



**HUMAN RIGHTS IN
THE FACE OF THE
CLIMATE CRISIS:**

**a youth led initiative to
bring climate justice to
the International Court
of Justice**



N.N.

Second Edition, 2022

**Human rights in the face of the climate crisis: a youth-led initiative to bring climate justice to the
International Court of Justice**

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This edition of the legal report enumerates the political and legal developments in International Environmental Law that form the basis of seeking an advisory opinion from the International Court of Justice (ICJ) on the matters of integrating human rights law and climate change law to protect future generations from the adverse impacts of climate change. The report discusses the legal developments that are transforming public consciousness toward tackling issues of climate change. The editors of this edition are members of the Academic Taskforce for World's Youth for Climate and believe in solid climate action for safeguarding the needs of the future.



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July 2021



Executive Summary

This is the second edition of a report that was first published in July 2021 in collaboration with students from eight different universities and one institution around the world which all believe in legal pathways as one way to address the inequity arising from the climate crisis and has been co-edited by the Academic Taskforce of World’s Youth for Climate Justice (WYCJ).



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Introduction

The United Nations High Commissioner for Human Rights, Michele Bachelet, alerted States in an open letter to the necessity for human-rights based climate action at the 25th COP to the UNFCCC: “*the economies of all nationals; the institutional, political, social and cultural fabric of every State; and the rights of all people - and future generations - will be impacted.*”¹

In 2022, the United Nations on General Assembly also recognised that the right to a clean, healthy and sustainable environment is a human right.² This has been reiterated in the UNHRC’s latest decision on the Torres Straits Islanders’ case where it has found Australia violating its obligations to protect human rights from the adverse impacts of climate change.³ Thus, the connection between climate change and human rights is now well established.⁴ Climate change has been shown to exacerbate pre-existing inequalities and human rights challenges such as poverty, well-being, right to life, gender relations, and many others,⁵ more importantly, it affects vulnerable groups most acutely. Children, whose rights are set out in the Convention on the Rights of the Child,⁶ are a poignant example of a vulnerable group who have contributed least to historic greenhouse gas emissions. The World Health Organisation found that annually 1.7 million children under the age of 5 die due to environmental damage,⁷ and the Human Rights Council affirmed that millions of children worldwide grow up deprived of parental care due to natural disasters caused by climate change.⁸

¹ OHCHR, ‘Open-Letter from the United Nations High Commissioner for Human Rights to Member States on priorities for human rights-based climate action at the 25th Conference of the Parties to the United Nations Framework Convention on Climate Change’ (Geneva, 27 November 2019) <https://www.ohchr.org/Documents/Issues/ClimateChange/UNFCCCOP25_OpenletterfromHCMemberStates_NoV2019.pdf> accessed 20 January 2021.

² <https://news.un.org/en/story/2022/07/1123482>

³ <https://www.ohchr.org/en/press-releases/2022/09/australia-violated-torres-strait-islanders-rights-enjoy-culture-and-family>

⁴ See for example, International Council on Human Rights Policy ‘Climate Change and Human Rights: A Rough Guide’ (Geneva 2008) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1551201> accessed 22 January 2021; OHCHR, ‘Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights’ (Geneva 2009); John H. Knox ‘Climate Change and Human Rights Law’ (2009) 50:1 Virginia Journal of International Law, 164; and Siobhan McInerney-Lankford, Mac Darrow and Lavanya Rajamani ‘Human Rights and Climate Change: A Review of the International Legal Dimensions’ (17 March 2011) World Bank <<https://documents.worldbank.org/en/publication/documents-reports/documentdetail/903741468339577637/human-rights-and-climate-change-a-review-of-the-international-legal-dimensions>> accessed 18 January 2021.

⁵ OHCHR ‘Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship Between Climate Change and Human Rights’ (Geneva, 15 January 2009) A/HRC/10/61.

⁶ UN Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (UNCRC).

⁷ WHO, ‘Don’t Pollute My Future! The Impact Of The Environment On Children’s Health’ (2017) <<https://apps.who.int/iris/bitstream/handle/10665/254678/WHO-FWC-IHE-17.01-eng.pdf?sequence=1>> accessed 18 January 2021.

⁸ UNHRC, ‘Rights of the child: realizing the rights of the child through a healthy environment’ (5 October 2020) UN Doc A/HRC/45/L.48/Rev.1.



These examples expose the horrifying range of children's rights that are affected by climate change, such as the right to life, family life, and health.

Climate change is also a threat to a range of substantive rights, such as the right to food and housing.⁹ The Human Rights Council has frequently stated that massive violations of the right to food are already occurring today, particularly in developing countries. Also establishing that these violations are related in part to climate change and its related impacts.¹⁰ The Special Rapporteur on the Human Rights of Internally Displaced Persons has further identified five climate-related reasons that lead to mass displacements, such as increased frequency of extreme weather events, slow onset events, the sinking of small island States, and violence and armed conflict due to scarcity of resources.¹¹

In 2013, the Yale Center for Environmental Law and Policy published a [Report](#) entitled '*Climate Change and the International Court of Justice: Seeking an Advisory Opinion on Transboundary Harm from the Court*'. The Report was prepared to support a campaign initiated by the Republic of Palau and the Republic of the Marshall Islands in 2011 to secure an Advisory legal Opinion from the International Court of Justice (ICJ) on transboundary harm arising from climate change.

Almost a decade later, the umbrella-organisation World's Youth for Climate Justice (WY CJ) is pursuing an ICJ Advisory Opinion on State's human rights obligations in relation to the climate crisis. This civil society campaign was started by students from the University of the South Pacific who have rapidly grown a powerful coalition pursuing the Advisory Opinion.

The Yale brief inspired the World's Youth for Climate Justice to write a report on its climate justice campaign. The purpose of the report is to provide a platform for academics and law students to discuss the nature and impacts of a potential Advisory Opinion, as well as to analyse its legitimacy, justification, and broader legal and societal implications. Since the 2011 efforts by Palau and the Marshall Islands, there have been significant global developments towards a consensus on the threat of anthropogenic climate change, the need for climate action and, more recently, the role of litigation.¹² Nonetheless, discussions on the equity of dealing with the impacts of the climate crisis are progressing at a glacial pace. This is why the youth-led campaign for an ICJ Advisory Opinion is one promising pathway to contribute to the development of international law.

⁹ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art. 11.

¹⁰ UNHRC, 'Report of the Special Rapporteur Ambeyi Ligabo on the promotion and protection of the right to freedom of opinion and expression' (28 Feb 2008) UN Doc A/HRC/7/14; UNHRC, 'Report of the Special Rapporteur Margaret Sekaggya on the situation of human rights defenders' (12 February 2009) UN Doc A/HRC/10/12;

UNHRC, 'Report of the United Nations High Commissioner for Human Rights on the situation of human rights and the activities of her Office in the Democratic Republic of the Congo' (10 January 2011) UN Doc A/HRC/16/27; See also OHCHR 'UN Special Procedures Facts and Figures 2011' (Geneva, 2012).

¹¹ OHCHR, 'Report of the United Nations High Commissioner for Human Rights: Analytical study on the relationship between human rights and the environment' (16 December 2011) UN Doc A/HRC/19/34, para 52.

¹² There have been important climate focused human rights developments since the brief to support such a focus. See Jacqueline Peel & Hari M. Osofsky, 'A Rights Turn in Climate Change Litigation?' (2018) 7(1) *Transnational Environmental Law* 37-67.



The legal question the WYCY is seeking an Advisory Opinion on is along the lines of “*What are the obligations of states under international law to protect the rights of present and future generations against the adverse effects of climate change?*”

This report is produced by students from universities all over the world who have used their academic resources to dive into the questions of the ICJ Advisory Opinion campaign, and who, through their work, have provided a powerful collaborative effort in support of the WYCY Campaign. We are deeply impressed with their curiosity and attention to detail and are grateful for their time, effort, and commitment.

Disclaimer: We have collectively put together materials that the judges, legal professionals, academics, students and civil society are likely to take into consideration when deliberating the question. We believe that this collection convincingly demonstrates that the ICJ has a sufficient and legitimate basis both in law and evidence to engage with the questions. Yet, it is important to acknowledge that States will be allowed to make written and oral submissions and can further increase and add to the material which the Court will be considering. Therefore, we do not claim that report is exhaustive. Rather, it provides a solid starting point for further deliberations.

In addition, the question posed above is one proposed by WYCY. The legal question that could be posed to the ICJ will be the subject of negotiations among States at the UN General Assembly.



World's Youth for Climate Justice

Human exploitation, extraction and consumption of resources has been out of control for decades, and this comes at a dire cost. Global heating, sea level rise, more frequent and intense extreme weather events, and biodiversity decline do not happen in a vacuum. These are just some of the climate crisis impacts that are now directly infringing on our basic human rights.

The human rights of people living in communities on the frontline of the climate crisis are already being impacted and violated today. The rights to life, housing, food, and health are infringed by climate change impacts every day. Vulnerable groups such as women, children, Indigenous people, the elderly, people living in poverty, and other marginalised groups are facing the brunt of this crisis. All this has been reiterated countless times and articulated by Indigenous leaders, community organisers, activists, youth, elders, academia, and some politicians. Despite these efforts, global society continues to implement sustainable solutions at no more than a glacial pace.

In 2011, the climate-vulnerable Pacific Island states of Palau and the Marshall Islands attempted to take climate change to the International Court of Justice. They were seeking clarifications on the obligations of States to cut greenhouse gas emissions to avoid transboundary harm. Palau's attempts were unsuccessful. A few years later, states from all over the world ratified the Paris Agreement, which invites States to voluntarily commit to emission reduction targets. So far, States' contributions have not been ambitious enough to reach the 1.5-degree target agreed upon in Paris. Moreover, the Paris Agreement does not create binding obligations on adaptation or loss and damage¹³, and the relationship to human rights is limited to a preambular reference.¹⁴

In 2019, 27 law students from The University of the South Pacific were inspired by Palau's initiative and came together to form the Pacific Islands Students Fighting Climate Change (PISFCC). They have built upon Palau's campaign with a new focus: human rights and climate change. In the same year, the PISFCC's proposal was tabled by the Vanuatu government at the Pacific Island Forum. There, the 18 Member States of the Pacific Island Forum noted positively the proposal for a United Nations General Assembly resolution seeking an Advisory Opinion from the International Court of Justice on climate change and human rights. Although a crucial step in the right direction, in order for the resolution to be successful there must be a simple majority vote by the 193-member States of the UN. Recognizing this reality, the ICJ Advisory Opinion campaign has grown beyond the Pacific where Pacific youth and partners are working tirelessly to galvanise support both regionally and internationally. Youth from around the world have united in this mission under the youth-led umbrella-organisation World's Youth for Climate Justice. Today, WY CJ is a global youth-led NGO that campaigns for seeking this advisory opinion from the ICJ. WY CJ has grown and established regional fronts in Asia, Latin America, Africa and Europe to mobilise civil society and youth in support of this campaign. We use various instruments of legal advocacy to support our demand for the benefit of future generations.

¹³ Lavanya Rajamani, 'The 2015 Paris Agreement: Interplay Between Hard, Soft and Non-Obligations' (2016) 28(2) *Journal of Environmental Law* 337-358.

¹⁴ See further Alan Boyle, 'Climate Change, The Paris Agreement and Human Rights' (2018) 67(4) *The International and Comparative Law Quarterly* 759-777.



Our Campaign and Journey Until Today

Following support from members of the Pacific Island Forum in 2019, September 2021 came with our first victory when the Government of Vanuatu announced its support for the International Court of Justice Advisory Opinion (ICJAO) initiative and take it to the UNGA. It declared that it would table the resolution at the 77th UNGA in New York to seek an advisory opinion from the ICJ on the matters relating to the integration of Human Rights Law and Climate Change Law. Following that, in May 2022, a global alliance of civil society groups, representing over 1500 civil society organisations in 130 countries, was launched today to support a powerful new climate justice initiative by the Government of Vanuatu to take the human rights impacts of climate change to the world’s highest court, the International Court of Justice.¹⁵ Against the backdrop of the ICJAO campaign at the New York, the efforts of the youth movements finally seem to have transpired at a high level.

During the opening statements at the 77th UNGA, national delegations of the Solomon Islands, Papua New Guinea, and Antigua and Barbuda formally declared their support for Vanuatu’s ICJAO initiative. On 24th September, H.E. PM Browne (Antigua and Barbuda) called to support Vanuatu’s Resolution for an ICJ advisory opinion. He stated, ‘Not to support the Vanuatu Resolution would be a vote to circumvent a decision on the legal obligations of each nation...thereby imperilling human civilization’. Following that, H.E. PM Mr. James Marape (Papua New Guinea) stated “It is Papua New Guinea’s humble view that the atmospheric balance of oxygen and carbon should be ranked the number one focus of all mankind.”. He supported Vanuatu’s initiative to seek an International Court of Justice Advisory Opinion on this existential threat. Similarly, Antigua & Barbuda, Costa Rica, Sierra Leone, Germany, Mozambique, Liechtenstein, Samoa, Federated States of Micronesia, Bangladesh, Morocco, Singapore, Uganda, New Zealand, Vietnam, and Portugal have announced their support for the ICJAO initiative. Following these developments, on 27th October 2022, Vanuatu announced the core group of States that will finalise and make the resolution public in mid-November and open to informal negotiation later in November. Following that, a final vote is expected between December 2022 and February 2023.¹⁶

Against the backdrop of these high-level developments, WY4CJ believes that an Advisory Opinion on climate change from the ICJ will not just summarise States’ existing obligations with regard to human rights and climate change, but can also deliver a progressive interpretation of those obligations and make global progress toward intergenerational equity and climate justice. The ICJ Advisory Opinion campaign is a concrete and well-justified catalyser for more ambitious climate action.

We are grateful for all the work civil society and youth leaders from around the world are doing for climate justice, and seek to use our collective megaphone for the progressive development of climate justice.

Join us in our journey to take the world’s biggest problem to the World’s Highest Court.

For more information on World’s Youth for Climate Justice, please visit www.wy4cj.org.

¹⁵ <https://climatenetwork.org/2022/05/05/thousands-of-civil-society-organisations-call-on-countries-to-support-vanuatu-climate-justice-initiative/>

¹⁶ <https://www.vanuatuicj.com/resolution>



State of our Planet



1. The human impacts of the climate crisis

Key takeaways:

- Climate change has a significant impact on Small Island States (SIS) and vulnerable groups.
- The State of Vanuatu for instance is particularly affected by the impacts of climate change and its citizens are experiencing the consequences disproportionately.
- Recent trends (such as the latest IPCC report) depict higher intensity and frequency of climate and weather outbreaks resulting from the increase in the average global temperature.
- Human Rights are impacted by the effects of climate change, and several court cases have legally recognised the legal link between climate change and human rights.

