Conclusion

The ICJ and the Climate Commons:

Cautious Transformations in the Structural Architecture of International Law

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I. Introduction

The climate change advisory proceedings before the International Court of Justice (ICJ or the Court) indicate that international *law* and the Court itself have become a central site of contestation over the legal governance of the climate system. Prior to the Advisory Opinion, it was debated whether and to what extent international law limits State discretion in the field of climate protection.

While the Paris Agreement was widely regarded as an innovative legal framework fostering experimentalist and polycentric forms of governance,[1] it was generally understood to establish procedural, rather than substantive legal obligations, geared towards aspirational targets.[2]

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1 Veerle Heyvaert, *Transnational Environmental Regulation and Governance* (Cambridge University Press, 2019); Andrew Jordan, Dave Huitema, Harro van Asselt, Johanna Forster (eds), *Governing Climate Change: Polycentricity in Action?* (Cambridge University Press, 2018); Elinor Ostrom, 'Polycentric systems for coping with collective action and global environmental change.' GEC 20(4) (2010), 550–557; Gráinne De Búrca, Robert Keohane, Charles Sabel, Global Experimentalist Governance, BJPolS 44(3) (2014), 477–486.

2 See e.g. Dan Bodansky, The Paris Climate Change Agreement: A New Hope?, AJIL 110(2) (2016), 288-319 (289); Laurence Boisson de Chazournes, Editorial on Paris Agreement, EJIL 27(2) (2016), 253-265 (254); Meinhard Doelle, The Paris Agreement: Historic Breakthrough or High Stakes Experiment?, CLLA 6(1–2) (2016), 1-20 (20); for a criticism of the qualification of the Paris Agreement as bottom-up,

Against this background, the advisory proceedings raised the question of whether international law provides a meaningful framework for guiding State conduct towards the long-term common interests of the international community, or indeed of humankind, rather than the short-term preferences of individual States. Beneath this inquiry lay a more fundamental issue: whether the core branches of international law are capable of accommodating the imperatives of intergenerational solidarity and collective responsibility that have become particularly salient in the context of climate protection.

The Court was called upon to respond to these questions at a moment in which international law had moved beyond mere coexistence towards cooperation and global governance.[3] At the same time, however, international law's authority is increasingly contested, placing renewed pressure on its capacity to provide normative orientation, command compliance and structure collective action. The challenge confronting the Court, therefore, was not only whether international law's structural development could be advanced and further articulated in response to the demands of climate protection, but also whether this could be achieved in a manner capable of reinforcing its legitimacy and authority.

We suggest that the climate change Advisory Opinion has advanced international law's turn towards fiduciary governance as an expression of intergenerational solidarity grounded in preventive self-limitation and mandatory cooperation. Our analysis builds on the contributions to this volume that have examined the content, methodology, and unresolved tensions of the Opinion along four central fault lines[4]: the sovereignty/community interest divide, the public/private divide, the science/politics divide and the North/South divide. Our conclusion is divided into three parts that make observations on the refinement, consolidation, and reinforcement of the role of international law in the governance of the global commons.

First, the Court advances international law towards a more principled and conceptually coherent framework for addressing the collective chal-

see Christina Voigt, 'The ICJ and the UN Climate Regime: Clarifying mitigation obligations under the Paris Agreement', in this volume.

3 Seminally, Wolfgang G. Friedmann, *The Changing Structure of International Law* (Columbia University Press, 1964), 60 et seq.

4 See introduction at p. 10; Moritz Vinken, 'International Law's Fault Lines and Sediments: Geology as Method', *Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper Series*, No. 2025–09, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5274030.

lenge of climate protection. It reorients the purpose of protection away from present State interests towards common interests of present and future generations, conceptualising States as trustees of these shared interests (II.). As such, States are required to prevent significant harm to the climate system and to cooperate in avoiding such harms.

Second, the Court consolidates international law around the obligations flowing from these concepts and principles in a coherent manner (III.). It thereby cautiously reads international law as a comprehensive public legal order.[5]

Third, while reinforcing international law's capacity not only to govern climate change but also to contribute to a more just distribution of responsibility,particularly by equipping civil society and States with legal tools to enforce State obligations, the Court leaves open the future role of climate litigation for climate governance (IV.). More fundamentally, the ICJ bench appears deeply divided on whether the Court should, in future, engage

5 International law has arguably progressively developed characteristics of a public legal order. This has led to a range of public law approaches to international law. Global Constitutionalism, for instance, has focused on identifying and theorising the core constitutional principles of the international legal order – democracy, rule of law and human rights, seminal, Jan Klabbers, Anne Peters, Geir Ulfstein, *The Constitutionalization of International Law* (expanded ed., Oxford University Press, 2011); Anne Peters, 'Global Constitutionalism' in: Michael T. Gibbons (ed), *The Encyclopedia of Political Thought* (John Wiley & Sons, 2015). Other approaches have focussed on the emergence of complex administrative structures and the growing range of instruments of international institutions that are capable of determining or conditioning the behaviour of States and other actors, including individuals. Among those is the Global Administrative Law (GAL) approach, see Benedict Kingsbury, Nico Krisch and Richard B. Stewart, 'The Emergence of Global Administrative Law' L&CP 68 (2005), 15–62; Benedict Kingsbury, 'Global Environmental Governance as Administration: Implications for International Law' in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (1 edn, Oxford University Press, 2008). Similar but distinct to the GAL approach, is the International Public Authority approach, that aims to reconstruct public law frameworks for those instruments of international institutions that constitute exercises of international public authority, see Armin von Bogdandy, Matthias Goldmann and Ingo Venzke, 'From Public International to International Public Law: Translating World Public Opinion into International Public Authority' EJIL 28 (2017), 115–145.
For an assessment of the ICJ's Advisory Opinion from the perspective of international administrative law, see Caroline E. Foster, Bella Belcher, 'International Law's Administrative Law Turn and the Paris Agreement' in: Maria Antonia Tigre, Maxim Bönnemann & Antoine De Spiegeleir (eds.), *The ICJ's Advisory Opinion on Climate Change* (Verfassungsbooks, 2025), 109-122; also on Verfassungsblog 11.9.2025.

more deeply with demands of intragenerational justice including those of distributive justice.

