Towards State Responsibility in the ICJ Climate Change Advisory Opinion?

A Cross-Regime Analytical Perspective

1. Introduction

The legal status of state obligations under climate-related instruments remains a contested issue. While many commentators and affected states have long criticized the lack of a clear accountability mechanism in the UN climate regime,[1] others argue that these instruments, including the United Nations Framework Convention on Climate Change (UNFCCC) and the Paris Agreement, impose binding obligations. However, many obligations under these instruments, particularly in the Paris Agreement, remain phrased in aspirational or non-punitive terms, such as through nationally determined contributions (NDCs) and facilitative compliance mechanisms. This raises questions about their enforceability in international law and whether they suffice to establish legal responsibility. The ICJ's forthcoming opinion will likely clarify to what extent climate treaties impose binding obligations that can form the basis for state responsibility.

However, for states severely affected by climate change, such as small island developing states (SIDS), to build an effective and workable shared responsibility mechanism has been a long-standing and urgent goal.[2] For SIDS, the establishment of an effective accountability mechanism for climate change is not merely a matter of legal interest: it is a matter of survival. These states are among the most vulnerable to the adverse effects of climate change, facing existential threats such as rising sea levels, intensified storms, loss of freshwater resources, and declining agricultural productivity.[3] An effective mechanism to hold major emitting states accountable represents not only a pursuit of climate justice but would also strengthen the claims for climate finance and technical support. Without such a mechanism, SIDS are left with limited recourse, reliant on voluntary cooperation and fragmented institutional responses that often fail to deliver concrete outcomes. Thus, advancing legal accountability is a long-standing and urgent goal for these states, one that reflects both moral claims and practical needs.

In this context, the 2023 request submitted to the International Court of Justice (ICJ or Court) for an advisory opinion on climate change[4] may mark a turning point in clarifying the applicable legal regime, the nature of climate-related obligations, and the legal consequences of their breach. Notably, the question (b) in the request concerns "legal

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[1] In its advisory opinion, the International Tribunal for Law of the Sea (ITLOS) listed key climate-related legal instruments including the UNFCCC, Kyoto Protocol, Paris Agreement, COP decisions, and noted that international instruments adopted within the framework of the IMO, ICAO and the Montreal Protocol also address matters related to climate change. See International Tribunal for the Law of the Sea, *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law*, Advisory Opinion, Case No 31, 21 May 2024.

[2] For example, see United Nations, *Warning Time Is Running Out, Small Island Developing States Demand Urgent Action to Address Climate Crisis They Did Not Create*, as General Debate Continues UN Doc GA/12638 (27 September 2024) https://press.un.org/en/2024/ga12638.doc.htm accessed 7 July 2025.

[3] Ibid.

[4] See International Court of Justice, '*Request for an Advisory Opinion of the International Court of Justice on the Obligations of States in Respect of Climate Change*' (ICJ Case No 187) https://www.icj-cij.org/case/187 accessed 2 April 2025.

consequences",[5] which raises the issue of state responsibility. This issue has become one of the central topics during the advisory proceedings.[6] The ICJ's response could provide an important legal foundation for future efforts to build a state responsibility mechanism in the climate-related context. In particular, by adopting a cross-regime analytical approach, the Court may clarify how existing international legal regimes with established responsibility frameworks can be used to assess climate-related harm.

In the advisory proceedings, SIDS and other climate-vulnerable states have explored legal approaches to connect climate-related harm with general international law of state responsibility. In particular, they argue that the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) should apply to assess whether a state's failure to act on climate change gives rise to international responsibility of a state.[7] However, despite the prevalence of this approach, it remains uncertain whether the Court will directly endorse ARSIWA in its advisory opinion. Given the diversity of treaty obligations and their often non-punitive or facilitative character, the Court may be cautious in drawing a direct line between treaty breaches and legal consequences under ARSIWA. The Court is likely to adopt a cross-regime approach, assessing climate-related harm through other international legal regimes with established responsibility mechanisms.