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1.1. Introduction

Small Island States are currently experiencing significant impacts from a wide range of climate hazards. The rise in sea levels has led to the disappearance of several low-lying Pacific Islands along with severe erosion. Coastal aquifers, which are often the primary source of freshwater for islands, are facing decreased water quality from salinization due to both sea-level rise and increased flooding from coastal storms. Extended periods of drought have also threatened water security whilst changes to ocean conditions have led to population declines in fisheries for island communities and more generally, across the world.

Climate change threatens the realisation of sustainable development and, on a deeper scale, the future of humanity.¹⁷ Indeed, climate change threatens the livelihoods of all people since we are collectively dependent on biodiversity and healthy ecosystems such as access to food, water, and shelter.¹⁸

Burning fossil fuels contribute to the climate crisis by producing large quantities of greenhouse gases that remain trapped in the atmosphere. The results of warming the earth are rising sea levels, melting ice caps, and biodiversity loss. These effects are symptomatic of climate change and pose a great threat to our lives, and our planet.¹⁹ Indeed, the [2021 IPCC report](#) stated it is “code red for humanity”.

¹⁷ Valerie Masson-Delmotte and others, ‘Global warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty’, (IPCC 2014) <https://www.ipcc.ch/site/assets/uploads/sites/2/2019/06/SR15_Full_Report_High_Res.pdf> accessed 12 May 2021.

¹⁸ Secretariat of the Convention on Biological Diversity, ‘Connecting Biodiversity and Climate Change Mitigation and Adaptation. Key Messages from the Report of the Second Ad Hoc Technical Expert Group on Biodiversity and Climate Change’ (Secretariat of the Convention on Biological Diversity 2009) <<https://www.cbd.int/doc/publications/cbd-ts-41-en.pdf>> accessed 12 May 2021.

¹⁹ IPCC, (n 13).



At present, global temperatures are currently increasing at 0.2°C per decade due to past and ongoing anthropogenic emissions.²⁰ Recent trends depict higher intensity and frequency of climate and weather extremes resulting from global warming, and that warming is generally higher over land than over oceans.²¹

1.2. Global progress towards GHG emission mitigation

“There are millions of people all around the world who are already suffering from the impacts of climate change. Denying this fact could be interpreted by some to be a crime against humanity.”

– Ian Fry, Tuvalu representative for the COP25 climate change talks.

Desperate pleas for action followed by statements of regret and disappointment are becoming standard practice for many at UN Climate Change Conferences, and the 2019 talks in Madrid were no exception. Activists and representatives of Indigenous peoples and states particularly vulnerable to climate change have expressed frustration at the consistent lack of ambition expressed and progress made as a result of pushback from major polluters. The frustration felt is understandable given the scientific consensus on the impact climate change is having on human life and how that impact is predicted to grow in the coming decades.

A United Nations Office for Disaster Risk Reduction report shows that there has been a “staggering rise” in the number of extreme weather events in the last 20 years which have been primarily driven by rising global temperatures. Between 2000 and 2019 there were 7,248 major natural disasters across the world, which killed 1.23 million people and cost the global economy \$2.97 trillion. This was significantly greater than the previous 20-year period, 1980-1999 which recorded 4,212 natural disasters, claiming 1.19 million lives and creating losses of \$1.63 trillion to the global economy. We can no longer continue to think that climate change-related deaths are an issue to be addressed in the future. An overwhelming and ever-increasing body of evidence shows that climate change already has a death toll and its impacts have long been a reality for many.

During COP25 in Madrid, Aliioaiga Feturi Elisaia, Head of the Samoan Delegation, presented his powerful opening speech on the rising sea level and the pressure it places on Small Island Developing States.

“The world has witnessed in recent times epic occurrences of horrific disasters from climate change and national hazard risks unprecedented in the 74-year history of the United Nations. Tornadoes, bushfires,

²⁰ Ibid.

²¹ Ibid.

earthquakes, flooding, droughts – all have resulted in countless loss of lives and untold suffering and set back for years the development of some countries.”²²

Aliioaiga Feturi Elisaia stressed the devastating impacts of climate change on the very survival of SIDS and this message must prompt action before it is too late.

Even if emissions are reduced in the coming decades per the goals of the 2015 Paris Agreement many countries are still expected to experience more frequent and longer droughts. Currently, 3.6 billion people across the globe live in areas which experience water scarcity for at least one month per year. However, this is predicted to increase to 4.8-5.7 billion people by 2050 according to the UN World Water Development Report. Future competition for water resources is expected to be ‘unprecedented’ and will undoubtedly surpass political boundaries.²³ Climate change-related disruption of weather systems and increasing temperature and precipitation fluctuations pose a direct threat to global food security. For example, late 2015 to early 2016 saw one of the strongest El Niño events to date which saw areas of Ethiopia endure less than half of normal precipitation levels. This resulted in significant droughts and widespread crop failure leading to more than 10 million people in Ethiopia requiring food aid. The impacts of climate change on food production are predicted to be increasingly detrimental with livestock farming projected to suffer graver impacts than crop production. This is concerning as according to the FAO food production systems will have to produce 50% more food by 2050 to sustain the increasing global population.²⁴

20 - 30% of species are at increased risk of extinction if increases in global average warming exceed 1.5 to 2.5°C above the 1980-1999 temperature. In order to prevent these devastating impacts on biodiversity, states must work towards keeping global temperatures below 2°C as this will inevitably flatten the curve of climate change risk to biodiversity.

At the COP25 in Madrid, Zhang Xinsheng, President of the International Union for Conservation of Nature (IUCN) highlighted the negative impacts of Ocean Deoxygenation and the devastating impact it has on marine biodiversity. Continuing trends show that if the temperature increase exceeds 3.5°C, 40-70% of global species would face extinction. States must take action to avoid these devastating impacts or as Zhang Xinsheng concluded in her opening speech at COP25 ‘*If we take better care of nature, nature will take better care of us.*’

The effects of climate change exacerbate socio-economic and environmental challenges that prompt migration while also increasing the number and severity of humanitarian crises that drive it. A 2018 report by the World Bank estimates that by 2050 three regions (Latin America, sub-Saharan Africa, and Southeast

²² Aliioaiga Feturi Elisaia, ‘Statement at the High-Level Segment of COP25’ (11 December 2021) <https://unfccc.int/sites/default/files/resource/SAMOA_cop25cmp15cma2_HLS_EN.pdf> accessed 21 May 2021.

²³ UNESCO, ‘The United Nations World Water Development Report 2018: Nature-based Solutions for Water’ (2018) <<https://www.unwater.org/publications/world-water-development-report-2018/>> accessed 12 May 2021.

²⁴ Priyadarshi Shukla and others, ‘Climate Change and Land: an IPCC special report on climate change, desertification, land degradation, sustainable land management, food security, and greenhouse gas fluxes in terrestrial ecosystems (IPCC 2019) <<https://www.ipcc.ch/site/assets/uploads/sites/4/2021/02/210202-IPCCJ7230-SRCCL-Complete-BOOK-HRES.pdf>> accessed 12 May 2021, chapter 5.



Asia) will produce 143 million climate refugees.²⁵ This issue is expected to impact Pacific islands especially hard. With sea levels rising 12 millimetres per year, eight islands have already been submerged and another two are following close behind. It is estimated that by 2100 we will have lost 48 islands to rising ocean levels which will leave all the people living there displaced.²⁶ The issue of climate refugees was considered by the UN Human Rights Committee in the landmark *Teitiota* decision, ruling that governments cannot return people to countries where their lives might be threatened by climate change.²⁷

These impacts highlight the devastating effects of climate change which will be felt across the globe. These effects will not only damage fragile ecosystems across the world but will have a devastating impact on human populations. This ultimately highlights the importance of state action through their commitments under the Paris Agreement, and the importance of the submission of ambitious NDCs at the COP26. States in the Global North carry great responsibility as there is still a need for adaptation and mitigation efforts to ensure that the climate debt owed by the developed countries to the developing countries does not increase further. This inequity highlights the unjust nature of climate change as states who contributed the least will be the ones that suffer the greatest consequences. This inherent inequity between the people producing climate change and the people feeling the effects of climate change is a universal wrong that needs to be righted.²⁸

1.3. Background on the role of human rights

1.3.1. The connection between human rights and climate change

States have the duty to respect, protect, and fulfil human rights²⁹. There are two primary ways in which the connection to climate change manifests itself. First, in jurisdictions where an autonomous right to a healthy environment is not recognised³⁰ courts have noted the impacts of climate change on other rights, such as the right to life, health, or a private and family life. Second, climate change is a direct and unequivocal threat to the right to a healthy environment, where such a concept is recognised.³¹

²⁵ The World Bank. Rigaud, K. and others. “Groundswell: Preparing for Internal Climate Migration” (2018) <<https://openknowledge.worldbank.org/handle/10986/29461>> accessed 12 May 2021.

²⁶ John Podesta ‘The climate crisis, migration, and refugees’ (2019) Report in Brookings Blum Roundtable, “2020 and beyond: Maintaining the bipartisan narrative on US global development” <<https://www.brookings.edu/research/the-climate-crisis-migration-and-refugees/>> accessed 12 May 2021.

²⁷ UNHRC ‘Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2728/2016’ (2020) CCPR/C/127/D/2728/2016.

²⁸ Edith Brown Weiss, *Intergenerational Equity* (Oxford Public International Law, February 2013) <<https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1421>> accessed 12 May 2021.

²⁹ UNHRC, ‘General Comment No. 3: The nature of States’ parties’ obligations (art. 2, para. 1, of the Covenant)’ (1990) E/1991/23.

³⁰ *Kyrtatos v Greece* [2003] ECHR 41666/98 (ECtHR, 22 August 2003).

³¹ Inter-American Court on Human Rights Advisory Opinion, *The Environment and Human Rights* (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity – interpretation and scope of Articles 4(1) and 5(1) of the American Convention on Human Rights), Advisory Opinion OC-23/17 of November 15, 2017, Series A, No. 23.



On that matter, the environment provides humans with multiple endowments: “*clean air to breathe; clean water to drink; food to eat; fuels for energy; protection from storms, floods, fires and drought; climate regulation and disease control; and places to congregate for aesthetic, recreational and spiritual enjoyment*”.³² These environmental services, often referred to as ecosystem services, are considered to be the core of human’s well being and essential to human rights’ enjoyment. Consequently, many rights recognised by international and domestic law possess environmental dimensions. There is no exhaustive list of these rights and they come in diverse nature. For example, the right to health, the right to life, the right to an adequate standard of living and the right to adequate housing, are all potentially affected by poor environmental conditions, and in this sense a good environment”.³³

Climate change is the largest, most pervasive, threat to the environment, and its negative consequences have repercussions on the full enjoyment of human rights. On that point, the Fifth Assessment Report (AR5) by the Intergovernmental Panel on Climate Change (IPCC) unequivocally states that “*human influence on the climate system is clear, and recent anthropogenic emissions of greenhouse gases are the highest in history*”.³⁴ It adds that “*recent climate changes have had widespread impacts on human and natural systems*”.³⁵

1.3.2. Human rights in climate change litigation

The negative impacts of climate change on the Earth’s ecosystem have recognised consequences for the enjoyment of human rights. “*Human rights such as the rights to health, food, water, housing, self-determination and even the right to life are threatened by climate change*”.³⁶ Consequently, climate change litigation has been using human rights law against governments and other duty-bearers. For example, in 2019, the Dutch Supreme Court held in *Urgenda*, that the Netherlands' inadequate climate policies violated Articles 2 and 8 of the European Convention on Human Rights (ECHR).³⁷

A promising example could be the first climate change case before the European Court of Human Rights in 2020, brought by four children and two young adults from Portugal against 33 European countries.³⁸ In a nutshell, the plaintiffs claim that they face unprecedented risks to their lives and livelihoods and accuse the defendants of contributing to climate change and failing to take any effective measures against it. This,

³² UNEP and Sabin Center for Climate Change Law (Columbia Law School), 'Climate Change And Human Rights' (United Nations Environment Programme 2015)

<https://web.law.columbia.edu/sites/default/files/microsites/climate-change/climate_change_and_human_rights.pdf> accessed 24 November 2020.

³³ John Knox, 'Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment' (2018) UN Doc A/HRC/37/59.

³⁴ Pachauri and others, (n) 2.

³⁵ Ibid.

³⁶ Bridget Lewis, *Environmental Human Rights and Climate Change, Current Status and Future Prospects, Introduction to Environmental Human Rights and Climate Change* (Springer Nature Singapore 2018) 1-14.

³⁷ *Urgenda Foundation v. State of the Netherlands* [2019] High Court Netherlands 19/00135.

³⁸ Paul Clark and others, 'Climate change and the European Court of Human Rights: the Portuguese Youth Case' (2020) EJIL Talk <<https://www.ejiltalk.org/climate-change-and-the-european-court-of-human-rights-the-portuguese-youth-case/>> accessed 01 July 2021.



the plaintiffs say, violates their rights to life, privacy and non-discrimination under the ECHR. The Court, in requesting responses from Contracting Parties, has also added the consideration of Article 3 - the prohibition of torture - making it the first court in the world to do so. This signals a dramatic shift, from its previous position that considered a claim based on Article 3 in relation to environmental damage to be “*manifestly ill-founded*”.³⁹

Litigation has contributed to recognizing the human rights impacts of a changing climate, and it has become a key feature in the fight against climate change and the protection of the environment. Even more importantly, “*human rights-based approaches to climate change are now considered to be useful in helping to identify vulnerable individuals and groups, articulating impacts and balancing competing priorities*”.⁴⁰

1.4. Climate change and human rights in Vanuatu

Vanuatu, located in the South Pacific is a 12,190 km² archipelago consisting of 83 volcanic islands⁴¹ that belong to the Melanesian sub-region of Oceania and is divided into six provinces—Malampa, Panama, Sanma, Shefa, Tafea, and Torba—comprising different groups of islands.⁴² The economy primarily depends on agriculture, fisheries and other marine resources. Due to its geographical location, its climate is strongly influenced by ocean-atmosphere interactions which are often manifested by extreme weather events.

1.4.1. Vanuatu’s climate disaster proneness

Vanuatu is considered the ‘world’s most vulnerable nation’ on the World Risk Index.⁴³ Disasters such as landslides, earthquakes, flooding, storm surges, cyclones, prolonged drought and wet periods are quite common throughout the archipelago. According to the IPCC report; the population of Vanuatu is vulnerable to involuntary displacement due to both sudden-onset and slow-onset disasters, which are expected to become more prevalent in the future due to climate change. These impacts—alongside ocean acidification,

³⁹ *Lopez Ostra v Spain* App no 16798/90 (ECtHR, 09 December 1994).

