

2. The Proceduralisation of International Environmental Law and its Turn to the Future.

The Advisory Opinion on *Obligations of States in Respect of Climate Change*: Harm Prevention under Customary International Law

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I. Introduction

The International Court of Justice (ICJ) has delivered an Advisory Opinion on *Obligations of States in Respect of Climate Change* that meets the moment.¹ That the members of the Court clearly felt the weight of that moment on their shoulders – with respect to the role of the ICJ in the context of the current pressures on international legality and the existential threat of climate change – is evident from the fact that the Court issued an opinion that is not only robust but also unanimous on all aspects of the opinion’s operative part.²

The Advisory Opinion covers the wide spectrum of issues raised by the UN General Assembly request of March 2023.³ While there is much to be said, my focus is on the highly significant pronouncements on States’ environmental harm prevention obligation under customary international law. In this short contribution, I highlight some of the most important ways in which the opinion reinforces, clarifies and augments the Court’s previous decisions on this pivotal obligation. In so doing, the opinion also speaks to

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1 ICJ, *Obligations of States in Respect of Climate Change*, Advisory Opinion of 23 July 2025.

2 Declaration of Judge Tladi, *Obligations of States in Respect of Climate Change*, Advisory Opinion of 23 July 2025, para. 2.

3 UNGA, *Request for an advisory opinion of the International Court of Justice on the obligations of States in respect of climate change*, Resolution 77/276 (29 March 2023).

debates around the structure and, according to some,⁴ ‘proceduralization’ of international (environmental) law. Far from being a relic of the past, customary international law emerges as a highly relevant, strong normative framework for grappling with global environmental concerns.

II. Five Take-Aways (and One in Five Parts ...)

1. Invoking its 1996 Advisory Opinion on *Nuclear Weapons*,⁵ the Court confirms that States’ harm prevention obligations under customary law apply to global environmental concerns. The ICJ is explicit that the salient obligations are ‘not confined to instances of direct cross-border harm’-⁶ Since all of the Court’s judgments on the harm prevention rule were rendered in the context of disputes involving transboundary environmental impacts,⁷ this is a very welcome statement. The Court had previously confirmed that the harm prevention rule applied to the ‘environment of other States or of areas beyond national control’.⁸ Its unequivocal affirmation in *Obligations of States in Respect of Climate Change* that the rule also applies to the climate system is all the more significant because several States had argued that it did not apply, given the cumulative and global nature of climate change.⁹

2. The Court notes that the duty to prevent under customary law arises when there is a risk of significant harm to the environment’.¹⁰ This simple, intuitive statement provides a crucial clarification of some of the Court’s previous jurisprudence on the harm prevention rule. Its decisions in the

4 See e.g. Martti Koskenniemi, ‘The Fate of International Law: Between Technique and Politics’ M.L.R. 70 (2007), 1-30; Jan Klabbers, *International Law* (4th edn., Cambridge University Press 2023), 291.

5 ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, ICJ Rep. 226, para. 29.

6 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 134.

7 ICJ, *The Gabčíkovo-Nagymaros Project (Hungary/ Slovakia)*, Judgment of 25 September 1997, ICJ Rep. 7, para. 53; ICJ, *Pulp Mills on the River Uruguay (Argentina/ Uruguay)*, Judgment of 20 April 2010, ICJ Rep. 14, para. 193; ICJ, *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica/ Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua/ Costa Rica)*, Judgment of 16 December 2015, para. 104.

8 ICJ, *Legality of Nuclear Weapons* (n. 5); ICJ, *Gabčíkovo-Nagymaros* (n. 7); ICJ, *Pulp Mills* (n 7) [emphasis added].

9 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), paras. 133, 134, 273.

10 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 274.

