

CAUTION AND SILENCE: THE ICJ'S DUAL ARCHITECTURE TO EXTRATERRITORIAL HUMAN RIGHTS IN THE CLIMATE CONTEXT

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Abstract: The International Court of Justice's 2025 Advisory Opinion on climate change confirmed that States are legally obliged to prevent and mitigate climate harm, yet it avoided clarifying whether human rights obligations apply beyond national borders. Instead of addressing this question explicitly, the Court noted that the scope of human rights treaty law and that of customary law are distinct. This article argues that the Court's cautious distinction between treaty and custom should be read as an opening rather than an end to the question of extraterritoriality. By noting that the extraterritorial application of human rights treaties depends on the specific jurisdiction clauses of each treaty, while at the same time recognising that customary duties of prevention, due diligence, and cooperation continue to operate irrespective of territorial boundaries, the Court preserved the existing treaty framework but left open a distinct pathway for the further development of extraterritorial obligations through customary international law. This reflects the confines and limits of the Advisory Opinion rather than any substantive conclusion on extraterritoriality, leaving further clarification to future cases.

Keywords: Extraterritoriality, Advisory opinion, International Court of Justice, Human rights, Climate change litigation, Customary international law.

1. INTRODUCTION

On 23 July 2025, the International Court of Justice (ICJ) delivered its long-awaited Advisory Opinion on the obligations of States in respect of climate change. The ruling was hailed as a major success, especially for the small group of Pacific Island students whose campaign first set the process in motion. In its conclusions, the Court confirmed that States are legally obliged to prevent and mitigate climate-related harm, and that failure to do so may entail responsibility under international law (ICJ, 2025, paras 207, 272–273, 279, 409, 444). Yet, conspicuously, the Court refrained from addressing one of the most contested issues in contemporary human rights law: whether States bear extraterritorial human rights obligations for climate-related harms occurring beyond their borders (Jamali, 2025a).

This question is not merely academic. Greenhouse gas emissions, by their very nature, transcend territorial boundaries. The harms they generate (e.g., rising sea levels, extreme weather events, food insecurity, and forced displacement) are often suffered far from the point of emission (Raible, 2025, pp. 3–4). For communities on the frontlines

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of climate change, the existence of extraterritorial obligations may determine whether they can seek protection under international human rights law at all. This is particularly true for individuals living in States that are severely affected by climate change while contributing only minimally to global greenhouse-gas emissions, for whom a strictly territorial understanding of human rights obligations risks leaving the principal sources of harm legally out of reach. The issue is further compounded by structural limits on access to justice in certain regions (Faix and Jamali, 2022). For example, in the African context, the African Court on Human and Peoples' Rights has jurisdiction to receive individual applications from only nine States. For States, the answer implicates not only climate policy but also the scope of their accountability before international and regional courts.

The ICJ's cautious silence on this matter therefore warrants close examination. While the Court reaffirmed the general principle that human rights treaties may apply extraterritorially when jurisdiction is established (ICJ, 2025, paras 394–402), it declined to clarify how that principle might operate in the unique context of climate change, where harms are diffuse, cumulative, and global. Instead, the Opinion left the question unanswered—neither foreclosing nor embracing the possibility of extraterritorial human rights obligations in the climate sphere (Keller, 2025).

Scholarly engagement with the question of extraterritoriality — well beyond the climate context — is already substantial (Keller, 2025; Załucki, 2015; Colangelo, 2014; Miller, 2009; Milanovic, 2011; Besson, 2012; Raible, 2020a; Raible, 2020b). A growing body of literature has explored the potential for extraterritorial human rights obligations in environmental or climate-related contexts (Mayer, 2021; Besson, 2012). Contributions range from normative or interpretive arguments recognising some form of recognition of such obligations (Hathaway et al., 2011; Antoniazzi, 2024; Monnheimer, 2021; Altwicker, 2018; Fera-Tinta, 2021) to doctrinal analyses that contest this expansion (Mayer, 2021; Besson, 2012). Parallel debates have arisen around regional jurisprudence, particularly the European Court of Human Rights' (ECtHR) *Duarte Agostinho* decision (Raible, 2025; Heri, 2024; Jamali, 2025b), which explicitly declined to extend jurisdiction to climate harms abroad, and the Inter-American Court of Human Rights's (IACtHR) Advisory Opinions (Berkes, 2018; Ollino, 2020; Auz, 2021), which have taken a more expansive approach to extraterritorial environmental obligations (IACtHR, 2017; IACtHR, 2023).