II. Normative and Structural Refinement of International Law: Fiduciary Governance of Climate Commons[6]

The Advisory Opinion contributes to a turn of international law towards fiduciary governance, reflecting an emerging conception of intergenerational solidarity grounded in self-restraint and mandatory cooperation.[7] 'From Carbon Sovereignty to Trusteeship'[8] analyses this development as a conceptual turn: States do not merely cooperate as neighbours but act as fiduciaries of a shared atmospheric resource, answerable both to the international community and to future generations. This shift carries significant implications for international law's understanding of State sovereignty, its purposes, and the international legal obligations constraining State discretion. The Court refines the customary duties to prevent and to cooperate by extending the underlying purpose of international law to the collective management of the global commons. In doing so, it limits State discretion in a qualitatively new manner (1.). We suggest that these normative refinements signal the emergence of a structural principle of trusteeship, which operationalises the intertemporal dimension of solidarity in international law (2.).

6 Cf. Eyal Benvenisti, 'Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders', AJIL 107 (2013), 295–333. See also Jannika Jahn and Nele Suchantke, 'The ICJ Advisory Opinion on Climate Change: From Carbon Sovereignty to Trusteeship of the Climate Commons', in this volume.

7 On the idea of fiduciary duties of States in international law, cf. Anne Peters, 'Humanity as the A and Ω of Sovereignty', EJIL 20(3) (2009), 513–544; Criddle, Evan J., '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); Criddle, Evan J., and Evan Fox-Decent, *Fiduciaries of Humanity: How International Law Constitutes Authority* (Oxford University Press, 2016); in the context of international environmental law, see Klaus Bosselmann, *Earth Trusteeship and the Sovereign State Transforming International Environmental Law* (Wiley, 2025).

8 See Jahn and Suchantke (n. 6) in this volume.

I. Normative Refinement

The customary prevention rule and that of cooperation form the epicentre of the wider normative framework applicable to climate change. Their interpretation reveals the shifting purpose of international law in this regard: from the individual State interest not to be harmed, to the aggregate State interests of preserving and sharing the benefits of a natural resource beyond national jurisdiction, to the long-term interests of present and future generations to protect the life-sustaining stability of the climate system.[9] It is through the refinement of their scope, their procedural and substantive dimensions, as well as their implications for the broader body of international law applicable to climate protection that these rules render international environmental law capable of informing and guiding the societal transformation required to meet the challenges of anthropogenic climate change.

The Advisory Opinion expands the scope and positive dimension of the prevention rule and reinforces the duty of cooperation for the protection of the environment. As Brunnée astutely observes in her contribution, the prospectively oriented harm prevention rule has its origins in its retrospective complement: the no harm rule. It was firmly rooted in the coexistential international law of neighbourly relations, entailing negative duties to abstain from neighbourly nuisances.[10] From the 1972 Stockholm Declaration (Principle 21) and the 1992 Rio Declaration (Principle 2) onwards, the no harm rule was tilted towards the prevention of harm and extended to areas beyond national jurisdiction. During this reorientation, the rule transcended its coexistential focus and acquired a cooperative layer.

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9 See Jutta Brunnée, 'The Advisory Opinion on *Obligations of States in Respect of Climate Change*: Harm Prevention under Customary International Law', in this volume; Jahn and Suchantke (n. 6), in this volume; see also Wolfgang G. Friedmann (n. 3), 60 et seq.; Wolfrum, 'Entwicklung des Völkerrechts von einem Koordinations- zu einem Kooperationsrecht', in: Peter Christian Müller-Graf and Herberth Roth (eds), *Recht und Rechtswissenschaft* (C.F. Müller, 2000), 425–429; Rüdiger Wolfrum, 'International Law of Cooperation', in: Wolfrum (ed), *Max Planck Encyclopedia of International Law* (2010), 7, available at: <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1427?rskey=io1EcQ&result=4&prd=MPIL>.

10 Jutta Brunnée, *Procedure and Substance in International Environmental Law*, Collected Courses of the Hague Academy of International Law 405 (Brill, 2019) 87 (115 et seq.).

With the Advisory Opinion, the Court expands its scope to the diffuse phenomenon of climate change which affects the integrity of globally connected environmental ecosystems outside and inside state jurisdiction. At the same time, it extends the rule's temporal dimension by recognising intergenerational equity as an interpretative principle that grants weight to the interests of future generations.[11] This is more than rhetoric: it operates as a doctrinal device through which present-day obligations are assessed in light of their projected future impacts, tightening the standard of due diligence and reinforcing an intertemporal (fiduciary) framing of State obligations.

Substantively, the Advisory Opinion enhances the positive obligations flowing from the rule of prevention. They are structured around obligations of due diligence. Despite their procedural nature, this interpretation cannot be read as a step towards a proceduralisation of international environmental law detached from any substantive goal.[12] Instead, the harm prevention rule drives a proceduralisation that enmeshes substance and procedure through its standard of due diligence whereby the procedural requirements serve the implementation of the substantive stipulations.

Alongside the harm prevention rule, the Court recognises a distinct duty to cooperate for the protection of the environment.[13] By recognising this duty as a self-standing rule of customary international law and refining its normative contours, the Advisory Opinion strengthens its normative force in the context of climate protection. In doing so, the Court positions international law as a proactive normative framework for guiding and structuring collective action.

