THE ICJ'S ADVISORY OPINION ON CLIMATE CHANGE

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Content

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The ICJ's Advisory Opinion on Climate Change: An Introduction

"An existential threat" – this is how the International Court of Justice (ICJ) characterized climate change in its long-awaited advisory opinion on the obligations of States with respect to climate change.[1] In the most significant development in international climate law since the adoption of the Paris Agreement, the ICJ outlined numerous obligations that could significantly shape the contours of international environmental law and global climate governance.

The ICJ's message is clear: climate obligations are not aspirational – they are legal, substantive, and enforceable. Drawing from an array of legal sources and rejecting arguments based on the *lex specialis* principle aimed at limiting the rules applicable to climate governance, the ICJ affirmed that States have binding obligations to prevent significant environmental harm, cooperate internationally, and uphold fundamental rights in the face of escalating climate risks. These duties extend to all states, and the climate system must be protected for present and future generations.

The opinion does more than clarify individual legal duties. It reframes the relationship between science and law, between national discretion and responsibility, and between climate policy and binding legal obligation.

Among the most consequential aspects of the opinion is the ICJ's articulation of a stringent due diligence standard. Based on the scientific consensus as established in the work of the Intergovernmental Panel on Climate Change (IPCC) – understood as "the best available science on the causes, nature and consequences of climate change" (para. 74) – states must act urgently. This includes not only setting and updating robust national climate plans under the Paris Agreement but also regulating private actors and providing support to more vulnerable nations. Inaction, or failure to act

decisively, may constitute an internationally wrongful act – triggering consequences under the law of state responsibility.

Strikingly, the ICJ adopted the entire operative part of the opinion unanimously – a rare feat that underscores the global consensus around the legal obligations at stake. With climate litigation surging globally, the ICJ has laid down a clear and united marker: climate obligations are real, and the law has a role to play. There is no question that the ICJ's advisory opinion will shape climate governance in the years to come. The specific ways in which it will influence policy and practice will undoubtedly become the focus of intense debate across academia, courts, bureaucracies, and civil society in the years ahead.

Because the opinion sits at the intersection of legal doctrine, political reality, and institutional authority, its implications cannot be understood through doctrine alone. They demand interpretation, comparison, and contestation across multiple fields of practice. As a first step toward analyzing and discussing the various dimensions of the advisory opinion, the Sabin Center for Climate Change Law's Climate Law Blog and Verfassungsblog organized a joint blog symposium in July 2025, inviting leading experts to examine selected aspects of the opinion.[2] The symposium has, within a short period of time, developed into a globally used resource, exceeding its format. Not only academics and students made intensive use of its contributions; journalists, policymakers, and high-ranking climate diplomats also approached us with positive feedback and further questions, demonstrating that global interest in the advisory opinion is extraordinarily high. Against this background, we decided to make the symposium available as an open-access book. For this purpose, we have restructured the overall architecture of the symposium, while leaving the individual contributions in their original form.

In the remainder of this introduction, we first briefly outline the background of the advisory opinion and the ICJ's most important findings, highlight a few selected impacts that the advisory opinion has already had since it was issued, and explain the structure of this book.

From Vanuatu to The Hague

Requested by the United Nations General Assembly following a campaign initiated by law students at the University of South Pacific, then led by Vanuatu and supported by over 130 states, the opinion marks the first time the ICJ has authoritatively interpreted the legal duties of states in relation to climate change mitigation, adaptation, and transboundary harm.[3] The journey from a student-led campaign to a formal instrument of the world's highest court reflects a broader shift: climate change has consolidated as a legal question, one deeply rooted in equity and justice, and not merely a scientific or political one.

Prior to issuing its advisory opinion, the ICJ received over a hundred written and oral submissions, which revealed both unprecedented global engagement with the legal dimensions of the climate crisis and deep divisions over how international law should respond. Nearly 100 States and multiple international organizations participated in the ICJ's proceedings, offering sharply contrasting views on the applicable legal framework, the content and reach of states' obligations, and the legal consequences of climate harm. These included many countries that had never before engaged with the ICJ, further substantiating the relevance of the topic worldwide.

The submissions reflected competing legal paradigms: one that views international law as a living tool for advancing climate

justice and accountability, and another that emphasizes legal caution, treaty limits, and political sensitivities. The ICJ's opinion was expected to navigate these tensions carefully – seeking legal clarity while acknowledging the complexity of the climate crisis and its evolving legal terrain. Instead, the ICJ's responses went far beyond this careful approach, delivering a bold and far-reaching opinion poised to influence climate policy well into the future.

Scope of state obligations and legal framework clarified

The ICJ began by noting that it had jurisdiction to hear the case and that there were no compelling reasons to decline to answer the questions submitted by the General Assembly. It also reviewed the relevant scientific literature, drawing heavily from the work of the IPCC. Thereafter, the ICJ addressed the question of the "most directly relevant applicable law" that governs the questions posed to it (paras. 113 ff). The ICJ identified a comprehensive legal framework that includes the Charter of the United Nations, climate change treaties (such as the United Nations Framework Convention on Climate Change (UNFCCC), Kyoto Protocol, and Paris Agreement), the United Nations Convention on the Law of the Sea (UNCLOS), and other environmental treaties like the Ozone Layer Convention, the Montreal Protocol, the Kigali Amendment to the Montreal Protocol, the Convention on Biological Diversity, and the Convention to Combat Desertification.

Customary international law duties also come into play, particularly the duty to prevent significant harm to the environment (paras. 132-139) and the duty to cooperate for environmental protection (paras. 140-142). Notably, the ICJ found that international human rights law is part of the most directly relevant applicable law, including the rights to life, health, housing, food, and a

clean, healthy, and sustainable environment. Other principles, such as the principles of sustainable development, common but differentiated responsibilities and respective capabilities (CBDR-RC), equity, intergenerational equity, and the precautionary principle, are also applicable (para. 161).

Taken together, this framework shows that climate governance can no longer be approached as a fragmented regime composed of isolated treaties and principles. Instead, the ICJ presented an interconnected legal order in which environmental protection, human rights, and the law of the sea, within a broader framework of international law, operate cumulatively rather than competitively. By grounding its interpretation in a broad set of legal sources, the ICJ established that states must navigate climate obligations through systemic interpretation, not selective reliance on isolated provisions.

No legal silos: The ICJ on lex specialis

The ICJ rejected the argument made by some states – including the United States – that climate change treaties constitute *lex specialis* and therefore render other rules of international law inapplicable (paras. 162-171). *Lex specialis* is a principle of legal interpretation used to determine whether a more specific rule takes precedence over a more general one, or whether the two rules apply concurrently. The ICJ relied on the work of the International Law Commission, which states that mere overlap in subject matter does not automatically trigger the application of *lex specialis*. For the principle to apply, there must be either a real inconsistency between two legal provisions or clear evidence that one was intended to exclude the other. The ICJ found no inconsistency between climate treaties, such as the UNFCCC and the Paris Agree-

ment, and other relevant rules and principles of international law. In fact, both treaties explicitly refer to other legal frameworks in their preambles, indicating that they are intended to operate within, rather than outside, the broader international legal system (paras. 168-170).

This clarification carries significant implications. By rejecting a narrow *lexspecialis* approach, the ICJ limited the ability of states to construe climate treaties as optional, flexible instruments insulated from broader legal duties. Instead, obligations arising from multiple areas of law converge and reinforce one another. The result is a more demanding legal landscape: one in which climate commitments must be interpreted in light of human rights law, customary duties, and cross-cutting principles such as equity and precaution. It is against this integrated framework that the ICJ developed the due diligence obligations that follow.

Due diligence over discretion

Among the most consequential aspects of the opinion is the ICJ's articulation of a stringent due diligence standard. In light of the scientific consensus, states must act urgently. This includes not only setting and updating robust national climate plans under the Paris Agreement but also regulating private actors and providing support to more vulnerable nations. Inaction, or failure to act decisively, may constitute an internationally wrongful act, triggering consequences under the law of state responsibility.

The ICJ found that the discretion of parties to the Paris Agreement in preparing their Nationally Determined Contributions (NDCs) is limited (paras. 237-249). Under the Paris Agreement, each party is required to submit NDCs outlining efforts to reduce greenhouse gas emissions and adapt to the impacts of climate

change. Some states argued that NDCs fall entirely within the discretion of each state party. The ICJ disagreed. It held that parties are under an obligation to exercise due diligence when preparing their NDCs, ensuring that, when taken together, they achieve the 1.5°C temperature goal (para. 245).

In setting this standard, the ICJ recalibrated expectations surrounding state conduct: climate action may vary across national contexts, but it cannot fall below a legally defensible threshold grounded in science, good faith, and international cooperation. Importantly, due diligence becomes the mechanism through which discretion is exercised, rather than a justification for inaction. This reframing prepares the ground for the ICJ's next step, where it explains how customary international law reinforces and extends these obligations beyond treaty frameworks.

Customary international law and the climate system

The ICJ held that the customary duty to prevent significant harm to the environment applies fully to the climate system. Crucially, this duty applies to all states, including those that are not parties to climate change treaties. As a vital part of the global environment, the climate system must be protected for present and future generations (para. 273). The risk of significant environmental damage must be assessed based on the likelihood and magnitude of potential harm. Furthermore, the ICJ recognized that significant harm can also arise from the cumulative impacts of multiple activities – both by states and non-state actors (para. 276).

The standard of conduct required is due diligence – a flexible, context-sensitive obligation shaped by a range of legal and scientific considerations. The ICJ identified several key elements that define how due diligence must be understood in the climate

context (paras. 281-299). These include: (i) the adoption of appropriate legal and regulatory measures, such as effective policies aimed at achieving deep, rapid, and sustained reductions in greenhouse gas emissions; (ii) the availability and assessment of scientific and technological information, which states are expected to acquire and analyze actively; and (iii) the relevance of both binding and non-binding norms, including decisions by the Conferences of the Parties (COPs) to climate treaties and recognized technical standards and best practices.

In addition, the ICJ stressed: (iv) the CBDR-RC principle, noting that states with greater resources and governance capacity are expected to exercise a higher standard of care, though all states must act within the limits of their capabilities; (v) the necessity of taking preventive action even amid scientific uncertainty, which should not be used as a pretext for delay or inaction; (vi) the requirement that states undertake thorough risk and impact assessments for proposed activities within their jurisdiction that may contribute to climate harm, based on the best available science; and (vii) the obligation to notify and consult in good faith with other states when activities may create a risk of significant transboundary harm or interfere with collective climate efforts.

The ICJ also reaffirmed the customary duty to cooperate, emphasizing that international collaboration is essential when addressing a global commons like the climate system (paras. 301-302). While states retain discretion in how they regulate greenhouse gas emissions, this does not exempt them from legal accountability (para. 306). Discretion must be exercised in good faith and in accordance with the required level of due diligence.

By applying customary duties directly to the climate system, the ICJ eliminated the notion that climate protection depends solely on treaty membership or negotiated targets. The opinion

instead positioned these obligations as part of a broader legal architecture that binds all states. Customary law, therefore, reinforces treaty-based duties and ensures legal continuity even where treaty language is silent or contested. With this foundation in place, the ICJ proceeded to examine what follows when these obligations are breached and how responsibility and reparations operate in the climate context.

Together, these conclusions close legal gaps often invoked to justify delay or discretion, and transform climate action from voluntary aspiration into legal expectation.

Protection of the marine environment, sea level rise, and statehood

The ICJ identified UNCLOS as one of the instruments most directly relevant to the questions submitted to it by the General Assembly. The ICJ recalled the advisory opinion rendered by the International Tribunal for the Law of the Sea (ITLOS) last year,[4] noting that it would "ascribe great weight to the interpretation adopted by the Tribunal" (para. 338). In this light, the ICJ reaffirmed that anthropogenic greenhouse gas emissions fall within the definition of marine pollution under Article 1, paragraph 1, subparagraph 4, of UNCLOS, thereby making Part XII of UNCLOS on the protection of the marine environment applicable to climate governance (paras. 339-340).

The ICJ found that states have both positive and negative obligations under UNCLOS: they must take active steps to protect and preserve the marine environment (Article 192) and avoid degrading it (paras. 342-343). This includes taking all necessary measures to prevent, reduce, and control marine pollution (Article 194), even if

complete prevention is not immediately achievable. The ICJ emphasized a stringent standard of due diligence, requiring states to act based on the best available science and their capabilities (paras. 345-349). It also underscored states' obligations to cooperate under Article 197 (paras. 350-351), to conduct environmental impact assessments when planned activities pose significant risks under Article 206 (paras. 352-353), and to support research and data sharing under Articles 200-201 (para. 351). The ICJ stressed that UNCLOS and other rules of international law "inform each other" and must be applied hand in hand (para. 354).

The ICJ also addressed concerns about sea level rise, particularly its impact on maritime territories and the statehood of small island states. It found that UNCLOS does not require states to revise established baselines or maritime boundaries in response to physical changes such as coastal recession (para. 362). Thus, existing maritime entitlements remain valid even as sea levels rise. More fundamentally, the ICJ found that "once a State is established, the disappearance of one of its constituent elements would not necessarily entail the loss of its statehood" (para. 363). In other words, according to the ICJ, the complete submergence of a territory does not necessarily negate a state's legal status. This confirmation of the existence of a presumption of continuity of statehood will undoubtedly be welcomed by the states most immediately affected by sea-level rises, but it is unfortunate that the ICJ did not elaborate further on this important finding, as deplored by Judge Peter Tomka[5] and Judge Bogdan Aurescu.[6]

International human rights law and the climate

The ICJ underscored the indivisibility of climate justice and human rights. It recognized that a stable climate is foundational to the

enjoyment of numerous rights, including the rights to life, health, food, water, and housing (paras. 373 ff). Climate vulnerable groups such as children, women, and indigenous peoples were given special attention by the ICJ (paras. 382 ff), which also clarified that states have obligations under the principle of non-refoulement when there is a real risk of irreparable harm to life, citing the Human Rights Committee's decision in *Teitiota v. New Zealand* (para. 378). Remarkably, the ICJ went on to describe a clean, healthy, and sustainable environment as "a precondition" for the enjoyment of human rights, and that the right to such an environment "results from the interdependence between human rights and the protection of the environment" and is "therefore inherent in the enjoyment of other human rights" (para. 393).

Reaffirming that human rights treaties may apply extraterritorially when a state exercises jurisdiction outside its borders (paras. 394 ff), the ICJ once more stressed that international human rights law, climate change treaties, and environmental agreements are mutually reinforcing and "inform each other" (para. 404). Therefore, when implementing obligations under one body of law, states must consider and harmonize their responsibilities under the others.

State responsibility and reparations

While acknowledging the complexity of climate change in terms of its causality, temporal scope, attribution, and causation, the ICJ did not shy away from affirming that reparations are warranted when acts or omissions can be attributed to a state, giving rise to state responsibility. In particular, the ICJ affirmed that "[f]ailure of a State to take appropriate action to protect the climate system from [greenhouse gas] emissions – including through fossil fuel produc-

tion, fossil fuel consumption, the granting of fossil fuel exploration licences or the provision of fossil fuel subsidies – may constitute an internationally wrongful act which is attributable to that State." (para. 427).

The ICJ further held that when a state fails to meet its international obligations related to climate change – whether under treaty law, customary international law, or human rights law – it incurs responsibility under the law of state responsibility (para. 444), triggering "a panoply of legal consequences" (para. 445). These include obligations of (i) cessation and non-repetition, (irrespective of harm) and (ii) full reparation, including restitution (returning things to the *status quo ante*, if possible), compensation (for financially assessable damage) and/or satisfaction (for moral or non-material harm). The ICJ also noted that breaches of states' obligations do not affect the continued duty of the responsible state to perform the obligation breached.

The ICJ confirmed that these remedies can apply for wrongful acts caused by cumulative greenhouse gas emissions (para. 429) or failures to regulate private actors (para. 438), provided they constitute a breach of an international obligation. These obligations are *erga omnes* – owed to the international community as a whole (paras. 439ff). This means that any state may invoke responsibility, not just injured states.

The ICJ's findings on responsibility and reparations underscore that climate obligations are not merely procedural or interpretive; they carry enforceable legal consequences. By confirming that breaches may arise from omissions, cumulative emissions, or failure to regulate private actors, the ICJ situated climate responsibility within established doctrines rather than creating a parallel regime. This closing step completes a coherent legal architecture:

duties exist, standards apply, and accountability mechanisms are available when obligations are not met.

The ICJ's articulation of reparations and extraterritorial human rights obligations may become one of the most debated aspects of the opinion, shaping future litigation.

A clear message

As contributors to this volume explore, the opinion's true legacy may lie not only in its legal conclusions, but in its power to influence political will, guide national courts, and support vulnerable communities seeking justice. Amid a global surge in climate-related lawsuits, the ICJ has sent a clear message: legal systems must reckon with climate duties, and action can no longer be deferred.

Five months after the advisory opinion was published, we have started to see the ways in which it can be influential. In *Greenpeace Nordic and Others v. Norway*[7], the European Court of Human Rights (ECtHR) noted the ICJ's advisory opinion's interpretation that the customary international law obligation to prevent significant environmental harm required states to undertake climate-specific environmental impact assessments in case of proposed activities in a transboundary context.[8]

In the Canadian case *Lho'imggin et al. v. Her Majesty the Queen*[9], the Federal Court referred to the ICJ's articulation of due diligence and the potential emergence of customary climate obligations. While noting that the opinion is non-binding, it clarified that its outlined principles have "substantial persuasive authority" and "may have significant legal implications in the Canadian context," for example, by influencing "how courts interpret domestic laws,

particularly in relation to constitutional rights and international obligations."

In the Brazilian case, *Instituto Preservar, AGAPAN and Núcleo Amigos da Terra vs. Federal Union and others*[10], the Federal Court of Rio Grande do Sul referred to the ICJ's interpretation of the 1.5 °C target as a mandatory obligation for all states, based on IPCC consensus, and the narrow margin of appreciation that states have in their NDCs. The decision also referred to the ICJ's affirmed strict due diligence standard in implementing mitigation targets, which directly impacted how the Federal Court assessed climate change in environmental permitting procedures. It noted that there is an evident change in the legal demand that falls upon permitting agencies based on the ICJ's opinion and the IACtHR's opinion.[11]

This is only the beginning. As national courts, treaty bodies, and international tribunals begin citing the opinion, its authority will expand through jurisprudential practice rather than declaration alone.

On the structure of this book

The structure of this book follows a simple two-step approach. In the first part, the contributions to this volume examine what the ICJ *did* in its Climate Advisory Opinion: the doctrines it clarified, the legal fields it touched, and the new standards it articulated. Part I moves through four thematic sections – *Foundations and Standards of Obligation*, *Human Rights, Reparations, and Persons Affected*, *Oceans, Territory, and Statehood*, and *Energy, Governance, and Implementation* – to show how the ICJ's reasoning consolidated an emerging global climate constitution. The second part examines what the ICJ did not say. The chapters in this section reveal how the ICJ's silences – on responsibility, differentiation, colonial

legacies, military emissions, and regional perspectives – are as consequential as its findings. These contributions turn omission into analysis and conclude with reflections on how to interpret these silences and what they reveal about the ICJ itself. The structure reflects a central truth of the opinion: its influence lies not only in what it resolved, but also in the questions it left open. These questions will shape the next phase of climate law and litigation.

Part I: The Court's Reach: Substantive Developments in International Law

To further structure the diverse questions raised by the advisory opinion, we have divided the first part of this book into four sections.

A. Foundations and Standards of Obligation

Margaretha Wewerinke-Singh opens the first section of Part I by tracing how the ICJ wove treaty provisions, custom, and general principles into a single fabric. She shows that the ICJ rejected any attempt to treat the climate treaties as siloed instruments, instead consolidating a broader shift toward systemic integration that fortifies the binding force of environmental duties. Building on this, **Christina Voigt** examines the Opinion's articulation of due diligence as the operative standard of conduct in international climate law. She argues that the ICJ's insistence on an objective and evolving benchmark transforms once-discretionary domestic climate commitments into binding obligations of conduct, the breach of which may trigger responsibility.

Markus Gehring turns to customary international law, highlighting the ICJ's confirmation that all states – irrespective of treaty membership – are bound to prevent significant climate harm

and to cooperate in good faith. He reads this as a decisive clarification of universal climate duties. **Niklas Reetz** then explores how the ICJ reaffirmed the applicability of the law of state responsibility, underscoring that diffuse causation does not dilute states' preventive obligations. While praising the clarity of the ICJ's approach to obligations under the Paris Agreement and customary law, he notes that attribution and reparation remain deferred questions. **Caroline Foster and Bella Belcher** trace an "administrative law turn" in the ICJ's reasoning: they show how procedural standards – rationality, reasonableness, due regard – reshape the assessment of NDCs, subjecting state climate decision-making to a form of administrative-style review. **Margaret A. Young, Dan Parker, and Stanislav Roudavski** close this section with a particularly innovative contribution that communicates through various visualizations, which are available by scanning the QR code in the chapter. Developed as a collaboration between a lawyer and two designers, the data story engages with the Court's reasoning and situates its consequences within a broader web of interrelated information.

B. Human Rights, Reparations, and Persons Affected

The second section of Part I begins with **David Boyd**'s account of the ICJ's embrace of the right to a clean, healthy, and sustainable environment. He situates the ICJ within a broader global movement toward recognizing environmental rights as binding norms. **Corina Heri** follows with a comparative reading of the ICJ and the IACtHR, noting that although the ICJ's approach is more cautious, it nonetheless confirms the coexistence of human rights law and climate treaties and maps a wide array of climate-related rights. **Maria Antonia Tigre, Camille Martini, Miriam Cohen, and Armando Rocha** then examine the ICJ's treatment of remedies

and reparations. They argue that while the Opinion brings the consequences of wrongful emissions into sharper focus, it offers only limited guidance on reparative forms, risking constrained climate justice. Closing the section, **Lena Riemer** analyzes the ICJ's strikingly brief but potentially far-reaching reference to climate-induced displacement. She contrasts this with the IACtHR's expansive approach and suggests that even the ICJ's simplicity carries implications for global refugee protection.

C. Oceans, Territory, and Statehood

Part I's third section moves seaward. **Antoine De Spiegeleir and Armando Rocha** unpack how the ICJ integrated the law of the sea into its climate analysis, affirming that greenhouse-gas emissions constitute marine pollution and engaging in an evolving judicial dialogue with ITLOS over baselines and statehood under sea-level rise. **Zana Syla and Avidan Kent** focus on the ICJ's treatment of statehood, arguing that its restatement of the presumption of continuity offers cautious yet significant reassurance to small island states facing existential territorial loss. **Aurelio Corneo and Judith Scherer** extend this inquiry by examining the ICJ's acknowledgment that a state may persist even without territory. They situate the ICJ's position within debates on de-territorialized statehood, interpreting it as a gesture toward legal stability over physical geography.

D. Energy, Governance, and Implementation

The final section of Part I turns to energy, governance, and implementation. **Jochen von Bernstorff and Ingo Venzke** introduce "fossil sovereignty" to describe entrenched structures shielding fossil-fuel interests. They argue that the ICJ's reasoning implicitly challenges these structures and gestures toward the unlawfulness

of continued fossil-fuel support. **Elsabé Boshoff and Samrawit Getaneh Damtew** examine what this means in Africa, where acute energy poverty collides with the Opinion's universal application. They show how this uniformity raises unresolved questions of fairness for states seeking development through oil and gas. **Joe Udell and Floris Tan** then analyze the Opinion's relevance for domestic framework litigation, underscoring how the ICJ's affirmation of the 1.5°C limit and rejection of discretionary interpretations of the Paris Agreement create clearer benchmarks for national courts. **Sebastián Rioseco and Tejas Rao** expand the institutional lens by showing how the ICJ, alongside ITLOS and the IACtHR, elevates COP decisions from political outputs to legally influential instruments that shape governance. Concluding Part I, **Jorge Alejandro Carrillo Bañuelos and Susan Ann Samuel** trace the convergence among the three advisory opinions, revealing a cross-court alignment grounded in science, due diligence, and human rights, and pointing toward a general obligation to protect the climate system.

Part II: The Court's Restraint: Silences, Gaps, and Self-Reflection

Part II begins with **Jed Odermatt**'s analysis of the ICJ's silences as deliberate judicial restraint. He argues that the ICJ avoided contentious issues to preserve institutional legitimacy while still laying a framework that leaves room for other bodies to elaborate. **Matthias Petel** examines one such omission: the ICJ's reluctance to address differentiation. He contends that by foregrounding cooperation but declining to specify how responsibilities should be distributed, the ICJ sidesteps questions of justice and the legacies of colonial inequality. **Dina Lupin** follows with an exploration of Africa's relative invisibility in the Opinion, asking whether an "African perspective" nonetheless emerges from the reasoning of

African judges and probing the fraught relationship between judicial identity and continental representation.

Julia Dehm turns to the ICJ's handling of historical responsibility, arguing that its avoidance of temporal and distributive dimensions limits prospects for reparative climate justice and risks perpetuating the erasure of colonial harms. **Eva Baudichau** examines another silence: the status of military emissions. She argues that although the ICJ left the issue untouched, interpretive openings remain for extending climate obligations to wartime contexts and recognizing military emissions as legally relevant climate harm. **David Frydlinger** then proposes turning the ICJ's own integrative interpretive method back onto its silences, suggesting that the Opinion offers tools for clarifying unresolved issues such as fossil-fuel legality, environmental rights, and reparation. The volume closes with **Antoine De Spiegeleir**'s portrait of the Opinion as an act of institutional self-representation: a performance aimed at presenting the ICJ as a stabilizing, authoritative actor at a moment of global crisis.

As climate litigation accelerates and the international system confronts profound transformation, this volume aims to provide a foundation for understanding the advisory opinion not as an endpoint, but as a starting point; a legal and political watershed whose consequences will continue to unfold.

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References

1. ICJ, *Obligations of States in respect of Climate Change*, Advisory Opinion of 23 July 2025.
2. For a further symposium on the ICJ Advisory Opinion, see the excellent symposium on *Völkerrechtsblog*, available at https://voelkerrechtsblog.org/symposium/symposium-on-the-icj-climate-change-advisory-opinion/ .
3. For further background see Maria Antonia Tigre, 'It Is (Finally) Time for and Advisory Opinion on Climate Change: Challenges and Opportunities on a Trio of Initiatives' (2023) 17 Charleston Law Review 623–723; Maria Antonia Tigre and Armando Rocha (eds.), The Role of Advisory Opinions in International Law in the Context of the Climate Crisis (Brill | Nijhoff, 2025).
4. For background, see Korey Silverman-Roati and Maxim Bönnemann, 'The ITLOS Advisory Opinion on Climate Change', *Verfassungsblog* (22 May 2024), available at https://verfassungsblog.de/theitlos-advisory-opinion-on-climate-change/ .
5. ICJ, *Obligations of States in respect of Climate Change*, Declaration of Judge Tomka, 23 July 2025.
6. ICJ, *Obligations of States in respect of Climate Change*, Separate Opinion of Judge Aurescu, 23 July 2025.
7. See the entry in the Sabin Center for Climate Change Law's Climate Litigation Database, available here: https://www.climatecasechart.com/document/greenpeace-nordic-and-others-v-norway_0687
8. For a comprehensive discussion of the ECtHR's 2024 climate rulings, see Maxim Bönnemann and Maria Antonia Tigre (eds.), *The Transformation of European Climate Litigation* (Verfassungsbooks, 2024).
9. See the entry in the Sabin Center for Climate Change Law's Climate Litigation Database, available here: https://www.climatecasechart.com/document/lhoimggin-et-al-v-her-majesty-the-queen_a57c?q=Lho%E2%80%99imggin+et+al.+v.+Her+Majesty+the+Queen
10. See the entry in the Sabin Center for Climate Change Law's Climate Litigation Database, available here: https://www.climatecasechart.com/document/instituto-preservar-agapan-and-nucleo-amigos-da-terra-vs-federal-union-and-others-climate-emergency-in-rio-grande-do-sul-state_5859?cpl=jurisdiction%2FBrazil&q=AGAPAN.

11. For an overview of the Inter-American Court of Human Rights' Advisory Opinion on the Climate Emergency, see Maria Antonia Tigre, Maxim Bönnemann, and Korey Silverman-Roati, 'A Blueprint for Rights-Based Climate Action: The Inter-American Court of Human Rights' Advisory Opinion on the Climate Emergency', *Climate Law: A Sabin Center Blog* (8 July 2025), available at https://blogs.law.columbia.edu/climatechange/2025/07/08/a-blueprintfor-rights-based-climate-action-the-inter-american-court-of-human-rights-advisory-opinion-on-the-climate-emergency/ . See also the symposium jointly organised by the Sabin Center for Climate Change Law's *Climate Law Blog* and *Verfassungsblog*, available at https://verfassungsblog.de/category/debates/human-rights-protection-in-the-climate-emergency-the-inter-american-court-of-human-rights-advisory-opinion-no-32-debates/ .

The Court’s Reach: Substantive Developments in International Law

A. Foundations and Standards of Obligation

Margaretha Wewerinke-Singh

Harmonizing Sources, Hardening Duties

Inside the ICJ's Advisory Opinion on Climate Change

The International Court of Justice (ICJ)'s release of its Advisory Opinion on the *Obligations of States with Respect to Climate Change* marks a watershed moment, not just because of what the court says about climate obligations, but also because of how it says it.[1] In responding to the legal question posed to it, the ICJ does not reinvent the law so much as weave together its many threads. Rather than treating treaty, custom, and general principles of law as enclosed, the ICJ reads them together – sometimes cumulatively, sometimes cross-referentially, always purposively. That approach is not conjured from thin air. It consolidates a lineage already visible in recent jurisprudence of the International Tribunal for the Law of the Sea (ITLOS), the Inter-American Court of Human Rights (IACtHR) and the European Court of Human Rights (ECtHR), and it speaks to what many domestic courts have been doing more for than a decade in climate cases.[2] The result is a careful, source-sensitive account of international obligations that deepens their legal texture and clarifies the consequences of their breach.

This chapter analyzes the advisory opinion's treatment of sources, arguing that it reflects a deeper shift in international law's orientation that will reverberate far beyond climate litigation. It complements another piece, written jointly with Jorge Viñuales, which discusses the advisory opinion's contributions to climate law and governance more broadly.[3]

Treaty and custom in tandem - and the interpretive role of principles

From the outset, the ICJ rejected attempts to corral climate change law into a self-contained regime. As Phoebe Okowa recalls, a hand-

ful of large emitters (e.g. the United States, Japan, Saudi Arabia, Kuwait, Australia) had urged a "climate treaties only" view – that the United Nations Framework Convention on Climate Change (UNFCCC), Kyoto Protocol, and Paris Agreement form a *lex specialis,* displacing broader international law.[4] The ICJ firmly disagreed. It held that the climate accords neither exclude nor exhaust States' obligations under general international law. In other words, the existence of specialized climate treaties does not immunize States from parallel customary duties or other treaty commitments. This view echoes the ICJ's classic approach in *Nicaragua*: treaty norms and custom can coexist and independently bind States (*Military and Paramilitary Activities (Merits)*, paras. 92-107).

Interpretively, the Court was explicit that the climate treaties must be interpreted in accordance with Articles 31-33 of the Vienna Convention on the Law of Treaties (VCLT), which themselves reflect customary international law. This includes the duty of good faith, the directive to read terms in their context and in light of the treaty's object and purpose, and the operation of systemic integration under Article 31(3)(c). The Court also stressed that subsequent agreements and subsequent practice may arise from decisions of the Conference of the Parties to the UNFCCC (COP), the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement (CMA) and related bodies, and must be taken into account (para. 177). This approach allows the ICJ to read the UNFCCC, Kyoto Protocol, and Paris Agreement together, while resisting any automatic *lex posterior* displacement and insisting instead on compatibility and harmonious interpretation across instruments.

The ICJ spelled out in detail how treaty and custom interact, placing these sources in a mutually reinforcing relationship.

Treaties are to be read within the "entire legal system prevailing at the time of interpretation", including relevant customary rules; treaty provisions can also shed light on the content of custom or even accelerate its development (para. 311). At the same time, customary norms continuously complement the relevant treaties; they bind even States not party to a specific treaty and fill treaty gaps (para. 315).[5] The ICJ even recognized COP decisions as potentially contributing to the formation of custom; however, it cautioned that each decision must be assessed for the requisite State practice and *opinio juris* (para. 288). This careful, case-by-case method mirrors the International Law Commission (ILC)'s guidance that no single formula creates or defines custom; rather, one must examine practice and belief in normative obligation.

Substantively, the ICJ singled out two customary norms as "most directly relevant" to climate change: (1) the duty to prevent significant environmental harm to the environment (through "due diligence" to avoid foreseeable damage), and (2) the duty to cooperate in good faith for environmental protection. Both are framed as obligations owed by *all* States and both operate beyond the formal membership of particular treaties. Additionally, the ICJ explicitly considered "the human rights recognized under customary international law" as part of the applicable law (para. 145), with the customary law on State responsibility providing the overarching framework for determining breaches and legal consequences (para. 420).[6]

For the duty to prevent significant environmental harm, the ICJ referred to its previous confirmations of the norm's customary status and agreement among participants about the same (para. 132). It rejected a narrow, direct-transboundary-harm template and applied the no-harm rule to a global, cumulative process, while reaffirming that "use all the means at [a State's]

disposal" remains the operative standard of conduct (para. 281). The duty to co-operate is treated both as a rule of custom and as an interpretive guide for other rules; a conclusion the ICJ reached after surveying a wide range of sources demonstrating State practice and *opinio juris* (para. 140). Interpretively, the ICJ stressed that the principle of good faith is not a mere VCLT adornment but applies equally to custom: it structures how States perform co-operation, including the continuous development and implementation of collective climate policy based on an equitable distribution of burdens. Read together, the duty to co-operate and good faith require more than the exchange of finance or technology; they require a sustained, reviewable practice of equitable effort aligned with treaty temperature goals and with customary prevention obligations (paras. 303-307). That is why the ICJ seemed at pains to say that co-operation is not optional and is not satisfied simply by participation in treaty processes (paras. 308-315).[7]

The ICJ's treatment of human rights and custom merits separate emphasis. The Court placed human rights at the heart of the legal analysis, recognized the human right to a clean, healthy and sustainable environment as essential "under international law" (paras. 387-393) and used that recognition, together with interdependence, to specify the content of States' climate obligations (para. 457). Judge Aurescu argued – persuasively in my view – that the evidentiary record would have supported an explicit customary characterization[8]; Judge Bhandari and Judge Tladi asserted the ICJ recognized as much.[9]' [10] Whether or not one reads the advisory opinion as going that final step, the result is a customary law of prevention and cooperation whose content is informed by human rights and by best available science. That is a powerful convergence for courts and policymakers alike.[11]

Some of the separate opinions and declarations spotlight areas where the ICJ could have applied the two-pronged assessment more explicitly or rigorously (e.g. fixed baselines/ outer limits of maritime zones[12]; continuity of statehood[13]; and, as noted above, the right to a clean, healthy and sustainable environment). But these observations do not so much undercut the opinion as indicate what remains at the frontier of international climate law scholarship and practice.

General principles and global equity

Equally intriguing is the ICJ's engagement with general principles of law. The ICJ never once pronounced the formula "general principles of law" in the opinion, yet it plainly worked with such principles throughout. In identifying "other principles" that are "part of the applicable law" – sustainable development, common but differentiated responsibilities and respective capabilities (CBDR-RC), equity, intergenerational equity and the precautionary approach or principle – the ICJ incorporated them into the very *corpus juris* governing climate change, alongside treaty and custom.

In doing so, the Court silently endorsed the classification proposed by the ILC in its near-finalized work on the topic[14]: general principles of law may be "derived from national legal systems" or "formed within the international legal system" (ILC draft conclusion 3). Most of the principles on the ICJ's list appear to have been viewed through the lens of the latter category.[15] The advisory opinion traces their origins primarily to treaties, other international instruments, and judicial reasoning at the international level rather than in recognition in domestic legal systems. Yet the ICJ's approach is flexible enough to accommodate hybrid origins. Equity, for example, is so deeply embedded in many

domestic legal traditions that the ICJ may have regarded a fresh comparative analysis as unnecessary. At the same time, it has long circulated autonomously in international jurisprudence.[16] A similar duality of origin may explain why the "precautionary approach or principle" features in the list as "law", despite its ambiguous phrasing (which Judge Yusuf and Judge Charlesworth criticized).

The rigor of the ICJ's methodology is illustrated by its treatment of the "polluter pays" principle – the only candidate principle expressly rejected. Noting the principle's absence from climate treaties and the sector-specific character of the State practice on which proponents relied, the Court concluded that the polluter pays principle did not apply "for the purposes of this Advisory Opinion" (para. 160). The ICJ's reference to national *and* international practice signals that both categories of general principles are subject to a shared evidentiary threshold of "recognition" (ILC draft conclusion 2). An open-ended question is whether the evidence examined by the Court was sufficient to make a determination about the polluter pays principle's status as a general principle of law. According to Judge Bhandari it was not; he argued that the Court overlooked the principle's "normative and jurisprudential grounding in international environmental law" and in doing so, "misse[d] an opportunity to strengthen the accountability architecture essential for addressing climate change" (para. 2).[17] Judge Nolte, in turn, underscored that the Court did not close the door to "a likely future development of the law" with respect to the polluter pays principle (para. 17).[18]

The advisory opinion's exposition of equity illustrates both the promise and the ambiguity of general principles' normative yield. Recalling *Continental Shelf (Tunisia/Libya)*, the opinion reproduces the assertion that "the legal concept of equity is a general principle directly applicable as law", but – crucially – omits the adverb

"*Moreover*" that once separated that proposition from the next sentence on equity's interpretive role (para. 152). By eliding that connective word, the Court fused two propositions that were originally distinct: equity can generate substantive norms, *and* it can guide the choice between competing readings of positive law. This fusion enabled the Court, in an earlier paragraph, to declare that CBDR-RC, while derived from equity, "does not establish new obligations" and instead "guides the interpretation" of existing law (para. 151). Judge Xue's separate opinion refuses that narrowing move: once a principle has been acknowledged as applicable law, she argues, it must possess "its own substantive content" (para. 3).[19] Equity therefore cannot be confined to a merely hermeneutic function when the issue at stake is distributive justice in climate action. This tension between the majority and Judge Xue foreshadows future litigation. By characterizing CBDR-RC and the other listed principles as interpretive canons *for now*, the Court leaves open the possibility that, in concrete disputes, those same principles may give rise to freestanding obligations – particularly where equity demands differentiation based on historical responsibility or capacity.

While the ambiguity about the listed principles' generative function is real, this should not overshadow the significance of the ICJ's conclusion that they are applicable as "guiding principles for the interpretation and application" of the relevant legal rules (para. 161). Given the plethora of rules the ICJ considered "directly relevant", the implications of this recognition are far-reaching. CBDR-RC, for example, must be applied systematically "beyond its express articulation in different treaties" (para. 151) to ensure that the relevant law takes due account of "the historical responsibility of certain States" and "different current capabilities" (para. 148).[20] Similarly, the Court's recognition of intergenerational equity is

remarkable, even if the extent of its law-generating capacity remains unsettled: a concept whose legal status was long debated[21] is now affirmed as a manifestation of equity that must inform the application of both treaties and custom, ensuring "due regard for the interests of future generations" across the board. The precautionary principle also received significant validation: While the Court called it both an "approach" and a "principle", it nevertheless deemed it determinative of the standard of due diligence required under custom and treaties (e.g. para. 178).[22]

Taken together, these moves reposition general principles at the heart of global climate governance. By confirming their status as law and by insisting that they infuse the interpretation of all "directly relevant" rules, the Court has equipped litigants and policymakers with a vocabulary of equity that transcends the confines of any single treaty regime. The section thus lays doctrinal groundwork for a more differentiated, future-oriented, and justice-centred application of international climate obligations. At the same time, it gives the ILC's work on general principles increased salience by revealing the need for a conceptual map and methodology to enhance transparency in future invocations of these principles. Moreover, the ICJ's near-silence on principles derived from national legal systems leaves room for comparative research to render this source more inclusive.[23]

Emancipatory potential unlocked

Why does the ICJ's holistic approach to sources matter? Because it transforms what could have been a modest restatement of obligations into a bold affirmation of international law's capacity to drive equitable climate action at a global scale. By confirming that States must act not only under treaties but also under general interna-

tional law to avoid and repair climate harm, the ICJ essentially tells the world that our shared norms and principles demand climate justice (though Judge Yusuf, Judge Sebutinde and Judge Charlesworth insisted, from different angles, that the ICJ should have gone further in linking the law to the realities of climate change). This approach frees the entire field of climate law from the constraints of particular agreements and roots it in something larger – the idea of legal duties owed to present and future generations. This idea is further consolidated by the ICJ's finding that climate obligations are *erga omnes* under custom and *erga omnes partes* under the treaties (paras. 439-443). Accordingly, any State can invoke responsibility if these duties have been breached, as per the rule codified in Article 48 of the ILC's Articles on the Responsibility of States for Internationally Wrongful Acts (para. 442).[24] The grounding of *all* applicable obligations into the general law of State responsibility is precisely where the advisory opinion's cross-source method delivers bite.

For vulnerable States and communities long frustrated by the slow pace of negotiations, this result is vindication. The ICJ's opinion itself is not binding, but as a clarification of binding law from the UN's principal judicial organ, it carries the highest degree of legal weight and political legitimacy (see e.g., Soenke Kreft and Maren Solmecke[25]). In addition to reshaping international relations, it is bound to have deep implications for climate litigation worldwide.[26] Activists and advocates now have authoritative language to bolster cases in domestic courts; for example, national judges seeing that the world's highest court considers failure to regulate greenhouse gas emissions a breach of international law may feel empowered (and indeed obligated) to interpret domestic duties in light of that standard. We can anticipate litigants invoking the ICJ opinion to argue that government inaction violates

legal obligations – the due diligence duty to prevent harm, the right to a clean, healthy and sustainable environment, etc. Where governments, courts, or other organs of the State ignore the opinion, they will do so at their own peril. Breaches trigger legal consequences which, if left unaddressed, will accumulate and intensify over time. As noted elsewhere, the new baseline that emerges through this framing marks "a fundamental reset" of how we understand international law's application to climate change.[27]

It is worth stressing that none of this emerges *ex nihilo*. The ICJ's integrated reading reflects and consolidates an interpretive technique that a growing number of international courts have already deployed to align discrete treaty regimes with overarching climate objectives. ITLOS, in its 2024 *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law* (Case No. 31), treated the Paris Agreement not as a self-contained *lex specialis* but as one of many reference points for interpreting States' due diligence obligations under the United Nations Convention on the Law of the Sea. The IACtHR had taken a parallel step seven years earlier in its Advisory Opinion OC-23-17, reading the American Convention on Human Rights together with environmental treaties and custom to recognise an autonomous right to a healthy environment. In turn, the ECtHR's Grand Chamber in *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*[28] grounded its dynamic interpretation of Articles 2 and 8 of the European Convention on Human Rights in the goals and equity principles of the UNFCCC and the Paris Agreement, thereby weaving climate law and human rights doctrine into a single fabric. Most recently, the IACtHR in its Advisory Opinion OC-32/25 distilled a *jus cogens* obligation not to cause irreversible damage to the climate and the environment from general principles of law – including the precautionary principle, the polluter pays principle,

and intergenerational equity – and fundamental human rights. Domestic courts – such as the German Federal Constitutional Court in *Neubauer* – have, in parallel, brought intergenerational equity and carbon-budgeting into human rights doctrine.[29]

While the precise jurisprudential interactions merit more detailed analysis, seeing the ICJ's reasoning as part of a continuum helps explain both its historical significance and its normative power. By aligning the core of its analysis with this broader transnational trend, the ICJ confirmed that systemic integration is the beating heart of international climate law. What was once viewed as progressive experimentation has become orthodox international law. That very institutionalization explains why the advisory opinion feels both spectacular and evolutionary: Spectacular, because the ICJ has historically hewed to incrementalism; evolutionary, because its method crystallizes a decades-long jurisprudential arc that has already normalized cross-regime reasoning in environmental and human rights litigation.

Conclusion

The ICJ's advisory opinion on climate change may come to be remembered as the moment international law explicitly rose to the climate challenge. Yet, what the opinion offers is not a new edifice but a sturdier legal architecture. By advancing an "all of the above" approach to international law's sources; by treating these sources as interlocking parts of a living legal system; and by recognizing *erga omnes* and *erga omnes partes* duties with concrete consequences for responsibility, the Court has given States, courts and litigants a legally rigorous, source-sensitive map. This map clearly shows how each source can discipline the others: Principles channel discretion; custom supplies baselines where treaty text is thin;

treaty institutions specify and update standards; human rights ground both interpretation and the content of obligations, including as customary law. That method is not merely elegant. It is action-forcing, because it ties the work of implementation (from enhanced Nationally Determined Contributions to finance and technology transfer) to good-faith co-operation, due diligence and rights-based constraints, and because it makes clear that breaches sound in responsibility with the full suite of consequences.

That is why the Opinion will travel: It offers a vocabulary courts and other decision-makers are already speaking – and an invitation to use it with greater confidence.

Margaretha Wewerinke-Singh served as lead counsel for Vanuatu in these proceedings, together with Julian Aguon at Blue Ocean Law, but writes in an academic capacity.

References

1. ICJ, *Obligations of States in respect of Climate Change*, Advisory Opinion of 23 July 2025.
2. Margaretha Wewerinke-Singh and Sarah Mead (eds.), *The Cambridge Handbook on Climate Litigation* 1st edn. (Cambridge University Press, 2025).
3. Margaretha Wewerinke-Singh and Jorge Viñuales, 'The Great Reset: The ICJ Reframes the Conduct Responsible for Climate Change Through the Prism of Internationally Wrongful Acts' *EJIL:Talk* (4 August 2025), https://www.ejiltalk.org/the-great-reset-the-icj-reframes-the-conduct-responsible-for-climate-change-through-the-prism-of-internationally-wrongful-acts/.
4. Phoebe Okowa, 'Arguing for Systemic Integration of the UN Climate Regime at the ICJ' *IISD Knowledge Hub* (12 March 2025), https://sdg.iisd.org/commentary/guest-articles/arguing-for-systemic-integration-of-the-un-climate-regime-at-the-icj/.
5. Julian Arato and Justina Uriburu, 'Treaty and Custom in the ICJ's Climate Change Opinion' *EJIL:Talk* (24 July 2025), https://www.ejiltalk.org/treaty-and-custom-in-the-icjs-climate-change-opinion/.
6. See the analysis by Federica Paddeu and Miles Jackson, 'State Responsibility in the ICJ's Advisory Opinion on Climate Change' (July 2025), https://www.ejiltalk.org/state-responsibility-in-the-icjsadvisory-opinion-on-climate-change/
7. ICJ, *Obligations of States in respect of Climate Change*, Joint Declaration of Judges Charlesworth, Brant, Cleveland, and Aurescu, 23 July 2025.
8. ICJ, *Obligations of States in respect of Climate Change*, Separate Opinion of Judge Aurescu, 23 July 2025.
9. ICJ, *Obligations of States in respect of Climate Change*, Declaration of Judge Tladi, 23 July 2025.
10. ICJ, *Obligations of States in respect of Climate Change*, Separate Opinion of Judge Bhandari, 23 July 2025.
11. As further analyzed by David R. Boyd and Corina Heri in their respective contributions to this volume.
12. See ICJ, Obligations of States in respect of Climate Change, Separate Opinion of Judge Auresco, 23 July 2025, paras. 1-13.
13. ICJ, *Obligations of States in respect of Climate Change*, Declaration of Judge Tomka, 23 July 2025.
14. International Law Commission, *General principles of law: texts and titles of the draft conclusions adopted by the Drafting Committee on second reading*, Seventy-sixth session, Geneva, 28 April–30 May 2025, UN Doc. A/CN.4/L.1018.
15. Eirik Bjorge, 'General Principles of Law Formed Within the International Legal System' (2023) 72:4 *International and Comparative Law Quarterly* 845–867.

16. Margaret White, 'Equity – A General Principle of Law Recognised by Civilised Nations?' (2004) *QUT Law Review* 103–116.
17. ICJ, *Obligations of States in respect of Climate Change*, Separate Opinion of Judge Bhandari, 23 July 2025.
18. ICJ, *Obligations of States in respect of Climate Change*, Declaration of Judge Nolte, 23 July 2025.
19. ICJ, *Obligations of States in respect of Climate Change*, Separate Opinion of Judge Xue, 23 July 2025.
20. See further ICJ, Obligations of States in respect of Climate Change, Separate Opinion of Vice-President Sebutinde, 23 July 2025, paras. 9-12; ICJ, Obligations of States in respect of Climate Change, Separate Opinion of Judge Yusuf, 23 July 2025, paras. 20-29; Judge Xue (Fn. 17), paras. 51-78; and ICJ, Obligations of States in respect of Climate Change, Joint Declaration of Judges Bhandari and Cleveland, 23 July 2025, paras. 24-27.
21. Katalin Sulyok, 'Intergenerational Equity' in Christina Binder et al. (ed.), *Elgar Encyclopedia of Human Rights*, (2022).
22. See also Judge Charlesworth's elaboration on how the prevention and precaution principles interact with due diligence.
23. Imogen Saunders, 'General principles, inter-generational equity and the ICJ advisory opinion on climate change: An opportunity to hear well' *ANU Law School* (1 June 2023), https://law.anu.edu.au/general-principles-inter-generational-equity-and-icj-advisory-opinion-climate-change-opportunity.
24. Luciano Pezzano, 'Obligations Erga Omnes and Climate Change: Reflections on the ICJ Advisory Opinion' *EJIL:Talk* (8 August 2025), https://www.ejiltalk.org/obligations-erga-omnes-and-climate-change-reflections-on-the-icj-advisory-opinion/.
25. Soenke Kreft and Maren Solmecke, 'Delivering Climate Justice? The ICJ Advisory Opinion and its Significance for Climate Action' *UNU EHS* (28 July 2025), https://unu.edu/ehs/commentary/delivering-climate-justice-icj-advisory-opinion-and-its-significance-climate-action.
26. See the chapter by Joe Udell and Floris Tan in this volume.
27. Margaretha Wewerinke-Singh and Jorge Viñuales, 'The Great Reset: The ICJ Reframes the Conduct Responsible for Climate Change Through the Prism of Internationally Wrongful Acts' *EJIL:Talk* (4 August 2025), https://www.ejiltalk.org/the-great-reset-the-icj-reframes-the-conduct-responsible-for-climate-change-through-the-prism-of-internationally-wrongful-acts/.
28. ECtHR, *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, Appl. no. 53600/20, Judgment of 9 April 2024.

