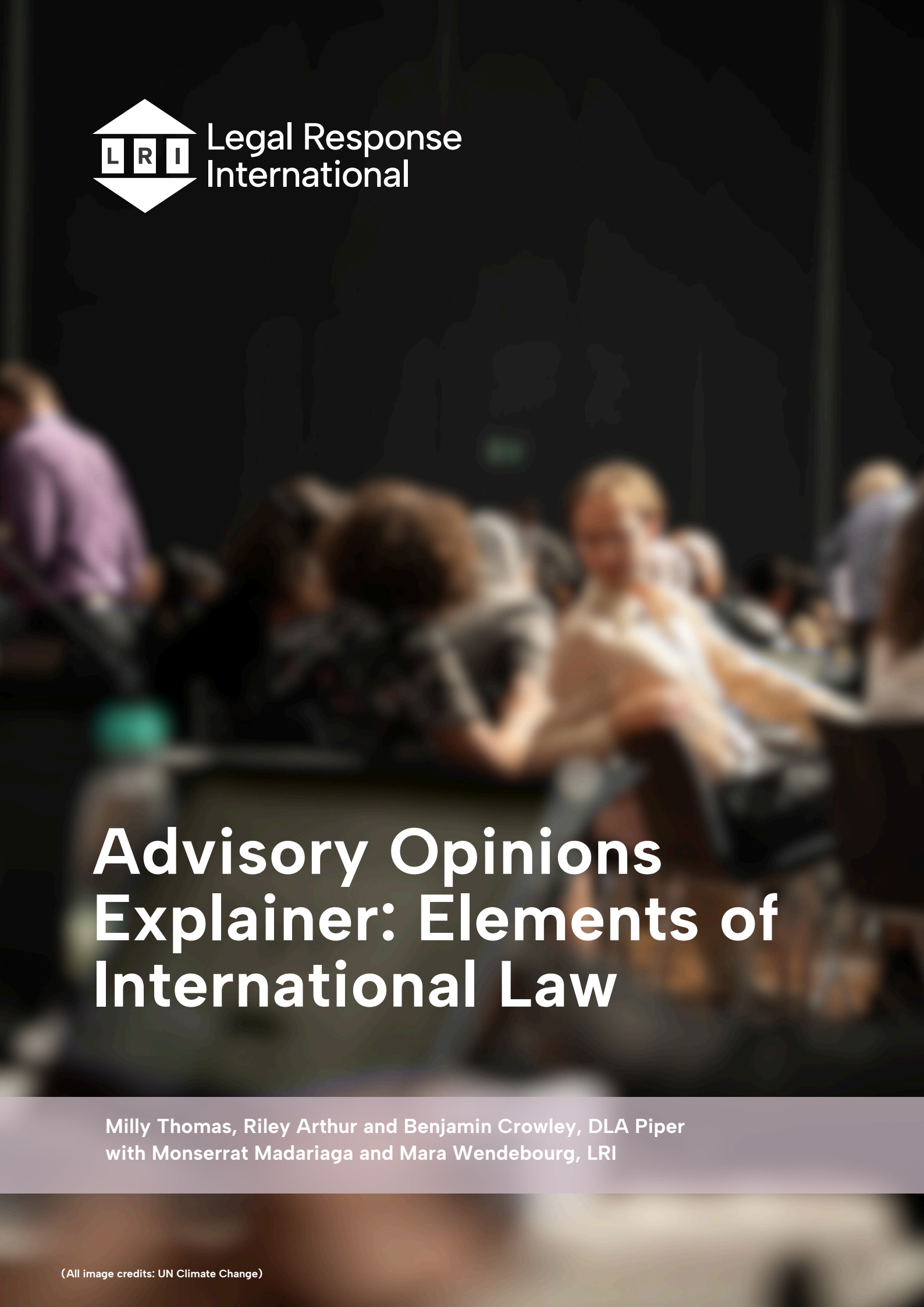

Legal Response International

Advisory Opinions Explainer: Elements of International Law

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(All image credits: UN Climate Change)

What are the legal obligations of States, under international law, regarding climate change? What are the legal consequences for harming the climate system?

Introduction: What are advisory opinions

The International Tribunal for the Law of the Sea (ITLOS), the Inter-American Court of Human Rights (IACtHR) and the International Court of Justice (ICJ) delivered opinions regarding the legal obligations of States regarding climate change. A fourth Advisory Opinion on climate change obligations of African states was requested to the African Court on Human and People's Rights in May 2025.

