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The "Common Concern of Humankind": Establishing Erga Omnes Obligations for Climate Change Responsibility in the ICJ's Forthcoming Advisory Opinion

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COMMENT

THE "COMMON CONCERN OF HUMANKIND": ESTABLISHING *ERGA OMNES* OBLIGATIONS FOR CLIMATE CHANGE RESPONSIBILITY IN THE ICJ'S FORTHCOMING ADVISORY OPINION

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In March 2023, the United Nations General Assembly ("UNGA") requested the International Court of Justice ("ICJ") to render an advisory opinion on the following questions:

> (a) What are the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gasses [("GHGs")] for States and for present and future generations[?]
> (b) What are the legal consequences under these obligations for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment, with respect to:
>
> > (i) States, including, in particular, small island developing States, which due to their geographical circumstances and level of development, are injured or specially affected by or are particularly vulnerable to the adverse effects of climate change?
> > (ii) Peoples and individuals of the present and future generations affected by the adverse effects of climate change?[1]

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1. G.A. Res. A/77/276, Request for an Advisory Opinion of the International Court of Justice on the Obligations of States in Respect of Climate Change, at 3 (Mar. 29, 2023).

This advisory opinion request comes at both a time of urgent global need for climate change action and an ongoing paradigm shift, at domestic and international levels, recognizing the importance of such cooperative, collective action to sustain a habitable environment for present and future generations.[2] This Comment explores the current landscape of the climate change crisis that the ICJ will consider through the background of environmental agreements[3] and climate change litigation,[4] as well as human rights agreements[5] and established principles of transboundary harm.[6] Ultimately, this Comment will argue that the ICJ's advisory opinion should unequivocally recognize that States' responsibilities regarding climate change have the character of *erga omnes* obligations, by which each State is responsible to the entire global community.[7]

Within international law, *erga omnes* obligations are significant because, by "their nature," they concern the international community as a whole and implicate a schema of natural law at the foundation of all international law that supersedes state sovereignty.[8] *Erga omnes* obligations are derived from two primary sources of international law: treaties and custom.[9] In many cases, the *erga omnes* obligations of international law are codified in the form of treaties, such as the prohibition against genocide in the Genocide Convention.[10] In other cases, *erga omnes* obligations, even if partially or fully codified in treaties, draw broadly from customary international law and its overlapping concept of *jus cogens*—the peremptory norms of international law from which no derogation is permitted.[11] Unlike

2. *See* Sandra Cassotta, *The Development of Environmental Law Within a Changing Environmental Governance Context: Towards a New Paradigm Shift in the Anthropocene Era*, 30 Y.B. INT'L ENV'T L. 54, 55 (2021). Cassotta notes an ongoing "progressive transformation of the way we perceive environmental problems and, consequentially, also the way we perceive the notion of environment." *Id.* Cassotta explains this shift in perception as one by which the environment is increasingly seen as "*res communes* and a public good" that is shared rather than "belonging to one single entity." *Id.*

3. *See infra* Section I.B.

4. *See infra* Section I.C.

5. *See infra* Section II.A

6. *See infra* Section II.B.

7. *See* Ardit Memeti & Bekim Nuhija, *The Concept of* Erga Omnes *Obligations in International Law*, 14 NEW BALKAN POL. 31, 32 (2013). For a more detailed explanation of *erga omnes* obligations and their potential significance to global climate change law, see *infra* Section II.C.

8. Memeti & Nuhija, *supra* note 7, at 32, 44.

9. Statute of the International Court of Justice art. 38, ¶ 1.

10. Convention on the Prevention and Punishment of the Crime of Genocide, *opened for signature* Dec. 9, 1948, S. TREATY DOC. No. 81-15 (1986), 78 U.N.T.S. 277.

11. *See* Erika de Wet, Jus Cogens *and Obligations* Erga Omnes, *in* THE OXFORD HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW 541, 541–47 (Dinah Shelton ed., 2013). Article 53 of the Vienna Convention on the Law of Treaties states: "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law." Vienna Convention on the Law

in most disputes between States, which result from one nation directly breaching its obligations toward another nation, the breach of *erga omnes* obligations may result in any State seeking to hold the breaching party accountable.[12] This Comment considers the strength of a potential *erga omnes* obligation for climate change action in light of the strong foundation provided by both treaty and customary sources of international law.[13]

I. BACKGROUND

In its Sixth Assessment Report, released between August 2021 and March 2023, the Intergovernmental Panel on Climate Change ("IPCC") acknowledged that "[h]uman activities, principally through emissions of greenhouse gases, have unequivocally caused global warming, with global surface temperature reaching 1.1°C above 1850–1900 in 2011–2020" and observed that greenhouse gas emissions have continued to increase due to historically unequal and ongoing contributions between countries.[14]

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of Treaties art. 53, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331. The United States helped negotiate and signed the Vienna Convention on the Law of Treaties, but it was never ratified by the U.S. Senate; nevertheless, the United States views many provisions of the treaty as part of customary international law. CONG. RSCH. SERV. FOR S. COMM. ON FOREIGN RELS., 106TH CONG., TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 20–21, 45 (Comm. Print 2001).

12. *See, e.g.*, Application of Convention on Prevention and Punishment of Crime of Genocide (Gam. v. Myan.), Judgment, 2022 I.C.J. 478 (July 22). The Gambia brought this case against Myanmar before the ICJ due to alleged actions of genocide against the Rohingya people in violation of the Genocide Convention. *Id.* ¶¶ 28, 30. In finding that The Gambia had standing, the ICJ affirmed its earlier decision in *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, holding:

> All the States parties to the Genocide Convention . . . have a common interest to ensure the prevention, suppression, and punishment of genocide, by committing themselves to fulfilling the obligations contained in the Convention. . . . [S]uch a common interest implies that the obligations in question are owed by any State party to all the other States parties to the relevant convention; they are obligations erga omnes partes, in the sense that each State party has an interest in compliance with them in any given case.

Id. at ¶ 107 (citations omitted) (citing Questions Relating to Obligation to Prosecute or Extradite (Belg. v. Sen.), 2012 I.C.J. Rep. 423, ¶ 68 (July 20)). More recently, the ICJ allowed South Africa's case against Israel, alleging acts of genocide committed against Palestinians, to proceed and issued an Order in response to South Africa's provisional measures request on January 26, 2024. Application of Convention on Prevention and Punishment of Crime of Genocide in Gaza Strip (S. Afr. v. Isr.), Order, ¶¶ 1, 33 (Jan. 26, 2024), https://www.icj-cij.org/sites/default/files/case-related/192/192-20240126-ord-01-00-en.pdf.

13. *See infra* Section II.C.

14. Intergovernmental Pannel on Climate Change, *Climate Change 2023: Synthesis Report* 42 (2023) [hereinafter *AR6 Synthesis Report*]. Recognized as an international authority on climate change, the IPCC is an intergovernmental body of the United Nations formed in 1988 "to provide policymakers with regular scientific assessments on climate change, its implications and potential future risks, as well as to put forward adaptation and mitigation options." *The Intergovernmental Panel on Climate Change*, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, https://www.ipcc.ch/ (last visited Mar. 20, 2024).

Moreover, it is likely that warming will exceed 1.5°C in the near future and, as a result of projected inabilities to meet climate goals, warming may even exceed 2°C during the twenty-first century.[15] The most recent IPCC Synthesis Report warns, with very high confidence, that "[t]here is a rapidly closing window of opportunity to secure a liveable and sustainable future for all," and, with high confidence, that "[t]he choices and actions implemented in this decade will have impacts now and for thousands of years."[16]

The ICJ's forthcoming advisory opinion therefore comes at a time of amplified awareness of the dangers of climate change and the urgent need for an international response to both reverse the course of climate change and mitigate its effects.[17] Before venturing into an analysis of the ICJ's potential position, this Background section seeks to offer procedural, historical, and legal context for the forthcoming advisory opinion. Section A explains the ICJ's advisory opinion mechanism.[18] Section B discusses the trajectory of international climate agreements leading to the 2015 Paris Climate Agreement.[19] Finally, Section C briefly considers the history of global climate litigation before turning to several recent cases.[20]

A. ICJ Advisory Opinions

Under Article 96 of the U.N. Charter, the ICJ may be asked to provide an advisory opinion on "any legal question" referred to it by the UNGA or

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15. *AR6 Synthesis Report*, *supra* note 14, at 92. The IPCC Report warns, with very high confidence: "Risks and projected adverse impacts and related losses and damages from climate change will escalate with every increment of global warming." *Id.* at 15. These risks are "higher for global warming of 1.5°C than at present, and even higher at 2°C." *Id.* In the immediate future, every region in the world is expected to face increased climate-related risks to ecosystems and humans. *Id.* These risks expected in the near term include:

> an increase in heat-related human mortality and morbidity (*high confidence*), food-borne, water-borne, and vector-borne diseases (*high confidence*), and mental health challenges (*very high confidence*), flooding in coastal and other low-lying cities and regions (*high confidence*), biodiversity loss in land, freshwater and ocean ecosystems (*medium* to *very high confidence*, depending on ecosystem), and a decrease in food production in some regions (*high confidence*).

Id. Moreover, "floods, landslides, and water availability have the potential to lead to severe consequences for people, infrastructure and the economy in most mountain regions (*high confidence*)," and "[t]he projected increase in frequency and intensity of heavy precipitation (*high confidence*) will increase rain-generated local flooding (*medium confidence*)." *Id.* Beyond 2°C, the potential for irreversible changes—such as species extinction, loss of biodiversity in ecosystems including forests, coral reefs, and Arctic regions, and melting of the Greenland and West Antarctic ice sheets—becomes significant. *Id.* at 18.

16. *Id.* at 24.

17. *See* Request for an Advisory Opinion of the International Court of Justice on the Obligations of States in Respect of Climate Change, *supra* note 1, at 1.

18. *See infra* Section II.A.

19. *See infra* Section II.B.

20. *See infra* Section II.C.

Security Council.[21] In order for the General Assembly to request an advisory opinion, it must formally adopt a resolution making the request, after which the UNGA Secretary-General communicates a written request to the ICJ specifying the questions it wishes clarified by the ICJ.[22] Although the ICJ has discretionary power to decline to give an advisory opinion, the ICJ has never refused an advisory opinion request from the UNGA.[23] In most instances, the ICJ then accepts written statements from organizations and States authorized to participate in the proceedings and frequently holds oral hearings associated with the case.[24] Unlike the ICJ's judgments in contentious cases between States, an advisory opinion is not binding.[25] Nevertheless, advisory opinions issued by the ICJ "carry great legal weight and moral authority,"[26] and therefore serve as important clarifications of international law that are frequently cited to in both domestic and international courts.[27] In this way,

21. U.N. Charter art. 96, ¶ 1. Other organs of the U.N. and specialized agencies, when authorized to do so by the General Assembly, may also request advisory opinions, but any such request must be limited to "legal questions arising within the scope of their activities." U.N. Charter art. 96, ¶ 2. The ICJ's own jurisdiction stems from Article 65 of the ICJ Statute, which states: "The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request." Statute of the International Court of Justice art. 65, ¶ 1.

22. *Advisory Jurisdiction*, INT'L CT. OF JUST., https://www.icj-cij.org/advisory-jurisdiction (last visited Mar. 20, 2024); *see also* ROBERT KOLB, THE INTERNATIONAL COURT OF JUSTICE 1037–39 (2013). It is worth noting that the ICJ has the authority to interpret or reformulate the question(s) posed according to its own understanding of the "legal questions really in issue." Interpretation of Agreement of 25 March 1951 Between WHO and Egypt, Advisory Opinion, 1980 I.C.J. 73, ¶ 35 (Dec. 20); *see also* KOLB, *supra*, at 1077–80.