⁴⁰ International Council on Human Rights Policy (n 2).

⁴¹ Daniel. Petz and Justin Ginnetti ‘Neglected displacement: human mobility in pacific disaster risk management and climate change adaptation mechanisms’ (2013) Geneva: Norwegian Refugee Council/International Displacement Monitoring Centre <<https://environmentalmigration.iom.int/neglected-displacement-human-mobility-pacific-disaster-risk-management-and-climate-change-adaptation>> accessed 12 May 2021.

⁴² Nikita Perumal, ‘The place where I live is where I belong: community perspectives on climate change and climate-related migration in the Pacific island nation of Vanuatu’, (2018) 13(1) *Island Studies Journal*, 45-64.

⁴³ Matthias Garschagen and others, ‘World Risk Report 2015’ (United Nations University Institute for Environment and Human Security and Bündnis Entwicklung Hilft 2015) 11, 46; Department of Economic and Social Affairs, ‘Vanuatu National Assessment Report: 5 Year Review of the Mauritius Strategy for Further Implementation of the Barbados Programme of Action for Sustainable Development’ (UN 2010) 6–7.

and saltwater intrusion—have a direct impact on Vanuatu rather than the threat of rising sea levels.⁴⁴ It is observed that climate variability has disrupted crop production resulting in food scarcity thus threatening food security.⁴⁵ Additionally, the low-lying coastal areas of the country are susceptible to rising sea levels along with the issues mentioned earlier.

Several studies focusing on Pacific Islands surmise and analyse the concept of ‘climate migration’. It is also argued that “*climate change may induce and force migration from a large number of Pacific Island countries...*”⁴⁶

1.4.2. Vanuatu’s human rights approach to the climate crisis

As compared to the other Pacific SIDS, Vanuatu has comprehensive climate change adaptation policies and established a dedicated climate change ministry. Vanuatu’s new National Climate Change and Displacement Policy is one of the world’s most progressive policies on climate-driven displacement. Despite the government’s efforts, human rights violations cannot be prevented unless global emissions are mitigated. “*Where land that is fundamental to indigenous or cultural ways of life becomes uninhabitable and relocation is the only option, even dignified, planned, and supported migration will still result in a violation of the rights to land, culture and self-determination.*”⁴⁷ Thus an integrated approach to human rights and climate change law can enhance accountability for mitigation actions that, ultimately, reduce some of the risks of climate displacement in states like Vanuatu.⁴⁸ Moreover, the adoption of the Paris Agreement⁴⁹ has confirmed that obligations under climate change law on the one hand and human rights law on the other need to be complied with in an integrated manner.⁵⁰ International Human Rights Law provides obligations to protect peoples and individuals against forced displacement resulting from climate change that complements and reinforces obligations contained in international climate change law.⁵¹

⁴⁴ Michael Parry and others, ‘Climate Change 2007: Impacts, Adaptation and Vulnerability Contribution of Working Group II to the Fourth Assessment Report of the IPCC’ (IPCC 2007)

<https://www.ipcc.ch/site/assets/uploads/2018/03/ar4_wg2_full_report.pdf> accessed 12 May 2021; Rajendra Pachauri and others, ‘Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change’ (IPCC 2014) <<https://www.ipcc.ch/report/ar5/syr/>> accessed 12 May 2021, 10–11, 15, 69.

⁴⁵ Julie Webb and others ‘Tools for CBA: lessons from NGO collaboration in Vanuatu’ (2015), 43(4) *Coastal Management*, 407-423.

⁴⁶ John Campbell and Olivia Warrick, ‘Climate change and migration issues in the Pacific’ United Nations Economic and Social Commission for Asian and the Pacific / International Labour Organization.’ (2014) <<https://www.ilo.org/dyn/migpractice/docs/261/Pacific.pdf>> accessed 12 May 2021.

⁴⁷ Article 3, United Nations Declaration on the Rights of Indigenous Peoples, UN General Assembly Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Agenda Item 68, Supp No 49, (2 October 2007, adopted 13 September 2007); UNGA A/RES/61/295 (UNDRIP).

⁴⁸ Margaretha Wewerinke and Tess Van Geelen, ‘Protection of climate displaced persons under International Law: A case study from Mataso Island, Vanuatu’ (2019) *Melbourne Journal of International Law Vol 19*(2).

⁴⁹ Paris Agreement, (opened for signature 16 February, entered into force 4 November 2016) UNTS I-54113.

⁵⁰ K. McNamara & C. Gibson, “‘*We Do Not Want to Leave Our Land*’”: *Pacific Ambassadors at the United Nations Resist the Category of “Climate Refugees”*” (2009) 40 *Geoforum* 475, 478–9; N. Perumal (n 38) 45.

⁵¹ Margeretha Wewerinke, ‘The Role of the UN Human Rights Council in Addressing Climate Change’ (2014) 8 *Human Rights and International Legal Discourse* 10.



Climate change adaptation comprises efforts by states, regional governments, civil society actors, and individuals to adjust ‘natural or human systems in response to actual or expected climatic stimuli or effects’ in order to ‘moderate harm or exploit beneficial opportunities’.⁵² Those groups within SIDS that are politically, economically and socially marginalised have a low adaptive capacity, requiring concerted international action to enable them to adapt to the effects of climate change.⁵³ The legal and policy implications of climate change-related migration cut across many different fields, including human rights, development, humanitarian assistance, asylum, immigration and the environment.⁵⁴

⁵² Pachauri, (n 40) 87.

⁵³ Ibid.

⁵⁴ Jane McAdam, ‘*Climate Change Displacement and International Law: Complementary Protection Standards*’ (May 2011) UNHCR Legal and Protection Policy Research, Division of International Protection, 7.



The Advisory Opinion and the Paris Agreement

2. The Advisory Opinion in the context of the UNFCCC

Key takeaways:

- The adoption of the Paris Agreement was a milestone in international efforts to address climate change but it has not lived up to its aims.
- The widespread acceptance of the Paris Agreement by nearly every member of the international community, including major emitters, provides further legitimacy to an overarching international law norm requiring states to take mitigation and adaptation measures in relation to climate change.

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In seeking an Advisory Opinion, it is essential to consider existing international climate change covenants, in particular the Paris Agreement.⁵⁵ The adoption of the Paris Agreement was a milestone in international efforts to address climate change but current greenhouse gas emission pledges have yet to live up to its aims.

2.1. Obligations under the Paris Agreement

The Paris Agreement was opened for signature on 22 April 2016 and entered into force on 4 November 2016. The Paris Agreement built on the Kyoto Protocol and the United Nations Framework Convention on Climate Change (UNFCCC).⁵⁶ Of the 197 parties to the UNFCCC, 191 parties have ratified the Paris Agreement.⁵⁷ Significantly, the United States withdrew from the Paris Agreement under the Trump administration on November 4, 2020, but has since rejoined under President Biden on 19 February 2021.⁵⁸ The history of international climate change regimes, including the Paris Agreement, demonstrates overarching global recognition and agreement that climate change is anthropogenic and that it needs to be resolved by global collective action. The Paris Agreement demonstrates recognition of the need for states

⁵⁵ United Nations, Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) 54113 UNTS.

⁵⁶ Kyoto Protocol to the United Nations Framework Convention on Climate Change (signed 11 December 1997, entered into force 16 February 2005) 2303 UNTS 162; United Nations Framework Convention on Climate Change (signed 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107 (UNFCCC).

⁵⁷ UNFCCC, 'Paris agreement: status of ratification' <<https://unfccc.int/process/the-paris-agreement/status-of-ratification>> accessed 12 May 2021.

⁵⁸ Lavanya Rajamani and Jutta Brunnée, 'The Legality of Downgrading Nationally Determined Contributions under the Paris Agreement: Lessons from the US Disengagement', *Journal of Environmental Law*, Volume 29, Issue 3, November 2017, 537–551 <<https://academic.oup.com/jel/article/29/3/537/4318807>> accessed 12 May 2021.



to take collective action on climate change:⁵⁹ and it continues to provide a basis for states to ‘*strengthen the global response to the threat of climate change*’.⁶⁰

The primary aim of the Paris Agreement is to:

“[hold] the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change”.⁶¹

To achieve this aim, the Paris Agreement establishes a system of nationally determined contributions (NDCs) whereby state parties make pledges regarding their emissions reductions targets which are submitted to a public NDC registry.⁶²

The Paris Agreement is a legally binding instrument. However, it includes both binding and non-binding obligations. Article 4(2) of the Paris Agreement provides that, ‘[e]ach Party shall prepare, communicate and maintain successive nationally determined contributions, every five years’.⁶³ Parties are bound to prepare and submit NDCs. However, the content of each NDC is non-binding. Parties submitted their NDCs in 2015 and 2020. The next round of NDCs will be submitted to the NDC registry in 2025. Some states include financial commitments in their NDCs and some provide that mitigation reductions are dependent on receiving financial assistance.

Is the Paris Agreement achieving its aims?

The Paris Agreement provided important recognition of the need for global climate action, and some state courts have upheld NDC obligations at a domestic level. However, as they exist today, the individual NDCs are insufficient to meet the aims of the Paris Agreement. Even if all states fully implemented their current NDCs, global warming would still continue well above the 1.5-2°C target.⁶⁴ In order to reach the 1.5°C targets all parties to the Paris Agreement would need to dramatically reduce their emissions by

⁵⁹ Cara A. Horowitz, ‘Paris Agreement’, *International Legal Materials* Vol. 55, No. 4 (2016), Cambridge University Press Stable, 740-755 <<https://www.jstor.org/stable/10.5305/intelegamate.55.4.0740>> accessed 13 May 2021.

⁶⁰ UNFCCC, *Nationally determined contributions under the Paris Agreement Synthesis Report* by the Secretariat, 26 February 2021, FCCC/PA/CMA/2021/2, 4.

⁶¹ Paris Agreement art 2(a).

⁶² NDC Registry Website ‘All NDCs’, <<https://www4.unfccc.int/sites/NDCStaging/Pages/All.aspx>> accessed 12 May 2021.

⁶³ *Paris Agreement* art 4(2); UNFCCC Website, ‘Nationally Determined Contributions (NDCs)’ <<https://unfccc.int/process-and-meetings/the-paris-agreement/nationally-determined-contributions-ndcs/nationally-determined-contributions-ndcs#eq-2>> accessed 12 May.

⁶⁴ UNEP, ‘Emissions Gap Report 2020’ (2020) <<https://www.unep.org/emissions-gap-report-2020>> accessed 12 May 2021.



2030 compared to the current NDC levels.⁶⁵ The Paris Agreement’s NDC reporting framework has fallen short of its intended objectives due to the voluntary content of NDCs and the lack of strong enforcement mechanisms (amongst others).⁶⁶

2.2. The significance of the Paris Agreement for an ICJ Advisory Opinion

The Paris Agreement must not be overlooked when calling for an ICJ Advisory Opinion on climate change. Although NDCs under the Paris Agreement are voluntary and non-binding, the Paris Agreement certainly does influence climate action. The Paris Agreement demonstrates collective action, it includes binding procedural requirements as well as normative expectations, and NDCs have been upheld in domestic Courts.⁶⁷

Further, the Paris Agreement undeniably represents a historic milestone of collective state action. The widespread acceptance of the Paris Agreement by nearly every member of the international community, including major emitters, provides further legitimacy to an overarching international law norm requiring states to take mitigation and adaptation measures in relation to climate change.

The Paris Agreement demonstrates global acknowledgement of increasing climate change impacts and it is a backdrop for the ICJ identifying more ambitious duties on states to combat climate change. An ICJ Advisory Opinion on climate change could further encourage parties to the Paris Agreement to commit to a level of emissions reductions that more accurately coincides with the aims of the Paris Agreement. This is necessary to prevent dangerous anthropogenic interference with the climate system.

⁶⁵ Wei, YM., Han, R., Wang, C. *et al.* Self-preservation strategy for approaching global warming targets in the post-Paris Agreement era. *Nat Commun* 11, 1624 (2020). <<https://doi.org/10.1038/s41467-020-15453-z>> accessed 12 May 2021.

⁶⁶ William Nordhaus, ‘The Climate Club: How to Fix a Failing Global Effort,’ *Foreign Affairs* 2020 99(3) 10-17, 13.

⁶⁷ Lennart Wegener, Can the Paris Agreement Help Climate Change Litigation and Vice Versa? *Transnational Environmental Law*, (2020) 9(1), 17-36. <<https://www.cambridge.org/core/journals/transnational-environmental-law/article/can-the-paris-agreement-help-climate-change-litigation-and-vice-versa/5740A983674D197C6F070B081ADAB400>> accessed 12 May 2021.



**An
Advisory
Opinion
by the ICJ**

ICJ Advisory Opinion in a nutshell:

What the UN says:

An advisory opinion is a legal advice provided to the United Nations or a specialized agency by the International Court of Justice, in accordance with Article 96 of the UN Charter. The General Assembly and the Security Council may request Advisory Opinions on "legal questions arising within the scope of their activities".

Source: www.un.org

Unlike judgments of the ICJ in contentious proceedings, Advisory Opinions are not binding at law. Nonetheless, due to the status of the ICJ as the highest court in the world they “*carry great legal weight and moral authority*”.⁶⁸ They are often an instrument of preventive diplomacy and help to keep the peace. In their own way, Advisory Opinions also contribute to the “*clarification and development of international law and thereby to the strengthening of peaceful relations between states*.”⁶⁹ In the *Nuclear Weapons* Advisory Opinion, the Court stated that the “purpose of the advisory function is not to settle – at least directly – disputes between States, but to offer **legal advice** to the organs and institutions requesting the opinion.”⁷⁰

3. Requesting an ICJ Advisory Opinion on climate change and human rights

Key takeaways:

- The legal question WYJC asks centres on human rights obligations, and in particular intergenerational equity
- Climate change and its effects on human rights fall within the mandate of the UNGA.
- An ICJ Advisory Opinion on states’ obligations would assist the UNGA in the performance of its functions.

By: Anna-Mira Brandau (University of Oxford) and Shannon Peters (PACE University)

⁶⁸ International Court of Justice, Advisory Jurisdiction <<https://www.icj-cij.org/en/advisory-jurisdiction>> accessed 12 May.

⁶⁹ Ibid.

⁷⁰ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, 11 (July 8), at 15.

3.1. The legal question

The legal question posed to the Court by the UN General Assembly (UNGA) is subject to negotiations in one of the six UNGA Committees.

This negotiation process is likely to happen behind closed doors since only state parties are allowed to contribute to the formulation of the resolution, which will contain the question being sent to the Hague. For WY CJ it is important that this question is ambitious, and does not leave room for the judges to evade answering the question and clarifying current international law.

