activities carried out by the *criollo* population on the territory of the Indigenous communities concerned,

---

<sup>99</sup> Inter-American Court on Human Rights, *Pueblos Kaliña y Lokono v. Surinam*, Judgment of November 25, 2015, Serie C, No. 309.

<sup>100</sup> Inter-American Court on Human Rights, *Salvador Chiriboga v. Ecuador* (n 96).

<sup>101</sup> *Pueblos Kaliña y Lokono v. Surinam* (n 99).

<sup>102</sup> *Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina* (n 198).



as it affected their environmental rights and their way of life, harming their cultural identity at the same time.

### **General position of the Inter-American Court of Human Rights on climate change**

The case-law from the Inter-American Court of Human Rights supports the importance of environmental protection. Governments have specific obligations with respect to the risk of environmental degradation, in order to prevent the possibility of significant environmental damages. They need to conduct studies on environmental impacts, to regulate the activities on their territory and to establish a contingency plan. States must also act in conformity with the precautionary principle to protect human rights in the event of possible serious and irreversible damage to the environment, even in the absence of scientific certainty.

In addition, the Court recognizes the right to a healthy environment as an essential autonomous human right, protecting the components of the environment (forests, rivers, seas...). Other living organisms on the planet deserve to be protected and respected. Moreover, this right to a healthy environment is linked with a variety of other essential human rights, such as the right to life, to personal integrity, to health, to access to water and food, to property, since the full enjoyment of all human rights depends on a favorable environment. It emphasizes the interdependence and indivisibility between human rights, the environment and sustainable development. The Court therefore recognizes the existence of an irrefutable relationship between the protection of the environment and the realization of other human rights.



## 4.2.2. Inter-American Commission on Human Rights

### 4.2.2.1. Hearing on Climate Change before the Inter-American Commission on Human Rights

In September 2019, the Inter-American Commission on Human Rights heard presentations from representatives of numerous civil society organizations about the impacts of climate change on the human rights of Indigenous peoples, women, children, and rural communities.<sup>103</sup> They stated that human rights impacts can result from the emission of greenhouse gases, due to the effects of extreme climate events, and in the response to climate change. On July 11, 2019, the following organizations made a request for hearing: Fundación Pachamama (Ecuador), Dejusticia (Colombia), EarthRights International (regional), AIDA (regional), FUNDEPS (Argentina), FIMA (Chile), DPLF (regional), IDL (Peru), CELS (Argentina), Engajamundo (Brazil), AHCC (Honduras), Conectas (Brazil), FARN (Argentina), CEMDA (México) and La Ruta del Clima (Costa Rica). These petitioners asked the Commission to promote climate policies that protect human rights. They urged it to recognize the climate crisis as a priority that threatens human rights and ecosystems and asked to advance precautionary measures related to climate change. The organizations further requested that the Commission calls on States to take action to cease activities that aggravate climate change and threaten the effective enjoyment of human rights and promote energy transition models that guarantee environmental rights. On May 5, 2020, the petitioners published a report regarding their request.<sup>104</sup>

### 4.2.2.2. Inuit Climate Change Petition

On December 7, 2005, the Inuit Circumpolar Council, nonprofits Earthjustice and the Center for International Environmental Law submitted a petition to the Inter-American Commission on Human Rights seeking relief from violations resulting from global warming caused by acts and omissions of the United States.<sup>105</sup> It argued that impacts of climate change violate the Inuit's fundamental human rights, including right to the benefits of culture, to property, to the preservation of health, life, physical integrity,

<sup>103</sup> Climate Case Chart, Hearing on Climate Change before the Inter-American Commission on Human Rights, <<http://climatecasechart.com/non-us-case/hearing-on-climate-change-before-the-inter-american-commission-on-human-rights/>> accessed 12 May 2021.

<sup>104</sup> Magdalena A Diaz and others, 'Cambio climático y los derechos de mujeres, pueblos indígenas y comunidades rurales en las Américas' (2020) <[https://www.dejusticia.org/wp-content/uploads/2020/05/hbs\\_Cambio\\_climatico-en-las-Americas\\_web.pdf](https://www.dejusticia.org/wp-content/uploads/2020/05/hbs_Cambio_climatico-en-las-Americas_web.pdf)> accessed 12 May 2021.

<sup>105</sup> Sheila Watt-Cloutier, *Petition to the Inter American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States*, December 7, 2005 <[https://earthjustice.org/sites/default/files/library/legal\\_docs/summary-of-inuit-petition-to-inter-american-council-on-human-rights.pdf](https://earthjustice.org/sites/default/files/library/legal_docs/summary-of-inuit-petition-to-inter-american-council-on-human-rights.pdf)> accessed 12 May 2021.



security, to a means of subsistence, to residence, movement and inviolability of the home. However, in November 2006, the Commission declined the petition, because the information provided was insufficient for making a determination. The Commission nevertheless accepted to hold a hearing on March 1, 2007, not to revise the petition itself, but to address matters relating to global warming and human rights. This shows that even though the petition was rejected, the Commission is concerned by the relationship between global warming and human rights. This hearing was a constructive step in the direction of recognizing States' obligations to prevent human rights violation resulting from their contribution to global warming.<sup>106</sup>

#### 4.2.3. African Commission on Human and Peoples' Rights

There have two cases before the African Commission on Human and Peoples' rights, with particular importance with respect to the question of climate change and environmental protection: the *Ogoni*<sup>107</sup> and the *SERAC v. Nigeria*<sup>108</sup> cases.

##### 3.2.3. Ogoni v. Nigeria

The first dispute concerns the oil company Shell, which has been using oil stocks in the Niger delta since the 1950s. Many oil spills had caused massive environmental deterioration, destroying both the land and the groundwater. This severely harmed the Ogoni people, a community living in that particular region of Nigeria. The company was allowed to operate as such, because the Nigerian military government did not impose any oversight or regulation aimed at health, safety or environmental protection. Even more, the government put its military power at the disposal of the oil companies. As a result, the non-violent Ogoni protest movement was repressed, villages were attacked, and community leaders were executed. In total, the military government was guilty of the death and displacement of thousands of people.<sup>109</sup>

---

<sup>106</sup> Jessica Gordon, 'Inter-American Commission on Human Rights to Hold Hearing after Rejecting Inuit Climate Change Petition' (2007) 7(2) *Sustainable Development Law & Policy*, 55.

<sup>107</sup> African Commission on Human and Peoples' Rights, *The Social and Economic Rights Action Center et. al. v. Nigeria (Ogoni case)* No. 155/96 (2001). See also High Court of Nigeria, *Gbemre v. Shell Petroleum Nigeria Limited and Others*, FHC/B/CS/53/05, Judgment of 14 November 2005.

<sup>108</sup> African Commission on Human and Peoples' Rights, *SERAC v. Nigeria*, Case No. ACHPR/COMM/A044/1.

<sup>109</sup> Clemens Kaupa, Human+fundamental rights and climate change (*Medium*, Climate Change Law) September 20, 2019, <<https://medium.com/climate-change-law/human-fundamental-rights-and-climate-change-74654d4acb61>> accessed 12 May 2021.



Two NGOs brought a complaint to the African Commission on Human and Peoples' Rights, on the ground that Nigeria had breached human rights enshrined in the Banjul Charter.<sup>110</sup> The Commission ruled the following:

- The right to health (Article 16) and the right to a satisfactory environment (Article 24). Article 24 imposes clear obligations upon a government, by requiring the State to take reasonable measures to prevent pollution and ecological degradation, in order to promote conservation.
- The right of people to dispose of their resources (Article 21). The Commission held that the government must take sufficient actions to keep private parties (*i.e.*, the oil companies) from further damaging the land.
- The right to food, implicitly contained in Articles 4, 16 and 22 (*i.e.*, the rights to life, health, and economic and social development). The violation came from the fact that the government did not prevent the environmental destruction.
- The Commission also held that Nigeria systematically violated the right to adequate housing, which is not itself contained in the Charter, but is derived from a combination of the rights to health, family and property.

### 3.3.3. SERAC v. Nigeria

Furthermore, *SERAC v. Nigeria* is another important decision, because, unlike other cases related to environmental issues, the reliefs sought did not focus on pecuniary compensation. Rather, the focus was on the establishment of a right to a clean, poison-free and pollution-free healthy environment.<sup>111</sup> The African Commission on Human and Peoples' Rights decided that the right to a clean environment contained in Article 24 of the African Charter imposes a clear obligation on States to take reasonable measures to “prevent pollution and ecological degradation, to promote conservation, and to secure ecologically sustainable development and use of natural resources”.<sup>112</sup> This decision placed a positive obligation on governments to desist from activities that may threaten the health and environment of their

---

<sup>110</sup> Another name of the African Charter on Human and Peoples' Rights.

<sup>111</sup> Bukola Faturoti, Goodswill Agbaitoro and Obinna Onya, “Environmental Protection in the Nigerian Oil and Gas Industry and Jonah Gbemre v. Shell PDC Nigeria Limited: Let the Plunder Continue?”, *African Journal of International and Comparative Law*, May 2019.

<sup>112</sup> African Commission on Human's & Peoples' Rights, *SERAC v. Nigeria*, Case No. ACHPR/COMM/A044/1.



citizens. The African Commission also outlined a number of procedural rights included in its conception of the right to a clean environment, such as the right to information concerning hazardous activities, as well as the right of communities to participate in decision-making on matters concerning their environment.

In summary, the Commission found a violation of a fundamental right in light of the absence of measures taken by the government to avoid any environmental annihilation and prevent any harm to the population living in the area. The African Commission took the matter seriously, by establishing a state's liability for the absence of protection and action regarding the protection of the environment, leading to breach of fundamental rights recognised at the international level.

The question of how and whether human rights law can be applied to assess states' responsibility for climate change is increasingly receiving analysis and concern from the international law community. International courts seem to agree that major human rights are affected by the impacts of climate change. These include right to life, to property, to family life, to self-determination, right to food, shelter, health, water, culture, development and natural resources, and Indigenous people's rights. In this respect, the African Commission on Human and Peoples' Rights highlighted during its 47<sup>th</sup> Ordinary Session the human rights dimension of climate change as another disturbing threat to the enjoyment of human rights on the African continent, saying that many African nations are realizing that the threats from climate change are serious and urgent.<sup>113</sup> Moreover, concerning the African Commission of Human and Peoples' Rights, there have been specific references to the fact that there should be some legislation or case law on the question of climate change and state responsibility. Indeed, the Special Rapporteur on Refugees, Asylum Seekers, Internally Displaced Persons and Migrants in Africa has made several statements on the issue, among which the following one: "On this International Migrants Day, the Special Rapporteur on Refugees, Asylum Seekers, Displaced Persons and Migrants in Africa of the African Commission on Human and Peoples' Rights, recalls that migration is an inherent feature of the human condition and despite efforts aimed at dissuading or putting an end to this phenomenon, it will persist so long as factors such as violence, poverty, discrimination, inequality, climate change, natural and other disasters continue to prevail".<sup>114</sup>

---

<sup>113</sup> Final Communique of the 47<sup>th</sup> Ordinary Session of the African Commission on Human and Peoples' Rights, May 26, 2010.

<sup>114</sup> Statement made by the Special Rapporteur on Refugees, Asylum Seekers, Internally Displaced Persons and Migrants in Africa on the occasion of International Migrants Day, December 8, 2018.