29. See further Margaretha Wewerinke-Singh and Lucy Maxwell, 'Human Rights' in Margaretha Wewerinke-Singh and Sarah Mead (eds.), *The Cambridge Handbook on Climate Litigation*, (Cambridge University Press, 2025); Sam Bookman and Margaretha Wewerinke-Singh, 'Intergenerational Equity' in Margaretha Wewerinke-Singh and Sarah Mead (eds.), *The Cambridge Handbook on Climate Litigation*, (Cambridge University Press, 2025).

Christina Voigt

"Doing the Utmost"

Due Diligence as the Standard of Conduct in International Climate Law

One of the most profound findings in the International Court of Justice's (ICJ's) climate change advisory opinion (AO) is that State obligations to mitigate climate change to a level that holds warming to the Paris Agreement's 1.5 °C threshold are spread out over the large canvas of international law, including United Nations (UN) climate treaties, particularly the Paris Agreement, UNCLOS, human rights treaties, other environmental treaties, and the customary international rules to prevent significant harm to the environment and to cooperate. While most of these treaties, and the customary no-harm rule, do not contain obligations to achieve a particular result, they establish obligations on states to act in a particular manner – or obligations of conduct – which are assessed against a standard of due diligence.

The ICJ AO, in interplay with the advisory opinions by the International Tribunal for the Law of the Sea (ITLOS) and the Inter-American Court for Human Rights (IACtHR), clarifies that the due diligence standard of conduct applies in an objective and stringent manner in the context of climate change. It also provides a detailed set of factors to determine the content of due diligence.

The ICJ found that some norms, previously thought not binding and falling under the unfettered discretion of States (e.g. the content of NDCs) are in fact binding obligations of conduct based on a due diligence standard, and their breach can give rise to state responsibility.

In this chapter, I address some pertinent issues regarding due diligence as addressed by the ICJ, as well as ITLOS and the IACtHR. In particular, I focus on the relationship between obligations of result and obligations of conduct, the nature of due diligence, factors to determine its content, and the legal consequences of not acting with due diligence as the required standard of conduct.

Relationship to obligations of result

The distinction between obligations of conduct and obligations of result is not always clear-cut. However, in general, the fulfillment of obligations of result can be measured against an achieved objective or outcome, while obligations of conduct require a State to act in a particular manner and are usually assessed against a standard of due diligence. The ICJ noted that one type of obligation is not more onerous than the other; the two often coexist and seek to achieve the same objectives through different means (para. 175). This aligns with the emphasis by ITLOS that an obligation of due diligence does not require a lesser degree of effort to achieve the intended result, but that "[i]In many instances, an obligation of due diligence can be *highly demanding*" (ITLOS, para. 257). Importantly, an obligation of due diligence, though different in character, is as conducive to the achievement of a particular objective as an obligation of result.

The legal nature of due diligence: objective, non-discretionary and determinable

While due diligence has long been considered to be subjective, discretionary, and indeterminate, the ICJ, ITLOS and the IACtHR clarified that this is not the case.

ITLOS noted the *objective* nature of due diligence (ITLOS, para. 257). The ICJ concurred that "whether or how a relevant element of the obligation to exercise due diligence to protect the environment applies in a particular situation should be determined objectively" (ICJ, para. 300).

It follows, therefore, that "an obligation of due diligence should not be understood as an obligation which depends largely on the discretion of a State" (ITLOS, para. 257).

Further, due diligence is not indeterminable. One of the most important aspects of the courts' findings is a comprehensive set of factors to determine due diligence. ITLOS noted that factors to be considered include "scientific and technological information, relevant international rules and standards, the risk of harm and the urgency involved. The standard of due diligence may change over time, given that those factors constantly evolve" (ITLOS, para. 239). Both the IACtHR and ICJ added further factors, as will be shown below. Determination of due diligence is, thus, possible, but it needs to be assessed in a case-specific context; based on what is reasonable under the concrete and specific circumstances of a State. This does not exclude identifying a standard of conduct at a general level, depending on the risk's overall character (ICJ, para. 137).

Application of due diligence

During the proceedings before the courts, particularly before the ICJ, several parties maintained that due diligence is a self-standing norm under international law. This notion was partly enhanced by the UN General Assembly Resolution 77/276, which requested the opinion from the ICJ. The resolution called upon the Court to have particular regard, *inter alia*, to "the duty of due diligence" in rendering its answer to the questions put before it.

The ICJ, however, made clear that due diligence does not exist independently. It is not a norm, let alone an obligation, on its own. Rather, it is the standard applying to a State's expected conduct in fulfilling a (main) obligation – the obligation of conduct. This can

be a customary international obligation (i.e., of cooperation or harm prevention) or a treaty-based obligation (i.e., to prevent, reduce, and control pollution of the marine environment under Art. 194.1 UNCLOS or climate adaptation obligations under Art. 7 of the Paris Agreement), but there must be a (main) obligation to which the due diligence standard applies and in relation to which its compliance is assessed.

The content of due diligence

Due diligence is a variable and evolving concept, yet it does not escape determination and concretization. The ICJ, ITLOS, and IACtHR provided a comprehensive set of factors designed to support the determination of due diligence.

1. Best efforts

In general, due diligence requires that States undertake their best efforts – or to do the utmost (ITLOS, paras. 233 and 241; ICJ, paras. 253, 270; IACtHR, para. 232). This is usually defined by what can reasonably be expected of a State in a similar situation (i.e., the employment of best efforts by using all the means at its disposal (ICJ, 229; citing *Pulp Mills*[1]) or as an obligation to deploy "adequate means, exercise best possible efforts, and do its utmost" *(ITLOS Seabed Dispute Chamber* AO[2])).

2. Factors

A comprehensive set of elements or factors for determining due diligence has now emerged. The factors comprise, in a non-exhaustive manner: (i) taking all appropriate measures, (ii) scientific and technological information, (iii) relevant international rules and standards, (iv) different capabilities, (v) the risk of harm and the

urgency, (vi) precautionary approach or principle and respective measures, (vii) risk assessment and environmental impact assessment, (viii) notification and consultation (ITLOS, para. 239 and ICJ, paras. 231-299).

In addition to these factors, the IACtHR added the following: (ix) integration of the human rights perspective into the formulation, implementation and monitoring of all policies and measures related to climate change to ensure that they do not create new vulnerabilities or exacerbate preexisting ones, (x) permanent and adequate monitoring of the effects and impacts of the adopted measures, (xi) strict compliance with the obligations arising from procedural rights, in particular, access to information, participation, and access to justice; (xii) transparency and accountability in relation to State climate action, (xi) appropriate regulation and supervision of corporate due diligence, and (xiii) enhanced international cooperation, particularly regarding technology transfer, financing, and capacity-building.[3] (IACtHR, para. 236).

a) All appropriate measures

For the ICJ, taking all appropriate measures "means that States must put in place a national system, including legislation, administrative procedures and an enforcement mechanism necessary to regulate the activities in question, and to exercise adequate vigilance to make such a system function efficiently, with a view to achieving the intended objective" (ICJ, paras. 235, 281; ITLOS, para. 235 referring to *Pulp Mills*). This entails not only the adoption of appropriate rules and measures, but also their enforcement and the exercise of administrative control applicable to both public and private operators, such as monitoring the activities undertaken by these operators.

The term "appropriate" further indicates that there has to be a means-end relationship, in the sense that the measures adopted

must be a suitable and effective contribution to achieving the intended objective. In the view of the ICJ, taking appropriate measures to protect the climate system also includes addressing "fossil fuel production, fossil fuel consumption, the granting of fossil fuel exploration licenses or the provision of fossil fuel subsidies" (ICJ, para. 427).[4]

The ICJ also clarified due diligence requirements for determining the content of Nationally Determined Contributions (NDCs). The ICJ rejected the characterization of NDCs as voluntary and discretionary and confirmed that the content, implementation, and achievement of NDCs are obligations of conduct, based on a stringent due diligence standard.[5]

With respect to the content of NDCs, the ICJ made clear that States do not enjoy unfettered discretion when preparing NDCs (ICJ, para. 270). Rather, their discretion is limited (ICJ, para. 245). As an obligation of conduct, parties are obliged to exercise due diligence when putting forward their NDC and must satisfy certain expectations and standards under the Paris Agreement when doing so, as set out in Art. 4.3 (ICJ, para. 249). This provision is not a voluntary expectation. It is prescriptive in the sense that it requires that "successive nationally determined contributions will represent a progression" and "reflect [a party's] highest possible ambition", without prescribing precisely what constitutes a progression, or what reflects a party's highest possible ambition." (ICJ, para. 240) These standards require, first, that NDCs represent a progression, which the court interpreted as a legal obligation of due diligence that "a party's NDCs must become more demanding over time" (ICJ, para. 241).

Second, a party's NDCs must reflect the highest possible ambition, to which many parties had referred to in their oral statements. The ICJ clarified that each party has a due diligence obliga-

tion to do its utmost to ensure that the NDCs it puts forward represent its highest possible ambition in order to realize the objectives of the Agreement. (ICJ, para. 270, 245). It stated that this implies that NDCs must be capable of making an adequate contribution to the achievement of the temperature goal. This provision reveals the necessity for the ambition contained in a party's NDC to relate to the object and purpose of the Agreement set out in Article 2, i.e. to hold the increase in the global average temperature to 1.5°C (ICJ, para. 242). Literature has provided more detail on the contours of "highest possible ambition" in Art. 4.3.[6, 7, 8]

Parties must, third, be informed by the outcomes of the Global Stocktake in the preparation of their NDCs, according to Arts. 14.3 and 4.9 of the Paris Agreement, and when communicating their NDCs must provide the information necessary for clarity, transparency and understanding, according to Art. 4.8.

Further, the ICJ concluded that the national implementation and achievement of NDCs are obligations of conduct and not voluntary. The obligation that parties "shall pursue domestic mitigation measures" in Art. 4.2(2) is substantive in nature and creates an individual obligation of conduct for each party to the Paris Agreement (ICJ, para. 251).

This does not mean that parties are obligated to achieve their NDC targets, but rather that they must make best efforts, based on stringent due diligence (ICJ, para. 254) to obtain such a result. Parties must "pursue domestic mitigation measures" that aim to achieve the objectives of their NDCs which are proactive and reasonably capable of achieving the NDCs set by them, including in relation to activities carried out by private actors (ICJ, para. 252).

Also the fulfillment of adaptation obligations needs to be assessed against the standard of due diligence. The ICJ considers it incumbent upon parties to enact appropriate measures (examples

of which are provided in Article 7, paragraph 9) that are capable of "enhancing adaptive capacity, strengthening resilience and reducing vulnerability to climate change". (ICJ, para. 258)

In sum, with respect to the Paris Agreement, the ICJ concluded that "the compliance of parties with their obligations of conduct under the Paris Agreement is assessed on the basis of whether the party in question exercised due diligence and employed best efforts by using all the means at its disposal in the performance of that obligation" (ICJ, paras. 229 and 245).

The IACtHR added various components to identifying appropriate measures, such as the need to reflect maximum use of available resources, avoid technologies whose effects have not been fully verified, protect biodiversity and ecosystems, facilitate the continuing participation of Indigenous Peoples in decision-making, stimulate and attract investment in innovation in low-emission activities, as well as to develop new tools and standards for strengthening green finance, review existing trade and investment agreements, and settlement mechanisms for litigation between investors and States (IACtHR, paras. 336-367).

The IACtHR also details in particular what due diligence entails in relation to the regulation of private actors (IACtHR, para. 347). Private actors do not fall outside the normative "force-field" of States' due diligence. As the activities in question are mostly carried out by private entities, due diligence requires States to regulate their conduct (i.e., "regulatory due diligence") (ITLOS, para. 236; IACtHR, para. 231; ICJ, para. 428).

A State is responsible for its *own* actions or omissions when failing to exercise regulatory due diligence. In the context of state responsibility, the question of attributing the conduct of private actors to a State therefore does not arise in such circumstances, as a State's own regulatory performance is at stake. "Thus, a State

may be responsible where, for example, it has failed to exercise due diligence by not taking the necessary regulatory and legislative measures to limit the quantity of emissions caused by private actors under its jurisdiction." (ICJ, para. 428; see also IACtHR, para. 345)

A final aspect of due diligence with regard to appropriate measures to be highlighted here is vertical and horizontal policy coherence. The IACtHR observed that "[t]aking into account the standard of enhanced due diligence [...], States have the obligation to ensure coherence between their domestic and international commitments and their obligations concerning the mitigation of climate change. [...] among other measures, States should ensure that public finance and incentives aimed at activities that generate [greenhouse gas (GHG)] emissions are conditioned on strict compliance with national mitigation norms and policies" (IACtHR, para. 344).

Overall, while the respective climate measures of each state will necessarily differ depending on its emission portfolio, drivers, and other national circumstances, the courts have provided comprehensive guidance for states on due diligence for adopting appropriate measures.

b) Scientific and technological information

The availability of, and the need to acquire and analyse scientific and technological information, are important factors of due diligence, as scientific information may be relevant to assess the probability and seriousness of possible harm (ICJ, 283).

This is not a passive obligation. Due diligence requires States to actively pursue the relevant scientific information. In this regard, reports by the IPCC constitute comprehensive and authoritative restatements of the best available science about climate change at the time of their publication (ICJ, para. 284). The standard of due

diligence may also become more demanding in the light of new scientific or technological knowledge (ICJ, para. 284).

c) Relevant international rules and standards

In determining the required due diligence, current international rules and standards must be taken into consideration which may arise from binding and non-binding norms (ICJ, para. 287 referencing Gabcikovo-Nagymaros[9]). Such standards may therefore not only be contained in treaties and in customary international law, but "may also be reflected in certain decisions of the [conferences of the parties (COPs)] to the climate change treaties and in recommended technical norms and practices, as appropriate." (ICJ, para. 288)

Regarding COP decisions, the ICJ narrowed their application in the context of determining due diligence to those decisions that have acquired the status of customary international law, in so far as they reflect State practice and express an *opinio juris* and noted that such legal significance can only be determined *in concreto*. It did, however, not indicate when COP decisions – and which – may have acquired such status.

The ICJ's approach to international rules and standards in the context of due diligence builds on that of ITLOS. For climate change, ITLOS observed that international rules and standards are found in various climate-related treaties and instruments, including the UNFCCC and the Paris Agreement, MARPOL, the Chicago Convention, and the Montreal Protocol, including its Kigali Amendment (ITLOS, paras. 214, 239). ITLOS relied predominantly on the 1.5 °C global temperature goal and the timeline for emission pathways (i.e., net-zero emissions by 2050) set forth in the Paris Agreement in the interpretation of "all necessary measures" under Art. 194.1 of UNCLOS and due diligence (ITLOS, para. 222). In the same vein, the ICJ observed that "the climate change treaties

establish standards that may enable or facilitate the identification and application of the diligence that is due in specific instances". (ICJ, 313).

The reference to international rules and standards is also important for another reason: to create consistency and harmony in international law.[10] By interpreting UNCLOS in the light of the Paris Agreement as the primary legal instrument for addressing climate change (ITLOS, para. 214), ITLOS ensured that the standard applied to states' obligations to address climate change under UNCLOS was no different to the one they agreed to when adopting the Paris Agreement. Similarly, the ICJ applies the Paris Agreement standard in the determination of due diligence pertaining to other treaties as well as to customary law. It goes so far as to state that "at the present stage, compliance in full and in good faith by a State with the climate change treaties, as interpreted by the Court [...], suggests that this State substantially complies with the general customary duties to prevent significant environmental harm and to co-operate" (ICJ, para. 314). This, according to the ICJ, also applies to States that are not a party to the climate change treaty or treaties. Though it noted that "if a non-party State does not co-operate in such a way, it has the full burden of demonstrating that its policies and practices are in conformity with its customary obligations". (ICJ, 314)

The ICJ reiterated ITLOS' observation that obligations under other treaties (such as under UNCLOS) (ITLOS, 222 and 223) or customary obligations would not be fulfilled simply by States complying with their obligations under the climate change treaties. Treaty law and customary international law are different in character and do not entirely overlap. However, they inform each other. Therefore, the ICJ noted with respect to UNCLOS, that measures under Art. 192 and 194 "must be adopted in accordance with the

obligations incumbent upon States under the UNFCCC and the Paris Agreement, in so far as the States concerned are parties to those instruments" (ICJ, 343).

What can be drawn from this is that the Paris Agreement permeates other international obligations of states, both under treaty and customary law, and informs their interpretation and the exercise of due diligence. Thus, the standards and norms included in the Paris Agreement become the benchmark against which, to a large extent, the performance of states in respect to climate change is assessed under other international treaties and under customary law.[11] Such an approach ensures that states are consistently held to the 1.5 °C temperature threshold and to acting with the necessary due diligence in this regard, also in fulfilling their *other* obligations under international law.

d) Differentiation

The need to act with due diligence applies to all states. However, consistent with the principle of common but differentiated responsibilities and respective capabilities (CBDR), the standard varies (ICJ, para. 247). The ICJ noted that CBDR reflects the need to equitably distribute the burdens of the obligations in respect of climate change.

The ICJ observed that CBDR does not categorically place different burdens on a state based on whether is a developed or developing country. Rather, in its view, the principle calls for taking into account the circumstances of the state in question, such as historical *and current* contributions to cumulative GHG emissions, and their different current capabilities and national circumstances, including their economic and social level of development and other national circumstances of the party in question (ICJ, para. 148). The court also observed that the inclusion of the phrase, "in the light of different national circumstances" in the Paris Agreement,

adds nuance to the principle by recognizing that the status of a State as developed or developing is *not static* (ICJ, 226).[12]

Importantly, the ICJ notes that in between the most developed and least developed states "are States that have progressed considerably in their development since the conclusion of the UNFCCC in 1992 [...] and some of which now contribute significantly to global GHG emissions and possess the capacity to engage in meaningful mitigation and adaptation efforts, as well as other States with significant resources and technical capabilities to contribute to addressing global climate change" (ICJ, para. 150).

Moreover, in referring to the ITLOS climate change advisory opinion, the ICJ noted that CBDR "requires a State with greater capabilities and sufficient resources to do more than a State not so well placed," but that, based on CBDR, "implementing the obligation of due diligence requires even the latter State to take all the means at its disposal to protect the climate system in accordance with its capabilities and available resources" (ICJ, para. 291). It stated:

> *"The difference between the respective capabilities of States, as one of the factors which determines the diligence required, cannot therefore merely result from a distinction between developed and developing countries, but must also depend on their respective national circumstances. The multifactorial and evolutive character of the due diligence standard entails that, as States develop economically and their capacity increases, so too are the requirements of diligence heightened. Finally, the reference to available means and capabilities cannot justify undue delay or a general exemption from the obligation to exercise due diligence." (ICJ, para. 292).*

In the court's view, the CBDR principle does not apply categorically to whether a state is a developed or developing state, nor is it based on an assessment of historical facts only. Rather, the court "future-proofed" the principle by underlining its dynamic and evolving nature

e) Precautionary approach or principle and respective measures

Due diligence is also informed by the risk at stake and the urgency to act. In general, "[t]he standard of due diligence has to be more severe for the riskier activities" (Seabed AO[13]). The notion of risk in this regard should be appreciated in terms of both the probability or foreseeability of the occurrence of harm and its severity or magnitude. With respect to climate change, the risks are exceptionally high as it poses a "quintessentially universal risk to all States" which is "of a general and urgent character" (ICJ, para. 138) and "an existential problem of planetary proportions that imperils all forms of life and the very health of our planet" (ICJ, para. 456). States are therefore required to take all appropriate measures to prevent significant harm where reliable scientific evidence of a risk of significant harm exists (ICJ, para. 293).

Where scientific uncertainty exists, States should not refrain from or delay taking precautionary actions of prevention in the face of risk. According to Principle 15 of the Rio Declaration, precaution requires that where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation (see also Article 3, paragraph 3, of the UNFCCC).

The obligation of due diligence is closely linked with precaution. As ITLOS already confirmed (ITLOS, paras. 213 and 242), it is "an integral part of the general obligation of due dili-

gence" (Seabed AO). The ICJ agreed with this conclusion that "where there are plausible indications of potential risks," a State "would not meet its obligation of due diligence if it disregarded those risks" and, in that sense, the "precautionary approach is also an integral part of the general obligation of due diligence" under the duty to prevent significant harm to the environment" (ICJ, para. 294).

f) Risk assessment and environmental impact assessment

Due diligence also requires States to take certain procedural measures, which are distinct from substantive measures, to prevent risks (ICJ, para. 295), However, as ITLOS noted, "procedural obligations, such as the requirement to conduct an environmental impact assessment [EIA], may, indeed, be of equal or even greater importance than the substantive standards existing in international law" (ITLOS, para. 345, with reference to Chagos Award[14]).

In this context, the ICJ pointed to the need to undertake an EIA, which it considered a rule of customary international law (with reference to *Certain Activities*[15] and *Pulp Mills*[16]). This aligns with the confirmation by the IACtHR that, "in compliance with the standard of enhanced due diligence, States must conduct a meticulous assessment of activities that could result in significant harm to the climate system before granting approval" (IACtHR, para. 363).

Since customary international law does not specify the scope and content of an EIA, the specific character of the respective risk and the specific circumstances of each case need to be taken into account (ICJ, paras. 296, 298). Such specific assessment could also "identify previously unknown information about possibilities for reducing the quantity of GHG emissions by relevant proposed individual activities" (ICJ, para. 298).

The obligation to conduct an EIA concerns planned activities and must be carried out on the basis of the best available science. It must be conducted prior to the implementation of a project and applies to both those planned by private entities and by States (ITLOS, 358). Moreover, it should include not only the specific effects of the planned activities concerned but also the socio-economic impacts and cumulative impacts of these and other activities (ITLOS, para. 365). Planned activities may not be environmentally significant if considered in isolation, whereas they may produce significant effects if evaluated in interaction with other activities. (ITLOS, para. 365)

Ultimately, "it is for each State to determine in its domestic legislation or in the authorization process for the project, the specific content of the environmental impact assessment required in each case, having regard to the nature and magnitude of the proposed development and its likely adverse impact on the environment as well as to the need to exercise due diligence in conducting such an assessment'". (ICJ, para. 298)

g) Notification and consultation

Due diligence also contains an obligation of States to notify and consult in good faith with other States where planned activities within the jurisdiction or control of a State create a risk of significant harm, and notification and consultation is necessary to determine the appropriate measures to prevent that risk. (ICJ, para. 299 with reference to Certain Activities)

This applies in particular "where an activity significantly affects collective efforts to address harm to the climate system" (ICJ, para. 299). This can be understood as notification and consultation to be especially warranted when planning fossil fuel extraction or combustion projects, which may affect other states'

fossil fuel phase-out policies or their transition to renewable energies.

3. Qualifier: Stringent/Enhanced Due Diligence

As explained above, the catalogue of factors to assess whether the obligation to act with due diligence has been met is detailed and specific, and allows for the determination of lawful – or unlawful – state behavior in relation to their obligations to address climate change. This constitutes a significant hardening and concretization of international climate law and circumscribes the conduct to be exercised in the compliance with international legal obligations.

The courts also qualified the level of due diligence. ITLOS observed that, given the high risks of serious and irreversible harm to the marine environment from GHG emissions, the standard of due diligence under UNCLOS should be set high and considered it to be *stringent* (ITLOS, para. 243). With respect to transboundary pollution affecting the environment of other States, the standard is even more stringent (ITLOS, paras. 248, 256, 258).

Similarly, the ICJ confirmed that the standard of due diligence is stringent because of the seriousness of the threat posed by climate change (ICJ, paras. 138, 246, 399) and on account of best available science indicating that the "[r]isks and projected adverse impacts and related losses and damages from climate change escalate with every increment of global warming" (ICJ, para. 254).

Given the "extreme gravity of climate impacts" and "the urgency of effective measures to avoid irreparable harm to the individual," the IACtHR found that States must act with enhanced due diligence to comply with the obligation of prevention arising from the obligation to guarantee the rights protected by the American Convention in the context of the climate emergency (IACtHR, paras. 233-236).

Accordingly, states must do their utmost in addressing climate change (ICJ, para. 246). Due diligence takes on a particular quality in the context of climate change, requiring a heightened degree of vigilance and prevention. This includes the exercise of regulatory due diligence in taking all necessary regulatory and legislative measures to limit the quantity of emissions caused by private actors under a state's jurisdiction and control. There is now a legal imperative – alongside a moral one – to address this "existential problem of planetary proportions that imperils all forms of life and the very health of our planet," which not only is daunting, but also self-inflicted (ICJ, para. 456).

Conclusion

The Advisory Opinions issued by the ICJ, ITLOS, and IACtHR make clear that nothing short of the utmost effort by each individual State would satisfy the duty of States. Due diligence – once believed to be soft and weak – has now emerged as a potent and powerful standard against which to assess compliance with international obligations. There is no hiding behind discretion and sovereign entitlements anymore. States must act with stringent due diligence and do the utmost in addressing climate change, or they will incur the consequences of international responsibility: restoration, in the form of restitution, satisfaction, and – importantly – compensation for climate harms.

The author acted as lead legal counsel for IUCN in climate change AO proceedings before ITLOS, the IACtHR, and the ICJ.

References

1. ICJ, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment of 20 April 2010.
2. ITLOS Seabed Disputes Chamber, *Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area*, Advisory Opinion of 1 February 2011, Case No. 17.
3. IACtHR, *Climate Emergency and Human Rights*, Advisory Opinion OC-32/25 of 29 May 2025, requested by the Republic of Chile and the Republic of Colombia.
4. See on this point the chapter by Jochen von Bernstorff and Ingo Venzke in this volume.
5. For a discussion see Christina Voigt, 'The ICJ and the UN Climate Regime: Clarifying Mitigation Obligations Under the Paris Agreement' Völkerrechtsblog (4 August 2025), https://intrechtdok.de/receive/mir_mods_00020832
6. Christina Voigt, 'The Paris Agreement: What is the standard of conduct for parties?' *Questions of International Law* (24 March 2016), https://www.qil-qdi.org/paris-agreement-standard-conduct-parties/.
7. Christina Voigt, 'The power of the Paris Agreement in international climate litigation' (2023) 32:2 *Review of European, Comparative & International Environmental Law* 237–49.
8. Benoit Mayer, 'The 'Highest Possible Ambition' on Climate Change Mitigation as a Legal Standard' (2024) 73:2 *International and Comparative Law Quarterly* 285–317.
9. ICJ, *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment of 25 September 1997.
10. Jacqueline Peel, 'Unlocking UNCLOS' *Verfassungsblog* (1 May 2024), https://verfassungsblog.de/unlocking-unclos/.
11. Christina Voigt, 'The power of the Paris Agreement in international climate litigation' (2023) 32:2 *Review of European, Comparative & International Environmental Law* 237–49.
12. See, on the nuanced and dynamic nature of CBDR, Christina Voigt and Felipe Ferreira, 'Differentiation in the Paris Agreement' (2016) SSRN Electronic Journal.
13. ITLOS Seabed Disputes Chamber, *Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area*, Advisory Opinion of 1 February 2011, Case No. 17.
14. PCA, *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award of 18 March 2015.
15. ICJ, *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Judgment of 16 December 2015.

16. ICJ, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment of 20 April 2010.

Markus Gehring

When Custom Binds All States

Reflections on Customary International Law in the ICJ Climate Advisory Opinion

In the triptych of inspiring advisory opinions by international courts[1] and tribunals,[2] the third iteration by the International Court of Justice (ICJ) did not disappoint. Its unanimous advisory opinion on climate change constitutes a landmark decision that will be with us for many years.[3]

This chapter reflects on the ICJ's trailblazing findings on customary international law as it applies to climate change.

The ICJ is unanimously of the opinion that

> *"customary international law sets forth obligations for States to ensure the protection of the climate system and other parts of the environment from anthropogenic greenhouse gas emissions. These obligations include the following: (a) States have a duty to prevent significant harm to the environment by acting with due diligence and to use all means at their disposal to prevent activities carried out within their jurisdiction or control from causing significant harm to the climate system and other parts of the environment, in accordance with their common but differentiated responsibilities and respective capabilities; (b) States have a duty to co-operate with each other in good faith to prevent significant harm to the climate system and other parts of the environment, which requires sustained and continuous forms of co-operation by States when taking measures to prevent such harm." (Operative Clause).*

This finding provides very clear guardrails for future negotiations and especially relations with States that have already decided, or might in the future decide, that the Paris Agreement and/or the UN Framework Convention on Climate Change UNFCCC are too onerous in the obligations imposed on States. The ICJ clarifies that rejecting or breaking the existing international treaty regime on

climate change does not diminish any State's obligations to actually address the underlying global challenge that is climate change. This is a very welcome clarification and directly contradicts the opinions voiced by several States, such as the USA and Saudi Arabia.

While many previous ICJ rulings focused on finding customary international law by carefully evaluating State practice with corresponding *opinio juris*, this advisory opinion helpfully clarifies the content of existing customary international law obligations, their relationship with other sources of law, such as custom and general principles, and their legal consequences in cases of breaches.

This chapter does not offer the space to extensively discuss all aspects, so it focuses on the ICJ's pronouncements on the content of applicable customary norms and the relationship between climate treaty law and corresponding customary international law.

Duty to cooperate

The duty of States to cooperate, especially "[t]o achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character" (para. 140, citing Article 1 of the United Nations Charter), was emphasised by over 50 States and international organisations in their submissions as applicable in the climate context.[4] This view is accepted by the ICJ. In its advisory opinion, the ICJ reviews international treaties, its own prior decisions, and other binding and non-binding declarations, and swiftly concludes that "in view of the related practice of States, the Court considers that the duty of States to co-operate for the protection of the environment is a rule whose customary character has been established" (para. 140, citing the ITLOS advisory opinion). It also helpfully clarifies that the obligation to

prevent significant harm to the environment has an intrinsic link with the duty to cooperate (para. 141) – a position many States had argued for.[5] The ICJ ends its analysis there. This is understandable because elsewhere in the advisory opinion, the ICJ clarifies that several obligations to cooperate under the UNFCCC and the Paris Agreement mean that the customary duty to cooperate "serves as a guiding principle" for the treaty interpretation (para. 178). The ICJ does not take the next step – namely, to offer a legal opinion on the possible withdrawal from or lack of participation in the current climate treaty regime which might signify a violation of this same customary law obligation. This element of judicial restraint is understandable because even just the hypothetical analysis could probably have gone beyond the ICJ's self-imposed limitation of its advice that the concrete application of the opinion to individual States should be left for future decisions.

Duty to prevent significant harm to the environment

The ICJ's most significant contribution on customary law lies in its detailed analysis of the application of the "duty to prevent significant harm to the environment" (the so-called "no-harm principle"). The ICJ keeps the analysis of the existence of this rule of customary law very short, merely referring to its own prior case law. Still, the ICJ concludes that States must act with due diligence and use all means at their disposal to prevent climate-destructive activities in accordance with the Common but Differentiated Responsibilities (CBDR) principle.

The ICJ creatively relies on the Nuclear Weapons Advisory Opinion to highlight that not only does the duty to prevent significant harm to the environment exist beyond the bilateral context,

but it also applies to global environmental concerns (para. 134). In the Nuclear Weapons Advisory Opinion, the ICJ recognised

> *"that the environment is under daily threat and that the use of nuclear weapons could constitute a catastrophe for the environment. The Court also recognise[d] that the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment." (para. 29)*

We should recall that the Nuclear Weapons opinion was adopted by a split Court with its President's casting vote and as such see the climate change advisory opinion as especially significant also because of its unanimous adoption.[6]

Helpfully, the ICJ summarises the legal consequences for States:

> *"The conduct required by due diligence has several elements. These elements include States taking, to the best of their ability, appropriate and, if necessary, precautionary measures, which take account of scientific and technological information, as well as relevant rules and international standards, and which vary depending on each State's respective capabilities. Other elements of the required conduct include undertaking risk assessments and notifying and consulting other States, as appropriate."*

These consequences largely flow from the ICJ's conclusion that: "the risk of significant harm to the climate system is indisputably established… Climate change therefore poses a quintessentially universal risk to all States" (para. 137). The ICJ therefore concludes, citing the ITLOS advisory opinion, that the "standard of due diligence for preventing significant harm to the climate system is stringent … a heightened degree of vigilance and prevention is required" (para. 138). The due diligence standard thus does restrict State's discretion significantly and means that they have an obligation to "use all means at their disposal to prevent activities carried out within their jurisdiction or control". It is notable that the ICJ refers to activities under a State's jurisdiction or control, which could encompass private businesses acting overseas or through subsidiaries (i.e. under their control).

Lex specialis?

This, of course, raises the tricky question of *lex specialis*. Several interveners claimed that the UNFCCC and Paris Agreement constitute *lex specialis* or *lex posterior* in relation to customary international law. Here, the ICJ provides a very helpful clarification, which could also be applicable in other treaty – custom contexts.

The ICJ resoundingly rejects this notion. It reminds readers that "it is a generally recognized principle that, when several rules bear on a single issue, they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations" (para. 165).

According to the International Law Commission (ILC), *lex specialis* requires more than overlapping subject matter – there must be an actual inconsistency or a clear intention for one rule to exclude another, making it fundamentally a question of interpreta-

tion. The ICJ finds no inconsistency between climate change treaties and other relevant rules of international law, noting that the preambles of the UNFCCC and Paris Agreement explicitly acknowledge the relevance of other principles (paras. 166-170).[7]

Mutual supportiveness

The ICJ elegantly returns, in true sustainable development fashion, to the mutual supportiveness of the provisions of the climate treaties and custom. It highlights that "the compliance of parties with their obligations of conduct under the Paris Agreement is assessed on the basis of whether the party in question exercised due diligence and employed best efforts by using all the means at its disposal in the performance of that obligation" (para. 229, citing *Pulp Mills*[8]).

The ICJ further explains that evaluating environmental risks, including those related to climate change, requires considering current standards, which may derive from both binding and non-binding norms found not only in treaties and customary international law but also in certain Conference of the Parties (COP) decisions under climate change treaties and in recommended technical norms and practices. Notably, the ICJ indicates that while COP decisions are relevant for interpreting and implementing treaties, they may also contribute to identifying customary international law when they reflect consistent State practice and express *opinio juris*[9], though the legal significance of any specific COP decision must be assessed on a case-by-case basis (paras. 287-288). In other words, the climate treaty regime directly impacts the performance of the due diligence obligations of States under the customary law duty to prevent significant harm.

Treaty-custom relationship

The ICJ examines the relationship between treaty obligations and customary international law in the context of climate change. The ICJ notes that while treaty and custom are distinct sources of law, they should, where possible, be interpreted to produce a coherent set of compatible obligations. This means, for the ICJ, that multilateral environmental treaties must be read in light of relevant customary rules, and conversely, treaties can help define, record, and develop customary law, sometimes even elevating treaty provisions to independent customary status, particularly when they share common underlying general principles.

In environmental matters, evolving scientific understanding and heightened awareness of risks have led to new norms and standards, as reflected in climate change treaties, which can guide the due diligence required of States and shape customary obligations, just as customary rules inform treaty interpretation. The ICJ recognises that full and good-faith compliance with climate change treaties generally suggests substantial adherence to customary duties to prevent significant harm and cooperate, but does not guarantee complete fulfilment, as each remains an independent source of obligation.

For States not party to climate change treaties, customary obligations still apply. The ICJ explains "that it is possible that a non-party State which co-operates with the community of States parties to the three climate change treaties in a way that is equivalent to that of a State party, may, in certain instances, be considered to fulfil its customary obligations through practice that comports with the required conduct of States under the climate change treaties." (para. 315). In other words, only through alignment with

the practices of treaty parties can States, in some cases, meet their customary obligations. If it does not cooperate, it bears the burden of proving that its policies and practices conform to customary law (paras. 309-315). It is difficult to see how a non-party can still comply with customary international law without full and meaningful participation or at least close cooperation with States in the climate regime.

Erga omnes and jus cogens?

While the ICJ does not go as far as the IACtHR in declaring the fight against climate change a *jus cogens* norm,[10] it does unanimously agree that all States share a common interest in protecting global environmental commons, such as the atmosphere and high seas. The ICJ further confirms that obligations to safeguard the climate system from anthropogenic greenhouse gas emissions – particularly the customary law duty to prevent significant transboundary harm – are obligations *erga omnes*, owed to the international community as a whole. This is only a small step away from considering these customary obligations as part of j*us cogens*, particularly because the ICJ then applied Article 48 of the ILC Articles on State Responsibility, which many consider reserved for *jus cogens* norms.

The fact that the ICJ identifies certain *erga omnes* obligations but does not assign them *jus cogens* character, raises a systematic challenge, which Judge Tladi evaluates in detail.[11] He criticises the ICJ for exposing and then ignoring an inconsistency in its jurisprudence. He notes that in its July 2024 Advisory Opinion on the Occupied Palestinian Territory, the ICJ linked breaches of *erga omnes* obligations to the duties of non-recognition, non-assistance, and cooperation – consequences that the ILC associates only with

serious breaches of *jus cogens* norms – thereby conflating *erga omnes* with *jus cogens*.[12] If that logic were applied consistently, similar consequences should have been identified for the *jus cogens* character of climate obligations, yet the ICJ does not do so and, in Judge Tladi's view, gives no explanation as to why. He recalls that he had previously warned this conflation would cause incoherence and believes the ICJ knowingly ignored the problem – likening it, in a Setswana idiom, to "pouring cold shade over oneself" or, in Swahili, adopting a "Hakuna Matata" attitude.

Advice for the climate crisis

The ICJ's advisory opinion ends with the words "climate crisis" because that is what the world is facing and contains a note that should be taught in all law schools around the world and perhaps should give us renewed pause to reflect on the ethics of legal advice in the climate crisis:[13]

> *"…International law, whose authority has been invoked by the General Assembly, has an important but ultimately limited role in resolving this problem. A complete solution to this daunting, and self-inflicted, problem requires the contribution of all fields of human knowledge, whether law, science, economics or any other." (para. 456).*

The statement contains echoes of the work by Vaughan Lowe, who stated that "Lawyers have a contribution to make. They offer one way of going about resolving some of the most crucial problems that face the world. But it is only one way among many. There are many times when it is much better to call upon a politician, or a priest, or a doctor, or a plumber." (V. Lowe, International Law (2007,

OUP Oxford, Oxford) p. 290). The ICJ's concluding statement wisely acknowledges both the value and the limits of international law in tackling the climate crisis. No, this opinion will not stop climate change tomorrow. It acknowledges that legal norms alone cannot solve a challenge so deeply rooted in human behaviour, economic systems, and political choices. As the most important solutions, addressing climate change requires an interdisciplinary approach that combines law with science, economics, and other fields, and especially emphasises the importance of human will and wisdom as decisive factors for meaningful change.

Conclusion

The extensive analysis of the content of customary international law applicable to climate change is an important and welcome part of the advisory opinion. It should aid climate negotiators when confronted with issues of State consent, given the clear no harm and cooperation obligations.

Despite not expressing a view on the *jus cogens* character of climate-related obligations, the ICJ's detailed analysis of all the consequences flowing from existing international law, especially customary international law, and the international responsibility of States – also for businesses operating in their territory, or under their jurisdiction or control – makes this a foundational advisory opinion that will prove helpful for future (climate) negotiations as well as future climate responsibility cases. In essence, the ICJ has authoritatively delivered advice that could serve to correct our path and show a way out of the climate crisis.

We can only applaud the ICJ for situating its advisory opinion as part of a broader United Nations and global effort, not as an endpoint but as a guide for progress that is meant to inspire and

direct the social and political transformations necessary to secure a liveable future for current and future generations.

References

1. On the Inter-American Court of Human Rights' advisory opinion No. 32 see the joint blog symposium between Verfassungsblog and the Climate Law Blog, available here: https://verfassungsblog.de/category/debates/human-rights-protection-in-the-climate-emergency-the-inter-american-court-of-human-rights-advisory-opinion-no-32-debates/.
2. On the ITLOS advisory opinion on climate change see the joint blog symposium by Verfassungsblog and the Climate Law Blog, available here: https://verfassungsblog.de/category/debates/the-itlos-advisory-opinion-on-climate-change-debates/.
3. ICJ, *Obligations of States in respect of Climate Change*, Advisory Opinion of 23 July 2025.
4. See, for example, People's Republic of Bangladesh, 'Written Comments of the People's Republic of Bangladesh on the Written Statements Submitted to the Court' (Obligations of States in respect of Climate Change, Advisory Opinion) 15 August 2024 https://www.icj-cij.org/sites/default/files/case-related/187/187-20240815-wri-15-00-en.pdf, Fn. 12.
5. See, for example, Republic of Vanuatu, 'Written Comments of the Republic of Vanuatu' (Obligations of States in respect of Climate Change, Advisory Opinion) 15 August 2024 https://www.icj-cij.org/sites/default/files/case-related/187/187-20240815-wri-17-00-en.pdf.
6. See the contribution by Antoine De Spiegeleir in this volume.
7. See, for more detail, the chapter by Maria Antonia Tigre, Maxim Bönnemann, and Antoine De Spiegeleir in this volume.
8. ICJ, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment of 20 April 2010.
9. See the contribution by Margaretha Wewerinke-Singh in this volume.
10. Markus Gehring, 'Jus Cogens and the Climate Crisis: The Inter-American Court's Landmark Climate Emergency Advisory Opinion and its Jus Cogens Ruling' *Verfassungsblog* (16 July 2025), https://verfassungsblog.de/jus-cogens-and-the-climate-crisis/.
11. ICJ, *Obligations of States in respect of Climate Change*, Declaration of Judge Tladi, 23 July 2025.
12. ICJ, *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Advisory Opinion of 19 July 2024.
13. See also the contribution by Antoine De Spiegeleir in this volume.

Niklas S. Reetz

State Responsibility and the ICJ's Advisory Opinion on Climate Change

One Step at a Time

After the International Court of Justice (ICJ) issued its advisory opinion on *Obligations of States in Respect of Climate Change*[1], many observers were quick to conclude that it "[opens] the door to a cascade of lawsuits"[2]. The advisory opinion is indeed an important confirmation that the rules of State responsibility apply in the climate change context. In this post, I assess the ICJ's treatment of State responsibility in light of the particularities of climate change, especially the plurality of States that contribute to, and suffer from, climate harm. The advisory opinion places trust in the capabilities and flexibility of the applicable rules, yet defers complex decisions on questions like causation to a case-by-case assessment.

Primary obligations and State responsibility

In the advisory opinion, the ICJ addressed two questions. Question (a) is concerned with obligations of States "to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases". Question (b) covers "the legal consequences under these obligations for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment". While question (b) is the one that speaks directly to the law of State responsibility, the answer to question (a) also has considerable bearing on this issue. That is because the law of State responsibility does not, itself, set out the content of "primary" rules, such as the obligations arising for States under the Paris Agreement. Instead, the rules of State responsibility are "secondary" rules, which means they presuppose the existence of a primary obligation and determine responsibility for its breach and the legal consequences flowing therefrom.

In the context of climate change, a dearth of robust primary obligations is sometimes seen as a hurdle to State responsibility, as several high-emitting States argued during the ICJ proceedings.[3] This hurdle appears much smaller after the ICJ's response to question (a). Among other things, it espoused a strong interpretation of obligations under the climate treaties. It stated that the obligation to prepare, communicate, and maintain nationally determined contributions (NDCs) to the 1.5°C temperature goal under Article 4(2) of the Paris Agreement is subject to a "stringent" due diligence standard that limits the States parties' discretion in preparing their NDCs (paras. 237-249). The implementation of NDCs through mitigation measures is also not simply a domestic issue, but an international obligation of conduct (paras. 250-254). Thus, the ICJ identified in these obligations a substantive content, which allows for a strict assessment of a potential breach.

In addition, the ICJ put forth a "stringent" due diligence standard for the customary duty to prevent significant harm to the environment – possibly the most relevant primary obligation for State responsibility (paras. 272-300). Importantly, "a risk of significant harm may also be present in situations where significant harm to the environment is caused by the cumulative effect of different acts undertaken by various States [...], even if it is difficult in such situations to identify a specific share of responsibility of any particular State" (para. 276). Due diligence then requires States to, among other things, put in place and enforce "regulatory mitigation mechanisms that are designed to achieve the deep, rapid, and sustained reductions of [greenhouse gas (GHG)] emissions that are necessary for the prevention of significant harm to the climate system" (para. 282). By elaborating specific and demanding criteria, the advisory opinion facilitates the concrete assessment of whether a State's conduct breaches the obligation to prevent

significant harm to the climate system and other parts of the environment.

Applicability of the law of State responsibility

Turning to the secondary rules of State responsibility, the ICJ's first significant finding is that the customary rules of State responsibility, largely reflected in the International Law Commission's Articles on State Responsibility (ARSIWA), are applicable in the context of climate change. Applicability was contested in the proceedings, with Kuwait and a few others arguing that the climate regime constitutes *lex specialis* and excludes the general rules of State responsibility. These arguments were rejected by the majority of participating States[4] and ultimately the ICJ.

The ICJ convincingly argued that neither the text, context, nor object and purpose of the climate treaties (especially Articles 8 and 15 of the Paris Agreement and Article 24 of the UN Framework Convention on Climate Change (UNFCCC)) support an intention of the parties to derogate from the general rules of State responsibility (paras. 410-420). The unequivocal rejection of the *lex specialis* argument means that, at the very least, it has become impossible for States to avoid a substantive discussion about responsibility and its legal consequences.

Assessing State responsibility

In applying the law of State responsibility, the ICJ pronounced on several aspects arising from the "unprecedented nature and scale of harm resulting from climate change" (para. 421): attribution, responsibility for cumulative harms, and causation. It did so at a

general level without an individualized assessment of any State's conduct.

Regarding attribution, the ICJ emphasized that the internationally wrongful act to be attributed to a State is not the GHG emission *per se*, but the breach of obligations pertaining to the protection of the climate system from the harm of those emissions (paras. 427, 429). Accordingly, it is not necessary to attribute the – often private – acts that directly emit GHGs to the State. Instead, the relevant State conduct can be found in the regulatory and legislative spheres. Namely, "[f]ailure of a State to take appropriate action to protect the climate system from GHG emissions – including through fossil fuel production, fossil fuel consumption, the granting of fossil fuel exploration licenses or the provision of fossil fuel subsidies – may constitute an internationally wrongful act which is attributable to that State" (para. 427). By explicitly naming this range of relevant acts and omissions, the opinion highlights the importance for States to fulfil their obligations in all these areas, or otherwise be confronted with the legal consequences of State responsibility (see also the joint declaration of Judges Bhandari and Cleveland[5]).

A more complicated issue, and one highly contested in the proceedings, concerns the plurality of responsible and injured States. Though this issue is more relevant to causation and reparation, the ICJ still addressed it in the section of its opinion dealing with attribution. It considered that, while "the fact that multiple States have contributed to climate change may indeed increase the difficulty of determining whether and to what extent an individual State's breach of an obligation [...] has caused significant harm to the climate system [...], in principle, the rules on State responsibility [...] are capable of addressing [such] a situation" (para. 430). The ICJ further highlighted that "the responsibility of a single State for

damage may be invoked without invoking the responsibility of all States that may be responsible" (para. 430).

Throughout its discussion of the cumulative nature of climate change, the ICJ places considerable trust in the capability of the rules on State responsibility to facilitate case-by-case assessments. However, it avoids engaging with the thornier details, such as how responsibility – and reparation – is to be allocated among a plurality of responsible States. As Paddeu and Jackson observe,[6] the ICJ's precise citation of its *Armed Activities* judgment in paragraph 430 implies some apportionment among the responsible States. This is opposed to a single responsible State having to make full reparation for the damage, which was the alternative, not-cited option from *Armed Activities*.

Relatedly, the ICJ addressed causation in a confident yet cursory manner. To begin with, the ICJ emphasised that causation of damage is required only for the determination of reparation, not for a finding of State responsibility (para. 433). For the causal link between an internationally wrongful act and the damage suffered, the ICJ distinguished two elements: first, whether an event (flooding, for example) can be linked to climate change; second, whether damage can be linked to a State or group of States (para. 437).

The first element – whether a specific event can be attributed to climate change – may be addressed by recourse to science (para. 437). Legally more problematic is the second element. The ICJ held that the standard of a "sufficiently direct and certain causal nexus" is generally "flexible enough to address the challenges" related to climate change (para. 436). Ultimately, causation must be established through an *in concreto* assessment (paras. 437-438). Notably, the conclusion that "while the causal link [...] is more tenuous than in the case of local sources of pollution, this does not mean that the identification of a causal link is impossible

in the climate change context" (para. 438) suggests that this more tenuous link can suffice to establish the required causal nexus.

One unfortunate aspect of the causation section of the ICJ's opinion is its exclusive focus on harm suffered by injured States or individuals. This contrasts with earlier sections of the opinion, and especially the specification of the customary no-harm principle, which relates to preventing harm to *the climate system* (for example, paras. 274-279). This distinction is of both symbolic and legal significance. If harm to the climate system suffices, this may simplify some of the causation challenges. It would not be necessary to link a specific event to climate change or assess the significance of a State's conduct for damage brought about by that event. Instead, the focus would (only) be on a State's role in the causation of climate change. On this, the ICJ stated that "it is scientifically possible to determine each State's total contribution to global emissions, taking into account both historical and current emissions" (para. 429 – but see, critically, Judge Nolte[7]). The focus of the opinion's causation section on harm to States aligns with the arguments articulated by most States in the proceedings. Still, it does not necessarily preclude the relevance of broader systemic harm; and neither do the rules of State responsibility.

Invoking State responsibility

In answering question (b), the ICJ also addressed the special character of certain primary obligations. It described customary "obligations pertaining to the protection of the climate system and other parts of the environment from anthropogenic GHG emissions, in particular the obligation to prevent significant transboundary harm" as obligations *erga omnes* and all obligations under the UNFCCC and the Paris Agreement as obligations *erga*

omnes partes (para. 440). Though this characterisation appears rather sweeping, it is convincingly justified by the common interest of all States in the protection of global environmental commons. This is reflected in the UNFCCC and Paris Agreement, which describe climate change as a "common concern of humankind".

