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PROTECTION OF THE GLOBAL CLIMATE REGIME AS AN OBLIGATION *ERGÄ OMNES*

BILKENT UNIVERSITY 2023

PROTECTION OF THE GLOBAL CLIMATE REGIME AS AN
OBLIGATION *ERGÄ OMNES*

A Master's Thesis

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Ankara
July 2023

PROTECTION OF THE GLOBAL CLIMATE REGIME
AS AN OBLIGATION *ERGA OMNES*

The Graduate School of Economics and Social Sciences
of
İhsan Doğramacı Bilkent University

by

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In Partial Fulfillment of the Requirements for the Degree of
MASTER OF PUBLIC LAW

THE DEPARTMENT OF LAW
İHSAN DOĞRAMACI BİLKENT UNIVERSITY
ANKARA

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ERGA OMNES
By Eylül Kabakcı

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ABSTRACT

PROTECTION OF THE GLOBAL CLIMATE REGIME AS AN OBLIGATION *ERGA OMNES*

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July 2023

Global climate change, in addition to the devastation generated by the increasing frequency of extreme weather events and rising sea-levels, has been adversely affecting the access to freshwater resources, food production and security, as well as biodiversity and human health. United Nations has recognized this environmental phenomenon as a common concern of humankind, which is a part of the global commons law. One legal implication attached to such recognition is that the general obligation of States to protect the climate regime might acquire an *erga omnes* character. However, it is not entirely clear what obligations *erga omnes* entail and how they are identified in international law. In this context this thesis will examine the identification methods proposed in international law and further explore the possibility of the adoption of an alternative approach to establish a basis for the protection of global climate regime to be recognized as an obligation *erga omnes*.

Keywords: Global climate change, Protection of the Global Environment, Common Concern of Humankind, Obligations *Erga Omnes*

ÖZET

BİR *ERGA OMNES* YÜKÜMLÜLÜK OLARAK KÜRESEL İKLİM REJİMİNİN KORUNMASI

Kabakcı, Eylül

Yüksek Lisans, Hukuk Bölümü

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Temmuz 2023

Küresel iklim değişikliği, aşırı hava olaylarının artan sıklığı ve yükselen deniz seviyelerinin yarattığı çevresel yıkıma ek olarak, su kaynaklarına erişimini, gıda üretimi ve güvenliğini, biyolojik çeşitliliği ve insan sağlığını olumsuz etkilemektedir. Birleşmiş Milletler bu çevresel olguyu insanlığın ortak bir endişesi olarak kabul etmiştir. Böyle bir kabulün hukuki sonuçlarından biri, devletlerin iklim rejimini korumaya yönelik genel yükümlüğünün *erga omnes* bir nitelik kazanabileceğidir. Ancak, uluslararası hukukta *erga omnes* yükümlülüklerin ne olduğu ve nasıl tanımlandıkları açıklığa kavuşturulamamıştır. Bu bağlamda, bu tez, uluslararası hukukta önerilen tanımlama yöntemlerini inceleyecek ve küresel iklim rejiminin korunmasının *erga omnes* bir yükümlülük olarak tanınması için bir temel oluşturmak üzere alternatif bir yaklaşımın benimsenmesi olasılığını araştıracaktır.

Anahtar Kelimeler: Küresel iklim değişikliği, Küresel Çevrenin Korunması, İnsanlığın Ortak Endişesi, *Erga Omnes* Yükümlülükler

ACKNOWLEDGEMENTS

First of all, I would like to express my sincere gratitude to my advisor Asst. Prof. Ayşe Dicle Ergin for her invaluable guidance and unwavering support throughout my master's program. Her expertise and encouragement paved the way for me to complete this research and write this thesis.

I would also like to thank Asst. Prof. Zülfiye Yılmaz and Asst. Prof. Elif Oral for being on my thesis committee and providing valuable comments and suggestions. Their insights and guidance were instrumental in helping me shape the final version of this thesis.

Further, I extend my heartfelt thanks to all the faculty members and staff in the Bilkent University Faculty of Law for their dedication to education and their willingness to share their knowledge. A special thanks is due to Assoc. Prof. Elvin Evrim Dalkılıç and Halil Baha Karabudak. I could not have undertaken this journey without their immense support and guidance. Their constant belief in my abilities and encouragement during both my undergraduate and graduate studies have been a source of strength that kept me going. Also, I am indebted to the Bilkent University for providing me with the necessary resources, facilities and research opportunities. This academic environment fostered by the University has been pivotal in enhancing my knowledge and skills.

Among the endless list of friends who continuously supported me, I have special thanks to my dear friends Tolunay Alankaya, Oktay Karaalp, İlke Başara, Aysu Gül Yılmaz, Deren Bayar, Nida Nur Yılmaz, Gürem Ulusoy, İmge Doğa Özden, Yeşim

Köseoğlu, Elif Anıl, Emir Berke Kahveci, Engin Güçlüol, Zeynep Baysar and Doğukan Miraç Demircan. Your tireless belief in me and your continuous words of motivation have been my driving force. The late-night study sessions in the library, the time you set aside for brainstorming discussions and the shared moments of stress have made this journey truly unforgettable. You were always there to offer a listening ear and a fresh perspective even when you had your own commitments and this reflects the true essence of our friendship and support. My dear friends, you have made this endeavor not just about academic accomplishment but about shared growth, laughter and provided me with memories lasting a life-time. I am incredibly fortunate to have friends like you who stood by me in all circumstances. Your presence has transformed what could have been a process I might have gone through alone into a collective achievement filled with the warmth of your companionship.

Finally, I would like to thank the people who mean to most to me: my family. My beloved mother and father, my dear role models Ceylan and Giray: I am thankful for your belief in my abilities and your constant encouragement. Your guiding light has not only been the foundation of my journey in completing this master's thesis, but my whole life. Your sacrifices, both seen and unseen, have shaped not only this academic achievement but also the person I have become. Your faith in me has been my greatest motivation. As I move forward with my journey, I know that I will always feel your love, care and support to keep me going. To my dear brother, Erkin, your companionship and understanding have provided me with a sense of purpose and determination. Thank you for all the comedic reliefs you provided during this process. Your pride in my achievements fuels my aspirations. You are the best brother a person can ask for. I also would like to acknowledge the sacrifices made by my grandparents,

whose wisdom, stories and continuous faith in me have been invaluable sources of inspiration. To my family as a whole, your patience during my long hours of study, your empathy during moments of frustration and stress, your celebrations during my victories have made this journey incredibly meaningful. Therefore, in true spirit of family, this achievement is as much your as it is mine. Your love and support have transformed my aspirations into tangible accomplishments and I am forever grateful for that.



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TABLE OF ABBREVIATIONS

AdV	: Archiv des Völkerrechts
AIS	: Antarctic Ocean, Indian Ocean and South China Sea
AJIL	: American Journal of International Law
AJPIL	: Australian Journal of Public International Law
AOSIS	: Alliance of Small Island States
APJEL	: Asia-Pacific Journal of International Law
ARSIWA	: Draft Articles on Responsibility of States for Internationally Wrongful Acts
BYIL	: British Yearbook of International Law
CAT	: Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CBD	: Convention on Biological Diversity
CBDR	: Common but Differentiated Responsibilities
CCPR	: Committee on Civil and Political Rights
CDP	: Climate Change Induced Displacement
CESCR	: Committee on Economic, Social and Cultural Rights
CFCs	: Chlorofluorocarbons
COP	: Conference of the Parties

CRC	: Convention on the Rights of the Child
CROC	: United Nations Committee on the Rights of Child's
ECHR	: European Convention on Human Rights
ECtSR	: European Committee of Social Rights
ECtHR	: European Court of Human Rights
ed.	: Editor
EJIL	: European Journal of International Law
EPL	: Environmental Policy and Law
ESC	: European Social Charter
FAO	: Food and Agriculture Organization of the United Nations
GHGs	: Greenhouse Gases
GJIL	: Georgetown Journal of International Law
GoJIL	: Goettingen Journal of International Law
GYIL	: German Yearbook of International Law
HRC	: Human Rights Council
IA	: International Affairs
IACtHR	: Inter-American Court of Human Rights
ICCPR	: International Covenant on Civil and Political Rights

ICERD	: International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	: International Covenant on Economic, Social and Cultural Rights
ICJ	: International Court of Justice
ICLQ	: International and Comparative Law Quarterly
ICRW	: International Convention for the Regulation of Whaling
ICTY	: International Criminal Tribunal for the former Yugoslavia
IDPs	: Internally Displaced Persons
IEP	: Institute for Economics and Peace
ILC	: International Law Commission
IPCC	: Intergovernmental Panel on Climate Change
IR	: International Relations
ISBA	: International Sea-bed Authority
ITLOS	: International Tribunal for the Law of the Sea
IUCN	: International Union for Conservation of Nature
JEL	: Journal of Environmental Law
JIA	: Journal of International Affairs
JILCS	: International Law Students Association Journal of International and Comparative Law

MEA	: Multilateral Environmental Agreement
MJIL	: Melbourne Journal of International Law
MIJSDLP	: McGill International Journal of Sustainable Development Law and Policy
MP	: Marine Policy
MqJICEL	: Macquarie Journal of International and Comparative Environmental Law
NBP	: New Balkan Politics
NGOs.	: Non-Governmental Organization
NYIL	: Netherlands Yearbook International Law
NYUELJ	: New York University Environmental Law Journal
NYULR	: New York University Law Review
OAS	: Organization of American States
ODS	: Ozone Depleting Substance
OECD	: Organization for Economic Cooperation and Development
OHCHR	: United Nations Human Rights Office of the High Commissioner
PCIJ	: Permanent Court of International Justice
PFCs	: Perfluorocarbons

RECIEL	: Review of European Comparative and International Environmental Law
SIDs	: Small Island Developing States
TEL	: Transnational Environmental Law
TIR	: Tuoro International Review
UN	: United Nations
UNCLOS	: United Nations Convention on the Law of the Sea
UNEP	: United Nations Environmental Program
UNFCCC	: United Nations Framework Convention on Climate Change
UNGA	: United Nations General Assembly
USA	: United States of America
UV	: Ultraviolet
VCLT	: Vienna Convention on the Law of Treaties
VJEL	: Vermont Journal of Environmental Law
VJIL	: Virginia Journal of International Law
WJELP	: Washington Journal of Environmental Law and Policy
WMO	: World Meteorological Organization
WTO	: World Trade Organization

INTRODUCTION

In 1992, Intergovernmental Panel on Climate Change (IPCC), an independent scientific intergovernmental body established in 1988 by the United Nations Environment Program (UNEP) and the World Meteorological Organization (WMO), published its first Assessment Report, confirming scientists' concerns that the human activities are the main cause of the inadvertently changing climate of globe through the enhanced greenhouse effect¹. In this initial report, IPCC predicted that the increase in global average temperatures to be about 1 degree Celsius by 2030. Yet, as of 2023, the Earth has already warmed around 1.1 degrees Celsius and with the current climate policies and the legal framework set out for climate change mitigation, the world is on the track to warm 2.7 degrees by the end of the century². Hence, the climate crisis, once talked about in the future tense, unfortunately has already arrived³.

Global climate change, in addition to the devastation generated by the increasing frequency of extreme weather events and rising sea-levels, has already been adversely affecting the access to freshwater resources, food production and security, as well as biodiversity and human health⁴. To address these issues, States appear to be

¹ Intergovernmental Panel on Climate Change (IPCC), *First Assessment Report: Climate Change: the 1990 and 1992 IPCC Assessments* (1992) < <https://www.unep.org/resources/report/climate-change-ipcc-1990-and-1992-assessments> > Accessed 28 May 2023, 65.

² Climate Action Tracker, "2100 Warming Projections: Emissions and expected warming based on pledges and current policies" (2022) <https://climateactiontracker.org/global/temperatures/> Accessed 28 May 2023.

³ Courtney Lindwall, "IPCC Climate Change Reports: Why They Matter to Everyone on the Planet" (2023) <<https://www.nrdc.org/stories/ipcc-climate-change-reports-why-they-matter-everyone-planet#sec-whatis>> Accessed 28 May 2023.

⁴ Benoit Mayer, "The Relevance of the No-Harm Principle to Climate Change Law and Politics" (2016) 19 APJEL 79, 82; Andrew Davis and Garrett Nagle, *Environmental Systems and Societies*, (2nd edn., Pearson Education, 2010) 269.

more willing to establish and rely upon treaties containing liability regimes, such as the United Nations Framework Convention on Climate Change (UNFCCC)⁵ or the Paris Agreement⁶, despite the fact that these agreements neither provide a concrete protection regime for the adverse impacts of the global climate change nor envisage an effective enforcement mechanism. Furthermore, on 29 March 2023, a coalition of United Nations General Assembly (UNGA) Member States, led by the Republic of Vanuatu, successfully adopted a Resolution⁷, calling for a non-binding Advisory Opinion from the International Court of Justice (ICJ), for clarifications on how the existing legal obligations of States can be applied to climate change mitigation and protect the people of this Earth. While this Advisory Opinion might shed light on the application of certain international environmental law principles to the protection of the global climate regime, this issue still requires the adoption of effective and binding judicial instruments to answer to and mitigate the severe and irreversible effects of the global climate change.

This necessity is essentially created by the fundamental characteristics of international law, in particular, the absence of any centralized international law enforcement mechanisms. While this thesis does not attempt to explore the venues for the establishment of a centralized international law enforcement body, for instance a World Court for International Environmental Law⁸, it at least tries to find a basis on which States could invoke each other's responsibility for the global climate change

⁵ United Nations Framework Convention on Climate Change (adopted 4-14 June 1992, entered into force 21 March 1994) 1771 UNTS 107.

⁶ Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) UN Doc. FCCC/CP/2015/L.9/Rev/1.

⁷ United Nations General Assembly (UNGA) Resolution 77/276 (4 April 2023) UN Doc. A/RES/77/276.

⁸ See for example. Alexander M. Solntsev, "The International Environmental Court – A Necessary Institution for Sustainable Planetary Governance in the Anthropocene", in Michelle Lim (ed.) *Charting Environmental Law Futures in the Anthropocene* (Springer Link, 2019) 129-138.

related damage within the existing framework of international law. Considering the global impact climate change has, this thesis focuses on the *erga omnes* status of the general obligation to protect the environment, which has its roots in international environmental law's most fundamental principle: the no-harm rule. In other words, the aim of this thesis is to find an answer to the question of whether the protection of the global climate regime is an obligation *erga omnes*. To answer this research question, the following questions need to be answered first: what is the legal status of the global climate change in international law and where does this legal status fit within the system of international law.

As such, Chapter I of this thesis focuses on establishing the conceptual framework for the protection of the global climate regime. Chapter I (A) begins with the exploration of the historical background of the obligation to protect the environment, rooted in the no-harm rule. The focus of this brief historical assessment is mainly centered around the application of this customary law obligation to areas beyond national jurisdiction, which consists of the concepts of common areas, common heritage of mankind and common concern of humankind. Chapter I (B) discusses the legal status of the global climate change by examining the adverse effects of this widespread environmental problem. This discussion is made so to provide a basis for the argument that the global climate change is a common concern of humankind. Then, the legal implications of such a designation are briefly explored, one of which is the implication that the obligation to protect the common concerns of humankind might have an *erga omnes* status.

Consequently, Chapter II turns the focus on the concept of obligation *erga omnes*. Similar to Chapter I, this chapter begins with assessment of the historical

background of obligations *erga omnes* and the exploration of the relation of this concept with other similar concepts in international law, namely with obligations *erga omnes partes* and *jus cogens*, to outline a general framework of the concept. Then, Chapter II (B) will provide the competing identification methods of obligations *erga omnes* before turning to the main research question of this thesis: *whether the protection of the global climate regime is an obligation erga omnes*. Chapter II will finalize the discussion by exploring the possible legal consequences of identifying the protection of the global climate regime as an obligation *erga omnes*.

Throughout this discussion, the study applies the traditional doctrinal legal method, which consists of identifying and interpreting the existing legal framework of international law, in particular treaty law, customary international law, documents of the United Nations and the jurisprudence of the international courts and tribunals. As a result, this thesis ultimately argues in favor of the existence of the *erga omnes* status of the obligation of protecting the global climate regime but not to the extent that this could be done with certainty, mainly due to the lack of clarification of this topic provided by the international courts and tribunals.

CHAPTER I

PROTECTION OF THE GLOBAL CLIMATE REGIME

I. Obligation to Protect the Global Environment

A. Conceptual Framework

The obligation to protect the global environment refers to the responsibility of States not to cause damage to areas beyond the limits of their national jurisdiction and is rooted in the no-harm rule, which is seen as international environmental law's point of origin⁹.

Scholars trace this rule back to the 1941 arbitral award in the Trail Smelter case¹⁰, which was the first international decision that challenged the doctrine of absolute territorial sovereignty¹¹ in the context of environmental harm¹². The central

⁹ Edith Brown Weiss, "The Evolution of International Environmental Law" (2011) 54 JYIL 1, 4.

¹⁰ *Trail Smelter Arbitration (United States v. Canada)* (1938 and 1941) 3 R.I.A.A. 1905.

¹¹ In the context of international environmental law, the roots of the doctrine of absolute territorial sovereignty can be traced back to an 1895 dispute between the United States and Mexico, regarding the use of waterways in the Rio Grande River. During this dispute, an US Attorney General, Judson Harmon, in response to a request by the Department of State for advice concerning the dispute, expressed that the Mexican government had no right to protest water pollution in the boundary of the Rio Grande River, contending that "*the fundamental principle of international law is the absolute sovereignty of every nation, as against all others, within its territory*". Under this doctrine, a state wields absolute sovereignty over the portion of a waterway that is located within its territory. In other words, according to the Harmon doctrine, a state could do virtually as it pleased with the portion of an international watercourse within its territory, irrespective of the harmful consequences it may impose on other states. See. Tuomas Koukkanen, *International Law and the Environment*, (Martti Koskenniemi ed, Kluwer Law International, 2001), 14, 15; Stephen C. McCaffrey, "Of Paradoxes, Precedents and Progeny: The Trail Smelter Arbitration 65 Years Later" in *Transboundary Harm in International Law: Lessons from the Trail Smelter Arbitration*, in Rebecca M. Bratspies and Russell A. Miller (eds.) (Cambridge University Press, 2006), 35.

¹² It is important to note that the first international jurisprudence that challenged the doctrine of absolute sovereignty in general terms, was the *Island of Palmas* case. In the *Island of Palmas Case*, the sole arbitrator Max Huber, stated that "*whatever the exclusive functions of a state may be at any given moment, it is obvious that due to factors both within and outside the control of a state, the exercise of exclusive sovereign rights by this state may be at variance with the claim of another state to rights in its own territory of the same exclusive character*". See. Günther Handl, "Territorial Sovereignty and the Problem of Transnational Pollution" (1975) 69 AJIL 50, 55.

issue in the Trail Smelter case was the pollution originating at the Cominco Smelter at Trail, British Columbia causing damage to the farms in Steven's County, Washington D.C.¹³. Prior to the genesis of the dispute, the smelter that triggered the controversy was sold to a private Canadian firm, the Consolidated Mining and Smelting Company. Designed to refine low-grade zinc ores, the smelter produced thick smoke with high sulfur dioxide concentrations, leading to land damage to nearby farms. These Canadian farmers were first to object, and their claims were litigated in Canada, leading to a decision by Consolidated Mining to transmit the smoke downwind across the border into the state of Washington, where US farmers began to complain of the damage being done to crops and livestock¹⁴.

Up until the Trail Smelter dispute, there were no previous decisions by the Permanent Court of International Justice (PCIJ) or other international tribunals in cases whose facts were analogous. It should be noted here that although PCIJ had found in the *River Oder* case that riparian states shared a common interest in the river¹⁵, the dispute was about navigational rights and not pollution¹⁶. Pointing out this absence of international decisions dealing with air pollution, the tribunal observed that 'the nearest analogy is that of water pollution, but again this Tribunal found no international decisions directly on point'¹⁷. It, therefore, felt the need to look to more general principles of international law and to the certain decision of the Supreme Court of the United States (U.S. Supreme Court) and of those of the courts of other federal states,

¹³ *Ibid.*

¹⁴ Allen L. Springer, *Cases of Conflict: Transboundary Disputes and the Development of International Environmental Law* (University of Toronto Press, 2016), 24-25.

¹⁵ *Territorial Jurisdiction of the International Commission of the River Oder (Czechoslovakia, Denmark, France, Germany, Great Britain and Sweden v. Poland)*, 1929 PCIJ Rep Series A No 23, 5.

¹⁶ McCaffrey, 35.

¹⁷ *Trail Smelter Arbitration*, 1964.

which, according to the Tribunal, “*may legitimately be taken as a guide in this field of international law*”¹⁸. The Tribunal then referred to a number of U.S. Supreme Court decisions¹⁹, with the intention of finding evidence of rules of customary international law and delivered its famous *dictum* establishing the basis of the no-harm principle, as follows:

“[U]nder principles of international law, as well as of the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence”²⁰

This *dictum* became the wellspring of international environmental law and specifically of the no-harm principle. *Lac Lanoux* arbitral award²¹, which came to existence about fifteen years after the aforementioned Trail Smelter dispute, is also an important precedent that demonstrates the responsibility of States as regards to transboundary environmental harm. The dispute was about whether France could utilize the waters of Lac Lanoux for French public works by restoring the waters to the River Carol which crosses the Spanish frontier to join the Segre River. Despite the fact neither party claimed that any water pollution had occurred, the arbitral tribunal addressed the possibility of pollution by stipulating that Spain would be able to assert its rights had been violated if the returned waters had a chemical composition or any

¹⁸ *Ibid.*

¹⁹ *Kansas v. Colorado* (1902) 185 U.S. 125; *Missouri v. Illinois*, (1906) 200 U.S. 496 ; *Georgia v. Tennessee Copper Company and Ducktown Sulphur, Copper and Iron Company Limited* (1915) 237 U.S. 474 ; *New York v. New Jersey*, (1921) 256 U.S. 296 ; *New Jersey v. City of New York*, (1931) 283 U.S. 473.

²⁰ *Trail Smelter Arbitration*, 1965.

²¹ *Affaire du Lac Lanoux (Spain v. France)* (1957) 12 R.I.A.A 281.

other feature that could harm its interests.²² Hence, although the tribunal recognized France's right to utilize the water of Lac Lanoux as a sovereign entity, the tribunal also considered the interest of Spain. This ultimately suggests that a sovereign state has the right to exercise its sovereignty within its territory but it is also under the obligation not to abuse its sovereignty and cause harm to other states.

While these early formulations of the no-harm rule only considered that States had a responsibility not to cause harm to the environment of another State's territory, the modern application of the rule extends its limits beyond the national jurisdiction of States. Indeed, Principle 21 of Stockholm Declaration stipulates that:

*"States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that the activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction."*²³

As can be seen from this formulation, Principle 21 comprises of two elements: "(1) the sovereign right of states to exploit their own natural resources and (2) the obligation not to cause damage to the environment of other states or of areas beyond the limits of national jurisdiction"²⁴. A similar formulation of the no-harm rule is contained in Principle 2 of the Rio Declaration on Environment and Development²⁵.

²² Alexandre Kiss and Dinah Shelton, *International Environmental Law* (2nd edn, Transnational Publishers, 2000), 126.

²³ Stockholm Declaration on the Human Environment (adopted 16 June 1972, UNGA Res 2994/XXVII, 2995/XXII and 2996/XXII) Principle 21.

²⁴ Phillippe Sands, *Principles of International Environmental Law* (3rd edn, Cambridge University Press, 2012) 241.

²⁵ Rio Declaration on Environment and Development (adopted 13 June 1992) 31 ILM 874, Principle 2: *"States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national*

The first element is a reflection of Max Huber’s reasoning in the *Island of Palmas* arbitration case. The second part of Principle 21 not only reflects the view of States that they are subject to environmental limits in the exercise of their right under the principle of sovereignty, as stipulated in the Trail Smelter *dictum*, but also adds an additional dimension, which is not to cause environmental harm to areas beyond national jurisdiction. This formulation established the basic obligation underlying international environmental law and is generally considered to reflect customary law, as confirmed by the ICJ in the *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, which reads as:

*“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.”*²⁶

In other words, Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration extended the reach of the no-harm rule to prevent harm to the global commons²⁷, which will be examined under the next section.

B. Areas Beyond National Jurisdiction

Global commons, or areas beyond national jurisdiction as referred to in the context of the no-harm rule, refers to those areas, resources or problems involving the

jurisdiction”. See. Patricia Birnie and Alan E. Boyle, *International Law and the Environment* (2nd edn, Oxford University Press, 2002) 112-115.

²⁶ *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, para. 29.

²⁷ Jutta Brunnée, *Procedure and Substance in International Environmental Law*, (The Hague Academy of International Law, 2020), 272.

international community as a whole where there is no specific state sovereignty²⁸. The underlying idea of this concept is the “tragedy of the commons”, which is the idea that common resources are over-exploited in the absence of regulation common concerns remain unaddressed²⁹. Tragedy of the commons is, above all, concerned with the detrimental effects of unregulated access to resource and the protection of areas, resources and environmental processes that have inherent value for humankind and the planet³⁰.

According to their characteristics, the commons can be divided to three categories: common areas, common heritage of mankind and common concern of humankind³¹. All three concepts deal with environmental challenges and problems that call for collective action. Addressing the environmental degradation arising from these areas, resources and concerns, or protecting them, provides benefits common to all states. For example, as it will be further explained under the concept of common concern, dealing with global issues such as climate change, incontestably provide a collective benefit for the international community. In the context of common areas and common heritages, collaboration is required due to the fact that these areas or resources are located beyond the jurisdiction of individual states. In other words, all states have access to commons and no state is legally in a position to impose a particular approach to their use or protection. Turning to common concerns of humankind, in these kinds of situations, States typically have a difficult time proving damage to their territories or tracing it back to the conduct of a single State or a group of State. Therefore, a

²⁸ Jimena Murillo Chavarro, “Common Concern of Humankind and its Implications in International Environmental Law”, (2008) 5 *MqJICEL* 133, 133.

²⁹ Surabhi Ranganathan, “Global Commons” (2016) 27(3) *EJIL* 693, 693.

³⁰ Denise Garcia, “Global Commons Law: Norms to Safeguard the Planet and Humanity’s Heritage” (2021) 35(3) *IR* 422, 423-424.

³¹ Murillo Chavarro, 133.

collective response is required to avoid the legal constraints, such as the issue of attribution, to tackle a global environmental problem³².

Although they do share some similarities, these three concepts have three distinctive areas of application. Even though the main focus of this thesis is the concept of common concern of humankind, it is useful to briefly explain the other two concepts to properly assess the differences between them.

1. Common Areas

Common areas, or sometimes referred to as common property, can be defined primarily as areas beyond national jurisdiction, which are not subject to appropriation to the exclusive sovereignty of any one state. In other words, these areas are open for legitimate and reasonable use by all states. Not many areas fall into this category but three: high seas, outer space and Antarctica³³.

High seas, or sometimes referred to as open sea, can be defined as the “coherent body of salt water all over the greater part of the globe, with the exception of maritime belt and the territorial straits, gulfs, and bays, which are part of the sea but parts of the open sea and, provided that the salt-water approach to it is navigable and open to vessels of all nations”³⁴. States exercise exclusive sovereignty over their territorial seas (max. 12 miles) and have the right to control resource exploitation and can exercise

³² Jutta Brunnée, “Common Areas, Common Heritage, and Common Concern” in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds.) *The Oxford Handbook of International Environmental Law* (1st edn, Oxford University Press, 2008) 553-554.

