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STATE OBLIGATIONS TO PROTECT THE CLIMATE SYSTEM

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Abstract

As the global climate continues to increase at an unnatural and unprecedented rate, nation States that have contributed the least to the crisis are experiencing the greatest and most immediate harm. Small developing island states like the Maldives, Vanuatu, and many others face extinction of their homelands as rising sea levels resulting from human dependence on fossil fuels continue to erode their coastlines until their territories are submerged entirely. The dire situation of these States highlights the injustice of mass carbon-producing countries—who are the most capable of adapting to the effects of climate change—not being held responsible for their contribution to the impending extinction of small island States. Fortunately, the United Nations General Assembly is formally seeking an advisory opinion from the International Court of Justice for clarification of State obligations to protect the climate system under international law. This Article undergoes an analysis of international environmental law, customary law, and human rights law to conclude that States, through integration of these areas of international law, have an obligation to protect the climate system to the extent that they cannot harm the human rights and environmental interests of other states.

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Introduction

Surrounded by fish and bleached-white coral reefs, President Mohamed Nasheed of the Republic of the Maldives sat underwater with his cabinet members to discuss global carbon emissions.¹ Dressed in scuba gear, the President and his cabinet convened in an underwater office and used hand signals to communicate with each other as a demonstration of rising sea levels as a consequence of climate change.² The meeting was a dramatic (but not entirely unrealistic) representation of the consequences of climate change on island States. President Nasheed commented to the press: “We are trying to send our message to let the world know what is happening and what will happen to the Maldives if climate change isn't checked.”³

Climate change is the most complex environmental issue of our time and likely will be for many generations forward. Unfortunately, the impact of anthropogenic⁴ emissions on the climate system is already severe as many individuals and States experience current harm.⁵ Some of those most immediately endangered by climate change are low-lying island States like the Maldives in the Indian Ocean or Vanuatu in the South Pacific Ocean.⁶ As greenhouse gas (GHG) emissions

¹ *From Underwater, Maldives Sends Warning on Climate Change*, CNN, <https://edition.cnn.com/2009/WORLD/asiapcf/10/17/maldives.underwater.meeting/> [<https://perma.cc/C7LL-VJ55>] (last visited Dec. 4, 2023).

² *Id.*

³ Maryam Omid, *Maldives Sends Climate SOS with Undersea Cabinet*, REUTERS (Oct. 19, 2009, 8:45 AM), <https://www.reuters.com/article/idUSTRE59G09P/> [<https://perma.cc/4JDY-LNWA>] (Quoting President Mohamed Nasheed).

⁴ “Anthropogenic” means caused or influenced by human beings. *Anthropogenic*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/anthropogenic> [<https://perma.cc/5Y5E-DNKE>] (last visited Apr. 23, 2024).

⁵ NASA, *The Effects of Climate Change*, <https://science.nasa.gov/climate-change/effects> [<https://perma.cc/JK3M-USPX>] (last updated Mar. 23, 2024).

⁶ See Chris Parsons, *The Pacific Islands: The Front Line in the Battle Against Climate Change*, U.S. NATIONAL SCIENCE FOUNDATION (May 23, 2022), <https://new.nsf.gov/science-matters/pacific-islands-front-line-battle-against-climate> [<https://perma.cc/4BC9-3AC2>].

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continue to raise the climate at an unnatural and unprecedented rate, sea levels are both warming and rising.⁷ As a consequence, many island nations are facing the eradication of both their homelands and way-of-life as the warm, rising sea erodes their coastlines, contaminates their fresh water, and kills their marine life.⁸ To add to the injustice, island nations like Tonga, Vanuatu, and Kiribati are small and emit the least amount of GHG,⁹ contributing only “0.03 percent of the world’s carbon dioxide emissions” collectively.¹⁰

While demonstrations like the underwater Maldivian cabinet meeting are a physical representation of the looming threats faced by island nations, they also represent the greater legal battle taking place within international law to hold States accountable for their environmentally destructive practices that contribute to climate change. International action on climate change is relatively recent and still largely ineffective. The Paris Agreement, entering into force in 2015, has achieved universal participation and requires States to create Nationally Determined Contributions (NDCs) to demonstrate their commitment to solving climate change.¹¹ But States are far from reaching their self-imposed emission targets, and the world is still woefully behind on meeting critical climate deadlines.¹² Most recently, the 28th Conference of the Parties (COP) of the United Nations Framework Convention on Climate Change (UNFCCC) explicitly called on nations for the very first time to transition away from the use of fossil fuels.¹³ The fact that the main “culprit of the climate crisis” has not been mentioned in climate conferences since their

⁷ *Id.* (“The current pace of sea level rise has not been seen for 5,000 years”); *The Effects of Climate Change*, *supra* note 5.

⁸ Parsons, *supra* note 5; *Small Island States Fight Back Against Nature Loss, Climate Change*, UN ENVIRONMENT PROGRAMME (Mar. 2, 2023), <https://www.unep.org/news-and-stories/story/small-island-states-fight-back-against-nature-loss-climate-change> [<https://perma.cc/Z67M-VHWP>].

⁹ *Which Countries Produce the Least Emissions*, ENVIROTECH ONLINE (Nov. 24, 2021), <https://www.envirotech-online.com/news/air-monitoring/6/breaking-news/which-countries-produce-the-least-emissions/56797> [<https://perma.cc/CZP3-4URL>]; Worldometer, *CO2 Emissions by Country*, <https://www.worldometers.info/co2-emissions/co2-emissions-by-country> [<https://perma.cc/FAE8-YQK9>] (last visited Apr. 6, 2024).

¹⁰ William C.G. Burns, *Pacific Island Developing Country Water Resources and Climate Change*, *THE WORLD’S WATER 2002-2003* 113, 113 (2002).

¹¹ Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104.

¹² Intergovernmental Panel on Climate Change, *Climate Change 2023 Synthesis Report* https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_SPM.pdf. See Gloria Dickie, Susanna Twidale & David Stanway, *COP28: What UN Reports Say About Global Action on Climate Change*, REUTERS (Nov. 30, 2023 3:59 AM), <https://www.reuters.com/business/environment/ahead-cop28-research-shows-world-far-behind-climate-fight-2023-11-29> [<https://perma.cc/5KE8-BXHF>].

¹³ Tina Gerhardt, *The UN Climate Conference Finally Names the Culprit, Fossil Fuels—but Is It Enough?*, *THE NATION* (Dec. 19, 2023), <https://www.thenation.com/article/environment/cop-28-fossil-fuels> [<https://perma.cc/8U8B-YYKG>].

inception nearly three decades ago demonstrates the crippling slow pace of the global community to sufficiently address climate change.¹⁴

Realizing the severity of climate change consequences, the ineffectiveness of existing international environmental law, and the disproportionate effects that climate change will have on their lives, youth in the islands and around the world have organized to promote greater climate action by the international community.¹⁵ The Pacific Islands Students Fighting Climate Change (PISFCC) is one of these organizations, and their efforts eventually led the United Nations General Assembly (UNGA) to adopt a resolution in March 2023 requesting an advisory opinion from the International Court of Justice (ICJ) regarding state obligations and climate change.¹⁶

Specifically, the UNGA Resolution asks the ICJ to clarify State obligations towards States and present and future generations to protect the climate system from GHG, while also asking:

What are the legal consequences under these obligations for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment with respect to: (i) States, including, in particular, small island developing States, . . . [and] (ii) [p]eoples and individuals of the present and future generations . . . [?]¹⁷

As existing obligations under the Paris Agreement have proved insufficient to achieve necessary climate goals, more demanding state obligations must be established to prevent the catastrophic consequences of climate change. In its advisory opinion, the ICJ has the opportunity to promote more urgent and ambitious climate action by formally recognizing state obligations to protect the climate system.¹⁸

¹⁴ *Id.* (Despite finally naming the burning of fossil fuels as the main contributor to climate change, COP 28's original language to "phase out fossil fuels" was diluted to "transitioning away," significantly limiting the utility of the agreement to actually reduce the use of fossil fuels.).

¹⁵ Christina Cilento, *The U.S. Has Several Strong Youth Climate Organizations*, CLIMATE SCORECARD (July 1, 2022), <https://www.climatescorecard.org/2022/07/the-u-s-has-5-strong-youth-climate-organizations> [<https://perma.cc/2DSX-PTZN>]; Pacific Islands Students Fighting Climate Change, *Who We Are?*, <https://www.pisfcc.org/who-we-are> [<https://perma.cc/SJ75-4THB>], (last visited Dec. 5, 2023).

¹⁶ Nina Lakhani, *United Nations Adopts Landmark Resolution on Climate Justice*, THE GUARDIAN (Mar. 29, 2023), <https://www.theguardian.com/environment/2023/mar/29/united-nations-resolution-climate-emergency-vanuatu> [<https://perma.cc/J5GV-9KNJ>]; G.A. Res. 77/276 Request for an Advisory Opinion of the International Court of Justice on the Obligations of States in Respect of Climate Change (Mar. 29, 2023).

¹⁷ G.A. Res. 77/276, 3 (Mar. 29, 2023).

¹⁸ Maria Antonia Tigre & Jorge Alejandro Carrillo Bañuelos, *The ICJ's Advisory Opinion on Climate Change: What Happens Now?*, COLUMBIA LAW SCHOOL: A SABIN CENTER BLOG (Mar. 29, 2023), <https://blogs.law.columbia.edu/climatechange/2023/03/29/the-icjs-advisory-opinion-on-climate-change-what-happens-now> [<https://perma.cc/2B6D-HRH3>] ("ICJ advisory opinions have no binding force. However, they carry great 'legal weight and moral authority.'" "The advisory opinion can clarify and concretize the legal obligations of states to prevent and redress

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This Article argues that state obligations to protect the climate system have been established through existing state obligations under international environmental law, the no-harm rule and duty of due diligence, and human rights law. Further, States can be held responsible when these obligations are violated, allowing harmed States (like low-lying island States) to bring action against large GHG emitting States for failure to fulfill their obligations.

