When Custom Binds All States

Reflections on Customary International Law in the ICJ Climate Advisory Opinion

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In the triptych of inspiring advisory opinions by international courts and tribunals (see here, here, and here), the third iteration by the International Court of Justice (ICJ) did not disappoint. Its unanimous advisory opinion on climate change constitutes a landmark decision that will be with us for many years.

This blog reflects on the ICJ's trailblazing findings on customary international law as it applies to climate change.

The ICJ is unanimously of the opinion that

> *"customary international law sets forth obligations for States to ensure the protection of the climate system and other parts of the environment from anthropogenic greenhouse gas emissions. These obligations include the following: (a) States have a duty to prevent significant harm to the environment by acting with due diligence and to use all means at their disposal to prevent activities carried out within their jurisdiction or control from causing significant harm to the climate system and other parts of the environment, in accordance with their common but differentiated responsibilities and respective capabilities; (b) States have a duty to co-operate with each other in good faith to prevent significant harm to the climate system and other parts of the environment, which requires sustained and continuous forms of co-operation by States when taking measures to prevent such harm." (Operative Clause).*

This finding provides very clear guardrails for future negotiations and especially relations with States that have already decided, or might in the future decide, that the Paris Agreement and/or the UN Framework Convention on Climate Change UNFCCC are too onerous in the obligations imposed on States. The ICJ clarifies that rejecting or breaking the existing international treaty regime on climate change does not diminish any State's obligations to actually address the underlying global challenge that is climate change. This is a very welcome clarification and directly contradicts the opinions voiced by several States, such as the USA and Saudi Arabia.

While many previous ICJ rulings focused on finding customary international law by carefully evaluating State practice with corresponding *opinio juris*, this advisory opinion helpfully clarifies the content of existing customary international law obligations, their relationship with other sources of law, such as custom and general principles, and their legal consequences in cases of breaches.

This blog does not offer the space to extensively discuss all aspects, so it focuses on the ICJ's pronouncements on the content of applicable customary norms and the relationship between climate treaty law and corresponding customary international law.

Duty to Cooperate

The duty of States to cooperate, especially "[t]o achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character" (para. 140, citing Article 1 of the United Nations Charter), was emphasised by over 50 States and international organisations in their submissions as applicable in the climate context (see, for example, Bangladesh, Fn 12). This view is accepted by the ICJ. In its advisory opinion, the ICJ reviews international treaties, its own prior decisions, and other binding and non-binding declarations, and swiftly concludes that "in view of the related practice of States, the Court considers that the duty of States to co-operate for the protection of the environment is a

rule whose customary character has been established" (para. 140, citing the ITLOS advisory opinion). It also helpfully clarifies that the obligation to prevent significant harm to the environment has an intrinsic link with the duty to cooperate (para. 141) – a position many States had argued for (see, for example, Vanuatu). The ICJ ends its analysis there. This is understandable because elsewhere in the advisory opinion, the ICJ clarifies that several obligations to cooperate under the UNFCCC and the Paris Agreement mean that the customary duty to cooperate "serves as a guiding principle" for the treaty interpretation (para. 178). The ICJ does not take the next step – namely, to offer a legal opinion on the possible withdrawal from or lack of participation in the current climate treaty regime which might signify a violation of this same customary law obligation. This element of judicial restraint is understandable because even just the hypothetical analysis could probably have gone beyond the ICJ's self-imposed limitation of its advice that the concrete application of the opinion to individual States should be left for future decisions.

Duty to Prevent Significant Harm to the Environment

The ICJ's most significant contribution on customary law lies in its detailed analysis of the application of the "duty to prevent significant harm to the environment" (the so-called "no-harm principle"). The ICJ keeps the analysis of the existence of this rule of customary law very short, merely referring to its own prior case law. Still, the ICJ concludes that States must act with due diligence and use all means at their disposal to prevent climate-destructive activities in accordance with the Common but Differentiated Responsibilities (CBDR) principle.

The ICJ creatively relies on the *Nuclear Weapons Advisory Opinion* to highlight that not only does the duty to prevent significant harm to the environment exist beyond the bilateral context, but it also applies to global environmental concerns (para. 134). In the Nuclear Weapons Advisory Opinion, the ICJ recognised

> *"that the environment is under daily threat and that the use of nuclear weapons could constitute a catastrophe for the environment. The Court also recognise[d] that the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment." (para. 29)*

We should recall that the *Nuclear Weapons* opinion was adopted by a split Court with its President's casting vote and as such see *the climate change advisory opinion* as especially significant also because of its unanimous adoption (see De Spiegeleir).

