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Can the International Court of Justice rise to the challenge of climate change?

Auteur

Marta Torre-Schaub

Associate Researcher

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Unprecedented hearings took place in The Hague over two weeks in December 2024 as part of a request for an advisory opinion from the International Court of Justice (ICJ) on States' obligations regarding climate change ([IDDRI, 2023](#))¹. 96 States and 11 international organizations put forth their perspective on how the ICJ should interpret States' legal obligations and, more importantly, on the nature and scope of climate law, and, in some cases, international law itself. Different interpretations of what the "international community" is and should be in the fight against climate change have emerged in these submissions. The ICJ must now consider these positions and produce its advisory opinion, which will ultimately establish a "doctrine" of its understanding of international solidarity and cooperation. Will this doctrine confirm existing divisions or offer an opportunity to go beyond them?

An ambitious undertaking

Firstly, it is important to note the unprecedented number of ICJ Member States that have participated in these proceedings. While no country has denied the seriousness of climate change, important differences—even tensions—have emerged on the obligations of States in the matter, with some countries cautious and sometimes reluctant to admit any obligations outside of those outlined in the Paris Climate Agreement. As a result, the overall impression is one of a disparate understanding of climate law.

This is because the specific questions put before the Court raise the broader question of the very nature of international climate law: is it a “closed” system, limited to the climate regime *stricto sensu* (United Nations Framework Convention on Climate Change, UNFCCC), or more “open”, and indeed systemic, finding its source also in obligations of general international law? Beyond the climate regime, questions surrounding international law remain: should the international community display more responsibility and solidarity, or should it limit itself to complying with the minimum obligations set out in the Paris Agreement?

Three theories of climate law

For some countries, the Paris Agreement represents a *Lex Specialis*, in other words a specialized law which exclusively applies to the question of climate change without interaction with general international law or other fields (biodiversity, human rights, or the sea). Countries with economies highly dependent on fossil fuels primarily constitute this first group.²

For other countries, however, the climate regime must be interpreted concurrently or reinforced by other aspects of international law such as customary international law, human rights law, the law of the sea or the rights of the child.³ These countries belong to the coalition which put forth the petition before the UN General Assembly requesting this advisory opinion from the ICJ.⁴

A third group, which features the largest number of countries, includes those who hold the view that climate law (i.e. UNFCCC) should be complemented by only parts of general international law with a minimalist approach to its interpretation. This means, for instance, putting forth the argument that the principles of due diligence cannot complement the obligations of the Paris Agreement. The group has also argued that the customary principle of prevention should not be interpreted by the ICJ in a broad manner, as this would add climate obligations which, in their view, are not contained in the Paris Agreement. In summary, for these countries (which include France), climate law already establishes obligations through the Paris Agreement, and customary principles of international law cannot additionally feed into the ICJ’s advisory opinion.

A “cathartic” effect of the ICJ proceedings

The ICJ proceedings are quite different in nature from a COP-style negotiation. All Parties were given ample time for preparation and were heard on an equal footing in a “transparent manner”.⁵ This should enable a more clear and sober analysis than during climate negotiations where a decision must be reached. Moreover, the request for an advisory opinion is not a geopolitical negotiation; rather it falls under the competence of an independent judicial authority recognized by the United Nations. Finally, the ICJ is not a climate “specialist” but its expertise builds on international law, in all areas. As such, it can apply, if it so wishes, its already well-established international and environmental jurisprudence to the climate problem, without limiting itself to taking a restrictive reading of the Paris

Agreement as the sole legal foundation. The opinion of the Court could thus significantly reinforce the UNFCCC system.

Indeed, even as some countries deny a systemic and adaptative understanding of international law in the fight against climate change, the hearings at The Hague have provided a useful, albeit divisive, kind of “catharsis”. We now know the true positions of certain countries as well as their difficulty, inability or refusal to implement effective climate policies and accept overly strict or constraining obligations, consequently compelling other countries to accept international climate law *a minima*. Some countries have even showed a certain scepticism towards the foundational principles of international law, such as the principles of prevention, responsibility, diligence and cooperation. Still others affirm that while only the Paris Agreement should apply on the issue of climate, the principles contained in the treaty which originate in the Framework Convention should nevertheless be interpreted parsimoniously. This particularly pertains to the principle of common but differentiated responsibilities (CBDR) ([IDDRI, 2015](#)). Several States have insisted on minimizing the geographical, temporal and material scope of this principle, such that it cannot be applied in any circumstances to so-called ‘historical emissions’, except in very exceptional and circumscribed instances. Some States have even expressed the wish that the CBDR should only apply from the present moment,⁶ stressing the importance of privileging a “dynamic” understanding of this principle.⁷

The ICJ: a key player in strengthening the international climate law of the future?

The positions of the States are now clear. The ICJ must now respond to the two questions asked in the advisory opinion request submitted in March 2023 ([UNGA, 2023](#)): “what are the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for present and future generations?” and “what are the legal consequences under these obligations for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment?”. As an independent and a priori transparent body, it can now act as a completely neutral third power (in parallel with the UN General Assembly and the States themselves) to establish, frame and affirm a legal perimeter of specific and clarified obligations in the combat against climate change for all States to respect.

The ball is now in its court. It can take the opportunity to highlight the necessary interlinking of climate law with general international law and its duties of prevention, protection, diligence and cooperation; or it can fail to heed the call of the most vulnerable members of the international community by choosing to put forth a moderate or “minimalist” response to avoid offending anyone. Will the ICJ be able to distance itself from the interests of the various Parties? Can it carry out its role in full without fuelling the same divisions that emerge during climate negotiations? Can it rise to the “historic” task placed before it?

While the stakes may be high, this must not be seen as the “final” or only opportunity for the ICJ, but rather as the start of a new era. Indeed, this first advisory opinion may open the door to further requests down the line, which could together gradually spell out the foundations of a new international law fully encompassing the question of climate change. Even if we assume that this first opinion is not successful in this regard, the ICJ could very well take up the issue at a later stage by initiating a legal “revolution”, as the [European Court of Human Rights](#) (ECHR) and the [International Tribunal of the Law of the Sea](#) (ITLOS) have recently done.

<https://www.icj-cij.org/case/187/oral-proceedings> ; <https://www.icj-cij.org/sites/default/files/case-related/187/187-20241213-pre-01-00-en.pdf> ; See also <https://www.iddri.org/en/publications-and-events/billet-de-blog/international-justice-and-environment-analysis-request>

2

The United States, Canada, Russia, Kuwait, the Nordic countries.

3

Barbados, Chile, Cook Islands.

4

The coalition including the Pacific States, Colombia, Ghana, Sierra Leone, Liechtenstein, Albania, Slovenia.

5

C. Heri (2024). "An Interim Report on the ICJ's Climate Advisory Opinion" <https://www.justsecurity.org/105917/interim-report-icj-climate-opinion/>

6

The UNFCCC only accounts for greenhouse gas emissions since 1990.

7

Germany, for instance.

CLIMATE

CLIMATE INTERNATIONAL NEGOTIATIONS

GOUVERNANCE ET DROIT