

A Right to a Clean, Healthy and Sustainable Environment – or perhaps not (yet)?

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I. Introduction

In the lead up to the Advisory Opinion on climate change¹ by the International Court of Justice (ICJ) there were high expectations of a groundbreaking intervention that clears any doubt about the content of legal obligations in relation to climate change and the consequences of their breach. At first glance, these expectations appear to have been met. However, upon closer examination, it becomes clear that various statements made by the ICJ pertaining to the intersection between climate change and human rights law remain vague. This chapter will highlight the relevant findings and then provide an overall assessment. First, the Court's response to the *lex specialis* argument will be considered and then its doctrinal findings as to the content and scope of human rights obligations related to climate change will be laid out. This will be followed by a brief assessment of the Advisory Opinion for its contribution towards settling the debate on difficult legal topics. Despite missed opportunities and the lack of clarity in the Advisory Opinion, its potential impact needs to be appreciated, as going forward, national and international courts will have no choice but to adopt the tone and commitment of this Advisory Opinion when dealing with issues of climate law.

II. Harmonizing Approach and Rejection of the *lex specialis* Argument

Having read the ICJ's opinion on climate change, readers may well ask themselves whether the Court recognized a right to a healthy, clean and

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

sustainable environment. The answer is not straightforward. The ICJ approached a possible response in several steps. First, the ICJ recognized the relationship between the climate protection regime and human rights. The long list of legal regimes that form part of the ‘most directly relevant applicable law’ for the purpose of this Advisory Opinion in the climate context also includes international human rights guarantees, albeit only in second-to-last place.² With this finding, the ICJ is aligning with a discernible trend in international law that recognizes climate change as a matter of human rights concern. This seemingly obvious statement is important because of controversy over the extent to which climate issues should be viewed through the lens of human rights, particularly in the wake of the *KlimaSeniorinnen v. Switzerland* ruling.³ The ECtHR was heavily criticised for establishing a link between Article 8 of the ECHR and the climate regime.⁴ This approach, however, has now been fully confirmed by the ICJ. The ICJ emphasized ‘that international human rights law, the climate change treaties and other relevant environmental treaties [...] inform each other. States must therefore take their obligations under international human rights law into account when implementing their obligation under the climate change treaties [...]’.⁵ This statement is important in three respects: Firstly, it opens legal avenues to human rights bodies and courts. Because we do not have a central body for enforcing climate-related concerns,⁶ this legal recourse is of paramount importance. Secondly, this statement is crucial for interpreting the obligations under the Paris Agreement. Finally, it is also of great practical relevance for the implementation of judgments by human rights bodies and courts (for example, in the case of the *KlimaSeniorinnen*⁷).

At this point, the ICJ could have stopped. However, the Court went further, engaging in a second step by recognizing a right to a clean, healthy

2 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), paras. 145 and 172.

3 ECtHR (Grand Chamber), *Verein KlimaSeniorinnen and Others v. Switzerland*, judgment of 9 April 2024, no 53600/20.

4 Most prominently: Alexander Zahar, ‘With Swiss Seniors the Climate-Litigation Movement Chalks up Another Hollow Victory’, *CLLA* 14 (2024), 285–316.

5 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 404.

6 See for a deeper discussion Helen Keller, Viktoriya Gurash and Corina Heri, ‘Do We Need an International Climate Court’, *HJIL* 85(3) (2025), 725–756..

7 Committee of Ministers, 1537th meeting, 15–17 September 2025 (DH), 1537th meeting, 15–17 September 2025 (DH), *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* (Appl. No. 53600/20), CM/Notes/1537/H46–37.

and sustainable environment, presenting it as ‘inherent in’, a ‘precondition’ to or ‘essential’ for the effective enjoyment of other human rights.⁸ The Court, however, does not say whether it recognizes this as a self-standing right. The statements in several separate opinions make it clear that there was no consensus among the judges as to whether this right has achieved the character of an international customary law norm.⁹ The content of a right to a healthy, clean and sustainable environment is not fleshed out in the Advisory Opinion. Judge Charlesworth gives a possible description of the procedural and substantive aspects of this right¹⁰ and links it to the mitigation and adaptation obligation in the climate context.¹¹ It seems obvious that the judges had differing opinions on the content of such a right.

III. Non-refoulement for Climate Migrants

The debate surrounding a possible human right to a healthy environment should not distract observers from another important finding. The ICJ has declared the principle of non-refoulement applicable in the context of climate change.¹² Here, too, the ICJ can point to prominent statements in this regard, most notably from the Human Rights Committee.¹³ From now on, asylum authorities will have to consider non-refoulement when examining asylum applications from climate migrants. However, the ICJ fails to explain to the reader what this principle, which forms part of *jus cogens*, entails *in concreto*. Judge Aurescu suggests that climate non-refoulement includes positive obligations to take proactive measures for the prevention of refoulement and to ensure that other rights are respected

8 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 393.

9 See Separate Opinion of Judge Aurescu, *Obligations of States in Respect of Climate Change*, Advisory Opinion of 23 July 2025, para. 28; Separate Opinion of Judge Bhandari, *Obligations of States in Respect of Climate Change*, Advisory Opinion of 23 July 2025, para. 3; Separate Opinion of Judge Charlesworth, *Obligations of States in Respect of Climate Change*, Advisory Opinion of 23 July 2025, para. 8; Declaration of Judge Tladi, *Obligations of States in Respect of Climate Change*, Advisory Opinion of 23 July 2025, paras. 24 et seqq.

