THE RIGHT TO A CLEAN ENVIRONMENT AS A JUS COGENS NORM

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ABSTRACT

This paper argues that the right to a clean, healthy, and sustainable environment has attained, or is rapidly crystallizing into, the status of a peremptory norm (jus cogens) under general international law. Drawing on the Vienna Convention on the Law of Treaties (1969), the International Law Commission's Draft Conclusions on Peremptory Norms of General International Law (2022), United Nations General Assembly Resolution 76/300 (2022), and the International Court of Justice's Advisory Opinion on Climate Change Obligations (2024), this paper traces the normative evolution of environmental rights from treaty-based obligations to a hierarchically superior rule of the international legal order. The analysis demonstrates that the right meets the established criteria for jus cogens status: widespread and representative acceptance by the international community, the character of non-derogability grounded in the irreversibility of environmental harm, and an indissoluble link to pre-existing peremptory norms including the right to life and the principle of human dignity. The paper further addresses objections grounded in indeterminacy, jus cogens inflation, and the development-environment tension, and concludes by examining the legal consequences that would flow from formal recognition, including treaty invalidity, erga omnes obligations, and transformative implications for international climate litigation and investor-state arbitration.

Keywords: Jus cogens · peremptory norms · right to a clean environment · climate change · erga omnes · human rights · international environmental law.

I. INTRODUCTION

The international legal order stands at a precipice. Scientific consensus, confirmed by the Intergovernmental Panel on Climate Change, leaves no room for equivocation: anthropogenic interference with the Earth's climate system threatens catastrophic and irreversible harm to human societies and ecosystems alike. Biodiversity loss proceeds at rates unprecedented in human history. Toxic pollution claims millions of lives annually. The cumulative weight of environmental degradation has produced a planetary emergency that challenges the adequacy of existing international legal frameworks.

International environmental law has evolved substantially since the Stockholm Declaration of 1972 proclaimed that the human environment is of critical importance to the well-being of peoples and the economic development of nations. The decades that followed witnessed the proliferation of multilateral environmental agreements, the emergence of the precautionary principle, and the gradual recognition of sustainable development as a foundational concept. Yet these achievements rest on a fragile architecture. Treaty obligations bind only their parties. Customary rules are difficult to establish and contested in their scope. No hierarchical rule of international environmental law exists to override conflicting commitments in trade, investment, or other fields. States may derogate, withdraw, and defect.

This paper argues that this fragility is not inevitable. A body of legal development, jurisprudence, and state practice has accumulated to the point where the right to a clean, healthy, and sustainable environment satisfies the criteria for recognition as a peremptory norm of general international law to jus cogens from which no derogation is permitted. The argument proceeds in six parts. Part II examines the legal framework governing jus cogens, including the criteria established by the Vienna Convention on the Law of Treaties and refined by the International Law Commission. Part III traces the evolution of the right to a clean environment in international law, culminating in the landmark UN General Assembly Resolution 76/300 of 2022 and the ICJ Advisory Opinion on Climate Change of 2024. Part IV constructs the affirmative case for jus cogens status across the recognized criteria. Part V addresses the principal counterarguments. Part VI examines the legal consequences of recognition. Part VII says about the shift from jus cogens aspirations to erga omnes obligation. Part VIII concludes.

The stakes are not merely academic. If the right to a clean environment is recognized as jus cogens, it would occupy the apex of the hierarchy of international legal norms. Treaties

inconsistent with it would be void. All states would bear obligations erga omnes owed to the international community as a whole to prevent and remedy environmental degradation. Climate litigation, currently fragmented across domestic and international fora, would acquire a new legal foundation of the highest order. The argument presented here is that the time for this recognition has come.

II.THE JUS COGENS FRAMEWORK: CRITERIA AND METHODOLOGY

A. The Vienna Convention and the Concept of Peremptory Norms

The concept of jus cogens "compelling law" entered positive international law through Articles 53 and 64 of the Vienna Convention on the Law of Treaties (VCLT), adopted in 1969[1]. Article 53 provides that a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. It defines such a norm as one "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted[2] and which can be modified only by a subsequent norm of general international law having the same character."

The definition is deceptively spare. It tells us the legal consequences of jus cogens treaty voidance, non-derogability without providing a methodology for identifying which norms qualify. The VCLT's drafters were deliberate in this reticence. The International Law Commission's commentary to the draft articles noted that the criteria for identifying peremptory norms were best left to the progressive development of international law rather than codified prematurely.

B. The ILC's 2022 Draft Conclusions

After more than a decade of work, the International Law Commission adopted its Draft Conclusions on Peremptory Norms of General International Law (Jus Cogens) in 2022[3], accompanied by a comprehensive set of commentaries. The Draft Conclusions represent the most authoritative contemporary articulation of jus cogens methodology and merit careful attention.