³³ Birnie and Boyle, 141.

³⁴ Sir Robert Jennings and Sir Arthur Watts, “Concept of High Seas”, in Sir Robert Jennings QC, Arthur Watts KCMG QC (eds.) *Oppenheim’s International Law: Volume 1: Peace* (9th edn, Oxford University Press, 2008) 722.

regulatory jurisdiction in their exclusive economic zones (max. 200 miles) but the remainder of the salt water over the globe, are categorized as high seas and is subject to the environmental protection requirements³⁵ set out by the 1982 United Nations Convention on the Law of the Sea (UNCLOS)³⁶. For example, Article 194 of UNCLOS foresees that states have a duty to prevent, reduce and control marine pollution and ensure that pollution from sources under their jurisdiction or control does not harm the environment of other states or spread to the open oceans. It is evident from the Convention that, first, its protection extends not only to states and their marine environment but to the marine environment as a whole. As elaborated in more detail above, this goes beyond the customary rule of no-harm based on the *Trail Smelter* arbitration, and reflects its extension to global commons, as contemplated by the Principle 21 of the Stockholm Declaration³⁷.

Much like the high seas, outer space is treated as a common area that no state can appropriate and to which, legally speaking, all states have equal access to³⁸. The widely ratified Treaty on Principles Governing the Activities in the Exploration and Use of Outer Space (1967 Outer Space Treaty)³⁹ reflect the international agreement on the application of principle of no-harm to outer space to an extent. For example, the 1967 Outer Space Treaty foresees that “States must conduct their activities in space with due regard to the interests of others, they must avoid harmful contamination of

³⁵ Brunnée, Common Area, 558-559.

³⁶ United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 14 November 1994) 1833 UNTS 3 (UNCLOS).

³⁷ Birnie and Boyle, 352; Ulrich Beyerlin and Thilo Marauhn *International Environmental Law* (Hart Publishing, 2011) 118; Alan E. Boyle, “Marine Pollution under the Law of the Sea Convention” (1985) 79 AJIL 347, 350.

³⁸ Brunnée, Common Area, 560.

³⁹ Treaty on Principles Governing the Activities in the Exploration and Use of Outer Space (adopted 27 January 1967, entered into force 10 October 1967) 610 UNTS 205.

space or of other celestial bodies and take appropriate measures to avoid adverse changes in the environment of the Earth by extra-terrestrial matter”⁴⁰. Without getting into much detail, it should be noted here that due to the rapidly developing technological advancements and the fact that many of these instruments were adopted prior to the emergence of environmental concerns as significant issues, they do not accurately reflect some of the legal innovations that primarily occurred after the adoption of the Rio Declaration in 1992⁴¹. Little attempt has been made to update these instruments or to develop a more comprehensive and extensive regime of environmental protection applicable to outer space. It is generally argued that international law for the protection of the “extra-terrestrial commons” must be further addressed, either through a new space treaty or in the general context of protecting the areas beyond national jurisdiction and control of states, i.e. global commons through international environmental law⁴².

Antarctica’s status as a common area differs from that of the high seas or outer space, mainly because territorial claims have been made for some segments of the Antarctic continent, but these have been frozen since the adoption of the 1959 Antarctic Treaty⁴³, which establishes that Antarctica is designated exclusively for peaceful and scientific uses and cannot be the subject of new territorial claims⁴⁴.

⁴⁰ Birnie and Boyle, 534.

⁴¹ Sands, 383.

⁴² K. Grove and E. Kamenetskaya, “Tensions in the Development of the Law of Outer Space” in C. Ku and P.F. Diehl, (eds.) *International Law: Classic and Contemporary Readings* (Lynne Rienner Publishers, 1998) 488; Ian H. Rowlands, “Atmosphere and Outer Space”, in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds.) *The Oxford Handbook of International Environmental Law* (1st edn, Oxford University Press, 2008) 334; J. Vogler, *The Global Commons: Environmental and Technological Governance*, (2nd edn, John Wiley and Sons, 2000), 118; Brunnée, *Common Area*, 560.

⁴³ The Antarctic Treaty (adopted 1 December 1959, entered into force 23 June 1961) 402 UNTS 71.

⁴⁴ James Crawford, *Brownlie’s Principles of International Law* (9th edn, Oxford University Press, 2019) 329.

Furthermore, the 1959 Antarctic Treaty is complemented by a number of treaties⁴⁵ that establishes an extensive environmental protection regime for the Antarctic continent and associated marine ecosystems⁴⁶.

The concept of common area also encompasses most of the living resources of the above-mentioned areas, including fish and mammals found in the high seas, which confirmed in the *Behring Sea Fur Seals Arbitration*⁴⁷. In the dispute arose between Great Britain and the United States of America regarding the seizure of British vessels engaged in fur seal fishing in the Behring Sea, the tribunal concluded that no state could create a monopoly of a particular fishing area of the high seas and that the regulations in place intended to protect and conserve the endangered species of fur seals⁴⁸. Furthermore, in the *Icelandic Fisheries* cases in 1974 observed the character of high seas fishing resources as common property⁴⁹. However, it is important to note here that because most of the fish stocks, for example, are found within the 200 miles exclusive economic zones, only certain high seas stocks, so-called straddling stocks, and highly migratory species remain within the common property regime⁵⁰.

⁴⁵ Convention on the Conservation of Antarctic Marine Living Resources (adopted 20 May 1980, entered into force 7 April 1982) 19 ILM 841; Protocol on the Environmental Protection to the Antarctic Treaty (adopted 4 October 1991, entered into force 14 January 1998) 30 ILM 1455 (Madrid Protocol).

⁴⁶ Brunnée, Common Area, 560-561; Emilio J. Sahurie, *The International Law of Antarctica* (Martinus Nijhoff Publishing, 1992) 507.

⁴⁷ *Award between the United States and the United Kingdom relating to the rights of jurisdiction of United States in the Behring Sea and the preservation of fur seals* (1893) 28 R.I.A.A 263.

⁴⁸ *Ibid.* 269; Sir Robert Jennings and Sir Arthur Watts, "Fisheries in the High Seas", in Sir Robert Jennings QC, Arthur Watts KCMG QC (eds.) *Oppenheim's International Law: Volume 1: Peace* (9th edn, Oxford University Press, 2008) 756.

⁴⁹ *Fisheries Case (United Kingdom v. Norway)* (Merits) [1951] ICJ Rep 116, para. 67; David Anderson, *Modern Law of the Sea: Selected Essays*, (Martinus Nijhoff Publishers, 2008) 195; Birnie and Boyle, p. 142.

⁵⁰ Brunnée, Common Area, 559.

2. Common Heritage of Mankind

The concept of common heritage of mankind is based on the idea that there should be no individual appropriation over the matter covered. It aims to ensure joint international management and acknowledges that all States have an interest in its conservation and sustainable use.⁵¹ The concept was first put forward by Malta to the UNGA to establish a new regime to address the over-exploitation of the resources of the seabed and exploit these resources for the benefit of all mankind⁵². Malta's proposal received general acceptance and the seabed, ocean floor and subsoil thereof beyond the limits of jurisdiction was accepted as a common heritage of mankind in the UNGA Resolution 2749⁵³. Although it is somewhat disputed what these resources are, and scholars continue to propose different kind of living resources to be included within this definition⁵⁴, it is generally accepted that the resources included within the scope of common heritage humankind are the ones defined in the 1979 Agreement Governing the Activities of States on the Moon and other Celestial Bodies (Moon Treaty)⁵⁵ and 1982 UNCLOS⁵⁶.

Part XI 1982 UNCLOS pronounce the seabed and its resources beyond national jurisdiction (the Area) to be 'the common heritage of mankind'. According to these provisions, the Area is not subject to appropriation by individual states and activities in the Area must be carried out "for the benefit of the mankind as a whole", which

⁵¹ Thomas Cottier, "The Principle of Common Concern of Humankind" in Thomas Cottier and Zaker Ahmad (eds.) *The Prospects of Common Concern of Humankind in International Law* (Cambridge University Press, 2021) 52.

⁵² Birnie and Boyle, 143; Murillo Chavarro, 134.

⁵³ UNGA Resolution 2749 (XXV) (17 December 1970) UN Doc. A/RES/2749(XXV).

⁵⁴ Brunnee, p. 557; Rüdiger Wolfrum, "Common Heritage of Mankind", *Max Planck Encyclopedias of International Law* (MPIL) (2009) para. 1; Murillo Chavarro, p. 136.

⁵⁵ Agreement Governing the Activities of States on the Moon and other Celestial Bodies (adopted 5 December 1979, entered into force 11 July 1984) 1363 UNTS 3 (1979 Moon Treaty); Sands, 301.

⁵⁶ Birnie and Boyle, 143.

should be equitably shared among all States. Moreover, the Convention foresees the establishment of the International Sea-bed Authority (ISBA) for the management of non-living resources of the Area. Lastly, Article 146 prescribes that the Area must be used for peaceful purposes only⁵⁷. These rules have counterparts in the Moon Agreement, which declared the Moon and its natural resources to be common heritage of mankind⁵⁸. Even though Article 11 of the Moon Treaty envisages the establishment of an international regime, this provision is yet to be realized⁵⁹.

As such, the concept of common heritage of mankind has at least four characteristics⁶⁰ as the following: non-appropriation, international management, being reserved for exclusively peaceful use and shared benefits⁶¹. First, no state can appropriate, claim, or exercise sovereignty over such an area or its resources. This is reflected in Article 11 of the 1979 Moon Treaty and Article 137 UNCLOS. In other words, it can be said that the ownership of these areas or resources defined as common heritage remain to the “ownership” of humanity⁶². Second, a system of international management is required to fulfill the objectives of the concept. As mentioned, UNCLOS has created ISBA, which is in charge of all of the activities conducted in the Area. In contrast, even though the Moon Treaty establishes an international regime to

⁵⁷ Brunnée, Common Area, 562; Birnie and Boyle, 143.

⁵⁸ Preamble of the 1979 Moon Treaty: “[...] Bearing in mind the benefits which may be derived from the exploitation of the natural resources of the moon and other celestial bodies [...]”.

⁵⁹ Brunnée, Common Area 562; Birnie and Boyle, 143.

⁶⁰ Some authors suggest an additional element, which is the mandate that conservation of the natural environment in areas beyond national jurisdiction must be ensured during the extraction of resources. See. Waseem Ahmad Qureshi, “Protecting the Common Heritage of Mankind Beyond National Jurisdiction”, 36 (1) *ArizJIntl&CompL* 79 (2019) 85; John E. Noyes, “The Common Heritage of Mankind: Past, Present and Future”, 40 *DJILP* 447 (2012) 450-451.

⁶¹ Murillo Chavarro, 135; Nilüfer Oral, “The Global Commons and Common Interests: Is There Common Ground”, in Massimo Iovane, Fulvio M. Palombino, Daniele Amoroso and Giovanni Zarra (eds.), *The Protection of General Interests in Contemporary International Law: A Theoretical and Empirical Inquiry*, (Oxford University Press, 2021) 27.

⁶² David Hunter, James Salzman and Durwood Zaelke, *International Environmental Law and Policy* (2nd edn., Foundation Press, 2001) 392.

govern the exploitation of the natural resources of the moon, such an international regime has not yet been implemented⁶³. Thirdly, the resources listed in the Moon Treaty and the UNCLOS are reserved for exclusively peaceful use and cannot, under any circumstance, be used for military purposes.

Fourthly, as the activities carried out in these areas or the resources that are exploited should be for the benefit of humankind as a whole, a shared system has been created to the benefit all states. An equitable sharing system is established in both of the Treaties, which foresees that even if a state is unable to participate in the actual process of extraction, that state should still be able to share in the rewards⁶⁴. However, this is the most contested point out of all. United States of America (USA), followed by several other Western industrialized States refused to become a party to the UNCLOS as long as the provisions about shared benefits remain as it is. In an effort to increase the ratification rate of the Convention, 1994 Agreement on Part XI of the UNCLOS modified the implementation of the relevant part, which followed a more liberal, free-market approach towards the exploitation of deep-sea bed resources⁶⁵. Similarly, the equitable sharing system under the Moon Treaty did not acquire universal agreement, in particular being rejected by the leading space powers⁶⁶. Since this essentially results in the rejection of the main underlying idea of the concept, which is to facilitate developing country access to benefit from resources that are

⁶³ Murillo Chavarro, 136-137.

⁶⁴ Birnie and Boyle, 143.

⁶⁵ Frank Biermann, "Common Concern of Humankind: The Emergence of a New Concept of International Environmental Law" (1996) 34(4) ADV 426, 429.

⁶⁶ Friedrich Soltau, "Common Concern of Humankind" in Cinnamon P. Carlarne, Kevin R. Gray, Richard Tarasofsky (eds.) *The Oxford Handbook of International Climate Change Law* (Oxford University Press, 2016) 206; Brunnée, Common Areas, 563

mostly inaccessible to them, it is viewed as the common heritage of mankind concept did not deliver the very premise it was established on⁶⁷.

3. Common Concern of Humankind

Common concern of humankind is relatively new compared to common areas and common heritage of mankind, as it was first recognized by the UNGA in 1988⁶⁸, in response to international negotiations on the need to find a solution for the global climate change. It focuses on particular environmental processes or preventative measures that require the cooperation of the international community as a whole, such as the conservation of biological diversity or the global climate change⁶⁹. Unlike the latter two concepts, however, common concern of humankind does not have a definition accepted by the general consensus. Rather, there are “aspects” or “characteristics” of common concern of humankind, identified by prominent international jurists and scholars.

These characteristics and the general conceptual framework of this concept will be dealt in detail under Section II(B)(1) but because the focus of this thesis is the global climate change, the definition and adverse impacts of this environmental phenomenon will be discussed to provide a basis for the recognition of global climate change being a common concern of humankind.

⁶⁷ Brunnée, *Common Areas*, 563; Murillo Chavarro, 137; Biermann, 430.

⁶⁸ UNGA RES. 43/53, “Protection of Global Climate for Present and Future Generations of Mankind” (6 December 1988) UN Doc. A/RES/43/53.

⁶⁹ Brunnée, *Common Areas*, p. 556.

II. Legal Status of the Global Climate Change

A. Definition and Consequences of Global Climate Change

The Earth's climate is determined in large part by the presence in the atmosphere of naturally occurring greenhouse gases (GHGs), including water vapor, carbon dioxide (CO₂), methane (CH₄), chlorofluorocarbons (CFCs), nitrous oxide (NO₂), hydrofluorocarbons (HFCs) and perfluorocarbons (PFCs) and ozone (O₃). The presence of these gases endeavors a warming influence on the earth⁷⁰. This is called the natural greenhouse effect. This natural greenhouse effect keeps the Earth warm and habitable. Without the greenhouse effect, average global surface temperature would be minus 18 degrees Celsius as opposed to what it actually is, plus 15 degrees Celsius.

Although the greenhouse warming theory was first discovered in 1896 by the Swedish chemist Svante Arrhenius, it only gained attention in the 1960s. In early 1960s, scientists established that, atmospheric concentrations of CO₂ – the primary greenhouse gas – are increasing⁷¹. For the most part, it is the growing emissions of CO₂ from industrial activities relying upon fossil fuel combustion is causing the problem widely known as global climate change⁷². The accumulation of CO₂ and other GHGs, such as HFCs and PFCs, acts as an insulating blanket that traps the energy of

⁷⁰ Philippe Sands and Iona Millar, "Climate, International Protection", *Max Planck Encyclopedias of International Law* (Oxford University Press, 2011), para. 1.

⁷¹ Daniel Bodansky, "History of the Global Climate Change Regime", (2001) 23 *International Relations and Global Climate Change* 478, 492.

⁷² Kiss and Shelton, 170; Jane A. Leggett, "Evolving Assessments of Human and Natural Contributions to Climate Change", in Jeremy Nesbitt (ed.), *Climate Change: Background, Funding and Impacts* (SNOVA, 2020) 6.

sunlight and prevents it from radiating back into outer space⁷³. The continued increase greenhouse gases in the atmosphere at a faster rate than the planet can absorb them, due to anthropogenic (human-caused) activities, is contributing to an “enhanced” greenhouse effect⁷⁴.

One result of this so-called enhanced greenhouse effect is global warming. Global warming refers to the long-term heating of Earth’s surface observed since the pre-industrial period. Since the pre-industrial period, anthropogenic activities are estimated to have increased the Earth’s global average temperature by about 1 degree Celsius, a number that is currently increasing by more than 0.2 degrees Celsius per decade⁷⁵.

Although people tend to use the terms interchangeably, global warming is just one aspect of the global climate change. Climate change, refers to the all of the various long-term changes in the climate regime, including sea-level rise, extreme weather conditions and ocean acidification⁷⁶. A rise in the world’s sea level of approximately 50 centimeters, due to the melting of the Greenland ice sheet and thermal expansion of sea water, would cause great damage to the low-lying coastal areas and even submerge small islands⁷⁷. Furthermore, increased water temperatures, ocean

⁷³ Ibid; IPCC, V. Masson-Delmotte et al. (eds.), *Climate Change 2021: The Physical Scientific Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change: Summary for Policy Makers*, (Cambridge University Press, 2021) 5-6.

⁷⁴ Rowlands, 327.

⁷⁵ NASA, “Global Warming v. Climate Change”, ([climate.nasa.gov/tr](https://climate.nasa.gov/global-warming-vs-climate-change/)) < <https://climate.nasa.gov/global-warming-vs-climate-change/>> accessed 1 June 2023; IPCC, H. Lee and J. Romero (eds.), *Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II, III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change: Summary for Policy Makers*, (Cambridge University Press, 2021) 4.

⁷⁶ Joseph Romm, *Climate Change: What Everyone Needs to Know*, (2nd edn., Oxford University Press, 2018) 19.

⁷⁷ Kiss and Shelton, 171; IPCC, H.O. Pörtner et al. (eds.) *Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change :Summary for Policymakers* (Cambridge University Press, 2022) 13.

acidification, heatwaves, droughts and heavy precipitation would result in a disturbance of both marine and terrestrial biodiversity, as well as having an incredibly high adverse impact on agriculture⁷⁸. All of these mentioned impacts have an adverse effect on human health and ultimately, on the realization of human rights.

Climate change's adverse impacts on small island states and human rights will be briefly examined under the next section, to provide a basis for why global climate change is considered to be a common concern of all of the humankind.

1. Effects on Human Health and Human Rights

It is an undoubtable fact that humankind's existence depends on the environment that they live in. Their health, lives and dignity are inextricably interdependent and interconnected to the condition of their homes, cities, nations and countries. Indeed, the temperatures and weather, the quality of air, food and water, and the interactions with the ecosystems all affect human health and the realization of human rights⁷⁹. The interdependence and interrelatedness of human rights and the environment is reflected in Principle 1 of the 1972 Stockholm Declaration, which reads as⁸⁰:

“Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to

⁷⁸ *Ibid.*; Rao Prasada, *Climate Change and Agriculture: Causes, Impacts and Interventions* (New India Publishing Agency, 2020) 4.

⁷⁹ Alexandra L. Phelan, “The Environment, a Changing Climate and Planetary Health” in Lawrence O. Gostin, Benjamin Mason Meier (eds.) *Foundations of Global Health and Human Rights* (Oxford University Press, 2020) 417.

⁸⁰ HRC, “Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights” (15 January 2009) A/HRC/10/61, 7.

*protect and improve the environment for present and future generations.”*⁸¹

Although this formulation did not find its place in the UNFCCC, later on, a direct reference to human rights in the context of the UNFCCC was made when the Cancun Agreements, adopted by the sixteenth session of the Conference of the Parties in 2010⁸² referred to the Human Rights Council’s (HRC) Resolution 10/4⁸³, which recognizes the adverse effects of climate change on the effective enjoyment on human rights and calls upon States to ensure respect for human rights in their climate related actions⁸⁴. The Preamble to the Paris Agreement expanded upon this language, calling upon States, when taking action to address climate change, to “respect, promote and consider their respective obligations on human rights”⁸⁵.

⁸¹ Stockholm Declaration, Principle 1.

⁸² Conference of the Parties, ‘Report of the Conference of the Parties on its sixteenth session, held in Cancun from 29 November to 10 December 2010’ (15 March 2011) FCCC/CP/2010/7/Add.1.

⁸³ HRC, “Resolution 10/4 Human rights and climate change’ (25 March 2009) UN Doc A/HRC/RES/10/4.

⁸⁴ United Nations Human Rights Office of the High Commissioner (OHCHR), ‘Frequently Asked Questions on Human Rights and Climate Change Fact Sheet No. 38’ (8 September 2021) 56.

⁸⁵ OHCHR, ‘Integrating Human Rights at the UNFCCC’ <<https://www.ohchr.org/en/climate-change/integrating-human-rights-unfccc>> accessed 1 June 2023.

Moreover, UN human rights treaty bodies⁸⁶, regional organizations⁸⁷ and regional and national jurisprudence⁸⁸ recognize the intrinsic link between protection of the environment. In the context of global climate change, the negative changes in the climate regime endangers the human existence because it causes food security problems, loss of livelihoods, infrastructure damage and restrict access to essential services including electricity, water and healthcare⁸⁹. Although all human rights are vulnerable to environmental degradation, some human rights are more susceptible than others to certain types of environmental harm⁹⁰. In this sense, HRC has underlined that climate change has a wide range of implications for the enjoyment of human rights, including the right to life, right to adequate food, right to water and right to health⁹¹, which will be briefly explained below.

⁸⁶ HRC ‘Resolution 7/23 (28 March 2008) UN Doc A/HRC/RES/7/23: the Council expressed concern that climate change posed an immediate and far-reaching threat to people and communities around the world; HRC, Resolution 26/27 (15 July 2014) A/HRC/RES/26/27: the Council emphasized that in order to address the negative effects of climate change on the enjoyment of human rights, including the right to development, all States must increase international cooperation; HRC, Resolution 29/15 (22 July 2015) A/HRC/RES/29/15: the Council emphasized the importance of the continuation of international cooperation to address the adverse consequences of climate change for all, highlighting in particular, its impacts on health. HRC Resolution 44/7 (23 July 2020) A/HRC/RES/44/7: the Council recognized that the negative impacts of climate change disproportionately affected the rights of older persons. *See*. OHCHR, Fact Sheet no. 38, 46-47.

⁸⁷ Organization of American States (OAS) General Assembly Resolution “Human Rights and Climate Change in the Americas”, AG/RES. 2429 (XXXXVIII/O/08), para. 22: OAS General Assembly has recognized the close relationship between the protection of the environment and human rights and emphasized that “*the adverse effects of climate change a negative impact on the enjoyment of human rights*”; Council of Europe Parliamentary Assembly, “Resolution 2396 on Anchoring the right to a healthy environment, need for enhanced action by the Council of Europe” adopted by the Parliamentary Assembly, 29/09/2021) Doc. 15367: Parliamentary Assembly recognized that environmental pollution, loss of biodiversity and the climate crisis are making people and the planet sick, leading to premature deaths among the current generation and stealing viable living space from future generations.

⁸⁸ *Case of Kwas Fernández v Honduras* (2009) (Merits) Inter-American Court of Human Rights Series C No 196 (3 April 2009), para. 148.

⁸⁹ OHCHR, “Safe Climate: A Report of the Special Rapporteur on Human Rights and the Environment, UN. Doc. A/74/161, 2019, para. 7; Ana Beridze, “The Right to Life in the Context of Climate Change” *Journal of Constitutional Law*, vol. 1-2, 2021, p. 187.

⁹⁰ UN Doc. A/HRC/22/43, para. 19.

⁹¹ UN Doc. A/HRC/10/61, p. 17; Laura Horn, *Climate Change and the Future Role of the Concept of the Common Concern of Humankind* (2015) 2 AJEL 24, 46; Phillipe Cullet, “Human Rights and Climate: Broadening the Right to Environment”, in Cinnamon P. Carlarne, Kevin R. Gray, Richard Tarasofsky (eds.) *The Oxford Handbook of International Climate Change Law* (Oxford University Press, 2016) 500.

a. Specific Rights

i. Right to Life

Life is the foundation of man as a citizen and as a member of society⁹². Accordingly, Article 6 of the International Covenant on Civil and Political Rights (ICCPR) recognizes that “*every human being has the inherent right to life*”⁹³. The right to life is not seen as one of the fundamental rights and the effective protection of it has crucial importance for the realization of all other human rights⁹⁴. In other words, the right to life is a prerequisite for the enjoyment of all other human rights⁹⁵.

According to the Committee on Civil and Political Rights (CCPR) “*environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life*”⁹⁶. Indeed, IPCC has foreseen with high confidence that a number of observed and projected effects of climate change poses direct and indirect threats to human lives, including death, disease and injury from extreme weather events, such as heatwaves, storms, droughts⁹⁷. The right to life is

⁹² Christian Tomuschat, “The Right to Life: Legal and Political Foundations” in Christian Tomuschat, Evelyne Lagrange and Stefan Oeter (eds.) *The Right to Life*, (Brill Publishing, 2010) 3.

⁹³ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, Art. 6 (1): “*Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life*”.

⁹⁴ Tomuschat, 3; Yoram Dinstein, “The Right to Life, Physical Integrity and Liberty”, in Louis Henkin (ed.), *The International Bill of Rights. The Covenant on Civil and Political Rights*. (Columbia University Press, 1981) 114.

⁹⁵ Christine Bakker, “Climate Change and Right to Life: Limits and potentialities of the human rights protection system”, Ottavio Quirico, Muluoud Boumghar (eds.) *Climate Change and Human Rights*, (1st edn., Routledge, 2015) 71; UN Doc. A/HRC/10/61, 9; United Nations Committee on Civil and Political Rights (CCPR) “General Comment no. 36 on Article 6: Right to Life” (2018) CCPR/C/GC/36, para. 2.

⁹⁶ CCPR, General Comment no. 36, para. 62.

⁹⁷ IPCC, *Climate Change 2022: Impacts, Adaptation and Vulnerability*, 11.

directly affected when people die in catastrophic weather events, like in hurricanes or floods and it is indirectly at risk when access to freshwater and food are threatened by the adverse effects of climate change⁹⁸.

This is reflected in the decisions of regional and national courts and the *State of the Netherlands v. Urgenda Foundation* case⁹⁹ is a prominent example in this regard, in which, the Urgenda Foundation, A Dutch environmental group, challenged the climate change policy of the Dutch government, claiming that the inadequacy of actions to counter climate change amount to the violation of Article 2 of the European Convention on Human Rights (ECHR)¹⁰⁰ before the Dutch Supreme Court. As outlined by the Court, the European Court of Human Rights (ECtHR), has held in previous cases that environmental degradation can constitute a violation of the right to life¹⁰¹ and in the context of climate change, based on scientific facts, the Court stipulated that the current generation of citizens will be confronted with the real threat of dangerous climate resulting in the risk of loss of life and will have to deal with the such negative impacts of climate change in their lifetime if global emissions of GHGs are not adequately reduced¹⁰². Based on this reasoning, the Court established that Article 2 of ECHR require states to take reasonable and suitable measures for the prevention of climate change “as if this were merely a national problem”¹⁰³ and such

⁹⁸ Christine Bakker, “Protecting the Atmosphere as a ‘Global Common Good’: Challenges and Constraints in Contemporary International Law” in Massimo Iovane, Fulvio M. Palombino, Daniele Amoroso and Giovanni Zarra (eds.), *The Protection of General Interests in Contemporary International Law: A Theoretical and Empirical Inquiry*, (Oxford University Press, 2021) 72.