In Part II, this Article starts by providing some background on the nature of climate change and its consequences on present and future generations.¹⁹ This includes the impact climate change has and will have on human and children's rights. Part III then explores existing international environmental law, customary law, and human rights law as they are relevant to climate change and establishing state obligations to protect the climate system.²⁰ After laying this legal foundation, Part IV analyzes the importance and weaknesses of existing state obligations under each of these areas of law, starting with obligations set by environmental treaties, then to obligations under international customary law through the no-harm rule and duty of due diligence, and finally to obligations under human rights law.²¹ The analysis addresses how these obligations work together to create a framework that establishes state responsibility for failure to adequately protect the climate system. To finish, Part V directly addresses the questions presented to the ICJ through the UNGA Resolution by laying out what state obligations exist under international law to protect the climate system as well as legal consequences for failure to meet these obligations.²²

Although the arguments presented in this Article may push against the boundaries of international law, ambitious legal action is necessary to solve the climate crisis before it is too late. If man-made law is too slow to adapt to the urgent needs of a polluted planet, then our own red tape will be our demise.

Part I: Harm of Climate Change on Human Rights and the Environment

A. Present and Future Consequences of Climate Change

This year, climate scientists have observed the rate of environmental degradation increase rapidly as climate records are continually broken.²³ The northern hemisphere experienced its warmest summer on record in 2023,²⁴ sea surface temperatures are warmer than ever before, and

the adverse effects of climate change. This clarification could provide clear standards and benchmarks for climate action. In this context, the advisory opinion would offer a solid basis for scrutinizing state actions.”).

¹⁹ See *infra* Part I.

²⁰ See *infra* Part II.

²¹ See *infra* Part III.

²² See *infra* Part IV.

²³ William J. Ripple et al., *The 2023 State of the Climate Report: Entering Uncharted Territory*, 73 *BIOSCIENCE* 841, 841–42 (Oct. 24, 2023), <https://doi.org/10.1093/biosci/biad080>.

²⁴ Ripple, *supra* note 21; *NASA Announces Summer 2023 Hottest on Record*, NASA (Sept. 14, 2023), <https://www.nasa.gov/news-release/nasa-announces-summer-2023-hottest-on-record> [<https://perma.cc/GUS4-SHBH>].

the polar regions have “unprecedented low levels of sea ice.”²⁵ These trends are leading to the deterioration of sea life, erosion of coastlines, and increased frequency of tropical storms.²⁶ Climate change is also resulting in more extreme weather patterns causing more severe natural disasters like flooding and wildfires.²⁷

While States everywhere are and will experience the negative impacts of climate change—whether those effects be environmental, economic, or humanitarian—developing nations disproportionately suffer the most.²⁸ Developed States, like the United States and China, as well as the European Union, are among the greatest contributors to climate change, but they also have the greatest capacity to adapt and survive to its effects.²⁹ Meanwhile, developing nations, like the island States of Vanuatu, Kiribati, and Tonga, are among the smallest contributors to climate change but face some of the most immediate and devastating consequences.³⁰ As sea levels continue to rise and severe tropical storms become more frequent, island nations are threatened with loss of vital sea life, territory, and fresh water.³¹ The very statehoods of these island nations are threatened as the actions of polluting States cause the islands to become gradually uninhabitable.³²

²⁵ Ripple, *supra* note 21 at 841 (The extent of this rapidly increase rate of change in the Earth’s climate can be illustrated by the fact that prior to the year 2000 “Global daily mean temperatures never exceeded 1.5-degree Celsius (°C) above preindustrial levels . . . and have only occasionally exceeded that number since then. However, 2023 has already seen 38 days with global average temperatures above 1.5°C by 12 September—more than any other year—and the total may continue to rise.”).

²⁶ *Id.* at 844.

²⁷ *Id.* at 845–46.

²⁸ United Nations: Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries, and Small Island Developing States, *On the Frontline of Climate Crisis, Worlds Most Vulnerable Nations Suffer Disproportionately*, <https://www.un.org/ohrlls/news/frontline-climate-crisis-worlds-most-vulnerable-nations-suffer-disproportionately> [<https://perma.cc/R4ZH-EPLT>] (last visited Dec. 5, 2023) [hereinafter *On the Frontline of Climate Crisis*].

²⁹ U.S. Env’tl. Prot. Agency, *Global Greenhouse Gas Emissions*, <https://www.epa.gov/ghgemissions/global-greenhouse-gas-emissions-data> [<https://perma.cc/W2XJ-UDR8>] (last visited Apr. 11, 2024); See Charles Phillips, *Which Countries are Best Prepared for the Impacts of Climate Change?*, HENLEY & PARTNERS, <https://www.henleyglobal.com/publications/investment-migration-climate-resilience-index/investor-insights/which-countries-are-best-prepared-impacts-climate-change> [<https://perma.cc/4LM4-RWKE>] (last visited Dec. 5, 2023).

³⁰ See *On the Frontline of Climate Crisis*, *supra* note 28; Burns *supra* note 10 at 113, 118, and 119.

³¹ *On the Frontline of Climate Crisis*, *supra* note 28.

³² Jonathan Watts, ‘We could lose our status as a state’: What Happens to a People When Their Land Disappears, *THE GUARDIAN* (June 27, 2023), <https://www.theguardian.com/environment/2023/jun/27/we-could-lose-our-status-as-a-state-what-happens-to-a-people-when-their-land-disappears> [<https://perma.cc/SK4M-YBR2>]; Jane McAdam, ‘Disappearing States’, *Statelessness and The Boundaries of International Law*,

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The impact of human activity on the environment is enduring and multigenerational.³³ Just as the actions of Americans in the Industrial Era have contributed to the climate crisis, our actions today continue to generate clouds of consequences that will loom over many generations to come. In fact, despite existing international instruments to limit GHG emissions, more carbon emissions were produced between 2010 and 2019 than any decade before.³⁴ We have inherited a world reliant on fossil fuels, and we are perpetuating that environmentally destructive reliance on future generations each day States remain lax on climate change.

While the consequences of human activity on the environment may appear to be slow, the climate system is changing at an unprecedented rate, and the consequences of such change are pervasive and difficult to reverse.³⁵ In fact, scientists estimate that even if we meet all of our climate targets to prevent the earth's temperature from increasing beyond two degrees Celsius above pre-industrial levels, the earth will inevitably still experience a destructive warming period this century before the climate is able to return back to normal.³⁶ It is precisely the enduring nature of climate change consequences that requires immediate, long-term solutions.

B. Harm to Human Rights and Children's Rights

Environmental harm has a direct impact on human rights, especially considering that many human rights implicitly rely on access to a healthy environment as a precondition.³⁷ Extreme weather, like severe tropical storms and droughts, threaten human rights to life, food, housing, and self-determination.³⁸ As the global climate increases, food and water become more scarce.³⁹

University of New South Wales Law Research Paper No. 2010-2 (May 5, 2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1539766.

³³ *Warming Across Generations*, CLIMATE CENTRAL, (Mar. 21, 2023) <https://www.climatecentral.org/climate-matters/warming-across-generations> [https://perma.cc/L4HY-KEFF]. See *Human Impact on the Environment*, UNITE FOR CHANGE (July 11, 2022), <https://uniteforchange.com/en/blog/environment/human-impact/> [https://perma.cc/FN7R-XBR2].

³⁴ *We Can Halve Emissions by 2030*, IPCC: NEWSROOM (Apr. 4, 2022), <https://www.ipcc.ch/2022/04/04/ipcc-ar6-wgiii-pressrelease> [https://perma.cc/YBA2-KM96].

³⁵ NASA, *Is it Too Late to Prevent Climate Change?*, <https://climate.nasa.gov/faq/16/is-it-too-late-to-prevent-climate-change> [https://perma.cc/VW6Q-KG85] (last visited Dec 5, 2023) (“While the effects of human activities on Earth's climate to date are irreversible on the timescale of humans alive today, every little bit of avoided future temperature increases results in less warming that would otherwise persist for essentially forever.”).

³⁶ See *id.* (“There is a time lag between what we do and when we feel it, but that lag is less than a decade.”).

³⁷ BRIDGET LEWIS, ENVIRONMENTAL HUMAN RIGHTS AND CLIMATE CHANGE, 15 (2018).

³⁸ OFFICE OF THE HIGH COMMISSIONER OF HUMAN RIGHTS, UNDERSTANDING HUMAN RIGHTS AND CLIMATE CHANGE (2015) at 13–24, <https://www.ohchr.org/sites/default/files/Documents/Issues/ClimateChange/COP21.pdf> (submission to the 21st Conference of the Parties to the UNFCCC).

³⁹ *Id.* at 16–7.

Homes will be destroyed by severe storms, flooding, and rising sea-levels.⁴⁰ Indeed, those living on low-lying islands will lose their right to self-determination as their entire homelands are gradually submerged below the rising ocean.⁴¹ This loss of statehood “poses a grave threat to the cultural identity and survival of [islanders] including generations yet unborn who may never know their traditional lands and territories.”⁴² Children today are both the present and the future generation. Their capacity to engage in climate litigation is severely limited due to their youth, yet they will experience the brunt of the destruction brought about by climate change.⁴³ Indeed, children’s rights to life, survival, and development are threatened.⁴⁴

Recognizing that their human rights are at risk, youth today are proactively fighting to hold polluters accountable through climate litigation.⁴⁵ Recently, a group of Montana youth prevailed against the State for violating their constitutional right to a “clean and healthful environment”⁴⁶ after the State sought to implement a “fossil fuel-based state energy system” without “considering the impacts of greenhouse gas [] emissions or climate change in their environmental reviews . . .”⁴⁷ At the federal level, twenty-one youth plaintiffs are currently litigating against the United States.⁴⁸ They argue that the federal government has violated their “fundamental constitutional rights to life, liberty, and property” by continuing to support policies and practices that allow for

⁴⁰ *Id.* at 19.

⁴¹ *Id.* at 14–15; Jasmin L’Green & Zara Bendit-Rosser, *The Impact of Climate Change on the Right to Self-Determination*, AUSTRALIAN INSTITUTE OF INTERNATIONAL AFFAIRS: AUSTRALIAN OUTLOOK (June 30, 2022), <https://www.internationalaffairs.org.au/australianoutlook/the-impact-of-climate-change-on-the-right-to-self-determination> [<https://perma.cc/3FCL-2MVC>].

⁴² UNDERSTANDING HUMAN RIGHTS AND CLIMATE CHANGE, *supra* note 38, at 25.