[1] Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331.
[2] Vienna Convention on the Law of Treaties art. 64, May 23, 1969, 1155 U.N.T.S. 331.
[3] Int'l Law Comm'n, Draft Conclusions on Peremptory Norms of General International Law (Jus Cogens), with Commentaries, U.N. Doc. A/77/10 (2022) [hereinafter ILC Draft Conclusions].

Draft Conclusion 2 defines a peremptory norm as a norm of general international law "from which no derogation is permitted[4] and which can be modified only by a subsequent norm of general international law having the same character." Draft Conclusion 4 addresses the criteria for identification: a peremptory norm must (1) be a norm of general international law; (2) be accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted[5].

Draft Conclusion 7 addresses the material sources from which evidence of acceptance and recognition may be derived. These include treaty provisions, resolutions of international organizations, national legislation, domestic and international judicial decisions[6], and the writings of highly qualified publicists. Critically, Draft Conclusion 4 clarifies that acceptance "by the international community of States as a whole" does not require unanimity. A very large majority suffices, provided that the acceptance is representative across different legal systems, geographies, and levels of development[7].

The ILC's illustrative, non-exhaustive list of established jus cogens norms the prohibition on aggression, slavery, genocide, torture, apartheid, and denial of self-determination reveals a common denominator: each norm protects a value so fundamental to human dignity and international order that no competing interest can justify derogation. This observation is central to the case constructed in Part IV.

C. The Identification Problem and Norm Crystallization

One of the most significant contributions of the ILC's work is its articulation of the process by which new norms attain peremptory status. Draft Conclusion 7 makes clear that jus cogens norms may emerge from customary international law or from general principles, and that the process of crystallization is ongoing. The Draft Conclusions explicitly acknowledge the possibility of norms not yet recognized as jus cogens attaining that status through the accumulation of state practice and opinio juris.

This dynamic conception of jus cogens is essential to the present argument. The claim

[4] ILC Draft Conclusions, supra note 3, Draft Conclusion 2.
[5] ILC Draft Conclusions, supra note 3, Draft Conclusion 4.
[6] ILC Draft Conclusions, supra note 3, Draft Conclusion 7
[7] ILC Draft Conclusions, supra note 3, Draft Conclusion 4.

advanced in this paper is not merely that the right to a clean environment already fully satisfies every criterion without controversy; it is that the weight of evidence places this norm at or near the threshold of peremptory status, and that the trajectory of international legal development points decisively toward formal recognition. The law, on this account, is in the process of becoming what it already substantially is.

III. THE RIGHT TO A CLEAN ENVIRONMENT IN INTERNATIONAL LAW

A. From Stockholm to Rio: The Foundational Period

The modern history of international environmental law begins with the Stockholm Declaration on the Human Environment, adopted at the United Nations Conference on the Human Environment in 1972. Principle 1 of the Stockholm Declaration proclaimed that the human being has a fundamental right to freedom, equality, and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being[8]. Though cast in the language of rights, the Declaration was politically declaratory rather than legally binding, and its substantive content remained contested.

The two decades following Stockholm witnessed both expansion and fragmentation. States negotiated a cascade of multilateral environmental agreements addressing specific problems ozone depletion, transboundary air pollution, hazardous waste, biodiversity loss but no general treaty on the human right to a clean environment emerged. The field developed in silos, with environmental law and human rights law evolving on parallel tracks with limited cross-fertilization.

The Rio Declaration on Environment and Development (1992) marked an important consolidation. Principle 1 reaffirmed that human beings are at the centre of concerns for sustainable development and are entitled to a healthy and productive life in harmony with nature. Rio Declaration has also introduced the precautionary principle (Principle 15) and the polluter-pays principle (Principle 16), enriching the normative vocabulary of international environmental law. Yet Rio, like Stockholm, produced politically significant but legally non-binding declarations[9].

[8] Stockholm Declaration on the Human Environment, Principle 1, U.N. Doc. A/CONF.48/14/Rev.1 (June 16, 1972).
[9] Rio Declaration on Environment and Development, Principles 1, 15, 16, U.N. Doc. A/CONF.151/26/Rev.1

B. Regional Frameworks and the Human Rights-Environment Nexus

The most legally significant advances in environmental rights have occurred at the regional level. The African Charter on Human and Peoples' Rights (Banjul Charter, 1981) is the first binding international human rights instrument to expressly recognize environmental rights, providing in Article 24 that all peoples shall have the right to a general satisfactory environment favorable to their development[10]. The African Commission on Human and Peoples' Rights subsequently interpreted this provision expansively in the Ogoniland case, holding that Nigeria had violated Article 24 by permitting oil companies to conduct operations causing severe environmental degradation in the Niger Delta[11].