⁹⁹ *State of the Netherlands v. Urgenda Foundation*, Judgment (Supreme Court Netherlands, 20 December 2019) ECLI:NL:HR:2019:2007.

¹⁰⁰ Maiko Meguro, “*State of the Netherlands v. Urgenda Foundation*”, (2020) 114 (4) AJIL 729, 730.

¹⁰¹ *Öneryıldız v Türkiye*, [GC] App. No: 48939/99 (ECtHR, 30.11.2004); *Budayeva and others v Russia*, App. No. 15339/02, 21166/02, 20058/02, 11673/02, 15343/02, (ECtHR, 29.09.2008).

¹⁰² *State of the Netherlands v. Urgenda Foundation*, para. 4.7.

¹⁰³ *State of the Netherlands v. Urgenda Foundation*, para. 5.6.2.

an obligation within its jurisdiction requires it to do its own part to prevent overall dangerous consequences of climate change¹⁰⁴.

Although right-based climate litigation is relatively new and there is not a lot of precedents by international and regional courts that shed light on the effects of the global climate change on the right to life, the above-mentioned *Ugenda* judgment, as well as the Advisory Opinion of the Inter-American Court of Human Rights (IACtHR), in which the Court considered right to life to be particularly vulnerable to environmental impacts¹⁰⁵, show the severe and widespread effects of global climate change on the enjoyment right to life.

ii. Right to Water and Right to Adequate Food

Just as life being the foundation of man and society, water is the essence of life. Safe drinking water and sanitation are indispensable to sustain life and health and fundamental to the dignity of all human beings¹⁰⁶. The right to water has been implicitly recognized under Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)¹⁰⁷ and explicitly recognized by UNGA as a

¹⁰⁴ Ibid, para. 5.8; Meguro, 732.

¹⁰⁵ *The Environment and Human Rights (State Obligations in Relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity – interpretation and scope of Articles 4(1) and 5(1) of the American Convention on Human Rights*, Advisory Opinion OC-23/17, Inter-American Court of Human Rights Series A No. 23, para. 66.

¹⁰⁶ United Nations Human Rights Office of the High Commissioner (OHCHR), ‘Frequently Asked Questions on The Right to Water No. 35’ (1 August 2010) 1.

¹⁰⁷ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3, Article 11: “*The State Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing and to the continuous improvement of living conditions*”. Scholars suggest that the right to water derives from the right to an adequate standard of living, as well as the right to life. Mac Darrow, “Climate Change and the Right to Water”, in Malcolm Langford and Anna F.S. Russell (eds.) *The Human Right to Water: Theory, Practice and Prospects*, (Cambridge University Press, 2017) 174, footnote 1.

human right¹⁰⁸. The Committee on Economic, Social and Cultural Rights (CESCR) defined the right to water as “the right of everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses”¹⁰⁹.

Recent analyses by IPCC shows that adverse effects of global climate change are already apparent in some regions of the world¹¹⁰. Climate change affects the realization of the right to water, as water is a key medium through which climate change impacts upon human populations and ecosystems¹¹¹. The adverse impacts of climate change on the right to water should be seen in light of its direct and indirect effects. While loss of glaciers and reductions in snow cover in high latitudes, as well as droughts and floods in lower latitudes will negatively affect availability for drinking water millions of people¹¹² can be given as examples to the direct effects; indirect effects of climate change on the right to water include the destruction of infrastructure due to floodings that lead to contaminated water supplies¹¹³ and the increase of operating costs, which results in the escalation of the price of domestic water supplies¹¹⁴.

The right to water is inextricably connected with a range of other human rights, most significantly with right to adequate food, as it cannot be realized if people lack access to safe drinking water for personal and domestic uses¹¹⁵. Contrary to right

¹⁰⁸ UNGA Res 64/292 (3 August 2010) UN Doc. A/RES/64/292.

¹⁰⁹ Committee on Economic, Social and Cultural Rights (CESCR) “General Comment no.15: The Right to water (Arts. 11 and 12 of the Covenant)” (2003) UN Doc. E/C.12/2002/11, para. 2.

¹¹⁰ Darrow, p. 179.

¹¹¹ OHCHR, “Position Paper on Climate Change and the Human Rights to Water and Sanitation” (2010) < https://www2.ohchr.org/english/issues/water/iepert/docs/climatechange_hrtws.pdf > accessed 1 June 2023, 2.

¹¹² A/HRC/10/61, para. 29; IPCC, *Climate Change 2022: Impacts, Adaptation and Vulnerability*, 9.

¹¹³ OHCHR Position Paper on Climate Change and the Human Rights to Water and Sanitation, 17.

¹¹⁴ *Ibid.*, p. 23.

¹¹⁵ OHCHR, “Frequently Asked Questions on The Right to Adequate Food, Fact Sheet No. 35” (1 April 2010), 7.

to water, the right to adequate food is explicitly recognized under Article 11 of ICESCR. As explained by CESCR, “the right to adequate food is realized when every man, woman and child, alone or in community with others, has physical and economic access at all times to adequate food or means for its procurement”¹¹⁶. Global climate change already has affected and will continue to affect the availability of food. At lower latitudes, crop productivity is projected to decrease significantly due to floods or droughts and the acidification of oceans results in a decrease in fish stocks, causing the risk of food security and people facing malnutrition¹¹⁷.

All of these adverse impacts of climate change, not only affects the right to water and the right to adequate food but also the right to health. As stated in Article 24(2) of the Convention on the Rights of the Child (CRC), the enjoyment of the right to health depends on adequate nutritious foods and clean drinking-water¹¹⁸ and the impacts of the global climate change to the enjoyment of right to health will be discussed under the next section.

¹¹⁶ CESCR, “General Comment no. 12: The Right to Adequate Food (Art.11)” (1999) UN Doc. E/C.12/1999/5, para. 6.

¹¹⁷ UN Doc. A/HRC/10/61, para. 26; UN Doc. A/HRC/7/5, para. 51; OHCHR, “Report of the Secretary-General on the adverse impact of climate change on the full realization of the right to food (Advanced edited version)” (19 June 2023) UN Doc. A/HRC/53/47, para. 6.

¹¹⁸ Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3, Art. 24 (2) (c): “[...] to combat disease and malnutrition, including within framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking water, taking into consideration the dangers and risks of environmental pollution [...]”; Alessandra Franca, “Climate Change and Interdependent Human Rights to Food, Water and Health: The contest between harmony and invention”, in Ottavio Quirico, Mouloud Boumghar (eds.) *Climate Change and Human Rights*, (1st edn., Routledge, 2015) 94.

iii. Right to Health

As said, the enjoyment of right to health is highly dependent on the availability of freshwater resources, sanitation and access to adequate nutritious food. This linkage is reflected in the text of the ICESCR, where the right to the highest attainable standard of health (right to health) is guaranteed under Article 12¹¹⁹, immediately after Article 11, which safeguards right to water and right to adequate food. According to the CESCR, right to health encompasses a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, including a healthy environment¹²⁰. Indeed, Article 12(2)(b) of ICESCR imposes an obligation to “*improve all aspects of environmental and industrial hygiene*”¹²¹, on the State Parties to the Covenant to achieve the full realization of the right to health¹²². This link between the right to health and climate was established by the European Committee of Social Rights (ECtSR) in the *Marangopoulos* case¹²³, in which the ECtSR upheld the Applicant’s claim that the Greek energy policy allowing the operations emitting GHGs breached Article 11 of the European Social Charter (ESC)¹²⁴, by adversely impacting human health¹²⁵.

¹¹⁹ ICESCR, Art. 12: “The States Parties to the present Covenant recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. [...]”.

¹²⁰ CESCR, “General Comment no. 14: The Right to the Highest Attainable Standard of Health (Article 12 of the ICESCR)” (2000) UN. Doc. E/C.12/2000/4.

¹²¹ ICESCR, Art. 12 (2)(b).

¹²² Franca, 94.

¹²³ *Marangopoulos Foundation for Human Rights (MFHR) v Greece*, Collective Complaint No 30/2005 (ECtSR, 26 December 2005).

¹²⁴ European Social Charter (adopted 18 October 1961, entered into force 26 February 1965) ETS 35, Art. 11: “*With a view to ensuring the effective exercise of the right to protection of health, the Contracting Parties undertake, either directly or in cooperation with public or private organizations, to take appropriate measures, designed inter alia: (1) to remove as far as possible the causes of ill-health [...] (3) to prevent as far as possible epidemic, endemic and other diseases*”.

¹²⁵ Franca, 99; Danai Spentzou, “Climate change litigation as a means to address intergenerational equity and climate change” (2021) 2 QMLJ 153, 178.

Global climate change is not merely another addition to the list of environmental hazards, but one of the primary threats for the enjoyment of right to health¹²⁶. IPCC projects that the occurrence of climate-related food-borne and water-borne diseases has increased significantly, especially in developing countries. While increases in thermal extremes, extreme weather conditions and increased production of certain air pollutants directly affect human health, climate change impacts on the regional food productivity and freshwater resources affect human health indirectly, by increasing the transmission rates of food-borne, vector-borne and water-borne diseases¹²⁷. Moreover, climate change does not only affect the physical well-being of people but the trauma associated with increasing temperatures, extreme weather events and eventually loss of livelihoods and culture also cause mental health challenges for the directly or indirectly affected individuals¹²⁸.

b. Specific Groups

Although the above-explained effects of global climate change on human rights is true for all individuals, some segments of the population feel these effects more acutely, namely women, children and indigenous people. Due to factors such as poverty, gender, age, societal status, minority status or disability, these groups are

¹²⁶ Paul Hunt and Rajat Khosla, “Climate Change and the right to the highest attainable standard of health” in Stephen Humphreys (ed.) *Human Rights and Climate Change* (Cambridge University Press, 2009) 243.

¹²⁷ IPCC, *Climate Change 2022: Impacts, Adaptation and Vulnerability*, 11; Horn, 47; UN Doc. A/HRC/10/61, para. 32-33; UNEP, “Climate Change and Human Rights Working Paper” (2015) <<https://www.unep.org/resources/report/climate-change-and-human-rights>> Accessed 28 May 2023, 8; Huny and Khosla, 243.

¹²⁸ IPCC, *Climate Change 2022: Impacts, Adaptation and Vulnerability*, 11; Horn, 47.

already considered to be in vulnerable positions¹²⁹ and are in a more susceptible position to be adversely impacted by issues caused by climate change.

i. Women

Women are especially exposed to climate change-related risks due to existing gender discrimination, gender roles and inequality¹³⁰. In particular, women in developing countries are vulnerable to climate change not only because they are highly dependent on local natural resources for their livelihood, but also, they experience unequal access to resources and lack of participation in decision making processes. These factors combined with the gender roles and responsibilities women retain aggravates the disproportionate effects climate change has on them¹³¹. In other words, existing patterns of discrimination render women more vulnerable to the negative and even fatal impacts of climate change. The death rate of women is marked to be higher than of men during natural disasters, which is often linked to women being seen as having the duty to look after their children or to be wearing clothes which inhibit their movement¹³². Furthermore, often times than not women are the victims of gender-based violence in the aftermath of natural disasters and during forced migration¹³³.

¹²⁹ UN Doc. A/HRC/10/61, para. 42.

¹³⁰ Ibid., para. 45.

¹³¹ M.A. Abebe, “Climate Change, Gender Inequality and Migration in East Africa” (2014) 4 WJELP 104, 114-115; Sumudu Atapattu, *Human Rights Approaches to Climate Change: Challenges and Opportunities* (1st edn, Routledge, 2015) 199-200.

¹³² UN Doc. A/HRC/10/61, para. 42; E. Neumayer and T. Plümper, *The Gendered Nature of Natural Disasters: The Impact of Catastrophic Events on the Gender Gap in Life Expectancy (1981-2002)* (2008) < <http://ssrn.com/abstract=874965> > Accessed 28 May 2023, 27.

¹³³ Food and Agriculture Organization of the United Nations (FAO): Gender and Population Division, Y. Lambrou and R. Laub (eds.) “Gender perspectives on the conventions on biodiversity, climate change and desertification” (2004) < <http://www.unisdr.org/eng/risk-reduction/gender/gender-perspectives-FAO.doc> > Accessed 28 May 2023, 7-8; UN Doc. A/HRC/10/61, para. 45.

ii. Children

Compared to adults, children are physically more vulnerable to the direct effects of climate change, such as extreme weather conditions, droughts and other natural disasters. Not only that but also climate change's indirect effects can also affect children's development, whether it be malnutrition due to food shortages, lack of access to clean water or the increase in certain diseases, like malaria¹³⁴.

These issues were raised by the applicants in the United Nations Committee on the Rights of Child's (CROC) "*Sacchi et al. v. Argentina et al.*" case¹³⁵. Sixteen children, from different jurisdictions, filed a petition alleging that Argentina, Brazil, France, Germany and Turkey violated their rights under the CRC by failing to fulfil their obligation to cut the greenhouse gases under the Paris Agreement¹³⁶. Although the complaint was declared inadmissible for a failure to exhaust local remedies¹³⁷, the decision has had a significant impact on the issue of whether States are legally responsible for the harmful effects of emissions originating in their territory on children outside their borders. However, for the purposes of this section, only the petitioners claim regarding the adverse effects of climate change on their wellbeing will be briefly examined. In this regard, for example, Deborah Adegbile, who is a twelve-year-old child from Nigeria, asserted that her asthma has worsened and she has been repeatedly hospitalized due to smoke from wildfires and heat-related pollution¹³⁸.

¹³⁴ Janet Currie and Olivier Deschenes, "Children and Climate Change: Introducing the Issue" (2016) 26 FOC 3, 4.

¹³⁵ CRC, *Decision adopted by the CRC under the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure in Respect of Communication No. 104/2019* (2021) CRC/C/88/D/104/2019.

¹³⁶ Climate Case Chart, "*Sacchi et. Al. v. Argentina et. al*" <http://climatecasechart.com/non-us-case/sacchi-et-al-v-argentina-et-al/> Accessed 28 May 2013.

¹³⁷ CRC Decision 10.21.

¹³⁸ CRC Decision 10.13.

Furthermore, petitioners from Marshall Islands, named David Ackley III and Ranton Anjain, who are sixteen and seventeen-years-old respectively, contracted malaria, dengue fever and chikungunya¹³⁹, which have increased as a result of climate change¹⁴⁰.

In addition to the fact that children are evidently among the most vulnerable groups to the current consequences of climate change, it should be noted that today's children and their children will bear the brunt of climate change impacts as they get older¹⁴¹.

iii. Indigenous People

Indigenous peoples often live in marginal lands and fragile ecosystems, like the Arctic region or the Kalahari Desert, and face socioeconomic disadvantages related to historic and ongoing marginalization and discrimination¹⁴². Climate related extreme weather events, drought, rising sea levels, ocean acidification and degradation of terrestrial and oceanic ecosystems have a disproportionate negative impact on indigenous communities, who are particular sensitive to alterations in their physical environment due to them usually living off the land that they live in¹⁴³. For example,

¹³⁹ CRC, *Chiara Sacchi et al. v. Argentina, Brazil, France, Germany and Turkey* (2019) Communication No. 104/2019 (Argentina), Communication No. 105/2019 (Brazil), Communication No. 106/2019 (France), Communication No. 107/2019 (Germany), Communication No. 108/2019 (Turkey) para. 272.

¹⁴⁰ World Health Organization (WHO), *Quantitative risk assessment of the effects of climate change on selected causes of death, 2030s and 2050s* (2014) < <https://apps.who.int/iris/handle/10665/134014> > Accessed 28 May 2023, 48.

¹⁴¹ CRC Petition, para. 87.

¹⁴² HRC, "Report of the Special Rapporteur on the impacts of climate change on the human rights of people in vulnerable situations" (2022) UN Doc. A/HRC/50/57, para. 8; UN Doc. A/HRC/10/61, para. 51.

¹⁴³ UN Doc. A/HRC/10/61, para. 51; HRC, "Report of the United Nations High Commissioner for Human Rights on Addressing human rights protection gaps in the context of migration and displacement of persons across international borders resulting from the adverse effects of climate change and

Inuit people, who live in the Arctic region, petitioned to the Inter-American Human Rights Commission on how the rising temperatures and the thawing of food supplies in the Arctic region have jeopardized the food security, their cultural practices, their health and ultimately their lives¹⁴⁴.

Furthermore, some indigenous people, particularly those who live on the islands of the Pacific, are directly threatened with total or partial disappearance as a result of climate change¹⁴⁵. This issue will be separately examined under the next section.

2. Effects on Small Island Developing States and Their Population

Small island developing states (SIDS) are low-lying coastal territories that are located in three geographical areas, namely the Caribbean, the Pacific and the Atlantic, Indian Ocean and South China Sea (AIS). These states tend to share similar sustainable development challenges, including limited resources, susceptibility to natural disasters, dependence on international trade, remoteness and exposure to global environmental challenges¹⁴⁶. Although SIDS are among the least responsible of all nations for climate change due to their low carbon emissions, they are most likely to suffer strongly from its adverse effects¹⁴⁷. In particular, sea-level rise and the increase

supporting the adaptation and mitigation plans of developing countries to bridge the protection gaps” (2018) UN Doc. A/HRC/38/21, para. 19.

¹⁴⁴ Sheila Watt-Cloutier, *Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States*, 2005, p. 45, 63, 67; John H. Knox, “Human Rights Principles and Climate Change”, in Cinnamon P. Carlarne, Kevin R. Gray, Richard Tarasofsky (eds.) *The Oxford Handbook of International Climate Change Law* (Oxford University Press, 2016) 220.

¹⁴⁵ UN Doc. A/HRC/4/32, para. 50.

¹⁴⁶ Atapattu, p. 223.

¹⁴⁷ UNFCCC Subsidiary Body for Scientific and Technological Advice, “International Meeting to Review the Implementation of the Programme of Action for the Sustainable Development of Small Island Developing States (Note by the Secretariat)” (2005) UN Doc. FCCC/SBSTA/2005/INF.1, 5.

in extreme weather events, both of which associated with global climate change, threaten the very existence of these small island nations¹⁴⁸.

Leaders of the SIDS began to speak out on the potential dangers of climate change, and the sea level rise specifically, in the late 1980s by organizing a conference in 1989 for the need of a common strategy to protect the SIDS from the effects of climate change. The Small States Conference on Sea Level Rise adopted the Malé Declaration on Global Warming and Sea Level Rise¹⁴⁹, which called for international negotiations towards a treaty regime on climate change to start¹⁵⁰. The same group convened again in 1990 during the Second World Climate Conference in Geneva, and established the Alliance of Small Island States (AOSIS), which received official recognition from the international community with UNGA Resolution 45/212¹⁵¹. As of 2023, AOSIS has 39 member states, all of which placed themselves at the forefront of action relating to climate change¹⁵².

The main concern of AOSIS is revolves around the submergence of small island states due to climate change, which raises several legal issues, including loss of statehood due to deterritorialization and issues regarding right to self-determination and displacement. It is not possible to discuss the dimensions of these complex and

¹⁴⁸ Espen Ronneberg, "Small Islands and the Big Issue: Climate Change and the role of the Alliance of Small Island States", in Cinnamon P. Carlarne, Kevin R. Gray, Richard Tarasofksy (eds.) *The Oxford Handbook of International Climate Change Law* (Oxford University Press, 2016) 761; Atapattu, p. 221

¹⁴⁹ Malé Declaration on Global Warming and Sea Level Rise (adopted 18 November 1989) UN Doc. A/C.2/44/7.

¹⁵⁰ Ronneberg, p. 762-763.

¹⁵¹ UNGA Resolution 45/212 (21 December 1990) UN Doc. A/RES/45/212.

¹⁵² Current Members: Cabo Verde, Guinea-Bissau, Sao Tomé and Príncipe, Antigua and Barbuda, Bahamas, Barbados, Belize, Cuba, Dominica, Dominican Republic, Grenada, Guyana, Haiti, Jamaica, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname, Trinidad and Tobago, Comoros, Maldives, Seychelles, Mauritius, Cook Islands, Fiji, Kiribati, Marshall Islands, Federated States of Micronesia, Nauru, Niue, Palau, Papua New Guinea, Samoa, Solomon Islands Timor-Leste, Tonga, Tuvalu, Vanuatu, Singapore. <https://www.aosis.org/about/member-states/> Accessed 28 May 2023.

multi-faceted issues in-depth here, due to the limits of this thesis. Rather, these issues will be briefly explained to provide the reader an understanding of how impactful global climate change is upon these nations.

a. Loss of Statehood due to Deterritorialization

Sea-level rise threatens the sovereign existence of low-lying island States. The criteria of statehood, which can be found under Article 1 of the Montevideo Convention on Rights and Duties of States, consists of the following four components: a permanent population, government, the capacity to enter into international relations with other states and a defined territory¹⁵³. Although there is no “fixed lower limit” on size of the territory, the State of Vatican or the Pacific Island States being the prime examples of this, a State cannot exist without one¹⁵⁴, because territory is the essential requirement for the realization of the other three criteria. Indeed, a permanent population requires the existence of defined territory; government needs a territory to establish its authority on a national and international level¹⁵⁵. This was affirmed by the ICJ in the *Case concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge*, where the Court observed that “sovereignty comprises of both

¹⁵³ Montevideo Convention on the Rights and Duties of States (adopted 26 December 1933, entered into force 26 December 1934) 165 UNTS 19, Art. 1: “*The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory, (c) government; and (d) capacity to enter into relations with the other States*”.

¹⁵⁴ Crawford, p. 191.

¹⁵⁵ Nico Shrijver, “The Impact of Climate Change: Challenges for International Law” in Ulrich Fastenrath et al. (eds.) *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford University Press, 2011) 1285.

elements personal and territorial”¹⁵⁶. Therefore, it can be concluded that a State would not be sovereign without a territory¹⁵⁷.

Some scholars proposed the doctrine of “nations *ex-situ*” as a possible legal solution to this problem. According to this doctrine, *ex-situ* nationhood would be a special legal status and a new category of international actors, that allows for the continued existence of a sovereign state, without the existence of a ‘physical’ territory¹⁵⁸. However, it should be noted that there is no state practice, international or national jurisprudence or more than a few scholarly writings that support this doctrine. Hence, this doctrine may be better classified as a theoretical proposal, which might gain attraction in the future. In this sense, it is safe to say that climate change and its adverse effects are direct threats to the existence of SIDS.

b. Right of Self-Determination

The loss of their territorial basis of statehood would also impair the island peoples’ right to self-determination¹⁵⁹. Article 1 of both the ICCPR and the ICESCR, recognized that by virtue of their right to self-determination “all peoples freely determine their political status and freely pursue their economic, social and cultural development”¹⁶⁰. In addition to damages to island State economies and tears to the

¹⁵⁶ *Case concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia v. Singapore)* (2008) ICJ Rep 2008, para. 79.

¹⁵⁷ Shrijver, p. 1285.

¹⁵⁸ Maxine Burkett, “The Nation Ex-Situ” in Michael B. Gerrard and Gregory E. Wannier (eds.) *Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate* (Cambridge University Press, 2013) 89.

¹⁵⁹ UN Doc. A/HRC/10/61, para. 41; Horn, 47.

¹⁶⁰ ICCPR Article 1 (1): “All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development”.

societal and cultural norms; climate change induced destruction of the physical basis for the exercise of any kind of activity, would evidently impair the islanders' ability to exercise their right to self-determination and determine their political, economic, social and cultural future¹⁶¹.

c. Climate Change-Induced Displacement

While some SIDS will be inundated by the sea-level rise, some SIDS will simply become uninhabitable due to the disappearance of their agricultural and fresh water resources¹⁶². The impact on coral reefs is also significant for the island populations because they support the economy of many island nations via fisheries, tourism and recreation¹⁶³. In this sense, direct and indirect impacts of climate change certainly exacerbate the social, economic, cultural and environmental vulnerabilities, especially for people located in SIDS¹⁶⁴, and create a wave of forced displacement, generally referred to as “climate-induced displacement” (CDP)¹⁶⁵. World Bank has estimated that the number of people who will have to move locations due to CDP will be 216 million people by 2050. On the other hand, the Institute for Economics and

¹⁶¹ Jenny Grote Stoutenburg, “When Do States Dissappear?: Thresholds of Effective Statehood and the Continued Recognition of ‘Deterritorialized’ Island States”, in *Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate* (Cambridge University Press, 2013) 76-77.

¹⁶² IPCC, V. Masson-Delmotte et al. (eds.), *Global Warming of 1.5°C: an IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty* (Cambridge University Press, 2018) 38.

¹⁶³ Angelique Pouponneau, “Climate-Displace People: A Small Island Developing States Perspective”, in Simon Behrman and Avidan Kent, *Climate Refugees: Global, Local and Critical Approaches* (Cambridge University Press, 2022) 232.

¹⁶⁴ Horn, 48; Jane McAdam, *Climate Change, Forced Migration and International Law* (Oxford University Press, 2012) 20.

¹⁶⁵ Pouponneau, p. 231; Adelle Thomas, April Baptiste, Rosanne Martyr-Koller, Patrick Pringle and Kevon Rhiney, “Climate Change and Small Island Developing States”, 45 ARER 1, 4

Peace (IEP) estimate that this number could exponentially higher, reaching around 1.2 billion people in more than 30 countries¹⁶⁶.

At the international level, there is no specific legal framework protecting the human rights of climate change induced displaced people. The Convention Relating to the Status of Refugees¹⁶⁷ (1951 Refugee Convention) does not cover people who are internally displaced and it is debated whether these people can be classified as “refugees” within the meaning of the 1951 Refugee Convention if they were to cross borders¹⁶⁸. A refugee is defined as someone who:

*“owing to well-founded fear of being persecuted for reasons of race, religion nationality membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”*¹⁶⁹

There is not a clear-cut consensus on whether climate change can meet the threshold of persecution, where most of the scholars are in the view that climate change induced harm exceeds the presently recognized bounds of the 1951 Refugee

¹⁶⁶ Igarapé Institute, “Global Futures Bulletin: Climate Migration and Displacement: No Place to Run” (2022) < <https://igarape.org.br/wp-content/uploads/2022/11/Global-Future-Bulletin-Climate-Migration-and-Displacement.pdf>> Accessed 28 May 2023, 14.

¹⁶⁷ Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 150.

¹⁶⁸ Horn, 49.

¹⁶⁹ 1951 Refugee Convention, Art. 1(2) : “As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it. In the case of a person who has more than one nationality, the term “the country of his nationality” shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national”.

Convention¹⁷⁰. Furthermore, even if it is accepted that impacts of climate change can be characterized as persecution, the 1951 Refugee Convention stipulates that the persecution should be motivated by an individual's race, religion, nationality, political opinion or membership of a particular social group. The requirement of persecution and the list of Convention reasons, read in conjunction, limit the Convention's scope as to exclude those people fleeing from natural disasters¹⁷¹. Indeed, as stipulated by national courts around the globe, the 1951 Refugee Convention does not provide protection for those fleeing from natural disasters or seeking better living conditions to due to these factors, despite the fact that "both of these scenarios seem deserving of international sanctuary"¹⁷². Considering that the impacts of climate change are largely indiscriminate, it is unlikely that climate change induced displaced persons can rely upon the definition provided by the Convention¹⁷³.

