Open the Floodgates: Standing for the Enforcement of Obligations *Erga Omnes* in the ICJ's Advisory Opinion on Climate Change

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11 August 2025

Available at: https://cil.nus.edu.sg/blogs/open-the-floodgates-standing-for-the-enforcement-of-obligations-erga-omnes-in-the-icjs-advisory-opinion-on-climate-change/

[Several themes discussed are elaborated in forthcoming articles in the British Yearbook of International Law and the International and Comparative Law Quarterly.]

The International Court of Justice (ICJ, the Court), in its advisory opinion *Obligations of States in Respect of Climate Change*, issued on 23 July 2025, comprehensively addressed the first question posed to it by the UN General Assembly by identifying a range of obligations of states in respect of climate change (question (a)). In contrast, the Court devoted far fewer words to answering the second question asked of it, that is, in the Court's understanding of the question: 'the legal consequences arising for States that have breached any of the obligations identified in relation to question (a)' (question (b)) (para 405). Among other relevant issues under the law of state responsibility, the Court asked 'whether the character of certain obligations identified under question (a) results in any special legal consequences for States' (para 439). Against the backdrop of an otherwise comprehensive opinion, one might be easily forgiven for simply nodding along in agreement as the Court, in five terse paragraphs, characterised a variety of environmental obligations as obligations *erga omnes* or *erga omnes partes* and, having done so, concluded that any state and state party, respectively, may individually invoke the responsibility of a state alleged to be in breach of any such obligation—even in the absence of injury (para 442).

This post examines the ICJ's approach to the articulation and enforcement of obligations *erga omnes* and *erga omnes partes* in its latest advisory opinion. The opinion marks a significant departure from the Court's existing jurisprudence when it comes to standing for the enforcement of obligations *erga omnes* and *erga omnes partes*. Given the weight of the Court's pronouncements, the brevity with which the Court arrived at relevant conclusions, in particular the omission to engage sufficiently with the work of the International Law Commission (ILC, the Commission), fosters conceptual incoherence and is likely to lead to reluctance on the part of states to consent to its jurisdiction to adjudicate disputes pertaining to environmental issues in years to come.

Climate Change Obligations as Obligations *Erga Omnes* and *Erga Omnes Partes*

The advisory opinion on climate change marks the first time the ICJ has characterised international environmental obligations as obligations *erga omnes*, in the case of obligations under customary international law, and obligations *erga omnes partes*, in the case of the UN Framework Convention on Climate Change (UNFCCC) and the Paris Agreement. While the Court in the *Whaling* case effectively permitted Australia to institute proceedings against Japan for breaches of the International Convention for the Regulation of Whaling without demonstrating any injury on its part, the decision did not expressly address the character of relevant obligations in the Convention as obligations *erga omnes partes*.

In its latest advisory opinion, the Court laconically observed that, when it came to obligations under customary international law, 'certain rules of international law relating to global common goods, such as the climate system, may produce *erga omnes* obligations' and that 'all States have a

common interest in the protection of global environmental commons like the atmosphere and the high seas' (para 440). On this basis, it characterised states' 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*. Given the far-reaching consequences of such a characterisation, it is striking that the only authority cited by the Court on this point is the commentary to the ILC's Draft Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law (*Jus Cogens*), where the Commission observed that 'certain rules relating to common spaces, in particular common heritage regimes, may produce *erga omnes* obligations' (p.66). The Commission, in turn, had cited the International Tribunal for the Law of the Sea (ITLOS, the Tribunal) advisory opinion in 'Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area', which referred to 'the *erga omnes* character of the obligations relating to preservation of the environment of the high seas and in the Area' (para 180). Critique of the ITLOS advisory opinion aside (fn 196), the reference to the work of the ILC is misleading given the disagreement amongst ILC members in the 2018 Draft Guidelines on the Protection of the Atmosphere as to 'whether or not the obligation to protect the atmosphere is an *erga omnes* obligation' (p.175).

When it came to identifying the obligations *erga omnes partes* contained in the UNFCCC and the Paris Agreement, the Court pointed to the preambular reference in each treaty to climate change as 'a common concern of humankind' and calling for 'a global response' to conclude that each instrument 'seek[s] to protect the essential interests of all States in the safeguarding of the climate system, which benefits the international community as a whole' (para 440). Accordingly, the Court concluded, 'the obligations of States under these treaties are obligations *erga omnes partes*' (para 440). The Court omitted, as it did in the past, to clarify whether all the obligations contained in a treaty advancing the common interest of states parties are obligations *erga omnes partes* and, if not, on what grounds the obligations *erga omnes partes* contained in such treaties might be distinguished. Indeed, the Court introduced some confusion by observing at one point that 'the obligations of States under these treaties are obligations *erga omnes partes*' (para 440) while suggesting elsewhere that only 'the main mitigation obligations' contained in the UNFCCC and Paris Agreement are owed *erga omnes partes* (para 441). When summarising its earlier jurisprudence on the point, the Court noted that 'treaties protecting common interests imply, *with respect to some provisions*, the existence of obligations *erga omnes partes*' (para 441; emphasis added). How to assess which multilateral treaty obligations are obligations *erga omnes partes* remains open to question.