#### 4.2.4. Other references by regional courts

At the First International Human Rights Forum, from October 28 to 29, 2019, the African Court on Human and Peoples' Rights, the European Court of Human Rights and the Inter-American Court of Human Rights agreed “to undertake knowledge-sharing through digital platforms, on topical human rights issues, including on, migration, violence against women, environmental hazards, climate change, bioethics, terrorism, mass data surveillance and on the working methods of the three courts.”<sup>115</sup>

There have been specific references to the fact that there should be some legislation or case law on the question of climate change and state responsibility. Indeed, statements by the Special Rapporteur are mentioning the issue, among which the following one: “On this International Migrants Day, the Special Rapporteur on Refugees, Asylum Seekers, Displaced Persons and Migrants in Africa of the African Commission on Human and Peoples' Rights, recalls that migration is an inherent feature of the human condition and despite efforts aimed at dissuading or putting an end to this phenomenon, it will persist so long as factors such as violence, poverty, discrimination, inequality, climate change, natural and other disasters continue to prevail”.<sup>116</sup> It can therefore be concluded from the above that there is in the African Human Rights System an early thinking process regarding the matter of human rights and climate change.

Moreover, at the 47<sup>th</sup> Ordinary Session of the African Commission on Human and Peoples' Rights held in Banjul from May 12 to 26, 2010, Mrs. Hannah Forster, Director of the African Centre for Democracy and Human Rights Studies, spoke on the behalf of the participants of the Forum of NGOs. In reviewing the human rights situation in African for the last six months, she highlighted “the continuing depletion of Africa’s natural resources as well as the deterioration of the environment due to lack of transparency in investment and corporate policies of some organizations”.<sup>117</sup> In her opinion, it was meritorious for the African Commission to establish a Working Group under this matter, but it was absolutely crucial to formulate mechanisms protecting vulnerable people from exploitation in its various forms. She also outlined that climate change threatened the enjoyment of human rights on the continent. African nations are finally realizing that the threats from climate change are serious and urgent.

---

<sup>115</sup> The African Court on Human and Peoples' Rights, the European Court of Human Rights and the Inter-American Court of Human Rights, ‘Kampala Declaration’, First International Human Rights Forum (28 October 2019) <[https://echr.coe.int/Documents/Kampala\\_Declaration\\_ENG.pdf](https://echr.coe.int/Documents/Kampala_Declaration_ENG.pdf)> accessed 12 May 2021.

<sup>116</sup> Ibid.

<sup>117</sup> Final Communique of the 47<sup>th</sup> Ordinary Session of the African Commission on Human and Peoples' Rights (n 113).



Specialists call for a recognition of the importance of climate change in light of respecting fundamental human rights.

Furthermore, the African Commission addressed during its sessions the problem that its Resolutions do not seem to be applied in practice:<sup>118</sup>

*“Resolutions have been passed by the African Commission on climate change and human rights, but the quality of their content is not impressive. The African Commission Resolution 153 of 2009 only focuses on the negotiations under the UNFCCC and mentions the concern that human rights standards are lacking in “various draft texts of the conventions under negotiation.”*

*“This failure is made worse by the fact that African states, such as Mali, Mauritius, and Zimbabwe, participated in the process which led to the adoption of resolutions at the UN-level, which list a range of rights which can be adversely affected by climate change. Resources thus do exist but have not been fully utilized.”*

*“Both individual and inter-state communications can be used to advance the link of climate change to human rights in Africa. As shown earlier, communications on climate change grounded in allegations of human rights violations feature in the work of the Inter-American Commission. National courts have also examined the implication of climate change for environmental rights.”*

*“For instance, in *Urgenda Foundation v. The State of the Netherlands*, the Hague District Court established a causal link between emissions by the Netherlands, global climate change, and the effects on states’ duty for environmental rights”.*

The *Urgenda* decision has been seen by the Commission as a landmark case, providing a clear path forward for concerned individuals around the world to pursue climate litigation and to protect human rights. The principles in the case adds significantly to the current global legal and political pressure applied by citizens on their governments to take urgent action on climate change.

---

<sup>118</sup> Ademola Oluborode Jegede, Climate Change in the Work of the African Commission on Human and Peoples’ Rights, *Speculum Juris*, 2017 31 (2)  
<[https://www.researchgate.net/profile/Ademola-Oluborode-Jegede/publication/326818271\\_Climate\\_change\\_in\\_the\\_work\\_of\\_the\\_African\\_Commission\\_on\\_human\\_and\\_peoples%27\\_rights/links/5b64f480458515cf1d32f417/Climate-change-in-the-work-of-the-African-Commission-on-human-and-peoples-rights.pdf](https://www.researchgate.net/profile/Ademola-Oluborode-Jegede/publication/326818271_Climate_change_in_the_work_of_the_African_Commission_on_human_and_peoples%27_rights/links/5b64f480458515cf1d32f417/Climate-change-in-the-work-of-the-African-Commission-on-human-and-peoples-rights.pdf)> accessed 11 May 2021.



### **General position of the African Court of Human and Peoples' Rights on climate change**

The Court is aware of the need for recognition of environmental protection, regulation and case law. However, in practice, African countries are not (yet) inclined to use the tools presented to them. They still have not acknowledged the need to “switch” their minds toward a protection of human rights and the fact that those rights depend on the protection of the environment.

Overall, although the African Court on Human and Peoples' Rights does not seem to be a pioneer on the subject, it must be underlined that climate change appears to be a growing, general concern.

#### 4.2.5. European Court of Human Rights

### **How the European Court of Human Rights works**

The European Court of Human Rights (ECtHR) enforces and interprets the ECHR. The number of judges on the bench is equal to the number of Member States to the Council of Europe, currently 47.<sup>119</sup> The ECtHR can decide on contentious cases, both inter-State and brought by individual victims of human rights violations, and can render advisory opinions.<sup>120</sup>

The legal basis of ECtHR case law is thus the ECHR, which contains mainly civil and political human rights – and not the right to a healthy environment. However, the court often utilises the ‘living instrument doctrine’ as an interpretation mechanism, which entails that the ECHR is interpreted in light of present-day conditions.<sup>121</sup> It has therefore been very active in deriving environmental rights from civil and political rights, sometimes referred to as the ‘greening’ of human rights. Thus, it has been argued that the ECtHR’s case law “all but in name provides for a right to a healthy environment”.<sup>122</sup> This case law therefore merits some attention.

---

<sup>119</sup> Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms (n 91) Article 20.

<sup>120</sup> Articles 33, 34 and 47 ECHR.

<sup>121</sup> *Tyrer v United Kingdom* App No 5856/72 (ECtHR, 25 April 1978) paragraph 31.

<sup>122</sup> Ole W. Pedersen, ‘The European Court of Human Rights and International Environmental Law’ in John H Knox & Ramin Pejan (eds), *The Human Right to a Healthy Environment* (Cambridge University Press 2018) 87.



#### 4.2.5.1. Introduction

The ECtHR acknowledged the connection between human rights and environmental matters in its case law as early as the 1990s.<sup>123</sup> The human rights encompassed in the ECHR are thus currently presumed to offer environmental protection. While the court has not yet ruled in any cases on the topic of climate change specifically, it seems plausible that the corpus of environmental case law is applicable to this human rights threat as well. In the domestic case *Urgenda c.s. v the State of the Netherlands*, it was confirmed that articles 2 and 8 ECHR impose a positive duty upon the State to prevent from dangerous climate change.<sup>124</sup> While this has not yet been affirmed in front of the ECtHR, it might merely be a matter of time. Articles 2 and 8 ECHR – encompassing, respectively, the right to life and the right to respect for private and family life – have proven especially valuable in relation to the environment.

#### 4.2.5.2. Articles 2 and 8 ECHR

In the environmental context, articles 2 and 8 ECHR are generally taken together, as the court has confirmed that the scope of the obligations arising under these provisions largely overlaps.<sup>125</sup> Their development in case law, however, was not simultaneous.

In *López Ostra v Spain*,<sup>126</sup> the ECtHR ruled for the first time that the human right to respect for private and family life under article 8 ECHR can protect from environmental harm. Environmental harm was mainly understood to encompass noise, water, and air pollution. As air pollution from leather factories caused health risks to the applicant and her family, the court ruled that “severe environmental pollution may (...) affect their private and family life adversely”.<sup>127</sup> It further decided that Spain was liable for this violation of article 8 ECHR, despite the State not being directly responsible for the factories.<sup>128</sup> It thus not only confirmed that the provision protects from environmental harm, but also that States might have a positive obligation in this regard.

The existence of this positive obligation was confirmed in *Guerra and others v Italy*,<sup>129</sup> where the court expressed that the State must take positive protective action in the environmental ambit.<sup>130</sup> There is thus general consensus that States have both a negative and a positive obligation under article 8 ECHR with regard to environmental protection. While the court deemed it unnecessary to go into the potential

---

<sup>123</sup> Kravchenko and Bonine (n 95) 248.

<sup>124</sup> Supreme Court of the Netherlands 20 December 2019 ECLI:NL:HR:2019:2006 (*Urgenda*).

<sup>125</sup> *Budayeva and others v Russia* App Nos 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02 (ECtHR, 20 March 2008) paragraph 133.

<sup>126</sup> *López Ostra v Spain* (n 35).

<sup>127</sup> *Ibid* paragraph 51.

<sup>128</sup> *Ibid* paragraph 58.

<sup>129</sup> *Guerra and others v Italy* App No 116/1996/735/932 (ECtHR, 19 February 1998).

<sup>130</sup> *Ibid* paragraph 58.



application of article 2 ECHR to an environmental context, Judges Walsh and Jambrek in their concurring opinions stated that it would be beneficial to consider article 2 ECHR in future environmental cases.

Their considerations were heard, as the court ruled in *Öneryildiz v Turkey*<sup>131</sup> that article 2 ECHR can be invoked in environmental matters. When a methane explosion at a mountain of rubbish neglected by the government took several lives, it was contemplated by the court to be a violation of the right to life.<sup>132</sup> Moreover, the court reiterated that this human right imposes a positive obligation on the State in environmental cases as well.<sup>133</sup>

Thus, the ECtHR's case law has elucidated the environmental potential of the ECHR, specifically the right to life and the right to respect for private and family life. Articles 2 and 8 ECHR both contain a negative and a positive obligation for the State in environmental matters. Moreover, they both concern substantive and procedural rights. Interestingly, both articles 2 and 8 ECHR do not explicitly contain any procedural requirements. The court has, however, considered that the procedural duties of States under these provisions include, but are not limited to: providing information<sup>134</sup>, providing access to justice<sup>135</sup>, and conducting environmental impact assessments<sup>136</sup> in situations where environmental rights need to be protected.

While it is apparent the ECtHR has fulfilled an important role in the connection between human rights, the environment, and State obligations, it has also formulated some limitations in this regard. Firstly, governments enjoy a wide margin of appreciation in providing environmental policies, as they have direct democratic legitimacy.<sup>137</sup> Secondly, human rights are not designed to protect the environment per se, and therefore a victim-connection is pertinent for a successful environmental case at the ECtHR.<sup>138</sup> Thirdly, the environmental harm needs to reach a certain level of severity to be considered a violation of a human right.<sup>139</sup> Nevertheless, the court has, over the last decades, proven valuable in the protection of the environment.

---

<sup>131</sup> *Öneryildiz v Turkey* App No 48939/99 (ECtHR, 30 November 2004).

<sup>132</sup> *Ibid* paragraph 118.

<sup>133</sup> *Ibid* paragraph 90.

<sup>134</sup> *Guerra and others v Italy* (n 131) paragraph 60.

<sup>135</sup> *Taşkin and others v Turkey* App No 46117/99 (ECtHR, 10 November 2004) paragraph 124-5.

<sup>136</sup> *Giacomelli v Italy* App No 59909/00 (ECtHR, 26 March 2007) paragraph 96-97.

<sup>137</sup> *Hatton and others v United Kingdom* App No 36022/97 (ECtHR, 8 July 2003) at 97-103.

