IN THE INTERNATIONAL COURT OF JUSTICE

AT THE PEACE PALACE
THE HAGUE, THE NETHERLANDS
THE ADVISORY OPINION CONCERNING
FUTURE GENERATIONS’ LEGAL INTERESTS IN RELATION TO THE CLIMATE CRISIS

MEMORIAL FOR THE ORGANIZATION OF AMERICAN STATES (OAS)
The 2016 WORLD CONSERVATION CONGRESS MOOT COURT WORKSHOP
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STATEMENT OF JURISDICTION

On January 15, 2016 the General Assembly of the United Nations adopted Resolution A/RES/70/xxx, which requests an advisory opinion from the International Court of Justice (“the Court”) in accordance with Article 65 of the Statute of the International Court of Justice (‘the Statute’). Pursuant to Article 66, paragraph 2, of the Statute, the Court decided that the States entitled to appear before it and the United Nations were able to furnish information on the question through regional intergovernmental organizations. Therefore, the Organization of American States hereby submits its memorial on the question presented.
QUESTION PRESENTED

I. WHAT IS THE RESPONSIBILITY UNDER INTERNATIONAL LAW OF STATES TO ADDRESS THE GLOBAL CLIMATE CRISIS FOR THE BENEFIT OF PRESENT AND FUTURE GENERATIONS OF HUMANKIND?
STATEMENT OF FACTS

Conscious that the development of International Environmental Law is of paramount importance not only to the sustainable development but also to the poverty eradication and social and economic equality, the United Nations General Assembly (UNGA) adopted in September of 2015 the Sustainable Development Goals (SDGs) which establishes a plan of action to the governments, the private sector and the civil society, in a collaborative perspective, aiming to shift the world on to a sustainable and resilient path.

Recognizing that climate change represents a threat to the humankind, the Conference of the Parties for the United Nations Framework Convention on Climate Change adopted in December of 2015 the Paris Agreement which aims to strengthen the global response to climate change.

On the 19th of June of 2015, UNGA decided to develop an international legally binding instrument under the United Nations Convention on the Law of the Sea (UNCLOS) on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction. Thus, the 1st Session of the Preparatory Committee established by UNGA Resolution 69/292 started discussions concerning the aforementioned instrument.

Considering the need to clarify the parameters of the responsibility under international law of States to address the global climate crisis for the benefit of present and future generations of humankind, the UNGA adopted the resolution A/RES/70/xxx requesting the ICJ for an advisory opinion on this matter (“What is the responsibility under international law of States to address the global climate crisis for the benefit of present and future generations of humankind?”).

In accordance to Article 66, paragraph 2, of the Statute of the International Court of Justice (ICJ), the ICJ decided to invoke its right to hear oral arguments, and invited all interested State parties to submit written statements through regional intergovernmental organizations as an efficient way to represent the multiplicity of State interests in the proceedings.

The Organization of American States thus presents the memorial pursuant Article 49 of the ICJ Rules of Court.
SUMMARY OF ARGUMENTS

Primarily, the Organization of American States (OAS) corroborates that all States must bear in mind their responsibility to protect the environment for future and present generations of humankind, a principle backed by documents such as the United Nations Convention on Law of the Sea, and the Rio and Stockholm declarations, among others.

Under general principles and international instruments on human and environmental rights, the States have the responsibility concerning the environmental crisis and its effects on future and present generations – a commitment that is backed by respecting of the rights of children, and reinforced by the Paris Agreement, as well as within the framework of the 2030 Sustainable Development Goals.

The Pact of San José, just like the Universal Declaration of Human Rights, does not contain references to environmental conservation, however, within the Inter-American system the connection between human and environmental rights is also recognized, and so, the OAS have the responsibility to act upon climate change issues, which is reflected on how the organization’s resolutions reinforce this commitment, bearing in mind that developed and developing countries have common but differentiated responsibilities when addressing the matter, a principle rooted in the United Nations Framework Convention on Climate Change (UNFCCC).

Being affected by the impacts of climate change, the OAS has utmost interest to partake in the efforts towards environmental conservation.
ARGUMENT

I. THE RESPONSIBILITY OF STATES UNDER INTERNATIONAL LAW TO ADDRESS THE GLOBAL CLIMATE CRISIS FOR THE BENEFIT OF PRESENT AND FUTURE GENERATIONS OF HUMANKIND

State responsibility is a principle of paramount importance in International Law. It establishes that when a State commits an internationally wrongful act that generates consequences in another State the perpetrator State is accountable for its actions, as international responsibility is established amongst them\(^1\). Those acts are normally derived from breaches in customary international law or treaties.