The Inter-American system has developed environmental rights jurisprudence through the lens of existing civil and political rights. The Inter-American Court of Human Rights, in its Advisory Opinion OC-23/17 (2017), concluded that the right to a healthy environment is an autonomous right protected under the American Convention on Human Rights by virtue of its connection to other conventionally protected rights. The Court further held that the right protects components of the environment as legal interests in themselves, not merely for their instrumental value to human life. This formulation, departing from purely anthropocentric approaches, represents a significant doctrinal development[12].

The Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (1998), adopted under the auspices of the United Nations Economic Commission for Europe, established procedural environmental rights access to information, participation, and justice as legally enforceable obligations. Its linkage of procedural rights to the substantive right to a healthy environment has been influential beyond its European geographic scope[13].

(June 14, 1992).

[10] African Charter on Human and Peoples' Rights art. 24, June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982)

[11] Social and Economic Rights Action Center (SERAC) and the Center for Economic and Social Rights (CESR) v. Nigeria, African Comm'n on Human and Peoples' Rights, Comm. No. 155/96 (2001) [Ogoniland case].

[12] Inter-American Court of Human Rights, Advisory Opinion OC-23/17: The Environment and Human Rights, para. 62 (Nov. 15, 2017).

[13] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, June 25, 1998, 2161 U.N.T.S. 447 (Aarhus Convention).

C. UN General Assembly Resolution 76/300 (2022)

The watershed moment in the global recognition of the right to a clean environment came on 28 July 2022, when the United Nations General Assembly adopted Resolution 76/300, declaring that all people on Earth have the right to a clean, healthy, and sustainable environment. The resolution was adopted by a recorded vote of 161 in favor, with no votes against and 8 abstentions. The breadth of this endorsement spanning all regional groups and encompassing states of widely varying legal traditions, developmental levels, and political systems is of cardinal significance for the jus cogens analysis.

The resolution did not merely restate existing norms. It called upon states, international organizations, civil society, and the private sector to scale up efforts to ensure a clean, healthy, and sustainable environment for all. It acknowledged the links between the right and existing international law, including human rights law and environmental law, and noted the related work of treaty bodies, special procedures, and regional human rights mechanisms.

For present purposes, Resolution 76/300 constitutes powerful evidence of acceptance by the international community of States as a whole of the right to a clean environment. While General Assembly resolutions are not per se binding, they carry significant legal weight as evidence of opinio juris the conviction that the norm in question is legally obligatory particularly when adopted by overwhelming majorities[14].

D. The ICJ Advisory Opinion on Climate Change (2024)

The International Court of Justice's Advisory Opinion on the Obligations of States in respect of Climate Change, delivered in 2024, represents the most authoritative judicial statement to date on the legal character of environmental obligations. The Court, requested by the General Assembly, addressed the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic greenhouse gas emissions, and the legal consequences for States that have caused significant harm to the climate system[15].

[14] G.A. Res. 76/300, The Human Right to a Clean, Healthy and Sustainable Environment (July 28, 2022), U.N. Doc. A/RES/76/300.
[15] Obligations of States in Respect of Climate Change, Advisory Opinion, ICJ General List No. 187 (2024) [hereinafter ICJ Climate Advisory Opinion].

The Court held that customary international law imposes on all states obligations to take all necessary measures to prevent significant harm to the climate system and to other parts of the environment. It affirmed the existence of an obligation not to cause transboundary environmental harm and recognized that this obligation has achieved the status of customary international law. While stopping short of formally designating the right to a clean environment as jus cogens, the Court's reasoning emphasizing the universal character of the obligation, its non-derogable quality in light of the irreversibility of climate harm, and its connection to the right to life traced precisely the contours of peremptory norm status[16].

Significantly, several judges in individual opinions explicitly entertained the question of jus cogens status. Judge Charlesworth, in a separate opinion, observed that the accumulation of state practice, treaty commitments, and pronouncements of international organizations makes the right to a clean environment a candidate for peremptory norm status under the criteria established by the ILC's 2022 Draft Conclusions. This judicial engagement with the jus cogens characterization signals the direction of future development[17].

IV. BUILDING THE JUS COGENS CASE

A. General International Law: The Normative Foundation

The first criterion for jus cogens status, as articulated by the ILC, is that the candidate norm must be a norm of general international law. This requirement is met with respect to the right to a clean environment. The norm derives support from multiple sources recognized under Article 38(1) of the ICJ Statute: international treaty law (through the growing body of environmental agreements incorporating rights-based frameworks), customary international law (as affirmed by the ICJ in its 2024 Advisory Opinion), and general principles of law recognized by civilized nations[18].

The norm's normative foundation is further bolstered by the constitutionalization of environmental rights in domestic legal systems. As of 2024, more than 150 states have incorporated the right to a clean or healthy environment in their national constitutions, legislation, or judicial decisions. This domestic entrenchment reflects not merely municipal

[16] ICJ Climate Advisory Opinion, supra note 16.
[17] ICJ Climate Advisory Opinion, supra note 16 (Charlesworth, J., separate opinion).
[18] ILC Draft Conclusions, supra note 3, Draft Conclusion 4; see also Statute of the International Court of Justice art. 38(1), June 26, 1945, 59 Stat. 1055.

law choices but, in aggregate, powerful evidence of the norm's status as a general principle shared across legal systems.

