2026, Vol. 15, Issue 1

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https://doi.org/10.21697/2026.15.1.05

# APPLIER, INTERPRETER, AND JUDICIAL CODIFIER: THE THREE CLIMATE ADVISORY OPINIONS, SUSTAINABLE DEVELOPMENT, AND INTERNATIONAL JUDICIAL LEGITIMACY

Received: 2026-02-17; Revised: 2026-03-31; Accepted: 2026-05-28

**Abstract:** The International Tribunal for the Law of the Sea, the Inter-American Court of Human Rights, and the International Court of Justice have recently issued three landmark climate advisory opinions. Amidst the long-standing ambiguity of sustainable development in international law, this paper analyzes how the advisory opinions contributed to its clarification and development and proposes a political explanation for their differences. As a treaty applier, the Tribunal was the most conservative in limiting its engagement to a textual interpretation of sustainability provisions in the Framework Convention. As a treaty interpreter, the Inter-American Court actively embraced sustainable development in answering both scientific and legal dimensions of the question presented. As a judicial codifier of international law, the World Court carefully identified shared legal consensus in the international community of States, while its reservation in climate mitigation and adaptation was criticized in Judge Xue's Separate Opinion. Based on Professor Jorge Viñuales's theory, after the present Advisory Opinions, sustainability remains a 'normative concept' in general international law, which supplies conceptual materials for legal and policy instrument and assists clarification of States' obligations; however, within the regional system of inter-American human rights, the principle has become a fully entitled legal norm as an independent source of States' obligation that is justiciable. Beyond the permanent debate over whether the advisory opinions have correctly applied law, a proposed political explanation, termed 'international judicial relay', reveals how the three bodies collaborate by playing to their respective strengths to contribute to the concept's development at different stages, so that they earn instead of lose legitimacy. The relay began before the Advisory Opinions, and will continue thereafter, that sustainability will be increasingly invoked in future advisory and contentious proceedings specific to trade and investment, and even private commercial disputes applying international law.

Keywords: Sustainable Development, Climate Change, Advisory Opinion, International Courts and Tribunals, Judicial Politics

## 1. Introduction

The International Tribunal for the Law of the Sea (ITLOS) on 21 May 2024,[1] the Inter-American Court of Human Rights (IACtHR) on 29 May 2025,[2] and the International Court of Justice (ICJ) on 23 July 2025[3] issued their climate advisory opinions.[4] They all mentioned the principle of sustainable development, albeit at largely different frequencies. As a preliminary statistical observation, the terms sustainable, sustainability, and sustainably appear 10 times in the ITLOS Advisory Opinion, 240 times in the IACtHR Advisory Opinion, and 54 times in the ICJ Advisory Opinion, in terms of their main text.[5]

The phenomenon inspires this article to examine more closely the three international judiciaries' engagements with sustainable development in the present Advisory Opinions. To systematically evaluate these divergent judicial approaches, this article introduces an original analytical framework that categorizes the respective roles of the three

1 *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*, ITLOS advisory opinion of 21 May 2024 (ITLOS Climate Change Advisory Opinion).

2 *The Climate Emergency and Human Rights (Interpretation and scope of Articles 1(1), 2, 4(1), 5(1), 8, 11(2), 13, 17(1), 19, 21, 22, 23, 25 and 26 of the American Convention on Human Rights; 1, 2, 3, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17 and 18 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador," and I, II, IV, V, VI, VII, VIII, XI, XII, XIII, XIV, XVI, XVIII, XX, XXIII, and XXVII, of the American Declaration of the Rights and Duties of Man)*, IACtHR advisory opinion, AO-32/25 of 29 May 2025, Series A No. 32 (IACtHR Climate Emergency Advisory Opinion).

3 *Obligations of States in respect of Climate Change*, ICJ advisory opinion of 23 July 2025 (ICJ Climate Change Advisory Opinion).

4 For a comparative study of the present Advisory Opinions on several topics that are not the focus of this article (the role of science, due diligence, private actors, and reparations), see Bañuelos and Samuel, "Judicial Convergence on Climate Change".

5 This excludes the words' appearances in the Judges' separate opinions. Appearances in an advisory opinion's table of content and procedural background are not excluded. For example, sustainability wordings in an oral hearing participant's title or affiliated institution are counted, such as ITLOS Climate Change Advisory Opinion, para. 38: "Ms Margaretha Wewerinke-Singh, Associate Professor of Sustainability Law, University of Amsterdam; Adjunct Professor of Law, University of Fiji; member, Bar of Vanuatu; Blue Ocean Law" (emphasis added).

judiciaries. Specifically, the author conceptualizes ITLOS as a treaty applier, the IACtHR as a treaty interpreter, and the ICJ as a judicial codifier. This tripartite taxonomy is developed herein to better parse how each institution engaged with the normative boundaries of sustainable development while remaining within its specific jurisdictional mandate and institutional constraints.

Chapter 2 introduces Professor Jorge Viñuales's theory in 2021 that defined sustainable development as a normative concept and distinguished it from a fully entitled legal norm. Chapter 3 summarizes each of the Advisory Opinions' normative contribution to sustainable development and applies Viñuales's theory for an updated conclusion. Chapter 4 critically reviews the limitations of the above positivist research approach and alternatively proposes a political explanation for the different roles undertaken by the international judiciaries in the Advisory Opinions. The concluding Chapter 5 summarizes contributions and looks forward to future research agendas.

