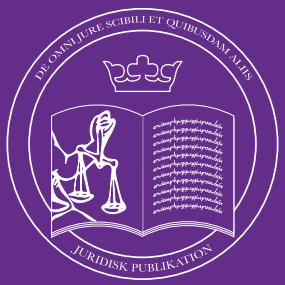

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Stella Scocco

From Trail Smelter to the Anthropocene – Climate Justice & the ICJ Advisory Opinion on the Obligations of States in Respect of Climate Change

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FROM TRAIL SMELTER TO THE ANTHROPOCENE

– CLIMATE JUSTICE & THE ICJ ADVISORY OPINION ON THE OBLIGATIONS OF STATES IN RESPECT OF CLIMATE CHANGE

By Stella Scocco[1]

On July 23 2025, the International Court of Justice delivered a landmark Advisory Opinion on the legal obligations of States in the face of climate change. It arrives at a moment of intensifying climate impacts, including record-breaking heatwaves, increasingly destructive floods, and rising sea levels. Many countries are emphasising the profound and devastating effects they face due to climate change, highlighting the urgent nature of the issue and the imminent threat it poses to their populations, territories, economies, cultural traditions, and, for some, existence. This article argues that the opinion's key contribution lies in extending the no-harm rule to the cumulative, diffuse, and global nature of greenhouse gas emissions. By clarifying that the character of such emissions does not bar attribution and by affirming that the obligations are owed erga omnes, the Court has provided vulnerable states with a juridical pathway to hold high-emitting states accountable. The article concludes that, whilst the advisory opinion cannot substitute for political will, it can catalyse interstate climate litigation and, more broadly, serve as a starting point for climate justice.

1. INTRODUCTION

In the early summer of 2025, the International Court of Justice (ICJ) issued its long-awaited Advisory Opinion (AO) on the obligations of States in respect of climate change.[2] The AO was initiated by the United Nations General Assembly (UNGA) following a 2019 campaign led by Pacific Island youth. The campaign successfully secured UNGA's referral to the ICJ, with the support of Vanuatu, Antigua and Barbuda, the Maldives, and a team of international lawyers. The opinion addressed two questions: (a) what are the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for present and future generations and (b) what are the legal consequences

1 Pre-doctoral Researcher at Laboratory for the Governance of the Commons (LabGov) and Adjunct Lecturer at LUISS Guido Carli University, focusing on sustainability and international law.

2 *Obligations of States in respect of Climate Change* (Advisory Opinion, 21 March 2024) https://www.icj-cij.org/sites/default/files/case-related/187/187-20250723-adv-01-00-en.pdf accessed 3 September 2025.

under these obligations for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment?

To clarify the analytical lens of this article, it is necessary first to situate the opinion within the context of climate litigation, which refers to legal actions related to climate change and its associated harms. A fundamental assumption is that states – and generations – have not contributed equally to this harm and are also unequally affected by it. Indeed, those who have contributed the least are often the most affected and the most vulnerable.[3] To address this, notions of climate justice have been integrated into environmental law, shaping how the burdens and benefits of mitigation and adaptation are shared.[4]

Climate justice asserts that those most accountable for climate change should primarily bear the responsibility for addressing it, recognising that climate change is a symptom of unfair economic, social, and political institutions that disproportionately harm those least responsible.[5] In climate justice jurisprudence, this is often achieved through distributive principles (e.g., equality, responsibility, and capability, such as equal per-capita shares, historical responsibility, and the capacity to pay) and by integrating them as lenses for both the formulation and interpretation of obligations and rights.[6] However, in practice, translating concepts of fairness into treaties typically requires political will, which has historically led to weak redistributive mechanisms – for further discussion of historic and contemporary redistributive mechanisms, see the section 'Conclusions and Implications'. In effect, the possibility of litigation serves a pivotal role.

3 Lucas Chancel, Thomas Piketty, Emmanuel Saez and Gabriel Zucman, *Climate Inequality Report 2023: Fairness in an Era of Global Warming* (World Inequality Lab 2023) https://wid.world/www-site/uploads/2023/01/CBV2023-ClimateInequalityReport-3.pdf accessed 25 November 2025.

4 This is shown, for example, by the Common But Differentiated Responsibilities and Respective Capabilities (CBDR-RC) principle, embedded in the UNFCCC and articulated in Principle 7 of the 1992 Rio Declaration (*Rio Declaration on Environment and Development* (12 August 1992) UN Doc A/CONF.151/26 (vol I), and by the Polluter Pays Principle (PPP), originally developed by the OECD in the 1970s and reaffirmed in Principle 16 of the Rio Declaration (n 4); *United Nations Framework Convention on Climate Change* (opened for signature 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107, art 3(1); OECD, *Recommendation of the Council on Guiding Principles concerning International Economic Aspects of Environmental Policies* (26 May 1972) C(72)128.

5 University of California, Center for Climate Justice, "*What Is Climate Justice? The Six Pillars*," https://centerclimatejustice.universityofcalifornia.edu/what-is-climate-justice/ accessed 26 October 2025; Grantham Research Institute on Climate Change and the Environment. *What Is Meant by "Climate Justice"?* London School of Economics and Political Science https://www.lse.ac.uk/granthaminstitute/explainers/what-is-meant-by-climate-justice accessed 26 October 2025.

6 Friedrich Soltau, 'Theoretical Aspects of Fairness' in Robin Miller (ed), *Fairness in International Climate Change Law and Policy* (Cambridge University Press 2009) 102–130, particulary 129–130.

A common approach in climate litigation is the rights-based approach. This approach reframes climate-related harms as human rights violations by utilising existing human rights frameworks, such as those on life, health, and a healthy environment.[7] Such litigation efforts have persuaded courts to order more ambitious action in several cases, even if their willingness to translate these rights into specific remedial obligations varies.[8] The AO overall enhances this growing body of case law by recognising the interconnectedness between human rights and environmental protection. It affirms that without protecting the environment, states cannot fulfil their current human rights obligations. The Court emphasises that this is well-established in international, regional, and national law, citing its widespread acknowledgement through United Nations (UN) resolutions, human rights treaties, and over 100 constitutions.[9]

However, human rights-based litigation has inherent weaknesses in addressing climate justice. Both future-generation claims and transnational claims are frequently dismissed on grounds of justiciability or standing.[10] This is often due, not only, but in part, to the interpretation that human rights are non-extraterritorial, meaning that a state has responsibilities only within its jurisdiction

7 See *Urgenda Foundation v State of the Netherlands* (Ministry of Infrastructure and the Environment) (Supreme Court of the Netherlands, 20 December 2019) ECLI:NL:HR:2019:2007; *Neubauer and others v Germany* (Federal Constitutional Court, Order of 24 March 2021) 1 BvR 2656/18 and others; *Torres Strait Islanders v Australia* (UN Human Rights Committee, Views adopted 23 September 2022) UN Doc CCPR/C/135/D/3624/2019; *Verein KlimaSeniorinnen Schweiz and Others v Switzerland* (ECtHR, Grand Chamber, Judgment of 9 April 2024) App no 53600/20; Samuel Adelman and Benoit Lewis, 'Symposium Foreword: Rights-Based Approaches to Climate Change' (2018) *Transnational Environmental Law* https://doi.org/10.1017/S2047102518000067.

