The ICJ Advisory Opinion on Climate Change: From Carbon Sovereignty to Trusteeship of the Climate Commons

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I. Introduction

Treated as a corollary of industrial development, the freedom to emit CO_2 and other greenhouse gases within a State's territory has long been regarded as both a prerequisite of economic progress and an expression of sovereignty. The International Court of Justice (ICJ/the Court)'s Advisory Opinion marks a shift, calling on States to protect the climate system, thereby putting their carbon sovereignty under an international-law duty of justification (II.). The Court's interpretation reinforces a public-order conception of international law guided by common interests (III.). The Opinion articulates a vision of sovereignty as trusteeship of the climate commons that emphasises collective environmental responsibility and intergenerational solidarity (IV.). It advances a normative counterpoint to interest-driven, short-term international relations. However, its robustness will yet have to be tested when normative commitments, particularly those of ecological and economic concerns, collide (V.).

II. Prevention and Cooperation: Legal Constraints on Carbon Sovereignty

The ICJ limits States' carbon sovereignty through internal obligations of prevention (1.) and external obligations of cooperation (2.), and characterises the relevant obligations as *erga omnes (partes)*.[1] This places legal constraints on States' exercise of territorial sovereignty when formulating and implementing climate policies and aligns with ITLOS's Climate Change

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1 ICJ, *Obligations of States in Respect of Climate Change*, Advisory Opinion of 23 July 2025, para. 440.

Advisory Opinion which held that the sovereign right in Article 193 UNCLOS 'to exploit their natural resources pursuant to their environmental policies' is subject to the duty to protect and preserve the marine environment.[2]

I. The Duty to Prevent Significant Harm to the Climate System

The Court requires States to employ effective means to advance collective climate-mitigation efforts. It understands the climate system as a global commons,[3] whose safeguarding is a preventive duty incumbent on States. The Court thereby orients the protective purpose of international environmental law toward a common ecological interest. Specific obligations to mitigate CO_2 emissions, and the general duty to prevent significant harm to the environment, arise under the applicable climate treaties and customary international law.[4] The Court narrows the discretion of States under the climate treaty framework, in particular the Paris Agreement,[5] requiring them to justify their conduct against normative standards,[6] particularly the principles of due diligence and common but differentiated responsibilities and respective capabilities (CBDR-RC), in light of national circumstances. Similarly, the customary due diligence duty to prevent significant harm requires effective regulation of public and private conduct,[7] including fossil-fuel production and consumption, licensing and subsidies. The failure to do so may constitute an internationally wrongful act.[8] One might read this

2 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 344, with reference to ITLOS, *Request of the Commission of Small Island States on Climate Change and International Law*, Advisory Opinion of 21 May 2024, paras. 187, 380.

3 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), paras. 308, 440.

4 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), paras. 116 and esp. 230 et seq.; 132 and 272 et seq.; see also Christina Voigt, 'The ICJ and the UN Climate Regime: Clarifying Mitigation Obligations Under the Paris Agreement', in this volume; and Jutta Brunnée, 'The Advisory Opinion on Obligations of States in Respect of Climate Change: Harm Prevention under Customary International Law', in this volume.

5 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 237.

6 Cf. Voigt (note 4).

7 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 282; cf. ICJ, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010 (I), para. 197; Harro van Asselt, 'The Private Life of the ICJ Advisory Opinion on Climate Change', in this volume.

8 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 427.

as support for an ecologically informed approach to economic governance that prioritizes long-term climate protection over short-term interests.

2. The Duty to Cooperate for the Protection of the Environment

The ICJ further reinforces cooperation as a justiciable duty and situates it within a broader conception of community. Recognising climate change as a 'common concern of humankind', it characterises cooperation as 'a pressing need and a legal obligation'.[9] While the existence, character, and content of a customary obligation to cooperate had previously remained unclear,[10] the Court now confirms such a duty for the protection of the environment.[11] According to the Court, this customary obligation reinforces the Paris Agreement's cooperation duties.[12] Although States retain discretion as to the means of cooperation under treaty and customary law, they must satisfy due-diligence and good-faith standards.[13] In substance, the customary duty to cooperate extends beyond procedural requirements and beyond obligations regarding finance, technology transfer, and capacity-building as set out in the Paris Agreement.[14] It requires that 'States develop, maintain and implement a collective climate policy that is based on an equitable distribution of burdens and in accordance with the principle of common

9 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 308.