Although the ICJ's 2025 Advisory Opinion has already prompted significant commentary (Keller, 2025; Heri, 2025; Lawrence and Reder, 2025; Robinson, 2025; Bodansky and Biniaz, 2025; Tigre et al., 2025), the question of extraterritoriality has received comparatively little attention. This article addresses that gap by providing a systematic analysis of the ICJ's approach to extraterritorial human rights obligations, identifying the Opinion's analytical omissions, and examining how its careful positioning may influence the future development of both treaty law and customary international law.

The central claim advanced here is interpretive rather than descriptive of the Court's subjective intent. The article argues that the ICJ's silence on extraterritorial jurisdiction in the climate context should be understood as a decision to stay within the confines of existing doctrine rather than as disengagement from the issue. By refraining

from elaborating on extraterritorial human rights obligations while simultaneously emphasising the distinction between treaty-based duties and customary international law, the Court left the question unresolved and maintained space for its further consideration by treaty bodies, regional courts, and generally future cases or lawsuits. In doing so, it also preserved room for divergent approaches across different human rights instruments and regional systems—allowing, for example, the ECtHR’s restrictive stance under the ECHR and the UN Committee on the Rights of the Child’s (CRC) more expansive interpretation under the Convention on the Rights of the Child to coexist. In this sense, the Opinion effectively adopts a lowest-common-denominator position, avoiding any endorsement of extraterritorial obligations in circumstances where they are not universally recognised. In this sense, the Opinion’s caution functions less as a constraint than as a boundary line, indicating the limits of what the Court was prepared to decide without foreclosing subsequent doctrinal development.

The article proceeds in five parts. Section 2 briefly sets out the background to the Advisory Opinion and situates the issue of extraterritorial obligations within broader debates in international human rights law. Section 3 analyses the ICJ’s treatment of extraterritoriality, highlighting three analytical gaps. Section 4 contrasts the constraints of treaty law with the potential flexibility of customary international law. Section 5 concludes.

2. BACKGROUND AND THE CHALLENGE OF EXTRATERRITORIALITY

The ICJ’s 2025 Advisory Opinion was the culmination of a process that began not within diplomatic circles but with a student-led initiative in the Pacific. In 2019, a group of law students from the Pacific Islands formed Pacific Islands Students Fighting Climate Change and proposed that their governments seek an advisory opinion from the ICJ on States’ obligations regarding climate change (Pacific Islands Students Fighting Climate Change, 2025). Their campaign gained political traction when Vanuatu brought the proposal to the Pacific Islands Forum in 2022, where it received regional endorsement (Pacific Islands Students Fighting Climate Change, 2025). With this support, Vanuatu then introduced a resolution at the United Nations General Assembly, which the Assembly adopted in March 2023, formally requesting the Opinion (UNGA, 2023). What started as a grassroots mobilisation thus evolved into a global diplomatic effort, reflecting the deep concern of climate-vulnerable States about the limits of existing legal frameworks.

The question presented to the Court was broad: it asked the ICJ to clarify both (a) the obligations of States under international law to ensure the protection of the climate system and environment from anthropogenic greenhouse gas emissions (UNGA, 2023), and (b) the legal consequences arising from acts or omissions that cause significant climate-related harm (UNGA, 2023).

In its response, the Court confirmed that international law imposes duties to prevent and mitigate climate-related harms, grounding these duties in a combination of treaty law, customary international law, and general principles (ICJ, 2025, paras 121, 142, 161, 207, 280, 293, 300). It emphasised the obligations to reduce greenhouse gas emissions, to protect human rights from the adverse effects of climate change (ICJ, 2025, paras

234, 250, 254, 372, 381, 386, 387, 393), and to cooperate in addressing transboundary environmental harm (ICJ, 2025, paras 289, 301–308). At the same time, the Opinion was marked by restraint: while the Court reaffirmed that human rights treaties may apply extraterritorially where jurisdiction is established (ICJ, 2025, para 394), it declined to clarify how that principle should be understood in the climate context, where harms are diffuse, cumulative, and global (Jamali, 2025b).

