Custom, Entrenchment, Interpretation – How the ICJ's Advisory Opinion on Climate Change Contributes to International Law's Turn Toward the Future

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I. Introduction

The vision of international climate change law is as simple as it is unassailable: Keeping the world a liveable place for humans all over the planet. As modest as this vision might sound, it still is a vision, i.e. a substantive conception of what the future should look like. Thus, having to fight climate change is having to shape the future. International rules and conventions tackling the current climate crisis have therefore always been among the most prominent exponents of international law's orientation toward the future. Whereas large parts of classic international law – such as the rules protecting State sovereignty or governing treaty relations – primarily aim to safeguard the conditions necessary for the collective self-regulation of States, international climate change law contains norms designed to substantively shape the world's future state: By calling for mitigation, these norms commit States to upholding the status quo ('*stabilization* of greenhouse gas concentrations in the atmosphere'[1] – emphasis added), as it is considered worth preserving for the future. At the same time, by requiring adaptation, they call for change to make the world more resilient and less vulnerable to the consequences of climate change than it is today (these dimensions might be labelled as 'safeguarding the future' ['Zukunftssicherung'] and 'shaping the future' ['Zukunftssteuerung'] respectively)[2]. In a couple of to some extent inconspicuous ways, the ICJ's advisory opinion on Obligations of States in Respect of Climate Change sharpens the contours of this substantive grasp for the future. In this article, I will focus

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1 Art. 2 United Nations Framework Convention on Climate Change (UNFCCC), 1771 UNTS 107.

2 Jochen Rauber, 'Zukunftsorientierung und Prozeduralisierung im öffentlichen Recht', AöR 143 (2018), 67–121 (68 et seq.).

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on three of them: The customary status of climate change obligations (II), their qualification as obligations *erga omnes* (III) and, most importantly, the Court's finding that intergenerational equity serves as a guiding interpretative principle (IV).

II. Conceptualising the Future Through Custom

It is first and foremost by strengthening States' mitigation obligations that the Advisory Opinion contributes to defining – and in fact expanding[3] – international law's conception of the future. In contrast to what some States claimed during the course of the proceedings,[4] the Court clarified without any further ado that the protection provided by the customary principle of prevention extends to the climate system as well, as it forms 'an integral and vitally important part of the environment'[5]. Considering international law's turn to the future, this is important for two reasons: First, because the substantive vision of the future that customary international law pursues is broadened. It now encompasses an undamaged climate system – or at least one that compared to its current state has not suffered further significant harm. Second, as has already been noted,[6] protecting the climate system under the customary principle of prevention expands the range of duty-bearers under international law's future-oriented obligations. Even States that are not parties to the treaty framework on climate change, namely the UNFCCC, the Kyoto Protocol and the Paris Agreement, are now legally held to contribute to the fight against climate change and, hence, to the realization of international law's idea of what the future should look like.

3 For a similar assessment see: Julian Arato and Justina Uriburu, 'Treaty and Custom in the ICJ's Climate Change Opinion', EJIL:Talk!, 24 July 2025.
4 See inter alia: ICJ, *Obligations of States in Respect of Climate Change*, Written Statement of the United States of America, 22 March 2024, para 4.5 et seqq.; Written Statement of New Zealand, 22 March 2024, para. 96 et seqq.
5 ICJ, *Obligations of States in Respect of Climate Change*, Advisory Opinion of 23 July 2025, para. 273.
6 Maria Antonia Tigre, Maxim Bönnemann and Antoine De Spiegeleir, 'The ICJ's Advisory Opinion on Climate Change: An Introduction', Verfassungsblog, 24 July 2025.