Moreover, the Court acknowledges the *erga omnes* character of the customary duties to prevent significant harm to the climate system and to cooperate in climate protection in light of the recognition of climate change

11 *See* ICJ, *Obligations of States in Respect of Climate Change*, Advisory Opinion of 23 July 2025, paras. 157, 273, 373, despite acknowledging their lack of procedural standing before the Court.

12 For this criticism and concern, see Martti Koskenniemi, 'Peaceful Settlement of Environmental Disputes' NORD 60 (1991), 73-92 (85).

13 ICJ, *Obligations of States in Respect of Climate Change* (n. 11), para. 140. See Jahn and Suchantke (n. 6), in this volume. For a thorough engagement with the ICJ's advisory jurisprudence on duty to cooperate, cf. Khaled El Mahmoud and Natali Gbele, 'When Guidance Becomes Fog: The ICJ and the Normative Uncertainty of the Duty to Co-Operate', EJIL: Talk!, 14 January 2026.

as a common concern (of humankind).[14] Contributions in this volume have underscored the implications of the Advisory Opinion's *erga omnes* recognition as signalling a reallocation of responsibility beyond bilateral relations.[15] Importantly, this gives all States standing to bring respective violations of these common obligations before the ICJ, which in turn enables them to enforce the preventive and cooperative obligations of States.

With the ICJ Advisory Opinion, the trajectory towards an international (environmental) law of cooperation is further consolidated: The Opinion reinforces coordinated action in the management of the climate system.[16] By articulating a self-standing customary duty to cooperate, it overlays international law's coexistential foundations with a more pronounced cooperative orientation.

This normative refinement of the customary international obligations of States proves particularly consequential insofar as it informs and structures the interpretation of the broader framework of international law applicable to climate change. The Court states in its Advisory Opinion that 'at the present stage, compliance in full and in good faith by a State with the climate change treaties [...] suggests that this State substantially complies with the general customary duties to prevent significant environmental harm and to co-operate.'[17] In the reading of the Court, the preventive and cooperative logic of the Paris Agreement as well as its recourse to the regulatory technique[18] of due diligence manifest and mirror the customary rules of harm prevention and cooperation.

This interpretation follows logically from the close enmeshment of customary and treaty law in the field of climate protection. Both share the same overarching goal. As Christina Voigt's contribution intimates,[19] the

14 ICJ, *Obligations of States in Respect of Climate Change* (n. 11), para. 440.

15 Jutta Brunnée (n. 9), in this volume; Phillip Paiement and Corina Heri, 'Strengthening International Climate Obligations Beyond Paris: Situating the ICJ's Opinion within a Comparative Legal Context', in this volume; Jannika Jahn and Nele Suchantke (n. 6), all in this volume.

16 ICJ, *Obligations of States in Respect of Climate Change* (n. 11), para. 141; cf. ICJ, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment of 20 April 2010, I.C.J. Reports 2010 (I), para. 77.

17 ICJ, *Obligations of States in Respect of Climate Change* (n. 11), para. 314.

18 On our use of this term, see the Introduction. Heike Krieger, Anne Peters, 'Due Diligence and Structural Change in the International Legal Order', in: Anne Peters, Heike Krieger and Leonhard Kreuzer (eds), *Due Diligence in the International Legal Order* (Oxford University Press, 2020), 351–390 (351).

19 See Voigt (n. 2), in this volume.

Court reads the entire climate regime in line with the UNFCCC's ultimate objective of the 'stabilization of the greenhouse gas concentrations in the atmosphere at a level that would *prevent* dangerous anthropogenic interference with the climate system'.[20] The Paris Agreement temperature target concretises this goal. Moreover, the character of the Paris Agreement's cyclical ambition spiral[21] shares the same regulatory logic as the more abstract customary standard of due diligence.[22] On this basis, the Court holds that both standards inform each other to such an extent that they substantially overlap. This does not signify that 'the autonomous force of customary law'[23] is diluted. Rather, it reflects an overarching consolidation of the applicable international legal rules around the normative refinement of the customary harm prevention rule and the duty to cooperate, geared towards the collective management of the atmospheric commons.

In substance, the Court relies on this interpretative alignment between customary international law and treaty law to further recalibrate the scope of State discretion. The Court interprets the Paris Agreement's provisions in light of the harm prevention rule's due diligence requirements as limiting State discretion in the preparation and implementation of NDCs.[24] It insists that States must satisfy the due diligence standard in determining ambitious and progressive NDCs, which means, in particular, that, when taken together, NDCs must be capable of achieving the temperature goal of limiting global warming to 1.5 °C above preindustrial levels.[25] On this reading, remaining within the 1.5 °C limit is conceived as an inherently collective, yet individualisable obligation incumbent upon all States. The corresponding treaty obligations are owed to the community of States par-

20 Art. 2 UNFCCC.

21 On the regime specificity of the due diligence standard under the Paris Agreement, see Lavanya Rajamani, 'Due Diligence in International Climate Change Law', in: Anne Peters, Heike Krieger and Leonhard Kreuzer (eds), *Due Diligence in the International Legal Order* (Oxford University Press, 2020), 163-180. See also Christina Voigt (n. 2), in this volume.

22 Cf. Christina Voigt, *'The Paris Agreement: What is the standard of conduct for Parties?',* QIL 26 (2016), 17–28.

23 Mario Prost, 'Disaster Passing as Miracle? A Critical Take on the ICJ's Climate Advisory Opinion', EJIL:Talk!, 14 August 2025; See also Andrej Lang and Denise Koecke, 'Rising to the Occasion: The World Court as Architect of a Harmonious International Climate Law Framework', in this volume.