## 2. The Normative Functions Theory

Under the context of increasing world attention to environmental problems, the 1987 Brundtland Report, "Our Common Future",[6] became the conceptual origin of sustainable development from which it was popularized at the international level. The 1992 United Nations (UN) Conference on Environment and Development (UNCED) further materialized the concept into an international policy, adopting the landmark document of the Rio Declaration, which recognized the twenty-seven principles of sustainable development and Agenda 21 for national implementations.[7] In a relatively short period of time, the UN system embraced the concept in its policy language. Agenda 21 was subsequently updated and enlarged by the Millennium Development Goals in 2000, and then the Sustainable Development Goals in 2015. The process took place not only within the Organization but also Specialized Agencies, not only in international development but also in its financing, through development finance institutions like the World Bank.[8]

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6 Brundtland Commission, *Our Common Future*.

7 Rio Declaration on Environment and Development, 14 June 1992, A/CONF.151/26 (Vol. I).

8 For an evolutionary history of sustainable development, see Atapattu, "From 'Our Common Future' To Sustainable Development Goals", 217-228.

Beyond these non-binding instruments, an international legal momentum of sustainable development at the UNCED was the signing of the Convention on Biological Diversity[9] and the UN Framework Convention on Climate Change (UNFCCC).[10] They were the first treaties that incorporated sustainable development into their various provisions, meaning that the concept started to determine legal rights and obligations of the treaties' State Parties. Since then, a paradigm was established and maintained to incorporate sustainability expressions in multilateral environmental treaty-making. To date, it is difficult, if still possible, to find an environmental treaty where the sustainability language is absent. Lastly, as the most influential multilateral instrument in international trade and investment, the Marrakesh Agreement Establishing the World Trade Organization incorporated sustainable development in its preamble, which guides the interpretation of all WTO provisions.[11]

Based on those practices and also the concept's invocation by various international courts and tribunals, Viñuales believed that sustainable development had evolved into a normative concept.[12] That normativity is demonstrated by its pervasive appearances in treaties as well as decisions of international courts and tribunals, requiring economic activities of States to comply with customary international environmental law. To call it a normative concept also means that its effect in legal practices is incomplete when compared with a fully entitled legal norm in terms of the functions they may play. A fully entitled legal norm can perform three main functions, which this article terms together normative functions. An architectural function shapes a treaty or its part, or more broadly, a policy document; an interpretive function helps to 'clarify another norm, or to update its content… or to reconcile competing norms or the values underpinning them…'; A decision-making function supplies a primary rule to 'be relied upon, as such and without reference to related but more specific norms, as a primary rule of obligation defining

9 Convention on Biological Diversity, 5 June 1992, 1760 U.N.T.S. 79.

10 United Nations Framework Convention on Climate Change, 9 May 1992, 1771 U.N.T.S. 107 (UNFCCC).

11 Preamble, Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994, 1867 U.N.T.S. 154: "Recognizing that their relations in the field of trade and economic endeavour should… allow [] for the optimal use of the world's resources in accordance with the objective of sustainable development…"

12 Viñuales, "Sustainable Development", 292.

a conduct to decide a case'.[13] Evidence of the first function is found in the text of a treaty or policy instrument, and that of the remaining two takes the form of judicial decisions.[14]

Viñuales argued that the limitation of sustainable development that prevented it from exercising a decision-making function was inherent instead of practical.[15] Accordingly, it is the concept's vagueness and inoperability, instead of the judicial institutions' unwillingness, that precluded sustainable development from becoming a fully entitled legal norm, and the preclusion is likely permanent. After examining case laws of ICJ, the World Trade Organization (WTO) Dispute Settlement Body (DSB), investment and inter-State tribunals, the African Commission on Human and Peoples' Rights, and IACtHR, he believed, at least as of 2021, sustainable development had not performed any decision-making function, and thus was not a fully entitled legal norm. It had assisted the courts and tribunals in understanding relevant treaty and customary rules, sometimes providing determinative contributions. Nonetheless, the cases provided no examples where it was invoked as a primary rule. Instead, that role was undertaken by more specific norms that derived from it, like prevention, cooperation, and environmental impact assessment.[16]

The recent climate change advisory opinions provoked two critical inquiries. First, concerning Viñuales's conclusion, do the advisory opinions provide new practical evidence that sustainable development can perform a decision-making function, thus rendering it a fully entitled legal norm? Secondly, and to go further into the doctrinal level, can the present Advisory Opinions inspire another explanatory framework for the phenomenon?

## 3. Sustainable Development in the Climate Advisory Opinions

### 3.1. ITLOS as Treaty Applier

The author proposes to summarize the three international judicial institutions' approaches towards sustainable development as "treaty applier", treaty interpreter, and judicial codifier of international law. Applying Viñuales's framework in the present context, this part examines

[13] Viñuales, "Sustainable Development", 293.
[14] Viñuales, "Sustainable Development".
[15] Viñuales, "Sustainable Development".
[16] Viñuales, "Sustainable Development", 296-299.

the normative functions of sustainable development in the present Advisory Opinions. ITLOS's engagement with sustainable development in its Climate Change Advisory Opinion was limited to a textual application of two sustainability-related treaties based on distinct legal grounds. First, the United Nations Convention on the Law of the Sea (UNCLOS) is expressed as the Tribunal's primary applicable law,[17] not only in contentious cases but also in advisory proceedings.[18] It has been the case that UNCLOS contains only two sustainability provisions, namely Articles 61(3) and 119(1), setting the "maximum sustainable yield" (MSY) requirement for measures for the conservation of the living resources in the exclusive economic zone and the high sea. Here, sustainable has a different meaning from that in sustainable development. It shall not be individually understood, but in the inseparable context of MSY. It is defined as the largest average catch that can be captured from a species over an indefinite period under prevailing environmental conditions without depleting its population. Based on the logistic growth curve of a population in biology and ecology theories, MSY's technical nature distinguishes it from the value reconciliation process under sustainable development. It can thus be said that the concept has not performed an architectural function in UNCLOS in a strict definition, with which Viñuales may agree, since he did not make reference to the Convention.[19]

Further, MSY under Articles 61(3) and 119(1) specifies, and therefore substitutes sustainable development before the Tribunal. It does have such problems as focusing on individual species instead of the ecological system and representing an idealistic stance that leaves no redundancy for implementation errors or the risk of drastic environmental change, but its individual operability as a primary rule of obligation is inarguable. Accordingly, in the advisory opinion, MSY performs architectural and decision-making functions, while the function of sustainable development remains interpretive only.