8 *Urgenda* (Supreme Court of the Netherlands, 20 December 2019) ECLI:NL:HR:2019:2007, where the Court required the government to strengthen its emission reductions in light of Articles 2 and 8 ECHR; see also *KlimaSeniorinnen* (ECtHR, Grand Chamber, 9 April 2024) App no 53600/20, where the Court found Switzerland in violation of Article 8 ECHR for failing to adopt adequate climate policies.

9 *Obligations of States* AO (n 2) para 391.

10 In *Duarte Agostinho and Others v Portugal* and 32 Other States App no 39371/20 (ECtHR, Grand Chamber, 9 April 2024), six Portuguese youths filed a complaint with the European Court of Human Rights against 33 countries, alleging human rights violations for insufficient climate action. Amnesty International supported the case, arguing that international law prohibits states from harming human rights extraterritorially. On 9 April 2024, the Court declared the application inadmissible. Regarding extraterritorial jurisdiction, the Court found no basis to extend the Convention's application as requested by the applicants. Jurisdiction was recognised only in relation to Portugal, yet the applicants had not exhausted domestic remedies there, rendering that part of the complaint inadmissible as well. See also *Balaj and Others v Serbia App* no 42188/19 (ECtHR, 2021); and Eleni Polymenopoulou, 'Klimaseniorinnen, the Prohibition of Actio Popularis Cases, and Future Generations: A False Dilemma?' (EJIL:Talk!, 16 April 2024) https://www.ejiltalk.org/klimaseniorinnen-the-prohibition-of-actio-popularis-cases-and-future-generations-a-false-dilemma/ accessed 28 September 2025.

or effective control. This doctrine has fragmented the responsibility for climate-related harms, leaving cross-border victims and future generations without effective avenues for rights-based litigation against high-emitting actors. This barrier is also widely acknowledged in the literature. Bookman and Petel analyse Urgenda, Klimaatzaak, and Neubauer, showing that courts can impose ambitious mitigation duties domestically whilst often avoiding wider questions of international redistribution and intragenerational inequality.[11] Additionally, Adelman and Lewis highlight how climate change threatens the right to life and health, and how vulnerable groups bear disproportionate burdens. However, their reach remains largely national unless extraterritorial doctrines are advanced.[12] Whilst we have seen some evolution in both future generations' claims and the extension of human rights to transboundary harm,[13] calls to treat environmental and intergenerational harms as triggering extraterritorial duties often confront political and legal resistance, and the non-extraterritorial default still produces enforcement gaps that impede climate justice. Global redistribution and climate justice claims have therefore been left to voluntary mechanisms negotiated through climate treaty forums. These mechanisms, based on advocacy rather than enforceable obligations, have so far proven deeply inadequate in addressing the scale and urgency of climate harm.[14] The AO does little to

11 Sam Bookman and Matthias Petel, 'Climate Litigation & Climate Justice: The Distributional Implications of Rights-Based Climate Actions in Europe' (2024) 14(02) *German Journal of Human Rights* https://doi.org/10.21248/gjn.14.02.285.

12 Benoit Lewis, 'Human Rights Duties Towards Future Generations and the Potential for Achieving Climate Justice' (2016) 34 Netherlands Quarterly of Human Rights 303 https://doi.org/10.1177/016934411603400303; Samuel Adelman and Benoit Lewis, 'Symposium Foreword: Rights-Based Approaches to Climate Change' (2018) 7(1) *Transnational Environmental Law* 9 https://doi.org/10.1017/S2047102518000067.

13 The Inter-American Court of Human Rights expanded extraterritorial jurisdiction in *Advisory Opinion OC-23/17, Environment and Human Rights* (IACtHR, 15 November 2017) paras 95, 97, 101, 102, 104, recognising that a State may exercise jurisdiction over individuals outside its territory if it has effective control over domestic activities causing extraterritorial harm. See also OHCHR, *Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship Between Climate Change and Human Rights* (15 January 2009) UN Doc A/HRC/10/61, para 99; CESCR, *General Comment No 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities* (10 August 2017) UN Doc E/C.12/GC/24, paras 26, 28, 30–32; Human Rights Committee, *General Comment No 36 on Article 6 of the International Covenant on Civil and Political Rights: Right to Life* (30 October 2018) UN Doc CCPR/C/GC/36, para 22; and Daniel Bertram, '"For You Will (Still) Be Here Tomorrow": The Many Lives of Intergenerational Equity' (2022) *Transnational Environmental Law* https://doi.org/10.1017/S2047102522000395.

14 United Nations Environment Programme (UNEP), *Adaptation Gap Report 2023: Underfinanced, Underprepared–Inadequate Investment and Planning on Climate Adaptation Leaves World Exposed* (UNEP 2023) https://www.unep.org/resources/adaptation-gap-report-2023 finds that developing countries face an annual shortfall of between USD 194 and 366 billion in adaptation finance, see p 12.

advance on this inherent issue: it reiterates rather than reimagines the role of human rights law in the climate change context.

Regarding treaty interpretation, the ICJ concludes that limiting global warming to 1.5°C is the primary goal of the parties to the Paris Agreement, elevating it from a target to a legal standard governing due diligence obligations of all states under both the Paris Agreement and international law generally.[15] Moreover, the Court clarified that the United Nations Framework Convention on Climate Change (UNFCCC), the Kyoto Protocol, and the Paris Agreement are complementary and mutually reinforcing instruments. That is, there is no conflict among them, rendering unnecessary the application of the *lex posterior* rule under the Vienna Convention on the Law of Treaties (VCLT), as argued by some predominantly high-emitting states.[16] The Court also concluded that the discretion of states in formulating their Nationally Determined Contributions (NDCs) is not unlimited.[17] In establishing NDCs, parties are expected to exercise due diligence to ensure that, collectively, their commitments are sufficient to limit global warming to 1.5°C above pre-industrial levels. Whilst this is indeed an advancement in the interpretation of both the 1.5°C goal and the use of NDCs, it remains within the purview of climate treaty forums. In general, the failure of states to fulfil their climate treaty commitments, whether under the UNFCCC, the Kyoto Protocol, or the Paris Agreement, has had limited consequences as compliance mechanisms in climate treaties have been inherently weak.[18] For example, Canada withdrew from the Kyoto Protocol when it became clear it would not meet its targets, avoiding penalties altogether.[19] Likewise, under the Paris Agreement, the regime relies heavily on transparency and peer pressure rather than sanctions.[20] This means that non-compliance has carried reputational and diplomatic costs, but little in terms of binding enforcement.

To this end, this article argues that the AO's primary contribution lies in affirming that the customary international norm of no harm applies to climate change and explicitly recognising that violations trigger the doctrine of state responsi-

15 *Obligations of States* AO (n 2) para 270.

16 Ibid paras 189–195.

17 Ibid para 245.

18 See Council on Energy, Environment and Water (CEEW), *Strengthening Climate Accountability: Improving Compliance and Delivery under the Paris Agreement* (Policy Brief) https://www.ceew.in/sites/default/files/ceew-research-on-paris-agreement-compliance-delivery-mechanisms-for-global-climate-change-accountability.pdf (noting the absence of punitive mechanisms).

19 Francesco Bassetti, 'Success or Failure? The Kyoto Protocol's Troubled Legacy' (Climate Foresight, 2022) https://www.climateforesight.eu/articles/success-or-failure-the-kyoto-protocols-troubled-legacy/.