24 ICJ, *Obligations of States in Respect of Climate Change* (n. 11), para. 231.

25 ICJ, *Obligations of States in Respect of Climate Change* (n. 11), para. 241-242, 245.

ties as a whole (*erga omnes partes*), aligning them with their counterparts in customary international law.[26]

The Court furthermore builds on the customary duty to prevent environmental harm to indicate, albeit in a rudimentary manner, the regulatory role of international law in guiding towards a deep transition of the private and energy sectors. In this regard, the Advisory Opinion assumes a forward-looking dimension with potentially transformative implications, justified by the common goal of preventing future harm to the climate system.[27] Several authors point to the far-reaching implications of the Advisory Opinion's finding that a failure to regulate private emissions may constitute an internationally wrongful act.[28] Thus, the Court affirms that under the harm prevention rule States must adopt and enforce 'regulatory mitigation mechanisms' for both public and private operators,[29] implying that a State's climate duty is not satisfied by reducing its own emissions alone but extends to actively regulating the activities of private actors. This places traditional sovereign prerogatives—energy licensing, subsidies, and fiscal incentives—under a new standard of international review, linking corporate emissions to State due diligence duties. Equally significant, and still within the harm prevention rule, is the Court's expansion of environmental impact assessment (EIA) obligations to include downstream and end-use emissions.[30] States are now expected to anticipate and integrate the global carbon effects of projects, such as new oil and gas fields, industrial agriculture, or major infrastructure, into their permitting processes. This innovation shifts EIAs from a localised, site-specific tool to a global emissions filter and embeds private-sector activities squarely within States' climate obligations.[31]

2. Structural Refinement

These normative refinements, it is suggested, manifest an underlying structural refinement of international (environmental) law. This refinement may

26 ICJ, *Obligations of States in Respect of Climate Change* (n. 11), paras. 157, 273, 440.
27 ICJ, *Obligations of States in Respect of Climate Change* (n. 11), para. 427.
28 ICJ, *Obligations of States in Respect of Climate Change* (n. 11), paras. 282, 427.
29 ICJ, *Obligations of States in Respect of Climate Change* (n. 11), para. 282.
30 ICJ, *Obligations of States in Respect of Climate Change* (n. 11), para. 298.
31 ICJ, *Obligations of States in Respect of Climate Change* (n. 11), para. 440.

be conceptualised through intergenerational trusteeship as a conceptual umbrella for the core elements that shape the international legal framework governing climate change: the atmosphere's status as a global environmental commons; climate change constituting a common concern of humankind; intergenerational equity as an interpretative principle; and the refined harm prevention rule together with the duty to cooperate for environmental protection.[32] Taken together, these elements signify that the atmosphere is held in trust for present and future generations, placing States under a fiduciary duty to collectively preserve the stability of the climate system.[33] As a conceptual umbrella, intergenerational trusteeship does not itself constitute a legally binding norm. Rather, it operates as a structural principle[34] that systemises the legal framework under a common purpose, shapes the content of the legal obligations, and guides their interpretation.[35]

This principle builds upon and further develops the principle of solidarity in its intertemporal dimension. According to Wolfrum,[36] solidarity comprises three dimensions: inter-state solidarity (taking into account the

32 Cf. ICJ, *Obligations of States in Respect of Climate Change* (n. 11), paras. 157, 273, 308, 440; Jannika Jahn and Nele Suchantke (n. 6), in this volume.

33 For a conceptualisation of ecological trusteeship, see Klaus Bosselmann, *Earth Trusteeship and the Sovereign State* (Routledge, 2025), both with further references; 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 certain stewardship models for environmental goods that were critiqued from a postcolonial perspective, see e.g. Surabhi Ranganathan, 'Global Commons', EJIL 27 (2016), 693–717 (714).

34 For the likewise *structural* principle of solidarity, see Rüdiger Wolfrum, 'Solidarity and Community Interests: Driving Forces For the Interpretation and Development of International Law', Collected Courses of the Hague Academy of International Law 416 (Brill, 2021), 300.

35 Armin von Bogdandy, 'Prolegomena zu Prinzipien internationalisierter und internationaler Verwaltung', in: Hans-Heinrich Trute and others (eds), *Allgemeines Verwaltungsrecht – zur Tragfähigkeit eines Konzepts,* Festschrift für Eberhard Schmidt-Aßmann (Mohr Siebeck, 2008).

36 Rüdiger Wolfrum, 'Solidarity amongst States: An Emerging Structural Principle of International Law', in: Pierre-Marie Dupuy and others (eds), *Völkerrecht als Wertordnung / Common Values in international law, Festschrift für Christian Tomuschat* (Engel Verlag, 2006); Chie Kojima and Rüdiger Wolfrum (eds), *Solidarity: A Structural Principle of International Law* (Springer, 2010); Wolfrum (n. 34).

interests of other States), community-oriented solidarity (the interests of the international community as a whole), and intergenerational solidarity (towards future generations).[37] While solidarity itself provides the normative foundation for collective responsibility, trusteeship translates this foundation into a concrete temporal fiduciary logic of State conduct: it defines how States must exercise their powers in light of the shared and continuing interests of humankind.[38] In the climate context, the fiduciary dimension of this principle extends solidarity from its focus on cooperation to a more transformative governance principle, requiring international law to function not merely as a law of cooperation and risk aversion, but as a law that informs and guides structural change, particularly in the economic sector.[39] Moreover, the fiduciary duties flowing from the concept of trusteeship give rise to legal accountability for State conduct, in particular through the justiciability of State duties and the recognition of legal entitlements to hold States to account.[40]

The Advisory Opinion confirms this reading, as the concept of trusteeship appears to permeate the climate regime as a whole, endowing States with fiduciary duties that govern both their external relations and internal obligations. As several contributions to this volume have demonstrated, the rule of harm prevention, especially in its cooperative dimension, now connects internal (prevention within jurisdiction) and external duties (cooperation across borders) with an *erga omnes* effect.[41] It operates as a normative hinge linking domestic governance, transnational cooperation, and the collective maintenance of climate stability. The impact on internal matters is reinforced by the conjunction of environmental principles and human rights, converging in the right to a clean, healthy and sustainable environment as a prerequisite for all other human rights.[42] This, again, is of structural importance.[43] For, the imbuement of an international legal

37 Wolfrum (n. 34), 300.

38 For the idea of fiduciary state duties towards humankind, see n. 7.

39 As for instance implied in ICJ, *Obligations of States in Respect of Climate Change* (n. 11), paras. 282, 427.

40 See (n. 7); see also Evan Fox-Decent, From Fiduciary States to Joint Trusteeship of the Atmosphere: The Right to a Healthy Environment through a Fiduciary Prism', in: Charles Sampford, Ken Coghill and Tim Smith, *Fiduciary Duty and the Atmospheric Trust* (Routledge, 2012), 253-268.