Secondly, to provide the international legal background of the advisory opinion, the Tribunal summarized the UNFCCC, which

[17] Art. 293(1), United Nations Convention on the Law of the Sea, 10 December 1982, 1833 U.N.T.S. 3 (UNCLOS).

[18] *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, ITLOS advisory opinion of 2 April 2015, I.T.L.O.S. Reports 2015, para. 80-84; ITLOS Climate Change Advisory Opinion, paras. 123-127.

[19] See generally, Viñuales "Sustainable Development".

covered the sustainability-related Articles 2 and 3. The former stipulates UNFCCC's objectives, including 'to enable economic development to proceed in a sustainable manner'.[20] The latter establishes the Convention's governing principles, including sustainable development. Specifically, Article 3(4) emphasizes the dual nature of sustainable development as both a right and an obligation of States that are opposable to each other. The principle's function was understood as 'achieving the objective of the UNFCCC and the implementation of its provisions',[21] instead of providing a specific primary rule. Under Viñuales's theory, this meant that sustainable development in Articles 2 and 3 played architectural and interpretive functions, but not that of decision-making.

For the relevance of UNFCCC as a whole to the question the Tribunal was seised of, it should be clarified that the Convention was not an applicable law but served as an interpretive guidance. Here, both sub-questions presented before the Tribunal focused on State Parties' obligation under UNCLOS,[22] and thus, the Tribunal should not apply any UNFCCC provisions. Accordingly, UNFCCC is not one of the 'other rules of international law not incompatible with [UNCLOS]' for the purpose of applicable law in advisory proceedings before the Tribunal.[23]

Instead, Articles 2 and 3 of UNFCCC, as the Convention's sustainability provisions, were implicitly taken into account by the Tribunal when it confirmed UNCLOS obligations. With UNFCCC's nearly universal membership,[24] its State Parties encompass all of those of UNCLOS.[25] The Tribunal was thus exempted from the requirement to prove

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20 ITLOS Climate Change Advisory Opinion, para. 68.

21 ITLOS Climate Change Advisory Opinion, 69.

22 "What are the specific obligations of State Parties to the United Nations Convention on the Law of the Sea (the 'UNCLOS'), including under Part XII: (a) to prevent, reduce and control pollution of the marine environment in relation to the deleterious effects that result or are likely to result from climate change, including through ocean warming and sea level rise, and ocean acidification, which are caused by anthropogenic greenhouse gas emissions into the atmosphere? (b) to protect and preserve the marine environment in relation to climate change impacts, including ocean warming and sea level rise, and ocean acidification?" ITLOS, ibid, 139.

23 Art. 293(1), UNCLOS.

24 Signatories: 165; parties: 198. "United Nations Framework Convention on Climate Change, New York, 9 May 1992", UN Treaty Series: https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXVII-7&chapter=27&Temp=mtdsg3&clang=_en (accessed 24 May 2026).

25 Signatories: 157; parties: 172. "United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982", UN Treaty Series: https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en (accessed 24 May 2026).

the customary status of UNFCCC provisions before applying the general rule of treaty interpretation under Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT). Accordingly, for the purpose of interpreting and applying UNCLOS, UNFCCC provisions constitute any relevant rules of international law applicable in the relations between the parties that shall be taken into account.[26] Another ground to relate UNFCCC with the Tribunal's interpretation of UNCLOS obligation may be found in UNCLOS, under the context of marine pollution prevention. Articles 207(1) and 212(1) of UNCLOS require State Parties to 'tak[e] into account internationally agreed rules' when adopting laws and regulations against land-based and atmospheric pollutions of the marine environment. To clarify, the Tribunal's scrutiny of either obligation shall not reach a level of treaty application. The obligation is primarily procedural, and a substantive violation is found only in cases of apparent contravention of internationally agreed rules like the UNFCCC.

To summarize, ITLOS was merely a treaty applier concerning sustainability in its Climate Change Advisory Opinion. Its direct engagement with sustainable development was limited to a textual replication of the MSY test under Articles 61(3) and 119(1) of UNCLOS, without further clarification or elaboration. For UNFCCC, the Court did not apply the Convention's sustainability-related Articles 2 and 3. Instead, they were only taken into account for the purpose of interpreting UNCLOS, and did not exhibit substantial influence on that interpretation. Under Viñuales's theory, the Advisory Opinion did not provide evidence that sustainable development had become a fully entitled legal norm.

### 3.2. IACtHR as Treaty Interpreter

Sustainable development continued to perform an interpretive function in the IACtHR advisory opinion, where it went further than ITLOS by interpreting sustainability-related treaty provisions beyond a mere textual reading. The Court started by, like ITLOS did, citing UNFCCC's codification of sustainable development as one of the principles that are 'give[n] special prominence'.[27] However, unlike the Tribunal, the Court expressly clarified, in a prior paragraph, that it was not interpreting

[26] Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331 (VCLT).
[27] IACtHR Climate Emergency Advisory Opinion, para. 126.

