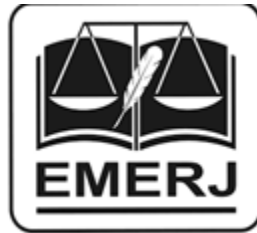


IUCN World Commission on Environmental Law

2nd World Environmental Law Congress



Escola da Magistratura do Estado do Rio de Janeiro (EMERJ)

The Question of States' obligations under international law to protect forests under their national jurisdiction, as a response to climate change and for the benefit of present and future generations

REQUEST FOR ADVISORY OPINION SUBMITTED BY NORWAY

MEMORANDUM FILED ON BEHALF OF UNICEF



WCEL International Climate Justice Moot Court, 2020

Table of Authorities	2
Introduction	8
Pleading for UNICEF on behalf of children	8
The contribution of deforestation to climate change and the importance to preserve forests for staying below 1.5C	9
The severe impacts of deforestation and forest degradation on human rights and especially on children	12
Obligations of states in International Environmental law in defense of forests	14
International climate change law, a focus on the Paris Agreement	14
Other international environmental treaties, notably the CBD	17
Other regional environmental law treaties and policy instruments	19
International environmental customary law	21
No-harm rule	21
Standard of care and due diligence	23
Obligations of states in International Human and Children’s Rights for protecting forests	25
International and regional human rights	25
International and regional case law in defense of forests and human rights	28
Childrens’ rights and the preservation of forests	32
Conclusion & Submissions on behalf of the Norwegian Delegation	35
How to save the global environment by protecting forests and respect, protect, and fulfill human rights	35
Final Submissions on behalf of Norway	36

Table of Authorities

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“If we want to use forests as a weapon in the fight against climate change, then we must allow them to grow old, which is exactly what large conservation groups are asking us to do.”

– Peter Wohlleben, *The Hidden Life of Trees: What They Feel, How They Communicate – Discoveries from a Secret World*

I. Introduction

1. *Pleading for UNICEF on behalf of children*

UNICEF works to improve children's rights and raise their living conditions by putting them on the political agenda. As a strong and independent UN body, they have a unique opportunity to influence governments, authorities, and other decision makers to prioritize and respect children's needs and rights. UNICEF is operating in 190 countries and territories. Their main goal is to safeguard children's rights, assist countries to ensure that children receive the best possible living conditions, and provide emergency relief when a disaster occurs.

Children are the least responsible for climate change, yet they will bear the greatest burden of its impact. A new report from the World Health Organization, UNICEF, and the Lancet Commission is stating that today's children face an uncertain future due to climate change and its conflicts, as well as ecological degradation.¹ As a result, Sustainable Development Goals (SDGs) were agreed upon five years ago yet countries are struggling to achieve them. For example, goal number 13 calls for urgent action to combat climate change and its impacts. Additionally to the SDGs, countries adopted the Paris Agreement at the COP21 in Paris to strengthen the global response to the threat of climate change. In this agreement, all countries agreed to work to limit global temperature rise to well below 2 degrees.² A new assessment from the IPCC says that limiting global warming to 1.5°C compared to 2°C would go hand in hand with ensuring a more sustainable and equitable society, with clear benefits to people and ecosystems.³ However, climate change and environmental degradation undermine the rights of every child, even if every child has the right to grow up in a safe and inclusive environment.⁴

¹ WHO, UNICEF, Lancet Commission 2020. *A future for the world's children?* Executive summary.

² Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015. Article 2.1 (a).

³ IPCC, 2018. *Summary for policymakers*. In: *Global Warming of 1.5°C*. (SPM) D.4.5

⁴ UNICEF, <<https://www.unicef.org/what-we-do>> accessed february 26th

All children are covered by the Convention on the Rights of the Child. The Convention was adopted by the United Nations General Assembly in 1989 and applies to all children, regardless of nationality, gender, social status, religion, and culture. The main principle is that the best interests of the child come above anything else. The Convention was ratified by 117 states, thus all countries except the United States. This gives the Convention considerable political and moral strength, in addition to it being legally binding. The 117 states are bound by this Convention and have a legal duty to protect children, which could be upheld by preserving forests to mitigate the effects of climate change.

2. The contribution of deforestation to climate change and the importance to preserve forests for staying below 1.5C

The Fifth Assessment Report from the International Panel on Climate Change (IPCC) stated that the last three decades have been successively warmer than any preceding decade.⁵ Anthropogenic greenhouse gas emissions have increased since the pre-industrial era, driven largely by economic and population growth, and are now higher than ever. This has led to atmospheric concentrations of carbon dioxide, methane, and nitrous oxide that are unprecedented in at least the last 800,000 years. Their effects, together with those of other anthropogenic drivers, have been detected throughout the climate system and are extremely likely to have been the dominant cause of the observed warming since the mid-20th century.⁶ If global warming continues with current projections and exceeds 4 degrees by the year of 2100, the consequences for humans' health would be dire due to heatwaves, rising ocean levels, and the proliferation of diseases.⁷ This is why climate change requires urgent legal attention.

The IPCC Special report released in 2018 discusses the solution of limiting global warming to 1.5 degrees above pre-industrial levels to strengthen the global response to the threat of climate change. The risk of food and water shortages will keep increasing and lead to

⁵ IPCC, 2014: Climate Change 2014: Synthesis Report (AR5). SPM 1.1.1

⁶ IPCC AR5, 2014: SPM 1.2.1

⁷ WHO, UNICEF, Lancet Commission. *A future for the world's children?* 2020

suffering in parts of the world, and particularly affecting poorer communities.⁸ The report mentions that we must reduce emissions of greenhouse gases to net zero by the middle of this century to have a reasonable chance of limiting global warming to 1.5C. Limiting global warming to 1.5 degrees instead of 2 degrees could reduce the number of people vulnerable to poverty and reduce their exposure to climate-related risks.⁹

Impacts associated with biodiversity-related risks such as more forest fires and the spread of invasive species are also scientifically proven to be lower at 1.5 degrees. Forests must be protected and preserved in order to reach the 1.5 degrees target goal. Trees are naturally storing CO₂ in their soil and biomass, and deforestation would consequently lead to a massive release of CO₂. Therefore, deforestation is one of the most important factors contributing to greenhouse gases. Between 2010 and 2015, 32 million hectares of primary or recovering forest were lost worldwide.¹⁰ Particularly high latitude tundra and boreal forest are at risk for degradation and loss caused by climate change. Boreal forests thrive in colder climates and it is thus important to ensure temperature stability for its preservation. This type of forest stores carbon, purifies both air and water, hence regulating the climate. Its' protection will be crucial for reaching the targeted temperature limit.¹¹

The Amazon removes between 1 to 2 billion tons of carbon dioxide from the atmosphere a year which covers 5% of all carbon dioxide from human activities. As a consequence of deforestation and fires, the Amazon removes only 500-700 million tons of carbon a year.¹² If deforestation continues at the same rate, we will not only fail to reach the goal of emission reductions to lower than 1.5 degrees, we will also reach a tipping point for the global climate

⁸ IPCC 2018 (Contributing lead authors: MR Allen, OP Dube, and W Solecki) *Global Warming of 1.5°C. Special Report*, A.3, D.2.2

