

CUSTOMARY NORMS OF INTERNATIONAL ENVIRONMENTAL LAW

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Abstract: *International environmental law is understood as a set of norms and principles regulating the relations of subjects of international law in the field of environmental protection, rational use of natural resources, ensuring environmental safety and environmental human rights. This is a relatively new and at the same time dynamic branch of modern international law. Global warming, desertification, pollution of the atmosphere, hydrosphere and world ocean, and loss of biodiversity have contributed to the awareness of the global community of the need to develop and implement joint measures to minimise the negative impact of human activity on the environment and its individual components (the ozone layer of the Earth, oceans, rivers, air, etc.), as well as to eliminate the consequences of human anthropogenic activity and natural disasters. International environmental law has the largest number of international treaties compared to other branches of international law. But at the same time, it is necessary to note a number of shortcomings of these treaties: their framework nature and often too general wording, a wide possibility of making reservations, a large number of treaties do not enter into force due to a limited number of ratifications. All this requires the implementation of customary norms by states in order to ensure environmental protection. The article analyses existing customary norms of international environmental law and clarifies their content. General and special features of the principles of customary international environmental law were disclosed. We also analysed the question whether the right to a healthy environment has customary nature and came to a conclusion that it has not yet attained the status of customary international law.*

Key words: *Customary Law; International Environmental Law; Principles of International Environmental Law; Environment; Human Right to a Healthy Environment*

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1. INTRODUCTION

Sources of international law, including international environmental law, are usually divided into legally binding "hard law" and "soft law" of a recommendatory nature. Sources of "hard law" include international treaties, international custom, general principles of law and unilateral acts of states. Sources of "soft law" are normative provisions contained in non-binding texts.¹ The term "soft law" usually refers to any international instrument other than "hard law" that contains norms, principles and standards that define desired behaviour. "Soft law" includes, for example, non-legal recommendatory norms contained in documents of international intergovernmental organisations, declarations adopted at international conferences, recommendations,

¹ Dinah Shelton, *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Oxford University Press 2000) 292.

statements, final acts, etc., which can, to some extent, influence the behaviour of states, even if their norms are not formally binding. The provisions of “soft law” have a moral-political character, but they can influence the content of hard law sources and over time can acquire the status of a binding norm. Therefore, on the one hand, “soft law” norms are not binding, but, on the other hand, they create the basis for the formation of customary law in this area, i.e., they reflect the actual permanent practice of states and influence the preparation and development of contractual international legal norms.

International custom is another source of international environmental law. Article 38 of the Statute of the ICJ provides that the ICJ shall base its decisions on “international custom as evidence of general practice accepted as law”. International law does not have a clear list of customary norms of international environmental law. Scientists also have different opinions on this issue. For example, M. Lavrik names the following customary norms: permanent sovereignty over natural resources, the principle of cooperation, the no-harm rule, the precautionary principle, the principle of prevention, the duty to conduct environmental impact assessment.² According to J. Jankuv, customary norms of international environmental law include the principle of non-harm to the environment beyond the jurisdiction of states, the principle of good neighbouring, the principle of just use of shared natural resources between two or more states, the principle of prevention and precautionary principle.³

Despite the huge number of treaties adopted in the field of environmental protection, customary norms of international environmental law still play a vital role, as international treaties are binding only upon those states that have formally consented to them. As a result, international courts and arbitration tribunals are forced to rely on customary norms when resolving disputes that arise between countries in the environmental sphere. The article analyses the content of customary norms of international environmental law, which follows from the above-mentioned practice and international documents.

2. THE PRINCIPLE OF NO-HARM TO THE ENVIRONMENT BEYOND THE JURISDICTION OF STATES

According to Dworkin, a principle is a standard that should be followed not only because it's necessary for economic, political, or social reasons, but because it is a necessity for ensuring justice, fairness, and morality.⁴ Philippe Sands, Jacqueline Peel, Adriana Fabra and Ruth MacKenzie distinguish the rules from principles and argue that rules are binding, while principles express a general truth and do not specify particular actions.⁵ According to Pierre-Marie Dupuy and Jorge E. Viñuales, it is necessary to distinguish between the use of the term “principle” to refer to a type of statement or formulation of a norm, and its use to describe the legal foundation of a norm, whether it

² Maksim Lavrik, 'Customary Norms, General Principles of International Environmental Law, and Assisted Migration as a Tool for Biodiversity Adaptation to Climate Change' (2022) 4 *Jus Cogens* 99 <https://doi.org/https://doi.org/10.1007/s42439-022-00055-8> accessed 25 June 2026.

³ Juraj Jankuv, *Mechanizmy Ochrany Ľudských Environmentálnych Práv v Medzinárod Nom Práve Verejnóm, v Práve Európskej Unie a v Právnom Poriadku Slovenskej Republiky* [Legal Mechanisms of Protection of the Human Environmental Rights in Public International Law, Law of the European Union and Legal Order of the Slovak Republic] (Leges 2018) 76.

⁴ Ronald M Dworkin, 'The Model of Rules' (1967) 35 *University of Chicago Law Review* 14, 23.

