State Responsibility and the ICJ's Advisory Opinion on Climate Change

One Step at a Time

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After the International Court of Justice (ICJ) issued its advisory opinion on Obligations of States in Respect of Climate Change, many observers were quick to conclude that it "[opens] the door to a cascade of lawsuits" (Politico). The opinion is indeed an important confirmation that the rules of State responsibility apply in the climate change context. In this post, I assess the ICJ's treatment of State responsibility in light of the particularities of climate change, especially the plurality of States that contribute to, and suffer from, climate harm. The advisory opinion places trust in the capabilities and flexibility of the applicable rules, yet defers complex decisions on questions like causation to a case-by-case assessment.

Primary Obligations and State Responsibility

In the advisory opinion, the ICJ addressed two questions. Question (a) is concerned with obligations of States "to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases". Question (b) covers "the legal consequences under these obligations for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment". While question (b) is the one that speaks directly to the law of State responsibility, the answer to question (a) also has considerable bearing on this issue. That is because the law of State responsibility does not, itself, set out the content of "primary" rules, such as the obligations arising for States under the Paris Agreement. Instead, the rules of State responsibility are "secondary" rules, which means they presuppose the existence of a primary obligation and determine responsibility for its breach and the legal consequences flowing therefrom.

In the context of climate change, a dearth of robust primary obligations is sometimes seen as a hurdle to State responsibility, as several high-emitting States argued during the ICJ proceedings. This hurdle appears much smaller after the ICJ's response to question (a). Among other things, it espoused a strong interpretation of obligations under the climate treaties. It stated that the obligation to prepare, communicate, and maintain nationally determined contributions (NDCs) to the 1.5°C temperature goal under Article 4(2) of the Paris Agreement is subject to a "stringent" due diligence standard that limits the States parties' discretion in preparing their NDCs (paras. 237-249). The implementation of NDCs through mitigation measures is also not simply a domestic issue, but an international obligation of conduct (paras. 250-254). Thus, the ICJ identified in these obligations a substantive content, which allows for a strict assessment of a potential breach.

In addition, the ICJ put forth a "stringent" due diligence standard for the customary duty to prevent significant harm to the environment – possibly the most relevant primary obligation for State responsibility (paras. 272-300). Importantly, "a risk of significant harm may also be present in situations where significant harm to the environment is caused by the cumulative effect of different acts undertaken by various States [...], even if it is difficult in such situations to identify a specific share of responsibility of any particular State" (para. 276). Due diligence then requires States to, among other things, put in place and enforce "regulatory mitigation mechanisms that are designed

to achieve the deep, rapid, and sustained reductions of [greenhouse gas (GHG)] emissions that are necessary for the prevention of significant harm to the climate system" (para. 282). By elaborating specific and demanding criteria, the advisory opinion facilitates the concrete assessment of whether a State's conduct breaches the obligation to prevent significant harm to the climate system and other parts of the environment.

Applicability of the Law of State Responsibility

Turning to the secondary rules of State responsibility, the ICJ's first significant finding is that the customary rules of State responsibility, largely reflected in the International Law Commission's Articles on State Responsibility (ARSIWA), are applicable in the context of climate change. Applicability was contested in the proceedings, with Kuwait and a few others arguing that the climate regime constitutes *lex specialis* and excludes the general rules of State responsibility. These arguments were rejected by the majority of participating States and ultimately the ICJ.

The ICJ convincingly argued that neither the text, context, nor object and purpose of the climate treaties (especially Articles 8 and 15 of the Paris Agreement and Article 24 of the UN Framework Convention on Climate Change (UNFCCC)) support an intention of the parties to derogate from the general rules of State responsibility (paras. 410-420). The unequivocal rejection of the *lex specialis* argument means that, at the very least, it has become impossible for States to avoid a substantive discussion about responsibility and its legal consequences.

Assessing State Responsibility

In applying the law of State responsibility, the ICJ pronounced on several aspects arising from the "unprecedented nature and scale of harm resulting from climate change" (para. 421): attribution, responsibility for cumulative harms, and causation. It did so at a general level without an individualized assessment of any State's conduct.

Regarding attribution, the ICJ emphasized that the internationally wrongful act to be attributed to a State is not the GHG emission *per se*, but the breach of obligations pertaining to the protection of the climate system from the harm of those emissions (paras. 427, 429). Accordingly, it is not necessary to attribute the – often private – acts that directly emit GHGs to the State. Instead, the relevant State conduct can be found in the regulatory and legislative spheres. Namely, "[f]ailure of a State to take appropriate action to protect the climate system from GHG emissions — including through fossil fuel production, fossil fuel consumption, the granting of fossil fuel exploration licenses or the provision of fossil fuel subsidies — may constitute an internationally wrongful act which is attributable to that State" (para. 427). By explicitly naming this range of relevant acts and omissions, the opinion highlights the importance for States to fulfil their obligations in all these areas, or otherwise be confronted with the legal consequences of State responsibility (see also the joint declaration of Judges Bhandari and Cleveland).

A more complicated issue, and one highly contested in the proceedings, concerns the plurality of responsible and injured States. Though this issue is more relevant to causation and reparation, the ICJ still addressed it in the section of its opinion dealing with attribution. It considered that, while "the fact that multiple States have contributed to climate change may indeed increase the difficulty of determining whether and to what extent an individual State's breach of an obligation [...] has caused significant harm to the climate system [...], in principle, the rules on State responsibility [...] are capable of addressing [such] a situation" (para. 430). The ICJ further highlighted that "the responsibility of a single State for damage may be invoked without invoking the responsibility of all States that may be responsible" (para. 430).