The silence is striking against the background of existing jurisprudence on extraterritoriality in international human rights law. Human rights treaties are largely silent on territorial scope, leaving interpretation to courts and treaty bodies. The Human Rights Committee has read Article 2(1) of the International Covenant on Civil and Political Rights (ICCPR) as extending obligations to all individuals subject to a State's 'power or effective control,' even outside its territory (Human Rights Committee, 1979a; Human Rights Committee, 1979b; Human Rights Committee, 2018). The ICJ itself had earlier addressed the question in its Wall Advisory Opinion of 2004, affirming that the ICCPR applies extraterritorially to territories under a State's jurisdiction, a position the Court reiterated in its 2024 Advisory Opinion on the *Occupied Palestinian Territory* (ICJ, 2024, paras 99–101).

The CRC has also contributed to this understanding of jurisdiction. In its decision in *Sacchi et al. v. Argentina et al.*, a climate-change-related communication concerning States' regulation of greenhouse-gas emissions, the Committee accepted that children may fall within a State's jurisdiction even when located outside its territory if the State exercises 'effective control' over the conduct that produces foreseeable transboundary harm (CRC, 2021, para. 9.7). Although the communication was dismissed on admissibility grounds, the Committee's reasoning confirms that jurisdiction under the Convention on the Rights of the Child can extend beyond national borders where a State's activities—such as greenhouse-gas emissions—create real and foreseeable impacts on the rights of children abroad.

Regional human rights courts, however, have taken different approaches. The ECtHR has generally maintained a restrictive model (Keller and Heri, 2022; Jamali, 2025b; Raible, 2025), requiring either effective control over territory (ECtHR, 1995, para. 62) or authority over individuals (ECtHR, 2011). Most recently, in *Duarte Agostinho v. Portugal and Others*, it rejected claims that emitting States exercised jurisdiction over foreign applicants suffering climate harms, thus narrowing the prospects for extraterritorial obligations in the climate sphere. By contrast, the IACtHR has adopted a markedly broader approach, most clearly articulated in its Advisory Opinion OC-23/17 on the environment and human rights. It held that when conduct originating within a State's territory causes rights-impairing effects abroad, those affected individuals fall within the State's jurisdiction where a causal link exists between the domestic activity and the harm suffered (IACtHR, 2017, para 101). Jurisdiction in this context is grounded in the State's effective control over the activities that generated the harmful effects (IACtHR, 2017, para 104 (h)), on the understanding that the State of origin is uniquely positioned to regulate and prevent the risk of transboundary harm (IACtHR, para 102). The Court further affirmed that the obligation to prevent significant transboundary environmental damage is a recognised

principle of international law, capable of engaging State responsibility for harm inflicted on persons outside its borders by activities originating within its territory or under its authority (IACtHR, 2017, para 103).

Taken together, these differing approaches reveal the absence of a coherent model of extraterritorial jurisdiction in international human rights law. The difficulty is amplified in the climate context, because climate change does not fit within any of these established frameworks that have a restrictive approach to extraterritoriality (Jamali, 2025b). Climate-related harm does not originate in a single, identifiable wrongful act but in the cumulative effect of emissions produced over time by numerous actors operating across different jurisdictions. These emissions disperse through the atmosphere and generate consequences far beyond the territory of any one State (Raible, 2025), making the traditional tests of ‘control’ over individuals or territory ill-suited to capture the responsibility of States whose conduct contributes to global harm (Keller and Heri, 2022). Some scholars have therefore suggested alternative approaches, including a ‘control over the source’ model that would ground jurisdiction in the State’s control over emissions rather than over victims (Rocha, 2024; Schayani, 2024; Murcott, Tigre and Zimmermann, 2022). While this proposal reflects the distinctive features of climate change, it remains doctrinally contested and sits uneasily with the textual limits of at least some human rights treaties (Mayer, 2021; Besson, 2012). Against this backdrop, the ICJ’s choice to avoid taking a position can be read as both cautious and consequential: cautious in sidestepping an issue that has deeply divided human rights jurisprudence, and consequential in leaving the matter open for future elaboration by treaty bodies and regional courts.