⁵ Philippe Sands and others, *Principles of International Environmental Law* (Cambridge University Press 2012) 180.

is a treaty or customary international law.⁶ We should agree with the scholar that if we find a principle among the sources of soft law, it is difficult to determine its normative character and bindingness for all subjects.⁷ Therefore, it is important to analyse the principles of international environmental law in order to determine this character.

The principle of no-harm to the environment beyond national jurisdiction, as a fundamental principle of international environmental law, is enshrined in various international treaties, declarations, and other soft law instruments and is recognised in the jurisprudence of international judicial bodies.

The customary nature of the principle of no-harm to the environment beyond the national jurisdiction was confirmed in the decisions of the arbitral tribunal in the Trail Smelter case (United States v. Canada, 1938 and 1941) and in several decisions of international courts (Corfu Channel (United Kingdom v. Albania, 1949 ICJ Judgment),⁸ Legality of the Threat or Use of Nuclear Weapons (1996 ICJ Advisory Opinion),⁹ Gabčíkovo-Nagymaros (Hungary v. Slovak Republic, 1997 ICJ Judgment).¹⁰

The Trail Smelter decision played an important role in the development of international environmental law, as it established the fundamental principles of international environmental law. The facts of the case are as follows. The Columbia River originates in Canada and in the British Columbia region flows past a steel mill operated by a Canadian company, where large quantities of zinc and lead are smelted, about 10 miles north of the international border with Washington State (USA). Between 1925 and 1927, the mill greatly increased its production and as a result the amount of sulphur emitted almost quadrupled compared to 1924 during the same period. The air, water and soil of the United States were polluted. The case was submitted to an international joint commission for review. In its report, the commission considered it appropriate to determine the amount of damage that would be compensated to the United States for the emissions. Two years after the report was signed, the United States Government informed the Canadian Government that the existing conditions were completely unsatisfactory, and that the company continued to cause harm to the environment. The dispute was submitted to an arbitration tribunal.¹¹

In its award, the arbitral tribunal noted that

under the principles of international law [...] no State has the right to use or permit the use of its territory in a manner which would cause damage by fumes to the territory of another State or to property or persons situated therein, where the case has serious consequences and the damage is established by clear and convincing evidence,¹²

thereby recognising the customary nature of the principle of no-harm to the environment beyond the national jurisdiction. In light of the case's circumstances, the tribunal determined that Canada was responsible for the actions of the Trail Smelter steelworks.

⁶ Pierre-Marie Dupuy and Jorge E Viñuales, *International Environmental Law* (Cambridge University Press 2018) 58 <https://doi.org/https://doi.org/10.1017/9781108399821> accessed 25 June 2026.

⁷ *Ibid.* 59.

⁸ Corfu Channel (United Kingdom v Albania) (Merits) (International Court of Justice, 9 April 1949) [1949] ICJ Rep 4, para 22.

⁹ Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) (International Court of Justice, 8 July 1996) [1996] ICJ Rep 226, para 29.

¹⁰ Gabčíkovo–Nagymaros Project (Hungary v Slovakia) (Judgment) (International Court of Justice, 25 September 1997) [1997] ICJ Rep 7, para 53.

¹¹ Trail Smelter Arbitration (United States v Canada) (Awards) (Arbitral Tribunal, 16 April 1938 and 11 March 1941) 3 RIAA 1905, pp. 1920–1930.

¹² *Ibid.*

The issue of compensation for the harm caused is closely related to the customary norm prohibiting causing significant harm outside the national jurisdiction. The state does not hold responsibility for all actions conducted on the territory under its sovereignty. But the state must adhere to the concept of due diligence. The essence of the concept of due diligence is that the state must show "care" by taking all necessary measures to prevent environmental pollution as a result of any activity that is carried out under its jurisdiction or control. The state is not responsible for the illegal activity of natural or legal persons, but is obliged to take organisational and legal measures to ensure proper control of such activity, prevent and stop illegal activities, punish persons who have violated the law, etc. Violation of the duty of due diligence leads to international responsibility and the obligation to compensate for damage.¹³

The concept of due diligence was also confirmed in the decisions of international courts, such as: Corfu Channel Case,¹⁴ Pulp Mills,¹⁵ Military and Paramilitary Activities in and against Nicaragua Case,¹⁶ San Juan River Case,¹⁷ etc. In its Advisory Opinion on Request submitted by the Commission of Small Island States on Climate Change and International Law ITLOS once again emphasised the importance of this concept for the protection of sea waters and also stated that this concept is an integral part of UNCLOS. Thus, states should also apply this concept to protect marine environment and its natural resources.