<sup>138</sup> *Kyrtatos v Greece* (n 26) 52.

<sup>139</sup> *Fadeyeva v Russia* App No 55723/00 (ECtHR, 9 June 2005) 70.



#### 4.2.5.3. Future prospects

While the only cases explicitly concerning the climate crisis, as of now, have taken place in domestic courts – such as the above-mentioned Urgenda case – this might change rather swiftly. The case of *Duarte Agostinho and others v Portugal and 33 other States*, also known as the Portuguese Youth case, is currently pending at the ECtHR. If the court would deliver a decision on the merits, it would clarify whether and to what extent articles 2 and 8 ECHR might be applicable to the specific context of climate change. More interesting, however, are three other innovative aspects concerned by this case; these merit some more attention.

Firstly, the applicants explicitly invoke article 14 ECHR: the prohibition of discrimination.<sup>140</sup> They reason that States not taking appropriate measures against climate change violates the prohibition of discrimination. As younger generations will suffer more from the climate crisis, and there is no objective justification for this placement of the heavy burden of climate change upon younger and future generations, States are discriminating against these younger generations. This complaint is directly intertwined with the notion of intergenerational equity, according to which the environmental rights of present and future generations must be taken into account.

Secondly, as the applicants intend to litigate against not only the State they are residents of, but also 33 other States, the issue of extraterritorial application of human rights comes to the fore. Article 1 ECHR provides that States only have the obligation to protect human rights for people within their jurisdiction, which comprises the group of people on their own territory and people under their control and authority.<sup>141</sup> With climate change being a global problem for which all States are partly responsible, extraterritorial application is of great import; yet it is still uncertain to what extent human rights apply extraterritorially in the specific context of climate change.<sup>142</sup> A decision on the merits in the Portuguese Youth case might provide further guidance on this issue.

---

<sup>140</sup> *Duarte Agostinho and others v Portugal and 33 other States* Application Form 9

<<https://youth4climatejustice.org/wp-content/uploads/2020/12/Application-form-annex.pdf>> accessed 12 May 2021.

<sup>141</sup> For an elaboration see e.g. Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford University Press 2011).

<sup>142</sup> John H Knox, 'Diagonal Environmental Rights' in Mark Gibney & Sigrun Skogly (eds), *Universal Human Rights and Extraterritorial Obligations* (University of Pennsylvania Press 2010) 86-87; Greenpeace & Center for International Environmental Law, 'Extraterritorial Obligations in the Context of Eco-destruction and Climate Change' (FIAN International 2014) 9-10

<[https://www.fian.org/fileadmin/media/publications\\_2015/ETO\\_and\\_climate\\_change.pdf](https://www.fian.org/fileadmin/media/publications_2015/ETO_and_climate_change.pdf)> accessed 12 May 2021.



Lastly, the court itself, in its statement on the Purpose of the Case, requested litigants to comment on the prohibition of torture (article 3 ECHR) in relation to climate change.<sup>143</sup> As the environment has previously mainly been linked to the right to life and the right to respect for private and family life, the court would find itself in uncharted waters having to decide on the potential connection between the prohibition of torture and climate change.

#### 4.2.5.4. Conclusion

In conclusion, under the ECHR States have both a negative and a positive obligation to protect human rights, and thus to protect persons from environmental harm. Especially the right to life and the right to respect for private and family life provide substantive and procedural duties for States in this regard. While it has not yet been decided on at the international level, it seems that these obligations also apply in the context of anthropogenic climate change. In this respect, the currently pending Portuguese Youth case might provide answers. The established obligations for States under human rights law can and should be taken into account by the International Court of Justice in rendering its Advisory Opinion on climate change, as they ensure the protection of the fundamental rights of all humans.

#### 4.2.6. Conclusion on regional human rights courts

Bringing a legal claim which attempts to make a connection between human rights and state responsibility for climate change has in the last few years met great success, as observed for example in the Advisory Opinion OC-23/17 of November 15, 2017 of the Inter-American Court of Human Rights<sup>144</sup> and in *Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina*.<sup>145</sup> In addition, the current character of state's legal obligations with respect to climate change and environmental protection is clear and precise in the jurisprudence of the Inter-American Court of Human Rights. The African Commission on Human and Peoples' Rights also adopted several specific Regulations in that respect, among which Resolution 271 on Climate Change in Africa<sup>146</sup>, Resolution 417 on the human rights impacts of extreme weather in Eastern and Southern Africa due to Climate Change<sup>147</sup> and Resolution 153

---

<sup>143</sup> *Duarte Agostinho and others v Portugal and 33 other States* Statement on the Purpose of the Case 5, accessible at <<https://youth4climatejustice.org/wp-content/uploads/2021/05/2020.11.20-objet-de-laffaire-professional-translation.pdf>> accessed 9 May 2021.

<sup>144</sup> Inter-American Court on Human Rights, *The Environment and Human Rights* Advisory Opinion (n 27)

<sup>145</sup> *Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina* (n 98).

<sup>146</sup> African Commission on Human Rights and Peoples' Rights, 271 Resolution on Climate Change in Africa - ACHPR/Res.271(LV) 2014, 55<sup>th</sup> Ordinary Session of the African Commission on Human and Peoples' Rights, held in Luanda, Angola, from April 28 to May 12, 2014.

<sup>147</sup> African Commission on Human Rights and Peoples' Rights, 417 Resolution on the human rights impacts of extreme weather in Eastern and Southern Africa due to climate change - ACHPR / Res. 417 (LXIV), held in Sharm el Sheik, May 14, 2019.



on Climate Change and Human Rights and the Need to Study its Impact in Africa <sup>148</sup>, aimed at being applied on a “case to case” basis.

Both the Inter-American Commission on Human Rights and the African Commission on Human Rights have been called in several instances to analyse the question of climate change and take position on this issue. Although in November 2006, the Inter-American Commission on Human Rights declined the 2005 Inuit Climate Change Petition<sup>149</sup> seeking relief from violations resulting from global warming caused by acts and omissions of the United States and arguing that impacts of climate change violate the Inuit’s fundamental human rights, the Commission nevertheless agreed to hold a hearing in March 2007, to address matters relating to global warming and human rights. It shows that even if the petition was rejected, the Commission is concerned by the relationship between global warming and human rights. This hearing was a positive step in the direction of recognizing States’ obligations to prevent human rights violation resulting from their contribution to global warming.<sup>150</sup> Another petition submitted by several NGOs requesting a hearing on climate change is currently pending before the Inter-American Commission on Human Rights.<sup>151</sup> The petitioners asked the Commission to promote climate policies that protect human rights. They urged it to recognize the climate crisis as a priority that threatens human rights and ecosystems and asked to advance precautionary measures related to climate change. The organizations further requested that the Commission calls on States to take action to cease activities that aggravate climate change and threaten the effective enjoyment of human rights and promote energy transition models that guarantee environmental rights. The response of the Commission on this question will surely be of particular importance.

The European Court of Human Rights has dealt with several environmental cases, and currently one climate case is pending. Under the European Convention on Human Rights, States have both positive and negative obligations. The pending climate case will provide clarity as to the extent of applicability of these obligations to anthropocentric climate change.

#### 4.2.7. ITLOS

---

<sup>148</sup> African Commission on Human Rights and Peoples’ Rights, 153 Resolution on Climate Change and Human Rights and the Need to Study its Impact in Africa - ACHPR/Res.153(XLVI), held in Banjul, Gambia, November 25, 2009.

<sup>149</sup> Watt-Cloutier (n 105).

<sup>150</sup> Gordon (n 106) p. 55.

<sup>151</sup> Climate Case Chart (n 103).



By: Lianne Baars (Leiden University)

#### 4.2.7.1. Introduction

The International Tribunal for the Law of the Sea (ITLOS) is the permanent judicial body that decides on any dispute concerning the application or interpretation of the United Nations Convention on the Law of the Sea (UNCLOS) and other related international agreements.<sup>152</sup> It has 21 members on the bench that are elected for 9-year terms.<sup>153</sup> It can decide both contentious cases and give provisional measures orders, as well as deliver Advisory Opinions.<sup>154</sup> While there is a special chamber for disputes concerning the marine environment, this chamber has not yet heard a case.

The legal basis of ITLOS cases is most often UNCLOS, which was negotiated and adopted when there was still little attention for the impacts of climate change on the oceans.<sup>155</sup> Thus, anthropogenic climate change is not considered in this instrument. While articles 1(1)(4), 192, 212(1) and 212(3) read together arguably impose a due diligence obligation upon States to reduce greenhouse gas emissions that might damage the marine environment, these provisions are too general to impose any genuine targets.<sup>156</sup> As ITLOS has a key role in the dynamic development of ocean governance norms and principles, it is pre-eminently an adequate avenue to pursue the intertwinement of climate change and the law of the sea.<sup>157</sup>

---

<sup>152</sup> United Nations Convention on the Law of the Sea (adopted 10 December 1982, entry into force 16 November 1994) 1833 UNTS 3 (*UNCLOS*); article 288 UNCLOS.

<sup>153</sup> Articles 2 and 5 Annex VI UNCLOS.

<sup>154</sup> Article 138 ITLOS Rules of the Tribunal (adopted 28 October 1997, as amended).

<sup>155</sup> Tim Stephens, 'Warming Waters and Souring Seas: Climate change and Ocean Acidification' in Donald Rothwell and others (eds), *The Oxford Handbook of the Law of the Sea* (Oxford University Press 2015) 777; Elise Johansen, 'The Role of the Oceans in Regulating the Earth's Climate: Legal Perspectives' in Elise Johansen, Signe Veierud Busch & Ingrid Ulrikke Jakobsen (eds), *The Law of the Sea and Climate Change: Solutions and Constraints* (Cambridge University Press 2021) 3.

<sup>156</sup> Stephens, (n 157) 783.

<sup>157</sup> Donald Rothwell, 'The Contribution of ITLOS to Oceans Governance through Marine Environmental Dispute Resolution' in Tafsir Malick Ndiaye & Rüdiger Wolfrum, *Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mensah* (Martinus Nijhoff Publishers 2007) 1008.



## Climate change and the oceans

Anthropogenic climate change has recently merited great attention, both in academic literature and with the greater public. However, the interdependency between climate change and the oceans has remained in the background of this discourse, despite the firm establishment of its existence by the Intergovernmental Panel on Climate Change.<sup>158</sup> Especially the interaction between the two legal regimes – law of the oceans and climate change law – has not had the proper amount of attention devoted to it. There is a discrepancy between the actual situation, and the debate surrounding it.<sup>159</sup> Nevertheless, it has been observed that climate change will be the main challenge for the law of the sea regime in the twenty-first century.<sup>160</sup>

The situation of small island States, such as Vanuatu, is especially dire. Climate change impacts on the oceans will first and foremost be noticeable for low-lying States and islands, due to sea level rise; consequences could be that these States become submerged or uninhabitable. Rising seas, in this case, bring up not only essential questions of human rights, but also questions concerning maritime entitlements and statehood.<sup>161</sup>

### 4.2.7.2. ITLOS and climate change

Since its commencement in 1996, ITLOS has heard 29 cases, of which not one has been about climate change.<sup>162</sup> However, over half of those cases were in some way related to the protection of the marine environment.<sup>163</sup> These decisions could in the future also be applied to the issue of climate change, as the marine environment needs to be protected from it. Moreover, it could be deemed relatively simple to apply Part XII UNCLOS to greenhouse gas emissions and climate change, especially due to the broadness of article 192; here might lie a future task for ITLOS.

---

<sup>158</sup> Pörtner H.O. and others, ‘IPCC Special Report on the Ocean and Cryosphere in a Changing Climate’, (IPCC 2019) <<https://www.ipcc.ch/srocc/>> accessed 12 May 2021.