Besides, many of will be displaced internally, which could only make them as "internally displaced persons" (IDPs). IDPs fall outside the scope the of the 1951 Convention¹⁷⁴. As such, they will have to rely upon national human rights protection mechanisms, which may not be adequately enforced due to lack of resources and limited access to institutions in SIDS¹⁷⁵.

¹⁷⁰ Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, Oxford University Press, 2007) 100-101; McAdam, *Forced Migration*, 43; Horn, 49.

¹⁷¹ Jane McAdam, "Climate Change-related Displacement of Persons" in Cinnamon P. Carlarne, Kevin R. Gray, Richard Tarasofksy (eds.) *The Oxford Handbook of International Climate Change Law* (Oxford University Press, 2016) 522.

¹⁷² *Canada (Attorney General) v. Ward* (1993) 2 S.C.R. 689 (Supreme Court of Canada) 732; *Applicant A v. Minister for Immigration and Ethnic Affairs* (1997) 142 A.L.R. 331 (High Court of Australia) 248; *Horvath v Secretary of State for the Home Department* (2000) 3 W.L.R. 379 (United Kingdom: House of Lords) 499-500; McAdam, Climate Change-related Displacement of Persons, 522.

¹⁷³ Jane McAdam, "Climate Change-related Displacement of Persons", 522.

¹⁷⁴ International Committee of the Red Cross, "Internally Displaced Persons and International Humanitarian Law" (2018) < <https://www.icrc.org/en/document/internally-displaced-persons-and-international-humanitarian-law> > Accessed 28 May 2023.

¹⁷⁵ Horn, 50.

Furthermore, it is not clear whether these persons could be considered as “stateless”, within the meaning of the 1954 Convention relating to the Status of Stateless Persons¹⁷⁶ (1954 Convention). Article 1 of the 1954 Convention defines stateless person as “a person not considered a national by any State under the operation of its law”¹⁷⁷. In a scenario where the SID has been completely submerged underwater and therefore left without a defined territory, some authors answer this question as yes, the people on the island may become legally stateless. However practically, the 1954 Convention and other international instruments on this issue are not well-ratified and a few States have national protection mechanisms for stateless people¹⁷⁸. On the other hand, in a scenario where the SID has become uninhabitable rather than submerged, it is generally argued that the situation would be out of the scope the 1954 Convention, because the definition does not include people who are *de facto* stateless¹⁷⁹.

All of the above-explained adverse impacts of global climate change, whether it be effects on the general international community or small island developing states specifically, shows the gravity and severity of the issue. Moreover, because climate change affects international community as a whole, its impacts can only be mitigated with the cooperation of the international community. This line of argumentation indicates that global climate change is a common concern of humankind, which will be analyzed in depth in the section.

¹⁷⁶ *Convention relating to the Status of Stateless Persons* (adopted 28 September 1954, entered into force 6 June 1960) 360 UNTS 117.

¹⁷⁷ *Ibid.*, Art. 1: “For the purpose of this Convention, the term ‘stateless person’ means a person who is not considered as a national by any State under the operation of its law [...]”.

¹⁷⁸ Jane McAdam, “Displacement in the Context of Climate Change and Disasters”, in Cathryn Costello, Michelle Foster, Jane McAdam (eds.) *The Oxford Handbook of International Refugee Law* (Oxford University Press, 2021) 844.

¹⁷⁹ *Ibid.*

B. Global Climate Change as a Common Concern of Humankind

1. Conceptual Framework

Common concern of humankind was introduced to the international arena in response to international negotiations on the need to find a solution for the global climate change¹⁸⁰. Indeed, it was first officially recognized by the international community in the 43rd session of the UNGA. The Ambassador of Malta submitted a proposal to the General Assembly for the acceptance of climate as a “common heritage of mankind” and argued that climate is a natural resource that can be significantly altered regionally and globally due to anthropogenic activities¹⁸¹. Eventually, UNGA adopted Resolution 43/53, which reads as:

“[...] Convinced that climate change affects humanity as a whole and should be confronted within a global framework so as to take into account the vital interests of all mankind,

1. Recognizes that climate change is common concern of mankind, since climate is an essential condition which sustains life on earth [...]”¹⁸²

This approach was not entirely new¹⁸³. Previous legal documents have denoted various issues as constituting a common “interest” of humankind. Earliest reference to common interest can be found in the Preamble of the 1946 International Convention for the Regulation Whaling¹⁸⁴ (ICRW), where it is stated that the “*interest of the world*

¹⁸⁰ Murillo Chavarro, 138.

¹⁸¹ UNGA Draft Resolution A/43/251, “Conservation of climate as part of the common heritage of mankind: draft resolution” (26 October 1988) UN Doc. A/C.2/43/L.17.

¹⁸² UNGA Resolution 43/53, “Protection of Global Climate for Present and Future Generations of Mankind” (6 December 1988) UN Doc. A/RES/43/53.

¹⁸³ Cottier, “Principle of Common Concern of Humankind”, 11.

¹⁸⁴ International Convention for the Regulation of Whaling (adopted 3 December 1946, entered into force 10 November 1948) 161 UNTS 72, Preamble: “[...] Recognizing that is in the common interest

in safeguarding for future generations the great natural resources represented by the whale stocks”, and that is in the common interest to achieve the optimum level of whale stock as rapidly as possible¹⁸⁵. While “common interest” seems to draw attention to the necessity of some form of international governance regarding those issues; “common concern” indicates a higher status for the potential dangers underlying the global environmental problem¹⁸⁶. In other words, while common concern of humankind indicates that the object of concern is a fundamental interest of all States and even of all humankind and international cooperation is essential for the survival of humankind, common interest merely provides a motivation leading to the development of international law¹⁸⁷.

Nonetheless, as stated, it is a relatively new concept compared to the common areas or common heritage of mankind. Unlike the latter two concepts, however, common concern of humankind does not have a definition accepted by the general consensus. Rather, there are “aspects” or “characteristics” of common concern of humankind, identified by prominent international jurists and scholars. In 1990, UNEP gathered a group of legal experts to conduct a debate on the implications of common concern of humankind and its application to international environmental law. The Meeting of the Group of Legal Experts to Examine the Concept of the Common

to achieve the optimum level of whale stocks as rapidly as possible without causing widespread economic and nutritional distress”.

¹⁸⁵ Dinah Shelton, “Common Concern of Humanity” (2009) 39(2) EPL 83, 85.

¹⁸⁶ Biermann, 431; Shelton, 86; Laura Horn, “The Common Concern of Humankind and Legal Protection of the Global Environment” (PhD Dissertation, University of Sydney, 2000) 107.

¹⁸⁷ Jutta Brunneé, “Common Interest – Echoes from an Empty Shell? Some Thoughts on Common Interest and International Environmental Law” (1989) 49 ZaöRV 791, 796; Biermann, 431; Iryna Bodganova, *Unilateral Sanctions in International Law and the Enforcement of Human Rights: The impact of the principle of common concern of humankind* (Brill Nijhoff Publishing, 2022) 273.

Concern of Humankind in Relation to Global Environmental Issues¹⁸⁸, identified three important dimensions that compound the concept of common concern of humankind¹⁸⁹.

First, the collective dimension of common concern of humankind involves the cooperation of all states when responding to the environmental threat due to the subject of the concern being significant for all States and international community as a whole¹⁹⁰. Second, temporal dimension of this concept arises from the long-term effects of severe and major environmental threats, which affects rights and obligations of both the present and the future generations¹⁹¹. Third, the common concern of humankind, as a concept, requires the engagement of all levels of the society, including States, judicial and governmental institutions, companies, international organizations, non-governmental organizations (NGOs), civil society associations and individuals¹⁹². This requirement constitutes the multilevel governance dimension of common concern of humankind. In other words, the very notion of common concern comprises aspects of the global environment that, by their nature, are significant and require the collective effort of all levels of the international community, whether it be States, NGOs or individuals¹⁹³.

¹⁸⁸ United Nations Environment Programme (UNEP), David J. Attard (ed.) “The Meeting of the Group of Legal Experts to Examine the Concept of the Common Concern of Mankind in Relation to Global Environmental Issues” (13-15 December 1990) < <https://digitallibrary.un.org/record/766634?ln=en> > Accessed 28 May 2023.

¹⁸⁹ *Ibid*, p. 37; Murillo Chavarro, p. 138; Horn, “Climate Change and the Future Role of the Concept of the Common Concern of Humankind”, 27.

¹⁹⁰ *Ibid*.

¹⁹¹ Murillo Chavarro, 139; UNEP, The Meeting of the Group of Legal Experts, 37; Horn, Climate Change and the Future Role of the Concept of the Common Concern of Humankind”27.

¹⁹² *Ibid*.

¹⁹³ Soltau, 204.

Another point made by the Legal Experts at the UNEP meeting was that even though the concept of “common concern of humankind” is deeply rooted in other concepts such as common areas or common heritage of mankind, they are different by their nature. Common areas and common heritage are both inherently limited by their focus on certain geographic areas and their resources. As noted previously, common areas are located beyond the jurisdiction States, like the high seas, Antarctica or outer space¹⁹⁴. Common areas, thus, have a spatial component that is not a necessary condition for common concerns, which may occur within the national borders or outside of national jurisdiction, such as in the case of conservation of biodiversity or the atmosphere, respectively¹⁹⁵.

The relationship between “common heritage of mankind” and “common concern humankind” is not as evident as it is with the common areas. Some scholars view the connection between the concept of common heritage of mankind and common concern of humankind as the latter concept being the derivative or successor of the former and that these two concepts coexist in contemporary international law. Judge Cançado Trinidad, stressing the importance of commonness in both concepts, argues that the emergence of common concern of humankind was based on the intention to remove any associations with exploitation and the distribution benefits¹⁹⁶. In other words, common concern of humankind came as a solution to the disagreements between states to choose the best system to protect and conserve the environment without generating a high interference in their own sovereignty or

¹⁹⁴ Brunnée, Common Area, 553-554.

¹⁹⁵ Shelton, “Common Concern”, 85; Soltau, 206.

¹⁹⁶ Antônio Augusto Cançado Trindade, *International Law for Humankind: Towards a New “Jus Gentium”* (2nd edn., Martinus Nijhoff Publishers, 2013) 344, 352.

compromising states to the benefit sharing system established by the common heritage concept¹⁹⁷.

Then there are some scholars who argue that common concern adds nothing to the notion of common heritage. Rather, these concepts are very different from one another in terms of material scope, territorial application and focus areas. First, while the common heritage applies to areas beyond national jurisdiction and its resources, common concern of humankind has a wider scope as it is applied both beyond national jurisdiction but also within the jurisdiction of individual states. Following this point of differentiation, it is argued as a second difference that while the scope of common heritage of mankind is related to the areas beyond national jurisdiction and its resources; common concern of humankind includes matters that are of “concern” to humanity as a whole¹⁹⁸. Thirdly, common heritage regimes are concerned with equitable sharing of benefits whereas common concern regimes focus on equitable sharing of the burden of cooperation and problem solving¹⁹⁹.

Perhaps the most evident difference between these concepts is that it is not areas or resources as such that are common concerns. Rather, the concept is focused more narrowly on specific environmental processes or protective actions. To be exact, under the UNFCCC, it is not the atmosphere or even the “climate” that is the common concern but rather the “change in the Earth’s climate and its adverse effects”²⁰⁰.

Although these concepts are very different from one another, they are also related to some extent. Indeed, they both serve the purpose of protection and

¹⁹⁷ Murillo Chavarro, 138, 142.

¹⁹⁸ Murillo Chavarro, p. 142

¹⁹⁹ Brunnée, *Common Area*, 566; UNEP, *The Meeting of the Group of Legal Experts*, 19-47.

²⁰⁰ *Ibid.*

preservation of the environment and both enjoy an equitable shared system. Mostly importantly, however, as common concern has a broader territorial scope and the matters of common concern are of relevance for the international community, it would be possible to say that the former covers some areas of the common heritage. There even may be, for example, a common concern about the extinction of whales in the future, which is part of the common area regime as of today²⁰¹.

2. Identification of Common Concern of Humankind

a. Criteria

As stated, since the emergence of the concept of common concern of humankind in 1988, scholars have tried to shed light on how to identify a common concern of humankind.

According to Antônio Trinidad, there are five constitutional elements of the concept of common concern of humankind that have been identified. First, the issue at hand should be devoid of any proprietary connotations and truly be a fundamental issue for all humankind. Second, the issue could only be resolved with the engagement of all societal segments of the international community. Thirdly, the protection should be afforded not on a basis of reciprocity but on the basis of humanitarian considerations. Fourthly, the equitable sharing of responsibilities, not resources or benefits, should be at the center of application of the concept of common concern of

²⁰¹ Murillo Chavarro, p. 140.

humankind. Lastly, the main attention should be at the causes of the concerns, both for their prevention and for the responses to be given²⁰².

Furthermore, Friedrich Soltau submitted that the fundamental characteristics of a common concern of humankind are the three-fold. First, the interest at stake should extend beyond those of individual states and have an impact upon the values or moral principles of global significance. Second, threats to such interests should reach a level of gravity and have potential irreversible impacts. Last but not least, safeguarding the interests involved should require collective action and entail collective responsibility²⁰³.

Although these submissions identify a different number of characteristics, they are essentially the same in spirit. It seems that scholars generally seem to agree on the following point: issues of common concern should be significantly harmful for the international community on a global scale and can only be effectively addressed through international cooperation²⁰⁴. The Second Report of the Special Rapporteur of ILC on the protection of the atmosphere supports this basic idea that common concern implies and provides a basis for cooperation of all states on matters of an equal importance to all nations²⁰⁵.

²⁰² Trinidad, 351.

²⁰³ Soltau, 208.

²⁰⁴ Brunnée, Common Areas, 564; Duncan French, “Common Concern, Common Heritage and Other Globalizing Concepts: Rhetorical Devices, Legal Principles or a Fundamental Challenge?” in Michael Bowman et al. (eds.) *Research Handbook on Biodiversity and Law* (Edward Elgar Publishing, 2016) 334; Werner Scholtz, “Greening Permanent Sovereignty through the Common Concern in the Climate Change Regime: Awake Custodial Sovereignty” in Oliver C. Ruppel et al. (eds.) *Climate Change: International Law and Global Governance* (Nomos Verlagsgesellschaft mbH, 2013) 201; International Law Commission (ILC) Second Report on the Protection of the Atmosphere by Special Rapporteur Mr. Shinya Murase (2015) UN Doc. A/CN.4/681, 17; Nadia Noelia de los Angeles Sanchez Castillo, “International Law and the Sustainable governance of shared natural resources: A principles approach” (PhD Dissertation, Leiden University, 2020) 82.

²⁰⁵ ILC, Second Report of the Special Rapporteur of Mr. Shinya Murase, 17.

The lack of a clear definition of the concept and clear-cut identification criteria results in the uncertainty of what actually constitutes a common concern of humankind. There are only two multilateral environmental agreements (MEAs) that actually defines specific environmental issues as common concerns in their preambles: 1992 Convention on Biological Diversity (CBD)²⁰⁶ and 1992 UNFCCC. Other than these, as mentioned above, the 1987 Montreal Protocol on the Substances That Deplete the Ozone Layer is now closely associated with common concern regime.

Some scholars suggested that other environmental issues such as conservation of fresh water resources²⁰⁷, rainforests²⁰⁸, marine biodiversity²⁰⁹, soil²¹⁰ and the issue

²⁰⁶ Convention on Biological Diversity (CBD) (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79.

²⁰⁷ P. Cullet, “Water Law in a Globalised World: The Need for a New Conceptual Framework” (2011) 23 JEL 233; E. Brown Weiss, “The Coming Water Crisis: A Common Concern of Humankind”, (2012) 1 TEL 153, 154: The author argues that fresh water will be become a crisis because the supply needed to satisfy basic human needs of water will either not exist in the future or will be too costly afford. Therefore, Brown-Weiss suggests that freshwater, its availability and use should be recognized as a common concern of humankind, much as climate change was recognized as a common concern of humankind.

²⁰⁸ D. Humphreys, “The Elusive Quest for a Global Forest Convention” (2005) 14 RECIEL 1; Paige Mason, “Inadequacies of the Amazon Fund: Evaluating Brazil’s Sovereignty in the Context of Promising Market Mechanisms and the Need for International Oversight to Protect the Amazon Rainforests” (2010) 13 TIR 116, 122: Mason argues that global climate change will cause the Amazon rainforests to become drier and warmer, resulting in the collapse of the forest ecosystem. When these are combined with the increasing amounts of deforestation, the result will exacerbate climate change.

²⁰⁹ Chelsea Bowling, Elizabeth Pierson, and Stephanie. Ratté, “The Common Concern of Humankind: A Potential Framework for a New International Legally Binding Instrument on the Conservation and Sustainable Use of Marine Biological Diversity in the High Seas” (2017) Yale Law School Working Paper, <
https://www.un.org/depts/los/biodiversity/prepcom_files/BowlingPiersonandRatte_Common_Concern.pdf> Access date 28 May 2023, 13.

²¹⁰ Thomas Cottier and E. Bürgi Bonanomi, “Soil as a Common Concern: Towards Disciplines on Sustainable Land Management”, in T. Cottier and K. Nadakavukaren Schefer (eds.) *Encyclopedia of International Economic Law* (Edward Elgar Publishing, 2017) 627: The authors argue that protection of soil is interlinked with the protection of food supplies, an issue that does not only affect local populations but also people abroad, who are dependent upon the importation of agricultural goods. Therefore, this issue concerns the international community as a whole.

of deforestation²¹¹ should be regarded as common concerns of humankind²¹². For these issues to be recognized as common concerns, there should be sufficient international consensus. Such consensus may find expression in customary international law but, treaty negotiations may be more conducive for forging that consensus²¹³. Since these issues are not recognized as common concerns in treaty law, it is difficult to find the necessary international support to declare these as common concerns.

As such, it is generally accepted that the conservation of biological diversity and the protection of the global atmosphere²¹⁴, which consists of the depletion of the ozone layer and the global climate change, fulfill the above-mentioned criteria²¹⁵. Before moving on with global climate change, which is the central issue of this thesis, the issues of conservation of biological diversity and the depletion of the ozone layer will be briefly explained to provide a general legal framework governing other recognized common concerns of humankind.

b. Conservation of Biological Diversity

Biological diversity, or commonly referred to as biodiversity, is the variability among living organisms from all resources, *inter alia*, terrestrial, marine and other

²¹¹ Jutta Brunnée and A. Noellkaemper, “Between Forests and the Trees: The Emerging International Forest Law” (1996) 23 EC 207, 250: The authors argue that the issue of deforestation should be regarded as a common concern of humankind similar to conservation of biodiversity. In both situations, there is conflicting interests and priorities between sovereignty over forests and the interests of all nations in the protection of forests.

²¹² Cottier, “Principle of Common Concern of Humankind” 13.

²¹³ Brunnée, “Common Areas”, 565.

²¹⁴ From a scientific standpoint, transboundary air pollution is also a part of the atmospheric pollution. However, transboundary air pollution is not a part of the legal framework for protection of the global atmosphere because it is not regarded as a common concern of humankind. Rather, it is the subject of bilateral or sometimes multilateral legal instruments. See. Birnie and Boyle, 505-516.

²¹⁵ Soltau, 206.

aquatic ecosystems and the ecological complexes of which they are a part of, including diversity within species, between species and of ecosystems²¹⁶. According to the International Union for Conservation of Nature (IUCN), the available scientific evidence indicates that anthropogenic activities are eroding biological resources and greatly reducing the planet's biological diversity. The projected growth in population and economic activity signals that the rate of loss of biodiversity is far more likely to increase than stabilize and no single state can by itself ensure that biological resources are sustainably managed. Especially because biological diversity is unevenly distributed around the globe. The North has depleted its biodiversity reserves over time, but the South is still considered to be biologically rich. The conservation of biodiversity therefore, imposes a heavier burden on the South²¹⁷. Hence, international cooperation is required between all States and various sectors²¹⁸. To achieve this goal, on 22 May 1992, in Nairobi, the nations of the world adopted the CBD. The Preamble of the CBD declares biological diversity as a common concern of humankind by stating that:

*“The Parties to this Convention,
Affirming the conservation of biological diversity is a common
concern of humankind,
[...]”*²¹⁹

²¹⁶ CBD, Art. 2: “For the purposes of this Convention: ‘Biological Diversity’ means the variability among living organisms from all sources including, inter alia, terrestrial marine and other aquatic ecosystems and the ecological complexes of which they are: this includes diversity within species and of ecosystems.”; Birnie and Boyle, 549.

²¹⁷ IUCN, Lyle Glowka et al. (eds.) “A Guide to the Convention on Biological Diversity, Environmental Policy and Law Paper No. 30” (1994) < <https://portals.iucn.org/library/efiles/documents/EPLP-no.030.pdf>> Accessed 28 May 2023, 1.

²¹⁸ *Ibid.*, 18.

²¹⁹ CBD, Preamble.

With the affirmation of conservation of biodiversity being a common concern of humankind, conservation of biodiversity refers to specific environmental processes or protective actions²²⁰, which transcend the territorial sovereignty of individual states and establishes a common responsibility for all States²²¹. As such, the Convention calls for the development of an international regulatory framework to fulfill its objectives and establishes a common responsibility for the international community to conserve the biological diversity, while it recognizes and emphasizes that states have sovereign rights over their biological resources²²².

The strong emphasis on national sovereignty included by the Convention is mainly because most components of biological diversity are located within national borders as are the activities that have adverse effects on biodiversity²²³.

c. Protection of the Global Atmosphere

Atmosphere is a distinct category in international law because it consists of a dynamic airmass²²⁴. Indeed, according to the IPCC, the atmosphere is the “gaseous envelope surrounding the Earth”²²⁵. In its dry state, it contains a combination of gases

²²⁰ Brunnée, “Common Areas”, 564.

²²¹ Sharaban Tahura Zaman, “Recognising Biodiversity Conversation as a ‘Common Concern of Mankind’: A Legal Appraisal” (2020) 50 EPL 171, 173.

²²² CBD, Art. 3: “States have, in accordance with the Charter of United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.”

²²³ Bowling, Pierson and Ratté, 9.

²²⁴ Birnie and Boyle, 500.

²²⁵ IPCC, V. Masson-Delmotte et al. (eds.), *Climate Change 2021: The Physical Scientific Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change: Summary for Policy Makers*, (Cambridge University Press, 2021) 2219.

made up of nitrogen, oxygen, argon, helium, carbon dioxide and ozone²²⁶. The atmosphere, in this sense, cannot be equated with the airspace, which is simply a spatial dimension above land, subject to the sovereignty of the subjacent states²²⁷. Moreover, unlike minerals in the seabed, the atmosphere is not a commercially exploitable resource²²⁸. It can be argued that “clean air” is the resource found in the atmosphere and it does become scarce as pollutant are added²²⁹, but still, it cannot be physically extracted or ultimately exploited²³⁰. Therefore, it physically cannot be considered as a “common area” or a “common heritage of mankind”. It is rather a natural resource that is crucial for all living things and its degradation pose serious risk to the health and well-being of all species, if not the existence of life on Earth²³¹. Despite the collective interest in its protection, there is not a single all-embracing global convention on the topic. Instead, the protection of the atmosphere has been separated into three different categories as transboundary air pollution, depletion of the ozone layer and the global climate change.

Before moving on with the thematic protection mechanisms of the global atmosphere, it is important to note here that at its 65th session in 2013, the International Law Commission (ILC) decided to include the topic protection of the atmosphere in its current program of work²³². While the initial goal of the Special Rapporteur was to declare the legal status of the atmosphere as a common concern of humankind²³³, in

²²⁶ Rowlands, 316.

²²⁷ Birnie and Boyle, 501.

²²⁸ Oral, 40.

²²⁹ Susan J. Buck, *Global Commons: An Introduction* (1st edn., Routledge, 1998), 126.

²³⁰ *Ibid.*

²³¹ Oral, 41.

²³² Peter H. Sand, “Towards a New International Law of the Atmosphere?” (2016) 7 GoJIL 195, 197.

²³³ ILC, “Second Report of the Special Rapporteur of Mr. Shinya Murase”: In his first report, the Special Rapporteur of the ILC, Professor Shinya Murase had proposed the following the formulation for the ‘Guideline on the Legal Status of the Atmosphere’: “*The atmosphere is a natural resource essential for*

response to “political sensitivities of the issue”, the ILC’s mandate has ultimately been defined in a far more restricted manner²³⁴. Indeed, the final version of the Draft Guidelines on the Protection of Atmosphere²³⁵, adopted in 2021, stated in the preamble that:

“[...]

Recognizing therefore that the protection of the atmosphere from atmospheric pollution and atmospheric degradation is a pressing concern of the international community as a whole”.

[...]”²³⁶

This formulation has been highly characterized by scholars as a “missed opportunity”²³⁷ especially as regards to the ILC’s mandate, which is “to make recommendations for the purpose of encouraging the progressive development of international law and its codification”²³⁸. Bakker argues that ILC, as one of the most authoritative bodies of international jurists in the world, should have been more precise about the legal status of the global atmosphere and its legal implications, especially considering that the atmosphere has been facing extreme threats and has already been adversely affected by such threats in significant terms²³⁹.

sustaining life on earth, human health and welfare, and aquatic and terrestrial ecosystems; hence, its protection is common concern of humankind”. However, after discussion of this report, the last part of this proposal was reformulated as: “and hence the degradation of atmospheric conditions is a common concern of humankind.” Eventually, this formulation was found to be too far-reaching and reformulated all together; Bakker, 184.

²³⁴ Bakker, 183.

²³⁵ ILC, Report of the International Law Commission on the Draft Guidelines on the Protection of the Atmosphere (2021) UN Doc A/76/10.

²³⁶ *Ibid.* Preamble.

²³⁷ Bakker, 185; Sand, 217; Benoit Mayer, “A Review of the International Law Commission’s Guidelines on the Protection of the Atmosphere” (2019), 20 MJIL 453, 457.

²³⁸ Establishment of an International Law Commission, GA Res 174 (II), UN GAOR, 2nd sess, 123rd plen mtg, UN Doc A/RES/174(II) (21 November 1947) Preamble para 1.

²³⁹ Bakker, 185.

This is supported by the comments of several states, expressing their regret as regards to the replacement of the terminology used in the operative clause by “pressing concern of the international community as a whole” in the Preamble²⁴⁰. For instance, Antigua and Barbuda expressed its regret that the Special Rapporteur has been limited in the scope of his work, especially considering that common concern of humankind reflects the vulnerability of developing States to atmospheric change²⁴¹. Moreover, Belgium referred to the last preambular paragraph, which states that the Draft Guidelines must not interfere with relevant political negotiations concerning in particular climate change and ozone depletion, and noted that this paragraph undermines the relevance and added value of the guidelines by limiting the field of application of it²⁴². Lastly, Finland, on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), while welcoming the work of the ILC, noted their regret that the Draft Guidelines inevitably reflect the tight constraints of the Special Rapporteur’s mandate²⁴³.