⁴³ Ann Sanson & Marco Bellema, *Children and Youth in the Climate Crisis*, 45–4 BJPSYCH 205, 206 (2021), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8499628> (“The emotional impact of knowing about the climate crisis is not limited to ‘worry’. Children and youth also experience anger, frustration, depression, sadness, grief, anxiety and a sense of powerlessness about its impact on their lives. Interviews with 10–12-year-olds in the USA found that strong feelings of fear, sadness and anger were expressed by 82% of the children.”); Ann V. Sanson et al., *Responding to the Impacts of the Climate Crisis on Children and Youth*, 13–4 CHILD DEVELOPMENT PERSPECTIVES 199, 202 (Dec. 2019), <https://srcd.onlinelibrary.wiley.com/doi/full/10.1111/cdep.12342>.

⁴⁴ Comm. on the Rts. of the Child Gen. Comment No. 26, 4 (Aug. 22, 2023).

⁴⁵ *Climate Litigation More Than Doubles in Five Years*, UN ENVIRONMENT PROGRAMME (July 27, 2023), <https://www.unep.org/news-and-stories/press-release/climate-litigation-more-doubles-five-years-now-key-tool-delivering> [<https://perma.cc/5GQD-TT53>] (“[T]he voices of vulnerable groups are being heard globally: 34 cases have been brought by and on behalf of children and youth under 25 years old, including by girls as young as seven and nine years of age in Pakistan and India respectively . . .”).

⁴⁶ Mont. Code Ann. § 9-9-1 (2023).

⁴⁷ *Held v. State*, No. CDV-2020-307, ¶¶ 9, 10, 24, 25 (Mont. Dist. Ct. Aug. 14, 2023); David Gelles & Mike Baker, *Judge Rules in Favor of Montana Youths in a Landmark Climate Case*, New York Times (Aug. 16, 2023), <https://www.nytimes.com/2023/08/14/us/montana-youth-climate-ruling.html> [<https://perma.cc/LJL4-H22Q>].

⁴⁸ Our Children’s Trust, *Juliana v. United States*, <https://www.ourchildrenstrust.org/juliana-v-us> [<https://perma.cc/3SPK-KV6D>] (last visited Dec. 5, 2023).

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the exploitation of fossil fuels despite having knowledge for decades that “swift transition away from fossil fuels was necessary” to protect the climate system and prevent harm to present and future generations.⁴⁹ Similar youth-led legal actions are taking place across the globe.⁵⁰ In Columbia, Canada, Australia, and many other nations, young people are taking action against their governments for their contributions to climate change and asserting their rights to a healthy environment.⁵¹

But, as mentioned at the beginning of this Article, not all legal action has taken place in domestic courts. The Pacific Islands Students Fighting Climate Change is a youth-led organization dedicated to “fight[ing] against climate change at every level.”⁵² From an idea born in a Vanuatu classroom four years ago, students of the Pacific made it their mission to seek an advisory opinion from the International Court of Justice to clarify States’ obligations to the global environment and future generations.⁵³ Other youth-led organizations, like World’s Youth for Climate Justice (WY CJ) have joined PISFCC in many of their efforts.⁵⁴ PISFCC worked with governments to bring their mission to fruition, leading Vanuatu to announce that it would move for the General Assembly to seek an advisory opinion from the ICJ regarding climate obligations of States.⁵⁵

C. General Assembly Seeks ICJ Advisory Opinion

Because of the efforts of these youth-led organizations and Vanuatu, the UNGA adopted a formal resolution in March 2023 requesting an advisory opinion from the ICJ.⁵⁶ Specifically, the

⁴⁹ First Amended Complaint for Declaratory and Injunctive Relief at 2–3 *Juliana v. United States*, No. 6:15-cv-01517-TC (D. Or., 2015) (Our Children’s Trust—a nonprofit spearheading the federal climate case—is also engaged in youth-plaintiff climate suits in Florida, Hawai’i, Utah, and Virginia). *State Legal Actions*, OUR CHILDREN’S TRUST <https://www.ourchildrenstrust.org/state-legal-actions>, [https://perma.cc/WLQ2-RBEB] (last visited Dec. 5, 2023).

⁵⁰ *Climate Litigation More Than Doubles in Five Years*, *supra* note 45.

⁵¹ Our Children’s Trust, *Global Legal Actions*, <https://www.ourchildrenstrust.org/other-global-actions> [https://perma.cc/3QYE-NQB9] (last visited Dec. 5, 2023).

⁵² Pacific Islands Students Fighting Climate Change, *supra* note 15.

⁵³ *ICJAO Resolution Adopted by the UN General Assembly*, PACIFIC ISLANDS STUDENTS FIGHTING CLIMATE CHANGE (Mar. 30, 2023), <https://www.pisfcc.org/news/icjao-resolution-adopted-by-the-un-general-assembly> [https://perma.cc/LC3L-CJV5].

⁵⁴ See World’s Youth for Climate Justice, <https://www.wy4cj.org> [https://perma.cc/7DWY-LP63] (last visited Dec. 5, 2023).

⁵⁵ Malgosia Fitzmaurice & Agnes Viktoria Rydberg, *Using International Law to Address the Effects of Climate Change: A Matter for the International Court of Justice?*, 4 Y.B. OF INT’L DISASTER L. ONLINE 281, 282–83 (April 13, 2023); Melanie Burton, *Vanuatu to Push International Court for Climate Change Opinion*, REUTERS (Sept. 24, 2021), <https://www.reuters.com/world/asia-pacific/vanuatu-push-international-court-climate-change-opinion-2021-09-25> [https://perma.cc/KJ58-VU5K].

⁵⁶ Nina Lakhani, *United Nations Adopts Landmark Resolution on Climate Justice*, THE GUARDIAN (Mar. 29, 2023), <https://www.theguardian.com/environment/2023/mar/29/united->

UNGA requested an advisory opinion regarding “the obligations of states in respect of climate change” under international law, including specification on state obligations “to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for present and future generations”⁵⁷ The Resolution also seeks clarification on “the legal consequences under these obligations for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment”⁵⁸ The Resolution frames its question on legal consequences within the context of harm caused to those most vulnerable and least responsible to climate change, including small island developing States (SIDS) and “[p]eoples and individuals of the present and future generations.”⁵⁹ Because advisory opinions issued by the ICJ are not legally binding on States, the value of the opinion will be the clarification of existing state obligations to both preserve the environment and control the anthropogenic causes of climate change.⁶⁰

Perhaps in an effort to aid the ICJ’s analysis, the UNGA Resolution gives “particular regard” to several sources of international law.⁶¹ Among environmental instruments, the Resolution acknowledges the United Nations Framework Convention on Climate Change (UNFCCC), the Paris Agreement, and the United Nations Convention on the Law of the Sea (UNCLOS).⁶² It also emphasizes the importance of ozone treaties like the Montreal Protocol as well as the Declaration of the United Nations Conference on the Human Environment and the Rio Declaration on Environment and Development.⁶³ From international customary law, the Resolution gives “particular regard” to the no-harm rule and the duty of due diligence.⁶⁴ Concerning human rights law, the Resolution acknowledges the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social and Cultural Rights (ICESCR); and the Universal Declaration of Human Rights (UDR) while “emphasizing the importance” of the Convention on the Rights of the Child (CRC).⁶⁵

Each of the legal instruments acknowledged in the UNGA Resolution have established valuable state obligations or otherwise contributed to the development of international environmental law. While only the UNFCCC and subsequent Paris Agreement originated specifically as a response to the climate crisis, the listed sources of customary and human rights law have their own application to climate change as well.

Part II: Existing State Obligations Relevant to Climate Change

A. State Obligations Under International Environmental Law

nations-resolution-climate-emergency-vanuatu [https://perma.cc/JU7F-RW8F]; G.A. Res. 77/276 (Mar. 29, 2023).

⁵⁷ G.A. Res. 77/276, at 3 (Mar. 29, 2023).

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Tigre & Bañuelos, *supra* note 18.

⁶¹ G.A. Res. 77/276, 3 (Mar. 29, 2023).

⁶² *Id.*

⁶³ *Id.* at 1–2.

⁶⁴ *Id.* at 3.

⁶⁵ *Id.* at 1, 3.

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Concerning international environmental law, the health of the global environment has been on the international community's radar since at least 1968 when the Economic and Social Council held its first United Nations Conference on the Human Environment.⁶⁶ The Conference took place in Stockholm Sweden in 1972 where it adopted the "Stockholm Declaration and Plan of Action" which established principles for preserving the human environment and "warn[ed] Governments to be mindful of activities that could lead to climate change"⁶⁷

Before climate change was of major global concern, the human production of ozone-depleting substances created a growing hole in the ozone layer that risked the health of the human population.⁶⁸ This led to the creation of the Montreal Protocol, a multilateral treaty aimed at phasing out ozone-depleting substances on a global scale.⁶⁹ Every member State signed and ratified the treaty, and its overwhelming success led to the elimination of 99 percent of ozone-depleting substances from the atmosphere.⁷⁰ Much of the instrument's success is attributed to an "unprecedented level of cooperation by the international community, and collaboration between public and private sectors."⁷¹ The ozone treaties—namely the 1985 Vienna Convention and Montreal Protocol—established multiple state obligations, including requiring States to "[a]dopt appropriate legislative or administrative measures . . . to control, limit, reduce or prevent human activities under their jurisdiction or control" that are likely to adversely affect the ozone layer; to cooperate in ozone research and the development of substitutes to ozone-depleting substances; to phase out entirely the use and production of ozone-depleting substances; and for developed States to provide financial assistance to developing States so that those States can comply with obligations established under the agreement.⁷² While the scope of the obligations created by the ozone treaties are limited to the ozone layer, the treaties have had significant precedential influence on the formation of later environmental treaties like the UNFCCC.

⁶⁶ Peter Jackson, *From Stockholm to Kyoto: A Brief History of Climate Change*, UN CHRONICLE (June 2007), <https://www.un.org/en/chronicle/article/stockholm-kyoto-brief-history-climate-change> [<https://perma.cc/KF86-446V>].

⁶⁷ United Nations Conferences: Environment and Sustainable Development, *Sustainable Development Goals: Leaving No One Behind – Examples from Papua New Guinea*, <https://www.un.org/en/conferences/environment> [<https://perma.cc/Q8MJ-S62L>] (last visited Dec. 5, 2023); Jackson, *supra* note 66.