23. KOLB, *supra* note 22, at 1036. The ICJ has consistently claimed this discretion exists, despite neglecting to exercise it. *Id.* at 1083. In its *Legality of the Threat or Use of Nuclear Weapons* advisory opinion, for example, the ICJ, with reference to the language of Article 65 of the ICJ Statute (see *supra* note 21), states: "'The Court *may* give an advisory opinion[.]' . . . As the Court has repeatedly emphasized, the Statute leaves a discretion as to whether or not it will give an advisory opinion that has been requested of it, once it has established its competence to do so." Legality of Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 14 (July 8). Nevertheless, commentators have frequently questioned the functional nature of the ICJ's discretionary power in this regard, many of whom argue legal norms constrain the ICJ's ability to refuse an advisory request except for reasons of judicial integrity, in which case the ICJ should then refuse for reasons of general admissibility, not based on any discretionary power. *See* KOLB, *supra* note 22, at 1083–94.

24. *Advisory Jurisdiction*, *supra* note 22.

25. *Id.* There are rare exceptions where the ICJ's advisory opinion has binding force, such as when it concerns conventions on the privileges and immunities of the United Nations. *Id.*; *see also* KOLB, *supra* note 22, at 1100–02.

26. *Advisory Jurisdiction*, *supra* note 22; *see also* LOUIS HENKIN ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 120–21 (3d ed. 1993).

27. *See* KOLB, *supra* note 22, 1094–99; *see also* Jordan J. Paust, *Domestic Influence of the International Court of Justice*, 26 DENV. J. INT'L L. & POL'Y 787, 787–89 (1998). Paust notes that, from the creation of the ICJ in 1945 to the publication of his (now outdated) article in 1998, forty-two cases in federal courts (including six Supreme Court cases) have applied fifteen ICJ decisions or advisory opinions "as evidence of international normative content." *Id.* at 791–92; *see, e.g.*, Diggs

the ICJ participates in the entrenchment of customary international law as a source of both normative and interpretive authority.[28]

The UNGA adopted resolution A/77/276 by consensus on March 29, 2023, formally requesting an advisory opinion from the ICJ on the obligations of States with respect to climate change.[29] The adoption of this resolution came to fruition only after a years-long initiative spearheaded by the Republic of Vanuatu.[30] Ultimately, the resolution was co-sponsored by more than 130 U.N. member States,[31] although the United States, Brazil, India, China, and Russia were notably not among these co-sponsors.[32] The UNGA request recognizes "that climate change is an unprecedented challenge of civilizational proportions and that the well-being of present and future generations of humankind depends on our immediate and urgent

v. Richardson, 555 F.2d 848, 849 n.2 (D.C. Cir. 1976) (citing the ICJ's 1971 *Namibia Advisory Opinion* to show the consequences of the opinion in southern Africa); Fernandez v. Wilkinson, 505 F. Supp. 787, 796–97 (D. Kan. 1980) (citing the *Namibia Advisory Opinion* in support of the proposition that the Universal Declaration of Human Rights "has evolved into an important source of international human rights law"); Cruz v. Zapata Ocean Res., Inc., 695 F.2d 428, 433, 433 n.9 (9th Cir. 1982) (citing the 1949 *U.N. Reparations Advisory Opinion* for the proposition that there are exceptions to the general norm proclaiming that a state may not present a claim on behalf of another state); McComish v. Comm'r, 580 F.2d 1323, 1329 (9th Cir. 1978) (citing the 1950 *Advisory Opinion on South West Africa* regarding state sovereignty under League of Nations mandates); United States v. Palestine Liberation Org., 695 F. Supp. 1456, 1461–62, 1467 (S.D.N.Y. 1988) (citing the 1988 *Advisory Opinion on Applicability of the Obligation to Arbitrate* in order to distinguish disputes that must proceed to arbitration under the U.N. Headquarters Agreement); Princz v. Fed. Republic of Ger., 26 F.3d 1166, 1180 (D.C. Cir. 1994) (citing the 1951 *Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* as evidence of the fact that the principles underlying the Genocide Convention are part of customary international law).

28. Niccolò Lanzoni, *The Authority of ICJ Advisory Opinions as Precedents: The* Mauritius/Maldives *Case*, 2 ITALIAN REV. INT'L & COMPAR. L. 296, 306–09 (2022).

29. Request for an Advisory Opinion of the International Court of Justice on the Obligations of States in Respect of Climate Change, *supra* note 1.

30. Maria Antonia Tigre & Jorge Alejandro Carrillo Bañuelos, *The ICJ's Advisory Opinion on Climate Change: What Happens Now?*, SABIN CTR. FOR CLIMATE CHANGE L. (Mar. 29, 2023), https://blogs.law.columbia.edu/climatechange/2023/03/29/the-icjs-advisory-opinion-on-climate-change-what-happens-now/. Vanuatu is a small island archipelago in the South Pacific that has already faced severe climate change impacts; the Institute for Environment and Human Security has consistently named Vanuatu as the nation with the highest disaster risk worldwide, and the 2021 U.N. University World Risk Index ranked Vanuatu as the highest disaster risk worldwide. *The Republic of Vanuatu*, VANUATU ICJ INITIATIVE, https://www.vanuatuicj.com/vanuatu (last visited Mar. 20, 2024); *see* MARIYA ALEKSANDROVA ET AL., BÜNDNIS ENTWICKLUNG HILFT, WORLD RISK REPORT 2021, at 7. It is predicted that Vanuatu, a low-lying atoll, will be uninhabitable by the middle of this century due to the effects of climate change unless significant steps are taken to curb current trends. *The Republic of Vanuatu*, *supra*. Vanuatu has consequently become a leading advocate for climate change action within the international community. *Id.*

31. *The Republic of Vanuatu Is Leading the Initiative at the UN International Court of Justice for an Advisory Opinion on the Obligations of States Relevant to Climate Action*, VANUATU ICJ INITIATIVE, https://www.vanuatuicj.com/home (last visited Mar. 20, 2024).

32. Request for an Advisory Opinion of the International Court of Justice on the Obligations of States in Respect of Climate Change, *supra* note 1, at 1.

response to it."[33] Notably, the request expresses its concerns through not only relevant climate change agreements—including the United Nations Framework Convention on Climate Change ("UNFCCC"), the Kyoto Protocol, and the Paris Climate Agreement—but also the body of international human rights law that includes the Universal Declaration of Human Rights ("UDHR"), the International Covenant on Civil and Political Rights ("ICCPR"), the International Covenant on Economic, Social and Cultural Rights ("ICESCR"), and the Convention on the Rights of the Child ("CRC").[34] In doing so, the UNGA request circumscribes the climate change crisis within the legal and moral boundaries of international human rights discourse.[35]

B. International Climate Agreements

The history of significant international environmental agreements begins with the 1972 Stockholm Declaration, which lays out twenty-six principles acknowledging the essential relationship between humankind and the environment, as well as the need for environmental education, research, coordinated action, and responsibility.[36] The Stockholm Declaration recognizes that humanity has "the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and [humankind] bears a solemn responsibility to protect and improve the environment for present and future generations."[37] The path to realizing these rights, the Stockholm Declaration suggests, is through international cooperation:

> International matters concerning the protection and improvement of the environment should be handled in a co-operative spirit by all countries, big and small, on an equal footing. Co-operation through multilateral or bilateral agreements or other appropriate means is essential to effectively control, prevent, reduce and eliminate adverse environmental effects resulting from activities conducted

33. *Id.*

34. *Id.* at 2.

35. *See* Tigre & Bañuelos, *supra* note 30.

36. U.N. Conference on the Human Environment, *Declaration of the United Nations Conference on the Human Environment*, ch. I, U.N. Doc. A/CONF.48/14/Rev.1 (June 5–16, 1972) [hereinafter Stockholm Declaration]. The United Nations Conference on the Human Environment, which produced the Stockholm Declaration, also led to the creation of the United Nations Environment Programme ("UNEP"). G.A. Res. 2997 (XXVII), ¶ 1 (Dec. 15, 1972). UNEP plays an important organizational role for environmental action within the U.N. system and its creation is notable for its foundational significance to international environmental governance. *Frequently Asked Questions*, U.N. ENV'T PROGRAMME, https://www.unep.org/who-we-are/about-us/frequently-asked-questions (last visited Mar. 21, 2024).

37. Stockholm Declaration, *supra* note 36, at 4.

> in all spheres, in such a way that due account is taken of the sovereignty and interests of all States.[38]

In the half-century since the Stockholm Declaration, the development of climate science has led to widespread public awareness of human harms to the global environment, which, in turn, has resulted in calls for international action to address the dangers posed by these harms.[39]

The 1987 Montreal Protocol, which required States to stop producing substances that were damaging the ozone layer of the Earth's atmosphere, such as chlorofluorocarbons ("CFCs"), remains perhaps the most successful example of international environmental cooperation.[40] Although this agreement did not explicitly address climate change, it nevertheless provided an important model for future international cooperation on environmental issues; every country in the world eventually ratified the treaty,[41] which has succeeded in eliminating nearly ninety-nine percent of harmful ozone-depleting substances.[42] More recently, in the 2016 Kigali Amendment to the Montreal Protocol, parties agreed to reduce production of the damaging greenhouse gases hydrofluorocarbons ("HFCs").[43]

The true beginning of agreements specific to climate change, however, came with the 1992 foundation of the UNFCCC,[44] which is currently ratified by 198 countries,[45] including the United States.[46] With the objective of

38. *Id.* at 5.

39. Peter Jackson, *From Stockholm to Kyoto: A Brief History of Climate Change*, U.N. CHRON., June 2007, at 6, 6–7, 10, https://www.un.org/en/chronicle/article/stockholm-kyoto-brief-history-climate-change.

40. Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, S. TREATY DOC. No. 100–10 (1987), 1522 U.N.T.S. 29 [hereinafter Montreal Protocol].

41. Lindsay Maizland, *Global Climate Agreements: Successes and Failures*, COUNCIL ON FOREIGN RELS., https://www.cfr.org/backgrounder/paris-global-climate-change-agreements (last updated Dec. 5, 2023, 2:46 PM).

42. *Montreal Protocol: Successful Ozone and Climate Agreement Turns 30*, INT'L INST. FOR SUSTAINABLE DEV. (Sept. 19, 2017), http://sdg.iisd.org/news/montreal-protocol-successful-ozone-and-climate-agreement-turns-30/.

43. Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer, Oct. 15, 2016, S. TREATY DOC. No. 117–1 (2021) [hereinafter Kigali Amendment]. The Kigali Amendment's reduction of HFCs, which have shorter life cycles but are many times more potent than regular GHGs, is expected to avoid up to 0.5°C of global warming by 2100. Savannah Bertrand, *Senate Ratification of Kigali Is Good for the Climate and U.S. Competitiveness*, ENV'T & ENERGY STUDY INST. (Sept. 26, 2022), https://www.eesi.org/articles/view/senate-ratification-of-kigali-is-good-for-the-climate-and-u.s-competitiveness. The United States only recently ratified this treaty in September 2022, joining 137 other signatories, including India and China. *Id.*

44. United Nations Framework Convention on Climate Change, *opened for signature* May 9, 1992, S. TREATY DOC. No. 102-38 (1992), 1771 U.N.T.S. 107 (entered into force Mar. 21, 1994) [hereinafter UNFCCC].