B. Widespread and Representative Acceptance

The second and most critical criterion is acceptance and recognition by the international community of States as a whole. As the ILC has clarified, this does not demand unanimity but requires a very large majority representative of diverse legal traditions, regional groups, and developmental stages.

The evidence of acceptance is compelling. Resolution 76/300 commanded 161 affirmative votes, with no opposition. The right is expressly recognized in the constitutions or fundamental laws of more than 150 states. It appears in binding regional human rights instruments applicable across Africa, Latin America, and Europe. The UN Human Rights Council has consistently recognized the right to a safe, clean, healthy, and sustainable environment as a human right. Special Rapporteurs on Human Rights and the Environment have documented extensive state practice in support of the norm[19].

The representative character of this acceptance satisfies the ILC's standard. Support for the norm extends across the Global South and the developed world, across common law and civil law systems, across states with advanced environmental frameworks and those still developing such systems. The virtual unanimity of Resolution 76/300 with even the abstaining states declining to vote against, and several explaining their abstentions on procedural rather than substantive grounds reinforces this conclusion[20].

C. Non-Derogability: The Irreversibility Argument

The non-derogable character of a norm the conviction that no competing interest can justify setting it aside is both a criterion for jus cogens status and a consequence of it. The argument for non-derogability in the environmental context rests on the unique character of environmental harm: irreversibility.

Unlike most harms addressable by international law, environmental degradation of sufficient severity cannot be remedied ex post. An extinct species cannot be restored. A

[19] G.A. Res. 76/300, supra note 14
[20] G.A. Res. 76/300, supra note 14

destabilized climate system cannot be quickly returned to equilibrium. A polluted aquifer may remain compromised for generations. The irreversibility of these harms places them in a different normative category from harms however severe that are susceptible to repair and reparation. Where the very possibility of future enjoyment of all other rights depends on a viable natural environment, derogation from the obligation to protect that environment cannot be permitted without rendering the entire framework of international human rights law incoherent.

This argument has a formal legal dimension as well. The right to life universally recognized as jus cogens is hollowed of content if the physical conditions necessary for life are systematically destroyed. The right to health, the right to food, the right to water all rights whose foundational character is increasingly recognized are similarly dependent on environmental integrity. To permit derogation from environmental protection in favor of economic or developmental interests is to subordinate the conditions of human existence to contingent policy preferences. The logic of peremptory norms that certain values are non-negotiable applies with particular force to the environmental right that undergirds all others. The right to life is need to treated as a jus cogens because of irreversible environmental destruction or degradation permanently injures humanity and future generations, the right to clean and healthy environment should be treated as a non-derogable norm of international law[21].

D. Indissoluble Link to Existing Jus Cogens Norms

The right to a clean environment does not exist in legal isolation. It is connected by bonds of logical and normative necessity to norms already recognized as jus cogens. The prohibition on conduct that causes the destruction of the conditions of human life through environmental catastrophe no less than through aggressive war or genocide is conceptually continuous with the prohibitions that already populate the jus cogens list.

The relationship is not merely metaphorical. As the Inter-American Court recognized in OC-23/17, environmental degradation directly impairs the right to life, the right to health, and the right of peoples to determine their own development. Customary international law, as reflected in the Trail Smelter arbitration and its progeny, has long recognized that states bear

[21] ILC Draft Conclusions, supra note 3, Draft Conclusion 7.

responsibility for environmental harm that impairs the rights of other states and their populations. The step from this established principle to recognition of a peremptory norm against serious environmental harm is shorter than the distance already traversed in international law's development of jus cogens[22].

E. Opinio Juris: The Conviction of Legal Obligation

A norm attains peremptory character not merely through widespread practice but through the conviction that the practice is legally obligatory opinio juris sive necessitatis. The evidence of opinio juris in the environmental context is extensive. States invoking environmental obligations before international courts and tribunals consistently characterize those obligations as legal duties, not merely political commitments. Domestic courts, from the Constitutional Court of Colombia to the Supreme Court of Pakistan, have recognized the right to a clean environment as an enforceable legal right, not a hortatory aspiration[23].

The language of Resolution 76/300 is instructive: it "recognizes" the right rather than "declaring" or "recommending" it, signaling the Assembly's view that the norm pre-exists the resolution as a matter of legal entitlement. The Human Rights Committee, interpreting the International Covenant on Civil and Political Rights, has held that environmental degradation impairing the right to life gives rise to legal obligations under the Covenant. These authoritative interpretations, from bodies charged with the official interpretation of binding international legal instruments, carry significant weight as evidence of opinio juris[24].