41 Jahn and Suchantke (n. 6), in this volume.

42 ICJ, *Obligations of States in Respect of Climate Change* (n. 11), para. 393.

43 Anne Peters, 'Global Constitutionalism: The Social Dimension', in: Takao Suami, Anne Peters, Dimitri Vanoverbeke, Mattias Kumm (eds.), *Global Constitutionalism*

regime with human rights changes the orientation of State responsibilities from inter-state obligations towards obligations which the State owes to the individual. International environmental law is thereby restructured towards being 'built around the central figure of the individual, his rights, and his basic needs'.[44] This, in turn, allows individuals to hold States to account for breaches of their fiduciary duties towards (global) environmental commons.[45]

III. Consolidation of a Public Legal Order of International Climate Protection

In line with the structural principle of intergenerational trusteeship over environmental commons, the Court consolidates the different sources and areas of international law around a common set of concepts, principles and obligations, embedding an orientation of public international law towards environmental protection (1.). It thereby contributes to the construction of an international *public* legal order, a *Völkerrechtsordnung*.[46] To legitimately substantiate the common *public* values, the Court draws on authoritative scientific findings. The 'objectivity' that comes with this allows the Court to demonstrate that it does not commensurate individual State interests with public interests (2.). Aside from formal legal integration, the Court also seeks to build its Advisory Opinion on a solid evidentiary basis which includes civil society briefs so as to embed the legal analysis in real human experiences (3.).

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from European and East Asian Perspectives (Cambridge University Press, 2018), 277-350 (299–300).

44 Emmanuelle Jouannet, 'How to depart from the existing dire condition of development', in Antonio Cassese (ed.), *Realizing Utopia: The Future of International Law* (Oxford University Press, 2012), 392-417 (398–399).

45 Cf. Fox-Decent (n. 40).

46 Herman Mosler, 'Völkerrecht als Rechtsordnung' HJIL 36 (1976) 6-49; Cf. Hoffmeister and Kleinlein, 'International Public Order', Wolfrum (ed), Max Planck Encyclopedia of International Law (2019), <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1430?rskey=LGJMpt&result=2&prd=MPIL>.

I. Systemic Integration

Several contributions to this book have underlined that systemic integration is a central element of the ICJ's Advisory Opinion.[47] Instead of following a large number of State submissions, which offered a reading of international law as a patchwork of specialised self-contained regimes, depicting the Paris Agreement as *lex specialis*, the Court instead engages in an impressive effort of systemic integration constructing a coherent and mutually reinforcing framework.

To this end, the Court employs Article 31(3)(c) VCLT which directs judges to interpret treaties 'in the light of any relevant rules of international law applicable in the relations between the parties.' Taking this provision seriously, the ICJ situates the Paris Agreement within the broader normative architecture of international law. This allows the Court to read the Agreement's provisions in light of customary prevention duties,[48] UNCLOS obligations on marine pollution,[49] international human rights standards,[50] and the decisions of the COP and CMA as expressions of the parties' subsequent agreements (Art. 31(3)(a) VCLT) and evolving practice.[51] The result is a decidedly public-order conception of international law, in which all 'relevant rules' enter into a conversation with one another.

Against this background, the Court does justice to the principle of systemic integration's hermeneutic qualities.[52] For the principle of systemic integration as an interpretative principle not only requires the insurance of textual coherence, but also an interpretative exercise of hermeneutic harmonisation. A telling example is the Court's determination of the Paris Agreement's regime-specific due diligence standard.[53] Rooted in the

47 In particular, Lang and Koecke (n. 23).

48 Brunnée (n. 9) in this volume.

49 Rozemarijn Roland Holst, 'Climate Change Law and the Law of the Sea: Systemic Impacts of the ICJ and ITLOS Advisory Opinions Read Together', in this volume.

50 See Hellen Keller, 'A Right to a Clean, Healthy and Sustainable Environment – or Perhaps not (yet)?', in this volume.

51 See Voigt (n. 2), in this volume.

52 On the hermeneutic qualities of the principle of systemic integration, see McLachlan, *The Principle of System Integration in International Law* (Oxford University Press 2024).

53 On the regime specificity of the due diligence standard, see Voigt, Christina, *'The Paris Agreement: What is the standard of conduct for Parties?',* QIL 26 (2016), 17–28; Lavanya Rajamani, 'Due Diligence in International Climate Change Law', in: Anne Peters, Heike Krieger and Leonhard Kreuzer (eds), *Due Diligence in the In-*

Agreement's procedural obligations and the qualifiers of progression and highest possible ambition, the Court draws on the customary principle of prevention, as well as on the best available science as manifested in the Agreement's temperature goals in order to arrive at a stringent standard from which concretised duties of conduct and result arise.[54]