10 Cf. Laurence Boisson de Chazournes and Jason Rudall, 'Co-Operation', in: Jorge Viñuales (ed.), *The UN Friendly Relations Declaration at 50: An Assessment of the Fundamental Principles of International Law* (Cambridge University Press 2020), 105 (113); Jutta Brunnée and Ellen Hey, 'Judicial Contributions to the Development of International Environmental Law: Refining the Duty to Cooperate in Environmental Harm Prevention', YIEL, 30 (2019), 45 (46); Rüdiger Wolfrum, 'Entwicklung des Völkerrechts von einem Koordinations- zu einem Kooperationsrecht', in: Peter-Christian Müller-Graf and Herbert Roth (eds.), Recht und Rechtswissenschaft (C.F. Müller 2000), 421 (425–429); see also International Law Commission (ILC), Report of 67th session, 2015, A/CN.4/689, para. 12.

11 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 140, referencing the ITLOS, *Request of the Commission of Small Island States on Climate Change and International Law* (n. 2); cf. Khaled El Mahmoud, 'One Climate, Many Courts: The ICJ Advisory Opinion on Climate Change, Systemic Integration, Cross-Judicial Law-Making and Interjudicialism', in this volume.

12 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 261.

13 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), paras. 262, 306.

14 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), paras. 260 et seq.

but differentiated responsibilities and respective capabilities.'[15] Cooperation emerges as an essential complement to the duty to prevent significant environmental harm, since effective prevention requires coordinated action.[16] This action must be geared to preventing significant climate harm and to fostering solidarity among States.[17] Additionally, the duty to cooperate serves as a legal benchmark for assessing whether further collective action, particularly treaty-based obligations, must be undertaken.[18]

III. Common Interests Guiding Interpretation

The restriction of carbon sovereignty through international legal obligations reflects an interpretive approach that conceives international environmental law as a public order grounded in common interests. The Court distils the content of the common interest from the most pertinent sources of international environmental and human-rights law relevant to the protection of the climate system. It engages in harmonious interpretation, reinforcing and consolidating the common interest within a coherent body of climate obligations through systemic integration: treaty and customary law inform each other[19] and customary rules guide – and may even reinforce – the interpretation of treaty obligations.[20]

With respect to interpreting customary international law, the Court relies not only on bottom-up State consent but proceeds deductively from rules and principles that express a common interest.[21] It extends the duty to prevent significant harm from the transboundary context to the global phenomenon of climate change.[22] Although some States rejected this extension,

15 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 306.
16 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 141, cf. *Pulp Mills* (note 7), para. 77.
17 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), paras. 305–306; 364.
18 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 307.
19 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), paras. 313–314.
20 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), paras. 261, 313.
21 Cf. Stefan Talmon, 'Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion', EJIL 26 (2015), 417–443; William T. Worster, 'The Application of Logic and Reason in CIL Identification and Interpretation', in: Marina Fortuna et al (eds.), *Customary International Law and Its Interpretation by International Courts: Theories, Methods and Interactions* (Cambridge University Press 2024), 105–129.
22 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 134.

pointing to the diffuse nature of climate change,[23] the Court notes that it has applied this duty to areas beyond national jurisdiction, and thus to global environmental concerns, in earlier pronouncements.[24] It proceeds deductively from a broad prevention principle that protects long-term environmental and not merely present State interests, and by analogy to areas beyond jurisdiction.

Since treaty obligations are interpreted in light of these customary duties, this interpretation results in stricter treaty obligations, as evidenced in the Court's reading of Article 4 (2) and (3) Paris Agreement. The Court treats the clause that successive NDCs 'will' represent a progression prescriptively, explaining that this interpretation is informed by the customary duty to prevent significant environmental harm, which requires States to exercise due diligence, including when setting NDCs.[25] Similarly, the Court adopts a strict reading of 'highest possible ambition'[26] and subjects Parties to stringent due-diligence requirements in implementing domestic mitigation measures.[27]

Furthermore, the Court expressly invokes the common interest in climate protection and the treaty notion of the common concern of humankind to characterise the relevant obligations to protect the climate system as *erga omnes (partes)*.[28] On this basis, any State may invoke responsibility irrespective of injury.[29] This approach differs from earlier reasoning that grounded *erga omnes* status in the universal or quasi-universal character of treaties or in the *jus cogens* nature of the obligations.[30] With this approach, the Court recognizes the broader 'commons' dimension of international environmental law, acknowledging the inherent common interest in protecting shared environmental systems.[31]

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23 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 133.

24 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 134, citing ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996 (I), para. 29.

25 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), paras. 241; see also 133, 139.

26 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), paras. 242 et seq.; 136 et seq.

27 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 254.

28 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 440.

29 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 441.

30 Cf. *Barcelona Traction, Light and Power Company, Limited* (New Application: 1962) (Belgium v. Spain), Second Phase, Judgment, I.C.J. Reports 1970, para. 34.

