



22 OTTOBRE 2025

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by Gianfranco Gabriele Nucera

Assistant Professor in International Law
Sapienza University of Rome

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Assistant Professor in International Law
Sapienza University of Rome

Abstract [En]: This article aims to analyze the Inter-American Court of Human Rights' Advisory Opinion No. 32 on Climate Emergency and Human Rights, issued on 29 May 2025, with specific reference to the peremptory nature of the prohibition to cause irreversible damage to the environment and the climate system asserted by the Court. This classification underscores the non-derogable nature of such a norm, binding all States also for the consequences related to its breach, and linking the health of ecosystems to fundamental human rights. The article discusses the Court's innovative approach, taking into consideration the work of the International Law Commission on the topic and the practice of other international tribunals, in order to outline a regional approach in the identification of *ius cogens*.

Title: Riflessioni sull'identificazione del divieto di causare danni irreversibili all'ambiente e al sistema climatico come norma imperativa: un approccio regionale allo *ius cogens* promozionale?

Abstract [It]: L'articolo si propone di analizzare il parere n. 32 della Corte interamericana dei diritti umani sull'Emergenza climatica e i diritti umani, adottato il 29 maggio 2025, con specifico riferimento al carattere cogente del divieto di causare danni irreversibili all'ambiente e al sistema climatico, affermato dalla Corte. Tale qualificazione sottolinea la natura inderogabile di tale norma, vincolante per tutti gli Stati anche per le conseguenze connesse alla sua violazione, e che collega la salute degli ecosistemi ai diritti umani fondamentali. L'articolo discute l'approccio innovativo della Corte, tenendo conto del lavoro della Commissione del diritto internazionale sul tema e della prassi di altri tribunali internazionali, al fine di individuare un approccio regionale nell'identificazione delle norme di *ius cogens*.

Keywords: International Law; Environmental Protection; *ius cogens*; Inter-American Court of Human Rights; International Law Commission

Parole chiave: Diritto internazionale; Tutela ambientale; *ius cogens*; Corte interamericana dei diritti umani; Commissione del diritto internazionale

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* Articolo sottoposto a referaggio.

1. Setting the Scene

On 29 May 2025, the Inter-American Court of Human Rights (IACtHR) issued its Advisory Opinion No. 32 on *Climate Emergency and Human Rights*¹. Generally, the Opinion aimed to clarify the scope of international human rights obligations in the field of climate change and can be read as a part of a broader context of climate litigation strategies, in line with other opinions requested from various international tribunals². However, while being part of a common strategy, the advisory opinions reveal many differences among them, related to the particular legal order in which they were requested³. This feature emerges, for example, from a quick comparison of the advisory opinions adopted, again on the topic of international climate obligations, by the IACtHR and the International Court of Justice (ICJ). Although very similar in time⁴, the Opinion of the ICJ appears less innovative in terms of identifying obligations, in a consistent manner with its jurisprudence, which always had a more restrained interpretative approach

¹ IACtHR, *Climate Emergency and Human Rights*, Advisory Opinion OC 32/25, 29 May 2025, (English text of the opinion is available at the website of the [IACtHR](#)). Among the first comments to the advisory opinion, see: N. REISCH, L. GOMEZ BETANCUR, U. KHATRI, *What the Inter-American Court's Climate Opinion Could Mean for Human Rights and Climate Justice*, in *CIEL Blog Post*, June 23, 2025; M.A. TIGRE, M. BÖNNEMANN, K. SILVERMAN-ROATI, *A Blueprint for Rights-Based Climate Action: The Inter-American Court of Human Rights' Advisory Opinion on the Climate Emergency*, in *Verfassungsblog*, July 9, 2025; L. RIEMER, L. SCHEID, *A Differentiated Path Forward: The Inter-American Court's Advisory Opinion on Climate Change and Human Mobility Rights*, in *Climate Law. A Sabin Centre Blog*, July 10, 2025; D.R. BOYD, *The Right to a Healthy Environment as a Catalyst for Urgent and Ambitious Climate Action at the IACtHR*, in *Verfassungsblog*, July 15, 2025; M. GEHRING, *Jus Cogens and the Climate Crisis: The Inter-American Court's Landmark Climate Emergency Advisory Opinion and its Jus Cogens Ruling*, in *Verfassungsblog*, July 16, 2025; J. AUZ, *The Inter-American Court of Human Rights' Advisory Opinion on the Climate Emergency: A Global South Contribution to Climate Governance*, in *EJIL:Talk!*, July 18, 2025; S. GUPTA, *Erga Omnes and Climate Change as a Human Rights Emergency: The IACtHR's Reconceptualisation of State Responsibility in its Climate Change Advisory Opinion*, in *Cambridge International Law Journal - Blog*, July 31, 2025; E. JACKSON, *Potential Climate Remedies at the Inter-American Court of Human Rights*, in *OpinioJuris*, August 1, 2025; M. SCHEININ, *Right to Life in the ICJ Advisory Opinion on Climate Change*, in *EJIL:Talk!*, September 12, 2025; N. ALIZADEH MARANDI, P. SCHÖNBERGER, *A Right to Defend the Environment: Legal Protection for Environmental Advocacy in the IACtHR's Climate Advisory Opinion*, in *Verfassungsblog*, September 16, 2025.

² In addition to the request presented before the IACtHR, advisory opinions have been also adopted by the International Tribunal for the Law of the Sea (ITLOS, *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law*, No. 31, 21 May 2024, available at the website of the [ITLOS](#)), and the International Court of Justice (ICJ), *Obligations of States in Respect of Climate Change*, Advisory Opinion, 23 July 2025, available at the website of the [ICJ](#)). A fourth opinion is currently pending before the African Court of Human and Peoples' Rights (ACtHRP, *Request by the Pan African Lawyers Union (PALU) for an Advisory Opinion on the Obligations of States with Respect to the Climate Change Crisis*, 2 May 2025, available at the website of [Climate Case Chart](#)). On the use of advisory opinions in climate litigations, see: D. BODANSKY, *Advisory Opinions on Climate Change: Some Preliminary Questions*, in *Review of European, Comparative & International Environmental Law*, n. 32, 2023, pp. 185-192; B. MAYER, *International Advisory Proceedings on Climate Change*, in *Michigan Journal of International Law*, n. 44, 2023, pp. 41-115. Even if at European level there have been no requests for opinions on the climate obligations of States, it is essential to highlight that there has been no shortage of significant rulings both at regional level (see the ECtHR decision in the case *Verein KlimaSeniorinnen Schweiz v. Switzerland*, Grand Chamber, Application No. 53600/20, 9 April 2024) and at national level (see, recently, the decision of the Italian Court of Cassation of 18 February 2025, No. 20381).

³ C. VOIGT, *Foreword: Advisory Opinions from ICJ, ITLOS, and IACtHR: Expectations and Risks*, in M.A. TIGRE, A. ROCHA (eds.), *The Role of Advisory Opinions in International Law in the Context of the Climate Crisis*, Brill, Leiden-Boston, 2025, pp. IX-XIII.

⁴ In about two months' span, both opinions were adopted. A. LUQUE ARMESTAR, G. CHÁVEZ VILLAFANE, D. PULIDO RAMÍREZ, *Análisis comparativo de las opiniones consultivas de la Corte IDH y la CIJ sobre las obligaciones de los Estados respecto del cambio climático*, August 19, 2025, available at the website of the [Instituto de Democracia y Derechos Humanos](#).

compared to that of regional human rights courts⁵. For this reason, we decided to focus our attention on the novelty and innovative perspective that the Court of San Jose promoted with the adoption of its last advisory opinion.

More specifically, the IACtHR recognised that the prohibition against causing irreversible damage to the environment is a peremptory norm of international law, or *ius cogens*. This acknowledgement represents a significant and progressive development in the evolution of international jurisprudence, underscoring the imperative nature of this obligation⁶. It emphasises that this obligation is non-derogable and universally binding upon all states, regardless of individual legislative frameworks or domestic priorities. By categorising the prohibition as a peremptory norm, the Court conceptually aligns with contemporary understandings of international law that recognise the intrinsic interrelation between the condition of the environment and fundamental human rights. This perspective is particularly relevant in the face of escalating global challenges such as climate change, biodiversity loss, and ecological degradation, which threaten not only the vitality of ecosystems but also the well-being and survival of humanity as a whole. Furthermore, the Court's determination reinforces the responsibility of States to not only refrain from engaging in actions that inflict irreversible harm, but also to adopt proactive measures that preserve ecological balance for present and future generations. Importantly, this elevation of environmental protection to the status of a *ius cogens* norm demands a cohesive and collective legal response, fostering greater accountability among States and facilitating more rigorous enforcement mechanisms to mitigate environmental harm on a global scale⁷.

To understand the significance of recognising a peremptory norm concerning environmental protection, the research will preliminarily summarise the Court's legal reasoning. Then, the meaning of peremptory norms of general international law and the legal methodology defined by the International Law Commission (ILC) for ascertaining the existence of such norms will be addressed. In the last part of the research, consideration will be given to the approach that led the Inter-American Court of Human Rights

⁵ J. ODERMATT, [What the Court Didn't Say: The ICJ's Climate Opinion and the Politics of Judicial Restraint](#), in *Climate Law. A Sabin Centre Blog*, July 30, 2025. See also L. LIXINSKI, *Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law*, in *European Journal of International Law*, n. 21, 2010, pp. 585-604; F. DE LONDRAS, K. DZEHTSIAROU, *Managing judicial innovation in the European Court of Human Rights*, in *Human Rights Law Review*, n. 15, 2015, pp. 523-547; G. CANDIA, *Interpretation of Regional Human Rights Conventions and Originalism: Different Context, Same Myths*, in *DPCE online*, n. 31, 2017, pp. 597-606; C. ROBERTS, *Alternative Approaches to Human Rights: The Disparate Historical Paths of the European, Inter-American and African Regional Human Rights Systems*, Cambridge University Press, Cambridge, 2022.

⁶ On the concept of imperativeness in private international law, see G. ZARRA, *Imperativeness in Private International Law. A View from Europe*, T.M.C. Asser Press, The Hague, 2022.

⁷ Cfr. P. PUSTORINO, *Cambiamento climatico e diritti umani: sviluppi nella giurisprudenza nazionale*, in *Ordine internazionale e diritti umani*, n. 8, 2021, pp. 596-605. See also R. CADIN, *La prassi del Consiglio di sicurezza sul cambiamento climatico: le dinamiche giuridiche prevalenti e la chimera della catartica risoluzione tematica sul binomio clima/sicurezza*, in S. CAFARO (a cura di), *Beni e valori comuni nelle dimensioni internazionale e sovranazionale*, Editoriale Scientifica, Napoli, 2022, pp. 111-126.

to assert that the duty not to cause significant damage to the environment and the climate system reaches a *ius cogens* status in current international law, with a view to identifying a regional approach to the identification of such norms. To this end, the role of the IACtHR will be framed in the dialogue between regional and international promotion of peremptory norms of general international law.