UNFCCC or other instruments as it was not mandated to do so; instead, they were invoked by the Court as 'supplementary sources for interpretation of the content of the provisions of the American Convention and the Protocol of San Salvador to which the request relates…'.[28]

Subsequently, the Court gave a landmark definition of the concept:

> …a process aimed at the constant improvement of the well-being of the entire population, which necessarily requires the protection of all human rights and the environment as a means of ensuring, in the long term, the resilience of both natural and human systems.[29]

The definition was landmark as it was the first single-sentence, legal definition of sustainable development given by an international judicial institution. The infamous *Gabčíkovo-Nagymaros Project* jurisprudence, actually, cannot be said to have defined sustainable development; instead, the 'need to reconcile economic development with protection of the environment' is understood as 'aptly expressed in the concept of sustainable development' instead of constituting its full meaning, meaning that additional expression was possible, and thus the process of definition was incomplete.[30]

Looking further into its substance, IACtHR's definition was both new and familiar. It was new for ICJ and the inter-State tribunal in the *Iron Rhine Arbitration*, as it replaced the balancing exercise between economy and environment[31] with that between human rights and environment, and set the ultimate purpose of such an exercise to be the long-term resilience of both natural and human systems, which may also serve as the standard for measuring implementation effectiveness. On the other hand, it was familiar to WTO DSB and progressive sustainable development law theorists, represented by the drafters and supporters of the New Delhi Declaration of Principles of International Law Relating

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28 IACtHR Climate Emergency Advisory Opinion, 38.

29 IACtHR Climate Emergency Advisory Opinion, 211.

30 *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, ICJ judgment of 25 September 1997, I.C.J. Reports 1997, para. 140.

31 ICJ, *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*; *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, Appeals, WTO Appellate Body report of 12 October 1998, WTO Doc WT/DS58/AB/R (US Shrimp-Turtle AB Report), para. 129, fn. 107; *Arbitration regarding the Iron Rhine ("Ijzeren Rijn") Railway between the Kingdom of Belgium and the Kingdom of the Netherlands*, Tribunal decision of 24 May 2005, R.I.A.A. XXVII, para. 59.

to Sustainable Development (New Delhi Principles).[32] In *US Shrimp-Turtle*, the Appellate Body stated that sustainable development 'has been generally accepted as integrating economic and social development and environmental protection' when it read the exhaustible natural resources exception under Article XX(g) of the General Agreement on Tariffs and Trade.[33] The New Delhi Principles include the principle of integration and interrelationship, which particularly recognizes the social or human rights values in the reconciliation process.[34]

After defining sustainable development and before using it to assist treaty interpretation, the Court identified the Cooperation Framework relating to the Subregional Action Program for the Sustainable Development of the American Gran Chaco[35] as one of the relevant regional norms on the environment and climate change.[36] Critically, the instrument was not subsequently invoked in the rest of the advisory opinion, rendering the initial referencing rather formalistic. The Court then turned to answering the submitted questions[37] that it had reformulated[38] in two parts that together occupied the majority of the advisory opinion. In both of them, sustainable development played an indispensable interpretive function.

Part V clarified the present factual context of the climate emergency and existing international and regional responses.[39] The Court, in noting the complexity of the requisite response, recognized that sustainable development is a means to achieve both human and environmental rights. To prove such effectiveness, the Court referenced the SDGs as evidence, pointing to its roadmap function in promoting all human rights as well as its benefit to the collective addressing of climate change.[40] Since both issues to be proved here were matters of natural and social

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32 International Law Association, *New Delhi Declaration of Principles of International Law Relating to Sustainable Development*, 6 April 2002 (New Delhi Principles).

33 US Shrimp-Turtle AB Report, para. 129, fn. 107.

34 Section 7, New Delhi Principles.

35 Cooperation Framework relating to the Subregional Action Program for the Sustainable Development of the American Gran Chaco, March 2009.

36 IACtHR Climate Emergency Advisory Opinion, para. 150.

37 *Request for an advisory opinion on the Climate Emergency and Human Rights submitted to the Inter-American Court of Human Rights by the Republic of Colombia and the Republic of Chile*, IACtHR, 9 January 2023, 1.

38 IACtHR Climate Emergency Advisory Opinion, para. 28.

39 IACtHR Climate Emergency Advisory Opinion, para. 31.

40 IACtHR Climate Emergency Advisory Opinion, para. 212.

science instead of law, sustainable development only presented an architectural function in relation to policy and legal instruments, but not any interpretive or decision-making function. Further, in reading Article 15 of the Inter-American Democratic Charter,[41] the Court stated that an effective response to the climate emergency in line with sustainable development shall not be a ground for the derogation of the democratic rule of law for the protection of human rights.[42] Here, sustainable development was further understood as an equal, if not higher, status of democracy compared with climate-related environmental and human rights protection. A radical reading of the advisory opinion would even lead to the former's hierarchy over the latter, meaning that political rights in procedural and substantive terms shall be guaranteed in inter-American and domestic climate governance.

Part VI addressed inter-American human rights obligations of States in the climate emergency context.[43] The Court understood sustainable development as shedding light on substantive rights, specifically the right to a healthy environment. In the climate emergency context, in addition to the governmental obligation of immediate response, adopting progressive measures is required.[44] A provided example of an immediate obligation was the existence of a sustainable development strategy at both levels of national legislation and policy;[45] for progressive obligations, the given example was adopting measures to comply with this strategy.[46] Some have thus understood that sustainability became an immediate legal duty,[47] which makes sense if compared with positive human rights obligations of States for their same requirement that legislation and policy be made and implemented for their realization. The IACtHR Advisory Opinion thus provides latest evidence that a decision-making function was performed by sustainable development, proving the principle's status beyond normative concept and into a fully entitled legal norm, in the inter-American regional system.