In addition to the significance of the *erga omnes (partes)* nature for the normative pull of these obligations, it has legal consequences under the rules of State responsibility. Under Article 48(1) of ARSIWA, any State – not just an injured State – can invoke responsibility for breaches of these obligations. This broadening of the entitlement to invoke State responsibility constitutes a significant boost for potential inter-State litigation.

Practical significance and future litigation

The ICJ's advisory opinion on climate change touches upon many critical issues of State responsibility, though often only superficially (see, critically, Judge Yusuf[8]). To some extent, this was inevitable given that the ICJ was not asked to assess the responsibility of individual States or groups of States. The opinion is an important confirmation that the well-established rules of State responsibility apply to climate change and that these rules are capable of addressing the complexities at hand. The advisory opinion – reached unanimously! – is poised to reverberate throughout courtrooms and political negotiations.

For a concrete assessment of the responsibility of individual States, litigation seems the logical path forward. With its specific references to potential breaches of due diligence obligations and its emphasis on the law of State responsibility's flexibility, the advisory opinion almost reads as inviting the opportunity to assess questions like attribution and causation *in concreto*. In this regard,

Judge Nolte warns of "false hopes that climate litigation can supplement the mechanisms of financial transfers and the remedies for loss and damage contained in the climate change treaties" (para. 31)[9]. However, the opinion illustrates that the legal consequences of State responsibility go well beyond compensation payments (though these may be appropriate). Among the legal consequences is the duty of cessation, which "may require a State to revoke all administrative, legislative and other measures that constitute an internationally wrongful act" (para. 447). Importantly, cessation does not depend on the causation of harm. Litigation could, for instance, push States that are generally committed to efforts against climate change to adopt and implement more ambitious mitigation measures under their due diligence obligations of Article 4(2) of the Paris Agreement.

The elephant in the room is the question of jurisdiction. One possibility is the ICJ's jurisdiction under the optional clause, which has been recognized as compulsory by several high-emitting States, such as Australia, Germany, Norway, and the UK. Another option, which does not depend on jurisdiction and is not mentioned in the opinion, is to resort to lawful countermeasures.

By presenting the assessment – and potential litigation – of State responsibility for climate change as a realistic prospect, the opinion increases the immediate incentive for States to comply with their mitigation obligations. Thereby, the opinion promises a political impact even without actual contentious litigation. This impact extends to the broad range of acts (or omissions) identified by the ICJ as potential wrongful acts, including the production and consumption of fossil fuels.

References

1. ICJ, *Obligations of States in respect of Climate Change*, Advisory Opinion of 23 July 2025.
2. Zia Weise, 'World's top court says climate inaction can breach international law' *Politico* (23 July 2025), https://www.politico.eu/article/top-court-climate-inaction-international-law-icj-global-warming/.
3. Verfassungsblog, 'The Advisory Opinion Could Reshape Global Climate Governance: Five Questions to Tejas Rao, Marie-Claire Cordonier Segger and Markus Gehring' *Verfassungsblog* (7 December 2024), https://verfassungsblog.de/the-advisory-opinion-could-reshape-global-climate-governance/.
4. Thomas Buri, 'The ICJ's Advisory Opinion on Climate Change: A Data Analysis of Participants' Submissions' *American Society of International Law* (9 December 2024), https://www.asil.org/insights/volume/28/issue/10.
5. ICJ, *Obligations of States in respect of Climate Change*, Joint Declaration of Judges Bhandari and Cleveland, 23 July 2025.
6. Federica Paddeu and Miles Jackson, 'State Responsibility in the ICJ's Advisory Opinion on Climate Change' *EJIL:Talk* (25 July 2025), https://www.ejiltalk.org/state-responsibility-in-the-icjs-advisory-opinion-on-climate-change/.
7. ICJ, *Obligations of States in respect of Climate Change*, Declaration of Judge Nolte, 23 July 2025.
8. ICJ, *Obligations of States in respect of Climate Change*, Separate Opinion of Judge Yusuf, 23 July 2025.
9. ICJ, *Obligations of States in respect of Climate Change*, Declaration of Judge Nolte, 23 July 2025.

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International Law's Administrative Law Turn and the Paris Agreement

In the recent *Advisory Opinion on States' Obligations in respect of Climate Change* various remarks by the International Court of Justice (ICJ) lean into an increasingly "administrative" law turn in international law. Administrative law, particularly in the common law, often focuses on the acceptability of the procedures through which government decisions are made. For instance, administrative law may require rationality, reasonableness, certain types of means-to-ends relationships, and the taking into account of mandatory relevant considerations. Government decision-making which does not meet the demands fails administrative law review and may be set aside.

We are increasingly seeing these sorts of tests or standards for governmental decision-making within international law. This might be because the growing interconnection between international and domestic legal systems calls for interstitial rules that mediate between legal systems[1], leading to the identification of a range of standards for governmental conduct embedded within existing international legal rules.[2] This is an independent phenomenon, although it could be linked with the development of a broader "global administrative law" addressing accountability within international law and institutions.[3]

Perhaps it should be no surprise that international climate law is now giving rise to such "administrative law" style tests and standards. After all, if it is to be effective, international climate law must inevitably reach into domestic law spheres.

In this chapter, we investigate this phenomenon by looking at the ways in which States' preparation, communication, and maintenance of their Nationally Determined Contributions (NDCs) under the Paris Agreement are coming to be characterised by requirements or standards with a domestic administrative law tone. The chapter begins by detecting in the ICJ's reasoning the

standards of "holism", and of "due regard" for future generations, in both of which we see administrative law resonances. We then discuss the ICJ's remarks on the relationship between States' domestic measures and the objectives of NDCs, and on the standards inhering in the principles of progression and ambition, as well as touching on the underpinning standard of due diligence.

Holism

"Holism", as we are calling it, is perhaps the most recently articulated benchmark for NDCs. The ICJ found that the Paris Agreement requires a "capable of achieving" means-to-ends relationship as the test for NDCs' *collective* relationship with the Agreement's temperature target. Specifically, if they are to meet the underlying standard of due diligence, states' NDCs when taken together *as a whole* must be *capable of achieving* the Paris Agreement's goal of limiting global warming to 1.5°C (paras. 245, 249, 457(3)(A)(f)). This is a sound judicial determination, as ultimately what counts in practical terms is what NDCs can achieve globally. We use the term "holism" to capture the novel collective or global character of the standard.

Among the mechanisms for achieving holism is the requirement in Article 4(9) that NDCs must be informed by the outcomes of five-yearly Global Stocktakes. Indeed, Decision 4/CMA.1 explicitly states that information on how a Party's preparation for its NDC was informed by the Global Stocktake should be included in its NDC (Annex 1, para. 4(c)). The Global Stocktake outcome is intended to provide a summary on opportunities to enhance action and clarify best practices. These can then be translated by states into national trajectories and policies. The troubling thing, of course, is that the 2023 Global Stocktake recognised that "Parties

are not yet collectively on track" towards achieving the Paris Agreement goals (para. 243, Decision 1/CMA.5, para. 25).

The requirement for holism appears not to dictate any specific "sharing" of the carbon budget. However, it does appear to require the world to find ways to work together, using all practical means to transition to a non-carbon-based global economy. Thus, to meet the standard of holism, states will need to ramp up cooperation in existing and new fora by all means possible, including through international technical and financial means and also, logically, through international economic law.[4] Indeed, the ICJ specified that states have customary international law and treaty-based duties to cooperate to combat climate change.

Due regard for future generations

The ICJ's findings on "due regard for the interests of future generations" are strong examples of the turn toward identifying requirements for states to follow certain procedures in governmental decision-making. According to the ICJ, international law requires states actively to consider the interests of future generations, and the long-term implications of their conduct, when making decisions. These considerations "need to be *taken into account* where states contemplate, decide on and implement policies and measures in fulfilment of their obligations under the relevant treaties and customary international law" (para. 157, emphasis added). This will require a specific step in states' decision-making processes.

The ICJ's remarks that the principle of intergenerational equity requires due regard for the interests of future generations are an important feature of the Advisory Opinion. Preparedness to give due consideration and weight to the interests of future generations in present day decision-making is critical to dealing with climate

change. The ICJ grounded this requirement of due regard for future generations in equity within the law (equity *infra legem*). Further, intergenerational equity is an expression of the idea that "present generations are trustees of humanity tasked with preserving dignified living conditions and transmitting them to future generations" (para. 156).

As Rauber has astutely pointed out,[5] the requirement of due regard for future generations does not appear to be limited to the climate context. This may apply across all domains, including the depletion of biodiversity and well beyond. Due regard is both procedural and potentially substantive. For instance, there could be associated substantive constraints on state conduct requiring avoidance of "manifestly excessive adverse impacts" on the interests of future generations.[6]

Domestic measures

As well as setting an NDC, each State also has a critically important due diligence obligation under Article 4(2) of the Paris Agreement to pursue domestic measures with the aim of achieving the objectives of its NDC. The ICJ held that this requires States to be proactive and pursue measures that are *reasonably capable of achieving* their NDCs (paras. 253, 457 (3)(A)(g)). This is again a "capable of achieving" test. As compared with the test as applied in relation to holism, fulfilment of the test in relation to domestic measures is more likely within an individual state's control and can be assessed by examining states' internal governmental measures.

We observe that another, complementary, way to approach this is to focus on the concept of "intention" in Article 4(2)'s provision that "Each Party shall prepare, communicate and maintain successive nationally determined contributions *that it intends to*

achieve". There is no explicit obligation in the Paris Agreement to implement and achieve a State's NDCs, although there is a good faith obligation that Parties *intend* to do so.[7] But what does it mean for a State to "intend" to achieve its NDC? Can international law hold a state to account for not having this intention?

The ordinary definition of intention is "something you want and *plan* to do". For instance, previously the ICJ has looked to see if there is a plan when determining whether the intention to commit genocide has been present.[8] We say this knowing that combatting climate change is a desirable intention, whereas the commission of genocide is abhorrent. This should be taken into account when applying and developing tests for "intention", but the core idea of an appropriately calibrated plan still appears useful. Where states have an appropriate plan and scheme of budgets and/or initiatives for how their NDCs will be achieved this may help establish their intention.

Progression and ambition

The ICJ also helpfully clarified the status of Article 4(3)'s provision that each successive NDC will represent both a "progression" beyond the state's previous NDC, and its "highest possible ambition", reflecting its common but differentiated responsibilities and respective capabilities in the light of different national circumstances. The ICJ advises that these references are "prescriptive", meaning that these are requirements of NDCs (para. 240). The NDCs of states that are performing their obligations with due diligence will conform with these requirements.

The ICJ held that the requirement for progression means that a state's NDC "must become more demanding over time" (para. 241). The ICJ then introduces a further ends-means capability test,

stating that an NDC must "be *capable of making an adequate contribution"* to achieving the temperature goal (paras. 242, 457(3)(A)(e)).

Assessing an NDC will call for a range of reference points. Pertinently, to facilitate clarity, transparency, and understanding of an NDC's substantive contribution, each state party is directed to address a range of matters in accordance with the Parties' Decision 4/CMA.1 (and Article 4(8) Paris Agreement). As well as reviewing "headline" numerical targets, assessing NDCs may involve looking at their scope, coverage, and inclusion of supplementary objectives.[9] *Inter alia*, Voigt has suggested that establishing "best efforts" in this context involves showing that a "comprehensive assessment of all mitigation options in all relevant sectors" has been undertaken.[10]

Requiring the undertaking of such prior analysis as a step in states' decision-making processes is again reminiscent of international law in other fields. In *Whaling in the Antarctic (Australia v Japan; New Zealand Intervening*), Japan had not sufficiently analysed the need for lethal whaling, and this undermined Japan's case that its whaling programme was for the purposes of scientific research (para. 137). Similarly, in the climate context, states may struggle to demonstrate the appropriateness of their NDCs if they have failed to analyze the full suite of climate mitigation options available to them.

Further, each Party to the Paris Agreement must also explain how the Party considers that its NDC is fair and ambitious in the light of its national circumstances (Annex 1, para. 6), as well as how the NDC contributes towards achieving the objective of the Convention (Annex 1, para. 7).

Due diligence

The ICJ recognized that the Paris Agreement parties' Article 4(2) obligations to prepare, communicate, and maintain successive NDCs are procedural obligations of result (paras. 235-236). The ICJ also addressed the *substantive* dimension of these obligations, concluding that they are obligations of conduct to be performed to a due diligence "best efforts" standard. Thus, even though the due diligence standard does not itself have so much of a domestic administrative law "ring" about it, we address it in this chapter.

Throughout the advisory opinion, due diligence is recognised as a central and unifying feature of the international law complex governing climate change. The ICJ held that both the Paris Agreement and customary international law obligations call for "stringent" due diligence, given the state of the climate crisis. The practical implication is that it would make little sense for a state to exit the Paris Agreement, as the Agreement's core obligations deeply overlap with the due diligence requirement in the customary international law on prevention of environmental harm, which binds parties and non-parties alike. Indeed, the ICJ advised that customary international law requires even non-parties to engage in conduct equivalent to that under the Paris Agreement.

Due diligence is subject to differentiation among states based on their common but differentiated responsibilities and respective capabilities (CBRD). The CBDR principle has long been a feature of international environmental law, including climate change law. In the Paris Agreement, the principle became, in Article 4(3), "common but differentiated responsibilities and respective capabilities in the light of national circumstances" (CBDR-RC-ILONC). The ICJ recognised that CBDR-RC-ILONC requires a dynamic

assessment.[11] The capability and national circumstances of each state to address climate change differ, and will continue to change over time. Importantly, this means states fall on a spectrum rather than dividing into two groups of developed and developing countries (para. 150).

Conclusion

The ICJ has helpfully confirmed that parties to the Paris Agreement do not have unfettered discretion in relation to their NDCs (paras. 242, 245, 249, 270). Once submitted, NDCs are going to be increasingly open to scrutiny (Declaration of Judge Tladi, para. 7).

The tests we have analysed above can help generate accountability for government action through domestic advocacy and litigation[12], complementing practices of justification, assessment, and response provided through the Paris Agreement.[13] For example, perhaps one of the fascinating questions arising is, if progression and highest possible ambition are prescribed qualities for successive NDCs, might the PAICC have to assess whether NDCs demonstrate these qualities? Would this fall within the PAICC's mandate under Decision 20/CMA.1 (Art. 15, para. 22(a)(i))?

Further, if a successive NDC, by definition, must demonstrate progression and highest possible ambition, would an NDC that did not do so still qualify as a successive NDC? There are precedents for finding that instruments lacking essential qualities, failing to consider matters they ought to, or marred by methodological flaws, do not count. For example, in the World Trade Organization case of Australia – Measures Affecting the Importation of Apples from New Zealand, 2010, both the Panel and Appellate Body found against Australia in part because the process Australia had not

completed could not be considered a "proper" risk assessment (ABR paras. 255, 261).

Moreover, if multiple NDCs were seemingly lacking in the required qualities, would this constitute a systemic issue? And might the PAICC refer the matter back to the CMA, and provide a recommendation, consistent with its mandate? If so, this could increase international political pressure for greater substantive commitment to addressing climate change through national contributions and lead to renewed attention to methods for bringing this about. Meanwhile, domestic challenges in national jurisdictions around the world employing administrative law "readings" of the international legal rules like those canvassed above could be expected to bring the pressure onto governments at home.

The idea that the climate change regime could increasingly come to feature public or administrative law analogies has been foreseen by others.[14] However, the reality appears to be more decentralised than predicted: much remains within the power of individual states as the primary locus of decision-making and control. However, at base, there can be no mistaking the legal requirements for states to do their utmost,[15] both individually and collectively, to address climate change, and the emerging administrative law style tests discussed above will be important engines to help advocate for action.

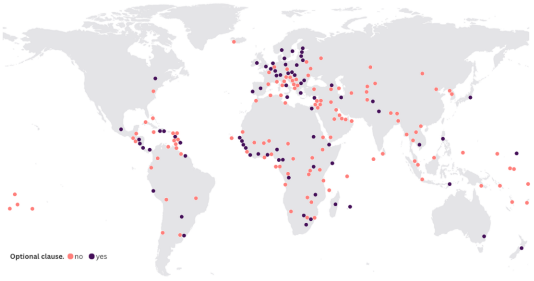
References

1. Nico Krisch, Beyond Constitutionalism: The Pluralist Structure of Postnational Law 1st edn. (Oxford University Press, 2010).
2. Caroline E. Foster, *Global Regulatory Standards in Environmental and Health Disputes: Regulatory Coherence, Due Regard, and Due Diligence* 1 edn. (Oxford University Press, 2021).
3. Benedict Kingsbury, Nico Krisch, and Richard B. Stewart, 'The Emergence of Global Administrative Law' (2005) *SSRN Electronic Journal*.
4. See Valentina Vadi and David Collins (eds.), Routledge handbook on international economic law (Routledge, 2025); Kathleen Claussen and Geraldo Vidigal (eds.), The sustainability revolution in international trade agreements: ACLAW - WTO & international trade: ACSD 1st edn. (Oxford university press, 2024); *Villars Framework for a Sustainable Trade System*, Version 2.0, available at: https://remakingtradeproject.org/villars-framework
5. Jochen Rauber, 'Custom, Entrenchment, Interpretation: How the ICJ's Advisory Opinion on Climate Change Contributes to the International Law's Turn toward the Future' *Völkerrechtsblog* (5 August 2025), https://voelkerrechtsblog.org/de/custom-entrenchment-interpretation/.
6. Caroline E. Foster, 'Due Regard for Future Generations? The No Harm Rule and Sovereignty in the Advisory Opinions on Climate Change' (2024) 13:3 *Transnational Environmental Law* 588–609.
7. Lavanya Rajamani, 'The 2015 Paris Agreement: Interplay Between Hard, Soft and Non-Obligations' (2016) 28:2 Journal of Environmental Law 337–58.
8. See ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007, paras. 373, 376.
9. Benoit Mayer, 'Progression requirements applicable to state action on climate change mitigation under Nationally Determined Contributions' (2023) 23:3 *International Environmental Agreements: Politics, Law and Economics* 293–309.
10. Christina Voigt, 'The power of the Paris Agreement in international climate litigation' (2023) 32:2 *Review of European, Comparative & International Environmental Law* 237–49.
11. Christina Voigt and Felipe Ferreira, 'Differentiation in the Paris Agreement' (2016) *SSRN Electronic Journal*.
12. Christina Voigt, 'The ICJ and the UN Climate Regime: Clarifying Mitigation Obligations Under the Paris Agreement' *Völkerrechtsblog* (4 August 2025), https://voelkerrechtsblog.org/the-icj-and-the-un-climate-regime/.

13. Christopher Campbell-Duruflé, 'Accountability or Accounting? Elaboration of the Paris Agreement's Implementation and Compliance Committee at COP 23' (2018) 8:1–2 Climate Law 1–38.
14. Ellen Hey, 'The Climate Change Regime: An Enviro-Economic Problem and International Administrative Law in the Making' (2001) 1:1 *International Environmental Agreements* 75–100.
15. See the chapter by Christina Voigt in this volume.

Margaret A. Young, Dan Parker, Stanislav Roudavski

Visualisation of the Advisory Opinion on Climate by the International Court of Justice



The ICJ's Advisory Opinion is a significant development for States and for international law. The Court's systemic approach in interpreting obligations to protect the climate has been analysed in webinars, podcasts and blogs. While many commentators continue to add valuable words, this contribution communicates through pictures.

A collaboration between a lawyer and two designers, our data story considers the Court's reasoning and links its consequences to interrelated information. Datasets describe attributes of each country by referring to their ratification of selected treaties, application of customary international law, cumulative greenhouse gas emissions, income levels, and other relevant material.

Viewers can use and adapt the images in the animated slideshow to suit their needs, including research, teaching and public engagement.

The visualisation is available here:

B. Human Rights, Reparations, and Persons Affected

David R. Boyd

A Right Foundational to Humanity's Existence

World's Highest Court Embraces the Right to a Healthy Environment

For the second time in a month, one of the world's highest judicial authorities has issued an advisory opinion on the climate crisis that highlights the importance of the human right to a clean, healthy and sustainable environment. Echoing the Inter-American Court of Human Rights in its Advisory Opinion 32/25[1], on July 23, the International Court of Justice (ICJ) unanimously held that this right constitutes a binding norm of international law.[2] Both Courts also described the climate crisis as an existential threat to humanity and all forms of life on Earth (para. 456 of the ICJ AO, para. 302 of AO 32/25).

These advisory opinions cap a remarkable four-year run of advances for the right to a healthy environment, beginning with its recognition in Resolution 48/13 of the United Nations (UN) Human Rights Council in October 2021. The UN General Assembly (UNGA) followed suit in July 2022 with Resolution 76/300, which was supported by 164 States and opposed by none, with seven abstentions.[3]

Because the ICJ is widely regarded as the leading global authority on the interpretation of international law, its endorsement of the right to a healthy environment should put an end to the long-standing debate about whether this right is part of the pantheon of universally recognized human rights. Although the advisory opinion offers scant guidance on the content of the right to a healthy environment, the ICJ is clear that protecting this right is an essential prerequisite for the enjoyment of all human rights (para. 393). In combination with other aspects of the advisory opinion, the recognition of the importance of the right to a healthy environment should serve as a catalyst for accelerated climate action, and enhance accountability for ongoing State failures to tackle the climate crisis.

UN Resolutions spark further developments for right to a healthy environment

Following the UNGA resolution in 2022, the right to a healthy environment was incorporated in a series of key international instruments including the Kunming-Montreal Global Biodiversity Framework, key outcome documents from the 27th and 28th Conferences of the Parties to the United Nations Framework Convention on Climate Change (UNFCCC) (the Sharm El-Sheikh Implementation Plan and the first Global Stocktake) and the Bonn Declaration for a Planet Free of Harm from Chemicals and Waste (2023).

At least ten States have legally recognized the right for the first time since the UNGA's resolution in 2022, through constitutional amendments (Micronesia, Pakistan), legislation (Canada), and the ratification of treaties, including the right (Antigua and Barbuda, Bahamas, Belize, Dominica, Grenada, Oman, Saint Lucia). These actions brought the number of States that recognize the right to a healthy environment in law to 165, or more than 85 percent of UN Member States.

Courts around the world have embraced these developments, including the Constitutional Chamber of the Supreme Court of Costa Rica, the Supreme Court of Brazil, the Supreme Court of India, the Supreme Court of Mexico, the Supreme Court of Panama and other courts from South Africa to Norway.[4]

Seeking climate justice at the ICJ

Sparked by visionary university students in the South Pacific, Vanuatu led an extraordinary diplomatic campaign resulting in a

unanimous UNGA resolution posing two basic questions to the ICJ.[5] First, what are States' obligations, under international law, to protect the climate system for present and future generations? Second, what are the legal consequences of causing harm to the climate system by failing to fulfil those obligations?

Reflecting the global interest in this issue, the ICJ recorded an unprecedented level of participation in the advisory opinion process, receiving submissions from 99 States and 13 international organizations.[6] The participants were divided into two opposing camps.

A small group of States, composed mainly of the world's dominant fossil fuel producers and consumers, argued that the only applicable international law was the three climate treaties – the UNFCCC, the Kyoto Protocol, and the Paris Agreement. In their view, international human rights law and customary international law were displaced by this specialized legal regime (*lex specialis*). These States argued that the climate treaties required them to submit Nationally Determined Contributions, but any other climate actions could be considered discretionary or voluntary.

In contrast, the vast majority of States and international organizations participating in the ICJ proceeding took a much broader view, arguing that the entire corpus of international law was relevant, including other environmental treaties, customary international law, and, of primary relevance for this chapter, international human rights law.

Interestingly, at the conclusion of the oral hearings before the ICJ in December, four judges asked participants to file written replies to questions. Judge Aurescu asked about the status of the right to a clean, healthy and sustainable environment under international law, the content of the right, and its relationship to other human rights. Fifty-four participants submitted replies to Judge

Aurescu's question, with the vast majority concluding that the right to a healthy environment is a critically important part of international law.[7]

In its Advisory Opinion, the ICJ sided unanimously with the majority on the question of relevant sources of international law, and rejected the *lex specialis* argument (paras. 162-171). This determination by the ICJ opened the door to consideration of the role and importance of international human rights law in defining states' obligations with respect to climate change, and in particular the right to a healthy environment.

Determining the status and relevance of the right to a healthy environment at the ICJ

During the ICJ's advisory opinion process, 92 participants (84 States and eight international organizations) made written and/or oral submissions about the right to a clean, healthy and sustainable environment. The vast majority of participants (more than seventy-five) advanced arguments supporting the status of the right to a healthy environment as a binding norm of international law. Some States identified the right as part of customary international law,[8] others as a general principle of international law,[9] and some went so far as to assert that the right is a peremptory norm of international law (similar to prohibitions on slavery, genocide and torture, which permit no derogations).[10]

The small minority of States (12) that sought to confine their obligations to the climate treaties denied the existence of the right to a healthy environment, claimed its content was unknown, and dismissed its relevance for the advisory opinion.

Again, in its Advisory Opinion, the ICJ sided with the majority of States. First, the ICJ summarized the international developments with respect to the right to a healthy environment, from the Stockholm Declaration in 1972, which vaguely alluded to the right, to the Human Rights Council and UNGA resolutions in 2021 and 2022, which clearly and overwhelmingly recognized it (para. 388, 392). The ICJ also identified regional treaties in Africa, Latin America and the Middle East that include the right, highlighted the widespread recognition of the right at the national level in constitutions and legislation, and mentioned the reporting on implementation of the right at the universal periodic review process overseen by the Human Rights Council.

Then came the ICJ's unanimous endorsement of the right to a healthy environment as a binding norm of international law. Paragraph 393 of the advisory opinion is worth citing in its entirety:

> *Based on all of the above, the Court is of the view that a clean, healthy and sustainable environment is a precondition for the enjoyment of many human rights, such as the right to life, the right to health and the right to an adequate standard of living, including access to water, food and housing. The right to a clean, healthy and sustainable environment results from the interdependence between human rights and the protection of the environment. Consequently, in so far as States parties to human rights treaties are required to guarantee the effective enjoyment of such rights, 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. The human right to a clean, healthy and sustainable environment is therefore inherent in the enjoyment of other human rights. The Court thus concludes that, under international law, the human*

right to a clean, healthy and sustainable environment is essential for the enjoyment of other human rights.

This extraordinary conclusion reflects a remarkably rapid evolution in the development of the right to a clean, healthy and sustainable environment over the past four years. In fact, Judges Aurescu, Bhandari, Charlesworth and Tladi issued separate opinions lamenting that the ICJ did not go further in articulating the right.[11] Judges Aurescu (para. 46), Bhandari (para. 3), and Tladi (para. 31) called for the specific recognition of the right as customary international law. Judge Tladi noted that "[i]n this particular instance, the evidence that has been put forward to support the right to a clean, healthy and sustainable environment is much more than what has been presented in many cases where the Court found the existence of a rule of customary international law." Judge Charlesworth articulated the content of the right, describing the procedural rights of access to information, public participation in decision-making and access to justice as well as clean air, safe and sufficient water, adequate sanitation, healthy and sustainably produced food, a nontoxic environment, healthy ecosystems and biodiversity and a safe climate, echoing Special Rapporteurs, United Nations agencies, and recent legislation in Australia.

The brevity of the ICJ's comments on the right to a healthy environment does seem like a missed opportunity, particularly in light of the widespread agreement among participants in the ICJ process about the procedural and substantive elements of the right. But the bottom line is that the ICJ rejected the arguments made by the US, the UK, and a few other States that the right did not constitute part of international law. To the contrary, it is now part of the tapestry of international law that determines State obligations to address the "existential problem of planetary proportions that

threatens all forms of life and the very health of our planet" (para. 456). The advantage of the ICJ's framing is that all States have binding obligations to respect, protect and fulfil human rights, and this includes the right to a healthy environment, both on its own and as a prerequisite for the enjoyment of all human rights.

Moving forward: Implications for the future

While there is much to parse and debate in the ICJ's advisory opinion, there is no doubt that it advances the status and stature of the right to a healthy environment under international law. The arguments of States that raised doubts about the right at the Human Rights Council, the UNGA, the ICJ, and other international fora have been conclusively refuted.

The Council of Europe must now move forward with the long-delayed development of an additional protocol to the European Convention on Human Rights, recognizing the right to a clean, healthy and sustainable environment.[12] This is the only regional human rights system in the world that does not yet incorporate this right.

The ICJ's advisory opinion should encourage States in Africa and Southeast Asia to move forward with regional instruments to advance the implementation of the right to a healthy environment (similar to the Aarhus Convention and the Escazu Agreement). The ICJ's ruling should also compel the 28 UN Member States that have not yet incorporated this right into their domestic legal systems to do so as a matter of urgency (Afghanistan, Andorra, Australia, Barbados, Brunei Darussalam, Cambodia, China, Democratic People's Republic of Korea, Israel, Japan, Kiribati, Laos, Liechtenstein, Marshall Islands, Myanmar, Nauru, New Zealand, Papua New

Guinea, Samoa, San Marino, Singapore, Solomon Islands, Tonga, Trinidad and Tobago, Tuvalu, the United Kingdom, the United States, and Vanuatu).

More importantly, all States, especially large current and historical greenhouse gas emitters, must strengthen their Nationally Determined Contributions to include significantly more ambitious targets and effective measures to achieve those targets. The failure to do so would contravene their obligations under international law, as articulated so forcefully by the ICJ, and would constitute a *prima facie* violation of the right to a clean, healthy and sustainable environment.

It is obvious that ongoing or new fossil fuel subsidies are impossible to reconcile with the human rights obligations of States in the face of a climate emergency. Authorizations for additional fossil fuel exploration and infrastructure also face unprecedented legal obstacles, particularly in wealthy nations that are mandated to take the lead in reducing emissions. One of the sentences (para. 427) in the Advisory Opinion most likely to be widely quoted targets fossil fuels directly, echoing a report from the UN Special Rapporteur on human rights and the environment[13] (paras. 77-78):

> *Failure of a State to take appropriate action to protect the climate system from GHG emissions – including through fossil fuel production, fossil fuel consumption, the granting of fossil fuel exploration licences or the provision of fossil fuel subsidies – may constitute an internationally wrongful act which is attributable to that State.*

Wealthy States must also mobilize climate finance on a scale and at a speed comparable to the Marshall Plan implemented in the aftermath of World War II, fulfilling their legal duties to assist less

wealthy States in shifting to clean energy and adapting to climate impacts and to compensate climate vulnerable States for the immense damages already inflicted by the disruption of the climate system.

While one can hope that governments around the world will implement the major legislative, regulatory and budgetary changes needed to comply with their clarified legal obligations to address the climate crisis, some will inevitably ignore the ICJ advisory opinion, drag their heels, and continue capitulating to the insidious influence of the oil, gas and coal industries. These States' failures, now understood as internationally wrongful acts and violations of human rights, will rightfully be targeted by litigation. Courts across the world will continue to play a key role, even an enhanced role, in holding governments accountable for their climate, environmental and human rights commitments.

The advisory opinion of the ICJ provides an inspiring high-water mark for the legal recognition of the right to a healthy environment. The debates about the right's existence, its relevance, and its importance are over. The right to a healthy environment has moved from *lex ferenda* to *lex lata* and, as multiple courts have recognized, is foundational to humanity's existence and the future of life on Earth. Implementing bold, urgent and rights-based climate action now must be a paramount priority for all States.

References

1. IACtHR, *Climate Emergency and Human Rights*, Advisory Opinion OC-32/25 of 29 May 2025, requested by the Republic of Chile and the Republic of Colombia.
2. ICJ, *Obligations of States in respect of Climate Change*, Advisory Opinion of 23 July 2025.
3. UN General Assembly, Resolution 76/300, *The human right to a clean, healthy and sustainable environment*, 28 July 2022, UN Doc. A/RES/76/300.
4. David R. Boyd, Melina De Bona, and César Rodríguez-Garavito (eds.), *20 Landmark Court Decisions on the Right to a Healthy Environment* (New York University, Earth Rights Research and Action (TERRA) Program, 2024).
5. United Nations General Assembly, *Request for Advisory Opinion transmitted to the Court pursuant to General Assembly resolution 77/276 of 29 March 2023: Obligations of States in respect of Climate Change*, UN Doc A/RES/77/276 (29 March 2023).
6. The submissions are available here: https://www.icj-cij.org/case/187/written-proceedings.
7. The replies are available here: https://www.icj-cij.org/case/187/other-documents.
8. Republic of Kiribati, *Written Statement* (Obligations of States in respect of Climate Change, Request for Advisory Opinion) 22 March 2024, para. 42; Oriental Republic of Uruguay, *Written Submission* (Obligations of States in respect of Climate Change, Request for Advisory Opinion) 22 March 2024, para. 106; Republic of Namibia, *Written Replies to the Question Put by Judge Aurescu* (Obligations of States in respect of Climate Change, Request for Advisory Opinion) 20 December 2024, para. 106.
9. See the oral statement by Slovenia, Verbatim Record 50, pp. 23-25, paras. 7-10, available here: https://www.icj-cij.org/sites/default/files/case-related/187/187-20241211-ora-02-00-bi.pdf.
10. See Melanesian Spearhead Group and Vanuatu, Written Reply to Judges Cleveland, Tladi, Aurescu, & Charlesworth, paras. 7-8, available here: https://www.icj-cij.org/sites/default/files/case-related/187/187-20241220-oth-67-00-en.pdf.
11. ICJ, *Obligations of States in respect of Climate Change*, Separate Opinion of Judge Aurescu, 23 July 2025; ICJ, *Obligations of States in respect of Climate Change*, Separate Opinion of Judge Bhandari, 23 July 2025; ICJ, *Obligations of States in respect of Climate Change*, Separate Opinion of Judge Charlesworth, 23 July 2025; ICJ, *Obligations of States in respect of Climate Change*, Declaration of Judge Tladi, 23 July 2025.
12. Natalia Kobylarz, 'A World of Difference: Overcoming Normative Limits of the ECHR Framework through a Legally Binding Recognition of the Human Right to a Healthy Environment' (2025) 1:37 *Journal of Environmental Law* 23–43.

13. See UN Human Rights Council, *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, UN Doc. A/74/161 (15 July 2019) (David R. Boyd, Special Rapporteur).

Corina Heri

Human Rights in the ICJ's Climate Opinion

A Comparative Evaluation

This summer has seen two major climate advisory opinions published – first from the Inter-American Court of Human Rights (IACtHR)[1], and then from the International Court of Justice (ICJ)[2]. Both opinions address human rights law, embedding human rights in a broader overarching framework of international law that also includes international climate treaties and customary international law. But how do these opinions compare, and what room does the ICJ leave for continuing development of human rights standards by other relevant courts and treaty bodies? This chapter explores those questions by analyzing the human rights aspects of the ICJ's advisory opinion, and contrasting them with the findings of the IACtHR (and to a lesser degree with those of other international and regional human rights adjudicators). The analysis reveals that the rights-based findings made in the ICJ's inaugural climate advisory opinion are not necessarily ground-breaking in terms of their scope or ambition, but that they instead serve to legitimize and encourage the climate-related findings of regional human rights courts and United Nations (UN) treaty bodies.

The ICJ's findings on climate change and human rights

To begin, the following summarizes the ICJ's analysis of human rights law, which led it to find that human rights law obligates States to take climate-related protective measures aimed at mitigation and adaptation (para. 403). This includes its discussion of the *lex specialis* argument, the range of rights at stake, the existence of a right to a healthy environment, and the extraterritoriality of obligations.[3]

Human rights obligations are not displaced by the climate treaties

The first building block of the ICJ's engagement with human rights law concerned a fundamental issue: its applicability to climate change. The States involved in the ICJ climate advisory proceedings did not dispute climate change's impact on human rights. But, several States did argue that the international climate treaties (the UN Framework Convention on Climate Change (UNFCCC) and the Paris Agreement, in particular) constitute a *lex specialis* to human rights law, meaning that they displace human rights obligations, rendering them inapplicable. The ICJ rejected this argument, noting long-standing recognition of the interdependence between human rights and the environment, including in case-law from the three major regional human rights courts and UN human rights treaty bodies.

The ICJ held that, when it comes to climate change, "the core human rights treaties, including the ICESCR [International Covenant on Economic, Social and Cultural Rights] and the ICCPR [International Covenant on Civil and Political Rights], and the human rights recognized under customary international law form part of the most directly relevant applicable law" (para. 145). Notably, in this crucial phrase the ICJ did not explicitly refer to the highly relevant UN Convention on the Rights of the Child (UNCRC).

Ultimately, the ICJ found that international human rights law must inform States' obligations under climate treaties and customary international law, and *vice versa*, facilitating a harmonized interpretation of the overlapping obligations at stake (para. 404).

Climate change risks impairing a wide array of human rights

Second, the ICJ mapped the human rights impacts of climate change. Citing its own past opinions[4], reports of the Intergovernmental Panel on Climate Change (IPCC), and the human rights listed in the preamble of the Paris Agreement, the ICJ held that "the protection of the environment is a precondition for the enjoyment of human rights" (para. 373). It then examined the impacts that climate change threatens to have on a (non-exhaustive) array of human rights, relying on the climate-related findings of various UN human rights bodies to discuss climate change's implications for the right to life (para. 377), the obligation of *non-refoulement*[5] (para. 378), the right to health (para. 379), the right to an adequate standard of living, including access to food, water and housing (para. 380), the right to privacy, family and home, which entails an obligation to adapt to climate-related impacts (para. 381), and the rights of women, children and indigenous peoples, migrants, persons with disabilities and other people in vulnerable situations (para. 382). Additionally, it cited the principles of substantive equality, non-discrimination, participation, access to justice, transparency, and the rule of law (para. 383), and noted that climate change is already contributing to malnutrition and child mortality (para. 384).

The right to a clean, healthy and sustainable environment is inherent in other rights

Third, the ICJ engaged with the right to a clean, healthy, and sustainable environment.[6] During the ICJ proceedings, a number of States had invoked the existence of such a right, which the UN General Assembly recognized in 2022.[7] Citing the indivisibility and interdependence of human rights and the high number of interna-

tional, regional, and domestic instruments recognizing this right, the ICJ found that many human rights cannot be fully realized in the absence of a clean, healthy, and sustainable environment (para. 389). As a result, the ICJ opined that the right to a healthy environment is "a precondition for the enjoyment of many human rights" and "is therefore inherent in the enjoyment of other human rights", meaning that it is "essential for the enjoyment of other human rights" (para. 393). Notably, however, the ICJ skirted the issue of explicitly declaring this right a norm of customary international law.

Human rights treaties can apply extraterritorially

Fourth, the ICJ considered the extraterritoriality of human rights obligations. It drew on its own past case-law, where it has repeatedly established that States' human rights obligations can apply extraterritorially.[8, 9, 10] Although noting the primarily territorial nature of jurisdiction, the ICJ found that States should not be allowed to escape their human rights obligations where they exercise jurisdiction abroad, and that the human rights obligations under the ICCPR, ICESCR, and UNCRC can also apply extraterritorially. Keeping its findings abstract, the ICJ highlighted that the territorial scope of human rights treaties and customary law differs without providing further clarification of what this might mean for a potential interstate climate case.

How ground-breaking are the ICJ's findings on human rights law?

The ICJ's climate opinion has already (and understandably) been described as "historic".[11] But how do its findings on human rights

law measure up? The following contrasts these findings with recent case-law from regional human rights courts, and in particular the IACtHR. The analysis shows that the ICJ provided an affirmation of rights-based engagement with climate change, inviting further clarifications from human rights courts and treaty bodies without, however, making particular strides over existing jurisprudence.

What is the status of the right to a healthy environment?

Although the ICJ discussed the right to a healthy environment, its language around the status and content of this right is frustratingly vague. Several of the ICJ's judges picked up on this in their separate opinions, with both Judge Aurescu and Judge Tladi discussing the potential to recognize this right as a norm of customary international law.[12, 13]

The ICJ's approach, which stops short of giving content to or specifying obligations entailed by this right, stands in sharp contrast to the IACtHR's climate advisory opinion. That opinion extensively clarified this right's autonomous role, its protection of nature as well as individuals, and the fact that it contains within it an independent human right to a healthy climate. Recognizing the right to a healthy environment as a binding, independent, and fleshed-out right with both individual and collective dimensions had important ramifications for the IACtHR's advisory opinion. The depth of its engagement allowed for a harmonized understanding of States' obligations across customary and human rights law, including in terms of territorial jurisdiction and the human-versus-nature conundrum of anthropocentric rights (paras. 277-278). Similar findings are decidedly missing in the approach of the ICJ – and in that of the European Court of Human Rights (ECtHR), which likewise has not recognized a right to a healthy environment, and

considers itself unable to do so without explicit State consent (*KlimaSeniorinnen*, para. 448).[14]

Who are the rights-holders?

The recognition of rights for future generations[15] continues to divide scholars.[16] While courts are increasingly recognizing the importance of intergenerational burden-sharing,[17] the question of how to frame and operationalize actual human rights entitlements for future generations without undermining attention for current impacts and future inequalities remains contentious. The ICJ did not engage with these debates, because it did not talk about the rights of future generations as rights. Instead, it understood them as part of an overarching principle of intergenerational equity (para. 156). The ICJ declared that "intergenerational equity is a manifestation of equity in the general sense," making it a general interpretative principle that does not give rise to new rights or obligations, but must nonetheless shape States' policies (para. 157).

This stands in sharp contrast to the approach of the IACtHR, which leveraged its own case-law[18] and the 2023 Maastricht Principles to recognize that the human right to a healthy environment not only guarantees a right to climate protection, but also contains a collective dimension that is owed to both present and future generations (para. 272). This in turn contributed to the IACtHR's recognition of nature as a subject of rights,[19] its foregrounding of sustainable development, and its acknowledgment of the *jus cogens* status of the obligation to protect planetary habitability (para. 290).[20] At the same time, both courts avoided facing head-on the questions of who might represent future generations in court, or how to balance their interests against those of today's living generations.[21] However, both findings show a much-needed open-

ness to broadening the temporal dimension of climate obligations, beyond present-day burdens and impacts.

Whose vulnerability matters?

The ICJ's discussion of vulnerable groups, communities, and individuals particularly affected by climate change also lacks depth. The ICJ discusses the human rights obligations that are particularly relevant in the face of climate change in an abstract way, without detailed discussion of the nature of the impacts concerned or the measures required. The ICJ also fails to discuss intersectionality, poverty, cultural heritage, or race, and its treatment of Indigenous rights is vestigial at best. The separate opinion of Judge Charlesworth, who argued that "States have a particular obligation to protect the human rights of vulnerable groups" – which requires "close attention to the potentially discriminatory effects of measures taken to respond to climate change" – stands in sharp contrast to the opinion's foreshortened engagement with the equity implications of climate change on the sub-national level.[22]

This terseness is accentuated when compared to the IACtHR, which dedicated extensive attention to climate-related vulnerabilities in its own climate opinion. The IACtHR not only delved deeply into the inequalities of climate change, including global, regional, and sub-national inequalities, but it also engaged substantively with the need for a gender-based perspective,[23] access to justice, safeguards for persons living in poverty and/or displaced by climate change,[24] protection of environmental human rights defenders, recognition of Indigenous and traditional knowledge, and the need for a fair transition that does not jettison participation, property, land, labour, or non-discrimination rights. Overall, the difference in these approaches reveals something crucial about the underlying opinions: while the ICJ understands inequality (among States,

and to a lesser degree among generations and individuals) as an interpretative consideration, the IACtHR's understanding is transformative, substantive, and "a key factor in understanding the climate crisis" (para. 63).

What kinds of obligations do States have?

Both the ICJ and the IACtHR – like ITLOS and the ECtHR – have recognized that States are under an obligation of due diligence as concerns climate change. While the ICJ's standard of due diligence is "stringent" (para. 246), the IACtHR's is "enhanced" (para. 233). In this regard, the two courts diverge not so much in the nature of the standard applied, but in the level of specification that it is given. Both courts apply the precautionary principle and require mitigation and adaptation, cooperation, control over corporate actors, and environmental impact assessments, but the IACtHR also disaggregates positive, negative, and procedural obligations and foregrounds information, democratic participation, and procedural rights.

Here, too, the brevity of the ICJ's engagement with human rights obligations reveals something about the nature of the proceedings concerned. The ICJ was not primarily focused on individuals or even on collectives at the subnational level. Instead, it leaves the clarification of their rights to specialized treaty bodies, inviting these bodies to exercise their mandate without usurping their role. The ICJ's abridged engagement with human rights becomes understandable if interpreted in light of the fact that it is not a human rights treaty body, but a court of general jurisdiction in a system comprising several specialized human rights bodies. Its core contribution, then, lies in legitimizing rights-based engagement by these specialized bodies, and opening the door for their further engagement.

Can human rights obligations apply extraterritorially?

Like its consideration of the content of States' human rights obligations, the ICJ's treatment of these obligations' territorial scope is also abstract. This, again, seems to leave the details of interpreting the relevant instruments – and their jurisdictional clauses – to the bodies tasked with this work: the UN human rights bodies. Here, the Court's response may also be interpreted in another way: as an attempt to leave room for diverging approaches to extraterritorial climate obligations by human rights courts. In this regard, it can be noted that while the ECtHR has rejected the idea of an impact-based approach to extraterritorial jurisdiction,[25] the IACtHR has accepted it (paras. 229 and 277 of its 2025 opinion, as well as its 2017 opinion on the environment[26]).

What right to reparation?

As concerns reparations obligations for breaches of human rights law, the ICJ acknowledged at least the possibility of such obligations (paras. 433, 449). Still, as Judge Sebutinde noted in her separate opinion, the Court did not clarify the standing of individuals or collectives to bring claims concerning the legal responsibility of States, arguing instead that this depends on the underlying (human rights) treaties.[27]

By contrast, the IACtHR's reparations findings – while succinct for a court known for creative, hands-on approaches to remedies[28] – require the creation of effective administrative and judicial mechanisms tailored to climate-related harms, measures to protect and restore nature, medical care for climate-related illness, compensation, and guarantees of non-repetition, including preventative measures and monitoring (para. 558). Together with its findings on cooperation, including financial and economic aid to least-

developed countries, the IACtHR opinion sets the tone for the array of reparations claims that will likely be contemplated by forthcoming waves of rights-based climate litigation. However, notably, the IACtHR also stopped short of what climate litigants in some domestic proceedings have sought: a judicial indication of clear reduction targets (para. 332).

Conclusion

There are many reasons to celebrate the ICJ's climate advisory opinion. However, with climate litigation's "turn to rights" now in full swing,[29] its value lies not *per se* in its innovations. Instead, the ICJ's engagement with human rights obligations signals a focus on inter-state dynamics and an effort to leave room for dedicated human rights treaty bodies. Its major contribution lies in legitimizing the rights-based approach to climate change taken by these bodies, creating space that they can flesh out of their own accord. In an age of backlash against climate rulings,[30] consolidating the recognition that human rights and the environment are deeply intertwined, and that human rights obligations must shape States' responses to climate change, is an achievement worth celebrating in itself.

The author was involved in the ICJ proceedings on behalf of the International Union for Conservation of Nature.

References

1. IACtHR, *Climate Emergency and Human Rights*, Advisory Opinion OC-32/25 of 29 May 2025, requested by the Republic of Chile and the Republic of Colombia.
2. ICJ, *Obligations of States in respect of Climate Change*, Advisory Opinion of 23 July 2025.
3. On the right to a healthy environment, see the contribution by David R. Boyd in this volume.
4. ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996.
5. See the contribution by Lena Riemer in this volume.
6. See the contribution by David R. Boyd in this volume.
7. UN General Assembly, Resolution 76/300, *The human right to a clean, healthy and sustainable environment*, 28 July 2022, UN Doc. A/RES/76/300.
8. ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment of 19 December 2005.
9. ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004.
10. ICJ, *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Advisory Opinion of 19 July 2024.
11. See the press release by the United Nations Human Rights Office of the High Commissioner, *UN experts welcome recognition from International Court of Justice that all States must protect the climate system*, 28 July 2025, available at: https://www.ohchr.org/en/press-releases/2025/07/un-experts-welcome-recognition-international-court-justice-all-states-must.
12. ICJ, *Obligations of States in respect of Climate Change*, Declaration of Judge Tladi, 23 July 2025.
13. ICJ, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion of 25 February 2019.
14. ECtHR, *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, Appl. no. 53600/20, Judgment of 9 April 2024.
15. Aoife Nolan, 'Placing future generations at the heart of Inter-American human rights law?' *EJIL:Talk* (21 July 2025), https://www.ejiltalk.org/placing-future-generations-at-the-heart-of-inter-american-human-rights-law/.
16. Stephen Humphreys, 'Against Future Generations' (2022) 4:33 *European Journal of International Law* 1061–1092.
17. ECtHR, *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, Appl. no. 53600/20, Judgment of 9 April 2024.