Throughout its discussion of the cumulative nature of climate change, the ICJ places considerable trust in the capability of the rules on State responsibility to facilitate case-by-case assessments. However, it avoids engaging with the thornier details, such as how responsibility — and reparation — is to be allocated among a plurality of responsible States. As Paddeu and

Jackson observe, the ICJ's precise citation of its *Armed Activities* judgment in paragraph 430 implies some apportionment among the responsible States. This is opposed to a single responsible State having to make full reparation for the damage, which was the alternative, not-cited option from *Armed Activities*.

Relatedly, the ICJ addressed causation in a confident yet cursory manner. To begin with, the ICJ emphasised that causation of damage is required only for the determination of reparation, not for a finding of State responsibility (para. 433). For the causal link between an internationally wrongful act and the damage suffered, the ICJ distinguished two elements: first, whether an event (flooding, for example) can be linked to climate change; second, whether damage can be linked to a State or group of States (para. 437).

The first element – whether a specific event can be attributed to climate change – may be addressed by recourse to science (para. 437). Legally more problematic is the second element. The ICJ held that the standard of a "sufficiently direct and certain causal nexus" is generally "flexible enough to address the challenges" related to climate change (para. 436). Ultimately, causation must be established through an *in concreto* assessment (paras. 437-438). Notably, the conclusion that "while the causal link [...] is more tenuous than in the case of local sources of pollution, this does not mean that the identification of a causal link is impossible in the climate change context" (para. 438) suggests that this more tenuous link can suffice to establish the required causal nexus.

One unfortunate aspect of the causation section of the ICJ's opinion is its exclusive focus on harm suffered by injured States or individuals. This contrasts with earlier sections of the opinion, and especially the specification of the customary no-harm principle, which relates to preventing harm to *the climate system* (for example, paras. 274-279). This distinction is of both symbolic and legal significance. If harm to the climate system suffices, this may simplify some of the causation challenges. It would not be necessary to link a specific event to climate change or assess the significance of a State's conduct for damage brought about by that event. Instead, the focus would (only) be on a State's role in the causation of climate change. On this, the ICJ stated that "it is scientifically possible to determine each State's total contribution to global emissions, taking into account both historical and current emissions" (para. 429 — but see, critically, Judge Nolte). The focus of the opinion's causation section on harm to States aligns with the arguments articulated by most States in the proceedings. Still, it does not necessarily preclude the relevance of broader systemic harm; and neither do the rules of State responsibility.

Invoking State Responsibility

In answering question (b), the ICJ also addressed the special character of certain primary obligations. It described customary "obligations pertaining to the protection of the climate system and other parts of the environment from anthropogenic GHG emissions, in particular the obligation to prevent significant transboundary harm" as obligations *erga omnes* and all obligations under the UNFCCC and the Paris Agreement as obligations *erga omnes partes* (para. 440). Though this characterisation appears rather sweeping, it is convincingly justified by the common interest of all States in the protection of global environmental commons. This is reflected in the UNFCCC and Paris Agreement, which describe climate change as a "common concern of humankind."

In addition to the significance of the *erga omnes (partes)* nature for the normative pull of these obligations, it has legal consequences under the rules of State responsibility. Under Article 48(1) of ARSIWA, any State – not just an injured State – can invoke responsibility for breaches of these obligations. This broadening of the entitlement to invoke State responsibility constitutes a significant boost for potential inter-State litigation.

Practical Significance and Future Litigation

The ICJ's advisory opinion on climate change touches upon many critical issues of State responsibility, though often only superficially (see, critically, Judge Yusuf). To some extent, this was inevitable given that the ICJ was not asked to assess the responsibility of individual States or groups of States. The opinion is an

important confirmation that the well-established rules of State responsibility apply to climate change and that these rules are capable of addressing the complexities at hand. The advisory opinion – reached unanimously! – is poised to reverberate throughout courtrooms and political negotiations.

For a concrete assessment of the responsibility of individual States, litigation seems the logical path forward. With its specific references to potential breaches of due diligence obligations and its emphasis on the law's flexibility, the advisory opinion almost reads as inviting the opportunity to assess questions like attribution and causation *in concreto*. In this regard, Judge Nolte warns of "false hopes that climate litigation can supplement the mechanisms of financial transfers and the remedies for loss and damage contained in the climate change treaties" (para. 31). However, the opinion illustrates that the legal consequences of State responsibility go well beyond compensation payments (though these may be appropriate). Among the legal consequences is the duty of cessation, which "may require a State to revoke all administrative, legislative and other measures that constitute an internationally wrongful act" (para. 447). Importantly, cessation does not depend on the causation of harm. Litigation could, for instance, push States that are generally committed to efforts against climate change to adopt and implement more ambitious mitigation measures under their due diligence obligations of Article 4(2) of the Paris Agreement.

The elephant in the room is the question of jurisdiction. One possibility is the ICJ's jurisdiction under the optional clause, which has been recognized as compulsory by several high-emitting States, such as Australia, Germany, Norway, and the UK. Another option, which does not depend on jurisdiction and is not mentioned in the opinion, is to resort to lawful countermeasures.

By presenting the assessment – and potential litigation – of State responsibility for climate change as a realistic prospect, the opinion increases the immediate incentive for States to comply with their mitigation obligations. Thereby, the opinion promises a political impact even without actual contentious litigation. This impact extends to the broad range of acts (or omissions) identified by the ICJ as potential wrongful acts, including the production and consumption of fossil fuels.

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