31 Cf. Brunnée and Hey (n. 10), 52.

IV. Sovereignty as Trusteeship: Responsibility and Solidarity in International Environmental Law

Against this background, the Advisory Opinion forms part of a shift in international environmental law from managing 'neighbourly relations' to pursuing long-term community interests[32] and thus, from a private-law to a public-law paradigm in which state sovereignty is oriented not to individual or aggregate States' interests but to the interest of the international community. Conceptually, the Court transposes the notion that present generations act as trustees of humanity[33] to States, which must give due regard to interests of future generations when exercising sovereign rights affecting the climate system.[34] The trusteeship notion can be regarded as a structural umbrella principle anchored in the common concern concept which the Court invokes alongside intergenerational equity as an interpretative principle to buttress duties of cooperation and prevention.[35] It enshrines the understanding that the atmosphere as a global commons is not owned by anyone and must be preserved for the benefit of present and

32 Cf. Alan Boyle and Catherine Redgwell, 'International Law and the Environment', in: Alan Boyle and Catherine Redgwell (eds.), *Birnie, Boyle, and Redgwell's International Law and the Environment* (4th edn, Oxford University Press, 2021), 1 (40); Rüdiger Wolfrum, 'The International Law of Cooperation', in: Anne Peters (ed.), *Max Planck Encyclopedia of Public International Law* (online edn, Oxford University Press 2010), para. 40.

33 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 156.

34 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 157..

35 Cf. ICJ, *Obligations of States in Respect of Climate Change* (n. 1), paras. 155, 308, 440; Special Rapporteur Murase for the ILC on the 'protection of the atmosphere' called common concern and the obligations of prevention and cooperation the 'trinity for the protection of the atmosphere', Second Report, 2 March 2015, A/CN.4/681, para. 78. For a more elaborate discussion of this interpretation, see the Concluding Chapter by Jannika Jahn, Moritz Vinken and Khaled El Mahmoud, 'The ICJ and the Climate Commons', in this volume, I. 2.

future generations[36] with due diligence and care.[37] The Opinion emphasises collective responsibility, accountability and solidarity, recasting the freedom underpinning sovereignty as contingent on the common goal of climate protection. Accordingly, States must subject their individual interests to the common interest in climate protection by self-limitation, so that all States have equal opportunities in exercising CO_2-related freedoms. Fulfilling this common interest is not only a moral imperative, but also a prerequisite for States' compliance with their human rights obligations[38] and a yardstick for assessing the lawfulness of the exercise of territorial sovereignty in light of States' treaty and customary obligations relating to CO_2 mitigation.

Assuming that emitting CO_2 'appropriates' the atmosphere's absorptive capacity,[39] the conception of sovereignty underpinning the Advisory Opinion aligns with traditions of common-ownership thinking. It moves beyond Grotius's view of the high seas as inexhaustible *res communis* not subject to appropriation (Mare liberum), from which scholarship derived open access and first-come-first-served principles, enabling unrestricted exploitation.[40] Grotius also held that God bestowed the Earth in common and that private

36 For a conceptualisation of ecological trusteeship, see in particular Klaus Bosselmann, *Earth Trusteeship and the Sovereign State* (Routledge 2025); Christina Wood, *Nature's Trust: Environmental Law for a New Ecological Age* (Cambridge University Press 2014); see also Trevor Daya-Winterbottom, Trusteeship for the environment?', in: Harro van Asselt, Seita Vesa and Kaisa Huhta, *Future-Proofing Law in a Time of Environmental Emergency* (Edward Elgar Publishing 2025), 251-272; the concept of ecological trusteeship is closely related to the common law public trust doctrine, see Joseph L. Sax, 'The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention', Mich. L. Rev. 68 (1970), 471-566 and must be distinguished from mere stewardship models for environmental goods that do not entail public accountability and were critiqued from a postcolonial perspective, see e.g. Surabhi Ranganathan, 'Global Commons', EJIL 27 (2016), 693–717 (714).

37 See more generally on fiduciary State duties towards humankind, Anne Peters, 'Humanity as the A and Ω of Sovereignty, European Journal of International Law', EJIL 20 (2009), 513–544; see also Evan J. Criddle, Evan, 'Fiduciary Principles in International Law', in Evan J. Criddle, Paul B. Miller, and Robert H. Sitkoff (eds), *The Oxford Handbook of Fiduciary Law* (Oxford University Press 2019); Evan J. Criddle and Evan Fox-Decent, *Fiduciaries of Humanity: How International Law Constitutes Authority* (Oxford University Press 2016).

38 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), paras. 369 et seq.

39 Cf. Darrel Moellendorf, 'Common atmospheric ownership and equal emissions entitlements', in: Denis G. Arnold (ed.), *The Ethics of Global Climate Change* (Cambridge University Press 2011), 104 (106).