Helpfully, the ICJ summarises the legal consequences for States:

> *"The conduct required by due diligence has several elements. These elements include States taking, to the best of their ability, appropriate and, if necessary, precautionary measures, which take account of scientific and technological information, as well as relevant rules and international standards, and which vary depending on each State's respective capabilities. Other elements of the required conduct include undertaking risk assessments and notifying and consulting other States, as appropriate."*

These consequences largely flow from the ICJ's conclusion that: "the risk of significant harm to the climate system is indisputably established… Climate change therefore poses a quintessentially universal risk to all States" (para. 137). The ICJ therefore concludes, citing the ITLOS advisory opinion, that the "standard of due diligence for preventing significant harm to the climate system is stringent … a heightened degree of vigilance and prevention is required" (para. 138). The due diligence standard thus does restrict State's discretion significantly and means that they have an obligation to "use all means at their disposal to prevent activities carried out within their jurisdiction or control." It is notable that the ICJ refers to activities under a State's jurisdiction *or control,* which could

encompass private businesses acting overseas or through subsidiaries (i.e. under their control).

Lex Specialis?

This, of course, raises the tricky question of *lex specialis*. Several interveners claimed that the UNFCCC and Paris Agreement constitute *lex specialis* or *lex posterior* in relation to customary international law. Here, the ICJ provides a very helpful clarification, which could also be applicable in other treaty–custom contexts. Several commentators have already explored this very important point.

The ICJ resoundingly rejects this notion. It reminds readers that "it is a generally recognized principle that, when several rules bear on a single issue, they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations" (para. 165).

According to the International Law Commission (ILC), *lex specialis* requires more than overlapping subject matter – there must be an actual inconsistency or a clear intention for one rule to exclude another, making it fundamentally a question of interpretation. The ICJ finds no inconsistency between climate change treaties and other relevant rules of international law, noting that the preambles of the UNFCCC and Paris Agreement explicitly acknowledge the relevance of other principles (paras. 166–170) (see for more detail Tigre/Bönnemann/De Spiegeleir).

Mutual Supportiveness

The ICJ elegantly returns, in true sustainable development fashion, to the mutual supportiveness of the provisions of the climate treaties and custom. It highlights that "the compliance of parties with their obligations of conduct under the Paris Agreement is assessed on the basis of whether the party in question exercised due diligence and employed best efforts by using all the means at its disposal in the performance of that obligation" (para. 229, citing *Pulp Mills*).

The ICJ further explains that evaluating environmental risks, including those related to climate change, requires considering current standards, which may derive from both binding and non-binding norms found not only in treaties and customary international law but also in certain Conference of the Parties (COP) decisions under climate change treaties and in recommended technical norms and practices. Notably, the ICJ indicates that while COP decisions are relevant for interpreting and implementing treaties, they may also contribute to identifying customary international law when they reflect consistent State practice and express *opinio juris*, though the legal significance of any specific COP decision must be assessed on a case-by-case basis (paras. 287-288). In other words, the climate treaty regime directly impacts the performance of the due diligence obligations of States under the customary law duty to prevent significant harm.

Treaty-Custom Relationship

The ICJ examines the relationship between treaty obligations and customary international law in the context of climate change. The ICJ notes that while treaty and custom are distinct sources of law, they should, where possible, be interpreted to produce a coherent set of compatible obligations. This means, for the ICJ, that multilateral environmental treaties must be read in light of relevant customary rules, and conversely, treaties can help define, record, and develop customary law, sometimes even elevating treaty provisions to independent customary status, particularly when they share common underlying general principles.

In environmental matters, evolving scientific understanding and heightened awareness of risks have led to new norms and standards, as reflected in climate change treaties, which can guide the due diligence required of States and shape customary obligations, just as customary rules inform treaty interpretation. The ICJ recognises that full and good-faith compliance with climate change treaties generally suggests substantial adherence to customary duties to prevent significant harm and cooperate, but does not guarantee complete fulfilment, as each remains an independent source of obligation.