45. *What Is the United Nations Framework Convention on Climate Change?*, U.N. CLIMATE CHANGE, https://unfccc.int/process-and-meetings/what-is-the-united-nations-framework-convention-on-climate-change (last visited Mar. 21, 2024).

46. Maizland, *supra* note 41.

stabilizing greenhouse gas concentrations "at a level that would prevent dangerous anthropogenic (human induced) interference with the climate system,"[47] the UNFCCC is responsible for an annual Conference of the Parties ("COP"), the international forum out of which the most significant climate agreements have emerged.[48]

The Kyoto Protocol, adopted in 1997 and entered into force in 2005, is one such agreement and was the first legally binding climate treaty.[49] The agreement operationalized the UNFCCC by committing the parties to reduce GHG emissions according to individually set targets.[50] Notably, the Kyoto Protocol only binds developed nations, specifically requiring these nations to achieve emissions reduction targets that total a five percent emissions reduction compared to 1990 levels during the first commitment period from 2008–2012.[51] Article 17 of the Kyoto Protocol sets out an emissions trading framework, permitting nations to sell unused GHG emissions units to other nations.[52] State emissions are monitored, recorded, and verified through a

47. *What Is the United Nations Framework Convention on Climate Change?*, *supra* note 45 (quoting UNFCCC art. 2, *supra* note 44, at 4).

48. Maizland, *supra* note 41.

49. *Id.* There are currently 192 Parties to the Kyoto Protocol. *What Is the Kyoto Protocol?*, U.N. CLIMATE CHANGE, https://unfccc.int/kyoto_protocol (last visited Mar. 21, 2024). Although the United States was a signatory to the Kyoto Protocol in 1998 under President Bill Clinton, it was never a full party to the agreement. *United States Signs the Kyoto Protocol*, U.S. DEP'T OF STATE (Nov. 12, 1998), https://1997-2001.state.gov/global/global_issues/climate/fs-us_sign_kyoto_981112.html. President George W. Bush opposed the Kyoto Protocol and his administration refused to ratify the agreement, claiming it was unfair because "it exempts 80 percent of the world, including major population centers such as China and India, from compliance, and would cause serious harm to the U.S. economy." Letter from President George W. Bush to Members of the Senate on the Kyoto Protocol on Climate Change (Mar. 13, 2001), https://www.govinfo.gov/content/pkg/WCPD-2001-03-19/pdf/WCPD-2001-03-19-Pg444-2.pdf.

50. *What Is the Kyoto Protocol?*, *supra* note 49.

51. *Id.* Nations with binding emissions targets (originally known as Annex I parties, later changed to Annex B parties with the inclusion of three additional countries under the more recent version of the treaty) consist of thirty-nine countries determined to be industrialized nations or nations in transition to a market economy. Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 11, 1997, 2303 U.N.T.S. 162. These countries include the United States, Canada, the United Kingdom, Australia, New Zealand, Japan, and most E.U. countries. *Id.*

Other non-Annex I countries (developing nations) that were signatories to the Kyoto Protocol were required to report their GHG emissions but did not have formal emissions obligations. *Id.* Notably, China, India, and Brazil were not Annex I countries due to their comparative lack of carbon emissions at the time of the treaty. *See* Miriam Prys-Hansen, *Competition and Cooperation: India and China in the Global Climate Regime*, GIGA FOCUS, July 2022, at 1, 3–4. In the decades since, China has emerged as the world's most prolific emitter of GHGs, accounting for nearly thirty percent of global emissions. Eur. Comm'n, Joint Rsch. Ctr., *GHG Emissions of All World Countries: 2023*, at 4–5, EUR 31658 (2023). India is the world's third worst emitter with 7.33% of the global total, while Brazil is sixth worst with 2.44% of total emissions. *Id.* at 5.

52. *What Are Carbon Markets and Why Are They Important?*, U.N. DEV. PROGRAMME (May 18, 2022), https://climatepromise.undp.org/news-and-stories/what-are-carbon-markets-and-why-are-they-important. These so-called "carbon markets" allow entities such as nations and

compliance tracking system established by the agreement.[53] The Doha Amendment was added to the Kyoto Protocol in December 2012, supplementing the original agreement with a second commitment period covering emissions targets between 2013–2020.[54] Despite its significance as the first legally binding climate agreement, numerous critics have judged the Kyoto Protocol a failure due to global emissions continuing to increase relative to 1990s levels, with much of this increase coming from nations, among them China and India, that were excluded from GHG reduction targets.[55] Other critics have pointed to the agreement's conservative emissions targets in condemning the effectiveness of the Kyoto Protocol.[56] Nevertheless, the Kyoto Protocol exceeded its five percent emissions reduction target, with aggregate emissions reductions over the first commitment period (2008–2012) calculated at between seven and twelve-and-a-half percent.[57] And some experts have defended the agreement by arguing that even limited success—especially when viewed as the result of collective action instead of individual national targets—has put the world in a better place than it would have been without the Kyoto Protocol.[58]

The 2015 Paris Climate Agreement, which emerged out of the Kyoto Protocol and subsequent climate agreements, is the most significant international climate treaty to date.[59] The treaty, which was adopted by 196

corporations to compensate for their GHG emissions by purchasing carbon credits from entities that remove or reduce GHG emissions. *Id.* Article 6 of the Paris Climate Agreement (discussed below), building on the emissions trading framework of the Kyoto Protocol, similarly enables the use of carbon markets for reaching emissions targets. *Id.* Carbon markets are becoming an increasingly vital component of the global response to the climate change crisis; eighty-three percent of nationally determined contributions under the Paris Climate Agreement intend to make use of carbon market mechanisms to reduce GHG emissions. Taryn Fransen, *Making Sense of Countries' Paris Agreement Climate Pledges*, WORLD RES. INST. (Oct. 22, 2021), https://www.wri.org/insights/understanding-ndcs-paris-agreement-climate-pledges. As carbon markets continue to grow, especially in developing countries, there are regulatory challenges that must be confronted in order for their implementation to occur in effective, transparent, and humane ways. *What Are Carbon Markets and Why Are They Important?*, *supra* note 52.

53. *What Is the Kyoto Protocol?*, *supra* note 49.

54. *Id.*

55. Francesco Bassetti, *Success or Failure? The Kyoto Protocol's Troubled Legacy*, CMCC: FORESIGHT (Dec. 8, 2022), https://www.climateforesight.eu/articles/success-or-failure-the-kyoto-protocols-troubled-legacy/. In 2012, global emissions were up forty-four percent from 1997 levels. *Id.* China surpassed the United States in total annual emissions by 2006, and India's current emissions are nearly equal to those of the European Union. *Id.*

56. *See* Christian Almer & Ralph Winkler, *Analyzing the Effectiveness of International Environmental Policies: The Case of the Kyoto Protocol*, 82 J. ENV'T ECON. & MGMT. 125, 139 (2017).

57. Bassetti, *supra* note 55.

58. *See* Nada Maamoun, *The Kyoto Protocol: Empirical Evidence of a Hidden Success*, 95 J. ENV'T ECON. & MGMT. 227, 228–29 (2019).

59. Maizland, *supra* note 41.

Parties at COP21,[60] requires States to set individually determined emissions-reduction pledges known as nationally determined contributions ("NDCs").[61] Without any enforcement mechanism, the Paris Climate Agreement is implemented "to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances."[62] The stated goal of the Paris Climate Agreement is to "strengthen the global response to the threat of climate change" by "[h]olding 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"[63] in accordance with IPCC's recommendations.[64] The Paris Climate Agreement also targets increased adaptability regarding adverse impacts of climate change, climate resilience, and development towards low greenhouse gas emissions, in addition to consistently securing necessary finance contributions for these goals.[65] Ultimately, the goal is to achieve total carbon neutrality through reaching global net-zero emissions in the second half of the current century.[66]

Progress toward NDCs is assessed every five years in global stocktakes, the first of which culminated at COP28 in 2023.[67] The first global stocktake report from September 2023 acknowledged success on the part of the Paris

60. *The Paris Agreement*, U.N. CLIMATE CHANGE, https://unfccc.int/process-and-meetings/the-paris-agreement (last visited Mar. 21, 2024). The United States was a party to the Paris Climate Agreement in 2015 under President Barack Obama, who pledged a twenty-six percent to twenty-eight percent reduction of national emissions below 2005 levels by 2025. Tony Barboza, *A Brief Timeline of U.S. Climate Pledges Made, and Discarded*, L.A. TIMES (Apr. 22, 2021, 3:00 AM), https://www.latimes.com/environment/story/2021-04-22/three-decades-of-us-climate-pledges-and-inaction. Under President Donald Trump, the United States left the agreement in 2017, but rejoined again under President Joe Biden in 2021. *Id.* President Biden has ambitiously pledged an NDC of fifty to fifty-two percent below 2005 levels by 2030. THE UNITED STATES OF AMERICA: NATIONALLY DETERMINED CONTRIBUTION, REDUCING GREENHOUSE GASES IN THE UNITED STATES: A 2030 EMISSIONS TARGET 1 (2021), https://unfccc.int/sites/default/files/NDC/2022-06/United%20States%20NDC%20April%2021%202021%20Final.pdf.

61. Maizland, *supra* note 41.

62. Paris Agreement to the United Nations Framework Convention on Climate Change art. 2, Dec. 12, 2015, T.I.A.S. No. 16-1104, 3156 U.N.T.S. 79 [hereinafter Paris Climate Agreement].

63. *Id.*

64. *See generally AR6 Synthesis Report*, *supra* note 14.

65. Paris Climate Agreement, *supra* note 62.

66. Maizland, *supra* note 41.

67. Jamal Srouji & Deirdre Cogan, *What Is the "Global Stocktake" and How Can It Accelerate Climate Action?*, WORLD RES. INST. (Sept. 8, 2023), https://www.wri.org/insights/explaining-global-stocktake-paris-agreement. These global stocktakes were initiated under Article 14 of the Paris Agreement to "periodically take stock of the implementation of [the Paris] Agreement to assess the collective progress towards achieving the purpose of [the Paris] Agreement and its long-term goals." Paris Climate Agreement, *supra* note 62.

Climate Agreement for generating "broad global commitment" to the agreement, for "its central role in catalysing the cooperative action needed to address the climate change crisis," and for "inspir[ing] significant progress in global mitigation and adaptation action and support."[68] Nevertheless, the report concerningly found:

> [G]lobal emissions are not in line with modelled global mitigation pathways consistent with the temperature goal of the Paris Agreement, and there is a rapidly narrowing window to raise ambition and implement existing commitments in order to limit warming to 1.5 °C above pre-industrial levels.[69]

The report further cautioned that "much more ambition in action and support is needed in implementing domestic mitigation measures and setting more ambitious targets in NDCs to realize existing and emerging opportunities across contexts," in order to meet currently estimated implementation gaps and reach 2030 global emissions reduction goals.[70]

Although the international community may agree on the risks posed by climate change and the value of reduction goals, it has not reached the same level of concurrence on the questions of liability and damages.[71] The Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts, established at COP19 in November 2013, represents a noteworthy effort to address climate change damage resulting from both extreme weather events and slow onset events,[72] but how to address loss and damage caused by climate change has been an ongoing and divisive issue, for which small island developing states have been particular advocates and

68. U.N. Climate Change Conference, *Synthesis Rep. on the Technical Dialogue of the First Global Stocktake*, ¶ 2, U.N. Doc. FCCC/SB/2023/9 (Sept. 8, 2023) [hereinafter *Technical Dialogue of the First Global Stocktake*].