⁶⁸ UN Environment Programme, *Rebuilding the Ozone Layer* (Sept. 15, 2021), <https://www.unep.org/news-and-stories/story/rebuilding-ozone-layer-how-world-came-together-ultimate-repair-job> [<https://perma.cc/CCF9-ZPZZ>].

⁶⁹ Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, S. Treaty Doc. 100-10.

⁷⁰ Lizzie Sayer, *Happy Birthday to the Montreal Protocol*, INTERNATIONAL SCIENCE COUNCIL (Sept. 16, 2022), <https://council.science/current/blog/happy-birthday-montreal-protocol-ozone> [<https://perma.cc/8F8N-MFQL>].

⁷¹ *Id.*

⁷² Vienna Convention for the Protection of the Ozone Layer art. 2, Mar. 22, 1985, T.I.A.S. No. 11,097.

In 1992, the United Nations convened to discuss climate change specifically in the United Nations Framework Convention on Climate Change.⁷³ The UNFCCC entered into force in 1994 and sought to “prevent dangerous anthropogenic (human induced) interference with the climate system.”⁷⁴ One hundred and ninety-eight countries have since signed and ratified the UNFCCC.⁷⁵

Many of the state obligations established by the UNFCCC parallel those established by the Montreal Protocol.⁷⁶ The UNFCCC requires developed State-parties to “adopt national policies and take corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions of greenhouse gases . . .” as well as provide financial assistance to developing States so that they can comply with their obligations under the convention.⁷⁷ Additionally, all parties to the convention are required to cooperate in their research on climate change and their development of technologies that relate to the climate system.⁷⁸

While the UNFCCC laid the foundation for international obligations to protect the environment, the legally binding responsibilities of signatories were not operationalized until 2005 when the Kyoto Protocol entered into force.⁷⁹ The Kyoto Protocol requires industrialized nations to do much of the heavy lifting in limiting greenhouse gas emissions, imposing “binding emission reduction targets for 37 industrialized countries and economies in transition and the European Union.”⁸⁰ However, the Kyoto Protocol is only legally binding on these industrialized nations,⁸¹ and some of the largest greenhouse gas producers, like the United States, have not ratified the convention.⁸²

The UNFCCC also established the Conference of the Parties (COP)—a yearly meeting where parties to the UNFCCC meet to “measure progress and negotiate multilateral responses to

⁷³ United Nations: Climate Change, *What is the United Nations Framework Convention on Climate Change?*, <https://unfccc.int/process-and-meetings/what-is-the-united-nations-framework-convention-on-climate-change> [<https://perma.cc/W38D-KF9E>] (last visited Dec. 5, 2023).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ Compare Montreal Protocol, *supra* note 69, and Vienna Convention, *supra* note 72, with United Nations Framework Convention on Climate Change, May 9, 1992, S. Treaty Doc. No. 102-38.

⁷⁷ United Nations Framework Convention on Climate Change art. 4, May 9, 1992, S. Treaty Doc. No. 102-38.

⁷⁸ *Id.*

⁷⁹ United Nations: Climate Change, *What is the Kyoto Protocol?*, https://unfccc.int/kyoto_protocol [<https://perma.cc/PL58-QJSS>] (last visited Dec. 5, 2023).

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² At the time of ratification, large polluting nations like India and China were not legally bound to cut emissions. *Bush: Kyoto Treaty Would Have Hurt Economy*, THE ASSOCIATED PRESS (June 30, 2005), <https://www.nbcnews.com/id/wbna8422343> [<https://perma.cc/PPE2-XRET>]. Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 2303 U.N.T.S. 162.

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climate change.”⁸³ These yearly conferences work to reduce carbon emissions, help nations adapt to climate issues, and bring governments and industries together to solve the climate crisis.⁸⁴

One of the most significant contributions of the COP was the creation of the Paris Agreement. The Paris Agreement, introduced in 2015 during the 21st Conference of the Parties, is one of the most recent and ambitious actions taken so far by States to control climate.⁸⁵ It entered into force in 2016 and is binding on 196 party States.⁸⁶ With the goal to limit “the increase in the global average temperature to well below 2°C above pre-industrial levels,” the treaty requires each of its ratifying States to set pledges to reduce emissions through nationally determined contributions (NDCs).⁸⁷ Although the creation of NDCs is an essential step to reduce carbon emissions, the Agreement does not create binding state obligations to meet these emission targets.⁸⁸ This lack of accountability to NDCs has likely been a significant reason why many States are not on track to meet their climate goals. Adding to the frustration, many current state NDCs are not sufficiently ambitious to reach the goals of the Paris Agreement.⁸⁹ Fortunately, these are not the only environmental obligations imposed on states.

B. State Obligations Under the No-Harm Rule and Duty of Due Diligence

International customary law also imposes certain environmental obligations on States.⁹⁰ Although international environmental law is relatively new, customary law regarding States and

⁸³ United Nations: Climate Action, *UN Climate Change Conferences*, <https://www.un.org/en/climatechange/un-climate-conferences> [<https://perma.cc/4WUF-RPMB>] (last visited Dec. 5, 2023).

⁸⁴ *Id.*

⁸⁵ United Nations: Climate Change, *The Paris Agreement*, <https://unfccc.int/process-and-meetings/the-paris-agreement> [<https://perma.cc/S3VP-YLBN>] (last visited Dec. 5, 2023).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *UN Adopts Landmark Resolution to Define Global Legal Obligations on Climate Change*, FRANCE24 (Mar. 29, 2023), <https://www.france24.com/en/environment/20230329-un-adopts-landmark-resolution-to-define-global-legal-obligations-on-climate-change> [<https://perma.cc/YPV2-8MC3>]. See Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104.

⁸⁹ Chico Harlan, *The World is ‘Woefully Off Track’ on Dozens of Climate Goals, Scientists Find*, THE WASHINGTON POST (Nov. 14, 2023), <https://www.washingtonpost.com/climate-environment/2023/11/14/climate-goals-off-track> [<https://perma.cc/LDH3-AZZW>] (“A separate progress report released . . . by the United Nations, assessing nations’ climate pledges, showed that these plans—even if fully implemented—would lead to 2030 emissions levels being higher than they were in 2010. That is far short of the 43 percent decrease that would be consistent with the 1.5 goal.”).

⁹⁰ Sandrine Maljean-Dubois, *The No-Harm Principle as the Foundation of International Climate Law*, in DEBATING CLIMATE LAW 15, 15–7 (Benoit Mayer & Alexander Zahar eds., 2021).

their obligations to the environment has been invoked since the mid-1900s.⁹¹ One of these customs is the no-harm rule.⁹² As applied to environmental issues, the no-harm rule creates a binding obligation on all States “to prevent, reduce and control the risk of environmental harm to other states.”⁹³ The custom emerged from cases like the *Trail Smelter* dispute between Canada and the United States where, in a court of arbitration, Canada was held responsible for violating international law by allowing pollution from a Canadian smelting company to cross the U.S.–Canadian border into Washington State and contaminate the State’s forests and crops.⁹⁴ The no-harm rule was later articulated by the ICJ in its opinion in *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)* where it held that every State has the “obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.”⁹⁵

Eventually, the ICJ officially recognized the no-harm rule as custom in its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons where it applied the no-harm rule to the environmental harm caused by nuclear weaponry.⁹⁶ There, the court stated: “The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.”⁹⁷

In addition to the no-harm rule, the duty (or principle) of due diligence has been recognized under international law as both a customary standard by which the adequacy of state action is measured as well as an obligation itself that can be violated.⁹⁸ The principle of due diligence has

⁹¹ See *Trail Smelter Arbitration (U.S. v. Canada)*, 3 R.I.A.A. 1905, 1965; Maliean-Dubois, *supra* note 90, at 16; MARIA MONNHEIMER, *DUE DILIGENCE OBLIGATIONS IN INTERNATIONAL HUMAN RIGHTS LAW* 78–115 (2021).

⁹² UN Environment, *No harm rule*, <https://globalpact.informea.org/glossary/no-harm-rule> [<https://perma.cc/ZC42-9XM9>] (last visited Dec. 6, 2023); IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 275–285 (7th ed., 2008); PATRICIA BIRNIE, ALAN BOYLE & CATHERINE REDGWELL, *INTERNATIONAL LAW AND THE ENVIRONMENT* 143–152 (Oxford 3rd ed., 2009).

⁹³ *Id.* The custom is also characterized as the maxim *sic utere tuo ut alienum non laedas* which means “use your own property in such a way as not to harm others.” Caroline E. Foster, *Due Regard for Future Generations? The Obligation to Prevent Significant Environmental Harm and Sovereignty in the ICJ Advisory Opinion on Climate Change*, 3 (Aug. 24, 2023), <https://ssrn.com/abstract=4551473>.

⁹⁴ See *Trail Smelter Arbitration*, *supra* note 91; Wikipedia, *Trail Smelter Dispute*, https://en.wikipedia.org/wiki/Trail_Smelter_dispute [<https://perma.cc/9S2G-QKDF>] (last visited Apr. 25, 2024).

⁹⁵ *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Judgment, 1949 I.C.J. Rep. 4, 22 (April 1949). See also UN Secretary-General, *Survey of International Law in Relation to the Work of the ILC* 4 Rev. 1, ¶ 57 (1949) (restating the no-harm rule as an obligation whereby “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.”).

⁹⁶ *Legality of the Threat of Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226 (July 1996).

⁹⁷ *Id.* at ¶ 29.