<sup>159</sup> Johansen, (n 157) 2-3.

<sup>160</sup> Donald Rothwell & Tim Stephens, *The International Law of the Sea* (Hart Publishing 2016) 25.

<sup>161</sup> Stephens (n 157) 787-91; see for the consequences on maritime entitlements Signe Veierud Busch, ‘Law of the Sea Responses to Sea-Level Rise and Threatened Maritime Entitlements: Applying an Exception Rule to Manage an Exceptional Situation’ in Elise Johansen, Signe Veierud Busch & Ingrid Ulrikke Jakobsen (eds), *The Law of the Sea and Climate Change: Solutions and Constraints* (Cambridge University Press 2021).

<sup>162</sup> For a full list, see: ITLOS, ‘List of Cases’ <<https://www.itlos.org/en/main/cases/list-of-cases/>>.

<sup>163</sup> Roda Verheyen & Cathrin Zengerling, ‘International Dispute Settlement’ in Cinnamon P Carlarne, Kevin R Gray & Richard Tarasofsky (eds), *The Oxford Handbook of International Climate Change Law* (Oxford University Press 2016) 429.



#### 4.2.7.3. Environmental principles

ITLOS has, in the past, seemed eager to play a progressive role in developing environmental principles within its case law, as to effectively implement these in order to protect and preserve the marine environment.<sup>164</sup> Here, the environmental precautionary principle and the original human rights duty of cooperation will be discussed.

##### 4.2.7.3.a. Precautionary principle

Many notions have been bestowed upon the precautionary principle, or approach, but the definition in Principle 15 of the 1992 Rio Declaration is most often adhered to. It entails that where there are threats of serious irreversible damage to the environment, scientific uncertainty shall not be employed as a reason to postpone cost-effective measures to prevent such damage. However, international courts and tribunals, including ITLOS, have been hesitant to apply this principle.<sup>165</sup>

The precautionary principle was first implicitly used by ITLOS in the *Southern Bluefin Tuna Cases*.<sup>166</sup> In this provisional measures case, Australia and New-Zealand claimed that Japan was overfishing Southern Bluefin Tuna with experimental fishing techniques and thus putting the species in danger. ITLOS decided that the parties had to act ‘with prudence and caution’ to prevent serious harm to the species, despite scientific uncertainty that the experimental technique would do such harm.<sup>167</sup> It has been concluded in literature that ITLOS thus applied the precautionary principle, despite not naming it as such. This was also declared in the Separate Opinions of Judges Shearer and Laing;<sup>168</sup> the latter, moreover, described the precautionary approach to be of an intergenerational nature.<sup>169</sup>

While in later cases ITLOS seemed to adopt a different approach to the precautionary principle, this does not mean it rejected it as such. In *The Mox Plant Case*<sup>170</sup> ITLOS did not consider the precautionary principle, despite parties mentioning it as legal ground.<sup>171</sup> According to the Separate Opinions of Judges Wolfrum and Treves, this was not a rejection of the precautionary principle in general, but merely

---

<sup>164</sup> Haritini Dipla, ‘The Role of the International Court of Justice and the International tribunal for the Law of the Sea in the progressive Development of the Law of the Sea’ in Anastasia Strati, Maria Gavouneli & Nikos Skourtos (eds), *Unresolved Issues and New Challenges to the Law of the Sea: Time Before and Time After* (Martinus Nijhoff Publishers 2006) 246.

<sup>165</sup> Yoshifumi Tanaka, *The International Law of the Sea* (Cambridge University Press 2015) 255.

<sup>166</sup> *Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan)* (Provisional Measures, Order of 27 Augustus 1999) ITLOS Reports 1999, 280.

<sup>167</sup> *Ibid* paragraph 77, 80.

<sup>168</sup> Separate Opinion of Judge Shearer 326-7; Separate Opinion of Judge Laing 12-21.

<sup>169</sup> *Ibid* paragraph 14.

<sup>170</sup> *The MOX Plant Case (Ireland v. United Kingdom)* (Provisional Measures, Order of 3 December 2001) ITLOS Reports 2001, 95.

<sup>171</sup> *Ibid* paragraph 84 does refer to ‘prudence and caution’, but in relation to the duty of cooperation.



dependent upon the specific circumstances of this case.<sup>172</sup> Judge *ad hoc* Székely found it regrettable that the tribunal did not rely upon the principle.<sup>173</sup> In *Case concerning Land Reclamation by Singapore in and around the Straits of Johor*,<sup>174</sup> the tribunal again implicitly referred to the precautionary principle in the context of coastal adaptation works.<sup>175</sup> With the future sea level rise due to climate change, it is important for States to remember that they should exercise caution when planning coastal adaptation works, as to not damage the marine environment.<sup>176</sup>

An elaboration on the precautionary principle was eventually given in *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area*<sup>177</sup>, an Advisory Opinion rendered by the Seabed Disputes Chamber upon request of Nauru and Tonga, two small island States pursuing deep seabed mining. The Area is a part of the ocean beyond national jurisdiction that is ‘common heritage of mankind’; this thus contains an intergenerational component.<sup>178</sup> The Advisory Opinion considered that the Area deserved the highest standard of protection for the marine environment. For this reason, the precautionary principle was deemed applicable in cases concerning the Area, and deemed a part of general due diligence obligations.<sup>179</sup> Moreover, it considered that this principle was starting to become part of customary international law.<sup>180</sup> While this is not a full endorsement, it could contribute to other international courts, such as the International Court of Justice, recognising the principle. Other principles, such as that of common but differentiated responsibilities,<sup>181</sup> best environmental practices<sup>182</sup>, and the obligation to conduct an environmental impact assessment were also considered.<sup>183</sup>

Thus, while the precautionary principle is not explicitly stated in UNCLOS as such, it has been interpreted by ITLOS to be encompassed in the law of the sea regime, in light of dynamic interpretation. The application of this principle gives small island States better prospects for requesting provisional measures from ITLOS based on the climate policies of major greenhouse gas emitters, that are damaging

---

<sup>172</sup> Separate Opinion of Judge Wolfrum 133-5; Separate Opinion of Judge Treves 8-9.

<sup>173</sup> Separate Opinion of Judge *ad hoc* Székely 22-4.

<sup>174</sup> *Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore)* (Provisional Measures, Order of 8 October 2003) ITLOS Reports 2003, 10.

<sup>175</sup> *Ibid* paragraph 99.

<sup>176</sup> Stephens, (n 158) 794.

<sup>177</sup> *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area (Request for Advisory Opinion submitted to the Seabed Disputes Chamber)* (Advisory Opinion of 1 February 2011) ITLOS Reports 2011, 10.

<sup>178</sup> Article 136 UNCLOS.

<sup>179</sup> *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area* (n 179) 131.

<sup>180</sup> *ibid.* 135.

<sup>181</sup> *ibid.* 152-163.

<sup>182</sup> *ibid.* 135-6.

<sup>183</sup> *ibid.* 141-50.



the marine environment, as they will have to take preventative measures even in light of scientific uncertainty.

#### 4.2.7.3.b. Duty of cooperation

The duty of cooperation is one of the core principles of UNCLOS, seen – as related to the environment – in e.g. articles 118, 194, and 197 UNCLOS. The rationale behind this is that cooperation is needed to protect the marine environment and the oceans; one single State cannot achieve such a global goal. Thus, the duty has been emphasized in ITLOS case law.

In *The Mox Plant Case*, ITLOS recognised the duty of cooperation in a fundamental principle for the prevention of pollution of the marine environment, and linked it to the precautionary principle. Moreover, it recognised the duty also as a fundamental principle of general international law.<sup>184</sup> As such, the principle has been recognised not only in a human rights context, but also specifically in the climate change regime. Both the United Nations Framework Convention on Climate Change and the Paris Agreement acknowledge the importance of cooperation in *inter alia* their preambles. The ruling in *Case concerning Land Reclamation by Singapore in and around the Straits of Johor* further confirmed the importance of the duty to cooperate, and especially its link to the precautionary principle, as ITLOS stated that prudence and caution require cooperation.<sup>185</sup> The two principles thus need to be read together to protect and preserve the marine environment.

Thus, the principle or duty of cooperation has been firmly established in multiple legal regimes. Amongst others in the law of the sea, also specifically regarding the marine environment, and in climate change law. As it is evident climate change is a global problem that cannot be solved by merely one State, the duty of cooperation is necessary to ensure the mutual effort needed to combat the climate crisis.

---

<sup>184</sup> *ibid.* 82-4.

<sup>185</sup> *Ibid.* 96-9.



#### 4.2.7.4. Conclusion on ITLOS case law

In conclusion, under UNCLOS and ITLOS case law, States have the obligation to preserve and protect the marine environment, especially through application of the precautionary principle and the duty of cooperation. While it has not formally been decided on, it seems that this obligation also applies in the context of anthropogenic climate change, as its consequences severely threaten the marine environment, and the human rights of people living in low-lying countries. The establishment of the precautionary principle as (almost) part of customary international law, and the duty of cooperation as general international law, can and should be taken into account by the International Court of Justice in delivering its Advisory Opinion on climate crisis, as they protect the interests of the marine environment and all of humankind.

### 4.3 Customary Law

By: Jule Schnakenberg (University of Aberdeen)

The ICJ could contribute to the development of customary environmental law. In the past, the ICJ has done so, for example for article 2(4) of the UN Charter on the prohibition on the use of force.<sup>186</sup>

Deppermann writes “*Even though the nations involved have significantly hedged their commitment to human rights through treaties, enough human rights norms have reached customary status to provide the ICJ with plenty of applicable law to draw upon in an Advisory Opinion.*”<sup>187</sup> In addition, some argue that the obligations arising from the Paris Agreement are growing to become part of customary international law.<sup>188</sup>

The Court could significantly contribute to the development of customary law on the one hand, and it can also influence its Advisory Opinion. This warrants further research.

---

<sup>186</sup> *Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua)* (Judgement) [2009] ICJ Rep 2009.

<sup>187</sup> Lee J.F. Deppermann, 'Increasing The ICJ's Influence As A Court Of Human Rights: The Muslim Rohingya As A Case Study' (2013) 14 Chicago Journal of International Law.

<sup>188</sup> Kayla Clark, 'The Paris Agreement: Its Role In International Law And The American Jurisprudence' (2018) 8 Notre Dame Journal of International & Comparative Law, 116.



# Back- ground of the Court

## 5. The International Court of Justice

### Key takeaways:

- The ICJ has contributed significantly to the development of international human rights law, and the ICJ's jurisprudence on human rights has evolved considerably
- The Court's role in international human rights law, especially as it relates to other bodies of international law, is unique and crucial.

By: Amanda Zerbe (Stanford University)

### 5.1. The Court's Influence on International Environmental Law

The International Court of Justice has played an important role in articulating and solidifying international environmental law. The Court has considered cases concerning transboundary environmental harm as well as how to address shared freshwater and marine resources.<sup>189</sup> Decisions from the Court have impacted international environmental law in a number of significant ways, including by:

- Solidifying as customary international law States' obligations to ensure that actions within their jurisdiction do not cause transboundary environmental harm;<sup>190</sup>
- Articulating the procedural requirements associated with a significant risk of transboundary environmental harm;<sup>191</sup>
- Enumerating interconnections between international environmental law and international humanitarian law.<sup>192</sup>

---

<sup>189</sup> Tim Stephens, 'Environmental Principles and the International Court of Justice' in *Elgar Encyclopedia of Environmental Law* (Edward Elgar Publishing Limited 2018), 559. While the Court created a specific Chamber for Environmental Matters in 1993, because the Chamber has gone generally unused, in 2006 the Court stopped holding elections for that specialized chamber.