3. THE ICJ’S CAUTION ON EXTRATERRITORIALITY

What stands out most in the Advisory Opinion is not what the Court said about extraterritorial human rights obligations, but what it declined to say. The Court briefly recalled its existing jurisprudence confirming that human rights treaties may apply beyond a State’s borders where ‘jurisdiction’ is established, yet it stopped short of explaining when that threshold is met in the climate context. Rather than engaging with the substance of the question, the Court confined itself to the generic observation that the analysis is ‘treaty-specific’ and then shifted attention to the distinction between treaty law and customary international law (ICJ, 2025, para. 402).

This restrained posture leaves unresolved an issue that the General Assembly’s request inevitably brings into view: because the harms it asked the Court to assess arise across borders, any meaningful answer requires clarifying how the obligations identified by the Court operate when the effects of climate change occur beyond the acting State’s territory. The Opinion therefore remains silent on a central concern—how human rights analysis should accommodate the inherently transboundary nature of climate harm—a silence that is especially striking given the Court’s readiness elsewhere in the Opinion to characterise climate impacts as transboundary harm for the purposes of the no-harm rule. Whether this reflects a deliberate choice to reserve its engagement with transboundary questions for the sphere of customary environmental law, or simply the limits of what

the Court was prepared to resolve within its human-rights analysis, remains unclear. This silence gives rise to three analytical gaps that limit the Opinion's interpretive value.

The first gap concerns the Court's reliance on treaty body jurisprudence without clarifying its normative weight. The Court drew on the Human Rights Committee's position under Article 2(1) ICCPR—that obligations extend to all individuals under a State's power or effective control outside its territory—developed in *Lopez Burgos v. Uruguay* and *Celiberti de Casariego v. Uruguay* and reaffirmed in General Comment No. 31 and General Comment No. 36. But the Court refrained from clarifying whether these pronouncements amount to binding law, persuasive authority, or mere soft law, even though treaty body views are generally understood not to create legally binding obligations as such, but to constitute authoritative interpretations of their respective treaties that carry significant persuasive weight in practice (Keller and Grover, 2012). This passivity is problematic: the ICJ's advisory function is not confined to summarizing existing positions but extends to clarifying contested points of international law (Jamali, 2025a). This omission perpetuates ambiguity over whether States are bound by extraterritorial obligations articulated by treaty bodies, or whether such interpretations remain aspirational (Keller, 2025).

The second gap is conceptual. Not only did the Court engage to a very limited extent with the concept of extraterritorial jurisdiction and how human rights can apply extraterritorially, but it also did not apply that analysis to climate change at all. The opinion simply did not explain whether, or how, existing jurisdictional frameworks could operate in relation to climate-related harm. Imagine a simple scenario: State A, a major emitter, fails to regulate its fossil-fuel industry. Rising sea levels and intensifying storms then displace communities in State B, a low-lying island nation. The harm is foreseeable and scientifically attributable to emissions from State A—a point the Court itself acknowledged in the Opinion (ICJ, 2025, para. 429). Does State A owe any human rights obligations to those affected in State B? That is precisely the kind of question the Court avoided.

The third gap is the failure to engage with regional jurisprudence, most notably the *Duarte Agostinho* judgment of the ECtHR. That case involved claims against 33 States, arguing that their inadequate mitigation policies violated Convention rights of Portuguese youth. The Strasbourg Court declared the extraterritorial claims inadmissible, adhering to a traditional 'control over the victim' model and rejecting 'control over the source' as incompatible with Article 1 ECHR. The Court expressed concern that adopting such an approach would effectively turn the ECHR into a global climate treaty (ECtHR, 2024, para 208). By contrast, the IACtHR in its 2017 Advisory Opinion on the Environment and Human Rights embraced a broader conception, recognising that extraterritorial human rights obligations may arise where a State exercises effective control over activities that cause cross-border environmental harm. Together, these findings mark the two most authoritative regional pronouncements on the issue—one restrictive, the other expansive. These divergent approaches illustrate the broader phenomenon of fragmentation in international human rights law, where regional courts develop parallel and sometimes incompatible jurisdictional doctrines (Ajevski, 2014; Payandeh, 2015). Given its universal mandate, the ICJ might have been expected to engage with these competing approaches, if only to distinguish them or to situate its own reasoning within a comparative frame.