2. The Advisory Opinion No. 32 on Human Rights in the Climate Emergency

Examining the background of the Opinion⁸, the request made by Colombia and Chile sought clarifications on twenty issues related to the Inter-American Convention on Human Rights (IACHR)⁹. The Court instead reorganized the Opinion into three main questions, related to the obligations of States to respect, protect, and fulfil substantive rights in relation to the climate emergency, the procedural rights, and the obligations strictly related to equality and non-discrimination, impacting identified vulnerable groups. A mention must be made of the process that led to the adoption of the Advisory Opinion, as it was the broadest participatory process in the history of the Court, with written interventions from 263 actors, including nine States¹⁰.

Concerning the content of the Advisory Opinion, while it is a comprehensive legal act, given the interdisciplinary nature of the climate emergency, the Court heavily relied on the information and data provided by the reports of the Intergovernmental Panel on Climate Change (IPCC)¹¹, in order to seek also the necessary technical legitimacy in forming its opinion. This has been particularly addressed in the first part of the Advisory Opinion, which dealt with the current context of climate change and its effects within the Americas and among the people living therein. In contrast, the second part adequately addressed the legal questions posed by the requesting States.

In its Advisory Opinion, the Court sought to define the context by analysing the critical and escalating issue of climate change, examining its multifaceted causes and profound impacts on both natural and human systems. The background of the Advisory Opinion was rooted in the understanding that human

⁸ On the advisory function of the Court, see G. ASTA, *La funzione consultiva delle Corti regionali dei diritti umani*, Editoriale Scientifica, Napoli, 2019; T. BUERGENTHAL, *The Advisory Practice of the Inter-American Human Rights Court*, in *American Journal of International Law*, n. 79, 1985, pp. 1-27. See also J.M. PASQUALUCCI, *The Practice and Procedure of the Inter-American Court of Human Rights*, Cambridge University Press, Cambridge, 2012, pp. 27-80; L. BURGORGUE-LARSEN, A. ÚBEDA DE TORRES, *The Inter-American Court of Human Rights. Case Law and Commentary*, Oxford University Press, Oxford, 2011.

⁹ See *Request for an advisory opinion on the Climate Emergency and Human Rights submitted to the Inter-American Court of Human Rights by the Republic of Colombia and the Republic of Chile*, 9 January 2023, available at the website of the [IACtHR](https://www.corteidh.or.cr/).

¹⁰ IACtHR, *Climate Emergency and Human Rights*, *cit.*, pp. 6-7. Full list of written comments is available at the website of the [IACtHR](https://www.corteidh.or.cr/).

¹¹ The IPCC is an intergovernmental body jointly established in 1988 by the World Meteorological Organization (WMO) and the United Nations Environment Programme (UNEP) to review, through periodic assessment cycles, scientific, technical, and socio-economic information on the state of the global climate and to provide the world with a science-based view of knowledge on climate change and its potential environmental, social, and economic impacts. The IPCC is currently under its 7th cycle of assessment.

activities, particularly greenhouse gas (GHG) emissions, have had a significant role in exacerbating climate change. The Court outlined the contributions of various social and economic sectors, differentiating their impacts by State and region, as well as by demographic sectors. It emphasised the urgent need to recognise how climate change disproportionately affects vulnerable territories, especially in the Americas, such as the Amazon and insular regions of the Caribbean. By contextualising these challenges, the Court aimed to underscore the importance of international cooperation and accountability in addressing climate change, laying the groundwork for its recommendations on legal obligations and responsibilities at both national and global levels¹².

Thus, the Advisory Opinion reflects a significant evolution in the approach to human rights in the context of the global warming emergency. In its exploration of substantive obligations, the IACtHR recognised that the climate emergency has altered the obligations of States to respect and protect rights as outlined in the IACHR. It emphasised the necessity of addressing climate-related threats to human rights, mandating that States not only refrain from infringing upon these rights but also take proactive measures to prevent foreseeable climate-related harms by following a “*enhanced due diligence*” approach¹³. Such a notion partially diverges from that pertaining to traditional international environmental law, which primarily focuses on avoiding or mitigating transboundary ecological harm¹⁴. Instead, the IACtHR framed a reinforced due diligence within the context of the climate emergency, arguing that it fulfils human rights obligations if one considers both the specific risks to threatened rights and the vulnerability of the rights holders. To this end, States must conduct “*a meticulous assessment of activities that could result in*

¹² The Court clearly referred to the causes of global warming (anthropogenic greenhouse gas emissions, analysing the contributions of both sectors and States to these emissions) as well as to the impacts of slow-onset and sudden-onset climate events on natural systems and individuals, with particular reference to territories with special vulnerability in the Americas, such as the Amazon and insular territories. IACtHR, *Climate Emergency and Human Rights*, *cit.*, pp. 16-44.

¹³ *Ibid.*, paras. 231-237.

¹⁴ Due diligence requires State’s reasonable efforts to be informed of the foreseeable consequences of a given situation in order to take preventative or responsive measures, unilaterally or in cooperation with third parties, in a timely manner. Such measures include, on the one hand, the formulation of policies aimed at preventing serious harm or minimizing the risk thereof and, on the other, the implementation of such policies. The ICJ has recalled that due diligence “*entails not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as the monitoring of activities undertaken by such operators*.” ICJ, *Pulp Mills on the River Uruguay (Argentina) c Uruguay*, Judgment, 20 April 2010, in *I.C.J. Reports 2010*, para. 191. On the concept of due diligence see, *ex multis*, R. PISILLO MAZZESCHI, “*Due diligence*” e responsabilità internazionale degli Stati, Giuffrè, Milano, 1989; H. KRIEGER, A. PETERS, L. KREUZER (eds.) *Due Diligence in the International Legal Order*, Oxford University Press, Oxford, 2020; C. VOIGT, *The Climate Change Dimension of Human Rights: Due Diligence and States’ Positive Obligations*, Cheltenham-Northampton, 2022, pp. 152-171; M. MALAIHOLLO, *Due Diligence in International Environmental Law and International Human Rights Law: A Comparative Legal Study of the Nationally Determined Contributions under the Paris Agreement and Positive Obligations under the European Convention on Human Rights*, in *Netherlands International Law Review*, n. 68, 2021, pp. 121-155.

significant harm to the climate system before granting approval”, taking into account the best available science and knowledge at their disposal¹⁵.

Moreover, the Court’s interpretation of Article 26 of the Inter-American Convention on Human Rights – regarding economic, social, cultural, and environmental rights – marked a pivotal shift by affirming the right to a safe climate in both individual and collective terms¹⁶. Such a safeguard is essential in the interest of current and future generations and is interwoven with other fundamental rights, such as health, water, and food security. In this context, the Court emphasised the intergenerational dimension of state obligations, highlighting how current actions (or inactions) will impact future generations¹⁷.

Additionally, in line with its recent jurisprudence, the IACtHR advanced a post-anthropocentric perspective by recognising Nature and its components as subjects of rights, independent of their utility to humans. According to the judges, this significant development aims to protect the integrity and functioning of ecosystems, providing a doctrinal framework to address what the Court termed the “triple planetary crisis”, encompassing climate change, biodiversity loss, and pollution¹⁸.

Regarding procedural obligations, the IACtHR emphasised the necessity of States ensuring access to information, public participation in decision-making processes, and legal remedies related to climate issues. This involves promoting transparency and accountability in actions that impact the environment and human rights, recognising the pivotal role that participatory governance plays in effective climate action¹⁹.

The Court pointed out that States must facilitate the participation of affected communities, particularly vulnerable groups, in environmental decision-making processes. By doing so, they can ensure that policies

¹⁵ In general, the enhanced due diligence standard requires: “(i) identification and thorough, detailed and in-depth assessment of the risks; (ii) adoption of proactive and ambitious preventive measures to avoid the worst climate scenarios; (iii) utilization of the best available science in the design and implementation of climate actions”. IACtHR, *Climate Emergency and Human Rights*, *cit.*, para. 236. See also M. MARCHEGANI, *Climate Change and Vulnerability*, in S. VEZZANI, M.C. CARTA, *International and European Union Law in the Face of Climate Change*, Giappichelli, Torino, 2024, pp. 3-21.

¹⁶ IACtHR, *Climate Emergency and Human Rights*, *op. cit.*, paras. 297-304.

¹⁷ *Ibid.*, paras. 305-313. See also N. CARRILLO SANTARELLI, F. SEATZU, *La protección de las generaciones futuras como transformadora del derecho internacional y garantía del entorno de quienes nos sucederán*, in M.I. TORRES CAZORLA, E.M. GARCÍA RICO, A. BAUTISTA HERNÁEZ, A.M. PASTOR GARCÍA (coords.), *Medio ambiente, seguridad y salud: grandes retos del derecho en el siglo XXI*, Tirant lo Blanch, Valencia, 2024, pp. 59-102.

¹⁸ IACtHR, *Climate Emergency and Human Rights*, *cit.*, p. 215. In its previous case law, the Court noted that the triple planetary crisis presents complex and multifaceted challenges that require an integrated and urgent response to guarantee the sustainability of the planet and the well-being of its inhabitants (IACtHR, *U’wa Indigenous Peoples and their members v. Colombia*, Judgment, 4 July 2024. Series C No. 530, para. 304).

¹⁹ According to the judges, the standard of implies not only the regulatory consolidation of environmental and climate rights but also the need for States to strengthen their technical and legal capacity “to guarantee the broadest and most effective involvement of citizens in the response to the climate emergency”. IACtHR, *Climate Emergency and Human Rights*, *cit.*, para. 468.

and measures designed to mitigate, and adapt to, climate change are inclusive and fair, primarily taking into account the perspectives and needs of those directly impacted by environmental degradation²⁰.

The IACtHR's focus on procedural rights underscores the importance of democracy and human rights in the climate discourse, emphasising that effective climate policies are contingent upon the active engagement and empowerment of citizens. This approach aligns with international standards that advocate for participatory governance and respect for human rights across all sectors²¹.

The third key obligation addressed by the IACtHR pertains to intersectional considerations in the context of the climate emergency. The Court explicitly recognised the disproportionate impacts of climate change on marginalised and vulnerable groups, asserting that States must take specific actions to protect these populations.

