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International justice and the environment: Analysis of the request for an advisory opinion to the International Court of Justice

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On March 29, 2023, the United Nations General Assembly adopted a resolution (A/77/76)^{[1](#)} requesting an advisory opinion from the International Court of Justice (ICJ) on the obligations of States in relation to climate and environmental matters; this will be the first time the ICJ rules on this issue. While advisory opinions do not have the same binding force as decisions in litigation cases, they can have important effects on the principles of international law applicable to relations between States in climate matters, on the conduct of other legislative proceedings at the national level, or on climate disputes in the regional and national context. This blog post examines the political and legal issues associated with such a resolution in terms of international justice and international environmental governance.

A history of mixed success

The first request for advice from a body with extraterritorial jurisdiction over States' obligations on climate change was made in 2005 by the Inuit community and was directed at the United States. Since then, others have followed, including to human rights bodies. One of the most recent, and with some success for the plaintiffs, is the UN Human Rights Council (HRC) case of *Ioane Teitiota v. New Zealand*, issued on October 24, 2019². The UNHRC's findings have been analysed as a breakthrough for the international recognition of a legal status for climate migrants. For the first time, the UNHRC had recognised that the effects of climate change are likely to affect the right to life³ and therefore trigger a non-refoulement obligation for host States towards climate migrants. However, the general climate responsibility of States was not settled on this occasion.

The adoption of [Article 8 of the Paris Climate Agreement](#) on loss and damage has clarified the scope of the areas covered by the Warsaw Mechanism. This mechanism has a role of information, coordination and exchange of knowledge and good practices, in order to help the most vulnerable countries to anticipate and minimise the risks of loss and damage caused by climate change and to discuss possible risk management mechanisms. However, Article 8 does not establish an international responsibility of greenhouse gas (GHG) emitting countries towards others that are adversely affected by climate change. While this may be a recognition of a duty of solidarity on the part of developed countries towards countries with limited resilience, the mechanism does not establish legally binding obligations.

The making of a "historic" resolution

It all began in 2011 when Palau and the Marshall Islands tried, unsuccessfully, to bring the issue of climate change to the ICJ. They wanted clarification on States' obligations to reduce GHG emissions. A few years later, the Paris Agreement was ratified, calling on States to voluntarily commit to emission reduction targets. However, the Agreement does not create binding obligations on adaptation or loss and damage, and the link to human rights is limited to a reference in its preamble.

In 2019, the Vanuatu government presented the Pacific Islands Students Fighting Climate Change (PISFCC) proposal to the Pacific Islands Forum. The campaign for the advisory opinion rapidly expanded beyond the Pacific to mobilise wider support. In May 2022, a global alliance was launched. The campaign was successful and in March 2023 the resolution was adopted by a majority of countries.

What is the advisory opinion about?

The request for an advisory opinion was based on a number of findings: climate change is having a significant impact on Small Island States, with Vanuatu being particularly affected; recent trends (highlighted by the latest IPCC report) show an increase in the intensity and frequency of extreme weather and climate events⁴; human rights are being affected and violated by climate change, and a number of court cases have recognised the legal link between climate change and these rights.

The request for an advisory opinion raises a number of issues for the Court. The first concerns the obligations of States under international law. The ICJ is asked to clarify these in order to ensure the protection of the climate system and other aspects of the environment from anthropogenic GHG emissions for States and for present and future generations. The second is the legal consequences of these obligations for States where, through their acts

and omissions, they have caused significant damage to the climate system and other parts of the environment. For this latter question, two clarifications are sought from the Court: first, in relation to States, including, in particular, Small Island Developing States, what are the obligations in view of their particular vulnerability? Secondly, in relation to present and future generations affected by the effects of climate change, are there specific obligations for their protection?

What should the advisory opinion be based upon?

The opinion should be based on the sources of international law listed in Article 38 of the Statute of the Court. These include: international conventions, whether general or particular; international custom, as evidence of accepted general practice; general principles of law recognised as a primary source of international law; subject to the provisions of Article 59, judicial decisions of countries as a subsidiary means of determining rules of law; and expert contributions⁵.

The Court will have to rely on the abovementioned sources, which have a broad and rather flexible scope. First, those of a conventional nature. Although the Paris Agreement does not necessarily imply binding obligations, it does impose duties regarding the timetable to be respected and the information to be provided by States every five years. Similarly, the Monitoring Committee of the Agreement can report on the "good and bad performers" regarding progress on national contributions and other more or less voluntary commitments. Other treaties can also provide food for thought for the Court. The Convention on Wetlands (Ramsar 1971), the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES 1973), the Convention for the Protection of the World Cultural and Natural Heritage (Paris, UNESCO 1972) and the Convention on the Conservation of European Wildlife and Natural Habitats (Bern 1979) are among the most important. In addition, the 1992 Rio Conference included several conventions that were intended to govern the handling of global environmental issues: the Convention on Climate Change (UNFCCC) and the Convention on Biological Diversity (CBD). The Convention to Combat Desertification (UNCCD), drawn up in Paris in 1994, is associated with these. Also included in the sources are the Convention on the Rights of the Sea, the Aarhus and Escazu Conventions (on the rights to information, participation and access to justice in environmental matters), the recent agreement on the Treaty on the Conservation and Sustainable Use of Marine Biodiversity in the High Seas or the Convention on the Rights of the Child, which contains specific provisions on climate change and future generations.