It is worth noting another important point concerning the implementation of the concept of due diligence in practice, which ITLOS focused on. According to the tribunal, scientific aspects must form the basis for decision making and for assessing the sufficiency of actions aimed at preventing climate change. ITLOS also provides the answer regarding which science should be taken into account. It must be reports of the IPCC, which the Tribunal recognises as "authoritative assessments of the scientific knowledge".¹⁸

The first case in which the ICJ addressed the issue of compensation for environmental damage was the San Juan River case. The case arose from a territorial dispute between Costa Rica and Nicaragua over a 3 km long area of internationally significant wetlands located adjacent to the northern channel of the San Juan River. In 2010, Costa Rica initiated proceedings before the ICJ against Nicaragua for illegal entry into the territory and environmental damage to wetlands and rainforests caused by the dredging of a canal for navigation purposes. Nicaragua responded by initiating proceedings against Costa Rica in 2011 concerning accusations of violating territorial sovereignty and causing serious environmental damage through the construction of a road in the border region by Costa Rica. In 2013, the ICJ consolidated the two cases into a single proceeding. The ICJ determined that Nicaragua was required to provide compensation to Costa Rica for the material harm resulting from its unlawful actions

¹³ Masha Medvedeva, 'On the Question of Liability in International Environmental Laws' (2010) 93 *Actual problems of international relations* 116.

¹⁴ Corfu Channel (n 8) Rep 4.

¹⁵ Pulp Mills on the River Uruguay (Argentina v Uruguay) (Judgment) (International Court of Justice, 20 April 2010) [2010] ICJ Rep 14.

¹⁶ Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Jurisdiction and Admissibility) (Judgment) (International Court of Justice, 26 November 1984) [1984] ICJ Rep 392.

¹⁷ Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica) (Judgment) (International Court of Justice, 16 December 2015) [2015] ICJ Rep 665.

¹⁸ Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law (Advisory Opinion, 21 May 2024) ITLOS Reports 2024, para 51.

within Costa Rican territory and encouraged the parties to settle the compensation through mutual agreement. As the parties failed to reach a consensus, Costa Rica submitted a request to the ICJ in January 2017 to determine the appropriate amount of compensation.

There was a substantial disagreement between the parties over the method to be applied in defining the environmental damage caused by Nicaragua. Nicaragua argued that Costa Rica was entitled to compensation for material damages, the scope of which was limited to damage to property or other interests of the State that was valuable in financial terms. Costa Rica identified 22 types of ecosystem services that may have been adversely affected by Nicaragua's unlawful activities, but it limited its compensation claim to six categories: timber, other raw materials (such as fiber and energy), regulation of air quality and gases, mitigation of natural hazards, soil formation and erosion control, and biodiversity.¹⁹

The ICJ recognised that both environmental degradation and the reduced ability of ecosystems to supply goods and services constitute compensable harm under international law. Such compensation should include compensation for lost environmental resources and services and expenses required to return the environment to its original state.²⁰

Crucially, the Court recognised that damages to ecosystem services are compensable under international environmental law. The ICJ clarified that a lack of detailed proof regarding the extent of damage does not generally preclude the awarding of compensation. The ICJ's evaluation of environmental damage included the financial costs of restoring the environment and the value of lost environmental services during the period before restoration.

The amount of compensation awarded by the Court to Costa Rica was set at US\$120,000 for the impairment and loss of environmental goods and services and US\$2,708.39 for the cost of restoring internationally protected wetlands. The total amount of compensation, US\$378,890.59 (including default interest), was set at only approximately 5% of the amount claimed by Costa Rica.²¹

The case is significant for multiple reasons. This was the first time the ICJ has made a decision involving compensation for environmental damage. The Court confirmed that environmental damage includes ecosystem services. Unfortunately, the Court did not specify the methodology it used to calculate the amount of compensation.

The lack of international standards on the methodology for assessing environmental damage is a significant shortcoming that reduces legal certainty and complicates the decision-making activity of international judicial and arbitration bodies. In our opinion, it is necessary to adopt international standards in this field.

The obligation of states not to cause serious harm in the territory of other states has been recognised by the ICJ as an obligation arising from customary law in its previous decisions.²² But in the Advisory opinion on obligations of states in respect of climate change the ICJ expanded this duty on the duty to prevent significant harm to the environment in the context of climate change.²³ The ICJ's jurisprudence demonstrates a clear evolution in the scope of the no-harm principle. While the court had previously

¹⁹ Certain Activities Carried Out by Nicaragua in the Border Area (n 17) ICJ Rep 665, p. 55.

²⁰ Ibid p. 15.

²¹ Ibid p. 157.

²² See *Corfu Channel* (n 8) Rep 4, para 101.

²³ *Obligations of States in respect of Climate Change* (Advisory Opinion) (International Court of Justice, 23 July 2025) General List No. 187, para 133.

recognised the obligation not to cause serious transboundary environmental harm as a rule of customary international law, its recent Advisory opinion extends this duty into a broader environmental context. By affirming that states must prevent significant harm to the climate system, the ICJ adapted a traditional customary norm to the reality of climate change, that needs to be addressed.

The ICJ recognised that failure of a state to take appropriate action to protect the climate system from GHG emissions (including through fossil fuel production, fossil fuel consumption, the granting of fossil fuel exploration licences or the provision of fossil fuel subsidies) may constitute an internationally wrongful act which is attributable to that state.²⁴ The ICJ's statement implies that inadequate climate action is not merely a policy failure, but may constitute a breach of international law. The ICJ recognised that a state's failure to regulate, limit or control greenhouse gas emissions can constitute an international wrongful act. This statement marks a significant shift in the doctrine of international responsibility. States may now be brought to international responsibility not only for causing direct environmental harm, but also for failing to prevent foreseeable, significant harm to the global climate system.