In particular, the IACtHR focused on vulnerable groups, including children, environmental defenders, women, indigenous peoples, Afro-descendants, and peasant communities, underscoring the need for tailored protection measures to address their unique vulnerabilities within the climate crisis framework²². This intersectional approach not only highlights the importance of equity in climate action but also calls for robust legal protections for those who are most at risk.

By addressing the preservation of rights in an intersectional manner, the IACtHR reinforced the notion that effective climate action must consider various layers of vulnerability and social justice, ensuring that no group is left behind in the transition to a more sustainable future.

3. Declaring the Obligation not to Cause Irreversible Damage to the Environment and the Climate System as *Ius Cogens*

The Advisory Opinion of the IACtHR raises many interesting points, as underlined in the previous paragraph. However, there is one issue that, from our perspective, deserves a deeper analysis. It is the first time that the prohibition of causing irreversible damage to the climate and the environment is qualified as a peremptory norm of international law.

This recognition represents the last step of a long pathway. The case-law of the Court on environmental matters has always been innovative, also due to the specific legal context in which it has been developed, and considering the importance recognized to natural resources for indigenous groups and the growing

²⁰ States must: “(i) adopt measures to protect local, traditional and indigenous knowledge through appropriate mechanisms; (ii) take all measures to respect and protect the rights of Indigenous Peoples, particularly their land, their identity, and the moral and material interests resulting from the knowledge of which they are authors, individually or collectively, and (iii) support the compilation of local, traditional and indigenous knowledge related to climate change, the environment and human rights”. *Ibid.*, para. 484.

²¹ Cfr. M.E. HARRIS, *The 2018 Escazú Agreement: Strengthening Public Participation and Human Rights in Environmental Matters*, in *Rivista di diritto internazionale*, n. 103, 2020, pp. 1007-1041.

²² IACtHR, *Climate Emergency and Human Rights*, *cit.*, para. 593.

recognition of Nature as an autonomous subject of rights contained in several constitutions of Latin America²³.

The Advisory Opinion No. 23 of 15 November 2017, on *The Environment and Human Rights*, already posed the basis for declaring the obligation not to cause irreversible damage to the environment as a peremptory norm.

The mentioned opinion systematized the environmental obligations and emphasized their importance in the context of the Pact of San José. First, relying on its previous jurisprudence, the Court recognized the “undeniable relationship between the protection of the environment and the realization of other human rights” as environmental degradation and the adverse effects of climate change seriously affect the effective enjoyment of such rights²⁴, highlighting the concurring individual and collective dimension of the right to a healthy environment. The latter implies that States must fulfil several obligations of prevention, precaution, cooperation, and the procedural duties, which have to be considered together with those provided by multilateral environmental agreements²⁵.

Subsequent decisions of the Court confirmed this approach. In the case *Habitantes de La Oroya v. Peru*, the Court ascertained the international responsibility of the State as a consequence of the air and soil caused by the company conducting activities in the area²⁶. According to the judges, obligations that protect the environment against unlawful or arbitrary conduct that causes severe and irreversible environmental damage bear the greatest importance, as they are related to the survival of species. To this end, the protection of the environment requires “the progressive recognition of the prohibition of such conduct as a peremptory norm [...] from which no derogation is permitted”²⁷.

In this line, building on the recognition of the importance of international legal concepts and instruments to guarantee the essential values of humanity, which are necessary for present and future generations to live on a habitable planet, the Court, in its most recent Advisory Opinion, recognised that the obligation

²³ E. FERRER MAC-GREGOR, P. GONZÁLEZ DOMÍNGUEZ, *El derecho al medio ambiente sano en la jurisprudencia de la Corte Interamericana de Derechos Humanos*, in *Ordine internazionale e diritti umani*, n. 11, 2024, pp. 378-386.

²⁴ IACtHR, *The Environment and Human Rights*, Advisory Opinion OC 23/17, 15 November 2017, para. 47. See also C. CAMPBELL-DURUFLÉ, S.A. ATAPATTU, *The Inter-American Court's Environment and Human rights Advisory Opinion: Implications for International Climate Law*, in *Climate Law*, n. 8, 2018, pp. 321-337; T. SCOVAZZI, *Il diritto umano a un ambiente sano alla luce dell'opinione consultiva della Corte interamericana dei diritti umani*, in *I diritti dell'uomo. Cronache e battaglie*, n. 32, 2021, pp. 111-126; L.C. LIMA, *The Protection of the Environment before the Inter-American Court of Human Rights: Recent Developments*, in *Rivista Giuridica dell'Ambiente*, n. 35, 2020, pp. 495-522.

²⁵ Cfr. IACtHR, *The Environment and Human Rights*, *op. cit.*, para. 125. K. MARTIN-CHENUT, I. MAGALHÃES, C. COSTA DE OLIVEIRA, C. PERRUSO, M. ROTA, A. SCHEMBRI, L. SUASSUNA, *La protection de l'environnement saisie par la Cour interaméricaine des droits de l'homme*, in *Revue de science criminelle et de droit pénal comparé*, n. 15, 2024, pp.441-452.

²⁶ IACtHR, *Habitantes de La Oroya v. Peru*, Judgment, 27 November 2023, Series C No. 511, pp. 130-131. See also L. D'APOTE, [Diritto a un Ambiente Salubre e Democrazia Ambientale: Il Caso La Oroya tra Dimensione Locale e Globale](#), in *SIDIBlog*, February 10, 2025; T. VIVEROS-UEHARA, [La Oroya and Inter-American Innovations on the Right to a Healthy Environment](#), in *Versassungsblog*, May 16, 2024.

²⁷ IACtHR, *Habitantes de La Oroya v. Peru*, *op. cit.*, para. 129.

not to cause irreversible damage to the climate and the environment, enshrined in several legal instruments, protects universal values. Specifically, international environmental law has evolved toward the crystallisation of certain obligations that cannot be derogated, particularly regarding the risk of irreversible damage to the ecosystems that sustain life²⁸. In particular, such crystallisation has been possible by the establishment of fundamental environmental principles²⁹, and the adoption of global agreements to address climate change³⁰ and loss of biodiversity³¹, accompanied by consistent efforts undertaken to prohibit conducts that give rise to massive and long-lasting damage to the ecosystems³². Furthermore, there is a scientific consensus on the existential risks and the fact that anthropogenic activities can cause irreversible effects, negatively affecting the vital equilibrium of the ecosystem³³. As the best available science has confirmed, the anthropogenic contribution to climate change and the consequent irreversible deterioration of the common ecosystem constitute “*risks of an existential nature that call for a universal and effective legal response*”³⁴.

²⁸ IACtHR, *Climate Emergency and Human Rights*, cit., para. 287.

²⁹ Reference is made primarily to the principles enshrined in the Rio Declaration on Environment and Development (*Report of the United Nations Conference on Environment and Development*, UN Doc. A/CONF. 151/26 (Vol. 1), 12 August 1992). On the Rio Declaration and the consolidation of the principles contained therein in international law, see: S. MARCHISIO, *Gli atti di Rio nel diritto internazionale*, in *Rivista di diritto internazionale*, n. 75, 1992, pp. 581-621; J.D. KOVAR, *A Short Guide to the Rio Declaration*, in *Colorado Journal of International Environmental Law and Policy*, n. 4, 1993, pp. 119-140; I.M. PORRAS, *The Rio declaration: a new basis for international cooperation*, in *Review of European Community & International Environmental Law*, n. 1, 1992, pp. 245-253; D. FREESTONE, *The Road from Rio: International Environmental Law after the Earth Summit*, in *Journal of Environmental Law*, n. 6, 1994, pp. 193-218; A.C. KISS, *The Rio Declaration on Environment and Development*, in L. CAMPIGLIO, L. PINESCHI (eds.), *The Environment after Rio: International Law and Economics*, Graham & Trotman, The Hague, 1994, pp. 55-64; D.A. WIRTH, *The Rio Declaration on Environment and Development : two steps forward and one back, or vice versa?*, in *Georgia Law Review*, n. 29, 1995, pp. 599-652; J.E. VIÑUALES (ed.), *The Rio Declaration on Environment and Development: A Commentary*, Oxford University Press, Oxford, 2015.

³⁰ *United Nations Framework Convention on Climate Change*, New York, 9 May 1992, in UNTS, vol. 1771, p. 107; *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, Kyoto, 11 December 1997, in UNTS, vol. 2303, p. 162; *Paris Agreement*, Paris, 12 December 2015, in UNTS, vol. 3156, p. 3.

³¹ *Convention on Biological Diversity*, Rio de Janeiro, 5 June 1992, in UNTS, vol. 1760, p. 79; *Cartagena Protocol on Biosafety to the Convention on Biological Diversity*, Montreal, 29 January 2000, in UNTS, vol. 2226, p. 208; *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity*, Nagoya, 29 October 2010, in UNTS, vol. 3008, p. 3; *Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety*, Nagoya, 15 October 2010, in UNTS, vol. 3239, p. 3.

³² In this respect see, *inter alia*, the provisions of the *Convention for the Protection of the Ozone Layer* (Vienna, 22 March 1985, in UNTS, vol. 1513, p. 293) and its *Protocol on Substances that Deplete the Ozone Layer* (Montreal, 16 September 1987, in UNTS, vol. 1522), the *United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa* (Paris, 14 October 1994, in UNTS, vol. 1954, p. 3), the *Convention on Persistent Organic Pollutants* (Stockholm, 22 May 2001, in UNTS, vol. 2256, p. 119), the *Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade* (Rotterdam, 10 September 1998, in UNTS, vol. 2244, p. 337), the *Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal* (Basel, 22 March 1989, in UNTS, vol. 1673, p. 57).

³³ The Court referred *passim* to large-scale and irreversible deforestation of primary forests, destruction or extensive damage to biodiversity, persistent pollution of vital resources, oceans and the atmosphere, massive radioactive pollution, irreversible alteration of natural biogeochemical cycles.

³⁴ IACtHR, *Climate Emergency and Human Rights*, cit., para. 289.

The logical assumption on which the Court's statement is based regards the necessity of a peremptory prohibition not to significantly alter the ecological equilibrium, as the latter represents a requirement for the present and future habitability of the planet³⁵, and its legal protection is essential for guaranteeing human rights, including non-derogable prohibitions. To confirm this assertion, the Court make the hypothesis that if there is no peremptory prohibition under international law regarding conduct creating irreversible impacts on the ecosystem, this situation would undermine the essential conditions for the enforceability of fundamental human rights protected by peremptory provisions³⁶.