⁹ IPCC 2018 (Contributing lead authors: MR Allen, OP Dube, and W Solecki) *Global Warming of 1.5°C. Special Report*, B.5.1

¹⁰ Plenary of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES) Seventh session. Paris, 29 April–4 May 2019. SPM, A4

¹¹ Government of Canada, "Boreal forest" (Natural resources Canada, February 20th, 2020)

<<https://www.nrcan.gc.ca/our-natural-resources/forests-forestry/sustainable-forest-management/boreal-forest/13071>

¹² C. A. Nobre, G. Sampaio, L. S. Borma, J. C. Castilla-Rubio, J. S. Silva, M. F. Cardoso, Land-use and climate change risks in the Amazon and the need of a novel sustainable development paradigm. *Proc. Natl. Acad. Sci. U.S.A.* **113**, 10759–10768 (2016)

system, turning rainforest into savannas and hence into carbon sources instead of sinks.¹³ This will increase the amount of greenhouse gasses worldwide and disrupt the hydrological cycle with less rain and longer dry seasons all over the world. Recent analysis shows that forests are not only essential to meet the goals of the Paris Agreement, but are also essential in order to ensure climate stability across global scales.¹⁴ Carlos Nobre is the leading expert on the Amazon forest, and he concludes that if we add severe deforestation to global warming,¹⁵ we will reach a tipping point when we exceed 20 to 25% deforestation, which will be in 25 to 30 years if we don't reach our 2030 targets.¹⁶

Limiting global warming to 1.5 degrees would require drastic and rapid transitions in land infrastructure, urban planning, and energy. A wide range of adaptation options are available to reduce the risks to natural and managed ecosystems (ie., ecosystem-based adaptation, ecosystem restoration and avoided degradation and deforestation). This would resort to the use of carbon dioxide removals (CDR) on the order of 100-100 GtCO₂ over the 21st century. Currently, the only proven scientific option for the use of CDR is reducing deforestation, preserving forest and forest-soil. Without the reliance on bioenergy, the report mentions that an increase of 9.5 million km² forests by 2050 will naturally enable us to reach the degree limit, simply thanks to the forests ability to capture carbon. Nature based solutions are estimated to provide 37% of climate change mitigation needed until 2030 to meet the goal of a 1.5 degree limit of climate warming.

¹³ C.A. Nobre, G. Sampaio, L.S. Borma, J.C. Castilla-Rubio, J.S. Silva, M.F. Cardoso, (2016) Land-use and climate change risks in the Amazon and the need of a novel and sustainable development paradigm, *Proc. Natl. Acad. Sci. U.S.A.* **113**, 10759-10768

¹⁴ Houghton, R. A., Birdsey, R. A., Nassikas, A., & McGlinchey, D. (2017). *Forests and Land Use: Undervalued Assets for Global Climate Stabilization: Why protecting and restoring forests and promoting sustainable agriculture and land use is more important than ever for the future of our planet.* Woods Hole Research Center.

¹⁵ E. Salati, A. Dall'Olio, E. Matsui, J. R. Gat, Recycling of water in the Amazon Brazil: An isotopic study. *Water Resour. Res.* **15**, 1250-1258 (1979)

¹⁶ C. A. Nobre, G. Sampaio, L. S. Borma, J. C. Castilla-Rubio, J. S. Silva, M. F. Cardoso, Land-use and climate change risks in the Amazon and the need of a novel sustainable development paradigm. *Proc. Natl. Acad. Sci. U.S.A.* **113**, 10759-10768 (2016).

3. *The severe impacts of deforestation and forest degradation on human rights and especially on children*

From pollination to photosynthesis, all humans depend on healthy ecosystems. Biological diversity is necessary for healthy ecosystems, which in turn are necessary for the full enjoyment of human rights.¹⁷ In the global assessment report on biodiversity and ecosystems services of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES SFP), it is pointed out that forests' contribution to human beings is vital. Forests indeed provide basic life support for humanity and gives humans the quality of life regulating both material goods and spiritual inspiration.¹⁸

In the statement following the release of the scientific report (IPBES), the independent experts warned that they were alarmed at the accelerating loss of biodiversity on which humanity depends.¹⁹ David Boyd, the UN Special Rapporteur on human rights and the environment, said that *“the loss of global biodiversity is having [effect] on human rights for decades to come. This report is a stark reminder that we can simply not enjoy our basic human rights to life [...] without a healthy environment”*. Failing to protect biodiversity can constitute a violation of the right to a healthy environment, a right that is legally recognised by 155 States and should be globally recognised as fundamental.

The right to a healthy environment must also be ensured in order to protect especially vulnerable groups such as children who make up 30% of the world population. Globally, the major causes of child deaths are diseases such as diarrhea, malaria, and congenital anomalies. Most of these conditions and diseases are caused by environmental harm and degradation. The World Health Organization estimates that more than 1.5 million deaths for children under the age of 5 could be prevented through the reduction of environmental

¹⁷ A/HRC/37/58 p.9 III A.5 pt. 30

¹⁸ Plenary of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES) Seventh session. Paris, 29 April–4 May 2019. SPM, A.1

¹⁹ IPBES/7/10/Add.1 p. 4, A4

risks.²⁰ In addition, one quarter of the total disease children experience when they are under the age of 5 is attributed to environmental exposures.²¹

It is important to note that a growing body of scientific evidence shows that deforestation is acting like an incubator for insect-borne and other infectious diseases that afflict humans, creating great conditions for the spread of mosquito-borne sources.²² In addition to diseases, the severity and frequency of climate disasters due to deforestation will increase. Approximately 160 million children already live in areas of extremely high drought severity while they are more vulnerable to the harmful effects of heat waves, where UNICEF has indicated that *“infants and small children are more likely to die or suffer from heatstroke because they are unable or lack agency to regulate their body temperature and control their surrounding environment”*.²³ Environmental harm interferes with the full enjoyment of a vast range of the rights of the child.

Besides the Convention on the Rights of the Child and the States' obligations to comply with it, the aforementioned science is proof that by protecting and preserving forests, human and children's rights will be safeguarded as both are deeply intertwined. Combating deforestation also ensures the protection of the children's right to well-being and health, maintaining it for future generations as well. Nevertheless, states have obligations under international environmental law to combat deforestation and protect forests in order to respect, protect, and fulfill, their human rights obligations to present and future citizens. In the following sections, these international legal obligations to protect children and citizens from environmental harm and degradation will be discussed.

²⁰ WHO, “Don't pollute my future! The impact of the environment on children's health” (Geneva, 2017), p. 1.

²¹ A/HRC/37/58, Ibid., p. 22

²² Jim Robbins, “How Forest Loss Is Leading To a Rise in Human Disease”, *Yale School of Forestry & Environmental Studies*, February 23rd 2016 accessed at

“https://e360.yale.edu/features/how_forest_loss_is_leading_to_a_rise_in_human_disease_malaria_zika_climate_change”

²³ A/HRC/37/58, UNICEF, Unless we act now, p. 6.