<sup>190</sup> Jorge E Vinuales, 'The Contribution of the International Court of Justice to the Development of International Environmental Law: A Contemporary Assessment' (2008) 32 *Fordham Int'l LJ* 232, 253.

<sup>191</sup> Stephens, (n 189) 567.

<sup>192</sup> Vinuales, (n 190) 253.



The Court's jurisprudence has been influential in other international courts, which have looked to the ICJ's articulation of international environmental law in formulating their own decisions.<sup>193</sup>

Writing in 2008, the international lawyer Jorge E. Vinuales suggested that there had previously been two major waves of environmental cases in the ICJ. In Vinuales' view, the first wave -- comprising the *Trail Smelter*, *Affaire du Lac Lanoux*, and *Corfu Channel* cases -- applied a fairly "narrow" lens to transboundary harms, but nevertheless began to link transboundary harms to general international law.<sup>194</sup> The second wave, which included the cases in *Phosphate Lands in Nauru* and the *Gabcikovo-Nagymaros Project* as well as the Court's Advisory Opinions related to nuclear weapons, served to "consolidate the previous case law" and also highlighted "a number of interconnections between IEL, on the one hand, and both boundary delimitation and international humanitarian law, on the other hand."<sup>195</sup>

Following Vinuales' article, in both the *Pulp Mills* case and in *Certain Activities Carried Out by Nicaragua in the Border Area and Construction of a Road in Costa Rica Along the San Juan River*, the Court affirmed the importance of an environmental impact assessment when there is a "risk of significant transboundary harm."<sup>196</sup> In addition, the Court returned to international environmental obligations related to cooperation that it had first considered in the 1970s when the *Whaling in the Antarctic* - case came before the Court in 2014.<sup>197</sup>

The Court's development of international environmental law included the following major milestones:

- In the *Trail Smelter* case, the Court considered a dispute between Canada and the United States related to sulfur dioxide emissions from a Canadian smelter. The emissions were causing crop damage to the state of Washington. The Court held that the United States was entitled to financial remuneration for the damage, finding that international legal principles prohibit use of a State's territory in a way that causes transboundary harm, when the consequences rose to a certain level and the evidence met a certain threshold. In this case, the Court presented a narrow but clear initial articulation of the principle of transboundary harm.<sup>198</sup>

---

<sup>193</sup> Stephens, (n 189) 566.

<sup>194</sup> Vinuales, (n 190) 235-244.

<sup>195</sup> Ibid 236.

<sup>196</sup> Stephens, (n 189) 560.

<sup>197</sup> Ibid.

<sup>198</sup> Vinuales, (n 190) 237; see also *ibid* 237-38 (describing the subsequent *Affaire du Lac Lanoux* case).



- While the 1949 *Corfu Channel* case itself was not directly related to an environmental issue, its background section linked transboundary harm principles with general international law. Its articulation of these principles provided the foundation for such crucial instruments of international environmental law as the 1972 Stockholm Declaration.<sup>199</sup>
- In its 1996 Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, the Court described its view of the environment as “not an abstraction, but represents the living space, the quality of life, and the very health of human beings, *including generations unborn.*”<sup>200</sup> The Court also stated its view that the obligation of states to prevent transboundary harm was now part of international environmental law (or “the corpus of international law relating to the environment”).<sup>201</sup> Finally, the Court stated that States were required to account for environmental factors in making determinations concerning which measures are necessary and proportionate in the context of military objectives, and that “respect for the environment” should inform determinations related to these principles.<sup>202</sup>
- In the *Gabcikovo-Nagymaros Project* case, decided in 1997, the Court framed environmental interests as potentially an “essential interest” of a State (in the context of the state of necessity defense).<sup>203</sup> The Court also linked international environmental law and international humanitarian law in its opinion, building on its decision from the previous year.<sup>204</sup> The Court also explicitly referenced the idea of “sustainable development” in its opinion.<sup>205</sup> Finally, the Court explicitly noted the irreversible nature of certain kinds of environmental harms, noting the difficulty sometimes involved in repairing such harms.<sup>206</sup>
- In 2010, in its decision on the *Pulp Mills* case, the Court addressed both the prevention principle (the obligation to prevent transboundary harm) and referred to the precautionary principle, noting that it could be pertinent to applying the statute at issue, it did not constitute an inversion of the burden of proof. Most significantly, the Court found that performing an environmental impact assessment was required under general international law when a proposed activity might have significant and negative transboundary impacts.<sup>207</sup>

---

<sup>199</sup> Ibid 238-40, 235.

<sup>200</sup> Ibid 245 (emphasis added).

<sup>201</sup> Ibid 245-46.

<sup>202</sup> Ibid 245.

<sup>203</sup> Ibid 236, 248-49.

<sup>204</sup> Ibid 249.

<sup>205</sup> Ibid.

<sup>206</sup> Stephens, (n 189) 564.

<sup>207</sup> Stephens, (n 189) 562.



- The Court built on this jurisprudence in its 2015 decision in its decisions in *Certain Activities Carried out by Nicaragua in the Border Area* and *Construction of a Road in Costa Rica along the San Juan River*. In this duo of cases, the Court connected the principle of preventing significant transboundary harm to the environmental impact assessment, noting that the former triggers the latter.<sup>208</sup>

## 5.2. The Court's Influence on International Human Rights Law

The ICJ has also contributed significantly to the development of international human rights law. Because five of the nine major human rights treaties have a “compromissory clause” -- a clause that gives jurisdiction to the ICJ when disagreements arise between States concerning treaty interpretation or application -- the Court has the opportunity to consider many human rights cases, but lacks jurisdiction over all such issues.<sup>209</sup> As in the international environmental law context, other tribunals have looked favorably on the ICJ's articulation of international human rights principles.<sup>210</sup>

As many scholars have noted, the ICJ's jurisprudence on human rights issues has evolved considerably. Professor and Permanent Member of the Court of Arbitration Gentian Zyberi has characterized the court's jurisprudence as unfolding in three stages. First, in the late 1970s, the Court facilitated the larger internationalization of human rights law as well as the United Nations' role in monitoring by drawing on fundamental international legal principles.<sup>211</sup> These principles included the fundamental prohibitions on slavery and discrimination and general human rights principles enshrined in the Universal Declaration of Human Rights and the United Nations Charter.<sup>212</sup> From the late 1970s until the early 1990s (the second phase), the Court was more reluctant to address these issues, in the highly politicized context of the Cold War; but after the 1990s, the third phase began, in which both the Court's reputation and the legal principles concerning human rights that it addressed were “fairly well-established.”<sup>213</sup>

---

<sup>208</sup> Stephens (n 189) 563.

<sup>209</sup> Gentian Zyberi, “The Interpretation and Development of International Human Rights Law by the International Court of Justice” in Martin Scheinin (ed), *Human Rights Norms in 'Other' International Courts* (Cambridge University Press 2019), 202; Bruno Simma, “Mainstreaming Human Rights: The Contribution of the International Court of Justice” (2012) 3 *Journal of International Dispute Settlement* 7, 15.

<sup>210</sup> Zyberi (n 209) 202.

<sup>211</sup> *Ibid* 208.

<sup>212</sup> *Ibid*.

<sup>213</sup> *Ibid*.



Over the years, the Court has weighed in on a multiplicity of topics, including interpreting the breadth of reservations to treaties on human rights, considering self-determination in the decolonization context, and prosecution and extradition of individuals accused of human rights violations.<sup>214</sup> For instance, the Court has extensively considered the international crime of genocide -- including by articulating genocide's *erga omnes* ("towards all") status, interpreting reservations to the Genocide Convention, clarifying the definition of a protected group under the Convention, and clarifying what a "part" of such a group is.<sup>215</sup> The Court's findings on this topic have been pertinent for international criminal tribunals applying international criminal law.<sup>216</sup>

Former ICJ Judge and scholar Bruno Simma has characterized the ICJ's most promising contribution to international human rights law as "mainstreaming":

*"[Mainstreaming human rights can involve] integrating [human rights law] into both the fabric of general international law and its various other branches . . . [the ICJ] can render human rights arguments more readily acceptable to international law generalists by interpreting and applying substantive provisions of human rights treaties . . . [f]urther, the Court is singularly capable of devising solutions for practical, more technical, legal problems which arise at the interface between human rights and more traditional international law, thus paving the way for the acceptance of human rights arguments and, more generally, supporting and developing the framework of human rights protection."*<sup>217</sup>

As Judge Simma also noted, the Court has already contributed considerably to this endeavor. Particularly significant contributions to date include:

- Interpreting and defining obligations that result from human rights treaties;
- Interpreting reservations to human rights treaties;
- Assessing the geographic scope of treaty obligations;
- Further defining obligations related to prevention;
- Addressing the question of how to attribute actions by non-State actors to States;

---

<sup>214</sup> Ibid 211.

<sup>215</sup> Ibid 214-15; Vincent Chetail, 'The contribution of the International Court of Justice to international humanitarian law' (2003) 85 Int'l Rev Red Cross 235, 248 (referencing the Court's decisions in the In its Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide and in the Barcelona Traction Judgement).

<sup>216</sup> Zyberi (n 209) 216.

<sup>217</sup> Simma (n 209) 27.



- Relating international human rights law and international humanitarian law;
- Developing *jus cogens* and *erga omnes* as categories of law which connect with human rights law and lend it “greater weight.”<sup>218</sup>

The Court’s role in international human rights law -- especially as it relates to other bodies of international law -- is unique and crucial.

---

---

<sup>218</sup> Ibid 28-29.



**Climate**

**action**

**through**

**law**

## 6. Youth leading the way

### Key takeaways:

- Courageous youth leaders have put the climate crisis on the global political agenda
- Young people are standing on the shoulders of brave leaders who came before us
- An ICJ Advisory Opinion can contribute to the progressive development of international law in four areas: (i) by holding States accountable, (ii) by spurring climate action, (iii) by depoliticizing climate science, and lastly (iv) by providing guidance to domestic and regional courts.

### 6.1. Standing on the shoulders of those before us

By: Aoife Fleming (Leiden University) & Jule Schnakenberg (University of Aberdeen)

Courageous youth leaders have put the climate crisis on the global political agenda. But the world is still learning how to put human rights at the heart of that conversation. The climate crisis poses an immediate and non-discriminating threat to peace, security and stability everywhere. It is time we treat the climate crisis as the human rights issue that it is, and address and mitigate the climate impacts through human rights based solutions.

We are standing on the shoulders of giants in their never-ending pursuit of peace and their love for humanity. Palau and the Marshall Islands, both climate vulnerable Pacific Island nations, started a similar initiative in 2011. Youth groups from around the world work hard to hold their governments accountable to their promises in court cases. Indigenous people have a long history of defending their lands. Many pioneers have come before us to make the most noble sacrifices for our shared humanity, to make the impossible possible, and our work builds upon the gravity of their legacy. It is for this reason that it is a great honour for us to learn from those who have come before us, and from our courageous peers around the world.



### 6.1.1. The campaign for an ICJ Advisory Opinion on nuclear weapons

The 1996 Advisory Opinion on the legality or threat of nuclear weapons came about by a civil society call led by impassioned Aotearoa/New Zealanders. Aotearoa/New Zealand faced the threat of atmospheric nuclear weapons testing in Pacific waters by nuclear weapons states such as France and the United States. This reality led a group called ‘the World Court Project’ to lead a campaign to request an ICJ Advisory Opinion on one of the biggest threats of the nineties. The campaign built on several decades of strong anti-nuclear activism in Aotearoa/New Zealand by a coalition of Indigenous people and civil society groups, such as the women's suffrage movement. The campaign was led by the International Peace Bureau, the International Association of Lawyers Against Nuclear Arms and the International Physicians for the Prevention of Nuclear Weapons. The WCP first convinced the World Health Organisation to request an Advisory Opinion in 1996. The ICJ concluded that the request was not within the scope of activities of the WHO. Nonetheless, the political will at the Assembly of the WHO paved the way for support at the UN General Assembly.