18. IACtHR, *Inhabitants of La Oroya v. Peru*, Judgment of 27 November 2023 (Preliminary Objections, Merits, Reparations and Costs).
19. Ecab Amor Vázquez and Theresa Amor-Jürgenssen, 'The Bloom of Nature's Rights: On the IACtHR's Recognition of Nature's Legal Personality in AO-32/25' *Verfassungsblog* (18 July 2025), https://verfassungsblog.de/the-bloom-of-natures-rights/.
20. Markus Gehring, 'Jus Cogens and the Climate Crisis: The Inter-American Court's Landmark Climate Emergency Advisory Opinion and its Jus Cogens Ruling' *Verfassungsblog* (16 July 2025), https://verfassungsblog.de/jus-cogens-and-the-climate-crisis/.
21. Aoife Nolan, 'Placing future generations at the heart of Inter-American human rights law?' *EJIL:Talk* (21 July 2025), https://www.ejiltalk.org/placing-future-generations-at-the-heart-of-inter-american-human-rights-law/.
22. ICJ, *Obligations of States in respect of Climate Change*, Separate Opinion of Judge Charlesworth, 23 July 2025.
23. Maria Antonia Tigre, Dina Lupin, and Natalia Urzola, 'A Nod, Not a Leap: Gender and Climate in the IACtHR's AO-32/25' *Climate Law Blog* (17 July 2025), https://blogs.law.columbia.edu/climatechange/2025/07/17/a-nod-not-a-leap-gender-and-climate-in-the-iacthrs-ao-32-25/.
24. Lena Riemer and Luca Scheid, 'A Differentiated Path Forward: The Inter-American Court's Advisory Opinion on Climate Change and Human Mobility Rights' *Verfassungsblog* (10 July 2025), https://verfassungsblog.de/inter-american-courts-advisory-opinion-on-climate-change-and-human-mobility-rights/.
25. ECtHR, *Duarte Agostinho and Others v. Portugal and 32 Others*, Appl. no. 39371/20, Decision of 9 April 2024.
26. IACtHR, *The Environment and Human Rights*, Advisory Opinion OC-23/17 of 15 November 2017, requested by the Republic of Colombia.
27. ICJ, *Obligations of States in respect of Climate Change*, Separate Opinion of Vice-President Sebutinde, 23 July 2025.
28. Juan Auz, '13 - Climate Crisis and the Testing of International Human Rights Remedies: Forecasting the Inter-American Court of Human Rights' in: The Centre for Studies and Research in International Law and International Relations Online, (Brill | Nijhoff, 2023).
29. Jacqueline Peel and Hari M. Osofsky, 'A Rights Turn in Climate Change Litigation?' (2017) 1:7 *Transnational Environmental Law* 37–67.
30. Hannah Leoni Stahl, Aylin Yildiz Noorda, and Elizabeth Hicks, 'Will the Swiss Grandmas Travel the World? Early Reflections on the "Strasbourg Effect" of the KlimaSeniorinnen Ruling' *Völkerrechtsblog* (12 May 2025), https://voelkerrechtsblog.org/will-the-swiss-grandmas-travel-the-world/.

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A Panoply of Consequences?

Remedies and Reparations in the ICJ's Climate Opinion

The International Court of Justice (ICJ)'s recent advisory opinion on climate change represents a pivotal moment in the evolution of international climate law.[1] By affirming that States can incur legal responsibility for failing to reduce greenhouse gas (GHG) emissions, the ICJ brought long-standing principles of State responsibility into sharper focus within the climate context. Among the opinion's most significant – but underexplored – aspects is its treatment of reparations and remedies. This chapter unpacks the legal consequences outlined by the ICJ, examining what the opinion says and doesn't say about how climate-related harm should be remedied. At the heart of this analysis lies a central question: can the affirmation of legal responsibility without clear guidance on reparation design meaningfully advance climate justice? Similarly to our analysis of how the IACtHR dealt with reparations,[2] the ICJ touched on essential parts, but could have gone further.

The affirmation of state responsibility

A key breakthrough in the ICJ's opinion is its affirmation that States may bear international responsibility for failing to control and reduce GHG emissions.[3] This outcome reflects the positions advanced by several States.[4] According to customary law international law, as codified in the International Law Commission (ILC) Draft Articles, "Every internationally wrongful act of a State entails the international responsibility of that State" (Art. 1). Common objections to assigning responsibility for climate-related harms in climate litigation-including by several States' arguments in the proceedings – relate to attribution, breach of obligation (Art. 2), and causation.[5]

The ICJ laid strong foundations for establishing State responsibility. On attribution, it confirmed that States' individual contributions to global GHG emissions, past and present, are scientifically traceable (para. 429) and that international law can address harm involving multiple responsible and injured parties (para. 430). It dismissed the *Monetary Gold* argument,[6] affirming that each State's responsibility can be individually invoked (para. 431), and clarified that States are accountable for the conduct of private business actors (para. 428).

On breach, the ICJ emphasized that both treaty and customary law obligations – especially under the UNFCCC and the Paris Agreement – are binding. It affirmed that Article 4 of the Paris Agreement imposes obligations on all States (para. 234) and that the content of a State's nationally determined contribution (NDC) must reflect progression and "highest possible ambition" (paras. 240-242). States must act with due diligence, and failure to regulate emissions, including through fossil fuel licensing or subsidies, may constitute a wrongful act (paras. 245, 427). Finally, the ICJ held that the existing legal standard of causation applies in climate contexts, requiring a "sufficiently direct and certain causal nexus" between the wrongful act and the injury (para. 436). While the ICJ did not specify a test for causation, it rejected the argument that climate complexity precludes responsibility (para. 438).

Erga omnes obligations and collective enforcement

Unlike the Inter-American Court of Human Rights, which emphasized the *jus cogens* nature of certain environmental norms in its advisory opinion, the ICJ did not address *jus cogens* directly.[7] Instead, it clarified the *erga omnes* character of specific obligations related to climate change – namely, obligations owed to the inter-

national community as a whole. Building on its prior case law, the ICJ affirmed that customary international law duties to protect global commons, such as the climate system, are obligations *erga omnes*. In particular, the duty to prevent significant transboundary harm falls within this category (para. 440). By contrast, obligations under the UNFCCC and the Paris Agreement are *erga omnes partes* – owed only among State Parties to those treaties (para. 440).

This distinction has important implications. *Erga omnes* obligations allow any State – not just those directly harmed – to invoke responsibility for breaches, though they cannot seek reparations for themselves unless they are harmed directly (para. 433). This reinforces a collective approach to climate accountability, rooted in shared global interests rather than bilateral relations. While not unprecedented, the ICJ's articulation lends authoritative weight to a view long advanced in doctrine: that key climate obligations reflect common concerns and may be enforced collectively.

By affirming the *erga omnes* nature of customary environmental duties, the ICJ helps ground climate-related obligations within the framework of international legal responsibility, supporting broader efforts to hold States accountable beyond direct harm. Its findings (paras.439-443) contribute to the evolving architecture of international climate law by recognizing the legitimacy of universal standing and collective enforcement in appropriate circumstances.

The "panoply of legal consequences"

In addressing remedies for breaches of climate-related obligations, the ICJ anchored its analysis in the established framework of State responsibility, confirming that violations – such as failures to

regulate GHG emissions – may trigger the full range of legal consequences (or, as the ICJ puts it, a "panoply of legal consequences") under customary international law (para. 445). While this is doctrinally orthodox, the ICJ's treatment is notable for explicitly extending these consequences to the climate context without narrowing their scope.

The ICJ's framework underscores three central elements: (i) cessation and guarantees of non-repetition, (ii) continued performance of obligations, and (iii) full reparation. Importantly, a breach does not extinguish the underlying duty; States remain bound to fulfil their climate commitments. This means that even after a finding of non-compliance – e.g., under Article 4 of the Paris Agreement – States would still be obliged to revise NDCs and pursue mitigation domestically (para. 447). Cessation may also require repeal of laws or permits enabling the wrongful act, while guarantees of non-repetition could entail institutional or regulatory reforms (para. 448).

Reparation – whether restitution, compensation, or satisfaction – remains available but raises specific challenges in the climate context. Restitution, though ideal in principle, is often unfeasible for large-scale and long-term environmental harm, making it more relevant to localized damage than to diffuse climate impacts (para. 451). Compensation, recognised as applicable to environmental damage in *Certain Activities Carried Out by Nicaragua in the Border Area*,[8] faces evidentiary and methodological hurdles when applied to climate harm. The ICJ's acknowledgment that equitable considerations and aggregate estimates may be used where precise quantification is impossible (paras. 452-454) signals a pragmatic flexibility that could prove critical for future claims.

Satisfaction – ranging from formal apologies to judicial declarations of wrongfulness – may appear symbolic, yet can carry

significant normative weight. In climate disputes, such measures could advance recognition of historical loss and damage, affirm shared responsibilities, and contribute to rebuilding trust with disproportionately affected communities (para. 455). While the ICJ stopped short of operationalizing these remedies, its articulation leaves the door open for creative adaptation of traditional principles to the distinctive realities of climate litigation.

Looking ahead, the ICJ's framing of remedies could have tangible ripple effects across multiple fora. By explicitly confirming that the "panoply" of consequences under State responsibility applies to climate breaches, the ICJ equips domestic, regional, and international adjudicators with a doctrinally secure basis for ordering both forward-looking measures (e.g., cessation, guarantees of non-repetition, ongoing compliance) and backward-looking relief (e.g., reparation). While operational challenges – especially in quantifying compensation – will persist, the ICJ's openness to equitable and aggregate approaches lowers the evidentiary bar that has often stalled climate claims. This interpretive space could embolden litigants to test climate-related remedies not only before international bodies but also in domestic courts applying international law or constitutional environmental provisions, broadening the practical pathways for accountability.

Individual opinions: Calls for a more ambitious vision

Sharing the view that the opinion could have gone further on this topic, individual judges used their separate opinions to push beyond the majority's cautious approach to remedies. Several states have called for specific remedies and reparations to be outlined in the opinion. For example, some States advocated for compensation to include a variety of forms beyond monetary

damages, such as transfers of technology, capacity-building, and debt-relief.[9] Other states had stressed the link between compensation and loss and damage[10], as well as the need to compensate not only tangible financial losses, but also intangible losses associated with, for example, emotional pain and suffering.[11] Vanuatu also stressed that restitution should include, among other things, non-monetary redress for the human mobility, including displacement and migration, caused by the adverse effects of climate change (para. 582).

Both Vice-President Sebutinde[12] and Judge Bhandari[13] urged a more expansive and concrete articulation of reparations for climate-related harm, signalling pathways the ICJ left underdeveloped. Vice-President Sebutinde underscored the missed opportunity to detail specific remedial measures – ranging from monetary compensation to reforestation, biodiversity recovery, coastal protection, debt relief, technology transfer, and infrastructure rebuilding – while situating reparations within the principle of common but differentiated responsibilities and respective capabilities (CBDR-RC) (para. 12).

Judge Bhandari pressed for a fuller account of all forms of reparation under international law, including cessation, restitution, compensation, and satisfaction. His proposals included restoration of carbon sinks, habitat rehabilitation, return of lost territory, and protection of Indigenous peoples' land rights (para. 6). In cases of sea-level rise, he argued for the continued recognition of maritime entitlements and sovereign rights, and for restitution to extend to climate-displaced communities (para. 7).[14]

On compensation, Bhandari highlighted the evidentiary difficulties inherent in climate harm, advocating for global lump-sum awards based on equitable considerations and suggesting that the General Assembly establish claims commissions under UN auspices

(para. 8). For satisfaction, he envisioned symbolic and institutional measures – from formal recognition of States and communities as climate victims to memorials, tributes, and trust funds – designed to address non-pecuniary loss and affirm shared responsibility.

Taken together, these opinions frame a more assertive vision for climate reparations – one that integrates material restoration with symbolic recognition, and that treats equity, vulnerability, and differentiated responsibilities as core legal considerations rather than peripheral political ones. While non-binding, they provide a normative blueprint that litigants and policymakers could invoke to push courts and arbitral bodies toward more imaginative and victim-centred remedies. If embraced, such approaches could broaden the remedial repertoire available in both domestic and international proceedings, moving climate adjudication closer to a form of justice that responds to the scale, complexity, and human dimensions of climate harm.

Conclusion

The ICJ's advisory opinion cements that climate obligations are binding and breaches can trigger reparations, but its abstract treatment of remedies leaves much of climate justice's practical architecture undefined. By avoiding the hard questions – how to address cumulative and intergenerational harm, private-sector responsibility, or equitable allocation of burdens – the Court risks leaving vulnerable communities without a clear path to redress. The separate opinions point toward a more concrete and justice-oriented model, combining material restoration with symbolic recognition and institutional innovation. Whether this potential is realized will depend on how decisively States, domestic courts, regional human rights bodies, and arbitral panels translate these principles into

practice. As some observers have already noted, the decision may mark the start of a "new era of climate reparations"[15] – but only if it is seized as an operational blueprint rather than allowed to remain an aspirational statement.

References

1. ICJ, *Obligations of States in respect of Climate Change*, Advisory Opinion of 23 July 2025.
2. Armando Rocha, Maria Antonia Tigre, and Miriam Cohen, 'Addressing Accountability in the IACtHR's Advisory Opinion: The Question of Reparation and Loss and Damage ' *Verfassungsblog* (21 July 2025), https://verfassungsblog.de/reparation-and-loss-and-damage-iacthr-climate-advisory-opinion/.
3. Margaretha Wewerinke-Singh and Jorge Viñuales, 'The Great Reset: The ICJ Reframes the Conduct Responsible for Climate Change Through the Prism of Internationally Wrongful Acts' EJIL:Talk (4 August 2025), https://www.ejiltalk.org/the-great-reset-the-icj-reframes-the-conduct-responsible-forclimate-change-through-the-prism-of-internationally-wrongful-acts/; Federica Paddeu and Miles Jackson, 'State Responsibility in the ICJ's Advisory Opinion on Climate Change' EJIL:Talk (25 July 2025), https://www.ejiltalk.org/state-responsibility-in-the-icjs-advisory-opinion-on-climate-change/.
4. See, e.g., the submissions by Vanuatu (para. 197), Colombia (para. 3.10), Saint Lucia (paras. 66–67), and the Melanesian Spearhead Group (para. 298).
5. See, e.g., the submissions by Australia (paras. 6.19-6.31); China (para. 138); Kuwait (paras. 108-124); Russia (para. 16); Saudi Arabia (para. 6.7); United Kingdom (paras. 125-127); USA (para. 5.10).
6. Raelee Toh, 'The meaning of 'very subject-matter of the dispute' in the Monetary Gold rule of the International Court of Justice's jurisprudence' (2025) 16:2 *Journal of International Dispute Settlement*.
7. Markus Gehring, 'Jus Cogens and the Climate Crisis: The Inter-American Court's Landmark Climate Emergency Advisory Opinion and its Jus Cogens Ruling' *Verfassungsblog* (16 July 2025), https://verfassungsblog.de/jus-cogens-and-the-climate-crisis/.
8. ICJ, *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Compensation Owed by the Republic of Nicaragua to the Republic of Costa Rica*, Judgment of 2 February 2018.
9. See, e.g., the submissions by Antigua and Barbuda (para. 599), the African Union (para. 298), Brazil (para. 96), Colombia (para. 4.15), and Vanuatu (para. 597).
10. See the submission by India, para. 90.
11. See, e.g., the submission by Federated States of Micronesia, para. 130.
12. ICJ, *Obligations of States in respect of Climate Change*, Separate Opinion of Vice-President Sebutinde, 23 July 2025.
13. ICJ, *Obligations of States in respect of Climate Change*, Separate Opinion of Judge Bhandari, 23 July 2025.

14. On displacement and climate change see the contribution by Lena Riemer to this volume.
15. Harj Narulla, 'The ICJ's ruling means Australia and other major polluters face a new era of climate reparations' *The Guardian* (24 July 2025), https://www.theguardian.com/commentisfree/2025/jul/24/the-icjs-ruling-means-australia-and-other-major-polluters-face-a-new-era-of-climate-reparations.

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A Single Paragraph's Promise

The ICJ's Advisory Opinion on Climate Change and the Understated Question of Human Displacement

Within a single month, two groundbreaking advisory opinions on climate change have been issued, fundamentally shaking the field of international environmental and human rights law: the Inter-American Court of Human Rights (IACtHR) Advisory Opinion OC-32/25 on the "Climate Emergency and Human Rights"[1] and the International Court of Justice's (ICJ's) Advisory Opinion on "Obligations of States in Respect of Climate Change"[2]. Many commentators have hailed these decisions as "historic"[3] and "landmark,"[4] characterizing them as transformative moments in global climate jurisprudence. Legal scholars and practitioners have quickly engaged with various dimensions of the ICJ's advisory opinion, dissecting issues ranging from the relationship between treaty and customary law[5] to the right to a clean, healthy and sustainable environment.[6] However, another topic– one that strikes at the heart of climate change's impact on the most vulnerable populations – has unfortunately garnered little attention: climate-induced displacement. The ICJ dedicates just one single, 105-word paragraph to this pressing issue (para. 378).

Still, this one seemingly modest paragraph may have profound implications for millions of people fleeing across borders due to climate change, potentially reshaping the legal landscape for those seeking protection and at least offering minimum guarantees against their removal to a place where they would be at risk. At the same time, however, there is much to be said about what the ICJ conspicuously fails to address or addresses with too much caution, a reticence that has drawn criticism in several separate opinions and declarations, most prominently from Judge Aurescu in his separate opinion (paras. 25-26).[7]

Without diminishing the broader significance of the ICJ's decision, this chapter examines the ICJ's treatment of displacement within its broader context, including the Human Rights Commit-

tee's *Teitiota* decision that the Court prominently cited.[8] It explores what the opinion could have been, particularly compared to the Inter-American Court of Human Rights' far more comprehensive Advisory Opinion OC-32/25, delivered just one month earlier.[9] The contrast between these advisory opinions reveals different judicial philosophies and divergent approaches to one of the twenty-first century's most pressing humanitarian challenges.

What the ICJ said: Recognizing climate displacement under non-refoulement

In its single paragraph addressing climate change-induced displacement (para. 378), the ICJ emphasized that environmental conditions caused by climate change may endanger lives and force individuals to seek refuge in other countries or prevent their return home. The ICJ held that, under the principle of *non-refoulement*, states have an obligation not to return individuals to situations where there are substantial grounds to believe there is a real risk of irreparable harm to their right to life, as protected by Article 6 of the International Covenant on Civil and Political Rights. In doing so, the ICJ referenced the Human Rights Committee's (HRC) landmark 2013 decision in *Teitiota v. New Zealand* – the key case affirming that climate change may put people's lives at risk or expose them to cruel, inhuman or degrading treatment, thus triggering states' obligations not to return them.

The ICJ's explicit recognition of the principle of *non-refoulement* in the context of climate change-induced displacement is therefore both notable and important. Its reliance on *Teitiota v. New Zealand*, a widely discussed and celebrated decision, signals an emerging convergence between international judicial bodies on the

legal consequences of climate-driven harm. As legal scholars Michelle Foster and Jane McAdam have emphasized, *Teitiota* is "significant for the signal it sends to lawyers, decision-makers and policymakers considering how to respond to displacement in the context of climate change."[10] By adopting the HRC's approach, the ICJ affirmed that climate change can create conditions giving rise to non-return obligations under international law – a finding of great relevance for those displaced due to climate change directly or indirectly.

This acknowledgment, while limited in scope compared to providing refugee protection, offers a meaningful entry point for the strengthening of legal protections for those displaced by climate impacts. It also reinforces growing trends in domestic case law, where courts have increasingly relied on this approach to address climate-related protection claims.[11] The ICJ's reference, therefore, should not be understated. It ensures that people facing life-threatening climate conditions are at least not returned to dangerous conditions in the sense of *non-refoulement*.

The ICJ's articulation of *non-refoulement* obligations is also significant because it helps resolve long-standing ambiguity surrounding the threshold for protection in climate-related displacement cases – specifically, whether the harm must be *imminent* to trigger such obligations. The ICJ found that states must not return individuals where there are "substantial grounds for believing that there is a real risk of irreparable harm" to the right to life under Article 6 of the International Covenant on Civil and Political Rights. This phrasing, closely mirroring the HRC's language in *Teitiota* (para. 4.5), avoids reference to the imminence of the harm, which has generated confusion in the legal community.

As Foster and McAdam emphasize, the correct legal standard in human rights and refugee law is not imminence, but rather a *real*

risk or *foreseeable harm*.[12] By adopting the real-risk standard without reference to imminence, the ICJ reinforces the forward-looking, risk-based logic underpinning international protection. This clarification is crucial: Misunderstanding the threshold as requiring imminence has already led to erroneous interpretations in legal manuals and decisions, potentially narrowing the scope for protection and dampening strategic litigation. The ICJ's more precise framing thus helps to correct the record and offers clearer guidance for future decision-making.

What the ICJ didn't say: Missed opportunities for comprehensive protection

Climate-induced displacement was explicitly recognized in the General Assembly resolution requesting the advisory opinion (Resolution 77/276, preambular para. 8), which noted that climate change effects are "leading to displacement of affected persons." Despite this, the ICJ devoted little attention to displacement in its advisory opinion. This judicial neglect attracted pointed criticism from Judge Charlesworth on displacement and disability vulnerability (para. 22),[13] and Judge Aurescu on the lack of detail regarding state obligations under the *non-refoulement* principle in climate contexts (paras. 25-26).[14]

As Judge Aurescu points out in his separate opinion, the ICJ's treatment of *non-refoulement* is incomplete, particularly in the context of sea-level rise and the eventual uninhabitability of entire state territories. Judge Aurescu stresses the important point that *non-refoulement* entails not just passive obligations to refrain from return but also positive obligations under international human rights law. These include duties to admit persons at risk, to conduct

individualized risk assessments, and to provide temporary residence permits, as well as to ensure protection from arbitrary detention and non-state violence that could result in indirect *refoulement*. By failing to engage with these topics, the ICJ missed an important opportunity to offer comprehensive legal guidance on how states must respond to displacement driven by climate change, not only in abstract but very concrete terms, especially for vulnerable populations.

The ICJ could have drawn from the more advanced and concrete reasoning of the IACtHR in Advisory Opinion OC-32/23. There, in a development of unprecedented importance, the IACtHR became the first human rights court to explicitly require states to establish effective legal and administrative mechanisms for the protection of cross-border displaced persons due to climate change (para. 433).[15] The ICJ, which does reference other regional human rights case law in its opinion, including OC-32/25 (see para. 385), could and arguably should have relied on or at least cited the IACtHR's findings on climate displacement. Notably, the IACtHR adopted a differentiated and temporally sensitive approach to climate displacement, acknowledging the need for both short-term relief measures, such as humanitarian visas and temporary stays in response to sudden-onset disasters, and longer-term protection mechanisms (para. 433). This nuanced articulation of state obligations offers precisely the kind of legal clarity and practical guidance that the ICJ's opinion lacks.

The ICJ's failure to adopt a differentiated approach to vulnerabilities in climate-related displacement is particularly problematic given the clear precedents in international human rights law and the growing consensus on the need to address disproportionate vulnerabilities. The omission is striking considering the availability of authoritative sources that could have guided a more nuanced

assessment. For instance, the Committee on the Rights of the Child's General Comment No. 26 (2023) explicitly recognizes that environmental degradation and displacement place certain groups of children, such as those living in poverty or climate-vulnerable areas, at heightened risk of violence, exploitation, and rights violations. The Committee thus calls for a targeted and rights-based approach that accounts for intersecting vulnerabilities (para. 35). Given the ICJ's broader reliance on international human rights instruments, it is regrettable that it chose to stop at the *Teitiota* decision of the HRC and not also engage with more recent and progressive normative developments that could have grounded its opinion in a more inclusive and protective legal framework.

How the ICJ said it: Cautious language in the face of scientific certainty

The language used by the ICJ in its advisory opinion on the nexus between climate change and displacement is notably cautious and more reserved than both the General Assembly resolution that triggered the opinion and the scientific consensus reflected in Intergovernmental Panel on Climate Change (IPCC) findings, which serve as the basis for much of the Court's reasoning. The ICJ stated that conditions "likely to endanger the lives of individuals *may lead* them to seek safety in another country or prevent them from returning to their own" (emphasis added). This could be read to mean that the ICJ views climate change-induced displacement as a potential outcome in the future rather than the present and ongoing reality it really is.

The ICJ should have used unequivocal language acknowledging that, while climate change already triggers displacement in certain

regions, it is not always the sole or direct cause of such displacement. Indeed, General Assembly Resolution 77/276 explicitly notes that least developed countries and small island developing states are already experiencing displacement due to a broad range of climate-related impacts, including drought, sea level rise, and coastal erosion (preamble). The IPCC in its 2023 Synthesis Report is even more direct, stating with *high confidence* that climate and weather extremes are increasingly driving displacement across multiple regions,[16] and highlighting the disproportionate impact on small island states. It is somewhat surprising, then, that the ICJ, which in many parts of its opinion extensively cites current scientific evidence and IPCC reports, adopts such cautious language in this context. This rhetorical restraint contrasts with the more assertive and empirically grounded language found in the sources it otherwise relies upon.

Conclusion: A foundation built, opportunities missed

The ICJ's treatment of climate-induced displacement, though confined to a single paragraph, represents both meaningful progress and missed opportunity in equal measure. The Court's explicit recognition of *non-refoulement* obligations in climate contexts and its alignment with the HRC's *Teitiota* jurisprudence represent a significant advancement in legal protection frameworks for climate-displaced populations. By rejecting imminence thresholds and reinforcing risk-based approaches to protection, the ICJ resolves a critical ambiguity that has long hindered both protection outcomes and strategic litigation efforts. This judicial convergence signals growing international recognition of climate displacement realities and establishes essential groundwork for

more legal responses to be implemented on the regional and domestic level via political processes.

However, the ICJ's achievements must be measured against the conspicuous limitations of its opinion. The narrow focus on *non-refoulement* leaves vast dimensions of climate-related mobility unexplored, including internal displacement, voluntary migration, planned relocation, and crucially, involuntary immobility, where populations cannot move despite facing existential risks. Moreover, the ICJ's failure to adopt the differentiated vulnerability analysis evident in contemporary human rights jurisprudence, its cautious language that downplays ongoing displacement realities, and its failure to engage with the Inter-American Court's far more comprehensive treatment in Advisory Opinion OC-32/25 all represent significant shortcomings.

References

1. IACtHR, *Climate Emergency and Human Rights*, Advisory Opinion OC-32/25 of 29 May 2025, requested by the Republic of Chile and the Republic of Colombia.
2. ICJ, *Obligations of States in respect of Climate Change*, Advisory Opinion of 23 July 2025.
3. See, for instance, the press release by the International Union for Conservation of Nature, *IUCN welcomes International Court of Justice's historic climate change Advisory Opinion*, 23 July 2025, available at: https://iucn.org/press-release/202507/iucn-welcomes-international-court-justices-historic-climate-change-advisory.
4. See OHCHR, *UN experts hail landmark Inter-American Court opinion on States' extensive duties to protect the climate*, 11 July 2025, available at: https://www.ohchr.org/en/press-releases/2025/07/un-experts-hail-landmark-inter-american-court-opinion-states-extensive.
5. Julian Arato and Justina Uriburu, 'Treaty and Custom in the ICJ's Climate Change Opinion' *EJIL:Talk* (24 July 2025), https://www.ejiltalk.org/treaty-and-custom-in-the-icjs-climate-change-opinion/.
6. University of Cambridge, *The 'world court' and climate change: A Cambridge professor and counsel team member for Vanuatu gives his initial views on the landmark ICJ Advisory Opinion.*, 24 July 2025, available at: https://www.cam.ac.uk/stories/icj-climate-opinion-cambridge-expert.
7. ICJ, *Obligations of States in respect of Climate Change*, Separate Opinion of Judge Aurescu, 23 July 2025.
8. Human Rights Committee, *Teitiota v. New Zealand*, Views adopted under article 5(4) of the Optional Protocol, Communication No. 2728/2016, 24 October 2019, UN Doc. CCPR/C/127/D/2728/2016.
9. Lena Riemer and Luca Scheid, 'A Differentiated Path Forward: The Inter-American Court's Advisory Opinion on Climate Change and Human Mobility Rights' *Verfassungsblog* (10 July 2025), https://verfassungsblog.de/inter-american-courts-advisory-opinion-on-climate-change-and-human-mobility-rights/.
10. Michelle Foster and Jane McAdam, 'Analysis of "Imminence" in International Protection Claims: Teitiota v New Zealand And Beyond' (2022) 4:71 International and Comparative Law Quarterly 975–82, p. 976.
11. Lena Riemer and Luca Scheid, 'Leading the Way: The IACtHR's Advisory Opinion on Human Rights and Climate Change' *Verfassungsblog* (18 January 2024), https://verfassungsblog.de/leading-the-way/.
12. Michelle Foster and Jane McAdam, 'Analysis of "Imminence" in International Protection Claims: Teitiota v New Zealand and Beyond' (2022) 4:71 *International and Comparative Law Quarterly* 975–82.

13. ICJ, *Obligations of States in respect of Climate Change*, Separate Opinion of Judge Charlesworth, 23 July 2025.

14. ICJ, *Obligations of States in respect of Climate Change*, Separate Opinion of Judge Aurescu, 23 July 2025.

15. Lena Riemer and Luca Scheid, 'A Differentiated Path Forward: The Inter-American Court's Advisory Opinion on Climate Change and Human Mobility Rights' *Verfassungsblog* (10 July 2025), https://verfassungsblog.de/inter-american-courts-advisory-opinion-on-climate-change-and-human-mobility-rights/.

16. Katherine Calvin et. al., IPCC, Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change [Core Writing Team, H. Lee and J. Romero (eds.)]. p. 51.

C. Oceans, Territory, and Statehood

Antoine De Spiegeleir, Armando Rocha

Sea-Level Rise Reaches The Hague

Findings in Relation to the Law of the Sea in the ICJ's Climate Change Advisory Opinion

The advisory opinion rendered by the International Court of Justice (ICJ) on 23 July 2025 marks a pivotal moment in the articulation of States' obligations concerning climate change. While based on broader rules and principles of international law, the opinion foregrounded the United Nations Convention on the Law of the Sea (UNCLOS) as a key legal framework relevant to defining States' climate obligations. As the ICJ itself stated, UNCLOS "forms part of the most directly relevant applicable law" (para. 124). Thus, far from peripheral, the law of the sea emerged as a primary site for interpreting and enforcing States' climate obligations under international law.

This post examines the most salient features of the ICJ's assessment of the law of the sea in the context of climate change, namely (i) the manner in which the ICJ dialogued with the International Tribunal on the Law of the Sea (ITLOS), which issued its own advisory opinion on climate change last year,[1] (ii) the findings of that opinion that were confirmed by the ICJ; (iii) the ICJ's finding on the stability of States' maritime baselines, and (iv) the ICJ's findings on the presumption of continued statehood in the context of sea level rise.

A two-way street from Hamburg to The Hague

The ICJ's opinion is evidence of a growing judicial dialogue between the ICJ and ITLOS, which strengthens a reading of UNCLOS as a source of States' obligations in the context of climate change. Such an alignment of views provides States with legal certainty and clarity regarding the sources and extent of their international obligations.

The dialogue between both courts was already starkly visible in ITLOS's 2021 judgment on preliminary objections in the *Maldives v*

Mauritius maritime boundary dispute.[2] Here, ITLOS directly engaged with the ICJ's *Chagos opinion* to affirm Mauritius' sovereignty over the Chagos archipelago. Remarkably, ITLOS emphasized the role of ICJ advisory opinions as a source of clarification and development of the existing law. As such, although they are formally non-binding, ITLOS acknowledged that the ICJ's advisory opinions carry legal weight equivalent to judgments, as the principal judicial organ of the United Nations with competence in matters of international law (paras. 203 and 246).

Similarly, the ICJ drew upon ITLOS's 2022 advisory opinion on climate change in several key passages of its own opinion on climate change, noting that it would "ascribe great weight to the interpretation adopted by the Tribunal" (para. 338). Thus, the ICJ did not look at the ITLOS opinion as peripheral commentary; rather, it integrated the reasoning of ITLOS into its own analysis, thereby affirming ITLOS's interpretive authority.

This growing trend of mutual borrowing[3] strengthens coherence across judicial bodies and reinforces the role of international courts in clarifying States' obligations in relation to climate change. It also paves the way for further legal action grounded in UNCLOS by small island states and other vulnerable actors.

Confirming the findings of ITLOS

The ICJ largely confirmed the key findings of ITLOS in its 2022 advisory opinion. In essence, it confirmed that greenhouse gas emissions fall within the definition of "pollution of the marine environment" under Article 1(1)(4) of UNCLOS, thereby activating the application of Part XII of the Convention (para. 340). The ICJ found that Article 194 of UNCLOS establishes an obligation to take all necessary measures to prevent, reduce, and control marine

pollution (para. 346). It further affirmed that this is an obligation of conduct, rather than of result, characterized by a stringent due diligence standard (paras. 347 and 349). The ICJ also reiterated that this obligation includes duties to cooperate and to carry out environmental impact assessments (paras. 350-353). Finally, it emphasized that in implementing both UNCLOS and climate change-related treaties, States must interpret and apply their obligations in a mutually supportive manner, taking into account the requirements under both legal regimes (para. 354).

Thou shalt not move! Sea level rise impact on baselines and maritime areas' outer limits

The ICJ took the opportunity in its advisory opinion to clarify some legal implications of sea level rise.[4] Being adopted in 1982, prior to scientific studies on climate change, UNCLOS is premised on the assumption of a stable global mean sea level. Unsurprisingly, no provision of UNCLOS contains any reference to sea level rise. The problem is that, under UNCLOS, maritime baselines are established along a State's coastlines and serve as a starting point for drawing the outer limits of its territorial sea, exclusive economic zone, continental shelf, and eventual archipelagic waters. If the coastline recedes as a result of sea level rise, the question arises whether these baselines and outer limits should also recede. A parallel question is whether certain geographic formations, such as islands, rocks, and low-tide elevations, need to be re-qualified as a result of sea level rise.

UNCLOS seems to be clear in setting the conditions for establishing states' maritime baselines and the outer limits of their maritime jurisdiction and implies their landward adjustment,

including definitions for islands, rocks, and low-tide elevations. These conditions and definitions may be clear, but they are not aligned with the interests of coastal States. As a result, a new rule has been emerging in recent years, based on State practice,[5] the works of the International Law Association (ILA) Committee on International Law and Sea Level Rise,[6] and the report of the International Law Commission (ILC) Study Group on Sea-Level Rise.[7] The ILC report, published earlier this year, noted a clear change in State practice (paras. 32, 36) and underscored that States are under "no obligation to update baselines, geographical coordinates or the outer limits of maritime zones to account for changes as a result of climate change-related sea-level rise" (para. 28). It suggested adopting an interpretation of UNCLOS "that allows for the preservation of baselines, the outer limits of maritime zones and associated entitlements notwithstanding changes to the coastline as a result of climate change-related sea-level rise" (para. 27).

In this context, the ICJ's opinion remarked that several States and groups of States argued during the proceedings in favor of the stability of baselines and outer limits (para. 355)[8]. The ICJ also took note of the works of the ILA Committee and the ILC Study Group and the existing State practice. All of this led it to conclude that States do not bear an obligation under UNCLOS "to update their charts or lists of geographical co-ordinates that show the baselines and outer limit lines of their maritime zones once they have been duly established in conformity with the Convention" (para. 361). This implies the stability of baselines and maritime areas' outer limits. And yet, somewhat surprisingly, the ICJ failed to say that explicitly.

Still, the ICJ's opinion paves the way for ITLOS or another court (including the ICJ itself) to carve out the rule on the stability of baselines and outer limits more explicitly in the future.

Thou shalt not disappear! A presumption of continued statehood of small island States

The same State practice and works of the ILA Committee and the ILC Study Group also point to an emerging presumption of continued statehood, despite the complete loss of a State's territory as a result of sea level rise. Such a rule is especially important for small island States, which do not contribute to global warming, but are uniquely affected by sea level rise. For these States, the ICJ's recognition offers a measure of legal stability and dignity, reinforcing the idea that sovereignty is not entirely contingent on geography. It affirms that the legal identity of a State can persist despite extreme environmental degradation, a point with profound implications for access to treaty rights, maritime entitlements, and participation in international institutions.

However, the tone and wording in the works of the ILA Committee and the ILC Study Group, as well as those used in the ICJ's advisory opinion, suggest this presumption is not yet fully developed. In fact, whilst the ICJ stated that, "once a State is established, the disappearance of one of its constituent elements *would not necessarily* entail the loss of its statehood" (para. 363, emphasis added, with a special highlight of the verb mode and the adverb used), it could only find an obligation of cooperation to take "appropriate measures to address the adverse effects of [sea level rise]" (para. 364). This latter obligation, moreover, was presented as being results-oriented, since States must "achiev[e] equitable solutions, taking into account the rights of affected States and those of their populations" (para. 365). Implied in the words of the ICJ is a very broad margin of discretion for States when implementing the

obligation. This lack of elaboration was expressly regretted in the declaration of Judge Tomka[9] and the separate opinion of Judge Aurescu, who argued for more detailed guidance on the criteria and mechanisms through which statehood continuity might be assessed.[10]

Still, the ICJ's caution is not without justification. Whilst the rules on the stability of baselines and maritime areas' outer limits are binary (i.e., baselines and outer limits either move or do not move), the obligations correlative to the presumption of continued statehood necessarily involve difficult trade-offs and a balancing of competing interests that belong to the political sphere. Nonetheless, the ICJ still highlighted that cooperation "is not a matter of choice for States but a legal obligation" (para. 364) and rendered an opinion that can be used in future pronouncements from ITLOS or the ICJ to clarify and develop these obligations correlative to the presumption of continued statehood.

Concluding remarks

The advisory opinion clearly demonstrates that the ICJ remains – or strives to remain – a meaningful and authoritative actor in the evolving law of the sea landscape. By engaging deeply with UNCLOS and related maritime issues, the ICJ reinforced its central role in clarifying states' rights and obligations in the face of climate change, signaling that the law of the sea continues to be a vital arena for international legal development.

More importantly, the ICJ's advisory opinion reinforces the idea that international law is not merely a passive object of study, but an active, participatory process of claim-making aimed at shaping new rules and stabilizing expectations. International law is never fully settled; the law of the sea, in particular, exemplifies a legal

regime that must evolve in response to changing conditions. By clarifying existing norms and recognizing the development of emerging ones, the ICJ has made the law of the sea more attuned to principles of fairness and better equipped to address the challenges posed by sea level rise.

References

1. ITLOS, *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*, Advisory Opinion of 21 May 2024.
2. ITLOS, *Dispute Concerning Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives)*, Judgment on Preliminary Objections of 28 January 2021, Case No. 28.
3. Maria Antonia Tigre and Armando Rocha, 'Competing Perspectives and Dialogue in Climate Change Advisory Opinions' (2023) 117 *AJIL Unbound* 287–91.
4. Armando Rocha and Manasa Venkatachalam, 'Validating Rules and Clarifying Obligations through Strategic Sea Level Rise Litigation' (2025) 19(3) Carbon & Climate Law Review 155-165.
5. See the declarations issued between 2021 and 2024, available at: https://forumsec.org/publications/declaration-preserving-maritime-zones-face-climate-change-related-sea-level-rise ; https://demaribus.net/wp-content/uploads/2023/02/japan-mofa_baselines_slr.pdf ; https://demaribus.net/wp-content/uploads/2022/09/fact-sheet_-roadmap-for-a-21st-century-u.s.-pacific-island-partnership-the-white-house.pdf ; https://solomons.gov.sb/inside-the-fiji-solomon-islands-maritime-boundary-agreement/ ; https://forumsec.org/sites/default/files/2024-05/2023%20Declaration%20on%20the%20Continuity%20of%20Statehood%20and%20the%20Protection%20of%20Persons.pdf?utm ; https://www.eeas.europa.eu/delegations/un-new-york/eu-statement-%E2%80%93-un-general-assembly-6th-committee-sea-level-rise-relation-international-law_en?s=63&utm ; https://www.aosis.org/aosis-leaders-declaration-on-sea-level-rise-and-statehood/ .
6. Available at: https://www.ila-hq.org/en/committees/international-law-and-sea-level-rise .
7. International Law Commission, *Final report of the Study Group on Sea-level Rise in Relation to International Law*, adopted at its seventy-sixth session (2025), in Report of the International Law Commission, UN Doc. A/80/10, annex I, Yearbook of the International Law Commission, 2025, vol. II, Part Two.
8. See, e.g., the written comments of the Pacific Islands Forum Secretariat, the written statement of the Bahamas, and the written statement of Australia.
9. ICJ, *Obligations of States in respect of Climate Change*, Declaration of Judge Tomka, 23 July 2025.
10. ICJ, *Obligations of States in respect of Climate Change*, Separate Opinion of Judge Aurescu, 23 July 2025.

Zana Syla, Avidan Kent

Statehood in the Climate Crisis

The ICJ's Climate Advisory Opinion and the Presumption of State Continuity

More than two years after the United Nations General Assembly (UNGA) adopted Resolution 77/276, the International Court of Justice (ICJ) issued its highly anticipated Advisory Opinion on the *Obligations of States in Respect of Climate Change* on 23 July 2025.[1] The ICJ was unanimous in its findings that states have obligations under international law to protect the climate system and other parts of the environment from human-caused greenhouse gas emissions and uphold the effective enjoyment of human rights in the climate context, with breaches by states of these obligations entailing an internationally wrongful act, triggering state responsibility (para. 457). Additionally, as also noted elsewhere, the opinion supplies the international legal community with material on the relationship between treaty and customary international law,[2] *lex specialis,* state responsibility,[3] aspects concerning maritime zones,[4] and statehood, among other things.

In this blog post, we zero in on the part of the opinion that concerns statehood. Specifically, we analyze the ICJ's restatement of the presumption of state continuity, examining both what the Court says and doesn't say, and what the implications could be. We also consider the individual opinions that discuss statehood and add some brief reflections on the applicability of Article 1 of the Montevideo Convention on the Rights and Duties of States (Montevideo Convention) and on State extinction. Our analysis is preliminary, and certainly much ink will be spilled on the ICJ's remarks going forward.

The ICJ's remarks on statehood

During the advisory proceedings, which featured a record-setting number of participants, thirty-three states and seven international organisations addressed in one way or another the topic of state-

hood. Many of these participants articulated, in varied ways, support for the continuity as States under international law of the small island nations that may become uninhabitable or be submerged due to the impacts of climate change, particularly sea level rise. Even with different States bringing up statehood in this context, it was not at all clear, as suggested elsewhere, whether the ICJ would weigh in on the matter.[5] The request made no mention of statehood, and the ICJ has generally been cautious when it comes to this topic, as evidenced by the 2010 Kosovo Advisory Opinion.[6] Seven direct references to statehood and three key paragraphs put these doubts to rest. The ICJ did comment on the issue of statehood, as did four judges in their individual opinions.

The ICJ's advisory opinion explicitly mentioned statehood in several places. In paragraph 110, the ICJ recalled that many participants in the proceedings noted concerns over sea level rise, which causes coasts to recede and, thus, may impact the outer boundaries of maritime zones or even threaten the very existence of small island and low-lying coastal states. In paragraph 355, the ICJ referred again to arguments in the proceedings "that existing baselines, maritime entitlements, maritime delimitations and statehood should be preserved, notwithstanding the physical effects of sea level rise, including coastal recession".

The ICJ's view of the presumption of state continuity and most important part of the opinion concerning statehood is set out in paragraph 363. The ICJ started by recalling the participants' statements that sea level rise "poses a significant threat to the territorial integrity and thus to the very statehood of small island States" and that "in the event of the complete loss of a State's territory and the displacement of its population, a strong presumption of continued statehood should apply". It then notably declared that "[i]n the view of the Court, once a State is established, the disappearance of

one of its constituent elements would not necessarily entail the loss of its statehood". Although the opinion does not name them, it is difficult to think that these constituent elements are anything other than those reflected in Article 1 of the Montevideo Convention: population, territory, government, and capacity to enter into international relations.

Individual Opinions

The Advisory Opinion is accompanied by twelve individual opinions from the Court's judges. Four judges – Vice-President Sebutinde, Judge Aurescu, Judge Bhandari, and Judge Tomka – addressed statehood in their individual opinions.

Vice-President Sebutinde (para. 8)[7] and Judge Aurescu (paras. 20-21)[8] both argued that the opinion could have been clearer or more resolute in affirming the presumption of state continuity in the context of climate change. According to Judge Aurescu (paras. 21-22), it would have been important to add that the loss of constituent elements of statehood not only does not affect existing statehood, but also does not and cannot affect membership in international organisations, including the United Nations (UN). Judge Aurescu also stated that the ICJ should have included as a legal basis for presumption in the context of climate change the principle of legal stability, security, certainty, and predictability (paras. 4, 23). Finally, it was opined by Judge Aurescu (para. 24) and alluded to by Judge Bhandari (para. 7)[9] that the opinion could or should have acknowledged continued recognition of statehood as a form of restitution under the law of state responsibility for those small island States that may lose their effective statehood.

The most detailed treatment of statehood is in the declaration of Judge Tomka.[10] Judge Tomka focused particularly on the ambi-

guity of the opinion's part on the presumption of state continuity and the lack of a customary legal basis for the ICJ's possible affirmation of this presumption in the context of climate change.

Did the ICJ endorse state continuity in the context of climate change?

There are two ways to read paragraph 363. On the one hand, the ICJ can be seen as merely restating a conventional position that statehood is not a legal status that is easily affected.[11] Alternatively, it can be read as affirming the presumption of state continuity in the context of climate change, in which case the implications are profound: it would involve the ICJ accepting that statehood as a legal status can exist even without the constituent elements of statehood, primarily population and territory. The differences between the two scenarios are significant.

Starting with the first interpretation, there is nothing particularly remarkable about the ICJ declaring that "once a State is established, the disappearance of one of its constituent elements would not necessarily entail the loss of its statehood". International law is not unfamiliar with situations where States lost compliance with the constituent criteria of statehood, e.g., due to military occupation or government failure ("failed States"), without this affecting their status as States.[12] It is, after all, this practice that has informed and substantiates the presumption of State continuity in international law. According to this interpretation, paragraph 363 of the opinion holds little significance beyond entailing the ICJ's support or confirmation of this presumption, with no significant implications capable of being drawn from it.

Under the second interpretation of paragraph 363, the ICJ's restatement of the presumption of State continuity is not just a general remark, but it is considered and framed against the backdrop of climate change.[13] There are two main arguments favouring this reading. First, not only is the declaration issued in an advisory opinion on climate change, but it comes after the ICJ recalls the existential threats of sea level rise and participant statements backing the presumption for the States that may be impacted. Second, the ICJ did not say that the presumption applies only when there is a change in the constituent elements of statehood, but also when those elements disappear entirely. According to Judge Tomka (para. 2), there is no doubt that here the ICJ "has in mind the disappearance of the territory of a State in case it becomes completely submerged as a result of sea-level rise".

On the other hand, however, the ICJ was extremely careful and did not, in the sentence in question, include any references to sea level rise or climate change more broadly. It is likely that this was a deliberate decision; were the ICJ as a whole comfortable and legally convinced that this presumption extends to the situation of statehood in relation to climate change, the opinion would have clearly stated this. The individual opinions stating that the opinion could have been firmer in affirming a presumption of State continuity in the context of climate change lend support to what the ICJ intentionally left out.[14] Sometimes refraining from saying something can be as powerful – and revealing – as stating it, especially in legal writing.

Further reflections

If one, however, is ready to accept that the ICJ extended the presumption of continuity to the context of climate change, the

question then becomes whether this is supported by state practice, either past or present.[15]

It is not obvious that a presumption of State continuity in relation to climate change, and thus the ICJ's view, can be based on past State continuity practice. As discussed by Judge Tomka (para. 5) and also some States in other fora,[16] international practice surrounding the presumption of State continuity is in situations distinct from that of climate change.[17] It has been linked to temporary situations of loss of constituent elements, e.g., of effective government (Judge Tomka, para. 5) or other situations related to changes in the size of territory and population. Even if a number of States favouring State continuity have referred to this past international practice, climate change may present challenges to statehood that are much more far reaching and lasting.[18] The elements of population and territory may be gone entirely. This would, of course, compromise the elements of government and capacity to enter into international relations. It follows that it is not clear and certain that the presumption of State continuity, as developed through international practice, furnishes a valid legal ground for presumption in relation to climate change.

True, as also expressed by Judge Tomka (para. 6), in recent years an increasing number of States have advanced the position in both bilateral and multilateral settings that climate change should not affect the existing international legal personality of small island states that may be impacted. But a widespread and consolidated body of State practice is still to grow. Much of the evidence regarding State practice is contained in the reports of the Co-Chairs of the International Law Commission (ILC) Study Group on sea level rise in relation to international law.[19] Importantly, neither of these reports posits that State practice, accompanied by *opinio juris*, has developed to extend the presumption of state

continuity to the context of climate change. It is relevant to note that the opinion does not engage with recent State practice on this matter, nor does the ICJ provide any systematic empirical examination of it. All that is mentioned is the view of "several participants" in the proceedings that sea level rise "poses a significant threat [...] to the very statehood of small island States" and that "in the event of the complete loss of a State's territory and the displacement of its population, a strong presumption in favour of continued statehood should apply" (para. 363).

Some States have also linked their support for continuing statehood in the context of climate change with the right of self-determination, respect for territorial integrity, the State's fundamental right of survival, permanent sovereignty over natural resources, and so on.[20] While the ICJ did mention territorial integrity, permanent sovereignty over natural resources, and self-determination, this was done in the context of the threats that sea level rise presents to these legal norms (paras. 357 and 363). The opinion did not deal with the legal arguments that connect these legal norms with the presumption of State continuity, if or how they interact with one another, and then what content or scope the norms have. Judge Tomka devoted some attention to these arguments in his declaration. For him, the essential difficulty in applying these legal norms to State continuity is that they "are heavily tied to territory" and presuppose the existence of territory or the State as a territorial unit, suggesting that they do not apply to a situation in which territory has been submerged due to rising sea levels (paras. 7-8).

Finally, if one is to accept the interpretation that paragraph 363 implies an acceptance of State continuity in the context of rising sea levels, the ICJ's restatement of the presumption of State continuity also bears on the applicability of Article 1 of the Montevideo

Convention and the contours of State extinction. The full submergence of States due to rising sea levels implies not merely the loss of *one* of the constituent elements listed in Article 1 but rather all of them. Without territory, the population is likely to disperse, there is little left to govern, and the capacity to engage in international relations will be severely constrained. Thus, if paragraph 363 is to be understood as endorsing State continuity in the context of climate change, Article 1 of the Montevideo Convention becomes largely irrelevant when it comes to maintaining statehood, and from the perspective of State extinction, a State would not necessarily cease to exist due to the *disappearance* of all of the basic elements of statehood.

Conclusion

Paragraph 363 of the ICJ's advisory opinion could have significant implications – or very limited ones – depending on how it is understood. If one were to look for a silver lining, it is that at least the ICJ did not assert that the presumption of state continuity could not apply in the context of climate change, and that is still meaningful in itself. At the same time, the ambiguity in the discussion of statehood and state continuity is unhelpful for the small island nations that are at greatest risk from climate change but have contributed next to nothing to it and the international community more broadly. The ICJ ought to have addressed this crucial matter with greater care, articulating a clearer stance and providing more rigorous legal analysis and relying more substantively on State practice.