II. Obligations of states in International Environmental law in defense of forests

1. International climate change law, a focus on the Paris Agreement

The Paris Agreement is an internationally binding environmental treaty which reserves a special place for forests.²⁴ Article 5.1 of the Agreement states that “*Parties should take action to conserve and enhance as appropriate, sinks and reservoirs of greenhouse gases as referred to in Article 4, paragraph 1(d), of the Convention including forests*”. The drafting of this article seemingly appears to be insufficient to create direct obligation for state parties (typically using ‘should’ and not ‘shall’), and it is rather broad. Yet, parties have agreed to the objective of keeping temperatures stable somewhere between 1.5 and well below 2 degrees as Article 2.1(a) of the Agreement mentions. According to the IPCC Special Report of 2018, one effective way to maintain global temperatures below that strict threshold would be to achieve global neutral (net zero) emissions by 2050 and negative emissions thereafter. This carbon goal can only be achieved by protecting remaining forests as they hold a pivotal role in capturing and stocking carbon.

Further, Parties have the obligation to put forward NDCs²⁵ at their highest possible level of ambition as read in Article 4(1) and 4(3) of the Agreement. In fact, Article 4(1) precisely states that “*in order to achieve the long-term temperature goal set out in Article 2, Parties aim to reach global peaking of greenhouse gas emissions as soon as possible [...] so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases [...] on the basis of equity, and in the context of sustainable development.*” This provision urges the Parties to rapidly reduce their greenhouse gas emissions “*as soon as possible*” consequently creating a new international legal objective to keep under the long-term temperature goal expressed in Article 2(1).²⁶ This provision also considers sustainable development and the principle of “equity” which are important aspects to connect with

²⁴ Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015

²⁵ Nationally Determined Contributions

²⁶ Article 2(1)(a) “*Holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change*”

climate justice - that is to frame global warming as an ethical and political issue rather than one that is purely environmental or physical. The Parties thus have to consider sustainable development and equity whilst they significantly reduce their greenhouse gas emissions to offer a healthy lifestyle to future generations.

Another principle presented by the Paris Agreement is the principle of common but differentiated responsibility mentioned in Article 9. This principle is of legal importance as it mentions financial support from developed countries Parties to developing countries. In fact, article 9(1) of the Agreement clearly states that “*developed country Parties shall provide financial resources to assist developing country Parties with respect to both mitigation and adaptation in continuation of their existing obligations under the Convention.*” This underlines that keeping global temperatures down requires global cooperation from States, and that this cooperation must be differentiated to reflect the various capabilities and differing responsibilities of individual countries in addressing climate change. Cooperation on REDD+ is one way through which developed countries can meet their obligations under Article 9(1) of the Agreement. It is a mechanism for slowing deforestation by effectively paying forest-rich developing countries to preserve many of its remaining forests. The equitable principle mentioned in Article 9 thus seems to help countries with different capabilities and different responsibilities to address climate change at their own speed with financial help from other countries who can, at this time, afford it.

In addition to this common but differentiated principle, the Parties have committed to adopting appropriate national climate measures according to Article 4.2 of the Agreement. In fact, the second sentence of this Article states that “*Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions.*” The use of the word “shall ” emphasizes the legal obligation of countries to set aside national sovereignty by pursuing “*domestic mitigation measures*” in harmony with the temperature goal mentioned above. The legal argument can thus be made that those state Parties which do have significant forest cover with relevance to the global climate system are obliged to protect and conserve their forests whilst countries with less forest should focus on afforestation and preservation. Forests can thus legally be described as a substantial aspect of NDCs as they

must be incorporated into the Parties domestic mitigation measures. This argument can also be supported by the aforementioned Article 5.1 of the Agreement as it explicitly requires parties to “*take action to preserve and enhance [...] forests*”. Thus, the protection of forests is an international common concern of States.

The omissions of states in protecting their forests from degradation have consequences which affect the global enjoyment of human rights. The Paris Agreement is the first climate and environmental agreement to explicitly recognize the nexus between human rights and climate change. After acknowledging that climate change is a common concern of humankind, the preamble states that “*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.*” Many references to human rights and other social and environmental obligations are concentrated in the preamble of the Paris Agreement. The content of the preamble is integral to this Agreement and must be considered when interpreting any provision. The preamble cannot create new legal obligations in itself yet, this remains of little significance as the preamble refers to existing human rights obligations that parties have already entered into. Therefore, the preamble is important as it sets the method of interpretation for the entire Agreement so as to ensure harmonisation of international implementation.

In an important sense, the Paris Agreement signifies the recognition by the international community that climate change poses unacceptable threats to the full enjoyment of human rights and that actions to address climate change must comply with human rights obligations.²⁷

²⁷ A/HRC/31/52, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment

2. Other international environmental treaties, notably the CBD

The Convention on Biological Diversity framework only directly addresses forest conservation in subsequent Conference Of the Parties decisions, and not in the main body of the Convention.²⁸ It is only through treaty-body decisions that it created an “*expanded programme of work on forest biological diversity*”²⁹. They have been the basis for multiple plans and programmes of action, and a substantial amount of soft-law decisions have been taken even though the Convention remains binding.

The CBD addresses forests and their preservation specifically at section VI/22 : “the Conference of the Parties [...] *recognizes that Parties should implement the expanded programme of work on forest biological diversity in the context of their national priorities and needs. Activities implemented domestically by Parties will be prioritized based on country and regionally specific needs, national determination, legislation, circumstances and priorities concerning forest-related issues, and their national forest and biodiversity strategies.*”³⁰ This article is an example of common but differentiated responsibility of States towards their forests and biological diversity. This article also emphasizes the importance of sustaining forest biological diversity in the context of equity between countries.

The Strategic Plan for Biodiversity 2011/2020 adopted by the tenth Conference of the Parties (COP) to the CBD promotes the effective implementation of the Convention through broad-based action by all Parties and stakeholders to halt the loss of biodiversity. This was to ensure that by 2020, ecosystems are resilient and continue to provide essential services for the well-being and livelihoods of people and ecosystems.³¹ At the heart of the Strategic Plan are 20 targets collectively known as the Aichi Biodiversity Targets. Several of the targets relate to forest agenda³²:

²⁸ The Convention on Biological Diversity of 5 June 1992 (1760 U.N.T.S. 69)

²⁹ DECISIONS ADOPTED BY THE CONFERENCE OF THE PARTIES TO THE CONVENTION ON BIOLOGICAL DIVERSITY AT ITS SIXTH MEETING The Hague, 7-19 April 2002

³⁰ Ibid. UNEP/CBD/COP/6/20 Page 225 of the decision.

³¹ The Rio Conventions, Action on FORESTS Brochure (2012) Convention on Biological Diversity, United Nations Convention to Combat Desertification, United Nations Framework Convention on Climate Change, p.4, accessed at “unfccc.int › resource › docs › publications › rio_20_forests_brochure” disclaimer that *this publication is issued for public information purposes and is not an official text of the Conventions in any legal or technical sense.*

³² The Convention on Biological Diversity of 5 June 1992 (1760 U.N.T.S. 69)

- **Target 5.** The rate of loss of all-natural habitats, including forests, is at least halved and where feasible is brought close to zero, and degradation is significantly reduced.
- **Target 7.** All areas under forestry are managed sustainably, ensuring conservation of biodiversity.
- **Target 15.** Enhance the resilience and the contribution of biodiversity to carbon stocks through conservation and restoration, including restoration of at least 15% of degraded ecosystems, thereby contributing to climate change mitigation and adaptation and to combating desertification.