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III. Securing the Future by Entrenchment

Quite remarkably, the Court adds that these customary obligations protect a common interest of all States and consequently qualify as obligations *erga omnes*.[7] While the Advisory Opinion elaborates on the effects of this qualification for the question of *ius standi*,[8] it has remained largely unnoticed that it also provides these obligations with a form of legal entrenchment that makes them immune against almost any attempt to evade or disengage from them in the future. As Art. 41 (1) (b) VCLT[9] demonstrates for treaty relations, bilateral modifications or exemptions are no longer an option once every State has a legally protected interest in upholding of the respective obligations.[10] To customary international law this applies as well. Hence, except for the highly unlikely case of a sufficiently universal desuetude with regard to the principle of prevention, there is no way out of the respective climate change obligations. It follows that States' obligations to preserve the climate system and thus to contribute to international law's vision for the future are itself rendered future-proof. The ICJ may not have followed in the footsteps of the Inter-American Court of Human Rights that in its own Advisory Opinion on 'The Climate Emergency and Human Rights' has declared the prohibition of irreversible harm to the environment, including the climate system, part of *jus cogens*.[11] But in terms of temporality, the effects of its finding that the prevention principle contains obligations *erga omnes* are not that different. Neither the obligation nor the vision of the future it purports are going to go away any time soon.

7 ICJ, *Obligations of States in Respect of Climate Change* (n. 5), para. 440.

8 ICJ, *Obligations of States in Respect of Climate Change* (n. 5), para. 441 et seqq.; for a deeper analysis of this aspect of the opinion see: Federica Paddeu and Miles Jackson, 'State Responsibility in the ICJ's Advisory Opinion on Climate Change', EJIL: Talk!, 25 July 2025.

9 Vienna Convention on the Law of Treaties of 23 May 1969, 1155 UNTS 331.

10 It is subject to debate, however, whether an agreement that tries to illegally derogate from an *erga omnes* (*partes*) obligation is also invalid or at least inapplicable between the parties of the *inter* se-opt out, see on this discussion Jan B. Mus, 'Conflicts Between Treaties in International Law', NILR 1998, 208–232 (222–227).

11 IACtHR, *Advisory Opinion on Climate Emergency and Human Rights*, 29 May 2025, AO-32/25, para. 291.

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IV. Shaping the Future Through Legal Interpretation

This rather firm grip on the future seems to be somewhat at odds with the fact that explicit references to the rights of future generations are – except for the occasional quotes from the General Assembly's request or the preamble of one of the climate change treaties – rather hard to find in the Court's Advisory Opinion. Although the Court directly mentions 'generations unborn' in the context of States' obligations to protect the environment,[12] the Court's silence on the not-yet-living is particularly striking in the human rights context. Taking into account that the most severe consequences of a failure to act now will materialize only after the life-span of current generations has ended and considering that most mitigation efforts will not yield success in the immediate future, the rights to life and a healthy environment would, in my opinion, have suggested a more detailed analysis of those questions. And it does not come as a surprise that the General Assembly had, in its request for the Advisory Opinion, explicitly asked the Court to delineate the obligations that States bear to protect 'present and future generations' and even demanded to outline the consequences of violations of those duties 'with respect to [...] [p]eoples and individuals of the present and future generations'.[13] In one of the many individual declarations appended to the Opinion, Vice-President Sebutinde understandably deplores the reluctance of the Court to deal with this particular aspect of the question put to it.[14] And it is in this regard that the Court could have adopted a more future-oriented stance.

It would not do justice to the Opinion, though, to accuse the Court of outlining States' future-shaping obligations without having due regard to future generations and their (presumed) interests. Instead, in one of the rather jaw-dropping paragraphs of the Opinion, the Court acknowledges intergenerational equity as a principle that – although not establishing self-standing obligations – guides the interpretation of applicable rules.[15] This principle, according to the Court, gives 'expression [to] the idea that present generations are trustees of humanity tasked with preserving dignified living

12 ICJ, *Obligations of States in Respect of Climate Change* (n. 5), para. 155.
13 ICJ, *Obligations of States in Respect of Climate Change*, Request for Advisory Opinion, 12 April 2023.
14 Separate Opinion of Vice-President Sebutinde, *Obligations of States in Respect of Climate Change*, Advisory Opinion of 23 July 2025, para. 7.
15 ICJ, *Obligations of States in Respect of Climate Change* (n. 5), paras. 157, 161.

