INTER-AMERICAN COURT OF HUMAN RIGHTS

REQUEST FOR AN ADVISORY OPINION ON THE CLIMATE EMERGENCY AND HUMAN RIGHTS

Written Observations

Presented by Professor Dinah Shelton

November 15, 2023

Signature

---

1. INTRODUCTION

1 *I, Dinah Shelton, am the Manatt/Ahn Professor emerita at the George Washington University Law School. I served as a member of the Inter-American Human Rights Commission (2010-2014) and in 2010 became president of the Commission. During my tenure on the Commission, I served as rapporteur on the rights of indigenous peoples. I am the author of three prize-winning books, *Protecting Human Rights in the Americas* (co-authored with Thomas Buergenthal), *Remedies in International Human Rights Law*, and the three-volume *Encyclopedia of Genocide and Crimes against Humanity*. I have also authored many other articles and books on international law, human rights law, and international environmental law. I have served as a legal consultant to international organizations and am on the board of numerous human rights and environmental organizations. In 2006, I was awarded the Elisabeth Haub Prize for Environmental Law and 2013 received the Goler Butcher Prize in Human Rights; in January 2024, I will receive the Nelson Mandela award for human rights. I was conferred the degree of doctor honoris causa at the University of Stockholm in 2012 and the Pazmany Peter Catholic University of Budapest in 2014.

2. SUMMARY OF ARGUMENT

2 The Court has found that, in application of the rules of the Vienna Convention and the American Convention, it must take international law on environmental protection into consideration when defining the meaning and scope of the obligations assumed by the States under the American Convention, in particular, when specifying the measures that the States must take. This Court has already recognized the undeniable relationship between the protection of the environment and the realization of other human rights, in that environmental degradation and the adverse effects of climate change affect the real enjoyment of human rights. Likewise, the OAS General Assembly has recognized the close relationship between the protection of the environment and human rights and emphasized that "the adverse effects of climate change have a negative impact on the enjoyment of human rights." There is extensive recognition of the interdependent relationship between protection of the environment, sustainable development, and human rights in international law. The human right to a healthy environment is now widely recognized and is understood as a right that has both individual and also collective connotations. Environmental degradation may cause irreparable harm to human beings; thus, a healthy environment is a fundamental right for the existence of humankind. This Court has stressed that, as an autonomous right, the right to a healthy environment, unlike other rights, protects the

components of the environment, such as forests, rivers and seas, as legal interests in themselves, even in the absence of the certainty or evidence of a risk to individuals.

3 The Court has established that whenever activities within the control of a State causes injury to those outside the State's frontiers, the State is responsible for any violations that occur in that other State. The use of the word "jurisdiction" in Article 1(1) of the American Convention signifies that the State obligation to respect and to ensure human rights applies to every person who is within the State's territory or who is in any way subject to its authority, responsibility or control. These cross-border consequences are potentially global in the context of the climate emergency, because the emission of greenhouse gases or other substances known to affect the climate can result in the deprivation of human rights far from the originating State.

4 Another aspect of the climate emergency is its long-term impact, as well as its impact on current enjoyment of human rights. While future generations may not have human rights under the American Convention, persons now alive may represent their interests, as domestic courts have found. While there may be practical problems with determining who can speak for future generations, there is no theoretical reason why legal systems cannot recognize future generations to have claims on the present that can be denominated rights. Importantly, in international law, recognition of this fact has led to the identification of common interests or common concerns in a variety of circumstances where harm to one is harm to all and protection of one helps to protect all. As the past and present negative impacts of human activities on the future are accelerating, the foreseeability of harm imposes responsibilities of prevention and mitigation. Even when scientific and technological changes have uncertain consequences over the long-term, our ability to create or destroy imposes obligations of risk assessment and precaution to ensure future survival of societies. Unjust enrichment has also been cited as the basis of duties towards future generations. The living are indebted for all that has been transmitted from the past, whether in medical advances, culture, art, or technology, all of which have contributed to present well-being. Those living have also received a heritage of natural resources which imposes on them a special obligation to maintain the planet's integrity, because it has intrinsic worth and is essential to human survival.

5 Intergenerational equity in respect to natural resources is based on the recognition of three key points: (1) that human life emerged from, and is dependent upon, the Earth's natural resource base, including its ecological processes, and is thus inseparable from environmental conditions; (2) that human beings have a unique capacity to alter the environment upon which life depends and (3) that no generation has a superior claim to the Earth's resources because humans did not create them, but inherited them. Taken together, these three points have led many to the concept of trust: imposing obligations on present generations to conserve and maintain the planetary resources for future beneficiaries. In fact, the present generation is both beneficiary of the past

and trustee for the future. Meeting the obligation does not mean that no development is possible, but it does call for minimising or avoiding long-term and irreversible damage to the environment.

6 Intergenerational equity is primarily a principle of distributive justice, concerned with the allocation of benefits and burdens. In part it asks whether a given resource should be used today or saved for possible future use. From this perspective, the implications of the principle of solidarity with future generations are three: first, that each generation should conserve the diversity of the natural, cultural and economic resource base so that it does not unduly restrict the options available to future generations to satisfy their own values and needs. Second, the quality of ecological processes passed on should be comparable to that enjoyed by the present generation. Third, the past and present cultural and natural heritage should be conserved so that future generations will have access to it. Prior assessment should be done to ensure that the benefits from a proposed activity outweigh the costs and that the burdens are equitably borne by all or there is adequate compensation for those who bear the greater burdens. These rights and obligations derive from a notion of human solidarity that extends beyond the totality of the current planetary population, giving it a temporal dimension that places its focus on prevention of harm.

7 Principle 21 of the 1972 Stockholm Declaration reiterated the norm formulated in the *Trail Smelter Arbitration* and other cases as follows:

> States have, in accordance with the Charter of the United Nations and the principles of international law … the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

8 Principle 2 of the Rio Declaration also appears in the preamble of the 1992 UN Framework Convention on Climate Change and Article 3 of the Convention on Biological Diversity. The International Court of Justice (ICJ) recognized in a 1996 advisory opinion that "[t]he 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." This statement was repeated in the judgment concerning the *Gabçikovo-Nagymaros Project*, in which the Court also "recall[ed] that it has recently had occasion to stress . . . the great significance that it attaches to respect for the environment, not only for states but also for the whole of mankind."

9 While Stockholm Principle 21 and similar formulations could be read to impose absolute state responsibility for any trans-frontier harm, whether intentional or accidental, states generally have not invoked it to assert claims for non-intentional harm, however damaging the impact. It is well established by science in the context of the climate emergency that the world is very aware that

any additional warming matters. All States have agreed with the IPCC reports. It is also well established that global warming today is already impacting human rights beyond the territory where the warming has first been felt. It is further established that the main sources of global warming, therefore sources of GHG's emissions, can be traced to specific territories to determine jurisdiction and obligations.

10 Due diligence first appeared in the law of neutrality and in the law concerning injury to aliens. Due diligence made a more recent appearance in international human rights law. The existence of affirmative duties to prevent and to remedy human rights violations implies, as a consequence, that state responsibility extends to omissions by State actors. This Court has declared that where human rights violations committed by private parties are not seriously investigated, "those parties are aided in a sense by the government, thereby making the State responsible on the international plane." One of the obligations in human rights law is to "respect and ensure" internationally recognized human rights. Because of this duty, a State's failure to act to prevent or remedy human rights violations committed by private entities may constitute the breach of an international obligation, giving rise to State responsibility. In respect of economic, social and cultural rights (ESCR) the obligations are also those of due diligence, although constrained by the State's capacity in many instances; the constraint does not apply, however, when the alleged violation concerns the "minimum core" of a right.

11 The human right to life in the context of the climate emergency entails the human right to resilience, as a manifestation of the human right to life. It implies mandatory obligations on States and non-State actors. These mandatory obligations are:

11.1 To manage the risks and the threats that will otherwise make resilience futile, by adopting all the measures necessary to a consistent path to remain under 1.5°C of warming above pre-industrial levels and to ensure time to build resilience by slowing the rate of global warming in the near term.

11.2 To ensure the means to reduce vulnerability and therefore strengthen resilience of people and ecosystems that are essential for the enjoyment of the human right to life, by allocating funds to the public budget and incentivizing private investments for fast mitigation actions and adaptation measures.

12 Since 1972, the obligation of due diligence has also appeared in numerous environmental conventions, which have obliged the parties to take "appropriate" or similar measures. Due diligence obligations serve to manage risks. Some risks stem from natural or technical phenomena that may threaten persons, property or ecosystems. Risk management by States may be hampered by a limited knowledge about the nature and scope of the risk, the difficulty of

actually proving the presence and degree of the risk, doubts about causes and effects, and the necessity of dealing with numerous contributing factors and actors. In order to deal with these problems, the precautionary principle has been designed as a legal tool. The precautionary principle might justify requiring environmental impact assessments to include information about carbon usage and emissions.

13 The development of international law on due diligence has derived in large part from the International Law Commission's (ILC) Articles on Prevention of Transboundary Harm, which provide that "[t]he State of origin shall take all appropriate measures to prevent significant transboundary harm or at any event to minimize the risk thereof". The ILC Articles specify that the measures to be taken are those "generally considered to be appropriate and proportional to the degree of risk of transboundary harm, also using the term "a reasonable standard of care." The Commission's Articles built on the recognition of the duty to prevent transboundary harm in Principle 21 of the 1972 Stockholm Declaration, echoed in Principle 2 of the 1992 Rio Declaration, both of which refer to States' 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. In international dispute settlement, recent contentious judgements and advisory opinions by international courts and tribunals attest to the growing importance of due diligence.

14 At its heart, due diligence is concerned with supplying a standard of care against which fault can be assessed. It is a standard of reasonableness, that seeks to take account of the consequences of a wrongful act or omission and the extent to which such consequences could have been avoided by the State that either authorized the relevant act or which failed to prevent its occurrence. Due diligence standards preserve for States a significant measure of flexibility in discharging their international obligations. The use of due diligence makes the international legal system adaptable to meet particular needs of States within a diverse international community. It avoids perfect equality of obligations in favor of a more flexible equitable approach to encourage broader participation in treaty and customary regimes.

15 In recent years, the search for equity has affected the law on environmental protection and natural resources, where the concept of common but differentiated responsibilities informs what diligence is due. Due diligence as thus an open-ended principle that avoids difficulties that can arise in reaching agreement on rules and in the enforcement of such rules. Due diligence tends to focus on whether States have taken reasonable and appropriate steps to avoid or mitigate injury to other States. Moreover, the content of due diligence duties can and do evolve over time. For example, the obligation to undertake environmental impact assessment has been progressively strengthened. 'Reasonableness' is determinative of which measures States should take in a duly diligent manner. Indeed, one might describe a due diligence obligation as an

obligation for the State to take *all measures it could reasonably be expected to take*. Even in the instance of preventing the commission of genocide, the standard articulated by the ICJ in order to incur international responsibility was that a State 'manifestly failed to take all measures' that were 'within its power' to take. As a tool to manage risk in conditions of incertitude, due diligence appears as a companion of the precautionary principle, in that it demands States to establish laws and procedures to avert foreseeable disasters. If science shows that the risk of damage is not merely theoretical but proven, the principle of prevention applies; where there is a likelihood of significant harm, a State that permits an operation to proceed is acting wrongfully.

16 The Inter-American Court has concluded that States must take measures to prevent significant harm or damage to the environment, within or outside their territory. Any harm to the environment that may involve a violation of the rights to life and to personal integrity must be considered significant harm. Based on the scientific consensus, the existence of significant harm in these terms is concrete and evident in the case of the climate emergency. Moreover, the measures to meet this standard may change over time, in light of new scientific or technological knowledge. Moreover, the existence of this obligation does not depend on the level of development; in other words, the obligation of prevention applies equally to both developed and developing States. The specific measures States must take include the obligations to: (i) regulate; (ii) supervise and monitor; (iii) require and approve environmental impact assessments; (iv) establish contingency plans, and (v) mitigate, when environmental damage has occurred. The State obligation to adapt domestic laws to the provisions of the Convention is not limited to the constitutional or legislative text, but must extend to all legal provisions of a regulatory nature and result in effective practical implementation.

17 The Inter-American Court has considered that States have an obligation to supervise and monitor activities within their jurisdiction that may cause significant damage to the environment. Accordingly, they must develop and implement adequate independent monitoring and accountability mechanisms. These mechanisms must not only include preventive measures, but also appropriate measures to investigate, punish and redress possible abuse through effective policies, regulations and adjudication. The level of monitoring and oversight necessary will depend on the level of risk that the activities or conduct involves.

3. THE COURT'S JURISDICTION

18 The Court's advisory function allows it to interpret any article of the American Convention, and no part or aspect of this instrument is excluded from such interpretation. Thus, it is evident that, since the Court is the "ultimate interpreter of the American Convention,"[1] it has full authority and competence to interpret all the provisions of the Convention.[2]

19 In addition, the Court has considered that, when referring to its authority to provide an opinion on "other treaties concerning the protection of human rights in the States of the Americas," Article 64(1) of the Convention is broad and non-restrictive. In general, the advisory jurisdiction of the Court can be exercised with regard to any provision dealing with the protection of human rights set forth in any international treaty applicable in the American States, whether it be bilateral or multilateral, whatever the principal purpose of such a treaty, and whether or not non-Member States of the inter-American system are or have the right to become parties thereto.[3]

20 The OAS General Assembly has "underscore[d] the importance of studying the link that may exist between the environment and human rights, recognizing the need to promote environmental protection and the effective enjoyment of all human rights."[4] In addition, the OAS Member States indicated in the Inter-American Democratic Charter that it was essential that "the States of the hemisphere implement policies and strategies to protect the environment, including application of various treaties and conventions, to achieve sustainable development for the benefit of future generations."[5] Furthermore, they have adopted the Inter-American Program for Sustainable Development 2016-2021, which recognizes the three dimensions of sustainable

1 Case of Almonacid Arellano et al. v. Chile. Preliminary objections, merits, reparations and costs. Judgment of September 26, 2006. Series C No. 154, para. 124; Advisory Opinion OC-22/16, para. 16, and Case of Chinchilla Sandoval et al. v. Guatemala. Preliminary objection, merits, reparations and costs. Judgment of February 29, 2016. Series C No. 312, para. 242.

2 Cf. Article 55 of the American Convention on Human Rights. Advisory Opinion OC-20/09 of September 29, 2009. Series A No. 20, para. 18; Advisory Opinion OC-22/16, para. 16.

3 Cf. "Other Treaties" Subject to the Advisory Function of the Court (Art. 64 American Convention on Human Rights). Advisory Opinion OC-1/82 of September 24, 1982. Series A No. 1, first operative paragraph; Advisory Opinion OC-22/16, para. 17.