V. COUNTERARGUMENTS AND RESPONSES

A. The Indeterminacy and determinate Objection

The most frequently voiced objection to jus cogens status for the environmental right is its alleged indeterminacy. Unlike the prohibition on torture which admits of reasonably precise definition the right to a clean environment appears to lack determinate content. What level of pollution violates it? Which ecosystems must be protected? How is the right to be

[22] Inter-American Court of Human Rights, Advisory Opinion OC-23/17, supra note 12
[23] Urgenda Found. v. The Netherlands, Hoge Raad [HR] [Supreme Court], Dec. 20, 2019, ECLI:NL:HR:2019:2006 (Neth.); Neubauer v. Germany, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Mar. 24, 2021, 1 BvR 2656/18 (Ger.); Future Generations v. Ministry of the Environment, Corte Suprema de Justicia [Supreme Court], Apr. 5, 2018, STC4360-2018 (Colom.); Asghar Leghari v. Federation of Pakistan, Lahore High Court, Sept. 4, 2015, W.P. No. 25501/2015 (Pak.).
[24] G.A. Res. 76/300, supra note 14.

balanced against development needs? Critics argue that a norm so vague cannot perform the functions of jus cogens most importantly, invalidating treaties and generating erga omnes obligations without introducing unacceptable legal uncertainty.

This objection, while not without force, overstates the indeterminacy of the norm and underestimates the indeterminacy of norms already recognized as jus cogens.[25] The prohibition on torture is not self-defining; it has required decades of jurisprudential elaboration by treaty bodies, domestic courts, and international tribunals. The prohibition on slavery has required contentious litigation to address its application to debt bondage, forced labor, and human trafficking. No recognized jus cogens norm arrived fully specified. Indeterminacy is a feature of legal development, not a disqualification from peremptory status.

Moreover, the right to a clean environment has a determinate core. At a minimum, it prohibits state conduct that causes catastrophic and irreversible environmental harm ecocide, in the terminology increasingly adopted in international legal discourse. It prohibits systematic pollution that renders territory uninhabitable. It imposes obligations to take effective measures to prevent foreseeable environmental catastrophe. This core is sufficiently precise to generate meaningful legal obligations and to perform the function of invaliding directly conflicting treaty provisions.

B. The Jus Cogens Inflation Concern

A second objection is structural: if the category of jus cogens is expanded to include environmental rights, the risk is that it becomes so capacious as to lose its distinctive legal force. The power of jus cogens derives from its selectivity; it identifies a small set of norms so fundamental that they override all competing considerations. An expansive list, it is argued, would dilute this hierarchical force and undermine the special status of existing peremptory norms.

This concern reflects a legitimate jurisprudential interest in preserving the integrity of the jus cogens category. It does not, however, constitute a substantive argument against recognizing the environmental right as peremptory. The inflation concern is equally applicable to any proposed expansion of the jus cogens list and would, if given dispositive weight, freeze

[25] ILC Draft Conclusions, supra note 3, Draft Conclusion 7; see also Itzchak Kornfeld, Jus Cogens Norms in International Environmental Law, 8 Mich. J. Envtl. & Admin. L. 263 (2019).

the list at its current configuration regardless of the merits of any particular candidate norm. The ILC's 2022 Draft Conclusions expressly contemplate the possibility of new norms attaining jus cogens status through the ordinary process of legal development, while acknowledging that the bar is deliberately high[26]. The environmental right, meeting the applicable criteria, is not an inflation of the category; it is an appropriate recognition of a norm whose peremptory character follows from the values already embedded in the existing list.

C. The Development-Environment Tension

Perhaps the most politically significant objection comes from developing states that fear jus cogens recognition of the environmental right would effectively freeze existing inequalities by constraining their development choices. If a peremptory norm prohibits environmental degradation, and if industrialization inherently causes environmental degradation, does recognition of the norm amount to pulling up the ladder after developed states have climbed it?

The objection deserves serious engagement. The right to development recognized in the 1986 UN Declaration on the Right to Development and increasingly regarded as a norm of customary international law is not inherently in conflict with the right to a clean environment[27]. The concept of sustainable development, articulated in the Brundtland Report and incorporated into international law through Rio and subsequent instruments, specifically addresses this tension: development that meets the needs of the present without compromising the ability of future generations to meet their own needs does not sacrifice environment to development or development to environment.

Recognition of the environmental right as jus cogens would not prohibit development; it would require that development be pursued in ways consistent with the right. This imposes more demanding obligations on developed states who have historically contributed disproportionately to environmental degradation and possess greater technological and financial capacity to pursue sustainable development than on developing states. Moreover, the erga omnes character of jus cogens obligations would support legal claims against developed states and their corporations whose activities cause environmental harm in developing

[26] ILC Draft Conclusions, supra note 3, Draft Conclusion 7.
[27] G.A. Res. 41/128, Declaration on the Right to Development (Dec. 4, 1986).

countries, a result more likely to benefit than burden the Global South.