After a decade of campaigning, the ICJ delivered an Advisory Opinion of which the influence is felt beyond the court room.

## **6.2. The potential impact of an Advisory Opinion on Human Rights and Climate Change**

An effective Advisory Opinion on climate change and human rights contributes to closing the protection gaps and tying the work of the UNFCCC and the human rights treaty bodies together. An effective Advisory Opinion also contributes to a range of developments that go beyond human rights law. In particular there are four areas of potential impact.

(1) The ICJ can promote the rule of law by holding states accountable for environmental damages, failure of regulation and lack of enforcement of environmental legislation.<sup>219</sup> By holding states accountable for environmental legislation and regulation, private parties are indirectly also drawn into the human rights framework. The Committee on Economic, Social and Cultural Rights has already stated that compliance with human rights in the face of climate change is an obligation of both state and non-state actors.<sup>220</sup>

---

<sup>219</sup> Boyle (n 12).

<sup>220</sup> UN Committee on Economic, Social and Cultural Rights ‘Climate Change and the International Covenant on Economic, Social and Cultural Rights’ (8 October 2018) <<https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=23691&LangID=E>> accessed 25 November 2020.



(2) The ICJ can spur climate action taken by both state and non-state actors. Youth have been very vocal on climate change, and strategic litigation by youth groups has increased in recent years.<sup>221</sup> The momentum around the advisory proceedings at the ICJ could catalyse new actions, and an Advisory Opinion could change attitudes and behaviour of both states and non-state actors.<sup>222</sup> An illustrative example of the authoritative influence the ICJ has on non-state actors is the contentious case *Whaling in the Antarctic*. The day after the ICJ delivered its judgement that Japan's 'scientific whaling' was unlawful - a judgement that was directed to Japan - a Japanese company canceled its retail sale of whale meat.<sup>223</sup>

(3) The Advisory Opinion could depoliticize climate science by giving the IPCC-findings "authority of a judicial determination of the facts".<sup>224</sup> It would not be the first time the ICJ deliberates on questions of science. During the *Whaling-case*<sup>225</sup> the ICJ had allowed for cross-examination of scientific experts, which constituted a change in method<sup>226</sup> demonstrating the court does not avoid engaging in complex science. Nonetheless, the question remains if the judges - with no scientific background - could be able to form an opinion on climate science. Further analysis is required here.

(4) With increased domestic and regional adjudication around climate change, an Advisory Opinion could provide guidance for domestic courts. Domestic courts look to dictates of international courts and tribunals to complement national law. In particular, an Advisory Opinion on the customary duties of states could help courts decide whether to award climate damages.<sup>227</sup>

In conclusion, this report has aimed to demonstrate that there are sufficient sources of law to warrant the request for an Advisory Opinion on climate change and human rights. In particular, an ICJ Advisory Opinion can contribute to the progressive development of international law in four areas: (i) by holding States accountable, (ii) by spurring climate action, (iii) by depoliticizing climate science, and lastly (iv) by providing guidance to domestic and regional courts.

---

<sup>221</sup> See inter alia Urgenda and the Global Climate Litigation Network under <<https://www.urgenda.nl/en/themas/climate-case/global-climate-litigation/>>, Our Children's Trust under <<https://www.ourchildrenstrust.org/juliana-v-us>>, and Global Legal Action Network under <<https://youth4climatejustice.org/>>.

<sup>222</sup> Sands (n 68).

<sup>223</sup> 'Rakuten Updates Guidelines Regarding Items For Japan Marketplace' (*Rakuten Media Room*, 2014) <[http://global.rakuten.com/corp/news/press/2014/0401\\_04.html](http://global.rakuten.com/corp/news/press/2014/0401_04.html)> accessed 29 November 2020.

<sup>224</sup> Sands (n 68).

<sup>225</sup> *Whaling in the Antarctic (Australia v Japan: New Zealand intervening)* (Judgement) [2014] ICJ Rep 2014.

<sup>226</sup> Sands (n 68).

<sup>227</sup> Daniel Bodansky, 'The Role of the International Court of Justice in Addressing Climate Change: Some Preliminary Reflection' (2017) 49 *Ariz St LJ* 689, 707, citing Andre Nolkaemper, Cesare P. R. Romano and others (eds.), 'Conversations Among Court: Domestic and International Adjudicators', in the *Oxford Handbook of International Adjudication* (Oxford 2014), at 523, 538.



## **Bibliography**

### **Primary Sources**

#### **Table of Cases**

African Commission on Human and Peoples' Rights, The Social and Economic Rights Action Center et. al. v. Nigeria (Ogoni case) No. 155/96 (2001)

High Court of Nigeria, Gbemre v. Shell Petroleum Nigeria Limited and Others, FHC/B/CS/53/05, Judgment of 14 November 2005

Sheila Watt-Cloutier, Petition to the Inter American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States, December 7, 2005  
<[https://earthjustice.org/sites/default/files/library/legal\\_docs/summary-of-inuit-petition-to-inter-american-council-on-human-rights.pdf](https://earthjustice.org/sites/default/files/library/legal_docs/summary-of-inuit-petition-to-inter-american-council-on-human-rights.pdf)> accessed 12 May 2021

Supreme Court of the Netherlands 20 December 2019 ECLI:NL:HR:2019:2006 (*Urgenda*)

#### **International Court of Justice Judgements**

Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua) (Judgement) [2009] ICJ Rep 2009

Whaling in the Antarctic (Australia v Japan: New Zealand intervening) (Judgement) [2014] ICJ Rep 2014

#### **International Court of Justice Advisory Opinions**

Western Sahara, Advisory Opinion, 1975 I.C.J. 12

Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226

#### **International Tribunal on the Law of the Sea Judgments**

Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan) (Provisional Measures, Order of 27 Augustus 1999) ITLOS Reports 1999

The MOX Plant Case (Ireland v. United Kingdom) (Provisional Measures, Order of 3 December 2001) ITLOS Reports 2001

Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore) (Provisional Measures, Order of 8 October 2003) ITLOS Reports 2003



## **International Tribunal on the Law of the Sea Advisory Opinions**

Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area (Request for Advisory Opinion submitted to the Seabed Disputes Chamber) (Advisory Opinion of 1 February 2011) ITLOS Reports 2011

## **Inter-American Court on Human Rights**

Inter-American Court on Human Rights, Salvador Chiriboga v. Ecuador, Judgment of May 6, 2008, Serie C, No. 179

Inter-American Court on Human Rights, Pueblos Kaliaña y Lokono v. Surinam, Judgment of November 25, 2015, Serie C, No. 309

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) of the American Convention on Human Rights), Advisory Opinion OC-23/17 of November 15, 2017, Series A, No. 23

Inter-American Court on Human Rights, Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina, Judgment of February 6, 2020. Series C, No. 400

## **African Commission on Human Rights and Peoples' Rights**

African Commission on Human Rights and Peoples' Rights, 153 Resolution on Climate Change and Human Rights and the Need to Study its Impact in Africa - ACHPR/Res.153(XLVI), held in Banjul, Gambia, November 25, 2009

African Commission on Human Rights and Peoples' Rights, 271 Resolution on Climate Change in Africa - ACHPR/Res.271(LV) 2014, 55<sup>th</sup> Ordinary Session of the African Commission on Human and Peoples' Rights, held in Luanda, Angola, from April 28 to May 12, 2014

African Commission on Human Rights and Peoples' Rights, 417 Resolution on the human rights impacts of extreme weather in Eastern and Southern Africa due to climate change - ACHPR / Res. 417 (LXIV), held in Sharm el Sheik, May 14, 2019

African Commission on Human's & Peoples' Rights, SERAC v. Nigeria, Case No. ACHPR/COMM/A044/1

## **European Court of Human Rights**

Budayeva and others v Russia App Nos 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02 (ECtHR, 20 March 2008)

Duarte Agostinho and others v Portugal and 33 other States, Statement on the Purpose of the Case 5, accessible at



<<https://youth4climatejustice.org/wp-content/uploads/2021/05/2020.11.20-objet-de-laffaire-professional-translation.pdf>> accessed 9 May 2021

Fadeyeva v Russia App No 55723/00 (ECtHR, 9 June 2005)

Giacomelli v Italy App No 59909/00 (ECtHR, 26 March 2007)

Guerra and others v Italy App No 116/1996/735/932 (ECtHR, 19 February 1998)

Hatton and others v United Kingdom App No 36022/97 (ECtHR, 8 July 2003)

Kyrtatos v Greece App No 41666/98 (ECtHR, 22 August 2003)

López Ostra v Spain App No 16798/90 (ECtHR, 9 December 1994)

Taşkin and others v Turkey App No 46117/99 (ECtHR, 10 November 2004)

Tyrer v United Kingdom App No 5856/72 (ECtHR, 25 April 1978)

Öneryildiz v Turkey App No 48939/99 (ECtHR, 30 November 2004)

### **Table of Statutes**

United Nations, Statute of the International Court of Justice (26 June 1945, entered into force 24 October 1945)

Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms (signed 4 November 1950, entered into force 3 September 1953, as amended) (ECHR)

Stockholm Declaration of the United Nations Conference on the Human Environment' (1972) UN Doc A/CONF.48/14

International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR)

UN Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (UNCRC)

United Nations, Convention on Biological Diversity (signed 5 June 1992, entered into force 26 December 1993) 1760 UNTS 79 (CBD)

United Nations Framework Convention on Climate Change (signed 9 May 1992, entered into force 21 March 1994)  
1771 UNTS 107 (UNFCCC)

UN Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 397 (UNCLOS)

ITLOS Rules of the Tribunal (adopted 28 October 1997, as amended).



Kyoto Protocol to the United Nations Framework Convention on Climate Change (signed 11 December 1997, entered into force 16 February 2005) 2303 UNTS 162

United Nations Declaration on the Rights of Indigenous Peoples, UN General Assembly Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Agenda Item 68, Supp No 49, (2 October 2007, adopted 13 September 2007); UNGA A/RES/61/295 (UNDRIP)

United Nations, Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) 54113 UNTS

### **UN General Assembly Resolutions**

UN General Assembly Resolution A/RES/43/53 (6 December 1988)

UN General Assembly Resolution A/RES/50/50/115 (20 December 1995)

UN General Assembly Resolution A/RES/51/184 (16 December 1996)

UN General Assembly Resolution A/RES/52/199 (18 December 1997)

UN General Assembly Resolution A/RES/54/222 (22 December 1999)

UN General Assembly Resolution A/RES/56/199 (21 December 2001)

UN General Assembly Resolution A/RES/58/243 (23 December 2003)

UN General Assembly Resolution A/RES/59/234 (22 December 2004)

UN General Assembly Resolution A/RES/60/197 (22 December 2005)

UN General Assembly Resolution A/RES/61/201 (20 December 2006)

UN General Assembly Resolution A/RES/62/86 (10 December 2007)

UN General Assembly Resolution A/RES/63/32 (26 November 2008)

UN General Assembly Resolution A/RES/64/73 (7 December 2009)

UN General Assembly Resolution A/RES/65/159 (20 December 2010)

UN General Assembly Resolution A/RES/66/200 (22 December 2011)

UN General Assembly Resolution A/RES/67/210 (21 December 2012)

UN General Assembly Resolution A/RES/67/210 (12 March 2013)

UN General Assembly Resolution A/RES/68/212 (18 February 2014)



UN General Assembly Resolution A/RES/70/1 (21 October 2015)