4 OAS, General Assembly Resolution entitled: "Human Rights and the Environment," adopted at the third plenary session held on June 5, 2001, OEA/Ser. P AG/ RES. 1819 (XXXI-O/01), first operative paragraph. Also, in the Resolution entitled "Human Rights and the Environment in the Americas," the OAS General Assembly acknowledged "a growing awareness of the need to manage the environment in a sustainable manner to promote human dignity and well-being," and decided "[t]o continue to encourage institutional cooperation in the area of human rights and the environment in the framework of the Organization, in particular between the Inter-American Commission on Human Rights (IACHR) and the Unit for Sustainable Development and Environment." OAS, General Assembly Resolution entitled "Human Rights and the Environment in the Americas," adopted at the fourth plenary session held on June 10, 2003, AG/RES. 1926 (XXXIII-O/03), preamble and second operative paragraph.

5 Inter-American Democratic Charter, adopted at the first plenary session of the OAS General Assembly held on September 11, 2001, during the twenty-eighth period of sessions, art. 15.

development: "the economic, social and environmental," which are "integrated and indivisible" "to support development, eradicate poverty, and promote equality, fairness and social inclusion."[6]

21 The general and customary rules for the interpretation of international treaties[7] involves the simultaneous and joint application of the criteria of good faith, and the analysis of the ordinary meaning to be given to the terms of the treaty in question "in their context and in the light of its object and purpose." The Court thus uses the methods set out in Articles 31[8] and 32[9] of the Vienna Convention to make this interpretation.

22 The object and purpose of the American Convention is "the protection of the fundamental rights of the human being"[10] and it was designed to protect the human rights of individuals, regardless of their nationality, before their own State or any other State.[11] The specificity of

6 The Inter-American Program for Sustainable Development 2016-2021 was adopted on June 14, 2016, and sets out strategic actions to ensure that the work of the OAS General Secretariat in the area of sustainable development is aligned with the implementation of Agenda 2030 for Sustainable Development (Resolution A/RES/70/1 of the United Nations General Assembly, October 21, 2015) and the Paris Agreement on Climate Change in the hemisphere, and that its objectives and results are guided by the new global Sustainable Development Goals (SDG) adopted by the Members States and that will contribute to achieving them. Cf. OAS, General Assembly Resolution entitled "Inter-American Program for Sustainable Development," AG/RES. 2882 (XLVI-O/16), June 14, 2016. The Inter-American Program for Sustainable Development 2016-2021 was adopted on June 14, 2016, and sets out strategic actions to ensure that the work of the OAS General Secretariat in the area of sustainable development is aligned with the implementation of Agenda 2030 for Sustainable Development (Resolution A/RES/70/1 of the United Nations General Assembly, October 21, 2015) and the Paris Agreement on Climate Change in the hemisphere, and that its objectives and results are guided by the new global Sustainable Development Goals (SDG) adopted by the Members States and that will contribute to achieving them. Cf. OAS, General Assembly Resolution entitled "Inter-American Program for Sustainable Development," AG/RES. 2882 (XLVI-O/16), June 14, 2016.

7 Cf. Advisory Opinion OC-21/14, para. 52, and Advisory Opinion OC-22/16, para. 35. See also, International Court of Justice (hereinafter ÏCJ"), Case concerning the sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v. Malaysia), Judgment of December 17, 2002, para. 37, and ICJ, Avena and Other Mexican Nationals (Mexico v. the United States of America), Judgment of March 31, 2004, para. 83.

8 Cf. Article 31 (General rule of interpretation) of the Vienna Convention on the Law of Treaties stipulates that: "1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. 3. There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties. 4. A special meaning shall be given to a term if it is established that the parties so intended." Vienna Convention on the Law of Treaties, U.N. Doc A/CONF.39/27 (1969), 1155 U.N.T.S. 331, signed at Vienna on May 23, 1969, entered into force January 27, 1980.

9 Article 32 (Supplementary means of interpretation) of the Vienna Convention on the Law of Treaties establishes that: "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application

10 Cf. Articles 43 and 44 of the American Convention.

11 Cf. Article 61 of the American Convention

human rights treaties creates a legal system under which States assume obligations towards the persons subject to their jurisdiction.

23 As the Court indicated in Advisory Opinion OC-23, "An extensive *corpus iuris* of environmental law exists. According to the systematic interpretation established in the Vienna Convention on the Law of Treaties, the provisions must be interpreted as part of a whole, the significance and scope of which must be established based on the legal system to which it belongs."[12] The Court finds that, in application of these rules, it must take international law on environmental protection into consideration when defining the meaning and scope of the obligations assumed by the States under the American Convention, in particular, when specifying the measures that the States must take.[13] It is evident that the principles, rights and obligations contained in international environmental law can make a decisive contribution to establishing the scope of the American Convention.

4. WHAT RIGHTS ARE IMPACTED BY THE CLIMATE EMERGENCY

24 This Court has already recognized the undeniable relationship between the protection of the environment and the realization of other human rights, in that environmental degradation and the adverse effects of climate change affect the real enjoyment of human rights.[14] In addition, the preamble to the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (hereinafter "Protocol of San Salvador"), emphasizes the close relationship between the exercise of economic, social and cultural rights – which include the right to a healthy environment – and of civil and political rights, and indicates that the different categories of rights constitute an indivisible whole based on the recognition of the dignity of the human being. They therefore require permanent promotion and protection in order to ensure their full applicability; moreover, the violation of some rights in order to ensure the exercise of others can never be justified.[15]

12 Case of González et al. ("Cotton Field") v. Mexico, para. 43, and Advisory Opinion OC-22/16, supra, para. 56.

13 In the Kaliña and Lokono Peoples case, the Court referred to the Rio Declaration and Convention on Biological Diversity when ruling on the compatibility of the rights of indigenous peoples with the protection of the environment. Cf. Case of the Kaliña and Lokono Peoples v. Suriname. Merits, reparations and costs. Judgment of November 25, 2015. Series C No. 309, paras. 177 to 179.

14 Cf. Case of Kawas Fernández v. Honduras. Merits, reparations and costs. Judgment of April 3, 2009. Series C No. 196. para. 148.

15 Cf. Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ("Protocol of San Salvador"), entered into force November 16, 1999, Preamble. The following OAS Member States have ratified the Protocol of San Salvador to date: (1) Argentina, (2) Bolivia, (3) Brazil, (4) Colombia, (5) Costa Rica, (6) Ecuador, (7) El Salvador, (8) Guatemala, (9) Honduras, (10) Mexico, (11) Nicaragua, (12) Panama, (13) Paraguay, (14) Peru, (15) Suriname and (16) Uruguay.

25 Meanwhile, the Inter-American Commission on Human Rights (IACHR) has stressed that "several fundamental rights require, as a necessary precondition for their enjoyment, a minimum environmental quality, and are profoundly affected by the degradation of natural resources."[16] Likewise, the OAS General Assembly has recognized the close relationship between the protection of the environment and human rights and emphasized that "the adverse effects of climate change have a negative impact on the enjoyment of human rights."[17]

26 There is extensive recognition of the interdependent relationship between protection of the environment, sustainable development, and human rights in international law. This interrelationship has been asserted since the Stockholm Declaration on the Human Environment, which established that "[e]conomic and social development is essential for ensuring a favourable living and working environment for man and for creating conditions on earth that are necessary for the improvement of the quality of life," and asserting the need to balance development with protection of the human environment. Subsequently, in the Rio Declaration on Environment and Development, the States recognized that "[h]uman beings are at the centre of concerns for sustainable development," and also underlined that "[i]n order to achieve sustainable development, environmental protection shall constitute an integral part of the development process."[18] Following this, the Johannesburg Declaration on Sustainable Development established three pillars of sustainable development: economic development, social development and environmental protection.[19] Also, in the corresponding Plan of Implementation of the World Summit on Sustainable Development, the States "acknowledge[d] the consideration being given to the possible relationship between environment and human rights, including the right to development."[20] The Inter-American Democratic Charter stipulates that "[t]he exercise of democracy promotes the preservation and good stewardship of the environment. It is essential that the States of the hemisphere implement policies and strategies to protect the environment, including application of various treaties and conventions, to achieve sustainable development for the benefit of future generations."[21] Specifically, climate change

16 Cf. IACHR, Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources – Norms and jurisprudence of the inter-American human rights system, December 30, 2009, OEA/Ser.L/V/II. Doc. 56/09, para. 190.

17 Cf. OAS General Assembly, Resolution entitled "Human Rights and Climate Change in the Americas," adopted at the fourth plenary session held on June 3, 2008, AG/RES. 2429 (XXXVIIIO/08).

18 Rio Declaration on Environment and Development. United Nations Conference on Environment and Development, Río de Janeiro, June 3 to 14, 1992, UN Doc. A/CONF.151/26/Rev.1 (Vol. 1), Principles 1 and 4.

19 Cf. Johannesburg Declaration on Sustainable Development adopted at the United Nations World Summit on Sustainable Development, Johannesburg, September 4, 2002, UN Doc. A/CONF. 199/20, para. 5.

20 Cf. Plan of Implementation of the World Summit on Sustainable Development, adopted at the World Summit on Sustainable Development, Johannesburg, September 4, 2002, UN Doc. A/CONF.199/20, para. 5.

21 Inter-American Democratic Charter, adopted at the first plenary session of the OAS General Assembly on September 11, 2001, during the twenty-eighth period of sessions, Art. 15.

climate change has a wide range of implications for the effective enjoyment of many human rights, including the rights to life, health, food, water, housing and self-determination.[22]

27 The human right to a healthy environment is now widely recognized and is understood as a right that has both individual and also collective connotations. In its collective dimension, the right to a healthy environment constitutes a universal value that is owed to both present and future generations. That said, the right to a healthy environment also has an individual dimension insofar as its violation may have a direct and an indirect impact on the individual owing to its connectivity to other rights, such as the rights to health, personal integrity, and life. Environmental degradation may cause irreparable harm to human beings; thus, a healthy environment is a fundamental right for the existence of humankind.

28 This Court has stressed that, as an autonomous right, the right to a healthy environment, unlike other rights, protects the components of the environment, such as forests, rivers and seas, as legal interests in themselves, even in the absence of the certainty or evidence of a risk to individuals. It protects nature and the environment, not only because of the benefits they provide to humanity or the effects that their degradation may have on other human rights, such as health, life or personal integrity, but because of their importance to the other living organisms with which we share the planet that also merit protection in their own right.

22 Cf. Human Rights Council, Resolution 35, entitled "Human rights and climate change," adopted on June 19, 2017, UN Doc. A/HRC/35/L.32; Human Rights Council, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, February 1, 2016, UN Doc. A/HRC/31/52, paras. 9 and 23; Human Rights Council, Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights, January 15, 2009, UN Doc. A/HRC/10/61, paras. 18 and 24, and Human Rights Council, Analytical study of the relationship between human rights and the environment, Report of the United Nations High Commissioner for Human Rights Report of the United Nations High Commissioner for Human Rights, December 16, 2001, UN Doc. A/HRC/19/34, para. 7.

29 The Court has considered that the rights that are particularly vulnerable to environmental impact include the rights to life, personal integrity,[23] private life, health,[24] water,[25] food,[26] housing,[27] participation in cultural life, property, and the right to not be forcibly displaced.

5. Whose Human Rights are Guaranteed?

30 The American Convention requires States to "respect the rights and freedoms recognized" in it and "to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms." These twin verbs have a broad geographic and temporal scope.

31 The Court has established that whenever activities within the control of a State causes injury to those outside the State's frontiers, the State is responsible for any violations that occur in that other State. The use of the word "jurisdiction" in Article 1(1) of the American Convention signifies that the State obligation to respect and to ensure human rights applies to every person who is within the State's territory or who is in any way subject to its authority, responsibility or control.[28] These cross-border consequences are potentially global in the context of the climate emergency, because the emission of greenhouse gases or other substances known to affect the climate can result in the deprivation of human rights far from the originating State. The word "jurisdiction," for the purposes of the human rights obligations under the American Convention as well as extraterritorial conducts may encompass a State's activities that cause effects outside its territory. Many environmental problems involve transboundary damage or harm. "One country's pollution can become another country's human and environmental rights problem, particularly where the polluting media, like air and water, are capable of easily crossing

23 See, for example, African Commission on Human and Peoples' Rights, Resolution 153 on climate change and human rights and the need to study its impact in Africa. November 25, 2009.

24 On this point, the Committee on Economic, Social and Cultural Rights has indicated that the obligation to respect the right to health means that "States should […] refrain from unlawfully polluting air, water and soil, e.g. through industrial waste from State-owned facilities, from using or testing nuclear, biological or chemical weapons if such testing results in the release of substances harmful to human health." Committee on Economic, Social and Cultural Rights (hereinafter "ESCR Committee"), General Comment No. 14: The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights). UN Doc. E/C.12/2000/4, August 11, 2000, para. 34. See, also, African Commission on Human and Peoples' Rights, Social and Economic Rights Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria. Communication 155/96. Decision of October 27, 2001, paras. 51 and 52.

25 See, for example, ESCR Committee, General Comment No. 15: The right to water (articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), UN Doc. E/C.12/2002/11, January 20, 2003, paras. 8 and 10.

26 See, for example, ESCR Committee, Concluding observations: Russian Federation, May 20, 1997, UN Doc. E/C.12/Add.13, paras. 24 and 38.

27 See, for example, ESCR Committee, General Comment No. 4: The right to adequate housing (article 11(1)

28 Cf. Advisory Opinion OC-21/14, supra, para. 61. See: Advisory Opinion OC-23/17, November 15, 2017 "The Environment and Human Rights."

boundaries."[29] The prevention and regulation of transboundary environmental pollution has resulted in much of international environmental law, through bilateral, regional or multilateral agreements that deal with global environmental problems such as ozone depletion and climate change.[30]

32 The ICJ has indicated that States must 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 their jurisdiction,[31] and that States are obliged to use all available means to avoid activities in their territory, or in any area under their jurisdiction, causing significant damage to the environment of another State.[32] For the purposes of the American Convention, when transboundary damage occurs that effects treaty-based rights, it is understood that the persons whose rights have been violated are under the jurisdiction of the State of origin,[33] if there is a causal link between the act that originated in its territory and the infringement of the human rights of persons outside its territory.