3. THE PRINCIPLE OF PREVENTION

In the Pulp Mills case between Argentina and Uruguay²⁵ and in the case concerning certain road construction activities carried out by Nicaragua in the border area between Costa Rica and Nicaragua,²⁶ the ICJ also stated that the principle of prevention of transboundary damage is also customary law. In the Pulp Mills case the ICJ stated that the principle of prevention as a customary rule has its origin in the due diligence required from a state in its territory.²⁷ The court referred to its previous decision on Corfu Channel, in which it specified that it is the obligation of every state not to allow its territory to be used for activities inconsistent with the rights of other sovereign states.²⁸ A state is thus obliged to use all available means to prevent, on its territory or in an area under its jurisdiction, activities which would cause substantial environmental harm.²⁹ In the Iron Rhine case, the arbitral tribunal stated that the principle of prevention is part of the general principles of international law, which apply even if activities that are imposed by the international treaties are carried out.³⁰

The most significant development of the principle of prevention in a transboundary context was developed by the International Law Commission in its 2001 Draft Articles on the Prevention of Transboundary Damage from Hazardous Activities. The Draft Articles provide an important explanation of content of the precautionary principle.³¹ According to some authors, the Draft Articles are so well-founded in treaties, decision-making and State practice that they can be considered as a codification of existing international law.³²

²⁴ Ibid para 427.

²⁵ Pulp Mills on the River Uruguay (n 15) Rep 14, para 101.

²⁶ Certain Activities Carried Out by Nicaragua in the Border Area (n 17) Rep 665, para 104.

²⁷ Pulp Mills on the River Uruguay (n 15) Rep 14, para 101 – 102.

²⁸ Corfu Channel (United Kingdom v Albania) (Preliminary Objection) (Judgment) (International Court of Justice, 25 March 1948) [1948] ICJ Rep 15, para 22.

²⁹ Pulp Mills on the River Uruguay (n 15) Rep 14, para 101 – 102.

³⁰ Iron Rhine Arbitration (Belgium v Netherlands) (Award of the Arbitral Tribunal, 24 May 2005), para 59.

³¹ Malgosia Fitzmaurice, Megan S Wong and Joseph Crampin, *International Environmental Law. Text, Cases and Materials* (Edward Elgar 2022) 48.

³² Ludmila Pošiváková, 'Zodpovednosť Štátov v Medzinárodnom Práve [International Legal Responsibility of States]' (2015) 3 *Studia Iuridica Cassoviensia* 100, 113.

The Draft Articles in Art. 3 establish the preventive duty of states: "The State of origin shall take all appropriate measures to prevent serious transboundary harm or, in any case, to minimise the risk thereof." The preventive obligations under the draft articles include, for example: to cooperate in good faith and, where necessary, to seek support from one or more qualified international organisations in efforts to prevent substantial cross-border harm or, in any case, minimising the risk thereof (Article 4); to take the necessary legislative, administrative or other measures, including the establishment of appropriate monitoring mechanisms (Article 5); to establish a permit regime and to monitor compliance with the conditions contained in the permit for activities conducted within its territory or under its jurisdiction or control that pose a risk of causing substantial harm beyond national borders (Article 6); to ensure that, before granting a permit to operators to carry out activities involving a risk of causing significant transboundary harm, an assessment of the risk of the activity causing significant transboundary damage is carried out (Article 7); to consult on preventive measures (Article 9); to develop emergency response plans, in coordination with potentially affected states and relevant international organisations (Art. 16).³³

4. PRECAUTIONARY PRINCIPLE

The classic formulation of the precautionary principle is enshrined in principle 15 of the 1992 Rio Declaration on Environment and Development:

In order to protect the environment, States shall apply the precautionary approach to the greatest extent possible. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.³⁴

It is also enshrined in a number of environmental treaties: the UN Framework Convention on Climate Change (1992), the Bamako Convention on the Ban on Imports into Africa and on the Control of Transboundary Movements and Management of Hazardous Wastes in Africa (1991),³⁵ and others. For example, according to art. 4(3)(f) of the Bamako Convention states should implement precautionary principle without the proof of possible environmental harm.

At the same time, it should be noted that not all scholars believe that this principle belongs to customary environmental law. As an argument, Malgosia Fitzmaurice, Megan S. Wong and Joseph Crampin provide that international courts have not recognised the customary nature of this principle in any decision.³⁶ We have a slightly different view on this statement. The ITLOS in its Advisory opinion of 1 February 2011 stated that there is a trend towards making the precautionary principle part of customary international law.³⁷ This is evidenced by the existence of a significant number of treaties that reinforce this principle, which indicates the recognition of this principle by states. According to the

³³ International Law Commission, Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with Commentaries (2001) UN Doc A/56/10.

³⁴ Rio Declaration on Environment and Development, UN Doc A/CONF.151/26 (Vol I), 12 August 1992.

³⁵ Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa (adopted 30 January 1991, entered into force 22 April 1998) 2101 UNTS 177 ('Bamako Convention'), Article 4 (3).

³⁶ Fitzmaurice, Wong and Crampin (n 31) 68.