In the field of international environmental law specific limitations in exploitative activities that may cause harm to other States are sometimes unclear and subject to regional practice. The Declaration of the United Nations Conference on the Human Environment, held in Stockholm in 1972, provides in its Principle 21 that States do have the right to exploit their resources and to establish their own environmental law, but have to assure that no damage is caused to other States or to areas beyond national jurisdictions. This right, despite being conceived as a soft-law instrument has been widely accepted by the international community, thus becoming a norm of customary international environmental law. As writes Sands about Principle 21 reaffirmed by Principle 2(a) of the Rio Declaration: “[...] a document adopted by consensus by 176 states, arguably reflects an ‘instant’ change in the rule of customary international law which is widely considered to be set forth in Principle 21”\(^2\). And the Principle was later stated in an arbitral award in the Trail Smelter case between the United States of America and Canada\(^3\), in 1941 and later recognized in Principle 21. Principle 21 is reiterated by Principle 2 of the Rio Declaration on Environment and Development from 1992. Recently, the International Court of Justice dealt with the matter of transboundary pollution in the Pulp Mills on the River Uruguay case, between Argentina and Uruguay, in 2010\(^4\), in

\(^3\) Pulp Mills on the river Uruguay (Argentina v. Uruguay), 2010.
\(^4\) Trail smelter case (USA v. Canada), 1941.
which Argentina despite being unsuccessful in their claims, argued that the pulp mills represented potential transboundary damage to argentinian territory.

Article 139 of the United Nations Convention on the Law of the Sea (UNCLOS) provides that States must ensure that activities are developed in conformity otherwise entailing liability, those activities being carried out by the States themselves, enterprises or natural or juridical persons that possess that State’s nationality or is controlled by their nationals. Article 139 was recently cited by the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea, further elaborating on the responsibilities of sponsoring States. UNCLOS also provides in its article 235 that States are to be considered liable in accordance with international law, being responsible for the fulfilment of their obligations regarding the preservation and protection of the marine environment. The article seeks to establish adequate compensation for damage caused by pollution of the marine environment.

Notably the Trail smelter case, an arbitration settled in 1941 between Canada and the United States of America, sets precedent towards the understanding that even if the activity that causes damage is conducted by a private party a State will not be excused from its obligations and responsibilities by allowing a private party to take control of said activity. Therefore “due diligence” is a concept of extreme importance when considering the activities of enterprises in relation to the countries from which these enterprises operate. As Kiss writes:

The duty to avoid transfrontier pollution requires each state to exercise “due diligence,” which means to act reasonably and in good faith and to regulate public and private activities subject to its jurisdiction or control that are potentially harmful to any part of the environment. The principle does not impose an absolute duty to prevent all harm, but rather requires each state to prohibit those activities known to cause significant harm to the environment, such as the dumping of toxic waste into an international lake, and to mitigate harm from lawful activities that may harm the environment, by imposing limits, for example, on the discharges of pollutants into the atmosphere or shared watercourses.

5 SEABED DISPUTES CHAMBER OF THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA. Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area. Advisory Opinion (2011)
6 Trail smelter case (USA v. Canada), 1941
It is therefore clear that compliance with international environmental law is a goal to be pursued, since non-compliance bears great responsibility and risks to the State and also to the international community. State responsibility can be applied to the enormous impact caused by State’s industries that contribute to climate change. It is a danger to the whole world and the same standards of liability should be held. Actions that contribute to climate crisis or even lack of action towards preventing it represent a threat to the world and should, therefore, be considered as part of the aforementioned Principles. It is also stated in the Stockholm Declaration in its Principle 22 that States are to work in order to improve international law aimed at compensating victims of environmental damage.

In the advisory opinion handed by the Court in 1996 by request of the General Assembly of the United Nations about the Legality of the Threat or Use of Nuclear Weapons, considerations were made concerning the safeguarding and protection of the environment and the environment being seen as an element that should be taken into consideration regarding the law applicable in armed conflict.

It was argued by some States that the use of nuclear weapons would be unlawful at any time because the inherently harmful nature of the weapons would breach the norms concerning environmental protection by itself. Namely, the Additional Protocol I of 1977 to the Geneva Conventions of 1949, Article 35, paragraph 3, establishes the prohibition of “methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment”. The Convention of 18 May 1977 on the Prohibition of Military Techniques or Any Other Hostile Use of Environmental Modification Techniques, Stockholm Declaration of 1972 and the Rio Declaration of 1992 were cited to the same effect, referencing transboundary damages and arguing that such norms should apply in times of peace or war.

Even though the Court said the issue at stake was if there was an obligation of total restraint during a military conflict and not if those treaties applied during armed conflict, the Court recognized that indeed those obligations regarding the respect for the environment are “now part of the corpus of international law relating to the environment”. The Court states that whilst there is no specific prohibition for the use of nuclear weapons the environment must always be taken into account when analyzing the norms applicable to armed conflict.