These targets are proof that the CBD creates legal obligations for Parties to consider, preserve, and enhance forests and their biodiversity. This convention ensures that carbon sinks are safeguarded, and by doing so, that temperatures remain below 2 degrees.

In addition to these targets, action programs under the CBD include programs on forest biodiversity and other protected areas. The program on forest biodiversity contains 130 specific actions to ensure the conservation and sustainable use of forest biodiversity at national level, including for example developing good forest governance, promoting law enforcement, and addressing related trade. Every Party is expected to develop and periodically revise their National Biodiversity Strategies and Action Plans (NBSAPs). Since the CBD, many countries and regions have considerably moved ahead with forest preservation. For example, Brazil has designated half the Amazonian state of Acre's territory as protected areas. Liberia set aside 30% of forest land for conservation while Malaysia and Vietnam have established forest corridors to connect forest biodiversity hotspots; and India enacted landmark legislation which assigned ownership rights to minor forest produce to indigenous peoples and local communities (CBD 4th National Reports).³³ Yet, it is important to bear in mind that this brochure was written in 2012.

³³ The Rio Conventions, Action on FORESTS Brochure (2012) Convention on Biological Diversity, United Nations Convention to Combat Desertification, United Nations Framework Convention on Climate Change, p.4, accessed at "unfccc.int > resource > docs > publications > rio_20_forests_brochure"

3. Other regional environmental law treaties and policy instruments

Lastly, it is important to note that other treaties have been drafted with the aim of protecting and preserving forests in addition to the Paris Agreement and the CBD. These regional treaties can be used as examples for the drafting of future international treaties as they generally offer stricter enforcement mechanisms and thus a higher threshold of protection of forests.

The Treaty for Amazonian Cooperation focuses on cooperation between countries in the Amazonian Basin for better economic prosperity whilst protecting natural resources.³⁴ Article I mentions that “*the Contracting Parties agree to undertake joint actions and efforts to promote the harmonious development of their respective Amazonian territories in such a way that these joint actions produce equitable and mutually beneficial results and achieve also the preservation of the environment, and the conservation and rational utilization of the natural resources of those territories.*” This article balances both the Parties' economic rights and environmental preservation by the “*conservation and rational utilization of the natural resources*” i.e. rivers and forests. This is a newly drafted obligation which ensures both regional economic wealth and environmental preservation through joint cooperation.

Moreover, Article IV of the Treaty states that “*the Contracting Parties declare that the exclusive use and utilization of natural resources within their respective territories is a right inherent in the sovereignty of each state and that the exercise of this right shall not be subject to any restrictions other than those arising from International Law.*” The Parties thus have a sovereign right to exclusively use and utilize their own natural resources which can be restricted by international law. International law seems to suggest that the protection of forests is equally important to economic wealth as Article 5 of the Paris Agreement states “*parties should take action to conserve and enhance as appropriate, sinks and reservoirs of greenhouse gases [...] including forests*”. The concept of regional cooperation is furthered with the Article XI of the Treaty as States are “*encourage[d] to join[t] studies and measures aimed at promoting the economic and social development of said territories*” to ensure efficient

³⁴ Treaty for Amazonian Cooperation, 1978

rationalisation of resources. Therefore, regional cooperation enables countries with Amazonian forest to protect and preserve this vulnerable resource. These neighbouring countries can in fact protect the Amazon forest to a higher degree as it is easier to agree on a strict legal threshold and efficient enforcement mechanisms through regional co-operation as countries share the same responsibility.

In addition to the Amazonian regional treaty, the EU has made efforts to combat deforestation through policies and law. The EU currently only contains 5 % of the world's forests yet they remain a key reservoir of biodiversity and must be protected.³⁵ Although the EU Treaties make no explicit provision for a common forest policy, there is a long history of EU policies, measures, and activities directly or indirectly affecting the forest sector, in particular in the areas of climate, agricultural policy, and energy. The EU Forestry Strategy adopted in 1998 puts forward the principles of sustainable forest management and the multifunctional role of forests. The Strategy was reviewed in 2005, and the Commission presented an EU Forest Action Plan in 2006. A new EU Forest Strategy for forests and the forest-based sector was adopted in 2013 and a multi-annual implementation plan was adopted in 2015.³⁶ The 3rd priority of this multi-annual implementation plan focuses on increasing the mitigating potential of forests through measures such as reduced emissions and prevention of disasters (forest fires).³⁷ The examination of the usage of land use, land use change, and forestry (LULUCF) is added to the 2030 greenhouse gas mitigation framework following the European Council conclusions of October 2014.³⁸ This shows that the EU has been tackling deforestation in order to ensure climate mitigation in the last decade.

Some countries from the European Union have however legislated to protect forests further. For instance, the Danish Forest Act states that “*this Act aims to preserve and protect the*

³⁵ European Commission, Environment, “EU Forests and forest related policies” accessed at “https://ec.europa.eu/environment/forests/index_en.htm”

³⁶ COMMISSION STAFF WORKING DOCUMENT Multi-annual Implementation Plan of the new EU Forest Strategy, Brussels, 3.9.2015 SWD(2015) 164 final

³⁷ Priority area n°3: *Forests in a changing climate Forests can help mitigate climate change, and associated extreme weather events, and must therefore maintain and enhance their resilience and adaptive capacity.*

³⁸ European Council, Brussels, 24 October 2014 EUCO 169/14 CO EUR 13 CONCL 5 accessed at “http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/145397.pdf”

country's forests. Its purpose is to enforce forest sustainability to natural areas by implementing national plans providing funding for forest management, development of forest derivatives and timber industry, information, guidance and research, and to ensure advice for the identification of natural habitats".³⁹ Danish law thus goes as far as to implement national plans for funding the protection of forests and research to safeguard forests, obligations that the EU never appeared to have drafted. The fact that this is more than just policy also illustrates the fact that Danish law protects their own forests at a higher threshold.

The Paris Agreement, the Convention on Biological diversity, and other regional treaties all aim to combat deforestation to mitigate climate change and its dire consequences on human rights.