VI. LEGAL CONSEQUENCES OF RECOGNITION

A. Treaty Invalidity Under Article 53 VCLT

The most dramatic consequence of recognizing the right to a clean environment as jus cogens is the invalidity, under Article 53 VCLT, of treaties inconsistent with it[28]. A treaty concluded between states that explicitly permits conduct causing catastrophic environmental harm would be void ab initio. The practical significance of this consequence is not to render swaths of existing treaty law immediately invalid most treaties do not expressly authorize environmental destruction but to establish a constitutional floor below which no treaty obligations may descend.

More immediately significant are the implications for treaty interpretation. Where a treaty provision is susceptible of multiple interpretations, one consistent with the peremptory norm and one inconsistent with it, the principle of systematic integration under Article 31(3)(c) VCLT which requires treaty interpretation to take account of relevant rules of international law applicable between the parties would require the norm-consistent interpretation. This principle, already employed by the WTO Appellate Body and investment tribunals, would be powerfully reinforced by recognition of the environmental right as jus cogens[29].

B. Erga Omnes Obligations and Standing

Jus cogens norms generate obligations erga omnes owed to the international community as a whole, rather than to specific states parties to a bilateral or multilateral treaty. The ICJ recognized the concept of erga omnes obligations in the Barcelona Traction case (1970)[30], and subsequent jurisprudence has confirmed that breaches of erga omnes obligations create standing for all states to invoke state responsibility, regardless of direct injury.

The implications for environmental protection are profound. Under current international law, a state whose conduct causes environmental harm outside its territory can be held responsible by directly injured states under the rules of state responsibility. Recognition

[28] Vienna Convention on the Law of Treaties art. 53, supra note 1.
[29] Id. art. 31(3)(c).
[30] Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain), Second Phase, 1970 I.C.J. Rep. 3, para. 33 (Feb. 5)

of the environmental right as jus cogens and thus of environmental obligations as erga omnes would extend standing to all states, enabling international legal proceedings to address environmental harm of global significance even where the directly injured states lack the capacity or political will to bring claims[31].

This consequence is of particular importance in the climate context. No state can demonstrate direct injury from the carbon emissions of a specific state in a manner sufficient to ground traditional standing rules. An erga omnes framework would permit coalitions of vulnerable states small island developing states, sub-Saharan African nations facing desertification, Arctic states confronting glacial melt to bring collective claims against the largest emitters.

C. Implications for International Investment Law and Trade

Investor-state arbitration has long presented a structural tension between environmental regulation and investment protection. Investors have challenged domestic environmental measures as indirect expropriation or violations of fair and equitable treatment standards, raising the prospect that states may be deterred from regulating in the environmental interest by the risk of arbitral liability.

Recognition of the environmental right as jus cogens would fundamentally alter the legal landscape of investment arbitration. Arbitral tribunals would be required to interpret investment treaties consistently with the peremptory norm; they could not award compensation to investors for the loss of profits they would have earned by engaging in conduct inconsistent with that norm. Equally, domestic environmental regulations necessary to give effect to the right could not be characterized as unlawful expropriation. The hierarchical priority of jus cogens would insulate good-faith environmental regulation from investor challenge[32].

D. Strengthening Climate Litigation

The past decade has witnessed an explosion of climate litigation before domestic and international courts. Judgments from the Dutch Supreme Court in Urgenda, the German Federal Constitutional Court in Neubauer, the Colombian Supreme Court of Justice in Future

[31] Int'l Law Comm'n, Draft Articles on Responsibility of States for Internationally Wrongful Acts art. 48, U.N. Doc. A/56/10 (2001) [hereinafter ARSIWA].
[32] ICJ Climate Advisory Opinion, supra note 16

Generations v. Colombia, and the Pakistani Supreme Court in Leghari v. Federation of Pakistan have collectively established that governments bear legally enforceable obligations to take effective climate action. The ICJ's 2024 Advisory Opinion provides the most authoritative international legal foundation for this litigation wave.

Recognition of the environmental right as jus cogens would provide climate litigation with its strongest possible legal foundation. It would resolve debates about the justiciability of climate obligations by establishing those obligations at the highest level of the international legal hierarchy. It would generate a floor of protection applicable in all domestic legal systems, regardless of the specific constitutional or statutory frameworks of individual states. And it would impose on all states obligations of cooperation and assistance in the global effort to protect the climate obligations enforceable by other states under the erga omnes framework described above[33].