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Finally, taking cognizance of these developments, the International Court of Justice recognized in an advisory opinion that “[t]he existence of the general obligation of states to ensure that activities within their jurisdiction and control respect the environment of other states or of areas beyond national control is now part of the corpus of international law relating to the environment.”  

A nuclear weapon has specific characteristics that differ from any other weapon used in warfare, due to its extreme nature and the well known long lasting consequences from radiation, since it deeply harms ecosystems, food supplies and is able to cause genetic defects in future generations. Its use cannot be overlooked. Taking the rights of the future generations and the protection of the environment into account means to recognize that the use of nuclear weapons poses a threat not only to the mankind but to the planet itself.

Therefore, all States must bear in mind their responsibility to protect the environment for both the present and future generations, taking in consideration the International Court of Justice opinion on the States' obligation to avoid any hazardous activity such as the use of nuclear weapons.

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9 *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 ICJ 241–42, para. 29*
II. THE STATES HAVE THE RESPONSIBILITY TO ATTEND TO THE GLOBAL CLIMATE CRISIS UNDER THE GENERAL PRINCIPLES AND INTERNATIONAL INSTRUMENTS ON HUMAN AND ENVIRONMENTAL RIGHTS

A. HUMAN RIGHTS, THE 1972 STOCKHOLM DECLARATION, AND THE INTERNATIONAL RIGHT TO A CLEAN ENVIRONMENT

It is of common knowledge that human rights have long been discussed and held as one of the main interests of the international community, especially after the Second World War. Being so, human rights have been progressing and expanding over the years. Certainly, a dissonant circumstance is the case of environmental rights – that only in the recent 1960’s began to develop and consolidate – with a major turning point in 1972 with the United Nations Conference on the Human Environment, held in Stockholm.

Having this timeline in mind, the vast majority of human rights treaties were written before environmental rights and change became an international issue and focus point, and so, it is understandable that the fundamental Universal Declaration of Human Rights does not even mention the environment or climate change once. However, it was only natural to link the two: environmental law is not only a new set of rights and obligations in itself, but also part of the human rights system; the human right to a healthy environment.

For example, in 1966, the International Covenant on Economic, Social, and Cultural Rights, in its Article 12, as one of the means to guarantee physical and mental health, considers the improvement of the “environmental and industrial hygiene” to be necessary (12 (2)(b)). Regarding this matter, the Committee on Economic, Social, and Cultural Rights, in its General Comment no. 14, addressing the Right to the Highest Attainable Standard of Health contained in Article 12, acknowledges that “the right to health embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life,

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10 UNGA Resolution 2398 (XXIII Session) (1968). In this resolution, titled “Problems of the human environment,” a concern “about the consequent effects on the condition of man, his physical, mental and social well-being, his dignity and his enjoyment of basic human rights” was expressly demonstrated in regards to environmental change. Also, in this resolution, the parties agreed that “increased attention to the problems of the human environment is essential for sound economic and social development,” and determined that they were to "to convene in 1972 a United Nations Conference on the Human Environment," which resulted in the iconic Stockholm Declaration.


12 Contained in Document E/C.12/2000/4
and extends to the underlying determinants of health, such as […] a healthy environment.”\textsuperscript{13} The Comment clearly associates human and environmental rights in co-dependency.

Such correlation can also be found in the 1989 Convention on the Rights of the Child,\textsuperscript{14} in Article 24(c), connecting primary health care with the provision of clean drinking-water and takes into consideration the risks and dangers of environmental pollution.\textsuperscript{15}

However, the direct link between the environment and the right to life was made for the first time during the United Nations Conference on the Human Environment, in 1972,\textsuperscript{16} precisely in the preamble’s Paragraph 1 and Principle 1 of the Stockholm Declaration.\textsuperscript{17}

During the drafting, more than a dozen countries proposed that the initial principle of the convention should begin “with a general affirmation of every human being’s right to a safe or wholesome environment, arguing that it was implicit in the right to an adequate standard of living recognized in Art. 25 (1)”\textsuperscript{18} of the Universal Declaration of Human Rights.

However, this was rejected and the final text adopted for Principle 1 was the one submitted by a group of developing countries, with a different tone, securing not only the right to an “environment of a quality that permits a life of dignity and well-being,” but also including the determination that “colonial and other forms of oppression and foreign domination stand condemned”\textsuperscript{19} – bringing about prominent human rights issues in 1972 such as the aforementioned problem of colonialism, but also racial discrimination, and the apartheid. Thus, this first principle upholds fundamental human rights such as liberty, equality, and adequate conditions of life\textsuperscript{20} in the previously mentioned “environment of a quality that permits a life of dignity and well-being.” Principle 1 is momentous in the sense

\textsuperscript{13} UN Committee on Economic, Social and Cultural Rights. General Comment No. 14 (11 August 2000).
\textsuperscript{14} General Assembly resolution 44/25
\textsuperscript{17} Declaration of the United Nations Conference on the Human Environment (1972).
that it was the first statement of the association between environmental conservation and human rights, “a matter of considerable jurisprudence in the subsequent three decades.”