References

1. ICJ, *Obligations of States in respect of Climate Change*, Advisory Opinion of 23 July 2025.
2. Julian Arato and Justina Uriburu, 'Treaty and Custom in the ICJ's Climate Change Opinion' *EJIL:Talk* (24 July 2025), https://www.ejiltalk.org/treaty-and-custom-in-the-icjs-climate-change-opinion/.
3. Federica Paddeu and Miles Jackson, 'State Responsibility in the ICJ's Advisory Opinion on Climate Change' *EJIL:Talk* (25 July 2025), https://www.ejiltalk.org/state-responsibility-in-the-icjs-advisory-opinion-on-climate-change/.
4. See the chapter by Antoine De Spiegeleir and Armando Rocha in this volume.
5. Jean-Baptiste Dudant and Géraldine Giraudeau, 'Continuity of Statehood for Deterritorialized Nations: A Range of Principles but Few Concrete Prospects' *EJIL:Talk* (21 January 2025), https://www.ejiltalk.org/continuity-of-statehood-for-deterritorialized-nations-a-range-of-principles-but-few-concrete-prospects/.
6. ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion of 22 July 2010.
7. ICJ, *Obligations of States in respect of Climate Change*, Separate Opinion of Vice-President Sebutinde, 23 July 2025.
8. ICJ, *Obligations of States in respect of Climate Change*, Separate Opinion of Judge Aurescu, 23 July 2025.
9. ICJ, *Obligations of States in respect of Climate Change, Separate Opinion of Judge Bhandari*, 23 July 2025. To clarify, Judge Bhandari made the argument of *continued recognition as restitution* in relation to maritime entitlements and sovereign rights of the states that may be impacted. Statehood is therefore not directly mentioned. It is, however, brought up in the section where *continued recognition* and *restitution* are discussed, with the judge noting that the Court should have also considered continued statehood under the second question on legal consequences. One impression this gives is that Judge Bhandari adopts a similar logic (*continued recognition as restitution*) with regard to statehood.
10. ICJ, *Obligations of States in respect of Climate Change*, Declaration of Judge Tomka, 23 July 2025.
11. Andreas Zimmermann, 'Continuity of States (last updated August 2006)' in Anne Peters (ed.), *The Max Planck Encyclopedia of Public International Law*, (Oxford University Press, 2008–).
12. Andreas Zimmermann, 'Continuity of States (last updated August 2006)' in Anne Peters (ed.), *The Max Planck Encyclopedia of Public International Law*, (Oxford University Press, 2008–).
13. See separate opinion of Judge Aurescu, separate opinion of Judge Bhandari, declaration of Judge Tomka, para. 2.

14. See particularly the separate opinion of Vice-President Sebutinde.

15. See particularly the declaration of Judge Tomka.

16. Milan Kollár, Legal Adviser, Ministry of Foreign and European Affairs of the Slovak Republic, *Statement on the Report of the International Law Commission on the Work of its Seventy-fifth Session (Cluster I)*, delivered before the Sixth Committee of the 79th Session of the UN General Assembly, New York, 21 October 2024, available at: https://www.un.org/en/ga/sixth/79/pdfs/statements/ilc/20mtg_slovakia_1.pdf .

17. See more on the limited value of past practice in Aurelio Corneo and Judith Scherer's analysis in this book.

18. Damian Carrington, 'Sea level rise will cause "catastrophic inland migration", scientists warn' *The Guardian* (20 May 2025), https://www.theguardian.com/environment/2025/may/20/sea-level-rise-migration.

19. International Law Commission, *Sea-Level Rise in Relation to International Law: Second Issues Paper*, by Patrícia Galvão Teles and Juan José Ruda Santolaria, Co-Chairs of the ILC Study Group on Sea-Level Rise in Relation to International Law, UN Doc. A/CN.4/752 (19 April 2022); *Sea-Level Rise in Relation to International Law: Additional Paper to the Second Issues Paper*, by Patrícia Galvão Teles and Juan José Ruda Santolaria, Co-Chairs of the ILC Study Group on Sea-Level Rise in Relation to International Law, UN Doc. A/CN.4/774 (19 February 2024); *Sea-Level Rise in Relation to International Law: Final Consolidated Report of the Co-Chairs of the Study Group on Sea-Level Rise in Relation to International Law*, by Patrícia Galvão Teles, Nilüfer Oral and Juan José Ruda Santolaria, UN Doc. A/CN.4/783 (3 February 2025).

20. Republic of Kiribati, *Written Comments* (Obligations of States in respect of Climate Change, Request for Advisory Opinion), 15 August 2024, available at: https://www.icj-cij.org/sites/default/files/case-related/187/187-20240815-wri-04-00-en.pdf; Oral Statements by Tonga and Tuvalu (Obligations of States in respect of Climate Change, Request for Advisory Opinion), Verbatim Record of 12 December 2024, available at: https://www.icj-cij.org/sites/default/files/case-related/187/187-20241212-ora-01-00-bi.pdf; Oral Statement by El Salvador (Obligations of States in respect of Climate Change, Request for Advisory Opinion), Verbatim Record of 04 December 2024, available at: https://www.icj-cij.org/sites/default/files/case-related/187/187-20241204-ora-01-00-bi.pdf

Aurelio Corneo, Judith Scherer

Is Montevideo Sinking?

"Disappearing" States and De-Territorialized Statehood Following the ICJ's Advisory Opinion on Climate Change

The International Court of Justice's (ICJ) recent advisory opinion on climate change[1] is a landmark in the development of international law. In this chapter, we focus on a short section of the opinion that may signal a fundamental shift in how international law conceives of statehood. We aim to decipher the ICJ's "Delphic pronouncement"[2] on sea-level rise and its implications for the statehood of low-lying island States.

In classical international law, statehood (the most fundamental type of international legal personality) is defined by three cumulative criteria: territory, population, and government.[3] These criteria reflect customary international law and, along with a fourth criterion on the capacity to conduct foreign relations, were codified in the Montevideo Convention on the Rights and Duties of States (the "Montevideo criteria").[4]

What could not have been foreseen during the initial development of these criteria was the complete submersion of a State's (land) territory beneath the sea. But that is now a very real possibility. For low-lying island States in particular, sea-level rise due to climate change poses an existential threat. The United Nations Development Programme predicts that 95% of Tuvalu's land mass will be flooded by 2100.[5] Tuvalu and Vanuatu have identified sea-level rise as their greatest national security threat and have engaged in extensive diplomatic advocacy to generate attention on the issue.[6] These efforts contributed to the United Nations General Assembly's decision to seek the ICJ's advisory opinion on climate change.

The central question we address in this chapter is: What becomes of statehood when a State's entire territory disappears beneath the sea? The intuitive answer would be: no territory, no state.[7] However, the ICJ took a different turn in its opinion.

The ICJ's position on sea-level rise and statehood

Although the question of statehood was not explicitly included in the General Assembly's request, the ICJ nonetheless addressed it – albeit briefly and not in the operative part, but in a single paragraph, nestled in the 140-page document:

> *"363. Several participants argued that sea level rise also poses a significant threat to the territorial integrity and thus to the very statehood of small island States. In their view, in the event of the complete loss of a State's territory and the displacement of its population, a strong presumption in favour of continued statehood should apply. In the view of the Court, once a State is established, the disappearance of one of its constituent elements would not necessarily entail the loss of its statehood."*

Unfortunately, the ICJ offered no reasoning for this view – possibly reflecting internal disagreement.[8] However, the last sentence suggests the ICJ's general agreement with the findings of the International Law Commission (ILC) on the issue. In its May 2025 final report on sea-level rise in relation to international law, the ILC took a clear position in favor of continuing statehood even after the complete loss of territory, declaring:

> *"35. With regard to States particularly affected by climate change-related sea-level rise, there is strong support among States for the continuity of statehood and sovereignty and the maintenance of international legal personality and membership of international organizations."*[9]

It remains unclear whether the view of the ILC represents *lex lata* or rather, as suggested by Judge Tomka[10] and legal scholars De Spiegeleir and Rocha in this volume, a progressive development of the law due to the urgent realities of climate change. Notably, there is – as yet – no State practice addressing the complete submersion of territory (see below).

Discussion of statehood in separate declarations

While the ICJ's advisory opinion was unanimous, a majority of judges appended separate opinions or declarations. Four of these address the issue of statehood. Judges Aurescu (paras. 20-24)[11], Bhandari (para. 7)[12], and Sebutinde (para. 8)[13] explicitly endorse the ICJ's position and advocate for an even stronger stance in favour of continued statehood.

Judge Aurescu, formerly a member of the ILC's study group on sea-level rise, takes the strongest stance in favor of those States endangered in their existence. He sees a clear rule of continuing statehood, based on the principle of legal stability, and argues for an obligation of third states to recognize the continued statehood and maritime entitlements of "de-territorialized" States (paras. 20, 23). Judges Aurescu and Bhandari propose that restitution could include the "continued recognition by all States of the entitlements of States affected by sea-level rise to their current maritime zones as well as of their continued statehood, even if submerged". (Aurescu, para. 24; cf. Bhandari, para. 7). This is particularly interesting because restitution presupposes wrongful conduct – an aspect elaborated on by the ICJ in substantive parts of the opinion.[14]

In contrast, Judge Tomka, in his declaration, voices criticism of the ICJ's light-handed approach to the topic. He rightly points to

the fundamental importance of the notion of statehood to international law and the far-reaching implications any change of the law in this regard might have (para. 2). Judge Tomka reiterates the general view that "statehood is virtually inseparable from a land and a people" (para. 3) and refutes the view that the Montevideo criteria apply only to the original creation of States, not their continuing existence as such. He also calls for caution in accepting the ILC's conclusion as existing customary international law (para. 6) and highlights the exceptional relevance of (land) territory to statehood, sovereignty, and self-determination in international law (paras. 7-9).

The limited value of precedent

As Judge Tomka observes in his declaration, concerning State practice on the issue of submerged States, "on a narrow view, there is none" (para. 5). Perhaps the closest "precedent" takes us back over 200 years: when the Order of Malta lost control of Malta and thus of its territory but retained its international legal personality. The Order of Malta is a subject of international law *sui generis* – not a State, but mostly treated as such.[15] It enjoys State and other forms of immunity, maintains embassies, issues diplomatic passports, and concludes treaties. Yet its non-State status limits its value as a precedent for de-territorialized statehood.[16]

A more recent and legally significant step came in August 2024, when Tuvalu and Australia concluded the Falepili Union treaty.[17] This international agreement recognizes the dangers of climate change to Tuvalu's existence and aims to address these concerns by explicitly recognizing the continuing statehood and sovereignty of Tuvalu (Article 2(b)) and including a human mobility scheme for Tuvaluans to move to Australia (Article 3). More than 80 percent of

the population of Tuvalu has since applied for climate change visas.[18] Legally, this treaty is best understood as pre-emptive *opinio juris*, not State practice as such. The reactions of States to the first actual submersion of a State will be decisive – if a uniform position emerges, it may constitute "instant customary law"[19].

Subsequent issues of "de-territorialized" statehood

The ICJ did not elaborate on the legal consequences of its presumption of continuing statehood, beyond a general duty to cooperate (para. 364). In the event of complete loss of territory, such a duty might oblige third States to take specific measures, but the opinion provides little further guidance.

The ILC, by contrast, outlined numerous legal and political reasons for accepting the continuing statehood of submerged States: legal stability and certainty, territorial integrity, permanent sovereignty over natural resources, self-determination of peoples, and equity (paras. 38-39). Yet, as Judge Tomka emphasizes in his declaration, territory is still fundamental to the very concept of statehood (paras. 3 and 8).[20] The exercise of extraterritorial jurisdiction is the exception, not the rule. What, then, is the jurisdictional anchor of these States in the rough waters of international law?

Transitional or permanent?

A key question is whether continued statehood would be permanent or merely transitional. The ICJ's vague formulation in paragraph 363 of the opinion leaves open the circumstances under which statehood would be lost or preserved. This ambiguity allows for the interpretation that continued statehood may be understood as a "transitional phase".

While not identical, there have been comparable cases where territory became uninhabitable and the population had to resettle elsewhere. As described by Rayfuse, in the 1870s, about half of Iceland's territory became uninhabitable due to a volcanic eruption, and large parts of the population resettled in Canada.[21] However, "New Iceland eventually joined the province of Manitoba becoming fully integrated into Canada"[22]. Whereas such incorporation is one possible scenario, a State could alternatively turn into another legal subject over time: Once the entire population resettles in a different jurisdiction, the submerged State might (similar to the Order of Malta) continue to entertain diplomatic missions and be a member of international organizations – ultimately evolving into a *sui generis* subject of international law.

Territory: Maritime zones as a sovereignty "anchor"

Traditionally, maritime claims are tied to the territory of the coastal State (cf. Articles 2-16 United Nations Convention on Law of the Sea). While both the ILC (para. 29)[23] and the ICJ (para. 362)[24] have come to the conclusion that States are not under the obligation to update their "charts or lists of geographical co-ordinates that show the baselines and outer limit lines of their maritime zones," neither body explicitly affirmed the permanence of these baselines.[25] The future of the maritime zones of the sinking State thus remains uncertain.

However, it would not only be unjust to deprive sunken States of maritime entitlements (as Judge Aurescu argues, para. 23), but these could also serve as an "anchor" for continuing statehood. In the absence of landmass, the sunken State could continue to exercise its sovereignty over its maritime area. Further, when States that are highly vulnerable to sea-level rise negotiate with other States about possible human mobility schemes, they could use

their maritime claims and connected fishing and exploitation rights as leverage.[26]

Population: Citizenship and statelessness

James Crawford has noted that the "permanent population" criterion for statehood "is not a rule relating to the nationality of that population"[27]. However, without territory, there can hardly be a permanent population. In order to preserve the de-territorialized State's statehood and because so far, the statehood criteria have been largely defined from a "territorial" view, the remaining criteria will also have to be interpreted in a new light.

One main concern with a possible disappearance of statehood is the issue of statelessness, which must be prevented.[28] While international law allows for multiple citizenships, the question remains: What would be the role of the de-territorialized citizenship and what rights would it confer, especially considering the de-territorialized State's limited ability to exercise jurisdiction? In recent years, the idea of virtual copies of endangered States – such as 3D scans of their territory uploaded to the metaverse – has emerged.[29] One of the main values of such "virtual States" could be the preservation of the State's cultural heritage. When displaced citizens acquire a second citizenship, the de-territorialized State's citizenship could similarly be limited to a "commemorative nationality".

Government: Self-determination vs. sovereignty

To enable the effective exercise of governmental functions in a future de-territorialized State, Tuvalu "started exploring a digital ID system, which will use the blockchain to connect the Tuvaluan diaspora and allow them to participate in Tuvaluan life, wherever they are".[30] The role of government in a "sunken" State could be to

maintain connections between its diaspora and the government itself, as well as within the diaspora community.

Whereas the host State would exercise sovereignty over its territory, displaced people would continue to have a right to self-determination. To remain represented by a government, however, a de-territorialized State would have to find a new seat of government (or at least a location to host its servers).[31] As the exercise of regular governmental functions would probably fall outside the scope of permitted diplomatic activity (see Article 3 Vienna Convention on Diplomatic Relations), a specific agreement between the host State and the *ex situ* government would be advisable.[32] Due to the prohibition of intervention, the *ex situ* government would be severely limited in exercising jurisdiction without the host State's consent.

Even with consent, an unsolved problem could be the emergence of dual jurisdiction: While the host State's citizens would be governed solely by its jurisdiction, resettled communities would additionally be governed by the sunken State's (extraterritorial) jurisdiction. They would thus have to follow the rules of both States but have fewer rights than "territorial" citizens (as pertains to voting, for example). Hence, people from a sunken State would be in a permanent situation of being foreigners everywhere. This could lead to double-standards and neo-colonialist power structures.[33] Potentially, the displaced people could become a recognized (autonomous) minority in their host State.

The imperative to prevent

Following the ICJ's opinion, only time will tell whether the Montevideo criteria are themselves "sinking," and what might replace them. It remains doubtful whether sunken States could be sover-

eign equals to States with territory, as they would necessarily rely on the goodwill of their host State to cede jurisdiction to some degree. Even though the ICJ's opinion is a big step forward (especially) for small island States, it cannot, by itself, preserve a State's full sovereignty once its territory is submerged.

Small island States have contributed the least to climate change, yet now face an existential threat. This unfair fate must be prevented. If their territory is lost to the sea, an essential part of their sovereignty and self-determination would too be swept away beneath the waves.

References

1. ICJ, *Obligations of States in respect of Climate Change*, Advisory Opinion of 23 July 2025.
2. ICJ, *Obligations of States in respect of Climate Change*, Declaration of Judge Tomka, 23 July 2025.
3. Georg Jellinek, Allgemeine Staatslehre, 3rd edition (1921); Malcolm N. Shaw, International Law 9th edn. (Cambridge University Press, 2021), p. 182.; James Crawford, 'State (last updated 2011)' in Anne Peters (ed.), *The Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2008–).
4. Convention on the Rights and Duties of States (Montevideo Convention), CLXV UNTS 1936, No. 3802.
5. Arthur Webb, Yusuke Taishi, Srilata Kammila, and Pradeep Kurukulasuriya, 'Notes from Tuvalu: Leading the way in adapting to sea-level rise' *UNDP Blog* (19 July 2023), https://www.undp.org/blog/notes-tuvalu-leading-way-adapting-sea-level-rise.
6. Alex Green and Douglas Guilfoyle, 'The Australia-Tuvalu Falepili Union Treaty: Statehood and Security in the Face of Anthropogenic Climate Change' (2024) 118:4 American Journal of International Law 684–703, page 686-687.
7. Malcolm N. Shaw, International Law 9th edn. (Cambridge University Press, 2021), p. 190.
8. See the chapter by Zana Syla and Avidan Kent in this volume.
9. International Law Commission, *Final report of the Study Group on Sea-level Rise in Relation to International Law*, adopted at its seventy-sixth session (2025), in Report of the International Law Commission, UN Doc. A/80/10, annex I, Yearbook of the International Law Commission, 2025, vol. II, Part Two.
10. ICJ, *Obligations of States in respect of Climate Change*, Declaration of Judge Tomka, 23 July 2025.
11. ICJ, *Obligations of States in respect of Climate Change*, Separate Opinion of Judge Aurescu, 23 July 2025.
12. ICJ, *Obligations of States in respect of Climate Change*, Separate Opinion of Judge Bhandari, 23 July 2025.
13. ICJ, *Obligations of States in respect of Climate Change*, Separate Opinion of Vice-President Sebutinde, 23 July 2025.
14. On the role of state responsibility in the ICJ's advisory opinion see the contribution by Niklas Reetz in this volume.
15. Francesco Gazzoni, 'Malta, Order of (last updated January 2009)' in Anne Peters (ed.), *The Max Planck Encyclopedia of Public International Law*, (Oxford University Press, 2008–).

16. Emma Allen and Mario Prost, 'Ceci n'est pas un État: The Order of Malta and the Holy See as precedents for deterritorialized statehood?' (2022) 31:2 *Review of European, Comparative & International Environmental Law* 171–181.
17. The treaty is available here: https://www.dfat.gov.au/sites/default/files/australia-tuvalu-falepili-union-treaty.pdf
18. France24, "More than 80% of Tuvalu citizens seek world-first Australian climate visa," 23 July 2025, available at: https://www.france24.com/en/asia-pacific/20250723-more-than-eighty-percent-of-tuvalu-applies-for-australian-climate-visa-amid-rising-seas
19. Bin Cheng, 'United Nations Resolutions on Outer Space: 'Instant' International Customary Law?' in Bin Cheng (ed.), *Studies in International Space Law*, (Oxford University Press, 1997).
20. ICJ, *Obligations of States in respect of Climate Change*, Declaration of Judge Tomka, 23 July 2025.
21. Rosemary G. Rayfuse, 'W(h)ither Tuvalu? International Law and Disappearing States' (2009) 9 *UNSW Law Research Paper*.
22. Rosemary G. Rayfuse, 'W(h)ither Tuvalu? International Law and Disappearing States' (2009) 9 UNSW Law Research Paper, p. 8.
23. International Law Commission, *Final report of the Study Group on Sea-level Rise in Relation to International Law*, adopted at its seventy-sixth session (2025), in Report of the International Law Commission, UN Doc. A/80/10, annex I, Yearbook of the International Law Commission, 2025, vol. II, Part Two.
24. ICJ, *Obligations of States in respect of Climate Change*, Advisory Opinion of 23 July 2025.
25. See also the contribution by Antoine De Spiegeleir and Armando Rocha to this volume.
26. Michael B. Gerrard, 'Statehood and Sea-Level Rise: Scenarios and Options' (2023) 17 Charleston L. Rev. 579–602, pages 598 et seq.
27. James Crawford, 'State (last updated 2011)' in Anne Peters (ed.), *The Max Planck Encyclopedia of Public International Law*, (Oxford University Press, 2008–).
28. UNHCR, *Climate Change and Statelessness: An Overview*, submission to the 6th session of the Ad Hoc Working Group on Long-Term Cooperative Action (AWG-LCA 6) under the UN Framework Convention on Climate Change, Bonn, 1–12 June 2009, supported by the International Organization for Migration (IOM) and the Norwegian Refugee Council (NRC), available at: https://www.unhcr.org/media/climate-change-and-statelessness-overview
29. Sophie Yeo, 'Tuvalu: The disappearing island nation recreating itself in the metaverse' *BBC* (21 November 2024), https://www.bbc.com/future/article/20241121-tuvalu-the-pacific-islands-creating-a-digital-nation-in-the-metaverse-due-to-climate-change.
30. For more information, see https://www.tuvalu.tv/about

31. Ryan Mitra and Sanskriti Sanghi, 'The small island states in the Indo-Pacific: sovereignty lost?' (2023) 31:2 *Asia Pacific Law Review* 428–450.
32. Maxine Burkett, 'The Nation Ex-Situ: On climate change, deterritorialized nationhood and the post-climate era' (2013) 2:3 *Climate Law* 345–374.
33. For third world approaches to climate change, see Sumudu Atapattu and Carmen G. Gonzalez, 'Climate Change' in Anthony Anghie, B.S. Chimni, Michael Fakhri, Karin Mickelson, and Vasuki Nesiah (eds.), Research Handbook on Third World Approaches to International Law (TWAIL), (Edward Elgar, 2025).

D. Energy, Governance, and Implementation

Jochen von Bernstorff, Ingo Venzke

The Struggle Against Fossil Sovereignty

The International Court of Justice in the Climate Crisis

Private actors are still expanding fossil fuel exploration and production while states continue to enable and even encourage such activities by granting subsidies, licences, and legal protection. This happens even though most fossil fuels must stay in the ground if the Paris target of limiting global warming to 1.5°C is to stay within reach (IPCC[1], IEA[2], and UNEP[3] agree). Apart from the decision of the COP28 in Dubai to transition away from fossil fuels, however, an explicit legal prohibition of measures in support of fossil fuels is not in sight. Or is it? In its advisory opinion on Climate Change, the International Court of Justice (ICJ) raises the spectre of illegality for high emitters' continued support of fossil fuels.

Currently, a tangled web of domestic, transnational and international legal norms still enables and entrenches fossil fuel exploitation, production, and consumption. A number of participants in the ICJ advisory proceedings drew attention to this problematic legal infrastructure. We share their concern and sharpen the focus. We introduce the notion of "fossil sovereignty" as a heuristic concept to capture the *ensemble* of otherwise heterogeneous legal norms that promote and protect fossil fuels. We note that the concept of sovereignty is an enigmatic one, often used to refer to a factual entity, somehow located behind the law. In the words of Nazi jurist Carl Schmitt: "sovereign is he who decides on the state of exception"[4]. In contrast, we are inspired by the tradition of Schmitt's nemesis Hans Kelsen, who decoupled the concept of sovereignty from the notion of an omnipotent state entity and reduced it to the elevated and largely independent position of a group of legal norms in a given legal order. We thus also employ the concept of fossil sovereignty to highlight the *relative independence* of the fossil-friendly legal infrastructure from political interference. Over time, fossil interests have become legally entrenched

in a way that has, to date, largely withstood pressure for change. Fossil sovereignty stretches across different regimes and can therefore take the shape of a many-headed Hydra that has proven to protect the integrity of fossil interests remarkably well.

The ICJ now confronts the "ongoing production, licensing and subsidizing of fossil fuels" and links these activities with concrete international legal obligations. It takes on three components of fossil sovereignty that we discuss in turn: the law of fossil fuel subsidies and licenses; the international legal protection of fossil investments; and the question of liability for damages induced by climate change. Alongside the ICJ's many achievements in strengthening international law in response to the climate crisis, we foreground the advisory opinion's potential for the pivotal struggle against fossil sovereignty – in other words, its role in dismantling existing fossil-friendly legal infrastructures.

Fossil fuel subsidies and licenses

New licences and subsidies for fossil fuels have stood in the way of a faster transition to renewable energy for decades. Curtailing state support or even prohibiting private activities on the supply side has been one of the most contentious issues in international climate negotiations over the last years. It is remarkable that the ICJ, for the first time, linked the issue of fossil fuel production with conventional and customary law obligations of states. The ICJ noted:

> *"obligations pertaining to the protection of the climate system do not rest exclusively with consumers and end users, but also include activities such as ongoing production, licensing and subsidizing of fossil fuels." (para. 94)*

The ICJ thus specifies state obligations regarding the production of fossil fuels. Does this mean that fossil fuel subsidies or new licences for fossil fuel exploration and production are wrongful acts in the view of the ICJ? The answer is: Yes! Under certain conditions.

The ICJ opined that the customary duty to prevent significant harm to the environment obliges states to act with due diligence (paras. 135, 280). This due diligence requirement is stringent and includes the procedural obligation to regulate and assess the environmental impacts of private high-emitting projects on the supply side (para. 254, 296). If these projects conflict with the reduction obligations of the respective State in light of the binding 1.5°C target, such projects may indeed constitute a violation of the State's customary no harm obligation or obligations under Art. 4 of the Paris Agreement.

That providing fossil fuel subsidies or new licenses can amount to an internationally wrongful act became even more apparent when the ICJ considered the legal consequences:

> *"Failure of a State to take appropriate action to protect the climate system from GHG emissions – including through fossil fuel production, fossil fuel consumption, the granting of fossil fuel exploration licences or the provision of fossil fuel subsidies – may constitute an internationally wrongful act which is attributable to that State." (para. 427)*

A related question is whether or not impact assessments required for new fossil fuel extraction projects must include so-called "downstream" effects of producing new fossil fuels, namely those emissions generated by the consumption of the fuels. The ICJ explicitly stated that the required impact assessments *can* include

downstream effects (para. 298), and moreover suggested that they probably *should*.

As Judges Bhandari and Cleveland point out in their joint declaration, the ICJ

> *"acknowledges that assessments of potential risk of significant harm to the climate system must take into account the cumulative effect of all relevant activities occurring within a State's jurisdiction or control, including risks resulting from fossil fuel production, licensing and subsidies and the foreseeable 'downstream' consequences of such activities in other jurisdictions" (para. 13).*[5]

The advisory opinion thus makes a crucial contribution to dismantling the stronghold of fossil sovereignty. To reach the 1.5˚C target, high-emitting private sectors must be subject to robust legal regulation. High-emitting projects must now be subject to strict eligibility assessments, as high-emitting States, in particular, otherwise risk committing an internationally wrongful act, triggering all consequences of state responsibility – including reparations.

The international legal protection of fossil investments

The international legal protection of fossil investments is another main component of fossil sovereignty. Judge Cleveland, in her declaration, recalls the IPCC's finding in this regard that

> *"international investment agreements may lead to 'regulatory chill', which may lead to countries refraining from or delaying the adoption of mitigation policies, such as phasing out fossil fuels" (para. 21).*[6]

If nothing else, the expansive legal protection of fossil investments risks significantly increasing the cost of climate policies. International investment law inexorably links climate protection regulation with significant financial liabilities for States, enabling investors who can no longer realise their high-emitting projects to sue States for actual and projected losses of profit – often to the tune of billions.

A prominent illustration of this is the widely discussed arbitral award in *Rockhopper v. Italy*.[7] Briefly: "No Oil" was the slogan around which Italian civil society mobilised to prevent new oil drilling off the Italian coast. Protests were ultimately successful, and in 2016, the Italian Parliament passed a law banning oil exploration within 12 nautical miles of the coast. But before that happened, in 2014, the UK-based company Rockhopper bought an Italian enterprise for US$40 million in hopes of securing offshore drilling rights – hopes dashed by the new law. In response, Rockhopper took the Italian State to arbitration. In 2022, the three arbitrators found that Italy had violated Rockhopper's property rights and had to pay the company US$250 million in compensation for lost profits. (The award was recently annulled for reasons unrelated to the substance of the case.)

Rockhopper v. Italy amplified growing concerns that international investment law is fundamentally at odds with effective climate protection.[8] The European Union and its Member States have since withdrawn from the European Energy Charter Treaty (ECT), which provided the jurisdictional basis for Rockhopper's claim against Italy. While some argue that the ECT's sunset clause ensures that the legal protection of investments continues for another 20 years beyond the treaty's termination, this claim can be rebutted with solid legal doctrine.[9]

The ICJ's advisory opinion lends further support to efforts aimed at pushing back the international legal protection of fossil investments. As Judge Cleveland points out:

> *"the interpretation of investment instruments must be informed by States' obligations in respect of climate change under international law, including the stringent due diligence standard to which States are bound in implementing such obligations." (para. 22)*

Under the tangible influence of the fossil lobby, the international legal protection of fossil investments has expanded significantly – often through judicial activism within a regime ridden with conflicts of interest. The ICJ has significantly strengthened the legal position of States prioritising their obligations under international climate law over the commercial interests of the fossil fuel industry.

Liability for climate change-induced damages

The body of law we associate with the concept of fossil sovereignty has, to date, largely shielded activities relating to the extraction, production, and consumption of fossil energy from legal responsibility and liability. High-emitting actors have, by and large, been able to claim that their GHG emissions have been, well, legal. Private actors will continue to play that card for as long as States do not comply with their obligation to regulate and adjust the domestic legal frameworks for their GHG emissions.

The ICJ has now made clear that breaches of the obligation to regulate private emitters may give rise to the "full panoply of legal consequences" under the rules of state responsibility (para. 445). Moreover, these obligations can also have *erga omnes* character

(para. 440). Together with its findings on causality and attribution, the ICJ thus created solid grounds[10] for inter-state climate litigation regarding wrongful acts or omissions.

As Judge Yusuf spelled out in his separate opinion, the question of the legality, i.e. wrongfulness, of an act or omission is decisive for international legal *responsibility*, but not necessarily so for questions of *liability*.[11] Actors can under certain conditions be liable for injury caused by acts that are *per se* lawful. Most legal systems know the principle according to which injuries caused by certain high-risk activities are sufficient for triggering liability, even if the act or omission at issue is not wrongful (*sic utere tuo ut alienum non laedas*). Strict liability regimes are also well established in various international liability conventions regarding activities that, due to their scale, may have dangerous and largely uncontrollable effects (e.g., Art. II Convention on International Liability for Damage caused by Space Objects).

Given that the catastrophic effects of further increasing GHG emissions are well established, it is unsurprising that some domestic courts have recently espoused stricter standards of liability when it comes to injury in the climate crisis. The recent decision in *Lliyuya vs. RWE* serves as a good example: a Peruvian farmer, Saúl Lliyuya, brought a civil action against the German energy corporation RWE, alleging that the company's contribution to climate change infringed on his property rights. RWE relied on the fact that all of its GHG emissions had been licensed (legal) under German public law, and argued that this effectively precluded liability. The German court rejected this argument, holding that legality does not preclude liability, and that foreseeable harm to protected rights (e.g., property) is sufficient to trigger liability.[12]

Adequate liability standards in the climate field could be further clarified by way of subsequent resolutions of the United

Nations General Assembly or through other legal and political instruments. For now, the ICJ left the question of liability for arguably lawful emissions open.

Concluding remarks

Over the course of decades, law has primarily functioned to enable and support the extraction, production, and consumption of fossil energy. As a result, planetary destruction remains not only awfully lucrative but also, in many cases, legally protected. The substantive impact of the ICJ's advisory opinion on climate change will depend largely on how effectively it contributes to dismantling the stronghold of fossil sovereignty. That tangled web of fossil-friendly laws has often obstructed or blunted progressive climate politics or any other interference with unsustainable, fossil-driven profit-making.

The ICJ has strengthened States' due diligence obligations concerning private sector emissions. Its findings on States' obligations in the climate crisis push for changes in international investment law, and they leave room for developments in the liability standards for injury caused by GHG emissions. These are critical steps in the struggle against fossil sovereignty.

References

1. Katherine Calvin, Dipak Dasgupta, Gerhard Krinner, Aditi Mukherji, Peter W. Thorne, Christopher Trisos, José Romero, Paulina Aldunce, Ko Barrett, Gabriel Blanco, William W.L. Cheung, Sarah Connors, Fatima Denton, Aïda Diongue-Niang, David Dodman, Matthias Garschagen, Oliver Geden, Bronwyn Hayward, Christopher Jones, Frank Jotzo, Thelma Krug, Rodel Lasco, Yune-Yi Lee, Valérie Masson-Delmotte, Malte Meinshausen, Katja Mintenbeck, Abdalah Mokssit, Friederike E.L. Otto, Minal Pathak, Anna Pirani, Elvira Poloczanska, Hans-Otto Pörtner, Aromar Revi, Debra C. Roberts, Joyashree Roy, Alex C. Ruane, Jim Skea, Priyadarshi R. Shukla, Raphael Slade, Aimée Slangen, Youba Sokona, Anna A. Sörensson, Melinda Tignor, Detlef Van Vuuren, Yi-Ming Wei, Harald Winkler, Panmao Zhai, Zinta Zommers, Jean-Charles Hourcade, Francis X. Johnson, Shonali Pachauri, Nicholas P. Simpson, Chandni Singh, Adelle Thomas, Edmond Totin, Andrés Alegría, Kyle Armour, Birgit Bednar-Friedl, Kornelis Blok, Guéladio Cissé, Frank Dentener, Siri Eriksen, Erich Fischer, Gregory Garner, Céline Guivarch, Marjolijn Haasnoot, Gerrit Hansen, Mathias Hauser, Ed Hawkins, Tim Hermans, Robert Kopp, Noëmie Leprince-Ringuet, Jared Lewis, Debora Ley, Chloé Ludden, Leila Niamir, Zebedee Nicholls, Shreya Some, Sophie Szopa, Blair Trewin, Kaj-Ivar Van Der Wijst, Gundula Winter, Maximilian Witting, Arlene Birt, and Meeyoung Ha, *IPCC, 2023: Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change [Core Writing Team, H. Lee and J. Romero (eds.)]. IPCC, Geneva, Switzerland.* (2023).
2. IEA, *Net Zero by 2050* (2021).
3. United Nations Environment Programme, *Emissions Gap Report 2023: Broken Record – Temperatures hit new highs, yet world fails to cut emissions (again)* (United Nations Environment Programme, 2023).
4. Carl Schmitt, *Political theology: four chapters on the concept of sovereignty* (MIT Press, 1985).
5. ICJ, *Obligations of States in respect of Climate Change*, Joint Declaration of Judges Bhandari and Cleveland, 23 July 2025.
6. ICJ, *Obligations of States in respect of Climate Change*, Declaration of Judge Cleveland, 23 July 2025.
7. Alessandra Arcuri, 'On how the ECT fuels the fossil fuel economy: Rockhopper v Italy as a case study' (2023) 7:1 *Europe and the World: A law review*.
8. P. R. Shukla, Jim Skea, Andreas Reinhard Reisinger, and IPCC (eds.), *Climate change 2022: mitigation of climate change* (IPCC, 2022).
9. Tibisay Morgandi and Lorand Bartels, 'Exiting the Energy Charter Treaty under the law of treaties' (2023) 34:1 *King's Law Journal* 145–69.

10. Margaretha Wewerinke-Singh and Jorge Viñuales, 'The Great Reset: The ICJ Reframes the Conduct Responsible for Climate Change Through the Prism of Internationally Wrongful Acts' *EJIL:Talk* (4 August 2025), https://www.ejiltalk.org/the-great-reset-the-icj-reframes-the-conduct-responsible-for-climate-change-through-the-prism-of-internationally-wrongful-acts/.
11. ICJ, *Obligations of States in respect of Climate Change*, Separate Opinion of Judge Yusuf, 23 July 2025.
12. Maxim Bönnemann and Maria Antonia Tigre, 'What Lliuya v. RWE Means for Climate Change Loss and Damage Claims' *Climate Law Blog* (19 June 2025), https://blogs.law.columbia.edu/climatechange/2025/06/19/what-lliuya-v-rwe-means-for-climate-change-loss-and-damage-claims/.

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Can Africa Still Drill?

What the ICJ Climate Opinion Means for Oil and Gas Exploration in Africa

In July 2025, the International Court of Justice (ICJ) adopted its advisory opinion on climate change.[1] While the ICJ found that any State suffering from climate change can bring charges against others for their contribution to climate change, the opinion does not distinguish between the obligations of developed and developing States (except where treaty law already imposes different obligations). Some judges have, in separate opinions, criticised this approach, citing the unequal contribution of States to climate change and disparities in human development levels.

African States and the African Union have continued to support fossil fuel development on the continent. In light of this advisory opinion, what obligations are imposed on developing States, like African States, to protect the climate, particularly regarding the further development of fossil fuel industries?

Continued investment in fossil fuel production and exploration in Africa

Africa's fossil fuel industry is expanding amidst an intensifying global debate on energy transition. Countries like South Africa, Mozambique, Angola, Kenya, Somalia, Uganda, Tanzania, DRC, and Nigeria opened bids for onshore and offshore oil and gas drilling licenses in 2024 and 2025. Some countries are selling off large areas, with the DRC, in particular, criticised for opening "half of the country" for oil and gas drilling.[2]

The expansion of fossil fuel exploration and production in Africa is driven by economic development and energy access imperatives, with modern energy needed for heating, cooking, lighting, as well as transport, health care, and clean water provision across the continent. Currently, Africa accounts for more than

three-quarters of the global energy access deficit. Half a billion Africans, almost half of the continent's population, do not have access to electricity.[3] For those connected to the grid, electricity remains expensive and unreliable. Despite high and growing local demand for energy, most of the investment in oil and gas in Africa comes from outside of the continent, largely driven by "Europe's anxiety for its own energy security"[4].

The African Union has recommended that "oil exploration and development [...] should be promoted on a short, medium and long-term basis as a risk mitigation strategy" in countries with large oil reserves, such as Nigeria and Libya.[5] It has also encouraged countries with sufficient oil reserves but no production (like Mauritania, Uganda, Senegal, and Namibia), to "increase production" and "promote" investment in new oil field development. Similar emphasis is placed on natural gas, with calls for countries like Mauritania, Mozambique, South Africa, Nigeria, and Tanzania to "commence production" or "increase production" from recent discoveries.

The challenge of energy poverty creates a sharp tension between the continent's competing interests. On the one hand, Africa is one of the most vulnerable regions to climate change. Therefore, it is in the best interest of its people to see ambitious climate action. At the same time, however, it is also in the best interest of African people to accelerate access to energy to meet their basic needs.

Fossil fuel production and consumption may constitute an internationally wrongful act

In its advisory opinion, the ICJ made a crucial finding pertaining to fossil fuels and their effect on the climate system. It stated that:

> *Failure of a State to take appropriate action to protect the climate system from GHG emissions – including through fossil fuel production, fossil fuel consumption, the granting of fossil fuel exploration licences or the provision of fossil fuel subsidies – may constitute an internationally wrongful act which is attributable to that State (para. 427).*

As phrased by the ICJ, these activities "may" constitute a wrongful act. Whether it will be considered an internationally wrongful act depends on whether the State complied with its obligations under the Paris Agreement and other relevant international agreements, as well as customary law obligations to "act with due diligence in taking measures in accordance with their common but differentiated responsibilities and respective capabilities" in order to prevent significant harm to the environment (para. 457).

According to the ICJ, this obligation of due diligence is a stringent one because "the '[r]isks and projected adverse impacts and related losses and damages from climate change escalate with every increment of global warming'" (para. 254). This means that "a heightened degree of vigilance and prevention is required" (para. 138), including in relation to the conduct of private actors. Furthermore, whether a State acted with due diligence depends on the specific case and circumstances being

assessed. The assessment should take into account differing national circumstances. The ICJ recognised the principle of sustainable development (or the "need to reconcile economic development with protection of the environment" (para. 147)) and the principle of common but differentiated responsibilities and respective capabilities (CBDR-RC) as "guiding principles" for the application of the relevant legal rules (para. 161).

The question then arises whether the specific circumstances faced by African countries – that is, low contribution to historic greenhouse gas emissions, high levels of energy poverty, and lack of readily available local or foreign investment in renewable energy – constitute circumstances that would allow them to continue fossil fuel investment and production while complying with due diligence on climate obligations. Phrased differently, do considerations of the principles of sustainable development and CBDR-RC mean that fossil fuel production in Africa would not constitute a wrongful act? Our response is a cautious "no," should the necessary requirements be fulfilled, as we set out in the next section.

Why fossil fuel industries should be off the table - even for African States

While the ICJ recognised the importance of the principles of sustainable development and CBDR-RC, several of the judges, including Vice-President Sebutinde[6] and Judge Xue[7] in separate opinions and declarations, criticised the ICJ for not unpacking these obligations sufficiently, particularly concerning the distinction between "least developed", "developing", and "developed" States. The judges argued that the ICJ did not take full account of fairness considerations when allocating obligations between these

categories of States, given also their different contributions to historic and current greenhouse gas emissions. It should be recognised, as emphasised by Judge Xue, that:

> *"Climate change has aggravated the inequality between the rich and the poor and severely constrained the ability of the developing countries, [...] to pursue sustainable development goals and to eradicate poverty" (para. 28).*

Nevertheless, all the judges recognised that meeting the 1.5°C goal requires shifting away from reliance on fossil fuels. Judges Bhandari and Cleveland in a Joint Declaration argued that, in line with CBDR-RC, States with greater capability should transition away from fossil fuels faster, but they made clear that "the obligation to transition away from fossil fuel dependence [...] applies to all States" (para. 24). Therefore, CBDR-RC "does not exempt any State from measures that are necessary, consistent with their capabilities and national circumstances, to fulfil the objectives of the climate change treaties and stringent due diligence obligations" (para. 27).

Consequently, due diligence being a stringent test, the need to move away from fossil fuels is an overriding imperative that applies even when considerations of sustainable development and CBDR-RC are placed centrally. All States have to contribute to the "deep, rapid and sustained reductions of [greenhouse gas] emissions" which are necessary to comply with the Paris Agreement obligation to limit global temperature increases to 1.5°C, including by transitioning away from fossil fuels.

In addition to this legal imperative from the ICJ ruling, which could result in African countries being held accountable for fossil fuel activities that could constitute internationally wrongful acts,

there are two further compelling arguments for African States to stop investing in fossil fuels.

The first is a human rights argument – that it is in the best interest of African peoples, both present and future generations, to use renewables and limit further global warming, given the continent's vulnerability to climate change. The ICJ found that "the full enjoyment of human rights cannot be ensured without the protection of the climate system" (para. 403) and confirmed the right to a clean, healthy and sustainable environment is a human right, a right also fully ensconced in the African human rights system.[8] African States that take their human rights obligations seriously would thus have to also take the 1.5°C obligation under the Paris Agreement seriously, and exert every effort to ensure that their activities do not contribute unduly to further climate change. Furthermore, African countries have obligations under human rights law to regulate the actions of companies in the oil and gas sector. The continued licensing of fossil fuel companies, especially those that are extracting to export to the global market, must be done with a strict application of procedural obligations, such as "climate-specific" environmental impact assessment.

Second, there are also practical and economic reasons for African States to transition away from fossil fuels. On the one hand, there is the danger that eventual divestment from fossil fuels in the rest of the world and an end to fossil fuel subsidies will result in stranded assets.[9] On the other hand, the abundance of sunshine and minerals for renewable technology in African countries means they have enormous potential for renewable energy. Already, 55% of the total final energy consumption of the continent comes from renewable sources,[10] much higher than Europe's renewable energy at 15.3% of its total consumption. While harnessing renewable energy requires substantial invest-

ment, and Africa currently benefits from only 2% of global investment in renewable energy,[11] the cost of solar panels has declined exponentially,[12] making it an obvious choice for meeting Africa's energy deficits. Cognizant of this, the African Union should actively steer investments away from fossil fuels and towards renewable energy sources.

Climate Justice, or the "legal tools" the ICJ failed to provide

Despite the clear-cut obligation on African States to, along with the rest of the world, end fossil fuel investment and production, there are considerations of justice that need to be taken into account for most African countries to fully comply with this obligation.

Climate change is an issue of global injustice where the cost of fossil fuel exploitation is borne by people in countries who are least responsible for causing it, such as African States, and the benefit of fossil fuel extraction is accrued by those most responsible for causing it. Climate action, therefore, requires distributive justice where the socio-economic and environmental cost of centuries of fossil fuel exploitation is distributed so that those who caused it, also pay to address the effects and need for mitigation. To ensure fairness this has to be done to the extent of their contribution, using the benefits they accrued from it. This idea is captured in the "polluter pays" principle, which the ICJ only briefly mentions in its advisory opinion.

Scientific evidence tells us, with continuously increasing precision, which group of States is most responsible for climate change and to what extent. However, the ICJ's response to question (b) on the consequences for breaching climate change obligations falls short in this regard. The ICJ interpreted the question as requiring it

"to address legal consequences in a general manner," and concluded that it was not required "to identify the legal responsibility of any particular State or group of States." The separate opinion of Judge Yusuf criticised that approach by noting that the ICJ, in not recognising the different contributions of States to climate change, "failed to rise to the occasion and to provide the international community with the legal tools necessary for combating climate change in an equitable manner for all States" (para. 19).[13]

Climate change treaties recognise that equity requires that climate change not be addressed in isolation from other challenges. As provided in Article 4 of the Paris Agreement, mitigation measures must be taken "on the basis of equity, and in the context of sustainable development and efforts to eradicate poverty." The abstract responsibilities outlined by the ICJ for all States thus have to be further interpreted to give effect to justice and equity considerations. In this regard, climate action cannot be seen separately from developmental needs.

What then is required for a climate justice approach?

First, the principle of CBDR-RC emphasises the need for international cooperation and obligations to provide significant international support, finance, and technology transfer from developed nations to developing States. It is clear that developed States have an overdue legal and moral obligation to significantly boost cooperation and investment in green energy *in Africa*, *for Africans*. That is to say, not the development of, for example, green hydrogen that is exported for European use after using African land and water resources.

Second, as argued by Judges Bhandari and Cleveland, developed States and others with greater capabilities should achieve "deeper and faster targets than developing States with lesser capabilities" (para. 24).[14] It should not be necessary to say this, but highly developed countries like Norway and the UK should take the lead in shifting away from fossil fuels, and the recent opening of offshore oil fields by these countries[15] should be regarded as a blatant violation of their climate obligations and a clearly wrongful act.

Third, the conflict between energy needs driven by poverty alleviation imperatives and the critical need to phase out fossil fuels requires discussion on the distinction between "survival emissions" and "luxury emissions."[16] To the extent that foreign investment in fossil fuels continues to outstrip investment in green energy, and in the face of the vast energy deficit on the continent, African States may continue to be tempted, to continue developing their fossil fuel deposits, and even view it as a necessity for meeting basic needs. To the extent that individual States, due to a lack of means, are forced to choose between protecting the environment and meeting short term basic needs of their people, they should not be penalised for allowing the development of fossil fuel industries on their territories, as this would be a failure of the international community as a whole.

Finally, African countries themselves need to act with due diligence in redirecting investments in new fossil fuel exploration to renewables. Recent developments in Kenya and Morocco demonstrate how strategic investment in renewables such as solar and geothermal energy can enhance energy security while reducing greenhouse gas emissions.[17] Historically, renewables were seen as an expensive alternative to fossil fuels, but "a positive tipping point" has now been reached where they are "the least expensive

and fastest option for new energy generation."[18] While the bulk of the cost of energy transition should be borne by developed countries in accordance with their greenhouse gas contributions, investment in fossil fuels by African countries will lose its appeal as renewables become comparatively cheaper and more accessible.

After the ICJ advisory opinion - What next for Africa?

Going forward, Africa needs to reckon with what the ICJ stated explicitly, as well as what has been intentionally left for assessment on a case-by-case basis. In our view, while fossil fuel development and licensing would in most cases constitute a violation of the obligation to protect the climate system, there may be instances where, based on CBDR-RC and national circumstances of African States and the extent of external support, such actions could not, in all justice and equity, be considered wrongful.

Moreover, based on the duty of international cooperation as clarified by the ICJ, due diligence requires African countries to take all measures at their disposal to secure the required finances and technology for renewable energy, among other key priorities, such as finance for loss and damage. The measures at their disposal are not limited to international diplomacy, but include inter-State litigation to capitalise on the potential for case-by-case determination. In addition to North-to-South financial assistance and technology transfer, South-to-South as well as intra-African cooperation should be boosted significantly.

A pending request for an advisory opinion by African civil society organisations at the African Court on Human and Peoples' Rights on climate change could help to fill the gaps left by the ICJ advisory opinion. The forthcoming advisory opinion of the African Court should clarify the obligations of African States in concrete

terms, taking account of the enormity of the climate crisis and best available science, but also taking account of the severe energy and poverty crisis in the continent. The African Court should further be cognizant of the variations in responsibility and capacity between African States, and clarify that while all African States have an obligation to transition away from fossil fuels, a higher standard of due diligence is expected from States such as South Africa, Egypt, and Algeria, who together account for more than 60% of the total carbon footprint of the continent. The African Court can also elaborate on the human rights implications of climate change, including extra-territorial obligations – an area only briefly touched on by the ICJ.

The ICJ's opinion on climate change marks a pivotal moment for Africa, compelling the continent to critically reassess its relationship with fossil fuels against the backdrop of urgent global climate obligations. As we navigate the dual challenges of energy poverty and climate vulnerability, it is essential for African States to embrace a transition toward renewable energy, aligned with both human rights frameworks and sustainable development goals.