Besides contentious jurisdiction, where the courts adjudicate on a legal matter between parties, international courts also have an advisory jurisdiction, which enables them to provide a judicial opinion on legal questions put forward to them. Advisory opinions relate to questions of interpretation or application of the law and provide an authoritative statement of international law and have significant persuasive impact. As such, the interpretations they set hold significant value to be used in subsequent contentious cases and in national and regional litigation, as well as in diplomatic efforts.

This explainer offers a concise summary of the main points reasoned by each court in their respective opinions. This explainer is supplemented by a separate document for policy- and decision-makers, to guide UNFCCC negotiations and discussions.

Each court examined the international law applicable to States according to their own jurisdiction and the questions brought before them:

The ICJ Advisory Opinion was initiated by the Pacific Islands Students Fighting Climate Change (PISFCC) who were supported by Vanuatu in their efforts to mobilise States to request the opinion. This campaign led to the adoption of a UNGA resolution that asked the ICJ to clarify States' obligations to ensure the protection of the climate system and other parts of the environment from greenhouse gases (GHGs) and the legal consequences arising from acts or omissions causing significant harm to the environment. Owing to the broad competence of the ICJ, it can examine various sources and bodies of relevant international law.

The request to the ITLOS was made by the Commission of Small Islands States and relates to the obligations under the United Nations Convention on the Law of the Sea (UNCLOS) to prevent pollution to the marine environment from GHG emissions and to protect it from the impacts of climate change.

The IACHR Advisory Opinion was requested by Chile and Colombia and concerns the climate emergency and human rights in the context of the Inter-American Convention of Human Rights, determining the obligations of States in terms of substance, process and rights of vulnerable groups and people within the jurisdiction of the Inter-American Convention on Human Rights.

The authors would like to thank Kate Cook for reviewing this explainer.

The Climate Change Treaties in the AOs

The Climate Change Treaties are not *lex specialis* when determining States' obligations in respect of climate change. Lex specialis is an interpretative principle according to which a more specialised rule overrides the more general rule. Some states had argued that the United Nations Framework Convention on Climate Change (UNFCCC), Kyoto Protocol and the Paris Agreement (together, the Climate Change Treaties) are lex specialis and thus displace other rules of international law.

The ICJ and ITLOS Advisory Opinions find that lex specialis does not apply in regard to States' obligations in respect of climate change. Thus Climate Change Treaties, UNCLOS, other environmental treaties, customary international law and international human rights law all form part of the most directly relevant applicable law, which complements and informs one another with respect to climate change obligations.

The ITLOS held that the Paris Agreement was not lex specialis to the UNCLOS regarding the protection and preservation of the marine environment, instead both treaties, too, complement one another in matters of marine pollution from GHG emissions (ITLOS, [223]-[224]). **The IACHR** has recourse to other international environmental law treaties and the body of international human rights law to determine States' obligations in regard to climate change.

The confirmation that the Climate Change Treaties are not lex specialis is significant as UNFCCC negotiations are becoming more complex, often stalling thereby limiting the progress with some States deciding to remove themselves from this space altogether. This confirmation also means that obligations in regard to climate change are also applicable to parties and non-parties to the climate change treaties, and are thus broader in scope.

Common but Differentiated Responsibilities and Respective Capabilities (CBDR-RC) as a core principle

The courts confirm that CBDR-RC is a "core guiding principle" in interpreting and implementing the Climate Change Treaties. The IACtHR analyses in detail the historical and current contribution of different states, regions, and peoples highlighting it is highly unequal [60]. It names the 'Carbon Majors' as responsible for 71% of emissions between 1988 and 2017 [54] and note as wealth inequality amongst peoples is reflected in the contribution to climate change, where richest segments of the population contribute significantly more than poorest ones [56-63].

As a backdrop, the Court also notes impacts of climate change are also highly unequal, affecting more those poorer regions and peoples [100].

The ICJ emphasises the importance of CBDR-RC when defining mitigation obligations, support for adaptation and financial obligations of developed countries and international cooperation, amongst others. However, it also acknowledges that the qualifier "in the light of different national circumstances" in the Paris Agreement adds nuance to the CBDR-RC principle by recognising that "the status of a State as developed or developing is not static". Thus, a State's obligations depend on an assessment of its current circumstances, opening the possibility to them becoming more onerous over time as a State develops (ICJ, [226]).