In addition, the Court explained that the prohibition of conduct that irreversibly harms the vital equilibrium of ecosystems and their normative hierarchy can be deduced from general principles of law, such as the principle of effectiveness. To this end, the object of such a principle is to guarantee that the rights and obligations recognised in legal systems are interpreted and applied effectively in order to achieve their purpose. Only by respecting the equilibrium of the Earth's ecosystem, which enables the life of all species – including human beings – can human rights be fulfilled. Therefore, effectiveness requires that the protection of the environment be a condition *sine qua non* for compliance with the mentioned human rights obligations. Moreover, the environmental obligations constitute a manifestation of the collective interest of humanity, as “*there is no other way*” to guarantee the enforcement of human rights.

By adopting this logic, the Court seems to echo the interpretative principle of *effet utile*, which requires a provision to be interpreted in the most effective way to achieve its purpose, that is, the objective established by the law-maker³⁷. In this case, however, the judges' reasoning goes beyond mere

³⁵ The concept of habitability has gained specific legal attention in the last years. Such a concept, which refers to the capacity of a socio-ecological system to sustain and support the lives and livelihoods of its community, represents an essential condition to enjoy fundamental rights. The Human Rights Committee (HRC) already recognized that climate change would likely render a specific area uninhabitable, rendering the area “*incompatible with the right to life with dignity*” (HRC, *Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3624/2019, Daniel Billy et al. v. Australia*, CCPR/C/135/D3624/2019, 21 July 2022, para. 8.7; see also HRC, *Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2728/2016, Ioane Teitiota v. New Zealand*, CCPR/C/127/D/2728/2016, 24 October 2019).

³⁶ According to the Court, “*The existential interests of all individuals and species of all kinds [...] whose rights to life, personal integrity, and health have already been recognised by international law, crystallise the obligation to abandon anthropogenic conducts that pose a critical threat to the equilibrium of our planetary ecosystem. The prohibitions arising from the obligation to preserve our common ecosystem, as a precondition to the enjoyment of other rights that have already been identified as fundamental, are of peremptory importance and are therefore, of a ius cogens nature.*” IACtHR, *Climate Emergency and Human Rights*, cit., p. 102.

³⁷ This principle aims to ensure that laws are fully applicable and effective in practice, avoiding interpretations that undermine their original intent. On the principle see, *inter alia*, I. INGRAVALLO, *L'effetto utile nell'interpretazione del diritto dell'Unione europea*, Cacucci, Bari, 2017. Several authors recalled that the principle of effectiveness, even if not explicitly included in Article 31, para. 1, of the 1969 Vienna Convention on the Law of Treaties, can be regarded as a concrete application of the object and purpose test. O. DÖRR, *Article 31*, in O. DÖRR, K. SCHMALENBACH (eds.), *Vienna Convention on the Law of Treaties. A Commentary*, Springer, Heidelberg-Dordrecht-London-New York, 2012, pp. 521-570; A. ORAKHELASHVILI, *The Interpretation of Acts and Rules in Public International Law*, Oxford University Press, Oxford, 2008; E. BJORGE, *The Evolutionary Interpretation of Treaties*, Oxford University Press, Oxford, 2014.

interpretation to define a sort of useful effect for the provision, which, to be effective, must be peremptory.

Concerning the basis for the definition of the substantial content of the “*no irreversible harm rule*”, such a duty has a basis in general principles of law³⁸, particularly the principles of precaution, polluter pays, and the obligation *erga omnes* not to cause transboundary environmental damage, and is facing a growing consensus within the international community, achieving universal recognition. Lastly, according to the judges, the recognition of the peremptory nature of the duty does not contradict current positive law, but it gives effect to existing norms. In this sense, States practice, the conclusion of multilateral environmental treaties, the adoption of resolutions by the United Nations General Assembly and the case law of regional courts have represented “*a process of progressive consolidation that should be interpreted as an emerging juridical recognition of the non-derogable prohibition of irreversible environmental damage*”³⁹.

Logically, as there is no doubt that the global climate system is an essential part of the environment⁴⁰, harm caused to the climate system represents a specific environmental damage, which is automatically transboundary because it necessarily extends beyond the borders of the emitting State. To this end, preventing irreversible environmental damage also includes the duty to tackle climate damage by reducing GHG emissions and implementing measures to adapt to global warming, in line with the mentioned reinforced due diligence⁴¹. Furthermore, according to this Court’s case law, the violations of treaty-based rights as a result of climate damage are subject to the jurisdiction of the State in which it originated, or which contributed to the production of the damage, if there is a causal link between this fact and the violation of the human rights of individuals outside its territory⁴².

To conclude, the Court, by four votes to three⁴³, declared that pursuant to the principle of effectiveness, the prohibition of causing irreversible damage to the environment and the climate system constitutes a norm of *ius cogens*.

³⁸ Cfr. M. GERVASI, *Prevention of Environmental Harm under General International Law. An Alternative Reconstruction*, ESI, Napoli-Baden Baden, 2021.

³⁹ *Ibid.*, para. 293.

⁴⁰ The link between climate change and environment has always been underscored in the work of the United Nations since the beginning of the international cooperation to tackle global warming. See UNGA, A/RES/43/53, *Protection of Global Climate for Present and Future Generations of Mankind*, 6 December 1988.

⁴¹ IACtHR, *Climate Emergency and Human Rights*, *cit.*, paras. 231-237.

⁴² Cfr. IACtHR, *The Environment and Human Rights*, *cit.*, para. 101. Cfr. M. GERVASI, *Le regole della responsabilità internazionale degli Stati dinanzi alla sfida del cambiamento climatico*, in A. SPAGNOLO, S. SALUZZO (a cura di), *La responsabilità degli stati e delle organizzazioni internazionali: nuove fattispecie e problemi di attribuzione e di accertamento*, Ledizioni, Milano, 2017, pp. 61-88.

⁴³ Three judges of the Inter-American Court of Human Rights (Hernández López, Sierra Porto and Pérez Goldberg) voted against the recognition of the prohibition of causing irreversible damage to the environment and the climate system as a peremptory norm. Partially dissenting opinions have been announced by the judges but, until now, they are not available on the website of the Court.

4. Characteristics and Elements of Peremptory Norms

Within this context, it is important to preliminarily recall the main characteristics and elements of *ius cogens*, as it serves as a fundamental yet complex concept within international law, notable for its profound implications. Despite its importance, *ius cogens* remains somewhat elusive, with ongoing debates about its precise content and the legal consequences associated with it⁴⁴. Interestingly, while often referenced, peremptory norms have not significantly influenced the established legal framework, leading many authors to highlight their frequent citation without direct application⁴⁵.

The legal nature of peremptory norms is primarily understood in contrast to *ius dispositivum*, as the former includes inherently non-derogable norms, meaning that States cannot deviate from them, regardless of their agreements. This framework inherently affects State sovereignty and the traditional horizontal structure of international law⁴⁶.

Two primary theoretical frameworks attempt to delineate the essence of *ius cogens*: the positive law theory and the natural law theory. The positivist perspective posits that peremptory norms, and their change, derive from State acceptance, akin to other forms of international law⁴⁷. Conversely, the concept of *ius*

⁴⁴ Cfr., *ex multis*, M. ARCARI, B. BONAFÉ, *Divisive Ius Cogens*, in K. KOWALIK BAŃCZYK, K. WIERCZYŃSKA, A. JAKUBOWSKI (eds.), *Euphony, Harmony and Dissonance in the International Legal Order. Liber Amicorum Władysław Czapliński*, ILS PAS, Warsaw, 2024, pp. 43-54; D. SHELTON, *Jus Cogens*, Oxford University Press, Oxford, 2021; D. TLADI, *The International Law Commission's Draft Conclusions on Peremptory Norms of General International Law (ius cogens): Making Wine from Water or More Water than Wine*, in *Nordic Journal of International Law*, n. 89, 2020, pp. 244-270; D. COSTELLOE, *Legal Consequences of Peremptory Norms in International Law*, Cambridge University Press, Cambridge, 2017; J. D'ASPREMONT, *Jus Cogens as a Social Construct Without Pedigree*, in *Netherlands Yearbook of International Law*, n. 46, 2016, pp. 85-114; R. KOLB, *Peremptory International Law – Jus Cogens: A General Inventory*, Bloomsbury, Oxford-Portland, 2015; E. CANNIZZARO, *On the Special Consequences of a Serious Breach of Obligations Arising out of Peremptory Rules of International Law*, in E. CANNIZZARO (ed.), *The Present and Future of Jus Cogens*, Sapienza Università Editrice, Roma, 2015, pp. 141-151; D. SHELTON, *Sherlock Holmes and the Mystery of Jus Cogens*, in *Netherlands Yearbook of International Law*, n. 46, 2015, pp. 23-50; A. BIANCHI, *Human Rights and the Magic of Jus Cogens*, in *European Journal of International Law*, n. 19, 2008 pp. 491-508; A. D'AMATO, *It's a Bird, It's a Plane, It's Jus Cogens*, in *Connecticut Journal of International Law*, n. 6, 1990, pp. 1-6; L. HANNIKAINEN, *Peremptory Norms (Jus Cogens) in International Law: Historical Development, Criteria, Present Status*, Lakimiesliiton Kustannus, Helsinki, 1988; G. ABI-SAAB, *The Third World and the Future of the International Legal Order*, in *Revue égyptienne de droit international*, n. 27, 1973, pp. 27-66.

⁴⁵ See the statements on *ius cogens* made by Ian Brownlie (“the vehicle does not often leave the garage”) and Theodor Meron (“on the practical level ...the usefulness of the concept is mostly potential”) quoted in A. CASSESE, *General Round-Up*, in A. CASSESE, J.H.H. WEILER (eds.), *Change and Stability in International Law-Making*, De Gruyter, Berlin-New York, 1988, p. 175. See also W.E. CONKLIN, *The Peremptory Norms of the International Community*, in *European Journal of International Law*, n. 23, 2012, pp. 837-861; U. LINDERFALK, *The Legal Consequences of Jus Cogens and the Individuation of Norms*, in *Leiden Journal of International Law*, n. 33, 2020, pp. 893-909; D. SHELTON, *Sherlock Holmes and the Magic of Jus Cogens*, *cit.*, p. 44.

⁴⁶ Cfr. A. CASSESE, *International Law*, 2nd ed., Oxford University Press, Oxford, 2005, p. 199; ILC, *Fragmentation of International Law: Difficulties Arising from the Diversification of International Law*, Report of the Study Group of the International Law Commission, 58th Session, A/CN.4/L.682, 13 April 2006, paras. 31-32; D. SHELTON, *Normative Hierarchy in International Law*, in *American Journal of International Law*, n. 100, 2006, pp. 291-323; C. TOMUSCHAT, *Reconceptualizing the debate on jus cogens and obligations erga omnes: concluding observations*, in C. TOMUSCHAT, J.M. THOUVENIN (eds.), *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes*, Martinus Nijhoff, Leiden, 2006, p. 425. See also, *contra*, P.M. DUPUY, Y. KERBRAT, *Droit international public*, 17th ed., Dalloz, Paris, 2024, pp. 15-16.