References

1. ICJ, *Obligations of States in respect of Climate Change*, Advisory Opinion of 23 July 2025.
2. Phoebe Weston, 'Gorilla habitats and pristine forest at risk as DRC opens half of country to oil and gas drilling bids' *The Guardian* (29 July 2025), https://www.theguardian.com/environment/2025/jul/29/gorilla-habitats-pristine-forest-at-risk-as-drc-opens-half-of-country-to-oil-and-gas-drilling-bids-aoe.
3. Mo Ibrahim Foundation, *Addressing Africa's energy deficit: Climate change, renewables, and gas* (2022).
4. ICJ, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion of 25 February 2019.
5. The African Energy Commission (AFREC), *Africa and Just Energy Transition: Considerations for the Expansion of the African Oil & Gas Domestic Market* (2022).
6. ICJ, *Obligations of States in respect of Climate Change*, Separate Opinion of Vice-President Sebutinde, 23 July 2025.
7. ICJ, *Obligations of States in respect of Climate Change*, Separate Opinion of Judge Xue, 23 July 2025.
8. On the role of human rights in the ICJ's climate advisory opinion see the chapters by Corina Heri and David R. Boyd in this volume.
9. Atif Ansar, Ben Caldecott, and James Tilbury, *Stranded assets and the fossil fuel divestment campaign: what does divestment mean for the valuation of fossil fuel assets?* (2013).
10. Yacoub El Hillo, 'Decoding Africa's Energy Journey: Three Key Numbers' *UN Sustainable Development Group* (27 January 2025).
11. Yacoub El Hillo, 'Decoding Africa's Energy Journey: Three Key Numbers' *UN Sustainable Development Group* (27 January 2025).
12. Hannah Ritchie, 'Solar panel prices have fallen by around 20% every time global capacity doubled' *Oxford Martin School, Our World in Data* (13 June 2024), https://ourworldindata.org/data-insights/solar-panel-prices-have-fallen-by-around-20-every-time-global-capacity-doubled.
13. ICJ, *Obligations of States in respect of Climate Change*, Separate Opinion of Judge Yusuf, 23 July 2025.
14. ICJ, *Obligations of States in respect of Climate Change*, Joint Declaration of Judges Bhandari and Cleveland, 23 July 2025.
15. Helena Horton, Kiran Stacey, and Rowena Mason, 'UK ministers reopen door to drilling at two North Sea oilfields as new guidance released' *The Guardian* (19 June 2025), https://www.theguardian.com/environment/2025/jun/19/uk-ministers-to-restart-approval-process-for-two-north-sea-oilfields.

16. See on this distinction here: https://netzeroclimate.org/sectors/equity-inclusion/.
17. Temidayo Alex-Oke, Olusola Bamisile, Dongsheng Cai, Humphrey Adun, Chiagoziem Chima Ukwuoma, Samaila Ado Tenebe, and Qi Huang, 'Renewable energy market in Africa: Opportunities, progress, challenges, and future prospects' (2025) 59 *Energy Strategy Reviews*.
18. Rosie Frost, 'More than 90% of new renewable energy capacity is now cheaper than fossil fuels, study shows' *euronews* (22 July 2025), https://www.euronews.com/green/2025/07/22/more-than-90-of-new-renewable-energy-projects-are-now-cheaper-than-fossil-fuels-study-show.

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New Standards in Government Framework Litigation

Legal Implications of the ICJ's Advisory Opinion on Climate Change

In its long-awaited advisory opinion on climate change, the International Court of Justice (ICJ) made a range of landmark findings on States' obligations to address the climate crisis and the consequences of failing to do so.[1] The pronouncements from the world's highest court will now serve as immediate authoritative guidance to judiciaries across the globe. Accordingly, the opinion has the potential to alter the trajectory of climate change litigation, including cases concerning corporate accountability, fossil fuels permitting, and novel disputes between States (as other contributions in the Symposium will address).

One major area of climate litigation that the advisory opinion will impact is "government framework" litigation[2] – that is, cases that challenge governments' weak mitigation ambition (so-called "Ambition Gap cases") or failure to implement measures to meet their targets (so-called "Implementation Gap cases"). These cases target the overall emissions reduction targets that governments adopt, and the regulatory framework to support them (or lack thereof). The advisory opinion is highly relevant to government framework cases because (1) most such cases challenge emissions reduction targets that are based on or reflected in governments' Nationally Determined Contributions (NDCs) under the Paris Agreement and (2) plaintiffs often rely, directly or indirectly, on governments' obligations under the climate change and international human rights law treaties, which form the basis of the advisory opinion.

Over the last 10 years, there have been a number of groundbreaking decisions in government framework litigation, including *Urgenda Foundation v. State of the Netherlands* (the Netherlands), *Neubauer, et al. v. Germany* (Germany), *VZW Klimaatzaak v. Kingdom of Belgium & Others* (Belgium), *KlimaSeniorinnen v Switzerland* (European Court of Human Rights (ECtHR)), and *Do-Hyun Kim et al.*

v. South Korea (South Korea), where national and regional courts have found governments' insufficient climate policies in breach of their legal obligations. The ICJ's opinion not only builds on these precedents, it also provides greater clarity on some of the most contentious aspects of framework cases, in particular the standards against which a State's compliance with its climate obligations must be assessed. This blog offers initial reflections on how the ICJ's conclusions could shape the next generation of government framework litigation.

A definitive conclusion on the Paris Agreement temperature limit

First, and at a fundamental level, the ICJ "consider[ed] the 1.5°C threshold to be the parties' agreed primary temperature goal for limiting the global average temperature increase under the Paris Agreement" (para. 224). Drawing on the best available science, as well as political agreement in Conference of the Parties (COP) decisions, the ICJ thus resolved the debate on whether 1.5°C or "well below 2 degrees" of warming is the appropriate long-term temperature limit which should inform countries' mitigation efforts.

This conclusion reflects the findings of national and regional courts adjudicating recent government framework cases, including *Klimaatzaak, KlimaSeniorinnen*, *Do-Hyun Kim,* and *Mathur, et al. v. His Majesty the King in Right of Ontario* (Canada), which have relied on the 1.5°C limit to assess the lawfulness of governments' climate actions. Even so, questions as to whether that was the right approach have lingered, as evidenced by the fact that several States, such as China, Côte d'Ivoire, and Russia, argued in the oral hearings for this advisory opinion that the Paris Agreement

temperature limit was a range between 1.5° and 2°C. With the ICJ's pronouncement, there is no debate that governments' emissions reduction plans must be in line with the collective effort to limit global temperature rise to 1.5°C to prevent the most severe climate harms.

Standards for governments' mitigation obligations

The ICJ's findings regarding the "content" and "standards" of the obligations to mitigate climate change under the United Nations Framework Convention on Climate Change (UNFCCC) and the Paris Agreement also have significant implications for framework cases, and are likely to assist national and regional courts in adjudicating future cases, especially those focusing on the Ambition Gap.

A central point that many governments put forward in framework cases, which high-emitting States also argued in the ICJ proceedings, is that the UNFCCC and Paris Agreement do not impose enforceable mitigation obligations. According to these States, the climate treaties are "entirely discretionary" (para. 249), "not onerous" and altogether non-binding (para. 175). The ICJ firmly rejected these arguments. On a fundamental level, it found that there are substantive mitigation obligations imposed by the UNFCCC and Paris Agreement, and identified a number of standards to that effect.

In rejecting these arguments, the ICJ held that mitigation obligations under Article 4 of the UNFCCC cannot "be met merely by the adoption of any policies and the taking of corresponding measures" (para. 208). Similarly, the ICJ held that preparing, communicating, and maintaining successive NDCs is not enough to comply with obligations under the Paris Agreement. Rather, the

"content of the NDCs is equally relevant to determine compliance" (para. 236). It is therefore clear that States' mitigation obligations are *substantive*, not merely procedural. With regard to NDCs, States have "limited" discretion (para. 245). The ICJ outlined that, although the content of each State's NDC will vary, it must represent: (i) a progression over its previous one (para. 241); (ii) reflect its "highest possible ambition" (para. 242); (iii) be informed by global stocktake outcomes (para. 243); (iv) be sufficiently transparent (para. 244); and (v) crucially, must "be *capable* of making an adequate contribution to the achievement of the temperature goal" (para. 242, emphasis added).

Regarding the "adequate contribution" NDCs must make to the achievement of the temperature goal, the ICJ explained that States must *collectively* ensure that, "when taken together, [NDCs] are *capable of achieving* the temperature goal of limiting global warming to 1.5°C above pre-industrial levels" (para. 245, emphasis added).

The practical application of these findings is significant. The ICJ found that States must determine their "adequate contribution" to the global effort based on the principle of common but differentiated responsibilities and respective capabilities (CBDR-RC). The ICJ cited the "key role" (para. 226) of this principle and found that States must prepare their NDCs taking into account "historical contributions to cumulative GHG emissions, and the level of development and national circumstances of the party in question" (para. 247), noting that developed country governments are to "tak[e] the lead" under Art 4(4) of the Paris Agreement. Significantly, the ICJ referred to the Paris Rulebook decision (adopted by Parties to the Paris Agreement),[3] which, according to the ICJ, "requires each party to provide information together with its NDCs

on how it considers the NDCs *fair and ambitious* in light of its national circumstances" (para. 248, emphasis added).

What are we likely to see as a result of this? States must now ensure that their NDCs, including those to be submitted for this year's COP, (1) represent an adequate contribution to the global effort for 1.5°C, (2) collectively add up with other NDCs to achieve that aim, and (3) are fair and ambitious, in line with CBDR-RC – and thus historic responsibility. This leads to the conclusion that States must ensure their climate policies represent their *fair share* contribution to the collective climate mitigation effort to hold global temperature rise to 1.5°C. The importance of this conclusion lies in the fact that most States determine their reduction targets entirely divorced – instead of derived – from the required global effort. The inadequacy of this approach is central to most framework cases and is now authoritatively supported by the ICJ.

Finally, the ICJ emphasized that the standard of due diligence in this context is "stringent", which means States must do their "utmost" to ensure they carry out their highest possible ambition (para. 246).

These strong findings by the ICJ build on national and regional courts' findings over the past decade – such as those of the Dutch Supreme Court in *Urgenda* (para. 5.1.7) and the Belgian Court of Appeal in *Klimaatzaak* (para. 278), which respectively required the Netherlands and Belgium to do "its part" to address the climate crisis. Most notably, what stands out is the symmetry of the advisory opinion with *KlimaSeniorinnen* – the 2024 ECtHR judgment that established human rights-based climate obligations, with application to 46 Council of Europe Member States, and formulated certain "standards" that States' mitigation policies must meet (para. 550). Specifically, the ECtHR found that the "primary duty" for States is to "adopt, and to effectively apply in

practice, regulations and measures *capable of mitigating* the existing and potentially irreversible, future effects of climate change" (para. 545, emphasis added). For measures to be "capable", the ECtHR considered it crucial that they be based on the quantification of a national carbon budget, which must, in turn, be based on CBDR-RC.[4] The ECtHR further held that States' margin of appreciation in setting the ambition of their emissions reduction efforts is "reduced" (para. 543), mirroring the stringent due diligence standard formulated by the ICJ.

The ICJ's conclusions on NDCs are particularly timely. With the third round of NDCs due in September, States will ideally adopt stronger targets to urgently close the Emissions Gap and comply with their legal obligations. If they fail to do so, individuals, organizations, and communities around the world are likely to draw upon the advisory opinion to attempt to hold governments accountable for insufficient climate action. At the time of writing, nearly 170 States have yet to submit an NDC. As it is now clear that States must develop an NDC that represents their share of the global mitigation effort for 1.5°C, and is fair and ambitious, in line with CBDR-RC, the coming months represent both a test and an opportunity for States to demonstrate their commitment to addressing climate change, as well as their alignment with the standards set out in this advisory opinion.

Rejecting the "drop in the ocean" argument

The ICJ also resoundingly refuted one of the most common defenses raised in government framework cases: that a State's greenhouse gas emissions, when compared to the cumulative emissions of all other States, are too small to have a measurable impact on climate change. From *Urgenda* to *Neubauer* to *Massachusetts v.*

EPA[5] (United States of America), courts have repeatedly denied this "drop in the ocean" argument, yet governments continue to invoke it as a defense. Notably, and while not central to the holding of the case, the judge in *Pabai Pabai and Guy Paul Kabai v. Commonwealth of Australia* recently cited it as a reason why Australia does not owe a duty of care to Torres Strait Islanders affected by climate change (paras. 946-49). The ICJ, however, explained that (1) "while climate change is caused by cumulative [greenhouse gas] emissions, it is scientifically possible to determine each State's total contribution to global emissions, taking into account both historical and current emissions" (para. 429) and (2) "the rules on State responsibility are capable of addressing situations where damage is caused by multiple States engaging in wrongful conduct, and that the responsibility of a single State for damage may be invoked without invoking the responsibility of all States that may be responsible" (para. 430). This effectively dismisses one of the main arguments advanced by governments and will undoubtedly strengthen the ability of plaintiffs to hold them accountable for climate inaction.

Reaffirming the role of human rights in climate litigation

Individuals, organizations, and communities bringing government framework cases often rely upon human rights law as a legal basis for challenging inadequate climate policies. The ICJ advisory opinion affirmed that governments' obligations under international human rights law apply to the adverse effects of climate change (para. 372-386), referencing expressly climate litigation in national and regional courts (para. 385). Rights-based cases are thus strengthened, both on the merits and potentially to obtain access to court and remedies. In light of the ICJ's finding that States must take their international climate change obligations into account

when implementing their human rights obligations (para. 404), the ICJ's opinion adds significant weight to findings by other courts that a failure to contribute a fair share mitigation effort constitutes a human rights violation (e.g., *Urgenda*, *KlimaSeniorinnen*) – and paves the way for other courts to reach similar conclusions in the future.

The ICJ's conclusion that the right to a healthy environment is "essential for the enjoyment of other human rights" reaffirms the findings of national courts in framework cases of the last 10 years (para. 393). Plaintiffs in cases such as *Leghari v. Federation of Pakistan*, *Shrestha v. Office of the Prime Minister et al.* (Nepal), *Future Generations v. Ministry of the Environment and Others* (Colombia), *Held v. Montana* (United States), *Do-Hyun Kim*, and the *Hungarian Climate Case*[6] have successfully leveraged the domestic right to a healthy environment – which is enshrined in the laws and constitutions of over 100 countries (para. 391) – to hold governments accountable for stronger climate action in a range of jurisdictions. The ICJ's willingness to interpret the right to a healthy environment as a binding norm of international law will likely bolster national and regional framework cases that rely on this right, including pending cases such as *Álvarez et al v. Peru*[7] and *Indonesian Youths and others v. Indonesia*.[8]

Advancing intergenerational equity

The advisory opinion's conclusion that the sufficiency of a State's climate commitments must be considered through an intergenerational equity lens marks a significant advancement in the normative power of this international legal principle. Over the last 10 years, a number of court decisions requiring governments to take stronger climate action have relied on intergenerational equity

considerations to help determine that governments had violated their respective legal obligations, including the *Urgenda* District Court decision, *Shrestha*, *Future Generations*, *Neubauer*, *KlimaSeniorinnen*, *Do-Hyun Kim*, and the *Hungarian Climate Case*. The ICJ's conclusion that "[d]ue regard for the interests of future generations and the long-term implications of conduct are equitable considerations that need to be taken into account where States contemplate, decide on and implement policies and measures in fulfilment of their obligations under the relevant treaties and customary international law" builds upon the legal reasoning in these successful cases (para. 157). Given the disproportionate impacts of climate change on younger generations, as well as the prevalence of framework cases featuring youth plaintiffs, the ICJ's findings on intergenerational equity are poised to exert a profound influence on future and pending framework cases with youth plaintiffs in countries such as Canada, Indonesia, Sweden, Taiwan, and Turkey.

Expanding the potential for broader climate remedies

What remedies courts should order in framework cases has been a key question in climate litigation. Courts to date have awarded a range of remedies, including orders concerning specific emissions reductions (e.g., *Urgenda*, *Klimaatzaak* (Court of Appeal)); the adoption of economy-wide legislative or regulatory frameworks (e.g., *Shrestha*, *Future Generations*, *KlimaSeniorinnen*); and implementation of existing commitments (e.g., *Friends of the Irish Environment v. Ireland*, *Commune de Grande-Synthe v. France*, and *DUH and BUND*[9] (Germany)). In some instances, courts have considered declaratory judgments recognizing a breach of obligations to be sufficient (e.g., *Held*).

The ICJ importantly found that a State breaching its climate obligations "may give rise to the entire panoply of legal consequences provided for under the law of State responsibility", such as obligations of cessation, non-repetition, and performance, as well as full reparation, including restitution, compensation and/or satisfaction (para. 445). This finding offers a stronger legal foundation for national and regional courts to consider, for example, what restitution for emissions in excess of a carbon budget might entail, when compensation for climate harms should be awarded, and when to order more holistic and ambitious remedies.

Conclusion: Toward stronger climate accountability

The ICJ advisory opinion articulates very clearly States' international obligations with respect to climate change. Its findings that States' mitigation efforts must reflect their highest possible ambition, be capable of achieving the 1.5°C goal, and be fair and ambitious, determined through the application of CBDR-RC, are momentous, as are its conclusions on remedies. Government framework litigation can serve to hold States to these obligations – just as plaintiffs have done for the past 10 years. Given the multitude of lawsuits pending against governments around the world – including in Austria[10], Belgium[11], Brazil[12], Canada[13], the Czech Republic[14], France[15], Indonesia[16], Italy[17], the Netherlands[18], New Zealand[19], Portugal[20], Spain[21], Sweden[22], Taiwan[23], Turkey[24] and more – the ICJ's conclusions could have global effects, as lawyers involved in these cases have observed.[25] In addition, the ICJ's findings will undoubtedly inspire and catalyze the emergence of new claims that will shape litigation in the decade to come unless governments take meaningful climate action now.

References

1. Jochen Rauber, 'Custom, Entrenchment, Interpretation: How the ICJ's Advisory Opinion on Climate Change Contributes to the International Law's Turn toward the Future' *Völkerrechtsblog* (5 August 2025), https://voelkerrechtsblog.org/de/custom-entrenchment-interpretation/.
2. Catherine Higham, Joana Setzer, and Emily Braeden, *Challenging government responses to climate change through framework litigation* (2022).
3. Available here: https://unfccc.int/sites/default/files/resource/4-CMA.1_English.pdf.
4. Dennis Van Berkel, Floris Tan, Joe Udell, and April Williamson, 'Quantifying a 1.5°C Fair Share Carbon Budget: Human Rights Obligations on Climate Change after KlimaSeniorinnen' (1 January 2025), https://www.ssrn.com/abstract=5265958.
5. 'Massachusetts v. EPA - The Climate Litigation Database' https://www.climatecasechart.com/collections/massachusetts-v-epa_feb881.
6. 'Decision of the Hungarian Constitutional Court in case II/3536/2021 (on the constitutionality of Article 3(1) of the Climate Protection Act) - The Climate Litigation Database' https://www.climatecasechart.com/document/decision-of-the-hungarian-constitutional-court-in-case-ii-3536-2021-on-the-constitutionality-of-article-3-1-of-the-climate-protection-act_0a7e.
7. 'Álvarez et al v. Peru - The Climate Litigation Database' https://www.climatecasechart.com/document/alvarez-et-al-v-peru_b0a9.
8. 'Indonesian Youths and others v. Indonesia - The Climate Litigation Database' https://www.climatecasechart.com/document/indonesian-youths-and-others-v-indonesia_7919.
9. 'DUH and BUND v. Germany - The Climate Litigation Database' https://www.climatecasechart.com/document/duh-and-bund-v-germany_4411.
10. 'Müllner v. Austria - The Climate Litigation Database' https://www.climatecasechart.com/document/mullner-v-austria_5e43.
11. 'VZW Klimaatzaak v. Kingdom of Belgium & Others - The Climate Litigation Database' https://www.climatecasechart.com/document/vzw-klimaatzaak-v-kingdom-of-belgium-others_da42.
12. 'Institute of Amazonian Studies v. Brazil - The Climate Litigation Database' https://www.climatecasechart.com/document/institute-of-amazonian-studies-v-brazil_4826.
13. 'Mathur, et al. v. His Majesty the King in Right of Ontario - The Climate Litigation Database' https://www.climatecasechart.com/document/mathur-et-al-v-his-majesty-the-king-in-right-of-ontario_edc5.
14. 'Klimatická žaloba ČR v. Czech Republic - The Climate Litigation Database' https://www.climatecasechart.com/document/klimaticka-zaloba-cr-v-czech-republic_d4c0.

15. 'Notre Affaire à Tous and Others v. France - The Climate Litigation Database' https://www.climatecasechart.com/document/notre-affaire-a-tous-and-others-v-france_7e7d.
16. 'Indonesian Youths and others v. Indonesia - The Climate Litigation Database' https://www.climatecasechart.com/document/indonesian-youths-and-others-v-indonesia_7919.
17. 'A Sud et al. v. Italy - The Climate Litigation Database' https://www.climatecasechart.com/document/a-sud-et-al-v-italy_004c.
18. 'Greenpeace Nordic and Others v. Norway - The Climate Litigation Database' https://www.climatecasechart.com/document/greenpeace-nordic-and-others-v-norway_0687.
19. 'Lawyers for Climate Action NZ Inc. and Environmental Law Initiative v. Minister of Climate Change - The Climate Litigation Database' https://www.climatecasechart.com/document/lawyers-for-climate-action-nz-inc-and-environmental-law-initiative-v-minister-of-climate-change_04ce.
20. 'Associação Último Recurso et al. v. Portuguese State - The Climate Litigation Database' https://www.climatecasechart.com/document/associacao-ultimo-recurso-et-al-v-portuguese-state_fde1.
21. 'Greenpeace v. Spain I – The Climate Litigation Database' https://www.climatecasechart.com/document/greenpeace-v-spain-i_30f3
22. See the press release available here: https://auroramalet.se/en/news/aurora-revives-lawsuit/
23. 'Youth Petitioners et al. v. Executive Yuan (Constitutional Case) - The Climate Litigation Database' https://www.climatecasechart.com/document/youth-petitioners-et-al-v-executive-yuan-constitutional-case_73ac.
24. 'A.S. & S.A. & E.N.B v. Presidency of Türkiye & The Ministry of Environment, Urbanization and Climate Change - The Climate Litigation Database' https://www.climatecasechart.com/document/a-s-s-a-e-n-b-v-presidency-of-turkiye-the-ministry-of-environment-urbanization-and-climate-change_7a9b.
25. Alison Withers and Stephanie van den Berg, 'World Court climate opinion turns up the legal heat on governments' *Reuters* (29 July 2025), https://www.reuters.com/sustainability/cop/world-court-climate-opinion-turns-up-legal-heat-governments-2025-07-29/.

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From Sidelines to Center Stage

Conferences of the Parties (COPs) as Legal Playmakers

The trilogy of climate advisory opinions from the International Tribunal for the Law of the Sea (ITLOS)[1], Inter-American Court of Human Rights (IACtHR)[2], and the International Court of Justice (ICJ)[3] marks a watershed moment not only for climate litigation but also for understanding the evolving role of Conferences of the Parties (COPs) in international law. The opinions provide unprecedented recognition by ITLOS, the IACtHR, and ICJ of COP decisions' legal significance.

This chapter analyses the courts' engagement with COPs and argues that it represents another step in clarifying their institutional role in global governance – one that elevates these treaty bodies from largely diplomatic forums to authoritative interpreters and potentially norm-creators within treaty regimes. Building on our previous analysis elsewhere of COPs as emerging subjects of international law[4], we explore the implications of this evolving governance model.

COPs in the climate advisory opinions

The three climate change advisory opinions considered the activities of COPs in their reasoning. ITLOS acknowledged the importance of the United Nations Framework Convention on Climate Change (UNFCCC) COP (para. 69), and also noted the establishment of a similar body in the context of the Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction (BBNJ Agreement) (para. 92). ITLOS mostly used COP decisions as documentary evidence to trace how climate commitments have evolved, particularly regarding the 1.5°C target (paras. 77, 216).

The IACtHR also recognised the prominent role of the COP in the UNFCCC regime (para. 131), and footnoted its decisions several times across the opinion to support its views (eg. paras. 192, 200, 430). Furthermore, the IACtHR considered the steps of the adaptation "iterative cycle" identified by the COP serving as the Meeting of the Parties to the Paris Agreement (CMA) a "useful guide" for States to comply with their human rights obligations (paras. 381, 389).

Finally, as Wewerinke-Singh noted in her contribution to this volume, the ICJ equally underlined the relevance of COPs to the operation of climate change treaties (paras. 63 and 184), and also engaged with the work of COPs operating outside of the climate regime (para. 328). Notably, unlike ITLOS or the IACtHR, the ICJ provided reasoning for its reference to COPs, and an explanation of two pathways available for their decisions to have certain legal effects: (1) when treaties explicitly authorize it, and (2) when the decisions constitute "subsequent agreements" interpreting treaties (para. 184).

The legal status of COP decisions

The idea that COP decisions may constitute "subsequent agreements" for the purposes of Article 31(3)(a) Vienna Convention on the Law of Treaties (VCLT) is not new. The International Law Commission reached this conclusion in 2018, indicating that a COP decision could be invoked under this provision "in so far as it expresses *agreement in substance* between the parties regarding the interpretation of a treaty, regardless of the form and the procedure by which the decision was adopted, including adoption by consensus" (conclusion 11.3, emphasis added).[5] Still, it is notable that this approach has now been endorsed by the ICJ. Moreover, the ICJ put

it into practice in interpreting the temperature goal of the Paris Agreement.

The ICJ decision highlights both the strengths and weaknesses of viewing COP decisions as subsequent agreements. On one hand, the ICJ has provided an example of evolutionary interpretation based on identifying the intention of Parties.[6] The ICJ used COP decisions to show "the 1.5°C threshold to be the parties' agreed primary temperature goal for limiting the global average temperature increase under the Paris Agreement" (para. 224). On the other hand, as Stephen Humphreys has observed,[7] the ICJ opinion transforms what the Paris Agreement frames as "pursuing efforts" into a "primary temperature goal". This, to our minds, brings to the fore the question of where treaty interpretation ends and treaty amendments begin. It also raises fundamental questions about COPs institutional mandates and competence, especially when COP decisions reflect political aspirations or forward-looking ambitions rather than present-day objectives.

Furthermore, the ICJ does not clarify the meaning of the expression "agreement in substance". There is no guidance within the Advisory Opinion on when a COP decision constitutes such an agreement. Moreover, although there are 12 opinions and declarations appended to the main text which touch on different subject-matters, the temperature goal remains the only instance where a COP decision is utilised as a subsequent agreement. Lawyers can only interpret so much from its use for the temperature goal, raising a number of questions concerning the future application of the Article 31(3)(a) pathway. These concerns will not only interest legal practitioners and academics, but more importantly COP negotiators who must demand greater clarity on what constitutes a decision that qualifies as a subsequent agreement.

While most commentary on the role of COP decisions in the ICJ opinion focuses on their status as "subsequent agreements," other parts of the opinion raise additional potential pathways for COP decisions to produce legal effects. First, the ICJ acknowledged that COP resolutions might also play a role in the identification of customary international law, both reflecting State practice and expressing *opinio iuris* (para. 288), a subject analysed by Gehring.[8] Yet, unlike its treatment of General Assembly resolutions,[9] the ICJ did not provide any guidance on when this *opinio iuris* may be found (or not found).

Second, the ICJ seems to bring COP decisions into the "good faith" framework, in the context of its discussion of the obligations of co-operation and assistance under the UNFCCC. The ICJ stated that "[t]he duty to co-operate is an obligation of conduct, the fulfilment of which is assessed against a standard of due diligence [...]. Good faith co-operation in this context would entail taking into account the guidance provided by the COP decisions." (para. 218). This raises the question of whether performing obligations in good faith, as required by Article 26 VCLT, entails giving effect to COP decisions.

Finally, another less explored pathway for COP decisions to produce legal effects is found in the ICJ's discussion of relevant international rules and standards as an element to determine the content of the standard of due diligence. The ICJ considered that international standards "may arise from binding and non-binding norms," including the outcomes of COPs (para. 287). This might prove to be a particularly relevant pathway considering the significant role that ITLOS, the IACtHR, and the ICJ assigned to due diligence. All in all, these examples reveal that COP decisions can potentially produce legal effects in more than one way.

What's ahead

The ICJ's reasoning alters the stakes of COP negotiations across regimes. As Humphreys noted, the ICJ's reading "potentially increases enormously the relevant text to be taken into account as a matter of law" with over 900 COP decisions from the climate regimes that might now constitute legally relevant "subsequent agreements."[10] As Frydlinger showed, the stakes are high for the UNFCCC COP30, as negotiators must now consider that consensus decisions may acquire binding force through judicial interpretation, even absent explicit treaty authorization.[11] Could we expect future COP decisions containing preambulatory language to the effect of "the Parties declare that this instrument does not necessarily express agreement in substance"?

These issues are amplified when we consider that COPs exist beyond climate change agreements, and ongoing negotiations in those fields will also be affected by the findings of the ICJ regarding the legal effects of COP decisions. In this context, it is pertinent to note that the ICJ only engages with the UNFCCC COP for its reasoning, even though it provides an interpretation of obligations from other multilateral environmental agreements that have COPs (such as the Convention on Biological Diversity and the United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa). Furthermore, COPs also exist outside of the multilateral environmental system,[12] in areas such as international health law, international disarmament, international criminal law, and international law relating to cultural heritage. Delegates who once viewed COP decisions as political compromises must now consider the possibility that their consensus language could crystallize into

binding legal obligations through judicial interpretation. Expect future negotiations to feature even more protracted debates over every word and every comma, with States increasingly wary of language that might later be claimed as an "agreement in substance."

As a further issue, if and when COP decisions acquire legal force through judicial interpretation, States might become bound by obligations they may not have explicitly consented to. This is because most COPs do not have a voting procedure, instead, they adopt decisions by consensus. As such, sometimes, States have agreed to pass a decision they may not individually agree with in its entirety to avoid halting progress on all negotiations, providing observations on any limitations or objections during or after the adoption of the decision. Therefore, interpreting treaty obligations (which have an explicit consent mechanism) in this manner challenges traditional notions of sovereign consent, although this could be a pathway to "thick stakeholder consensus", as Pauwelyn et al argue.[13] In the case of climate governance, this exposes a particular variance of the democratic deficit.[14] Here, the deficit operates on two levels: not only are COP decisions made through processes that do not necessarily place States on a level-playing field, but States may also find themselves legally bound by interpretations of consensus decisions they never fully endorsed, creating a double attenuation of the consent principle that underpins both democratic governance and treaty law.

Concluding thoughts

The use of COP decisions across the climate advisory opinions, and in particular by the ICJ, confirms what those writing about COPs have long suspected: COPs have moved from the sidelines to center

stage as playmakers in international lawmaking. They are also rapidly being endowed with a broader institutional mandate, such as in the BBNJ Agreement, where the COP is empowered to take legally binding decisions and can request Advisory Opinions.[15] No longer mere diplomatic spectators, in light of this decision, COPs should be seen as directing the action, adopting decisions capable of producing legal effects and even impacting ongoing international conflicts.[16] By bringing some clarity to when and how COP decisions achieve legal effects, the ICJ has validated this starring role.

References

1. ITLOS, *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*, Advisory Opinion of 21 May 2024.
2. IACtHR, *Climate Emergency and Human Rights*, Advisory Opinion OC-32/25 of 29 May 2025, requested by the Republic of Chile and the Republic of Colombia.
3. ICJ, *Obligations of States in respect of Climate Change*, Advisory Opinion of 23 July 2025.
4. Sebastián Rioseco and Tejas Rao, 'COPs as Emerging Subjects of International Law? Rethinking Legal Personality in Global Governance' *EJIL:Talk* (6 November 2024), https://www.ejiltalk.org/cops-as-emerging-subjects-of-international-law-rethinking-legal-personality-in-global-governance/.
5. International Law Commission, *Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties*, adopted at its seventieth session (2018), in Report of the International Law Commission, UN Doc. A/73/10, para. 51, Yearbook of the International Law Commission, 2018, vol. II, Part Two.
6. Eirik Bjorge, *The Evolutionary Interpretation of Treaties* (Oxford University Press, 2014).
7. Stephen Humphreys, '1.5 at the ICJ' *EJIL:Talk* (25 August 2025), https://www.ejiltalk.org/1-5-at-the-icj/.
8. See the contribution by Markus Gehring to this volume.
9. See ICJ, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of 8 July 1996, para. 71; Brian D. Lepard, Customary International Law: A New Theory with Practical Applications 1st edn. (Cambridge University Press, 2010).
10. Stephen Humphreys, '1.5 at the ICJ' *EJIL:Talk* (25 August 2025), https://www.ejiltalk.org/1-5-at-the-icj/.
11. See the chapter by David Frydlinger in this volume.
12. Sebastián Rioseco, 'Conferences of the Parties beyond international environmental law: How COPs influence the content and implementation of their parent treaties' (2023) 36:3 *Leiden Journal of International Law* 699–719.
13. J. Pauwelyn, R. A. Wessel, and J. Wouters, 'When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking' (2014) 25:3 *European Journal of International Law* 733–63.
14. Monserrat Madariaga Gomez de Cuenca and Tejas Rao, *Participation, Power and Process: Fixing Climate Negotiations* (University College London, 2025).

15. Tejas Rao and Sebastián Rioseco, *Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction*, 19 June 2023 (UN Doc. A/CONF. 232/2023/4), OXIO 807, available at: https://opil.ouplaw.com/display/10.1093/law-oxio/e807.013.1/law-oxio-e807 .
16. Eva Baudichau and Meng Wang, 'Conflict at COPs: Russia's Exit from the Ramsar Convention' *EJIL:Talk* (28 August 2025), https://www.ejiltalk.org/conflict-at-cops-russias-exit-from-the-ramsar-convention/.

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Judicial Convergence on Climate Change

The Advisory Opinions of the ICJ, the IACtHR, and the ITLOS

In just over a year, three of the world's most prominent courts have addressed States' legal obligations in the context of climate change. In May 2024, the International Tribunal for the Law of the Sea (ITLOS) issued its advisory opinion in response to a request by the Commission of Small Island States.[1] A year later, the Inter-American Court of Human Rights (IACtHR) followed with a landmark opinion, requested by Chile and Colombia.[2] Finally, in July 2025, the International Court of Justice (ICJ) delivered its much-anticipated advisory opinion at the request of the United Nations General Assembly.[3]

These three advisory opinions represent a historic milestone in international law. They reaffirm that States have international obligations to address the climate crisis. These obligations are grounded in environmental law, human rights law, the law of the sea, and customary international law. Although each court examined various questions from its own unique institutional and legal standpoint, their conclusions showed a significant convergence on several key issues, including the role of science, the standard of due diligence, the duty to cooperate, the role of private actors, the importance of human rights, and the need for reparations. This chapter explores each court's consideration of these issues.

The role of science

Science played a critical role in all three advisory proceedings.

Notably, the three courts placed substantial emphasis on the findings of the Intergovernmental Panel on Climate Change (IPCC). The ICJ referred to IPCC reports as "the best available science on the causes, nature and consequences of climate change" (para. 74). This statement was particularly relevant in the interpretation of the standard of due diligence (paras. 345-349). ITLOS also refer-

enced the work of the IPCC to identify the best available science and underscored its relevance in determining the appropriate measures to prevent, reduce, and manage marine pollution resulting from greenhouse gas (GHG) emissions (paras. 208-212).

These conclusions were not surprising, considering that several States, organizations, and other actors emphasized the relevance of science and the role of the IPCC reports during the advisory proceedings. Members of the ICJ even met with a group of authors of the IPCC reports before the oral proceedings commenced.[4] While both the ICJ and ITLOS recognized the importance of the IPCC's work in determining the legal obligations of States, they did not clarify how States should define the best available science beyond these assessment reports.

The advisory opinion from the IACtHR addressed this gap. The IACtHR provided a set of criteria to determine what constitutes the best available science. These criteria include assessing whether the knowledge is up-to-date, whether it is based on peer-reviewed methodologies and practices, and whether it adheres to internationally recognized scientific standards, where such standards are available (para. 486). The IACtHR further highlighted the importance of integrating scientific knowledge with local, traditional, and indigenous knowledge (para. 476).[5] And it reaffirmed the importance of Article 7.5 of the Paris Agreement, which provides that climate action "must be guided by the best available science and, as appropriate, traditional knowledge, knowledge of indigenous peoples and local knowledge systems".

These conclusions on the relevance of science can shape domestic and international litigation. As illustrated by an increasing number of domestic climate litigation cases, courts will use science as a benchmark for evaluating the adequacy and ambition of climate policies and commitments. At this point, the best avail-

able science clearly indicates that current mitigation and adaptation efforts are insufficient. Countries are not on track to achieve the objectives of the Paris Agreement.[6] That is why the ICJ, IACtHR, and ITLOS confirmed that States are required to take urgent action; this is not optional.

Stringent due diligence

The obligation to prevent transboundary environmental harm was a key topic addressed in the advisory opinions.[7] All three courts affirmed that States must use all the means at their disposal to avoid activities within their territory or under their jurisdiction that could cause significant damage to the environment of another State. This obligation also applies in the context of climate change (ICJ, para. 273; IACtHR, para. 277; ITLOS, para. 250).

The ICJ emphasized that States must fulfil their obligation to prevent significant harm to the environment by acting with due diligence. According to the ICJ, this standard of conduct varies based on specific circumstances, including "the obligation in question, the level of scientific knowledge, the risk of harm and the urgency involved" (para. 254).[8] Similarly, the IACtHR and ITLOS established that the standard of due diligence depends on factors such as scientific and technological information, relevant international rules and standards, the risk of harm, and the level of urgency involved (IACtHR, para. 232; ITLOS, para. 239).

During the ICJ oral hearings, the majority of participants affirmed that the no-harm rule applies in the context of climate change, and that States must act with due diligence. It was reasonable to expect a similar position from the ICJ. What was perhaps less expected, however, was the ICJ's conclusion that due diligence involves the maintenance of a "heightened degree" of vigilance and

prevention (para. 138). The IACtHR reached the same conclusion and even introduced the concept of "heightened due diligence" concerning climate-related threats to human rights (para. 233). Similarly, ITLOS emphasized that the standard of the due diligence obligation "needs to be stringent" in the context of climate change (para. 241).

The standard of due diligence is especially relevant when analyzing the obligation to prepare, communicate, and maintain Nationally Determined Contributions (NDCs) under the Paris Agreement. Article 4 of the Paris Agreement requires each party to submit NDCs that outline their efforts to reduce GHG emissions and adapt to the impacts of climate change. The ICJ emphasized that the standard of due diligence applied to the preparation of NDCs is also stringent, which means that "each party has to do its utmost to ensure that the NDCs it puts forward represent its highest possible ambition in order to realize the objectives of the Agreement" (para. 246). As noted in another contribution to this volume (by Niklas S. Reetz), this obligation is *erga omnes partes*, meaning that all Parties to the Paris Agreement may invoke the responsibility of other Parties for their failure to meet this requirement (ICJ, paras. 440-441).[9]

The applicable standard to assess the NDCs of different countries will vary depending on factors such as the countries' historical contributions to cumulative GHG emissions and their level of development (ICJ, para. 247; IACtHR, para. 327). However, in any case, these climate pledges must represent a progression over time and reflect the highest possible ambition. This means that NDCs "must become more demanding over time" and adequately contribute to achieving the temperature goals established by the Paris Agreement (ICJ, paras. 241-249).

Notably, the IACtHR linked this analysis to the principles of progressive realization and non-regression in human rights law (IACtHR, para. 324). This means that any rollback of climate policies must be exceptional, justified by objective criteria, and adhere to the standards of necessity and proportionality (IACtHR, para. 222).

Multiple domestic courts have used similar arguments to invalidate or strike down NDCs that are considered not sufficiently progressive or ambitious.[10] With three advisory opinions affirming that, to satisfy a heightened due diligence, NDCs must represent a progression and reflect the highest possible ambition, more plaintiffs will likely challenge inadequate contributions in domestic courts, and those courts may require countries to provide more robust justifications for their NDCs.

Duty to cooperate

The ICJ, IACtHR, and ITLOS concluded that States must cooperate in protecting the climate system. The ICJ emphasized that this obligation has a customary nature and serves as "the very foundation of meaningful international efforts with respect to climate change" (ICJ, para. 302). Under the Paris Agreement, cooperation involves not only achieving a collective temperature goal but also providing financial assistance, transferring technology, and implementing capacity-building initiatives (ICJ, para. 262, IACtHR, para. 265; ITLOS, paras. 336-339).

The Paris Agreement already recognized the importance of these forms of cooperation in supporting developing countries with their mitigation and adaptation strategies. However, current efforts to provide such assistance are still insufficient to address the

widespread impacts of climate change.[11] Developing countries require more support.

All three courts established that cooperation goes beyond political will; it is a legal obligation. As such, any international commitments related to financial assistance, technology transfers, and capacity-building must comply with a standard of due diligence (ICJ, para. 259; IACtHR, para. 257). This conclusion could significantly influence negotiations under the Conference of the Parties (COP) and encourage States to adopt more ambitious and accountable forms of action.

Private actors

Several domestic climate litigation cases, such as *Milieudefensie et al. v. Shell*, highlight the crucial role of private actors in tackling the climate crisis. Unsurprisingly, the ICJ, IACtHR, and ITLOS all concluded that States have an obligation to regulate the activities of private actors as a matter of due diligence. In particular, the international courts concluded that States must regulate, supervise, and control activities under their jurisdiction that may pose environmental risks (ICJ, para. 276; IACtHR, para. 347-348). This includes establishing mechanisms to investigate, prosecute, and sanction private actors who fail to comply with climate laws and regulations, particularly those that limit GHG emissions (IACtHR, para. 356; ITLOS, para. 284). Accordingly, a State may be responsible where "it has failed to exercise due diligence by not taking the necessary regulatory and legislative measures to limit the quantity of emissions caused by private actors under its jurisdiction" (ICJ, para. 428)

This conclusion is particularly relevant in the context of fossil fuel production and consumption, the granting of fossil fuel explo-

ration licences, or the provision of fossil fuel subsidies. These activities are among the primary contributors to climate change. Both the ICJ and the IACtHR emphasized that States must take appropriate actions to protect the climate system from GHG emissions resulting from these activities. The IACtHR even concluded that States must impose stricter obligations on high-emission industries (ICJ, para. 427; IACtHR, paras. 350-351).

The IACtHR also distinctly stressed the importance of collaboration between States and private actors in the creation and dissemination of reliable climate-related information. The Court stated that such cooperation is essential for combating greenwashing, addressing misinformation, and supporting the efforts of environmental and human rights defenders (para. 529). Similarly, the ICJ and ITLOS acknowledged the importance of access to climate information, although their analyses focused primarily on the obligation to cooperate (ICJ, para. 260; ITLOS, para. 312).

Human rights obligations

All three advisory opinions discussed the importance of human rights in the climate crisis, albeit in different levels of detail. None of the courts accepted the lex specialis argument presented by several States during the proceedings to derive legal obligations solely from the climate treaties.

ITLOS briefly acknowledged that climate change raises human rights concerns (para. 66). As Corina Heri notes in her contribution to this volume, the ICJ and the IACtHR examined this issue more thoroughly. Both courts emphasized that climate change can impair the enjoyment of several human rights, including the right to life, the right to health, and the right to an adequate standard of living.

Notably, both the ICJ and IACtHR also reaffirmed that the human right to a clean, healthy, and sustainable environment is essential for the enjoyment of other human rights (ICJ, para. 393; IACtHR, paras. 272-274). The IACtHR went even further by stating that the right to a healthy environment protects nature for its intrinsic value, and that recognizing the rights of nature aligns with the American Convention on Human Rights (paras. 273-286). David Boyd, the former UN Special Rapporteur on the human right to a clean, healthy, and sustainable environment, has already explored the implications of this recognition by the IACtHR and the ICJ in his contribution to a joint blog symposium between Verfassungsblog and the Sabin Center's Climate Law Blog on the IACtHR.[12]

Lastly, both the ICJ and IACtHR also reaffirmed that human rights treaties may apply extraterritorially when a State exercises jurisdiction outside its territory (ICJ, para. 394; IACtHR, paras. 277-288).

These conclusions are likely to initiate important discussions about the need to strengthen NDCs and promote the recognition and enforcement of the right to a healthy environment.

Reparations

The advisory opinions reaffirmed the importance of reparations in the context of climate change.

The ICJ emphasized that "every internationally wrongful act of a State entails the international responsibility of that State" (para. 445). An example of an internationally wrongful act would be the failure to regulate GHG emissions, which constitutes a breach of the customary obligation to exercise due diligence. The wrongful act can also derive from the breach of treaty obligations,

such as the obligation to prepare, communicate, or implement NDCs (para. 444).

The ICJ further recognized that, when a State fails to fulfill its international obligations related to climate change, it incurs responsibility and triggers "a panoply of legal consequences"[13] (para. 445). These include cessation and non-repetition, restitution, compensation, and satisfaction.

The ICJ and the IACtHR discussed these legal consequences in detail. For instance, both courts emphasized that restitution refers to the restoration of the situation that existed before the commission of a wrongful act. In the context of climate change, this may involve restoring ecosystems and biodiversity.

Both courts also concluded that States must provide compensation when restitution is materially impossible. This compensation covers the damage inflicted on the environment "in and of itself" as well as the impairment or loss of environmental goods and services (ICJ, paras. 451-453; IACtHR, paras. 556-558).

ITLOS did not directly address issues regarding responsibility and liability. Still, it aligned with the other courts in recognizing that restitution for environmental harm can be difficult or even impossible, as such damage is often irreversible (ICJ, para. 451; ITLOS, para. 398; IACtHR, paras. 228, 363). This underscores the importance of the precautionary principle.

Lastly, the IACtHR set itself apart by highlighting that reparations must be based on the best available science and consider the vulnerabilities of affected populations, aiming to strengthen their resilience and adaptive capacity beyond restitution (paras. 557).

While reparations can involve complex questions of causation and other evidentiary hurdles, the conclusions in these advisory opinions offer a robust foundation for future claims.

Conclusion

These advisory opinions represent more than just parallel judicial developments; they mark a turning point in the legal architecture governing climate action. The message from the world's highest courts is unequivocal: States must act urgently.

By emphasizing the role of science, human rights, the responsibilities of private actors, the importance of reparations, and the necessity of strict due diligence, these opinions provide powerful tools for individuals, communities, and advocacy groups seeking to hold governments and other actors accountable. They offer a framework for advancing climate justice and embedding legal responsibility into climate action.

Ultimately, the effectiveness of these advisory opinions will depend on how their principles and arguments are implemented in binding rulings, legislation, policy-making, and transnational advocacy. Their true challenge is determining whether international law can move from abstract guidance to tangible, transformative change – ensuring accountability, empowering communities, and safeguarding the right to a healthy environment for current and future generations.

References

1. ITLOS, *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*, Advisory Opinion of 21 May 2024.
2. IACtHR, *Climate Emergency and Human Rights*, Advisory Opinion OC-32/25 of 29 May 2025, requested by the Republic of Chile and the Republic of Colombia.
3. ICJ, *Obligations of States in respect of Climate Change*, Advisory Opinion of 23 July 2025.
4. Michael A. Becker and Cecily Rose, 'The Return of Not-Quite "Phantom Experts"?' *Verfassungsblog* (3 December 2024), https://verfassungsblog.de/the-icj-meets-with-ipcc-scientists/.
5. Alberto do Amaral Junior and Isabela Soares Bicalho, 'Epistemic Authority and the Right to Science in AO-32/25' *Verfassungsblog* (5 September 2025), https://verfassungsblog.de/epistemic-authority-and-the-right-to-science-in-ao-32-25/.
6. UNFCCC, *Report of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement on its fifth session, held in the United Arab Emirates from 30 November to 13 December 2023, Part Two: Action taken by the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement at its fifth session*, UN Doc. FCCC/PA/CMA/2023/16/Add.1.
7. Jorge Alejandro Carrillo Bañuelos and Maria Antonia Tigre, 'The ICJ's Advisory Opinion on Climate Change: Key Takeaways from the 2024 Hearings (Part 1)' *Climate Law: A Sabin Center Blog* (10 March 2025), https://blogs.law.columbia.edu/climatechange/2025/03/10/the-icjs-advisory-opinion-on-climate-change-key-takeaways-from-the-2024-hearings-part-1/.
8. See the chapter by Christina Voigt in this volume.
9. See on this point the contribution by Niklas S. Reetz in this volume.
10. Jorge Alejandro Carrillo Bañuelos, 'Climate Litigation and Nationally Determined Contributions: Above and Beyond Accountability' (2023) 17:3 *Carbon & Climate Law Review* 113–122.
11. Melanie Pill and Georgia Hammersley, *A climate loss and damage fund that works* (2024).
12. David R. Boyd, 'The Right to a Healthy Environment as a Catalyst for Urgent and Ambitious Climate Action at the IACtHR' *Climate Law: A Sabin Center Blog* (15 July 2025), https://blogs.law.columbia.edu/climatechange/2025/07/15/the-right-to-a-healthy-environment-as-a-catalyst-for-urgent-and-ambitious-climate-action-at-the-iacthr/.
13. See the chapter by Maria Antonia Tigre, Camille Martini, Miriam Cohen, and Armando Rocha in this volume.

The Court’s Restraint: Silences, Gaps, and Self-Reflection

Jed Odermatt

What the Court Didn't Say

The ICJ's Climate Opinion and the Politics of Judicial Restraint

The advisory opinion of the International Court of Justice (ICJ) on the *Obligations of States in Respect of Climate Change* has already been hailed as a historic contribution to the evolving body of case-law on climate-related international law. The opinion was described as a "historic legal victory for small island states"[1] who remain most vulnerable to climate change. Legal commentators have largely responded positively, highlighting areas where the ICJ was unexpectedly progressive and where it clarified key aspects of States' legal obligations.

The aim of this chapter is not to summarise the ICJ's opinion or assess its overall relevance for international law. Instead, it draws attention to some of the issues that the ICJ did not address, or where it might have gone further, by providing more depth, precision, and guidance. By focusing on what the ICJ did not say, we can gain a better understanding of how it navigates its institutional constraints, political sensitivities, and the evolving terrain of international climate litigation.