5.1 Recognizing Future Generations

33 Another aspect of the climate emergency is its long-term impact, as well as its impact on current enjoyment of human rights. While future generations may not have human rights under the American Convention, persons now alive may represent their interests, as domestic courts have found.[34] In domestic law and policy, the emergence of pension funds for the elderly and public

29 Cf. Human Rights Council, Preliminary report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox, December 24, 2012, UN Doc. A/HRC/22/43, para. 47 and 48, and ESCR Committee, General Comment No. 15: The right to water (articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), UN Doc. E/C.12/2002/11, January 20, 2003, para. 31, and Human Rights Council, Analytical study of the relationship between human rights and the environment, Report of the United Nations High Commissioner for Human Rights, adopted on December 16, 2011, UN Doc. A/HRC/19/34, paras. 65, 70 and 72.

30 Cf. Human Rights Council, Preliminary report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox, December 24, 2012, UN Doc. A/HRC/22/43, para. 47 and 48, and Commission on Human Rights, Analytical study of the relationship between human rights and the environment, Report of the United Nations High Commissioner for Human Rights, adopted on December 16, 2001, UN Doc. A/HRC/19/34, paras. 65, 70 and 72.

31 Cf. ICJ, Legality of the threat or use of nuclear weapons. Advisory Opinion of July 8, 1996, para. 29.

32 Cf. ICJ, Case of Pulp Mills on the River Uruguay (Argentina v. Uruguay). Judgment of April 20, 2010, paras. 101 and 204; also, ICJ, Certain activities carried out by Nicaragua in the border area (Costa Rica v. Nicaragua) and Construction of a road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica). Judgment of December 16, 2015, paras. 104 and 118.

33 "State of origin" refers to the State under whose jurisdiction or control the activity that caused environmental damage originated, could originate, or was implemented.

34 In Minors Oposa v. Secretary of the Department of Environment and Natural Resources, the Philippine Supreme Court found that present generations have standing to represent future generations in large part because "every generation has a responsibility to the next to preserve that rhythm and harmony for the full enjoyment of a balanced and healthful ecology". Minors Oposa v. Secretary of the Department of Environment and Natural Resources, Philippine Supreme Court, reprinted in ILM 33 (1994), 168 et seq.

schooling paid for through taxation by all individuals in the community, whether or not they have children, is a manifestation of intergenerational solidarity.[35] Taking care of the elderly acknowledges that they have knowledge and traditions that may benefit present and future persons. Beyond the local community, each person on earth can be concerned about the rights, needs, and interests of future generations, and about how to counter the threats to their well-being, because many current threats have widespread negative impacts and the threats cannot be overcome or mitigated except by broad cooperative action. The dynamic planetary system, in which all are interrelated and interdependent, determines relationships in the contemporary world.[36] In such a system, there can be no isolation or independence, because all parts of the system are interrelated and mutually dependent now and in the future. Greenhouse gas emissions provide just one example of activities today that will produce effects for a century or more to come. Importantly, in international law, recognition of this fact has led to the identification of common interests or common concerns in a variety of circumstances where harm to one is harm to all and protection of one helps protect all.[37] There are strongly voiced opinions contrary to the idea that non-existent humans can have rights; but legal systems recognize several types of legal persons that are societal fictions, from states to corporations, and deem them to have rights – and in the case of corporations, even human rights.

34 While there may be practical problems with determining who can speak for future generations, there is no theoretical reason why legal systems cannot recognize future generations to have claims on the present that can be denominated rights. The European Court of Human Rights, while not deciding on the legal personhood of embryos, has nonetheless recognized that an embryo has protectable interests as a "potential human". Past humans are also protected: legal systems throughout the world have enacted anti-desecration laws and allow present persons to bring legal actions against those who wrongfully interfere with the remains of their deceased family members. If timing of birth is not a reason for *a priori* allocation, then it becomes important to determine the appropriate principle on which to determine what is an equitable allocation — whether decisions should be based on need, capacity, prior entitlement, "just

35 See, generally, E. Malinvaud, Intergenerational Solidarity: Proceedings of the Eighth Plenary Session of the Pontifical Academy of Social Sciences, 8-13 April 2002 (2002), 27-28.

36 A. Kiss/D. Shelton, "Systems Analysis of International Law: A Methodological Inquiry", NYIL XVII (1986), 45 et seq.

37 K. Wellens, "Solidarity as a Constitutional Principle: Its Expanding Role and Inherent Limitations", in: R. St. J. Macdonald/D. M. Johnston (eds), Towards World Constitutionalism (2005), 775 et seq. One interesting question is whether common interest gives rise to joint responsibility, as when two debtors are jointly responsible: to the extent one cannot pay, the other must fulfil the entire obligation. At the least, global or regional interdependence means the common interest should be given priority over the interests of individual states.

desserts," the greatest good for the greatest number, or strict equality of treatment. Each factor may point towards allocation in favour of one generation or another.

35 Bryan Norton asks, "What do present people owe to people of the future?"[38] This may be reformulated: "Do present people owe anything to people of the future and, if so, why?" Ultimately, all rationales for intergenerational equity rest on a single premise: that the survival of the human species is a good thing. If so, there is a moral obligation to contribute to human continuity by maintaining the essential natural and manmade resources necessary to life. Add to this, first, the foundational concept of human rights that each present and future person is entitled to a life of dignity and well-being, and, second, the reality that resources are finite and degradable, and the need for intergenerational equity emerges from scarcity.

36 John Rawls prescribed neutrality among individuals as the requirement of justice, including across generations.[39] His neutrality principle calls for allowing each person the fullest enjoyment of rights compatible with a similar enjoyment by any other person. Thus, persons in one generation have no claim to priority over members of any other generation: solidarity assumes that all persons are persons of equal concern, past, present and future. Other authors use the language of social contract, assuming it exists across past, present and future generations in an open-ended partnership.[40] Edith Brown Weiss expanded on these basic theories to establish a legal construct of trust: "each generation is a beneficiary of past generations and a trustee towards the future. In natural resource terms, this imposes an obligation of stewardship, so that present enjoyment does not endanger future access and beneficial use".[41]

37 A further rationale for intergenerational equity lies in the "just desserts" notion that those who cause harm are responsible for repairing or compensating for the damage caused to others. From this perspective intergenerational equity is not a matter of distributive justice but of corrective justice. As the past and present negative impacts of human activities on the future are accelerating, the foreseeability of harm imposes responsibilities of prevention and mitigation. Even when scientific and technological changes have uncertain consequences over the long-term, our ability to create or destroy imposes obligations of risk assessment and precaution to ensure future survival of societies. Jared Diamond's work has revealed the extent to which past

38 B. Norton, "Ecology and Opportunity: Intergenerational Equity and Sustainable Options", in: A. Dobson (ed.), Fairness and Futurity: Essays on Environmental sustainability and Social Justice, 1999, 122 et seq.

39 John Rawls, The Law of Peoples (1999).

40 Edmund Burke famously described the State in terms of a partnership over generations. See E. Burke, "Reflections on the Revolution in France (1790)", in Works of Edmund Burke, 1854, 130 et seq..

41 E. Brown Weiss, In Fairness to Future Generations: International Law, Common Patrimony and Intergenerational Equity' (Dobbs Ferry, NY: Transnational Publishers, 1989).

unsustainable practices led to the collapse of various civilisations around the world and provides further justification for taking a long-range view of the consequences of present decisions.[42]

38 Unjust enrichment has also been cited as the basis of duties towards future generations. The living are indebted for all that has been transmitted from the past, whether in medical advances, culture, art, or technology, all of which have contributed to present well-being. Those living have also received a heritage of natural resources which imposes on them a special obligation to maintain the planet's integrity, because it has intrinsic worth and is essential to human survival. This limitation requires each generation to maintain the corpus of the trust and to pass it on in no worse condition than it was received. The debt to prior generations cannot be repaid to those who produced current welfare, and present generations would enjoy a form of "unjust enrichment" were the benefits not transmitted into the future. If we surpass tipping points, we will activate feedback loops that will diminish to zero the probability that future generations can stabilize the climate system. Actions taken today can determine the possibility that future generations can carry on the inter-generational burden. Starkly, we are the last generation that can act to avoid irreversible harm to the climate system.

39 Finally, from a humanitarian perspective, "the moral obligation not to deprive future generations of resources essential to their avoiding impoverishment is part of our natural duty to avoid inflicting unnecessary suffering on other people".[43] Poverty, environmental degradation, disease, and a host of other ills already disproportionately harm infants, children and the elderly. Future generations are being made worse off by present day malnutrition and unsafe water which cripple the learning capacity and the physical strength of the young.[44] Poverty is thus as much an issue of intergenerational equity as it is an intragenerational concern.

40 Intergenerational equity in respect to natural resources is based on the recognition of three key points: (1) that human life emerged from, and is dependent upon, the Earth's natural resource base, including its ecological processes, and is thus inseparable from environmental conditions; (2) that human beings have a unique capacity to alter the environment upon which life depends and (3) that no generation has a superior claim to the Earth's resources because humans did not create them, but inherited them. Taken together, these three points have led many to the concept of trust: imposing obligations on present generations to conserve and maintain the planetary

42 J. Diamond, Collapse: How Societies Choose to Fail or Succeed (2005).

43 Wilfred Beckerman and Joanna Pasek, Justice, Posterity and the Environment (Oxford University Press 2001).

44 The UN Special Rapporteur on the Right to Food, Jean Ziegler, has noted the intergenerational links in nutritional status, where underweight and malnourished mothers are more likely to give birth to underweight babies whose mental and physical capacities are reduced and who may never recover. Hunger then is passed on through the generations. Report of the Special Rapporteur on the Right to Food, Jean Ziegler, Doc. A/HRC/7/5, 10 January 2008, para. 34.

resources for future beneficiaries. In fact, the present generation is both beneficiary of the past and trustee for the future. Meeting the obligation does not mean that no development is possible, but it does call for minimizing or avoiding long-term and irreversible damage to the environment.

41 There are already aspects of trust in international law, which recognises that certain resources, such as those on or under the deep seabed, belong to the common heritage of mankind by virtue of their location in commons areas. Inclusion of the word "heritage" connotes a temporal aspect in the communal safeguarding of areas or resources incapable of national appropriation. Based on this concept, special legal regimes have been created for the deep seabed[45] and the Moon. The nature of the common heritage is a form of trust, whose principal aims include restricting use to peaceful purposes, rational utilisation in a spirit of conservation, good management or wise use, and transmission to future generations. Benefits derived from the common heritage may be shared through equitable allocation of revenues, but this is not the essential feature of the concept. Benefit-sharing can also mean sharing scientific knowledge acquired in common heritage areas like Antarctica.

42 Climate change offers particularly difficult challenges to intergenerational equity. The greenhouse gases sent into the atmosphere in 2008 will be there for at least a century.[46] Thus, throughout the 21st century the world in general and the world's poor in particular will have to live with the consequences of human activities already undertaken or underway. The full consequences of today's actions may not be known, but the risks are: increased flooding, extreme storm activity, drought, melting sea ice, expanded range of disease vectors, and extreme heat events. In addition, the damage caused by present emissions may be irreversible, for example, the impacts from triggering global and regional tipping points. Development is already being hindered due to the consequences of climate change and this is likely to increase over time. There will be significant short-term costs, but the cost of mitigation and adaptation will grow the longer action is delayed. Moreover, the impacts will be felt unequally, with the already poor and marginalised suffering disproportionately from the consequences of climate change. Future generations will inherit a more unequal world with potentially irreversible changes to the ecological resource base on which they depend. As Desmond Tutu has expressed it, there is an increasing "adaptation apartheid". Moreover, there are limits to adaptation; the IPCC has stated that if we surpass multiple tipping points, large parts of the planet will become uninhabitable and adaptation will become impossible.

45 UN, Division for Ocean Affairs and the Law of the Sea, The Law of the Sea, Concept of the Common Heritage of Mankind, 1996.

46 UNDP, Human Development Report 2007/2008: Fighting Climate Change, Human Solidarity in a Divided World, 2007, at p. v.

43 Most of the existing references to intergenerational equity in international law are in the context of natural and cultural resources. Although mention of future generations can be found as early as the 1945 UN Charter[47] and the 1946 Convention for the Regulation of Whaling,[48] it is only more recently that a growing number of binding and non-binding international instruments make reference to future generations or intergenerational equity. The 1972 Stockholm Conference on the Human Environment has as its Principle 2: "The natural resources of the earth including the air, water, land, flora and fauna and especially representative samples of ecosystems must be safeguarded for the benefit of present and future generations through careful planning or management as appropriate".

44 Twenty years later, the Rio Declaration incorporated the reference to future generations into its statement on the right to development, reflecting the Brundtland Commission's definition of sustainable development,[49] a right which is to be fulfilled so as to equitably meet the developmental and environmental needs of present and future generations. Principle 6 calls for giving special priority to the situation and needs of developing countries, particularly the least developed and those most environmentally vulnerable. While these principles focus on elements of need as a basis for distributive justice, Principle 7 shifts to take into account responsibility and capacity, with its enunciation of the principle of common but differentiated responsibilities Thus, the declaration identifies at least three factors that could be taken into account in the equitable allocation of benefits and burdens: need, responsibility, and capacity.

45 The parties to the 1992 Convention on Biological Diversity expressed their determination "to conserve and sustainably use biological diversity for the benefit of present and future generations," establishing intergenerational solidarity as part of the general framework in which to apply the Convention.[50] The 1992 Climate Change has similar preambular language, but goes further in placing concern for future generations in article 3(1) of the Treaty as well. It provides that the parties should protect the climate system "for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities". A chapeau to article 3 insists that States

47 Charter of the United Nations (25 June 1945), 59 Stat. 1031, Preamble, "determined to save succeeding generations from the scourge of war…".

48 International Convention for the Regulation of Whaling, 2 December 1946, "Recognizing the interest of the nations of the world in safeguarding for future generations the great natural resources represented by the whale stocks…".

49 Our Common Future, 1987; defining sustainable development as development which meets the needs of the present generation without compromising the ability of future generations to meet their needs.

50 D. Bodansky, "International Law and the Protection of Biological Diversity", Vand. J. Transn'l L. 28 (1995), 623 et seq. In addition to the CBD and UNFCC, other examples of references to future generations as a motivating factor in taking action can be found in the preambles to the 1992 Convention on the Transboundary Effects of Industrial Accidents and the 1994 Convention to Combat Desertification.

are to be "guided by" these principles in their actions to achieve the objectives of the Convention. Humanitarian instruments also reflect concern for future well-being in prohibiting the employment of "methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment".[51]

46 Intergenerational equity is primarily a principle of distributive justice, concerned with the allocation of benefits and burdens. In part it asks whether a given resource should be used today or saved for possible future use. From this perspective, the implications of the principle of solidarity with future generations are three: first, that each generation should conserve the diversity of the natural, cultural and economic resource base so that it does not unduly restrict the options available to future generations to satisfy their own values and needs. Second, the quality of ecological processes passed on should be comparable to that enjoyed by the present generation. Third, the past and present cultural and natural heritage should be conserved so that future generations will have access to it. Prior assessment should be done to ensure that the benefits from a proposed activity outweigh the costs and that the burdens are equitably borne by all or there is adequate compensation for those who bear the greater burdens. These rights and obligations derive from a notion of human solidarity that extends beyond the totality of the current planetary population, giving it a temporal dimension that places its focus on prevention of harm.