41 Inter-American Democratic Charter, 11 September 2001, 40 ILM 1289.
42 IACtHR Climate Emergency Advisory Opinion, para. 214.
43 IACtHR Climate Emergency Advisory Opinion, para. 32.
44 IACtHR Climate Emergency Advisory Opinion, para. 368.
45 IACtHR Climate Emergency Advisory Opinion, para. 371.
46 IACtHR Climate Emergency Advisory Opinion, para. 372.
47 Borràs-Pentinat, "The IACtHR Climate Emergency Advisory Opinion", 9.

In terms of specific human rights, the Court read sustainability as realizing the right to development within the limits of environmental protection, and invoked the SDGs as evidence for an international consensus on that reading.[48] Accordingly, from the Court's view, in the step-by-step context, the principal human right that shall be reconciled with the right to a healthy environment is development, and the absence of such a reconciliation hampers sustainability. Some last observations were made that poverty and inequality constitute obstacles to sustainable development,[49] and that measures that are 'blatantly contrary to the aim of advancing towards sustainable development' violate multiple provisions in the inter-American human rights system.[50]

The IACtHR's willingness to crystallize sustainable development into a justiciable duty contrasts sharply with more conservative assessments of the concept's legal utility. Professor Vaughan Lowe famously characterized sustainable development as a mere interstitial norm, a meta-principle that guides judicial reasoning but lacks the independent normative force of a primary rule.[51] Yet, as Borràs-Pentinat argues, the IACtHR opinion functionally elevates the concept within the inter-American system by deriving concrete, positive State obligations from it, such as the immediate duty to implement a sustainable development strategy.[52] Consequently, the IACtHR provides the most compelling evidence to date that sustainable development can transcend its interstitial origins and exercise a decision-making function.

### 3.3. ICJ as Judicial Codifier of International Law

Progressive development of international law and its codification are the two international law-making functions of the UN General Assembly (GA) stipulated in Article 13(1) of the UN Charter.[53] According to the official definition, the former drafts legal rules 'in fields that have not yet been regulated by international law or sufficiently addressed in State practice'; the latter specifies and systematizes established rules of international

48 IACtHR Climate Emergency Advisory Opinion, 370.
49 IACtHR Climate Emergency Advisory Opinion, para. 375.
50 IACtHR Climate Emergency Advisory Opinion, para. 376.
51 Lowe, "Sustainable Development", 31.
52 Borràs-Pentinat, "The IACtHR Climate Emergency Advisory Opinion", 9.
53 Charter of the United Nations, 26 June 1945, XV U.N.C.I.O. 355 (UN Charter).

law 'on subjects that have already been extensively covered by State practice, precedent, and doctrine'.[54] The formal role to encourage the codification of international law is mandated to the UN GA,[55] carried out by established bodies like the International Law Commission and the GA's Sixth (Legal) Committee, and institutionally assisted by the Codification Division of the UN Office of Legal Affairs of the Secretariat.

The mandate is, indeed, not to ICJ or other international courts and tribunals, but borrowing the dichotomy from GA helps to describe the unparalleled normative influence of a decision of the principal judicial organ of the UN,[56] which is equally, if not more, recognized than the various international law-making products under the GA mechanisms. More generally, all three present Advisory Opinions had been expected to comply with judicial instead of legislative functions while avoiding platitudinous articulation of overly broad legal principles.[57] In the present Advisory Opinion, the Court essentially served a codification role in the field of sustainable development, while carefully avoiding acts of progressive development. The Court was silent on some key but still contested issues.[58] The cautiousness, at least in form, was freshly reiterated in the present Advisory Opinion by emphasizing the Court's judicial and not legislative function.[59]

First and fundamentally, unlike most other legal sources, the principle of sustainable development was actively engaged by the Court without a directive from the GA. In advisory proceedings, the applicable law is subject to a limited reading of most directly relevant applicable law,[60] instead of every rule of international law, including the obligations contained therein.[61] When GA sought the Court's opinion on question (a), sustainable development was not among the rules and principles that GA required the Court to have particular regard.[62] Nonetheless, the Court

54 Art. 15, Statute of the International Law Commission, G.A. Res. 174 (II) (21 November 1947).
55 Art. 13(1), UN Charter.
56 Art. 92, UN Charter.
57 Bodansky, "Advisory Opinions on Climate Change", 189.
58 Odermatt, "What the Court Didn't Say", 296-303.
59 ICJ Climate Change Advisory Opinion, para. 100; *Fisheries Jurisdiction (United Kingdom v. Iceland)*, Merits, ICJ judgment of 25 July 1974, I.C.J. Reports 1974, para. 53.
60 *Legality of the Threat or Use of Nuclear Weapons*, ICJ advisory opinion of 8 July 1996, I.C.J. Reports 1996(I), para. 34; ICJ Climate Change Advisory Opinion, para. 114.
61 ICJ Climate Change Advisory Opinion, para. 114.
62 A/RES77/276, 29 March 2023.

decided to include it in the list of other principles that are potentially applicable.[63]

Secondly, the Court confirmed that the principle of sustainable development constituted a principle of international law, and was an applicable law for question (a) of the present Advisory Opinion.[64] A two-level approach was developed: the Court first identified applicable rules and principles, and then discussed whether any of them is denied its applicability by the interpretive principle of *lex specialis*.[65] To prove the status of sustainable development as a legal principle, the Court paid attention to evidence such as the principles provisions in climate change treaties, and non-treaty sources like the SDGs.[66] Here, the Court implied a normative meaningfulness of the SDGs, which was a shared view with IACtHR as discussed above. The Court summarized the international community of States' attitude towards sustainable development as continuous and uncontested universal recognition.[67] Referencing the applicable law before the Court stipulated under Article. 38(1) of the ICJ Statute, the Court found from SDGs either an *opinio juris* for the purpose of an international custom,[68] or common recognition by the civilized nations for the purpose of a general principle of law.[69] This was another novel discovery, with judicial support to be found in the IACtHR's Advisory Opinion.