Therefore, it can be concluded that the work of the ILC has demonstrated that the scope for recognizing the global atmosphere as a common concern humankind is rather limited. However, the components of the global atmosphere, namely the depletion ozone layer and the global climate change are recognized as common concerns of humankind. As stated, while the research question of this thesis focuses on the protection of the global climate regime, these two issues are somewhat interlinked and the protection regimes are inherently similar. Hence, it is useful to

²⁴⁰ *Ibid.*; ILC, Protection of the Atmosphere: Texts and titles of the draft guidelines and preamble adopted by the Drafting Committee on second reading (2021) UN Doc. A/CN.4/735.

²⁴¹ *Ibid.*, 4.

²⁴² *Ibid.* 5.

²⁴³ *Ibid.* 6.

briefly explain the legal regime for the protection of the ozone layer before moving on with the central issue of this thesis.

i. Depletion of the Ozone Layer

Scientists divide the atmosphere into, from bottom to top: the troposphere, the stratosphere, the mesosphere and the thermosphere²⁴⁴. The Earth's stratosphere is located some 12 to 40 kilometers above the planet's surface. It is here that the so-called "ozone layer"—that is, the part of the atmosphere with most of the planet's ozone (three atoms of oxygen bonded together) can be found.

This layer acts as a filter to protect the Earth from the Sun's damaging ultraviolet (UV) radiation. Loss of this atmospheric shield would have serious implications for human health, including increased cancer rates, as well as weakened immune systems; agriculture due to reduced crop yields and disruptions in the marine food chains²⁴⁵.

In the early 1970s, it was theorized that CFCs, fluorine, bromine, halon and other chlorine-based substances, which are now called the "ozone-depleting substances (ODS)", had the potential to catalyze the destruction of the ozone layer. By the mid 1980's, scientists discovered a "hole" in the ozone layer above Antarctica. This meant that international atmospheric policy, which began by bilateral issues, now included a global dimension as well. As a result of the long residence time of ozone-

²⁴⁴ Charlotte Kreuter-Kirchof, "Atmosphere, International Protection", *Max Planck Encyclopedias of International Law* (MPIL) (2011) para. 2.

²⁴⁵ Birnie and Boyle, 501; Rowlands, "Atmosphere and Outer Space", 321-322; Stephen O'Andersen, et al. "Ozone Layer, International Protection", *Max Planck Encyclopedias of International Law* (MPIL) (2021) para. 3.

depleting substances in the atmosphere, they have had transported globally and have had global effects. This emerging debate about the potential ozone layer depletion led to the adoption of two international instruments addressing this issue: the 1985 Vienna Convention on the Protection of the Ozone Layer²⁴⁶ and the 1987 Montreal Protocol on the Substances That Deplete the Ozone Layer (Montreal Protocol)²⁴⁷. The international efforts to protect the ozone layer have had significant substantial impact. Especially due to the decrease in the emissions of ODSs, the depletion of the ozone layer has improved significantly²⁴⁸.

Neither of these legal instruments explicitly recognizes the depletion of ozone layer as “common concern of humankind”. This may be because these Conventions were adopted before concept of common concern humankind gained currency and officially recognized as a legal concept by the UNGA Resolution 43/53 in 1988²⁴⁹. However, even though ozone depletion is not explicitly pronounced as a common concern of humankind in these documents, there a few reasons why scholars state that the depletion of the ozone layer fits within the common concern of humankind concept.

First of all, Vienna Ozone Convention implicitly confers the status of common concern on the ozone layer since the definition provided by the Convention regards the ozone layer as a “global unity, without reference to legal concepts of

²⁴⁶ Vienna Convention on the Protection of the Ozone Layer, (adopted 22 March 1985, entered into force 22 September 1988) 1513 UNTS 293.

²⁴⁷ Montreal Protocol on Substances that Deplete the Ozone Layer (adopted 16 September 1987, entered into force 1 January 1989) 1522 UNTS 3; James Crawford, *Brownlie's Principles of International Law*, 347.

²⁴⁸ World Meteorological Organization, Ross J. Salawitch et al. (eds.) “Scientific Assessment Panel of the Montreal Protocol on Substances that Deplete the Ozone Layer: Twenty Questions & Answers About the Ozone Layer: 2022 Update” (2023) <
<https://csl.noaa.gov/assessments/ozone/2022/twentyquestions/>> Accessed 28 May 2023, 44.

²⁴⁹ Brunnée, “Common Areas” 565.

sovereignty, shared resources or common property”²⁵⁰. Furthermore, the Preamble of the Montreal Protocol recognizes the world-wide emission of certain substances (ODSs) can significantly deplete and otherwise modify the ozone layer in a manner that is likely to have climatic effects and adverse effects on human health and the environment²⁵¹.

Moreover, both the Convention and the Protocol circumscribe legal consequences and protection mechanisms that closely resemble those now associated common concern regimes, especially as regards to calling states for international cooperation²⁵². Although the 1985 Vienna Convention on the Protection of the Ozone Layer is a framework convention and does not include legally binding obligations to reduce emission of ODSs, it does call states for international cooperation on a range of issues including scientific research and information exchange²⁵³. A decade of greater public interest and increased certainty in the scientific work led to the adoption 1987 Montreal Protocol, which obliges industrialized states to limit their production and consumption of key ODSs²⁵⁴. The Montreal Protocol is unique in having the flexibility to respond to new scientific information²⁵⁵. Since its adoption, the Protocol was amended and adjusted a total of 11 times²⁵⁶, the most recent amendment being the Kigali Amendment in 2016²⁵⁷, in order to keep up with the rapid technological

²⁵⁰ Birnie and Boyle, 503; Lynne M. Jurgielewicz, *Global Environmental Change and International Law: Prospects for Progress in the Legal Order* (University Press of America, 1996) 66.

²⁵¹ Montreal Protocol on the Substances that Deplete the Ozone Layer, Preamble:

²⁵² *Ibid.*; Brunnée, 567.

²⁵³ Alexandre Kiss and Dinah Shelton, *Guide to International Environmental Law* (Martinus Nijhoff Publishing, 2007) 168.

²⁵⁴ Rowlands, 322-323.

²⁵⁵ UNEP Ozone Secretariat, “Ozone and You: All About the Ozone and the Ozone Layer” (2022) <<https://ozone.unep.org/ozone-and-you>> Accessed 28 May 2023.

²⁵⁶ London Amendment 1990; Copenhagen 1992; Montreal 1997; Beijing 1999 and Kigali 2016. Adjustments, London 1990; Copenhagen 1992; Vienna 1995; Montreal 1997; Beijing 1999; Montreal 2007.

²⁵⁷ Kigali Amendment, 2016.

developments to better protect the atmosphere²⁵⁸. Therefore, even if depletion of the ozone layer is not explicitly named as a common concern of humankind, unlike biodiversity and global climate change, it is now regarded as such²⁵⁹.

ii. Global Climate Change

Although the definition, the causes and the impacts of global climate change is explained in detail above under Section II (B)²⁶⁰; to reiterate, climate change, refers to the all of the various long-term changes, caused by human activities, in the climate regime, including sea-level rise, extreme weather conditions and ocean acidification²⁶¹. These changes in the climate regime have a significant impact on almost all aspects of life, from agriculture to the to the continued existence of small island developing states and from human rights to the survival of ecosystems.

The gravity and severity of the global climate change requires the cooperation of the whole international community and to establish that cooperation, global climate change has been named as a common concern of humankind. The recognition of global climate change as a common concern of humankind will be discussed under the next section, followed by the legal implications of such recognition.

²⁵⁸ O'Andersen et al. "Ozone Layer, International Protection", para. 11.

²⁵⁹ Birnie and Boyle, 503, Brunnée, "Common Areas" 565; Biermann, 431.

²⁶⁰ See above Section II (A).

²⁶¹ Romm, 19.

3. Recognition of Global Climate Change as a Common Concern of Humankind

As explained above, the first official appearance of “common concern of humankind” was the recognition of the climate change as a common concern of humankind with UN General Assembly Resolution 43/53 in 1988. After the adoption of UNGA Resolution 43/53, in 1989, climate change was declared to be a common concern of humankind, once again, in the Noordwijk Ministerial Declaration on Climate Change²⁶², where it is stated that:

*“Climate change is a common concern of mankind. All countries should now, according to their capabilities and the means at their disposal, initiate actions and develop and maintain effective and operational strategies to control, limit or reduce emissions of greenhouse gases. As a first step, they should take those actions which are beneficial in their own right. [...]”*²⁶³

It is important to note that this document is a declaration and not a treaty. Declarations are generally viewed as legal documents that are not intended to create legal rights and obligations but rather, political or moral commitments²⁶⁴. As such, it might be more acceptable for States to consent to a non-binding instrument which requires adherence to new principles or norms whose legal status is not determined at that point in time, similar to the adoption of the 1972 Stockholm Declaration and 1992 Rio Declaration. This does not mean, however, that these instruments have no legal

²⁶² The Noordwijk Declaration on Climate Change: Atmospheric pollution and climatic change (adopted in 6-7 November 1989) UN Doc. A/C.2/44/5.

²⁶³ *Ibid.*, para. 7.

²⁶⁴ Philippe Gautier, “Non-Binding Agreements” *Max Planck Encyclopedias of International Law* (MPIL) (2022) para. 1.

effect at all. Non-binding agreements may become the channel through which new norms are developed before being accepted in legal instruments²⁶⁵. In this regard, even though it does not impose legal obligations upon States, the Noordwijk Declaration can be regarded as a steppingstone in the development of the common concern of humankind concept.

Furthermore, in 1990, the Ministerial Statement of the Second World Climate Conference²⁶⁶ recognized the concept of climate change as a common concern of humankind and called for the drafting process of a framework treaty on climate change and the necessary protocols. The IPCC had completed its First Assessment Report for the Conference, which later acted as the scientific basis for the first session of the International Negotiating Committee for a Framework Convention on Climate Change in 1991²⁶⁷. Eventually, the concept of common concern of humankind developed and was applied as a treaty-based notion with the adoption of the 1992 UNFCCC²⁶⁸ at the 1992 Earth summit in Rio.

The Preamble of the UNFCCC states that:

“The Parties to this Convention,

*Acknowledging that change in the Earth’s climate and its adverse effects are a common concern of humankind”*²⁶⁹

²⁶⁵ *Ibid.*, para. 19.

²⁶⁶ UNGA, Report of the Secretary General on the Protection of Global Climate for Present and Future Generations of Mankind (1990) A/45/696/Add.1.

²⁶⁷ Bradley J. Condon and Tapen Sinha, *The Role of Climate Change in Global Economic Governance* (Oxford University Press, 2013) 23.

²⁶⁸ Cottier et al. “Principle of Common Concern and Climate Change” 299.

²⁶⁹ UNFCCC, Preamble.

The terms of the UNFCCC were reproduced in the Preamble of the 2015 Paris Agreement with the addition of a multitude of aspirations related to human rights²⁷⁰:

“The Parties to this Convention,

[...]

Recognizing the need for an effective and progressive response to the urgent threat of climate change on the basis of the best available scientific knowledge,

[...]

*Acknowledging that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity, [...]*²⁷¹

Similar to declarations, typically, preambles are not capable of creating binding legal effects upon parties in international law²⁷² but the legal significance of both preambular clauses are hardly questioned by the fact that “common concern of humankind” merely appears as part of the preambles²⁷³. Rather, a treaty’s preamble defines, in general terms, the purposes and considerations that led the parties to negotiate and conclude a treaty²⁷⁴. Preambular clauses of a treaty can perform four distinct functions as the following: interpretative, supplementary, incorporative and

²⁷⁰ Cottier “Principle of Common Concern of Humankind” 14.

²⁷¹ Paris Agreement, Preamble.

²⁷² Jan Klabbbers, “Treaties and Their Preambles”, in Michael J. Bowman and Dino Kritsiotis (eds.) *Conceptual and Contextual Perspectives on the Modern Law and Treaties* (Cambridge University Press, 2018) 182.

²⁷³ Peter-Tobias Stroll, “The Climate as a Global Common” in Daniel A. Farber and Marjan Peeters (eds.) *Climate Change Law* (Edward Elgar Publishing, 2016) 136.

²⁷⁴ Makane Moïse Mbengue, Preamble, *Max Planck Encyclopedias of International Law* (MPIL) (2006) para. 1.

binding. These four functions are not mutually exclusive, they can simultaneously be performed by the same preambular clause²⁷⁵.

The interpretative function of a preamble is recognized in the 1969 Vienna Convention on the Law of Treaties (VCLT)²⁷⁶, which states that along with the text and annexes of the treaty, the preamble may be taken into account for the purpose of interpretation²⁷⁷. In other words, the preamble is considered to be a fundamental and integral part of the treaty and an important interpretative tool for understanding the context, rationale and intent of the drafters²⁷⁸. Although there are examples of international jurisprudence where the court or the tribunal²⁷⁹ did not rely on the preamble of a treaty to figure out the object and purpose of it, preambular clauses are still important tools for treaty interpretation²⁸⁰. The importance of a Preamble's interpretative function is reflected in the practice international courts and tribunals²⁸¹. For example, in the *US-Shrimp Case*, the Appellate Body of the World Trade Organization (WTO) stated that:

*“[...] the Preamble attached to the WTO Agreement shows that the signatories to that Agreement were, in 1994, fully aware of the importance and legitimacy of environmental protection as a goal of national and international policy.”*²⁸²

²⁷⁵ *Ibid.*, para. 2.

²⁷⁶ Vienna Convention on the Law of Treaties [VCLT] (adopted 23 May 1969, entered into force 27 January 1980), 1155 UNTS 331.

²⁷⁷ Mbengue, para. 3; VCLT Art. 31 (2) : “The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes [...]”.

²⁷⁸ Sarah Lothian, “The BBNJ Preamble: More than just window dressing” (2023) 153 MP 1, p. 1.

²⁷⁹ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) (1951) ICJ Rep. 1951, 23-24: the Court refers to the Preamble of the Genocide Convention only once while examining the object and purpose of the Convention and does not provide an argumentative role to it; Klabbers, 186.

²⁸⁰ Klabbers, 186;

²⁸¹ *Application of the Convention of 1902 Governing the Guardianship of Infants (Netherlands v. Sweden)* (Merits) (1958) ICJ Rep 55, para. 68: “The 1902 Convention, as indicated by its preamble, was designed to ‘lay down common provisions to govern the guardianship of infants’”.

²⁸² WTO, *US-Shrimp* (1998) WT/DS58/R, para. 129-130.

Such an approach shows that preambles of treaties are relied on to further shed light on the object and purpose of a treaty. However, as mentioned, preambles are not just interpretation tools. Some preambular clauses act as incorporative clauses, which highlights the relevance of the external sources and integrates norms or principles of international law, by explicitly referring to another treaty or customary international law rules and resolutions of international organizations²⁸³. Preambular clauses of both the UNFCCC and Paris Agreement are evident examples of both interpretative and incorporative clauses²⁸⁴.

The Preamble of UNFCCC shows that the Parties to these Conventions intent to “acknowledge” that climate change is indeed a grave and global environmental issue, which reaches the level of “common concern of humankind”, and requires international cooperation and multilevel governance to mitigate the adverse effects of climate change²⁸⁵. This intent further consolidated with the references to the UNGA Resolutions on “the Protection of Global Climate for Present and Future Generations of Mankind”²⁸⁶ and to the Ministerial Declaration of the Second World Climate Conference.

The Preamble of the Paris Agreement went beyond the preamble of the UNFCCC by recognizing the “need for an effective and progressive response to the urgent threat of climate change”²⁸⁷. The inclusion of this phrase is evidence of the

²⁸³ Makane Moïse Mbengue, “Preamble”, *Max Planck Encyclopedias of International Law* (MPIL) (2006) para. 9 ; Klabbers, p. 180.

²⁸⁴ Maria Pia Carazo, “Analysis of the Provisions of the Agreement: Contextual Provision (Preamble and Article 1)”, in Daniel Klein, Maria Pia Carazo, Meinhard Doelle, Jane Bulmer, Andrew Higham (eds.), *The Paris Agreement on Climate Change: Analysis and Commentary*, (Oxford University Press, 2017) 116.

²⁸⁵ Daniel Bodansky, “The United Nations Framework Convention on Climate Change: A Commentary”, 18 YJIL 451, 497.

²⁸⁶ UNGA Resolution 43/53; UNGA Resolution 45/212.

²⁸⁷ Bogdanova, 275.

Parties' acknowledgement of the seriousness of the problem and reflects the shift in Parties' recognition of the imminent threat of climate change and their intent to address it²⁸⁸.

4. Legal Implications of Recognition of Climate Change as a Common Concern of Humankind

The legal implications of application of common concern of humankind to the adverse impacts of climate change is heavily debated amongst scholars and scholars identify four main legal implications. First, States are under the obligation to cooperate to protect the environment from the adverse impacts of climate change (duty to cooperate). Second, the concept of common concern of humankind, due its burden sharing component, is linked to intragenerational equity and common but differentiated responsibilities. Third, the subject matter of the concern is not within the *domaine réservé* of States, hence it is a matter for the international agenda²⁸⁹. Lastly, the obligation to protect the global environment is owed to the international community as a whole²⁹⁰. The first three legal implications will be addressed briefly, before moving with the in-depth analysis of the fourth issue.

a. Duty to Cooperate

Article 1(3) of the Charter of the United Nations foresees that states have a general duty to cooperate in solving international problems. International environmental law is the prime example of the international obligation to cooperate

²⁸⁸ Carazo, 111

²⁸⁹ Cottier, 54.

²⁹⁰ Jutta Brunnée, "Common Areas" 566; Birnie and Boyle, 195.

playing an important role, especially as regards to the protection of the global environment²⁹¹. In this regard, Principle 24 of the Stockholm Declaration reflects a general political commitment to international cooperation in matters pertaining to environmental protection and is later complemented by Principle 7 of the Rio Declaration, which reads that “*states shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth’s ecosystem*”²⁹². Although this obligation is present in most, if not all, international agreements relating to the environment, it presents itself in different ways. There are some environmental agreements with a restricted membership approach, for instance the North American Agreement on Environmental Cooperation²⁹³, in which the obligation of cooperation is applied on a reciprocal basis. In contrast, multilateral environmental agreement generally foresees this obligation as a fundamental and overarching principle²⁹⁴.

The importance of this obligation is especially apparent in the context of common concern of humankind. As explained in the previous sections, common concern of humankind, as a concept, inherently requires the international cooperation, either because the issue occurs within the jurisdiction of states but affects the international community as a whole, as in the case of conservation or because the issue cannot be limited with spatial terms and therefore is truly a global phenomenon, like the protection of the ozone layer or global climate change. In other words, in matter recognized by the international community as common concerns of humankind, by the

²⁹¹ Horn, “Climate Change and the Future Role of the Concept of the Common Concern of Humankind” 33; Rüdiger Wolfrum, “Cooperation, International Law of”, *Max Planck Encyclopedias of International Law* (MPIL) (2010) para. 28; Rio Declaration, Principle 7: “States shall cooperate in a spirit of global partnership to conserve protect and restore the health and integrity of the Earth’s ecosystem”.

²⁹² Sands, 203.

²⁹³ North American Agreement on Environmental Cooperation (United States – Canada – Mexico) (adopted 14 September 1993, entered into force 1 January 1994) Doc. A19/EN.

²⁹⁴ Wolfrum, “Cooperation, International Law of”, para. 31.

very nature of the problems identified, require international cooperation as the problem can only be addressed with the joint efforts of all States²⁹⁵. This is recognized in all of the common concern regimes, including the Vienna Convention on the Protection of the Ozone Layer and the Convention on Biological Diversity but especially apparent in the legal framework of the UNFCCC. The sixth preambular clause of the UNFCCC acknowledges that the most extensive cooperation of all countries is necessary to deal with the threat of climate change and carry out a suitable international response to this threat. The operational clauses of the Convention support this statement and set out a number of commitments from general duties to more specific ones, such as the transfer of technologies that reduce greenhouse gas emission and exchange of relevant information on the climate system and climate change²⁹⁶.

Most importantly, however, the general obligation to cooperate in the UNFCCC implies that states have a responsibility to develop a legal framework to deal with the threat of climate change²⁹⁷. Therefore, it can be said that the obligation to cooperate, in the context of common concern regimes, confers a duty upon States to negotiate and preferably ratify more detailed and more contemporary international agreements to continue the efforts of the international community to reduce the GHG emissions²⁹⁸. This sub-obligation is inherently linked with the principle of “common but differentiated responsibilities”, which will be dealt with in the next section.

²⁹⁵ Cottier, 60.

²⁹⁶ Horn, “Climate Change and the Future Role of the Concept of the Common Concern of Humankind”, 33; Thomas Cottier et al. “The Principle of Common Concern and Climate Change” (2014) 52(3) AdV 293, 317.

²⁹⁷ Horn, “Climate Change and the Future Role of the Concept of the Common Concern of Humankind”, 35 ; Wolfrum, “Cooperation, International Law of”, para. 31.

²⁹⁸ *Ibid.*

b. Common but Differentiated Responsibilities

The notion of commonality in the concept of common concern of humankind, relates to the principle of common but differentiated responsibilities (CBDR), a cornerstone principle of international environmental law²⁹⁹. This principle entails that while pursuing a common goal, States take on different obligations, in light of their historical contribution to the environmental problem at stake and diverging levels of socio-economic situation³⁰⁰. In other words, CBDR recognizes that climate change is common concern of all humans, which warrants the efforts of the whole international community for a global resolution, but also foresees the allocation of responsibilities should differ depending on the capacity and historical contribution of each State³⁰¹.

The appearance of principle of CBDR can be traced back to the very beginning of the modern era of international environmental law, specifically to the Stockholm Declaration³⁰². Principle 12 of the Stockholm Declaration recognizes the need for taking into account the “circumstances and particular requirements of developing countries” and foresees that “additional international technical and financial assistance” to be provided to those countries in order to ensure that sufficient resources would be available to the whole international community to preserve and improve the environment³⁰³. While the Stockholm Declaration affirmed the need to consider the

²⁹⁹ Cottier et al. “Principle of Common Concern and Climate Change”, 303; Horn, “Climate Change and the Future Role of the Concept of the Common Concern of Humankind” 36.

³⁰⁰ Ellen Hey and Sophia Paulini, “Common but Differentiated Responsibilities” *Max Planck Encyclopedias of International Law (MPIL)* (2021) para. 1.

³⁰¹ Justin Lee, “Rooting the Concept of Common but Differentiated Responsibilities in Established Principles of International Environmental Law”, (2015) 17 *VJEL* 27, 28.

³⁰² See Section I (A) for Stockholm Declaration

³⁰³ Stockholm Declaration, Principle 12: “Resources should be made available to preserve and improve the environment taking into account the circumstances and particular requirements of developing countries and any costs which may emanate from their incorporating environmental safeguards into their development planning and the need for making available to them, upon their development planning and need for making available to them upon their request, additional international technical and

different socio-economic circumstances of developed and developing countries are in, it did not go as far as curtailing a concrete obligation to embrace such differences in the context of environmental protection³⁰⁴. This recognition constituted a starting point for CBDR, which was later found its place in the Rio Declaration. Principle 7 of the Rio Declaration provides that:

*“[...] In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.”*³⁰⁵

This formulation reflects the core of what constitutes the principle of CBDR in international environmental law: a global partnership that is inherently linked to the duty to cooperate, in which States are to take on different levels of obligations based on their socio-economic situation, historical and current contribution to the degradation of the global environment³⁰⁶. This mirrored in the asymmetric obligation scheme of the UNFCCC, specifically Article 3(1), which states that:

*“The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed State Parties should take the lead in combating climate change and the adverse effects thereof.”*³⁰⁷

financial assistance for this purpose”; Phillipe Cullet, ‘Principle 7’ in Jorge E. Vinuales (ed), *The Rio Declaration on Environment and Development: A Commentary* (Oxford University Press, 2015) 230.

³⁰⁴ Cullet, 230.

³⁰⁵ Rio Declaration, Principle 7.

³⁰⁶ Hey and Paulini, para. 5.

³⁰⁷ UNFCCC, Art. 3(1): “The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof”.

The Kyoto Protocol operationalized this provision by establishing quantified GHG emission limitations and reduced obligations for the State Parties to the UNFCCC and the Kyoto Protocol, who were also members of the Organization for Economic Co-operation and Development (OECD)³⁰⁸. In other terms, Kyoto Protocol's approach was to divide states into two categories as industrialized and developing countries, and to assign a series of obligations, such as time-fixed mitigation obligations to the industrialized countries, whereas the developing countries were not assigned any emission reduction obligations³⁰⁹.

The negotiation history of these instruments shows that this approach was adopted to bring developing states, such as India and China, to the negotiating table³¹⁰. This approach both proved to be ineffective for combating the effects of the global climate change and garnered opposition from the developed States³¹¹. As a result of these arguments, the Parties to the UNFCCC tasked the Working Group on the Durban Platform for Enhanced Action with the duty to develop a new protocol or another legal instrument under the Convention, that would apply to all Parties³¹². Hence, a new approach was adopted in the Paris Agreement, which, at its core, commits parties to submit "Nationally Determined Contributions" that must progressively become more

³⁰⁸ Daria Shapovalova, 'In Defence of the Principle of Common but Differentiated Responsibilities and Respective Capabilities' in Benoit Mayer and Alexander Zahar (eds) *Debating Climate Law* (Cambridge University Press, 2021) 65;

³⁰⁹ Cinnamon P. Carlarne & JD Colavecchio, "Balancing Equity and Effectiveness: The Paris Agreement & the Future of the International Climate Change Law" (2019) 27 NYUELJ 107, 138.

³¹⁰ Phillippe Cullet, "Differential Treatment in Environmental Law: Addressing Critiques and Conceptualizing the Next Steps" (2016) 5 TEL 305, 305; Shapovalova, p. 66; Lavanya Rajamani, 'The Changing Fortunes of Differential Treatment in the Evolution of International Environmental Law' (2012) 88 IA 605, 623

³¹¹ For instance, the United States of America indicated that it did not believe that the CBDR imposed any legally binding obligation for the North, Phillippe Cullet, "Differentiation", *The Oxford Handbook of International Environmental Law* (2nd edition, Oxford University Press, 2021) 325.

³¹² UN Doc. FCCC/CP/2011/L.10 para. 2; Carlarne & Colavecchio, 139.

ambitious as time passes³¹³. Scholars state that this approach enhanced the international cooperation amongst States, notably between the United States of America and People's Republic of China³¹⁴, and suggests progress towards international efforts to address the adverse effects of the global climate change³¹⁵.

These explanations show that while it is the concept of common concern of humankind that ensures the participation of all states in efforts to mitigate the effects of the global climate change, it is the differentiation within the obligations that promotes the efficacy of such action, by making it politically acceptable³¹⁶.

c. National Sovereignty

In general terms, since the emergence of the doctrine in the Westphalian Peace of 1648³¹⁷, state sovereignty and equality represent the constitutional doctrine of the law of nations. The essential principles that compose sovereignty and equality are three-fold. First, states have exclusive jurisdiction over their territory and the permanent population living there. Second, states have an obligation not to intervene in the area of exclusive jurisdiction of other states. Third, the formation of international law is ultimately dependent on the consent of States, whether it be treaty law or

³¹³ Carlarne & Colavecchio, 135.