UN General Assembly Resolution A/RES/74/219 (27 January 2020)

UN General Assembly Resolution A/RES/74/L.92 (10 September 2020)

### **Other Primary Sources**

Aliioaiga Feturi Elisaia, ‘Statement at the High Level Segment of COP25’ (11 December 2021) <[https://unfccc.int/sites/default/files/resource/SAMOA\\_cop25cmp15cma2\\_HLS\\_EN.pdf](https://unfccc.int/sites/default/files/resource/SAMOA_cop25cmp15cma2_HLS_EN.pdf)> accessed 21 May 2021

The African Court on Human and Peoples’ Rights, the European Court of Human Rights and the Inter-American Court of Human Rights, ‘Kampala Declaration’, First International Human Rights Forum (28 October 2019) <[https://echr.coe.int/Documents/Kampala\\_Declaration\\_ENG.pdf](https://echr.coe.int/Documents/Kampala_Declaration_ENG.pdf)> accessed 12 May 2021

Final Communiqué of the 47<sup>th</sup> Ordinary Session of the African Commission on Human and Peoples’ Rights, May 26, 2010: <<https://www.achpr.org/sessions/info?id=228>> accessed 12 May 2021

OHCHR, ‘Open-Letter from the United Nations High Commissioner for Human Rights to Member States on priorities for human rights-based climate action at the 25th Conference of the Parties to the United Nations Framework Convention on Climate Change’ (Geneva, 27 November 2019) <[https://www.ohchr.org/Documents/Issues/ClimateChange/UNFCCCOP25\\_OpenletterfromHCMemberStates\\_Nov2019.pdf](https://www.ohchr.org/Documents/Issues/ClimateChange/UNFCCCOP25_OpenletterfromHCMemberStates_Nov2019.pdf)> accessed 20 January 2021

Parliamentary Assembly of the Council of Europe, ‘Drafting an additional protocol to the European Convention on Human Rights concerning the right to a healthy environment’ (2009) Recommendation 1885

Statement made by the Special Rapporteur on Refugees, Asylum Seekers, Internally Displaced Persons and Migrants in Africa on the occasion of International Migrants Day, December 8, 2018

UN Security Council, 5663rd Meeting, U.N. Doc. S/PV.5663 (Apr. 17, 2007)

UNHRC ‘General Comment No. 3: The nature of States’ parties’ obligations (art. 2, para. 1, of the Covenant)’ (1990) E/1991/23



## Secondary Sources

### **Books**

Busch S.V., 'Law of the Sea Responses to Sea-Level Rise and Threatened Maritime Entitlements: Applying an Exception Rule to Manage an Exceptional Situation' in Elise Johansen, Signe Veierud Busch & Invid Ulrikke Jakobsen (eds), *The Law of the Sea and Climate Change: Solutions and Constraints* (Cambridge University Press 2021)

Dipla H., 'The Role of the International Court of Justice and the International tribunal for the Law of the Sea in the progressive Development of the Law of the Sea' in Anastasia Strati, Maria Gavouneli & Nikos Skourtos (eds), *Unresolved Issues and New Challenges to the Law of the Sea: Time Before and Time After* (Martinus Nijhoff Publishers 2006)

Henriksen A., *International Law* (2nd edn, Oxford University Press 2019)

Johansen E., 'The Role of the Oceans in Regulating the Earth's Climate: Legal Perspectives' in Elise Johansen, Signe Veierud Busch & Invid Ulrikke Jakobsen (eds), *The Law of the Sea and Climate Change: Solutions and Constraints* (Cambridge University Press 2021) 2-3

Klein E. and Schmal S., 'The General Assembly, Functions and Power, Article 10', in Bruno Simma et al. (eds), *The Charter of the United Nations: A Commentary, Volume I*, (3rd edition, Oxford University Press 2012)

Knox J.H., 'Diagonal Environmental Rights' in Mark Gibney & Sigrun Skogly (eds), *Universal Human Rights and Extraterritorial Obligations* (University of Pennsylvania Press 2010)

Lewis B., *Environmental Human Rights and Climate Change, Current Status and Future Prospects, Introduction to Environmental Human Rights and Climate Change* (Springer Nature Singapore 2018)

Milanovic M., *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford University Press 2011)

Nolkaemper A., C. Romano and others (eds.), 'Conversations Among Courts: Domestic and International Adjudicators' in the *Oxford Handbook of International Adjudication* (Oxford 2014)

Pedersen O., 'The European Court of Human Rights and International Environmental Law' in John H. Knox & Ramin Pejman (eds), *The Human Right to a Healthy Environment* (Cambridge University Press 2018)

Rothwell D., 'The Contribution of ITLOS to Oceans Governance through Marine Environmental Dispute Resolution' in Tafsir Malick Ndiaye & Rüdiger Wolfrum, *Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mensah* (Martinus Nijhoff Publishers 2007)

Rothwell D., Stephens T., *The International Law of the Sea* (Hart Publishing 2016)

Stephens T., 'Warming Waters and Souring Seas: Climate change and Ocean Acidification' in Donal Rothwell and others (eds), *The Oxford Handbook of the Law of the Sea* (Oxford University Press 2015)



Stephens T., 'Environmental Principles and the International Court of Justice' in *Elgar Encyclopedia of Environmental Law* (Edward Elgar Publishing Limited 2018)

Tanaka Y., *The International Law of the Sea* (Cambridge University Press 2015)

Verheyen R., Zengerling C., 'International Dispute Settlement' in Cinnamon P Carlarne, Kevin R Gray & Richard Tarasofsky (eds), *The Oxford Handbook of International Climate Change Law* (Oxford University Press 2016)

Vinuales J. E. , 'The Contribution of the International Court of Justice to the Development of International Environmental Law: A Contemporary Assessment' (2008) 32 *Fordham Int'l LJ*

Zyberi G., 'The Interpretation and Development of International Human Rights Law by the International Court of Justice' in Martin Scheinin (ed), *Human Rights Norms in 'Other' International Courts* (Cambridge University Press 2019)

### **Journal Articles**

Bodansky D., 'The Role of the International Court of Justice in Addressing Climate Change: Some Preliminary Reflection' (2017) 49 *Ariz St LJ*

Boyle A., 'Climate Change, The Paris Agreement And Human Rights' (2018) 67(4) *International and Comparative Law Quarterly*

Chetail V., 'The contribution of the International Court of Justice to international humanitarian law' (2003) 85 *Int'l Rev Red Cross*

Clark K., 'The Paris Agreement: Its Role In International Law And The American Jurisprudence' (2018) 8 *Notre Dame Journal of International & Comparative Law*

Deppermann L., 'Increasing The ICJ's Influence As A Court Of Human Rights: The Muslim Rohingya As A Case Study' (2013) 14 *Chicago Journal of International Law*

Fatureti B., Agbaitoro G., Onya O., "Environmental Protection in the Nigerian Oil and Gas Industry and Jonah Gbemre v. Shell PDC Nigeria Limited : Let the Plunder Continue?", *African Journal of International and Comparative Law*, May 2019

Gordon J., 'Inter-American Commission on Human Rights to Hold Hearing after Rejecting Inuit Climate Change Petition' (2007) 7(2) *Sustainable Development Law & Policy*

Horowitz C., 'Paris Agreement', *International Legal Materials* Vol. 55, No. 4 (2016), Cambridge University Press Stable, 740-755 <<https://www.jstor.org/stable/10.5305/intelegamate.55.4.0740>> accessed 12 May 2021

Jegede A.O., Climate Change in the Work of the African Commission on Human and Peoples' Rights, *Speculum Juris*, 2017 31 (2)  
<[https://www.researchgate.net/profile/Ademola-Oluborode-Jegede/publication/326818271\\_Climate\\_change\\_in\\_the\\_work\\_of\\_the\\_African\\_Commission\\_on\\_human\\_and\\_peoples%27\\_rights/links/5b64f48045851](https://www.researchgate.net/profile/Ademola-Oluborode-Jegede/publication/326818271_Climate_change_in_the_work_of_the_African_Commission_on_human_and_peoples%27_rights/links/5b64f48045851)



5ef1d32f417/Climate-change-in-the-work-of-the-African-Commission-on-human-and-peoples-rights.pdf  
> accessed 11 May 2012

Knox J.H. 'Climate Change and Human Rights Law' (2009) 50(1) *Virginia Journal of International Law*

Kravchenko S., Bonine J., 'Interpretation of Human Rights for the Protection of the Environment in the European Court of Human Rights' (2012) 25 *Pacific McGeorge Global Business & Development Law Journal*

McNamara KE and Gibson C 'We do not want to leave our land': Pacific ambassadors at the United Nations resist the category of 'climate refugees' (2009) 40(3) *Geoforum*

Nordhaus W., 'The Climate Club: How to Fix a Failing Global Effort,' 2020 99(3) *Foreign Affairs*

Peel J. & Osofsky H.M., 'A Rights Turn in Climate Change Litigation?' (2018) 7(1) *Transnational Environmental Law*

Perumal N., 'The place where I live is where I belong: community perspectives on climate change and climate-related migration in the Pacific island nation of Vanuatu', (2018) 13(1) *Island Studies Journal*

Petersmann M., 'Narcissus' Reflection in the Lake: Untold Narratives in Environmental Law Beyond the Anthropocentric Frame' (2018) 30 *Journal of Environmental Law*

Rajamani L., 'The 2015 Paris Agreement: Interplay Between Hard, Soft and Non-Obligations' (2016) 28(2) *Journal of Environmental Law*

Rajamani L. and J. Brunnée, 'The Legality of Downgrading Nationally Determined Contributions under the Paris Agreement: Lessons from the US Disengagement', *Journal of Environmental Law*, 29(3), November 2017 <<https://academic.oup.com/jel/article/29/3/537/4318807>> accessed 12 May 2021

Simma B., "Mainstreaming Human Rights: The Contribution of the International Court of Justice" (2012) 3 *Journal of International Dispute Settlement*

Webb J. and others, 'Tools for CBA: lessons from NGO collaboration in Vanuatu' (2015), 43(4) *Coastal Management*

Wegener, L. 'Can the Paris Agreement Help Climate Change Litigation and Vice Versa?' (2020) 9(1) *Transnational Environmental Law*, doi:10.1017/S2047102519000396  
<<https://www.cambridge.org/core/journals/transnational-environmental-law/article/can-the-paris-agreement-help-climate-change-litigation-and-vice-versa/5740A983674D197C6F070B081ADAB400>> accessed 12 May 2021

Wei, Y.M. and others, 'Self-preservation strategy for approaching global warming targets in the post-Paris Agreement era' (2020) 11, 1624 *Nat Commun* <<https://doi.org/10.1038/s41467-020-15453-z>> accessed 12 May 2021

Wewerinke M., 'The Role of the UN Human Rights Council in Addressing Climate Change' (2014) 8 *Human Rights and International Legal Discourse*

Wewerinke M. and Van Geelen T., 'Protection of climate displaced persons under International Law: A case study from Mataso Island, Vanuatu' (2019) 19(2) *Melbourne Journal of International Law Vol*



## Reports

Campbell J. and Warrick O., 'Climate change and migration issues in the Pacific' United Nations Economic and Social Commission for Asian and the Pacific / International Labour Organization.' (2014) <<https://www.ilo.org/dyn/migpractice/docs/261/Pacific.pdf>> accessed 12 May 2021

CIEL, Global Initiative for Economic, Social and Cultural Rights, States' Human Rights Obligations in the Context of Climate Change - 2019 Update, (*ciel.org*, 25 March 2019) <<https://www.ciel.org/wp-content/uploads/2019/03/HRTB-Feb.-2019-update-2019-03-25.pdf>> accessed 23 November 2020