Thirdly, the Court impliedly endorsed part of Viñuales's normative concept theory and went further. According to the Advisory Opinion, the principle guides not only 'the interpretation of certain treaties", but also "the determination of rules of customary international law'.[70] The former was an example of an interpretive function, and the latter

63 ICJ Climate Change Advisory Opinion, para. 146.

64 '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?' ICJ, ibid, para. 88. The Court understood the scope of question (a) as "the obligations of States under international law to ensure the protection of the climate system and other parts of the environment". ICJ Climate Change Advisory Opinion, para. 98.

65 ICJ Climate Change Advisory Opinion, para. 114.

66 ICJ Climate Change Advisory Opinion, 147.

67 ICJ Climate Change Advisory Opinion.

68 Art. 38(1)(b), Statute of the International Court of Justice, 26 June 1945, 59 Stat. 1055, 33 U.N.T.S. 993 (ICJ Statute).

69 Art. 38(1)(c), ICJ Statute.

70 ICJ Climate Change Advisory Opinion, para. 147.

went beyond the treaty regime and entered into the field of custom. Considering together the Court's attitude here and previously on the normativity of SDGs, it is now clear that the Court was inclined to customary international law to find a non-treaty source for the principle of sustainable development.[71] That was consistent with Viñuales's silent denial of the potentiality of a general principle of law of sustainability. Having identified generally applicable rules and principles of international law, the Court stated that *lex specialis* did not apply to the relationship between climate change treaties and other rules of international law, including sustainable development.[72] The principle was categorized as a 'guiding principle[s] for the interpretation of various applicable rules and principles', which echoed Viñuales's belief that sustainable development's normative functions include an interpretive function, but not on the level of decision-making.[73] An express denial was found later when interpreting the climate change treaties to determine the State Parties' obligation.[74] Also, the Court textually read the UNFCCC requirement to take into account principles listed under its Article 3, including sustainable development,[75] and provided an example of the guiding role of sustainable development in the context of the duty to co-operate.[76]

This cautious textual approach reflects a deliberate exercise in judicial restraint. Dr. Jed Odermatt notes that the Court frequently relies on such restraint to preserve its institutional authority, choosing to remain silent on deeply contested political issues rather than risk non-compliance or backlash.[77] By classifying sustainable development primarily as an interpretive guide, the ICJ avoided the progressive law-making

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71 Tigre et al, "The ICJ's Advisory Opinion on Climate Change", 20. For a counter-argument that the Court recognized those "other principles" as general principles of law, see Wewerinke-Singh, "Harmonizing Sources, Hardening Duties", 49-52. Some other discussions avoided stating the principles' status of source(s). E.g., Foster, "The 2025 International Court of Justice Advisory Opinion on Obligations of States in respect of Climate Change", 791-793.

72 ICJ Climate Change Advisory Opinion, paras. 162-171.

73 ICJ Climate Change Advisory Opinion, para. 172.

74 ICJ Climate Change Advisory Opinion, para. 181: "As with the other principles, the Court observes that the principle of sustainable development does not in itself create specific rights and obligations for States, but informs the interpretation of the obligations under the climate change treaties."

75 ICJ Climate Change Advisory Opinion, para. 198.

76 ICJ Climate Change Advisory Opinion, para. 303: "For example, sustainable development is furthered through close and continuous co-operation in the context of climate change."

77 Odermatt, "What the Court Didn't Say", 296-303.

seen in the IACtHR. Nevertheless, this restraint does not entirely negate the concept's evolving status. As Professor Margaretha Wewerinke-Singh observes, the Court's formal recognition of these principles inherently contributes to hardening duties in international climate law, subtly elevating soft-law objectives into customary interpretive frameworks.[78]

Fourthly, while the Court remained silent on adding a social or human rights dimension to sustainable development, it endorsed the principle's relevance to human rights to life. In discussing the climate change obligation of States under international human rights law, the Court cited General Comment No. 36 of the UN Human Rights Committee on the right to life.[79] The cited paragraph recognized environmental degradation, climate change, and unsustainable development as 'some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life'.[80] While the citation aimed at proving environmental degradation and climate change as major threats to the right to life, the Court's endorsement of General Comment No. 36 as a whole gave the statement authoritative weight. It was thus implied that a causal relationship exists between sustainable development and the enjoyment of human rights.

Nonetheless, from Judge Hanqin Xue, sustainable development could have provided more guidance to the understanding of the UNFCCC obligations of climate mitigation and adaptation.[81] For climate mitigation specifically, the principle guides States 'to change current unsustainable patterns of production and consumption to move over time towards sustainable development'.[82] For both mitigation and adaptation, all related measures shall be guided by the balancing exercise among economic, social, and environmental considerations.[83] Her opinion also endorsed the integration of social values into sustainable development, finding particular normative support from the 2005 World Summit Outcome adopted by the GA.[84] She concluded that the climate change treaty regime

78 Wewerinke-Singh, "Harmonizing Sources, Hardening Duties" 49-52.

79 ICJ Climate Change Advisory Opinion, para. 377.

80 UN Human Rights Committee, *General Comment No. 36 on Article 6: Right to Life*, 30 October 2018, UN doc. CCPR/C/GC/36, para. 62.