International Cooperation in State's obligations and negotiations

For the courts, international cooperation and the duty to cooperate are essential features of the climate regime. Cooperation must occur amongst others through technology transfer, conservation, scientific and technological research, and adaptation (ICJ, [214]; [260]-[267]). Above all States must, continuously, "co-operate to achieve concrete emission reduction targets or a methodology for determining contributions of individual States, including with respect to the fulfilment of any collective temperature goal" (ICJ, [305]; ITLOS, [311]). **This duty to cooperate extends to the substantive obligations, as well as to how negotiations are conducted, requiring a certain degree of good faith from States.**

The IACtHR emphasises that States have an obligation to cooperate for the fulfilment of their climate obligations – both under the UNFCCC and the Inter-American Convention of Human Rights. However, the IACtHR frames **international cooperation under CBDR,** underlying the importance of international solidarity (IACtHR, [408]-[409]).

The ITLOS notes that the duty to cooperate is of continuing nature, requiring States to formulate and elaborate rules, standards and recommended practices and procedures, highlighting that the mere adoption of a treaty is not enough as it requires a continuous development and revision of regulatory instruments in light of evolving scientific knowledge (ITLOS, [311]).

NDCs: discretion is not limited

The ICJ affirms that States have the obligations to prepare, communicate and maintain successive Nationally Determined Contributions (NDCs), which are procedural in nature and obligations of result. Therefore, merely complying with those procedural obligations would be insufficient (ICJ, [235-236]). Indeed, the content of NDCs must become more demanding over time and must reflect a State's "highest possible ambition" (ICJ, [252]-[254]), which implies that the NDC must "be capable of making an adequate contribution to the achievement of the temperature goal" (ICJ, [242]). LRI's Delegates' Guide to the advisory opinions dives deeper on the ICJ's findings on NDCs.

Due diligence standard of conduct is stringent

The ICJ confirmed that to comply with Article 4 of the Paris Agreement, States parties are required "to act with due diligence in taking necessary measures to achieve the objectives set out in their NDCs" (ICJ, [252]). The standard of due diligence in this context varies according to the level of scientific knowledge, risk of harm and urgency (ICJ, [254]). Similarly, the IACtHR finds that the climate emergency calls for a higher degree of due diligence ("reforzada" or "reinforced") and makes it dependent on CBDR. The ICJ clarifies that it falls under the due diligence of a State to take the necessary regulatory and legislative measures to limit the quantity of emissions cause by private actors under its jurisdiction (ICJ, [428]); and that **"fossil fuel production, fossil fuel consumption, the granting of fossil fuel exploration licences [and] the provision of fossil fuel subsidies" are activities that may be considered as acts of State and engage its responsibility.** This is analysed further in the section on State Responsibility of this brief.

For the ITLOS, to comply with "specific obligations to take all necessary measures to prevent, reduce and control marine pollution" under UNCLOS (ITLOS, [243]), States must adopt measures considering the best available science and relevant international rules and standards contained in climate change treaties, singling out the temperature limit of 1.5ºC. The Tribunal finds these measures to vary according to States' capabilities and resources.

While the standard of due diligence is characterised as stringent or "enhanced" in all three Opinions, States may implement these obligations according to their capacity and in the light of obligations on the part of developed states to take the lead and provide support (ICJ, [290]–[292]; ITLOS, [226]–[228]). However, the Opinions also confirm that all states have certain obligations regardless of their development status (ITLOS, [229]; ICJ, [292]).

Other sources of international law

Customary international law encompasses rules of international law derived from state practice and acceptance of those practices as law. The AOs reiterate that obligations of States in regard to climate change emerge from customary international law, that customary international law serves to interpret climate change treaties [ICJ, 313], and that the treaties themselves also inform customary international law. This means, for example, that States not party to one or more climate change treaty have customary international law obligations and these could be informed, at least in part, on the actions of other States that are party to the treaties [315].

Amongst others, customary law obligations include the duty to cooperate and the duty to prevent significant harm. Hence, States' discretion on their means to mitigate GHG emissions does not allow them to refrain from cooperating at the required level of due diligence (ICJ, [305]–[306]; IACtHR, [253]). At the same time, the duty to prevent significant harm to the environment makes standards like the precautionary approach and the use of available scientific information applicable to obligations of States (ICJ, [275]–[276], [281]–[299]).