The question WY CJ suggests to be submitted to the ICJ for its Advisory Opinion is:

What are the obligations of states under international law to protect the rights of present and future generations against the adverse effects of climate change?⁷¹

This question asks the Court to consider substantive issues of international climate, environmental and international human rights law. Those two areas of international law operate currently in a separate manner. By integrating them, the Court would play a useful role in developing and clarifying international law and the obligations arising for States- the traditional subjects of international law. The language of ‘obligations to protect’ thereby asks the Court to express its opinion on the full range of human rights obligations arising in the environmental context. The emphasis on the rights of present and future generations asks the court to elaborate on the intergenerational quality of climate change. Through its explanation, the Court would not just provide legal clarification but could also contribute to a change of consciousness and these developments can in turn catalyse new and needed actions.⁷²

The question further offers the opportunity for the Court to cement consensus on the scientific evidence of climate change. The Advisory Opinion would provide an excellent forum to endorse the best scientific findings on anthropogenic climate change, including but not limited to the Special Report of the Intergovernmental Panel on Climate Change on Global Warming of 1.5 °C.

⁷¹ **Disclaimer:** WY CJ - as a coalition of civil society and youth organization - will continue to advocate for a legal question that reflects the highest possible ambition and climate justice principles. The above question is a draft question from the early days of our work. A team of youth campaigners, legal scholars and other stakeholders aim to continuously develop the question with a view to enhance it and make it more robust for the Court’s considerations.

⁷² Philippe Sands, ‘Climate Change and the Rule of Law: Adjudicating the Future in International Law’, Public Lecture at the Supreme Court of the United Kingdom (17 September 2015) <<https://www.supremecourt.uk/docs/professor-sands-lecture-on-climate-change-and-the-rule-of-law.pdf>> accessed 24 November 2020, 11.



By doing so, the Court would not just provide impetus and guidance for domestic, regional and international adjudication, but also advice in order to guide the UNGA as an organ of the United Nations system in the performance of its function.

This section explains the following features of the question:

1. The relationship of the question to the mandate and functions of the United Nations General Assembly (UNGA),
2. The framing of the question.

3.2. Relationship to General Assembly Mandate and Function

The UNGA is the body requesting the Advisory Opinion from the ICJ. The analysis presented in this part will outline that (i) the UNGA has the mandate to do so and (ii) the Advisory Opinion capacity to assist the UNGA in the performance of its function.

3.2.1. Mandate of the UNGA

The *prima facie* competence of the UNGA to request an Advisory Opinion from the ICJ is entailed in Article 65.1 of the ICJ Statute and Article 96.1 of the UN Charter. The former states that “*the Court may give an advisory opinion on any legal question at the request of whichever body may be authorized by or in accordance with the Charter of the United Nations to make such a request.*” Article 96.1 of the UN Charter provides that “*the General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.*”

These provisions follow the general competence of the UNGA to request an Advisory Opinion on *any legal question*. Despite the clear wording of Article 96.1 UN Charter, in the *Nuclear Weapons* Advisory Opinion, an attempt was made to argue that the UNGA may ask for an Advisory Opinion on a legal question only within the scope of its activities. The Court refrained from answering whether this interpretation of Article 96.1 was correct or not because the question presented fell within the scope of the UNGA’s competence in any event.⁷³ The same is true for the present question, as an examination of the UN Charter and the practice of the UNGA demonstrates.

Article 10 UN Charter deals with the competencies of the UNGA and states:

“The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided for in Article 12, may make recommendations to the Members of the United Nations or the Security Council or both on any such question or matters.” (emphasis added)

⁷³ *Nuclear Weapons*, Advisory Opinion, (n 66) para 11.



Article 10 entails two important specifications regarding the competences of the UNGA. First, the term “make recommendations”, which encompasses making resolutions, including such resolutions to request an Advisory Opinion from the ICJ.⁷⁴

Second, Article 10 defines the breadth of the UNGAs competence by stressing that it extends over the entire “*scope of the present Charter*”. The scope of the Charter can be derived from Articles 1 and 2 UN Charter and extend from international peace and security to international cooperation in solving international problems. It can hardly be argued that climate change does not qualify as an international/global problem.

According to Article 2.7 UN Charter, does the scope of the UN Charter find its limits in “*matters which are essentially within the domestic jurisdiction of states.*” This limitation however has been narrowly interpreted as allowing interventions for the purposes of upholding human rights violations.⁷⁵ It, therefore, follows that even the human rights framework of the given question is covered by the scope of the Charter and thus by the competence of the UNGA.

This finding is in line with the UNGA’s previous considerations of the issue of climate change and human rights (environment in general) (see below) and with Article 11 UN Charter.

According to Article 11, the UNGA may also discuss and make recommendations with regard to any question relating to the maintenance of international peace and security. This competence is not to be understood as limiting the general scope of competence established in Article 10 UN Charter (Article 11.4 UN Charter).

Different UN organs have repeatedly stressed and outlined the relevance of climate change in peace and security considerations. So stressed the former Secretary-General Ban Ki-moon in a debate hosted by the UN Security Council, that “issues of energy and climate change can have implications for peace and security”.⁷⁶ In a similar debate on climate change and security in September 2011, a number of delegates recognized a relationship between climate change and international peace and security.⁷⁷ The current General-Secretary, Mr António Guterres, made climate change one of his highest priorities. In a landmark

⁷⁴ Eckart Klein and Stefanie Schmal, ‘The General Assembly, Functions and Power, Article 10’, in Bruno Simma et al. (eds), *The Charter of the United Nations: A Commentary, Volume I*, (3rd edition, Oxford University Press 2012) 478.

⁷⁵ Ibid.

⁷⁶ UN Security Council, 5663rd Meeting, U.N. Doc. S/PV.5663 (Apr. 17, 2007). The UK, as President of the UNSC during the debate, stated that “an unstable climate will exacerbate some of the core drivers of conflict, such as migratory pressures and competition for resources”; and that “today is about the world recognizing that there is a security imperative, as well as economic, development and environmental ones, for tackling climate change and for our beginning to build a shared understanding of the relationship between energy, climate and security” (at 2); China recognized that climate change has certain security implications, though it considered it fundamentally to be an issue of sustainable development (at 12); the delegate of Germany, who spoke on behalf of the European Union stated “today we know that there is a clear link between climate change and the need for conflict prevention” and that the “cost of action on climate change is far outweighed by the consequences of inaction. We need to give due consideration to the security implications of inaction and mitigate those risks” (Turkey, Croatia, Macedonia, Albania, Bosnia and Herzegovina, Montenegro, Serbia, Ukraine and Moldova also aligned themselves with the statement) (at 19-20).

⁷⁷ Among others: China, Indonesia and South Africa, see id. at 13-15.



speech in December 2020, he states that “*making peace with nature is the defining task of the 21st century. It must be the top, top priority for everyone, everywhere*”.⁷⁸

The UNGA itself also has a long history in putting climate change and its human rights implications on its agenda: the foundation was laid by its resolution series on the “Protection of Global Climate for Present and Future Generations”⁷⁹ as early as 1988, which can be seen as the conceptual origin of the question presented. Multiple resolution series followed, for example on “Harmony with Nature”⁸⁰ or general notions about the protection of the environment.⁸¹

The commitment of the UNGA to the protection of the environment and climate change, in particular, has also been demonstrated by the adoption of the 2030 Agenda in 2015, which includes 17 sustainable development goals. Goal number 13 is called ‘climate action’ and asks UN member states to “take urgent action to combat climate change and its impacts”. One target following this goal is the implementation of the United Nations Framework Convention on Climate Change and its subsequent protocols and agreements.⁸² One of those agreements is the so-called Paris Agreement, which was adopted in 2015. It is the first international climate change agreement, that entails a direct reference to human rights by stating that:

“Acknowledging that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity.”

Even in its response to the current COVID-19 pandemic, the UNGA called on Member States to adopt a climate- and environment-sensitive approach to COVID-19 recovery efforts, including by aligning investment and domestic policies with the 2030 Agenda for Sustainable Development and the Paris Agreement.⁸³

⁷⁸ UNFCCC, UN Secretary General António Guterres, “Making peace with Nature is the Defining Task of the 21st century” (Speech at Columbia University, 02 December 2020) <<https://unfccc.int/news/un-secretary-general-making-peace-with-nature-is-the-defining-task-of-the-21st-century>> accessed 12 May 2021.

⁷⁹ Inter alia: UNGA A/RES/43/53 (6 December 1988); A/RES/50/50/115 (20 December 1995); UNGA A/RES/51/184 (16 December 1996); UNGA A/RES/52/199 (18 December 1997); UNGA A/RES/54/222 (22 December 1999); UNGA A/RES/56/199 (21 December 2001); UNGA A/RES/58/243 (23 December 2003); UNGA A/RES/59/234 (22 December 2004); UNGA A/RES/60/197 (22 December 2005); UNGA A/RES/61/201 (20 December 2006); UNGA A/RES/62/86 (10 December 2007); UNGA A/RES/63/32 (26 November 2008); UNGA A/RES/64/73 (7 December 2009); UNGA A/RES/65/159 (20 December 2010); UNGA A/RES/66/200 (22 December 2011); UNGA A/RES/67/210 (21 December 2012); UNGA A/RES/67/210 (12 March 2013); UNGA A/RES/68/212 (18 February 2014).

⁸⁰ United Nations, Harmony with Nature <<http://www.harmonywithnatureun.org>> accessed 12 May 2021.

⁸¹ UN General Assembly Resolution A/RES/74/219 (27 January 2020).

⁸² UN General Assembly Resolution A/RES/70/1 (21 October 2015).

⁸³ UN General Assembly Resolution A/RES/74/L.92 (10 September 2020).



The practice of the UNGA, therefore, demonstrates that climate change and its effects on human rights fall within its mandate. It will now be outlined that an Advisory Opinion from the ICJ on states' obligations in this regard would assist the UNGA in the performance of its functions.

3.2.2. Supporting the UNGA in its functioning

According to Article 92 UN Charter and Article 1 of the ICJ Statute, the ICJ is the principal judicial organ of the United Nations.

The Court itself described and defined its tasks as assisting the other UN organs in the exercise of their functions. In the Western Sahara Advisory Opinion, the Court stressed that *“lending its assistance in the solution of a problem confronting the GA, the Court would discharge its functions as the principal judicial organ of the United Nations.”*⁸⁴

In its later Nuclear Weapons Advisory Opinion, the Court stated that the *“purpose of the advisory function is not to settle- at least directly- disputes between States, but to offer legal advice to the organs and institutions requesting the opinion.”*⁸⁵

As subsection 3.2.1. above showed, the UNGA is on a general basis concerned with the issue of climate change and its impacts on human rights and the international community. It follows that the requested Advisory Opinion dealing with those topics would support the UNGA in exercising its functions.

The Court itself made clear that no further detail on how the Advisory Opinion would be useful for the UNGA is required:

*“it is not for the Court itself to purport to decide whether or not an advisory opinion is needed by the Assembly for the performance of its functions. The General Assembly has the right to decide for itself on the usefulness of an opinion in the light of its own needs.”*⁸⁶

It has therefore been established that the request for the Advisory Opinion falls within the mandate of the UN General Assembly and that the Court would assist the UNGA in exercising its function by accepting the request for the opinion.

⁸⁴ *Western Sahara*, Advisory Opinion, 1975 I.C.J. 12, para 23.

⁸⁵ *Nuclear Weapons*, Advisory Opinion, (n 66) para 15.

⁸⁶ *Ibid.* para 16.



State

Obligations:

Climate

Change and

Human Rights

4. Sources of Law

Key takeaways:

- The sources of law mentioned in Art 38 of the ICJ statute (namely treaty law, customary international law, general principles of international law, past judicial decisions, and academic writings) provide ample material for the judges to consider when formulating state obligations with regards to climate change and human rights.
- Jurisprudence of national, regional and international courts are likely to be taken into account by the ICJ judges.

Article 38 of the ICJ Statute outlines the sources of international law that the judges consider when drafting an Advisory Opinion. They are namely: treaty law, customary international law, general principles of international law, past decisions, and academic writings.⁸⁷

4.1. Treaty law

By: Charlotte Joppart (University of St. Louis), Luna Jalocha (University of St. Louis) & Lianne Baars (Leiden University).

4.1.1. International treaties

The Court will have several international covenants to consider in the drafting of an Advisory Opinion. Firstly, there are several international treaties on the environment and related matters such as the UN Framework Convention on Climate Change⁸⁸, the Kyoto Protocol⁸⁹, and the UN Convention on Biological Diversity.⁹⁰ Also, other treaties make reference to the environment. The Convention on the Rights of the Child requires “*States to pursue the full realization of the right of the child to the enjoyment of the highest attainable standard of health taking into consideration the dangers and risks of environmental pollution.*”⁹¹ Other examples are the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR): “*States have an obligation to enact legal and institutional frameworks to protect human rights against the effects [of climate change]. This is true*

⁸⁷ United Nations, Statute of the International Court of Justice (26 June 1945, entered into force 24 October 1945) <<https://www.icj-cij.org/en/statute>> Article 38, accessed 12 May 2021.

⁸⁸ United Nations Framework Convention on Climate Change, May 9, 1992 1771 U.N.T.S. 107, 165; S. Treaty Doc No. 102-38 (1992); U.N. Doc. A/AC.237/18 (Part II)/Add.1; 31 I.L.M. 849 (1992).

⁸⁹ Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997 37 I.L.M. 22 (1998); 2303 U.N.T.S. 148; U.N. Doc FCCC/CP/1997/7/Add.1.

⁹⁰ United Nations, Convention on Biological Diversity (signed 5 June 1992, entered into force 26 December 1993) 1760 UNTS 79 (CBD).

⁹¹ UNHRC, Report of the United Nations High Commissioner for Human Rights (n 9) para 25.



regardless of whether the state is responsible for those effects because (...) the ICCPR and ICESCR both include obligations to protect human rights from harms caused by third parties.”⁹²

The Preamble of the Paris Agreement provides that “*parties should when taking action to address climate change, respect, promote and consider their respective obligations on human rights*”.⁹³ The joint report ‘Delivering on the Paris Promises: Combating Climate Change while Protecting Rights’ by several civil society organisations finds that “*All states that negotiated the [Paris] Agreement are already parties to more than one core human rights treaty and bear international legal obligations to respect, fulfil, and protect the rights of people.*”⁹⁴ Therefore human rights protection in mitigation and adaptation under the Paris Agreement should be double-secured by other treaties. The judges at the ICJ will look to the Paris Agreement, as well as other treaties in their process of drafting an Advisory Opinion.