⁴⁷ Cfr. T. KLEINLEIN, *Change of Peremptory Norms of General International Law (Jus Cogens)*, in *ESIL Reflections*, n. 12, 2023, pp. 1-11. According to the author, the “most important norms are based on the most uncertain mechanism of norm change”.

cogens can reflect the influence of natural law⁴⁸. In this perspective, norms exist independently of State decisions, grounded in universal moral standards and immutable principles⁴⁹.

The adoption of the Vienna Convention on the Law of Treaties (VCLT) in 1969 marked a significant transition. Article 53 of the VCLT asserts that *ius cogens* norms cannot be derogated and are only modifiable through subsequent norms of equal standing. The Convention's emphasis on "acceptance and recognition" by the international community signifies a shift toward a more positivist interpretation, blending State consent with the acknowledgement of these fundamental norms⁵⁰.

The importance of *ius cogens* lies in its role in maintaining the integrity and coherence of international law. As these norms are accepted as binding on all States, they provide a framework within which other treaties and agreements operate. Violations of peremptory rules can result in serious legal repercussions, yet their precise application remains fraught with challenges.

Throughout history, few cases have been brought before international courts that dealt with peremptory rules. The hesitance of judges to apply *ius cogens* directly may stem from concerns related to legal uncertainty or potential conflicts with established treaties and customary international law⁵¹. Consequently, while the concept is vital in theory, its practical application is often overshadowed by simpler international legal mechanisms.

More recently, the International Law Commission has been instrumental in enhancing the understanding of *ius cogens*, by adopting the *Draft Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law* (Jus Cogens), which focus on establishing criteria for identifying *ius cogens* and its legal effects. This initiative reflects a broader intention to legitimise the concept within the international legal sphere and adapt it effectively within contemporary jurisprudence⁵².

See also, A. PAULUS, *Jus Cogens in a Time of Hegemony and Fragmentation – An Attempt at a Re-appraisal*, in *Nordic Journal of International Law*, n. 74, 2005, pp. 297-333; A. PIETROBON, *Trattati antichi e jus cogens superveniens*, in B. CORTESE (a cura di), *Studi in onore di Laura Picchio Forlati*, Giappichelli, Torino, 2014, pp. 115-122;

⁴⁸ M. SHAW, *International Law*, 9th ed., Cambridge University Press, Cambridge, 2021, p. 93.

⁴⁹ M. VIRALLY, *Réflexions sur le « jus cogens »*, in *Annuaire français de droit international*, 12, 1966, pp. 5-29; G. GAJA, *Jus Cogens Beyond the Vienna Convention*, in *Recueil des cours de l'Académie de droit international de La Haye*, n. 172, 1981, pp. 271-316.

⁵⁰ U. LINDERFALK, *The Creation of Jus Cogens – Making Sense of Article 53 of the Vienna Convention*, in *Heidelberg Journal of International Law*, n. 71, 2011, pp. 359-378.

⁵¹ It has also been highlighted that the extension of the scope of *ius cogens* gave rise to a symmetrical extension of the application of customary international law in the field of human rights. P. PUSTORINO, *Introduction to International Human Rights Law*, Springer, The Hague, 2023, pp. 28-32.

⁵² "These draft conclusions are aimed at providing guidance to all those who may be called upon to determine the existence of peremptory norms of general international law (jus cogens) and their legal consequences. Given the [ir] importance and potentially far-reaching implications [...], it is essential that the identification of such norms and their legal consequences be done systematically and in accordance with a generally accepted methodology". ILC *Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law* (Jus Cogens), with Commentaries, in *Yearbook of the International Law Commission*, 2022, Vol. II, Part Two, p. 17.

According to the ILC, a peremptory norm must meet three criteria. First, it shall be a norm of general international law. Second, the norm shall be accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted, and third, such a norm can be modified only by a subsequent norm having the same character⁵³.

While the meaning of “general international law” seems clear and refers to the applicability of the norm⁵⁴, the second criterion is composed of different sub-elements, while the third refers to possible modifications of the norm’s content. The criteria are cumulative and must coexist, but, in our view, the essence of *ius cogens* is the second criterion that links the “acceptance and recognition” of the international community with the peremptory character of non-derogability.

Concerning the generality, in order to identify a norm of such a nature, it is to be taken into account that the ILC recognised customary international law as the most common basis, as it is the most evident manifestation of general international law through the simultaneous presence of *opinion iuris* and *repetitio facti*. Similarly, the International Court of Justice (ICJ), as well as other international tribunals, has referred to customary international law as the basis for peremptory norms⁵⁵.

However, peremptory norms can also derive from treaty provisions and general principles of law⁵⁶. For instance, the ILC already identified in 1966 the prohibition on the use of force enshrined in Article 2, paragraph 4, of the Charter of the United Nations as an example of a peremptory norm⁵⁷. Concerning general principles, few international judicial decisions confirm this possibility. The Inter-American Court of Human Rights adopted this approach and declared the principles of equality and non-discrimination to have a *ius cogens* nature “because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws”⁵⁸.

⁵³ *Ibid.*, Draft Conclusion 4.

⁵⁴ In the context of *ius cogens*, the term “general” refers to the scope of applicability of the norm, which must have “equal force for all members of the international community”. ICJ, *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, Judgment, 20 February 1969, in *I.C.J. Reports 1969*, para. 63.

⁵⁵ ICJ, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, in *I.C.J. Reports 2012*, para. 99; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, in *I.C.J. Reports 1996*, p. 257.

⁵⁶ L. HANNIKAINEN, *Peremptory Norms (Jus Cogens) in International Law*, *cit.*, p. 242; B. SIMMA, P. ALSTON, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, in *Australian Yearbook of International Law*, n. 12, 1989, p. 107; A. BIANCHI, *Human Rights and the Magic of Jus Cogens*, *cit.*, p. 493; K. SCHMALENBACH, *Article 53*, in O. DÖRR, K. SCHMALENBACH (eds.), *Vienna Convention on the Law of Treaties. A Commentary*, *cit.*, pp. 920-921; T. KLEINLEIN, *Jus Cogens as the ‘Highest Law’? Peremptory Norms and Legal Hierarchies*, in *Netherlands Yearbook of International Law*, n. 46, 2016, p. 195.

⁵⁷ See the comment on Article 50 of the Draft Articles on the Law of Treaties (in *Yearbook of the International Law Commission*, 1966, Vol. II, Part Two, p. 247. On this specific norm, it is to be noted that relevant doctrine has pointed out that the peremptory status should be recognized to the prohibition of aggression, instead of generally refer to the use of force. See N. RONZITTI, *Diritto internazionale*, 7th ed., Giappichelli, Torino, 2023, p. 183. Such a position is implicitly confirmed by the fact that the ILC, in its annex to the Draft Conclusion 23 adopted in 2022, containing a list of norms already recognized as peremptory, mentions the prohibition of aggression.

⁵⁸ IACtHR, *Juridical Condition and Rights of Undocumented Migrants*, Advisory Opinion OC-18/03, 17 September 2003, para. 101.

In relation to the criterion of acceptance and recognition, ILC clarified that both bring a distinct perspective from the acceptance and recognition required for customary international law. In this case, the two elements are required to answer the question of whether the rule has a peremptory character, as to say from which no derogation is permitted, except for a subsequent norm having the same character. According to the ILC, determination of such elements involves the “*weighing and assessment of evidence*”⁵⁹, and it is not sufficient merely to assert such acceptance and recognition. Even if the threshold required for peremptory status is very high, it does not require universal *consensus*, as the relevant practice shall be representative of a vast majority of States and qualitatively significant, as such a vast majority must represent regions, legal systems and cultures⁶⁰. The practice of other actors may be relevant in providing context and for assessing acceptance and recognition by the international community of States as a whole⁶¹, but these practices cannot, by themselves, form part of such a process⁶². Among the practices may be included any act or document of the State capable of reflecting its view in respect of the norm⁶³. It should be noted that, in this framework, decisions of international and national courts represent subsidiary means for determining the identification of a peremptory norm, together with the works of expert bodies established by States or international organizations and the teachings of the most highly qualified publicists of the various nations. Throughout time, several international tribunals have relied on decisions adopted by other courts. Significantly, the case law of the IACtHR has also been recalled by the ILC as the Special Tribunal for Lebanon in the *El Sayed* case, which stated that the right to access justice acquired the status of a *ius cogens*, recalling, *inter alia*, the decision of the judges of San José in the case of *Goiburú et al. v. Paraguay*⁶⁴.

⁵⁹ ILC *Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law* (Jus Cogens), with commentaries, *cit.*, p. 37.

⁶⁰ Cfr. E. DE WET, *Jus Cogens and obligations erga omnes*, in D. SHELTON (ed.), *The Oxford Handbook of International Human Rights Law*, Oxford University Press, Oxford, 2013, p. 543; F.M. PALOMBINO, *Introduzione al diritto internazionale*, Laterza, Bari, 2024, p. 35; F. CAPOTORTI, *Cours général de droit international public*, in *Recueil des cours de l'Académie de droit international de La Haye*, n. 248, 1994, pp. 140-141.

⁶¹ ICJ, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, 28 May 1951, in *I.C.J. Reports 1951*, pp. 22-24.

⁶² Within the work of ILC, there have been suggestions for considering practice of non-State for the recognition and acceptance of *ius cogens*. However, it has been decided that only practice of States is of primary importance. International judicial decisions have confirmed the necessity of recognition of peremptory norms by States. See, once again, ICJ, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, *cit.*, para. 99.

⁶³ Draft Conclusion 8 recalls that forms of evidence include, “*but are not limited to*”, public statements made on behalf of States, official publications, government legal opinions, diplomatic correspondence, constitutional provisions, legislative and administrative acts, decisions of national courts, treaty provisions, resolutions adopted by an international organization or at an intergovernmental conference. In the same line, see also Draft Conclusion 10 of the *Draft Conclusions on Identification of Customary International Law* (with Commentaries, in *Yearbook of the International Law Commission*, Vol. II, Part Two, 2018, pp. 140-142).