2. The Limits of a Direct State Responsibility Mechanism

To establish the direct applicability of ARSIWA in the climate-related context, at least two core questions must be clearly addressed. First, is the existing regime, particularly the Paris Agreement with its facilitative and non-punitive architecture, can be interpreted as a specially designed framework intended to replace the application of general international law on state responsibility, thereby qualifying as a *lex specialis*? More specifically, does it qualify as a *lex specialis* that excludes the application of general international law, including ARSIWA? Second, even if ARSIWA does apply, it remains necessary to demonstrate that the climate-related harmful conduct alleged by SIDS constitutes a breach of international obligations. Only then can the conditions for triggering state responsibility under ARSIWA be satisfied.

2.1 The Lex Specialis Debate: Institutional Design or Legal Gap?

The first question is the subject of ongoing debate, and there is no clear consensus within the international community. Many sources support the view that the absence of a climate-related state responsibility mechanism represents a *lex specialis* that displaces general international law. The expert-based Facilitative Committee under the Paris Agreement operates in a transparent, non-adversarial, and non-punitive

[5] See United Nations General Assembly, '*Application Requesting an Advisory Opinion of the International Court of Justice on the Obligations of States in Respect of Climate Change*' (12 April 2023) UN Doc A/77/276, transmitted to the ICJ as ICJ Doc 187-20230412-APP-01-00. https://www.icj-cij.org/sites/default/files/case-related/187/187-20230412-app-01-00-en.pdf accessed 2 April 2025.

[6] See ICJ (n 4).

[7] Vanuatu and Melanesian Spearhead Group, Oral Statement, *Request for an Advisory Opinion on the Obligations of States in Respect of Climate Change* (Advisory Proceedings), CR 2024/35, [3] 100 (2 December 2024).

manner.[8] This design reflects a deliberate effort to address concerns about establishing an enforcement branch or imposing strict compliance consequences.[9] However, this view has been challenged, for example by the Melanesian Spearkhead Group (MSG) in its written comment to the ICJ, which argues that the Paris Agreement's non-compliance mechanism is cooperative in nature and does not displace the general rules of state responsibility under ARSIWA. The Fragmentation of International Law report also lists environmental law as a "special (self-contained) regime", which may constitute *lex specialis*.[10] Since climate change law is part of environmental law, it may also fall under this category.[11]

Notably, the International Tribunal for the Law of the Sea (ITLOS) advisory opinion[12] challenged this view. However, it must be emphasised that ITLOS concluded in its advisory opinion that "the Paris Agreement is not *lex specialis* to the convention",[13] which refers to the United Nations Convention on the Law of the Sea (UNCLOS). This does not necessarily mean that the Paris Agreement and other climate-related instruments cannot be considered *lex specialis* to ARSIWA.

2.2 Uncertain Obligations: Conduct or Result?

The second question — whether the climate-related harmful conduct amounts to a breach of international obligations if ARSIWA applies — is equally complex. The main issue lies in defining what counts as an "international obligation" in this field. In the advisory proceedings, while a few states such as Brazil argued that climate obligations should be understood as obligations of result,[14] other states clearly denied it and saw them as obligations of conduct.[15] Separately, there has also been debate about the legal status of these obligations. Are they legally binding or merely political commitments? It is important to note, however, that obligations of conduct can be

[8] *Paris Agreement* (adopted 12 December 2015, entered into force 4 November 2016) 1771 UNTS 107, art 15(2).

[9] See Lavanya Rajamani, 'Ambition and Differentiation in the 2015 Paris Agreement: Interpretative Possibilities and Underlying Politics' (2016) 65 *ICLQ* 505.

[10] International Law Commission (ILC), *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group, UN Doc A/CN.4/L.702, paras 14(11)–(12) (18 July 2006).