47 Thus, in regard to both spatial and temporal dimensions, international environmental obligations when facing the climate emergency are unprecedented in scope.

6. What are State Obligations in the Face of the Climate Emergency

48 Given the spatial and temporal scope of rights-holders and their advocates and representatives, it is important to define and circumscribe the duties of States respecting the environment as it affects the enjoyment of human rights; otherwise, the burden on States would be difficult to support and the regime would likely fail.

49 First, it is necessary to recall that, under international law, when a State is a party to an international treaty like the American Convention, the treaty is binding for all its organs, including the Judiciary and the legislature,[52] so that a violation by any of these organs gives rise to the

51 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1), adopted on 8 June 1977.

52 Cf. Case of Fontevecchia and D`Amico v. Argentina. Merits, reparations and costs. Judgment of November 29, 2011. Series C No. 238, para. 93, and Advisory Opinion OC-21/14, supra, para. 31

international responsibility of the State.[53] Accordingly, this Court considers that the different organs of the State must carry out the corresponding control of conformity with the Convention to ensure the protection of all human rights.[54] This is also based on the Court's considerations in exercise of its advisory jurisdiction, which undeniably shares with its contentious jurisdiction the purpose of the inter-American human rights system, which is "the protection of the fundamental rights of the human being."[55]

50 The principle that a State is responsible for causing environmental harm outside its territory in breach of an international obligation was before the arbitral tribunal in the well-known dispute between the United States and Canada concerning the activities of the Canadian smelter located in Trail, British Colombia.[56] The arbitral tribunal asserted a general duty on the part of a state to protect other states from injurious acts caused by individuals within its jurisdiction. Summing up, the tribunal found that "no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence."[57]

51 The tribunal agreed with national court precedents that States should take reasonable precautions to prevent harm, the same as those it would take to protect its own inhabitants. A State's failure to regulate or prevent serious harm from polluting activities, in instances where it would protect its own inhabitants, would constitute a wrongful act.

52 The *Trail Smelter* Arbitration set the foundations for discussions of responsibility and liability in environmental law.[58] More precisely, what diligence is due when the issue is one of actions required to mitigate the known or reasonably foreseeable consequences of climate change.[59]

53 Cf. Case of Velásquez Rodríguez v. Honduras. Merits. Judgment of July 29, 1988. Series C No. 4, para. 164, and Advisory Opinion OC-21/14, para. 31

54 Cf. Case of Almonacid Arellano et al. v. Chile, para. 124, and OC-21/14, para. 31.

55 The Effect of Reservations on the Entry into Force of the American Convention on Human Rights. Advisory Opinion OC-2/82 of September 24, 1982. Series A No. 2, para. 29, and Advisory Opinion OC-21/14, para. 31

56 1931-1941, 3 U.N.R.I.A.A. 19051931-1941, 3 U.N.R.I.A.A. 1905.

57 3 U.N.R.I.A.A. 1938, 1965.

58 The case continues to be invoked. In 1972, Canada referred to the judgment when an oil spill in Washington polluted beaches in British Colombia. 11 Can.Y.B.Int'l L 333-34 (1973).

59 On these topics, see T. Scovazzi, "State Responsibility for Environmental Harm," 12 YBIEL 43 (2001); Lammers, "International Responsibility and Liability for Damage Caused by Environmental Interferences," 31 EPL 42 (2001); R. Bratspies & R. Miller, eds. Transboundary Harm in International Law; Lessons from the Trail Smelter Arbitration (2006); G. Handl, "Transboundary Impacts, in D. Bodansky, J. Brunnee & E. Hey, Oxford Handbook of International Environmental Law (2007); A. Boyle, "State Responsibility

53 Following the *Trail Smelter* Arbitration, the ICJ asserted a general duty to avoid transboundary injury in the 1949 *Corfu Channel* case, which referred to "every State's obligation not to allow knowingly its territory to be used contrary to the rights of other states."[60] The same year as this decision, the United Nations Survey of International Law concluded that there is "general recognition of the rule that a State must not permit the use of its territory for purposes injurious to the interests of other States in a manner contrary to international law."[61]

54 Principle 21 of the 1972 Stockholm Declaration reiterated the norm formulated in the *Trail Smelter Arbitration* and other cases as follows:

> States have, in accordance with the Charter of the United Nations and the principles of international law … the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

55 The rule was reiterated in Principle 2 of the 1992 Rio Declaration and again confirmed in the 2002 World Summit on Sustainable Development. It has also been reaffirmed in declarations adopted by the United Nations, including the Charter of Economic Rights and Duties of States and the World Charter for Nature, and has been adopted by other international organizations and conferences.[62] Its content is inserted in the Convention on the Law of the Sea[63] as well as in Article 20 of the ASEAN Convention on the Conservation of Nature and Natural Resources.[64] The 1979 Geneva Convention on Long Range Transboundary Air Pollution reproduces Principle 21 stating that it "expresses the common conviction that States have" on this matter.

56 Principle 2 of the Rio Declaration also appears in the preamble of the 1992 UN Framework Convention on Climate Change and Article 3 of the Convention on Biological Diversity. The ICJ recognized in a 1996 advisory opinion that "[t]he 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."[65] This statement was repeated in the judgment concerning the *Gabçikovo-Nagymaros Project*, in which the Court also "recall[ed] that it has recently had occasion to

and International Liability For Injurious Consequences of Acts Not Prohibited By International Law: A Necessary Distinction," 39 ICLQ 1 (1990).

60 I.C.J. Rep., (1949) p. 22.

61 U.N. Doc. A/CN.4/1/Rev.1 (U.N. Pub. 1948. V.1(1)), at 34 (1949).

62 See e.g., Preliminary Declaration of a Program of Action of the European Communities in respect to the Environment, O.J. C 112/1, Dec.20, 1973; Final Act, Conference on Security and Cooperation in Europe, Helsinki, Aug. 1976.

63 UNCLOS Art.194(2).

64 ASEAN Agreement on the Conservation of Nature and Natural Resources (Kuala Lumpur, July 9, 1985), 15 EPL 64 (1985).

65 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, pp.241-242, para 29.

stress ... the great significance that it attaches to respect for the environment, not only for states but also for the whole of mankind."[66]

57 While Stockholm Principle 21 and similar formulations could be read to impose absolute state responsibility for any trans-frontier harm, whether intentional or accidental, states generally have not invoked it to assert claims for non-intentional harm, however damaging the impact. The well-known Chernobyl incident is a case in point.[67] Following the April 26, 1986 explosion in reactor Number 4 of the Chernobyl nuclear power plant, the resulting fire melted a portion of the uranium fuel. Although there was no nuclear explosion and the core of the reactor did not melt, the fire which engulfed the reactor was serious and released a large quantity of radioactive material into the air. Large amounts of fallout occurred near the plant and spread beyond. Between April 27 and May 8, nearly 50,000 persons were evacuated from towns located within a 30 kilometer radius of the plant. Two persons were immediately killed by the explosion, 29 died shortly after, and hundreds were afflicted with radiation poisoning. The foreign consequences were also severe, even though no deaths were immediately attributed to the accident. Following rapid changes in the wind direction, the radioactive cloud which had formed crossed the airspace of a series of countries beginning with those of Scandinavia. Four days after the incident, radiation measurements along the Swedish coast were ten times higher than normal. The radioactive cloud moved south, crossing Germany, Austria, Switzerland, Yugoslavia and Italy.

58 No conventional international regulation applied at the time the incident occurred in the Soviet Union. The interpretation then given to the Convention on Long-Range Transboundary Air Pollution[68] excluded pollution by radioactive elements. The USSR was not a contracting party to the Vienna Convention on Civil Liability for Nuclear Damage.[69] Indeed, among the states that suffered effects from the radioactive cloud, only Yugoslavia had signed and ratified the Convention. There remained, therefore, only the recourse to general rules of international environmental law; after consideration *none* of the affected States presented a claim to the Soviet Union for the damage they suffered.

59 Then, in the aftermath, apparently no government pushed to conclude a rule imposing strict liability for such environmental harm. Negotiations would no doubt have been lengthy and perhaps unsuccessful over such matters as proximate harm, and mitigation of damages. The difficulty of evaluating the cost of the consequences of the Chernobyl accident, especially the

66 Sept. 25, 1997, para 53.

67 See L. Malone, The Chernobyl Accident: A Case Study in International Law Regulating State Responsibility for Transboundary Nuclear Pollution, 12 COL.J. ENV'L L. 203, 222 (1987).

68 Geneva, November 13, 1979.

69 May 21, 1963.

preventive and precautionary measures taken by the affected countries, also may have been a determinant factor in avoiding the issue of state responsibility. This reluctance also seems, however, to be consistent with the general reticence displayed towards rules imposing strict liability on a state for damages caused by it, its citizens, or non-state actors like business entities, in another State. The emphatic preference remains measures of prevention rather than cure, using due diligence as the requisite standard of care.

60 Since 1978, the International Law Commission (ILC) has considered the question of "international liability for injurious consequences arising out of acts not prohibited by international law." In 1997, the ILC decided to deal only with the question of prevention of transboundary damage from hazardous activities and it presented to the U.N. General Assembly a completed set of 19 articles on this topic.[70] The General Assembly reviewed the articles and, pressed by certain member states, asked the ILC to continue working on the topic of international liability, "bearing in mind the interrelationship between prevention and liability…."[71]

61 By July 2004 a draft set of principles on Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities was provisionally adopted by the Commission on first reading,[72] and, after comments by States, adopted on second reading in May 2006.[73] To a large extent, these efforts can be seen to supplement and complete the ILC Articles on Responsibility of States for Internationally Wrongful Conduct,[74] although the content of the adopted rules appears largely to repudiate state liability when the State has complied with the Articles on Prevention.

62 The principles on loss correctly approach the issue as one of allocating the risk of loss due to harm resulting from lawful economic or other activities, when the relevant State has complied with its due diligence obligations to prevent transboundary harm. The articles provide a general framework for States to adopt domestic laws or conclude international agreements to ensure prompt and adequate compensation for the victims of transboundary damage caused by lawful hazardous activities. It also explicitly states that an additional purpose of the draft principles is

70 See Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, in Report of the International Law Commission on the Work of its Fifty-Third Session, UN GAOR, 56th Sess. Supp. No. 10, U.N. Doc. A/56/10 370 (2001).

71 Res. 56/82 of 18 January 2002.

72 U.N. Doc. A/59/10, pp. 153-156.

73 See Draft Report of the International Law Commission on the Work of its Fifty-Eighth Session, Chapter V: International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law (International Liability in Case of Loss from Transboundary Harm Arising out of Hazardous Activities), U.N. Doc. A/CN.4/L.693/Add.1, 9 June 2006.

74 Report of the International Law Commission on the Work of its Fifty-Third Session, UNGAOR, 55th Sess., Supp. No. 10, U.N. Doc. A/56/10 (2001).

"to preserve and protect the environment in the event of transboundary damage, especially with respect to mitigation of damage to the environment and its restoration and reinstatement." This principle should be read in the light of the broad definitions of damage,[75] environment[76] and hazardous activity[77] set forth in Principle 2. The last definition in particular extends liability considerably beyond that provided in most domestic laws, including for failure to prevent harm from any activity which poses a risk of causing significant harm. This might well apply to any activity emitting greenhouse gases or other substances that are linked persuasively to climate change.

63 The Committee on the Rights of the Child (CRC) applied the doctrine of state responsibility in the *Sacchi et al v Argentina et al.* case.[78] The CRC, though, opined that "the alleged harm suffered by the victims needs to have been reasonably foreseeable to the State party at the time of its acts or omissions." It is well established by science in the context of the climate emergency that the world is very aware that any additional warming matters. All States have agreed with the IPCC reports. It is also well established that global warming today is already impacting human rights beyond the territory where the warming has first been felt. It is further established that the main sources of global warming, therefore sources of GHG's emissions, can be traced to specific territories to determine jurisdiction and obligations. Therefore, as the CRC stated in *Sacchi*: "[i]n accordance with the principle of common but differentiated responsibility, as reflected in the Paris Agreement, the Committee finds that the collective nature of the causation of climate change does not absolve the State party of its individual responsibility that may derive from the harm that the emissions originating within its territory may cause to children, whatever their location."[79]

64 The IACHR has observed that States Parties' GHGs contribute to "the increase in frequency and intensity of meteorological phenomena attributable to climate change, which, regardless of their origin, contribute cumulatively to the emergence of adverse effects in other States."[80] States Parties are "responsible not only for actions and omissions in its territory, but also for those within its territory that could have effects on the territory or inhabitants of another State" and

75 In addition to personal and property losses, damage includes "loss or damage by impairment of the environment, the costs of reasonable measures of reinstatement of the environment, including natural resources, and the costs of reasonable response measures. Principle 2(1)(iii-v).

76 "Environment' includes natural resources, both abiotic and biotic, such as air, water, soil, fauna and flora and the interaction between the same factors, and the characteristic aspects of the landscape. Principle 2(b).

77 In probably the broadest definition given in the draft articles, a hazardous activity "means an activity which involves a risk of causing significant harm." Principle 2 (c).

78 Decision of September 22, 2021. CRC/C/88/D/104/2019.

79 Ibid, para 10.10.

80 IACHR, Climate Emergency: Scope of Inter-American Human Rights Obligations, Resolution 3/2021, para. 39.

"have the obligation, within their jurisdiction, to regulate, supervise and monitor activities that may significantly affect the environment inside or outside their territory."[81] In the context of the climate emergency, this means that all State activities within the 1.5°C guardrail, must refrain from destroying carbon sinks or from authorizing new exploration and exploitation of fossil fuels. In addition, they must regulate methane and black carbon to ensure near zero methane emissions.

6.1 The Obligation of Due Diligence

65 Due diligence first appeared in the law of neutrality and in the law concerning injury to aliens.[82] Due diligence made a more recent appearance in international human rights law. Between mid-1988 and early 1989, for example, the Inter-American Court of Human Rights decided cases based on petitions filed by the families of disappeared persons against the government of Honduras. In the cases of Angel Manfredo Velasquez Rodriguez and Saul Godinez Cruz, the Court unanimously found that Honduras had violated the rights of personal liberty, humane treatment, and life guaranteed by the American Convention on Human Rights.[83]

66 The Court determined that both Velasquez Rodriguez and Godinez Cruz were kidnapped under circumstances falling within a systematic practice of disappearances, that persons connected with the army or under its direction carried out the kidnappings, and that there was no evidence that either man had disappeared to join subversive groups. Based on these findings, the Court held Honduras responsible for the disappearances. Moreover, the State was responsible even if the disappearances were not carried out by agents who acted under cover of public authority, because the State's apparatus failed to act to prevent the disappearances or to punish those responsible. Therefore, because Honduran officials either carried out or acquiesced in the kidnappings, the Court concluded that the government "failed to guarantee the human rights affected by" disappearances.