20 Guri Bang, Jon Hovi and Tora Skodvin, 'The Paris Agreement: Short-Term and Long-Term Effectiveness' (2016) 4(3) *Politics and Governance* 209 https://doi.org/10.17645/pag.v4i3.640.

bility. In doing so, they addressed a longstanding barrier to interstate climate litigation. These contributions establish a new, previously unclear pathway for interstate litigation, marking a significant step toward climate justice.

2. INTERNATIONAL OBLIGATIONS IN REGARDS TO CLIMATE CHANGE

2.1 THE THREE MAIN PILLARS

The ICJ outlined the applicable legal framework in terms of three main pillars: treaty law, customary international law, and human rights law. The most pertinent treaty intruments include the Charter of the United Nations, the three core climate treaties (the UNFCCC, the Kyoto Protocol, and the Paris Agreement), the United Nations Convention on the Law of the Sea (UNCLOS), as well as other environmental treaties like the Vienna Convention for the Protection of the Ozone Layer, Montreal Protocol and its Kigali Amendment, the Convention on Biological Diversity, and the Convention to Combat Desertification. These obligations are reinforced by international human rights law, particularly the two core covenants – the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR).[21] Alongside these treaty regimes, the Court identified customary international law obligations, notably the duties of states to prevent significant environmental harm and the duty to cooperate for environmental protection, as independently binding under international law.

Considerable attention was directed towards clarifying the role of these customary principles. The Court stated that a complex normative framework guides states' actions and emphasised that environmental treaties do not constitute a self-contained regime but instead reflect and strengthen pre-existing customary obligations. This is contrary to some states' claims that treaty regimes exhaustively cover climate governance.[22] Whilst the Court reaffirmed that sources of law retain a separate existence and cannot be collapsed into one another – echoing its jurisprudence in *Nicaragua v. United States* (1986) – the Court emphasised that where multiple norms converge on the same issue, they should be read in conformity to create a coherent set of obligations in compliance with Article 31(3)(c) VCLT.[23] This requires interpreters to consider "any relevant rules of international law applicable in the relations between the parties".[24] In effect,

21 *Obligations of States* AO (n 2) paras 121–129, 145.

22 Ibid paras 168–173, 309–315.

23 *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v United States of America) (Merits) [1986] ICJ Rep 14. para 178, cited in *Obligations of States* AO (n 2) para 310.

24 Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 31(3)(c).

treaties help shape the content of customary law, reflect pre-existing customary law and accelerate its crystallisation.[25] This means that widespread adherence to and implementation of treaties like the UNFCCC and the Paris Agreement both demonstrate and develop *opinio juris* and state practice. Thus, the Court dismissed the argument, put forward by some high-emitting states, that environmental treaties should be considered *lex specialis* and thus hinder the application of other international norms.[26] Drawing on its reasoning in *Gabčíkovo-Nagymaros* (1997), the Court also emphasised that evolving scientific knowledge and standards, as reflected in environmental treaties, must inform the interpretation of both treaty and customary law.[27]

Lastly, the Court clarified that principles, including sustainable development, common but differentiated responsibilities and respective capabilities (CBDR-RC), equity and the precautionary approach, should guide the interpretation and application of the aforementioned customary obligations, operating as interpretive guides rather than autonomous sources of obligations. For example, the Court reiterated that equity is not a license for the judge to decide *ex aequo et bono*, but rather a principle *infra legem* to be applied within the limits of existing law to reach solutions closest to the requirements of justice.[28] This builds on earlier practice. In the *Gabčíkovo-Nagymaros* case, the Court described sustainable development as a principle that balances economic development and environmental protection. In the *Continental Shelf (Tunisia/Libya)* and the *North Sea Continental Shelf* cases, equity was recognised as a legal concept integral to the application of international law.[29] In addition, the Court invoked notions of intergenerational equity in its statement in the *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, noting that the environment represents "the living space" and the quality of life of present and unborn gen-

25 *Obligations of States* AO (n 2) paras 312–313.

26 Ibid paras 162–171, 410–413; Written Statement of the United States of America (2023); Written Statement of China (2023); Written Statement of Saudi Arabia (2023), all available at https://www.icj-cij.org/case/187.

27 *Gabčíkovo–Nagymaros Project (Hungary/Slovakia)* (Judgment) [1997] ICJ Rep 7 para 140.

28 *Obligations of States* AO (n 2) paras 152–153.

29 In its judgment in *Gabčíkovo-Nagymaros* (n 27) the ICJ stressed that "the need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development" (para 140), thereby articulating sustainable development as a guiding principle of international law. Earlier, in maritime delimitation cases, the Court recognised equity as a legal concept integral to the application of international law: in the Case concerning the Continental Shelf it held that equitable principles must inform delimitation, though equity "does not necessarily imply equality," *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* [1982] ICJ Rep 18, paras 70–71, whilst in the North Sea Continental Shelf Cases it underlined that equity constitutes one of the central factors in the application of international law to the division of maritime areas, *North Sea Continental Shelf Cases* [1969] ICJ Rep 3, para 85).

erations.[30] The precautionary approach, derived from the Rio Declaration, was endorsed in the *Pulp Mills* case, where the Court underscored the importance of Environmental Impact Assessments (EIA) under conditions of uncertainty.[31] By contrast, the Court was cautious in its treatment of the polluter-pays principle, noting that whilst present in national law and sector-specific treaties, it lacked sufficient general acceptance in climate treaties or customary law to elevate it to a binding principle in interstate relations.[32] In sum, the Court confirmed the weight of these considerations in climate governance by clarifying that wealthier and historically high-emitting states also bear a "heightened customary duty" not only to reduce emissions domestically but also to provide financial, technological, and capacity-building support to other states.[33]

Whilst the 140-page opinion could be considered nearly all-encompassing, this article makes no such claim. It will focus on what it considers to be the two core contributions: 1) the confirmation of the applicability of a customary international legal obligation of States to prevent significant environmental harm and the duty to cooperate for the protection of the environment, and 2) the conclusion that countries failing to meet this obligation may become subject to international legal proceedings and, ultimately, compensation claims.

2.2 THE DUTY OF STATES TO PREVENT SIGNIFICANT ENVIRONMENTAL HARM AND THE DUTY TO COOPERATE FOR THE PROTECTION OF THE ENVIRONMENT

The duty of prevention, sometimes referred to as the no-harm rule, is one of the oldest and most established principles in international environmental law, articulated as early as the *Trail Smelter* arbitration and reaffirmed in subsequent ICJ jurisprudence and several treaties.[34] The novelty in this opinion is thus not the existence of such a customary obligation but its scope. Earlier interpreta-

30 *Obligations of States* AO (n 2) para 155, recalling *Legality of the Threat or Use of Nucler Weapons* (Advisory Opinion) [1996] ICJ Rep 226, 241 para 29.

31 The precautionary approach, derived from the Rio Declaration (n 4) Principle 15, was endorsed in *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Judgment) [2010] ICJ Rep 14 paras 164-205, where the Court underscored the importance of conducting environmental impact assessments under conditions of scientific uncertainty, noting in particular paras 203–204.

32 *Obligations of States* AO (n 2) paras 159-160; Rio Declaration (n 4) Annex I, Principle 16.

33 *Obligations of States* AO (n 2) paras 226–232, 238–241, 393–394.

