JOINT DECLARATION OF JUDGES CHARLESWORTH, BRANT, CLEVELAND AND AURESCU

The relationship between customary international law and the climate change treaties — The Court's rejection of the argument that the climate change treaties constitute lex specialis *— Ambiguity in the Court's reasoning — Customary law and treaty law retain their separate existence under general international law and climate change law — States' compliance with customary rules cannot be assessed simply by reference to their compliance with climate change treaties.*

1. A central issue in this Advisory Opinion is the relationship between customary international law and treaty law with respect to climate change. Customary law imposes broad duties on all States to prevent significant harm to the environment, and to co-operate for the protection of the environment, duties that are intrinsically linked. The climate change treaties set out specific measures that States parties must take to mitigate, and to adapt to, climate change.

2. The relationship between the two sources of law was a matter of some contention between participants in the proceedings. At one end of the spectrum, a small number of participants argued that the climate change treaties constitute *lex specialis*. On such an analysis, the behaviour of States with respect to climate change should be assessed exclusively under the applicable treaty rules, and customary law obligations have no role to play. At the other end of the spectrum, many participants contended that the two sources of law co-exist and that the climate change treaties do not displace customary international law. The Court — in our view, correctly — unequivocally rejects the argument that the climate change treaties constitute *lex specialis* in their relation to other rules of international law (Advisory Opinion, para. 171).

3. The Opinion explains the relationship between the climate change treaties and customary international law in paragraphs 309-315. In paragraph 314, the Court states:

> "[a]s it is difficult to determine in the abstract the extent to which the climate change treaties and their implementation practice influence the proper understanding of the relevant customary obligations and their application, the Court considers that, at the present stage, compliance in full and in good faith by a State with the climate change treaties, as interpreted by the Court . . ., suggests that this State substantially complies with the general customary duties to prevent significant environmental harm and to co-operate. This does not mean, however, that the customary obligations would be fulfilled simply by States complying with their obligations under the climate change treaties . . . While the treaties and customary international law inform each other, they establish independent obligations that do not necessarily overlap." (Citations omitted.)

4. And in paragraph 315, the Court goes on to state that

> "it is possible that a non-party State which co-operates 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. However, if a non-party State does not co-operate in such a way, it has the full burden of demonstrating that its policies and practices are in conformity with its customary obligations."

5. When read in isolation, these formulations of the relationship between customary law and treaty law with respect to climate change appear ambiguous and potentially misleading. They must, however, be read within the frame of the whole Opinion, in conjunction with its relevant findings. In our view, paragraphs 314 and 315 should not be interpreted to suggest that compliance with customary rules may be assessed only by reference to the climate change treaties, since the Court expressly rejects this reading when emphasizing that obligations under customary law are not fulfilled simply by States complying with their obligations under the climate change treaties. As the Court recognizes, the treaties and customary international law establish independent obligations that do not necessarily overlap. Any other interpretation would run contrary to the rules of international law and the Opinion as a whole.

6. Moreover, paragraphs 314 and 315 of the Opinion should be understood in light of the Court's straightforward rejection of the argument that the climate change treaties constitute *lex specialis* (paras. 168-171). We also note the Opinion's emphasis at various points that the relevant sources of international law "inform each other" (see paragraphs 335 and 354). In doing so, as the Court acknowledges, customary international law and the climate change treaties retain their separate existence, and compliance with them must be assessed separately.

7. This is consistent with the jurisprudence of the Court, which has confirmed that customary and treaty law relating to the same issue retain a distinct existence. As the Court stated in the *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)* case:

> "[o]n a number of points, the areas governed by the two sources of law do not exactly overlap, and the substantive rules in which they are framed are not identical in content. But in addition, even if a treaty norm and a customary norm relevant to the present dispute were to have exactly the same content, this would not be a reason for the Court to take the view that the operation of the treaty process must necessarily deprive the customary norm of its separate applicability."[1]

8. In that case the Court found that the United Nations Charter "by no means cover[ed] the whole area of the regulation of the use of force in international relations"[2]. Indeed, we might wonder whether, even in theory, there could ever be complete identity between the content of treaty and customary rules applicable in a particular context. Jia points out that "treaties can never exhaust an account of general practices, including making prediction of trends of future practice, and . . . custom always outgrows and overtakes treaties"[3]. As such, he observes, "[a] perennial lack of equivalence . . . exists between every treaty and general practice"[4].

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[1] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 94, para. 175.

[2] *Ibid.*, para. 176.

[3] Bing Bing Jia, "The Relations between Treaties and Custom", *Chinese Journal of International Law*, 2010, Vol. 9 (1), p. 94; see also James Crawford, "Chance, Order, Change", *Collected Courses of the Hague Academy of International Law*, 2014, Vol. 365, p. 110, para. 169 ("customary international law is a conversation across time: like good coffee, international law has to be brewed. In contrast, treaties are time-bound promises or propositions that generally reflect a perspective at the time of being made").

[4] Bing Bing Jia, "The Relations between Treaties and Custom", *Chinese Journal of International Law*, 2010, Vol. 9 (1), p. 97.

9. In our view, the relationship between customary law and treaty rules is best described as one of complementarity. Dinstein explains this notion:

> "In most disputes between States, the law applicable is a skein comprising strands of both treaties and custom: several rules (some engendered by treaty and others derived from custom) are complementing and interlacing with each other. There are reasons galore for this phenomenon. First and foremost, a treaty — notably when formulated in order to regulate a wide sector of international law (and irrespective of whether the drafters' aim is the codification of custom or the progressive development of international law) — hardly ever addresses every single issue coming within range. When a particular topic is not covered by the treaty, customary international law continues to govern the *materia* among Contracting and non-Contracting Parties alike."[5]

10. If these statements hold true under general international law, they apply with particular force in the field of climate change law. In the context of States' obligations under climate change law, customary rules apply more broadly than the climate change treaties[6]. These treaties do not aim to codify customary rules or indeed to alter them, but constitute a gradual attempt to develop specific rules on climate change mitigation, adaptation and climate change law generally[7]. In other words, a State's compliance with its commitments under the climate change treaties does not automatically imply or presume compliance with its customary obligations in relation to climate change mitigation and vice versa[8].

11. This understanding is also reflected in the declarations that a number of States made when joining the United Nations Framework Convention on Climate Change and the Paris Agreement. These declarations are to the effect that no provision in those agreements may be interpreted as derogating from principles of general international law. Thirty-eight of the 43 participants that answered a question, posed during the oral hearings, on the significance of these declarations considered that the declarations reinforce the interpretation that the climate change treaties do not derogate from or displace general international law.

12. The Advisory Opinion should be understood as endorsing the view that under both general international law and climate change law, treaty rules and customary rules retain a separate existence and maintain their own separate scope of application. These bodies of law are independent but mutually reinforcing, and States' compliance with each of them must be assessed separately.

13. For these reasons, in our view, the Opinion, when read as a whole, confirms that it is not enough to assess a State's compliance with customary rules simply by reference to their compliance

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[5] Yoram Dinstein, "The Interaction Between Customary International Law and Treaties", *Collected Courses of the Hague Academy of International Law*, 2006, Vol. 322, p. 383, para. 229.

[6] See Benoit Mayer, *International Law Obligations on Climate Change Mitigation*, OUP, 2022, p. 88.

[7] *Ibid.*, p. 127.

[8] *Ibid.*, p. 119.

with the climate change treaties; in short, the treaties are not proxies for assessing compliance with the rules of customary international law.

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(Signed) Bogdan AURESCU.