67 Petitioners had alleged violations of articles 4, 5, and 7 of the Convention. The Court found that infringements of the rights contained in these provisions inevitably involve violation of Convention article 1, which sets out the general obligations of states and contains the generic basis of liability. The Court viewed Article 1 as establishing the conditions under which a particular act, which violates one of the rights recognized by the Convention, can be imputed to

81 Ibid., para 40.

82 Giulio Bartolini, 'The Historical Roots of the Due Diligence Standard' in Krieger et al (eds), Due Diligence in the International Legal Order, 23.

83 Velasquez Rodriguez, Inter-Am. Ct.H.R. at 75-76, para194; Godinez Cruz, Inter-Am. Ct. H.R. at 159-60, para 203. See, D. Shelton, "Private Violence, Public Wrongs, and the Responsibility of States," 13 Fordham Int'l L. J. 1 (1989/1990).

a State party, thereby establishing its international responsibility. Article 1(1), as interpreted by the Court, contains several separate duties.

67.1 First, a State shall respect the rights and freedoms recognized by the Convention. This "must necessarily comprise the concept of the restriction of the exercise of state power." However, the existence of a legal system designed to permit exercise of human rights does not alone ensure compliance with a State's obligations, because rights may be violated in spite of legal protections. Thus, whenever a State organ, official, or public entity violates a protected right, this constitutes a failure of the duty to respect the rights and freedoms set forth in the Convention, because public power is used to infringe the rights recognized. In general, then, a State is responsible for the acts and omissions of its agents undertaken in their official capacity, even if they are acting outside the scope of their authority or in violation of internal law. Intent or motivation is irrelevant.

67.2 Second, the States must "ensure" the free and full exercise of the rights recognized by the Convention. This obligation requires States "to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights." This implies that States must prevent violations of the rights recognized by the Convention. In addition, the State must attempt to investigate, prosecute and punish violations of human rights, restore the right violated, and provide compensation as warranted for damages resulting from the violation.

68 The existence of affirmative duties to prevent and to remedy human rights violations implies, as a consequence, that state responsibility extends to omissions by State actors. The Court cites the example of a State that is not directly responsible for a human rights violation because the act is that of a private person, but that becomes responsible because of "the lack of due diligence to prevent the violation or to respond to it as required by the Convention." In addition, the Court declared that where human rights violations committed by private parties are not seriously investigated, "those parties are aided in a sense by the government, thereby making the State responsible on the international plane." The Court concluded that the State was liable for disappearances of Velasquez Rodriguez and Godinez Cruz, which were found to be "carried out by [agents] who acted under cover of public authority." Significantly, the Court added that even if State complicity were not proven, the failure of the State "to act, which is clearly proven, is a failure on the part of Honduras to fulfill the duties it assumed under Article 1(1) of the Convention" to ensure the full and free exercise of human rights. Thus, responsibility may be imputed because of the "lack of due diligence" to prevent or remedy violations committed by non-state actors.

69 The Court's reasoning echoed the traditional law of state responsibility for injury to aliens. Prior to the establishment of international systems for the protection of human rights at the end of World War II, international law recognized a State's right to bring a claim against another state because of breaches of international law causing injury to the person or property of its nationals. In the *Mavrommatis Palestine Concessions*, the Permanent Court of International Justice states that "[i]t is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels."[84]

70 The great innovation of international human rights law was to extend the protections formerly afforded aliens to all individuals. Today, one of the international obligations imposed upon States by treaty and custom is to "respect and ensure" internationally recognized human rights. Because of this duty, a State's failure to act to prevent or remedy human rights violations committed by private entities may constitute the breach of an international obligation, giving rise to State responsibility. In respect of economic, social and cultural rights (ESCR) the obligations are also those of due diligence, although constrained by the State's capacity in many instances; the constraint does not apply, however, when the alleged violation concerns the "minimum core" of a right. This is crucial in cases where the right involved is the right to water or the right to food, for example.

71 The human right to life in the context of the climate emergency entails the human right to resilience, as a manifestation of the human right to life. It implies mandatory obligations on States and non-State actors. These mandatory obligations are:

71.1 To manage the risks and the threats that will otherwise make resilience futile, by adopting all the measures necessary to a consistent path to remain under 1.5°C of warming above pre-industrial levels and to ensure time to build resilience by slowing the rate of warming in the near term.

71.2 To ensure the means to reduce vulnerability and therefore strengthen resilience of people and ecosystems that are essential for the enjoyment of the human right to life, by allocating funds to the public budget and incentivizing private investments for fast mitigation actions and adaptation measures.

84 The Mavrommatis Palestine Concessions (Greece v. Gr. Brit.), 1924 P.C.I.J. (ser. A) No. 2, 6, 12 (Aug. 30).

72 Since 1972, the obligation of due diligence has also appeared in numerous environmental conventions, which have obliged the parties to take "appropriate" or similar measures.[85] In addition, international courts and tribunals have spelled out due diligence obligations with regard to the land, watercourses and marine environment.[86]

73 Due diligence obligations serve to manage risks. Some risks stem from natural or technical phenomena that may threaten persons, property or ecosystems. Risk management by States may be hampered by a limited knowledge about the nature and scope of the risk, the difficulty of actually proving the presence and degree of the risk, doubts about causes and effects, and the necessity of dealing with numerous contributing factors and actors. In order to deal with these problems, the precautionary principle has been designed as a legal tool.[87] The precautionary principle might justify requiring environmental impact assessments to include information about carbon usage and emissions.[88]

74 Due diligence facilitates dealing with uncertainty in the face of a plurality of diverse actors and varying risk proximity. In international climate law, risk proximity is contingent both on States' resources for action and on their past contributions to climate harm, making capacity of a State a relevant factor. It is especially important in climate change, as the knowledge about its causes and its consequences becomes clearer and the risks threaten catastrophic harm. Article 4(1) of the Paris Agreement on Climate Change refers, inter alia, to 'efforts to eradicate poverty' while

85 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (adopted 19 November 1972, entered into force 30 August 1975) 1046 UNTS 120 art 1; Vienna Convention for the Protection of the Ozone Layer (adopted 22 March 1985, entered into force 22 September 1988) 1513 UNTS 293 art 2; Convention on the Protection and Use of Transboundary Watercourses and International Lakes (adopted 17 March 1992, entered into force 6 October 1996) 1936 UNTS 269 art 2(1); Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (adopted 22 March 1989, entered into force 5 May 1992) 1673 UNTS 57 art 4(2); Convention on the Protection of the Alps (adopted 7 November 1991, entered into force 6 March 1995) OJ L61/32 art 2(2); Convention on the Transboundary Effects of Industrial Accidents (adopted 17 March 1992, entered into force 19 April 2000) 2105 UNTS 457 arts 3(1) and 6(1); Convention on the Law of the Non-Navigational Uses of International Watercourses (adopted 21 May 1997, entered into force 17 August 2014) 36 ILM 700 arts 7(1) and (2); Revised Protocol on Shared Watercourses in the Southern African Development Community (adopted 7 August 2000, entered into force 22 September 2003) (2001) 40 ILM 321 art 3(10)(a); and many more.

86 Pulp Mills on the River Uruguay (Argentina v Uruguay) (Judgment) [2010] ICJ Rep 14 [101], [197], [204] and [223]; Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica) (Merits) [2015] ICJ Rep 665 [104], [153], [168] and [228]; Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area (Advisory Opinion, 1 February 2011) ITLOS Reports 2011 [110]–[112] see below for further discussion.

87 See, eg, United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107 art 3(3).

88 See, Held v. The State of Montana, CVD-2020-307 (Mont.Dist Ct.) filed Aug 14, 2023.

Article 2(2) permits States to consider "different national circumstances."[89] This gives developing States more leeway for setting national policy priorities by weighing interests in poverty eradication and development against concerns of climate protection. The balancing process informs the due diligence standard in the concrete instance of implementation.

75 Obligations for the prevention of harm to the environment generally require States to act with due diligence in respect of activities by public and by private actors.[90] The development of international law on due diligence has derived in large part from the ILC's Articles on Prevention of Transboundary Harm, which provide that "[t]he State of origin shall take all appropriate measures to prevent significant transboundary harm or at any event to minimize the risk thereof".[91] The question is what are the "all appropriate measures" required of States in confronting the known consequences of global climate change?

76 The ILC Articles specify that the measures to be taken are those "generally considered to be appropriate and proportional to the degree of risk of transboundary harm, also using the term "a reasonable standard of care."[92] The Commission's Articles built on the recognition of the duty to prevent transboundary harm in Principle 21 of the 1972 Stockholm Declaration, echoed in Principle 2 of the 1992 Rio Declaration, both of which refer to States' 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.

77 Obligations to prevent transboundary environmental harm are often viewed in terms of the distinction between obligations of conduct and obligations of result. Illustrating the contrast between obligations of conduct and obligations of result, in the *Nuclear Weapons Advisory Opinion*, the ICJ, once it determined that it could not conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in the extreme circumstance in which the very survival of a State was at stake, unanimously found an obligation to negotiate in good faith to reach an agreement. The obligation went beyond a "mere obligation of conduct." It was "an obligation to achieve a precise result… by adopting a particular course of conduct."[93]

89 Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016), UNTS Registration No 54113; Lavanya Rajamani, 'Due Diligence in International Climate Change Law' in Krieger et al (eds), Due Diligence in the International Legal Order (2020)163, 173–177.

90 See, generally, the ILA Study Group documents: "Due Diligence in International Law (2012–2016)," Study Groups, International Law Association, accessed 20 January, 2021, https://www.ila-hq.org/index.php/study-groups.

91 Article 3, ILC, Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, II(2) U.N.Y.B.I.L.C., 2001, 148.

92 Ibid.

93 ICJ, Legality of the threat or use of nuclear weapons. Advisory Opinion of July 8, 1996, para. 99.

78 In international dispute settlement, recent contentious judgements and advisory opinions by international courts and tribunals attest to the growing importance of due diligence. The ICJ decided the *Case Concerning Pulp Mills* (*Argentina v. Uruguay)*[94] which was followed by an important advisory opinion adopted the Seabed Disputes Chamber of the International Tribunal of the Law of the Sea (ITLOS) on *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*.[95] In the *Case Concerning Pulp Mills* the ICJ expressly identified Articles 36 and 41 of the Statute of the River Uruguay as obligations of conduct requiring due diligence in their execution, including when carrying out environmental impact assessment and the selection of production technology. Article 41(a) of the Statute of the River Uruguay provided that the two parties were "to protect and preserve the aquatic environment and, in particular, to prevent its pollution, by prescribing appropriate rules and measures in accordance with applicable international agreements and in keeping, where relevant, with the guidelines and recommended actions of international technical bodies."[96] This required an environmental impact assessment conducted with due diligence.[97]

79 In the ITLOS Advisory Opinion, the Chamber responded to questions posed by the International Seabed Authority concerning the UNCLOS obligations and liability of states sponsoring mining-related activity on the deep seabed. The initial question was "What are the legal responsibilities and obligations of States Parties to the Convention with respect to the sponsorship of activities in the Area in accordance with the Convention, in particular Part XI, and the 1994 Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982?" The Chamber explained that UNCLOS's Article 139(1) "obligation to ensure" that activities in the Area were carried out in conformity with Part XI of UNCLOS required measures that were "reasonably appropriate." The Chamber identified this as the obligation sponsoring States to ensure contractors' compliance with the rules, regulations and procedures of the International Seabed Authority, contracts or plans of work for exploration and exploitation, and relevant provisions of the Convention's Part XI, Annex III on prospecting, exploration and exploitation.

80 The obligation of the State of origin to take preventive measures was one of due diligence. The Chamber called due diligence a "variable concept", changing over time in *light of the risks involved, and new scientific or technical knowledge concerning these risks*, citing the commentary on the ILC Articles

94 Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay) (Judgment), ICJ Reports, 2010, 14.

95 Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area (Advisory Opinion), ITLOS Reports, 1 February, 2011, 10.

96 Pulp Mills, para. 187.

97 Pulp Mills, paras. 204, 209.

on Prevention of Transboundary Harm. Sponsoring states were "bound to make best possible efforts to secure compliance by the sponsored contractors."[98] This was not the same as guaranteeing that the harm would not occur, but it required measures that were "reasonably appropriate."[99] Some States' obligations further indicated the specific measures required, including their enforcement; such as implementation of a precautionary approach, adoption of best environmental practices, and conduct of environmental impact assessment.

81 The final question asked was, "What are the necessary and appropriate measures that a sponsoring State must take in order to fulfil its responsibility under the Convention, in particular Article 139 and Annex III, and the 1994 Agreement?" The Chamber held that sponsoring States were required to adopt laws, regulations and administrative measures in good faith and taking into account the various options in a manner that was reasonable, relevant and conducive to the benefit of mankind as a whole.[100] The Chamber clearly recognized that the sponsoring State may make "policy choices" but it gave some general indications; e.g., the sponsoring State might find it necessary to include provisions in its domestic law concerning contractors, financial liability and technical capacity, conditions for the issue of sponsorship certificates and penalties for contractors' non-compliance. Contractors' contractual obligations to the ISA had to be made enforceable under sponsoring States' domestic law. States' direct obligations under UNCLOS further indicated the requisite laws, regulations and measures.

82 At its heart, due diligence is concerned with supplying a standard of care against which fault can be assessed. It is a standard of reasonableness, that seeks to take account of the consequences of wrongful act or omission and the extent to which such consequences could have been avoided by the State that either authorized the relevant act or which failed to prevent its occurrence. Due diligence standards preserve for States a significant measure of flexibility in discharging their international obligations. The use of due diligence makes the international legal system adaptable to meet particular needs of States within a diverse international community. It avoids perfect equality of obligations in favor of a more flexible equitable approach to encourage broader participation in treaty and customary regimes.

83 In recent years, the search for equity has affected the law on environmental protection and natural resources, where the concept of common but differentiated responsibilities informs what diligence is due.[101] The concept of "common but differentiated responsibilities" emerged from

98 Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area (Advisory Opinion), ITLOS Reports, 1 February, 2011, para 117.