Most notable in the Court's exercise of systemic integration is the fusion of environmental and human-rights law. The contributions to this volume have shown in detail,[55] how the ICJ Advisory Opinion bridges these two fields by recognising that environmental protection is a prerequisite for the enjoyment of human and fundamental rights such as life, health, food, water, and self-determination. The Court declares the right to a clean, healthy, and sustainable environment as 'inherent' to other human rights, elevating it from a soft-law aspiration to a core interpretative standard.[56] In this regard, it relies on a broad State consensus as expressed in the General Assembly Resolution 76/300[57], regional human rights conventions, national constitutional documents as well as the case law of regional human rights bodies, such as the IACtHR. At the same time, it exercises restraint and deference in leaving room for other approaches to the enmeshment of environmental needs and human rights, as done for example by the European Court of Human Rights in its *KlimaSeniorinnen* judgment.[58] On this basis, the Court manages to draw a direct link between the climate system and fundamental rights such as life, health, food, water, and self-determination while allowing for leeway in the specific implementation of this link.[59]

The centrality of systemic integration for the Court's envisioned coherent international legal order manifests itself institutionally in its engage-

ternational Legal Order (Oxford University Press, 2020), 163–180; Christina Voigt, Philipp Sauter, Rita Guerreiro Teixeiray, Joeri Rogelj, Carl Schleussner, Carl, Katalin Sulyok, 'The Legal Power of Highest Possible Ambition – Setting Legal and Scientific Benchmarks to Assess Highest Possible Ambition under Article 4(3) of the Paris Agreement', CLLA 15 (2025), 1–24. See also Voigt (n. 2), in this volume.

54 See Paiement and Heri (n. 15), in this volume.

55 In particular Keller (n. 50), in this volume.

56 ICJ, *Obligations of States in Respect of Climate Change* (n. 11), para. 393. See also Keller (n. 50) and Lang and Koecke (n. 23), both in this volume.

57 GA Resolution, The human right to a clean, healthy and sustainable environment, 28 July 2022, A/RES/76/300.

58 Keller (n. 50).

59 See also Jannika Jahn, 'The European Approach to Human Rights-Based Climate Litigation in Global Context: Difference, Deference, Consolidation', Verfassungsblog, 6 December 2025.

ment in cross-judicial dialogue with other tribunals. As several contributions to this volume have highlighted, the Advisory Opinion integrates findings from ITLOS' Advisory Opinion on climate change, which classified anthropogenic greenhouse gases as 'pollution of the marine environment' under UNCLOS and imposed a stringent due-diligence duty on States to prevent, reduce and control such pollution, including by regulating private actors.[60] By weaving these Opinions and judgments into its own reasoning, the ICJ positions itself at the centre of a network of international climate jurisprudence, in which different courts develop complementary doctrines rather than competing ones.

2. Integration Through Science

For the identification of community interests in public international law, courts rely on the articulation of common interests in treaty and customary international law. Additionally, with international law's increasing involvement in scientific risk regulation,[61] scientific expertise and assessments play an important role by giving these common interests an impression of 'objective necessities'.[62] It logically follows that science becomes a central hinge of the normative integration that the Court pursues in its Advisory Opinion. This is why the Court starts with an in-depth overview over central scientific findings on climate change and its negative effects as pronounced by the IPCC. The Court also relies on the assessments of the IPCC to develop legal thresholds and benchmarks such as the 1.5°C goal or to substantiate the 'best available science' which is to inform States' due diligence obligations.[63]

This is particularly interesting in light of the fact that the IPCC has always been conceived of as a producer of politically accepted science

60 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; Rozemarijn Roland Holst (n. 49), in this volume.

61 Seminally, Jacqueline Peel, *Science and Risk Regulation in International Law* (Cambridge University Press, 2010).

62 On the construction of (regulatory) science as objective and a-political, see Sheila Jasanoff, 'The Practices of Objectivity in Regulatory Science', in: Charles Camic, Neil Gross and Lamont Michele (eds), *Social Knowledge in the Making* (University of Chicago, Press 2011), 307–338.

63 Katalin Sulyok, 'On the Science-Coloured Glasses of the ICJ: Harmfulness, Wrongfulness, and Climate Accountability', in this volume.

specifically *for* the needs of the climate regime (i.e. UNFCCC and following protocols and agreements) in particular (and not for the production of climate science detached from that regime). It is this orientation of the IPCC's work which led to its special report on the impacts of global warming 1.5°C in the first place: The special report on 1.5°C was requested by the COP in 2015 together with the adoption of the Paris Agreement.[64] Remarkably, prior to this request, very little scientific research existed on the 1.5°C temperature goal, as it was widely considered unrealistic and therefore irrelevant by the scientific community. By agreeing to produce a special report on this target, the IPCC created a demand for scientific research that had previously been almost non-existent.[65] In this way, the IPCC became an important actor of scientific policy for the Paris Agreement treaty framework.[66] With the ICJ's Advisory Opinion, this role may have been brought to extend to the area of customary international law. Albeit not made explicit in the Opinion, the temperature target might, due to its scientific grounding, also be interpreted as the current yardstick for the goal of the harm prevention rule.[67] Accordingly, science truly takes on what Jasanoff called 'a constitutional position',[68] as it makes a harmonised, integrated and coherent interpretation of the applicable legal frameworks and norms possible.

64 COP Decision 1/CP.21, para. 21.

65 Provost, 'Rigorous and Relevant: Applying Lessons from the History of IPCC Special Reports to the Post-Paris Agreement World', *Harv. Envtl. L. Rev.* 43 (2019), 507–546, 528 et seq.

66 Marion Lemoine-Schonne, 'Le droit international au défi des évolutions scientifiques: le ole du GIEC', in: Sandrine Maljean-Dubois and Jacqueline Peel (eds), *Climate Change and the Testing of International Law / Le droit international au défi des changements climatiques* (Brill Nijhoff, 2023), 115–143; Jacqueline Peel, 'Imagining Unimaginable Climate Futures in International Climate Change Law', in: Monika Ambrus, Rosemary Rayfuse and Wouter Werner (eds), *Risk and the Regulation of Uncertainty in International Law* (Oxford University Press, 2017), 177–196.