Department of Economic and Social Affairs, 'Vanuatu National Assessment Report: 5 Year Review of the Mauritius Strategy for Further Implementation of the Barbados Programme of Action for Sustainable Development' (UN 2010)

Diaz M.A. and others, 'Cambio climático y los derechos de mujeres, pueblos indígenas y comunidades rurales en las Américas' (2020) <[https://www.dejusticia.org/wp-content/uploads/2020/05/hbs\\_Cambio\\_climatico-en-las-Américas\\_web.pdf](https://www.dejusticia.org/wp-content/uploads/2020/05/hbs_Cambio_climatico-en-las-Américas_web.pdf)> accessed 12 May 2021

Garschagen M. and others, 'World Risk Report 2015' (United Nations University Institute for Environment and Human Security and Bündnis Entwicklung Hilft) (2015)

Greenpeace & Center for International Environmental Law, 'Extraterritorial Obligations in the Context of Eco-destruction and Climate Change' (FIAN International 2014) 9-10 <[https://www.fian.org/fileadmin/media/publications\\_2015/ETO\\_and\\_climate\\_change.pdf](https://www.fian.org/fileadmin/media/publications_2015/ETO_and_climate_change.pdf)> accessed 12 May 2021

Knox J., 'Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment' (2018) UN Doc A/HRC/37/59

Masson-Delmotte V. and others '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' (IPCC 2014) <[https://www.ipcc.ch/site/assets/uploads/sites/2/2019/06/SR15\\_Full\\_Report\\_High\\_Res.pdf](https://www.ipcc.ch/site/assets/uploads/sites/2/2019/06/SR15_Full_Report_High_Res.pdf)> accessed 12 May 2021

McAdam. J, '*Climate Change Displacement and International Law: Complementary Protection Standards*' (May 2011) UNHCR Legal and Protection Policy Research, Division of International Protection

OHCHR, 'Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship Between Climate Change and Human Rights' (Geneva, 15 January 2009) A/HRC/10/61

OHCHR 'Report of the United Nations High Commissioner for Human Rights: Analytical study on the relationship between human rights and the environment' (16 December 2011) UN Doc A/HRC/19/34



Pachauri R.K. and others, 'Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change' (IPCC 2014) <<https://www.ipcc.ch/report/ar5/syr/>> accessed 12 May 2021

Parry M. and others, 'Climate Change 2007: Impacts, Adaptation and Vulnerability Contribution of Working Group II to the Fourth Assessment Report of the IPCC' (IPCC 2007) <[https://www.ipcc.ch/site/assets/uploads/2018/03/ar4\\_wg2\\_full\\_report.pdf](https://www.ipcc.ch/site/assets/uploads/2018/03/ar4_wg2_full_report.pdf)> accessed 12 May 2021

Pörtner H.O. and others, 'IPCC Special Report on the Ocean and Cryosphere in a Changing Climate', (IPCC 2019) <<https://www.ipcc.ch/srocc/>> accessed 12 May 2021

Petz D. and Ginnetti J, 'Neglected displacement: human mobility in pacific disaster risk management and climate change adaptation mechanisms' (2013) Geneva: Norwegian Refugee Council/International Displacement Monitoring Centre <<https://environmentalmigration.iom.int/neglected-displacement-human-mobility-pacific-disaster-risk-management-and-climate-change-adaptation>> accessed 12 May 2021

Podesta J., 'The climate crisis, migration, and refugees' (2019) Report in Brookings Blum Roundtable, "2020 and beyond: Maintaining the bipartisan narrative on US global development" <<https://www.brookings.edu/research/the-climate-crisis-migration-and-refugees/>> accessed 12 May 2021

Shukla P.R. and others, '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 (IPCC 2019) <<https://www.ipcc.ch/site/assets/uploads/sites/4/2021/02/210202-IPCCJ7230-SRCCL-Complete-BOOK-HRES.pdf>> accessed 12 May 2021

UN Committee on Economic, Social and Cultural Rights 'Climate Change and the International Covenant on Economic, Social and Cultural Rights' (8 October 2018) <<https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=23691&LangID=E>> accessed 25 November 2020

UN Economic and Social Council, Committee on Economic, Social and Cultural Rights 'Concluding observations on the fourth periodic report of Argentina' (1 November 2018) UN Doc E/C.12/ARG/4

UNEP, Report of the Special Rapporteur on Human Rights and the Environment 'Safe Climate' (1 October 2019) UN Doc A/74/161

UNEP, 'Emissions Gap Report 2020' (2020) <<https://www.unep.org/emissions-gap-report-2020>> accessed 12 May 2021

UNESCO, 'The United Nations World Water Development Report 2018: Nature-based Solutions for Water' (2018) <<https://www.unwater.org/publications/world-water-development-report-2018/>> accessed 12 May 2021

UNFCCC, 'Nationally determined contributions under the Paris Agreement Synthesis report by the Secretariat', (26 February 2021) FCCC/PA/CMA/2021/2

UNHRC, 'Report of the Special Rapporteur Ambeyi Ligabo on the promotion and protection of the right to freedom of opinion and expression' (28 February 2008) UN Doc A/HRC/7/14



UNHRC, 'Report of the Special Rapporteur Margaret Sekaggya on the situation of human rights defenders' (12 Feb 2009) UN Doc A/HRC/10/12

UNHRC, 'Report of the United Nations High Commissioner for Human Rights on the situation of human rights and the activities of her Office in the Democratic Republic of the Congo' (10 January 2011) UN Doc A/HRC/16/27

UNHRC, 'Rights of the child: realizing the rights of the child through a healthy environment' (5 October 2020) UN Doc A/HRC/45/L.48/Rev.1

## Websites

CIEL (Center for International Environmental Law), IWGIA (International Working Group for Indigenous Affairs), RFN (Rainforest Foundation Norway), CARE, WEDO, AIPP (Asia Indigenous Peoples Pact), ITUC (International Trade Union Confederation), 'Delivering On The Paris Promises: Combating Climate Change While Protecting Rights' (2017)  
<<https://unfccc.int/sites/default/files/903.pdf>> accessed 25 November 2020

Clark P., et al 'Climate change and the European Court of Human Rights: the Portuguese Youth Case' (2020) EJIL Talk  
<<https://www.ejiltalk.org/climate-change-and-the-european-court-of-human-rights-the-portuguese-youth-case/>> accessed 01 July 2021

Climate Case Chart, Healing on Climate Change before the Interamerican Commission on Human Rights  
<<http://climatecasechart.com/non-us-case/hearing-on-climate-change-before-the-inter-american-commission-on-human-rights/>> accessed 12 May 2021

Global Legal Action Network under <<https://youth4climatejustice.org/>> accessed 29 April 2021

International Court of Justice, Advisory Jurisdiction <<https://www.icj-cij.org/en/advisory-jurisdiction>> accessed 12 May 2021

Kaupa C., Human+fundamental rights and climate change (*Medium*, Climate Change Law) September 20, 2019,  
<<https://medium.com/climate-change-law/human-fundamental-rights-and-climate-change-74654d4acb61>> accessed 12 May 2021

McInerney-Lankford S, Darrow M and Rajamani L 'Human Rights and Climate Change: A Review of the International Legal Dimensions' (17 March 2011) World Bank  
<<https://documents.worldbank.org/en/publication/documents-reports/documentdetail/903741468339577637/human-rights-and-climate-change-a-review-of-the-international-legal-dimensions>> accessed 18 January 2021

NDC Registry Website 'All NDCs', <<https://www4.unfccc.int/sites/NDCStaging/Pages/All.aspx>> accessed 12 May 2021

'Rakuten Updates Guidelines Regarding Items For Japan Marketplace' (*Rakuten Media Room*, 2014)  
<[http://global.rakuten.com/corp/news/press/2014/0401\\_04.html](http://global.rakuten.com/corp/news/press/2014/0401_04.html)> accessed 29 November 2020



'OHCHR | Five UN Human Rights Treaty Bodies Issue A Joint Statement On Human Rights And Climate Change.' (OHCHR.org, 2020)  
<<https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24998&LangID=E>> accessed 27 November 2020, para 2 under 'States' Human Rights Obligations'

Our Children's Trust under <<https://www.ourchildrenstrust.org/juliana-v-us>> accessed 29 April 2021

UNDRR, 'The human cost of disasters: an overview of the last 20 years (2000-2019)' (2020) accessed at <<https://dds.cepal.org/redesoc/publication?id=5361>> accessed 1 July 2021

UNEP and Sabin Center for Climate Change Law (Columbia Law School), 'Climate Change And Human Rights' (United Nations Environment Programme 2015)  
<[https://web.law.columbia.edu/sites/default/files/microsites/climate-change/climate\\_change\\_and\\_human\\_rights.pdf](https://web.law.columbia.edu/sites/default/files/microsites/climate-change/climate_change_and_human_rights.pdf)> accessed 24 November 2020

Urgenda and the Global Climate Litigation Network  
<<https://www.urgenda.nl/en/themas/climate-case/global-climate-litigation/>> accessed 29 April 2021  
UNFCCC Website, 'Nationally Determined Contributions (NDCs)'  
<<https://unfccc.int/process-and-meetings/the-paris-agreement/nationally-determined-contributions-ndcs/nationally-determined-contributions-ndcs#eq-2>> accessed 12 May

UNFCCC, 'Paris agreement: status of ratification'  
<<https://unfccc.int/process/the-paris-agreement/status-of-ratification>> accessed 12 May 2021

UNFCCC, UN Secretary General António Guterres, "Making peace with Nature is the Defining Task of the 21st century" (Speech at Columbia University, 02 December 2020)  
<<https://unfccc.int/news/un-secretary-general-making-peace-with-nature-is-the-defining-task-of-the-21st-century>> accessed 12 May 2021

United Nations, Harmony with Nature <<http://www.harmonywithnatureun.org>> accessed 12 May 2021.

WHO, 'Don't Pollute My Future! The Impact Of The Environment On Children's Health' (2017)  
<<https://apps.who.int/iris/bitstream/handle/10665/254678/WHO-FWC-IHE-17.01-eng.pdf?sequence=1>> accessed 18 January 2021

### **Other Secondary Sources**

Ban Ki-moon, 'Climate change threatens our ability to achieve sustainable development, and in some cases, our very survival' (2015), SG/SM/16567-ENV/DEV/1492-HRC/20

Brown Weiss E., *Intergenerational Equity* (Oxford Public International Law, February 2013)  
<<https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1421>> accessed 12 May 2021

FAO, 'The Future of Food and Agriculture: Alternative Pathways to 2050' (2018)

International Council on Human Rights Policy 'Climate Change and Human Rights: A Rough Guide' (Geneva 2008) <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1551201](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1551201)> accessed 22 January 2021



OHCHR, 'UN Special Procedures Facts and Figures 2011' (Geneva, 2012)

Rigaud K. and others, 'Groundswell: Preparing for Internal Climate Migration' (2018) The World Bank <<https://openknowledge.worldbank.org/handle/10986/29461>> accessed 12 May 2021

Sands P., 'Climate Change and the Rule of Law: Adjudicating the Future in International Law', Public Lecture at the Supreme Court of the United Kingdom (17 September 2015). <<https://www.supremecourt.uk/docs/professor-sands-lecture-on-climate-change-and-the-rule-of-law.pdf>> accessed 24 November 2020

Secretariat of the Convention on Biological Diversity, 'Connecting Biodiversity and Climate Change Mitigation and Adaptation. Key Messages from the Report of the Second Ad Hoc Technical Expert Group on Biodiversity and Climate Change' (Secretariat of the Convention on Biological Diversity 2009)

UNHRC, 'Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2728/2016' (2020) CCPR/C/127/D/2728/2016



## Contributors



## Editors