99 Ibid., 120.

100 Ibid., para. 242.

101 See, Martti Koskenniemi, From Apology to Utopia: The Structure of International Legal Argument (1989), p. 391.

the 1992 Rio Conference on Environment and Development and the treaties that were concluded in conjunction with it. Three factors justify such an equitable approach. The first is the need to adopt measures of environmental protection that are designed and implemented in such a way as to support States in achieving their development objectives. Secondly, the responsibility of developed States for environmental damage, at least since the industrial revolution, and their disproportionate consumption of the Earth's resources, plus their contributions to the climate change threat, demand that they accept the major burden to combat the global problem. Thirdly, the developed States have greater financial and technological capacity to meet the costs of transition towards more environmentally sustainable use of resources. Technological advances can also enhance States' capacities to reduce negative impacts or render them cheaper, that is, more cost-effective. Reflecting these considerations, the Rio Declaration, Principle 7, provides:

> States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit to sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.

84 Principle 4 further proclaims that environmental protection "shall" constitute an integral part of the development process. Elsewhere, the Rio Declaration requires States to apply the precautionary approach "according to their capabilities." The precautionary principle was cited in the *Tatar* case by the European Court of Human Rights, which held it to be a binding norm of European law.[102]

85 Due diligence is thus an open-ended principle that avoids difficulties that can arise in reaching agreement on rules and in the enforcement of such rules. Due diligence tends to focus on whether States have taken reasonable and appropriate steps to avoid or mitigate injury to other States. Moreover, the content of due diligence duties can and do evolve over time. For example, the obligation to undertake environmental impact assessment has been progressively strengthened.[103] Similarly, in *Responsibilities and Obligations of States Sponsoring Persons and Entities*

102 Tatar v. Romania, App. No. 67021/01, judgement of 27 Jan. 2009.

103 Pulp Mills on the River Uruguay, Case Concerning (Argentina v Uruguay) (Merits) [2010] ICJ Rep 14 (Pulp Mills Case); Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica), Judgment of 16 December 2015 (cf. the Separate Opinion of Judge Donoghue's in which she observed that due diligence and environmental impact assessment should not be fixed and prescribed, and that there should be 'scope for variation in the way that States of origin conduct the assessment').

with Respect to Activities in the Area (*Seabed Mining Advisory Opinion*)[104] the ITLOS Seabed Disputes Chamber rejected the argument that marine environmental protection obligations could be adjusted according to the level of development of a State. It would "jeopardize uniform application of the highest standards of protection of the marine environment" if there were to develop sponsoring States "of convenience".[105] This decision balances two competing objectives: on the one hand, the notion of common but differentiated responsibilities takes account of the historical and economic disadvantages faced by developing States, and, on the other hand, the important interest in protecting the global environmental commons.

86 'Reasonableness' is determinative of which measures States should take in a duly diligent manner.[106] Indeed, one might describe a due diligence obligation as an obligation for the State to take *all measures it could reasonably be expected to take*.[107] Even in the instance of preventing the commission of genocide, the standard articulated by the ICJ in order to incur international responsibility was that a State "manifestly failed to take all measures" that were "within its power" to take.[108]

87 As noted in the *Seabed Mining Advisory Opinion*, '[due diligence obligations] may also change in relation to the risks involved in the activity.'[109] This is also reflected in the ILC's Draft Articles on the Prevention on Transboundary Harm. The Commentary to Article 3 of the Prevention Articles explains that due diligence standard should be "appropriate and proportional to the degree of risk of the transboundary harm".[110] The UN Guiding Principles on Business and Human Rights also accepts that due diligence requirements increase in situations in which the risks of harm are known to be particularly significant.[111] States can usually only be expected to

104 (2011) 50 ILM 458.

105 Ibid, para. 159.

106 See also Ian Brownlie, Principles of Public International Law (7th ed, 2008), p. 526 and Helge E. Zeitler, 'The Guarantee of "Full Protection and Security" in Investment Treaties Regarding Harm Caused by Private Actors' (2005) 3 Stockholm International Arbitration Review (2005), 1.

107 Jeswald W. Salacuse, The Law of Investment Treaties (2010), p. 217.

108 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro), Judgment of 26 Feb 2007, ICJ Reports 2007 para 430.(Genocide case)

109 Seabed Mining Advisory Opinion, (2011) 50 ILM 458, para. 117.

110 International Law Commission, Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, UN GAOR 56th Sess., Supp. No. 10, UN Doc. A/56/10 (2001), Commentary to article 3, para. 11.

111 Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, UN Human Rights Council, UN Doc. A/HRC/17/31 (Mar. 21, 2011). Principle 17(b) explicitly states that due diligence 'will vary in complexity with ... the risk of severe human rights impacts'. See also Principle 7, requiring States to pay particular attention to the human rights-related risks of businesses operating in conflict-affected areas, and Principle 3 (assessing the adequacy of laws in light of evolving circumstances) and Principle 21 (formal reporting where business operations or contexts pose risks of severe human rights impact

act in accordance with a due diligence obligation to prevent harm if the State has knowledge of the situation which requires action,[112] but the State may be under an obligation to attempt to gain knowledge of activities within its territory or jurisdiction. As observed in the *Corfu Channel* case, "the fact of…exclusive territorial control exercised by a State within its frontiers has a bearing upon the methods of proof available to establish the knowledge of that State as to such events."**[113]** It may allow the State which is the victim of an international wrong "a more liberal recourse to inferences of fact and circumstantial evidence[114] In that case, the Court concluded that the laying of the minefield in the channel could not have been accomplished without the knowledge of the Albanian Government. Albania was held responsible because it either knew or should have known about the activity.

88 These considerations – degree of risk of harm and knowledge/should have known - have long been the two elements used to judge the diligence due in a particular case. They have particular resonance in the context of the risks stemming from global climate change. There is no longer any doubt that the earth is facing catastrophic events stemming from human-induced climate change. In these circumstances, a State cannot be considered to have acted diligently when the State has knowingly refused to take any measures. In the case of *Wena v. Egypt*[54], the Tribunal found that the failure by the State to take action against those responsible for the forceful seizure of Wena's property was a breach of the required protection and security.[55] This conforms to due diligence as understood in international environmental law, to the extent that a State has to act diligently in the event of foreseeable harm.[56]

89 Advances in scientific understanding and technological capabilities can increase the degree of care required over time. The extent of risk or advances in scientific knowledge that allow us to perceive more accurately the extent of risk, will also influence the degree of diligence required.[115] This can also be seen in the relationship between the principles of precaution and prevention. States should take a precautionary approach to "threats of serious or irreversible damage."[116] They must take 'cost-effective measures' in light of those threats and "must not disregard those risks."[117] As a tool to manage risk in conditions of incertitude, due diligence appears as a

112 Helge E. Zeitler, 'The Guarantee of "Full Protection and Security" in Investment Treaties Regarding Harm Caused by Private Actors', 3 Stockholm International Arbitration Review (2005) 1, p. 14.

113 Corfu Channel Case, supra n 60 at para. 116.

114 Ibid.

115 Ibid, para 117; Pisillo-Mazzeschi 1992, above n 103, p. 44: First Report, above n 25, p. 29; ILC Draft Articles on Prevention of Transboundary Harm, commentary to article 3, para 11.

116 Rio Declaration, above n 61, principle 15.

117 Seabed Mining Advisory Opinion (2011) 50 ILM 458, para 131.

companion of the precautionary principle, in that it demands States to establish laws and procedures to avert foreseeable disasters.

90 If science shows that the risk of damage is not merely theoretical but proven, the principle of prevention applies; where there is a likelihood of significant harm, a State that permits an operation to proceed is acting wrongfully.[118] As scientific understanding advances over time, distinct shifts in the due diligence standard can arise; thus, if the damage decreases in severity from "serious or irreversible" (precautionary approach) to (merely) "significant"'(principle of prevention) the shift will occur. Secondly, while States should only give due regard to uncertain risks and are encouraged to take 'cost-effective measures' to reduce the risk (the precautionary approach), a known risk or likelihood of negative impact triggers a State's duty to exercise a much higher degree of diligence to prevent the damage (the principle of prevention). Physical changes beyond a State's control, such as an earthquake, a flood or volcano, may also render an activity more hazardous and hence increase the degree of diligence required of a State if it is aware or it should have been of the possibility of such hazards occurring. [119]

91 In sum, due diligence duties can increase or decrease through changes in customary international law. The Prevention Articles provide "an authoritative statement on the scope of a State's international legal obligation to prevent a risk of transboundary harm."[120] According to the Commentaries, this obligation is one of "due diligence" that requires the State to "exert its best possible efforts to minimize the risk."[121] The standard of due diligence is that which is generally considered to be appropriate and proportional to the degree of risk of harm in the particular instance.[122] The State is expected to put in place administrative, financial and monitoring mechanisms,[123] require its prior authorization for climate-risking activities, and play an active role in regulating them.[124]

92 Natural or juridical persons at risk of harm must be provided access to justice in the courts of the State, unless there is agreement on alternate means of redress.[125] The provision of access to remedy may itself be part of the due diligence obligation to prevent or minimize the risk of

118 Pulp Mills [2010] ICJ Rep 14, para. 101.

119 ILC Draft Articles on Prevention of Transboundary Harm, ILC Draft Articles on Prevention of Transboundary Harm from Hazardous Activities 2001, above n 32, commentary to article 1, para 15.

120 James Crawford, Brownlie's Principles of Public International Law (8 ed, 2012) pp. 356-7.

121 Ibid, Commentary to article 3, pp. 391-396.

122 Ibid, Commentary to article 3 at para. 11.

123 Ibid, Commentary to article 3 at para. 15.

124 Ibid, articles 6 and 7.

125 Ibid, article 15 and Commentaries.

harm, at least to the extent that access to courts could be used to seek measures designed to prevent harm.

93 Tribunals have also borne in mind that the effects on human rights due to climate change rights may be felt with greater intensity by persons or groups already in vulnerable situations;[126] hence, based on "international human rights law, States are legally obliged to confront these vulnerabilities based on the principle of equality and non-discrimination."[127] Various human rights bodies have recognized that indigenous peoples,[128] children[129,] people living in extreme poverty, minorities, and people with disabilities, among others, are groups that are especially vulnerable to environmental damage, and have also recognized the differentiated impact that it has on women.[130] In addition, the groups that are especially vulnerable to environmental

126 Human Rights Council, Resolution 16/11, "Human rights and the environment," 12 April 2011, UN Doc. A/HRC/RES/16/11, preamble, and Human Rights Council, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, February 1, 2016, UN Doc. A/HRC/31/52, para. 81.

127 Human Rights Council, Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights, January 15, 2009, UN Doc. A/HRC/10/61, para. 42, and Human Rights Council, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, February 1, 2016, UN Doc. A/HRC/31/52, para. 81.

128 Indigenous peoples are particularly vulnerable to environmental degradation, not only due to their special spiritual and cultural relationship with their ancestral territories, but also due to their economic dependence on environmental resources and because they "often live in marginal lands and fragile ecosystems which are particularly sensitive to alterations in the physical environment." Human Rights Council, Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights, January 15, 2009, UN Doc. A/HRC/10/61, para. 51. See also: Human Rights Council, Preliminary report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox, December 24, 2012, UN Doc. A/HRC/22/43, para. 45, and Human Rights Council, Mapping report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox, of December 30, 2013, UN Doc. A/HRC/25/53, paras. 76 to 78.

129 Environmental degradation exacerbates health risks and undermines support structures that protect children from harm. This is particularly evident in the case of children in the developing world. "For example, extreme weather events and increased water stress already constitute leading causes of malnutrition and infant and child mortality and morbidity. Likewise, increased stress on livelihoods will make it more difficult for children to attend school. Girls will be particularly affected as traditional household chores, such as collecting firewood and water, require more time and energy when supplies are scarce. Moreover, like women, children have a higher mortality rate as a result of weather-related disasters." Human Rights Council, Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights, January 15, 2009, UN Doc. A/HRC/10/61, para. 48. See also: Human Rights Council, Mapping report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox, of December 30, 2013, UN Doc. A/HRC/25/53, paras. 73 to 75.

130 According to the United Nations High Commissioner for Human Rights, "[w]omen are especially exposed to climate change-related risks due to existing gender discrimination, inequality and inhibiting gender roles. It is established that women, particularly elderly women and girls, are affected more severely and are more at risk during all phases of weather-related disasters […]. The death rate of women is markedly higher than that of men during natural disasters (often linked to reasons such as: women are more likely to be looking after children, to be wearing clothes which inhibit movement and are less likely to be able to swim). […] Vulnerability is exacerbated by factors such as unequal rights to property, exclusion from decision-making and difficulties in accessing information and financial services." Human Rights Council, Report of the Office of the United Nations High Commissioner for Human Rights

degradation include communities that, essentially, depend economically or for their survival on environmental resources from the marine environment, forested areas and river basins, or, run a special risk of being affected owing to their geographical location, such as coastal and small island communities. In many cases, the special vulnerability of these groups has led to their relocation or internal displacement.[131]

94 In cases of transboundary damage, the exercise of jurisdiction by a State of origin is based on the understanding that it is the State in whose territory or under whose jurisdiction the activities were carried out that has the effective control over them and is in a position to prevent them from causing transboundary harm that impacts the enjoyment of human rights of persons outside its territory. The potential victims of the negative consequences of such activities are under the jurisdiction of the State of origin for the purposes of the possible responsibility of that State for failing to comply with its obligation to prevent transboundary damage.

95 It can be concluded that the obligation to prevent transboundary environmental damage or harm is an obligation recognized by international environmental law, under which States may be held responsible for any significant damage caused to persons outside their borders by activities originating in their territory or under their effective control or authority. This obligation does not depend on the lawful or unlawful nature of the conduct that generates the damage, because States must provide prompt, adequate and effective redress to the persons and States that are victims of transboundary harm resulting from activities carried out in their territory or under their jurisdiction, even if the action which caused this damage is not prohibited by international

on the relationship between climate change and human rights, January 15, 2009, UN Doc. A/HRC/10/61, para. 45. See also: Human Rights Council, Mapping report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox, of December 30, 2013, UN Doc. A/HRC/25/53, paras. 70 to 72.