69. *Id.* ¶ 9.

70. *Id.* ¶ 13. "Implementation gaps refer to how far currently enacted policies and actions fall short of reaching stated [emissions] targets." *Id.* ¶ 10.

71. *See* Timothy Puko, *Rich Countries Promised Poor Nations Billions for Climate Change. They Aren't Paying.*, WASH. POST (Oct. 9, 2023), https://www.washingtonpost.com/climate-environment/2023/10/09/rich-nations-pledged-poor-ones-billions-climate-damages-they-arent-paying/; *see also* Andrea Nishi, *Unpacking the Liability Argument Against Loss and Damage Funding*, SABIN CTR. FOR CLIMATE CHANGE L. (Nov. 7, 2022), https://blogs.law.columbia.edu/climatechange/2022/11/07/unpacking-the-liability-argument-against-loss-and-damage-funding/.

72. *Warsaw International Mechanism for Loss and Damage Associated with Climate Change Impacts (WIM)*, U.N. CLIMATE CHANGE, https://unfccc.int/topics/adaptation-and-resilience/workstreams/loss-and-damage/warsaw-international-mechanism (last visited Mar. 21, 2024). Slow onset events, as defined in the Cancun Agreement (COP16), include: "increasing temperatures, desertification, loss of biodiversity, land and forest degradation, glacial retreat and related impacts, ocean acidification, sea level rise, and salinization." *Slow Onset Events*, U.N. CLIMATE CHANGE, https://unfccc.int/process/bodies/constituted-bodies/WIMExCom/SOEs (last visited Mar. 21, 2024).

wealthy developed nations have generally been opponents.[73] In light of these disagreements, the Warsaw Loss and Damage Mechanism emphasizes "[e]nhancing knowledge and understanding"; "[s]trengthening dialogue, coordination, coherence and synergies among relevant stakeholders"; and "[e]nhancing action and support, including finance, technology and capacity-building, to address loss and damage associated with the adverse effects of climate change," but does not make provisions for liability or compensation for any loss and damage associated with climate change.[74] The Warsaw Loss and Damage Mechanism is included in Article 8 of the Paris Climate Agreement, but the COP21 decision, by which the Paris Agreement was accepted, explicitly states that its inclusion "does not involve or provide a basis for any liability or compensation."[75] At COP27 in November 2022, however, an agreement was reached to establish a dedicated loss and damage fund for climate change events.[76] Although the details of the fund—including who pays into the fund and who can benefit from it—still need to be negotiated, the establishment of this fund is, by itself, a significant breakthrough toward fostering internationally shared climate change responsibility.[77]

C. Climate Change Litigation

Recent climate change litigation in domestic and international courts demonstrates increased attribution of harms to climate change and, moreover, demonstrates that legal systems are appropriate venues to adjudicate these harms.[78] According to data from the Sabin Center for Climate Change Law, 1,587 climate litigation cases have been brought in courts around the world between 1986 and May 2020.[79] Perhaps unsurprisingly, the number of cases

73. *See* M.J. Mace & Roda Verheyen, *Loss, Damage and Responsibility After COP21: All Options Open for Paris Agreement*, 25 REV. EUROPEAN CMTY. & INT'L ENV'T L. 197, 197–201 (2016).

74. Warsaw Climate Change Conference, *Rep. of the Conf. of the Parties on its Nineteenth Session*, U.N. Doc. FCCC/CP/2013/10/Add.1, at 6–7 (Jan. 31, 2014). The discussion of any loss and damage provision during COP19 occurred only after the entire delegation of developing nations staged a walkout during negotiations. DAVID HUNTER, JAMES SALZMAN & DURWOOD ZAELKE, INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 689 (6th ed. 2022).

75. Paris Climate Change Conference, *Rep. of the Conf. of the Parties on its Twenty-First Session*, U.N. Doc. FCCC/CP/2015/10/Add.1, at 8 (Jan. 29, 2016).

76. *Establishing a Dedicated Fund for Loss and Damage: Key Takeaways from COP27*, U.N. CLIMATE CHANGE, https://unfccc.int/establishing-a-dedicated-fund-for-loss-and-damage (last visited Mar. 21, 2024).

77. *Id.*

78. JOANA SETZER & REBECCA BYRNES, GLOBAL TRENDS IN CLIMATE CHANGE LITIGATION: 2020 SNAPSHOT 3 (2020).

79. *Id.* at 4. 1,213 of these cases were brought in the United States, and 374 of these cases were brought in thirty-six other countries—primarily Australia (ninety-eight cases), the United Kingdom

has increased in recent years, particularly after COP15 in 2009 and following the Paris Climate Agreement in 2015.[80] Climate legislation and litigation increasingly "appear to serve broadly complementary functions," particularly in the Global South.[81] Additionally, "human rights-related cases [have emerged] as a dominant climate litigation strategy" consistent with a "rapidly evolving body of norms at the national, regional and international level regarding states' human rights obligations to urgently mitigate climate change."[82] The next subsection explores several of these cases that have shaped the "human rights turn" in climate litigation.[83] The following subsection then concludes by considering a potential duty-based approach to climate change enforcement seen in transboundary harms cases.[84]

1. Human Rights Climate Change Litigation

A starting point for human-rights based climate change litigation can be traced to *Sheila Watt-Cloutier et al. v. United States* (2005),[85] when members of the Inuit people living in Canada filed a petition with the Inter-American Court of Human Rights ("IACHR") alleging human rights violations resulting from the acts and omissions of the United States regarding climate change.[86] The petitioners argued that climate change affects every aspect of Inuit life and culture due to its impact on the Arctic, and that the United States was primarily responsible for this destructive impact because it was the world's largest contributor to climate change.[87] The IACHR rejected the petition "at present" on the grounds that the petitioners had insufficient information for the IACHR to determine whether the alleged facts violated rights protected under relevant human rights agreements.[88] Although unsuccessful, the *Sheila Watt-Cloutier* case established an important

(sixty-two cases), and European Union bodies and courts (fifty-two cases)—in addition to eight regional or international jurisdictions. *Id.*

80. *Id.* at 7. Scholars have pointed to the perceived failures of COP15 as an explanation for this increase in litigation as a strategy for achieving climate change action. *Id.*

81. *Id.* at 9. Fifty-eight percent (187) of non-U.S. climate cases between 1986 and May 2020 had outcomes favorable to climate change action. *Id.* at 11.

82. *Id.* at 14–15.

83. Jacqueline Peel & Hari M. Osofsky, *A Rights Turn in Climate Litigation?*, 7 TRANSNAT'L ENV'T L. 37, 40 (2018); *see infra* Section I.C.1.

84. *See infra* Section I.C.2.

85. 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, Watt-Cloutier v. United States, Inter-Am. Comm. H.R. (filed Dec. 7, 2005).

86. *Id.* To this end, petitioners primarily relied on the American Declaration of the Rights and Duties of Man, in addition to the ICCPR, the ICESCR, and the UNFCCC. *Id.* at 5.

87. *Id.* at 35, 68.

88. Letter from Ariel Dulitzky, Assistant Exec. Sec'y, Inter-Am. Comm. H.R., to Paul Crowley, Legal Representative of Sheila Watt-Cloutier et al. (Nov. 16, 2006).

foundation for litigation connecting the consequences of climate change to a nation's GHG emissions through the obligations of international human rights law.[89]

Recently, international plaintiffs have had much better results in a string of significant domestic cases, among them *Future Generations v. Ministry of the Environment* (2018),[90] *Neubauer, et al. v. Germany* (2021),[91] and *Urgenda Foundation v. State of the Netherlands* (2019).[92] Plaintiffs in the United States, meanwhile, have had mixed results in cases such as *Juliana v. United States* (2020)[93] and *Held v. Montana* (2023).[94]

In *Future Generations v. Ministry of the Environment*, twenty-five youth plaintiffs between the ages of seven and twenty-five brought suit against Colombian governmental bodies and municipalities, along with several corporations, to protect their fundamental rights to a healthy environment, life, health, food, and water, which the plaintiffs claimed are threatened by climate change and deforestation.[95] Reversing the decision of the lower court, the Colombian Supreme Court recognized that the "fundamental rights of life, health, the minimum subsistence, freedom, and human dignity are substantially linked and determined by the environment and the ecosystem," concluding that the protection of these fundamental individual rights implicates the rights of all others, including the unborn.[96] The court agreed with the plaintiffs that the Colombian government has been ineffective in reducing Amazon deforestation[97]—a major source of GHG emissions—according to its commitments under the Paris Climate

89. *See* John H. Knox, *The Paris Agreement as a Human Rights Treaty*, *in* HUMAN RIGHTS AND 21ST CENTURY CHALLENGES: POVERTY, CONFLICT, AND THE ENVIRONMENT 323, 324–25 (Dapo Akanda et al. eds., 2020). Knox, whose work is cited throughout this Comment, served from 2015–2018 as the United Nation's first Special Rapporteur on the issue of human rights obligations relating to environmental law. *Faculty: John H. Knox*, WAKE FOREST L., https://law.wfu.edu/faculty/profile/knoxjh/publications/ (last visited Mar. 22, 2024). Now a professor at Wake Forest Law, he remains one of the foremost experts on the intersection between human rights law and international environmental law, which continues to be a primary focus of his scholarship. *Id.*

90. Corte Supreme de Justicia [C.S.J.] [Supreme Court], abril 5, 2018, M.P: L. Villabona, STC4360–2018, (No. 11001-22-03-000-2018-00319-01) (Colom.) (selected and trans. by DEJUSTICIA).

91. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Apr. 29, 2021, 1 BvR 2656/18 (Ger.) (Eng. trans.).

92. HR 20 december 2019, ECLI:NL:HR:2019:2007 (Stichting Urgenda/Verweerster) [Urgenda Foundation v. State of the Netherlands] (Neth) (Eng. trans.).

93. Juliana v. United States, 947 F.3d 1159 (9th Cir. 2020).

94. Held v. Montana, 2023 MT 307N, ¶ 58 (Mont. D. Ct. Aug. 14, 2023).

95. C.S.J., STC4360–2018 (No. 11001-22-03-000-2018-00319-01, p. 1) (Colom.).

96. *Id.* at 13.

97. *Id.* at 34. The court observed that, despite Colombia's commitments to reduce deforestation, deforestation in the country actually increased by forty-four percent between 2015 and 2016. *Id.* at 1.

Agreement and its own National Development Plan.[98] Furthermore, the court ordered the Colombian government to create an "intergenerational pact for the life of the Colombian Amazon," recognizing the Colombian Amazon as an entity "subject of rights."[99]

In *Neubauer, et al. v. Germany*, the German Constitutional Court ruled that part of the country's recent Federal Climate Protection Act was unconstitutional because it did not "sufficiently protect people against future infringements and limitations of freedom rights in the wake of gradually intensifying climate change."[100] The plaintiffs, a group of German youths, argued that the German Federal Climate Protection Act was insufficient to achieve the Paris Climate Agreement's goal of limiting the global temperature increase to below 2°C.[101] In doing so, the German court, as the Colombian court did in the *Future Generations* case, emphasized the fundamental rights of future environmental stakeholders, imposing on the German government positive obligations to realize those rights.[102]

In *Urgenda Foundation v. State of the Netherlands*, the Supreme Court of the Netherlands upheld the decisions of lower courts regarding claimed violations of the European Convention on Human Rights ("ECHR") by the Dutch government.[103] The suit, brought by a Dutch environmental group and 900 Dutch citizens, successfully argued that the Dutch government is required to take more determined measures to combat climate change.[104] The court concluded that the state has a duty to take climate change mitigation measures "[g]iven the severity of the impact from climate change and the significant chance that—unless mitigating measures are taken—dangerous climate change will occur."[105] In reaching this conclusion, the court cited, among other sources of law, the UNFCCC and Articles 2 and 8 of the ECHR, which protect a right to life and the right to private life, family life, home,

98. *Id.* at 34.