34 *Including Corfu Channel (United Kingdom v Albania) (Merits)* [1949] ICJ Rep 4, 22; *Nuclear Weapons* AO (n 30); *Gabčíkovo-Nagymaros* (n 27); Pulp Mills (n 30); and *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua)* [2015] ICJ Rep 665; *Trail Smelter Arbitration* (United States v Canada) (1938 and 1941) 3 RIAA 1905, 1965; see also Stockholm Declaration on the Human Environment (1972) UN Doc A/CONF.48/14/Rev.1, Principle 21; Rio Declaration (n 4) Principle 2; UNCLOS (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 397, arts 192–194.

tions have persistently claimed that climate change is too complex to attribute to specific states, as it is inherently cumulative and global. However, the Court holds that the rule applies not only to direct, traceable transboundary damage, as earlier jurisprudence has shown, but also to diffuse, cumulative, and global harms, such as those caused by greenhouse gas (GHG) emissions. The matter is not whether a single state's conduct alone suffices to cause measurable injury, but whether it materially contributes to a significant risk of harm.[35] This interpretive move is potentially groundbreaking and, in plain terms, means that a state cannot excuse itself by pointing to the contributions of others and the inherent difficulty of attributing collective emissions.

Furthermore, the Court stressed that the duty to prevent significant harm is not an obligation of result but an obligation of conduct, meaning states are bound to exercise due diligence, specifically to take all reasonable, timely, and science-informed measures consistent with their capabilities and evolving knowledge, to avoid foreseeable harm to the climate system.[36] States' obligations extend to "all actions or omissions" within their jurisdiction or effective control. States must thus actively legislate, regulate, and enforce measures to reduce GHG emissions, rather than simply avoid harmful conduct themselves.[37] Previous case law supports this understanding. In the *Corfu Channel case* (1949), the Court held that Albania had a duty not only to refrain from harmful conduct but also to warn and prevent third-party activities under its control that could endanger other states.[38] As already stated, similarly, in *Pulp Mills* (2010), the Court emphasised that states must carry out EIAs and implement regulatory measures to prevent private industrial activities from inflicting significant cross-border damage.[39] Due diligence, in this sense, requires constant vigilance: governments must update policies in line with the best available science, regulate private actors within their jurisdiction, and refrain from actions such as subsidising fossil fuel expansion that would predictably exacerbate climate damage.

The obligation extends not only to the consumption of fossil fuels but also to upstream activities such as extraction, licensing, and subsidisation of fossil fuel production. The whole chain of human activities contributing to anthropogenic GHG emissions falls within states' due diligence duties.[40] This position aligns

35 *Obligations of States* AO (n 2) paras 134, 275–279.

36 The Court links these standards to the "best available science" (notably the IPCC reports) and stresses that States must continuously update their climate policies as scientific knowledge evolves: see *Obligations of States* AO (n 2) para 284.

37 *Obligations of States* AO (n 2) paras 276–279.

38 Corfu Channel (n 34).

39 *Pulp Mills* (n 31) paras 101, 193–205.

40 *Obligations of States* AO (n 2) paras 94, 427–428.

with the submissions of most participating states, which argued that producer states share equal responsibility with consumer states in safeguarding the climate system.[41] The implication is that governments can no longer claim compliance merely by regulating end-use emissions whilst simultaneously facilitating new fossil fuel projects or maintaining subsidies that perpetuate carbon-intensive economies.

The second customary obligation is the duty to cooperate. A principle rooted in, among others, the UN Charter. The ICJ linked this duty directly to the no-harm rule, stating that preventing harm to the climate is impossible without collective action. Thus, cooperation is not discretionary, and states are required to share information, consult in good faith, and coordinate mitigation and adaptation measures to promote effective cooperation.[42] However, what this entails in more detail is not apparent. The Court concludes that treaties are neither obligatory nor sufficient to fulfil this obligation.[43] Furthermore, whilst countries have some flexibility in how they cooperate, this discretion cannot serve as an excuse for states to refrain from cooperating.[44]

International cooperation has recently been the subject of a more recent AO from the ICJ on the obligations of Israel in relation to the UN and other organisations and third states in the occupied Palestinian territory. The Court reaffirmed that Article 2 of the UN Charter establishes a general duty to fulfil Charter-based commitments in good faith and an obligation to cooperate with UN entities and forums, building on the Court's observation of the indispensable role of international institutions in responding to global crises.[45] States cannot remain passive or obstructive, as cooperation is indispensable to the realisation of the UN's core purposes. Several judges stressed that the duty to cooperate is not merely procedural.[46]

41 This position aligns with the submissions of most participating states, including Vanuatu, Chile and Colombia, the European Union, New Zealand, and Bangladesh, which argued that producer states share equal responsibility with consumer states in safeguarding the climate system: see *Obligations of States* AO (n 2) para 94; Written Statement of Vanuatu (2023); Joint Written Statement of Chile and Colombia (2023); Written Statement of the European Union (2023); Written Statement of New Zealand (2023); Written Statement of Bangladesh (2023) (all available at https://www.icj-cij.org/case/187).

42 *Obligations of States* AO (n 2) paras 141–142, 301–308.

43 Ibid para 304.

44 Ibid para 306.

45 *Obligations of Israel in relation to the Presence and Activities of the United Nations, Other International Organizations and Third States in and in relation to the Occupied Palestinian Territory* (Judgment, 10 October 2025) paras 171–172 https://www.icj-cij.org/case/196.

46 Judge Hilary Charlesworth, Declaration in *Obligations of Israel in relation to the Presence and Activities of the United Nations, Other International Organizations and Third States in and in relation to*

As already mentioned, environmental treaties and jurisprudence have, over the past decades, progressively framed environmental harms as a matter of human rights protection. Furthermore, in its concluding words of the AO, the Court writes that the issue of climate change "concerns an existential planetary problem threatening all life". We can thus conclude that even if the Court does not say that treaty regimes are obligatory, for example, active and meaningful participation in the UNFCCC Climate Summit is likely considered a customary obligation. In the Court's view, international customary law ultimately provides a benchmark for assessing whether current cooperation is sufficient, and whilst the underlying obligation is an obligation of conduct, this seems to be judged by its results.[47]

Lastly, the Court concluded that the customary obligations in question have an *erga omnes* character, meaning they are owed to the international community as a whole, as all states share an interest in protecting the geopolitical commons. As previously noted by the Court, obligations *erga omnes* are "[b]y their very nature [...] the concern of all States".[48] Furthermore, the Court has previously found that treaties protecting shared interests imply some obligations *erga omnes*.[49]

2.3 THE TEMPORAL SCOPE OF THE OBLIGATIONS

The Court's discussion of the temporal scope underscores the complexity of determining when climate-related obligations bind states. On the one hand, the issue arises in relation to the crystallisation of customary international law, which requires evidence of both consistent state practice and *opinio juris*; on the other, it implicates treaty obligations, which are governed by the principle of non-retroactivity enshrined in Article 28 of the VCLT. The Court thus acknowledged that the obligations do not bind states before either the emergence of the relevant customary norms or the entry into force of treaty commitments, and that this assessment may also depend on the state of scientific knowledge available at the time concerning the causes and effects of climate change.[50] The Court highlights two elements of temporality: the temporal scope of states' climate obligations (i.e., when the underlying obligation came into force) and the timeframe for

the Occupied Palestinian Territory (Advisory Opinion, 22 October 2025) https://www.icj-cij.org/sites/default/files/case-related/196/196-20251022-adv-01-04-en.pdf.