131 The Representative of the Secretary-General on the human rights of internally displaced persons underlined five situations related to climate change and environmental degradation that triggered displacement: (a) increased hydro-meteorological disasters such as hurricanes, flooding or mudslides; (b) gradual environmental degradation and slow onset disasters, such as desertification, sinking of coastal zones, or increased salinization of groundwater and soil; (c) the "sinking" of small island States; (d) forced relocation of people from high-risk zones; and (e) violence and armed conflict triggered by the increasing scarcity of necessary resources such as water or inhabitable land. Cf. Human Rights Council, Report of the Representative of the Secretary-General on the human rights of internally displaced persons, Walter Kälin, February 9, 2009, UN Doc. A/HRC/10/13, para. 22, and Human Rights Council, Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights, January 15, 2009, UN Doc. A/HRC/10/61, paras. 51 and 56. of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox, 44; Human Rights Council, Mapping report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox, of December 30, 2013, UN Doc. A/HRC/25/53, paras. 69 to 78. See also, Report of the Independent Expert on the question of human rights and extreme poverty, UN Doc. A/65/259, August 9, 2010, paras. 17 and 37 to 42; Human Rights Council, Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights, January 15, 2009, UN Doc. A/HRC/10/61, paras. 42 to 45, and Report of the Representative of the Secretary-General on the human rights of internally displaced persons, Walter Kälin, February 9, 2009, UN Doc. A/HRC/10/13, para. 22.

law.[132] That said, there must always be a causal link between the damage caused and the act or omission of the State of origin in relation to activities in its territory or under its jurisdiction or control.[133]

96 This Court, in OC/23 was asked specifically about the environmental obligations of prevention, precaution, mitigation of the damage, and cooperation. It noted that, to ensure compliance with these obligations, international human rights law imposes certain procedural obligations on States in relation to environmental protection, such as access to information, public participation, and access to justice. The right to life, in particular, requires States to take all appropriate measures to protect and preserve the right to life (positive obligation) of all.[134] States also must take the necessary measures to ensure a decent life, which includes adopting positive measure to prevent the violation of this right. Among the conditions required for a decent life, the Court has referred to access to, and the quality of, water, food and health, and the content has been defined in the Court's case law,[135] indicating that these conditions have a significant impact on the right to a decent existence and the basic conditions for the exercise of other human rights.[136] The Court has also included environmental protection as a condition for a decent life.[137]

97 In addition, access to food and water may be affected if pollution limits their availability in sufficient amounts or affects their quality.[138] Access to water includes access "for personal and domestic use," and this includes "consumption, sanitation, laundry, food preparation, and personal and domestic hygiene," and for some individuals and groups it will also include

132 Cf. Articles on Prevention of transboundary harm from hazardous activities, adopted by the International Law Commission in 2001 and annexed to UN General Assembly Resolution 62/68 of December 6, 2007, UN Doc. A/RES/62/68.

133 Similarly, see: International Tribunal for the Law of the Sea (ITLS), Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the area. Advisory Opinion of February 1, 2011, paras. 181 to 184, and IACHR, Franklin Guillermo Aisalla Molina (Ecuador v. Colombia), Admissibility Report No. 112/10 .

134 Cf. Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Merits, supra, para. 144, and Case of Ortiz Hernández et al. v. Venezuela, supra, para. 100

135 Cf. Case of the Yakye Axa Indigenous Community v. Paraguay, supra, para. 167, Case of the Sawhoyamaxa Indigenous Community v. Paraguay, supra, paras. 156 to 178, and Case of the Xákmok Kásek Indigenous Community v. Paraguay. Merits, reparations and costs. Judgment August 24, 2010. Series C No. 214, paras. 195 to 213.

136 Cf. Case of the Yakye Axa Indigenous Community v. Paraguay, supra, para. 163, and Case of Chinchilla Sandoval et al. v. Guatemala, supra, para. 168.

137 Cf. Case of the Yakye Axa Indigenous Community v. Paraguay, supra, para. 163, Case of the Xákmok Kásek Indigenous Community v. Paraguay, supra, para. 187, and Case of the Kaliña and Lokono Peoples v. Suriname, supra, para. 172.

138 Cf. Case of the Saramaka People v. Suriname. Preliminary objections, merits, reparations and costs, supra, para. 126; Case of the Xákmok Kásek Indigenous Community v. Paraguay, supra, paras. 195 and 198; ESCR Committee, General Comment No. 12: The right to adequate food (art. 11 of the International Covenant on Economic, Social and Cultural Rights), May 12, 1999, UN Doc. E/C.12/1999/5, paras. 7 and 8, and ESCR Committee, General Comment No. 15: The right to water (articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), UN Doc. E/C.12/2002/11, January 20, 2003, paras. 10 and 12.

"additional water resources based on health, climate and working conditions."[139] Access to water, food and health are obligations to be realized progressively; however, States have immediate obligations, such as ensuring these rights without discrimination and taking measures to achieve their full realization.[140]

98 Furthermore, in the specific case of indigenous and tribal communities, there is an obligation to protect their ancestral territories owing to the relationship that such lands have with their cultural identity, a fundamental human right of a collective nature that must be respected in a multicultural, pluralist and democratic society.[141]

99 The obligation to ensure rights encompasses the duty to prevent third parties from violating the protected rights in the private sphere.[142] This duty of prevention includes all those measures of a legal, political, administrative and cultural nature that promote the safeguard of human rights and ensure that eventual violations of those rights are examined and dealt with as wrongful acts that, as such, are susceptible to result in punishment for those who commit them, together with the obligation to compensate the victims for the negative consequences.[143] Furthermore, it is plain that the obligation to prevent is an obligation of means or behavior and non-compliance is not proved by the mere fact that a right has been violated.[144]

100 The *erga omnes* nature of the treaty-based obligation for States to ensure rights does not entail unlimited State responsibility, the particular circumstances of the case must be examined and whether the obligation of due diligence has been met.[145] In the context of environmental protection, the State's international responsibility derived from the conduct of third parties may result from a failure to regulate, supervise or monitor the activities of those third parties that caused environmental damage.

101 The State's positive obligations must be interpreted in a way that does not impose an impossible or disproportionate burden on the authorities. For this positive obligation to arise, it must be

139 ESCR Committee, General Comment No. 15: The right to water (articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), UN Doc. E/C.12/2002/11, January 20, 2003, para. 12. See also, Case of the Xákmok Kásek Indigenous Community v. Paraguay, supra, para. 195.

140 Cf. ESCR Committee, General Comment No. 15: The right to water (articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), UN Doc. E/C.12/2002/11, January 20, 2003, para. 21.

141 *Mutatis mutandi*, Case of the Kichwa Indigenous People of Sarayaku v. Ecuador, supra, para. 217, and Case of the Río Negro Massacres v. Guatemala. Preliminary objection, merits, reparations and costs. Judgment of September 4, 2012. Series C No. 250, para. 160.

142 Cf. Case of the "Mapiripán Massacre" v. Colombia, supra, para. 111, and Case of Gonzales Lluy et al. v. Ecuador, supra, para. 170.

143 Cf. Case of Velásquez Rodríguez v. Honduras. Merits, supra, para. 175; Case of González et al. ("Cotton Field") v. Mexico, supra, para. 252, and Case of the Kaliña and Lokono Peoples v. Suriname, supra, paras. 221 and 222.

144 Cf. Case of Velásquez Rodríguez v. Honduras. Merits, supra, para. 166, and Case of I.V. v. Bolivia, supra, para. 208.

145 Cf. Case of the "Mapiripán Massacre" v. Colombia, supra, para. 123, and Case of Gonzales Lluy et al. v. Ecuador, supra, para. 170.

established that: (i) at the time of the facts the authorities knew or should have known of the existence of a situation of real and imminent danger for the lives of specific group of individuals and failed to take the necessary measures within their area of responsibility that could reasonably be expected to prevent or to avoid that danger, and (ii) that there was a causal link between the impact on life and integrity and the significant damage caused to the environment. This will certainly be the case in the context of the climate change emergency.

102 States are bound to comply with their obligations under the American Convention with due diligence. The duty of a State to act with due diligence is a concept whose meaning has been determined by international law and has been used in diverse fields, including international humanitarian law,[146] the law of the sea,[147] and international environmental law.[148] In international human rights law, the duty to act with due diligence has been examined in relation to economic, social and cultural rights, regarding which States commit to take "all appropriate measures" to achieve, progressively, the full effectiveness of the corresponding rights.[149] In addition, as this Court has emphasized, the duty to act with due diligence also corresponds, in general, to the State obligation to ensure the free and full exercise of the rights recognized in the American Convention to all persons subject to their jurisdiction, according to which States must take all appropriate measures to protect and preserve the rights recognized in the Convention, and to organize all the structures through which public authority is exercised so that they are able to ensure, legally, the free and full exercise of human rights[150]

103 Most environmental obligations are based on this duty of due diligence. An adequate protection of the environment is essential for human well-being, and for the enjoyment of numerous human rights, particularly the rights to life, personal integrity and health, as well as the right to a healthy environment itself.

146 Cf. Article 1 common to the 1949 Geneva Conventions, and ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of February 26, 2007, para. 430.

147 Cf. ITLOS, Request for an advisory opinion submitted by the Subregional Fisheries Commission (SRFC). Advisory Opinion of April 22015, paras. 128 and 129, and ITLOS, Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area. Advisory Opinion of February 1, 2011, paras. 110 to 120.

148 See, inter alia, Stockholm Declaration, adopted on June 16, 1972, Principle 7; ICJ, Certain activities carried out by Nicaragua in the border area (Costa Rica v. Nicaragua) and Construction of a road in Costa Rica along the

149 Cf. ESCR Committee, General Comment No. 3: The nature of States Parties' obligations (art. 2, para. 1, of the Covenant) UN Doc. E/1991/23, December 14, 1990, paras. 2 and 3, and ESCR Committee, General Comment No. 15: The right to water (articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), UN Doc. E/C.12/2002/11, January 20, 2003, paras. 40 to 44.

150 See, inter alia, Case of Velásquez Rodríguez v. Honduras. Merits, supra, para. 166; Case of Gonzales Lluy et al. v. Ecuador, supra, para. 168, and Case of Ortiz Hernández et al. v. Venezuela, supra, paras. 100 and 101.

104 Under environmental law, the principle of prevention means that States have the "responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."[151] This principle was explicitly established in the Stockholm and Rio Declarations on the environment and is linked to the international obligation to exercise due diligence so as not to cause or permit damage to other States.

105 The principle of prevention of environmental damage forms part of international customary law.[152] This protection encompasses the land, water and atmosphere, as well as flora and fauna. The principle of prevention is applicable with regard to activities which take place in a State's territory, or in any area under its jurisdiction, that cause damage to the environment of another State,[153] or in relation to damage that may occur in areas that are not part of the territory of any specific State,[154] such as on the high seas.[155]

106 The Inter-American Court has concluded that States must take measures to prevent significant harm or damage to the environment, within or outside their territory. Any harm to the environment that may involve a violation of the rights to life and to personal integrity must be considered significant harm. Based on the scientific consensus, the existence of significant harm in these terms is concrete and evident in the case of the climate emergency. Moreover, the measures to meet this standard may change over time, in light of new scientific or technological knowledge.[156] Moreover, the existence of this obligation does not depend on the level of development; in other words, the obligation of prevention applies equally to both developed and developing States.[157] The specific measures States must take include the obligations to: (i) regulate; (ii) supervise and monitor; (iii) require and approve environmental impact assessments; (iv) establish contingency plans, and (v) mitigate, when environmental damage has occurred. The

151 Rio Declaration on Environment and Development, United Nations Conference on Environment and Development, Río de Janeiro, June 3 to 14 1992, UN Doc. A/CONF.151/26/Rev.1 (Vol. 1), Principle 2, and Stockholm Declaration on the Human Environment, United Nations Conference on the Human Environment, Stockholm, June 5 to 16, 1972, UN Doc. A/CONF.48/14/Rev.1, Principle 21.

152 The customary nature of the principle of prevention has been recognized by the International Court of Justice. Cf. ICJ, Legality of the threat or use of nuclear weapons, Advisory opinion, July 8, 1996, para. 29; ICJ, Case concerning the Gabčikovo-Nagymaros Project (Hungary v. Slovakia). Judgment of September 25, 1997, para.

153 Cf. ICJ, Case of Pulp Mills on the River Uruguay (Argentina v. Uruguay). Judgment of April 20, 2010, para. 101.

154 Cf. ICJ, Legality of the threat or use of nuclear weapons. Advisory Opinion of July 8, 1996, para. 29.

155 Cf. UNCLOS, arts. 116 to 118 and 192.

156 Cf. ITLOS, Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area. Advisory Opinion of February 1, 2011, para. 117.

157 Cf. ITLOS, Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area. Advisory Opinion of February 1, 2011, para. 158.

State obligation to adapt domestic laws to the provisions of the Convention is not limited to the constitutional or legislative text, but must extend to all legal provisions of a regulatory nature and result in effective practical implementation.[158]

107 Specifically, with regard to environmental impact assessments, this regulation must be clear as regards: (i) the proposed activities and the impact that must be assessed (areas and aspects to be covered); (ii) the process for making an environmental impact assessment (requirements and procedures); (iii) the responsibilities and duties of project proponents, competent authorities and decision-making bodies (responsibilities and duties); (iv) how the environmental impact assessment process will be used in approval of the proposed actions (relationship to decision-making), and (v) the steps and measures that are to be taken in the event that due procedure is not followed in carrying out the environmental impact assessment or implementing the terms and conditions of approval (compliance and implementation).[159]

108 States also have the duty to establish appropriate mechanisms to supervise and monitor certain activities in order to guarantee human rights, protecting them from the actions of public entities and private individuals.[160] Specifically in relation to the environment, in the *case of the Kaliña and Lokono Peoples*, the Court indicated that the obligation to protect the nature reserve areas and the territories of the indigenous communities entailed a duty of monitoring and oversight.[161] In the context of inter-State relations, the ICJ has indicated that States must ensure compliance and implementation of their environmental protection laws and regulations, as well as exercise some form of administrative control over public and private agents, for example, by monitoring their activities.[162] That Court has also indicated that the control that a State must exercise does not

158 Cf. Case of Vélez Loor v. Panama. Preliminary objections, merits, reparations and costs. Judgment of November 23, 2010. Series C No. 218, para. 286, and Advisory Opinion OC-21/14, supra, para. 65.

159 Cf. UNEP, Environmental Impact Assessment and Strategic Environmental Assessment: Towards an Integrated Approach, 2004, p. 18. Available at: https://unep.ch/etu/publications/textONUBr.pdf. See also, UNEP, Resolution 14/25 of June 17, 1987, adopting the Goals and Principles of Environmental Impact Assessment, UN Doc. UNEP/WG.152/4 Annex, Principle 2. Regarding these principles, the International Court of Justice has indicated that although they are not binding, States should take them into account as guidelines issued by an international organ. ICJ, Case of Pulp Mills on the River Uruguay (Argentina v. Uruguay). Judgment of April 20, 2010, para. 205.

160 See, inter alia, Case of Ximenes Lopes v. Brazil, supra, paras. 89 and 90; Case of the Kichwa Indigenous People of Sarayaku v. Ecuador, supra, para. 167; Case of I.V. v. Bolivia, supra, paras. 154 and 208.