The Court's characterisation of relevant obligations as obligations *erga omnes* and *erga omnes partes*, while far-reaching in the range of the obligations addressed, does not necessarily represent a radical departure from its existing approach to the articulation of such obligations. The Court has consistently referred to the common interest of states in compliance with certain obligations to support their characterisation as obligations *erga omnes* or *erga omnes partes*. The question may nevertheless be posed whether the existence of such a common interest is sufficient to support such a characterisation. Only Judge Tladi, in this opinion and elsewhere, sought to elaborate the point. In its earlier case-law, the Court hinted at two other justifications to support its identification of obligations *erga omnes* and *erga omnes partes*, which find no mention in the present opinion. The first is the *Barcelona Traction* reference to the importance of the rights (of states, groups or individuals?) underlying relevant obligations (para 33), faithfully recalled in subsequent case-law identifying obligations *erga omnes* and *erga omnes partes*, including last year's advisory opinion in *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem* (para 274). Second, the Court has hinted at the non-synallagmatic nature of certain treaty obligations to support their characterisation as obligations *erga omnes partes*, reasoning that, were a 'special interest' required to invoke responsibility for their breach, 'in many cases no State would

be in the position to make such a claim' (*Belgium v Senegal* p.450). That neither of these justifications is seen in the present advisory opinion suggests that, in the most recent view of the Court, a common interest in compliance is all that is required to demonstrate the character of an obligation as *erga omnes* or *erga omnes partes*, with all the consequences that such a characterisation entails.

The Invocation of State Responsibility for Breaches of Obligations *Erga Omnes* and *Erga Omnes Partes*

The ICJ's conclusions as to the invocation of responsibility for breaches of obligations *erga omnes* and *erga omnes partes* are equally striking. In its earlier case-law, the Court affirmed the character of relevant treaty obligations as obligations *erga omnes partes* and, on that basis, affirmed the standing of each state party to invoke the responsibility of a state allegedly in breach of its obligations, that is by instituting proceedings before the Court. To date, the Court has only done so in relation to obligations in the Torture Convention and Genocide Convention (see *Belgium v Senegal* and ongoing proceedings in *The Gambia v Myanmar*, *South Africa v Israel* and *Canada and The Netherlands v Syria*). For each treaty, the Court engaged in an exercise in treaty interpretation, referring to its object and purpose to support the entitlement to standing on the part of each state party in the absence of injury. Likewise, in its latest advisory opinion, the Court relied on the fact of certain treaties 'protecting common interests' to conclude that 'all States parties have a legal interest in the protection of the main mitigation obligations set forth in the climate change treaties and may invoke the responsibility of other States for failing to fulfil them' (para 441), presumably by instituting proceedings before the Court, if not also by resorting to unilateral countermeasures.

Where the Court departed from its existing jurisprudence is in its suggestion that any state to which an obligation *erga omnes* arising under customary international law is owed may invoke the responsibility of a state violating its obligations (para 442). Previously, the Court had not needed to address the question of the entitlement to standing for breaches of obligations *erga omnes*, rather than obligations *erga omnes partes*. Its conclusion in the latest advisory opinion seems to be based on the use of analogy: if the invocation of state responsibility is permitted states parties other than injured states parties to whom obligations *erga omnes partes* are owed, so too must it be permitted states other than injured states to whom obligations *erga omnes* are owed. This logic disregards the fact that, when it came to obligations *erga omnes partes* contained in the Torture Convention and Genocide Convention, respectively, it was the exercise in treaty interpretation that justified the standing of states parties in the absence of injury. What is more remarkable still is that the ICJ chose to elaborate on these consequences at all. The General Assembly asked the Court to clarify the legal consequences of the breach of relevant obligations 'with respect to' 'injured', 'specially affected … or particularly vulnerable' states, in particular small island developing states (question (b)(i)). The reference to 'injured' and 'specially affected' states is taken from Article 42 of the ILC's Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA). Given the General Assembly's emphasis on injury, it is interesting that the Court took the initiative to address the invocation of responsibility by states other than injured states, citing Article 48(1)(b) of the ARSIWA. In another life, the Court might have simply avoided doing so by construing the General Assembly's request more narrowly.

The ICJ having opted to address the standing of states other than injured states, it is regrettable that the opinion refers selectively to Article 48(1)(b) of the ARSIWA rather than the entirety of the ILC's framework on the invocation of state responsibility, which carefully distinguished the entitlements of 'injured States' and 'states other than injured States' in Articles 42 and 48, respectively. Only limited reference is made to the distinction while setting out available remedies (para 443). The advisory opinion fails to imagine circumstances in which states, such as small island developing states, might be 'specially affected', but not otherwise 'injured', by the breach of

obligations pertaining to climate change, as anticipated by the ILC in Article 42(b)(i) (para 440). Similarly, no mention is made of breaches of 'interdependent obligations', addressed in Article 42(b)(ii) as being 'of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation'. As I argue here, it is not at all obvious why certain breaches of obligations for the protection of 'global environmental commons like the atmosphere and the high seas' (para 440) could not injure all the states to which they are owed. The ICJ's reference only to the entitlement of states other than injured states under Article 48, and the omission to elaborate on the various forms of injury in Article 42, lacks proper consideration for the ILC's work.

Conclusions

The advisory opinion characterised a wide range of obligations pertaining to climate change as obligations *erga omnes* or *erga omnes partes*, which, to use the expression of Judge ad hoc Sur, were 'produced like a rabbit from a magician's hat' (para 44). Beyond the reference to the common interest of states in compliance with such obligations—a requirement easily satisfied by a wide range of multilateral obligations (p.449)—the Court offered little justification for its conclusion. This brevity is unfortunate given the Court's expansive view of the entitlement to invoke responsibility for breaches of such obligations even in the absence of injury, including, for the first time, obligations *erga omnes* under customary international law. What remains of the requirement of injury for standing before the Court—to say nothing of the permissibility of unilateral countermeasures—will need to be seen. The articulation and enforcement of obligations *erga omnes* and *erga omnes partes* is, at the initiative of the Japanese ILC member, now on the long-term programme of work of the ILC, which will provide an opportunity to address these deficiencies.