47 *Obligations of States* AO (n 2) para 308.

48 *Barcelona Traction, Light and Power Company, Limited* (Belgium v Spain) (Second Phase) [1970] ICJ Rep 3, para 33.

49 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar) (Preliminary Objections)* [2022] ICJ Rep 107, para 107; see also *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (Judgment) [2012] ICJ Rep 422, para 68.

50 *Obligations of States* AO (n 2) para 97.

breaches (regarding long-standing, continuous acts). It notes reliance on rules governing continuing and composite acts to pinpoint breach dates.[51]

In earlier jurisprudence, the ICJ and other tribunals have already confronted the interplay between temporality, evolving science, and the crystallisation of environmental obligations. The *Trail Smelter* arbitration provides the earliest illustration of how temporal scope and scientific knowledge interact in defining when obligations arise. The tribunal emphasised that once knowledge of the harm became sufficiently established, Canada had a duty to prevent further injury, thus treating the emergence of scientific certainty as the moment obligations crystallised.[52]

This logic has been echoed in later ICJ jurisprudence. In *Nuclear Tests* (1974), the Court recognised that scientific uncertainty regarding the effects of nuclear fallout did not absolve states from their responsibility; instead, emerging knowledge was sufficient to trigger precautionary duties.[53] Similarly, in *Pulp Mills*, the Court emphasised that EIAs must be conducted in light of the "best available scientific knowledge," underscoring that the timing of obligations is linked to the evolution of evidence and the foreseeability of harm.[54] The *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* further clarified that obligations under environmental law evolve as understanding of environmental risks develops, foreshadowing the context of climate change.[55] Against this backdrop, the AO situates the temporal scope of obligations within a continuum: states cannot ignore climate science, which has consolidated over decades, and their obligations to act have intensified in step with the growing clarity of risks documented by the Intergovernmental Panel on Climate Change (IPCC) and other bodies.

3. ASSESSING STATE RESPONSIBILITY WITHIN THE CONTEXT OF CLIMATE CHANGE

3.1 ATTRIBUTION AND CAUSATION

The doctrine of state responsibility requires that for an internationally wrongful act to exist, there must be 1) a breach of an international obligation, 2) the act must be attributable to the state, and 3) a causal link between that act and the injury suffered must be drawn. Attribution concerns whether the conduct

51 Ibid para 423.

52 *Trail Smelter Arbitration* (United States v Canada) (1938 and 1941) 3 RIAA 1905, 1965.

53 *Nuclear Tests (Australia v France)* (Judgment) [1974] ICJ Rep 253, 267 para 29; *Nuclear Tests (New Zealand v France)* (Judgment) [1974] ICJ Rep 457, 472 para 29.

54 *Pulp Mills* (n 31), paras 204–205.

55 *Nuclear Weapons* AO (n 30), para 29.

– whether of state organs, officials, or entities empowered to exercise governmental authority – can legally be considered an act of the state. Causation, in turn, demands a demonstrable connection between the breach and the resulting harm.

As already briefly discussed, GHG emissions are not attributable to a single activity or a specific group of activities linked to any one state or states. It is the collective and cumulative effects of GHGs, originating from both anthropogenic and natural sources, that harm the climate system. Added complexity arises from the fact that, in general, all states both contribute to these emissions and are adversely affected by them.

However, as previously stated, states have contributed to varying extents to atmospheric GHG concentrations and are affected differently by climate change. This, in combination with a clarified scope of the duties, provides that participation in cumulative global emissions may constitute an internationally wrongful act. As such, if a state has materially contributed to transboundary harm through inadequate due diligence, attribution is not barred.[56]

The Court disassembled a common defence presented by high-emitting nations, asserting that their individual emissions are insignificant compared to the global total.[57] Instead, the Court clarified that each tonne of CO_2 can have legal significance. The Court concluded that it is scientifically feasible to determine each state's total contribution to global emissions by considering both historical and current data.[58] For example, since the enactment of the UNFCCC, states are mandated to report their emissions data. The 2023 IPCC report provides information on cumulative net emissions by region, and additional studies offer data on both current and historical emissions attributable to individual states.[59] Whilst multiple states contributing to climate change complicate determining whether and to what extent a particular state's breach caused harm, customary

56 *Obligations of States* AO (n 2) para 426–432.

57 For examples of this defence, see Written Statements of the United States, China and Saudi Arabia (arguing that no single State's emissions are decisive given the cumulative nature of climate change); *Native Village of Kivalina v ExxonMobil Corp*, 696 F 3d 849 (9th Cir 2012) (dismissing claims on the ground that defendants' contributions to climate change were too diffuse to establish liability); *Lliuya v RWE AG* (Higher Regional Court of Hamm, 30 November 2017) (utility company argued its 0.5% share of global emissions was too minor to give rise to liability); and *Juliana v United States*, 947 F 3d 1159 (9th Cir 2020) (US Government contending that federal emissions were negligible relative to global totals, undermining standing and redressability).

58 *Obligations of States* AO (n 2) para 429.

59 IPCC, *Climate Change 2023: Synthesis Report* 45 https://www.ipcc.ch/report/ar6/synthesis-report/; European Commission, Joint Research Centre, *CO_2 Emissions of All World Countries 2022* https://publications.jrc.ec.europa.eu/repository/handle/JRC130363.

international law on state responsibility can address situations involving multiple injured individuals or responsible parties. This was exemplified, among others, in the *Judgment on Armed Activities in Congo*.[60] The *Draft Articles on Responsibility of States for Internationally Wrongful Acts* (ARSIWA) confirms that each state's responsibility is separate and independent, even when multiple states contribute to the same injury; each injured State may invoke the responsibility of any State that has committed an internationally wrongful act, and where multiple States contribute to the same harm, each bears separate responsibility.[61] The ICJ confirmed not only the applicability of the draft articles, thereby further cementing their status as customary law, but also that states affected by climate change may invoke responsibility against any state in breach of its obligations to prevent it.[62]

However, the Court observes that whilst causation of damage is not necessary to establish responsibility, it is, however, pertinent for determining reparation. Reparations rely on establishing a connection between a wrongful act and a specific harm. Several states raised the issue of harm causation before the Court, with some claiming that causation is impossible to establish in this context due to the diffuse nature of climate change, while others argued that causation should be presumed. The Court dismissed both positions. It noted that the fact that damage resulted from concurrent causes is not enough to exempt a State from reparation.[63] Yet, that causation cannot be presumed and is necessary.[64] The Court asserts that its established causation standard requires a causal link between the wrongful act and the injury, but this link can vary depending on the specific rule violated and the extent of the resulting damage.[65] Whilst the causal link between a state's wrongful actions and climate change might be weaker than, for example, for local pollution, it is still possible to establish this link on a case-by-case basis. The Court clarifies that establishing this causation involves two key elements: attributing climate events to human activity and linking specific damages to particular states. Whilst the first can often be supported by science, the second

60 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Judgment) [2005] ICJ Rep 168, paras 259–260 (confirming that the law on State responsibility applies in contexts involving multiple injured and multiple responsible States). This reasoning was expressly invoked in *Obligations of States* AO (n 2) paras 430–432. See also International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts* (2001) arts 47–48, UN Doc A/56/10.