4.1.2. American Convention on Human Rights

Article 11 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (“Protocol San Salvador”) expressly recognises the right to a healthy environment:

“1. Everyone shall have the right to live in a healthy environment and to have access to basic public services.

2. The State Parties shall promote the protection, preservation, and improvement of the environment”.

In light of the case law analysed below, this right should also be considered to be included among the economic, social and cultural rights protected by Article 26 of the American Convention on progressive development:

“The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in

⁹² UNEP and Sabin Center for Climate Change Law (Columbia Law School) (n 28) 32.

⁹³ Paris Agreement (12 December 2015) adopted at the twenty-first Conference of the Parties to the United Nations Framework Convention on Climate Change in Paris (UNFCCC). “While preambular text cannot create new legal obligations on its own, this limit is of little significance. The preambular language of the Paris Agreement regarding human rights refers to existing human rights obligations that parties have entered into previously. Therefore, the preamble is highly relevant to the interpretation of the entire agreement as these obligations are relevant in the context of climate change.” From CIEL (Center for International Environmental Law), IWGIA (International Working Group for Indigenous Affairs), RFN (Rainforest Foundation Norway), CARE, WEDO, AIPP (Asia Indigenous Peoples Pact), ITUC (International Trade Union Confederation), ‘Delivering On The Paris Promises: Combating Climate Change While Protecting Rights’ (2017) <<https://unfccc.int/sites/default/files/903.pdf>> accessed 25 November 2020, 5.

⁹⁴ Ibid 7.



the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.”

4.1.3. African Charter on Human and Peoples’ Rights

The main source of law concerning human rights at the African level is the African Charter on Human and Peoples’ Rights. Since its adoption 30 years ago, the Charter has formed the basis for individuals to allege violations of specific human rights in the African continent.

Articles 1 and 2 of the Charter enshrine the principle of responsibility of the States and grant freedoms, rights and duties to people and the obligation to adopt measures to ensure their enjoyment of them. In addition to this, Article 24 states that “*All peoples shall have the right to a general satisfactory environment favourable for their development*”. This article specifically recognises the right to a good and satisfactory environment, which enables people’s right to develop.

4.1.4. European Convention on Human Rights

The Convention for the Protection of Human Rights and Fundamental Freedoms, or the European Convention on Human Rights (ECHR) is a regional human rights treaty under the realm of the Council of Europe.⁹⁵ 16 protocols have amended it since its adoption in 1950.

The right to a healthy environment is not encompassed within the ECHR. In international law, the recognition of this right commenced with the first principle of the 1972 Stockholm Declaration.⁹⁶ As the ECHR was adopted *before* 1972, the right to a healthy environment was not incorporated into it.⁹⁷ The inclusion of the right in an additional protocol has since been proposed by the Parliamentary Assembly,⁹⁸ but these proposals have not yet yielded anything, as the Committee of Ministers has denied them all.⁹⁹

4.2. Jurisprudence from Courts and Tribunals

Climate change, as a matter of public concern, has received increased attention from international courts and tribunals over the past few years. This section will focus on the case law and the positions regarding

⁹⁵ Convention for the Protection of Human Rights and Fundamental Freedoms (signed 4 November 1950, entered into force 3 September 1953, as amended) (ECHR).

⁹⁶ 1972 Stockholm Declaration of the United Nations Conference on the Human Environment’ (1972) UN Doc A/CONF.48/14.

⁹⁷ Marie-Catherine Petersmann, ‘Narcissus’ Reflection in the Lake: Untold Narratives in Environmental Law Beyond the Anthropocentric Frame’ (2018) 30 *Journal of Environmental Law* 248.

⁹⁸ See e.g. Parliamentary Assembly of the Council of Europe, ‘Drafting an additional protocol to the European Convention on Human Rights concerning the right to a healthy environment’ (2009) Recommendation 1885.

⁹⁹ Svitlana Kravchenko and John E Bonine, ‘Interpretation of Human Rights for the Protection of the Environment in the European Court of Human Rights’ (2012) 25 *Pacific McGeorge Global Business & Development Law Journal* 245.



climate change of the Inter-American Court of Human Rights, the African Court on Human and Peoples' Rights, and the International Tribunal on the Law of the Sea. The ICJ is likely to look towards the work of regional human rights courts in its deliberations on the Advisory Opinion.

4.2.1. Inter-American Court of Human Rights

The jurisprudence from the Inter-American Court of Human Rights highlights the importance of environmental protection. In *Salvador Chiriboga v. Ecuador*¹⁰⁰, the Court recognises that the preservation of the environment represents a legitimate public interest.

Even more to the point is that the Court's Advisory Opinion OC-23/17 of November 15, 2017, issued in response to a request made by the State of Colombia concerning State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and personal integrity recognized in Articles 4 and 5 of the American Convention on Human Rights, in relation to Articles 1(1) and 2 of this Convention.¹⁰¹ First, the Court highlights that the right to a healthy environment is an autonomous right, protecting the components of the environment, such as forests, rivers, seas, and others, even in the absence of certainty or evidence about the risk to individual persons. It is about protecting nature and the environment. Not only because they are essential for human life, or because of the effects their deterioration could provoke on other rights, such as health, life, or personal integrity, but also for their usefulness for other living organisms on the planet, which deserve to be protected and respected. The right to a healthy environment as an autonomous right is thus different from the environmental content that arises from the protection of other rights, such as the right to life or personal integrity. In that respect, in *Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina*¹⁰², the Court examines for the first time in a contentious case the rights to a healthy environment autonomously, based on Article 26 of the American Convention.

Second, the Court asserts that environmental damages can affect all human rights. Indeed, their full enjoyment depends on a favourable environment. Some human rights are more affected than others by certain environmental harms. Rights to life, personal integrity, private life, health, access to water and food, housing, participation in cultural life, property, and the right not to be forcibly displaced are the most at risk. All these essential human rights cannot properly be guaranteed if the environment is not protected and respected. This statement of the Court emphasises the interdependence and indivisibility between human rights, the environment, and sustainable development. The importance of the protection, preservation, and improvement of the environment, contained in Article 11 of the Protocol of San Salvador, as an essential human right related to the right to life with dignity of Article 4 of the American Convention on Human

¹⁰⁰ Inter-American Court on Human Rights, *Salvador Chiriboga v. Ecuador*, Judgment of May 6, 2008, Serie C, No. 179.

¹⁰¹ Inter-American Court on Human Rights, *The Environment and Human Rights* (n 27)

¹⁰² Inter-American Court on Human Rights, *Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina*, Judgment of February 6, 2020. Series C, No. 400.



Rights, was already brought out in *Pueblos Kaliña y Lokono v. Surinam*.¹⁰³ However, in this Advisory Opinion, the Court affirms it strongly and confidently. The Court, therefore, recognizes the existence of an irrefutable relationship between protecting the environment and realizing other human rights.

Consequently, to respect and guarantee the right to a healthy environment and all fundamental human rights related to it, especially the rights to life and integrity of the people under their jurisdiction, States must prevent significant environmental damages, inside or outside their territory. They have special obligations to meet with respect to the risk of environmental degradation. They must conduct studies on environmental impacts; regulate and supervise the activities under their jurisdiction that may cause significant damage to the environment; establish a contingency plan in order to have security measures and procedures to minimise the possibility of major environmental accidents, and mitigate the significant environmental damages that may have occurred. Moreover, States must act in compliance with the precautionary principle to protect human rights against possible severe and irreversible damage to the environment, even in the absence of scientific knowledge and certainty.

Finally, States have appropriate obligations in relation to the protection of Indigenous and local communities, which are particularly affected by climate change and environmental degradation. In *Pueblo Indígena Kichwa de Sarayaky v. Ecuador*¹⁰⁴, the Court reminds the obligation of governments to perform studies of environmental impact, explaining that, where appropriate, studies must be carried out in cooperation with the people concerned in order to assess the social, spiritual, cultural and environmental incidence that projects of development could have on the concerned communities. Also, in *Pueblos Kaliña y Lokono v. Surinam*¹⁰⁵, the Court asserts that States must respect, preserve and maintain the practices of Indigenous and local communities that involve traditional lifestyles relevant to the conservation and sustainable use of biological diversity. The customary use of biological resources must be protected and encouraged in accordance with the traditional cultural practices compatible with the requirements of conservation or sustainable use. In that sense, in *Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina*¹⁰⁶, the Court condemned the illegal logging and the activities carried out by the *criollo* population on the territory of the Indigenous communities concerned, as it affected their environmental rights and their way of life, harming their cultural identity at the same time.

¹⁰³ Inter-American Court on Human Rights, *Pueblos Kaliña y Lokono v. Surinam*, Judgment of November 25, 2015, Serie C, No. 309.

¹⁰⁴ Inter-American Court on Human Rights, *Salvador Chiriboga v. Ecuador* (n 96).

¹⁰⁵ *Pueblos Kaliña y Lokono v. Surinam* (n 99).

¹⁰⁶ *Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina* (n 198).



General position of the Inter-American Court of Human Rights on climate change

The case law from the Inter-American Court of Human Rights supports the importance of environmental protection. Governments have specific obligations concerning the risk of environmental degradation to prevent the possibility of significant environmental damage. They need to conduct studies on environmental impacts to regulate the activities on their territory and to establish a contingency plan. States must also comply with the precautionary principle to protect human rights in the event of possible severe and irreversible environmental damage, even in the absence of scientific certainty.

In addition, the Court recognizes the right to a healthy environment as an essential autonomous human right, protecting the components of the environment (forests, rivers, seas...). Other living organisms on the planet deserve to be protected and respected. Moreover, this right to a healthy environment is linked with a variety of other essential human rights, such as the right to life, personal integrity, health, access to water and food, to property, since the full enjoyment of all human rights depends on a favourable environment. It emphasises the interdependence and indivisibility between human rights, the environment, and sustainable development. The Court, therefore, recognizes the existence of an irrefutable relationship between the protection of the environment and the realisation of other human rights.

4.2.2. Inter-American Commission on Human Rights

4.2.2.1. Hearing on Climate Change before the Inter-American Commission on Human Rights

In September 2019, the Inter-American Commission on Human Rights heard presentations from representatives of numerous civil society organisations about the impacts of climate change on the human rights of Indigenous peoples, women, children, and rural communities.¹⁰⁷ They stated that human rights impacts could result from the emission of greenhouse gases due to the effects of extreme climate events and in response to climate change. On July 11, 2019, the following organisations requested a hearing: Fundación Pachamama (Ecuador), Dejusticia (Colombia), EarthRights International (regional), AIDA (regional), FUNDEPS (Argentina), FIMA (Chile), DPLF (regional), IDL (Peru), CELS (Argentina), Engajamundo (Brazil), AHCC (Honduras), Conectas (Brazil), FARN (Argentina), CEMDA (México) and La Ruta del Clima (Costa Rica).

These petitioners asked the Commission to promote climate policies that protect human rights. They urged it to recognize the climate crisis as a priority that threatens human rights and ecosystems and asked to advance precautionary measures related to climate change. The organisations further requested that the Commission calls on States to take action to cease activities that aggravate climate change and threaten the effective enjoyment of human rights and promote energy transition models that guarantee environmental rights. On May 5, 2020, the petitioners published a report regarding their request.¹⁰⁸

4.2.2.2. Inuit Climate Change Petition

On December 7, 2005, the Inuit Circumpolar Council, non-profit Earthjustice, and the Centre for International Environmental Law submitted a petition to the Inter-American Commission on Human Rights seeking relief from violations resulting from global warming caused by acts and omissions of the United States.¹⁰⁹ It argued that impacts of climate change violate the Inuit's fundamental human rights, including the right to the benefits of culture, to property, to the preservation of health, life, physical integrity, and security, to a means of subsistence, to the residence, movement and inviolability of the home. However, in November 2006, the Commission declined the petition because the information provided was insufficient for deciding. The Commission nevertheless agreed to hold a hearing on March 1, 2007, not to revise the petition itself but to address matters relating to global warming and human rights. This shows that even though the petition was rejected, the Commission is concerned about the relationship between global

¹⁰⁷ Climate Case Chart, *Hearing on Climate Change before the Inter-American Commission on Human Rights*, <<http://climatecasechart.com/non-us-case/hearing-on-climate-change-before-the-inter-american-commission-on-human-rights/>> accessed 12 May 2021.

¹⁰⁸ Magdalena A Diaz and others, 'Cambio climático y los derechos de mujeres, pueblos indígenas y comunidades rurales en las Américas' (2020) <https://www.dejusticia.org/wp-content/uploads/2020/05/hbs_Cambio_climatico-en-las-Américas_web.pdf> accessed 12 May 2021.

¹⁰⁹ Sheila Watt-Cloutier, *Petition to the Inter American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States*, December 7, 2005 <https://earthjustice.org/sites/default/files/library/legal_docs/summary-of-inuit-petition-to-inter-american-council-on-human-rights.pdf> accessed 12 May 2021.



warming and human rights. This hearing was a constructive step toward recognizing States' obligations to prevent human rights violations resulting from their contribution to global warming.¹¹⁰

4.2.2.3. Resolution No. 3/21 “Climate Emergency: Scope of Inter-American human rights obligations”

On December 31st, 2021, the Commission, together with the Office of the Special Rapporteur on Economic, Social, Cultural and Environmental Rights, adopted its resolution No. 3/21 titled "Climate Emergency: Scope of Inter-American human rights obligations". It constitutes the only specific soft law instrument in the Inter-American human rights system that applies existing human rights standards to the context of the climate emergency, laying out specific human rights obligations of States. In this sense, the Resolution recognizes that climate change is fundamentally a human rights issue, and provides guidance to States on several key obligations, including: (i) the centrality of the rights approach in the construction of climate change instruments, policies, plans, programs, and norms on climate change; (ii) rights of individuals and groups in situations of vulnerability or historical discrimination in environmental and climate matters, and (iii) rights of access to information, public participation and access to justice in environmental and climate matters¹¹¹.

4.2.3. African Commission on Human and Peoples' Rights

There have been two cases before the African Commission on Human and Peoples' rights, with particular importance with respect to the question of climate change and environmental protection: the *Ogoni*¹¹² and the *SERAC v. Nigeria*¹¹³ cases.

Ogoni v. Nigeria

The first dispute concerns the oil company Shell, which has been using oil stocks in the Niger delta since the 1950s. Many oil spills have caused massive environmental deterioration, destroying both the land and the groundwater. This severely harmed the Ogoni people, a community living in that particular region of Nigeria. The company was allowed to operate as such because the Nigerian military government did not impose any oversight or regulation aimed at health, safety, or environmental protection. Even more, the government put its military power at the disposal of the oil companies. As a result, the non-violent Ogoni

¹¹⁰ Jessica Gordon, 'Inter-American Commission on Human Rights to Hold Hearing after Rejecting Inuit Climate Change Petition' (2007) 7(2) *Sustainable Development Law & Policy*, 55.