67 Cf. Paiement and Heri (n. 15), in this volume.

68 Sheila Jasanoff, 'Future Imperfect: Science, Technology, and the Imaginations of Modernity', in: Sheila Jasanoff and Sang-Hyun Kim (eds), *Dreamscapes of Modernity: Sociotechnical Imaginaries and the Fabrication of Power* (Chicago University Press, 2015), 1–33, 4.

3. Embedding the Advisory Opinion in Human Experience

Finally, the ICJ's construction of a coherent and integrated international legal order that encompasses the far-reaching impacts of climate change can also be understood as a product of the introduction of terminology into the proceedings which is reflective of the multifaceted lived reality of climate change. Particularly the contributions 'Global and International Court of Justice'[69] and 'Vanishing Yams'[70] illuminate how non-State actors shaped both the process and the substance of the Advisory Opinion. They uncover how civil society groups, Indigenous peoples, and youth movements did not only accompany the proceedings, but substantively influenced them by introducing experiential and moral vocabularies. Through testimony, amicus briefs, and the *Book of Exhibits*, they translated lived vulnerability into legal argument, articulating concepts such as climate-linked cultural loss, Indigenous epistemologies, and children's rights to a stable climate. Although the Court maintains the formal boundaries of standing, human rights and the principles of equity (*infra legem*), it enlarges the group of participants to the proceedings and pays due regard to the fact that climate change is a common concern of humankind and implies potential human rights impairments. At the same time, the Court broadens the audience of its Advisory Opinion which enhances the chances that civil society groups will rely on the Opinion to enforce State obligations through courts. One can assume that this form of civil society participation influences the judges' interpretation by broadening their perspectives on different human experiences with climate change-related developments.

IV. A Structural Transformation Torn Between Cooperative Governance and Distributive Justice?

The Advisory Opinion reinforces international law as a framework for the cooperative governance of the global climate system (1.), and at the same time opens avenues for litigation over climate harms and distributive justice which could arguably inadvertently undermine this collective endeavour (2.). Such proceedings might risk having counterproductive effects if States

69 Lillian Robb and Vishal Prasad, 'Both a "Global" and an "International" Court of Justice', in this volume.

70 Rashmi Dharia, '"Vanishing Yams", A Food Microhistory in the Climate Change Advisory Opinion', in this volume.

were to retract their recognition of climate duties under international law or question the legitimacy of international courts in adjudicating matters with redistributive implications. At the same time, however, they may also strengthen States' commitment to their international obligations by clarifying the legal parameters of responsibility and accountability. Viewed against this background, the ICJ was also tasked with striking a delicate balance: to reinforce international law's authority while signaling where solutions must ultimately be found through political negotiation, including with respect to historical injustices (3.). In this last respect, the Court seemingly remained deeply divided, which foreshadows future struggles over the role of climate litigation.

1. International Law as a Framework for Cooperative Governance

The Advisory Opinion strengthens the role of international law in providing a framework for the protection of the climate system. To this end, it curtails State discretion across conventional, customary, environmental, and human rights law, thereby binding States to shared normative benchmarks. It further consolidates international law around a coherent set of obligations, increasing legal certainty and enabling States to align their conduct with clear standards. The Court bases its reasoning on prior judicial pronouncements and authoritative statements made by other international institutions, such as the IPCC and the ILC, which enhances its authority vis-à-vis States. At the same time, it preserves sufficient leeway for legal pluralism, as is the case in human rights interpretation, thus maintaining the overall coherence of international law.

Additionally, the Court reinforces international law not only substantively but also procedurally by opening new avenues for climate litigation. This includes both inter-state and individual human rights proceedings. The former becomes possible because the Court affirms the applicability of the customary rules on State responsibility, as codified in the ILC's Articles on State Responsibility (ARSIWA).[71] Some States had argued that the Paris Agreement constitutes a *lex specialis* displacing these general rules, but the Court expressly rejected this claim. Inter-state proceedings may therefore help close the enforcement gap in international law, allowing

71 ICJ, *Obligations of States in Respect of Climate Change* (n. 11), paras. 407 et seq.

States to compel compliance with climate obligations. The Court also recognises that claims for reparation—compensation, restitution, or satisfaction—are in principle viable, provided causation and attribution can be proven.[72] Notably, it did not exclude the possibility of establishing such proof, despite the diffuse, cumulative nature of climate causation.[73] For climate governance where reciprocity of State interests is lacking, because the protected goods are community-based and future-oriented, allowing for compensation claims may in fact become one of the few effective mechanisms, alongside human rights litigation, to encourage compliance. By linking enforcement to responsibility, the Court reinforces international law's authority while giving it procedural traction.

2. Tension with Redistributive Justice

It is precisely this part of the Advisory Opinion, however, that appears to have divided the bench. While the Court recognises the potential engagement of State responsibility, it refraines from specifying its technical contours, such as the intertemporal scope of customary law or the evidentiary thresholds for causation and attribution.[74] This reticence can partly be explained by the abstract nature of advisory proceedings, yet it also reflects a deeper divide among the judges. This becomes apparent in the different declarations and separate opinions that all judges but the President and Vice-President added to the Advisory Opinion.

At the core lies a dual challenge: the international legal order must simultaneously address redistribution, both globally and domestically, with respect to harms resulting from past conduct and coordinate future-oriented collective action to protect the global climate system.[75] At first glance, the Advisory Opinion seems to tackle both. In particular, it emphasises the doctrinal foundations for flexible, differentiated forms of responsibility reflecting historical contribution, capacities, and circumstances. Moreover, it opens the door to future litigation and, potentially, to judicially enforced redistribution, whether by States invoking others' responsibility or by individuals and communities challenging insufficient mitigation efforts before

72 ICJ, *Obligations of States in Respect of Climate Change* (n. 11), paras. 436 et seq.
73 ICJ, *Obligations of States in Respect of Climate Change* (n. 11), para. 437.
74 ICJ, *Obligations of States in Respect of Climate Change* (n. 11), paras. 97, 106, 423.
75 Eliana Cusato, 'Progress and Linear Time: International Environmental Law and the Uneven Distribution of Futurity', HJIL 84 (2024), 865–894.

domestic or regional courts. However, it seems that States might face greater difficulties under the framework constructed by the Court than the Advisory Opinion suggests at first glance.