61 International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries* (2001) Yearbook of the International Law Commission, vol II, Part Two, arts 46–47.

62 *Obligations of States* AO (n 2), paras 409–415, 431–433.

63 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Reparations) [2022] ICJ Rep 93 in *Obligations of States* AO (n 2), para 435.

64 *Obligations of States* AO (n 2), paras 409–415, 431–433.

65 Ibid para 436.

requires concrete evidence.[66] Ultimately, it is for the courts to determine on a case-by-case basis whether there is a sufficient causal link.[67]

In addition, under State responsibility rules, any State other than the injured State may invoke another State's responsibility if the breached obligation is owed to the international community as a whole.[68] This means that all states can invoke responsibility, due to the *erga omnes* character of the underlying obligations. However, a distinction between the position of injured States or specifically affected States and that of non-injured States exists concerning the availability of remedies. Whilst a non-injured State is entitled to pursue a claim against a State in breach of a collective obligation, it is not authorised to claim reparation for itself. Instead, its claims are limited to the cessation of the wrongful act, assurances and guarantees of non-repetition, and the performance of the obligation of reparation in favour of the injured State or the beneficiaries of the breached obligation.[69] These legal consequences are examined subsequently.

3.2 REPARATIONS

Legal consequences of breaches include obligations to cease, ensure non-repetition, and provide reparation. The obligation to cease the wrongful act may require a state to revoke all administrative, legislative, and other measures necessary to prevent continued breach of the underlying obligation.[70] In this context, the duty to cease may thus obligate states to utilise all available means to reduce their GHG emissions and implement other measures in a manner that ensures they meet their obligations. Furthermore, in suitable situations, a responsible State might be expected to provide appropriate assurances and guarantee non-repetition.[71]

A responsible State is, in addition, under an obligation to make full reparation for the damage caused by the internationally wrongful act.[72] Reparation generally involves restitution, compensation and satisfaction, or a combination thereof.

66 See for example IPCC, *Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (H Lee and J Romero eds, IPCC 2023) 48.

67 *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua)* (Compensation) [2018] ICJ Rep 15, para 34.

68 ILC ARSIWA (UN Doc A/56/10) (n 60) Article 48(1)(b).

69 ILC Commentaries (n 61) commentary to Art 48, paras 1–12.

70 See *Gabčíkovo-Nagymaros* (n 27) para 114; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, para 163(3)(A)–(C).

71 ILC ARSIWA (UN Doc A/56/10) (n 60) Art 30 (b).

72 ILC ARSIWA (UN Doc A/56/10) (n 60) Art 31; See also *Wall* AO (n 70) para 163(3)(A) para 152.

As stated by the ICJ in the *Factory at Chorzów* case, reparation must "wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed".[73] Restitution, meaning restoring the situation as it was before the wrongful act, is inherently problematic in cases of environmental harm, as such damage is often irreversible. Restitution may thus involve rebuilding infrastructure and restoring ecosystems, but, with respect to these alternative paths, the Court reiterates that this cannot be decided abstractly and must be reviewed on a case-by-case basis. If restitution becomes impossible, states are instead obliged to compensate. Compensation addresses losses and should reflect financially the damage to the injured State or its nationals. The Court has already confirmed, in earlier jurisprudence, that environmental damage is compensable under international law. Compensation is due for damage caused to the environment, "in and of itself", which may include "indemnification for the impairment or loss of environmental goods and services in the period prior to recovery", and expenses incurred by injured States due to such damage.[74] Regarding the assessment of environmental damage, the Court has held that the absence of adequate evidence as to the extent of material damage will not, in all situations, preclude an award of compensation for that damage. For example, in the *Ahmadou Sadio Diallo* case, the Court determined the amount of compensation on equitable grounds.[75] As such, the Court holds that when the extent of the damage is uncertain, compensation may, on an exceptional basis, be awarded as a global sum within the evidence range, having regard to equitable factors.[76]

When satisfaction is warranted, it may include expressions of regret, apologies, public statements, or efforts to educate society about climate change. The Court also recognised that a formal declaration by an international tribunal of the wrongfulness of State conduct is a potential form of satisfaction in itself.[77]

4. IMPLICATIONS AND CONCLUSIONS

4.1 WHAT NOW?

In conclusion, vulnerable states, such as Small Island Development States (SIDS) and others, now have a clearer legal basis to invoke state responsibility for climate-related harms caused by major emitters. Meaning that the door is

73 *Factory at Chorzów (Claim for Indemnity) (Merits)* (Judgment No 13) (1928) PCIJ Series A No 17, 47.

74 *Certain Activities (Compensation)* (n 67) paras 41–43.

75 Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo) (Compensation) (Judgement) [2012] ICJ Rep 324, para 33.

76 See *Armed Activities (Reparations)* (n 63) para 106.

77 *Corfu Channel* (n 34).

now open for state-versus-state climate change litigation, something virtually unprecedented in the context of climate change until now.

However, whilst this juridical pathway has been underexplored and unclear, vulnerable states have sought compensation for loss and damage (L&D) in UN climate negotiations for over three decades. Beginning in 1991, Vanuatu and other SIDS proposed a plan (which was rejected) that each nation would contribute, based on its emissions as a share of the global total, to fund countries affected by sea-level rise.[78] In 2015, almost 25 years later and after continued efforts, developing countries succeeded in securing an article (Article 8) on L&D in the Paris Agreement.[79] However, financial aspects were overlooked, and developed countries ruled out liability or compensation claims in the decision text.[80] In 2022, seven years after the establishment of Article 8, countries agreed to establish a fund, which was operationalised in 2023 as the Fund for Responding to Loss and Damage (FRLD), with pledges today exceeding $700 million.[81] Whilst it is a start, it remains far short of the up to $580 billion needed by 2030 to address climate damage in vulnerable countries.[82]

One reason L&D has been so contentious historically is that developed countries fear that providing compensation for losses from adverse climate impacts could be interpreted as accepting legal responsibility, resulting in lawsuits and

78 Vanuatu (on behalf of the Alliance of Small Island States), 'An Insurance Mechanism for the Consequences of Sea Level Rise' (Submission to the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change, 9 December 1991) https://unfccc.int/documents/1782 accessed 28 September 2025.

79 L&D wasn't formally included in climate negotiations until 2007 (Bali Action Plan) and gained traction in 2013 with the Warsaw International Mechanism (WIM), see Decision 1/CP.13 (Bali Action Plan) para 1(c)(iii), Report of the Conference of the Parties on its thirteenth session (UNFCCC 2007) https://unfccc.int/files/meetings/cop_13/application/pdf/cp_bali_action.pdf and Decision 2/CP.19 (Warsaw International Mechanism for Loss and Damage) Report of the Conference of the Parties on its nineteenth session, Addendum: Decision 2/CP.19 (UNFCCC 2013) https://unfccc.int/resource/docs/2013/cop19/eng/10a01.pdf.

80 Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) UN Doc FCCC/CP/2015/10/Add.1, art 8; UNFCCC, *Report of the Conference of the Parties on its Twenty-First Session*, Addendum, Decision 1/CP.21 (29 January 2016) UN Doc FCCC/CP/2015/10/Add.1, para 51.