⁹⁸ See generally Katja L.H. Samuel, *The Legal Character of Due Diligence: Standards, Obligations, or Both?* (1 Cent. Asian Y.B. of Int’l L., 2018),

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also achieved “customary international law status,” establishing state obligations that “exist and operate in their own right, in parallel with those obligations triggering them.”⁹⁹

Though no concrete definition of due diligence is universally agreed upon, “key aspects of due diligence are identifiable, such as the indivisible element of ‘due, or merited, care’ which lies at its core.”¹⁰⁰ Due diligence obligations are also typically characterized as an obligation of means rather than an obligation of result.¹⁰¹ As such, violations of due diligence obligations tend to occur when a State fails to take necessary steps towards a result rather than failing to achieve the result itself.¹⁰² When defining “means,” Sir Ian Brownlie stated, “[r]easonableness is a golden thread in determining which measures States should take to act in a duly diligent manner.”¹⁰³ Due diligence obligations are broad and are “not limited to acts not prohibited by international law but may arise in any area of international law.”¹⁰⁴ Further, “failure to meet due diligence obligations might stem from omissive as well as commissive conduct, or even a combination of both forms.”¹⁰⁵

If States fail to exercise due diligence, either as an obligation on its own or a standard for an existing obligations, they can be held responsible by an international court and required to make reparations to an injured party.¹⁰⁶ In cases heard by the ICJ and special tribunals, States have been found liable for failing to satisfy due diligence obligations as a binding principle existing outside of international treaties.¹⁰⁷

The no-harm rule and duty of due diligence often work in tandem, where a State has an obligation to exercise due diligence in fulfilling their obligation to prevent harm to the interests of

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3264764 (addressing the dual nature of the due diligence principle as both a standard and obligation). International Law Association Study Group on ‘Due Diligence in International Law’, Second Report (31 August 2016) 5, https://www.ila-hq.org/en_GB/documents/draft-study-group-report-johannesburg-2016.

⁹⁹ Samuel, *supra* note 98 at 26. See Ellen Campbell et al., *Due Diligence Obligations of International Organizations Under International Law*, 50 INT’L ORG. CLINIC N.Y. UNIV. SCH. OF L. 541, 564–65 (2018), <https://www.nyuilp.org/wp-content/uploads/2018/07/NYI204.pdf> (“[A] ‘precautionary principle’ has been incorporated into the legal obligation of due diligence as part of customary international law.”) (citing *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. Rep. at 502–04, (Weeramantry, J., dissenting)).

¹⁰⁰ Samuel, *supra* note 98 at 11.

¹⁰¹ *Id.*

¹⁰² *Id.* (“[T]he real issue is commonly the failure by (normally) a state to take any action at all to prevent a violation from occurring.”).

¹⁰³ *Id.* at 12 (citing IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 275–285 (7th ed., 2008)).

¹⁰⁴ MARIA MONNHEIMER, *DUE DILIGENCE OBLIGATIONS IN INTERNATIONAL HUMAN RIGHTS LAW* 114 (2021).

¹⁰⁵ *Id.*

¹⁰⁶ See Samuel, *supra* note 98, at 40–41.

¹⁰⁷ *Id.* at 27–29 (citing the *Tehran Hostages* case, *AAPL v. Sri Lanka*, and the *SRFC* Advisory Opinion by the International Tribunal of the Law of the Sea to illustrate how the ICJ and other tribunals have recognized a duty of due diligence as a standalone state obligation).

other States.¹⁰⁸ Section C of Part IV of this Article explores how these customs have application to existing human rights obligations which are also relevant to climate action.

C. State Obligations Under Human Rights Law

Human rights law promotes peaceful and productive action from the international community to protect the rights of humankind, and many human rights are interconnected with environmental obligations.¹⁰⁹

First, modern human rights law began primarily with the adoption of the United Nations Charter in 1945.¹¹⁰ In response to the atrocities of Hitler's race-motivated genocide, one of the foundation goals of the UN Charter is to "reaffirm faith in fundamental human rights" and "to achieve international co-operation . . . in promoting and encouraging respect for human rights . . ." ¹¹¹ From the United Nations came the establishment of the Commission on Human Rights, which accomplished the "elaboration and near-universal acceptance of the three major international human rights instruments: the Universal Declaration of Human Rights, adopted in 1948, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), the latter two adopted in 1966."¹¹²

While the Universal Declaration on Human Rights describes generally the rights recognized by the United Nations, the instrument is not legally binding on any State.¹¹³ However, the ICCPR and ICESCR, each with their respective enumerated human rights, are binding on States who have ratified the treaties. Ratification of these treaties has been nearly universal, creating state obligations to respect, protect and fulfill recognized human rights.¹¹⁴

Additional human rights agreements have emerged since the adoption of the ICCPR and ICESCR, including the Convention on the Rights of the Child (CRC) which entered into force in 1990.¹¹⁵ The CRC has also received near universal ratification and recognizes the fundamental rights of children including the right to life, survival and development, participation in "proceedings affecting the child," and an adequate standard of living.¹¹⁶ Like the ICCPR and

¹⁰⁸ *Id.* at 24; Trail Smelter Arbitration, *supra* note 91; Corfu Channel, *supra* note 95; Legality of the Threat of Use of Nuclear Weapons, *supra* note 96.

¹⁰⁹ LEWIS, *supra* note 37, at 15.

¹¹⁰ Frans Viljoen, *International Human Rights Law: A Short History*, UN CHRONICLE <https://www.un.org/en/chronicle/article/international-human-rights-law-short-history> [https://perma.cc/478C-3DRK] (last visited Dec. 6, 2023).

¹¹¹ *Id.*; U.N. Charter preamble, art. 1, ¶ 3.

¹¹² Viljoen, *supra* note 110.

¹¹³ United Nations Human Rights Office of the High Commissioner, *Declaration on Human Rights Defenders*, <https://www.ohchr.org/en/special-procedures/sr-human-rights-defenders/declaration-human-rights-defenders> [https://perma.cc/5JDV-C54T] (last visited Dec. 6, 2023).

¹¹⁴ United Nations: Peace, Dignity and Equality on a Healthy Planet, *The Foundation of International Human Rights Law*, <https://www.un.org/en/about-us/udhr/foundation-of-international-human-rights-law> [https://perma.cc/5BVJ-HR9B] (last visited Dec. 6, 2023).

¹¹⁵ U.N. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, available at <https://www.ohchr.org/sites/default/files/Documents/ProfessionalInterest/crc.pdf>.

¹¹⁶ *Id.* at 4.

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ICESCR, signatories have binding obligations to protect and fulfill these rights.¹¹⁷ Unfortunately, despite near universal ratification, some developed nations like the United States have refused to bind themselves to these agreements.¹¹⁸

Many of the rights recognized under these human rights treaties are inherently dependent on access to a healthy environment.¹¹⁹ For rights like the right to life, health, property, adequate standard of living, and self-determination, access to a healthy environment is an essential precondition.¹²⁰ In a separate opinion for the *Gabcikovo-Nagymaros* case, Vice President Weeramantry of the ICJ recognized this relationship when he stated, “The protection of the environment is . . . a vital part of contemporary human rights doctrine, for it is *sine qua non* for numerous human rights such as the right to health and the right to life itself.”¹²¹

Additionally, the protection and availability of human rights also has an influence on environmental action.¹²² For example, the establishment of civil and political rights are essential for protecting the environment.¹²³ Having “[s]trong protections of human rights such as freedom of information and expression, the right to vote in free elections and the right to equality before the law can help to strengthen environmental protections and promote sustainable development” as the ability to inform, protest, and litigate are driving factors in preserving the environment and fighting climate change.¹²⁴

Many environmental treaties recognize the connection of environmental protection with the enjoyment of human rights. For example, the Stockholm Convention—one of the first international conventions dealing with environmental issues—states in the preamble of its first chapter that the environment is “essential to [humankind’s] well-being and to the enjoyment of basic human rights—even the right to life itself.”¹²⁵ Similarly, the Rio Declaration proclaims in its first principle that “[h]uman beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.”¹²⁶ The Paris Agreement acknowledges human rights when it states that “Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights,” including the rights of indigenous peoples, migrants, children, and vulnerable peoples.¹²⁷ While

¹¹⁷ See *Foundation of International Human Rights Law*, *supra* note 114.

¹¹⁸ The United States is a signatory to the ICCPR but not the CRC or ICESCR.

¹¹⁹ LEWIS, *supra* note 37, at 15.

¹²⁰ *Id.* at 6.

¹²¹ *Id.* at 16, citing ICJ 1997 *Gabcikovo-Nagymaros* (Hungary v. Slovakia), Separate Opinion by Vice-President Weeramantry, 1997 I.C.J. Rep. 88 (Sept. 25).

¹²² LEWIS, *supra* note 37, at 2.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ U.N. Conference on the Human Environment, *Declaration of the U.N. Conference on the Human Environment*, U.N. Doc. A/CONF.48/14/Rev. 1, ch. I, ¶¶ 1–2, (June 16, 1972).

¹²⁶ U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, 3, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), annex I (Aug. 12, 1992).

¹²⁷ Paris Agreement to the United Nations Framework Convention on Climate Change, *supra* note 11, at 2.

none of these environmental instruments impose specific human rights obligations on party-states, they recognize the direct and indirect impact that the environment has on human rights.

Clearly, state obligations under environmental, customary, and human rights law overlap in a variety of ways. In highlighting these overlaps, implicit obligations to protect the climate system are established, and the ICJ should recognize these obligations in its upcoming advisory opinion.

Part III: Establishing an Obligation to Protect the Climate System

Effectively reducing GHG emissions requires clear and demanding state obligations to protect the climate system. Though environmental treaties have established some climate obligations, they have thus far been insufficient in making meaningful changes toward reversing climate change, largely due to the limited scope of existing obligations and difficulty in enforcing their execution. However, by integrating principles of international environmental law, international customary law, and human rights law, it becomes evident that international law and custom demand more from States when it comes to protecting the climate system.

Human rights law alone may not establish state obligations to protect the climate system as the human right to a healthy environment has not yet been officially recognized in any binding treaty like the ICCPR or the ICESCR. As such, this Article does not make a case for establishing a human right to a healthy environment. Rather, as the reality of such a right is likely too distant and as the need for effective climate solutions is urgent, this Article makes the case that international environmental law, customary law, and human rights law as they exist today do, in fact, create binding obligations on States to protect the climate system from anthropogenic emissions for present and future generations.

A. Minimal State Obligations Under Environmental Law

To demonstrate the necessity of an appeal to customary and human rights law, it is important to first explain why international environmental law alone does not establish sufficient state obligations to meaningfully affect climate change.