⁶⁴ “*The right of access to justice [...] has acquired the status of a peremptory norm (ius cogens). [...] Admittedly there are few judicial pronouncements or State declarations suggesting that the right at issue has been elevated to this rank. One of them is a decision of the Inter-American Court of Human Rights of 22 September 2006 in the Goiburú et al. v. Paraguay case. Similar statements had been made, prior to that judgment, by Judge Antônio Cançado Trindade in various Dissenting and Separate Opinions attached to judgments of the same*

5. On the IACtHR's Methodology to Determine the Existence of a Peremptory Rule

In the Advisory Opinion under analysis, the Court linked the peremptoriness of the prohibition to produce massive and irreversible damage to the environment, and to the climate system as part of the environment, primarily to the principle of effectiveness, summed with considerations of dependence, necessity, universality of the underlying values and the absence of conflict with current law. In a complementary way, such a norm contributes to compliance with existing obligations, as it requires all States to cooperate in ceasing conducts that violate this prohibition⁶⁵.

Drawing from the abovementioned work of the ILC, at first sight, it seems that the Court refers to additional elements from what has been recognised by the ILC as the elements for identifying *ius cogens*. References to effectiveness, dependence, necessity, and the absence of conflict with current law seem to go beyond the requirement previously analysed. This perspective leads us to try to answer the following question: does the identification of *ius cogens* made by the IACtHR satisfy the criteria listed by the ILC?

According to the International Law Commission, the identification requires a two-step approach in which it is necessary to establish that the norm is of general international law and that non-derogation is admissible. The existence of such criteria must be demonstrated and should not be assumed they exist, nor is it sufficient to affirm the importance or the role of a norm, in order to show the peremptory character of that norm. In this sense, the two-step approach requested by the ILC appears to be a stringent standard of proof that many Courts have not consistently applied in their decision-making process⁶⁶. Undoubtedly, the IACtHR is not bound by the ILC Draft Conclusions and does not have to prove adherence to the criteria set out by the Commission⁶⁷.

Looking at the previous relevant jurisprudence of the Court, in the Advisory Opinion No. 20 on *The Obligations in Matter of Human Rights of a State that Has Denounced the American Convention on Human Rights and the Charter of the Organization of the American States*, the Court described *ius cogens* as the “legal expression of the

Court”. STL, *Prosecutor v. El Sayed*, Order Assigning Matter to Pre-Trial Judge, CH/PRES/2010/01, 15 April 2010, para 29.

⁶⁵ IACtHR, *Climate Emergency and Human Rights*, cit., p. 215.

⁶⁶ Upon reviewing the case law of the ICJ, it should be noted that judges have employed this approach in very few cases. In its 1986 judgment on the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, the Court, once identified the prohibition of the use of force as customary, it qualified such a norm as fundamental (Judgment, 26 November 1984, in *I.C.J. Reports 1986*, para.190). Similarly, this approach has been utilized in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* (Judgment, 20 July 2012, in *I.C.J. Reports 2012*, para. 99), or, more recently, in the advisory opinion on *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem* (Advisory Opinion, 19 July 2024, in *I.C.J. Reports 2024*, paras. 230-233). Cfr. H. DENG, [Reflections on the Identification of Jus Cogens by the ICJ in the Advisory Opinion on the Legality of Israel's Occupation of Palestinian Territories: Taking into Account the ILC Draft Conclusions on Jus Cogens](#), in *EJIL:Talk!*, August 27, 2024. On the opinion see also M. ARCARI, *Un'occupazione, un'annessione, una norma imperativa. Note sul parere della Corte internazionale di giustizia del 19 luglio 2024*, in *Diritti umani e diritto internazionale*, n. 18, 2024, pp. 633-646.

⁶⁷ Cfr. D. AZARIA, [On the ILC, Professional Background, Gender and Positivism: A Rejoinder to Jan Klabbers](#), in *EJIL:Talk!*, November 30, 2020.

*international community as a whole, based on universal and superior values, which embodies basic standards that guarantee essential or fundamental human values related to life, human dignity, peace and security*⁶⁸. In essence, peremptory norms “*protect fundamental rights and universal values without which society would not prosper*”⁶⁹.

So perceived, the identification of *ius cogens* seems to adopt a deductive approach, as it is assumed that a norm is peremptory whether it is perceived as necessary to protect the fundamental values of the international community as a whole⁷⁰, or intrinsically superior to other norms, even without considering the attitude of States⁷¹.

In addition, the IACtHR has made a consistent use of the concept of *ius cogens*, particularly regarding: equality and non-discrimination; torture, cruel, inhuman or degrading treatment; enforced disappearance of persons; slavery and other similar practices; *non-refoulement*; serious, massive or systematic human rights violations; crimes against humanity and the associated obligation to prosecute, investigate and punish those crimes⁷².

In many circumstances, the identification of a peremptory norm has been made using a semi-deductive approach, by affirming the universal and fundamental value surrounded by the specific rule or principle at stake⁷³, while in others, the Court employed a functional approach, asserting the dependence of the particular norm on others considered to be of *ius cogens*, as necessary to ensure the effective implementation of, or derivation from, them.

In our view, with specific reference to the case under discussion, the Court used a combination of both approaches.

On the one side, the previously mentioned semi-deductive approach makes the Court rely on a more “natural law” perspective and moral considerations⁷⁴, elevating the duty not to cause irreversible damage

⁶⁸ IACtHR, *The Obligations in Matters of Human Rights of a State that has Denounced the American Convention on Human Rights and the Charter of the Organization of American States*, cit., para. 105.

⁶⁹ *Ibid.*

⁷⁰ G. MORELLI, *A proposito di norme internazionali cogenti*, in *Rivista di diritto internazionale*, n. 51, 1968, pp. 108-117.

⁷¹ A. ORAKHELASHVILI, *Peremptory Norms in International Law*, Oxford University Press, Oxford, 2008, pp. 36-66.

⁷² See IACtHR, *The Obligations in Matters of Human Rights of a State that has Denounced the American Convention on Human Rights and the Charter of the Organization of American States*, cit., para 106, in which the Court recalls the peremptory norms already identified in its previous case law. See also, *inter alia*, *Workers of the Firework Factory of Santo Antônio de Jesus v. Brazil*, Judgment, 15 July 2020, Series C No. 407, para. 182; *Azul Rojas Marín et al. v. Peru*, Judgment, 12 March 2020, Series C No. 402, para. 140; *Women Victims of Sexual Torture in Atenco v. Mexico*, Judgment, 28 November 2018, Series C No. 371, para. 178; *Herzog et al. v. Brazil*, Judgment, 15 March 2018, Series C No. 353, para. 212; *Workers of Hacienda Brazil Verde v. Brazil*, Judgment, 20 October 2016, Series C No. 318, para. 249; *Tenorio Roca et al. v. Peru*, Judgment, 22 June 2016, Series C No. 314, para. 140; *Almonacid Arellano et al. v. Chile*, Judgment, 26 September 2006, Series C No. 154, para. 99; *Caesar v. Trinidad and Tobago*, Judgment, 11 March 2005, Series C No. 123, para. 100; *Gómez Paquiyauri Brothers v. Peru*, Judgment, 8 July 2004, Series C No. 110, para. 128; *Maritzá Urrutia v. Guatemala*, Judgment, 27 November 2003, Series C No. 103, para. 92.

⁷³ On the methodology used by international tribunals to identify peremptory rules, cfr. C. FOCARELLI, *Promotional Jus Cogens: A Critical Appraisal of Jus Cogens' Legal Effects*, in *Nordic Journal of International Law*, n. 77, 2008, pp. 429-259.

⁷⁴ This was also the perspective adopted by the ICJ in the advisory opinion on the *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, in which affirmed that genocide shocks the conscience of mankind and

to the environment and the climate system as a minimum, which is described as a general principle linked to human conscience and non-derogable reasons of survival⁷⁵. Such an approach echoes what the former Vicepresident of the ICJ, Christopher Weeramantry, affirmed in 1997, in his separate Opinion in the case *Gabčíkovo-Nagymaros Project* on sustainable development, which was described as not merely a principle of modern international law, due to its inescapable logical necessity and general acceptance by the global community, but also as one of the most ancient ideas in the human heritage⁷⁶.

A Court's examination of the practice of States partially mitigates the deductive approach. The Court has thus analysed domestic acts, judicial decisions and the positions of States within the international organization, in order to prove the general acceptance and recognition of the norm. However, concerning the peremptoriness, the assessment of the evidence, i.e. the international practice, seems to be directed towards proving that the prohibition to cause irreversible damage to the environment and the climate system does not conflict with the current state of the art of international and domestic law, as reported in the final decision adopted by judges.

On the other hand, the Advisory Opinion clearly expresses the need to ensure the effectiveness of human rights protection within the legal system of the Inter-American Convention on Human Rights. In this sense, it has already been noted how *ius cogens*, as a hierarchically superior rule, has been used by the Court to “*guarantee greater protection for the victims of serious human rights violations*”⁷⁷.

Using logical arguments, the IACtHR stated that if the prohibition of anthropogenic conducts that create irreversible impacts on the vital equilibrium of the planetary ecosystem is not of a peremptory character under international law, this will “*undermine the conditions required sine qua non for the enforceability of fundamental human rights that are already protected under international law by peremptory provisions*”⁷⁸. In this line, such an obligation must be peremptory, as it is a norm necessary for the protection of other norms of *ius cogens*.

Therefore, the deductive approach has been balanced by a functional approach that does not disregard the work of the ILC, in the sense that it has relied on already existing peremptory rules and principles, without clearly attempting to substantially identify new ones.

is “*contrary to moral law and the spirit and aims of the United Nations*”. ICJ, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, 28 May 1951, in *I.C.J. Reports 1951*, p. 23.

⁷⁵ Cfr. A.A. CANÇADO TRINDADE, *International Law for Humankind: Towards a New Jus Gentium*, Brill, Leiden-Boston, 2010, pp. 144-145.

⁷⁶ In that specific case it was not argued that sustainable development corresponds to *ius cogens* but to a general principle of international law. ICJ, *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, 25 September 1997, in *I.C.J. Reports 1997*, p. 110.

⁷⁷ L.C. LIMA, L. MAROTTI, *An Unlikely Duo? Regionalism and Jus Cogens in International Law*, in *Goettingen Journal of International Law*, n. 12, 2022, p. 233.

⁷⁸ IACtHR, *Climate Emergency and Human Rights*, *cit.*, para. 290.

Finally, a consideration should be devoted to highlight the conceptual contradiction between the affirmation of the rights of Nature, in the strict sense, and the peremptory norm identified, since the perspective of necessity and effectiveness of human rights, posed by the Courts at the basis of the identification, embodies a mainly anthropocentric approach, connected to that idea of “human environment” affirmed by the 1972 Stockholm Declaration on Human Environment⁷⁹. Perhaps the Court could have relied more on the concept of Nature in this specific aspect to ensure greater consistency between anthropocentric and ecological approaches.