Part of a State's duty to prevent significant harm is the adequate regulation of activities taking place within their jurisdiction or control in view of achieving substantial GHG emission reduction and enhance resilience (ICJ, [276]– [279]). Accordingly, States must regulate the conduct of public and private operators, which must be accompanied by effective enforcement and monitoring mechanisms to ensure their implementation.

Obligation to prevent irreversible harm has jus cogens character. The IACtHR goes a step further finding that the obligation to prevent irreversible harm to the climate and environment is a jus cogens obligation. This means that it has a higher legal status than other obligations and that no exception or contradiction by a treaty is applicable. This is the same status as norms that prohibit genocide or torture. The Court reasons that the principle of efficacy; the centrality of the environment for the enjoyment of human rights including the right to life; the broad recognition of environmental principles and norms indicate a consolidation of this obligation (IACtHR, [292]–[293]).

Rights-based arguments. The AOs acknowledge the threat posed by climate change to the enjoyment of human rights, and therefore, confirm the applicability of the body of human rights law to determine State's obligations. The IACtHR, given its jurisdiction as a human rights court, delivers a comprehensive assessment of States' duties to protect rights under Article 26 of the American Convention (on economic, social, cultural and environmental rights), with reference to both substantive and procedural rights. For example, concerning substantive rights, the IACtHR recognises the right to a safe climate in its individual and collective dimensions which need to be delivered with intra- and inter-generational equity (IACtHR, [269]–[278]). The IACtHR's opinion also lists more specific adaptation obligations that emerge from the right to life, personal integrity and health that include prioritising vulnerable groups; obligations to guarantee the rights to private and family life; private property and housing and freedom of movement; as well as the right to work and social security; access to food and water and others. Relocations, for example, in the opinion of the Court should only happen when inevitable but States should develop plans for conducting them to ensure other rights are not threatened.

As to procedural rights, the IACtHR warns against the threat that climate change poses to democracy and highlights the importance of adopting decisions on climate action in a participatory, open and inclusive fashion (IACtHR, [468]). The IACtHR finds that the right to science and recognition of local, traditional and indigenous knowledge are fully applicable to climate change decision-making, highlighting the importance of international cooperation to deliver on it. Further, when analysing the right to access to information in the context of the climate emergency, States not only have the obligation to produce and publish information, but also to counter disinformation (IACtHR, [524]).

The ICJ, on the other hand, does not analyse in detail the content of human right obligations in the context of climate change, but acknowledges that the international human rights regime must inform their behaviour, commitments and actions. The Court finds the ***right to a clean, healthy and sustainable environment to be a "precondition for the enjoyment of many human rights"*** (ICJ, [393]). Although the ICJ does not expressly indicate if this right exists as a standalone right, judges including Bhandari and Charlesworth affirm in separate opinions that this is the intended effect of the language in the Court's opinion. Finally, the ICJ confirms that States have obligations under the principle of non-refoulement, which prohibits States from returning individuals to a country where they face a real risk of persecution or other serious and irreparable harm (ICJ, [378]).

The Rights of Nature. The IACtHR also recognises nature and its components as subjects of rights. According to the Court, such rights protect the integrity and functioning of ecosystems is key to preventing irreversible existential harm, which as noted in the previous section, has been established as a jus cogens norm (IACtHR, [279]-[286]). This eco-centric approach reflects the legal tradition in Latin America recognising rights of nature.

Scientific basis

All three courts found the IPCC's reports to constitute the best available science (ICJ, [74]; IACHR, [33]; ITLOS, [208]) and interpreted the IPCC as crystallising the scientific consensus on the anthropogenic GHG emissions (ICJ, [72]; ITLOS, [54]; IACtHR [55]).

Other conclusions in regard to science:

ICJ

- Definitive stance on the scientific temperature goal, with 1.5ºC being the "primary temperature goal" (ICJ, [224]), which the ICJ considers was supported by the Glasgow Climate Pact of 2021 and the outcome of the First Global Stocktake.
- Determination of causality in the event of a wrongful act in the context of climate change is based on science. As it will be further explained in the section on state responsibility, the ICJ advances in endorsing the science of 'climate attribution'.

Please see the delegate's guide to the Advisory Opinions for further explanation.