Judge Nolte's declaration illustrates this tension. He emphasises that the Court should have been clearer about the intertemporal, attributional and causal limits of contentious proceedings in climate disputes. The probabilistic and cumulative nature of climate causation, he argues, makes direct attribution of harm among States exceedingly difficult.[76] Nolte also addresses the temporal scope of potential wrongfulness, noting that emissions could only be considered internationally wrongful from the late 1980s onwards.[77] This would raise the question whether the amount of wrongful emissions since that time would be sufficient at all to be considered as having caused significant harm to the climate system.[78] He warns that pursuing redistribution through litigation risks creating 'false hopes' of litigation serving as surrogate for climate policy, potentially undermining the cooperative mechanisms of the Paris Agreement and the legitimacy of international adjudication itself.[79] Outcomes of such climate cases might only have symbolic legal effect.[80] Judge Sebutinde went further, arguing that the Court should have refrained from addressing questions of State responsibility, attribution and causation altogether.[81]

Conversely, Judges Sebutinde and Charlesworth criticise the Opinion for not having properly articulated the various legal consequences and potential remedies available to injured States.[82] They regret its failure to specify what industrialised States might owe to developing and small island States under potential claims for compensation or restitution.[83] More generally, Judge Charlesworth faults the Court for insufficiently differentiating

76 Declaration of Judge Nolte, *Obligations of States in Respect of Climate Change*, Advisory Opinion of 23 July 2025, paras. 19 and 20.
77 Declaration of Judge Nolte (n. 76), paras. 23 et seq.
78 Declaration of Judge Nolte (n. 76), para. 27.
79 Declaration of Judge Nolte (n. 76), para. 31.
80 Declaration of Judge Nolte (n. 76), para. 31.
81 Separate Opinion of Vice-President Sebutinde, *Obligations of States in Respect of Climate Change*, Advisory Opinion of 23 July 2025, para. 13, referring to paras. 421-438 of the Opinion, *Obligations of States in Respect of Climate Change* (n. 11).
82 Separate Opinion of Vice-President Sebutinde (n. 81), paras. 9–12; Separate Opinion of Judge Charlesworth, *Obligations of States in Respect of Climate Change*, Advisory Opinion of 23 July 2025, paras. 13 et seq.
83 Separate Opinion of Vice-President Sebutinde (n. 81), paras. 5, 6, 8, 9; Separate Opinion of Judge Charlesworth (n. 82), paras. 13 et seq.

between those States most vulnerable to climate impacts and those most responsible for emissions.[84]

Overall, it can be said that the Advisory Opinion prioritises collective obligations and a forward-looking framework of cooperation, rather than constructing mechanisms for redistributing past harms. This future-oriented approach reflects broader trends in climate jurisprudence. In recent human rights-based climate litigation, such as *Urgenda*[85] and *KlimaSeniorinnen*[86], courts have been seized for forward-looking orders requiring governments to strengthen mitigation targets or adopt more ambitious legislation. The emerging pattern is one of preventive adjudication, where courts enforce legal obligations including self-imposed goals and targets for the future, rather than adjudicating past wrongs. By contrast, corporate climate litigation, such as *Milieudefensie v. Shell*[87], has yet to yield enforceable reparations. In a similar vein, however, also these proceedings serve as a catalyst for political accountability and public debate.

3. Finding a Delicate Balance between Law and Politics

Against this backdrop, the ICJ's Advisory Opinion can be read as part of an emerging international law of shared, future-oriented responsibility, rather than one of retrospective reparation. Its emphasis on the common concern of humankind and on the duties of prevention and cooperation signals a preference for collective problem-solving over distributive adjudication. A next crucial juncture for the structural transformation of international law will therefore be whether the ICJ will be seized and move towards adjudicating questions of distributive justice in contentious proceedings, acting as an arbiter of competing State interests, or whether it will exercise judicial restraint in this regard, foregrounding its role as an advisory authority and arbiter upholding the future-oriented public order of climate commons governance as established by international law.

84 Cf. Separate Opinion of Judge Charlesworth (n. 82), paras. 13–29.

85 Supreme Court of the Netherlands, Urgenda Foundation v. the State of the Netherlands, 20 December 2019, ECLI:NL:HR:2019:2007.

86 ECtHR (GC), *Verein KlimaSeniorInnen and others v. Switzerland*, 9 April 2024, no.53600/20.

87 Rechtbank Den Haag 26 May 2021, Milieudefensie et al/Royal Dutch Shell Plc, ECLI:NL:RBDHA:2021:5339.

V. Conclusion

In its analysis of the international law applicable to climate change, the ICJ constructs a coherent international legal order that provides a clear, future-oriented, and legally binding framework for the global governance of the climate system. At its centre, the Court places the obligations of prevention and cooperation, which serve to systematise and harmonise diverse treaty regimes and disciplinary boundaries through shared concepts such as science-based benchmarks, due diligence, *erga omnes* obligations, and intergenerational equity. It appears, therefore, that the Court has understood its task—at least in part—as one of ordering international law: offering a structural framework capable of coherently managing global climate governance. This vision conceives international law primarily as a regulatory architecture for the cooperative and future-oriented governance of the global commons. Whether the Court will, in the future, succeed in providing practically viable avenues for redistribution, individualised liability, and compensation or instead continue to exercise judicial restraint out of concern for preserving States' collective endeavours and the legitimacy of international adjudication remains to be seen. With the Advisory Opinion, both paths remain open.