Furthermore, Principle 2 asserts that the environment should be preserved for present and future generations. In that sense, Principle 3 determines that the capacity for human resources to renew themselves should be maintained and that the non-renewable ones should be guarded against exhaustion. The Declaration’s Principles also address the need to preserve wildlife and its habitat, and the cessation of the production of toxic wastes that cannot be absorbed by nature, as well as the prevention of marine pollution.

B. INTERGENERATIONAL RESPONSIBILITY AND PUBLIC PARTICIPATION

In fact, the OAS would like to highlight the importance of the aforementioned Principle 2 to the matter addressed in the present document. Said principle states that mankind “bears a solemn responsibility to protect and improve the environment for present and future generations” for basic human rights can only be fully experienced in an “environment of a quality that permits a life of dignity and well-being,” an understanding confirmed in the Preamble, in its Paragraph 1, which determines that “both aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights the right to life itself.”

Perhaps, more than directly linking environmental issues with human rights, the key idea of this Principle has to do with the intergenerational responsibility to protect and improve the environment. It is a responsibility of the peoples and governments of the world (as pointed out by Paragraph 2), but bearing in mind that the consequences of any harm done to the environment in the present will be suffered mainly in the future to come.

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21 Op cit.
This same idea is replicated in several other international instruments of human and environmental soft-law, such as the Rio Declaration on Environment and Development, the Proclamation of Teheran, and also, from the Convention on the Rights of the Child, deriving from the notion of Intergenerational Equity, a principle of international justice. As rationalized by Professors Kiss and Shelton:

“(…) humans who are alive today have a special obligation as custodians or trustees of the planet to maintain its integrity to ensure the survival of the human species. Those living have received a heritage from their forbearers in which they have beneficial rights of use that are limited by the interests and needs of future generations.”

The Rio Declaration of 1992, in Principle 3, states that human development must meet the environmental needs of the present without compromising future generations - a commitment reiterated recently in the Paris Agreement. Moreover, the Convention on the Rights of the Child, State Parties agree that a child’s education must be directed to develop a respect to the natural environment. Such provisions clearly demonstrate the necessity and intent of the international community to include and reach out to the successors of our global natural environment to understand that it is their right and responsibility to protect it.

In fact, it is important to address Principle 3 of the Rio Declaration – the principle of sustainable development. As explained by Sands:

The term ‘sustainable development’ is generally considered to have been coined by the 1987 Brundtland Report, which defined it as ‘development that meets the needs of the present without compromising the ability of future generations to meet their own needs’. It contains within it two concepts:

1. the concept of ‘needs’, in particular the essential needs of the world’s poor, to which overriding priority should be given; and

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2. the idea of limitations imposed, by the state of technology and social organisation, on the environment’s ability to meet present and future needs.\(^{30}\)

Bearing in mind the concern in balancing the needs of both generations - both present and future - the 2030 Agenda for Sustainable Development was recently adopted. It contains seven Sustainable Development Goals (SDGs) that are directly connected to environmental protection and rights, namely: Clean Water and Sanitation; Affordable and Clean Energy; Sustainable Cities and Communities; Responsible Consumption and Production; Climate Action; (Protection and Conservation of) Life Below Water; (Protection and Conservation of) Life on Land. Climate change was one of the core focuses of the SDGs, which encourage the engagement of governments, the private sector, and civil society to fulfill them by 2030.\(^{31}\)

These goals will undoubtedly protect the environment for generations to come if they are indeed fulfilled. However, the path for States to achieve them passes directly through solving current problems faced by would populations, i.e., the lack of clean supplies of water and sanitation. The only way to secure that to future generations is to start by finding out solutions towards the goals by guaranteeing that people's needs are gradually being met in the present.

This responsibility to protect different generations brings about the notion of public participation and how it becomes indispensable, so those affected can be heard on matters that shape the environmental future, i.e., how the Teheran Proclamation recognizes that it “is imperative that youth participate in shaping the future of mankind,”\(^{32}\) for instance. The World Charter on Nature also openly denotes the right of access to information and to participate in environmental decision-making, also guaranteed in the Rio Declaration, Principle 10.\(^{33}\) It is only through information that present generations can engage in public participation, and it is only through public participation that world generations can have a say in the kind of environment they want to live in or inherit.

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\(^{32}\) Proclamation of Teheran, Final Act of the International Conference on Human Rights (1968).

The Aarhus Convention, although regional (Europe - UNCEC) is perhaps the most across-the-board international agreement on public participation. It incorporates Principle 1 of the Stockholm Declaration, and the preamble declares that “every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations.” Furthermore, that rights and responsibilities depend on the access of citizens to information and participation in decision-making processes, and access to justice, which is reinforced in Article 1 as the Convention’s objective. It is crucial to note that Article 19 allows any other state to accede to the Convention, as long as it is a UN member and has approval from the Meeting of the parties, and so, it can be more than an example – States around the globe can accept its terms.  