Secondly, the major principles of international law can also guide the Court. These include the principle of common but differentiated responsibilities, the principle of responsibility (including the principle of good neighbourliness), the principle of cooperation, the principle of sustainability, the principles of prevention and precaution, and the principle of equity towards future generations. Also, a series of principles have emerged from certain regional conventions such as the European Convention on Human Rights (ECHR) and the Inter-American Convention on Human Rights (IACHR), concerning respect for the right to life, private and family life (with respect for the right to a dignified home), the principle of non-discrimination, the principles of information and participation, as well as the principle of the right to an effective remedy. Finally, the right to a healthy, sustainable and clean environment has recently been accepted by the UNGA and could be integrated into the Court's practice. In addition, the various international, regional and national jurisprudence on environmental and climate issues is also a source for the ICJ.

Climate justice to support the advisory opinion

The negative effects of climate change also have consequences on human rights. This was recognised by the Special Rapporteur on Human Rights and the Environment⁶. Moreover, some climate litigation cases have used

human rights to encourage various national courts to rule on the climate obligations of States (Urgenda cases⁷) and companies (Shell case⁸). Indeed, it is worth recalling that in 2019, the Dutch Supreme Court ruled in the Urgenda cases that the inadequate climate policies of the Netherlands violated Articles 2 and 8 of the ECHR. In the Shell case, the Hague Court recognised that a company's duty of care must be in line with Articles 2 and 8 of the ECHR.

Future decisions in response to the climate applications before the ECtHR may also clarify the nature and extent of States' positive obligations. As a common feature of the applications, the plaintiffs claim that they are facing unprecedented risks to their lives and health⁹. They consider that climate change is a threat to people's livelihoods and accuse the various States involved of contributing to the increase in warming and of not taking effective measures to counter it. This would constitute a violation of their rights to life, privacy and non-discrimination under the ECHR.

The various environmental treaties, the principles that have emerged from international practice and the various climate disputes can help define positive obligations for States. They have become, as the latest IPCC report recognises, a key element of governance in the fight against climate change¹⁰. Moreover, the Special Rapporteur for Human Rights and the Environment has just launched a questionnaire to better consider the outline of these obligations. If the ICJ's advisory opinion is inspired, as would be desirable, by the various elements cited here, it will finally clarify the duties of States on the climate issue, both from the point of view of prevention and reparation.

¹ <https://www.lefigaro.fr/flash-actu/l-onu-adopte-une-resolution-historique-pour-la-justice-climatique-20230329>

² Ioane Teitiota, a citizen of the Kiribati archipelago, had denounced the harmful effects of climate change, and in particular, sea level rise on his right to life to challenge his expulsion from New Zealand, Human Rights Committee, Teitiota v New Zealand, Communication 2728/2016 Doc off CDH NU CCPR/C/127/D/2728/2016 (2019)

³ Articles 6 and 7 of the International Covenant on Civil and Political Rights.

⁴ IPCC (2023). Climate Change 2023: Synthesis Report.

⁵ K. Horne, M.-A. Tigre, M. Gerrard (2023). Status Report of Principles of International Human Rights Law Relevant to Climate Change.

⁶ UN Doc A/HRC/37/59 (2018)

⁷ The Hague Court of Justice, Urgenda Foundation v. The Netherlands, June 24, 2015, C/09/456689/HA ZA 13-1396, ECLI :NL :RBDHA :2015 :7145 (Urgenda); The Hague Court of Appeal, Urgenda Foundation v. The Netherlands, October 9, 2018, 200.178.245/01, ECLI :NL:GHDHA :2018 :2610 (Urgenda); Netherlands Supreme Court, Urgenda Foundation v. The Netherlands, December 20, 2019, 19/00135, ECLI :NL:HR :2019 :2006 (Urgenda)

⁸ The Hague Court of Justice, Milieudefensie & al. v. RoyalDutch Shell, May 26, 2021, C/09/571932 / HA ZA 19-379, ECLI : ECLI:NL:RBDHA:2021:5337 (Shell).

⁹ Duarte Agostinho et al. v. Portugal & 32 other States, Request n° 39371/20, 2020; Verein KlimaSeniorinnen Schweiz et al. v. Switzerland, Request n° 53600/20, 2021; Greenpeace & others v. Norway, Request n° 34068/21, 2021; Carême v. France, Request n° 7189/21, 2022.

¹⁰ IPCC, Climate Change 2022: Mitigation of Climate Change : <https://www.ipcc.ch/report/ar6/wg3/>