40 Nico Schrijver and Vid Prislan, From Mare Liberum to the Global Commons: Building on the Grotian Heritage, Grotiana, 30 (2009), 168 (esp. 180–181).

ownership arose later by convention; access to the original commons had to be preserved in necessity, and harm to commonly used goods avoided.[41] *Vattel* likewise stressed that the Earth was given for human subsistence.[42] The theological idea of divinely granted common ownership has been recast in modern philosophy in terms of human rights: each person holds equal claims to access and use natural resources such as the atmosphere as a CO_2 sink.[43] Building on these ideas, some argue that territorial sovereignty must be complemented by other-regarding duties,[44] or that sovereign rights over territory and resources are legitimate only within a collective, justificatory legal framework that secures equal opportunities to exercise such exclusionary rights.[45] Others transpose Rawls's 'just savings' principle to justify fiduciary duties of States to preserve natural resources for future generations[46] and combine it with common-ownership thinking about the Earth and atmosphere.[47]

It is submitted that, on this common ownership reading, territorial sovereignty should be regarded as implicitly conditioned by the requirements of common use, warranting joint regulation. While the Court does not ground climate-protection duties in extraterritorial human rights law,[48] it develops a legal framework of positive State obligations to prevent harm to the climate commons. Beyond mere remediation, it advances a model of proactive prevention and cooperation attuned to the inter- and intragenerational power asymmetries inherent in territorial rights. By applying CBDR-RC across the relevant obligations, the Opinion treats States not as 'black boxes' but as representatives of populations requiring special protection or bearing particular responsibilities. Accordingly, the Opinion conceives

41 Hugo Grotius, 'II.2 II.1, IV.2 – 4, XI', in: Robert Feenstra and Bernadina Kanter- van Hettinga Tromp (eds.), De iure belli ac pacis 1625 (Scientia Verlag 1993).

42 Emer de Vattel, '§ 81', in: Joseph Chitty (ed.), The Law of Nations or Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns 1758 (Cambridge University Press 2015).

43 Matthias Risse, *On Global Justice* (Princeton University Press 2012).

44 Eyal Benvenisti, 'Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders', AJIL, 107 (2013), 295 (310–311).

45 Cf. Lea Ypi, 'A Permissive Theory of Territorial Rights', Eur. J. Philos. 22 (2012), 288–312, building on Kant.

46 Edith Brown Weiss, 'The Planetary Trust: Conservation and Intergenerational Equity' ELQ, 11 (1984), 495–582.

47 Moellendorf (note 39); Wood, *Nature's Trust* (n. 36).

48 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 402; cf. Helen Keller, 'A Right to a Clean, Healthy and Sustainable Environment: Or Perhaps Not (Yet)?', in this volume.

sovereign territorial rights not as an idealised extension of natural rights of appropriation, but as politically constituted and bound by a duty of justification.

V. From Vision to Practice

The Advisory Opinion advances a normative vision of global community and cooperative pursuit of shared interests despite short-term political or economic incentives. It substantiates this vision with duties of cooperation and prevention that address structural obstacles to effective global climate protection. The duty of prevention requires States to adopt a long-term perspective and regulate emissions by public and private actors.[49] Regulatory measures can remedy market failures, especially where prices fail to internalise the social costs of emissions. Reinforced cooperative obligations may counteract collective-action problems of the climate commons.[50] The recognition of customary obligations prevents States from evading international law obligations on climate protection simply by withdrawing from the Paris Agreement.[51] The risk of legal accountability for non-compliance acts as an incentive to cooperate.

Nevertheless, the legal effectiveness of international environmental law will be tested specifically in its interaction with international economic law.[52] International environmental law's transformative force will depend on the extent to which its objectives and State obligations will be integrated into the legal instruments of global trade, finance and investment, will

49 For the regulation of private actors, see ICJ, *Obligations of States in Respect of Climate Change* (n. 1), paras. 282, 298, 427.

50 See generally, Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (Harvard University Press 1965); in relation to climate change, Daniel C. Esty and Anthony L. Moffa, 'Why Climate Change Collective Action has Failed and What Needs to be Done Within and Without the Trade Regime', Journal of International Economic Law, 15 (2012), 777 (777-781).

51 Cf. also Art. 41(2) Vienna Convention on the Law of Treaties; Jochen Rauber, 'Custom, Entrenchment, Interpretation: How the ICJ's Advisory Opinion on Climate Change Contributes to the International Law's Turn toward the Future', in this volume.

52 Cf. ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 173; see also Declaration of Judge Cleveland, para. 21, see also von Jochen von Bernstorff and Ingo Venzke, 'The Struggle Against Fossil Sovereignty: The International Court of Justice in the Climate Crisis', Verfassungsblog, 6 August 2025.

prevail in case of normative conflict, and will materialise in state responsibility. This is where the legal framework will demonstrate if it can act as a catalyst[53] and guide the transformation of the global economy in the interest of a sustainable environment.

53 Cf. Steven Bernstein and Matthew Hoffmann, 'The politics of decarbonization and the catalytic impact of subnational climate experiments', Policy Sciences, 51 (2018), 189–211.