99. *Id.* at 45. The stated goal of this "intergenerational pact," which will include participation from the plaintiffs, affected communities, and research and scientific organizations, is to achieve net-zero deforestation in the Colombian Amazon, thereby reducing GHG emissions. *Id.* Moreover, by recognizing that the Colombian Amazon has rights of its own, the Colombian Supreme Court followed the lead of the Colombian Constitutional Court, which recognized the same for the Atrato River the year before. *Id.*

100. Louis J. Kotzé, Neubauer et al. versus Germany*: Planetary Climate Litigation for the Anthropocene?*, 22 GER. L.J. 1423, 1424 (2021).

101. *Id.*

102. *See* Andreas Buser, *Of Carbon Budgets, Factual Uncertainties and Intergenerational Equity—The German Constitutional Court's Climate Decision*, 22 GER. L.J. 1409, 1417 (2021).

103. HR 20 december 2019, ECLI:NL:HR:2019:2007 (Stichting Urgenda/Verweerster) [Urgenda Foundation v. State of the Netherlands] (Neth) (Eng. trans.).

104. *Id.*

105. *Id.*

and correspondence, respectively.[106] The court ordered the Dutch government to limit GHG emissions to twenty-five percent below 1990 levels by 2020—an increase of the government's pledge to reduce emissions by seventeen percent, which the court found insufficient to meet the state's contribution to the U.N. goal of keeping global temperatures within 2°C of pre-industrial levels.[107]

In the United States, two recent cases have seen mixed results for climate change litigants. In *Juliana v. United States* (2020), the Ninth Circuit dismissed for lack of standing a case brought by twenty-one youth plaintiffs in Oregon.[108] The plaintiffs claimed that the government had violated the public trust doctrine and infringed on their constitutional due process rights to life, liberty, and property by "continu[ing] to permit, authorize, and subsidize fossil fuel extraction" despite knowing how these activates contribute to global warming.[109] Although the district court ruled in the plaintiffs' favor and granted their requested remedy of an order requiring the United States to "swiftly phase out CO_2 emissions,"[110] the Ninth Circuit reversed on standing grounds, "reluctantly" finding redressability of the plaintiffs' injuries beyond the scope of its constitutional power under Article III.[111] The lone dissent lamented: "Plaintiffs bring suit to enforce the most basic structural principle embedded in our system of ordered liberty: that the Constitution does not condone the Nation's willful destruction."[112] In June 2023, the court allowed the plaintiffs to amend their complaint.[113] In *Held v. Montana* (2023), however, the Supreme Court of Montana ruled that a statute prohibiting the state government from considering the effects of climate change was unconstitutional because it violated provisions in the Montana

106. *Id.*

107. *Id.* The mitigation goals set out in *Urgenda* were achieved, but critics have pointed out this was due, in large part, to lower emissions caused by less travel during the Covid-19 pandemic. *See* Benoit Mayer, *The Contribution of* Urgenda *to the Mitigation of Climate Change*, 35 J. ENV'T L. 167, 170–72 (2023).

108. Juliana v. United States, 947 F.3d 1159, 1165, 1175 (9th Cir. 2020).

109. First Amended Complaint for Declaratory and Injunctive Relief ¶¶ 7–8, Juliana v. United States, 217 F. Supp. 3d 1224 (D. Or. 2016) (No. 15-cv-01517).

110. Juliana v. United States, 217 F. Supp. 3d 1224, 1247–48 (D. Or. 2016), *rev'd*, 947 F.3d 1159 (9th Cir. 2020). Significantly, the district court also found that the plaintiffs' had stated a potential due process claim because "a climate system capable of sustaining human life is fundamental to a free and ordered society," invoking the constitutional test for unenumerated fundamental rights. *Id.* at 1249–50.

111. *Juliana*, 947 F.3d at 1165.

112. *Id.* at 1175 (Staton, J., dissenting). Judge Staton's dissent further states that, as the plaintiffs' claims did not pose political questions that would disqualify them under the political questions doctrine, she would have allowed the claims to proceed. *Id.* at 1186.

113. *Youth Climate Lawsuit Against Federal Government Headed for Trial*, YALEENVIRONMENT360 (June 2, 2023), https://e360.yale.edu/digest/juliana-youth-climate-lawsuit-trial.

state constitution protecting the right to a clean environment.[114] Significantly, this case established that psychological harms can be a cause of action for climate-related harms.[115]

Finally, it is worth noting that there are two advisory opinions on climate change forthcoming from significant bodies of international law—one from the IACHR,[116] the other from the International Tribunal for the Law of the Sea ("ITLOS") under the United Nations Convention on the Law of the Sea ("UNCLOS").[117] The request for an advisory opinion submitted by Chile and Colombia to the IACHR is made with specific reference to the human rights obligations impacted by the effects of climate change, in addition to the effects of climate change on future generations.[118] Meanwhile, the pending advisory opinion from ITLOS refers instead to transboundary harm and therefore serves as an effective transition to an analysis of these principles as a basis for climate change litigation.[119]

2. Transboundary Harm as a Basis for Climate Change Litigation

In the forthcoming ITLOS advisory opinion, the Commission of Small Islands States bringing the request asks the tribunal to consider whether there are "specific obligations of State Parties to [UNCLOS] . . . to prevent, reduce and control pollution of the marine environment in relation to the deleterious effects that result or are likely to result from climate change . . . [and] to protect and preserve the marine environment in relation to climate change impacts."[120] These "specific obligations" incorporate customary international law regarding the prevention of transboundary harm, which, under Article 194 of UNCLOS, includes preventing pollution caused by human activities that contribute to climate change.[121] Furthermore, these obligations may be

114. Held v. Montana, 2023 MT 307N, ¶ 58 (Mont. D. Ct. Aug., 14 2023).

115. *Id.* ¶ 268.

116. Request for an Advisory Opinion on the Climate Emergency and Human Rights Submitted to the Inter-American Court of Human Rights by the Republic of Colombia and the Republic of Chile, Int.-Am. Ct. H.R. (Jan. 9, 2023) [hereinafter Request for an Advisory Opinion on the Climate Emergency and Human Rights].

117. Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law, ITLOS, Case No. 31/2022 (Dec. 12, 2022) [hereinafter Request for an Advisory Opinion Submitted by the Commission of Small Island States].

118. Request for an Advisory Opinion on the Climate Emergency and Human Rights, *supra* note 116.

119. Request for an Advisory Opinion Submitted by the Commission of Small Island States, *supra* note 117.

120. *Id.*

121. Maria José Alarcon & Maria Antonia Tigre, *Navigating the Intersection of Climate Change and the Law of the Sea: Exploring the ITLOS Advisory Opinion's Substantive Content*, SABIN CTR. FOR CLIMATE CHANGE L. (Apr. 24, 2023), https://blogs.law.columbia.edu/climatechange/2023/04/24/navigating-the-intersection-of-climate-change-and-the-law-of-the-sea-exploring-the-itlos-advisory-opinions-substantive-content/.

construed as *erga omnes* obligations due to the importance of maintaining the oceans as a "common concern of humankind."[122]

Initially distinct from climate change litigation, the body of caselaw centering on transboundary environmental harms, such as from pollution, directly attributes these harms to particular actors.[123] As can be observed in the Commission of Small Island States' ITLOS advisory request, principles of transboundary harm have become increasingly relevant to contemporary climate change mitigation as similar principles are applied.[124] Within international law, two of the most significant cases dealing with transboundary environmental harms are the ICJ's decisions in *Pulp Mills on the River Uruguay* (*Argentina v. Uruguay*) (2010)[125] and *Certain Activities Carried Out by Nicaragua in the Border Area* (*Costa Rica v. Nicaragua*) (2015)[126]/*Construction of a Road in Costa Rica along the San Juan River* (*Nicaragua v. Costa Rica*) (2018).[127]

In the *Pulp Mills* case, Argentina brought suit against Uruguay as a result of the planned construction of two pulp mills on the River Uruguay separating the countries.[128] Argentina had concerns about the environmental impact of the mills on the river, which would violate certain provisions of the bilateral treaty concerning use of the Uruguay River.[129] The ICJ, considering the principle of prevention, clarified that States must use all means at their disposal to avoid transboundary harm from activities in their territory or under their jurisdiction.[130] In order to exercise due diligence, the State has to follow the "requirement under general international law to undertake an environmental impact assessment where there is risk that the proposed

122. *Id.*

123. *See* Mara Tignino & Christian Bréthaut, *The Role of International Case Law in Implementing the Obligation Not to Cause Significant Harm*, 20 INT'L ENV'T AGREEMENTS: POL., L. & ECON. 631, 632–33 (2020).

124. *See, e.g.*, Duarte Agostinho and Others v. Portugal and Others, App. No. 29371/20 (filed Nov. 13, 2020), https://hudoc.echr.coe.int/fre?i=002-13055 (currently being heard by the Grand Chamber of the European Court of Human Rights). This case, filed by six Portuguese youth plaintiffs, alleges that the thirty-three countries named as defendants violated human rights by failing to take sufficient action regarding climate change. *Id.* The plaintiffs take a unique approach within climate change litigation by arguing that climate change raises issues of transboundary harm and common concern. *Id.*

125. Pulp Mills on the River Uruguay (Arg. v. Uru.), Judgment, 2010 I.C.J. 14 (Apr. 2).

126. Certain Activities Carried Out by Nicaragua in Border Area (Costa Rica v. Nicar.), Judgment, 2015 I.C.J. 665 (Dec. 16); *see also* Certain Activities Carried Out by Nicaragua in Border Area (Costa Rica v. Nicar.), Compensation, Judgment, 2018 I.C.J. 15 (Feb. 2).

127. Construction of a Road in Costa Rica Along the San Juan River (Nicar. v. Costa Rica), Judgment, 2015 I.C.J. 665 (Dec. 16).

128. *Argentina v. Uruguay*, 2010 I.C.J. ¶ 25.

129. *Id.* ¶ 26–27.

130. *Id.* ¶ 101.

industrial activity may have a significant adverse impact in a transboundary context."[131]

In the linked *Costa Rica v. Nicaragua*/*Nicaragua v. Costa Rica* cases, the ICJ reiterated and strengthened the holding in the *Pulp Mills* case regarding the principles of transboundary harm, finding that compensation may be due under international law for "damage caused to the environment, in and of itself."[132] Taken together, these decisions demonstrate the ICJ's firm recognition that the prevention of environmental harm to neighboring States is part of customary international law, and causing harm without proper due diligence, such as from an environmental impact assessment, can be a basis for liability.[133] As such, these cases offer a meaningful starting point for connecting environmental damage caused by climate change to principles of transboundary harm.[134]

II. ANALYSIS

The ICJ's forthcoming advisory opinion represents a recognition of climate change's perils for both our world's present inhabitants and for future generations.[135] This act of recognition is significant in itself because international law takes on meaning through such moments of recognition.[136] Customary international law comes into being when the international community collectively arrives at a shared understanding that, through awareness and repeated practice, eventually becomes an entrenched obligation of international law.[137] The Paris Climate Agreement insists on the "common but differentiated responsibilities" of the Parties depending on each State's individual contributions to global emissions, and each State must

131. *Id.* ¶ 204.