III. THE ORGANIZATION OF AMERICAN STATES (OAS) HAS A RESPONSIBILITY TO ADDRESS THE GLOBAL CLIMATE CRISIS UNDER THE ORGANIZATION OF AMERICAN STATES LEGAL INSTRUMENTS

Just like the Universal Declaration of Human Rights, the American Convention of Human Rights, or Pact of San José, the foundational instrument for the OAS, does not contain references to environmental conservation.

It does, however, contain several human rights that, as previously elucidated, do maintain a relationship with environmental rights and protection, e.g. the right to life, found in Article 4, and the right to humane treatment, found in Article 5(1) – in which the Convention guarantees that “every person has the right to have his physical, mental, and moral integrity respected.”

Within the Inter-American system, one can also find an unequivocal provision concerning the environment. Article 11 of the San Salvador Protocol establishes that “State Parties shall promote the protection, preservation, and improvement of the environment.”

However, the violation of Article 11 cannot be presented to the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights, through the system of individual petitions. Although Article 19(7) of the abovementioned Convention allows the Inter-American Commission on Human Rights to formulate observations and recommendations concerning any of the economic, social and cultural rights established in the Protocol, Article 19(6) only allows cases regarding education and union rights to be admitted to the Court and Commission via individual petitions.

A. THE RESOLUTIONS OF THE ORGANIZATION OF THE AMERICAN STATES REINFORCE THE COMMITMENT TO PROTECT AND PRESERVE THE ENVIRONMENT

Mindful that economic and social development as well as environmental protection are included in the OAS main pillars of human rights and development, and bearing in mind that climate change poses a serious threat to both of them, the OAS adopted a series of Resolutions which demonstrates the OAS commitment to mitigate the negative impacts of climate change especially the socio-economic and environmental consequences on the countries of the Hemisphere and the world, for instance, Resolution AG/RES. 1674 (XXIX-O/99) “Climate Change in the Americas”, Resolution AG/RES. 1682 (XXIX-O/99), “OAS Natural Disaster Reduction and Response Mechanisms”, Resolution AG/RES. 1736 (XXX-O/00), “The Socioeconomic and Environmental Impacts of Climate Change on the Countries of the Hemisphere”, Resolution AG/RES. 1821 (XXXI-O/01), “The Socioeconomic and Environmental Impacts of Climate Change on the Countries of the Hemisphere,” resolutions AG/RES. 1819 (XXXI-O/01), “Human Rights and the Environment,” and AG/RES. 1896 (XXXII-O/02) and AG/RES. 1926 (XXXIII-O/03), “Human Rights and the Environment in the America”.

Resolution 2429 on Human Rights and Climate Change in the Americas, adopted on June 3, 2008, firstly reaffirmed the commitment of all the OAS State-parties to all of the instruments concerning human rights, sustainable development and climate change in the framework of the OAS and eventually stimulated the coordination among the Inter-American Commission on Human Rights (IACHR), the General Secretariat of the OAS and both the United Nations Human Rights Council and the Office of the United Nations High Commissioner for Human Rights, in consultation with the member states, the Intergovernmental Panel on Climate Change (IPCC) and civil society organizations in order to determine the possible existence of a link between adverse effects of climate change and the full enjoyment of human rights.

The OAS understands that coordination among States and institutions is a indispensable mean to face climate change, and that climate change is potentially harmful to the enjoyment of human rights in a global scale.

B. THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS RECOGNIZES THE CONNECTION BETWEEN HUMAN AND ENVIRONMENTAL RIGHTS
Despite the restraint imposed by Article 19 of American Convention of Human Rights, the Commission has positioned itself against violations, in conformity with the resolutions, and the documents produced by it illustrate how the OAS system is engaged in protecting environmental rights and following the trend to link them to human rights.

In Yanomami v. Brazil,$^{40}$ in response to a petition made on behalf of the Yanomami indians, the Inter-American Commission recognized the connection between environmental quality and the right to life.$^{41}$

The petition alleged that the government violated the American Declaration of the Rights and Duties of Man by constructing a highway through Yanomami territory and authorizing exploitation of the territory’s resources. These actions had generated the influx of non-indigenous peoples who brought contagious diseases that remained untreated due to lack of medical care. The Commission found that the government had violated the Yanomami rights to life, liberty, and personal security guaranteed by Art. 1 of the Declaration, as well as the right of residence and movement (Art. VIII), and the right to the preservation of health and well-being (Art. XI).$^{42}$

The Commission also acts by elaborating reports and trying to solve conflicts before they are recommended to the Inter-American Court, such as the Yakye-Axa v. Paraguay case$^{43}$ and Sawhoyamaxa v. Paraguay.