[11] The Fragmentation of International Law report also notes that general international law may apply within a special regime when failure of special regimes exists. The failure of special regime may refer to persistent non-compliance by one or several of the parties, desuetude, withdrawal by parties instrumental for the regime, among other causes. Whether the lack of an effective climate-related state responsibility mechanism amounts to such a failure—and thus opens the door to the application of general international law—is a major point of contention. See ILC (n 10) para 14(16).

[12] ITLOS (n 1).

[13] ITLOS (n 1) para 224.

[14] For example, see Brazil, Oral Statement, *Request for an Advisory Opinion on the Obligations of States in Respect of Climate Change* (Advisory Proceedings), CR 2024/37, [10] 36 (3 December 2024).

[15] For example, see United States, Oral Statement, *Request for an Advisory Opinion on the Obligations of States in Respect of Climate Change* (Advisory Proceedings), CR 2024/40, [15] 42 (4 December 2024).

legally binding and stringent.[16] Some hold the opinion that it is a careful balance between legally binding clauses and non-binding political commitments.[17]

In the Pulp Mills on the River Uruguay (Argentina v Uruguay) case[18], the ICJ characterised environmental obligations as due diligence obligations.[19] This aligns with the original design of the climate-related legal regime, which envisioned flexible obligations. Under the current regime, it is unlikely that obligations will be interpreted as obligations of result. If obligations are defined as duties of conduct, states are not held responsible for the outcomes of their actions. It becomes much harder to prove a breach of obligations and to establish state responsibility.

3. A Cross-Regime Analytical Approach as a Viable Alternative

3.1 The ICJ's Balancing Act: Between Judicial Restraint and Legal Development

Given the unprecedented level of participation in the ICJ's climate advisory proceedings, the Court is likely to approach its task with caution and balance, mindful of both its institutional authority and the complexity of the legal questions involved.[20] For this reason, the Court is likely to ground its opinion firmly within existing legal frameworks to avoid potential controversy.

However, at the same time, as considered as a "law-formative agency"[21], the Court has a desire to contribute meaningfully to this high-profile issue and to support the development of climate-related legal regime. It continues to be the "the highest international court"[22] of the international legal system and aims to fulfill its mandate by playing an active and constructive role. The Court is therefore likely to engage with the relationship between climate-related issues and state responsibility in some form.

In light of the difficulties in establishing a direct state responsibility mechanism within the climate-related legal regime, the Court is more likely to adopt a cross-regime analytical approach. While it may be difficult to hold a state responsible for a climate-related harm under climate-related instruments alone, there may be a legal basis in other regimes of international law. The Court may identify links between climate-related harm and obligations under other legal regimes, and assess the harmful conduct within those existing legal regimes with an established state responsibility mechanism.

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[16] For example, the ITLOS advisory opinion emphasized that due diligence obligations. which are inherently obligations of conduct, require states to take all necessary and appropriate measures, and do not permit states to act at their discretion.

[17] Germany, Oral Statement, *Request for an Advisory Opinion on the Obligations of States in Respect of Climate Change* (Advisory Proceedings), CR 2024/35, [14] 142 (2 December 2024).

[18] *Pulp Mills on the River Uruguay* (Argentina v Uruguay) (Judgment) [2010] ICJ Rep 14.

[19] *Pulp Mills* (n 18) para 197.

[20] Robert Kolb, *The International Court of Justice* (Hart Publishing 2013) 1080.

[21] Christian J Tams and James Sloan (eds), *The Development of International Law by the International Court of Justice* (OUP 2013) 377.

[22] Charles De Visscher, *Les avis consultatifs de la Cour permanente de Justice internationale* (Martinus Nijhoff 1929) 27.