VII. FROM JUS COGENS ASPIRATIONS TO ERGA OMNES OBLIGATION:

The analysis presented in this paper reveals that the right to a clean, healthy, and sustainable environment has not yet fully crystallised as a jus cogens norm, yet it has clearly transcended the realm of ordinary international obligations. The absence of explicit judicial recognition, the continuing indeterminacy in the norm's precise scope, and persistent inconsistencies in state practice prevent a confident declaration of peremptory status at this stage. However, these limitations do not diminish the significant legal ground the right has already secured.

While jus cogens and erga omnes are related concepts, they are not identical. All jus cogens norms generate erga omnes obligations, but not all erga omnes obligations rise to the level of peremptory norms. Erga omnes obligations are those owed to the international community as a whole, in which all states have a legal interest a concept first articulated by the ICJ in the Barcelona Traction case (1970)[34]. The right to a clean environment satisfies this standard. Environmental harm is inherently transboundary, threatens collective rather than merely bilateral interests, and implicates the rights of present and future generations alike. UNGA Resolution 76/300 (2022), the ICJ's 2024 Advisory Opinion, and the broad constitutionalisation of environmental rights across more than 150 states collectively confirm

[33] ICJ Climate Advisory Opinion, supra note 16.
[34] Barcelona Traction, supra note 34, para. 33.

that environmental protection is now a matter of universal legal concern, not merely a domestic or bilateral one[35].

The practical significance of erga omnes status should not be understated. Under Article 48 of the ILC's Articles on State Responsibility, any state may invoke the responsibility of another for breach of an obligation owed to the international community regardless of direct injury[36]. This provides a meaningful legal basis for environmental accountability that does not depend on the full crystallisation of jus cogens.

The right to a clean environment therefore stands at an important threshold: it has moved beyond aspiration and political commitment into the domain of binding collective obligation, while the final step toward full peremptory status remains in progress. The right to a clean environment has not yet been conclusively recognised as a jus cogens norm due to absence of explicit judicial recognition, the continuing indeterminacy in the norm's precise scope, and persistent inconsistencies in state practice prevent a confident declaration of peremptory status and the transboundary nature of environmental harm strongly support its recognition as an erga omnes obligation owed to the international community as a whole and it increasingly exhibits peremptory characteristics and has at minimum attained erga omnes significance.

Therefore, while the right to a clean environment may not yet have fully crystallised into a recognised jus cogens norm, its character as an emerging obligation erga omnes is far more convincing. The global nature of environmental harm, the interconnectedness of ecosystems, and the increasing international recognition of environmental rights collectively support the view that environmental protection is now a responsibility owed to humanity as a whole. In this regard, recognising environmental protection as an obligation erga omnes represents an important step in the progressive development of international law towards greater ecological responsibility and intergenerational justice.

VIII. CONCLUSION

The case for recognizing the right to a clean, healthy, and sustainable environment as a

[35] G.A. Res. 76/300, supra note 14; ICJ Climate Advisory Opinion, supra note 16; ILC Draft Conclusions, supra note 3

[36] ARSIWA, supra note 31, art. 48.

peremptory norm of general international law is compelling. The norm rests on a foundation of general international law encompassing treaty obligations, customary rules, general principles, and authoritative judicial pronouncements. It commands virtually universal acceptance, as demonstrated by the landmark UN General Assembly Resolution 76/300 of 2022 and the constitutionalization of environmental rights in more than 150 domestic legal systems. Its non-derogable character is demanded by the unique nature of environmental harm irreversible, intergenerational, and foundational to the enjoyment of all other rights. And its indissoluble connection to pre-existing jus cogens norms most fundamentally the right to life and the principle of human dignity locates it within the normative family to which peremptory norms belong.

The counterarguments indeterminacy, jus cogens inflation, the development-environment tension are real concerns that deserve serious engagement but do not defeat the affirmative case. No recognized jus cogens norm arrived fully specified. The growth of the jus cogens list is a feature of international law's development, not a threat to its integrity. And the environmental right, properly understood, reinforces rather than undermines the right to development, imposing the strictest obligations on those who have most contributed to environmental degradation.

At the same time, important doctrinal and judicial uncertainties continue to exist. The absence of explicit recognition by international courts, continuing disagreements regarding the precise scope of environmental obligations, and the flexible nature of many environmental commitments prevent the right from being conclusively recognised as a fully crystallised jus cogens norm at present. Nevertheless, the study concludes that environmental protection has increasingly assumed the character of an obligation erga omnes. Environmental harm transcends territorial boundaries, affects the collective interests of humanity, and threatens present as well as future generations. Consequently, the protection of the environment can no longer be viewed solely through the lens of state sovereignty or domestic regulation it has emerged as a shared legal responsibility owed to the international community as a whole.

The legal consequences of such recognition treaty invalidity for inconsistent instruments, erga omnes obligations and universal standing, insulation of environmental regulation from investor challenge, and a strengthened legal foundation for climate litigation would represent a transformation of the international legal order commensurate with the

planetary emergency that necessitates it. These consequences are not disproportionate to the problem; they are demanded by it.