³⁷ Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area (Advisory Opinion) (International Tribunal for the Law of the Sea, February 1, 2011) ITLOS Reports 2011, p. 10, para 138.

tribunal, the provision enshrined in the Rio Declaration concerning precautionary principle is mandatory.

In Southern Bluefin Tuna Provisional Measures Order (New Zealand v. Japan; Australia v. Japan) of 27 August 1999 the ITLOS held that states in case of scientific uncertainty concerning the necessary measures to conserve the stock of southern bluefin tuna should „act with prudence and caution“³⁸ which can be interpreted as a reference to the precautionary principle necessary to be applied for the conservation of marine biodiversity. In the MOX Plant Provisional Measures Order (Ireland v. United Kingdom) of 3 December 2001 the ITLOS again emphasised that states must act with prudence and caution when there are risks of environmental harm which are uncertain (uncertain effects of the operation of the MOX plant) and linked the precautionary principle with the obligation of states to exchange information concerning risks of plant operation. It also stated the obligation of states to cooperate in devising ways to deal with risks.³⁹ Thus, we can see that in this case the tribunal went further and clarified the obligations of states regarding the application of the precautionary principle (the obligation to cooperate and to exchange information).

The most recent ITLOS case is the Advisory Opinion on Request submitted by the Commission of Small Island States on Climate Change and International Law. In this case the ITLOS stated that international climate change law is not *lex specialis* in relation to the UNCLOS, which means that the Paris Agreement does not limits or modifies the obligation of states provided for by the UNCLOS. According to the tribunal, both treaties are “interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation”.⁴⁰ Similar approach we can find in the ICJ Advisory Opinion on Obligations of States in Respect of Climate Change.⁴¹ According to the tribunal, the obligation of due diligence is also closely linked with the precautionary approach.⁴² As we can see in its advisory opinion the ITLOS once again emphasised the importance of precautionary principle for the protection of the sea and recognised it in the climate context. Thus, states should apply it to protect marine environment, its biological diversity and natural resources, as well as while addressing climate-related marine impacts.

The Convention on Biological Diversity of 1992 incorporates the precautionary principle in its preamble, stating that the lack of full scientific certainty shall not be used as a reason for postponing measures to prevent significant biodiversity loss.⁴³ This convention has near universal participation (more than 190 parties) and provided the normative foundation for application of precautionary principle in the sphere of protection of biodiversity.

5. ENVIRONMENTAL IMPACT ASSESSMENTS

“Environmental Impact Assessment” means a governmental process for evaluation of the potential environmental consequences of the planned activity.

³⁸ Southern Bluefin Tuna Cases (New Zealand v Japan; Australia v Japan) (Provisional Measures, Order) (International Tribunal for the Law of the Sea, 27 August 1999) ITLOS Reports 1999, p. 280, paras 77 and 79.

³⁹ MOX Plant (Ireland v United Kingdom) (Provisional Measures, Order) (International Tribunal for the Law of the Sea, 3 December 2001) ITLOS Reports 2001, p. 95, para 84.

⁴⁰ Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law (Advisory Opinion, 21 May 2024) ITLOS Reports 2024, para 136.

⁴¹ Obligations of States in Respect of Climate Change (n 23).

⁴² Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law (Advisory Opinion, 21 May 2024) ITLOS Reports 2024, para 242.

⁴³ Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79 (‘CBD’).

Environmental impact assessment has been included in a number of international and regional treaties, as well as soft law instruments. The Convention on Environmental Impact Assessment in a Transboundary Context (ESPOO Convention), adopted in Espoo, Finland, on 25 February 1991, is one of the most important treaties on the obligation to carry out environmental impact assessment. The Convention aims to introduce the principle of environmental impact assessment into the domestic legislation of individual states and to enable other states to intervene in a precisely defined manner during its implementation in case of activities carried out outside their territory which are likely to have a significant adverse effect on their environment. At the same time, it should be noted that ESPOO Convention does not have universal nature. That is why the customary nature of environmental impact assessment is very important, because this principle should be implemented not only by states which are parties to the ESPOO Convention, but by all states.

This principle was recognised as customary rule by the ICJ in the Pulp Mills case between Argentina and Uruguay. In the Pulp Mills case, the ICJ indicated that an environmental impact assessment must be carried out before the project is implemented. In addition, once the project starts, continuous monitoring of environmental impacts is required, if necessary, throughout the life of the project.⁴⁴

In Pulp Mills case the principle of environmental impact assessment was clarified, although not to the full extent. The ICJ stated, that the EIA should be conducted at least in cases when there are potential impacts of the planned activity on a shared resource and in case if the EIA was not conducted, although there were potential risks and due diligence of states was not exercised.

Judge Weeramantry, in his separate opinion in the Gabčíkovo-Nagymaros case between Hungary and Slovakia, highlighted that environmental impact assessment is an evolving principle that is not limited to the evaluation of environmental effects before the start of the project:

As long as a project of a certain scale is in operation, the environmental impact assessment must continue, because any such project may have unintended consequences; it is also necessary to constantly monitor the implementation of the project.⁴⁵

The ICJ pointed out the connection between environmental impact assessment and the State's duty to exercise due diligence in preventing significant transboundary damage in the San Juan River (Nicaragua v. Costa Rica) case⁴⁶ and in the Pulp Mills case:

the duty of due diligence, which includes the duty of caution and prevention, cannot be considered to be fulfilled if the party planning works that could affect the regime of a river or the quality of its water does not carry out an environmental impact assessment of those works.⁴⁷

Environmental impact assessment was also recommended by the Economic Commission for Africa Council of Ministers in 1984,⁴⁸ which also contributed to the development of understanding of this principle as customary international law.