¹¹¹ Inter-American Commission on Human Rights, 'Climate Emergency: Scope of Inter-American Human Rights Obligations', (2021) Resolution No. 3/2, <https://www.oas.org/en/iachr/decisions/pdf/2021/resolucion_3-21_ENG.pdf>, accessed 31 October 2022.

¹¹² African Commission on Human and Peoples' Rights, *The Social and Economic Rights Action Center et. al. v. Nigeria (Ogoni case)* No. 155/96 (2001). See also High Court of Nigeria, *Gbemre v. Shell Petroleum Nigeria Limited and Others*, FHC/B/CS/53/05, Judgment of 14 November 2005.

¹¹³ African Commission on Human and Peoples' Rights, *SERAC v. Nigeria*, Case No. ACHPR/COMM/A044/1.



protest movement was repressed, villages were attacked, and community leaders were executed. In total, the military government was guilty of the death and displacement of thousands of people.¹¹⁴

Two NGOs brought a complaint to the African Commission on Human and Peoples' Rights, on the ground that Nigeria had breached human rights enshrined in the Banjul Charter.¹¹⁵ The Commission ruled the following:

- The right to health (Article 16) and the right to a satisfactory environment (Article 24). Article 24 imposes clear obligations upon a government, by requiring the State to take reasonable measures to prevent pollution and ecological degradation, in order to promote conservation.
- The right of people to dispose of their resources (Article 21). The Commission held that the government must take sufficient actions to keep private parties (*i.e.*, the oil companies) from further damaging the land.
- The right to food, implicitly contained in Articles 4, 16 and 22 (*i.e.*, the rights to life, health, and economic and social development). The violation came from the fact that the government did not prevent environmental destruction.
- The Commission also held that Nigeria systematically violated the right to adequate housing, which is not itself contained in the Charter but is derived from a combination of the rights to health, family and property.

SERAC v. Nigeria

Furthermore, *SERAC v. Nigeria* is another important decision, because, unlike other cases related to environmental issues, the reliefs sought did not focus on pecuniary compensation. Instead, the focus was on establishing a right to a clean, poison-free, pollution-free, healthy environment.¹¹⁶ The African Commission on Human and Peoples' Rights decided that the right to a clean environment contained in Article 24 of the African Charter imposes a clear obligation on States to take reasonable measures to "*prevent pollution and ecological degradation, to promote conservation, and to secure ecologically sustainable development and use of natural resources.*"¹¹⁷ This decision placed a positive obligation on governments to desist from activities that may threaten the health and environment of their citizens. The African Commission also outlined a number of procedural rights included in its conception of the right to a clean environment, such as the right to information concerning hazardous activities, as well as the right of communities to participate in decision-making on matters concerning their environment.

¹¹⁴ Clemens Kaupa, Human+fundamental rights and climate change (*Medium*, Climate Change Law) September 20, 2019, <<https://medium.com/climate-change-law/human-fundamental-rights-and-climate-change-74654d4acb61>> accessed 12 May 2021.

¹¹⁵ Another name of the African Charter on Human and Peoples' Rights.

¹¹⁶ Bukola Faturoti, Goodswill Agbaitoro and Obinna Onya, 'Environmental Protection in the Nigerian Oil and Gas Industry and Jonah Gbemre v. Shell PDC Nigeria Limited: Let the Plunder Continue?' (2019) 27 *African Journal of International and Comparative Law* 225..

¹¹⁷ African Commission on Human's & Peoples' Rights, *SERAC v. Nigeria*, Case No. ACHPR/COMM/A044/1.



In summary, the Commission found a violation of a fundamental right in light of the absence of measures taken by the government to avoid any environmental annihilation and prevent any harm to the population living in the area. The African Commission took the matter seriously by establishing a State's liability for the absence of protection and action regarding the protection of the environment, leading to a breach of fundamental rights recognised at the international level.

The question of how and whether human rights law can be applied to assess States' responsibility for climate change is increasingly receiving analysis and concern from the international law community. International courts seem to agree that major human rights are affected by the impacts of climate change. These include the rights to life, property, family life, self-determination, food, shelter, health, water, culture, development and natural resources, and Indigenous people's rights. In this respect, the African Commission on Human and Peoples' Rights highlighted during its 47th Ordinary Session the human rights dimension of climate change as another disturbing threat to the enjoyment of human rights on the African continent, saying that many African nations are realising that the threats from climate change are serious and urgent.¹¹⁸ Moreover, concerning the African Commission of Human and Peoples' Rights, there have been specific references to the fact that there should be some legislation or case law on the question of climate change and state responsibility. Indeed, the Special Rapporteur on Refugees, Asylum Seekers, Internally Displaced Persons and Migrants in Africa has made several statements on the issue, among which the following one: "*On this International Migrants Day, the Special Rapporteur on Refugees, Asylum Seekers, Displaced Persons and Migrants in Africa of the African Commission on Human and Peoples' Rights, recalls that migration is an inherent feature of the human condition and despite efforts aimed at dissuading or putting an end to this phenomenon, it will persist so long as factors such as violence, poverty, discrimination, inequality, climate change, natural and other disasters continue to prevail*".¹¹⁹

4.2.4. Other references by regional courts

At the First International Human Rights Forum, from October 28 to 29 2019, the African Court on Human and Peoples' Rights, the European Court of Human Rights, and the Inter-American Court of Human Rights agreed "*to undertake knowledge-sharing through digital platforms on topical human rights issues, including on, migration, violence against women, environmental hazards, climate change, bioethics, terrorism, mass data surveillance and on the working methods of the three courts.*"¹²⁰

There have been specific references to the fact that there should be some legislation or case law on climate change and State responsibility. Indeed, statements by the Special Rapporteur mention the issue, among which the following one: "*On this International Migrants Day, the Special Rapporteur on Refugees, Asylum Seekers, Displaced Persons and Migrants in Africa of the African Commission on Human and Peoples'*

¹¹⁸ Final Communiqué of the 47th Ordinary Session of the African Commission on Human and Peoples' Rights, May 26, 2010.

¹¹⁹ Statement made by the Special Rapporteur on Refugees, Asylum Seekers, Internally Displaced Persons and Migrants in Africa on the occasion of International Migrants Day, December 8, 2018.

¹²⁰ The African Court on Human and Peoples' Rights, the European Court of Human Rights and the Inter-American Court of Human Rights, 'Kampala Declaration', First International Human Rights Forum (28 October 2019) <https://echr.coe.int/Documents/Kampala_Declaration_ENG.pdf> accessed 12 May 2021.



Rights, recalls that migration is an inherent feature of the human condition and despite efforts aimed at dissuading or putting an end to this phenomenon, it will persist so long as factors such as violence, poverty, discrimination, inequality, climate change, natural and other disasters continue to prevail."¹²¹ It can therefore be concluded from the above that there is in the African Human Rights System an early thinking process regarding the matter of human rights and climate change.

Moreover, at the 47th Ordinary Session of the African Commission on Human and Peoples' Rights held in Banjul from May 12 to 26 2010, Mrs. Hannah Forster, Director of the African Centre for Democracy and Human Rights Studies, spoke on behalf of the participants of the Forum of NGOs. In reviewing the human rights situation in Africa for the last six months, she highlighted "*the continuing depletion of Africa's natural resources as well as the deterioration of the environment due to lack of transparency in investment and corporate policies of some organisations.*"¹²² In her opinion, it was meritorious for the African Commission to establish a Working Group on this matter. However, it was crucial to formulate mechanisms protecting vulnerable people from exploitation in various forms. She also outlined that climate change threatened the enjoyment of human rights on the continent. African nations are finally realising that the threats from climate change are serious and urgent.

Specialists call for a recognition of the importance of climate change in light of respecting fundamental human rights.

Furthermore, the African Commission addressed during its sessions the problem that its Resolutions do not seem to be applied in practice:¹²³

“Resolutions have been passed by the African Commission on climate change and human rights, but the quality of their content is not impressive. The African Commission Resolution 153 of 2009 only focuses on the negotiations under the UNFCCC and mentions the concern that human rights standards are lacking in various draft texts of the conventions under negotiation.”

“This failure is made worse by the fact that the African States, such as Mali, Mauritius, and Zimbabwe, participated in the process which led to the adoption of resolutions at the UN-level, which list a range of rights which can be adversely affected by climate change. Resources thus do exist but have not been fully utilised.”

“Both individual and inter-State communications can be used to advance the link of climate change to human rights in Africa. As shown earlier, communications on climate change

¹²¹ Ibid.

¹²² Final Communiqué of the 47th Ordinary Session of the African Commission on Human and Peoples' Rights (n 113).

¹²³ Ademola Oluborode Jegede, Climate Change in the Work of the African Commission on Human and Peoples' Rights, *Speculum Juris*, 2017 31 (2) <https://www.researchgate.net/profile/Ademola-Oluborode-Jegede/publication/326818271_Climate_change_in_the_work_of_the_African_Commission_on_human_and_peoples_rights/links/5b64f480458515cf1d32f417/Climate-change-in-the-work-of-the-African-Commission-on-human-and-peoples-rights.pdf> accessed 11 May 2021.



grounded in allegations of human rights violations feature in the work of the Inter-American Commission. National courts have also examined the implication of climate change for environmental rights.”

“For instance, in Urgenda Foundation v. The State of the Netherlands, the Hague District Court established a causal link between emissions by the Netherlands, global climate change, and the effects on States’ duty for environmental rights”.

The *Urgenda* decision has been seen by the Commission as a landmark case, providing a clear path forward for concerned individuals around the world to pursue climate litigation and protect human rights. The principles in the case add significantly to the current global legal and political pressure applied by citizens on their governments to take urgent action on climate change.

General position of the African Court of Human and Peoples’ Rights on climate change

The Court is aware of the need to recognize environmental protection, regulation, and case law. However, in practice, African countries are not (yet) inclined to use the tools presented to them. They still have not acknowledged the need to "switch" their minds toward protecting human rights and the fact that those rights depend on protecting the environment.

Overall, although the African Court on Human and Peoples' Rights does not seem to be a pioneer on the subject, it must be underlined that climate change appears to be a growing, general concern.

4.2.5. European Court of Human Rights



How the European Court of Human Rights works

The European Court of Human Rights (ECtHR) enforces and interprets the European Convention on Human Rights (ECHR). The number of judges on the bench is equal to the number of Member States in the Council of Europe, currently 47. The ECtHR can decide on contentious cases, both inter-State and/or brought by individual victims of human rights violations, and can render advisory opinions.

The legal basis of ECtHR case law is thus the ECHR, which contains mainly civil and political human rights – and not the right to a healthy environment. However, the Court often utilises the 'living instrument doctrine' as an interpretation mechanism, which entails that the ECHR is interpreted in light of present-day conditions. It has therefore been very active in deriving environmental rights from civil and political rights, sometimes referred to as the 'greening' of human rights. Thus, it has been argued that the ECtHR's case law "all but in name provides for a right to a healthy environment." This case law, therefore, merits some attention.

4.2.5.1. Introduction

The European Court of Human Rights (ECtHR) acknowledged the connection between human rights and environmental matters in its case law as early as the 1990s.¹²⁴ The human rights encompassed in the European Convention on Human Rights (ECHR) are thus currently presumed to offer environmental protection. While the Court has not yet ruled in many cases on the topic of climate change specifically, it seems plausible that the corpus of environmental case law is applicable to this human rights threat as well. In the domestic case *Urgenda c.s. v the State of the Netherlands*, it was confirmed that articles 2 and 8 ECHR impose a positive duty upon the State to prevent dangerous climate change.¹²⁵ While this has not yet been affirmed in front of the ECtHR, it might merely be a matter of time. Articles 2 and 8 ECHR – encompassing, respectively, the right to life and the right to respect for private and family life – have proven especially valuable concerning the environment.

4.2.5.2. Articles 2 and 8 ECHR

In the environmental context, articles 2 and 8 ECHR are generally taken together, as the Court has confirmed that the scope of the obligations arising under these provisions largely overlaps.¹²⁶ Their development in case law, however, was not simultaneous.

In *López Ostra v Spain*,¹²⁷ the ECtHR ruled for the first time that the human right to respect private and family life under article 8 of ECHR can protect from environmental harm. Environmental harm was mainly

¹²⁴ Kravchenko and Bonine (n 95) 248.

¹²⁵ Supreme Court of the Netherlands 20 December 2019 ECLI:NL: HR:2019:2006 (*Urgenda*).

¹²⁶ *Budayeva and others v Russia* App Nos 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02 (ECtHR, 20 March 2008) paragraph 133.

¹²⁷ *López Ostra v Spain* (n 35).



understood to encompass noise, water, and air pollution. As air pollution from leather factories caused health risks to the applicant and her family, the Court ruled that "*severe environmental pollution may (...) affect their private and family life adversely*".¹²⁸ It further decided that Spain was liable for this violation of article 8 ECHR, despite the State not being directly responsible for the factories.¹²⁹ It thus not only confirmed that the provision protects from environmental harm, but also that States might have a positive obligation in this regard.

The existence of this positive obligation was confirmed in *Guerra and others v Italy*,¹³⁰ where the Court expressed that the State must take positive protective action in the environmental ambit.¹³¹ There is thus general consensus that States have both a negative and a positive obligation under article 8 ECHR with regard to environmental protection. While the Court deemed it unnecessary to go into the potential application of article 2 ECHR to an environmental context, Judges Walsh and Jambrek in their concurring opinions stated that it would be beneficial to consider article 2 ECHR in future environmental cases.

Their considerations were heard, as the Court ruled in *Öneryildiz v Turkey*¹³² that article 2 ECHR can be invoked in environmental matters. When a methane explosion at a mountain of rubbish neglected by the government took several lives, it was contemplated by the Court to be a violation of the right to life.¹³³ Moreover, the Court reiterated that this human right imposes a positive obligation on the State in environmental cases as well.¹³⁴

Thus, the ECtHR's case law has elucidated the environmental potential of the ECHR, specifically the right to life and the right to respect for private and family life. Articles 2 and 8 ECHR both contain a negative and a positive obligation for the State in environmental matters. Moreover, they both concern substantive and procedural rights. Interestingly, both articles 2 and 8 ECHR do not explicitly contain any procedural requirements. The Court has, however, considered that the procedural duties of States under these provisions include, but are not limited to: providing information¹³⁵, providing access to justice¹³⁶, and conducting environmental impact assessments¹³⁷ in situations where environmental rights need to be protected.