ITLOS

- GHG emissions constitute pollution as defined under Article 1(1)(4) of the UNCLOS [162]-[179].
- Significant role of the Subsidiary Body for Scientific and Technological Advice (SBSTA), which the Tribunal considers as the appropriate forum in establishing appropriate scientific criteria for the formulation of rules and standards for the prevention, reduction and control of marine pollution [318].

IACtHR

- Right to science as part of the access to information, defining it as an access to best available science and traditional and indigenous knowledge to understand and address climate change [473-484].
- Includes the duty to generate and disseminate reliable, accessible and culturally relevant scientific data, as well as countering climate disinformation in the obligations of States with regards to climate change [486].

State responsibility

The second part of the ICJ's opinion answers the question on the responsibility of States that breached their international legal obligations pertaining to climate change. The ICJ does not find any "clearly expressed lex specialis" that would exclude the application of the general rules and customary international law on State responsibility, reflected in the International Law Commission's Articles on State Responsibility (ICJ, [413]-[420]). The ICJ held that a State incurs liability if it fails to take all measures which were within its power to prevent the significant harm (ICJ, [409]).

Fossil fuel activity may lead to state responsibility

Most notably, as mentioned in the section concerning due diligence, the ICJ finds that ***'Failure 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 licences or the provision of fossil fuel subsidies — may constitute an internationally wrongful act which is attributable to that State'.*** (ICJ, [427]). This entails that a State's responsibility may be invoked where it fails to regulate polluting industries. Indeed, the Court stresses that state responsibility is not invoked by the "emission of GHGs per se, but the breach of conventional and customary obligations [...] pertaining to the protection of the climate system from significant harm resulting from anthropogenic emissions" (ICJ, [427]). Thus, it is the breach of those obligations stated by the Court in its answer to the first question that engages the responsibility of States.

Attribution and causation

It follows that, when addressing the question of **attribution**, the ICJ finds, consistent with scientific developments, the shared responsibility and diffuse character of emissions does not preclude the application of the rules of state responsibility, which are capable of addressing a plurality of injured or responsible States (ICJ, [426], [430]), neither does it hinder causation from being established [ICJ, 435]. The ICJ held that it is "scientifically possible to determine each State's total contribution to global emissions, taking into account both historical and current emissions" (ICJ, [429]).

Even when the causal link between the wrongful actions or omissions of a State and the harm caused by climate change is more tenuous, it is not impossible to establish (ICJ, [348]). It requires (1) a climate event or trend can be attributed to climate change (through scientific evidence of anthropogenic climate change) and (2) that the extent of damage caused by climate change can be attributed to a particular State or group of States. This second element must be established 'in concreto', relating to specific claims regarding damage incurred. The IACtHR mentions the possibility of presuming a causal link between GHG emissions and the degradation of the climate system, and between that degradation and the risks it poses to the environment and people (IACtHR, [553]).

Legal consequences

The ICJ briefly addresses the legal consequences arising from breaches of obligations in its first question as giving rise to cessation and non-repetition, full reparation, including restitution, compensation and/or satisfaction (ICJ, [445]). However, the ICJ does not expressly specify their content as they depend on an assessment of a specific breach in conjunction with the nature of the harm suffered (ICJ, [445]). Notably, the ICJ notes that the application of the general rules of state responsibility do not differ depending on the category or classification of the State (such as particularly vulnerable, or specially affected) (ICJ, [109]).

The IACtHR endorses a 'fair share' framework to assess state responsibility grounded in the principle of CBDR, and raised issues of equity, for example, by considering circumstances of oil producing countries, or analysing the limited delivery of climate finance. In doing so, it departs from a non-differentiated approach to determining state responsibility, an important distinction from the ICJ's opinion. As mentioned earlier, the Court identifies carbon majors and the significant contribution to the climate emergency by wealthier States, as well as wealthier segments of the population [IAtHR, [56] and following].

At the same time, when establishing the obligations applicable to States in the context of the climate crisis, the IACtHR does not make them conditional on the compliance by other States with their obligations, excluding the possibility to argue non-compliance of other States with this and other international obligations as an extenuating circumstance (IACtHR, [325]).

Way forward

COP and other international negotiations

Some of the potential impacts of the Advisory Opinions may include a recognition by the international community of the AOs themselves, or certain aspects of them, such as the normative power of COP and CMA decisions. They could lead to more ambitious negotiations and decisions, as they emphasise on the obligations of states in regards to cooperation.