132. *Costa Rica v. Nicaragua*, 2015 I.C.J. ¶ 41.

133. *See* Tigre & Bañuelos, *supra* note 30.

134. *Id.*

135. *See* Request for an Advisory Opinion of the International Court of Justice on the Obligations of States in Respect of Climate Change, *supra* note 1.

136. *See generally* MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT (1989).

137. *See* Laurence R. Helfer & Ingrid B. Wuerth, *Customary International Law: An Instrument Choice Perspective*, 37 MICH. J. INT'L L. 563, 567 (2016) (observing that the canonical elements of customary international law are state practice and *opinio juris*). *Opinio juris* is a principle of international law used to determine whether the practice of a state is performed with the belief that it legally obligated to take that action. *See* DAVID J. BEDERMAN, INTERNATIONAL LAW FRAMEWORKS 15–16 (2001). *Opinio juris*, or, more fully, *opinio juris sive necessitatis* ("an opinion of law or necessity"), draws on both the psychological belief of the state actor and the history of relations between nations. *See, e.g.*, *The Paquete Habana.; The Lola.*, 175 U.S. 677 (1900) (applying principles of *opinio juris* to determine whether small fishing boats are immune from capture during wartime under customary international law by looking to medieval English royal ordinances, agreements between European nations, U.S. Navy orders from previous conflicts, and views on the issue expressed by legal treatise writers).

therefore understand these responsibilities within the context of its own impact on present and future generations.[138] Nevertheless, it is essential that, at this pivotal moment in human history, with the Earth's global temperature set to soon exceed 1.5°C above pre-industrial levels, the international community recognizes the consequences of climate change and collectively takes immediate action to reverse its course.[139] In its advisory opinion, the ICJ should therefore make use of its opportunity to hasten this process of the entrenchment of customary international law.[140] The ICJ could do so by drawing on recent decisions in domestic and international courts around the world,[141] the commitments of international human rights treaties,[142] the frameworks of national constitutions,[143] and an understanding that a State's excessive carbon dioxide emissions contribute to transboundary harms[144] to unequivocally declare the obligations of international law regarding the anthropogenic emissions of greenhouse gases.[145] In doing so, the ICJ could—and, considering the undeniable existential threat posed by climate change, *should*—establish an *erga omnes* character for climate change obligations, making nations responsible for these obligations to the international community as a whole.[146]

A. Human Rights Obligations Provide a Foundation for Climate Change Protections

The field of human rights has become an expansive framework for understanding and addressing a range of global political and legal concerns,[147] and, although it is certainly possible to imagine a non-anthropocentric basis for environmental rights, environmental rights have largely become folded into human rights, especially regarding enacted environmental policy.[148] The 1972 Stockholm Declaration is particularly

138. Paris Climate Agreement, *supra* note 62.

139. *See Technical Dialogue of the First Global Stocktake*, *supra* note 68, ¶¶ 13, 22 (emphasizing the need for urgent climate change action and suggesting that "[m]ore effective international cooperation and credible initiatives can contribute to bridging emissions and implementation gaps").

140. *See* Ottavio Quirico, *Towards a Peremptory Duty to Curb Greenhouse Gas Emissions?*, 44 FORDHAM INT'L L.J. 923, 925–26 (2021).

141. *See supra* Section I.C.

142. *See infra* Section II.A.

143. *See infra* Section II.A.

144. *See infra* Section II.B.

145. *See infra* Section II.C.

146. *See infra* Section II.C.

147. *See* SAMUEL MOYN, THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY 176–211 (2010).

148. *See What Are Environmental Rights?*, U.N. ENV'T PROGRAMME, https://www.unep.org/explore-topics/environmental-rights-and-governance/what-we-do/advancing-environmental-rights/what (last visited Apr. 12, 2024); Yann Aguila, *The Right to a*

explicit in this regard when it states: "Of all things in the world, people are the most precious."[149] This Section begins by describing how the UNGA's request for an advisory opinion invokes human rights law within the field of environmental law.[150] Next, it examines national and U.S. state constitutions with environmental rights clauses.[151] Finally, it explains how human rights treaties and obligations bolster environmental legal claims.[152]

1. The UNGA's Advisory Opinion Request Incorporates International Human Rights into Environmental Rights

Although most major human rights treaties do not explicitly mention the right to a healthy environment, these treaties nevertheless provide strong foundations for enforcing climate change obligations.[153] The UNGA's request for an advisory opinion on climate change references by name the Universal Declaration of Human Rights ("UDHR"), the International Covenant on Civil and Political Rights ("ICCPR"), the International Covenant on Economic, Social and Cultural Rights ("ICESCR"), and the Convention on the Rights of the Child.[154] Of particular note in the UDHR are Article 3 (guaranteeing "the right to life, liberty and security of person"),[155] Article 25 (guaranteeing "the right to a standard of living adequate for the health and well-being of [oneself] and of [one's] family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of . . . lack of livelihood in circumstances beyond [one's] control"),[156] Article 28 (entitling everyone to "a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized"),[157] and, finally, Article 29 (declaring that "[e]veryone has duties to the community in which alone the free and full development of [one's] personality is possible").[158]

Similarly, Article 6 of the ICCPR acknowledges an "inherent right to life,"[159] and Article 17 describes a right to privacy, family, home, and

Healthy Environment, IUCN (Oct. 29, 2021), https://www.iucn.org/news/world-commission-environmental-law/202110/right-a-healthy-environment.

149. Stockholm Declaration, *supra* note 36, at 3.

150. *See infra* Section II.A.1.

151. *See infra* Section II.A.2.

152. *See infra* Section II.A.3.

153. *See* Knox, *supra* note 89 at 331–34.

154. Request for an Advisory Opinion of the International Court of Justice on the Obligations of States in Respect of Climate Change, *supra* note 1.

155. G.A. Res 217 (III) A, Universal Declaration of Human Rights art. 3 (Dec. 10, 1948).

156. *Id.* art. 25.

157. *Id.* art. 28.

158. *Id.* art. 29.

159. International Covenant on Civil and Political Rights art. 6, *opened for signature* Dec. 16, 1966, T.I.A.S. No. 92-908, 999 U.N.T.S. 171.

correspondence.[160] The U.N. Human Rights Committee, which monitors the ICCPR, has consistently emphasized that the right to life should not be interpreted narrowly.[161] Consequently, the Committee has recognized the connection between Article 6 of the ICCPR and climate change, stating that "[e]nvironmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life."[162]

Article 12 of the ICESCR recognizes the "right of everyone to the enjoyment of the highest attainable standard of physical and mental health," which includes the "improvement of all aspects of environmental and industrial hygiene."[163] Article 2 of the ICESCR moreover encourages each Party to "take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized" in the Covenant.[164]

Finally, Article 6 the Convention on the Rights of the Child recognizes that "every child has the inherent right to life" and requires that "Parties shall ensure to the maximum extent possible the survival and development of the child."[165] Article 24 further requires that Parties recognize "the right of the child to the enjoyment of the highest attainable standard of health," which includes "taking into consideration the dangers and risks of environmental pollution."[166] And Article 29 calls for the education of children to be "directed to . . . [t]he development of respect for the natural environment."[167]

As the UNGA advisory opinion request recognizes, each of these major human rights treaties offers avenues for incorporating the rights they protect into the field of environmental rights, and together they form a legally persuasive foundation for a reevaluation of the rights infringed upon by the inaction of international actors regarding climate change.[168] In July 2022, the UNGA adopted a resolution declaring the right to a

160. *Id.* art. 17.

161. Gen. Comment No. 36 on Article 6: Right to Life Adopted by the Hum. Rts. Comm. at its One Hundred Twenty-Fourth Session, ¶ 62, U.N. Doc. CCPR/C/GC/36 (Sept. 3, 2019).

162. *Id.*

163. International Covenant on Economic, Social and Cultural Rights art. 12, *opened for signature* Dec. 16, 1966, S. TREATY DOC. No. 95-19 (1978), 993 U.N.T.S. 3.

164. *Id.* art. 2.

165. Convention on the Rights of the Child art. 6, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3.

166. *Id.* art. 24.

167. *Id.* art. 29.

168. *See* John H. Knox, *Human Rights Principles and Climate Change*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL CLIMATE CHANGE LAW 213, 224–27 (Cinnamon Carlarne et al. eds., 2016).

healthy environment as a human right, following a similar declaration by the Human Rights Council in October 2021.[169] What is perhaps most significant about these recent declarations is the growing recognition of the incorporation of environmental rights into human rights, indicating momentum toward the right to a healthy environment becoming part of customary international law, which, in turn, invokes increased State responsibilities and strengthens the legal mechanisms guaranteeing the protection of this right.[170]

2. National Constitutions Provide Additional Sources for International Climate Change Action

National constitutions may also provide a rights-based source for climate change action, supplementing international law through domestic rights-based enforcement.[171] Globally, more than three-quarters of national constitutions contain specific references to environmental rights.[172] These constitutional rights include governmental duties toward the environment,[173] substantive environmental rights,[174] procedural rights,[175] individual duties,[176] and other environmental protections that include the right to water[177] and

169. OFF. OF THE HIGH COMM'R FOR HUM. RTS. ET AL., WHAT IS THE RIGHT TO A HEALTHY ENVIRONMENT? 4 (2023), https://www.undp.org/sites/g/files/zskgke326/files/2023-01/UNDP-UNEP-UNHCHR-What-is-the-Right-to-a-Healthy-Environment.pdf.

170. *See generally id.*

171. *See* Karla Martinez Toral et al., *The 11 Nations Heralding a New Dawn of Climate Constitutionalism*, GRANTHAM RSCH. INST. ON CLIMATE CHANGE & ENV'T (Dec. 2, 2021), https://www.lse.ac.uk/granthaminstitute/news/the-11-nations-heralding-a-new-dawn-of-climate-constitutionalism/; *see also* John C. Dernbach, *The Environmental Rights Provisions of U.S. State Constitutions: A Comparative Analysis*, *in* ENVIRONMENTAL LAW BEFORE THE COURTS: A US-EU NARRATIVE 35, 36 (Giovanni Antonelli et al. eds., 2023).

172. DAVID R. BOYD, DAVID SUZUKI FOUND., EXECUTIVE SUMMARY: THE STATUS OF CONSTITUTIONAL PROTECTION FOR THE ENVIRONMENT IN OTHER NATIONS 2 (2013), https://davidsuzuki.org/wp-content/uploads/2013/11/status-constitutional-protection-environment-other-nations-SUMMARY.pdf.

173. *See, e.g.*, Regeringsformen [RF] [Constitution] 1:2 (Swed.) ("The public institutions shall promote sustainable development leading to a good environment for present and future generations.").

174. *See, e.g.*, Kongeriket Norges Grunnlov [Constitution of Norway], May 17, 1814 (rev. 2023), art. 112 ("Every person has a right to an environment that is conducive to health and to a natural environment whose productivity and diversity are maintained. Natural resources should be managed on the basis of comprehensive long-term considerations whereby this right will be safeguarded for future generations as well.").

175. *See, e.g.*, Ústavní zákon č. 1/1993 Sb., Ústava České Republiky [Constitution of the Czech Republic], art. 35(2) ("Everyone has the right to timely and complete information about the state of the environment and natural resources.").

176. *See, e.g.*, 2005 LA CHARTE DE L'ENVIRONMENT [CHARTER FOR THE ENVIRONMENT], art. 2 (Fr.) ("Everyone is under a duty to participate in preserving and enhancing the environment.").