While it is apparent the ECtHR has fulfilled an important role in the connection between human rights, the environment, and State obligations, it has also formulated some limitations in this regard. Firstly, governments enjoy a wide margin of appreciation in providing environmental policies, as they have direct democratic legitimacy.¹³⁸ Secondly, human rights are not designed to protect the environment *per se*, and

¹²⁸ Ibid paragraph 51.

¹²⁹ Ibid paragraph 58.

¹³⁰ *Guerra and others v Italy* App No 116/1996/735/932 (ECtHR, 19 February 1998).

¹³¹ Ibid paragraph 58.

¹³² *Öneryildiz v Turkey* App No 48939/99 (ECtHR, 30 November 2004).

¹³³ Ibid paragraph 118.

¹³⁴ Ibid paragraph 90.

¹³⁵ *Guerra and others v Italy* (n 131) paragraph 60.

¹³⁶ *Taşkın and others v Turkey* App No 46117/99 (ECtHR, 10 November 2004) paragraph 124-5.

¹³⁷ *Giacomelli v Italy* App No 59909/00 (ECtHR, 26 March 2007) paragraph 96-97.

¹³⁸ *Hatton and others v United Kingdom* App No 36022/97 (ECtHR, 8 July 2003) at 97-103.



therefore a victim connection is pertinent for a successful environmental case at the ECtHR.¹³⁹ Thirdly, the environmental harm needs to reach a certain level of severity to be considered a violation of a human right.¹⁴⁰ Nevertheless, the Court has, over the last decades, proven valuable in the protection of the environment.

4.2.5.3. Future prospects

While the only cases explicitly concerning the climate crisis, as of now, have taken place in domestic courts – such as the above-mentioned Urgenda case – this might change rather swiftly. The case of *Duarte Agostinho and others v Portugal and 33 other States*, also known as the Portuguese Youth case, is currently pending at the ECtHR. If the Court would deliver a decision on the merits, it would clarify whether and to what extent articles 2 and 8 of ECHR might be applicable to the specific context of climate change. More interesting, however, are three other innovative aspects concerned by this case; these merit some more attention.

Firstly, the applicants explicitly invoke article 14 ECHR: the prohibition of discrimination.¹⁴¹ They reason that States not taking appropriate measures against climate change violate the prohibition of discrimination. As younger generations will suffer more from the climate crisis, and there is no objective justification for this placement of the heavy burden of climate change upon younger and future generations, States are discriminating against these younger generations. This complaint is directly intertwined with the notion of intergenerational equity, according to which the environmental rights of present and future generations must be taken into account.

Secondly, as the applicants intend to litigate against not only the State they are residents of, but also 33 other States, the issue of extraterritorial application of human rights comes to the fore. Article 1 ECHR provides that states are only obligated to protect human rights for people within their jurisdiction, which comprises the group of people on their own territory and those under their control and authority.¹⁴² With climate change being a global problem for which all States are partly responsible, the extraterritorial application is of great import; yet it is still uncertain to what extent human rights apply extraterritorially in the specific context of climate change.¹⁴³ A decision on the merits of the Portuguese Youth case might provide further guidance on this issue.

¹³⁹ *Kyrtatos v Greece* (n 26) 52.

¹⁴⁰ *Fadeyeva v Russia* App No 55723/00 (ECtHR, 9 June 2005) 70.

¹⁴¹ *Duarte Agostinho and others v Portugal and 33 other States* Application Form 9 <<https://youth4climatejustice.org/wp-content/uploads/2020/12/Application-form-annex.pdf>> accessed 12 May 2021.

¹⁴² For an elaboration see e.g. Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford University Press 2011).

¹⁴³ John H Knox, 'Diagonal Environmental Rights' in Mark Gibney & Sigrun Skogly (eds), *Universal Human Rights and Extraterritorial Obligations* (University of Pennsylvania Press 2010) 86-87; Greenpeace & Center for International Environmental Law, 'Extraterritorial Obligations in the Context of Eco-destruction and Climate Change' (FIAN International 2014) 9-10

<https://www.fian.org/fileadmin/media/publications_2015/ETO_and_climate_change.pdf> accessed 12 May 2021.



Lastly, in its statement on the Purpose of the Case, the Court itself requested litigants to comment on the prohibition of torture (article 3 ECHR) in relation to climate change.¹⁴⁴ As the environment has previously mainly been linked to the right to life and the right to respect for private and family life, the Court would find itself in uncharted waters, having to decide on the potential connection between the prohibition of torture and climate change.

4.2.5.4. Conclusion

In conclusion, under the ECHR States have both a negative and a positive obligation to protect human rights, and, thus, to protect persons from environmental harm. Especially the right to life and the right to respect for private and family life provide substantive and procedural duties for States in this regard. While it has not yet been decided on at the international level, it seems that these obligations also apply in the context of anthropogenic climate change. In this respect, the currently pending Portuguese Youth case might provide answers. The established obligations for States under human rights law can and should be taken into account by the International Court of Justice in rendering its Advisory Opinion on climate change, as they ensure the protection of the fundamental rights of all humans.

4.2.6. Conclusion on regional human rights courts

Bringing a legal claim that attempts to make a connection between human rights and State responsibility for climate change has in the last few years met great success, as observed for example in the Advisory Opinion OC-23/17 of November 15, 2017, of the Inter-American Court of Human Rights¹⁴⁵ and in *Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina*.¹⁴⁶ In addition, the current character of the State's legal obligations with respect to climate change and environmental protection is clear and precise in the jurisprudence of the Inter-American Court of Human Rights. The African Commission on Human and Peoples' Rights also adopted several specific Regulations in that respect, among which Resolution 271 on Climate Change in Africa¹⁴⁷, Resolution 417 on the human rights impacts of extreme weather in Eastern and Southern Africa due to Climate Change¹⁴⁸ and Resolution 153 on Climate Change and Human Rights and the Need to Study its Impact in Africa¹⁴⁹, aimed at being applied on a “case to case” basis.

¹⁴⁴ *Duarte Agostinho and others v Portugal and 33 other States* Statement on the Purpose of the Case 5, accessible at <<https://youth4climatejustice.org/wp-content/uploads/2021/05/2020.11.20-objet-de-laffaire-professional-translation.pdf>> accessed 9 May 2021.

¹⁴⁵ Inter-American Court on Human Rights, *The Environment and Human Rights* Advisory Opinion (n 27)

¹⁴⁶ *Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina* (n 98).

¹⁴⁷ African Commission on Human Rights and Peoples' Rights, 271 Resolution on Climate Change in Africa - ACHPR/Res.271(LV) 2014, 55th Ordinary Session of the African Commission on Human and Peoples' Rights, held in Luanda, Angola, from April 28 to May 12, 2014.

¹⁴⁸ African Commission on Human Rights and Peoples' Rights, 417 Resolution on the human rights impacts of extreme weather in Eastern and Southern Africa due to climate change - ACHPR / Res. 417 (LXIV), held in Sharm el Sheik, May 14, 2019.

¹⁴⁹ African Commission on Human Rights and Peoples' Rights, 153 Resolution on Climate Change and Human Rights and the Need to Study its Impact in Africa - ACHPR/Res.153(XLVI), held in Banjul, Gambia, November 25, 2009.



Both the Inter-American Commission on Human Rights and the African Commission on Human Rights have been called in several instances to analyse the question of climate change and take a position on this issue. Although in November 2006, the Inter-American Commission on Human Rights declined the 2005 Inuit Climate Change Petition¹⁵⁰ seeking relief from violations resulting from global warming caused by acts and omissions of the United States and arguing that impacts of climate change violate the Inuit's fundamental human rights, the Commission nevertheless agreed to hold a hearing in March 2007, to address matters relating to global warming and human rights. It shows that even if the petition was rejected, the Commission is concerned with the relationship between global warming and human rights. This hearing was a positive step toward recognizing States' obligations to prevent human rights violations resulting from their contribution to global warming.¹⁵¹ Another petition submitted by several NGOs requesting a hearing on climate change is currently pending before the Inter-American Commission on Human Rights.¹⁵² The petitioners asked the Commission to promote climate policies that protect human rights. They urged it to recognize the climate crisis as a priority that threatens human rights and ecosystems and asked to advance precautionary measures related to climate change. The organisations further requested that the Commission calls on States to take action to cease activities that aggravate climate change and threaten the effective enjoyment of human rights and promote energy transition models that guarantee environmental rights. The Commission's response on this matter will surely be of particular importance.

The European Court of Human Rights has dealt with several environmental cases, and one climate case is currently pending. Under the European Convention on Human Rights, States have both positive and negative obligations. The pending climate case will provide clarity as to the extent of applicability of these obligations to anthropocentric climate change.

4.2.7. ITLOS

By: Lianne Baars (Leiden University)

4.2.7.1. Introduction

The International Tribunal for the Law of the Sea (ITLOS) is the permanent judicial body that decides on any dispute concerning the application or interpretation of the United Nations Convention on the Law of the Sea (UNCLOS) and other related international agreements.¹⁵³ It has 21 members on the bench that are elected for 9-year terms.¹⁵⁴ It can decide both contentious cases and give provisional measures orders, as

¹⁵⁰ Watt-Cloutier (n 105).

¹⁵¹ Gordon (n 106) p. 55.

¹⁵² Climate Case Chart (n 103).

¹⁵³ United Nations Convention on the Law of the Sea (adopted 10 December 1982, entry into force 16 November 1994) 1833 UNTS 3 (*UNCLOS*); article 288 *UNCLOS*.

¹⁵⁴ Articles 2 and 5 Annex VI *UNCLOS*.



well as deliver Advisory Opinions.¹⁵⁵ While there is a special chamber for disputes concerning the marine environment, this chamber has not yet heard a case.

The legal basis of ITLOS cases is most often UNCLOS, which was negotiated and adopted when there was still little attention to the impacts of climate change on the oceans.¹⁵⁶ Thus, anthropogenic climate change is not considered in this instrument. While articles 1(1)(4), 192, 212(1) and 212(3) read together and arguably impose a due diligence obligation upon States to reduce greenhouse gas emissions that might damage the marine environment, these provisions are too general to impose any genuine targets.¹⁵⁷ As ITLOS has a key role in the dynamic development of ocean governance norms and principles, it is pre-eminently an adequate avenue to pursue the intertwining of climate change and the law of the sea.¹⁵⁸

¹⁵⁵ Article 138 ITLOS Rules of the Tribunal (adopted 28 October 1997, as amended).

¹⁵⁶ Tim Stephens, 'Warming Waters and Souring Seas: Climate change and Ocean Acidification' in Donald Rothwell and others (eds), *The Oxford Handbook of the Law of the Sea* (Oxford University Press 2015) 777; Elise Johansen, 'The Role of the Oceans in Regulating the Earth's Climate: Legal Perspectives' in Elise Johansen, Signe Veierud Busch & Ingrid Ulrikke Jakobsen (eds), *The Law of the Sea and Climate Change: Solutions and Constraints* (Cambridge University Press 2021) 3.

¹⁵⁷ Stephens, (n 157) 783.

¹⁵⁸ Donald Rothwell, 'The Contribution of ITLOS to Oceans Governance through Marine Environmental Dispute Resolution' in Tafsir Malick Ndiaye & Rüdiger Wolfrum, *Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mensah* (Martinus Nijhoff Publishers 2007) 1008.



Climate change and the oceans

Anthropogenic climate change has recently merited great attention, both in academic literature and with the greater public. However, the interdependency between climate change and the oceans has remained in the background of this discourse, despite the firm establishment of its existence by the Intergovernmental Panel on Climate Change. Especially the interaction between the two legal regimes – the law of the oceans and climate change law – has not had the proper amount of attention devoted to it. There is a discrepancy between the actual situation and the debate surrounding it.¹⁵⁹ Nevertheless, it has been observed that climate change will be the main challenge for the law of the sea regime in the twenty-first century.¹⁶⁰

The situation of small island States, such as Vanuatu, is especially dire. Climate change impacts on the oceans will first and foremost be noticeable for low-lying States and islands due to sea level rise; consequences could be that these States become submerged or uninhabitable. Rising seas, in this case, bring up not only essential questions of human rights but also questions concerning maritime entitlements and statehood.¹⁶¹

4.2.7.2. ITLOS and climate change

Since its commencement in 1996, ITLOS has heard 29 cases, of which not one has been about climate change.¹⁶² However, over half of those cases were in some way related to the protection of the marine environment.¹⁶³ These decisions could in the future also be applied to the issue of climate change, as the marine environment needs to be protected from it. Moreover, it could be deemed relatively simple to apply Part XII UNCLOS to greenhouse gas emissions and climate change, especially due to the broadness of article 192; here might lie a future task for ITLOS.

4.2.7.3. Environmental principles

ITLOS has, in the past, seemed eager to play a progressive role in developing environmental principles within its case law, as to effectively implement these in order to protect and preserve the marine

¹⁵⁹ Johansen, (n 157) 2-3.

¹⁶⁰ Donald Rothwell & Tim Stephens, *The International Law of the Sea* (Hart Publishing 2016) 25.

¹⁶¹ Stephens (n 157) 787-91; see for the consequences on maritime entitlements Signe Veierud Busch, 'Law of the Sea Responses to Sea-Level Rise and Threatened Maritime Entitlements: Applying an Exception Rule to Manage an Exceptional Situation' in Elise Johansen, Signe Veierud Busch & Ingrid Ulrikke Jakobsen (eds), *The Law of the Sea and Climate Change: Solutions and Constraints* (Cambridge University Press 2021).

¹⁶² For a full list, see: ITLOS, 'List of Cases' <<https://www.itlos.org/en/main/cases/list-of-cases/>>.

¹⁶³ Roda Verheyen & Cathrin Zengerling, 'International Dispute Settlement' in Cinnamon P Carlarne, Kevin R Gray & Richard Tarasofsky (eds), *The Oxford Handbook of International Climate Change Law* (Oxford University Press 2016) 429.



environment.¹⁶⁴ Here, the environmental precautionary principle and the original human rights duty of cooperation will be discussed.