Pulp Mills case and, in particular, in the *Certain Activities/Construction of a Road* cases, appeared to suggest that the Court considered that a failure to take the requisite prevention measures, notably procedural steps, would not constitute a violation of the rule unless harm had been caused.¹¹ However, harm *causation* is not in fact an element of the primary rule, which is concerned precisely with harm *prevention*.¹² In *Obligations of States in Respect of Climate Change*, the ICJ could not have been more explicit on this important point, stating that the '[f]ailure of a State to take appropriate action to protect the climate system [...] may constitute and internationally wrongful act',¹³ 'whether that act causes harm or not'.¹⁴ Hence, unless the desired remedy is compensation for harm,¹⁵ proof of harm causation is not required when States invoke the responsibility of others for failures to address climate change. So long as it can be established that a State is not taking measures that are commensurate with the risk of climate harm, it may incur legal consequences under the law of State responsibility,¹⁶ including the 'obligations of cessation and non-repetition, which [...] apply irrespective of the existence of harm'.¹⁷

3. What then is required of States in discharging their harm prevention obligation? As the ICJ previously decided, States must exercise due diligence,¹⁸ the requirements of which in a given situation, according to the ICJ in *Obligations of States in Respect of Climate Change*, 'should be determined objectively'.¹⁹ The ICJ previously held that due diligence 'entails not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators'.²⁰ In *Obligations of States in Respect of Climate Change*, the Court provides a series of important

11 For a discussion see Jutta Brunnée, 'Procedure and Substance in International Environmental Law', in: Hague Academy, *Collected Courses / Recueil des cours*, Vol. 405 (2020) 79, at 141–146.

12 See Brunnée (n. 11), 150–152.

13 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 427.

14 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 433.

15 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 433.

16 See Brunnée (n. 11), 151.

17 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 445.

18 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 135 (citing to ICJ, *Pulp Mills* (n. 7), paras. 101, 197).

19 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 300.

20 ICJ, *Pulp Mills* (n. 7), para. 197. See also ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 281 (citing ITLOS, *Request for an Advisory Opinion Submitted*

clarifications regarding the ‘elements’ that determine the ‘conduct required by due diligence’.²¹ Here, I highlight only the most significant of these clarifications.

a) Naturally, the ‘degree of a given risk of harm is always an important element’.²² Aligning itself with the conceptualization employed by the International Tribunal on the Law of the Sea (ITLOS) in its 2024 Advisory Opinion on *Climate Change and International Law*, the ICJ finds that ‘[w]hether an activity constitutes a risk of significant harm’ depends upon a combination of ‘both the probability or foreseeability of the occurrence of harm and its severity or magnitude’.²³ Therefore, ‘the higher the probability and the seriousness of possible harm, the more demanding the required standard of conduct’.²⁴

Indeed, with respect to threats of serious or irreversible harm, the ICJ agrees with ITLOS’ conclusion ‘that “where there are plausible indications of potential risks”, a State “would not meet its obligation of due diligence if it disregarded those risks”’.²⁵ Thus, significantly, the ICJ agrees with ITLOS that ‘the “precautionary approach is also an integral part of the general obligation of due diligence” under the duty to prevent significant harm to the environment’.²⁶

b) The ICJ also echoes ITLOS’ conclusion that the requisite risk can exist in situations involving ‘the cumulative effect of different acts undertaken by various States and by private actors subject to their jurisdiction or control’.²⁷ In short, the fact that risks of harm to the climate system result from

by the Commission of Small Island States on Climate Change and International Law, Advisory Opinion of 21 May 2024, case no. 31., para. 235).

21 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 136.

22 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 275.

23 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 275 (citing to ITLOS, *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law* (n. 20), para. 239).

24 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 275.

25 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 295 (citing to ITLOS, *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law* (n. 20), para. 131).

26 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), paras. 134, 294 (citing to ITLOS, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion of 1 February 2011, case no. 17, para. 131).