177. *See, e.g.*, S. AFR. CONST., 1996, Ch. 2, sec. 27(1)(b), (2) ("Everyone has the right to have access to . . . sufficient food and water . . . . The state must take reasonable legislative and other

rights of nature.[178] Although the U.S. Constitution does not contain any right to a healthy environment, the state constitutions of Hawai'i, Illinois, Massachusetts, Montana, New York and Pennsylvania all have explicit versions of this right, and other U.S. states are considering the addition of it.[179]

Even though most climate-related provisions in both national and domestic state constitutions are broad and do not contain actionable duties, some courts have nevertheless concluded that these constitutional provisions are sufficient to impose legal obligations on state actors.[180] In *Held v. Montana*, for example, the Montana Supreme Court determined that Montana's constitutional provisions made unconstitutional laws that prevented the state from considering climate change impacts in proposed state projects.[181] And in *Neubauer et al. v. Germany*, the German Constitutional Court declared parts of Germany's Federal Climate Protection Act unconstitutional because, by not setting emissions reduction targets beyond 2030, the law failed to take into account the constitutionally-protected rights of future generations.[182] Consequently, constitutional rights-based climate change protections have been accepted as legally actionable within both U.S. domestic courts and abroad.[183] Most significantly for the forthcoming ICJ advisory opinion on climate change, the expanding enshrinement of environmental human rights within constitutional frameworks is, as above, evidence of the movement toward these rights becoming part of customary international law.[184]

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measures, within its available resources, to achieve the progressive realisation of each of these rights.").

178. *See, e.g.*, Constituição Federal [C.F.] [Constitution] art. 225 (Braz.) ("Everyone has the right to an ecologically balanced environment, which is a public good for the people's use and is essential for a healthy life. The Government and the community have a duty to defend and to preserve the environment for present and future generations.").

179. Dernbach, *supra* note 171.

180. *See* Toral et al., *supra* note 171. One exception is the constitution of Ecuador, which outlines climate actions to be adopted in article 414: "The State shall adopt adequate and cross-cutting measures for the mitigation of climate change, by limiting greenhouse gas emissions, deforestation, and air pollution; it shall take measures for the conservation of the forests and vegetation; and it shall protect the population at risk." *Id.* (quoting CONSTITUCION DE LA REPUBLICA DEL ECUADOR [CONSTITUTION OF THE REPUBLIC OF ECUADOR] Oct. 20, 2008, art. 414).

181. *See supra* Part I.C.1.

182. *See supra* Part I.C.1.

183. *See* Toral et al., *supra* note 171; *see also* Dernbach, *supra* note 171.

184. *See* Melanie P. Pimentel, The Right to a Healthy Environment, a Social Environmental Justice Approach 11 (May 2023) (Master Thesis, Stockholm University) (on file with Stockholm University Library).

3. Tying Human Rights to Environmental Rights Provides More Enforcement Capabilities

Many of the rights enshrined in human rights treaties range from aspirational to utopian, particularly when considered in the global aggregate.[185] Nevertheless, even if individual nations do not always achieve a perfect realization of these rights, the documents outlining them remain significant as signposts for the aspirations of the international community as a whole, collectively representing an effort to secure humankind's freedom and wellbeing through shared "duties to the community."[186] The UDHR's language of "duties to the community" is echoed in the Stockholm Declaration's insistence on a "co-operative spirit by all countries"[187] and the Paris Climate Agreement's recognition of each nation's "common but differentiated responsibilities"[188] towards safeguarding an environment conducive to the UDHR's guarantee of a "standard of living adequate for the health and well-being of [oneself] and of [one's] family."[189] More has perhaps been made of the "differentiated" than the "common" nature of these environmental responsibilities; ultimately, however, the realization of environmental human rights—likely even more so than traditionally understood human rights—must be a collective, if asymmetrical, endeavor due to the global impact of climate change.[190] Furthermore, "differentiated" should not be understood to mean "lesser" responsibilities for those nations who, through their geographic situation or economic might, will remain—at least in the near future—less affected by climate change; instead, those nations should understand "differentiated" to mean that their responsibilities are proportional to both their capacities and their contributions to global carbon emissions and, by extension, their legal and moral obligations to uphold human rights treaty obligations.[191]

185. *See, e.g.*, Eric Neumayer, *Do International Human Rights Treaties Improve Respect for Human Rights?*, 49 J. CONFLICT RESOL. 925, 926 (2005); Emilie M. Hafner-Burton & Kiyoteru Tsutsui, *Human Rights in a Globalizing World: The Paradox of Empty Promises*, 110 AM. J. SOCIO. 1373, 1373–374 (2005).

186. Universal Declaration of Human Rights, *supra* note 155, art. 29.

187. Stockholm Declaration, *supra* note 36, at 5.

188. Paris Climate Agreement, *supra* note 62, at 1.

189. Universal Declaration of Human Rights, *supra* note 155, art. 25.

190. *See* Yanzhu Zhang & Chao Zhang, *Thirty Years with Common but Differentiated Responsibility, Why Do We Need It Ever More Today?*, BLAVATNIK SCH. OF GOV'T (May 4, 2022), https://www.bsg.ox.ac.uk/blog/thirty-years-common-differentiated-responsibility-why-do-we-need-it-ever-more-today.

191. Ellen Hey, Professor of Pub. & Int'l L., Erasmus Univ., Lecture for the U.N. Audiovisual Libr. Of Int'l L.: The Principles of Common but Differentiated Responsibilities (July 13, 2020), https://webtv.un.org/en/asset/k1w/k1w84ee3sb.

As discussed above, the recent successes of human rights-based climate change litigation evidence what has been termed the "human rights turn."[192] While not universally successful in all jurisdictions,[193] this human rights turn opens up important "linkages" between climate change and human rights protections.[194] And, as the human consequences of climate change become increasingly apparent, these linkages are likely to become only more deeply entrenched within international environmental frameworks.[195] Consequently, recent climate change decisions are significant in their own right, but together they take on increased significance within the norms-based framework of international law.[196]

Some authorities have argued that the Paris Climate Agreement itself functions as a human rights treaty, demonstrating the intermingling of environmental and human rights in the framing of these respective obligations.[197] Indeed, the Paris Agreement is the first global environmental agreement to explicitly mention human rights, although it does so only in the preamble.[198] In this regard, the Paris Agreement "[a]cknowledg[es] that climate change is a common concern of humankind" and insists that "Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights."[199]

As Lavanya Rajamani has noted, however, the clause "when taking action to address climate change" ostensibly limits the scope of this consideration to the implementation of a nation's climate change response

192. *See supra* Section I.C.

193. With the notable exception of *Held v. Montana*, U.S. courts, in particular, have not been particularly receptive to human rights-based arguments for climate change relief. Peel and Osofsky attribute the difficulties climate-change plaintiffs face in U.S. courts to issues of standing, separation of powers, and sovereign immunity. Peel & Osofsky, *supra* note 83, at 40 n.21.

194. *Id.* at 40.

195. *Id.*

196. *See supra* Section I.C.1.

197. *See* Knox, *supra* note 89, at 323–47.

198. *Id.* at 323.

199. Paris Climate Agreement, *supra* note 62, at 2. The Preamble beyond the point quoted above goes on to insist these obligations extend to "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." *Id.* Even this single paragraph of the human rights dimensions of climate change was contested during negotiations. Phoenix Tso, *How a Disagreement over Human Rights Language Almost Derailed the Climate Change Treaty*, UPWORTHY (Dec. 16, 2015), https://www.upworthy.com/how-a-disagreement-over-human-rights-language-almost-derailed-the-climate-change-treaty. Although originally part of Article 2, it was moved to the preamble due to the objections of some countries over its inclusion in an "operative" provision of the agreement. *Id.*

and is not a call to arms for climate change action in its own right.[200] Rajamani also points out the phrasing "respective obligations," indicating that the Paris Agreement creates no new human rights obligations but instead refers only to existing obligations that vary between nations depending on the treaties and agreements to which they are Parties.[201]

Conversely, John Knox suggests that this limitation is actually a positive development for climate change law because rather than requiring the Paris Agreement to establish new human rights obligations, it instead "incorporate[es] [existing] human rights protections into the [international (and domestic)] institutions themselves."[202] Knox goes on to consider the problems posed by the extraterritorial application of human rights norms "largely developed in the context of environmental harm whose causes and effects are felt within a single country."[203] A restrictive view of extraterritorial obligations regarding human rights is incompatible with the harms caused by climate change, both according to principles of justice and the reality of climate change's global impact.[204] As unilateral solutions for dealing with climate change are proved ineffective or impracticable, nations are left with only cooperative approaches to ensure compliance with human rights norms.[205]

Recently, Brazil's Supreme Court was the first legal body to recognize the Paris Agreement as a human rights treaty.[206] In a 2022 decision, the court ruled that the executive branch of Brazil has a constitutional duty to execute and allocate the funds of a national climate fund, in order to mitigate the effects of climate change, according to the national commitments of the Paris Agreement.[207] In its ruling, the Brazilian court wrote: "Treaties on environmental law are a species of the genus human rights treaties and enjoy,

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200. Lavanya Rajamani, *Human Rights in the Climate Change Regime: From Rio to Paris and Beyond*, *in* THE HUMAN RIGHT TO A HEALTHY ENVIRONMENT 236 (John H. Knox & Ramin Pejan eds. 2018).

201. *Id.*

202. Knox, *supra* note 89, at 323–24.

203. *Id.* at 335.

204. *Id.* As Knox observes:

> [A]ssessing States' obligations to mitigate their contributions to climate change only by reference to the effects of those contributions on those within their jurisdiction seems fundamentally unjust, since it ignores the substantial transboundary effects of such contributions by the major emitters. At the same time, no single emitter—even the largest—can prevent the effects of climate change on their own people merely by reducing their own emissions.

Id.

205. *Id.* at 336.

206. *Brazil's High Court First to Declare Paris Agreement a Human Rights Treaty*, YALEENVIRONMENT360 (July 7, 2022), https://e360.yale.edu/digest/paris-agreement-human-rights-treaty-brazil.

207. *Id.*

for this reason, supranational status. Thus, there is no legally valid option of simply omitting to combat climate change."[208]

Considering the substantial foundations provided by human rights obligations and the framing of the advisory opinion request regarding climate change, the ICJ has a strong basis for reinforcing the associations between climate change and human rights in its advisory opinion, specifically by recognizing the status of the right to a healthy environment within international customary law.[209]

B. The Precautionary Principle and Principles of Transboundary Harm as Bases for Climate Change Liability

The precautionary principle, already recognized as customary international law, is potentially applicable to the harms caused by climate change.[210] The precautionary principle is a preventative principle of international law stating that, just because an activity cannot be proven unsafe, that does not mean it has no negative effects.[211] Intended to "anticipate and avoid environmental damage before it occurs," the precautionary principle developed in Germany in the mid-1970s[212] before eventually becoming accepted as a principle of customary international law.[213] Principle 21 of the Stockholm Declaration declares: "States have . . . the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."[214] Echoing this language in its 1996 advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the ICJ recognized: "The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment."[215]

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208. R.S.T.J., ADPF 708, Relator: Des. Luís Roberto Barroso, 30.06.2022, ¶ 17 (Braz.) (Eng. trans.)

209. *See* CHRIS WOLD, DAVID HUNTER & MELISSA POWERS, CLIMATE CHANGE AND THE LAW 22–25 (2d ed. 2013).

210. *Id.* at 2–4.