A noteworthy document by the Commission is the Report on the Situation of Human Rights in Ecuador. In it, a relationship between a healthy environment and the American Convention on Human Rights, as stated:

> The realization of the right to life, and to physical security and integrity is necessarily related to and in some ways dependent upon one's physical environment. Accordingly, where environmental contamination and degradation pose a persistent threat to human life and health, the foregoing rights are implicated.$^{44}$


$^{42}$ Op cit.

$^{43}$ The case ultimately ended up going to the Court after Paraguay’s response to the Commission’s recommendations.

By doing so, the Commission linked these rights to Article 1(1) of the American Convention on Human Rights, creating a certain degree of enforceability to the right to a healthy environment, when associating it with an obligation pertinent to rights contained in the American Convention.

Therefore, although the right to respond to violations is somewhat restrained when it comes to the litigative function, conversely, there is no limitation to the interpretative function of the institutions, that cannot shy away from any treaty abuses, if requested. So, there is an effort and will to react to violations, even within the legal limitations imposed by the Convention.

It is important to point out that if environmental rights are indeed considered a human right, as extensively demonstrated throughout this memorial, then a violation could be submitted to the Court, but then as a transgression of the American Declaration of Human Rights, in the form of its Article 63(1). Hence, an understanding of the structure of the Organization of the American States is imperative.

C. STRUCTURE OF THE ORGANIZATION OF AMERICAN STATES

The Organization of American States (OAS) is considered the oldest regional organism in the world, its origins date back to the First International Conference of American States, held in Washington D.C, in 1890. The Conference resulted in the creation of the International Union of American Republics, starting what was later known as the “inter American system”, the oldest international institutional system.45

After the First International Conference of American States, numerous other conferences were held until the creation of the OAS. 46 Then after World War II, the Ninth Conference was held in Bogotá in 1948, where the Charter of the Organization of American States was signed, officially creating the OAS.47

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45 Organization of American States. Who We Are. Available at: <http://www.oas.org/en/about/who_we_are.asp.  
47 OAS Member States: Antigua and Barbuda, Argentina, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Saint Kitts and Nevis, Saint
The Charter of the Organization of American States came into effect on December 13, 1951 and it has been amended in four different occasions. The first amendment was the Protocol of Buenos Aires (1967), the second was the Protocol of Cartagena (1985), the third was the Protocol of Washington (1992) and, finally, the fourth was the Protocol of Managua (1993).

As of today, the 35 independent States of the Americas have ratified the OAS Charter being the main international organization in the Americas and one of the most important in the world. The OAS’ main pillars are democracy, human rights, security, and development.

The Organization of American State’s structure is composed by the General Assembly, the Meeting of Consultation of Ministers of Foreign Affairs, the Councils, the Inter-American Juridical Committee, the Inter-American Commission on Human Rights, the General Secretariat, the specialized conferences and the specialized organizations.

The Inter-American Commission on Human Rights is an autonomous organ of the OAS whose main goal is to promote and protect human rights, also serving as a consultative organ of the Organization in the matter of human rights. Together with the Inter-American Court of Human Rights it is competent on matters of human rights, not only those present in the American Convention on Human Rights but also in all of the inter-american treaties concerning human rights.

The Inter-American Court of Human Rights holds a consultative competence, interpreting the norms brought by the Inter-American Convention on Human Rights or any other inter-american treaty concerning human rights, and it also holds competence on

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48 On June 3, 2009, the Ministers of Foreign Affairs of the Americas adopted resolution AG/RES. 2438 (XXXIC-O/09), that resolves that the 1962 resolution, which excluded the Government of Cuba from its participation in the inter-American system, ceases to have effect in the Organization of American States (OAS). The 2009 resolution states that the participation of the Republic of Cuba in the OAS will be the result of a process of dialogue initiated at the request of the Government of Cuba, and in accordance with the practices, purposes, and principles of the OAS.


contentious cases, acting when treaties are violated by a member State that recognizes the Court’s competence (Argentina, Brazil, Chile, Mexico and others).  

Regarding the contentious cases, only member States and the Inter-American Commission on Human Rights can make submissions to the Court. Differently, the Commission admits that citizens can access the system directly, the same understanding used by the European system of human rights, applying the *jus standi* principle. The Court is an organ of the OAS, but an autonomous one; an important organ of the inter-american system for the protection of human rights.

Therefore it is important to clarify that OAS’ interest in climate change and the environment is not diminished in any way. We seek to demonstrate our concern with environmental matters and our efforts in maintaining the Americas in a constant search for sustainable development.