3.2 Drawing from Precedent: The Nuclear Weapons Advisory Opinion

In fact, the ICJ has already adopted a similar cross-regime analytical approach in its 1996 Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons.[23] In that case, some parties sought to build a solid argument that the use of nuclear weapons is illegal. The Court affirmed that the principles and rules of humanitarian law and the principle of neutrality apply to nuclear weapons.[24] But the Court made another claim that it considers that it does not have sufficient elements to enable it to conclude with certainty that the use of nuclear weapons would necessarily be at variance with the principles and rules of law applicable in armed conflict in any circumstance.[25] The Court is led to observe that it cannot reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defense, in which its very survival would be at stake.[26] The ICJ's use of this analytical approach shows how the Court, while providing a clear legal answer to the question presented, draws on existing legal regimes to construct an analytical mechanism for emerging areas of law. It demonstrates the Court's cross-regime analytical approach of applying established legal regimes to new contexts where treaty law remains underdeveloped.

This cross-regime analytical approach would send a clear message to the international community: state responsibility could be established at the level of specific climate-related cases. Even though the UN climate treaty framework lacks a specific state responsibility mechanism, climate-related harmful conducts can still be assessed on a case-by-case basis under other alternative regimes of international law, which establishes state responsibility.

3.3 Framing Climate Harm through Other Legal Regimes: Human Rights Law, The Right to Self-determination, The Law of the Sea

Human rights law provides a relevant and well-established framework for assessing climate-related harms that directly interfere with individual rights, such as the rights to life, health, housing, and a healthy environment. It is widely recognised that insufficient climate-related action can violate human rights such as the right to life.[27] In recent judicial practice, invoking human rights law to support climate-related claims has become both common and broadly accepted. This line of reasoning has already been adopted in cases such as Sacchi et al. v. Argentina et al. before the Committee on the Rights of the Child,[28] in recent rulings by the European Court of Human Rights, including and KlimaSeniorinnen v. Switzerland,[29] and in cases before national courts such as Neubauer et al. v. Germany.[30] In those cases, state inaction on climate was framed as a violation of states' positive obligations under human rights law.

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[23] *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226.

[24] *Legality of the Threat or Use of Nuclear Weapons* (n 23) paras 87 and 89.

[25] *Legality of the Threat or Use of Nuclear Weapons* (n 23) para 95.

[26] *Legality of the Threat or Use of Nuclear Weapons* (n 23) para 97.

[27] Vanuatu and Melanesian Spearhead Group (n 7) [3] 101.

[28] *Sacchi et al v Argentina et al, Decision of the Committee on the Rights of the Child (CRC)*, Communication No 104/2019, UN Doc CRC/C/88/D/104/2019 (22 September 2021).

[29] *Verein KlimaSeniorinnen Schweiz and Others v Switzerland* App no 53600/20 (ECtHR, 9 April 2024).

[30] *Neubauer et al. v. Germany* 1 BvR 2656/18 (BVerfG, 24 March 2021).

The right to self-determination serves as another legal basis, particularly relevant in cases where climate-related harms jeopardise the territorial integrity, sovereignty, or continued existence of states — most notably SIDS facing sea level rise. In the ICJ advisory proceedings, Vanuatu and other SIDS argued that climate-related harm violates this right. In their written and oral submissions, they emphasised that rising sea levels are projected to submerge the entire territory of certain small island States and inhibit the sovereignty of these States. These conditions are essential for the exercise of self-determination.[31] Citing the ICJ's earlier cases, Vanuatu argued that self-determination is a peremptory norm of international law and gives rise to obligations of an *erga omnes* character.[32] On this basis, large-scale emissions and failure to meet mitigation targets are not simply policy failures. They may amount to internationally wrongful acts that prevent peoples from determining their political, economic, social, and cultural development.[33]

The law of the sea also provides a strong legal foundation for assessing climate-related state responsibility, since greenhouse gas emissions contribute to marine pollution and degradation, thereby triggering specific obligations under UNCLOS. The ITLOS advisory opinion supports this position. ITLOS clearly held that greenhouse gas emissions qualify as marine pollution under Article 1(1)(4) of UNCLOS,[34] triggering obligations under UNCLOS. The ITLOS analysed Article 192 and 194 of UNCLOS to affirm the obligations to prevent, reduce and control marine pollution from anthropogenic GHG emissions[35] and a general obligation on States Parties to protect and preserve the marine environment.[36] ITLOS further clarified that states bear the obligations to adopt national legislation and establish international rules and standards, obligations of enforcement, global and regional cooperation, technical assistance, monitoring and environmental assessment based on UNCLOS.