These three gaps must be considered together. The issue of extraterritorial climate obligations is highly contentious: expansive reasoning could provoke resistance from States wary of new responsibilities, while a restrictive pronouncement risks disappointing those advocating progressive development. We have already seen a strong form of resistance against international courts including the International Criminal Court and those regional courts in Europe, Africa and the Americas (Jamali and Faix, 2023; Mills and Bloomfield, 2018; Breuer, 2021). Against this background, the Court’s reasoning reflects a cautious approach that remains within the confines of existing doctrine. By relying on treaty-body practice without clarifying its legal weight, refusing to engage with extraterritoriality in the context of climate harm, and overlooking relevant regional jurisprudence, the ICJ avoided doctrinal innovation. At the same time, its emphasis on the distinction between treaty law and customary international law signals an awareness that obligations grounded in custom may operate differently from treaty-based human rights duties. Importantly, the customary obligations to which the Court alluded in this context are not human rights norms as such, but derive from international environmental law and general international law, governing States’ duties of prevention, due diligence, and cooperation in relation to transboundary harm.

4. THE COURT SPEAKS IN SILENCE: TREATY LAW V CUSTOMARY LAW

The Advisory Opinion’s most structurally significant point appears in paragraph 402 of the opinion. The Court emphasised that determining whether a State exercises jurisdiction outside its territory depends on the specific provisions of each treaty. However, the Court also underscored that, in this regard, ‘the scope of human rights treaty law and that of customary law are distinct’ (ICJ, 2025, para. 402).

This reasoning carries important implications for how extraterritoriality is understood. On the treaty side, the Court returns to a familiar line of thought: Article 2(1) of the ICCPR may apply outside a state’s territory when that state exercises jurisdiction, as recognised in the *Wall* Advisory Opinion and the 2005 *Armed Activities* case. However, the Court stops short of explaining how this approach should extend to complex, cumulative forms of transboundary climate harm.

The Opinion also reflects the growing recognition of environmental dimensions within human rights law, acknowledging the right to a clean, healthy, and sustainable environment as inherent to the enjoyment of other rights (ICJ, 2025, para. 393). However, it again stops short of addressing the crucial question of how far such rights extend beyond national borders in climate-related contexts. The result is a set of treaty-law principles that are normatively powerful but jurisdictionally restrained.

By contrast, customary international law offers firmer ground for extraterritorial application, since many of its core obligations are not tied to territorial control. The no-harm rule and the duty to prevent significant transboundary environmental harm do not depend on a State’s control over victims; rather, they are duties of conduct owed to other States—and increasingly to the international community of States as a whole—in relation to shared environmental interests. In contemporary law, these obligations are articulated

through the standard of due diligence, informed by the best available science and shaped by principles of precaution, prevention, environmental impact assessment, cooperation and recognition of States' differing capabilities (ICJ, 2010, paras 119, 152, 187, 197, 203–206; ICJ, 2015, paras 104–105, 227; International Court of Justice, 2025, paras 261, 272, 274–276, 278, 289, 296–297, 457(b)(a)). The Court's Advisory Opinion consolidates this understanding: it identifies the key elements of due diligence and emphasises that climate treaties and customary law 'inform each other' (ICJ, 2025, paras 280–300, 309–315). Crucially, the Court also links these underlying duties to the category of *erga omnes* obligations (ICJ, 2025, paras 439–443). This step is significant: by characterising at least the customary obligation to prevent significant climate harm as *erga omnes* (ICJ, 2025, paras 439–443), the Court indicates that any State may invoke responsibility for a breach, even without demonstrating a specific, individualised injury (ICJ, 2025, para. 443; ICJ, 1970, paras 33–34).

Recent jurisprudence confirms this trajectory. The 2024 ITLOS Advisory Opinion on Climate Change held that anthropogenic greenhouse-gas emissions constitute 'pollution of the marine environment' (ITLOS, 2024, para. 179) and interpreted UNCLOS Articles 192, 194, and 197 as imposing stringent due-diligence and cooperation duties guided by the best available science and the Paris Agreement's temperature goal, yet not confined by its procedural framework (ITLOS, 2024, paras. 241–243, 215–224, 321). Notably, ITLOS rejected the view that compliance with the Paris Agreement suffices to meet UNCLOS obligations, affirming that the law of the sea continues to impose independent standards (ITLOS, 2024, paras. 223–224).