⁴⁴ Pulp Mills on the River Uruguay (n 15) Rep 14.

⁴⁵ Gabčíkovo-Nagymaros Project (Hungary v Slovakia) (Separate Opinion of Vice-President Weeramantry) [1997] ICJ Rep 7, para 108.

⁴⁶ Certain Activities Carried Out by Nicaragua in the Border Area (n 17) Rep 665, para 153.

⁴⁷ Pulp Mills on the River Uruguay (n 15) Rep 14, para 204.

⁴⁸ Economic Commission for Africa, Environment and Development in Africa, ECA Res 496(XIX), UN Doc E/ECA/CM/10/RES/496(XIX), 1984.

A key shortcoming is that international environmental law does not specify the manner in which environmental impact assessments should be conducted. Furthermore, this question is not answered in the decisions of the ICJ either.

6. HUMAN RIGHT TO A HEALTHY ENVIRONMENT

The presence of a significant number of documents that enshrine the human right to a safe environment, the work of international organisations in this area, as well as the recognition of this right in the constitutions of a significant number of states indicate the need to include human right to a healthy environment in customary norms of international environmental law. In this section of the article, we will try to answer the question whether the right to a healthy environment has customary nature.

The Rio Declaration on Environment and Development adopted by the United Nations Conference on Environment and Development in Rio de Janeiro in 1992 emphasises the human right to a healthy and productive life in harmony with nature (Principle 1).⁴⁹

The 2015 Paris Agreement focused on human rights as well. In its preamble the Agreement acknowledged that states should take "action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health".⁵⁰

IUCN World Declaration on the Environmental Rule of Law draws attention to the need to create environmental rule of law. It emphasises close relationship between human rights and protection of the environment. According to the Declaration, rule of law should include "respect for human rights, including the right to a safe, clean, healthy, and sustainable environment".⁵¹ Very important are principles 2 and 3 of the Declaration. Principle 2 states that "each human and other living being has a right to the conservation, protection, and restoration of the health and integrity of ecosystems. Nature has the inherent right to exist, thrive, and evolve". Principle 3 speaks about the right to a safe, clean, healthy, and sustainable environment.

On 8 October 2021, the UN Human Rights Council adopted Resolution 48/13, which for the first time globally recognised the human right to a clean, healthy and sustainable environment.⁵²

In the context of the global environmental crisis, the Human Rights Council in its Resolution calls on States to cooperate at the international level to ensure this right. The UN General Assembly in its Resolution of 28 July 2022 calls on States, international organisations and business companies to increase their efforts to ensure a healthy environment for all.⁵³ The adoption of these resolutions is important because it gives all people the right to demand that their governments protect this right. This right is enjoyed by everyone without exception.

Office of the United Nations High Commissioner for Human Rights also pays attention to the human right to safe environment. For example, it in its Report of 2016

⁴⁹ Rio Declaration on Environment and Development, UN Doc A/CONF.151/26 (Vol I), 12 August 1992.

⁵⁰ Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) 3156 UNTS 79 ('Paris Agreement').

⁵¹ IUCN World Commission on Environmental Law, IUCN World Declaration on the Environmental Rule of Law (Rio de Janeiro, April 2016).

⁵² Human Rights Council, The Human Right to a Clean, Healthy and Sustainable Environment, UN Doc A/HRC/RES/48/13, 8 October 2021.

⁵³ United Nations General Assembly, The Human Right to a Clean, Healthy and Sustainable Environment, UNGA Res 76/300, UN Doc A/RES/76/300, 28 July 2022.

concentrates its attention on the obligations of states in the sphere of environmental human rights.⁵⁴

In May 2023, the Council of Europe in Reykjavik adopted the Reykjavik Declaration in which recognised the impact of current challenges, including the environmental pollution and negative effects of climate change on human rights. In the Declaration the Council of Europe committed to strengthen the activities in the areas of environmental protection and human rights and to develop tools to address emerging challenges in the fields of climate change and the environment. The Reykjavik Declaration emphasises the need for enhanced measures to safeguard the environment and to address the human rights implications of the triple planetary crisis – pollution, climate change, and biodiversity loss. Appendix V of the Declaration determines the connection between human rights and the environment, stating that a clean, healthy, and sustainable environment is essential for the full realisation of human rights for both current and future generations.⁵⁵ Although the resulting document recognises the urgent need for coordinated action to address the consequences of environmental degradation, it does not contain a sufficient commitment to legally recognise the right to a clean and healthy environment,⁵⁶ however it should be noted that this shortcoming is inherent to all soft law instruments.

WHO promotes discussion of pressing issues related to the impact of the environment on human health, develops specific recommendations aimed at improving the situation of various categories of people; exchanges of experience in the treatment of diseases, etc. It developed Draft Global Action Plan on Climate Change and Health.⁵⁷ This document also focuses on environmental justice and human right to healthy environment.