81 In 2021, climate-vulnerable nations renewed their push for a Loss and Damage (L&D) fund, but without success. Instead, a two-year Glasgow Dialogue was launched, and the Santiago Network on Loss and Damage (SNLD) was funded; UNFCCC, 'Fund for Responding to Loss and Damage' (UNFCCC 2023) https://unfccc.int/fund-for-responding-to-loss-and-damage accessed 28 September 2025; NRDC, 'Climate Funds Pledge Tracker' (NRDC 2023) https://www.nrdc.org/resources/climate-funds-pledge-tracker accessed 28 September 2025.

82 World Resources Institute, 'Loss and Damage: Why Climate Justice Matters in the Face of the Climate Crisis' (1 November 2022) https://www.wri.org/insights/loss-damage-climate-change accessed 28 September 2025.

claims for compensation. This concern was addressed in L&D funding discussions at the 2022 UN climate summit and subsequently in the final decision the following year, which states that "funding arrangements, including a fund, for responding to loss and damage are based on cooperation and facilitation and do not involve liability or compensation".[83] However, as of this AO, legal experts assert that the ICJ has essentially "laid out the possibility of big emitters being successfully sued" for climate-related damage.[84] Whether cases will succeed – and what that would look like – remains to be seen. Nonetheless, the ICJ has undoubtedly turned the tables in the discussion regarding L&D and, most importantly, liability and compensation. Vulnerable states can now advocate for more decisive climate action amid the threat of potential legal action, and climate advocacy groups and diplomats alike have spoken of a "new era of climate accountability".[85]

Considering the scale of harm and losses, along with the three-decade effort to secure compensation, it seems unlikely that the same countries repeatedly advocating for funds to address climate change effects would not seek to claim compensation in court unless high-emitters significantly boost their L&D commitments. What would happen if such cases moved forward?

Firstly, international courts require jurisdiction, and major emitters would need to consent to being sued, which is far from guaranteed. The jurisdiction of the ICJ derives from three principal bases: (i) special agreement (compromis), whereby states jointly submit a dispute to the Court under Article 36(1) of the Statute; (ii) compromissory clauses in treaties that provide for disputes concerning interpretation or application to be referred to the Court; and (iii) the optional clause declaration under Article 36(2), by which states accept the Court's compulsory jurisdiction *ipso facto* and in relation to other states that have made similar declarations. Even if jurisdiction is secured on any of the three grounds, some scholars have noted enforcement challenges. However, whilst compliance with AO is disputed, complete non-compliance with ICJ judgments in contentious cases remains relatively uncommon.[86] One notable example of non-compliance in which the state had an Article 36(2) declaration in force at the time is *Nicaragua v. United States*. The ICJ found the U.S. in breach of international

83 Ibid.

84 Valerie Volcovici and Stephanie van den Berg, 'Top UN Court Says Treaties Compel Wealthy Nations to Curb Global Warming' *Reuters* (23 July 2025) https://www.reuters.com/sustainability/cop/top-un-court-says-treaties-compel accessed 28 September 2025.

85 Paris Agreement, Art 8.

86 Constanze Schulte, 'Lessons to be Learned from the Practice' in *Compliance with Decisions of the International Court of Justice* (Oxford University Press 2004) https://doi.org/10.1093/acprof:oso/9780199276721.003.0005.

law for unlawful use of force and support for the Contras. Nonetheless, the U.S. refused to participate in the merits proceedings, rejected the Court's jurisdiction, and did not pay reparations. Soon after, they also withdrew their optional clause declaration to preclude future cases.[87] Additionally, France, despite accepting the Court's jurisdiction in the *Nuclear Tests case*, failed to comply with interim measures and did not participate in the proceedings. Although it had announced an end to atmospheric nuclear tests, it withdrew its declaration in 1974, effectively sidestepping non-compliance.[88] However, overall, non-compliance is primarily observed among powerful states, such as the U.S., France, and Russia, which often respond by withdrawing their declarations or treaty commitments that grant jurisdiction to the ICJ. Indeed, whilst states with optional clause declarations have occasionally refused to comply, such actions remain uncommon and thus do not warrant a complete disregard of future litigation on state responsibility for climate harm.

Instead, there are reasons to believe that states are, on the contrary, unlikely to openly defy an ICJ judgment ordering climate reparations. Unlike in *Nicaragua v. United States*, where non-compliance was facilitated by a great power's geopolitical leverage against a single adversary, the solidaric responsibility framework outlined by the Court alters the diplomatic calculus. For countries such as France, which have previously shown partial compliance but are deeply committed to multilateralism, international law, and climate diplomacy, such non-compliance would carry prohibitive reputational costs and weaken broader strategic interests, including leadership in climate negotiations and credibility within the EU and beyond. In this context, the fact that high emitters can be sued individually for collective harm makes compliance a diplomatic issue, as it becomes a matter of solidarity not only with vulnerable states but also among high-emitting ones.

The AO has, however, also been criticised in commentary for potentially hindering international collaboration by questioning widely used problem-solving tools.[89] Whilst there is a general hope that it will contribute to more ambi-

87 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Jurisdiction and Admissibility)* [1984] ICJ Rep 392; *Nicaragua (Merits)* (n 23) paras 30–31, 146, 149, 292.

88 *Nuclear Tests (Australia v France) (Interim Protection)* [1973] ICJ Rep 99; *Nuclear Tests (New Zealand v France) (Interim Protection)* [1973] ICJ Rep 135 (ordering France to avoid nuclear testing pending judgment, which it ignored); *Nuclear Tests (Australia v France) (Judgment)* [1974] ICJ Rep 253; *Nuclear Tests (New Zealand v France) (Judgment)* [1974] ICJ Rep 457 (France declined to participate in proceedings and subsequently withdrew its Optional Clause declaration under art 36(2) of the ICJ Statute, thereby sidestepping non-compliance).

89 Daniil Ukhorskiy, 'The ICJ's Advisory Opinion on Climate Change: Does It Throw a Wrench into the Negotiators' Toolbox of Diplomatic Problem-Solving Techniques?' (EJIL:Talk!, 29 July 2025) https://www.ejiltalk.org/the-icjs-advisory-opinion-on-climate-change-does-it-throw-a-wrench-into-the-negotiators-toolbox-of-diplomatic-problem-solving-techniques/ accessed 28 September

tious efforts to reduce GHG emissions, states might also become hesitant to accept vague or ambitious wording in future agreements, fearing that a court could interpret such language adversely to their interests. As Judge Nolte noted, this could lead states to "shy away from accepting new treaty obligations [...] that could subject them to unpredictable legal consequences."[90] Commentators have noted that the stance on the opinion's impact is inherently tied to whether one considers the global climate treaty regime toothless or crucial. In the first instance, concerns about the AO's influence on climate diplomacy might seem negligible. In the second instance, the AO's impacts may not be entirely positive and warrant some scepticism.[91]

However, in the second scenario, a relevant and overlooked question is whether a state *can* take a diplomatic back seat, given its duty to cooperate. As explained in an earlier chapter, the ICJ emphasised that genuine international cooperation to combat climate change is not optional; it is a fundamental duty "intrinsically linked" to solving the problem. Consequently, if a government were to boycott climate negotiations or refuse to communicate new targets, that stance alone might be seen as breaching that said duty. Therefore, it can be argued that, at present, there is no way for states to avoid climate treaty forums and commitments to reduce climate harm without violating international law. During a period of several "stress-tests" for international law, this is undoubtedly one of them, and its success will be judged by its impact.