The International Law Commission's authoritative 2022 Draft Conclusions acknowledged the possibility of new peremptory norms emerging through the ordinary processes of international legal development. The ICJ, in its 2024 Advisory Opinion, traced the outlines of a peremptory environmental norm without fully articulating it.

In conclusion, the right to a clean, healthy, and sustainable environment has gained significant recognition in contemporary international law through state practice, international instruments, and human rights jurisprudence. Although the right has not yet been conclusively recognised as a fully crystallised jus cogens norm due to continuing doctrinal and judicial uncertainties, its importance within the international legal system cannot be denied. Environmental harm today extends beyond territorial boundaries and affects humanity collectively, including future generations. For this reason, environmental protection should no longer be viewed merely as a domestic concern of individual states, but as a shared responsibility owed to the international community as a whole. Therefore, the right to a clean environment is more convincingly understood at present as an emerging obligation erga omnes, reflecting the growing global commitment towards ecological protection, human dignity, and intergenerational justice.

REFERENCES

A. International Treaties and Instruments:

1. Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331.

2. African Charter on Human and Peoples' Rights (Banjul Charter), 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 ILM 58 (1982).

3. Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention), 25 June 1998, 2161 UNTS 447.

4. Paris Agreement under the United Nations Framework Convention on Climate Change, 12 December 2015, TIAS No. 16-1104.

5. United Nations General Assembly Resolution 76/300, The human right to a clean, healthy and sustainable environment (28 July 2022), UN Doc. A/RES/76/300.

B. International Court of Justice:

1. Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (Second Phase) [1970] ICJ Rep 3.

2. Case Concerning the Gabcikovo-Nagymaros Project (Hungary v. Slovakia) [1997] ICJ Rep 7.

3. Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay) [2010] ICJ Rep 14.

4. Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion [2019] ICJ Rep 95.

5. Obligations of States in respect of Climate Change, Advisory Opinion (2024), ICJ General List No. 187.

C. International Law Commission:

1. International Law Commission, Draft Conclusions on Peremptory Norms of General International Law (Jus Cogens), with Commentaries, UN Doc. A/77/10 (2022).

2. International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, UN Doc. A/56/10 (2001).

D. Regional Decisions

1. Social and Economic Rights Action Center (SERAC) and the Center for Economic and Social Rights (CESR) v. Nigeria, African Commission on Human and Peoples' Rights, Comm. No.

155/96 (2001).

2. Inter-American Court of Human Rights, Advisory Opinion OC-23/17: The Environment and Human Rights (15 November 2017).

E. International case laws:

1. Urgenda Foundation v. The Netherlands, Supreme Court of the Netherlands (20 December 2019) ECLI:NL:HR:2019:2006.

2. Neubauer and Others v. Germany, Federal Constitutional Court of Germany, Order of 24 March 2021, 1 BvR 2656/18.

3. Future Generations v. Ministry of the Environment and Others, Supreme Court of Justice of Colombia (5 April 2018), STC4360-2018.

4. Asghar Leghari v. Federation of Pakistan, Lahore High Court (4 September 2015), W.P. No. 25501/2015.

5. Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), Second Phase, Judgement, 1970 I.C.J. Rep. 3, para 33

F. Secondary Sources:

1. Birnie, Patricia, Alan Boyle, and Catherine Redgwell. International Law and the Environment. 3rd edn. Oxford: Oxford University Press, 2009.

2. Dupuy, Pierre-Marie, and Jorge E. Vinuáles. International Environmental Law. 2nd edn. Cambridge: Cambridge University Press, 2018.

3. Knox, John H. "Diagonal Environmental Rights." In Human Rights and the Environment: Legality, Indivisibility, Dignity and Geography, edited by Stephen Humphreys. Cambridge: Cambridge University Press, 2021.

4. Kornfeld, Itzchak. "Jus Cogens Norms in International Environmental Law." (2019) 8 Michigan Journal of Environmental & Administrative Law 263.

5. Lixinski, Lucas. "Jus Cogens and International Environmental Law: Exploring the Boundaries." (2021) 30 Review of European, Comparative & International Environmental Law 412.

6. Meron, Theodor. "On a Hierarchy of International Human Rights." (1986) 80 American Journal of International Law 1.

7. Noyes, John E., and Brian D. Smith. "State Responsibility and the Principle of Joint and Several Liability." (1988) 13 Yale Journal of International Law 225.

8. Shelton, Dinah. "Human Rights and the Environment: Past, Present, and Future Linkages and the Value of a Declaration." (2010) 13 Georgetown International Environmental Law Review 359.

9. Weston, Burns H., and David Bollier. Green Governance: Ecological Survival, Human Rights, and the Law of the Commons. Cambridge: Cambridge University Press, 2013.

10. Zerk, Jennifer A. Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law. Cambridge: Cambridge University Press, 2006.