211. Mary Stevens, *The Precautionary Principle in the International Arena*, 2 SUSTAINABLE DEV. L. & POL'Y 13, 13 (2002).

212. *Id.*

213. *See* WOLD ET AL., *supra* note 209, at 4.

214. Stockholm Declaration, *supra* note 36, at 5.

215. Legality of Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 29 (July 8).

The precautionary principle was first recognized in the context of responsibility for climate change in Principle 15 of the Rio Declaration in 1992.[216] At its 1992 convention on climate change, the UNFCCC similarly specified: "The Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures . . . ."[217]

The duty to not cause transboundary environmental harms to other States is likewise recognized within customary international law.[218] Principle 22 of the Stockholm Declaration pledges: "States shall co-operate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction."[219] This proposition has been used to link transboundary harms with climate change since at least *Sheila Watt-Cloutier et al. v. United States*.[220] In the *Pulp Mills* case, the ICJ observed that "the principle of prevention, as a customary rule, has its origins in the due diligence that is required of a State in its territory,"[221] and the ICJ later stated that, in order to exercise due diligence, a State must "ascertain whether there is a risk of significant transboundary harm prior to undertaking an activity having the potential adversely to affect the environment of another State," including by "conduct[ing] an environmental impact assessment."[222] If a State's actions

216. U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26 Rev. 1 (Vol. I), annex I (Aug 12, 1992). Principle 15 of the Rio Declaration reads: "In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation." *Id.* The Rio Declaration was signed at the U.N. Conference on the Environment and Development, the first significant international conference on the environment since the U.N. Conference on the Human Environment, which produced the Stockholm Declaration, was held in 1992. Stevens, *supra* note 211, at 14. The Rio Declaration was the first instance where the United States joined an international agreement invoking the precautionary principle. *Id.*

217. UNFCCC, *supra* note 44, art. 3.

218. WOLD ET AL., *supra* note 209, at 2.

219. Stockholm Declaration, *supra* note 36, at 5.

220. 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, *supra* note 85, at 99–100.

221. Pulp Mills on River Uruguay (Arg. v. Uru.), Judgment, 2010 I.C.J. 14, ¶ 101 (Apr. 2).

222. Certain Activities Carried Out by Nicaragua in Border Area (Costa Rica v. Nicar.), Judgment, 2015 I.C.J. 665, ¶ 153 (Dec. 16).

do cause transboundary harms, that State can be found liable for those actions according to customary international law.[223]

Nevertheless, despite decades of warnings about the harms of climate change, nations have continued energy, agricultural, and environmental practices contributing to its effects, the damaging consequences of which are now being experienced around the world.[224] On this basis, the UNGA request for an advisory opinion invokes "the principle of prevention of significant harm to the environment."[225] While skeptics of the precautionary principle applying to climate change harms in any meaningful, adjudicatory way point to its bilateral nature and its normative indeterminacy, some legal scholars have argued the precautionary principle could have an important function in both advisory and contentious climate change proceedings.[226] The precautionary principle and transboundary harm principles are, after all, part of treaty practice applying to most states.[227]

Moreover, even if transboundary harm principles are difficult to apply to climate change—which is not bilateral in nature but rather affects the entire world—due to the difficulty of establishing causality and the determination of harm, preventative principles of due diligence toward the environment can be applied broadly to past and present State action with respect to climate change.[228] Climate change harms affect the environment as a whole, as a community interest, and the ICJ's past jurisprudence in this area—as seen in the *Legality of the Threat or Use of Nuclear Weapons* advisory opinion and *Pulp Mills* case judgment—has regarded the collective international responsibility toward the environmental common good, such as preserving the ocean, as applying to all States.[229] The precautionary principle therefore provides a basis for interpreting the standard of care required by the Paris Climate Agreement that the ICJ could draw on in its advisory opinion.[230]

223. *See* WOLD ET AL., *supra* note 209, at 2.

224. *See The Hellish Monotony of 25 Years of IPCC Climate Change Warnings*, GUARDIAN (Mar. 30, 2014), https://www.theguardian.com/environment/planet-oz/2014/mar/31/ipcc-climate-change-impacts-report-history-warnings.

225. Request for an Advisory Opinion of the International Court of Justice on the Obligations of States in Respect of Climate Change, *supra* note 1, at 3.

226. *See, e.g.*, Leslie-Anne Duvic-Paoli & Mario Gervasi, *Harm to the Global Commons on Trial: The Role of the Prevention Principle in International Climate Adjudication*, 32 REV. EUR. COMPAR. & INT'L L. 226, 231 (2022).

227. *Id.* at 230–31.

228. *Id.*

229. *Id.* at 231.

230. *Id.* at 232.

C. Erga Omnes Obligations and the Principles of International Law

Accepting that the ICJ has sufficient foundation in human rights treaties and established principles of customary law, such as the precautionary principle, to announce State actors have unequivocal and irrevocable climate change obligations, how, exactly, do those obligations take shape within the framework of international law?[231] In its advisory opinion, the ICJ could—and, indeed, should—go so far as to declare the climate change obligations of States as obligations *erga omnes*: obligations that, owing to their universality and importance, are owed by each member of the international community to all others and in which all States have an interest.[232]

The concept of *erga omnes* obligations in international law stems from the 1970 *Barcelona Traction* case, where the ICJ recognized that "[i]n view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*."[233] The ICJ specifically identified four *erga omnes* obligations: (1) outlawing acts of aggression; (2) outlawing genocide; (3) protection from slavery; and (4) protection from racial discrimination.[234] In this regard, *erga omnes* obligations can perhaps be thought of as fundamental international rights, the superseding norms of customary international law.[235] And, as indivisible general duties, *erga omnes* obligations are peremptory norms that are non-severable and non-derogable by means of bilateral or multilateral agreements.[236] *Erga omnes* norms matter within international law because they can be invoked without the need to justify a particularized injury or specific interest, moving international law beyond its primarily bilateral and multilateral nature toward a global community of interrelated interests.[237] In light of the dangers posed by climate change, the need for a new conception of cooperative multilateral action to solve problems on a global scale has never been more pressing.[238]

Recognizing climate change obligations as *erga omnes* would potentially allow for enforcement of the Paris Climate Agreement at the level

231. *See supra* Sections II.A–B.

232. *See* Memeti & Nuhija, *supra* note 7, at 32.

233. Barcelona Traction, Light and Power Company Ltd. (Belg. v. Spain), Judgment, 1970 I.C.J. 3, ⁋ 33 (Feb. 5); *see* Moise Jean, *Customary International Law and the Challenge of Climate Change: How to Deal with the Stagnation of the Paris Agreement*, 54 N.Y.U. J. INT'L L. & POL. 85, 94 (2021).

234. *Barcelona Traction*, 1970 I.C.J. ⁋ 34.

235. *See* Quirico, *supra* note 140, at 927.

236. *Id.*

237. Duvic-Paoli & Gervasi, *supra* note 226, at 232.

238. *See* Dennis J. Snower, *Multilateralism 2.0: Reconfiguring Climate Action and Beyond*, INST. FOR NEW ECON. THINKING (Dec. 12, 2022), https://www.inet.ox.ac.uk/news/multilateralism-2-0-reconfiguring-climate-action-and-beyond/.

of international law in the same manner that several domestic courts have enforced it, holding nations accountable for domestic progress toward NDCs.[239] Moreover, the ICJ's forthcoming advisory opinion could strengthen future domestic and international climate litigation by bestowing the ICJ's "legal weight and moral authority"[240]—particularly if the ICJ acknowledges that climate change obligations have taken root in customary international law based on the evidence of over three decades of climate change treaties that intersect with human rights treaties and precautionary principles of mitigating transboundary harm.[241] But, even in the absence of enforcement, the ICJ's advisory opinion is significant for its expressive function, compelling States to comply out of concern for reputational consequences.[242]

Considering the existential threat of climate change to the future of humanity, the Paris Climate Agreement perhaps understates the situation by simply "[a]cknowledging that climate change is a common concern of humankind"—although this language of "common concern" is significant in establishing the responsibilities of States toward a collective need that affects the fortunes and futures of all nations.[243] The ICJ uses similar language in the *Gabčikovo-Nagymaros* case, where, drawing on its *Legality of the Threat or Use of Nuclear Weapons* advisory opinion, it emphasized "the great significance that it attaches to respect for the environment, not only for States but also for *the whole of mankind*."[244] Judge Weeramantry, writing separately in the case, observed that a bilateral or multilateral basis for environmental protection "scarcely does justice to rights and obligations of an *erga omnes* character—least of all in cases involving environmental damage of a far-reaching and irreversible nature."[245] As such, "[i]nternational environmental law will need to proceed beyond weighing the rights and obligations of parties within a closed compartment of individual State self-interest, unrelated to the global concerns of humanity as a whole," and instead recognize the common necessity of climate change action.[246]

239. *See, e.g.*, Corte Supreme de Justicia [C.S.J.] [Supreme Court], abril 5, 2018, M.P: L. Villabona, STC4360–2018, (No. 11001-22-03-000-2018-00319-01) (Colom.) (selected and trans. by DEJUSTICIA); HR 20 december 2019, ECLI:NL:HR:2019:2007 (Stichting Urgenda/Verweerster) [Urgenda Foundation v. State of the Netherlands] (Neth) (Eng. trans.).

240. *Advisory Jurisdiction*, *supra* note 22.

241. *See supra* Sections II.A–B.

242. *See* Alex Geisinger & Michael Ashley Stein, *A Theory of Expressive International Law*, 60 VAND. L. REV. 77, 78–79 (2007).

243. Paris Climate Agreement, *supra* note 62, at 2.

244. Gabčikovo-Nagymaros Project (Hung. v. Slovk.), Judgment, 1997 I.C.J. 7, ¶ 53 (Sept. 25) (emphasis added).

245. *Id.* at 117 (separate opinion by Weeramantry, V.P.).

246. *Id.* at 118.

The unfortunate, cruel reality of climate change is that it is, as John Knox has described it, "inherently discriminatory: its effects will be felt disproportionately by those who are already among the poorest, the marginalized, and the least powerful, and who have done the least to contribute to the crisis."[247] Like other obligations *erga omnes* already recognized by international law, climate change implicates human rights in their most urgent, most necessary, most universal sense.[248] Just as the global community is affected by an ongoing genocide anywhere in the world, so, too, is it affected by the risk that Vanuatu—its people, culture, and history—may cease to exist in the next several decades, or any of the other potential devastations caused by climate change.[249]

CONCLUSION

The ICJ's forthcoming advisory opinion is an ideal place to finally recognize the evolving *erga omnes* obligations of avoiding or mitigating climate change harms in the ICJ's interpretation of human rights treaties, customary law, and the Paris Climate Agreement.[250] As human rights discourse becomes intermingled with environmental law and policy, it is imperative that the ICJ recognize and strengthen the connections between these two fields to address the looming threat of climate change.[251] By using its upcoming advisory opinion to declare climate change obligations are obligations *erga omnes*, the ICJ could simultaneously acknowledge the existence of these obligations within customary international law and provide a concrete basis for addressing the dire climate change situation through cooperative international effort and enforceable responsibilities.[252]

247. Knox, *supra* note 89, at 328.

248. *Id.*

249. *See* Application of Convention on Prevention and Punishment of Crime of Genocide (Gamb. v. Myan.), Judgment, 2022 I.C.J. 478, ¶ 28 (July 22); *The Republic of Vanuatu*, *supra* note 30.

250. *See supra* Sections I.B, II.A–B.

251. *See supra* Section II.A.

252. *See supra* Section II.C.