What can already be said is that the opinion will be remembered not only for its substantive contributions but also, as some early commentators have pointed out, for being coherent, confident, and, most importantly, unified (for example, compared to the 1996 nuclear weapons opinion).[92] Suppose impacts are vast,

2025.

90 *Obligations of States* AO (n 2) (Declaration of Judge Nolte) para 9.

91 Schulte, 'Lessons to be Learned' (n 83).

92 According to commentators the Court's ruling was mostly symbolically unanimous, due to perhaps the need to reinforce the aforementioned strength and role of the Court. Underlying divisions were revealed through the separate opinions of several judges, who expressed dissatisfaction. They stress that the Court adopted a formal and narrow approach by reframing the climate justice request into a general survey of state obligations, avoiding more profound questions of distributive justice, such as the responsibility of major emitters and the protection of climate refugees. Key issues, such as the expansion of fossil fuels, the scope of emissions, and binding climate finance targets, were not addressed, and the decision said to be less progressive than those of some domestic and regional courts. See Jed Odermatt, 'What the Court Didn't Say' (Verfassungsblog, 30 July 2025) https://verfassungsblog.de/what-the-court-didnt-say/ accessed 28 September 2025; *Obligations of States* AO (n 2) (Separate Opinion of Judge Yusuf); ibid (Separate Opinion of Judge Xue); ibid (Separate Opinion of Judge Bhandari); ibid (Separate Opinion of Judge Aurescu); ibid (Declaration of Judge Nolte); ibid (Separate Opinion of Judge Cleveland); ibid (Declaration of Judge Tladi).

either through enforcement mechanisms or governance mechanisms; in that case, the Court will have positioned itself as capable of navigating politically sensitive issues and still producing unanimous and coherent opinions. However, if impacts are minimal, the effect might, as mentioned above, instead be harmful to climate governance.

4.2 WHAT THE COURT OVERLOOKED

A crucial aspect that the Court fails to address is migration as a form of reparation. If global warming continues, the World Bank estimates that by 2050, 216 million people will have migrated within their own countries. United Nations High Commissioner for Refugees (UNHCR) data show that, in the last decade alone, weather-related effects have displaced twice as many people as conflict.[93] Although displacement often begins internally – from rural to urban areas – it increasingly leads to international migration as urban areas become stressed. Most states and international institutions are unprepared for anticipated climate-related migration, and researchers are seeking legal solutions to what they describe as a legal gap.[94] This link between climate damage and forced migration has been largely overlooked in jurisprudence and doctrine, and, unfortunately, in this opinion as well.[95]

The Court confirmed that climate change will compel individuals to seek safety elsewhere or prevent them from returning home due to its adverse effects. It further notes that the preamble to the Paris Agreement explicitly urges parties to consider the rights of migrants and vulnerable populations when addressing climate change. It also emphasises that states have obligations under the principle of non-refoulement to avoid returning individuals to environments where they face a real risk of irreparable harm due to climate change. However, to start, such protection remains contingent upon the individual being within a state's jurisdiction or effective control and facing an imminent risk of death or torture. Secondly, no case has successfully gained international protection based on such claims to date. This also stands in sharp contrast to the discourse of SIDS, which have consistently stressed climate justice as inseparable from the right to migrate

93 UN News, 'Climate change link to displacement of most vulnerable is clear' (UN News, 23 April 2021) https://news.un.org/en/story/2021/04/1090432 accessed 28 September 2025.

94 Caitlan M Sussman, 'The Missing Refuge for Climate Refugees in the International Legal Framework: A Dialogue with Caitlan M Sussman' (Georgetown Journal of International Affairs, 21 September 2024) https://gjia.georgetown.edu/2024/09/21/the-missing-refuge-for-climate-refugees-in-the-international-legal-framework-a-dialogue-with-caitlan-m-sussman/ accessed 28 September 2025.

95 Chiara Scissa, 'Environmental Crimes and Forced Migration: An Overlooked Nexus' (IAI – Istituto Affari Internazionali 2024).

with dignity and that current legal frameworks are insufficient to safeguard this right.

The Court, however, did not entirely disregard this issue; it discussed several essential points regarding the threat of sea level rise. It noted that, in cases where a country loses its territory and its population is displaced, this does not necessarily mean that that state ceases to exist, and thus statehood could be maintained.[96] It again emphasised the duty to cooperate and that this obligation is not optional but a legal requirement, calling on countries to collaborate to find fair solutions that respect the rights of affected populations.[97] There are already some examples of such collaboration, e.g. the Australia-Tuvalu Falepili Union treaty, even if it is sometimes argued to be a security deal in disguise.[98] However, the Court does not address what happens if such cooperation fails to yield an equitable solution.

In conclusion, the intersection of climate justice and migration remains a critical yet underexplored area within the legal discourse. Alarming projections underscore the urgent need for legal frameworks that protect the rights and ensure the safety of individuals displaced by climate change. The absence of clear legal remedies in cases of failed cooperation raises pressing questions. As the impacts of climate change persistently escalate, ensuring that migration is recognised as a legitimate form of reparation and not left to the discretion of states amid waning political will and tightening borders is imperative for the future protection of human rights. Without such efforts, even if we see successful reparations cases

96 *Obligations of States* AO (n 2) (Declaration of Judge Nolte) para 363.

97 Such solutions entail maintaining citizenship and cultural rights despite the lack of territory. The Sovereign Military Order of Malta is often cited as the only contemporary example of a sovereign entity without territory that nonetheless maintains citizenship, issues passports, and enjoys diplomatic relations with over one hundred states. Whilst its claim to sovereignty has been debated, it continues to function as a subject of international law; see Noel Cox, 'The Continuing Question of Sovereignty and the Sovereign Military Order of Jerusalem, of Rhodes and of Malta' (2008) *SSRN Electronic Journal* https://doi.org/10.2139/ssrn.1140462.

98 Criticism of Australia's Falepili Union treaty with Tuvalu centers on its potential to be a security-driven pact disguised as climate action, granting Australia influence over Tuvalu's foreign policy in exchange for climate migration pathways. Critics argue the treaty prioritizes Australian strategic interests, such as containing China's regional influence, over true climate justice or Tuvaluan sovereignty and may not adequately address the climate crisis itself, see for example Alex Green and Douglas Guilfoyle, 'The Australia–Tuvalu Falepili Union Treaty: Statehood and Security in the Face of Anthropogenic Climate Change' (2024) 118 *American Journal of International Law* 684, doi:10.1017/ajil.2024.54 (noting that the treaty "intertwines security and climate action […] granting Australia substantial influence over Tuvalu's security and foreign-policy decisions").; RNZ Pacific, "Australia–Tuvalu falepili union 'shameful' – former Tuvalu PM" (27 Nov 2023) (criticising the pact as effectively ceding sovereignty) https://www.rnz.co.nz/international/pacific-news/503354/australia-tuvalu-falepili-union-shameful-former-tuvalu-pm accessed 28 September 2025.

in the future, the most vulnerable and those most affected will be left without protection. Thus, and to conclude with the Court's final words, "a comprehensive solution to this frightening and self-inflicted predicament requires contributions from every field of human knowledge – law, science, economics and beyond. Above all, a sustainable and satisfactory resolution requires human will and wisdom – at the individual, societal and political levels – to alter our habits, our comforts and our present way of life for the sake of securing a future for ourselves and for those yet to be born".