4. *International environmental customary law*

Custom under international law provides a range of obligations which are constantly evolving. These obligations are binding for states and they must comply by protecting forests, as negligence would have extraterritorial consequences and affect other states. Article 38(1)(b) of the statute of the ICJ defines customary international law as "*evidence of a general practice accepted as law*".⁴⁰ Custom has played a secondary role in international environmental law but it can establish obligations binding on all states, regardless of adherence to treaty law. Furthermore, when a custom develops alongside a conventional rule, it may supply or inform the content and effect of this rule.⁴¹

A. No-harm rule (Prohibition of transboundary environmental harm)

The no harm-rule is of particular relevance to the case of forest degradation due to the international effects of global warming. The no harm rule was first put forward in the *Trail Smelter* case.⁴² An arbitration tribunal decided that it is the responsibility of the State to protect other states against harmful acts by individuals from within its jurisdiction. No state has the right to use or permit the use of the territory in a manner as to cause injury by

³⁹ Danish Forest Act No. 122 of 2017 accessed at "www.retsinformation.dk; www.nmkn.dk"

⁴⁰ Sands and Peel, *Principles of International Environmental Law* (2012), pp. 111. Statute of the ICJ, 1963

⁴¹ *Ibid* pp 112

⁴² THE TRAIL SMELTER ARBITRATION CASE (UNITED STATES VS CANADA) 1941, U.N. Rep. Int'l Arb. AWARDS 1905 (1949)

fumes in or to the territory of another or the properties or persons therein.⁴³ Eight years later, in the *Corfu Channel* case,⁴⁴ the ICJ recognized the existence of a general principle of law prohibiting states from violating the rights of or inflicting damage on other states. The Court thus generalized the *Trail Smelter* principle, and later found that it can be violated by an act as well as an omission.⁴⁵

The prohibition of transboundary harm was enshrined in the 1972 Stockholm Declaration: “States have, in accordance with the Charter of the United Nations and the principles of international law (...) the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction”.⁴⁶ In the *Gabčíkovo-Nagymaros* case,⁴⁷ the ICJ emphasized that the general obligation on states to respect the environment of other States or of areas beyond national control are part of “*the corpus of international law relating to the environment*”. This could indicate that states are responsible for contributing to climate change and are violating international customary law for transboundary damage to other territories.⁴⁸

According to academic literature, there are four conditions which must necessarily be satisfied for harm to qualify as transboundary harm:⁴⁹

- the harm must result from human activity;⁵⁰
- the harm must be a physical consequence of human activity;⁵¹
- there must be a physical effect crossing national boundaries⁵²; and

⁴³ Ibid, pp 21-22

⁴⁴ *Corfu Channel Case* (United Kingdom v. Albania); Assessment of Compensation, 15 XII 49, International Court of Justice (ICJ), 15 December 1949

⁴⁵ Ibid, pp 21-22

⁴⁶ *Principle 21/1992 Rio Declaration Principle 2*, UN General Assembly, United Nations Conference on the Human Environment, 15 December 1972, A/RES/2994 / UN Commission on Human Rights, Human rights and the environment., 9 March 1994, E/CN.4/RES/1994/65.

⁴⁷ *Gabčíkovo-Nagymaros Project*, Hungary v Slovakia, Judgment, Merits, ICJ GL No 92, [1997] ICJ Rep 7, [1997] ICJ Rep 88, (1998) 37 ILM 162, ICGJ 66 (ICJ 1997), 25th September 1997, International Court of Justice [ICJ]

⁴⁸ Ibid, pp. 40-42

⁴⁹ Schachter, Oscar *The Emergence of International Environmental Law*, *Journal of International Affairs*, vol. 44 (1991) pp. 463

⁵⁰ Ibid.

⁵¹ Ibid, pp. 464

⁵² Ibid.

- the harm must exceed a certain level of severity that calls for legal action.⁵³

The third condition is not limited to neighboring states but may also include transboundary effects crossing several national boundaries, thereby causing damage to multiple states. Under this prerequisite, it could be argued that the effects of forest degradation leading to global warming are in fact transboundary damage to all states. Regarding the fourth condition, transboundary effects are usually considered cross boundary through a media, such as water, soil, or air, such as when pollutants from industrial activities conducted in one state form acid rain, which damages forests and lakes in other states. Under current international law, the no-harm rule is expanded to also include harm to areas beyond national control. The rule thus protects not only the territories under state control, but also the “global commons”.⁵⁴

It is important to highlight that a state cannot demand that other states abstain from all activities which may have transboundary impacts on the environment, and not all boundary crossing harm is prohibited under the no-harm rule as the harm must exceed a certain degree of severity.⁵⁵ However, scientific evidence indicates that the loss of forests causes global warming, which in turn has severe consequences for human beings and children’s livelihoods and health.

B. Standard of care and due diligence

Determining the standard of care required for the no harm-rule is crucial for environmental damage to be prevented. The due diligence standard can be described as the conduct that can be expected of a good government⁵⁶, in an objective and international standard.⁵⁷ Defining the duty of care is a prerequisite where a State invokes the no-harm rule as a cause of action in seeking an injunction, positive action to prevent harm, or

⁵³ Ibid.

⁵⁴ Ibid.

⁵⁵ Jervan, Marte The Prohibition of Transboundary Environmental Harm. An Analysis of the Contribution of the International Court of Justice to the Development of the No-harm Rule. Pluricourts Research Paper No. 14-17 (2014), pp.

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⁵⁶ Report ILC 53rd session, Commentary, 395.

⁵⁷ Verheyen, Roda Climate Change Damage and International Law: Prevention Duties and State Responsibility (2005), pp. 174.

compensation once damage has occurred.⁵⁸ This means that a State would be unable to argue that its internal laws set the standard of due diligence. Regarding climate change damage, it would not be acceptable for a government to argue that their internal laws do not create the obligation or allow the State to reduce its emissions. The International Law Commission (ILC) defines the standard of due diligence as the conduct “*which is generally considered to be appropriate and proportional to the degree of risk of transboundary harm in the particular instance*”.⁵⁹ The ILC adds that “*the required degree of care is proportional to the degree of hazard involved. The degree of harm itself should be foreseeable and the State must have known or should have known that the given activity has a risk of causing significant harm. The higher the degree of inadmissible harm, the greater would be the duty of care required to prevent it*”.⁶⁰

Both the level of risk and uncertainty therefore are to be taken into account when defining the applicable standard of care.⁶¹ The standard of care may change over time, where scientists assess the risk involved is greater than previously thought.⁶² This is the case with the IPCC reports on climate change and the importance of the preservation of forests to reduce global warming. Nothing in international law supports a finding that excludes the formulation of an international standard of due diligence merely because the risk of harm is uncertain or lies in the future. Instead, this is a prerequisite for applying the duty to minimize risk contained in the no-harm rule.⁶³

It is important to recall the obligation that the no-harm rule poses on states to protect forests within their national jurisdiction and to do so with the standard of care or due diligence.

⁵⁸ Ibid.

⁵⁹ Report ILC 53rd session, Commentary 394 to the Draft Articles on Prevention of Harm.

⁶⁰ Report ILC 53rd session, Commentary 396 to the Draft Articles on Prevention of Harm.

⁶¹ Verheyen (2005), pp. 176.

⁶² Ibid.

⁶³ Ibid., pp. 177.

III. Obligations of states in International Human and Children's Rights for protecting forests

1. International and regional human rights treaty law

It is important to briefly mention the primary status which human rights hold in the corpus of international law. Article 103 of the UN Charter states that *"in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."* In the context of the law of treaties, the Vienna Convention on the Law of Treaties indicates that any treaty which is in violation of a peremptory norm of general international law (also referred as *jus cogens*) is to be considered void.⁶⁴ When it comes to climate change, the international treaties which contain peremptory norms such as the right to life⁶⁵ should prevail when States invoke other rights to justify either their promotion of the degradation of forests, or their lack of action towards their protection.⁶⁶

Both Article 3 of the Universal Declaration and Article 6 of the ICCPR respectively declare that *"everyone has the right to life, liberty and security of person"*⁶⁷ and that *"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."*⁶⁸ This right to life sets a high threshold of human rights protection as it prevails over other regional and domestic treaties. This should also be interpreted considering climate change as the states which lack responsibility to protect their citizens against the climate crisis can amount to a violation of their right to life.