International treaties have played a vital role in achieving universal recognition of environmental issues. Although it took decades for States to become convinced that human activity was negatively affecting the global climate system, today's science on climate change is sound, and its near-universal acceptance has been reflected by the ratification of 194 States to international treaties like the Paris Agreement.¹²⁸

¹²⁸ United Nations: Climate Change, *The Paris Agreement*, <https://unfccc.int/process-and-meetings/the-paris-agreement> [<https://perma.cc/WF32-TZDE>] (last visited Dec. 5, 2023); Paris Agreement to the United Nations Framework Convention on Climate Change, *supra* note 10, at 1 (recognizing in its Preamble “the need for an effective and progressive response to the urgent threat of climate change” along with the multifaceted consequences of climate change on existing global issues like poverty, food security, and human rights. By signing as a party to the agreement states recognize the real threat of climate change and its devastating consequences. Despite referencing human rights in its preamble, the Paris Agreement does not establish a legal obligation to preserve human rights through climate action.).

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While the Paris Agreement is a significant leap forward for solving the climate crisis, it is not without its issues. Currently, the Intergovernmental Panel on Climate Change (IPCC) reports that “limiting warming to around 1.5°C (2.7°F) requires global greenhouse gas emissions to peak before 2025 at the latest, and be reduced by 43% by 2030.”¹²⁹ But currently, “the world is not on track to meet the long-term goals of the Paris Agreement.”¹³⁰

Like the Montreal Protocol, the Paris Agreement has experienced near universal cooperation, and many of the obligations established under the Montreal Protocol are parallel to those established by the UNFCCC.¹³¹ Unfortunately, the very nature of the ozone crisis was significantly different than the nature of the climate crisis. International consensus on the issue of the ozone layer was much easier to achieve because the issue dealt primarily with ozone-depleting substances,¹³² which could be phased out and replaced in a way that had a relatively light impact on social, economic, and political systems.¹³³ Climate change is more complicated. GHG emissions are the byproduct of basic modern human activity that require fuel, including producing energy, food, water, shelter, transportation, and work. As such, fossil fuels have become essential for the continued function of many current social, economic, and political systems.¹³⁴ While significant efforts have been made to find alternative, climate-friendly fuel sources, those substitutes are not nearly as accessible as substitutes to ozone-depleting substances.¹³⁵ Unfortunately, it appears humans are dependent on fossil fuels in a way we never were on ozone-depleting substances.

Despite these differences, the Paris Agreement still imposes necessary legal obligations on States to protect the climate system. Under this agreement, States are required to formulate specific climate action plans nationally determined contributions, or (NDCs) and to submit those

¹²⁹ *The Evidence is Clear: the Time for Action is Now. We Can Halve Emissions by 2030*, IPCC: NEWSROOM (Apr. 4, 2022), <https://www.ipcc.ch/2022/04/04/ipcc-ar6-wgiii-pressrelease> [<https://perma.cc/PV33-BVYF>].

¹³⁰ Lindsay Maizland, *Global Climate Agreements: Successes and Failures*, COUNCIL ON FOREIGN RELATIONS (Dec. 5, 2023), <https://www.cfr.org/backgrounder/paris-global-climate-change-agreements> [<https://perma.cc/2K6H-KMVW>] (quoting the 2023 Global Stocktake report).

¹³¹ See *supra* text accompanying notes 68–78.

¹³² See Sayer, *supra* note 70.

¹³³ See *id.* (“Of course, chemical compounds and the sectors in which they’re used are an easier target than the full spectrum of greenhouse gas emitters.”).

¹³⁴ See Samantha Gross, *Why are Fossil Fuels so Hard to Quit?*, BROOKINGS (2020), <https://www.brookings.edu/articles/why-are-fossil-fuels-so-hard-to-quit> [<https://perma.cc/5723-ZWR2>] (“We haven’t found a good substitute for oil, in terms of its availability and fitness for purpose. Although the supply is finite, oil is plentiful and the technology to extract it continues to improve, making it ever-more economic to produce and use. The same is also largely true for natural gas.”).

¹³⁵ See Sayer, *supra* note 70; Gross, *supra* note 134.

plans to the UNFCCC secretariat every five years.¹³⁶ However, the agreement does not create a legal obligation on States to meet their NDCs.¹³⁷ This means a State could, in good faith, create a meaningful NDC but ultimately not face repercussions if it fails to take sufficient action to fulfill those goals. Despite positive state obligations created under the Paris Agreement to cooperate, make goals, and provide reports, the lack of an explicit obligation to fulfill or even make good faith efforts towards state NDCs leaves the treaty difficult to enforce and its practical goals unattainable.¹³⁸

Further, the convention is only binding on ratifying States. As climate change is a global issue where nearly all States are responsible for at least a small fraction of GHG emissions, treaties like the UNFCCC and the Paris Agreement require universal cooperation to have any meaningful impact on the climate crisis. Unfortunately, domestic politics can interfere. For example, when the United States briefly withdrew from the Paris Agreement during President Donald Trump's administration, one of the world's largest GHG producers no longer committed itself to do its part in solving the problem.¹³⁹ Fortunately, the United States rejoined the Paris Agreement after President Joe Biden succeeded President Trump,¹⁴⁰ but these events demonstrate one of the major downfalls of relying solely on international environmental treaties to solve an issue like climate change. As proposed solutions have become widely politicized, and as the politics of any nation are volatile, the risk of state withdrawal from treaties is significant.

In sum, environmental treaties create meaningful state obligations to cooperate, plan, and report efforts to solve climate change, but they fail to compel States to stick to their word. Recognizing these weaknesses in existing environmental treaties, a broader and more binding source of international law is needed to ensure consistent universal cooperation. Fortunately, international customary law does a lot of work to fill in the holes left by environmental treaties.

B. Application of the No-Harm Rule and Due Diligence Principle to Climate Change

International customary law solves a problem inherent in treaties by being binding on every State. In determining state obligations to protect the climate system, the no-harm rule and the duty of due diligence impose meaningful binding obligations on States that allow for more genuine execution of NDCs. Further, they provide a more stable avenue for attributing state responsibility.

These two customs often work in tandem. For instance, while the duty of due diligence is often a standard to measure the reasonableness of state action, it is also an obligation in its own

¹³⁶ United Nations: Climate Change, *Nationally Determined Contributions (NDCs)*, <https://unfccc.int/process-and-meetings/the-paris-agreement/nationally-determined-contributions-ndcs> [<https://perma.cc/TC32-TJ62>] (last visited Dec. 6, 2023).

¹³⁷ *UN Adopts Landmark Resolution to Define Global Legal Obligations on Climate Change*, *supra* note 88. See Paris Agreement to the United Nations Framework Convention on Climate Change, *supra* note 11.

¹³⁸ *UN Adopts Landmark Resolution to Define Global Legal Obligations on Climate Change*, *supra* note 88.

¹³⁹ Matt McGrath, *Climate Change: US Formally Withdraws from Paris Agreement*, BBC (Nov. 4, 2020), <https://www.bbc.com/news/science-environment-54797743> [<https://perma.cc/2756-MBXT>].

¹⁴⁰ Press Release, Antony J. Blinken, Secretary of State, The United States Officially Rejoins the Paris Agreement (Feb. 19, 2021), <https://www.state.gov/the-united-states-officially-rejoins-the-paris-agreement> [<https://perma.cc/NG6P-TLFR>].

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right that could be violated as an obligation of means for fulfilling the no-harm rule.¹⁴¹ As such, this Article will first analyze obligations established under the no-harm rule and then analyze the role of the due diligence principle before analyzing their combined effect in establishing state obligations to protect the climate system.

1. State Obligations Under the No-Harm Rule

In relation to climate change, the no-harm rule creates an obligation on States to protect the climate system to the extent that States are prevented from causing environmental harm to other States.¹⁴² While this is not a direct obligation to protect the climate system, the custom could be applied to GHG emissions, prohibiting States from emitting levels of GHG that directly impact another state's environment.¹⁴³ While Canada's pollution of Washington State in *Trail Smelter* was not characterized as a climate issue, the court's application of the no-harm rule, in that case, is analogous to a hypothetical modern dispute concerning GHG emissions harming the environment of another State. The United States was harmed by Canada's actions to the extent that the pollution contaminated the forests and crops of Washington State, thus directly affecting the US environment.¹⁴⁴

Within the context of climate change, a State like Vanuatu could attempt an action against a major GHG producer like the United States, arguing that the U.S.'s high level of emissions has directly contributed to the rise in sea level that is eroding Vanuatu's coastlines and contaminating their freshwater. In fact, it is becoming easier to measure the effect of human activity on the climate and to attribute the consequences of specific emissions activity to certain actors.¹⁴⁵ Vanuatu could seek damages under the theory that the United States must provide restitution for the proportion of harm caused by United States' GHG emissions to Vanuatu. The challenge of such a claim is proving harm that is direct enough to establish state responsibility. Whereas the harm in *Trail Smelter* was rather easy to identify as Canada and the United States are neighbors and the effect of the Canadian pollution was direct and physical, the causal chain between United States emissions and rising sea levels is more complicated. The U.S. is not the sole contributor to climate change, and GHG emissions do not directly impact Vanuatu. Rather, it is the effects of GHG in the atmosphere that lead to sea warming and rising that harms Vanuatu. As such, relying solely on obligations under the no-harm rule may be too much of a stretch to persuade a court to hold a State responsible for its emissions. But the no-harm rule does not operate in isolation, and further customary obligations established under the duty of due diligence may provide an extra layer of justification for holding States responsible for their GHG emissions.

¹⁴¹ Samuel, *supra* note 98, at 11.

¹⁴² See *Trail Smelter Arbitration*, *supra* note 91; *Legality of the Threat of Use of Nuclear Weapons*, *supra* note 96 at ¶ 29.

¹⁴³ *Legality of the Threat of Use of Nuclear Weapons*, *supra* note 96, at ¶ 29.

¹⁴⁴ *Trail Smelter Arbitration*, *supra* note 91 at 1925.

¹⁴⁵ See Yale Sustainability, *Yale Experts Explain Climate Lawsuits* (Aug. 16, 2023), <https://sustainability.yale.edu/explainers/yale-experts-explain-climate-lawsuits> [<https://perma.cc/K98G-U4D3>] (explaining the processes for attributing emissions to States through concepts called "climate attribution" and "source attribution.").