**D. DEVELOPED AND DEVELOPING COUNTRIES HAVE COMMON BUT DIFFERENTIATED RESPONSIBILITIES WHEN ADDRESSING CLIMATE CHANGE**

The concept of Common but Differentiated Responsibilities and Respective Capabilities was first established as a principle in the 1992 United Nations Framework Convention on Climate Change (UNFCCC), in its Preamble, and Articles 3(1) and 4(1). It was then formulated as Principle 7 of the Rio Declaration – also in 1992. As Sands writes:

> The principle of common but differentiated responsibility has developed from the application of equity in general international law, and the recognition that the special needs of developing countries must be taken into account in the development, application and interpretation of rules of international environmental law.  

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Therefore, the abovementioned Principle 7 of the Rio Declaration recognizes the importance of state cooperation and global partnership in order to protect and restore the environment, but it does, however, bring about the notion previously contained in the UNFCCC (1992), stating that “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.”

This is also replicated in Principle 12 of the Declaration of the United Nations Conference on the Human Environment, considering that the resources made available to preserve and improve the environment should take into account the circumstances and particular requirements of developing countries, as well as in the Kyoto Protocol, Article 10. Additionally, Montreal Protocol’s Article 5 also differentiates the responsibilities of states to take measures against the depletion of the Ozone layer, giving special situation to developing countries.

Despite the fact that the principle of common but differentiated responsibilities was a point of contention during the negotiations of the 2015 Paris Agreement, which aims to reduce annual emissions of greenhouse gases by 2020, it was also contemplated in Article 4:

3. Each Party’s successive nationally determined contribution will represent a progression beyond the Party’s then current nationally determined contribution and reflect its highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances. 4. Developed country Parties should continue taking the lead by undertaking economy-wide absolute emission reduction targets. Developing country Parties should continue enhancing their mitigation efforts, and are encouraged to move over time towards economy-wide emission reduction or limitation targets in the light of different national circumstances.

This principle is built on two basic assumptions. Firstly, it acknowledges the environment as a common heritage of humankind, which leads to the conclusion that all the States bear the responsibility of protecting and preserving it. And secondly, that there are some countries that have used up a greater amount of resources in the course of its own development process and thus, bear greater responsibility towards the restoration of damages historically caused to the environment. This conception is corroborated by Phillip Sands, who also recognizes:

Since climate change is acknowledged by the United Nations Framework Convention on Climate Change as common concern of humankind, the principle of common but differentiated responsibilities applies thoroughly to this matter. Hence, the Court is called to differentiate each country's obligations according to its usage of shared natural resources and its ability to respond to environmental problems.

Considering that the OAS is mainly composed of developing States, yet also includes developed ones, the Court is called to weigh each States’ ability to contribute to the environment while determining their responsibilities. However, the OAS makes an appeal to this Court to take this decision bearing in mind not only the aforementioned treaties, but also the various contexts in which countries might be categorized in, taking into account their level of development, in order to fairly determine the duties of each country.

Aware that this principle can be inconclusive in regarding the criteria that should be adopted by the Court in determining each country's duties, we would like to recall the 1974 Charter of Economic Rights and Duties of States in order to clarify this issue. The Charter provides in Article 30 that:

“(...)All States shall endeavour to establish their own environment and development policies in conformity with such responsibility. The environmental policies of all States should enhance and not adversely affect the present and future development potential of developing countries.”

Therefore, the Court should take into consideration the developing countries special circumstances and should evaluate the social cost of the duties posed on them, so that binding environmental policies do not deepen their social vulnerability instead. The Court should take account of each country economic capability, its historical contribution to environmental problems and its need of economic development.

Hence, the ICJ can establish specific commitments for developed states, by setting a range of different targets to be fulfilled by each state or even by granting developing states
with a longer fulfillment time frame, as for instance, was done in the Montreal Protocol, Article 5 (1):

Article 5: Special situation of developing countries.1. Any Party that is a developing country and whose annual calculated level of consumption of the controlled substances in Annex A is less than 0.3 kilograms per capita on the date of the entry into force of the Protocol for it, or any time thereafter until 1 January 1999, shall, in order to meet its basic domestic needs, be entitled to delay for ten years its compliance with the control measures set out in Articles 2A to 2E, provided that any further amendments to the adjustments or Amendment adopted at the Second Meeting of the Parties in London, 29 June 1990, shall apply to the Parties operating under this paragraph after the review provided for in paragraph 8 of this Article has taken place and shall be based on the conclusions of that review.