⁶⁴ A peremptory norm of general international law is defined as *"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"* see De Schutter, Olivier, *International Human Rights Law* (2014), pp. 73

⁶⁵ This right can be found in numerous articles and treaties : *Article 3 of the Universal Declaration on Human Rights, Article 6 of the ICCPR, Article 4 of the African Charter on Human and People's Rights, Article 4 of the American Convention on Human Rights, Article 2 of the European Convention on Human Rights*

⁶⁶ See Asbjørn Eide's tripartite typology of the obligation of States to respect, protect and fulfil human rights.

⁶⁷ Article 3, UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), available at: <https://www.refworld.org/docid/3ae6b3712c.html> [accessed 2 March 2020]

⁶⁸ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <https://www.refworld.org/docid/3ae6b3aa0.html> [accessed 2 March 2020]

Additionally, five United Nations Treaty Bodies⁶⁹ made a Joint Statement on "Human Rights and Climate Change" illustrating a clear nexus between the two. The statement indicates that under five international treaties "*state parties have obligations, including extraterritorial obligations, to respect, protect and fulfil all human rights of all peoples*", and that "*failure to take measures to prevent foreseeable human rights harm caused by climate change, or to regulate activities contributing to such harm, could constitute a violation of States' human rights obligations*".⁷⁰

Besides international human rights treaty law, regional human right treaty law is also of strong importance as it provides for better enforcement mechanisms and thus a higher threshold of protection for human rights. The European Convention of Human Rights (ECHR) is a great legal tool to protect human rights as it mentions a nexus between climate change and Human Rights.⁷¹ Article 2 and 8 of the Convention are of pivotal importance when protecting citizens and future generations from environmental harm. Article 2 grants citizens the "right to life" while Article 8 provides a right to respect for one's "private and family life, his home and his correspondence". Both these articles can be read in accordance with climate law as in order to preserve and respect both those articles, environmental harm must be avoided. Combating deforestation ensures the respect of Article 2 and 8 while allowing deforestation would be a violation of these articles.

In addition to European human rights instruments, there also are the African Charter of Human Rights⁷² and the American Convention on Human Rights.⁷³ These two conventions

⁶⁹ Committee on the Elimination of Discrimination Against Women, Committee on Economic, Social and Cultural Rights, Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, Committee on the Rights of the Child, Committee on the Rights of Persons with Disabilities.

⁷⁰ International Convention on the Elimination of all Forms of Discrimination Against Women, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the International Convention on the Rights of the Child, and the International Convention on the Rights of Persons with Disabilities.

⁷¹ Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, available at: <https://www.refworld.org/docid/3ae6b3b04.html> [accessed 16 February 2020]

⁷² Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), available at: <https://www.refworld.org/docid/3ae6b3630.html> [accessed 16 February 2020]

⁷³ Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, 22 November 1969, available at: <https://www.refworld.org/docid/3ae6b36510.html> [accessed 16 February 2020]

have codified human rights and linked some of these human rights to environmental conservation. Article 16 of the African Charter of Human Rights states that “*every individual shall have the right to enjoy the best attainable state of physical and mental health. State Parties to the present Charter shall take the necessary measures to protect the health of their people*” while Article 24 mentions that “*right to a general satisfactory environment ie all peoples shall have the right to a general satisfactory environment favorable to their development*”. Both these articles tie together the enjoyment of human rights and the right to a safe and sustainable environment.

The American Convention of Human Rights also intertwines both human rights and environmental protection. Article 4.1 of the Convention mentions every person's right to life while Article 11 states their right to a healthy environment by ensuring everyone has access to basic public services and by creating legal obligations for the State Parties to promote the protection, preservation, and improvement of the environment as a whole.

The Human Rights Committee in 2009 furthermore made a significant contribution to existing international treaty law establishing the duties of States regarding the protection of the environment. General Comment No. 36 on article 6 of the ICCPR on the right to life, asserted that the degradation of the environment may give rise to direct threats to life and, as such, States parties to the Covenant should take appropriate measures to address it.⁷⁴ More specifically, the document also states that “*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*”. In this sense, the Human Rights Committee also considers that the obligation to respect and ensure the right to life and life with dignity entails taking measures to preserve the environment and protect it against harm, pollution and climate change caused by public and private actors.⁷⁵

⁷⁴ UN Human Rights Committee (HRC), General comment no. 36, Article 6 (Right to Life), 3 September 2019, CCPR/C/GC/35, para. 26.

⁷⁵ *Ibid*, para. 62.

2. International and regional case law in defense of forests and human rights

According to UN Special Rapporteur David Boyd “*virtually every source reviewed identified human rights whose enjoyment was infringed or threatened by environmental harm, and the sources agreed that States had obligations under human rights law to protect against such harm.*”⁷⁶ The states have a binding obligation to protect their citizens from environmental harm, even if harm has not been caused directly by them. For instance, the case of the European Court of Human Rights arising from mudslides in the Caucasus which killed several inhabitants of the town of Tyrnauz,⁷⁷ the Court stated that “*governments must adopt legal frameworks designed to effectively deter threats to the right to life from natural disasters as well as dangerous human activities.*”⁷⁸ The State has not only a responsibility to protect citizens’ from harm, but it also needs to exercise precaution when mitigating the harm as the environmental crisis cannot be reversed. This legal obligation is especially important to ensure the safety and well-being of future generations and children.

The case of *Costa Rica v. Nicaragua*⁷⁹ where Costa Rica had instituted proceedings with the International Court of Justice against the Republic of Nicaragua for unlawful incursion, occupation, and use of Costa Rican territory, included claims of serious damage to protected rainforests and wetlands. This is a landmark case where environmental damage was recognised and where a State was held responsible to repair the environmental degradation it caused. This reparation principle for environmental wrongdoing is efficient when the wrongful doing has been done, but difficult to use when the damage might be caused. A similar approach could be taken to safeguard forests as the case’s decision was based on certain customary obligations that can also be applied to forests. This indeed can become a legal solution to the issue of deforestation.

⁷⁶ A/73/188 - Human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, R.Boyd, notes by the UN Secretary General, p.3

⁷⁷ European Court of Human Rights, *Budayeva and others v. Russia*, application. No. 15339/02 (2008). Available from www.echr.coe.int

⁷⁸ A/HRC/31/52, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, p.10

⁷⁹ *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, 2015, ICJ

The jurisprudence of the European Convention of Human Rights (ECHR) is also useful for protecting human rights from climate change.⁸⁰ In *Lopez Ostra v Spain*, noxious fumes from a waste plant cause significant discomfort, leading to health problems for the applicant's daughter.⁸¹ The Court found a violation of Article 8 as her right to property and home was violated by an unhealthy environment. The same reasoning can be applied to forests as the key point here is the States knowledge of the actual or potential harm in light of its duty to act, and if the States would fail to act, it would amount to an omission and violation of human rights. According to this case, a State should thus be held responsible for the fumes and noxious substances emitted by deforestation, especially States which have implemented the ECHR.