81 ICJ Climate Change Advisory Opinion, Separate Opinion of Judge Xue, para. 2; see also Boshoff and Damtew, "Can Africa Still Drill?", 238-239.

82 ICJ Climate Change Advisory Opinion, Separate Opinion of Judge Xue, para. 27.

83 ICJ Climate Change Advisory Opinion, Separate Opinion of Judge Xue, paras. 36, 41.

84 ICJ Climate Change Advisory Opinion, Separate Opinion of Judge Xue, para. 37.

had fully embraced the principle of sustainable development, and was regretful that the Court did not articulate more on the latter's impact on the former.[85]

## 4. A Political Explanation

### 4.1. Limitations of the Positive Approach

As a fundamental assumption of international legal positivism, international law shows a scientific nature, and thus, questions like the legal status of sustainable development shall have one definite answer at a specific period. Positivism remains a mainstream approach to the comparative study of the present Advisory Opinions.[86] However, since the three Advisory Opinions' understandings of sustainable development have been revealed to be different instead of uniform, the positivists encounter two challenges in justifying those differences.

First, they cannot be addressed by *lex temporalis*. As a customary international law codified in Article 28 of VCLT, treaties do not have any retroactive effect unless a different intention is established. The principle applies *mutatis mutandis* to the non-treaty applicable law of the ICJ and other international courts and tribunals. Given that the present Advisory Opinions were issued within fourteen months, the treaty and customary laws they applied as to the status of sustainable development were unlikely to have substantially evolved over that short period of time. The argument is unlikely to stand that the Advisory Opinions respectively reflected the status of the law at the time of their issuance.

Secondly, driven by judicial-centrism, positivists avoid asserting the incorrectness of an international judicial decision. Instead, when one of them presents a *prima facie* conflict with another, harmonization is sought by proving that they essentially deal with separate issues. A prominent example is the contrasted definition between the ICJ and the International Criminal Tribunal for the former Yugoslavia (ICTY) on the problem of attribution. On the surface, for the issue of attribution of a non-State entity's conduct over a State, the effective control test

[85] ICJ Climate Change Advisory Opinion, Separate Opinion of Judge Xue para. 50.
[86] See generally, Tigre et al, *The ICJ's Advisory Opinion on Climate Change*.

established by the ICJ in *Nicaragua v. US*[87] was rejected by the ICTY in *Tadić*, who instead proposed its overall control test.[88] It is subsequently emphasized by both institutions that the ICJ saw no problem in applying the overall control test to determine whether or not an armed conflict is international or not.[89] By drawing a boundary for their scope of application, the *prima facie* norm conflict was overcome. However, the *prima facie* conflict here concerned the legal status of a concept, which was a minimum unit problem that disallows further separation. Regardless of whether the Advisory Opinions might have dealt with different aspects of the problem, they should not contrast each other to any degree, but they have.

Admittedly, from the perspective of critical international legal theory, the Advisory Opinions' divergent understandings can each find justification for themselves and rebuttal against the others by switching between descending and ascending arguments that either restrict or promote States' legal freedom in the international domain.[90] To transcend the permanent debate of whether the present Advisory Opinions had correctly interpreted and applied international law, a political perspective may help better understand their differences as a fact. By situating the three approaches in the broader, intra- and inter-institutional political context, this perspective proposes an explanatory framework of why largely different roles were taken by international adjudicative bodies, and assesses whether they have helped those bodies to accumulate, instead of lose, their legitimacy in the international community.

87 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, ICJ judgment of 27 June 1986, I.C.J. Reports 1986, paras. 114-122.

88 *Prosecutor v. Dusko Tadić*, Appeals, ICTY decision of 2 October 1995, IT-94-1-AR72, paras. 115-145.

89 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, ICJ judgment of 26 February 2007, I.C.J. Reports 2007, para. 404; *Prosecutor v. Jadranko Prlić et al.*, Appeals, ICTY judgment of 29 November 2017, IT-04-74-A, para. 238.

90 Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument*, 58-68.

### 4.2. The 'International Judicial Relay'

While domestic courts are commonly constrained by *stare decisis*, this is not the case within and among international judiciaries,[91] allowing the latter to depart from their own precedents and make express or secret cross-references among each other. Previous scholarly accounts have largely characterized the relationship among these advisory proceedings either as an environment of institutional competition or as a transnational, horizontal judicial dialogue. Dr. Maria Antonia Tigre, for instance, conceptualizes the simultaneous requests as a trio of initiatives characterized by overlapping jurisdictions and a race to define climate obligations.[92] Another paradigm is transnational and horizontal judicial dialogue, which primarily emphasizes how knowledge spreads and consensus forms among judiciaries across national borders that are not formal subsidiaries of one another, through the formal channel of opinion reference and also informal ones like personal connections among Judges.[93] Both paradigms go beyond normative analysis and take a functional view on the present Advisory Opinions and their contribution to the institutions' performance of duty. However, the competition paradigm makes less emphasis on the collaborative feature of the decisions, and the dialogue paradigm falls short of explaining the deliberate, sequential escalation of normativity across the decisions. To further their functional observation, the author suggests that the temporal sequence and substantive layering of the present Advisory Opinions may be best described as an international judicial relay. It allowed each international judiciary to play to their respective strengths to tackle the various challenges at different stages in the evolution of the concept of sustainable development, driven by their pursuit of institutional legitimacy. The institutions function not as isolated competitors nor mere conversationalists, but as a collective machinery. Supported by broader legal theories of institutional effectiveness,[94] each court maximized its

[91] For some examples of provision against *stare decisis* in the rules of international courts and tribunals, see Art. 33, Annex VI, UNCLOS, Statute of the International Tribunal for the Law of the Sea; Art. 59, ICJ Statute; Art. 68(1), American Convention on Human Rights "Pact of San José, Costa Rica", 18 July 1978, 1144 U.N.T.S. 123.