27 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 276 (citing to ITLOS, *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law* (n. 20), para. 365).

the multiple States' and private actors' contributions does not relieve individual States from their obligation to take appropriate preventive measures. This conclusion is in line with other judicial decisions to the effect that no State should 'evade its responsibility by pointing to the responsibility of other States' and that 'each State has its own responsibilities within its own territorial jurisdiction in respect of climate change'.²⁸ Given the growing international and national judicial consensus on this issue, the 'drop in the ocean' argument seems to have [...] run dry.

c) What measures are appropriate to prevent harm is dependent, in particular, upon 'scientific and technological information, as well as relevant rules and international standards', including those adopted under the auspices of the UN climate regime.²⁹ As is true for the risk to which States' measures must respond, these factors underscore that the standard of conduct can evolve over time, for example in light of 'new scientific or technological knowledge'.³⁰ The ICJ notes at various points that, given the indisputable scientific evidence of the universal and urgent risks of significant harm to the climate system, 'the standard of due diligence is stringent',³¹ requiring 'a heightened degree of vigilance and prevention',³² that States do their 'utmost',³³ and that they take measures that are 'designed to achieve the deep, rapid, and sustained reductions of GHG emissions that are necessary for the prevention of significant harm to the climate system'.³⁴

d) As the Court confirms, 'what is required by due diligence ultimately "calls for an assessment *in concreto*" of what is reasonable under the specific circumstances in which a State finds itself',³⁵ such that the standard 'will vary depending on each State's respective capabilities'.³⁶ For the Court, this conclusion follows because the obligation requires a given State to

28 ECtHR (Grand Chamber), *KlimaSeniorinnen v. Switzerland*, judgment of 9 April 2024, no 53600/20, paras. 442–443.

29 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), paras. 136, 283–288.

30 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 284.

31 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), paras. 137, 138.

32 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 138.

33 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 246.

34 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 282.

35 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 137 (citing to ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment on the merits on 26 February 2007, ICJ Rep. 43, para. 430).

36 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 136.

'use all means at its disposal'.³⁷ I do not have space here to comment on the Court's various observations regarding the principle of common but differentiated responsibilities and respective capabilities. Suffice it to say for present purposes that it considers the principle to be relevant to the 'determination of the applicable standard of due diligence in a particular situation'.³⁸

e) Due diligence entails substantive and procedural requirements. Previously, notwithstanding acknowledgement of their 'functional' linkages,³⁹ the Court appeared to separate these requirements legally speaking, finding a procedural violation while refraining, in the absence of harm causation, from finding a substantive violation.⁴⁰ In *Obligations of States in Respect of Climate Change*, the ICJ seems intent on overcoming this much criticized, including by members of the Court,⁴¹ and conceptually unconvincing approach to the relationship between procedure and substance.⁴² After all, in the context of the harm prevention rule, procedural elements, such as the obligations to undertake risk or environmental impact assessments, or to notify and consult potentially affected States, are tightly intertwined with the substantive goal of harm prevention, such that the latter could not be achieved without the former. *Obligations of States in Respect of Climate Change* reflects this reality, noting that the 'duty to prevent significant harm to the environment consists of substantive elements [...] and procedural elements, through both of which States fulfill their duty of due diligence'.⁴³ Accordingly, a State's failure, for example, to assess the risks of harm to the climate system occasioned by activities under its jurisdiction, could amount to a violation of the harm prevention rule. That certainly would be the logical consequence of the Court's observation in *Pulp Mills* that 'due diligence [...] would not be considered to have been exercised if a party

37 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 290 (citing to ICJ, *Pulp Mills* (n. 7), para. 101 and ICJ, *Certain Activities/Construction of a Road* (n. 7), para. 104).

38 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 290.

39 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 289 (citing to ICJ, *Pulp Mills* (n. 7), para. 79).

40 See also *supra* notes 10–17 and accompanying text (discussing the ICJ, *Pulp Mills* (n. 7) and *Certain Activities/Construction of a Road* (n. 7) cases).

41 See e.g. Joint Dissenting Opinion Al-Khasawneh and Simma, *Pulp Mills* (n. 7); and Separate Opinion Donoghue, *Certain Activities/Construction of a Road* (n. 7).

42 For a discussion, see Brunnée (n. 11).

43 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), paras. 289, 136, 295, 299.