Another case which mentions Article 2 and 8 of the ECHR is the *Urgenda Foundation v. The State of the Netherlands* case.⁸² It is the leading case linking both climate science and human rights law while upholding the State responsibility for emitting greenhouse gases. In fact, the District Court found “[a] sufficient causal link can be assumed to exist between the Dutch greenhouse gas emissions, global climate change and the effects (now and in the future) on the Dutch living climate.”⁸³ This case is remarkable in its way of integrating climate science in its judgement, using it as a justification to its legal decision. The Court of Appeal summarized the environmental case law as follows: “the State has a positive obligation to protect the lives of citizens within its jurisdiction under Article 2 ECHR, while Article 8 ECHR creates the obligation to protect the right to home and private life. This obligation applies to all activities which could endanger the rights protected in these articles, and certainly in the face of industrial activities which by their very nature are dangerous. If the government knows that there is a real and imminent threat, the State must take precautionary measures to prevent infringement as far as possible”.⁸⁴

⁸⁰ Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, available at: <https://www.refworld.org/docid/3ae6b3b04.html> [accessed 16 February 2020]

⁸¹ Application no. 16798/90, Judgement of 9 December 1994

⁸² *The State of the Netherlands v Urgenda Foundation*, The Hague Court of Appeal (9 October 2018), case 200.178.245/01 (English translation) <<https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHDHA:2018:2610>> (State v Urgenda)

⁸³ *Idem*. Para. 4.90

⁸⁴ *Idem*. para 43

The Court also believes that it is appropriate to “*speak of a real threat of dangerous climate change, resulting in serious risk that the current generation of citizens will be confronted with loss of life/or a disruption of family life (...) It follows from Article 2 and 8 of the ECHR that the State has a duty to protect against this real threat*”.⁸⁵ According to the Court of Appeals, there is thus an imminent and real danger that these human rights will be violated by climate change. The Court also relied on IPCC reports,⁸⁶ and on decisions adopted by the UNFCCC Conference of the Parties (CoP) in the past decade, which all indicate that concentrations of greenhouse gases in the atmosphere have to remain within the 450 parts per million (ppm) limit or even within a 430 ppm limit, if the 1.5°C temperature goal of the Paris Agreement is to be met with a degree of certainty.⁸⁷ The Court concluded that the state had failed to fulfil its duty of care pursuant to Articles 2 and 8 of the ECHR urging the government to reduce its emissions by at least 25% by the end of 2020.⁸⁸ This case is of primordial importance as it places the burden on the State for mitigating and reducing their emissions of greenhouse gases by using human rights law. Moreover, this case sets a precedent in the way the Dutch Appeal Court used climate science reports to justify their legal decision. Lastly, the Court raised the vulnerability of children and future generations in light of the climate crisis and shifted the responsibility on the State to ensure their well-being and health by reducing emissions.

The ongoing case of the *People v Arctic* oil is of special interest here as it opposes Norway and NGO’s/students.⁸⁹ The litigants who include Greenpeace and Nature and Youth Norway, are suing the Norwegian government for approving exploratory drilling licenses in the

⁸⁵ Idem. Para 45

⁸⁶ For instance, in *ibid* para 44 on the discussion of the risk of reaching ‘tipping points’ with a temperature rise of between 1 and 2°C, the court cited RK Pachauri and LA Meyer (eds), 2014: Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change (IPCC 2014) 72.

⁸⁷ Jonathan Verschuuren, “*The State of the Netherlands v Urgenda Foundation: The Hague Court of Appeal upholds judgment requiring the Netherlands to further reduce its greenhouse gas emissions*”, *Review of European, Comparative & International Environmental Law* Volume 28, Issue 1, 21 February 2019 accessed at: “<https://onlinelibrary.wiley.com/doi/abs/10.1111/reel.12280>”

⁸⁸ *The State of the Netherlands v Urgenda Foundation*, The Hague Court of Appeal (9 October 2018), case 200.178.245/01 (English translation), Para 71. <<https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHDHA:2018:2610>> (State v Urgenda)

⁸⁹ *People vs. Arctic oil climate lawsuit* (2016) Norwegian Supreme Court

Barents sea as it amounts to a violation of the people's constitutional right to a healthy environment.⁹⁰ These environmental groups are also suing on behalf of future generations, arguing that approving oil exploration violates human rights conventions because of its contribution to increased carbon emissions. It is the first climate-change litigation to be brought under the Constitution's environmental provisions, and it is also among the highest-profile cases in a series of climate-change lawsuits brought by activists in Europe and internationally. The Norwegian government has said that "*it fulfilled its constitutional duty by compensating for negative effects on the environment in other areas, and that an expansive interpretation of the Constitution's environmental provisions would "change the relationship between state powers in a fundamental manner," and potentially erode democracy*".⁹¹ This case has been heard during the month of November of 2020 and it is impossible to determine the outcome of the case due to its uniqueness.

In addition to the European judicial system, the African Court also upheld the right to enjoy the best attainable state of physical and mental health, and thus the right to a generally satisfactory environment.⁹² Both these obligations tie together the enjoyment of human rights and the right to a safe and sustainable environment.⁹³ Further case law also illustrates these articles in practice such as the *Ogiek case*.⁹⁴ In this case, the African Court on Human and Peoples' Rights has ruled that the Kenyan government violated the rights of the Mau Ogiek people by evicting them from their ancestral land in the Mau Forest complex, violating their right to food under the right to natural resources and their right to land. The African Court has already been linking human rights and environmental conservation by recognising indigenous tribes' right to their ancestral land. Yet, there is no direct mention of protecting children or future generations further, as protecting the citizens today will enable the State to protect them later.

⁹⁰ Article 112 of the Norwegian Constitution

⁹¹ NY Times, Henrik Pryser Libell and Isabella Kwai, November 5th 2020, accessed at <https://www.nytimes.com/2020/11/05/world/europe/norway-supreme-court-climate-change.html>

⁹² Article 16 and 24 of the African Charter of Human Rights

⁹³ Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), available at: <https://www.refworld.org/docid/3ae6b3630.html> [accessed 16 February 2020]

⁹⁴ African Commission on Human and Peoples' Rights v. Republic of Kenya, ACtHPR, Application No. 006/2012 (2017)

Moreover, the Inter-American Court of Human Rights also upholds the right to a healthy environment. At the request of Colombia, the Inter-American Court of Human Rights (IACtHR) issued an advisory opinion regarding the environmental obligations of states that comprise the Inter-American Human Rights System.⁹⁵ The IACtHR held that the right to a healthy environment is a fundamental human right, elevating the protection of the environment at a higher legal threshold. The advisory opinion also details the states obligations when they have caused or may cause environmental harm. This ties in well with the precautionary approach as the state can also be held liable for environment damage which it might commit through omissions or poor governmental decisions. Moreover, the IACHR also concluded that the deaths and diseases allegedly caused by environmental contamination could constitute violations of the rights to life and personal integrity.⁹⁶

3. *Children's rights and preservation of forests*

Environmental harm causes the death of over 1 million children every year, most under the age of 5 years old.⁹⁷ Yet, states have heightened their obligations to take “*effective substantive measures to protect children from environmental harm*” but still seemingly fail to protect the children.⁹⁸ It is however their legal obligation as a state to care and protect their vulnerable citizens from harm. States have indeed international and regional human rights obligations which they have willingly incorporated in their own judicial and legal system. It is important to note that the meaning of the “environment” in a children’s rights context encompasses where a child lives (including living conditions, housing and community spaces), the natural world, which includes plants, animals and people and the duty of current populations to consider the rights of “future generations” when exploiting natural resources and causing environmental damage.