This chapter discusses five points where the ICJ could have provided greater clarity or elaborated in more detail. This is not necessarily a point of critique. Avoiding the most controversial issues allows the ICJ to speak with a single, authoritative voice and mitigates the risk of serious backlash. This exercise of imagining an alternative opinion helps to identify areas where the ICJ could have gone further or addressed the questions in a more direct manner.[2]

Navigating jurisdictional and political limits

It should be noted that the ICJ is constrained by the limits of its advisory jurisdiction. While it has some latitude to reformulate the questions posed to it, it cannot stray too far from the substance of the original request submitted by the United Nations General

Assembly (UNGA). Unlike contentious proceedings, where the ICJ may rule on issues of legal responsibility, attribution, or compensation in relation to specific facts, advisory proceedings are usually framed in more abstract, general terms. Indeed, while the ICJ advisory opinion is undoubtedly a welcome contribution to evolving climate change law, its findings are often presented as vague formulations that will require further elaboration by other actors – States, litigants, and domestic and international courts.

The limits on the ICJ's authority are not merely procedural. International courts operate within a broader political context, and when delivering an advisory opinion of such weight and visibility, the ICJ must remain attentive to the political constituencies that will be expected to respond to its findings. In contrast to other international and domestic courts that have been criticised for judicial overreach in climate litigation,[3] the ICJ has managed to strike a careful balance. It has delivered a detailed account of State obligations in a way that seeks to minimise direct provocation or backlash. The advisory opinion outlines key legal principles in broad and abstract terms, offering only limited application to the specific legal and factual issues raised. This approach tends to paper over the more controversial and politically sensitive issues that remain at the heart of the debate about the legal responses to climate change.

In his declaration, Judge Nolte noted the broader impact and implications of the advisory opinion on the very legitimacy of courts:

> *"Depending on how this Advisory Opinion will be generally understood, States may in the future shy away from accepting new treaty obligations or maintaining procedures that could subject them to unpredictable legal consequences. States may also chal-*

> *lenge the distributive implications of court decisions which, in their view, unjustifiably isolate parts of the problem from the whole. And States may challenge the very legitimacy of courts, particularly international courts, when these appear to unduly limit the exercise of States' political and administrative discretion" (para. 32, emphasis added).*[4]

This highlights how the ICJ's role is not only to address the legal questions put to it by the UNGA, but also to navigate its political aspects and consider how the opinion may be received.

The ICJ's approach in this instance is to provide a framework for addressing the questions it received. Rather than addressing in depth the myriad issues that arose from the questions put to it, as well as those that arose in the written submission and oral proceedings, the ICJ drew upon international law principles to provide the tools to address those questions. The ICJ clarified important legal questions – such as the relationship between treaties and custom or the relevance of the *lex specialis* rule – and provided guidance for other courts and bodies.

In making these pronouncements, the ICJ drew heavily on principles developed in its own case-law. For instance, when discussing rules of responsibility applicable to a plurality of injured or responsible States, it drew upon principles from *Armed Activities on the Territory of the Congo*[5] (para. 430). Although the ICJ did refer to recent decisions from other bodies, including the International Tribunal for the Law of the Sea's advisory opinion on climate change and international law in the context of the law of the sea[6] or the Human Rights Committee in relation to the principle of non-refoulement[7], it did not engage systematically with recent case-law from national and regional courts. This self-referential approach allows it to present its findings as based on well-estab-

lished rules, rather than as novel legal developments. Perhaps the brilliance of the ICJ opinion lies in its ability to present progressive legal developments as accepted, even self-evident, norms of international law.

No finger pointing

Is a general duty to avoid harming the climate system meaningful without clarity on what specific State actions breach that duty? The questions put to the ICJ refer to "acts and omissions" causing serious harm to the climate system. Yet the ICJ gave few examples of the types of acts that might engage such responsibility. The ICJ recognised that State obligations include activities relating to the production and licensing of, and subsidies for, fossil fuels. However, beyond its findings that States cannot harm the climate system, the opinion does not engage in depth with the types of acts that might give rise to harm.

One might argue that an advisory opinion is not the appropriate place to discuss the actions and omissions of specific States or groups of States. The ICJ itself pointed out that "the present opinion is not concerned with the invocation and determination of the responsibility of individual States or groups of States" (para. 97). However, in the context of other advisory opinions, the ICJ has examined whether the activities of a State comply with international law. For example, in its advisory opinion on *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, the ICJ found that Israel's continued presence in the Occupied Palestinian Territory is unlawful.[8] In *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, the ICJ found that the

United Kingdom is under an obligation to bring to an end its administration of the Chagos Archipelago.[9]

Admittedly, these advisory opinions relate to underlying bilateral disputes, and the questions put to the Court explicitly referred to the obligations of those States. Nonetheless, the UNGA requested an opinion on "the legal consequences [...] *for States where they, by their acts and omissions, have caused significant harm* to the climate system and other parts of the environment [...]" (emphasis added). Virtually all States have contributed to climate change in some way, but some have contributed, and continue to contribute, substantially more. The ICJ could have used this opportunity to address that disparity, which lies at the heart of the legal and political questions raised in the advisory opinion.

In doing so, the ICJ could have drawn from its own past experience, for example in the *Legality of the Threat or Use of Nuclear Weapons*(1996), where the ICJ addressed, in a non-bilateral context, the legality of certain State conduct without naming specific States.[10] Similarly here, the ICJ could have identified the group of States that are currently violating their obligations, clearly referencing acts and omissions that breach those obligations, while still fulfilling its advisory function.

Remedies

The ICJ's discussion of international responsibility is mostly framed in abstract terms, often repeating established principles included in the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts (2001). Doing justice to the questions posed by the UNGA required going further than just reciting these principles, by also showing how they apply to the specific context of climate change. For example,

the advisory opinion has a brief paragraph dedicated to restitution. It notes that this could include "reconstructing damaged or destroyed infrastructure, and restoring ecosystems and biodiversity" (para. 451), but concludes that whether "special forms of restitution are appropriate as reparation for damage suffered by States in relation to climate change" cannot be made in the abstract (para. 451). In her separate opinion, Vice-President Sebutinde referred to this lack of engagement with the types of remedies that would be appropriate for causing harm to the climate system, stating:

> *"the Advisory Opinion should have included in the reasoning that appropriate reparation may include such remedies as monetary compensation, reforestation, biodiversity recovery, coastal erosion prevention, disaster or debt relief, technological transfer and infrastructural rebuilding." (para. 12)*[11]

Judge Bhandhari also pointed out in his separate opinion that the ICJ could have gone further:

> *"and affirmed that restitution may encompass measures aimed at protecting, preserving, and enhancing the absorption capacity of GHG reservoirs and sinks; rebuilding damaged or destroyed infrastructure; restoring terrestrial and marine habitats; rehabilitating ecosystems and biodiversity; and, where feasible, returning lost territory or property." (para. 6)*[12]

Judge Bhandhari even discusses the possibility of recommending the establishment of claims commissions and other ways to systematically address claims. Although some would argue that this goes beyond the scope of the ICJ's advisory function, a mean-

ingful answer that seriously addresses the underlying issues behind the question would have engaged with the types of remedies climate harm requires. As climate justice would likely require a transfer of resources in some form, it is understandable that the ICJ avoided this sensitive question.

The absent rights of nature

In comparison with the advisory opinion of the Inter-American Court of Human Rights (IACtHR) on the climate emergency and human rights,[13] the ICJ opinion does not view Nature as a holder of rights.[14] In its opinion, the IACtHR found that the right to a healthy environment "is about protecting nature not only because of the effects that its degradation could cause on other rights of individuals, but also because of its vital interdependence with the other organisms that make life on the planet possible" (para. 273). The ICJ presented a view of Nature as external to human life, as something that impacts and is impacted by human behaviour. Although this was not explicitly included in the question, the ICJ could have given guidance relating to the emerging right of Nature.

Engagement with human rights

Many recent climate cases frame climate change as a human rights issue.[15] While the ICJ addressed human rights law, it discussed human rights obligations in abstract terms. Some of the challenges facing climate litigants in both national and regional human rights cases have involved questions about extra-territorial jurisdiction and the status of individuals as victims. The ICJ addressed the territorial scope of human rights treaties (paras. 394-402) but

merely repeated its findings in previous ICJ cases (such as *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*) and concluded that the issue of territorial jurisdiction "must be addressed in light of each instrument's specific provisions" (para. 394).

An important aspect of the ICJ's opinion is the recognition of the right to a clean, healthy and sustainable environment. Yet the ICJ presented this right as one that upholds other rights: "the human right to a clean, healthy and sustainable environment is [...] inherent in the enjoyment of other human rights" (para. 393). Judge Bhandhari argued that the ICJ could have gone further in explaining the status of the right:

> *"With respect to the right to a clean, healthy and sustainable environment, it remains unclear whether the Court ultimately affirmed the existence of this right as a distinct norm of customary international law. In my view, the Court's characterization of the right as 'inherent' in the enjoyment of other human rights does not sufficiently clarify its normative status or the precise nature of its relationship to other established rights." (para. 3)*[16]

In her separate opinion, Judge Charlesworth similarly lamented that the opinion does not discuss the substantive and procedural content of the right to a clean and healthy environment (para. 9), referring to an emerging body of case-law that considers the right to a healthy environment as an autonomous right.[17] Judge Aurescu went further, citing a wealth of statements, treaties, national constitutions and other legal texts to argue that sufficient state practice and *opinio juris* exist to establish it as a rule of customary international law (paras. 27-46).[18] While the ICJ emphasised the "importance" of the right to a clean and healthy environment

(para. 391), it could have clarified the status and content of the right.

Future generations

The UNGA asked the ICJ to clarify the legal consequences for States with respect to "Peoples and individuals of the present and *future generations* affected by the adverse effects of climate change" (emphasis added). Although the UNGA specifically invited the ICJ to discuss responsibilities towards future generations, the ICJ mostly avoided tackling this question in a meaningful way.

The ICJ acknowledged that the United Nations Framework Convention on Climate Change (UNFCCC) sets out that "[t]he Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity" (UNFCCC Article 3, paragraph 1). It also considered intergenerational equity as a manifestation of equity in general (para. 157) and found that "[d]ue regard for the interests of future generations and the long-term implications of conduct are equitable considerations that need to be taken into account where States contemplate, decide on and implement policies and measures in fulfilment of their obligations under the relevant treaties and customary international law" (para. 157). However, even though the ICJ acknowledged "intergenerational equity" as an interpretive principle, it avoided framing it as a basis for concrete obligations.

Beyond these references to future generations, the ICJ also side-stepped the thorny question of state obligations to those who will be most harmed by climate change. It made sporadic references to future generations but failed to address the specific obligations states have towards those not yet born.[19] As this is a

live issue before international and regional courts, and was a rationale behind the European Court of Human Rights' *Duarte Agostinho and Others v. Portugal and 32 Other States* and other litigation,[20] the ICJ could have addressed the UNGA's reference to future generations in a more meaningful way.

Conclusion

In his separate opinion, Judge Yusuf is scathing in response to the ICJ's framing of the questions: "the Court's attempts to dodge, elude and avoid by all means the ordinary meaning and material scope of [the] question [...] borders on the unreal" (para. 6).[21] Like all international courts, the ICJ decides which questions to avoid.[22] While the ICJ can be criticised for overlooking certain issues or not going into sufficient depth, its strategy is a logical one. Rather than pointing to specific States and actors who are harming the climate system, it set out a broad framework for addressing these questions in future cases. It did not engage with the more ambitious aspects of the climate justice movement, including the rights of Nature, extraterritorial jurisdiction, or questions about resource distribution.

The ICJ's strategy has two consequences. First, it delivers a unanimous decision that aims to protect the ICJ's institutional legitimacy and authority, in particular by not provoking severe criticism or backlash from States.[23] Second, it provides litigants before national, regional and international courts with the possibility of referring to its findings in future cases. The danger of framing its findings in abstract terms, however, is that they remain open for interpretation. In the hands of climate advocates, the opinion reads as a progressive roadmap for accountability. Yet the same formulations, especially regarding attribution, causation, and

reparation,[24] can be interpreted in ways that dilute or even deflect responsibility.

References

1. Natricia Duncan, ' Caribbean leaders hail ICJ climate ruling as "historic" win for small island states' *The Guardian* (25 July 2025), https://www.theguardian.com/world/2025/jul/25/caribbean-leaders-hail-icj-climate-ruling-as-historic-win-for-small-island-states.
2. United Nations General Assembly, *Request for Advisory Opinion transmitted to the Court pursuant to General Assembly resolution 77/276 of 29 March 2023: Obligations of States in respect of Climate Change*, UN Doc A/RES/77/276 (29 March 2023).
3. Corina Heri, 'Implementing KlimaSeniorinnen: Evaluating the Initial Swiss Response' *Climate Law Blog* (18 July 2024), https://blogs.law.columbia.edu/climatechange/2024/07/18/guest-blog-implementing-klimaseniorinnen-evaluating-the-initial-swiss-response/.
4. ICJ, *Obligations of States in respect of Climate Change*, Declaration of Judge Nolte, 23 July 2025.
5. See ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment of 19 December 2005, para. 430.
6. ITLOS, *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*, Advisory Opinion of 21 May 2024.
7. Human Rights Committee, *Teitiota v. New Zealand*, Views adopted under article 5(4) of the Optional Protocol, Communication No. 2728/2016, 24 October 2019, UN Doc. CCPR/C/127/D/2728/2016.
8. ICJ, *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Advisory Opinion of 19 July 2024.
9. ICJ, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion of 25 February 2019.
10. ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996.
11. ICJ, *Obligations of States in respect of Climate Change*, Separate Opinion of Vice-President Sebutinde, 23 July 2025.
12. ICJ, *Obligations of States in respect of Climate Change*, Separate Opinion of Judge Bhandari, 23 July 2025.
13. IACtHR, *Climate Emergency and Human Rights*, Advisory Opinion OC-32/25 of 29 May 2025, requested by the Republic of Chile and the Republic of Colombia.
14. Ecab Amor Vázquez and Theresa Amor-Jürgenssen, 'The Bloom of Nature's Rights: On the IACtHR's Recognition of Nature's Legal Personality in AO-32/25' *Verfassungsblog* (18 July 2025), https://verfassungsblog.de/the-bloom-of-natures-rights/.
15. See the contribution by Corina Heri in this volume.

16. ICJ, *Obligations of States in respect of Climate Change*, Separate Opinion of Judge Bhandari, 23 July 2025.
17. ICJ, *Obligations of States in respect of Climate Change*, Separate Opinion of Judge Aurescu, 23 July 2025.
18. ICJ, *Obligations of States in respect of Climate Change*, Separate Opinion of Judge Aurescu, 23 July 2025.
19. See the Maastricht Principles on the Human Rights of Future Generations, adopted 2023, available at: https://www.rightsoffuturegenerations.org/the-principles.
20. ECtHR, *Duarte Agostinho and Others v. Portugal and 32 Others*, Appl. no. 39371/20, Decision of 9 April 2024.
21. ICJ, *Obligations of States in respect of Climate Change*, Separate Opinion of Judge Yusuf, 23 July 2025.
22. Jed Odermatt, 'Patterns of avoidance: political questions before international courts' (2018) 2:14 *International Journal of Law in Context* 221–236.
23. Mikael Rask Madsen, Pola Cebulak, and Micha Wiebusch, 'Backlash against International Courts: Explaining the Forms and Patterns of Resistance to International Courts' (2018) 2:14 *International Journal of Law in Context* 197–220.
24. Federica Paddeu and Miles Jackson, 'State Responsibility in the ICJ's Advisory Opinion on Climate Change' *EJIL:Talk* (25 July 2025), https://www.ejiltalk.org/state-responsibility-in-the-icjs-advisory-opinion-on-climate-change/.

Matthias Petel

Cooperation Without Justice?

On the Elusive Differentiation of Responsibilities in the ICJ's Climate Advisory Opinion

Climate change is both a global crisis that binds humanity to a shared fate – a "common concern for humankind" – as well as the revealer of historical inequalities on the international stage, rooted in colonial legacies.[1] Every country is vulnerable to the destabilization of the climate system and must adopt mitigation and adaptation measures. At the same time, States have not contributed equally to the crisis, nor are they similarly exposed to the risks it generates. This tension is crystallized in the principle of "*common* but *differentiated* responsibilities" which lies at the heart of international climate law.

Such tension, in turn, generates conflicting perspectives on dealing with climate change. A first approach emphasizes the universal dimension of climate vulnerability, which should foster cooperation that transcends territorial and social boundaries. Following this account, the primary urgency is to move beyond narrowly defined national interests and propel collective action. A contrasting view conceives climate policy less as a neutral space for cooperation than as a deeply distributional struggle.[2] Climate policies must reckon with asymmetries of power, unequal ecological exchange, and colonial patterns of trade and finance to address the structural injustices that shape both responsibility for and vulnerability to climate change.[3]

In this chapter, I analyze the International Court of Justice (ICJ) climate change advisory opinion in the light of these antagonistic framings of the climate crisis. The ICJ's advisory opinion insists heavily on the duty to cooperate to protect the climate system. I show that this duty of cooperation is grounded in an acknowledgment of differentiated obligations among states but falls short in specifying how those differentiated obligations should be quantified, whether in relation to mitigation or to adaptation finance. I argue this reflects a general reluctance to engage with the distribu-

tive issues central to climate justice claims which, in turn, serves to preserve the ICJ legitimacy.

States of the world, unite!

The ICJ emphasized the importance of the duty to cooperate to protect the environment (paras. 140-142), including the climate system (paras. 301-308). This obligation is rooted both in customary and conventional international law, notably in environmental and climate treaties, the latter specifying the content of the customary obligation of cooperation (para. 216).[4] The ICJ traced the origins of the obligation to the United Nations Charter, which provides that the purpose of the organization is to "achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character" (Article 1). This commitment was subsequently extended to environmental challenges, notably in the Stockholm Declaration (Principle 24) and the Rio Declaration (Principle 7). Beyond this textual foundation, the ICJ highlighted the consistent practice of States in this area and thus considered that the duty to cooperate in environmental matters has acquired customary status (para. 140).

The ICJ further noted the existence of a duty to cooperate in climate treaties, most notably throughout the United Nations Framework Convention on Climate Change (UNFCCC), for example, in the areas of technological transfer, scientific research, and the preservation of natural carbon sinks (para. 214 referring to Article 4(1) of the UNFCCC). Additionally, the developed countries listed in Annex II (a subset of Annex I) are required to provide financial assistance to developing countries vulnerable to the impacts of climate change, both to cover the costs of adaptation (Article 4(4)) and to help them fulfill their obligations under the Convention

(Article 4(3)). Under the Paris Agreement, these obligations of cooperation are reiterated: developed countries are expected to provide financial assistance (Article 9) and technological transfers (Article 10) as well as capacity-building measures (Article 11) to assist developing countries in both mitigation and adaptation efforts.

This duty is justified due to the very nature of environmental matters that defy national borders and the interdependence of States: it is "intrinsically linked to the duty to prevent significant harm to the environment, because unco-ordinated individual efforts by States may not lead to a meaningful result" (para. 141). The ICJ cited a prior judgment[5] stating that "it is by co-operating that the States concerned can jointly manage the risks of damage to the environment" (para. 261). In the climate change context, this duty is "indispensable" given the global nature of the crisis: all States must participate in the implementation of international action to protect the climate system (paras. 215-216). As such, cooperation represents "the very foundation of meaningful international efforts with respect to climate change" (para. 302) and is "not a matter of choice for States but a pressing need and a legal obligation" (para. 308).

Developed States remain free to choose the means of cooperation, provided they act in "good faith" and with the required "diligence" (para. 262). The opinion, however, highlighted the three favored means of cooperation set out in the Paris Agreement: financial assistance (para. 263-265), technology transfers (para. 266), and capacity-building (para. 267). Notably, financial transfers are framed as binding international obligations on States (para. 264). Climate finance is thus no longer understood as voluntary humanitarian aid stemming from the benevolence of the North.

Differentiation without quantification

The duty to cooperate is not entirely disconnected from the historical and economic inequalities that structure the international scene, as the obligations arising from it rest primarily on developed States. More generally, the ICJ insisted on the importance of the principle of "common but differentiated responsibilities and respective capabilities":

"the principle of common but differentiated responsibilities and respective capabilities reflects the need to distribute equitably the burdens of the obligations in respect of climate change, taking into account, inter alia, States' historical and current contributions to cumulative GHG emissions, and their different current capabilities and national circumstances, including their economic and social development. The principle of common but differentiated responsibilities and respective capabilities thus acknowledges, on the one hand, the historical responsibility of certain States and, on the other, that the measures which can be expected from all States with respect to addressing climate change are not the same" (para. 148)

Hence, the differentiation of obligations is affirmed. It rests not only on varying levels of development (as it is often narrowly framed by Western States reluctant to confront past emissions) but also on historical contributions. This differentiation does not operate along a rigid binary that locks States into a frozen snapshot of the past. Rather, the ICJ conceives of it as a "spectrum" with two poles (para. 150): at one end are the most developed countries and largest contributors to climate change, and at the other, the least developed countries with only minimal contributions. Between these poles lie States that have experienced significant

economic development in recent decades and now command greater resources and capacities to contribute to mitigation efforts. The developed/developing divide is therefore not only spectral but also fluid.

In relation to the due diligence standard, the ICJ emphasized that its "multifactorial and evolutive character entails that, as States develop economically and their capacity increases, so too are the requirements of diligence heightened" (para. 292). According to the ICJ, this evolutive understanding of differentiation was made explicit in the Paris Agreement: Article 2 provides that "[t]his Agreement will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of *different national circumstances*" (emphasis added). The addition of "national circumstances" signals that the developed/developing distinction is not "static", but must be adapted to the evolving conditions of each State (para. 226).

The principle of common but differentiated obligations is relevant not only to the interpretation of cooperation duties but also to the assessment of the mitigation efforts of countries and the substance of their nationally determined contributions (NDCs) under the Paris Agreement. The opinion explicitly notes that "the standard to be applied when assessing the NDCs of different parties will vary depending, *inter alia*, on historical contributions to cumulative emissions, and the level of development and national circumstances of the party in question" (para. 247). In this sense, the ICJ recalled that each State must do its "fair share"[6] toward the collective mitigation goal established by the Paris Agreement.

This is a step in the right direction but allocating the costs and benefits of the climate transition is not an abstract matter to be settled by general appeals to "cooperation", "good faith", or "due

diligence". It is a set of very concrete questions: Who does what, and how much? Who pays, and for what? Who bears the costs of stranded fossil assets? On these questions, the ICJ remained elusive.

The ICJ opinion contains no discussion of how to fairly allocate the remaining global carbon budget (*i.e.*, the volume of emissions that can still be emitted to respect the Paris Agreement's goals) among nations. This requires a criterion, or a set of criteria, to determine each country's level of responsibility. The opinion does stress that developed countries must "do more"; but how much more? One approach would be to distribute carbon allowances equally among all individuals, regardless of geography, thus reflecting the human rights ideal of equality. An alternative is the "grandfathering" approach[7], which allocates future carbon quotas partly in proportion to past emissions, thereby granting developed States, with their high historical emissions, a disproportionately large share of the future carbon budget. The ICJ declined to settle this debate, leaving it to domestic courts to determine what qualifies as diligent mitigation action. In practice, these courts have often favored the least restrictive allocation criteria in the name of separation of powers, avoiding questions of equity, in order to leave discretion to political authorities.[8]

Relatedly, the ICJ noted that the level of climate finance should be sufficient to enable the fulfillment of the Paris Agreement, especially the collective temperature goal (para. 265). Additionally, it added that this obligation "can be evaluated on the basis of several factors, including the *capacity* of developed States and the *needs* of developing States" (para. 265, emphasis added). Yet the ICJ specified no concrete amounts, made no assessment of Global South needs or the current finance gap, and remained silent on the composition of climate finance, whether it must be via

grants or loans, public or private money, and the implications of those various options.

Universalizing climate responsibilities, silencing climate injustices

This lack of precision is hardly accidental. The ICJ justified it by repeating as a mantra that it "is not called upon to identify the legal responsibility of any particular State or group of States" but rather to articulate a general legal framework of obligations (paras. 106 and 108, and also mentioned in different wording in paragraph. 97). In other words, the ICJ left to contentious proceedings the delicate task of specifying the concrete content of obligations and their consequences.

The ICJ's interpretation of the General Assembly's resolution (which, as Mario Prost notes, did hint at questions of specific responsibilities and vulnerabilities) reflects a deliberate choice and illustrates its political caution.[9] In fact, in a striking passage, the Court explicitly sets aside certain terms from the questions posed, which specifically referred to the climate harm suffered by small island developing States:

"As for legal consequences with respect to certain categories of States that are "specially affected" or "are particularly vulnerable", the Court notes that the application of the rules on State responsibility under customary international law does not differ depending on the category or status of an injured State. Thus, "specially affected" States or States that are "particularly vulnerable" are in principle entitled to the same remedies as other injured States. Moreover, since, in these proceedings, the Court is not called upon to identify particular States that may have breached their relevant

obligations, it follows that it is also not called upon to determine any specific legal consequences with respect to particular injured States or groups of States" (para. 109)

Thus, rather than focusing on the circumstances of a few highly vulnerable States (apart from succinct passages to the specific issue of statehood in the context of sea-level rise and irreversible territorial loss), the ICJ adopted an abstract framing that universalizes both vulnerabilities and responsibilities. It emphasized that "[c]limate change [...] poses a quintessentially universal risk to all States" (para. 137). And it articulated obligations that, at least in principle, apply to all States.

A similar strategy is evident in its treatment of reparations: as Julia Dehm shows in her contribution to this volume, the ICJ merely restates general principles of international law in the climate context, while remaining evasive and declining to situate the issue within its (neo)colonial dimensions. This formalistic posture is heavily criticized by Judge Yusuf in his separate opinion who argued that "the Court has indeed ended up engaging in an abstract examination of the law of State responsibility in a manner divorced from the reality of the significant harm to the climate system caused by the historical and current GHG emissions of gross emitters and the injury suffered by the most vulnerable victims of climate change" (para. 7).[10]

This "no finger-pointing" approach[11] clearly serves a legitimizing function. The ICJ sought to articulate a legal framework that is both responsive to the urgency of the climate crisis and acceptable to States deeply divided on questions of responsibility and redress. As Antoine De Spiegeleir aptly describes in his contribution to this book, the ICJ was keenly aware of its institutional boundaries and attempted to engage in climate debates while portraying itself as an "impartial and cautious interpreter of the law". In this context,

the ICJ was more comfortable echoing consensual calls to international cooperation rather than confronting the historical processes of colonial domination and contemporary power asymmetries that lie at the heart of ecological crises. It was unwilling to determine what constitutes, in concrete terms, an equitable climate transition. As a result, the opinion is firm on principles, embracing the full body of international law and its relevance to climate change, while remaining reluctant to spell out the concrete implications of these obligations.

The ICJ's caution may be appropriate, and even wise, given the current political climate. The consequence of its silence, however, is that countries bearing the brunt of past and ongoing exploitation of the Earth, and its climate impacts, are left waiting to know what "cooperation" truly means in their circumstances. All the more reason, then, for future legal and political mobilization to turn the advisory opinion's aspirational promises into tangible justice.

References

1. Farhana Sultana (ed.), *Confronting climate coloniality: decolonizing pathways for climate justice* (Routledge, 2025).
2. Michaël Aklin and Matto Mildenberger, 'Prisoners of the Wrong Dilemma: Why Distributive Conflict, Not Collective Action, Characterizes the Politics of Climate Change' (2020) 20:4 *Global Environmental Politics* 4–27.
3. J. Timmons Roberts and Bradley C. Parks, 'Ecologically Unequal Exchange, Ecological Debt, and Climate Justice: The History and Implications of Three Related Ideas for a New Social Movement' (2009) 50:3-4 *International Journal of Comparative Sociology* 385–409.
4. On customary obligations in the ICJ's climate change advisory opinion see the chapter by Markus Gehring in this volume.
5. ICJ, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment of 20 April 2010.
6. See the chapter by Joe Udell and Floris Tan in this volume.
7. Carl Knight, 'What is grandfathering?' (2013) 22:3 *Environmental Politics* 410–427.
8. Matthias Petel and Norman Vander Putten, 'The Belgian Climate Case: Navigating the Tensions Between Climate Justice and Separation of Powers' *Verfassungsblog* (5 December 2023), https://verfassungsblog.de/the-belgian-climate-case/.
9. Mario Prost, 'Disaster Passing as Miracle? A Critical Take on the ICJ's Climate Advisory Opinion' *EJIL: Talk* (14 August 2025), https://www.ejiltalk.org/disaster-passing-as-miracle-a-critical-take-on-the-icjs-climate-advisory-opinion/.
10. ICJ, *Obligations of States in respect of Climate Change*, Separate Opinion of Judge Yusuf, 23 July 2025.
11. See the contribution by Jed Odermatt to this volume.

Dina Lupin

Looking for an African Perspective on the ICJ's Climate Advisory Opinion

According to the Intergovernmental Panel on Climate Change (IPCC), Africa has the lowest per capita greenhouse gas (GHG) emissions of any region in the world, but is already facing widespread and devastating climate impacts.[1] Despite contributing so little and suffering so much, the continent receives only a very small proportion of global climate finance and significantly too little to begin to address its climate needs. A report by the Climate Policy Initiative in 2024 found that Africa received only 20% of global adaptation finance (about 45% went to East Asia and the Pacific region) and that most of that money went to only 10 countries in Africa.[2] Loans constituted the largest funding category and those were mostly made to middle-income countries.

It is perhaps unsurprising then that African participation in the advisory proceedings on climate change at the International Court of Justice (ICJ) was relatively high. The African Union (AU) and more than 45 African States made written and oral submissions to the ICJ. These submissions emphasised, among other points, the significant harm climate change is inflicting on the continent and its peoples, and the importance of holding high-emitting States responsible for their historical greenhouse gas emissions. However, Africa received no substantial mention in the ICJ's advisory opinion.

In this chapter, I assess whether one can, nevertheless, find an African perspective in the reasoning of the ICJ judges. Since Africa gets little mention in the advisory opinion, I do this by looking at the separate opinions of Vice President Sebutinde[3], Judge Yusuf[4], and Judge Tladi[5], the three African judges to the ICJ.

Should we look to African judges for an African perspective?

This inquiry – looking for an African perspective by looking at the separate opinions of the African judges – raises two critical preliminary questions. First, why should judges from Africa – more than any other or, indeed, at all – be expected to provide an African perspective? Second, what counts as an "African perspective"?

I will briefly address the first question but, given the limited space in this chapter, simply acknowledge the significant political, ontological, and epistemological challenge of the second. While identifying what an African perspective is raises multiple questions, it is my belief that this should not discourage one from recognising the absence of African perspectives in context where there should, arguably, be one (spoiler alert: as is the case here).

Why look to African judges to provide an African perspective? The expectation that a judge represents the perspectives or attitudes of a country or a whole region is, clearly, problematic. The Rules of the ICJ provide that, once elected, a Member of the Court is a delegate neither of the government of his own country nor of that of any other State. As the ICJ's website explains, "the Court is not composed of representatives of governments. Members of the Court are independent judges whose first task, before taking up their duties, is to make a solemn declaration in open court that they will exercise their powers impartially and conscientiously."[6]

While this rule seeks to ensure judicial independence and impartiality, it has also been important in international diplomacy and in the political relationship of states to the ICJ. For example, Uganda recently distanced itself from the decision of Judge Julia Sebutinde in South Africa's genocide case against Israel. Sebutinde was the only judge to vote against all six measures adopted by the

Court in the Order of 26 January 2024, prompting the Ugandan government to state: "The position taken by Judge Sebutinde is her own individual and independent opinion, and does not in any way reflect the position of the government of the republic of Uganda."[7]

At the same time, however, judges are taken as acting and are often expected to act, at least in some sense, as representatives of the countries and regions they come from. Article 9 of the ICJ Statute requires (in its colonial phrasing) that "the body as a whole" should represent "the main forms of civilization and of the principal legal systems of the world". Regional representation in the make-up of the members of the Court is seen as critical to the legitimacy and political acceptability of the Court. This is especially true for Africa. As the ICJ's then President, Judge Yusuf, has noted, at independence many African states were reluctant to be a party to the ICJ due to a lack of African representation on the bench. In 1960, there was, for the first time, just one African judge on the bench.[8] Yusuf argues, "the African states therefore questioned whether this institution could represent African views and perspectives on international law, and whether it could understand the situation and needs of Africans. They discovered soon enough that many of the judges had a colonial conception of Africa and did not know very much about the continent". This suggests an expectation that the appointment of African judges would ensure the representation of African perspectives, views, and understandings of the continent in the work of the ICJ.

Judges do take up this representative mantle, especially in the context of separate opinions. Itamar Mann has written about the role of judges' identities and histories in minority opinions.[9] These personal experiences often play a crucial and valuable role in articulating the gaps or nuances in the ICJ's assessment of a matter. At the same time, the reliance on personal identity in judicial

reasoning has been subject to critique.[10] The identity Judge Sebutinde brought to her separate opinion in the January 2024 order was one informed by a conviction that "the crisis in Gaza was a sign of the 'End Times'" and that "the Lord [was] counting on [her] to stand on the side of Israel."[11]

While Mann's interest is in the personal identities of the judges, the examples he discusses demonstrate that these experiences, while personal, are also often geo-political, mapping onto histories of colonialism, apartheid, genocide and resistance struggles against unjust legal orders. Judges bring themselves into the court room and, in doing so, bring the history, context and experiences of their countries and regions.

As Members of the Court, Sebutinde, Yusuf and Tladi do not represent their countries or continent, and they have no obligation to consider an African perspective on any matter before them. They do, however, have the opportunity to do so – to bring their African identities, history, context, understanding and legal traditions into their opinions without compromising their impartiality and independence.

So, did they?

An African perspective? Judges Sebutinde, Yusuf and Tladi

Sebutinde, Yusuf and Tladi do not directly address the particular contribution, needs, or demands of African countries in relation to climate change. Sebutinde's objections to the ICJ's approach points to some of the themes highlighted by African States while Yusuf's separate opinion comes the closest to directly addressing issues raised by the AU and African States.

Sebutinde's separate opinion was critical of the ICJ's opinion and, while she addressed a number of issues, her overall critique

was that the ICJ simply failed to address the issue of *climate justice* (para. 1). She objected that the ICJ's discussion of climate justice was, at best, vague. The ICJ, she argued, failed to respond to the questions put to it, specifically in relation to the thorny issues of duties owed to future generations (paras. 6-7), the right to self-determination in the face of territorial loss (para. 8), and the differentiated responsibilities of developed States (paras. 9-12). On the latter point, Sebutinde stated that the ICJ ought to have found that Annex 1 countries (high-emitting, developed countries as identified in the United Nations Framework Convention on Climate Change) have *additional* obligations in relation to climate change – "to take the lead in combating climate change" (para. 11). Importantly, Sebutinde stated that developing States, in their submissions to the ICJ, proposed innovative remedial, reparative measures emphasising and giving weight to the principle of Common but Differentiated Responsibilities (para. 9). In Sebutinde's view, these should have been taken up by the ICJ, but instead the ICJ downplayed the principle, equating it merely to 'equity'. The ICJ, on Sebutinde's reading, did too little to protect the most vulnerable – both people and States – wasting its time instead, as she saw it, on matters better addressed in contentious proceedings (e.g., attribution and, causation and so on, which the ICJ addressed at length in paragraphs 421 to 438 of the opinion).

Like Sebutinde, Yusuf is critical of the ICJ, accusing it of producing a "learned scholarly dissertation" rather than a practical and concrete reply that engaged with the "material scope" of the urgent questions put to it (para. 2). Yusuf's primary objection is to the ICJ's rephrasing of the questions so as to avoid having to make a determination about the specific obligations of States that have made the predominant contribution to GHG emissions (paras. 3, 4 and 36). Yusuf is scathingly critical of what he sees as the ICJ's

efforts to downplay, dismiss or overlook the scientific and legal foundations for the historic responsibilities of certain States by instead articulating the causes of climate change as "the consequence of activities… of *all States*" (para. 14).

The ICJ, Yusuf argues, is called on to address a precise and material legal question: what are the legal consequences of "the failure of gross GHG emitting States to take appropriate action to protect the climate system from such emissions" and what is the entitlement of injured States given this failure? (para. 40). To answer this question, Yusuf finds that the Court ought to have considered not only the ILC Articles on State Responsibility but also the complimentary régime of international liability for injuries arising out of acts not prohibited by international law (paras. 42-46).

Yusuf's separate opinion comes closest to addressing an issue at the heart of many of the African State's concerns – accountability and reparation for historical emissions. However, as Michael Addaney has commented, Yusuf's historical approach still falls short of addressing the unique colonial and neocolonial dynamics that shape Africa's relationship to the climate crisis.[12] Yusuf does not address the environmental and extractive nature of colonialism nor the deeply entrenched "neo-colonial trade systems that push African economies toward raw material export without industrialisation."[13] While Yusuf recognises a legal basis for reparation, he fails to spell out the kinds of structural, economic and legal reform that would be necessary for accountability and repair to address Africa's climate past and its future.

In contrast to Sebutinde and Yusuf, Tladi's separate opinion praised the ICJ's efforts, repeatedly describing the opinion as *robust*. His separate opinion primarily sought to affirm and strengthen the findings of the ICJ, providing further evidence or

argument for its assertions, more fully articulating what Tladi took as the basis of the ICJ's reasoning.

Tladi's critical concerns with the ICJ's reasoning related exclusively to the consequences flowing from *erga omnes* obligations and whether the consequences of such obligations vary when there is a breach of a *jus cogens* norm(paras. 34-37). It is, however, something of a technical point as the interpretation of these obligations only came up indirectly in the advisory opinion (although Tladi would argue that this is exactly the problem but that is a topic for a different contribution).

Tladi did provide important support to the ICJ's finding that 1.5 degrees, rather than 2 degrees, is the temperature target of the Paris Agreement and that States do not have unfettered discretion to determine the content of their Nationally Determined Contributions (NDCs) (paras. 4-23). Rather, he agreed with the ICJ that NDCs "must be objectively capable of contributing towards the temperature goal" (para. 17).

In his separate opinion, Tladi articulated rigorous and stringent obligations on States under the Paris Agreement and customary international law. While Tladi's legal reasoning in this regard is, as ever, rigorous and elegant, it did not engage with the questions and concerns raised by African (and other highly vulnerable) States. Unlike Sebutinde and Yusuf, Tladi is interested in this case in questions of law rather than principles of climate justice and historical accountability. While he extracted a great deal out of the limited international legal texts, in some ways, the most interesting thing Tladi had to say about the advisory opinion is that, ultimately, he does not seem to think it matters all that much. The ICJ, he pointed out, has a limited role and, in the face of an existential problem like climate change he concluded that "no number of advisory opinions, no matter how robust or thoughtful, can save the

planet from the ongoing climate crisis" (para. 38). Tladi, a judge on the ICJ, invited by the countries of the world, including African countries and the African Union, to lay out the obligations of States to address an existential climate change crisis, instead kicked the can down the road: "I still maintain modest hope", he tells us, "Hope, that future generations will make better choices" (para. 39).

Silence on Africa

Despite the fact that Africa, as a continent, has contributed the least to climate change and is already suffering some of the worst of its impacts, with almost no financial support or relief from historical polluters, African concerns, arguments, and solutions got little attention in the ICJ advisory opinion. While Tadi and Sebutinde called on African idioms to articulate their response to the opinion, they fell short of articulating an African perspective on the obligations of States in relation to climate change.

While judges are expected to carry out their duties impartially and independently, they are, as discussed above, also often expected to bring an understanding and perspective of their homes with them, especially if they come from historically marginalised parts of the world. As Addaney has noted, "Given Africa's history – colonial plunder, transatlantic slavery, apartheid, land dispossession, structural adjustment programmes, and exploitative international trade regimes – African judges at the ICJ were uniquely positioned to call for climate reparations rooted in historical responsibility and climate justice."[14] In this regard, all three of the African judges can be criticized for missing a critical opportunity to more fully represent African views and perspectives, as the continent is forced to bear the brunt of climate harm.

The ICJ's advisory opinion and the separate opinions leave us with a question about what an African perspective on the obligations of States in relation to climate change is or ought to be. We may, however, soon have an answer. In May 2025, the Pan African Lawyers Union (PALU), supported by civil society organizations including the African Climate Platform, Natural Justice, Resilient40, and the Environmental Lawyers Collective for Africa, filed a petition before the African Court on Human and Peoples' Rights requesting an Advisory Opinion on the human rights obligations of African states in the context of climate change. We can only hope, *contra* Judge Tladi, that a growing number of advisory opinions can do something to save the planet from the climate crisis.

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References

1. C.H. Trisos, I.O. Adelekan, E. Totin, A. Ayanlade, J. Efitre, A. Gemeda, K. Kalaba, C. Lennard, C. Masao, Y. Mgaya, G. Ngaruiya, D. Olago, N.P. Simpson & S. Zakieldeen, *Africa*, in *Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (H.-O. Pörtner, D.C. Roberts, M. Tignor, E.S. Poloczanska, K. Mintenbeck, A. Alegría, M. Craig, S. Langsdorf, S. Löschke, V. Möller, A. Okem & B. Rama, eds., Cambridge University Press, Cambridge and New York, 2022), pp. 1285–1455, available at: https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_Chapter09.pdf .
2. Global Center on Adaptation & Climate Policy Initiative, *State and Trends in Climate Adaptation Finance 2024*, available at: https://gca.org/wp-content/uploads/2024/04/State-and-Trends-in-Climate-Adaptation-Finance-2024.pdf .
3. ICJ, *Obligations of States in respect of Climate Change*, Separate Opinion of Vice-President Sebutinde, 23 July 2025.
4. ICJ, *Obligations of States in respect of Climate Change*, Separate Opinion of Judge Yusuf, 23 July 2025.
5. ICJ, *Obligations of States in respect of Climate Change*, Declaration of Judge Tladi, 23 July 2025.
6. See here: https://www.icj-cij.org/members.
7. Reuters, 'Uganda says judge's dissent from World Court ruling on Israel does not reflect its position' *Reuters* (28 June 2024), https://www.reuters.com/world/middle-east/uganda-says-judges-dissent-world-court-ruling-israel-does-not-reflect-its-2024-01-28/.
8. Abdulqawi Ahmed Yusuf, *The International Court of Justice and Africa*, 5 April 2018, available at: https://chathamhouse.soutron.net/Portal/Public/en-GB/DownloadImageFile.ashx?objectId=3743&ownerType=0&ownerId=185631.
9. Itamar Mann, 'The Body of the Judge and the Suffering of the Collective: South Africa's Genocide Application and the Power of Minority Opinions' *Verfassungsblog* (8 January 2024), https://verfassungsblog.de/the-body-of-the-judge-and-the-suffering-of-the-collective/.
10. Juliette McIntyre, 'From One ICJ to Another: Impartiality, Independence and the World Court' *Verfassungsblog* (1 September 2025), https://verfassungsblog.de/from-one-icj-to-another/.
11. Anthony Wesaka, 'My country disowned me after Israel–Gaza ruling - Sebutinde' *Monitor* (13 August 2025), https://www.monitor.co.ug/uganda/news/national/my-country-disowned-me-after-israel-gaza-ruling-sebutinde-5153060.

12. See the comment by Michael Addaney on LinkedIn, available at: https://www.linkedin.com/feed/update/urn:li:activity:7383439133702135809/?commentUrn=urn%3Ali%3Acomment%3A%28activity%3A7383439133702135809%2C7383491033830948867%29&dashCommentUrn=urn%3Ali%3Afsd_comment%3A%287383491033830948867%2Curn%3Ali%3Aactivity%3A7383439133702135809%29.
13. See the comment by Michael Addaney on LinkedIn, available at: https://www.linkedin.com/feed/update/urn:li:activity:7383439133702135809/?commentUrn=urn%3Ali%3Acomment%3A%28activity%3A7383439133702135809%2C7383491033830948867%29&replyUrn=urn%3Ali%3Acomment%3A%28activity%3A7383439133702135809%2C7383491613823512576%29&dashCommentUrn=urn%3Ali%3Afsd_comment%3A%287383491033830948867%2Curn%3Ali%3Aactivity%3A7383439133702135809%29&dashReplyUrn=urn%3Ali%3Afsd_comment%3A%287383491613823512576%2Curn%3Ali%3Aactivity%3A7383439133702135809%29.
14. See the comment by Michael Addaney on LinkedIn, available at: https://www.linkedin.com/feed/update/urn:li:activity:7383439133702135809/?commentUrn=urn%3Ali%3Acomment%3A%28activity%3A7383439133702135809%2C7383491033830948867%29&replyUrn=urn%3Ali%3Acomment%3A%28activity%3A7383439133702135809%2C7383491329798008832%29&dashCommentUrn=urn%3Ali%3Afsd_comment%3A%287383491033830948867%2Curn%3Ali%3Aactivity%3A7383439133702135809%29&dashReplyUrn=urn%3Ali%3Afsd_comment%3A%287383491329798008832%2Curn%3Ali%3Aactivity%3A7383439133702135809%29.

Julia Dehm

The Evasion of Historical Responsibility?

Colonialism, Temporality and Reparative Justice in the ICJ's Climate Advisory Opinion

The International Court of Justice's (ICJ's) advisory opinion on *Obligations of States in Respect of Climate Change* has been celebrated as marking the start of a "new era of climate reparations."[1] The question of how the ICJ engaged with reparations has already been examined in two other contributions to this volume.[2] In my contribution, I want to draw attention to how, even as the ICJ opened the door to climate reparations, it was evasive on the key temporal questions that are central to any future claims about reparations owed by individual countries for their historical greenhouse gas emissions. Additionally, the advisory opinion avoided addressing how colonial histories continue to shape present-day climate injustices and the need to decolonize international law.

Why do historical greenhouse gas emissions matter?

Reparations for historical greenhouse gas emissions are a central aspect of climate justice, and demands for such reparations have been made by small-island states and climate-vulnerable countries since before the *United Nations Framework Convention on Climate Change* (UNFCCC) was adopted in 1992.[3]

As the ICJ noted in its advisory opinion, it is the accumulation of greenhouse gases in the atmosphere that is causing significant harm to the climate system (para. 72), and thus unequal historical emissions are directly relevant to understanding present-day harms. The ICJ quoted the findings of Working Group III of the Intergovernmental Panel on Climate Change that "the three developing regions together contributed 28% to cumulative CO_2 FFI [carbon dioxide from fossil fuels and industrial processes] emissions between 1850 and 2019, whereas Developed Countries

contributed 57% and Least-Developed Countries contributed 0.4%" (para. 80).

Historical emissions matter, not just because they have caused serious harm (which they have[4]), or because they appropriated atmospheric space (which they also have[5]), but because of what these emissions enabled and the world they produced. They enabled colonial suppression "abroad" and class and racial suppression "at home," which helped lay the foundations for the contemporary, unjust, and unequal international legal order (as Sarah Riley Case and I have argued elsewhere[6]). Historical emissions are constitutive not only of the climate crisis, but also "constitutive in enabling the conditions of dispossession, violence, slavery, racial difference and uneven wellbeing that did – and continue to – generate stark asymmetries between and within countries[7]".

Applicability of customary duty to prevent harm and principles of State responsibility

One of the most significant aspects of the ICJ's advisory opinion is the court's affirmation of the applicability of broader principles of general international law to the climate crisis.[8] While many high-polluting States argued that the applicable law of obligations is that contained in the specialized climate treaties – the UNFCCC, Kyoto Protocol, and Paris Agreement – climate vulnerable countries argued that the broader corpus of international law is applicable to climate change, and the obligations in those treaties should be read within this broader "normative context."[9] The ICJ agreed with the arguments of climate vulnerable countries and identified other treaty and customary obligations as part of the "most directly

relevant applicable law" (para. 132-139). This included, most significantly for reparations claims, the customary law duty to prevent significant harm to the environment. Moreover, the ICJ identified that the obligation to act with due diligence was "stringent" (para. 138).

While high-polluting States tried to argue that questions of breach are governed solely or primarily by the climate change treaty framework, the ICJ agreed with the submissions made by climate-vulnerable States that general rules on State responsibility apply (para. 418). While the ICJ only spoke in general terms about consequences for breach, it identified as applicable a State's duty of cessation and guarantees of non-repetition, satisfaction, and the duty to make reparations, provided "a sufficiently direct and certain causal nexus between the wrongful act [...] and the injury suffered" can be shown (para. 436).

Evasiveness on temporal questions

Despite these important pronouncements, the ICJ was evasive about the temporal aspects relevant both to the existence of customary obligations and their breach. In discussing the temporal scope of the request for an advisory opinion, the ICJ identified that issues of temporality were relevant to both question (a) about the obligations of States to protect the climate system, as well as question (b) about the legal consequences for breaches of these obligations (para. 97).

With regard to question (a), the ICJ acknowledged that there was an unresolved and highly contested question as to when there was a "crystallization and identification of obligations for States" to protect the climate system (para. 97). The identification of this moment of crystallization has important legal implications for

question (b) given the requirement that an "international obligation is 'in force' when the conduct allegedly leading to the breach occurred" (para. 97). Additionally, the ICJ acknowledged a related temporal question as to when there was "sufficient scientific understanding of the causes of climate change and its adverse effects" to give rise to foreseeability of harm, and thus, obligations under customary international law. Yet, the ICJ declined to opine on these temporal questions. Instead, it observed that "while these temporal issues may be particularly relevant for an *in concreto* assessment of the responsibility of States for breaches of obligations pertaining to the protection of the climate system, the present opinion is not concerned with the invocation and determination of the responsibility of individual States or groups of States" (para. 97).

Later in the opinion, when discussing the principles of State responsibility, the ICJ again flagged the relevance of temporal questions. The ICJ noted that questions of temporality are relevant to any discussion of a breach of an obligation identified in question (a) because such a breach "does not necessarily occur through one, temporally contained, action or omission" (para. 423) but arguably through cumulative emissions over time. Climate vulnerable States had invoked principles related to "acts having a continuing character" and "composite acts"[10] as a way of addressing the "challenges of precisely determining the critical date for the identification of a breach of States' obligations to protect the climate system" (para. 423). However, the ICJ again declined to provide further clarity on these temporal questions. Instead, it repeated its earlier stance that these temporal questions are necessary "elements of an *in concreto* assessment" but are "beyond the scope of this Advisory Opinion" (para. 423).