The ICJ's Climate Advisory Opinion follows this path. By identifying UNCLOS as part of the 'most directly relevant' applicable law (ICJ, 2025, para. 124) and rejecting the proposition that the climate regime operates as *lex specialis* (ICJ, 2025, paras. 164–171), the Court confirms that climate treaties do not displace general international law. UNCLOS obligations to prevent, reduce, and control greenhouse-gas pollution apply across maritime spaces irrespective of where harm occurs. This logic aligns closely with the structure of customary no-harm and cooperation duties, which have long been understood as governing activities with transboundary effects on shared environmental systems. Read in this light, the Opinion reflects a functional consistency: the same principles that anchor States' responsibilities under the law of the sea support the extraterritorial operation of customary obligations in the atmospheric context. Precisely for this reason, the ICJ's decision not to engage with the extraterritorial dimension of human rights obligations appears all the more puzzling.

One could thus argue that the Court's differentiation between treaty law and customary law is not merely taxonomic; it reflects a functional separation of normative roles. Human rights treaties contribute substantive standards (such as the rights to life, health, and an adequate standard of living) and procedural guarantees; yet their explicit or implied jurisdiction clauses (e.g., Article 1 of the ECHR) inevitably evoke decades of 'effective control' doctrine that is ill-suited to cumulative global emissions (Keller and Heri, 2022; Jamali, 2025b). It should be noted that the problem does not lie in the concept of 'effective control' itself. The IACtHR has already adapted the doctrine to cover situations

where a State exercises control over activities that produce cross-border environmental harm (IACtHR, 2017). What is ill-suited to cumulative global emissions is the traditional focus on control over territory or over the person, which cannot accommodate diffuse, globally distributed impacts.

Customary law, by contrast, regulates activities and effects. It requires States to organise their regulatory powers to avoid significant transboundary harm, conduct environmental impact assessments, cooperate, notify and consult, and adapt measures as risks evolve. These obligations are rooted in *Trail Smelter*, the *Corfu Channel* principle that States must not allow their territory to be used for acts contrary to the rights of others, and modern ICJ environmental jurisprudence such as *Pulp Mills or Costa Rica v. Nicaragua*. In the climate setting, the logic is inherently extraterritorial: the objects of protection—the atmosphere and the marine environment—are transboundary by definition.

The practical consequences of the Court’s approach are thus twofold. First, on attribution and responsibility, the Advisory Opinion confirms that climate treaties do not preclude the operation of the general law of State responsibility: failure to fulfil due diligence based obligations (whether treaty based or customary) may engage responsibility, including duties of cessation and reparation (ICJ, 2025, paras. 447–450; ARSIWA, 2001, Arts. 28–31). This stance goes against those arguments that claims ‘loss and damage’ are only confined to political forums. Second, on standing, by affirming the *erga omnes* character of core prevention and cooperation duties, the Court broadens the range of potential claimants in inter-State settings, even while leaving unaffected the jurisdictional debates within individual human-rights mechanisms.

The Opinion thus outlines a dual-track architecture. Human-rights bodies and regional human rights courts may continue to develop climate-related standards within their jurisdictional confines, while customary international law supplies transboundary duties of prevention and cooperation enforceable among States. The doctrinal foundations for this structure are already well established. On the customary side, the no-harm rule and due diligence have long histories and contemporary specificity, reflected in the ITLOS 2024 Advisory Opinion, the ILC’s Draft Articles on the Prevention of Transboundary Harm, and the ILC Draft Guidelines on the Protection of the Atmosphere. On the treaty side, the environmental turn in human rights law—endorsed by UNGA Resolution 76/300 and acknowledged by the ICJ—further elaborates the content of State obligations. Read together through Article 31(3)(c) VCLT, these sources support a layered interpretation: customary law imposes outward-facing duties of prevention and cooperation; human-rights treaties refine the standard of care owed to persons within jurisdiction; and neither regime displaces the other or the general law of responsibility.