³¹⁴ United States and the Republic of China, which are the two largest net GHG emitters, issued a joint announcement sharing their respective commitments to the Paris Agreement and their renewed commitment to bilateral cooperation to mitigate the adverse effects of the global climate change even further. <https://obamawhitehouse.archives.gov/the-press-office/2015/09/25/us-china-joint-presidential-statement-climate-change>

³¹⁵ Carlarne & Colavecchio, 40-141; Shapovalova, 67-68.

³¹⁶ Philippe. Sands, "International Law in the Field of Sustainable Development" (1994) 65 BYIL 303, 344; *See*. D. French, "Developing states and international environmental law: the importance of differentiated responsibilities" (2000) 49(1) ICLQ 35.

³¹⁷ Daniel Philpott, "Sovereignty: An Introduction and Brief History" (1995) 48(2) JIA 353, 364; Stephen D. Krasner, "Sovereignty" (2001) 122 FP 20, 20.

customary law³¹⁸. Common concern of humankind, as a concept, seems to affect these basic corollaries of statehood. Indeed, it does affect and restrict sovereignty in some ways, but the acceptance of a grave and globally shared problem as a “common concern of humankind” does not impede upon the traditional precepts of sovereignty³¹⁹.

First of all, sovereignty, in its roots, was about enabling and preserving peace and security amongst nations³²⁰. Indeed, the emergence of state sovereignty came with the Westphalian Peace of 1648, which ended the Thirty Years’ War and brought peace across Europe. The Westphalian idea of sovereignty finds its roots in Jean Bodin’s writings, who refers to sovereignty as the “supreme power of the state, over citizens and subjects, unrestrained by law”³²¹, which can end the internal strife and religious wars in European countries³²². Thomas Hobbes, in *Leviathan*, when arguing about the purpose to appoint a sovereign, has stated that, “to the end he may use the strength and means of them all, as he shall deem proper for their Peace and Common Defense”³²³. Jean Jacques Rousseau developed the idea of people’s sovereignty being the exercise of the general will of the public, created by the social contract to defend the community³²⁴. All these philosophers share in common that sovereignty serves the purpose of creating and maintaining peace within and amongst states, and thus welfare

³¹⁸ Crawford, *Brownlie’s Principles of International Law*, 431.

³¹⁹ Cottier, “Principle of Common Concern” 54.

³²⁰ Richard Falk, ‘Sovereignty’ in Joel Krieger (ed), *Oxford Companion to Politics of the World* (Oxford University Press, 1993) 854.

³²¹ Jean Bodin, *Six Books of the Commonwealth* (Translated by M.J. Tooley, Basil Blackwell) <https://www.yorku.ca/commnel/courses/3020pdf/six_books.pdf> accessed 1 June 2023, 46.

³²² Cottier, “Principle of Common Concern” 55; Shefali Jha, *Western Political Thought: From Plato to Marx*, Pearson Education, 2010, p. 358; Wm. A. Dunning, “Jean Bodin on Sovereignty” (1896) 11 PSQ 82, 92.

³²³ Thomas Hobbes, *Leviathan*, (Christopher Brooke (eds.), Penguin Classics, 2017) 134.

³²⁴ Jean-Jacques Rousseau, *The Social Contract, or Principles of Political Right* (Penguin Classics 2003), Ch. VII; Cottier, “Principle of Common Concern” 56.

within society³²⁵. The concept of common concern of humankind seeks to prevent or remedy the threats to international peace, security and welfare by creating a framework of international cooperation for the continuing existence of resources in a broader sense, the purpose is in line with the original goals of sovereignty³²⁶.

Furthermore, the concept of common concern of humankind, in its essence, protects the sovereignty of States. Climate change poses a significant threat to the continued existence of Statehood and in particular to the existence of small island developing countries, as explained above. To reiterate, the criteria of statehood, which can be found under Article 1 of the Montevideo Convention on Rights and Duties of States, consists of the following four components: a permanent population, government, the capacity to enter into international relations with other states and a defined territory³²⁷. Sea-level rise related to climate change threatens the very existence of small island developing states (SIDS), because without a territory, it is accepted that statehood ceases to exist³²⁸. The recognition of climate change as a common concern of humankind and the related duties thereof, seek to combat the global climate change and its adverse effects, such as the one described here. Consequently, common concern of humankind safeguards the territory of a state and accordingly, its sovereignty.

Moreover, the emergence of the concept of common concern of humankind is not fundamentally in contradiction with the role of state consent in the formation of

³²⁵ Cottier, "Principle of Common Concern" 56.

³²⁶ *Ibid.* 58.

³²⁷ Montevideo Convention, Art. 1: "*The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other States*".

³²⁸ Shrijver, 1285.

international law rules. First of all, common concern of humankind is, as explained in the prior section, is a treaty-based notion. It found its place in the Preambles of the UNFCCC and the Paris Agreement, which are ratified by 198 and 194 States respectively. Even if it was not a treaty-based notion, it could have still emerged as a rule of customary international law, which requires two elements: state practice as the material element and *opinio juris* as the psychological element³²⁹. Therefore, if a State does not agree with the emergence of a customary international law norm, they have the sovereign right to persistently object to the legal recognition of the said rule³³⁰. Indeed, traditional international law theory holds that States which persistently objects to a certain evolving rule to enter into the corpus of international law would not be bound by that rule³³¹. This is endorsed by international jurisprudence³³². For example, ICJ held in the Asylum case that:

*“[...] cannot find that the Colombian Government has proved the existence of such a custom. But even if it could be supposed that such a custom existed between certain Latin-American States only, it could not be invoked against Peru, which, far from having its attitude adhered to it, has, on the contrary, repudiated it by refraining from ratifying the Montevideo Conventions of 1933 and 1939, which were the first to include a rule concerning qualification of the offence in matters of diplomatic asylum”*³³³

³²⁹ *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark) (Federal Republic of Germany v. Netherlands)* (Merits) (1969) ICJ Rep 3, para. 77; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)* (Merits) [1984] ICJ Rep 392 para. 186; V.D. Degan, *Sources of International Law* (Martinus Nijhoff Publishers, The Hague, 1997) 146.

³³⁰ Cottier, “Principle of Common Concern” 54- 55; James A. Green, *the Persistent Objector Rule in International Law* (Oxford University Press, 2016) 1; T. Treves, “Customary International Law”, *Max Planck Encyclopedias of International Law (MPIL)* (2012) para. 39.

³³¹ Biermann, 449.

³³² *Fisheries case; Sabah El Leil v France* [GC] App.No. 34869/05 (ECtHR, 29.06. 2011).

³³³ *Asylum Case (Colombia v. Peru)* (Merits) [1950] ICJ Rep 266, para. 277.

The doctrine of the persistent objector finds its roots in the principle of non-intervention. ICJ has put forward the following definition of the non-intervention principle in the Nicaragua Case:

“The principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference³³⁴. [...] The principle forbids all States or groups of States to intervene directly or indirectly in the internal or external affairs of other States. A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely”³³⁵.

Generally, domestic affairs are defined as all matters which are not regulated by an international treaty, customary international law or other international rules. As globalization leads to an international system of co-operation and more problems fall into the sphere of international concern, fewer matters can be regarded as remaining purely domestic³³⁶. Due to its universal significance and implications for everyone, the conclusion that the global climate change is a "common concern" indicates that it can no longer be viewed as merely falling under the domestic jurisdiction of States³³⁷.

³³⁴ *Nicaragua case* (Merits) para. 202

³³⁵ *Ibid.* para. 205.

³³⁶ Philip Kunig, “Principle of Intervention”, *Max Planck Encyclopedias of International Law* (MPIL) (2008) para. 3.

³³⁷ Biermann, 449; Bogdanova, 273; International Union for Conservation of Nature and Natural Resources, ‘Draft International Covenant on Environment and Development, Implementing Sustainability’

<https://sustainabledevelopment.un.org/content/documents/2443Covenant_5th_edition.pdf> Accessed 28 May 2023, 45.

d. Obligations *Erga Omnes*

Scholars submit that the implication of “common concern” when applied to the protection of global environment is that a state has an obligation to the whole community as a whole³³⁸. Indeed, according to the ILC, there are views according to which, the “obligations pertaining to the protection of the atmosphere from global atmospheric degradation are obligations *erga omnes*” but at the same time, the legal consequences of such a recognition are not clear cut³³⁹. This directly relates to the research question of this thesis is, which is to answer whether the protection of the global climate regime has an *erga omnes* character.

As such, in the next chapter, firstly, the general theory of *erga omnes* obligations, including their historical development, identification methods and existing *erga omnes* obligations will be analyzed in order to determine whether there is an *erga omnes* obligation to protect the global climate regime. Lastly, the legal consequences of an environmental *erga omnes* obligation will be briefly examined.

³³⁸ Horn, “Climate Change and the Future Role of the Concept of the Common Concern of Humankind” 28.

³³⁹ Bakker, “Protection of the Global Atmosphere” 186.

CHAPTER II

CONCEPT OF OBLIGATIONS *ERGA OMNES*

I. Conceptual Framework

A. Definition

On 5 February 1970, the ICJ delivered a judgment concerning a dispute between Belgium and Spain on damages that Belgium claimed to have been caused to its nationals, who were the shareholders in the Barcelona Traction, Light and Power Company Ltd³⁴⁰. In this judgment, the ICJ identified a category of international obligations owed by states to the international community as a whole or obligations *erga omnes*³⁴¹. This was the first time the Court confirmed the existence of this concept in international law, but did not provide further explanation as to the identification and legal implications of such obligations, which left these questions at the hands of legal scholars, who proposed different identification methods and thus, different international obligations as obligations *erga omnes*. These views and propositions will be discussed under Section ... to seek an appropriate method for the identification of protection of the global climate regime as an obligation *erga omnes*. However, before diving deep into these issues, a brief historical background of obligations *erga omnes* will be provided, to lay out the general framework of this concept.

³⁴⁰Tuomas Palosaari, “More Than Wishful Thinking? Existence and Identification of Environmental Obligations *Erga Omnes*” (Master’s Thesis, University of Eastern Finland, 2018) 2.

³⁴¹ *Barcelona Traction, Light and Power Company Limited (Belgium v. Spain)* (Second Phase) (Merits) [1970] ICJ Rep 3, para. 33.

B. Historical Development

1. Pre-Barcelona Traction

Prior to the Barcelona Traction case, some scholars claimed that certain treaty obligations qualified as obligations *erga omnes*, aimed to broaden the number of States bound by the said rule³⁴². The traditional use of the *erga omnes* terminology, then, refers to the modification of the scope (*ratione personae*) of a primary rule of international law³⁴³. In contrast the *erga omnes* terminology used in the Barcelona Traction judgment concerns secondary rules of international of international law.

This distinction between primary and secondary rules was introduced to international law by Robert Ago, when he was working as the ILC's Special Rapporteur on state responsibility³⁴⁴. According to Ago, secondary rules of international law are the rules, which govern the responsibility of states for internationally wrongful acts, whereas primary rules of international law refer to the rules that impose obligations on States, the violation of which may generate responsibility³⁴⁵. Secondary rules determine, in general, when an obligation has been breached and the legal consequences of that violation. They are, in their essence, "rigorously general in character"³⁴⁶, encompassing all types of international

³⁴² Christian Tams, *Enforcing Obligations Erga Omnes* (Cambridge University Press, 2005) 105.

³⁴³ *Ibid.*

³⁴⁴ Gabor Kajtar, Başak Çalı, Marko Milanovic, *Secondary Rules of Primary Importance in International Law: Attribution, Causality, Evidence, and Standards of Review in the Practice of International Courts and Tribunals* (Oxford University Press 2022) 3; James Crawford, *State Responsibility: General Part* (Cambridge University Press 2013) 64.

³⁴⁵ International Law Commission, "Second Report on State Responsibility, by Robert Ago, Special Rapporteur: The Origin of International Responsibility", 1970, II Yearbook of the International Law Commission, 306.

³⁴⁶ Crawford, *State Responsibility: General Part*, 12

obligations regardless of whether they are acts or omissions, treaty obligations or customary international law norms, and regardless of their subject matter³⁴⁷.

In its essence, this distinction was adopted to serve a specific practical purpose: to allow the Commission to focus solely on the structural rules of state responsibility, to the exclusion of the substantive rules the violation of which gives rise to responsibility³⁴⁸. Indeed, throughout the drafting process of the Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), the ILC specified that its codification efforts concerned only the secondary rules of international law³⁴⁹.

One of the traditional uses of the *erga omnes* terminology is the concept of “objective regimes” or also referred to as “status treaties”. Objective regimes refer to the arguments that try to explain general effects of treaties, meaning the effects of a certain extending beyond the State Parties³⁵⁰. In his separate opinion in the *South West Africa case*, Judge McNair explained these regimes by stating that:

*“From time to time, it happens that a group of great powers, or a large number of States, both great and small, assume a power to create by a multilateral treaty some new international regime or status, which soon acquires a degree of acceptance and durability extending beyond the limits of the actual contracting parties, and giving it an objective existence.”*³⁵¹

³⁴⁷ Daniel Bodansky and John Crook, ‘Symposium on the ILC’s State Responsibility Articles: Introduction and Overview’ (2002) 96 AJIL 773, 779-780.

³⁴⁸ Eric David, ‘Primary and Secondary Rules’ in James Crawford, Alain Pellet, Simon Olleson and Kate Parlett (eds), *The Law of State Responsibility* (Oxford University Press 2010) 28.

³⁴⁹ *Ibid.*, 27.

³⁵⁰ Tams, 81-82.

³⁵¹ *South West Africa cases (Ethiopia v. South Africa; Liberia v. South Africa)* (Preliminary Objections) Judge McNair Separate Opinion [1962] ICJ Rep 319, 153.

These treaties are those that establish international settlements, international territories or boundaries³⁵². Indeed, the definition given by Special Rapporteur Waldock, in his 1964 Report to the ILC, included only treaties defining the status of a particular territory, area of the sea or airspace³⁵³. An example of such treaties can be the Antarctic Treaty. The aim of the Antarctic Treaty was not only to freeze the claims of sovereignty over the area but also to establish a particular regime for the continent³⁵⁴.

Scholars suggest that these treaties are international agreements setting “objective rules”, whose effects spread *erga omnes*³⁵⁵. Here, *erga omnes* has been used to describe the function of the concept as having general applicability and is used in the context of primary rules of international law, rather than secondary rules. As stated, the terminology of “*erga omnes*” in this context is different from the meaning of obligations *erga omnes* in the Barcelona Traction context.

2. Barcelona Traction

Barcelona Traction Light and Power Company Limited was a company incorporated in Canada, where the majority of its share capital had been held by Belgian nationals. To create and develop an electric power production and distribution system in Spain, it formed a number of subsidiaries in Spain, registered and

³⁵² Carlos Fernández de Casadevante Romani, Objective Regime, *Max Planck Encyclopedias of International Law* (MPIL) (2010) para. 3.

³⁵³ ILC, Fourth Report on the Law of Treaties by Special Rapporteur Sir Humphrey Waldock (1965) UN Doc. A/CN.4/177.

³⁵⁴ See Section I(B)(2).

³⁵⁵ P. Subedi, ‘The Doctrine of Objective Regimes in International Law and the Competence of the United Nations to Impose Territorial or Peace Settlements on States’ (1994) 37 *GYIL* 162, 174 ;

incorporated under Spanish Law³⁵⁶. By an application submitted in 1958, Belgium instituted proceedings against Spain before the ICJ, asking the Court to adjudge that the acts of organs of the Spanish state in declaring the Barcelona Traction Light and Power Company Ltd. In bankruptcy and seizing its assets were in violation of international and sought reparation for damages sustained by the shareholders³⁵⁷.

The Spanish government responded by raising four preliminary objections to Belgium's claims. The first and second objections related to the jurisdiction of the Court, whereas the third and fourth objections concerned the admissibility of the Belgian application. In a judgment delivered in 1964, the Court dismissed the preliminary objections regarding jurisdiction and joined the third and fourth objections to the merits³⁵⁸. Spain, in its third objection, denied the *jus standi* (standing) of Belgium on the grounds that "*international law does not recognize, in respect of injury caused by a State to a foreign company, any diplomatic protection of shareholders exercised by a State other than the national State of the company*"³⁵⁹. The Court reasoned that the question of standing of a government to protect the interest of shareholders as such, is merely a reflection or consequence of whether international does or does not recognize the right to exercise diplomatic protection in respect of shareholders of a company. Hence, the Court concluded that the third and fourth objections were not just issues of admissibility of the claim but of substantive legal

³⁵⁶ Stephan Wittich, "Barcelona Traction" *Max Planck Encyclopedias of International Law* (MPIL) (2007), para. 1.

³⁵⁷ Ragazzi, 4; Herbert W. Briggs, "Barcelona Traction: the Jus Standi of Belgium (1971) 65 (2) AJIL 327, 327-328.

³⁵⁸ *Barcelona Traction, Light and Power Company Limited (Belgium v. Spain)* (First Phase) (Preliminary Objections) [1964] ICJ Rep 6.

³⁵⁹ *Ibid.*, 42.

rights pertaining to the merits³⁶⁰ and therefore, should be examined in the second phase of the proceedings.

At the conclusion of the second phase of the proceedings, in its judgment of 1970, the Court sustained the third preliminary objection and thus, rejected the Belgian claim without pronouncing on any other aspects of the case³⁶¹. The Court held that an injury to the shareholder's interest did not confer rights on the State, which shareholders' hold the nationality of, to exercise diplomatic protection for the purposes of seeking redress and that such right is conferred upon the national state of the company alone³⁶².

Here, the Court distinguished "obligations the performance of which is the subject of diplomatic protection" from "obligations of a State towards the international community as a whole, as to which all States can be held to have legal interest in their protection"³⁶³. To be exact, the Court stated that:

*"[...] In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations **erga omnes**. [...]"*³⁶⁴

³⁶⁰ *Ibid.*

³⁶¹ Maurizio Ragazzi, *The Concept of International Obligations Erga Omnes* (Clarendon Press, 1997) 4.

³⁶² Ardit Memeti and Bekim Nuhija, "The concept of *erga omnes* obligations in international law" 13 NBP 31, 33.

³⁶³ *Barcelona Traction case* (Second Phase) [1970] para. 33.

³⁶⁴ *Ibid.* (Emphasis added).

The concept of obligations *erga omnes*, thus, had their appearance on the world stage, at least in the contemporary meaning, for the first time, in this famous *obiter dictum* of the ICJ in the 1970 Barcelona Traction case³⁶⁵. Although this passage is regarded as one of the most famous and the most often quoted paragraphs of the ICJ, some scholars criticized the Court on the basis that the dictum bears hardly any relevance to the issues disputed in the Barcelona Traction case³⁶⁶. Some scholars even stated that the way the *dictum* was written “conveys the impression of having been studiously planted in the text or artificially dragged into the arena”³⁶⁷.

Moreover, it is generally assumed that this passage was purposely put forward by the Court to respond in some way to the criticism the Court received in the *South West Africa* judgment³⁶⁸. The Court, in *South West Africa* case, declined to pronounce on whether racial discrimination was prohibited under general international law and rejected the more limited contention that two African states had a legal interest in the fulfillment of South Africa’s obligations³⁶⁹. Scholars state that at the time of the *South West Africa* judgment, state practice regarding the enforcement of obligations *erga omnes* was lacking³⁷⁰. Indeed, the Court concluded in the *South West Africa* case that:

³⁶⁵ Ragazzi, 1-2.

³⁶⁶ Ragazzi, 5; Memeti and Nuhija, 34; Stephen McCaffrey, “Lex Lata or the Continuum of State Responsibility”, in Joseph H. Weiler, Antonio Cassese and Marina Spinedi (eds.) *International Crimes of State: A Critical Analysis of the ILC’s Draft Article 19 on State Responsibility*, (De Gruyter, 1989) 243.

³⁶⁷ F.A Mann, “Doctrine of Jus Cogens in International Law, in H. Emkhe et al. (eds.) *Festschrift für Ulrich Scheuner zum 70 Geburtstag* (Duncker and Humboldt, 1973) 418.

³⁶⁸ Mann, p. 418, note 70; James Crawford, “The General Assembly the International Court and Self-Determination”, in V. Lowe and M. Fitzgerald (eds.) *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (Cambridge University Press, 1996) 588-589; Richard B. Lillich, “Two Perspectives on the Barcelona Traction Case” (1971) 65(3) AJIL 522, 532.

³⁶⁹ Rosalyn Higgins, “Aspects of the Case Concerning the Barcelona Traction, Light and Power Company, Ltd.,” (1971) 11(3) VJIL 327, 329-330.

³⁷⁰ Wittich, para. 27; Hugh Thirlway, *The Law and Procedure of the International Court of Justice: Fifty Years of Jurisprudence: Volume 1* (Oxford University Press, 2013) 82.

*“[...] the equivalent of an actio popularis or right resident in any member of a community to take legal action in vindication of a public interest ... a right of this kind ... is not known to international law as it stands at present [...]”*³⁷¹

Therefore, the *dictum* of Barcelona Traction, is viewed as an attempt at judicial law-making³⁷², decisively displacing the judgment of *South West Africa*³⁷³. Indeed, Judge Lachs, who is often considered to be the reason for the inclusion of the *dictum*³⁷⁴, stated that including a passage on obligations *erga omnes* in the Barcelona Traction case, “*was not necessary in the judgment, but it was a good opportunity to nail down certain provisions of the law and indicate where states are obliged to act vis-à-vis the international community as a whole*”³⁷⁵.

Surely enough, the Court provided the following obligations *erga omnes* as examples: “*outlawing of acts of aggression, the outlawing of genocide and principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination*”³⁷⁶. This is not an exhaustive list and international jurisprudence, ILC and Institute de Droit International, as well as scholars have proposed several different obligations as having *erga omnes* character over time, which will be briefly discussed under the next section.

³⁷¹ *South West Africa cases (Ethiopia v. South Africa; Liberia v. South Africa) (Second Phase) (Judgment)* [1966] ICJ Rep 6, 47.

³⁷² Wittich, para. 27.

³⁷³ *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States) (Jurisdiction and Admissibility) (Judgment)* Judge Schwebel Dissenting Opinion [1984] ICJ Rep 14, Nicaragua (Provisional Measures) 197.

³⁷⁴ Tams, 15.

³⁷⁵ Memeti and Nuhija, 34; Mohamed Shahabudeen, *Precedent in the World Court* (Cambridge University Press, 1997) 159.

³⁷⁶ *Barcelona Traction case (Second Phase)* [1970] para. 34.

3. Post-Barcelona Traction

Subsequent to the Barcelona Traction case, the ICJ and the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) identified the “right to self-determination”, and “prohibition of torture” as obligations *erga omnes*.

To begin with, the *erga omnes* status of the right of self-determination was first recognized by the ICJ in the *Case Concerning the East Timor*³⁷⁷. In 1991, Portugal instituted proceedings against Australia, arguing that, amongst others, Australia had breached its obligation to respect the right of the people of East Timor to self-determination, by concluding a treaty with Indonesia, which created a zone of cooperation in a maritime area located in between the Indonesian Province of East Timor and Australia³⁷⁸. By a judgment delivered in 1995, the Court affirmed Portugal’s argument that the right of self-determination is an obligation *erga omnes*, by stating that:

*“In the Court’s view, Portugal’s assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an erga omnes character, is irreproachable”*³⁷⁹.

However, the Court further stated that the *erga omnes* character of a norm and the rule of consent to jurisdiction were two different things. For the Court to entertain Portugal’s claims, it would have to rule on the conduct of a third State, namely Indonesia, without that State’s consent.

³⁷⁷ *Case concerning East Timor (Portugal v. Australia)* (Jurisdiction) (Judgment) [1995] ICJ Rep 90.

³⁷⁸ Ragazzi, 137

³⁷⁹ *Case concerning East Timor*, para. 28.

Therefore, by relying upon the *Monetary Gold* rule³⁸⁰, the Court concluded that it could not exercise its jurisdiction to adjudicate on the dispute³⁸¹. Nonetheless, the *erga omnes* status of the right of self-determination remains intact to this day, especially considering that the Court reiterated this conclusion in its *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*³⁸².

Besides the ICJ, ICTY has also contributed towards the development of the notion of *erga omnes* by asserting the *erga omnes* character of the prohibition of torture in its 1997 *Prosecutor v. Anto Furundzija* judgment³⁸³. Anto Furundzija was the commander of a special unit of the Croatian Defense Council, which was in charge of interrogating Bosnian Muslims. During these interrogations, detained Bosnian Muslims alleged that they were subjected to sexual assault, as well as physical and mental suffering, amounting to torture. Consequently, Furundzija was charged with one count of grave breach of the Geneva Conventions for torture or inhumane treatment and with two counts of violations of the laws of customs of war for torture and outrages upon personal dignity including rape³⁸⁴. In the judgment, the Trial Chamber asserted that:

³⁸⁰ The Monetary Gold principle is one of the preliminary objections based on admissibility, which allows the ICJ not to exercise its jurisdiction further with the proceedings to the merits of a case when the legal interests of third party is concerned. See. Zachary Mollengarden and Noam Zamir, “The Monetary Gold Principle: Back to Basics” (2020) 115 AJIL 41; *Case Concerning the Monetary Gold Removed From Rome in 1943 (Italy and France v. United Kingdom and United States)* (Judgment) [1954] ICJ Rep 19.

³⁸¹ Ragazzi, 138; *Case concerning East Timor*, para. 34-35.

³⁸² *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136, para 156: “[...] the Court has already observed that in the East Timor case, it described as ‘irreproachable’ the assertion that the ‘the right of peoples self-determination, as it evolved from the Charter and from United Nations practice, has an erga omnes character’”.

³⁸³ *Prosecutor v. Anto Furundzija* (Trial Chamber) (Judgment) [1999] IT-95-17/1-T.

³⁸⁴ *Prosecutor v. Anto Furundzija* (Office of the Prosecution) (Amended Indictment) [1998] IT-95-17/1-PT, 3-4.

*“[...] the prohibition of torture imposes upon States obligations erga omnes, that is, obligations owed towards all the other members of the international community, each of which then has a correlative right. In addition, the violation of such an obligation simultaneously constitutes a breach of the correlative right of all members of the international community and gives rise to a claim for compliance accruing to each and every member, which then has the right to insist on fulfilment of the obligation or in any case to call for the breach to be discontinued”*³⁸⁵

This pronouncement was later reaffirmed by the ICJ in its *Prosecute or Extradite* case, albeit in the context of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)³⁸⁶, thus declaring the prohibition of torture *erga omnes partes*³⁸⁷. Nonetheless, the prohibition of torture, along with the right of self-determination are now widely regarded as an obligations *erga omnes*³⁸⁸.

C. Differences from other Similar Concepts

1. Differences between Obligations *Erga Omnes* and Obligations *Erga Omnes Partes*

As explained above, the ICJ explained in *Barcelona Traction* case that there are two categories of obligations under public international law: “obligations of a State towards the international community as a whole”, and “those arising vis-à-vis another States”³⁸⁹. The Court later recognized another set of rules in the *Questions relating to*

³⁸⁵ *Prosecutor v. Anto Furundzija* (Judgment), para. 151.

³⁸⁶ *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT) (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85.

³⁸⁷ See below Section Chapter II (I)(C)(1) for the difference of *erga omnes* and *erga omnes partes*.