161 Cf. Case of the Kaliña and Lokono Peoples v. Suriname, supra, paras. 221 and 222.

162 Cf. ICJ, Case of Pulp Mills on the River Uruguay (Argentina v. Uruguay). Judgment of April 20, 2010, para. 197. See also, UNCLOS, arts. 204 and 213

end with the environmental impact assessment; rather, States must continuously monitor the environmental impact of a project or activity.[163]

109 The Inter-American Court has considered that States have an obligation to supervise and monitor activities within their jurisdiction that may cause significant damage to the environment. Accordingly, they must develop and implement adequate independent monitoring and accountability mechanisms.[164] These mechanisms must not only include preventive measures, but also appropriate measures to investigate, punish and redress possible abuse through effective policies, regulations and adjudication.[165] The level of monitoring and oversight necessary will depend on the level of risk that the activities or conduct involves.

110 The obligation to make an environmental impact assessment exists in relation to any activity that may cause significant environmental damage. The Rio Declaration established that "[e]nvironmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority."[166] Similarly, the ICJ has said that due diligence involves making an environmental impact assessment when there is a risk that a proposed activity may have a significant adverse transboundary impact and, particularly, when it involves shared

163 Cf. ICJ, Case of Pulp Mills on the River Uruguay (Argentina v. Uruguay). Judgment of April 20, 2010, para. 205, and ICJ, Certain activities carried out by Nicaragua in the border area (Costa Rica v. Nicaragua) and Construction of a road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica). Judgment of December 16, 2015, para. 161.

164 Cf. UN, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework. Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, UN Doc. A/HRC/17/31, March 21, 2011, Principle 5. The United Nations Human Rights Council adopted these principles and set up a working group to promote their dissemination and effective application, among other matters. Cf. Human Rights Council, Resolution 17/4, UN Doc. A/HRC/RES/17/4, July 6, 2011. Similarly, the OAS General Assembly resolved to promote the application of the said principles among OAS Member States. Cf. OAS General Assembly, Resolution AG/RES. 2840 (XLIV-O/14), "Promotion and protection of human rights in business," adopted at the second plenary session held on June 4, 2014.

165 Cf. Case of the Kaliña and Lokono Peoples v. Suriname, supra, para. 224.

166 Rio Declaration on Environment and Development, United Nations Conference on Environment and Development, Río de Janeiro, June 3 to 14 1992, UN Doc. A/CONF.151/26/Rev.1 (Vol. 1), Principle 17. Similarly, see, inter alia, UNCLOS, art. 204; Convention on Biodiversity entered into force on December 29, 1993, art. 14; United Nations Framework Convention on Climate Change, entered into force on March 21, 1994, art. 4(1)(f); Convention for the Protection and Development of the Marine Environment in the Wider Caribbean Region (Cartagena Convention), entered into force on October 11, 1986, art. 12.2; Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Western Indian Ocean (Nairobi Convention), entered into force on May 30, 1996, art. 14.2; Protocol to the Antarctic Treaty on Environmental Protection309 (Madrid Protocol), entered into force on January 14, 1998, art. 8; Convention for Cooperation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region.

resources.[167] This obligation rests with the State that plans to implement the activity or under whose jurisdiction it will be implemented.[168] Thus, the ICJ has explained that, before initiating any activity with the potential to affect the environment, States must determine whether there is a risk of significant transboundary harm and, if so, make an environmental impact assessment.[169]

111 The Inter-American Court has already indicated that environmental impact assessments must be made pursuant to the relevant international standards and best practice and has indicated certain conditions that environmental impact assessments must meet.[170] These are: a) the assessment must be made before the activity is carried out; b) it must be carried out by independent entities under the State's supervision; c) it must include the cumulative impact; d) it must include the participation of interested parties; and e) it must respect the traditions and cultures of indigenous peoples. As far as the content is concerned, the Court has said that it will depend on the specific circumstances of each case and the level of risk of the proposed activity.[171] The State should also have a contingency plan and must mitigate any damage that occurs.

112 In environmental matters, the precautionary principle refers to the measures that must be taken in cases where there is no scientific certainty about the impact that an activity could have on the environment. In this regard, the Rio Declaration establishes that in order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific

167 Cf. ICJ, Case of Pulp Mills on the River Uruguay (Argentina v. Uruguay). Judgment of April 20, 2010, para. 204, and ICJ, Certain activities carried out by Nicaragua in the border area (Costa Rica v. Nicaragua) and Construction of a road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica). Judgment of December 16, 2015, para. 104. Similarly, ITLOS, Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area. Advisory Opinion of February 1, 2011, para. 145.

168 Cf. ICJ, Certain activities carried out by Nicaragua in the border area (Costa Rica v. Nicaragua) and Construction of a road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica). Judgment of December 16, 2015, para. 153.

169 Cf. ICJ, Certain activities carried out by Nicaragua in the border area (Costa Rica v. Nicaragua) and Construction of a road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica). Judgment of December 16, 2015, para. 104.

170 Cf. Case of the Saramaka People v. Suriname. Interpretation of the judgment on preliminary objections, merits, reparations and costs, supra, para. 41; Case of the Triunfo de la Cruz Garifuna Community and its members v. Honduras, supra, para. 180, and Case of the Kaliña and Lokono Peoples v. Suriname, supra, para. 216.

171 See, inter alia, Case of the Yakye Axa Indigenous Community v. Paraguay, supra, paras. 124, 135 and 137; Case of the Kuna Indigenous Peoples of Madungandí and the Emberá Indigenous Peoples of Bayano and their members v. Panama, supra, para. 112; Case of the Punta Piedra Garifuna Community and its members v. Honduras. Preliminary objections, merits, reparations and costs. Judgment of October 8, 2015. Series C No. 304, para. 167, and Case of the Kaliña and Lokono Peoples v. Suriname, supra, para. 164.

certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.[172]

113 ITLOS has indicated that a trend has been initiated towards making the precautionary approach part of customary international law. ITLOS has also indicated that the precautionary approach is an integral part of the general obligation of due diligence which obliges States of origin to take all appropriate measures to prevent any damage that might result from their activities. "This obligation applies in situations where scientific evidence concerning the scope and potential negative impact of the activity in question is insufficient, but where there are plausible indications of potential risks."[173]

114 Therefore, the Court understands that States must act in keeping with the precautionary principle in order to protect the rights to life and to personal integrity in cases where there are plausible indications that an activity could result in severe and irreversible damage to the environment, even in the absence of scientific certainty. Consequently, States must act with due caution to prevent possible damage. Therefore, even in the absence of scientific certainty, they must take "effective"[425] measures to prevent severe or irreversible damage.[174]

115 The duty to cooperate is also an important part of due diligence, as is required by many environmental and human rights agreements. International law has defined the following specific duties that are required of States in relation to environmental matters in order to comply with this obligation: (1) the duty to notify, and (2) the duty to consult and negotiate with potentially affected States. as well as (3) the possibility of sharing information established in numerous international environmental instruments. The Court has concluded that States have the obligation to notify other potentially affected States when they become aware that an activity planned within their jurisdiction could result in a risk of significant transboundary harm. This notice must be timely, before the planned activity is carried out, and must include all relevant information. This duty arises when the State of origin becomes aware of the potential risk, either before or as a result of the environmental impact assessment. Carrying out environmental impact

172 Rio Declaration on Environment and Development, United Nations Conference on Environment and Development, Río de Janeiro, June 3 to 14 1992, UN Doc. A/CONF.151/26/Rev.1 (Vol. 1), Principle 15.

173 Cf. ITLOS, Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area. Advisory Opinion of February 1, 2011, para. 131.

174 The content of the precautionary principle varies depending on the source. However, according to the most usual wording in the most relevant international instruments and the domestic laws of the region, the precautionary principle is applicable when there is a danger of severe or irreversible damage, but where no absolute scientific certainty exists. Thus, it requires a higher level of damage than the standard applicable to the obligation of prevention, which requires a risk of significant damage (supra paras. 134 to 140). Cf. Rio Declaration on Environment and Development, United Nations Conference on Environment and Development, Río de Janeiro, June 3 to 14 1992, UN Doc. A/CONF.151/26/Rev.1 (Vol. 1), Principle 15, and United Nations Framework Convention on Climate Change, entered into force on March 21, 1994, article 3.3

assessments requires time and resources, so in order to ensure that potentially affected States are able to take the appropriate steps, States of origin are required to give this notification as soon as possible, without prejudice to the information transmitted being completed with the results of the environmental impact assessment when this has been concluded. In addition, there is a duty of notification in cases of environmental emergencies, in which case States must notify potentially affected States, without delay, of the environmental disasters originated within their jurisdiction.

116 As far as human rights are concerned, in the specific sphere of environmental law, numerous international instruments establish the duty of the State to prepare and disseminate, distribute or publish,[175] in some cases periodically, updated information on the situation of the environment in general or on the specific area covered by the instrument in question. The Court understands that in the case of activities that could affect other rights, the obligation of active transparency encompasses the duty of States to publish, *ex officio*, relevant and necessary information on the environment in order to ensure the human rights under the Convention. This includes information on environmental quality, environmental impact on health and the factors that influence this, and also information on legislation and policies, as well as assistance on how to obtain such information. The Court also notes that this obligation is particularly important in cases of environmental emergencies, such as the current climate emergency, that require relevant and necessary information to be disseminated immediately and without delay to comply with the duty of prevention. Judiciaries may recognize that the information on methane emissions and deforestation is sufficient to require injunctive relief.

117 States have the obligation to respect and ensure access to information concerning possible environmental impacts. This obligation must be ensured to every person subject to their jurisdiction, in an accessible, effective and timely manner, without the person requesting the information having to prove a specific interest. Furthermore, in the context of environmental protection, this obligation involves both providing mechanisms and procedures for individuals

167 See, for example, UNCLOS, art. 244(1); Guidelines for Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters (Bali Guidelines) adopted in Bali on February 26, 2010, by the UNEP Governing Council, Decision SS.XI/5, part A, Guideline 5; Inter-American Strategy for the Promotion of Public Participation in Decision-making on Sustainable Development, adopted in Washington in April 2000 by the Inter-American Committee on Sustainable Development, OEA/Ser.W/II.5, CIDI/doc. 25/00 (April 20, 2000), pp. 19 and 20; Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention), entered into force on October 30, 2001, art. 5; Convention for the strengthening of the Inter-American Tropical Tuna Commission established by the 1949 Convention between the United States of America and the Republic of Costa Rica (Antigua Convention), entered into force on August 27, 2010, art. XVI.1.a); North American Agreement on Environmental Cooperation, entered into force on January 1, 1994, art. 4, and Articles on prevention of transboundary harm from hazardous activities, adopted by the International Law Commission in 2001 and annexed to the United Nations General Assembly Resolution 62/68 of December 6, 2007, UN Doc. A/RES/62/68Doc. A/RES/62/68, art. 13.

to request information, and also the active compilation and dissemination of information by the State. This right is not absolute, and therefore admits restrictions, provided these have been established previously by law, respond to a purpose permitted by the American Convention, and are necessary and proportionate to respond to objectives of general interest in a democratic society.

118 The right of the public to take part in the management of public affairs is established in Article 23(1)(a) of the American Convention.[514] In the context of indigenous communities, the Court has determined that the State must ensure the rights to consultation and to participation at all stages of the planning and implementation of a project or measure that could have an impact on the territory of an indigenous or tribal community, or on other rights that are essential for their survival as a people[176] in keeping with their customs and traditions.[177] This means that, in addition to receiving and providing information, the State must make sure that members of the community are aware of the possible risks, including health and environmental risks, so that they can provide a voluntary and informed opinion about any project that could have an impact on their territory within the consultation process.[178] The State must, therefore, create sustained, effective and trustworthy channels for dialogue with the indigenous peoples, through their representative institutions, in the consultation and participation procedures.[179]

119 The State obligation to ensure the participation of persons subject to their jurisdiction in decision-making and policies that could affect the environment, without discrimination and in a fair, significant and transparent manner, is derived from the right to participate in public affairs and, to this end, States must have previously ensured access to the necessary information.[180]

176 Cf. Case of the Kichwa Indigenous People of Sarayaku v. Ecuador, supra, para. 167, and Case of the Triunfo de la Cruz Garifuna Community and its members v. Honduras, supra, para. 215.

177 Cf. Case of the Saramaka People v. Suriname. Preliminary objections, merits, reparations and costs, supra, para. 133, and Case of the Kaliña and Lokono Peoples v. Suriname, supra, para. 214.

178 Cf. Case of the Saramaka People v. Suriname. Interpretation of the judgment on preliminary objections, merits, reparations and costs, supra, para. 40, and Case of the Kaliña and Lokono Peoples v. Suriname, supra, para. 214.

179 Cf. Case of the Kichwa Indigenous People of Sarayaku v. Ecuador, supra, para. 166, and Case of the Triunfo de la Cruz Garifuna Community and its members v. Honduras, supra, para. 159.

180 See, for example, in the European sphere, article 1 of the Aarhus Convention explicitly establishes "the rights of access to information, public participation in decision-making, and access to justice in environmental matters." Regarding public participation, article 7 establishes: "[e]ach Party shall make appropriate practical and/or other provisions for the public to participate during the preparation of plans and programmes relating to the environment within a transparent and fair framework, having provided the necessary information to the public." Cf. Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention), entered into force on October 30, 2001, arts. 1 and 7.

120 Finally, access to justice is required. The Court has indicated that access to justice is a peremptory norm of international law.[181] In general, the Court has maintained that States Parties to the American Convention are obliged to provide effective judicial remedies to the victims of human rights violations (Article 25), remedies that must be substantiated in accordance with the rules of due process of law (Article 8(1)), all within the general obligation of these States to ensure the free and full exercise of the rights recognized in the Convention to all persons subject to their jurisdiction (Article 1(1)).[182]

121 In the context of environmental protection, access to justice permits the individual to ensure that environmental standards are enforced and provides a means of redressing any human rights violations that may result from failure to comply with environmental standards, and includes remedies and reparation. This also implies that access to justice guarantees the full realization of the rights to public participation and access to information, through the corresponding judicial mechanisms, done in a timely manner.

181 Cf. Case of Goiburú et al. v. Paraguay. Merits, reparations and costs. Judgment of September 11, 2006. Series C No. 153, para. 131, and Case of La Cantuta v. Peru. Merits, reparations and costs. Judgment of November 29, 2006. Series C No. 162, para. 160

182 Cf. Case of Velásquez Rodríguez v. Honduras. Preliminary objections. Judgment of June 26, 1987. Series C No. 1, para. 91, and Case of Favela Nova Brasília v. Brazil. Preliminary objections, merits, reparations and costs. Judgment of February 16, 2017. Series C No. 333, para. 174.