2. Obligations Under the Duty of Due Diligence

The due diligence principle is a standard by which the required level of state action under an international agreement is measured, but it is also a customary obligation in its own right.¹⁴⁶ As an obligation of conduct rather than result, this obligation requires States to take reasonable action in either fulfilling other obligations or preventing harm to another State.¹⁴⁷ Regarding preventative measures, States are required “to not knowingly allow their territory to be used for acts contrary to the rights of other states.”¹⁴⁸ If States fail to exercise due diligence in fulfilling their legal obligations, “their breach may constitute a wrongful act for the purpose of triggering international legal responsibility.”¹⁴⁹

The duty of due diligence is frequently recognized in environmental law.¹⁵⁰ The preventative nature of due diligence obligations is particularly important as it requires States “to prevent the causing of significant damage to the environment of another state.”¹⁵¹ This means that a State’s inaction or lack of diligent action to reduce carbon emissions could be a violation of the due diligence custom.¹⁵²

Due diligence obligations also aid and coincide directly with existing environmental obligations under the UNFCCC, Kyoto Protocol, and Paris Agreement. Where those treaties require more climate action from developed States (who have contributed more to the climate crisis) than from developing States,¹⁵³ likewise, due diligence obligations require more from developed States.¹⁵⁴ Essentially, “measures considered necessary and reasonable to meet relevant due diligence standards are not static. Instead, they may evolve over time, for example, due to scientific or technological advances.”¹⁵⁵ This adaptive nature of the duty of due diligence allows the obligation to be continually helpful and relevant to climate change. As developed countries

¹⁴⁶ Samuel, *supra* note 98, at 8.

¹⁴⁷ *Id.* at 24.

¹⁴⁸ *Id.* at 26.

¹⁴⁹ *Id.* at 25.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 27.

¹⁵² See United Nations Framework Convention on Climate Change, *supra* note 77, at 4 (“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.”).

¹⁵³ *Id.* Kyoto Protocol to the United Nations Framework Convention on Climate Change, *supra* note 82 at 11; Paris Agreement to the United Nations Framework Convention on Climate Change, *supra* note 11.

¹⁵⁴ Samuel, *supra* note 98, n.117 (2018), citing to TIMO KOIVUROVA, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, *Due Diligence* (2012), <https://www.arcticcentre.org/loader.aspx?id=78182718-d0c9-4833-97b3-b69299e2f127> (“[T]he ICJ confirmed a ‘traditional criterion of due diligence whereby developing States with their less developed economy and human and material resources cannot be expected to uphold the same degree of diligence as their developed counterparts.’”).

¹⁵⁵ *Id.* at 20.

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like the United States continue to increase their capability to transition away from fossil fuels, their obligations to exercise diligence in preventing harm increase.

If the due diligence principle did not exist as an obligation in its own right, then the scope of due diligence obligations would likely be limited in application. A State would only fail to exercise due diligence as a means to fulfilling some other existing legal obligation, like those specified by the treaty or those created under the no-harm rule.¹⁵⁶ Under the Paris Agreement, this would mean that States are only required to exercise due diligence in developing an NDC, not necessarily in actually reaching their climate targets. However, prevention of harm is international custom and provides the basis for due diligence to be violated as a state obligation without connection to any resulting state obligation.¹⁵⁷ Further, if States have an implied obligation under the no-harm rule to protect the climate system by not allowing their GHG emissions to harm other States, then the duty of due diligence operates as an obligation of conduct, requiring States to make reasonable efforts to fulfill their no-harm rule obligations.

3. The Combined Effect of the No-Harm Rule and Duty of Due Diligence

Under the no-harm rule and within the environmental context, States must exercise due diligence to refrain from causing harm to the environmental interests of other States. While this broad, customary obligation is not limited to the scope of the Paris Agreement, it is still limited in the degree to which States can be held responsible for their actions. Injured States will be required to show that an accused State's actions caused direct harm to their environment.¹⁵⁸ In certain cases, this may be enough to establish binding state obligations and attribute state responsibility, just as the United States was able to hold Canada responsible in *Trail Smelter*.

Ideally, this reasoning should also apply to small island developing States that are harmed by the effects of climate change. For example, a State like Vanuatu should be able to hold the United States responsible for failing to meet its obligations under both the no-harm rule and the duty of due diligence. Modern methods have made it easier to attribute environmental harm to specific countries.¹⁵⁹ As the United States is one of the largest GHG emitters and has contributed the most to the global climate crisis,¹⁶⁰ their emissions have contributed significantly to global warming and the subsequent rise in sea levels. That rise in sea levels affects small, low-lying island States by eroding their coastlines, contaminating their freshwater, and endangering their

¹⁵⁶ *Id.* at 15–16.

¹⁵⁷ *Id.* at 26 (“due diligence obligations can exist and operate in their own right, in parallel with those obligations triggering them. That such a distinction and separate existence is possible should not be surprising since many of these principles . . . find their origin in general principles creating due diligence obligations. For example, in the *Pulp Mills* case, the ICJ observed that ‘. . . the principle of prevention, as a customary rule, has its origins in the due diligence that is required of a State in its territory.’”).

¹⁵⁸ See *Trail Smelter Arbitration*, *supra* note 91; *Corfu Channel*, *supra* note 95 at 53.

¹⁵⁹ *Yale Experts Explain Climate Lawsuits*, *supra* note 145.

¹⁶⁰ Simon Evans, *Analysis: Which Countries are Historically Responsible for Climate Change?*, CARBON BRIEF (Oct. 5, 2021 6:00 AM), <https://www.carbonbrief.org/analysis-which-countries-are-historically-responsible-for-climate-change> [<https://perma.cc/TN6K-82JW>].

marine life.¹⁶¹ These are the domestic environmental resources that Vanuatu and other small island States have a sovereign right to exploit.¹⁶² By failing to exercise due diligence in limiting their GHG emissions, the United States is violating the no-harm rule.

In essence, the no-harm rule and the duty of due diligence place at least some constraints on sovereignty. While States do have a “sovereign right to exploit their own resources pursuant to their own environmental and developmental policies,”¹⁶³ States cannot exercise this right to the extent that it interferes with the rights of other States.¹⁶⁴ As international customary law is binding on all States and not limited to the scope of specific environmental treaties, these customs meaningfully fill a gap left behind by international environmental treaties to establish state obligations to protect the climate system.

The de facto effect of these customs is an enforcement mechanism for international climate agreements like the Paris Agreement. Whereas the current framework of the Paris Agreement does not establish consequences when States fail to meet their targets, the no-harm rule and duty of due diligence can hold a State responsible for not taking sufficient action to mitigate climate change. This is because the duty of due diligence operates as a customary obligation in its own right, requiring States to take reasonable action in preventing harm to other States.¹⁶⁵ The customs work to fill a gap left open by international treaties by imposing broad obligations on States to respect the environmental rights of other States and by applying to all States regardless of their signatory status.

International treaties and customs make up most of international environmental law. And despite their benefits, they still leave significant gaps when it comes to developing efficient, effective, and long-term solutions to climate change. Environmental treaties fail to have sufficient enforcement mechanisms to reach their goals and are only binding on parties that agree to be bound, which risks the chance of major players in climate change opting out of obligations. Additionally, attributing environmental harm to a specific State may be more difficult than in cases like *Trail Smelter* because the negative impacts of climate change are the result of a longer chain of causation with greater potential of mitigating factors warding off state responsibility. As such, applying the no-harm rule and the duty of due diligence to environmental law could still be insufficient to persuade a court to hold States responsible for their negligent emissions. By integrating human rights law with environmental law and the customs of no-harm and due diligence, state obligations become more concrete.

C. State Obligations Under Human Rights Law

Where it may be more difficult for a State to hold a GHG-emitting State responsible on environmental grounds alone, applying the no-harm rule and duty of due diligence to human rights law provides a stronger basis for showing why States are responsible for their harmful emissions.

¹⁶¹ Parsons, *supra* note 6.

¹⁶² See G.A. Res. 1803 (XVII), at 2 (Dec. 14, 1962) (declaring “the right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned”).

¹⁶³ U.N. Conference on Environment and Development, *supra* note 126, at 1.

¹⁶⁴ See *Corfu Channel*, *supra* note 95, at 22.

¹⁶⁵ Samuel, *supra* note 98, at 24.

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An appeal to human rights law in establishing state obligations to protect the climate system is natural as many of the goals of international environmental law coincide directly with human rights. Environmental principles like preservation and sustainable development are premised on the idea that present and future generations deserve to benefit from the environment just as past generations have.¹⁶⁶ The premise of environmental law is to ensure natural resources are used responsibly, state interests are protected, and humanity is able to live in harmony with nature.¹⁶⁷ For example, both the Rio Declaration and the United Nations Conference on Environment and Development urged States to develop preservation strategies to protect future generations.¹⁶⁸ The Conference also recognized that failure to implement practices of sustainable development “will narrow the choices of future generations.”¹⁶⁹ Thus, environmental law is built, at least in part, on a concern for the rights and interests of future humans.

The consequences of anthropogenic climate change are already threatening the human rights of current generations, and without significant intervention to reduce GHG emissions, the human rights of future generations will be endangered even more. Today, as a result of climate change, the IPCC and other organizations are finding that climate change is having both a direct and indirect impact on human rights including.¹⁷⁰ These rights include, among others, the right to life, the right to adequate food, the right to safe drinking water and sanitation, the right to good physical and mental health, the right to adequate housing, the right to self-determination, the right to work and the right to development.¹⁷¹

Further, the rights of children are adversely affected by climate change.¹⁷² The Committee on the Rights of a Child issued a general comment addressing “children’s rights and the environment with a special focus on climate change” in August 2023. There, it explained that the Convention on the Rights of the Child

explicitly addresses environmental issues in article 24 (2) (c), by which States are obliged to take measures to combat disease and

¹⁶⁶ Foster, *supra* note 93, at 3.

¹⁶⁷ American Public University, *Understanding Environmental Law: Definition and Scope*, <https://www.apu.apus.edu/area-of-study/security-and-global-studies/resources/what-is-environmental-law> [<https://perma.cc/HTK3-R9AL>] (last visited Dec. 6, 2023).

¹⁶⁸ The Rio Declaration establishes that “the right to development must be fulfilled so as to equitably meet development and environmental needs of present and future generations” while the Conference urged States to develop national strategies for sustainable development that will “ensure socially responsible economic development while protecting the resource base and the environment for the benefit of future generations.” U.N. Conference on Environment and Development, *supra* note 126, at 2; U.N. Conference on Environment and Development, *Agenda 21*, ¶8.7 (June 14, 1992).