³⁸⁸ Memeti, 31; Thomas Weatherall, *Jus Cogens: International Law and Social Contract* (Cambridge University Press, 2015) 352; Tams, 118.

³⁸⁹ *Barcelona Traction* (Second Phase), para. 33.

the Obligation to Prosecute or Extradite (Prosecute or Extradite) case³⁹⁰, namely obligations *erga omnes partes*, which refers to the obligations that a State owes to a ‘group of other States’ with a common interest³⁹¹.

Erga omnes partes, as a term, is usually used to describe treaty-based obligations that are owed by any State party to all the other State parties to the relevant convention³⁹². In the context of *Prosecute or Extradite*, the Court held that the State parties to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), had a common interest in ensuring the compliance with certain obligations under the convention, in whose performance all Contracting Parties are said have a legal interest³⁹³. Similarly, Article 48 of ARSIWA, recognizes both obligations, which are either “owed to a group of States” or “owed to the international community as a whole”³⁹⁴.

Without getting into much detail about the terminological inconsistencies within the Court’s jurisprudence and the very detailed theoretical debates on this topic³⁹⁵, it should suffice to say that the difference between these two concepts lies within their sources. While obligations *erga omnes partes* have their origins in treaty-law, obligations *erga omnes* have it in customary international law. Hence, *erga omnes* as a term, for the purposes of this thesis, will refer to customary obligations owed to

³⁹⁰ *Case Concerning Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* (Judgment) [2012] ICJ GL No 144.

³⁹¹ Nawi Ukabiala, Duncan Pickard and Alyssa Yamamoto, “Erga Omnes Partes Before the International Court of Justice: From Standing to Judgment on Merits” (2021) 27(2) JILCS 233, 234.

³⁹² *Obligation to Prosecute or Extradite* (Judgment) para. 68.

³⁹³ Palosaari, 42.

³⁹⁴ ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts* (ARSIWA) (2001) UN Doc. A/56/10, Art. 48; Pok Yin S. Chow, “On Obligations Erga Omnes Partes” (2021) 52(2) GJIL 469, 487.

³⁹⁵ See. ILC, Third Report on State Responsibility by Special Rapporteur Mr. James Crawford (2000) UN Doc. A/cn.4/507, para. 92; Tams, 125.

the international community as a whole, where “all States can be held to have a legal interest in their protection.

2. Differences between Obligations *Erga Omnes* and *Jus Cogens*

The peremptory norms of international law, or also referred to as *jus cogens*, formally entered into international with the adoption of Articles 53 and 64³⁹⁶ of the VCLT in 1969, which establish the illegality of treaties that are in conflict with *jus cogens*³⁹⁷ and provide the definition of *jus cogens*. According to Article 53 of VCLT, *jus cogens* are “accepted and recognized by the international community of States as a whole, as norms from which no derogation is permitted”³⁹⁸. Although this definition does not identify any specific rules having peremptory status, it implies that a particular rule is first recognized customary international law, whereafter the international community agrees that no derogation is permitted from that rule³⁹⁹. In essence, Article 53 of VCLT leaves it to the international community to identify the norms that can be categorized as *jus cogens* and according to the ILC, the most frequently cited candidates for *jus cogens* include the prohibition of acts of aggression, the prohibition of genocide, the prohibition of torture, prohibition of slavery and slave

³⁹⁶ VCLT, Art. 64: “If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminate”

³⁹⁷ Thomas Weatherall, *Jus Cogens: International Law and Social Contract* (Cambridge University Press, 2015) 1.

³⁹⁸ VCLT, Art. 53: “A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”.

³⁹⁹ Erika de Wet, “Jus Cogens and Obligations *Erga Omnes*”, in Dinah Shelton (ed.), *The Oxford Handbook of International Human Rights Law* (Oxford University Press, 2013) 542; Jure Vidmar, “Norm Conflicts and Hierarchy in International Law”, in Erika de Wet, Jure Vidmar (eds.) *Hierarchy in International Law: The Place of Human Rights* (Oxford University Press, 2012) 24.

trade, the prohibition of racial discrimination and apartheid⁴⁰⁰. These norms enjoy a higher rank in the international hierarchy than treaty law and customary international law, due to their non-derogable status and thus, importance⁴⁰¹.

Jus cogens are different obligations *erga omnes*. Whereas *jus cogens* are distinguished by their normative power, meaning their ability to override a conflicting norm in accordance with Article 53 VCLT, the latter refer to the scope of application of the relevant law and the procedural consequences that follow⁴⁰². The exact relation between these two notions is yet to settled. However, the prevailing view amongst scholars suggest that all *jus cogens* norms are necessarily obligations *erga omnes*, but the opposite is not true⁴⁰³. This view is also supported by state practice. For instance, the Democratic Republic of the Congo, in a statement to the General Assembly proposed a treaty on the prohibition of use of force, and stated that the proposed treaty should have an *erga omnes* effect because the prohibition of use of force was *jus cogens*⁴⁰⁴. Moreover, the ICTY, described the relation between obligations *erga omnes* and *jus cogens*, by stating that:

*“While the erga omnes nature [of obligations] appertains to the area of international enforcement, the other major feature of the principle proscribing torture relates to the hierarch of rules in international normative order.”*⁴⁰⁵

⁴⁰⁰ ILC, “Report of the Study Group of the International Law Commission on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law” (2006) UN Doc. A/CN.4/L.682, para. 374.

⁴⁰¹ *Prosecutor v. Furundzija*, para. 153.

⁴⁰² ILC, Fragmentation Report, para. 380.

⁴⁰³ ILC, Draft Conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*) with commentaries (2022) UN Doc. A/77/10, 67.

⁴⁰⁴ UNGA, Summary Record of the 32nd Meeting (1980) UN. Doc. A/C.6/35/SR.32, para. 32.

⁴⁰⁵ *Prosecutor v. Furundzija*, para. 153.

On the other hand, the ICJ has not explicitly examined the relation between *jus cogens* and obligations *erga omnes* and even did not pronounce that a link exists between these concepts⁴⁰⁶. Nonetheless, from the argument that the same prohibitions named by the ICJ in the Barcelona Traction case, are also widely regarded as *jus cogens*; it follows that when an obligation is defined as one from which no derogation is permitted, all states would have a legal interest in its protection⁴⁰⁷.

II. Identification

In the previous sections, it has been established that obligations *erga omnes* emerge from customary international law and the historical development of the examples of these obligations was briefly examined. Although there are some examples of what the international community considers to be an obligation *erga omnes*, there is no consensus on how to identify them.

The ICJ has been rather cautious on its remarks on obligations *erga omnes* and State practice does not provide an exact list of criteria for an obligation to actually enter the category of *erga omnes*⁴⁰⁸. Some scholars argue that it is not possible to determine any criterion or a common ground on which to base the *erga omnes* character of an obligation from the examples that ICJ has provided, because all of the examples belong to vastly different areas of international law⁴⁰⁹. Nonetheless, scholars

⁴⁰⁶ ILC, Report of the International Law Commission on its Seventy-First Session (2019) A/74/10, 191.

⁴⁰⁷ De Wet, 555.

⁴⁰⁸ Tams, 117-118.

⁴⁰⁹ André de Hoogh, *Obligations Erga Omnes and International Crimes: A Theoretical Inquiry into the Implementation and Enforcement of the International Responsibility of States* (Martinus Nijhoff Publishers, 1996) 55.

have proposed three different approaches to identify obligations *erga omnes*, namely the common elements approach, the structural approach and the material approach. Each one of them will be examined and an alternative approach, the common interests approach, will be proposed in order to determine whether the obligation to protect the global climate regime can be regarded as an obligation *erga omnes*.

A. Common Elements Approach

Ragazzi examined the four examples of obligations *erga omnes*, namely outlawing of acts of aggression, outlawing of genocide, protection from slavery and protection from racial discrimination, provided by the ICJ in the *Barcelona Traction* case and identified five elements that they have in common⁴¹⁰:

1. All four examples relate to narrowly defined obligations. Indeed, outlawing of aggression is an obligation *erga omnes*, rather than the illegal use of force, which is a broader obligation by its nature⁴¹¹. This is also true for rest: outlawing of genocide is narrower than crimes against humanity, protection from slavery is an obligation *erga omnes* rather than all unlawful restrictions on freedom and protection from racial discrimination rather than, more broadly, all kinds of discrimination⁴¹²;
2. All four examples are those of “obligations” or “duties”⁴¹³;

⁴¹⁰ Ragazzi, 132.

⁴¹¹ Ragazzi, 132-133.

⁴¹² *Ibid.*

⁴¹³ HLA Hart, *The Concept of Law* (2nd edn, Clarendon Press 1994) 284; Ragazzi, 140: obligations and duties are roughly synonyms in common law and in international law. However, it is important note here that the International Court of Justice in *South West Africa Advisory Opinion*, used the term “obligation” when referring to a legal concept, and the term “duty” when referring to a political or moral concept; *Case concerning East Timor (Portugal v. Australia)* (Jurisdiction) (Judgment) Judge

3. All four examples refer to negative obligations of the State, rather than positive obligations. Indeed, while two out of the four examples, namely the outlawing of acts of aggression and outlawing of genocide, are expressed in terms of “outlawing”, and the other two in terms of “protection from” certain acts, all four of them require States to refrain from that certain action⁴¹⁴, whether it be acts of aggression, genocide, slavery or discrimination⁴¹⁵;
4. All four examples are also *jus cogens* rules, and codified by international treaties, to which a high number of States have become parties⁴¹⁶;
5. All four examples are instrumental to political objectives of that day, such as the preservation of world peace and promotion of human rights, most importantly of life and human dignity⁴¹⁷.

This list of elements may provide a framework for the analysis of candidates of obligations *erga omnes*, offered by scholars or ICJ, because these five common elements are merely descriptive and not prescriptive. In other words, according to Ragazzi, an international obligation does not have to satisfy these elements to be categorized as an obligation *erga omnes*⁴¹⁸. Therefore, this approach should be taken into account with the approaches, whether it be the structural approach, the material approach or the community interests approach.

Weeramantry Dissenting Opinion [1995] ICJ Rep 90, 215: In his dissenting opinion in the *East Timor* case, Judge Weeramantry used these expressions indifferently.

⁴¹⁴ Dinah Shelton and Ariel Ground, “Positive and Negative Obligations”, in Dinah Shelton (ed.), *The Oxford Handbook of International Human Rights Law* (Oxford University Press, 2013) 562.

⁴¹⁵ Ragazzi, 133.

⁴¹⁶ Ragazzi, 133.

⁴¹⁷ Ragazzi, 133-134.

⁴¹⁸ Ragazzi, 134.

B. Structural Approach

Scholars have identified that, in the Barcelona Traction *dictum*, The Court distinguished between obligations which are owed to the international community as a whole, and obligations which are owed to another State⁴¹⁹. In other words, while there are some reciprocal obligations in international law; some obligations are non-reciprocal or non-bilateralizable. Structural approach suggests that the latter, the obligations that are non-reciprocal, are obligations *erga omnes*⁴²⁰. However, scholars argue that the structural approach is insufficient for identifying obligations *erga omnes* for two reasons.

First, in its most strict form, the structural approach does not take into account the Court's invocation of the importance of the obligation, when it has discussed *erga omnes*⁴²¹. The supporters of this approach argue that "*the determination as to which norms give rise to obligations erga omnes is not an assessment as to which norms are most 'important'*"⁴²². Gaetano Arangio-Ruiz, when he was the Special Rapporteur, stated that the concept of obligations *erga omnes* is not characterized by the importance of the interest protected by the norm, contrary to *jus cogens*, but rather by the "legal indivisibility" of the obligations⁴²³. Yet, this approach does not correlate with the Court's *Barcelona Traction dictum*⁴²⁴, in which the Court stipulated that all States can

⁴¹⁹ *Barcelona Traction* (Second Phase) [1970], para. 33.

⁴²⁰ Tams, 129.

⁴²¹ Tams, 131; C. Annacker, "The Legal Regime of Erga Omnes Obligations in International Law" (1994) 46 AJPIIL 131, 136; Vidmar, 23.

⁴²² Ian D. Seiderman, *Hierarchy in International Law: The Human Rights Dimension* (Intersentia Publishing, 2001) 129; Tams, 131.

⁴²³ ILC, Fourth Report on State Responsibility by the Special Rapporteur Mr. Gaetano Arangio-Ruiz (1992) UN.Doc. A/CN.4/444, para. 92.

⁴²⁴ Tams, 131, footnote 66.

be held to have a legal interest in the protection of obligations *erga omnes* “in the view of the importance of the rights involved”⁴²⁵.

Considering this problem of the strict structural approach, scholars proposed a more moderate version of the structural approach, where it is accepted that obligations *erga omnes* are both non-bilaterizable and important⁴²⁶. At first glance, this proposition seems to be in line with the Court’s *dictum* but it still has its own inherent problems, which is the second reason why scholars find the structural approach insufficient: not all examples of obligations *erga omnes* are purely non-reciprocal in nature. Indeed, the outlawing of acts of aggression, which was expressly referred to in the Barcelona Traction *dictum*, is a reciprocal, in other words a bilateral obligation⁴²⁷. However, some scholars point out that the breaches of outlawing of acts of aggression threatens the security of every other state, collectively and individually because it hinders the international peace and security⁴²⁸.

Furthermore, other obligations listed in the *dictum* can give rise to bilateral responsibility between two States. To explain it with an example, Tams offers the following example: if State A engages in genocidal conduct vis-à-vis the population of State B, responsibility arises primarily between the perpetrator State A and the victim State B. But if the perpetrator State A is also responsible towards other States (besides B), which it is due outlawing of genocide being an obligation *erga omnes*, then the non-reciprocal nature of the obligation should be based on a different approach⁴²⁹.

⁴²⁵ *Barcelona Traction* (Second Phase) [1970], para. 33.

⁴²⁶ Tams, 133.

⁴²⁷ Tams, 134; Palosaari, 53.

⁴²⁸ Chow, 482.

⁴²⁹ Tams, 135.

Although the moderate version of the structural approach may serve as a justification as to why protection of the global climate regime may be an obligation *erga omnes*, because of its non-bilateralizable nature and importance, it does not explain why other obligations are considered as obligations *erga omnes*.

C. Material Approach

As explained above, strict structural approach disregards the Court's reference to the importance of the obligation and even though the moderate version of the structural approach takes this into account, both fall short when it comes to distinguishing obligations *erga omnes* from other customary international law obligations. In contrast, the material approach focuses on this part of the dictum. According to the proponents of the material approach, obligations acquire *erga omnes* status because of their importance⁴³⁰. In support of this approach, in its report on the work of the twenty-eight session, when explaining the Barcelona Traction *dictum* ILC stipulated that:

*“ [...] there is a number, albeit a small one, of international obligations which, by reason of the importance of their subject-matter for the international community as a whole, are – unlike the others – obligations in whose fulfilment all States have a legal interest ”*⁴³¹.

Although this approach has more supporters and is more flexible compared to the structural approach, scholars argue that there should be a threshold of how important an obligation has to be, in order to be considered as an obligation *erga omnes*. However, while pronouncing that only “important” obligations can acquire *erga omnes*

⁴³⁰ Tams, 136.

⁴³¹ ILC, “Report of the Commission to the General Assembly on the work of its twenty-eight session” (1976) UN Doc. A/CN.4/SER.A/1976/Add.I, 99.

status, the ICJ did not provide any general guidance on how important these obligations have to be⁴³².

As regards to obligations protecting human rights having *erga omnes* character, the Court has used the term “obligations protecting ‘basic’ human rights”⁴³³ to point out to some kind of a threshold. This distinction between “basic human rights” or “fundamental human rights” and “other human rights”, have been heavily criticized by scholars. The differences in the social, cultural, political and economic values of States, resulted in States agreeing on a set of rights, rather than on the priority to govern them⁴³⁴. While it is generally accepted that some human rights (i.e. right to life, prohibition of torture) are considered to be prerequisites for the enjoyment of all other human rights⁴³⁵, human rights are indivisible, meaning that there is no exact hierarchy amongst them⁴³⁶.

Besides, the subsequent developments in the general acceptance of the *erga omnes* character of human rights has not been limited to the “basic rights of the human person”, as the Court had initially suggested⁴³⁷. For instance, in the Draft Restatement of the Foreign Relations Law of the United States, it is elaborated that “the customary law of human rights ... protects individuals subject to each state’s jurisdiction, and the international obligations runs equally to all other states, with no one state being a

⁴³² Tams, 138.

⁴³³ Barcelona Traction (Second Phase) [1970], para. 34. (Emphasis added).

⁴³⁴ Theodore Meron, “On a Hierarchy of International Human Rights” (1986) 80 AJIL 1, 4.

⁴³⁵ Christine Bakker, “Climate Change and Right to Life: Limits and potentialities of the human rights protection system”, Ottavio Quirico, Muluoud Boumghar (eds.) *Climate Change and Human Rights* (1st edn., Routledge, 2015) 71; See Chapter I (II)(A)(1).

⁴³⁶ Jan Essink, Alberto Quintavalla and Jeroen Temperman, “The Indivisibility of Human rights: An Empirical Analysis” (2023) 23(3) HRLR 1, 2.

⁴³⁷ Meron, 12.

victim of the violation more than the any other”⁴³⁸. Furthermore, in its Resolution titled “The Protection of Human Rights and the Principle of Non-intervention in Internal Affairs of States”, *Institute de Droit International* stated that the international obligation to protect human rights, as expressed by the ICJ is *erga omnes* and “every State has a legal interest in the protection of human rights”⁴³⁹, thus, recognizing the general obligation to protect human rights as *erga omnes*⁴⁴⁰. Therefore, international practice seems to have moved beyond the distinction the Court set out between “basic human rights” and “other human rights”, regarding the discussions on the threshold of importance of an obligation to acquire *erga omnes* character⁴⁴¹. Besides, this discussion only applies to obligations protecting human rights, and does not really answer whether the material approach can be adopted to determine whether the obligation to protect the global climate regime has an *erga omnes* character.

Additionally, some scholars suggest to adopt a comparative method to determine the threshold, which obligations must satisfy to be considered as *erga omnes*, by assessing the relation between obligations *erga omnes* and *jus cogens*⁴⁴². The relationship between obligation *erga omnes* and *jus cogens* was briefly addressed under Section... To reiterate, it is generally viewed that obligations deriving from *jus cogens* are also obligations *erga omnes*. It follows that when an obligation is

⁴³⁸ Restatement of the Foreign Relations Law of the United States (Revised) (1985) 1 Tent. Draft No. 6, Section 703(2).

⁴³⁹ Institut de Droit International, “Resolution The Protection of Human Rights and the Principle of Non-intervention in Internal Affairs of States” (1989) Art.1: “Human rights are a direct expression of the dignity of the human person [...] This international obligation, as expressed by the International Court of Justice, is *erga omnes*; it is incumbent upon every State in relation to the international community as a whole and every State has a legal interest in the protection of human rights. The obligation further implies a duty of solidarity among all States to ensure as rapidly as possible the effective protection of human rights throughout the world”.

⁴⁴⁰ Ragazzi, 141-142.

⁴⁴¹ Meron, 13.

⁴⁴² Tams, 140.

recognized as one from which no derogation is permitted because of its importance and fundamental nature, all states have a legal interest in its protection⁴⁴³. Considering this relation between obligation *erga omnes* and *jus cogens*, a core of obligation *erga omnes* can be identified with some precision. However, when moving beyond the realm of *jus cogens*, the identification of obligations *erga omnes* becomes instantly more difficult and therefore is not a conclusive test⁴⁴⁴. Furthermore, this discussion, similar to the conclusion reached on human rights discussion, does not provide a guidance or a method to identify whether the obligation to protect the global climate regime can be considered as an obligation *erga omnes*. There are scholars who argue that some international environmental law norms can be considered as *jus cogens*, but there is not a strong support for this argument in neither State practice nor international jurisprudence⁴⁴⁵.

Hence, neither of these methods is sufficient or defined enough to determine whether one can identify the obligation to protect the global climate regime as an obligation *erga omnes*. There might be a fourth approach that can be adopted to generally determine whether an obligation possesses *erga omnes* character and it requires to take a recourse to the “community interest doctrine” in international law, which will be examined under the next section.

⁴⁴³ de Wet, 555

⁴⁴⁴ Tams, 157.

⁴⁴⁵ See. Alain Pellet, “Responsibility of States in Cases of Human Rights or Humanitarian Law Violations, in James Crawford, Abdul G. Koroma, Said Mahmoudi, Alain Pellet (eds.) *The International Legal Order: Current Needs and Possible Responses: Essays in Honour of Djamciid Momtaz*, (Brill Nijhoff, 2017) 234.

D. Common Interests Approach

Since the beginning of the new millennium, the idea of an emerging international community” questioned the traditional international law model, which relies heavily upon the consent of states, and emphasized the rise of rules and principles reflecting community values rather than states’ self-interests⁴⁴⁶. Perhaps this idea was best formulated by Judge Weeramantry in his Separate Opinion in ICJ’s *Gabcikovo-Nagymaros* judgment, where he stated that:

*“[...] international environmental law will need to proceed beyond weighing the rights and obligations of parties within a closed compartment of individual State self-interest, unrelated to the global concerns of humanity as a whole.”*⁴⁴⁷

In simple terms, the communitarian approach prioritizes the “will of the international community”, above the will of individual states⁴⁴⁸. Although there is no exact definition of “community interest” in international law, it has been variously described as referring to “matters of fundamental values of concern to all States”⁴⁴⁹; “matters protecting important or fundamental interests of humankind”⁴⁵⁰ or “interests

⁴⁴⁶ Nico Kirsch, “The Decay of Consent: International Law in an Age of Global Public Goods” (2014) 108(1) AJIL 1, 1.

⁴⁴⁷ *Case Concerning the Gabcikovo-Nagymaros Project* (Merits) Judge Weeramantry Separate Opinion [1997] ICJ Rep 88, 31.

⁴⁴⁸ Green, 250.

⁴⁴⁹ Bruno Simma, “International Crimes: Injury and Countermeasures. Comments on Part 2 of the ILC Work on State Responsibility” in JHH Weiler, A Cassese and M Spinedi (eds), *International Crimes of State: A Critical Analysis of the ILC's Draft Article 19 on State Responsibility* (Walter de Gruyter, 1989) 285.

⁴⁵⁰ Samantha Besson, “Community Interest in International Law: Whose Interests Are They and How Should We Best Identify Them?” in Eyal Benvenisti and Georg Nolte (eds.) *Community Interests Across International Law* (Oxford University Press, 2018) 38.

of a collective nature, needing to be protected by collective action”⁴⁵¹. In other words, community interests refer to the interests that international community has in the protection of a common good or common value and extend beyond the concerns of individual States⁴⁵². The rules of international law that protect such shared interests and values are referred to as “community interest norms” or “communitarian norms”⁴⁵³. Such community interest norms seek to protect ‘common goods’ (i.e. international peace, global environment) or ‘common values’ (i.e. human rights) of a community⁴⁵⁴. These rules give rise general duties, that is, duties owed *by and to* everyone in that community⁴⁵⁵. Hence, they provide a basis for obligations *erga omnes*⁴⁵⁶.

Such communitarian norms and thus community interests may be found in different areas of international law, including international human rights law and international environmental law. Since the subject of this thesis is international environmental law, the community interests and communitarian norms in international human rights law will be briefly explained to provide an insight about how these norms and interests are manifested in international law, before moving on with international environmental law.

⁴⁵¹ Giorgio Gaja, “Obligations Erga Omnes, International Crimes and Jus Cogens: A Tentative Analysis of Three Related Concepts” in Joseph H. Weiler, Antonio Cassese and Marina Spinedi (eds.) *International Crimes of State: A Critical Analysis of the ILC’s Draft Article 19 on State Responsibility* (De Gruyter, 1989) 151; Besson, 39.

⁴⁵² Millicent McCreath, “Community Interests and the Protection of the Marine Environment within National Jurisdiction” (2021) 70(3) ICLQ 569, 574.

⁴⁵³ Christian Tams, “Individual States as Guardians of Community Interests”, in Ulrich Fastenrath et al. (eds.) *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford University Press, 2011) 380-381.

⁴⁵⁴ Tams, “Individual States as Guardians of Community Interests”, 381; Anne-Laure Vauris-Chaumette, “International Community as a Whole”, in James Crawford, Alain Pellet, Simon Olleson, Kate Parlett (eds.) *The Law of International Responsibility* (Oxford University Press, 2010) 1024.

⁴⁵⁵ Besson, 40

⁴⁵⁶ Cottier, “Principle of Common Concern”, 33.

The argument that the protection of international human rights being a common value of the international community is based on the reference of human rights in the UN Charter⁴⁵⁷ and the near universal acceptance of certain human rights treaties⁴⁵⁸, namely the ICCPR⁴⁵⁹ the ICESCR⁴⁶⁰, CRC⁴⁶¹, International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) . Thus, in international human rights law, the interests of the individuals are detached from the interests of the States and became the interest of the international community, for the purposes of protecting the individual against their State of nationality⁴⁶². ICJ, in the *Genocide Advisory Opinion* has pronounced that, with respect to the Genocide Convention, States “do not have any interests of their own; they merely have, one and all, a common interest”⁴⁶³, namely the accomplishment of the purposes of the Convention, which is to liberate mankind from the great losses on humanity, inflicted by acts of genocide⁴⁶⁴. These arguments, read in conjunction with the above-mentioned discussions, it can hardly be disputed that the protection of human rights is community interest and the corresponding obligations possess *erga omnes* status⁴⁶⁵.

⁴⁵⁷ United Nations Charter (adopted 26 June 1945, entered into force 24 October 1945), Preamble: “*We the peoples of the United Nations determined [...] to reaffirm faith in fundamental human rights, in the dignity and worth of the human person [...]. Article 1 of the UN Charter: The Purposes of the United Nations are: [...] 3. To achieve international cooperation [...] in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion [...]*”

⁴⁵⁸ Rüdiger Wolfrum, “Identifying Community Interests in International Law: Common Spaces and Beyond” in Eyal Benvenisti and Georg Nolte (eds.) *Community Interests Across International Law* (Oxford University Press, 2018) 29.

⁴⁵⁹ ICCPR has, as of June 2022, 113 State Parties and six more signatories without ratification.

⁴⁶⁰ ICESCR has, as of July 2020, 111 State Parties and four more signatories without ratification.

⁴⁶¹ CRC has, as of 18 July 2023, 116 State Parties.

⁴⁶² Isabel Feichtner, “Community Interest”, *Max Planck Encyclopedias of International Law* (MPIL) (2007) para. 27.

⁴⁶³ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) (1951) 23.

⁴⁶⁴ Genocide Convention, Preamble: “*The Contracting Parties, [...] recognizing that at all periods of history genocide has inflicted great losses on humanity, and being convinced that, in order to liberate mankind from such an odious scourge, international cooperation is required*”.

⁴⁶⁵ Wolfrum, 29.

As such, the doctrine of community interests emerged as the foundation to justify taking into account the interest the international community as a whole, beyond reciprocal relations among states⁴⁶⁶ and are seen as the driving force in the development of rules of international environmental law that are applicable *erga omnes*⁴⁶⁷. In a sense, the community interest approach might be seen as the hybrid of the structural and material approach because it takes into account both the non-reciprocal nature of certain obligations and attach a degree of importance to them, based on their commonality. The adoption of this approach, at least for the purposes of this thesis, may pave the way to determine whether the obligation to protect the global climate regime can be considered as an obligation *erga omnes*.