4. The Transformative Potential of Cross-Regime Analytical Approach: Short-Term Leverage, Long-term Evolution and Theoretical Development

The cross-regime analytical approach offers both immediate and long-term opportunities for SIDS and climate-affected populations to seek redress. In the short term, by situating climate-related harms within established legal regimes, this approach creates concrete avenues to pursue compensation and remedial measures. It can facilitate access to funding, support claims before international or regional adjudicatory bodies, and generate leverage in negotiations on climate finance and adaptation support. For SIDS, it may also enhance international visibility and draw political attention to their urgent challenges, strengthening their position in diplomatic and institutional arenas.

In the long term, repeated reliance on cross-regime arguments may contribute to the gradual development of legal norms specific to climate-related harm. Over time, this process of progressive interpretation[37] and legal borrowing could help institutionalise

[31] Vanuatu and Melanesian Spearhead Group (n 7) [6] 105.

[32] Vanuatu and Melanesian Spearhead Group (n 7) [1] 103.

[33] Vanuatu and Melanesian Spearhead Group (n 7) [1] 103.

[34] ITLOS (n 1) para 179.

[35] ITLOS (n 1) paras 243 and 258.

[36] ITLOS (n 1) paras 400 and 406.

[37] Sir Arthur Watts, Michael Wood and Omri Sender, 'Codification and Progressive Development of International Law' (April 2021) *[MPEPIL]* para 3.

a dedicated framework for state responsibility in the climate context, possibly transforming fragmented responses into more coherent and enforceable accountability mechanisms.

The cross-regime analytical approach also holds theoretical significance. It signals a new direction in the study of international legal fragmentation. Whereas earlier analyses focused mainly on the relationship between general international law and special regimes,[38] growing practice shows that different legal regimes can interact horizontally through mutual influence and normative convergence. Climate-related legal regime, as a fragmented and evolving special regime, offers a compelling test case for this trend. It may become a key site for shaping the future evolution of international legal thought.

5. Conclusion

The legal debate surrounding state responsibility in the climate-related context remains unsettled. Existing climate-related legal instruments lack binding state responsibility mechanisms, potentially making it difficult to hold states responsible under current treaty law. While the ICJ's upcoming advisory opinion may not establish a direct legal pathway for state responsibility under the UN climate treaties themselves, it could nonetheless play a pivotal role in clarifying how such responsibility can arise through existing legal frameworks by adopting a cross-regime analytical approach.

This method — grounded in analogical reasoning across established legal regimes such as human rights law, the law of the sea, and the right to self-determination — allows the Court to frame climate-related harmful conduct within existing legal frameworks of state responsibility. Though it may not create a new state responsibility mechanism, it opens a legal and conceptual space for assessing state responsibility on a case-by-case basis. In doing so, it responds to the urgent concerns of vulnerable states and demonstrates how international law can adapt to emerging global challenges through interpretive innovation.

More broadly, this approach reflects a mode of how international legal development can occur through interpretive practices across regimes. It draws on the practice of legal borrowing and progressive interpretation to fill normative gaps and gradually shape new obligations. As a response to the fragmentation of international law, cross-regime analysis not only offers practical solutions in the short term but also contributes to the long-term evolution of international legal theory. In this sense, the ICJ's advisory opinion could become a foundational moment in the construction of a future climate-related state responsibility mechanism.

[38] ILC (n 10).