

### Due Regard for Future Generations

One of the important aspects of the Advisory Opinion is the Court's specific statement that the principle of intergenerational equity requires "due regard for the interests of future generations" and the long-term implications of conduct.<sup>1</sup> With "due regard" emerging as a test for legal conduct in an increasingly wide variety of international legal fields, we may begin in the near future to see greater elaboration of what due regard comprises.<sup>2</sup> For instance, there may be an important procedural dimension requiring the analysis of the interests of those to whom due regard is owed.<sup>3</sup>

This Advisory Opinion contributes by specifying that, where due regard is required, the considerations in question "need to be taken into account where States contemplate, decide on and implement policies and measures in fulfilment of their obligations under the relevant treaties and customary international law."<sup>4</sup> This is a valuable contribution to general understandings in international law of the meaning of due regard, and provides a useful and concrete connection point between domestic and international law for invocation in the context of domestic and international policy development processes, negotiations and climate litigation.

The Court grounded the requirement of due regard for future generations in equity *infra legem*, with intergenerational equity as a manifestation of equity in a general sense, taking into account the added dimension that intergenerational equity is an expression of the idea that "present generations are trustees of humanity tasked with preserving dignified living conditions and transmitting them to future generations".<sup>5</sup> As the Intergovernmental Panel on Climate Change (IPCC) has observed, many of the changes that continued emissions cause to major climate system components will be irreversible on time scales from the centennial to the millennial, such that:<sup>6</sup>

"[w]ithout urgent, effective, and equitable mitigation and adaptation actions, climate change increasingly threatens ecosystems, biodiversity, and the livelihoods, health and well-being of current and future generations (high confidence)"

The Court, further, articulated that intergenerational equity is expressed in the idea that present generations are trustees of humanity tasked with preserving dignified living conditions and transmitting them to future generations.<sup>7</sup> Even with this hint of a "turn to the future",<sup>8</sup> there is room to suggest that the Court underplayed the matter of future generations' interests. Stronger arguments have been put forward in the literature. One argument is that future generations are "others" whose interests it would be consistent to consider in accordance with the maxim *sic utere tuo ut alienum non laedas* (use what is yours in such a way that you do not injure that of another) as recognised in the *Corfu Channel* case.<sup>9</sup> This extends into an argument that the customary

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<sup>1</sup> *Obligations of States in respect of Climate Change*, Advisory Opinion of 23 July 2025 [2025] ICJ Reports [157].

<sup>2</sup> Caroline E. Foster, (2021) *Global Regulatory Standards in Environmental and Health Disputes: Regulatory Coherence, Due Regard and Due Diligence* (Oxford University Press, 2021).

<sup>3</sup> Foster, (n 2) 89-99.

<sup>4</sup> *Obligations of States* (n 1) [157]. See also Shinya Murase, Sixth Report on the Protection of the Atmosphere UN Doc A/CN.4/736 (11 February 2020), Guideline 6, p. 39.

<sup>5</sup> [156].

<sup>6</sup> [156].

<sup>7</sup> [156] see Eyal Benvenisti, "Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders" [2013] 107(2) *American Journal of International Law* 295.

<sup>8</sup> Jochen Rauber, "Custom, Entrenchment, Interpretation: How the ICJ's Advisory Opinion on Climate Change Contributes to the International Law's Turn toward the Future" 5 August 2025, *Voelkerrechtsblog*.

<sup>9</sup> Caroline E. Foster, 'Due Regard for Future Generations? The No-Harm Rule and Sovereignty in the Advisory Opinions on Climate Change' [2024] 13 (3) *Transnational Environmental Law* 588-609, cited by Mr. Justin

international law obligation of prevention of harm to the environment might be understood as protecting the interests of future generations. There might possibly also be associated substantive constraints on State conduct requiring avoidance of 'manifestly excessive adverse impacts' on the interests of future generations.<sup>10</sup> The Court's approach to intergenerational equity does not preclude such findings in future. Judge Sebutinde considered the Court should have affirmed that States owe customary international law obligations not only to present generations but also to future generations.<sup>11</sup>

Elsewhere, the Court blended the matter of future generations' interests subtly but foundationally into its consideration of human rights, observing at the outset of the human rights section of the Advisory Opinion that "[t]he environment is the foundation for human life, upon which the health and well-being of both present and future generations depend".<sup>12</sup> However the Court made the point when parsing the General Assembly's request that, because international law is a law among States, individuals by and large lack standing to bring claims against States in respect of fulfilment of their climate obligations, except as might be recognised in specific treaties,<sup>13</sup> such as human rights treaties. Certainly there is blue sky between the Court's view and that of the Inter-American Court of Human Rights, which has recognised that human rights have collective dimensions in which they are owed to both present and future generations.<sup>14</sup>

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Sobion for Saint Vincent and the Grenadines, CR 2024/49, Public sitting held on Wednesday 11 December 2024, at 10 a.m., at the Peace Palace, 15.

<sup>10</sup> Foster (n 9), 590, 600.

<sup>11</sup> Separate Opinion of Vice-President Sebutinde [7], taking into account the Declaration on Future Generations adopted at the 2024 UN Summit of the Future as well as the 2023 Maastricht Principles on the Human Rights of Future Generations.

<sup>12</sup> *Obligations of States* (n 1) [373] citing *Legality of the Threat and Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996 (I).

<sup>13</sup> [111].

<sup>14</sup> Inter-American Court of Human Rights, Opinión Consultiva OC-32/25 sobre Emergencia Climática y Derechos Humanos [272]. Corina Heri, "Human Rights in the ICJ's Climate Opinion" 1 August 2025, *Verfassungsblog*, available at <https://verfassungsblog.de/author/corina-heri/>