III. Obligation to Protect the Global Climate Regime as an Obligation *Erga Omnes*

Before moving on with exploring the community interests in international environmental law, it is important to note that not every environmental problem has such an international dimension that it can be counted as an interest of the international community; only global environmental problems can be categorized as such at this point in time⁴⁶⁸. Therefore, the discussion here is limited to the protection of areas beyond national jurisdiction. To reiterate, the no-harm rule in international rule has evolved over time since its origins in the 1941 Trail Smelter Arbitration. With the

⁴⁶⁶ Feichtner, para. 13.

⁴⁶⁷ Brunnée, “Echoes from an Empty Shell” 807.

⁴⁶⁸ Although there are some scholars who argue that issues such as desertification is a community interest, the universality of this environmental problem has yet to be determined, *See*. Wolfrum, 31.

adoption of the 1972 Stockholm Declaration on the Human Environment, this rule had its scope of application extend beyond the territory of other States, to include areas beyond national jurisdictions⁴⁶⁹, namely common areas, common heritage of mankind and common concern of humankind.

Furthermore, because the focus of this thesis is on the common concern of humankind concept, and specifically on the global climate change, the details of the concepts of the common areas and common heritage of mankind will not be re-examined⁴⁷⁰. However, some points should be made, to pave the way for examining whether the obligation to protect the global climate regime is indeed an obligation *erga omnes*. To reiterate, it is prohibited for any State to single-handedly appropriate or exploit the areas and resources covered by these concepts, like the Antarctica or the deep seabed. This is based on the idea that the management and conservation of these areas and resources are in the interest of the international community as a whole, rather than one state or a group of states⁴⁷¹. the concepts of common areas and common heritage of mankind are seen as prime examples of community interests in the area of international environmental law.

The idea the protection of the global environment, whether it be matters relating to common areas, common heritage of mankind or common concern of humankind, gives rise to obligations *erga omnes* has been suggested by several prominent scholars⁴⁷². This is supported by the ILC's Special Rapporteur's Report on

⁴⁶⁹ McCreath, 575; See Chapter I (I)(B).

⁴⁷⁰ See. Section Chapter I (I)(B)(1) and Chapter I (I)(B)(2).

⁴⁷¹ Wolfrum, 35.

⁴⁷² Birnie and Boyle, 130; Ragazzi, 159; Leslie-Anne Duvic-Paoli, *The Prevention Principle in International Environmental Law* (Cambridge University Press, 2018) 321-323; Brunnée, *Procedure and Substance*, 135.

the Protection of the Atmosphere, where he stated that the concept of common concern of humankind certainly leads to the creation of substantive legal obligation part of all States to protect the global atmosphere as *erga omnes*⁴⁷³. As discussed above⁴⁷⁴, there is limited State practice on the proposition that the global atmosphere itself is a common concern of humankind, but the components of it, namely the depletion of the ozone layer and global climate change were declared to be as such.

Furthermore, this conclusion does find support in the Advisory Opinion of the International Tribunal for the Law of the Sea's (ITLOS) Seabed Chamber on *Responsibilities* Advisory Opinion on the Responsibilities and Obligations of States with respect to activities in the Area. Noting that the International Seabed Authority was tasked with acting on behalf of humankind as a whole, the Chamber observed that:

*“each State Party may also be entitled to claim compensation in light of the erga omnes character of the obligation relating to preservation of the environment of the high seas and in the Area”*⁴⁷⁵.

Besides ITLOS in this Advisory Opinion, there is no other international case law that can be examined to support this conclusion. Unfortunately, ICJ has not pronounced itself on the *erga omnes* dimensions of the no-harm rule. The only case that the Court might have had an opportunity to engage in this issue was the *Nuclear Tests* cases⁴⁷⁶, which did not reach the merits phase⁴⁷⁷. In 1973, Australia and New

⁴⁷³ ILC, “First Report on the Protection of the Atmosphere by Special Rapporteur Shinya Murase” (2014) UN Doc. A/CN.4/667, para. 89.

⁴⁷⁴ See Section Chapter I (II)(B)(2)(c).

⁴⁷⁵ *Responsibilities and Obligations of States with respect to activities in the Area (Advisory Opinion)* (ITLOS) [2011] ITLOS Rep 10, para. 180.

⁴⁷⁶ *Nuclear Tests cases (Australia v France) (New Zealand v France)* (Judgment) [1974] ICJ Rep 253.

⁴⁷⁷ Jutta Brunnée, “International Environmental Law and Community Interests: Procedural Aspects” in Eyal Benvenisti and Georg Nolte (eds.) *Community Interests Across International Law* (Oxford University Press, 2018) 162.

Zealand instituted separate proceedings against France, before the ICJ, concerning tests of nuclear weapons, which France carried out in the atmosphere in the South Pacific region. Both States claimed that France has violated the rights of all members of the international community to be free from the nuclear contamination of the high seas and the atmosphere⁴⁷⁸. Specifically, Australia referred to the supports the notion that protection of the global atmosphere is an obligation *erga omnes*, by stating that:

*“[...] the feature common to all the specific expressions and confirmations of the prohibition of atmospheric nuclear testing, is that they are couched in terms of an erga omnes obligation and not in terms of an obligation owed to particular States. [...] The duty is thus owed to the international community; it is a duty of every State towards every State”*⁴⁷⁹.

However, ICJ did not pronounce on the merits and in two separate judgments, dated 1974, concluded that the real object of the applicant States was not declaration that the nuclear tests were illegal under international law, but rather the termination of the nuclear tests in the region⁴⁸⁰.

In 2011, a small island developing state Palau, located in the western Pacific, attempted to secure an advisory opinion regarding the status of the no-harm rule in relation to the global climate change, pursuant to Article 96 of the UN Charter. Article 96 foresees that a path to an advisory opinion, which requires the UN General Assembly request one with the support of a majority of its members. However, at that

⁴⁷⁸ *Ibid.*

⁴⁷⁹ *Nuclear Tests cases (Australia v France) (New Zealand v France)* (Admissibility) (Judgment) Australia's Pleadings [1974] ICJ Rep 457, 333

⁴⁸⁰ Ragazzi, 173; *Nuclear Tests cases* Australia's Pleading, para. 34-40; *Nuclear Tests cases (Australia v France) (New Zealand v France)* (Admissibility) (Judgment) Australia's Pleadings [1974] ICJ Rep 457, para. 35-43.

time, this initiative was shut down due to strong political opposition, especially from the United States of America and the People's Republic of China. In this sense Australia's pleading in the Nuclear Tests cases and Palau's failed attempt at requesting an advisory opinion from the Court may have indicated the lack of evidence of state practice this topic, but the stigma around climate change has changed since then, mainly due to the scientific advancements⁴⁸¹. Indeed, with the Republic of Vanuatu's initiative this time around, which is another small island developing state in the Pacific, UN General Assembly adopted the Resolution 77/276 on April 2023 by consensus, requesting an advisory opinion of the International Court of Justice on the obligations of States in respect of climate change⁴⁸². The questions posed to the Court are:

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

*(b) What are the legal consequences under these obligations for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment [...]”*⁴⁸³

This may be an indication of state practice on this topic, especially considering that the Resolution was adopted by consensus.

Considering all these factors, the acknowledgement that the global climate change as a common concern of humankind⁴⁸⁴, taken together with the treaty regimes such as UNFCCC and the Paris Agreement, can be seen as an indication of the

⁴⁸¹Yale Center for Environmental Law and Policy, “Climate Change and the ICJ: Seeking an Advisory Opinion on Transboundary Harm” (2013) <<https://law.yale.edu/yls-today/news/climate-change-and-icj-seeking-advisory-opinion-transboundary-harm>> 15 March 2023.

⁴⁸² UN Doc. A/RES/77/276.

⁴⁸³ *Ibid.*, 3.

⁴⁸⁴ See Section Chapter I (II)(B)(3).

emergence of a general recognition in international law of a common legal interest in protecting the global climate regime. Thus, damage to the global climate regime can be seen as an injurious act against the international community as a whole⁴⁸⁵.

IV. Legal Implications of Recognition of Obligation to Protect the Global Climate Regime as an Obligation *Erga Omnes*

If the obligation to protect the global climate regime has indeed an *erga omnes* effect, the question of how States can respond to breaches of this obligation remains unanswered. This issue relates to the question of standing, or in Latin *locus standi*, which refers to, in the context of international adjudication, to the entitlement of an entity to be a party to judicial proceedings concerning contentious cases⁴⁸⁶. However, States have rarely brought their claims before the ICJ, especially as regards to breaches of obligations *erga omnes* and similarly, ICJ has rarely addressed such issues in contentious cases⁴⁸⁷. Instead, it seems that States react to breaches of such obligations by resorting to third-party countermeasures. A recent example of which, can be the countermeasures taken by Western nations against the Russian Federation in response to its use of force against Ukraine⁴⁸⁸.

Both of these issues, whether it be standing before the ICJ or third-party countermeasures, are fairly complex and exceeds the limits of the research question of this thesis. Nonetheless, the opinions and progress on these issues will be briefly

⁴⁸⁵ K. Leigh, “Liability for Damage to the Global Commons” (1993) 14 AYIL 129, 148.

⁴⁸⁶ Giorgia Gaja, “Standing: International Court of Justice (ICJ)” *Max Plank Encyclopedias of International Law* (MPIL) (2018), para. 1; Priya Urs, “Obligations Erga Omnes and the Question of Standing Before the International Court of Justice” (2021) 34 LJIL 505, 506.

⁴⁸⁷ *Obligation to Prosecute or Extradite* (Judgment), para. 2

⁴⁸⁸ *Ibid.*, 3.

examined under the next section, because without such examination, the argument that obligation to protect the global climate regime is an obligation *erga omnes* would be only of rhetorical value.

A. Standing to Institute ICJ Proceedings

This issue requires a brief analysis of the rules set out in ARSIWA, because there are no special set of rules addressing the invocation of state responsibility due to violations of international environmental law rules. Therefore, the general rules of ARSIWA are applicable for this issue.

ARSIWA recognizes two bases for standing, as injured states and non-injured states that have a legal interest to have standing due to the *erga omnes* nature of the obligation breached⁴⁸⁹. While Article 42 of ARSIWA relates to invocation of state responsibility by injured states⁴⁹⁰, Article 48 deals with this issue from the perspective of the latter. In other words, complementing Article 42, Article 48 deals with the invocation of responsibility by States other than the injured State acting in the collective interest⁴⁹¹, which foresees that:

⁴⁸⁹ Annemarieke Vermeer-Künzli, “Invocation of Responsibility” in André Kollkaemper and Ilias Plakokefalos (eds.) *Principles of Shared Responsibility in International Law* (Cambridge University Press, 2014) 257.

⁴⁹⁰ ARSIWA, Art. 42: “A State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to: (a) That State individually; or (b) A group of States including that State, or the international community as a whole, and the breach of the obligation: (i) specially affects that State; or (ii) Is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation”.

⁴⁹¹ ILC “Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries” (2001) UN Doc. A/56/10, 126.

“Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2, if:

- a. the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or*
- b. the obligation breached is owed to the international community as a whole*
[...] ”⁴⁹²

As can be seen from the phrase “any State other than the injured State”, within the meaning of Article 48, a State which is entitled to invoke the responsibility of other States, is acting not in its individual capacity but in its capacity either as a member of a group of States or member of the international community as a whole⁴⁹³, where the former refers to obligations *erga omnes partes*⁴⁹⁴, whereas the latter refers to obligations *erga omnes*⁴⁹⁵. Although these notions are well-established in international law and ARSIWA explicitly recognizes that non-injured States can invoke state responsibility; the existence of ‘standing’ based on obligations *erga omnes* before the ICJ seems far from settled. Some scholars argue that the Court has recognized a right of standing to enforce *erga omnes* and rely upon the Court’s case-law in which the right of standing to enforce obligations *erga omnes partes*⁴⁹⁶ was brought up, at least to a certain extent, for instance, in the *Whaling in the Antarctic* case (*Whaling*)⁴⁹⁷.

In 2010, Australia instituted proceedings against Japan in respect of Japan’s continued conduct of a large-scale program of whaling constituted a breach of its

⁴⁹² ARSIWA, Art. 48 (Emphasis added)

⁴⁹³ Commentary to ARSIWA, 126.

⁴⁹⁴ See. Section Chapter II (I)(C)(1) for the differences between these concepts.

⁴⁹⁵ *Ibid*; Urs, 508.

⁴⁹⁶ Urs, 515.

⁴⁹⁷ *Whaling in the Antarctic (Australia v. Japan, New Zealand intervening)* (Judgment) [2014] ICGJ 471.

obligations under the ICRW. Neither party addressed the issue of standing during the written proceedings phase and this issue was implicitly raised by Judge Bhandari, when he asked the agent for Australia “what injury, if any, has Australia suffered as a result of Japan’s alleged breaches of the ICRW through Japan’s conduct?”⁴⁹⁸ In turn, Australia explicitly stated that they were not claiming in any way to be an injured state and thus, seeking to uphold the “collective interest”⁴⁹⁹ in accordance with Article 48 of ARSIWA. However, the Court did not address whether Australia had standing to bring a claim for Japan’s conduct and mainly focused on the jurisdiction aspect of the case. Some scholars view the silence of the Court on this matter as an implicit recognition of the right of standing of non-injured states⁵⁰⁰. The Court may have taken this route because the interest to raise the issue of standing rests with the respondent state. This mainly due to the issue of standing not being considered as a general interest that needs to be addressed by the Court on its own motion⁵⁰¹.

Even if the implicit recognition were to be accepted, this would only indicate that the right to standing to enforce obligations *erga omnes partes* may exist. Indeed, as explained above⁵⁰², the Court proscribed in the *Prosecute or Extradite* case that State parties to the CAT, had a common interest in ensuring the compliance with certain obligations under the Convention, in whose performance all Contracting Parties have a legal interest⁵⁰³. In a more recent case, *Gambia v. Myanmar*, the Court rejected

⁴⁹⁸ *Whaling in the Antarctic (Australia v. Japan, New Zealand intervening)* (Judgment) Verbatim Record 2013/13 [2013], 73.

⁴⁹⁹ *Whaling in the Antarctic (Australia v. Japan, New Zealand intervening)* (Judgment) Verbatim Record 2013/18 [2013], 28.

⁵⁰⁰ Nicola Strain, “Regulating Collective Resources under Multilateral Treaties: The Decision in *Whaling in the Antarctic (Australia v. Japan)*” (2019) 20(2) MJIL 573, 586.

⁵⁰¹ Gaja, “Standing” (MPIL) para. 29.

⁵⁰² See Section Chapter II (I)(B)(3).

⁵⁰³ *Obligation to Prosecute or Extradite* (Judgment), para. 68

Myanmar's objection that the Gambia lacks standing to bring the case before the Court, by reiterating its conclusion in the *Prosecute or Extradite* judgment⁵⁰⁴. Hence, it can be said that the Court has already affirmed the practical applicability of invocation of state responsibility by a non-injured state, where the obligation breached is owed to a group of States. However, this cannot be said for the cases where the obligation breached is owed to the international community as a whole, meaning obligations *erga omnes* that derive from customary international law.

Notwithstanding the Court's lack of opinion on this matter, for many scholars and judges of the ICJ, the right of each state to invoke responsibility for violations is inherent in the very concept of obligations *erga omnes*⁵⁰⁵. For instance, Judge Barwick in his dissenting opinion in the *Nuclear Tests* cases, held that each State had a right to see obligations *erga omnes* observed and to vindicate this right before the Court⁵⁰⁶. This stance was endorsed by Judge Weeramantry and by Judge Ranjeva, in their separate opinions in the *East Timor* case⁵⁰⁷. Based on these views and the Draft Articles, some scholars state that in a case concerning obligations *erga omnes*, once the existence of the Court's jurisdiction is established, all States can institute proceedings against States responsible for violations of such obligations⁵⁰⁸.

⁵⁰⁴ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gambia v. Myanmar)* (Preliminary Objections) [2021] ICGJ 540, para. 107.

⁵⁰⁵ Bruno Simma, "From Bilateralism to Community Interest in International Law" in 250 *Collected Courses of the Hague Academy of International Law* (1994), 296.

⁵⁰⁶ *Nuclear Tests cases (Australia v France) (New Zealand v France)* (Judgment) Judge Barwick Dissenting Opinion [1974] ICJ Rep 253, 437; Tams, 181.

⁵⁰⁷ *Case of East Timor* Judge Weeramantry Separate Opinion 215; *Case concerning East Timor (Portugal v. Australia)* (Jurisdiction) (Judgment) Judge Ranjeva Separate Opinion [1995] ICJ Rep 90, 132.

⁵⁰⁸ Tams, 197; Roda Verheyen, *Climate Change Damage and International Law* (Brill Nijhoff Publishing, 2005) 267.

However, there is strong opposition amongst scholars and the judges of the ICJ, to the argument that non-injured states have right of standing for the invocation of state responsibility for breaches of obligations *erga omnes*⁵⁰⁹. In particular, Judge Xue has consistently challenged the overall philosophy of this notion, in her dissenting opinions in various cases⁵¹⁰. For instance, in her dissenting opinion in *Prosecute or Extradite*, she stated that:

*“It is one thing that each State party has an interest in the compliance with these obligations, and it is another that every State party has standing to bring claim against another State for the breach of such obligations in the Court”*⁵¹¹.

In other words, although Judge Xue recognizes that certain obligations imposed by CAT, in particular provisions safeguarding the prohibition of torture possess *erga omnes partes* status, this does not necessarily confer a right of standing on individual states to invoke responsibility for their breach⁵¹². In the same vein, in his dissenting opinion in the Nuclear Tests cases, Judge de Castro, asserted that, the applicant states, Australia and New Zealand had “no legal title to act as spokesman for the international community”⁵¹³.

⁵⁰⁹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* Judge Kooijmans Separate Opinion [2004] ICJ Rep 136, para. 39: “[...] admitting considerable difficulty in understanding why a violation of an obligation *erga omnes* by one State should necessarily lead to an obligation for third States; Judge *ad hoc* Sur, in his dissenting opinion in *Prosecute or Extradite*, asserted that “the parties do not form a single homogeneous group, which assumes the same obligations and can claim the same rights”.

⁵¹⁰ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gambia v. Myanmar)* (Preliminary Objections) Judge Xue Separate Opinion [2021] ICGJ 540.

⁵¹¹ *Case Concerning Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* (Judgment) Judge Xue Dissenting Opinion [2012] ICJ GL No 144, para. 17.

⁵¹² *Ibid*, para. 15-16; Urs, 513.

⁵¹³ *Nuclear Tests cases (Australia v France) (New Zealand v France)* (Judgment) Judge de Castro Dissenting Opinion [1974] ICJ Rep 253, para. 5.

In light of these explanations, it can be concluded that although ARSIWA clearly recognize a right to invoke state responsibility for breaches of obligations *erga omnes*, the question of standing before the ICJ is not yet settled. Therefore, it is not clear whether ICJ will affirm the standing of States for breaches of the obligation to protect the global climate regime. Nonetheless, the upcoming Advisory Opinion on climate change may shed some light on this topic in the future⁵¹⁴.

B. Third-Party Countermeasures

Countermeasures, generally, are unilateral measures adopted by the injured State in response to the breach of its rights by another State, aimed at inducing it to amende or cessation or reparations⁵¹⁵. The notion of third-party countermeasures, on the other hand, refers to the possible means of invocation of responsibility for breaches of obligations *erga omnes*⁵¹⁶. Similar to the systematic adopted for Article 42 and 48; Article 49⁵¹⁷ of ARSIWA concerns the resort to countermeasures by an injured state, whereas Article 54 deals with the measures taken by States other than an injured State. However, the content is not really parallel to Articles 42 and 48. While ILC explicitly recognizes in Article 48 that non-injured states are entitled to invoke the responsibility

⁵¹⁴ Daniel Bodansky, Jutta Brunnée, Lavanya Rajamani, *International Climate Change Law* (Oxford University Press, 2017) 51.

⁵¹⁵ Federica Paddeu, "Countermeasures" *Max Planck Encyclopedias of International Law* (MPIL) (2015) para. 1.

⁵¹⁶ Martin Dawidowicz, *Third-Party Countermeasures in International Law* (Cambridge University Press, 2017) 36.

⁵¹⁷ ARSIWA, Art. 49: "(1) An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations under part two. (2) Countermeasures are limited to the non-performance for the time being of international obligations of the State taking the measures towards the responsible State (3) Countermeasures shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question".

of a State, if the obligation breached is owed to the international community as a whole; Article 54 does not explicitly recognize the right of non-injured states to resort to countermeasures⁵¹⁸, which reads as:

*“This chapter does not prejudice the right of any State, entitled under Article 48, paragraph 1, to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached.”*⁵¹⁹

Article 54, in this sense, does not provide an explicit answer whether or not countermeasures aimed at protecting obligations *erga omnes* would qualify as “lawful measures”⁵²⁰. A brief examination of the drafting history of ARSIWA would reveal that ILC deliberately left open the answer to this question⁵²¹. During the drafting process of ARSIWA, there was strong political opposition from States as to the inclusion of this type of “collective” countermeasures⁵²². Hence, ILC was left with two options: complete deletion of this part or drafting this part of the ARSIWA explicitly dealing with only the countermeasures adopted by an injured State, with the reservation of the issue of countermeasures by third States in a saving clause and ILC chose the second option⁵²³. Some scholars view this provision as a compromise⁵²⁴.

⁵¹⁸ Dawidowicz, 37.

⁵¹⁹ ARSIWA, Art. 54: *“This chapter does not prejudice the right of any State, entitled under article 48, paragraph 1, to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached”*

⁵²⁰ Tams, 200.

⁵²¹ James Crawford, Jacqueline Peel & Simon Olleson, “The ILC’s Articles on Responsibility of States for Internationally Wrongful Acts: Completion of the Second Reading” (2001) 12 EJIL 963, 980.

⁵²² Crawford, General Overview, p. 936.

⁵²³ Ibid.

⁵²⁴ Linos-Alexandre Sicilianos, “Countermeasures in Response to Grave Violations of Obligations Owed to the International Community, in James Crawford, Alain Pellet, Simon Olleson, Kate Parlett (eds.) *The Law of State Responsibility* (Oxford University Press, 2010) 1145.

In the ARSIWA Commentary, ILC stipulates that the state practice on this topic has been rather limited, though there were some examples of States reacting against alleged breaches of obligation *erga omnes*, usually by imposing trade restrictions⁵²⁵, without claiming to be individually injured⁵²⁶. The lack of conclusive State practice makes it unclear how the rules relating to countermeasures taken by injured States apply to third-party countermeasures⁵²⁷. However, it is important to note here that almost all of the state practice regarding third-party countermeasures, are taken in the collective interest of Western nations⁵²⁸. This led scholars to argue that the pattern of state practice as to third-party countermeasures, assessed in conjunction with unequal distribution of power between developed and developing states, indicates that this method of enforcement may lead to “vigilantism” by powerful nations⁵²⁹. For some authors, though, the inherent importance of the community interest at issue requires states be able to induce compliance through third-party countermeasures⁵³⁰.

Regarding breaches of rules relating to the protection of the global environment some scholars suggest that the use of third-state countermeasures to protect common concerns of humankind (i.e. biodiversity and global climate change) “is not only appropriate and lawful under international law, but necessary for the maintenance of

⁵²⁵ ARSIWA Commentary, 137-139.

⁵²⁶ ARSIWA Commentary, 137.

⁵²⁷ Urs, 509; Denis Alland, “Countermeasures of General Interest” (2002) 13 EJIL 1221, 1233: “stating that Article 54 leaves no room for the theory of countermeasures by states not directly injured in response to a breach of obligations *erga omnes*; James Crawford, “The ILC’s Draft Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect,” (2002) 96 AJIL 874, 875

⁵²⁸ Tams, 235-236: pointing out to some practice by non-Western states.

⁵²⁹ Edith Brown Weiss, “Invoking State Responsibility in the Twenty-First Century” (2002) 96 AJIL 798, 805.

⁵³⁰ Margo Kaplan, “Using Collective Interests to Ensure Human Rights: An Analysis of the Articles on State Responsibility” (2004) 79 NYULR 1902, 1913; Jutta Brunnée, “International Accountability through the lens of the law of the state responsibility” (2007) 36 NYIL 21, 38.

good order among States”⁵³¹. Although there is support amongst scholars for the proposition that states taking third-party countermeasures to protect the global commons, and specifically to protect the global climate regime⁵³² the conclusion is the same: there is a lack of state practice to establish the legality of such measures.



⁵³¹ J. Charney, “Third State Remedies for Environmental Damage to the World’s Common Spaces”, in F. Francioni and T. Scovazzi, (eds.) *International Responsibility for Environmental Harm* (Graham & Trotman, 1991) 176-177.

⁵³² Phoebe N. Okowa, *State Responsibility for Transboundary Air Pollution in International Law* (Oxford University Press, 2000) 251-252; See. Patrick Hamilton, “Counter(measur)ing Climate Chnage: the ILC, Third State Countermeasures and Climate Change” (2008) 4 MIJSDLP 83.

CONCLUSION

Chapter I of this study showed that the adverse impacts of the global climate change are many-fold and affect the majority of the people, though some vulnerable groups more than others. These severe and irreversible consequences of climate change, led the United Nations to recognize it as a common concern of humankind, which results in the general obligation not to harm the environment to find applicability as regards to the climate regime protection.

One legal implication of such recognition is the *erga omnes* status of this obligation. Although the International Court of Justice first mentioned this concept in 1970, the lack of the Court's clarifications regarding the identification of obligations *erga omnes* has led legal scholars to put forward several methods of identification namely the common elements approach, structural approach and material approach. While all of these approaches cover some parts of the Barcelona Traction *dictum*, an alternative fourth approach, the common interests approach, proposed in this thesis, relies on the underlying idea of commonality of obligations *erga omnes*, which is also present in the concept of common concern of humankind. Considering the lack of clarity on the International Court of Justice's part, the adoption of this approach may establish a basis for the identification of the obligation to protect the global climate regime as an obligation *erga omnes*.

The very notion of common concern of humankind refers to environmental problems that affect and requires the attention of the international community as a whole, which is also the basis of obligations *erga omnes*. Indeed, although some

groups are more susceptible to the adverse impacts of the global climate change, it poses a serious threat to all States and all human beings. The solution of the global climate change can only be achieved with the cooperation of the whole international community. Therefore, every State has a legal interest in the protection of the global climate regime and thus, the whole international community has an obligation to protect it.

However, the legal implications of such recognition are not certain as well. There is no established state practice nor clarity on the Court's end, regarding the standing of States to institute proceedings before the International Court of Justice or to impose third-party countermeasures for the breach of the obligation to protect the global climate regime. Nonetheless, as regards to the question of standing, it can be concluded that every state has a right to invoke the responsibility of other States for breaches of such obligations, based on scholarly opinions and the work of the International Law Commission on the general principles of state responsibility. Conversely, the same conclusion cannot be reached for third-party countermeasures, as the legality of this concept generally and for breaches of environmental obligations specifically, is highly controversial and yet to be further examined by the Court or legal scholars.

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