⁹⁵ 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-23/18, Inter-Am. Ct. H.R., (ser. A) No. 23 (Nov. 15, 2017), available at http://www.corteidh.or.cr/docs/opiniones/seriea_23_esp.pdf(in Spanish)

⁹⁶ La Oroya Community v. Perú (2009) Report No. 76/09, Petition 1473-06, August 5, 2009;

⁹⁷ A/HRC/37/58, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment p.9

⁹⁸ A/HRC/37/58, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment p.19

Article 24 of the UN Convention on the Rights of the Child of 1989 mentions the obligations of “*States Parties [to] recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health*” requiring states to take into account the risk environmental damage as well as pollution in the realization of their right to the highest standards of health. The status of children's environmental health is intricately linked to other rights such as food, water, sanitation, adequate housing, and education, which are all codependent on the preservation of both the environment and biodiversity. The climate crisis will deeply affect those natural and human rights, having even more dire consequences on children as deforestation will result in poor air quality and poor agriculture hindering the children's right to health.

A specific mention to children is made in Article 16 of Protocol of San Salvador stating that “*every child, whatever his parentage, has the right to the protection that his status as a minor requires from his family, society and the State*”. This creates specific and strict legal obligations as the States party to the Convention needs to ensure the children's protection. The right to protection encompasses the right to a healthy environment as without it, ensuring the protection of a child becomes rickety as they are more vulnerable to diseases caused by climate degradation.

Children are entitled to legal protection and have strong legal standing due to their vulnerability. According to the Communication to the Committee on the Rights of the Child,⁹⁹ sixteen children presented the argument that 5 States are in breach of their obligation under Article 5 of the Third Optional Protocol to the United Nations Convention on the Rights of the Child.¹⁰⁰ The children claim that the respondents “*have failed to take necessary preventive and precautionary measures to respect, protect, and fulfill the petitioners' rights to life (Article 6), health (Article 24), and culture (Article 30) and are thus violating the Convention*”. The plaintiffs drew attention to the direct effect that human activities, and *inter alia* deforestation, have on contributing to global warming (para 1) and how vulnerable children

⁹⁹ Communication to the Committee on the Rights of the Child (23rd September 2019)

¹⁰⁰ Ibid, paragraph 24 (p.5)

are in light of these “*life-threatening impacts*”.¹⁰¹ The children claim that “*each of the respondents has contributed to causing the climate crisis through their past emissions*”,¹⁰² shifting the responsibility on the State for their omission to prevent environmental harm.

Furthermore, the children mention climate science in their legal argumentation by stating that global warming is a consequence of the destruction of natural carbon sinks and that human activities like deforestation, agriculture, and urbanization can turn carbon sinks into carbon sources, producing a quarter of all emissions.¹⁰³ There is also a strict duty to prevent foreseeable human rights harm as a result of climate change by “*reducing emissions at the highest possible ambition as it is the only way the respondents and other states can pursue efforts to prevent the domestic and transboundary human rights harms caused by climate change. [Moreover] State’s should promot[e] renewable energy and address emissions from the land sector, including by combating deforestation*”.¹⁰⁴ The States consequently have a legal duty and obligation to combat deforestation and thus reduce greenhouse gases emissions to protect children from environmental harm and climate change. If States fail to do so, they will be in clear breach of both their human and children’s rights obligations.

Another case which should be noted is *Minors Oposa v. Secretary of the Department of Environmental and Natural Resources*.¹⁰⁵ A group of children brought this lawsuit in conjunction with the Philippine Ecological Network, Inc. to stop the deforestation of their rainforests in the Philippines. The plaintiff (children) based their claims in the 1987 Constitution of the Philippines, which recognises the right of people to a “*balanced and healthful ecology*” and the right to “*self-preservation and self-perpetuation*”.¹⁰⁶ Oposa also raised the idea of “*intergenerational equity*” before the court, which is the idea that natural resources belong to people of all ages. The Supreme Court ruled in favor of the children, and made several powerful statements, finding that there is a constitutional right to a clean

¹⁰¹ Ibid, paragraph 3 (p.1)

¹⁰² Ibid, paragraph 5 (p.2)

¹⁰³ Ibid, paragraph 62 (p.14)

¹⁰⁴ Ibid, Para 182 (p.50)

¹⁰⁵ Supreme Court of the Philippines, 33 ILM 173 (1994) 30 July 1993

¹⁰⁶ Section 16, Article II of the Philippines Constitution

environment, to exist from the land, and to provide for future generations are fundamental. The Supreme Court also mentioned that there is an intergenerational responsibility to maintain a clean environment, meaning each generation has a responsibility to the next to preserve that environment, and children may sue to enforce that right on behalf of both their generation and future generations. Lastly, the Supreme Court recognised that the Philippine Constitution requires that the government “*protect and promote the health of the people and instill health consciousness among them.*”¹⁰⁷ (see Section 15, Article II).

IV. CONCLUSION AND SUBMISSIONS

1. How to save the global environment by protecting forests and respect, protect, and fulfill human rights

The environment can be safeguarded through enhanced international cooperation and locally relevant measures. Internationally agreed environmental goals and targets need to be reviewed and renewed based on the best available scientific knowledge and widespread actions of conservation, ecological restoration, and sustainable use, should be followed. There could be a mix of policies and instruments that ensure nature conservation, ecological restoration, sustainable use, production, and management for forest. Often the problem is in economic instruments who favor unsustainable production and consequently promote deforestation, urban sprawl, and wasteful use of water. States could impose trade sanctions against environmentally irresponsible states while the states which govern environmentally sensitive territories can be funded for preserving it in the interest of all mankind. Sustainable policies and regulations are highly needed for those sectors, as they are currently favoring unsustainable economic growth over protecting human rights and the future of children.

¹⁰⁷ Section 15, Article II of the Philippines Constitution

2. Final Submissions on behalf of Norway

- We request that national laws from States sharing forests are harmonized internationally to ensure a higher threshold of protection for forests.
- We urge the legal bodies to consider and include climate science reports in their judgements to scientific spread awareness and increase their legal authority.
- We require that States maintain the Paris Agreement goal to keep temperatures to 1.5 degrees warmer (or less) by combating deforestation to protect and preserve children and future generations.
- We demand that States take all the necessary and precautionary measures to develop and aim towards carbon neutrality (zero net carbon emissions).
- We kindly remind States that there is a clear nexus between climate change and human rights law, and that the dire consequences of climate change will inevitably degrade and hinder human rights globally. It is thus the State's duty to respect, protect, and fulfill their human rights obligations via mitigating the climate crisis to ensure the people's right to a clean and healthy environment. The States have an additional legal duty to protect the health of children and other vulnerable groups from the appalling consequences of climate change by safeguarding forests.