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conditions and transmitting them to future generations'.[16] And it is these 'interests of future generations' that 'need to be taken into account where States contemplate, decide on and implement policies and measures in fulfilment of their obligations under the relevant treaties and customary international law'.[17] With these brief remarks, the Court establishes a previously unarticulated interpretative principle aimed at reinforcing the core imperative of international climate change law: to preserve the world as a liveable place. International law's ambition to shape the future in this particular way is now a legally recognized and mandatory interpretative consideration. And although the Court initially draws on the preamble of the Paris Agreement to back the legal status of intergenerational equity and in its conclusions only refers to the interpretation of the 'most directly relevant legal rules'[18], the interpretative principle it endorses is neither restricted to the former nor to the legal instruments of climate change law in general. Instead, if I read the Opinion correctly, it applies to the entirety of international law – for a simple reason: In the Court's own words, intergenerational equity is nothing but a 'manifestation of equity in the general sense and thus shares its legal significance'[19]. Equity, however, is – as the Court has found before – a 'direct emanation of the idea of justice'[20] and 'a *general* principle directly applicable as law'[21]. Given this general character of the underlying principle of equity, it is difficult to see how the realm that considerations of intergenerational equity apply to could be restricted to the rules and treaties most directly relevant to questions of climate change. When in doubt, any rule of international law has therefore – according to the ICJ's interpretative approach – to be applied in a manner that preserves dignified living conditions for future

16 ICJ, *Obligations of States in Respect of Climate Change* (n. 5), para. 156; for a similar trusteeship-account, see Eyal Benvenisti, 'Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders', AJIL 107 (2013), 295–333 (314–318) who argues for a re-conception of sovereignty as trusteeship for humanity according to which 'national decision makers have an obligation to take into account the interests of others when devising policies (or when reviewing them, in the case of national courts)' (314).

17 ICJ, *Obligations of States in Respect of Climate Change* (n. 5), para. 157.

18 ICJ, *Obligations of States in Respect of Climate Change* (n. 5), para. 161.

19 ICJ, *Obligations of States in Respect of Climate Change* (n. 5), para. 157.

20 ICJ, *Obligations of States in Respect of Climate Change* (n. 5), para. 152; ICJ, *Continental Shelf* (Tunisia v. Libyan Arab Jamahiriya), Judgement of 24 February 1982, ICJ Rep. 18 (para. 71).

21 ICJ, *Obligations of States in Respect of Climate Change* (n. 5), para. 152.

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generations. For international law's orientation toward the future this is a new step. Where in classic international law a restrictive interpretation (*in dubio mitius*) would have prevailed in order to keep international law's determinations as minimal as possible, safeguarding States' regulatory freedoms,[22] the Court's interpretative approach potentially strengthens the realization of the modest vision that international climate change law holds for the future. It is somewhat disappointing that in the later passages of the Advisory Opinion the Court does not put its novel approach into practice but largely confines itself to the rather abstract statement of principle that I have just sketched. The Court's finding, for instance, that due diligence requires an environmental impact assessment could have benefitted from drawing on its new interpretative rule: If States are bound to consider the interests of future generations when applying international rules, is the duty to assess how these interests might be affected not an obvious corollary?

V. Conclusion

When it comes to international law's turn toward the future, there is no way around international climate change law. The ICJ's advisory opinion on climate change reinforces this centrality in three key ways: First, by extending the customary principle of prevention to the protection of the climate system, it expands international law's vision of the future to the conservation of the climate; second, by elevating these obligations to the status of *erga omnes*, it safeguards them for the foreseeable future; and third, by declaring intergenerational equity a general principle that guides the interpretation of international legal norms, it obliges States to contribute to international law's vision of the future. So, if the future should fail to be bright, the Court is not to blame.

22 On the discussion whether *in dubio mitius* still is a valid interpretative rule see Luigi Crema 'Disappearance and New Sightings of Restrictive Interpretation(s)', EJIL 21 (2010), 681–700 (686–691).

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