6. A Regional Approach to Identifying Peremptory Norms of International Law

The statement made by the Court on the peremptory status of the duty not to cause irreversible damage to the environment and the climate system leads us to consider some additional aspects regarding another long-standing issue in international law, namely the possible existence of a regional peremptory norm. With this term, similarly to regional customs, legal doctrine has attempted to describe a hypothetical peremptory norm that develops in a specific geographical area.

Several authors, including the ILC, have questioned the possible existence of a regional peremptory norm, raising doubts regarding, in particular, the conflict between the universal nature of peremptory norms and the regional nature of such a presumed norm, the definition of “region”, and the relationship between regional *ius cogens* and treaties concluded at the universal level. These doubts are, moreover, accompanied by a certain reticence on the part of States to consider the possible existence of peremptory norms, as they are seen as a further limitation on the scope for State action at the international level.

The ILC, however, has adopted a more pragmatic approach, excluding the topic from its work on peremptory rules, as it is an issue that does not align with the universalistic aspiration that characterises the subsidiary body’s activities.

However, it is a fact that the Inter-American Commission on Human Rights, as early as 1987, had stated that the norm prohibiting the execution of minors is recognised as having the status of *ius cogens* by the member states of the Organisation of American States⁸⁰.

⁷⁹ According to Principle 1 of the Stockholm Declaration on Human Environment, “*Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations [...]*” (in *Report of the United Nations Conference on the Human Environment*, Stockholm, 5-16 June 1972, A/CONF.48/14/Rev.1). See also F. CERULLI, *Antropocentrismo vs ecocentrismo nella giurisprudenza della Corte interamericana dei diritti umani*, in *Diritti umani e diritto internazionale*, n. 17, 2023, pp. 259-283; R. ÁVILA SANTAMARÍA, *Rights of Nature vs. Human Rights?*, in D. AMIRANTE, S. BAGNI (eds.), *Environmental Constitutionalism in the Anthropocene: Values, Principles and Actions*, Routledge, Abingdon, 2022, pp. 68-85.

⁸⁰ IACmHR, *Case 9647*, OEA/ser.L./V./II.71, doc. 9 rev. 1, 1987. See also C.A. BRADLEY, *The Juvenile Death Penalty and International Law*, in *Duke Law Journal*, n. 52, 2002, pp. 485-557.

It has been also argued that the possibility of regional *ius cogens*, beyond the provisions of the Vienna Convention on the Law of Treaties, which, in the opinion of some authors, referred to “universal” *ius cogens* and that there is, at least *in abstracto*, the possibility that a specific community recognize a peremptory norm as pertaining to a specific regional area⁸¹.

Doubts, however, remain. The practice of both the Commission and the IACtHR has not further supported this statement. Therefore, when the latter have invoked the concept of *ius cogens*, judges have always emphasised the universality of the values underlying the norm, thereby transcending, at least formally, the idea of a regional peremptory norm. This has been also the case of the duty to protect the environment from irreversible damage, as the IACtHR never mentioned a possible regional character of the norm, preferring instead to mention the universal character of the duty. Even in the abovementioned case, the statement of the Inter-American Commission on the prohibition of execution of minors should be read as reflecting the recognition by American States of the peremptory nature of the norm, instead of an identification of a universal norm of *ius cogens*, which requires an acceptance and recognition by the international community as a whole.

In addition, the general nature of the peremptory norm represents a logical obstacle that is difficult to overcome until the existence of a regional mandatory norm is affirmed. Both the ILC and the ICJ affirmed that the meaning of “norms of general international law”, in the context of *ius cogens*, “refers to the scope of applicability of the norm in question”, and that norms “must have equal force for all members of the international community”⁸².

The prohibition of irreversible pollution of the environment and the climate system cannot, therefore, logically be considered a regional peremptory norm, as it expresses fundamental values of universal interest to the international community of States as a whole. This conclusion, however, leads us to consider further the methodology used by the IACtHR to identify the peremptory norm since, as we have seen, the logical-legal reasoning employed by the Court partially departs from the two-step approach determined by the ILC.

The use of the semi-deductive method described above, combined with a functional perspective based on the necessity of the norm, outlines a regional approach to identifying peremptory norms, aimed at ensuring the effectiveness of human rights protection. This approach, as emphasised by some scholars,

⁸¹ See G. GAJA, *Jus Cogens Beyond the Vienna Convention*, *cit.*; K. SCHMALENBACH, *Article 53*, *cit.*, p. 940. See also P. FOIS, *Sui caratteri dello jus cogens regionale nel diritto dell'Unione Europea*, in *Rivista di diritto internazionale*, n. 103, 2020, pp. 635-656.

⁸² ICJ, *North Sea Continental Shelf Cases*, *cit.*, pp. 38-39.

has led to a certain vivacity on the part of the Court in identifying new peremptory norms and thus to the expansion of the range of norms that can be considered peremptory⁸³.

At this point, the question arises as to what value to give to these rulings of the regional courts, and in particular of the IACtHR, with respect to these “new” norms of *ius cogens*. A violation of a peremptory norm of international law has significant legal consequences. When a treaty conflicts with such a norm, it is rendered void, releasing the Parties from any obligations to perform under it. States are then required to eliminate the consequences of actions taken based on the invalid treaty and to align their relations with the overriding norm. Furthermore, peremptory norms create obligations owed to the international community as a whole, allowing any state to invoke the responsibility of another for breaches of these norms. Serious violations entail further obligations, where States must cooperate to remedy the breach and cannot recognise the legality of the resulting situation or provide assistance to maintain it⁸⁴.

However, the Court did not explore such consequences in the case of the prohibition at stake, reminding States that they only have to cooperate to end the conduct that violates the norm. This limited effect, recognised by the Court, appears to be linked to a more “promotional” effect of *ius cogens*, particularly in the context of a regional legal system, in the sense that it serves as a precedent to further the evolution of international law, if confirmed by subsequent practice⁸⁵. The envisaged perspective aligns with the predominant “natural law” approach followed by the Court, which holds that the protection of the environment and the climate system deserves to be recognised as a fundamental value. Still, all the effects and consequences associated with traditional peremptory rules and principles are not explicitly tied to such a norm. This reluctant attitude of the judges in recognising the full potential of a peremptory norm is evident in the use of verbs, whereby the Court affirms that States “should” cooperate and does not use

⁸³ L.C. LIMA, *Climate Change Before the Inter-American Court of Human Rights*, in *Rivista di diritto internazionale*, n. 108, 2025, p. 73; E. HANSBURY, *Le juge interaméricain et le jus cogens*, Graduate Institute Publications, Geneva, 2011.

⁸⁴ From this perspective, Article 41 of the 2001 Draft Article on the Responsibility of States for Internationally Wrongful Acts would be relevant, requesting States to cooperate, through lawful means, to put an end to any serious violation of peremptory norms and not recognise as lawful any situation resulting from it, nor support or assist the State responsible for the violation in maintaining the situation thus created. See A. GIANELLI, *Le conseguenze delle gravi violazioni di obblighi posti da norme imperative tra norme primarie e norme secondarie*, in M. SPINEDI, A. GIANELLI, M.L. ALAIMO (a cura di), *La codificazione della responsabilità internazionale degli Stati alla prova dei fatti*, Giuffrè, Milano, 2006, pp. 245-290; E. CANNIZZARO, *On the Special Consequences of a Serious Breach of Obligations Arising out of Peremptory Rules of International Law*, *cit.*; D. COSTELLOE, *Legal Consequences of Peremptory Norms in International Law*, *cit.*; G. NESI, *Accertamento delle gravi violazioni del diritto internazionale e progetto di articoli sulla responsabilità degli Stati per atti internazionalmente illeciti: non è mai troppo tardi...*, in P. BENVENUTI (a cura di), *L'accertamento delle gravi violazioni del diritto internazionale. Dalle proposte di Gaetano Arancio-Ruiz alla prassi contemporanea*, Roma TrE-Press Roma, 2025, pp. 291-301; G. PALMISANO, *Responsabilità degli Stati e obblighi di regolamento delle controversie: l'occasione mancata della Commissione del diritto internazionale*, in *Rivista di diritto internazionale*, n. 105, 2022, pp. 455-495.

⁸⁵ Cfr. C. FOCARELLI, *Promotional Jus Cogens*, *cit.*, *passim*; C. MAIA, *Le jus cogens dans la jurisprudence de la Cour interaméricaine des droits de l'homme*, in L. HENNEBEL, H. TRIGOURDJA (eds.), *Le particularisme interaméricain des droits de l'homme*, Pedone, Paris, 2009, pp. 271-311. According to Cassese, “peremptory rules primarily pursue a deterrent effect” as they are serving “to bar States from behaving in a certain manner and at the same time to induce them to fashion their conduct consistently with those values”. A. CASSESE, *International Law*, *cit.*, p. 210.

a more resolute verb, such as “shall” or “must”, which appears as a recommendation, in contradiction to the asserted peremptory character of the rule⁸⁶.

However, the Court should have gone further and forcefully affirmed all the legal consequences arising from the violation of the norm protecting the environment and the climate system. Moreover, it should be noted that, with reference to the list of mandatory norms annexed to the ILC Draft Conclusions, although the Commission did not include an environmental norm in the annex, it opened the possibility of identifying such a rule in the future⁸⁷. The ILC had, in fact, explained that the list of standards was not exhaustive, but referred only to those standards that, in its previous work, had been identified in some way as peremptory standards.⁸⁸ However, despite not including the ban on irreversible environmental pollution in the list, the commentary on Draft Conclusion 23 remembered that in the Draft Article 19, adopted in 1976 during the first reading of the topic “State responsibility”, the ILC had referred to obligations “*of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas*” as fundamental for the international community of States as a whole⁸⁹.

7. Closing Remarks

In recent years, the discourse surrounding environmental protection and human rights has increasingly emphasised the need to establish robust legal frameworks to address the escalating climate crisis. The concept of *ius cogens* has emerged as a fundamental concept guiding this discourse. While some may argue that the prohibition of causing irreversible damage to the environment is a universally accepted

⁸⁶ IACtHR, *Climate Emergency and Human Rights*, *cit.*, para. 294.

⁸⁷ ILC *Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law* (Jus Cogens), *with commentaries*, *cit.*, pp. 88-89.

⁸⁸ Despite a few criticisms from some States regarding the decision to include an illustrative list of peremptory norms (see the statements made by [France](#), [Spain](#), [China](#), [Russia](#)) the position expressed by other States within the 77th Session of the Sixth Committee of the United Nations General Assembly is significant. These include the [United States](#), which would have liked an explicit reference to the prohibition of piracy, and [Brazil](#), which welcomed Draft Conclusion 23 and the annex that does not exclude other *ius cogens* norms, even if recognized by regional courts, “*such as the right of access to justice, recognized as a peremptory norm by the case law of the Inter-American Court of Human Rights*”.

