Harmonizing Sources, Hardening Duties

Inside the ICJ's Advisory Opinion on Climate Change

Margaretha Wewerinke-Singh

11.08.2025 doi: 10.59704/ca99ffd63031501e

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. 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. The result is a careful, source-sensitive account of international obligations that deepens their legal texture and clarifies the consequences of their breach.

This post 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.

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 handful 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. 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 inter-

pretation," 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; see also Julian Arato and Justina Uriburu). 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 co-operate 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; see also Federica Paddeu and Miles Jackson's analysis).

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; see also the joint declaration of Judges Charlesworth, Brant, Cleveland, and Aurescu).

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; Judge Bhandari and Judge Tladi asserted the ICJ recognized as much. 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 (as further analyzed by David Boyd andCorina Heri in their respective contributions).

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, Judge Aurescu paras. 1-13; continuity of statehood, Judge Tomka paras. 1-11; 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: 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. 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 (see e.g. Justice Margaret White). 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). 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).

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). 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 free-standing 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; see further Judge Sebutinde, paras 9-12; Judge Yusuf, paras 20-29; Judge Xue, paras 51-78; and Judges Bhandari and Cleveland, paras 24-27). 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 (see e.g. Katalyn Sulyok) 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; see also Judge Charlesworth's elaboration on how the prevention and precaution principles interact with due diligence).

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 (see also Imogen Saunders).

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 international 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; see also Luciano Pezzano). 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). In addition to reshaping international relations, it is bound to have deep implications for climate litigation worldwide. 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.

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* 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 (see further here and here).

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 (as analyzed here with Sébastien Jodoin) 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.

ABOUT THE AUTHOR

Margaretha Wewerinke-Singh

Margaretha Wewerinke-Singh is an Associate Professor of Sustainability Law at the Faculty of Law of the University of Amsterdam and an Adjunct Professor of Law at Justice Devendra Pathik School of Law, University of Fiji.

SUGGESTED CITATION

Wewerinke-Singh, Margaretha: Harmonizing Sources, Hardening Duties: Inside the ICJ's Advisory Opinion on Climate Change, Verfassungsblog, 11.08.2025, doi: 10.59704/ca99ffd63031501e.

Licensed under CC BY-SA 4.0.

Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20250812-122447-0.