Or else, the ICJ could follow the pioneering instrument of climate financing contemplated in the 2015 Paris Agreement. Through this system, developed countries transfer financial resources to developing countries in order to assist them in the establishing of policies that aim to avoid adverse impacts of climate change and to foster climate resilience and low greenhouse gas emissions development. According to Professor Christina Voigt and Felipe Ferreira:

(...) this represents a considerable change to previous practice under the Convention, where developing countries simply had no formal role in climate finance or in supporting other countries or in being recognized for doing so. (VOIGT; FERREIRA, 2016, p. 70)

(...) Differentiation under the Paris Agreement has the potential to function as a catalyst for a race to the top on climate action, rather than merely a burden-sharing concept. (VOIGT; FERREIRA, 2016, p. 74)

A group of scholars and experts on international law released on March 30, 2015, a set of Principles named the Oslo Principles on Global Climate Change Obligations in which they work towards the goal of establishing clear criteria for States in order to face the threat of the climate crisis. These Principles follow the aforementioned concept of common but differentiated responsibilities by stating that least developed countries do not have the legal obligation to lower their greenhouse gas emissions at their own expense. The innovative approach taken by the Oslo Principles in dealing with the climate crisis creates a path to be followed by future legal experts, States, and enterprises, for the basic means to accomplish the obligations related to greenhouse gas emissions are set.

Oslo Principles on Global Climate Change Obligations. King’s College London. (2015)
Therefore, the ICJ should engage with the aforementioned instruments in order to implement the principle of common but differentiated responsibilities.

IV. CLIMATE CHANGE EFFECTS IN OAS STATE PARTIES REINFORCE THE ORGANIZATION'S COMMITMENT TO PROTECT AND PRESERVE THE ENVIRONMENT

Numerous reasons surface when the question “Why should we act?” is asked. The climate crisis represents a major threat to humankind, the slightest increase in global average temperatures is capable of causing huge effects on the planet. From COP21, in Paris, came the promise to guarantee that the world’s average temperature would not rise more than 1.5ºC, considering pre-industrial levels. This commitment is to be pursued by lowering the level of greenhouse gas emissions substantially, and the Paris Agreement recognizes the need for urgency in acting towards that goal. The climate crisis, despite being constantly downplayed, has been showing growing and undeniable effects. Reports show that 2016 is set to be the hottest year on record\(^\text{60}\), demonstrating that we have already reached a temperature 1.3ºC warmer than pre-industrial levels, making the goal to keep it at 1.5ºC even more daunting.

The actual consequences of warmer temperatures are being felt around the world and through different ways. In the Arctic, the levels of sea ice have been decreasing, reaching 14.52 million square kilometers, that number being 1.12 million square kilometers smaller than the average from 1981 to 2010\(^\text{61}\). The ice is expected to grow during wintertime but it has been increasing less from year to year, making it impossible to keep a sustainable yearly growth rate. Besides the Arctic, problems are happening in warmer climates also, unforeseen bleaching events are ravaging coral reefs in the Pacific, the Caribbean, and in other parts of the world. These bleaching events happen when temperatures in the ocean are warmer than usual, the reefs are able to recover but when the events take place too often it makes damages irreversible.


Some OAS member-states are especially affected by these impacts on the global environment, a condition that is even recognized in the Santa Cruz Declaration, e.g., the preambular Paragraph 3, which recognizes the vulnerability of Small Island developing states in the hemisphere,\textsuperscript{62} making the SDG regarding the protection of the marine environment particularly important to these States.

Negligence and environmental violations have been addressed in the Inter-American system’s resolutions and reports, as previously demonstrated, and were not condoned – rather, these behaviors were condemned.

The Poopo Lake was the second largest lake in Bolivia. Throughout the last thirty years the Poopo Lake has shrunk to two percent of its size. According to the Bolivian government, the exacerbation of El Niño's effects due to climate change is to blame. However, scientists agree that the misuse of the lakes water supply and the inadequacy of the state to take action by managing the waste are partially responsible.\textsuperscript{63}

Condemning or trying to figure out solutions to State-members’ environmental issues are not OAS’ only concern. As shown in Paragraph 15 of the Santa Cruz Declaration, OAS is taking action to acknowledge all environmental affairs, while also including indigenous peoples in the dialogue to reach a better understanding and consensus to solve the challenge at hand, demonstrating a clear engagement to public participation.\textsuperscript{64}

Climate change can be felt in various OAS state members, its impact presents itself in countless different ways, and hence, the Organization has an unquestionable interest and willingness to protect the environment, and to submit the present advisory opinion.

\textsuperscript{62} Declaration of Santa Cruz (2006).


\textsuperscript{64} Op Cit.
CONCLUSION

For the foregoing reasons, the Organization of American States respectfully requests that this Honorable Court accepts these considerations as it was previously requested, and takes into account that:

1. States have the responsibility to protect the environment for both the present and future generations according to the international instruments of international law, therefore, the principles contained in the instruments constituting the international system of Environmental Law should be applied in relation to the global response to climate change.

2. State parties of the Organization of American States have the responsibility to address the global climate crisis for the benefit of present and future generations under OAS legal instruments and principles, especially bearing in mind the principle of common but differentiated responsibilities, since most members are developing countries highly vulnerable to environmental impacts.

Respectfully Submitted

Agents for the Organization of American States