What this dual architecture implies for litigation, however, warrants further reflection. While customary international law may in the future offer a legal framework capable of addressing the transboundary and cumulative nature of climate harm, its primary mode of enforcement remains inter-State. The *erga omnes* character of core prevention and cooperation duties widens standing among States and enables responsibility to be

invoked before international courts and tribunals such as the ICJ or ITLOS, yet it leaves affected individuals dependent on States' willingness to act on their behalf.

Human rights treaty regimes, by contrast, provide procedural avenues for individual complaints and rights-based adjudication, but only within jurisdictional frameworks that have so far proven resistant to accommodating extraterritorial climate harm. The result is a structural asymmetry: the body of law most readily capable of operating across borders is institutionally distant from individual victims, while the fora most accessible to those victims remain jurisdictionally constrained. The ICJ's Advisory Opinion does not resolve this tension, but it makes it visible. By preserving the limits of treaty-based jurisdiction while reaffirming the independent force of customary obligations, the Court delineates a legal landscape in which climate-related claims may proceed along different tracks, depending on the claimant, the forum, and the nature of the obligation invoked.

Seen in this light, the Court's silence on extraterritorial human rights obligations appears less as an omission than as a structural choice. Rather than stretching jurisdictional doctrines within human rights treaties, the Court preserved their existing limits while reaffirming the independent force of customary duties governing transboundary harm. The resulting architecture does not resolve the tension between legal frameworks that are accessible to affected individuals and those that depend on States bringing claims against one another. It does, however, clarify the legal framework: treaty-based human rights mechanisms continue to operate within their established jurisdictional limits, while customary international law may provide a parallel framework through which climate-related responsibilities may be articulated across borders. This structural differentiation, rather than any substantive rejection of extraterritorial obligations, best captures the logic of the Advisory Opinion.

5. CONCLUDING REMARKS

The ICJ's Advisory Opinion will be remembered less for what it decided on human rights than for what it left unsaid. The Court did not explain how customary law might apply beyond a State's borders, nor did it explicitly suggest that custom could fill the jurisdictional gaps of human rights treaties. Its only clear statement—at paragraph 402—that 'the scope of human rights treaty law and that of customary law are distinct'—was cautious and descriptive. Yet, read in context, that distinction carries weight. It is the first time the Court has set treaty and custom side by side in the climate setting, quietly acknowledging that they work on different levels of responsibility.

This article has argued that the distinction can be understood as an opening rather than an endpoint. The Court's restraint leaves room to interpret customary law's activity-based duties—prevention, due diligence, and cooperation—as tools for addressing transboundary harms that human rights treaties, limited by jurisdictional clauses, cannot easily reach. That is not what the Court said, but it is what its structure allows us to see: an invitation to think about how existing norms might adapt to global problems.

Recent human-rights jurisprudence illustrates why this space matters. In *Duarte Agostinho*, the ECtHR rejected the notion that greenhouse-gas emissions could establish

jurisdiction under Article 1 ECHR, warning that a source-based model would transform the Convention into a global climate treaty. Yet in *Greenpeace Nordic v Norway*, the same Court accepted that States must assess the climate effects of fossil-fuel exports, explicitly acknowledging that these impacts may be felt beyond national borders (Heri and Jamali, 2025). Although the resulting obligations remained procedural, the case nonetheless confirms that climate-related conduct with extraterritorial effects cannot be ignored within the human-rights framework and suggests a potential opening for future engagement with Scope 3 emissions, meaning emissions that arise outside a company's own operations, for example through its supply chains or the use of its products. Taken together, these decisions reveal neither a consistent rejection nor a clear acceptance of extraterritorial climate obligations, but an unsettled jurisprudential field in which courts are experimenting with different legal routes—substantive in some systems, procedural in others—while remaining wary of altering the foundational doctrine of jurisdiction.

Seen this way, the ICJ's caution has its own purpose. By refusing to stretch human rights treaties beyond their text, it preserves legal certainty. However, by separating custom, it leaves space for gradual development. The task now lies with treaty bodies, regional courts, and national judiciaries to decide how far any such opening can be used within the jurisdictional limits of their respective instruments. In some systems, those limits may continue to block findings in extraterritorial climate claims; in others, the Opinion may lend interpretive support to more expansive approaches already developing in the case law. The Court's silence, in that sense, may serve as a reminder that in international law, progress sometimes begins with what a court chooses not to say.

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