[92] Tigre, "It Is (Finally) Time for and Advisory Opinion on Climate Change", 704-721.

[93] Samuel and Bañuelos, "The Role of Advisory Opinions in International Law in the Context of the Climate Crisis", 122-127.

[94] Shany, Assessing the Effectiveness, 34.

unique structural legitimacy: passing the baton of normative clarification to the next to progressively harden the principle of sustainable development.

ITLOS protected its legitimacy by remaining within the strictures of UNCLOS and taking conservative stances. The preserved legitimacy under the topic of sustainable development was invested in other areas with more pressing needs, like the very effort to establish a precedent of issuing an advisory opinion on climate change, as well as the burden to articulate contested, fundamental issues like finding anthropogenic greenhouse gas emissions as marine pollution.[95] The IACtHR bolstered its legitimacy by championing an evolutive interpretation that resonated with regional values. Its regional authority means reduced conflicts in States' positions and interests to absorb and reconcile, not only fewer in number, but also more similar in essence due to regional integration and social similarity, allowing for broader space for radical, progressive interpretation. And considering its activist tradition, evading the issue of sustainability might have instead hampered its legitimacy. Finally, the ICJ maximized its legitimacy by acting as a judicial codifier, carefully extending the law through "uncontested universal recognition" rather than judicial law-making. For its fundamental reluctance to embrace a social or human rights dimension of sustainable development, the reason was likely technical, as it lacked sufficient reason to depart from the *Gabčíkovo-Nagymaros Project* jurisprudence.

Compared with the time of Viñuales's conclusion in 2021, the present Advisory Opinions enhanced the normativity of sustainable development in various dimensions. All three of them endorsed its status as a legal principle in the climate change treaty regime. The ICJ further implied its general applicability in treaty interpretation and custom identification. The collective effort of the present Advisory Opinions has solidified its interpretive function to a degree that makes it an indispensable guidance for future international adjudications whenever they involve competing interests in economic, society and human rights, and environment. Lastly, while the principle is yet to perform a decision-making function at international level, the IACtHR Opinion recognized it as a source of State obligation under the inter-American regime.

[95] ITLOS Climate Change Advisory Opinion, paras. 159-179; Afzal and Ahmad, "The ITLOS Advisory Opinion on Climate Change and Marine Pollution", 70-71.

The present Advisory Opinions were not the first batch of attempted runners, nor did they conclude the relay. Prior attempts have been made as early as in 2011, targeting a GA resolution towards ICJ, including one specific to sustainable development, while efforts towards ITLOS is actually a rather recent campaign that began in around 2021.[96] Subsequent to the present Advisory Opinions, what is left is a novel foundation that will reverberate across the fragmented fields of international law and even into contentious proceedings. The pending request for an advisory opinion before the African Court on Human and Peoples' Rights on the obligations of States with respect to the climate change crisis and its interaction with the present Advisory Opinions is worth expecting.[97] Moreover, for the same pursuit of legitimacy, international adjudicative bodies in specialized areas will be reminded, if not pulled, by the present Advisory Opinions to reference their emphasis on sustainable development and apply the principle in their domains. It is a fair presumption that with strengthened normativity, sustainability will make more appearances in contentious cases, such as WTO DSB, investment tribunals, and even domestic courts and tribunals when they apply international law. Meanwhile, contract-based disputes remain governed by domestic laws, where the influence of sustainable development will be, as it has been, limited and indirect, unless the principle is incorporated or transformed into the domestic constitutional order.

## 5. Conclusion

The present Advisory Opinions issued by the ITLOS, the IACtHR, and ICJ offer different but connected views on sustainable development. This paper shows that while these international judiciaries do not agree on a single definition or legal status for the principle, their differences are not accidental. Instead, each court chose a specific role, either applier, interpreter, or codifier, to stay within its legal mandate and maintain its professional standing.

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[96] Barnes, "An Advisory Opinion on Climate Change Obligations Under International Law", 180-81.

[97] *Request for Advisory Opinion No.001 of 2025: In the matter of a request by the Pan African Lawyers Union (PALU) for an Advisory Opinion on the obligations of States with respect to the climate change crisis*, AfCtHPR, 02 May 2025.

By looking at those decisions together through the lens of how they dealt with sustainable development, their successes are observable in adding normative weights to the concept towards a practical legal tool for international justice and equity. Even though sustainability has yet to independently produce a legal obligation of States that is justiciable in a case, its guidance on other rules and principles of international law has been strengthened. The new foundation will likely influence future legal battles in areas like international trade and investment, and private lawsuits alike. Ultimately, the diversified ways that the principle was handled show how international judicial bodies balance the need for legal development with that of earning credibility in a complex political world.

Building on the framework of adjudicative legitimacy and the judicial relay, future research from a political perspective may investigate how the present Advisory Opinions will disseminate among international and domestic courts, and how they will balance between the IACtHR's radical, human-centric definition of sustainable development or the ICJ's more cautious approach. Investigating their competing pulls helps explain whether and why the international legal order is moving toward coherence or remaining fragmented. Meanwhile, while celebrating the enduring explanatory power of Viñuales's theory, the scrutiny of his conclusion would be permanent. As the principle of sustainable development continues to obtain normativity, future projects may track whether it eventually transforms from an interpretive guidance into a primary rule capable of a decision-making function under general international law, as it has in the inter-American human rights system.

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