Thus, even as the advisory opinion opens the doors to potential future claims for climate reparations, it also highlights the many still existing legal hurdles that such claims would face. In avoiding the temporal questions, the ICJ's advisory opinion replicates the way in which demand for reparative justice has been persistently evaded within the international climate regime due to developed countries' refusal to discuss any compensation of historical harm or anything that might give rise to liability.[11]

Separate opinion of Judge Yusuf

In his separate opinion, Judge Yusuf was scathing about what he called the ICJ's "excessively formalistic approach" and argued that the questions posed "deserved more concrete and tangible replies capable of engaging with their material scope, the context in which they were posed and the objectives underlying the request for an advisory opinion" (para. 2).[12] He decried the ICJ's "abstract examination of the law of State responsibility" that was divorced from the reality of harm and climate injustices (para. 7) and quoted the famous remarks of Anatole France that "[t]he law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread" (para. 8).

Judge Yusuf wanted a more direct and concrete engagement with the question of historical emissions, because, as he said, "historical responsibility is not just a matter of history but a matter of continued contribution, since the historical emissions of industrialized countries continue to have a significant impact on the current climate system" (para. 13). Yet, despite this searing rhetoric, his factual discussion, which seems to date knowledge of climate harm to the 1980s, would arguably limit reparations for historical emissions to the last 40 years (para. 32-33).

Historical emissions, reparation and colonialism

Scholars working in the Third World Approaches to International Law (TWAIL) tradition have shown how claims for reparations for historical injustices are "faced with numerous legal obstacles under the existing system of international law."[13] In the opening pages of his text, *Imperialism, Sovereignty and the Making of International Law,* Antony Anghie observes "that international law had not only legitimized colonial exploitation" but also "developed many mechanisms to prevent any claims for colonial reparations."[14] Sarah Riley-Case has shown how "[h]istorically, international law facilitated slavery, colonialism, and the rise of the extractive economy" and that in the aftermath of decolonization "liberal international law erected barriers against reparations for historical injustices that persist in present-day racial and ecological discrimination".[15]

If we approach the problem of climate reparations with this TWAIL sensibility, it suggests that the difficulties that claims for historical emissions face in demonstrating all elements of the duty to prevent significant harm to the climate system, including meeting all the evidentiary requirements, does not indicate an inherent "weakness" in these claims. Rather, it highlights how the doctrines of international law are themselves often still implicated in historical harms, and thus inadequate, for properly remedying the complex harms arising from cumulative, historical emissions.

Therefore, reparative justice might require not just applying international legal rules, but actively transforming them. For example, in her final report as special rapporteur on contemporary forms of racism, Tendayi Achiume called on the international community to "[p]rioritize reparations for historical environmental and climate harms and for contemporary harms rooted in historic

injustice."[16] She continued, "[t]o the extent that contemporary international legal principles present barriers to historical responsibility for climate change, United Nations Member States must decolonize or transform this law."[17]

In *Reconsidering Reparations*, Olúfemi Táíwò argued that we should adopt a "constructive view" of reparations. That is, reparations should not be backward-looking, but rather "as concerned with building the just world to come".[18] Reparations, on this view, is one part of a "broader worldmaking project".[19] This suggests that working towards the still unanswered imperative of reparative justice calls for broader thinking about how we might transform or "remake" international law.

Climate change and colonialism

In closing, I want to draw attention to another missed opportunity in the ICJ's advisory opinion, namely, to situate the climate crisis within the broader context of colonialism. The relevance of colonialism to understanding climate change, both as a historical driver of the climate crisis and also because of how neocolonial relations continue to exacerbate vulnerabilities to climate change, was recognised in the 2022 Working Group II report of the IPCC.[20] A growing body of scholarly work has exposed how "legacies of colonialism, imperialism, and capitalism co-produce and exacerbate the climate crisis"[21] and the need to confront this climate coloniality in working towards climate justice.[22]

The relationship between colonialism and climate justice was foregrounded in a number of the oral arguments made by climate-vulnerable nations before the ICJ. For example, in their opening submission, the Republic of Vanuatu and the Melanesian Spearhead Group argued that "the injustice of the climate crisis is insep-

arable from our shared colonial histories." Their submission continued:

> *"The majority of anthropogenic greenhouse gas emissions can be attributed to the conduct of a few readily identifiable States, some of which colonized and exploited the land, the resources and the peoples of Melanesia. We have not yet recovered from the enduring violence that colonization has inflicted on us, as we struggle to rebuild and assert ourselves within a system we did not create. Climate change is now depriving our peoples, again, of our ability to enjoy our right to self determination in our land" (p. 102, para. 7).* [23]

Other submissions also emphasized the links between colonialism and climate change. In their oral submissions, Saint Vincent and the Grenadines argued that "[t]his 'wicked' problem of climate change, as we deem it in the environmental world, is colonization on repeat.[24] Let us never forget who bears the historical responsibility. To tackle an issue, we must go not to the symptoms but beyond to the root cause" (p. 11, para. 2). The Democratic Republic of Timor-Leste argued that

> *"the legacy of historic injustices continues into the present. Climate justice cannot be achieved without accounting for the inequality arising from colonial rule and the actions of developed and high-emitting States" (p. 26, para. 20).*[25]

Similarly, the Organisation of African, Caribbean and Pacific States (OACPS) underscored that

> *"historical emissions" are the cause of climate change and that present day "acts and omissions resulting in such emissions, including the promotion of fossil fuels and the failure to regulate emissions are unlawful and they are also discriminatory, perpetuating the inequities rooted in our colonial past" (p. 49, para. 5).*[26]

In its submissions, the Cook Islands specifically argued that the questions put to the ICJ required it to engage with colonialism, submitting that "[t]his deeply colonial and racialized patterning of the relevant conduct and its effects are also unsurprisingly embedded in the questions put to the Court, which highlight that small island developing States are 'injured or specially affected by or are particularly vulnerable to the adverse effects of climate change'" (p. 16-17, para. 27).[27] They continued, that "[t]o adequately respond to these questions, it is clear that the Court must address the colonialism and racism that underpins the unlawful conduct and patterns its effects around the world" (p. 17, para. 28).

This forceful invitation to draw the links between colonialism and climate change was not taken up by the ICJ. The word "colonialism" is not mentioned in the advisory opinion or any of the twelve separate opinions or declarations. (The Separate Opinion of Judge Ausescu mentions decolonization but only in the context of discussing the principle of *uti possidetis juris* (para. 17)).[28] Thus, even as it delivered more than many climate advocates dared to hope for, the advisory opinion also speaks to the limits of progressive liberal legality and the ongoing challenge of decolonising international law.[29]

The advisory opinion has provided many hooks and tools for future advocacy: as Rohan Nanthakumar has argued, it has trans-

formed climate action into a "game of chess rather than checkers" and has thereby created more opportunities to strategically utilize the law to advance climate justice.[30] However, in order to use the tools provided by international law strategically, it is crucial that we soberly and critically assess the terrain of struggle and that we do not, as Mario Prost has cautioned[31], "euphemise shortcomings or pass off conservative decisions as ground-breaking". Properly "untangling and illuminating"[32] the role of colonialism in structuring the climate crisis and a truthful reckoning with the coloniality of international law is needed as we work towards reparative climate justice.

References

1. Harj Narulla, 'The ICJ's ruling means Australia and other major polluters face a new era of climate reparations' *The Guardian* (24 July 2025), https://www.theguardian.com/commentisfree/2025/jul/24/the-icjs-ruling-means-australia-and-other-major-polluters-face-a-new-era-of-climate-reparations.
2. See the chapter by Maria Antonia Tigre, Camille Martini, Miriam Cohen, and Armando Rocha, and the chapter by Niklas Reetz in this volume.
3. Julia Dehm, 'Climate change, "slow violence" and the indefinite deferral of responsibility for "loss and damage"' (2020) *Griffith Law Review*.
4. Marcia Rocha, Mario Krapp, Johannes Guetschow, Louise Jeffery, Bill Hare, and Michiel Schaeffer, *Historical Responsibility for Climate Change – from countries emissions to contribution to temperature increase* (2015).
5. Henry Shue, 'Changing images of climate change: human rights and future generations' in Anna Grear and Conor Gearty (eds.), *Choosing a Future*, (Edward Elgar Publishing, 2014).
6. Sarah Mason-Case and Julia Dehm, 'Redressing Historical Responsibility for the Unjust Precarities of Climate Change in the Present' in Alexander Zahar and Benoit Mayer (eds.), *Debating Climate Law*, (Cambridge University Press, 2021).
7. Sarah Mason-Case and Julia Dehm, 'Redressing Historical Responsibility for the Unjust Precarities of Climate Change in the Present' in Alexander Zahar and Benoit Mayer (eds.), *Debating Climate Law*, (Cambridge University Press, 2021).
8. See the contribution by Margaretha Wewerinke-Singh to this volume.
9. Lavanya Rajamani, 'Interpreting the Paris Agreement in its Normative Environment' (2024) 77:1 *Current Legal Problems* 167–200.
10. See the written statement submitted by the Republic of Vanuatu, paras. 530-535, available here: https://www.icj-cij.org/sites/default/files/case-related/187/187-20240321-wri-06-00-en.pdf.
11. Julia Dehm, 'Addressing Loss and Damage: The Unanswered Call for Climate Reparations' *CIL Dialogues: An International Law Blog* (21 September 2022), https://cil.nus.edu.sg/blogs/addressing-loss-and-damage-the-unanswered-call-for-climate-reparations/.
12. ICJ, *Obligations of States in respect of Climate Change*, Separate Opinion of Judge Yusuf, 23 July 2025.
13. Antony Anghie, 'Rethinking International Law: A TWAIL Retrospective' (2023) 34:1 European Journal of International Law 7–112, p. 11.
14. Antony Anghie, Imperialism, Sovereignty and the Making of International Law 1st edn. (Cambridge University Press, 2005), p. 2.

15. Sarah Riley Case, 'Looking to the Horizon: The Meanings of Reparations for Unbearable Crises' (2023) 117 *AJIL Unbound* 49–54.
16. UN General Assembly, *Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance: Ecological crisis, climate justice and racial justice*, UN Doc. A/77/549 (25 October 2022) (E. Tendayi Achiume, Special Rapporteur).
17. Ibid., para. 78.
18. Olúfẹ́mi O. Táíwò, *Reconsidering Reparations* (Oxford University Press, 2022), p. 74.
19. Ibid.
20. Available here: https://www.ipcc.ch/report/ar6/wg2/.
21. Farhana Sultana (ed.), *Confronting climate coloniality: decolonizing pathways for climate justice* (Routledge, 2025).
22. Gurminder K. Bhambra and Peter Newell, 'More than a metaphor: "climate colonialism" in perspective' (2023) *Global Social Challenges Journal*.
23. The whole statement is available here: https://www.icj-cij.org/sites/default/files/case-related/187/187-20241202-ora-01-00-bi.pdf.
24. Available here: https://www.icj-cij.org/sites/default/files/case-related/187/187-20241211-ora-01-00-bi.pdf.
25. Available here: https://www.icj-cij.org/sites/default/files/case-related/187/187-20241212-ora-01-00-bi.pdf.
26. Available here: https://www.icj-cij.org/sites/default/files/case-related/187/187-20241213-ora-01-00-bi.pdf.
27. Available here: https://www.icj-cij.org/sites/default/files/case-related/187/187-20241205-ora-02-00-bi.pdf.
28. ICJ, *Obligations of States in respect of Climate Change*, Separate Opinion of Judge Aurescu, 23 July 2025.
29. Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* 1st edn. (Cambridge University Press, 2011).
30. See the discussion here: https://www.youtube.com/watch?v=wy8sDHoTxTg
31. Mario Prost, 'Disaster Passing as Miracle? A Critical Take on the ICJ's Climate Advisory Opinion' *EJIL: Talk* (14 August 2025), https://www.ejiltalk.org/disaster-passing-as-miracle-a-critical-take-on-the-icjs-climate-advisory-opinion/.
32. Gurminder K. Bhambra and Peter Newell, 'More than a metaphor: "climate colonialism" in perspective' (2023) *Global Social Challenges Journal*.

Eva Baudichau

Of Warming and Warzones

The Legal Status of Military Emissions in the ICJ's Climate Opinion

Military activities and armed conflicts are a growing climate liability. Along with thousands of deaths, twelve months of war in Ukraine resulted in around 120 million tons[1] of greenhouse gas (GHG) emissions – matching Belgium's emissions over the same period. The climate footprint of the first fifteen months of Israel's war on Gaza exceeds the annual emissions of numerous individual countries[2] – compounding the global climate crisis alongside the devastating human cost. But wartime emissions remain largely unaccounted for; they were exempt from reporting under the Kyoto Protocol[3], and then left to States' discretion under the Paris Agreement. As of 2022, such emissions made up an estimated 5,5 % of global emissions[4]– enough for "the military" to be the world's fourth-largest emitter.[5] More broadly, armed conflicts are highly destructive of the environment, including carbon sinks and climate-critical ecosystems, and thereby undermine climate change mitigation and adaptation efforts…

With this in mind, I approached the International Court of Justice's (ICJ) climate change advisory opinion with a "ctrl+F" of the words "military" and "armed conflict". The lack of results did not come as a surprise, but it did come with a tinge of disappointment. Despite mounting attention to the impacts of military activities and conflicts on climate mitigation and adaptation in recent years, the issue remains largely absent from international legal scrutiny.[6] Therefore, the very fact that several States and organizations raised it during the advisory proceedings held last December left the few scholars and practitioners working on this issue hopeful.

This chapter reviews how the question of armed conflicts and military emissions was addressed during the ICJ advisory proceedings. Despite the ICJ's silence, the chapter highlights a few interpretative openings that may have legal implications for the regula-

tion of wartime climate harms and explores what the ICJ's ruling means for the legal visibility and accountability of military emissions.

Climate and conflict: What did the participants say?

In the 91 written statements submitted to the ICJ, and during the two weeks of hearings held in December 2024, references to armed conflicts and military emissions were few and far between. For the most part, the topic was alluded to in discussions about how climate change exacerbates the risks of conflict and insecurity. A small number of participants in the proceedings acknowledged that war itself contributes to harming the climate system and exacerbates the vulnerability of populations most affected by climate change. Among them were statements by Mexico, the Bahamas, the Democratic Republic of Congo (DRC), Colombia, and Palestine.

Colombia's written statement dedicated several pages to the mutually reinforcing relationship between environmental degradation and conflict. It highlighted some national legal innovations, including the recognition by Colombia's Special Jurisdiction for Peace (JEP) of territory as a victim of armed conflict (para. 2.42). Still, Colombia's statement remained largely descriptive, with only vague legal recommendations, such as adopting effective measures to mitigate the detrimental effects of conflicts on biodiversity conservation efforts (para. 2.35). The DRC's submission was slightly more grounded normatively. Building on States' due diligence obligations under international environmental law, the DRC underscored the incompatibility of military activities and armed conflicts with the objectives of mitigating GHG emissions that States have set (para. 142). It further emphasized that due diligence – as a central part of States' climate obligations – is also

embedded in international humanitarian law (IHL) and extends to the protection of the environment. Hence, it is "due in times of peace and in times of war" (para. 146).

The most comprehensive legal *exposé* on this issue came from Palestine.[7] It argued that international law imposes binding obligations on States to prevent harm to the environment, including the climate system, from GHG emissions – even when the harm results from armed conflicts and military activities. It highlighted the customary obligation to prevent significant transboundary harm and its relevance to the issue at hand. In this regard, Palestine contended that States must exercise a stringent level of due diligence in controlling all GHG emissions, including emissions from armed conflicts and other military activities (CR 2024/46, para. 7).

Palestine also underscored the relevance of IHL in addressing the environmental impacts of armed conflicts; in particular, Article 35(3) of Additional Protocol I to the Geneva Conventions, which prohibits methods or means of warfare expected to cause widespread, long-term, and severe environmental damage (*ibid.*, para. 8). Palestine also relied on the International Law Commission's 2022 Principles on the Protection of the Environment in Relation to Armed Conflicts (PERAC Principles, also mentioned in Mauritius' statement), and notably Principle 13, which affirms that the environment must be respected and protected during armed conflicts (*ibid.*, paras. 10-12). Palestine called on the ICJ to recognize the environment, in particular carbon sinks and reservoirs, as civilian objects under IHL and to clarify "that the rules of distinction, proportionality and precaution apply to armed conflicts and other military activities that generate GHG emissions and contribute to climate change" (*ibid.*, para. 16). With respect to occupation, Palestine referred to Principle 19 of the PERAC Principles, which requires occupying powers to take measures to prevent

significant environmental harm, and argued this obligation applies equally to activities significantly contributing to GHG emissions (*ibid.*, para. 17). Palestine also contended that all such emissions should be included in States' reporting obligations under the United Nations Framework Convention on Climate Change (UNFCCC). Finally, Palestine concluded by claiming that States failing to exert the appropriate level of due diligence to control and reduce GHG emissions, including wartime and military emissions, should be held internationally responsible (*ibid.*, para. 20).

The elephant in the room: climate, war, and the military emissions gap

Despite Palestine urging the ICJ to clarify States' climate obligations in relation to armed conflicts and military activities (*ibid.*, para. 11), the Court did not directly touch upon the issue. The broader context of the advisory request—in particular the Secretariat-General's 2009 report[8] – recognized that climate change may have security implications, including the risk of internal conflict (para. 67). However, the flipside of how conflict fuels climate harm was not addressed in the request to the ICJ, nor in the advisory opinion it issued. Still, three aspects of the opinion offer potential interpretative openings for engaging with this overlooked dimension.

First, concluding on the most directly relevant law for the first question put before it, the ICJ recognized in passing that rules of IHL could also be relevant in the climate change context (para. 173) – a connection increasingly explored in scholarly work.[9] Falling far short of Palestine's call for legal clarification, this nevertheless gives an indication that situations of armed conflicts – triggering

the applicability of IHL – are (or at least should be) concerned with climate change.

Second, the ICJ's broader discussion of the *lex specialis* principle sheds light on how overlapping legal regimes interact with each other in practice. Although not tied to IHL, the advisory opinion reiterated the view that the applicability of rules from one legal regime does not necessarily displace rules of another, unless displacement is expressly intended or the two are clearly incompatible. In this regard, the ICJ found that treaty obligations on climate change do not contain language suggesting they override other rules and principles of international law that may be relevant to defining states' climate obligations, and therefore do not trigger the *lex specialis* principle (paras. 168-169). If, in times of armed conflict, IHL is often broadly (and sometimes generically) referred to as a "lex specialis" in relation to other rules and principles of international law, the ICJ's reasoning reminds us that just because a set of rules was specifically designed to apply in certain settings does not mean it automatically displaces other rules. Rules should "to the extent possible, be interpreted so as to give rise to a single set of compatible obligations" (para. 165) and the appreciation of whether, in certain circumstances, a *lex specialis* takes precedence over another rule of international law must be done on a case-by-case basis (para. 166). Provided climate change obligations continue to apply in wartime,[10] they would not be displaced unless there is a direct conflict with IHL rules – but they might need to be adjusted to wartime conditions.[11] Most climate-related obligations – such as those to reduce GHG emissions, implement adaptation actions, or adopt measures for the conservation and sustainable use of biodiversity – are obligations of conduct rather than result, allowing flexibility in how states fulfill them, even during war. Their inherently qualified nature (e.g., requiring appropriate

measures, or action "as far as possible") allows wartime conditions to shape implementation. However, in certain circumstances, an IHL rule (such as the permissibility of damaging civilian objects, including parts of the environment) may conflict with a climate-related obligation (such as the duty to prevent significant environmental harm) in such a way that it would temporarily prevail over the latter. Of course, these are complex and unsettled questions on which clarification from the Court (although unlikely) would have been most welcome.

Three, the ICJ's broad language in paragraph 94, in which it says that it will consider "the full range of human activities that contribute to climate change as a result of the emission of GHGs" in the material scope of its inquiry, leaves room to include conflict-related and military emissions within the States' climate obligations. Interestingly, this interpretation was put forward by Judge Cleveland, whose declaration takes the view that, given the GHG emissions' from wartime and other military activities, "a comprehensive approach to evaluating and mitigating harms to the climate system arising within a State's jurisdiction or control requires taking such activities into account" (para. 18). As Cleveland proposes, this would notably involve starting to account for wartime emissions in national inventories of anthropogenic emissions under Article 4(1)*(a)* of the UNFCCC and in the context of Nationally Determined Contributions (NDCs) under Article 4 of the Paris Agreement. Climate change obligations, and the stringent standard of due diligence set out by the Court, would require taking adequate measures with a view to decarbonizing military operations, including by minimizing military spending on carbon-intensive activities and equipment. What is more, as others have argued[12], the obligation under Article 5 of the Paris Agreement to "take action to conserve and enhance, as appropriate, sinks and

reservoirs of greenhouse gases …, including forests" would take on great importance for climate protection in times of armed conflict. Judge Cleveland's declaration seems to support this point (para. 18).

If the customary international obligation to prevent climate harm requires States to exercise stringent due diligence (para. 138), this standard can be shaped or tempered by a State's national circumstances, as set out in the ICJ's advisory opinion (paras. 247). While this standard could provide flexibility to States in relation to wartime and military emissions in light of their national security context, it does not grant *carte blanche* for doing nothing. On the contrary, this stringent standard of due diligence could also imply heightened duties for States with large, carbon-intensive militaries and the institutional capacity to decarbonize them.

Concluding remarks: connected crises, disconnected opinions?

While the ICJ may not have lifted the legal invisibility cloak[13] on wartime GHG emissions, it did leave us with these small threads to pull on.[14] Interestingly, this is the second time in a year that the ICJ has been confronted with the entanglement of armed conflicts and environmental issues. In its 2024 advisory opinion regarding the *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, the ICJ dealt – albeit minimally – with the ecological dimensions of the Israeli occupation. It found that an occupying power has an obligation to care for the environment, in particular in its exploitation of natural resources. Incidentally endorsing the ILC's PERAC Principles mentioned above, the ICJ asserted that "the use of natural resources in the occupied territory must be sustainable, and it must avoid environmental harm" (para. 124). Arguably, and

although not addressed by the ICJ, the sustainable use of natural resources by an occupying power also needs to be informed by the broader context of the climate crisis, considering how it impacts availability and compounds the adaptive vulnerability of resources.

The ICJ's silence on the climate impacts of armed conflicts and military activities in its 2025 opinion likely reflects judicial caution in the face of a politically sensitive subject. It is not the first time the ICJ has erred on the side of prudence when it comes to balancing environmental considerations and security-related arguments. Alternatively, despite the few submissions addressing this intricate issue, the ICJ may have viewed it as insufficiently developed or irrelevant in light of everything else on the agenda. No matter the reason, this restraint comes with a cost. It leaves unresolved an accountability gap in climate governance at a time when military spending and operations are intensifying environmental harm.

Although it would have been groundbreaking for the ICJ to acknowledge the threat of armed conflicts and military activities for the climate system, one can only concede the ICJ's limited role in relation to a global crisis which, in its own words, "requires human will and wisdom – at the individual, social and political levels." Unfortunately, as Judge Tladi rightly noted:

> *"[t]he truth is that what you invest in reveals what you value. Currently, based on reported military spending compared to spending on other issues of international concern, such as the environment and global poverty, it seems that those who are in a position of authority value war over the plight of humanity and the future of the planet." (para. 38)*

To begin redressing this imbalance, States must treat armed conflicts and military activities as part of the climate crisis, not apart from it. Governing bodies under environmental treaties, whose authoritative interpretive role the ICJ highlighted in its opinion (para. 184), should bear a particular responsibility to develop guidance, standards, and expectations around military emissions. The time to act on this blind spot is long overdue.

References

1. Adriaan Korthuis et al, 'Climate damage caused by Russia's war in Ukraine (First and second interim assessments)' *Climate Focus* (1 June 2023), https://climatefocus.com/publications/climate-damage-caused-by-russias-war-in-ukraine/.
2. Benjamin Neimark, Frederick Otu-Larbi, Reuben Larbi, Patrick Bigger, Linsey Cottrell, Lennard De Klerk, and Mykola Shlapak, 'War on the Climate: A Multitemporal Study of Greenhouse Gas Emissions of the Israel-Gaza Conflict' (1 January 2025), https://www.ssrn.com/abstract=5274707.
3. Neta C. Crawford, *Pentagon Fuel Use, Climate Change, and the Costs of War*, Boston University, updated and revised 13 November 2019, available at: https://costsofwar.watson.brown.edu/sites/default/files/papers/Crawford-Pentagon-Fuel-Use-Climate-Change.pdf .
4. Stuart Parkinson & Linsey Cottrell, *Estimating Global Military Greenhouse Gas Emissions*, Scientists for Global Responsibility (SGR) & Conflict and Environment Observatory (CEOBS), November 2022, available at: https://www.sgr.org.uk/sites/default/files/2022-11/SGR%2BCEOBS-Estimating_Global_MIlitary_GHG_Emissions_Nov22_rev.pdf .
5. Doug Weir, 'The climate costs of war and militaries can no longer be ignored' *The Guardian* (9 January 2024), https://www.theguardian.com/commentisfree/2024/jan/09/emission-from-war-military-gaza-ukraine-climate-change.
6. Romina Edith Pezzot, 'The Silence of the Lambs and the Wartime GHGs Emissions' *Opinio Juris* (26 March 2024), https://opiniojuris.org/2024/03/26/the-silence-of-the-lambs-and-the-wartime-ghgs-emissions/.
7. Available here: https://www.icj-cij.org/sites/default/files/case-related/187/187-20241209-ora-02-00-bi.pdf.
8. UN General Assembly, *Climate change and its possible security implications: Report of the Secretary-General*, UN Doc. A/64/350 (11 September 2009).
9. See Karen Hulme, 'Climate Change and International Humanitarian Law' in Rosemary Rayfuse and Shirley V. Scott (eds.), International Law in the Era of Climate Change, (2012); Romina Edith Pezzot, 'IHL in the era of climate change: The application of the UN climate change regime to belligerent occupations' (2023) 105:923 *International Review of the Red Cross* 1071–91; Silja Voneky, 'Peacetime environmental law as a basis of state responsibility for environmental damage caused by war' in Jay E. Austin and Carl E. Bruch (eds.), The Environmental Consequences of War, (2010); Eva Baudichau, 'Another brick in the wall: Climate change (in)adaptation under the law of belligerent occupation' (2023) 105:924 *International Review of the Red Cross* 1337–64.

10. See International Law Commission, *Draft articles on the effects of armed conflicts on treaties, with commentaries*, adopted at its sixty-third session (2011), in Report of the International Law Commission, UN Doc. A/66/10, para. 101, Yearbook of the International Law Commission, 2011, vol. II, Part Two.
11. Raphaël Van Steenberghe, 'The Interplay between International Humanitarian Law and International Environmental Law' (2023) 20:5 *Journal of International Criminal Justice* 1123–54.
12. Stavros-Evdokimos Pantazopoulos, 'Navigating legal frontiers: Climate change, environmental protection and armed conflict' (2024) 106:925 *International Review of the Red Cross* 366–92.
13. Romina Edith Pezzot, 'The Silence of the Lambs and the Wartime GHGs Emissions' *Opinio Juris* (26 March 2024), https://opiniojuris.org/2024/03/26/the-silence-of-the-lambs-and-the-wartime-ghgs-emissions/.
14. See also Madara Melnika, 'What the ICJ's advisory opinion on climate change means for military emissions' Conflict and Environment Observatory (11 August 2025), https://ceobs.org/what-the-icjs-advisory-opinion-on-climate-change-meansfor-military-emissions/.

David Frydlinger

Closing the Silences

Using the ICJ's Interpretive Method to Read Its Climate Opinion

The International Court of Justice's (ICJ's) Advisory Opinion on Climate Change arrived with force. Given its far-reaching implications, there is no doubt that the opinion now will be subject to conflicting interpretations. In this chapter, I highlight the *interpretive compass* that the opinion supplies to those who will now interpret what the ICJ is saying and not saying.

At a *substantive* level, the ICJ clarified a number of important climate obligations, characterizing them as obligations *erga omnes* (paras. 439-443), upgrading 1.5°C from aspiration to an agreed temperature goal (paras. 224-225), demanding a stringent due-diligence test (para. 246) and establishing that unlawful warming can entail full reparation (paras. 420 and 449-250).[1] But at this level, a number of questions remain, as for example noted by von Bernstorff and Venzke, and Odermatt in their contributions to this volume. New fossil licenses or subsidies *may* be wrongful (para. 427), but *when* are they wrongful? Is there now a human right to a clean, healthy and sustainable environment; what did the ICJ mean when saying that this right is "inherent in the enjoyment of other human rights" (para. 393)?[2] And what does "full reparation" more concretely mean in a climate context?

However, the ICJ's opinion did more than list climate obligations; at a second, *methodological* level, it showed how those obligations should be read – weaving treaty text, General Assembly resolutions and foundational principles into a single, coherent rule-set.

And since that same interpretive compass as the ICJ itself applied should now, arguably, guide readers of the opinion itself, many of the uncertainties and gaps critics spotlight can arguably be closed by applying exactly the method the ICJ just deployed.

One text, different interpretive lenses

To understand the ICJ's method of interpretation, it is useful to begin with how some of the involved States argued in the written proceedings, either to indirectly avoid or to allocate responsibility. Ronald Dworkin famously said, in his book *Law's Empire*, that any legal interpretation must meet the double test of *fit* and *justification*.[3] In this context, *fit* means straightforward *textual support* – does the reading actually map onto the legal materials under scrutiny? *Justification* means the *principled rationale* for preferring one permissible reading over another: The reading must show the law as a *coherent scheme of principles* (e.g., equal concern and respect, fairness, non-arbitrariness, protection of rights, and integrity) rather than as a patchwork of ad hoc decisions.

Used as a heuristic rather than a rigid dichotomy, this distinction helps to read, for example, the written statements of the United States, the European Union (EU), and Vanuatu. They, arguably, line up along a spectrum of justification: At one end, *consent-first* positions justify their readings by pointing to explicit acceptance and minimal extension beyond the text; at the other, *coherence-first* positions justify them by showing how rules and principles hang together as a consistent whole that treats like cases alike and expresses the community's rights-based commitments. Differences in which materials are brought into view – and how they are read – thus reflect, even if not always made explicit, how each party *justifies* its interpretation in terms of principle.

The United States adopted the consent-first view. Climate law, it argued, is basically comprised of the Paris Agreement, "the clearest expression of States' consent". Obligations are procedural. There is no free-standing due diligence or human rights duty, and

any putative custom is satisfied once a State follows the Paris Agreement.

Vanuatu was at the opposite end of the spectrum, adopting the coherence-first view. Invoking no-harm, equity, and precaution alongside the treaty text, it asked the ICJ to craft a single, normatively coherent rule-set, concluding, for example, that fossil-fuel subsidies cannot be squared with existing obligations.

Everyone else sat at or between those poles**.** The decisive variable was how far each brief let principles and other duties reshape the interpretation of rules. Saudi Arabia and China stayed close to the U.S. line but selectively invoked the principle of Common But Differentiated Responsibilities and Respective Capabilities (CBDR-RC) and sustainable development while avoiding no-harm. The EU leaned toward Vanuatu, yet softened CBDR-RC and stressed party consent when it came to remedies, hoping to keep classic "full reparation" rules at bay. The other statements can be read along the same lines.

Across the spectrum, all sides could thus claim textual "fit"; what changed was, basically, the weight granted to e.g., no-harm, equity, and CBDR-RC, i.e. how their textual readings were justified in the legal framework. Even when not stated outright, this difference in weighting operated – using the substantive/methodological distinction – on the methodological level: It can be reconstructed as divergent readings of the interpretation rules in Articles 31-33 in the Vienna Convention on the Law of Treaties (VCLT) and corresponding customary rules of interpretation. Depending on the justificatory starting point – consent-firstor coherence-first – different VCLT components take centre stage (e.g., ordinary meaning versus context and object-and-purpose, the force of subsequent agreement/practice, and which relevant rules are pulled into the frame).

The ICJ's prescribed method of interpretation

Viewed through the "fit and justification" test, the ICJ clearly followed Vanuatu's path: it chose a reading that weaves together the treaties, customary law, human rights, and general principles into a textual and normatively coherent web of rules.[4]

Early in the advisory opinion, the judges set out the familiar doctrinal gateway for the treaty-based parts of their analysis: interpretation begins with Articles 31-33 of VCLT. For obligations arising under custom and general principles, the ICJ applies a parallel method – grounding rules in their accepted formulation, reading them in context, and integrating "other relevant rules" where applicable. What follows, in both strands, is anything but a narrow consent-only exercise. Some examples are provided below.

Treaty text interpreted within a principled frame

The ICJ identifies the 1.5°C floor from hard sources – the Glasgow and Dubai CMA decisions (Conference of the Parties serving as the meeting of the Parties to the Paris Agreement) treated as a "subsequent agreement" under VCLT 31(3)(a), read together with the "best available science" clause of Paris Art. 4(1) (paras. 224-225). This reading takes place within the interpretive frame set earlier (paras. 146-161), in which the no-harm duty and the principles of precaution, cooperation, and equity/CBDR-RC inform an object-and-purpose analysis. The result is that 1.5°C, rather than "well below 2°C", is treated as the benchmark for all States' conduct.

Due diligence with sharper edges

Drawing on the customary no-harm rule (para. 135), the ICJ said the due-diligence obligation under the Paris Agreement means a

Nationally Determined Contribution (NDC) is lawful only if it can credibly keep the State on a 1.5°C-consistent path (paras. 228, 251). "Highest possible ambition" thus requires not just progressive targets on paper but concrete *implementation* because letting emissions run beyond that path would violate the no-harm duty.

Soft-law carried into the core

General Assembly Resolution 76/300 is treated by the ICJ as evidencing broad *opinio juris* (paras. 392-393) of a right to a clean, healthy and sustainable environment. In the ICJ's view, when read together with existing rights treaties, the resolution reinforces the view that climate action must protect human dignity and health, supplying one of several normative pillars, contrary to the United States' submission that branded the resolution as merely aspirational.

Reparation sized for climate damage

The ICJ confirmed that the Paris regime is *not* a *lex specialis* that displaces the general law of State responsibility, so the (in many aspects) customary rules of "full reparation" expressed by the International Law Commission (ILC)[5] remain fully in force (paras. 450-453). The ICJ justified that move by implying (paras. 418-420) that only the ILC framework can uphold the "object and purpose" of the climate treaties – protecting people and ecosystems from dangerous harm – when losses are large-scale and irreversible. Hence, "full reparation" may include ecosystem restoration, rebuilt defences, and compensation for affected individuals, going beyond the Paris finance channels the ICJ discussed earlier. (As a side note, a justification of this interpretation, fully consistent with the ICJ's approach, would have been to point out the obvious inconsistency

that otherwise would have ruled: States not a party to Paris would face the full remedies regime in international law while Paris parties would "get away" with much lower liability.)

In short, for treaty interpretation, the ICJ read Articles 31-33 VCLT in a way that implied a tight integration of ordinary meaning, context, and "other relevant rules" with foundational duties and principles. For obligations arising under customary law or general principles, it applies a parallel, integrative method to produce a coherent and principled rule-set.

Filling the gaps with the ICJ's interpretation method

Run the opinion through the interpretation method the ICJ itself employed and many of its gaps arguably tighten into working rules.

Fossil licences, subsidies, and the implied phase-out

Paragraph 427 warns that continuing fossil extraction, issuing new permits, or prolonging subsidies for fossil fuel development *may* be an internationally wrongful act. Read alongside the CMA consensus that 1.5°C is now the legal floor, the Glasgow Climate Pact's call to "phase-down" unabated coal and "phase-out" inefficient fossil-fuel subsidies, plus the no-harm duty and precautionary principle together with stringent due diligence, that tentative "may" arguably hardens into a presumption: unless a government can prove – with credible science and carbon-budget math – that extra fossil capacity is consistent with a 1.5°C pathway, there are now strong arguments that the project fails due diligence. In effect, the burden of proof shifts, turning "phase-out" (a term missing in the opinion) from soft pledge into the default legal presumption. Of course, a number of complex questions remain, also within the ICJ's interpretive framework – not least how to find the right

balance between the no-harm duty, pointing toward restricting fossil licenses, and the CBDR-RC principle (noting that duties prevail over principles).

Reparation

When the ICJ addressed remedies, it quoted the ILC formula of "full reparation" but immediately explained that climate damage is often permanent and widespread. That insight pulls the concept far beyond diplomatic apologies: making victims whole can now mean restoring mangroves, rebuilding flood defences, transferring clean-tech know-how, or paying households for lost livelihoods – whatever the science and rights evidence show is actually required. The Paris finance channels are only a starting point; a State that offers less must justify why that smaller package truly repairs the harm.

Human-rights dimension

Paragraph 393 of the ICJ opinion calls a clean, healthy and sustainable environment "inherent" in existing human-rights treaties, and General Assembly Resolution 76/300 confirms broad acceptance of that view. The effect is far-reaching: whenever a policy foreseeably degrades air, water, or climate, it now engages obligations under the International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights – unless the State can explain, in rights terms, why the interference is nevertheless permissible.

Seen in that light, the opinion's silences are elastic restraints. Stretch them with unsupported emissions, under-funded remedies, or open-ended licensing, and they snap back as concrete legal faults. Applying the ICJ's own method of interpretation, it will not be enough, when courts, policy makers, COP negotiators and others interpret the Opinion – taken on its own or within the wider corpus

– to focus on textual fit, i.e. what the ICJ explicitly says or does not say. Any reading must harmonize with the duties and principles that permeate and justify both treaty and customary law, with particular weight on the no-harm rule, precaution, and equity/CBDR-RC.

Closing note

How the opinion is read in practice is, of course, another matter. Courts, arbitrators, and political actors may reject the gap-filling exercises suggested here. The near-future will show the distance between what the ICJ's method *should* support and what future decision-makers will *actually* accept.

At COP 30 (Conference of the Parties) in Belém, ministers will wrangle over how "sufficient" the new climate-finance goal must be, and whether "phase-down" of coal is a slogan or a legal trigger. In Brussels, the 2040 climate target faces the same test, while in Geneva, the WTO's fossil-subsidy reform stalls over which tax breaks to cut. Read through a strict consent-only lens, and these are political choices. Read through the ICJ's frame – science, equity, no-harm, precaution – they become legal ones: finance must be capable of delivering 1.5°C and repairing loss and damage, coal and subsidy policies must be plausibly 1.5°C-compatible, and the burden falls on governments to prove it.

The next round of climate politics could therefore become an exercise in forensic interpretation, not in treaty drafting.

References

1. See the chapter by Maria Antonia Tigre, Camille Martini, Miriam Cohen, and Armando Rocha in this volume.
2. See the contribution by David R. Boyd to this volume.
3. Ronald Dworkin, *Law's empire* 10. print edn. (Belknap Press of Harvard Univ. Press, 1997).
4. See also the excellent analysis by Margaretha Wewerinke-Singh in this volume.
5. International Law Commission, *Responsibility of States for Internationally Wrongful Acts*, adopted at its fifty-third session (2001), in Report of the International Law Commission, Yearbook of the International Law Commission, 2001, vol. II, Part Two, as corrected by UN Doc. A/56/49(Vol. I)/Corr.4, annexed to UN General Assembly Resolution 56/83 of 12 December 2001.

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The Ruling and the Mirror

The ICJ's Climate Change Advisory Opinion as Institutional Self-Portrait

On July 24, 2025, the International Court of Justice (ICJ) delivered its long-awaited advisory opinion on climate change. Reactions have been swift and enthusiastic. Some of the excitement arguably stems less from the content of the ruling than from the sheer scale of the process itself. The list of individuals who appeared before the Court during the two weeks of hearings back in December reads like a who's who of contemporary international law – an extraordinary assembly of legal minds that signals the global importance of the moment. Paragraph 35 of the opinion, which simply lists those who delivered oral statements before the ICJ, stretches across thirteen pages – a record destined for future ICJ-themed trivia nights.

Much of the commentary that has emerged so far focuses on the legal content of the opinion: the articulation of States' obligations under international law, the rejection of the *lex specialis* argument, and the recognition of the right to a healthy environment, *inter* many *alia*. Yet beyond the legal reasoning and doctrinal outcomes lies something else. The opinion is also an act of identity performance: a way for the ICJ to speak about itself.

This chapter approaches the ICJ's recent opinion as an act of institutional self-presentation. It argues that the ruling is an instance of what I call the autobiographical function of judicial decision-making: the way courts use rulings to construct and project their identity and their role in the community to which they (seek to) belong. In reading the opinion through this lens, I ask: How does the ICJ portray itself? What kind of actor does it imagine itself to be – arbiter, guardian, global conscience, neutral technocrat? What tools does the ICJ use to project that image to the world? And what can this moment tell us about the strategies international courts use to maintain legitimacy and relevance in times of planetary crisis?

Those are obviously big complicated questions. This brief chapter aims only to lay the groundwork for such a more extensive analysis by highlighting some of the opinion's most salient autobiographical features and reflecting on the image the ICJ sought to construct, as well as the legacy those efforts may leave behind.

The autobiographical function of international rulings

International rulings are often treated as neutral containers for doctrine. Yet when adjudicating disputes or clarifying the law, as international courts routinely do, they also inevitably reveal something about themselves. The autobiographical function of rulings is neither accidental nor merely ornamental. International courts are institutions embedded in specific professional communities and subject to constraints and incentives that have an immediate bearing on how they perform their judicial duties. In particular, international courts' legitimacy and survival depend not only on technical accuracy but also on the way these courts construct and maintain their own role in relation to other international actors and their various constituencies.

Rulings are one of the few public tools courts have to engage in this kind of identity work (another is the press release, which at the ICJ typically ends with a brief institutional self-portrait). Through voice, structure, silence, storytelling, and other elements that merge form and content, international courts project an image of the kind of authority they exercise, the values they embody, and their place in the world's institutional landscape.

Advisory proceedings are rich sites for this autobiographical function. Unlike contentious cases, they lack a binary outcome and immediate (though often tenuous) enforcement. Their authority flows from clarity, persuasiveness, and institutional posture. The

advisory opinion on climate change issued by the ICJ last week is a case in point.

Self-presentation in the ICJ's climate opinion

Self-presentation runs throughout the ICJ's advisory opinion on climate change, shaping both the content of the ruling and its form – the what and the how. The overall portrait the ICJ constructs is of an impartial and cautious interpreter of the law, a stable and sustainable social institution amid global crisis, and a steadfast guardian of the international legal order eager to collaborate with others.

A telling illustration of the ICJ's effort to project this self-image appears in the section addressing jurisdiction and discretion (paras. 37-49). International law experts widely expected the ICJ to confirm its jurisdiction and find no compelling reason to decline to answer the questions posed by the United Nations General Assembly (UNGA). The ICJ's findings are as expected. What makes this section noteworthy is how the ICJ uses this otherwise routine part of the ruling to reinforce its image as a neutral and restrained interpreter of the law, loyal to the international organization it serves. In paragraph 45, for example, the ICJ explicitly affirmed its commitment to "the integrity of [its] judicial function as the principal judicial organ of the United Nations", and emphasized that it is "mindful of the fact that its answer to a request for an advisory opinion 'represents its participation in the activities of the Organization, and, in principle, should not be refused'[.]"

Another example of explicit self-presentation by the ICJ appears in the section addressing the scope and meaning of the UNGA's questions. It is common practice for the ICJ to interpret and sometimes rephrase questions submitted in advisory proceed-

ings. When considering question (a) – in which the UNGA sought a clear and comprehensive catalogue of "the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for present and future generations" – the ICJ explicitly emphasized the limits of its own role (paras. 98-100). The ICJ specified that its response must be "limited to identifying the *existing* obligations of States under international law [...], thereby elucidating the content of these obligations, and clarifying the relationship between obligations arising from various sources of international law" (para. 100, emphasis added). This limitation is "inherent in the Court's judicial function" because, in its view, a court of law cannot render judgment *de lege ferenda* or "anticipate the law before the legislator has laid it down" (para. 100). Through this framing, the ICJ presents itself as a restrained interpreter of existing law, underscoring its role as a judicial and not legislative body. This reinforces its image as a principled adjudicator, careful not to overstep its institutional mandate.

The pièce de résistance: Paragraph 456 of the ICJ's climate opinion

By far the most direct form of self-presentation contained in the ICJ's advisory opinion appears in paragraph 456. Its inclusion in the shortened version of the ruling read out by ICJ President Iwasawa Yuji and broadcast live for all to hear (at 1:50:54)[1] signals its symbolic and rhetorical weight. This paragraph must be cited in full:

"Before concluding, the Court recalls that it has been suggested that these advisory proceedings are unlike any that have previously come before the Court. At the same time, as the Court concluded earlier, the questions put to it by the General Assembly are legal ones (see paragraph 40), and the Court, as a court of law, can do no more than address the questions put to it through and within the limits of its judicial function; this is the Court's assigned role in the international legal order. However, the questions posed by the General Assembly represent more than a legal problem: they concern an existential problem of planetary proportions that imperils all forms of life and the very health of our planet. International law, whose authority has been invoked by the General Assembly, has an important but ultimately limited role in resolving this problem. A complete solution to this daunting, and self-inflicted, problem requires the contribution of all fields of human knowledge, whether law, science, economics or any other. Above all, a lasting and satisfactory solution requires human will and wisdom – at the individual, social and political levels – to change our habits, comforts and current way of life in order to secure a future for ourselves and those who are yet to come. Through this Opinion, the Court participates in the activities of the United Nations and the international community represented in that body, with the hope that its conclusions will allow the law to inform and guide social and political action to address the ongoing climate crisis."

What does this paragraph achieve? First, it dramatizes the gravity of the task the ICJ has been given. The language is striking: Climate change is not simply a legal issue but "an existential problem of planetary proportions". That rhetorical turn alone

marks a departure from the usual formalistic tone used in the Peace Palace, underscoring the ICJ's recognition of the unprecedented nature of the request before it.

Second, this paragraph underscores once more how the ICJ understands the limits of its own role. It reaffirms that "the Court is only a court!", as Judge Tladi recently stressed in another momentous case pending before the ICJ (para. 19)[2] and further emphasized in the declaration he appended to this opinion (paras. 38-39)[3], and that the ICJ's function is circumscribed by legal mandate, not moral vision or political activism. This is not just modesty or, worse, a sign of bounded ambitions. It is a self-conscious assertion of institutional boundaries; a reminder that even the world's highest bench can only do so much. At the very close of its much-awaited opinion, the ICJ thus located itself as one institution among many, and law as one field of human endeavor among others.

Third, and relatedly, paragraph 456 of the opinion signals a form of "epistemic humility." The ICJ acknowledged that resolving the climate crisis will require the combined insights of "all fields of human knowledge." This interlacing of disciplines highlights a broader vision of collective human effort – an appeal to transdisciplinary thinking against the grain of the hermetic insularity of traditional legal reasoning.

Finally, this paragraph reimagines the function of international law, not as coercive or determinative, but as guiding and informing. This is significant. The idea that law "informs and guides" social and political action shifts expectations: from binding command to discursive influence. This softer framing reflects both the non-binding nature of advisory opinions and a deeper awareness of the structural limits of the international legal system itself, including the role of the ICJ within this system – particularly in addressing

diffuse, global challenges like climate change. The vocabulary here aligns with scholarly work on the epistemic authority of international courts, which often act less as enforcers and more as interpretive agents whose legitimacy stems from persuasion, not coercion.[4]

In short, paragraph 456 is the most explicit moment of judicial self-fashioning in the ICJ advisory opinion. It is a meditation on the role of law in a time of crisis – an affirmation of relevance tempered by realism. The paragraph carries existential undertones that point to the fragility of the legal systems humans have constructed to organize life on Earth, including courts themselves. As Anaïs Brucher and I argued in another context, the very institutions asked to adjudicate and interpret the crisis may, in time, be overwhelmed by its consequences.[5] That the ICJ addresses this problem at all, however cautiously, is itself remarkable, given how deeply climate change destabilizes the assumptions on which international law rests, thereby straining international institutions' authority and imaginative capacity.

Concluding remarks

The ICJ's climate change advisory opinion will be remembered for many things: its articulation of States' environmental obligations, its reaffirmation of key legal principles, and its careful navigation of politically charged terrain. It should also be remembered for what it reveals about the ICJ itself.

In this sense, the climate advisory opinion invites comparison with another advisory opinion delivered under similarly high stakes: the 1996 opinion on the Legality of the Threat or Use of Nuclear Weapons. That ruling was famously fractured, legally ambiguous, and marred by an almost painfully visible institutional

discomfort.[6] The ICJ could not muster a clear majority on the lawfulness of nuclear weapons use in extreme circumstances of self-defence. What emerged was a deeply compromised text – one that reflected not just legal uncertainty, but a world court divided on how far it could stretch its authority in the face of existential risk.

By contrast, the 2025 climate advisory opinion is stylistically controlled and much more confident in its articulation of legal responsibility, perhaps precisely because of the lessons drawn from 1996. Where the nuclear opinion exposed the ICJ's institutional vulnerability, the climate opinion projects institutional composure. It presents the image of a judicial institution capable of meeting the moment without fracturing under its weight. Whether this is persuasive depends on the audience – but the effort to perform that identity is unmistakable.

How this opinion will influence state behavior, litigation strategies, or treaty negotiations remains to be seen. The ICJ has spoken to guide others and, in doing so, it has defined itself. That definition may sit, years from now, as a marker of how the ICJ imagined its place in the world at a time when international law, international institutions, and the very future of our planet were in open question.

References

1. The video is available here: https://webtv.un.org/en/asset/k1c/k1cg72yf19.
2. ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*, Order of 24 May 2024 (Request for the Modification of the Order of 28 March 2024), Declaration of Judge Tladi.
3. ICJ, *Obligations of States in respect of Climate Change*, Declaration of Judge Tladi, 23 July 2025.
4. Ingo Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (2012).
5. Anaïs Brucher and Antoine De Spiegeleir, 'The European Court of Human Rights' April 9 Climate Rulings and the Future (Thereof)' in Maxim Bönnemann and Maria Antonia Tigre (eds.), *The Transformation of European Climate Litigation*, (Berlin: Verfassungsbooks, 2024).
6. Eric David, 'The Opinion of the International Court of Justice on the legality of the use of nuclear weapons' (1997) 37:Special Issue 316 *International Review of the Red Cross (1961 - 1997)* 21 – 34.

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