Moreover, the AOs' understanding of the climate regime as more extensive than the climate change treaties and their highlighting of other relevant treaties regimes and organisations such as biodiversity, desertification, the International Maritime Organization (ICJ, [80]) can inform further synergies and climate-related decisions in those negotiations.

Please see our second explainer on the potential impacts of the advisory opinions on future climate negotiations.

Domestic regulation

States are required to mitigate their GHG emissions, to protect the climate system and prevent human rights violations. Further, the ICJ and IACtHR observed that States' obligations extend to regulating the activities of private actors.

Specifically, the ICJ reiterated the international rule that "the conduct of any organ of a State must be regarded as an act of that States" (ICJ, [427]), noting the production and consumption of fossil fuel, the granting of fossil fuel exploration licences, and the provision of fossil fuel subsidies may constitute an internationally wrongful act (ICJ, [427]-[428]). Thus a ministry, national or regional agency responsible for granting those licences and subsidies thereby engages the responsibility of the State. Similarly, the IACtHR noted that States must adopt legislative and other measures to prevent human rights violations by State and private companies (IACtHR, [345]).

National litigation

Governments are likely to face more litigation at domestic level for failing to adopt adequate measures to mitigate and adapt to climate change, as the AOs have clarified their obligations and provided the legal basis for a domestic court to establish in concreto breaches to States' duties in relation to climate change.

As the ICJ and IACtHR have reiterated that climate change has an impact on the enjoyment of human rights, there may be an increase of human rights claims concerning climate change at the domestic level, and before international and regional human rights courts.

Intra-state litigation

States may bring action against another State before the ICJ (UNFCCC, art 14(2)(a)) if both States have accepted the jurisdiction of the ICJ. Whilst only a limited number of developed country or high-emitting States have accepted its jurisdiction, the interpretation of the rules of state responsibility laid down by the ICJ may be highly relevant in disputes across a range of fora including under other multilateral treaty regimes relevant to climate change as well as under human rights, intellectual property or trade-related agreements and investor state arbitration, particularly where states seek to defend their 'right to regulate' so as to effect the transition away from fossil fuels in the face of action from investors.

States may also resort to arbitration (UNFCCC, art 14(2)(b)) and conciliation (UNFCCC, art 14(6)). Certain features of conciliation may be better for specific disputes. Because conciliation has never been resorted to, it remains untested.

Under UNCLOS, State parties have the option to choose the means of dispute settlement concerning the interpretation and application of UNCLOS, including ITLOS, the ICJ or an arbitral tribunal.

Issues considered in the Advisory Opinions

✔ means the court made this finding ✖ means the court did not make this finding N/A means the Court did not extensively refer extensively to the issue	ITLOS	IACtHR	ICJ
1. The climate change treaties are not lex specialis	✔	✔	✔
2. States have obligations to adjust legislation as part of their efforts to achieve the goals of the UNFCCC and Paris Agreement support the climate change regime	✔	✔	✔
3. States have binding mitigation obligations	✔	✔	✔
4. States have binding adaptation obligations	✔	✔	✔
5. Developed States have obligations to provide financial assistance to developing States for both mitigation and adaptation	✔	✔	✔
6. States have binding international cooperation obligations	✔	✔	✔
7. The principles of prevention, precaution and transboundary harm inform States' obligations	✔	✔	✔
8. States have a duty to conduct environmental impact assessments	✔	✔	✔
9. States' obligations are to be viewed with reference to CBDR-RC and equity	✔	✔	✔
10. Climate change impacts on the enjoyment of human rights	N/A	✔	✔
11. States have obligations deriving from principles of equality and non-discrimination	N/A	✔	✔
12. Considered the impacts of climate change on the rights of nature	N/A	✔	N/A
13. States have obligations to protect and preserve the marine environment / prevent, reduce control pollution of marine environment	✔	✔	✔
14. Considered the impacts on sea-level rise and maritime entitlements	N/A	✔	✔
15. Considered the implications of climate change on statehood, nationality, climate refugees	N/A	✔	✔
16. States have obligations to regulate and legislate actions of non-State actors / private companies	✔	✔	✔
17. State responsibility applies, including reparations, compensation, satisfaction	✔	✔	✔
18. Considered the temporal and causal links for attribution of emissions and State responsibility	N/A	N/A	✔

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