In addition to a significant number of international documents in which states recognised the right of citizens to a healthy environment it should be pointed out that at the legislative level, more than 80 percent of UN Member States already recognised this right in their national legislation. This proves that the second criteria necessary for recognition of customary law (the *opinio juris*) is fulfilled. Essential elements of the right to a healthy environment include clean air, a safe climate, access to safe water and adequate sanitation, healthy and sustainably produced food, a non-toxic environment, and healthy biodiversity and ecosystems.⁵⁸

In its advisory opinion of 2025 concerning the obligations of states in respect of climate change, the ICJ recognised the link between climate change and human rights and the fact that without prevention of climate change and protection of the environment enjoyment of human rights is impossible.⁵⁹ The ICJ did not explicitly recognise the human right to a clean, healthy and sustainable environment as a rule of customary international

⁵⁴ Office of the United Nations High Commissioner for Human Rights, Analytical Study on the Relationship between Climate Change and the Human Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, UN Doc A/HRC/32/23, 6 May 2016.

⁵⁵ 4th Summit of Heads of State and Government of the Council of Europe: Final Outcome Document, Appendix V, The Council of Europe and the Environment (Council of Europe, Reykjavik, 16–17 May 2023) CM(2023)57-final.

⁵⁶ Amalia Ordóñez Vahí, *The Council of Europe and the Right to a Clean, Healthy, and Sustainable Environment* (Universal Rights Group, 2023).

⁵⁷ World Health Organization, Climate Change and Health: Draft Global Action Plan on Climate Change and Health, Report by the Director-General, WHO Doc EB156/25, 9 January 2025.

⁵⁸ Human Rights Council, Right to a Healthy Environment: Good Practices, Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, UN Doc A/HRC/43/53, 30 December 2019.

⁵⁹ Ibid para 393.

law. This caution of the ICJ slows the crystallisation of customary nature of this right. At the same time, it should be noted, that the court recognised that states have obligations to ensure protection of the climate system according to the climate change treaties and acknowledged that climate change treaties are not *lex specialis* in relation to other treaties or sources of law. According to the ICJ the states have obligations under general international law to protect the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases.⁶⁰ The court also recognised that additional obligations in this sphere arise under human rights law and other treaties (except climate change treaties). According to the ICJ, the states have to take action to protect the climate, and this obligation includes the obligation of protection of environmental human rights.⁶¹ The court emphasised, that human rights law, climate change treaties, other environmental treaties and customary international law do not exist separately, but they “inform each other”.⁶² It means that all treaties as well as customary international law should be interpreted and applied simultaneously and none of them have priority. The implicit recognition of the link between climate change and human rights by the court reinforces the growing international consensus that environmental protection is not merely an environmental concern, but essential human rights obligation of states.

On this issue, the ICJ's position diverges from the view of several scholars who consider the right to a healthy environment to have attained a status of customary international law (e.g., César Rodríguez-Garavito, Rebecca M. Bratspies). César Rodríguez-Garavito bases his statement on moral principles and socio-legal studies. Rebecca M. Bratspies bases her statement on environmental provisions in state constitutions.⁶³ Astrid Puentes Riaño, the UN Special reporter on the human right to a clean, healthy and sustainable environment, has likewise argued that the time has come for the ICJ to recognise this right as a customary international law.⁶⁴ Judge Aurescu in the separate opinion to the Advisory Opinion also reiterates his regret that the ICJ did not recognise the right to a clean, healthy and sustainable environment as a norm of customary international law in an express manner.⁶⁵

Despite many scholars claiming that the right to a clean, healthy and sustainable environment is a customary international law, we can state that this right is emerging, but not fully crystallised as customary law. There are several reasons why we can claim so. Not all states recognise this right in its national legislation. Besides, states' practice regarding the enforcement of this right varies in scope. *Opinio juris* means that states must believe that they are legally obliged to act in a certain way. While many states recognise the right to a healthy environment, they often do it as a part of development strategy, which calls into question the binding nature of this recognition. Secondly, recognition of the right to a healthy environment point to a certain trend, but they are not enough for the right to be recognised.

⁶⁰ Ibid para 97.

⁶¹ Obligations of States in respect of Climate Change (n 23) para 403.

⁶² Ibid para 314.

⁶³ Rebecca M Bratspies, 'Reasoning Up to Human Rights: Environmental Rights as Customary International Law' in John Knox and Ramin Pejan (eds), *The Human Right to a Healthy Environment* (2018) <https://ssrn.com/abstract=3172991> accessed 25 June 2026.

⁶⁴ Astrid Puentes Riaño, 'Healthy Environment: A Human Right and Customary International Law' (SDG Knowledge Hub, 30 January 2025) <https://sdg.iisd.org/commentary/guest-articles/healthy-environment-a-human-right-and-customary-international-law/> accessed 25 June 2026.

⁶⁵ Obligations of States in respect of Climate Change (Separate Opinion of Judge Aurescu, 23 July 2025) General List No 187, para 46.

This statement has direct influence on the protection of environmental human rights. The failure to prevent significant harm to the global climate system can also amount to a violation of the human rights that depend on a clean and sustainable environment, such as the right to a life, health, food, housing, and the right to a healthy environment.