[...] did not undertake an environmental impact assessment of the potential effects' of activities that may have a significant adverse impact.⁴⁴

4. In *Obligations of States in Respect of Climate Change* the ICJ confirms that 'States' obligations pertaining to the protection of the climate system and other parts of the environment [...], in particular the obligation to prevent significant transboundary harm under customary international law, are obligations *erga omnes*.⁴⁵ Since 'obligations *erga omnes*, are '[b]y their very nature [...] the concern of all States',⁴⁶ it follows that, under the rules on State responsibility, 'climate mitigation obligations [...] may be invoked by any State when such obligations arise under general international law',⁴⁷ including a State 'other than an injured State'.⁴⁸ This pronouncement marks the first time that the ICJ affirmed the *erga omnes* nature of obligations regarding the prevention of harm to the environment beyond national jurisdiction. Given the Court's reference to 'obligations pertaining to the protection of the climate system',⁴⁹ it stands to reason that all harm prevention obligations are owed *erga omnes*. This would include the procedural requirements detailed by the Court, as well as the all-important obligation to cooperate in good faith,⁵⁰ which for reasons of space I cannot discuss here.

5. There is much that could be said about the Court's engagement with States' commitments under the UN Framework Convention on Climate Change (FCCC) and, in particular, the Paris Agreement.⁵¹ For present purposes, the key point is that the ICJ is clear that, contrary to the views expressed by several States, these treaties do not displace States' harm

44 ICJ, *Pulp Mills* (n. 7), para. 204.

45 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 440.

46 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 441 (citing to ICJ, *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Judgment of 5 February 1970, ICJ Rep. 3, para. 33).

47 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 442.

48 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 442 (citing to Article 48(1)(b) of the ILC Articles on State Responsibility).

49 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 440 [emphasis added].

50 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), paras. 140–142, 301–302.

51 See e.g. Christina Voigt, 'The ICJ and the UN Climate Regime: Clarifying mitigation obligations under the Paris Agreement', in this volume. But see also the important concerns raised by Daniel Bodansky and Susan Biniarz, 'The ICJ's Advisory Opinion on Climate Change: Does It Throw a Wrench into the Negotiator's Toolbox of Diplomatic Problem-Solving Techniques?', EJIL: Talk!, September 23, 2025.

prevention obligations under customary law.⁵² On the contrary – according to the ICJ, the due diligence requirements discussed above inform the interpretation of States’ ‘obligations of conduct’ under the Paris Agreement, including their obligations regarding the mitigation of greenhouse gas emissions.⁵³

III. Conclusion

As the ICJ notes in its concluding observations: climate change is ‘more than a legal problem’; it is ‘an existential problem of planetary proportions that imperils all forms of life and the very health of our planet’.⁵⁴ Conscious that international law ‘has an important but ultimately limited role’ in resolving the climate crisis, the Court expressed the hope that ‘its conclusions will allow the law to inform and guide social and political action to address the ongoing climate crisis’.⁵⁵ In my assessment, the Court has made a significant contribution to these ends. As I hope to have illustrated, its opinion on *Obligations of States in Respect of Climate Change* reinforces, clarifies and augments its previous decisions on international environmental law’s cornerstone obligation. The Court’s observations confirm that, in terms of the structure of international law, the harm prevention obligation has emerged as a pivotal part of the international legal regime applicable to the climate crisis. Not only does it provide standards that bind every State, whether party to climate agreements or not, it also provides a robust normative framework. In this framework, the proceduralisation of international environmental law that some observers have detected would seem to be a strength rather than a weakness. Through the harm prevention obligation’s due diligence standard, substance and procedure are tightly intertwined to provide adaptable, stringent and remarkably concrete requirements for the conduct of all States in the face of the climate crisis.

52 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), paras. 162–171.

53 See ICJ, *Obligations of States in Respect of Climate Change* (n. 1), e.g. paras. 228–229, 241–242, 245–246, 252, 254.

54 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 456.

55 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 456.