¹⁶⁹ Rep. of the United Nations Conference on Environment and Development, 413 A/CONF.151/26 (Vol. III) (Aug. 14, 1992), <https://www.un.org/esa/documents/ga/conf151/aconf15126-3.htm>.

¹⁷⁰ G.A. Res. 50/9, Human Rights Council (July 7, 2022).

¹⁷¹ *Id.*

¹⁷² Comm. on the Rights of the Child, General Comment No. 26, CRC/C/GC/26 (Aug. 22, 2023).

malnutrition, taking into consideration the dangers and risks of environmental pollution, and under article 29 (1) (e), by which they are required to direct the education of children to the development of respect for the natural environment.¹⁷³

The general comment also lists several other significant rights established under the Convention on the Rights of the Child that are threatened by climate change, including the right to life, the right to survival and development, the right to the highest attainable standard of health, and the right to an adequate standard of living.¹⁷⁴

Human rights law alone would be insufficient to hold a State responsible for its GHG emissions as human rights actions can only be brought by an individual against their own government. Though able, a Vanuatu citizen would not bring an action against the Vanuatu government because the State of Vanuatu is not contributing to the rising sea levels that threaten the citizen's human rights. Rather, it's the actions of large GHG producers like the United States that contribute significantly to the harm on human rights. But the Vanuatu citizen has no method of recourse against another State as no *erga omnes* right to a healthy environment has been established. Instead, Vanuatu may choose to bring an action in its sovereign capacity against the United States for harming Vanuatu's interest and capability to fulfill its human rights obligations for its own citizens. Attributing harm to the United States would be essential in such an action, and an integrated legal theory based on environmental, customary, and human rights law would only bolster Vanuatu's claims.

D. Integration of Environmental, Customary, and Human Rights Law

As the no-harm rule and due diligence principle create state-to-state obligations, the identification of harm caused to a State's interests by an offending State is necessary to hold an offending State responsible.¹⁷⁵ And, as previously stated, one of those harms is impeding a State's ability to respect, protect, and fulfill the human rights of its nationals. A State could argue that the threat to human rights caused by climate change is not a current harm but a future potential harm and that the lack of any current harm to human rights prevents a State from having standing. However, the effects of climate change are present today through increasingly severe weather, droughts, loss of marine life, and other side effects of anthropogenic emissions.¹⁷⁶ Rights to life, health, food, and water along with children's rights to an adequate standard of living are already being harmed by the present consequences of climate change.¹⁷⁷ Thus, it should not be difficult for States most severely affected by climate change (like Vanuatu or the Maldives) to establish standing. In fact, as the effects of climate change worsen through time, more States will be able to prove current harm to the human rights of their citizens.

While the no-harm rule has typically been defined within the context of environmental harm, it is equally applicable to other state interests like human rights. *Corfu Channel* provides a

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ See Trail Smelter Arbitration, *supra* note 91; Corfu Channel, *supra* note 95; Legality of the Threat of Use of Nuclear Weapons, *supra* note 96.

¹⁷⁶ UNDERSTANDING HUMAN RIGHTS AND CLIMATE CHANGE, *supra* note 38, at 3.

¹⁷⁷ Comm. on the Rights of the Child, *supra* note 172.

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more general definition for the rule, describing it as preventing a State from using “its territory for purposes injurious to the interests of other States in a manner contrary to international law.”¹⁷⁸ Under this definition, preventing a State from meeting its human rights obligations is a violation of the no-harm rule. Meanwhile, failure to mitigate the causes of climate change frustrates state interests and is a violation of the due diligence principle.

It does not matter that actors like the United States do not bind themselves to the ICESCR or the CRC. While the U.S. does not impose on itself the obligation to respect, protect, and fulfill those rights for its own citizens, it does have an obligation to not harm another State’s interest in doing so. As such, nations like the United States are obligated to protect the climate system to ensure that they do not infringe on the human rights of foreigners who depend on access to a healthy environment. By harming another State’s environment, emitting States are consequently making it harder for States to fulfill the human rights of their citizens that require access to a healthy environment as a precondition.

Relying on human rights obligations to establish state responsibility for lackluster climate efforts strengthens the case for States that can show direct environmental harm and opens the door for States who may otherwise not be able to do so. A court may be unpersuaded by the longer causation chain between the emissions of the United States and the environmental harm caused to Vanuatu. By appealing to human rights law, the court can achieve a just outcome for States most harmed by climate change, especially considering that nearly all States have human rights obligations under the ICCPR, the ICESCR, and/or the CRC.

An appeal to human rights obligations as a state interest harmed under the no-harm rule naturally stems as an additional argument for States experiencing environmental harm because so many human rights require access to a clean and healthy environment as a precondition. States that cannot yet show direct environmental harm or current harm to human rights may still be able to establish state responsibility under the no-harm rule because the very nature of human rights obligations is proactive.¹⁷⁹ States have due diligence obligations to fulfill their human rights obligations, meaning that they must be proactive in fulfilling the human rights of their citizens by acting to preserve and protect those rights from future threats.¹⁸⁰ If a State’s emissions are making it more difficult for another State to proactively protect its citizens’ human rights, then the injured State’s interest in fulfilling its human rights obligations is harmed. Therefore, while environmental, customary, and human rights law in isolation may be insufficient to hold a State responsible for its GHG emissions, together they create a stronger justification for establishing harm and responsibility.

Part IV: Answering the General Assembly Resolution

Returning to the UNGA Resolution to the ICJ, do States have an obligation to protect the climate system? Surely, they do. Existing environmental treaties provide a foundation of state

¹⁷⁸ Corfu Channel, *supra* note 95. *See also* UN Secretary-General, Survey of International Law in Relation to the Work of the ILC, *supra* note 95.

¹⁷⁹ Samuel, *supra* note 98, at 39.

¹⁸⁰ *Id.*

obligations to cooperate and formulate plans for tackling climate change.¹⁸¹ While the Paris Agreement does not require States to fulfill their emissions targets,¹⁸² the customary no-harm rule and duty of due diligence operate as an enforcement mechanism for state NDCs. Under these customs, States have both an obligation to not harm the interests of other States and to exercise due diligence in preventing such harm.¹⁸³ Applied to the Paris Agreement, this means that States must exercise due diligence in preventing harm to other States caused by their GHG emissions. The best way for States to do that is to, at the very least, make reasonable efforts to meet their emissions targets.

Human rights obligations relate directly with the no-harm rule and the duty of due diligence in that States cannot knowingly harm the interests of other States,¹⁸⁴ of which one interest is to exercise due diligence in fulfilling human rights obligations. Altogether, these existing obligations under environmental law, customary law, and human rights law provide a framework to show that, at least implicitly, States have an obligation to protect the climate system as a part of exercising due diligence in fulfilling their existing obligations. The scope of this obligation is measured through the no-harm rule and the duty of due diligence. Because of the flexible nature of due diligence, the reasonable efforts a State must engage in to protect the climate system depends on their capability.¹⁸⁵ Thus, developed States that are both more responsible for the climate crisis and more capable of reducing GHG emissions will have a more demanding obligation to protect the climate system than developing States with less capabilities.

The legal consequences for state failure to adequately fulfill obligations to protect the climate system is the ability to hold the State responsible in an international court or tribunal. Assuming both States have consented to a court's jurisdiction, a State could bring an action against another State for failing to exercise due diligence in reducing GHG emissions and protecting the climate system. The legal consequences, therefore, would be providing recompense for damage already caused to an injured State. By allowing States to be held responsible for their GHG emissions, States will be more motivated to meet their emissions targets under the Paris Agreement, perhaps getting the world back on track with needed climate action.

Conclusions

Integration of environmental, customary, and human rights law fills in the gaps left by current environmental treaties that have allowed States to remain lax on climate change. It also gets around the problem of environmental treaties that are not always legally binding on actors whose participation is necessary to meaningfully solve the climate crisis. States have an obligation under the no-harm rule and the duty of due diligence to protect the climate system for the sake of not infringing on the environmental and human rights interests of other States. Additionally, as is consistent with the Paris Agreement and the nature of due diligence obligations, the extent of a State's obligation to protect the climate system is adaptable to the capability of States to reduce

¹⁸¹ See United Nations Framework Convention on Climate Change, *supra* note 77.

¹⁸² Paris Agreement to the United Nations Framework Convention on Climate Change, *supra* note 11.

¹⁸³ See Corfu Channel, *supra* note 95; Samuel, *supra* note 98, at 24.

¹⁸⁴ Corfu Channel, *supra* note 95.

¹⁸⁵ See Samuel, *supra* note 98, at 22–23.

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GHG emissions or, in other words, prevent harm to other States. This allows the rate of positive climate action to increase as clean technology continues to develop.

The integration of these areas of law also solves the issue of not having sufficient enforcement mechanisms on existing environmental treaties. The Paris Agreement, though essential, requires that States create and submit action plans to reduce emissions but does not require States to meet their emissions targets. Under the existing environmental law, a State could create an NDC but then neglect to meet its target and not be held responsible for its continued pollution. In fact, this is likely one of the exact reasons why the world is so woefully behind on its climate goals.

However, the failure of a State to meet its NDC, especially when it has the capacity to do so, could be seen as a violation of the principle of due diligence and the no-harm rule. By failing to exercise due diligence to meet its NDC, a State is continuing to exacerbate the climate crisis, which threatens the human rights of present and future generations as well as States' interests and obligations to respect, protect, and fulfill those rights. Customary international law and human rights law create a framework for holding States responsible for their inaction towards climate change. They create a web of obligations that are interdependent and, at least implicitly, establish a state obligation to protect the climate system to the capacity that they are reasonably capable.

While this analysis may push against the boundaries of international law and ask that the ICJ give credence to new legal theories in its advisory opinion, such is necessary to ensure the continued health of our home and its inhabitants. If the ICJ fails to recognize State obligations to protect the climate system, then climate action will continue to fall drastically behind, and present and future generations will be significantly harmed. Prevention of environmental catastrophe requires immediate action, and our reliance on the slow pace of the law may result in a poisoned planet we could have saved.