10 Separate Opinion of Judge Charlesworth (n. 9), para. 9.

11 Separate Opinion of Judge Charlesworth (n. 9), para. 10.

12 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 378.

13 Human Rights Committee, *Teitiota v. New Zealand*, 24 October 2019, doc. CCPR/C/127/D/2728/216.

during the individuals' stay in the State's territory.¹⁴ He mentions *inter alia* a duty to conduct an individualized risk assessment, an obligation to admit those seeking protection and to issue temporary residence permits. At a time when asylum laws are being tightened almost everywhere in the world, these statements are important yet politically controversial. They will require further clarification through case law at both the national and international levels.

IV. Extraterritoriality

In light of the global nature of the climate change problem, do human rights treaties create obligations for a state party towards those residing outside its territory? In this regard, the ICJ very carefully left the door open while summarizing the position under international law.¹⁵ Apart from omitting any discussion of the ECtHR's position in *Duarte Agostinho*,¹⁶ the ICJ ultimately left the question unanswered.¹⁷

The development of case law on extraterritoriality illustrates how international bodies can interpret international law differently. Rather than being a threat to international law, these differences present an opportunity. Undoubtedly, the ECtHR has the strictest case law in this area. In *Duarte Agostinho*, the ECtHR limited the Convention's applicability to victims of climate-related breaches of ECHR obligations to individuals within the ECHR Member State's territorial jurisdiction and it did not deal with possible issues of extraterritorial jurisdiction, such as those which might arise, for instance, in the context of more localised transboundary environmental harm.¹⁸ The ECtHR then argued that first, the United Nations Framework Convention on Climate Change (UNFCCC) and Articles 1 and 2 of the Draft Articles on Prevention of Transboundary Harm from Hazardous Activities¹⁹

14 Separate Opinion of Judge Aurescu (n. 9), para. 25 *in fine*.

15 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), paras. 395 et seqq.

16 ECtHR (Grand Chamber), *Duarte Agostinho and Others v. Portugal and 32 Others*, decision of 9 April 2024, no. 39371/20.

17 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 402.

18 ECtHR, *Duarte Agostinho* (n. 16), para. 167.

19 ILC, 'Draft Articles on Prevention of Transboundary Harm from Hazardous Activities', YILCB (2001), Vol. II, Part Two.

‘are documents of a fundamentally different nature than the Convention [...]. Secondly, the former are primarily designed to govern the relationships between States, while the Convention comprises more than mere reciprocal engagements between Contracting States and rather creates, over and above a network of mutual, bilateral undertakings, a system of objective human rights obligations [...]. Lastly, while the above-mentioned documents refer to the issue of “damage” or “harm” occurring outside the borders of a State, they do not seem to suggest that such “damage” or “harm” would bring any impacted individuals under the jurisdiction of the State from which the damage or harm originated. In fact, these instruments clearly differentiate between the activity causing the damage or harm, which emanates from the jurisdiction of one State, and their effects, which fall within the jurisdiction of another State.’²⁰

While the ICJ generally attempts to harmonise the various areas of law in its Advisory Opinion, the ECtHR in *Duarte Agostinho* makes a strict distinction between the ECHR and the U.N. climate regime for questions of jurisdiction. Only time will tell which approach is more convincing.

V. Wanted: Accuracy, Boldness, and Clarity!

The text of the opinion is unclear in many regards. While it is understandable that the ICJ cannot settle every issue in an opinion down to the last detail, many passages remain vague. Even those involved in the adoption of this opinion complain about the deliberately open wording in some places. Judge Aurescu laments that this Opinion is excessively and unnecessarily cautious and minimalist.²¹ Judge Nolte likens the Opinion to a Delphic Oracle²² and Judge Yusuf states that he is reminded of Alice in Wonderland where Humpty Dumpty says ‘when I use a word, it means just what I choose it to mean – neither more nor less.’²³

20 ECtHR, *Duarte Agostinho* (n. 16), para. 212, all references omitted, emphasis in the original.

21 Separate Opinion of Judge Aurescu (n. 9), para. 1.

22 Declaration of Judge Nolte, *Obligations of States in Respect of Climate Change*, Advisory Opinion of 23 July 2025, para. 34.

23 Separate Opinion of Judge Yusuf, *Obligations of States in Respect of Climate Change*, Advisory Opinion of 23 July 2025, para. 6.

Needless to say, we would have liked to see more clarity regarding the role of human rights in the climate context. This applies not only to the content of a possible fundamental right to a clean, healthy and sustainable environment, but also to the principle of non-refoulement under climate law. The ICJ says little about active and passive legal standing in human rights proceedings. Although it refers to future generations on several occasions,²⁴ it does not address how their interests can be asserted in a complaint procedure. The same applies to the vulnerability of certain groups or States. Future proceedings in climate litigation will need to provide clarification at the national and international levels.

The list of things that the ICJ could clarify may seem long. This is certainly due to the high expectations placed on the ICJ in advance. While certain aspects of the Advisory Opinion remain vague, from an overall perspective, expectations have largely been met. This must be stressed at this point. It is a remarkable achievement that the ICJ adopted the Advisory Opinion unanimously – ‘a rarity in the history of the Court’s advisory jurisprudence’.²⁵ Although the Advisory Opinion is not strictly binding, it will undoubtedly influence future legal developments significantly. It sets a tone of commitment, responsibility and alertness for the discussion on the further development in climate law.

24 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), paras. 157, 273, 313, 373, 377.

25 Declaration of Judge Tladi (n. 9), para. 2.