For States not party to climate change treaties, customary obligations still apply. The ICJ explains "that it is possible that a non-party State which cooperates with the community of States parties to the

three climate change treaties in a way that is equivalent to that of a State party, may, in certain instances, be considered to fulfil its customary obligations through practice that comports with the required conduct of States under the climate change treaties." (para. 315). In other words, only through alignment with the practices of treaty parties can States, in some cases, meet their customary obligations. If it does not cooperate, it bears the burden of proving that its policies and practices conform to customary law (paras. 309-315). It is difficult to see how a non-party can still comply with customary international law without full and meaningful participation or at least close cooperation with States in the climate regime.

Erga Omnes and Jus Cogens?

While the ICJ does not go as far as the IACtHR in declaring the fight against climate change a *jus cogens* norm (see the author's analysis here), it does unanimously agree that all States share a common interest in protecting global environmental commons, such as the atmosphere and high seas. The ICJ further confirms that obligations to safeguard the climate system from anthropogenic greenhouse gas emissions – particularly the customary law duty to prevent significant transboundary harm – are obligations *erga omnes*, owed to the international community as a whole. This is only a small step away from considering these customary obligations as part of *jus cogens*, particularly because the ICJ then applied Article 48 of the ILC Articles on State Responsibility, which many consider reserved for *jus cogens* norms.

The fact that the ICJ identifies certain *erga omnes* obligations but does not assign them *jus cogens* character, raises a systematic challenge, which Judge Tladi evaluates in detail. He criticises the ICJ for exposing and then ignoring an inconsistency in its jurisprudence. He notes that in its July *2024 Advisory Opinion on the Occupied Palestinian Territory*, the ICJ linked breaches of *erga omnes* obligations to the duties of non-recognition, non-assistance, and cooperation – consequences that the ILC associates only with serious breaches of *jus cogens* norms – thereby conflating *erga omnes* with *jus cogens*. If that logic were applied consistently, similar consequences should have been identified for the *jus cogens* character of climate obligations, yet the ICJ does not do so and, in Judge Tladi's view, gives no explanation as to why. He recalls that he had previously warned this conflation would cause incoherence and believes the ICJ knowingly ignored the problem – likening it, in a Setswana idiom, to "pouring cold shade over oneself" or, in Swahili, adopting a "Hakuna Matata" attitude.

Advice for the Climate Crisis

The ICJ's advisory opinion ends with the words "climate crisis" because that is what the world is facing and contains a note that should be taught in all law schools around the world and perhaps should give us renewed pause to reflect on the ethics of legal advice in the climate crisis (see also De Spiegeleir):

> *"…International law, whose authority has been invoked by the General Assembly, has an important but ultimately limited role in resolving this problem. A complete solution to this daunting, and self-inflicted, problem requires the contribution of all fields of human knowledge, whether law, science, economics or any other." (para. 456).*

The statement contains echoes of the work by Vaughan Lowe, who stated that "Lawyers have a contribution to make. They offer one way of going about resolving some of the most crucial problems that face the world. But it is only one way among many. There are many times when it is much better to call upon a politician, or a priest, or a doctor, or a plumber." (V. Lowe, International Law (2007, OUP Oxford, Oxford) p. 290). The ICJ's concluding statement wisely acknowledges both the value and the limits of international law in tackling the climate crisis. No, this opinion will not stop climate change tomorrow. It acknowledges that legal norms alone cannot solve a challenge so deeply rooted in human behaviour, economic systems, and political choices. As the most important solutions, addressing climate change requires an interdisciplinary approach that combines law with science, economics, and other fields, and especially emphasises the importance of

human will and wisdom as decisive factors for meaningful change.

Conclusion

The extensive analysis of the content of customary international law applicable to climate change is an important and welcome part of the advisory opinion. It should aid climate negotiators when confronted with issues of State consent, given the clear no harm and cooperation obligations.

Despite not expressing a view on the *jus cogens* character of climate-related obligations, the ICJ's detailed analysis of all the consequences flowing from existing international law, especially customary international law, and the international responsibility of States – also for businesses operating in their territory, or under their jurisdiction or control – makes this a foundational advisory opinion that will prove helpful for future (climate) negotiations as well as future climate responsibility cases. In essence, the ICJ has authoritatively delivered advice that could serve to correct our path and show a way out of the climate crisis.

We can only applaud the ICJ for situating its advisory opinion as part of a broader United Nations and global effort, not as an endpoint but as a guide for progress that is meant to inspire and direct the social and political transformations necessary to secure a liveable future for current and future generations.

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