The Inter-American Court of Human Rights in its Advisory opinion of May 29, 2025 on climate emergency and human rights recognised that the human right to a healthy environment should be understood as a fundamental right necessary for the existence of humanity. This right embodies a universal value, which must be guaranteed not only to present, but also to future generations.⁶⁶ The court therefore underscores the need to ensure inter-generational equality. According to the Inter-American Court of Human Rights, violations of environmental human rights affect the enjoyment of all other human rights,⁶⁷ which is why states must protect them within their territory and beyond it.⁶⁸ The protection of the right to a healthy environment has become an indispensable component of states' obligations, requiring proactive preventive actions to ensure the rights of present and future generations.

The Inter-American Court of Human Rights concurred with the ITLOS advisory opinion that the existence of a breach must be evaluated individually in each specific case.⁶⁹ The Advisory opinion is particularly valuable for its detailed clarification of states' due diligence obligations in the prevention of climate change. According to the Inter-American Court of Human Rights, due diligence entails: identification and thorough, detailed and in-depth assessment of the risks; adoption of proactive and ambitious preventive measures to avoid the worst climate scenarios; utilisation of the best available science in the design and implementation of climate actions; integration of the human rights perspective into the formulation, implementation and monitoring of all policies and measures related to climate change; permanent monitoring of the effects and impacts of the adopted measures; strict guarantee of procedural environmental rights; transparency and accountability in relation to state's climate action; appropriate regulation and supervision of corporate due diligence, and enhanced international cooperation.⁷⁰ By requiring the integration of human rights considerations into all climate policies and measures related to climate change, the court confirms that environmental protection and human rights protection are inseparable. Failures in climate governance, such as inadequate monitoring, weak regulation of private actors, or lack of public participation, can result to human rights violations, not merely policy shortcomings.

The Inter-American Court of Human Rights in its advisory opinion also adopts an innovative approach by recognising nature as a subject of rights.⁷¹ According to the court, treating nature as a holder of rights contributes to sustainable development and ensures the right to a healthy environment for future generations. The court explains the granting of legal personality to the environment by the need to focus on the protection of environmental conditions necessary for the life of local communities and indigenous peoples.⁷² According to the court, this is also required by the principle of progressive

⁶⁶ Climate Emergency and Human Rights (Advisory Opinion AO-32/25, requested by the Republic of Chile and the Republic of Colombia) (Inter-American Court of Human Rights, 29 May 2025) Series A No. 32, para 272.

⁶⁷ *Ibid* para 274.

⁶⁸ *Ibid* para 277.

⁶⁹ Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law (Advisory Opinion, 21 May 2024) ITLOS Reports 2024, para 239.

⁷⁰ Climate Emergency and Human Rights (no 66) para 236.

⁷¹ *Ibid* para 279.

⁷² *Ibid* para 280.

development of international human rights law. The natural environment, as a collective object of general interest, is the basis not only for the existence of the state, but also for life on our planet in general.⁷³ This approach of the court by recognising nature as subject of law contributes to the strengthening of environmental protection and protection of environmental human rights.

7. CONCLUSIONS

Given the shortcomings of international environmental treaties, customary environmental norms serve as a guide for states to regulate their relations in the field of environmental protection, and also help in resolving disputes that arise between states in the case of harm to the environment, in the field of shared use of common resources, etc. There is no established opinion among scholars as to which norms of international environmental law are customary. In determining the list, in our opinion, it is helpful to use the rulings of the UN International Court of Justice, in which the international court determines the belonging of certain norms to customary law. It follows from the decisions of the UN International Court of Justice that these include the following principles: the principle of non-harm to the environment beyond the jurisdiction of states, the principle of prevention, precautionary principle, environmental impact assessment. The UN International Court of Justice, unfortunately, did not specify in more detail the content of the implementation of these principles. Therefore, the key issue remains the study of the practice of states in this area. At the same time, it should be noted that customary norms of international environmental law are general and therefore it would be worth detailing them in international treaties. The right to a clean, healthy and sustainable environment has not yet attained the status of customary international law due to inconsistent state practice, insufficiently established *opinio juris* and insufficient consolidation of this right in international treaties. The ICJ in its recent Advisory opinion on obligations of states in respect of climate change confirmed this vision. It detailed environmental obligations of states, including the duty to prevent significant harm to the environment in the context of climate change, but avoided statement that a human right to a healthy environment has customary nature. The Inter-American Court of Human Rights in its Advisory opinion of May 29, 2025 on climate emergency and human rights recognises that the protection of the right to a healthy environment has become a part of states' obligations, requiring proactive preventive actions. The court adopts an innovative approach by recognising nature as a subject of rights. According to the court, treating nature as a holder of rights contributes to sustainable development and ensures the right to a healthy environment for future generations. At the same time the Inter-American Court of Human Rights also didn't recognise the right to a healthy environment as a customary law. The ITLOS in its advisory opinion on climate change and international law didn't do it either. Therefore, we can state that there is no recognition of this right by international courts, which also confirms that this right does not yet have the status of customary law.

⁷³ Ibid para 281.