⁸⁹ Article 19, para. 3, let. d), of the *Draft Articles on State Responsibility*, in *Yearbook of the International Law Commission*, 1976, vol. II, Part Two, pp. 95–96. According to the Special Rapporteur, Roberto Ago, “*the requirements of economic and social development on all sides and the marvellous achievements, but also the terrible dangers, of scientific and technological progress have led States to realize the imperative need to protect the most essential common property of mankind and, in particular, to safeguard and preserve the human environment for the benefit of present and future generations. New rules of international law have thus appeared, others in course of emergence have become firmly established and yet others, already existing, have acquired new vigour and more marked significance; these rules impose upon States obligations which are to be respected because of an increased collective interest on the part of the entire international community. Furthermore, there has gradually arisen the conviction that any breach of the obligations imposed by rules of this kind cannot be regarded and dealt with as a breach “like any other” but that it necessarily represents an internationally wrongful act which is far more serious, a wrong which must be differently characterized and therefore be subject to a different regime of responsibility*”. *Ibid.*, pp. 101-102.

peremptory norm, it is imperative to consider the regional context through which the Inter-American Court of Human Rights has approached the identification and affirmation of such norms.

In its Advisory Opinion on human rights obligations amidst the climate emergency, the IACtHR reframed the dialogue not only to recognise the significance of environmental protection but also to emphasise the unique regional dimensions that influence the interpretation of peremptory norms. The Court's examination of climate-related human rights issues signalled a nuanced understanding that integrates regional characteristics – cultural, socio-economic, and environmental – into the broader framework of international law⁹⁰.

The IACtHR has always specifically crafted its rulings to reflect the context of the Americas, a region uniquely affected by various environmental challenges, including deforestation, biodiversity loss, and vulnerability to the impacts of climate change⁹¹. The interplay between environmental issues and human rights within this regional context enabled the Court to assert the urgency of addressing these concerns through a tailored approach. Thus, rather than merely transposing universal principles, the Court adeptly preliminarily recognised the particularities of the region that necessitated complementary legal considerations.

Moreover, the IACtHR's methodology in identifying peremptory norms reflects a broader trend toward regional interpretations of universal values recognized by international law⁹². While traditional frameworks of *ius cogens* often emphasise universally binding norms, the Court's approach underlines the importance of other factors influencing legal recognition, such as effectiveness and necessity. This shift invites a more dynamic understanding of the evolution of international law, influenced also by normative trends that emerged at the regional level.

By situating the prohibition of causing irreversible damage to the environment within the regional context, the IACtHR fosters a critical dialogue among international and national courts invested with disputes concerning the interpretation and implementation of climate obligations, as well as regarding the legitimacy and efficacy of such norms, promoting an evolutionary interpretation of international norms⁹³.

⁹⁰ Cfr. L. HENNEBEL, *La Cour interaméricaine des droits de l'homme: entre universalisme et particularisme*, in L. HENNEBEL, H. TRIGOURDJA (eds.), *Le particularisme interaméricain des droits de l'homme*, cit., pp. 75-120.

⁹¹ E. KORNICKER, *Ius cogens und Umweltvölkerrecht: Kriterien, Quellen und Rechtsfolgen zwingender Völkerrechtsnormen und deren Anwendung auf das Umweltvölkerrecht*, Helbing & Lichtenhahn, Basel, 1997.

⁹² Cfr. F. SEATZU, *The Interpretation of the American Convention on Human Rights through the Prism of the United Nations Convention on the Rights of the Child. A Reality, A Promise, A Possibility, or A Problem?*, in *International Human Rights Law Review*, n. 9, 2020, pp. 1-26.

⁹³ C. MAIA, *Consécration du jus cogens: un dialogue à raviver entre cours internationale et régionales dans l'oeuvre de reconnaissance de droits humains impératifs*, in *Civitas Europa*, n. 45, 2020, pp. 297-315. On the concepts of static and evolutionary interpretations see E. BJORGE, *The Evolutionary Interpretation of Treaties*, cit.; G. NOLTE, *Treaties and their Practice - Symptoms of their Rise or Decline*, in *Recueil des Cours de l'Académie de droit international de La Haye*, n. 392, 2018, pp. 205-397; G. ABI-

However, at the global level, such a progressive evolution has not been followed by the ICJ, which, two months later than the IACtHR, adopted its advisory opinion on the *Obligations of States in respect of Climate Change*⁹⁴. While the ICJ explicitly recognized that a clean, healthy and sustainable environment is a precondition for the enjoyment of human rights⁹⁵, and that “*it is difficult to see how these obligations can be fulfilled without at the same time ensuring the protection of the right to a clean, healthy and sustainable environment as a human right*”⁹⁶, it did not make a step further and apply the logical reasoning that brought the IACtHR to affirm the peremptory nature of the protection of the environment from irreversible damages. Furthermore, the ICJ observed that all States have a common interest in the protection of global environmental commons and, consequently, States’ obligations related to the protection of the climate system, particularly the duty to prevent significant transboundary harm, are obligations *erga omnes*⁹⁷.

In line with this statement, we cannot assume an equivalence between *ius cogens* and obligations *erga omnes*, as they are conceptually different notions. Even if all peremptory norms of international law have an *erga omnes* effect, it is clear that not all the latter obligations arise from *ius cogens*. The ILC, in its comment to Draft Conclusion 17, recalled that some rules regarding common spaces may produce *erga omnes* obligations “*independent of whether they have peremptory status*”⁹⁸.

In conclusion, the IACtHR’s Advisory Opinion on human rights in the context of the climate emergency exemplifies the value of adopting a regional approach to identifying peremptory norms, striving to promote a cooperative path toward greater environmental justice and accountability. In our view, while the legal impact of the recognition of the prohibition of causing irreversible damage to the environment

SAAB, K. KEITH, G. MARCEAU, C. MARQUET (eds), *Evolutionary Interpretation and International Law*, Bloomsbury, Oxford-Chicago, 2019.

⁹⁴ ICJ, *Obligations of States in Respect of Climate Change*, *cit.*

⁹⁵ The Court explicitly mentioned the right to life, the right to health and the right to an adequate standard of living, including access to water, food and housing.

⁹⁶ IACtHR, *Climate Emergency and Human Rights*, *cit.*, para. 393.

⁹⁷ ICJ, *Obligations of States in Respect of Climate Change*, *cit.*, para. 440. With specific reference to the climate treaties (UNFCCC and Paris Agreement), the Court affirmed that the obligations contained therein seek to protect the essential interest of all States in the safeguarding of the climate system, which benefits the international community as a whole. Among the first comments, see M. MCVEY, A. SAVARESI, [The ICJ Advisory Opinion on Climate Change: A Business and Human Rights Perspective](#), in *OpinioJuris*, August 4, 2025.

⁹⁸ See the comment on Draft Conclusion 17. ILC *Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law (Jus Cogens)*, with *Commentaries*, *cit.*, p. 66. On the distinction between peremptory norms of general international law and obligations *erga omnes* see A. LIGUSTRO, *L’ordinamento internazionale nei 25 anni di DPCE. Dalla fine della storia alla terza guerra mondiale “frammentata”*, in *Diritto pubblico comparato ed europeo. Numero speciale. DPCE: i primi venticinque anni*, 2024, pp. 621-647; P. PICONE, *The Distinction between Jus Cogens and Obligations Erga Omnes*, in E. CANNIZZARO (ed.), *The Law of Treaties Beyond the Vienna Convention*, Oxford University Press, Oxford, 2011, pp. 411-424; M. BYERS, *Conceptualizing the Relationship between Jus Cogens and Erga Omnes Rules*, in *Nordic Journal of International Law*, n. 66, 1997, pp. 211-239. See also F. SALERNO, *Diritto internazionale. Principi e norme*, 7th ed., Wolters Kluwer, Milano, 2024, pp. 20 e 161-165; S. MARCHISIO, *Corso di diritto internazionale*, 3rd ed., Giappichelli, Torino, 2021, pp. 65-67; E. CANNIZZARO, *Diritto internazionale*, 6th ed., Giappichelli, Torino, 2023, pp. 250-253; N. RONZITTI, *Diritto internazionale*, *cit.*, p. 184; C. FOCARELLI, *International Law*, Cheltenham-Northampton, 2019, pp. 612-615; R. MONACO, C. CURTI GIALDINO, *Diritto internazionale pubblico*, 3rd ed., Utet, Milano 2009, pp. 121-123.

and the climate system has to be assessed in light of further developments of international law, as well as in the future decisions adopted by international and national tribunals concerning climate litigations⁹⁹, the implications of this interpretation may extend beyond legalistic understandings, fostering an *ethos* of responsibility among States¹⁰⁰, and allowing both individuals and civil society organizations to promote strategic litigations before domestic tribunals to protect both the environment and fundamental human rights in a rapidly changing world.

⁹⁹ According to some authors, the Court's Advisory Opinion "would certainly influence other courts (regional and international) in their own assessments of international law in the context of climate change". See M. FERIA-TINTA, *An Advisory Opinion on Climate Emergency and Human Rights Before the Inter-American Court of Human Rights*, in *Questions of International Law*, Zoom-In, n. 102, 2023, p. 60. See also L.C. LIMA, *Climate Change Before the Inter-American Court of Human Rights*, *cit.*, p. 71-73; P. SAAVEDRA ALESSANDRI, *A Broader Look at the Transformative Impact of the Inter-American Court of Human Rights' Decisions*, in A. VON BOGDANDY, F. PIOVESAN, E. FERRER MAC-GREGOR, M. MORALES ANTONIAZZI (eds.), *The Impact of the Inter-American Human Rights System: Transformations on the Ground*, Oxford University Press, New York, 2024, pp. 537-563.

¹⁰⁰ Reference here is to the value of the interpretation provided by the IACtHR in order to allow national judges to perform the conventionality test. On this point see E. FERRER MAC-GREGOR, *Conventionality Control: The New Doctrine of the Inter-American Court of Human Rights*, in *AJIL Unbound*, n. 109, 2015, pp. 93-99; P. GONZÁLEZ DOMÍNGUEZ, *The Doctrine of Conventionality Control: Between Uniformity and Legal Pluralism in the Inter-American Human Rights System*, Cambridge University Press, Cambridge, 2018; C. ZANGHÌ, *La dottrina del controllo di "convencionalidad" nella giurisprudenza della Corte interamericana dei diritti dell'uomo*, in *Ordine internazionale e diritti umani*, n. 12, 2025, pp. 685-697.