

The Normative Status of Climate Change Obligations under International Law ¹

‘Yesterday’s good enough has become today’s unacceptable’

ABSTRACT

This study, commissioned by the European Parliament’s Policy Department for Citizens’ Rights and Constitutional Affairs at the request of the JURI Committee, investigates the normative status of legal commitments of States in the field of international climate law. It concludes that the due diligence obligations of States to realize their nationally determined contributions (NDCs) qualifies as a norm of general international law, but at the moment not as a peremptory norm. It concludes that the legal impact of this norm currently lies in the sphere of interpretation and harmonization of existing international law rather than invalidation of conflicting rules.

In March 2023, the Intergovernmental panel on Climate Change (IPCC) published its most recent report confirming its earlier findings on the urgency of international climate action, that ‘climate change is a threat to human well-being and planetary health’ and that ‘the choices and actions implemented in this decade will have impacts now and for thousands of years’. As eloquently noted by the Supreme Court of the State of Hawaii in 2023 ‘[y]esterday’s good enough has become today’s unacceptable’.

In this wider context, the European Parliament Committee on Legal Affairs requested a study on: ‘The legal nature of climate goals (2° or 1.5°C) and of the actions foreseen by the Paris Agreement to achieve them and its impact on the international legal system’. More specifically the Committee seeks an answer to the question whether the climate goals and the actions foreseen by the Paris Agreement can be regarded as peremptory norms of international law (*jus cogens*) and what the consequences of such a qualification would be.

To start, the reference in the Paris Agreement to the universally shared objective of keeping the temperature rise limited to preferably 1.5°C reflects the *underlying rationale and values of the climate law regime*. Such references contribute to formulating norms of general international law, with the potential of obtaining in the future the status of peremptory norm.

The definition currently adopted by the International Law Commission in 2022, in its Draft Conclusions on *Jus Cogens*, allows for an interpretation, such that a peremptory norm related to climate may emerge in international law, although this does not seem to be the case at the moment. Were such a norm to emerge, in principle it would not be too difficult to argue that the purported general norm reflects universal values and is a norm of general international law accepted by the community of States as a whole. The acceptance of the existence of a peremptory climate norm would have as a consequence the fact that States will not be able to

¹ Full study in English: [https://www.europarl.europa.eu/RegData/etudes/STUD/2023/749395/IPOL_STU\(2023\)749395_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2023/749395/IPOL_STU(2023)749395_EN.pdf)



opt out or derogate from this norm, even if, for instance, a particular treaty would allow for withdrawal. Such a peremptory norm could be modified or replaced only by a subsequent peremptory norm.

However, one of the main issues with the potential emergence of peremptory climate norm is that it would be difficult to ascertain the *precise content* of the general norm, *given that the core obligation of climate law is formulated as a due diligence norm*. Hence, it would be also difficult to establish when such a peremptory climate norm, construed as a positive obligation, has been derogated from or violated. There is a fine line between not doing enough and a refusal to recognize the existence of a duty to do your best.

That is not to say that the obligations contained in the various climate change instruments are of limited value. Far from it. The number of legally binding obligations in the Paris Agreement may be limited, but the Paris Agreement as a whole in the context of the dynamic and continuous process of global cooperation, and aiming at keeping climate change under control, has immense legal value. The core norms contained in it can be considered as belonging to the domain of general international law and could potentially achieve the status of peremptory norm, in particular the obligation to exercise due diligence to formulate, maintain and enhance over time ambitious domestic climate goals, as well as the duty to meaningfully cooperate at the international level in a transparent way. The universally shared ambition of the Paris Agreement to keep temperature rise limited to preferably 1.5°C, is not a legal obligation as such, but is essential for the determination of compliance with the relevant climate norms.

In climate-related litigation at the domestic, regional or international levels, there are significant indications that courts and tribunals can play a meaningful role in the future development of this area of international law, although as seen in trade and investment law, general international climate law does not easily set aside other legal obligations.

The International Court of Justice, the International tribunal for the Law of the Sea and the Inter-American Court of Human Rights, through requests for advisory opinions which have been submitted to them, will have the opportunity to provide a better insight into the current state of international climate law. States and other actors should encourage the courts to contribute to the progressive development of international law, rather than seeking a restrictive view on the impact of climate law, in the interests of present and future generations and the planet as a whole.

However, the debate on whether climate norms have or will ever achieve(d) peremptory status is not the alpha and omega of their relevance. In practice, it will not make much difference whether or not general international climate law has obtained or will obtain the status of a peremptory norm. The generality of the due diligence norm on climate makes it difficult to formulate a clear conflict with other norms of international law that can be solved by prioritizing one over the other.

What is important is that the virtually universal support for the existence of the general international climate norm, even without a peremptory status, gives it an enormous interpretative and compliance pull. This will affect the application and interpretation of other rules of international law. Efforts of States, international organizations, and non-State actors can be best focused on promoting harmonious interpretation, rather than engaging in a zero-sum game of arguing that norms conflict exist and then trying to prioritize one norm over the other.

Claiming that climate norms have the status of peremptory norms may be contested by States and lead to a heated legal debate but with little practical impact. On the contrary, taking into account the general norm(s) of international law on climate in the interpretation and application of legal rules from all areas of international law can prove to be a much more effective and far-reaching approach.

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This document is available on the internet at: www.europarl.europa.eu/supporting-analyses

PE 749.395

IP/C/JURI/2022-107

Print ISBN 978-92-848-1094-9 | doi:10.2861/800438 | QA-04-23-878-EN-C
PDF ISBN 978-92-848-1089-5 | doi:10.2861/420243 | QA- 04-23-878-EN-N