4.2.7.3.a. Precautionary principle

Many notions have been bestowed upon the precautionary principle, or approach, but the definition in Principle 15 of the 1992 Rio Declaration is most often adhered to. It entails that where there are threats of serious irreversible damage to the environment, scientific uncertainty shall not be employed as a reason to postpone cost-effective measures to prevent such damage. However, international courts and tribunals, including ITLOS, have been hesitant to apply this principle.¹⁶⁵

The precautionary principle was first implicitly used by ITLOS in the *Southern Bluefin Tuna Cases*.¹⁶⁶ In the case of this provisional measure, Australia and New Zealand claimed that Japan was overfishing Southern Bluefin Tuna with experimental fishing techniques and thus putting the species in danger. ITLOS decided that the parties had to act ‘with prudence and caution’ to prevent serious harm to the species, despite scientific uncertainty that the experimental technique would do such harm.¹⁶⁷ It has been concluded in the literature that ITLOS thus applied the precautionary principle, despite not naming it as such. This was also declared in the Separate Opinions of Judges Shearer and Laing,¹⁶⁸ the latter, moreover, described the precautionary approach to be of an intergenerational nature.¹⁶⁹

While in later cases ITLOS seemed to adopt a different approach to the precautionary principle, this does not mean it rejected it as such. In *The Mox Plant Case*¹⁷⁰ ITLOS did not consider the precautionary principle, despite parties mentioning it as a legal ground.¹⁷¹ According to the Separate Opinions of Judges Wolfrum and Treves, this was not a rejection of the precautionary principle in general, but merely dependent upon the specific circumstances of this case.¹⁷² Judge *ad hoc* Székely found it regrettable that the tribunal did not rely upon the principle.¹⁷³ In the *Case concerning Land Reclamation by Singapore in and around the Straits of Johor*,¹⁷⁴ the tribunal again implicitly referred to the precautionary principle in the context of coastal adaptation works.¹⁷⁵ With the future sea level rise due to climate change, it is important for States to

¹⁶⁴ Haritini Dipla, ‘The Role of the International Court of Justice and the International tribunal for the Law of the Sea in the progressive Development of the Law of the Sea’ in Anastasia Strati, Maria Gavouneli & Nikos Skourtos (eds), *Unresolved Issues and New Challenges to the Law of the Sea: Time Before and Time After* (Martinus Nijhoff Publishers 2006) 246.

¹⁶⁵ Yoshifumi Tanaka, *The International Law of the Sea* (Cambridge University Press 2015) 255.

¹⁶⁶ *Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan)* (Provisional Measures, Order of 27 August 1999) ITLOS Reports 1999, 280.

¹⁶⁷ Ibid paragraph 77, 80.

¹⁶⁸ Separate Opinion of Judge Shearer 326-7; Separate Opinion of Judge Laing 12-21.

¹⁶⁹ Ibid paragraph 14.

¹⁷⁰ *The MOX Plant Case (Ireland v. United Kingdom)* (Provisional Measures, Order of 3 December 2001) ITLOS Reports 2001, 95.

¹⁷¹ Ibid paragraph 84 does refer to ‘prudence and caution’, but in relation to the duty of cooperation.

¹⁷² Separate Opinion of Judge Wolfrum 133-5; Separate Opinion of Judge Treves 8-9.

¹⁷³ Separate Opinion of Judge *ad hoc* Székely 22-4.

¹⁷⁴ *Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore)* (Provisional Measures, Order of 8 October 2003) ITLOS Reports 2003, 10.

¹⁷⁵ Ibid paragraph 99.



remember that they should exercise caution when planning coastal adaptation works, so as to not damage the marine environment.¹⁷⁶

An elaboration on the precautionary principle was eventually given in *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in Area*¹⁷⁷, an Advisory Opinion rendered by the Seabed Disputes Chamber upon request of Nauru and Tonga, two small island States pursuing deep seabed mining. The Area is a part of the ocean beyond national jurisdiction that is the ‘common heritage of mankind’; this thus contains an intergenerational component.¹⁷⁸

The Advisory Opinion considered that the Area deserved the highest standard of protection for the marine environment. For this reason, the precautionary principle was deemed applicable in cases concerning the Area, and deemed a part of general due diligence obligations.¹⁷⁹ Moreover, it considered that this principle was starting to become part of customary international law.¹⁸⁰ While this is not a full endorsement, it could contribute to other international courts, such as the International Court of Justice, recognising the principle. Other principles, such as that of common but differentiated responsibilities,¹⁸¹ best environmental practices¹⁸², and the obligation to conduct an environmental impact assessment were also considered.¹⁸³

Thus, while the precautionary principle is not explicitly stated in UNCLOS as such, it has been interpreted by ITLOS to be encompassed in the law of the sea regime, in light of dynamic interpretation. The application of this principle gives small island States better prospects for requesting provisional measures from ITLOS based on the climate policies of major greenhouse gas emitters, that are damaging the marine environment, as they will have to take preventative measures even in light of scientific uncertainty.

4.2.7.3.b. Duty of cooperation

The duty of cooperation is one of the core principles of UNCLOS, seen – as related to the environment – in e.g. articles 118, 194, and 197 UNCLOS. The rationale behind this is that cooperation is needed to protect the marine environment and the oceans; one single State cannot achieve such a global goal. Thus, the duty has been emphasised in ITLOS case law.

In *The Mox Plant Case*, ITLOS recognised the duty of cooperation as a fundamental principle for preventing marine environment pollution and linked it to the precautionary principle. Moreover, it recognised the duty also as a fundamental principle of general international law.¹⁸⁴ As such, the principle has been recognised

¹⁷⁶ Stephens, (n 158) 794.

¹⁷⁷ *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area (Request for Advisory Opinion submitted to the Seabed Disputes Chamber)* (Advisory Opinion of 1 February 2011) ITLOS Reports 2011, 10.

¹⁷⁸ Article 136 UNCLOS.

¹⁷⁹ *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area* (n 179) 131.

¹⁸⁰ *ibid.* 135.

¹⁸¹ *ibid.* 152-163.

¹⁸² *ibid.* 135-6.

¹⁸³ *ibid.* 141-50.

¹⁸⁴ *ibid.* 82-4.

not only in a human rights context but also specifically in the climate change regime. Both the United Nations Framework Convention on Climate Change and the Paris Agreement acknowledge the importance of cooperation in *inter alia* their preambles. The ruling in the *Case concerning Land Reclamation by Singapore in and around the Straits of Johor* further confirmed the importance of the duty to cooperate, and especially its link to the precautionary principle, as ITLOS stated that prudence and caution require cooperation.¹⁸⁵ The two principles thus need to be read together to protect and preserve the marine environment.

Thus, the principle or duty of cooperation has been firmly established in multiple legal regimes. Amongst others in the law of the sea, also specifically regarding the marine environment and climate change law. It is evident climate change is a global problem that cannot be solved by merely one State, the duty of cooperation is necessary to ensure the mutual effort needed to combat the climate crisis.

4.2.7.4. Conclusion on ITLOS case law

In conclusion, under UNCLOS and ITLOS case law, States have an obligation to preserve and protect the marine environment, especially through the application of the precautionary principle and the duty of cooperation. While it has not formally been decided, it seems that this obligation also applies in the context of anthropogenic climate change, as its consequences severely threaten the marine environment and the human rights of people living in low-lying countries. The establishment of the precautionary principle as (almost) part of customary international law, and the duty of cooperation as general international law, can and should be taken into account by the International Court of Justice in delivering its Advisory Opinion on the climate crisis, as they protect the interests of the marine environment and all of humankind.

4.3 Customary Law

By: Jule Schnakenberg (University of Aberdeen)

The ICJ could contribute to the development of customary environmental law. In the past, the ICJ has done so, for example for article 2(4) of the UN Charter on the prohibition of the use of force.¹⁸⁶

Deppermann writes “*Even though the nations involved have significantly hedged their commitment to human rights through treaties, enough human rights norms have reached customary status to provide the ICJ with plenty of applicable law to draw upon in an Advisory Opinion.*”¹⁸⁷

¹⁸⁵ Ibid. 96-9.

¹⁸⁶ *Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua)* (Judgement) [2009] ICJ Rep 2009.

¹⁸⁷ Lee J.F. Deppermann, 'Increasing The ICJ's Influence As A Court Of Human Rights: The Muslim Rohingya As A Case Study' (2013) 14 *Chicago Journal of International Law*.



In addition, some argue that the obligations arising from the Paris Agreement are growing to become part of customary international law.¹⁸⁸ The Court could significantly contribute to the development of customary law on the one hand, and it can also influence its Advisory Opinion. This warrants further research.

¹⁸⁸ Kayla Clark, 'The Paris Agreement: Its Role In International Law And The American Jurisprudence' (2018) 8 Notre Dame Journal of International & Comparative Law, 116.



Influence of the Court

5. The International Court of Justice

Key takeaways:

- The Court has contributed significantly to the development of international environmental law, and its own case law on the topic has evolved considerably.
- The Court's role in international human rights law, especially as it relates to other bodies of international law, is unique and crucial.

By: Amanda Zerbe (Stanford University)

5.1. The Court's Influence on International Environmental Law

The International Court of Justice has played an important role in articulating and solidifying international environmental law, as it has addressed issues ranging from transboundary environmental harm to shared freshwater and marine resources.¹⁸⁹ These decisions from the Court have impacted international environmental law in several ways. Firstly, they have solidified the obligation of States to ensure that actions within their jurisdiction do not cause transboundary environmental harm as customary international law.¹⁹⁰ Secondly, these decisions have articulated the procedural requirements associated with a significant risk of transboundary environmental harm.¹⁹¹ Thirdly, these decisions have enumerated interconnections between international environmental law and international humanitarian law.¹⁹² Additionally, the Court's jurisprudence has influenced other decisions, as international courts have looked at the ICJ's articulation of international environmental law in formulating their own decisions.¹⁹³

Writing in 2008, international lawyer Jorge E. Viñuales suggested that there had previously been two major waves of environmental cases before the ICJ. In his view, the first wave – comprising the *Corfu Channel* and *Nuclear Tests* cases – applied a fairly 'narrow' lens to transboundary harms, but nevertheless began to link transboundary harms to general international law.¹⁹⁴ The second wave, which included the contentious cases *Phosphate Lands in Nauru* and the *Gabcikovo-Nagymaros Project*, as well as the Court's Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, served to consolidate earlier case law

¹⁸⁹ Tim Stephens, 'Environmental Principles and the International Court of Justice' in *Elgar Encyclopedia of Environmental Law* (Edward Elgar Publishing Limited 2018) 559; while the Court created a specific Chamber for Environmental Matters in 1993, this has generally gone unused and in 2006 the Court stopped holding elections for the specialized chamber.

¹⁹⁰ Jorge E Viñuales, 'The Contribution of the International Court of Justice to the Development of International Environmental Law: A Contemporary Assessment' (2008) 32 *Fordham International Law Journal* 232, 253.

¹⁹¹ Stephens (n 189) 567.

¹⁹² Viñuales (n 190) 253.

¹⁹³ Stephens (n 189) 566.

¹⁹⁴ Viñuales (n 190) 235-44.



and to highlight “a number of interconnections between IEL, on the one hand, and both boundary delimitation and international humanitarian law, on the other hand.”¹⁹⁵

Subsequently, the Court has begun to concretise its earlier observations related to international environmental law, as it stipulated State obligations in this regard. In both the *Pulp Mills* case and in *Certain Activities Carried Out by Nicaragua in the Border Area and Construction of a Road in Costa Rica Along the San Juan River*, the Court affirmed the importance of conducting environmental impact assessments when a risk of significant transboundary harm exists.¹⁹⁶ Additionally, the Court returned to certain environmental obligations – related to the duty of cooperation – that it had first considered in the 1970s when the *Whaling in the Antarctic* case had to be decided in 2014.¹⁹⁷

The Court’s development of international environmental law has included several major milestones that are still relevant in the international legal sphere today. A selection of its environmental case law will be discussed here.

Shortly after its establishment, the Court had to decide in the *Corfu Channel* case, which was not directly related to an environmental issue, yet proved to be influential later on. The decision linked the principles of transboundary harm to general international law, which later provided the foundation for groundbreaking instruments of international environmental law like the 1972 Stockholm Declaration.¹⁹⁸

In its 1996 Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the Court described the environment as “not an abstraction but represents the living space, the quality of life, and the very health of human beings, including generations unborn.”¹⁹⁹ It furthermore recognised that the obligation for states to prevent transboundary harm was now part of international environmental law (or “the corpus of international law relating to the environment”).²⁰⁰ Finally, the Court stated that States should account for environmental factors in making determinations concerning the measures that are necessary and proportionate in the context of military objectives and that these determinations should be informed by respect for the environment and principles related thereto.²⁰¹ Then in the *Gabcikovo-Nagymaros Project* case of 1997, the Court framed environmental interests as potential essential interests of a State in the context of defences invoking a state of necessity.²⁰² The Court also linked international environmental law and international humanitarian law, building on an earlier decision, and explicitly referenced the notion of ‘sustainable development’.²⁰³ Finally, the Court explicitly noted the irreversible nature of certain kinds of environmental harms, and the difficulty of repairing such harms.²⁰⁴

¹⁹⁵ Ibid 236.

¹⁹⁶ Stephens (n 189) 560.

¹⁹⁷ Ibid.

¹⁹⁸ Ibid 238-40, 235.

¹⁹⁹ Ibid 245.

²⁰⁰ Ibid 245-6.

²⁰¹ Ibid 245.

²⁰² Ibid 236, 248-9.

²⁰³ Ibid 249.

²⁰⁴ Ibid 564.

In the 21st century, the Court has continued its development of international environmental law. In its 2010 decision in the *Pulp Mills* case, the Court addressed both the prevention principle (the obligation to prevent transboundary harm) and the precautionary principle, noting that although it could be pertinent to the statute at issue, it did not constitute a reversal of the burden of proof. Most significantly, the Court found that performing an environmental impact assessment was required under general international law when a proposed activity might have significant and negative transboundary impacts.²⁰⁵ The Court further built on this case in its 2015 decision in *Certain Activities Carried out by Nicaragua in the Border Area and Construction of a Road in Costa Rica along the San Juan River*. In these joint cases, the Court connected the principle of preventing significant transboundary harm to the environmental impact assessment, noting that the former triggers the latter.²⁰⁶

5.2. The Court's Influence on International Human Rights Law

The International Court of Justice has also contributed significantly to developing international human rights law. Five of the nine major human rights treaties have a 'compromissory clause' – i.e. a clause that gives jurisdiction to the ICJ when disagreements arise between States concerning treaty interpretation or application – which seemingly gives the Court many opportunities to consider human rights cases. However, States' consent to that jurisdiction is often absent.²⁰⁷ The decisions that have articulated the Court's view on international human rights have been received favourably by other tribunals, comparable to the international environmental law context.²⁰⁸

As many scholars have noted, the ICJ's jurisprudence on human rights issues has evolved considerably. Professor and Permanent Member of the Court of Arbitration Gentian Zyberi has characterised the Court's jurisprudence as unfolding in three stages. First, in the late 1970s, the Court facilitated the larger internationalisation of human rights law as well as the United Nations' role in monitoring these rights, by drawing on fundamental international legal principles.²⁰⁹ These general principles were often enshrined in the Universal Declaration of Human Rights and the United Nations Charter, including the prohibitions on slavery and discrimination.²¹⁰ The second phase began in the late 1970s and lasted until the early 1990s, as the Court became more reluctant to address these human rights issues in the highly politicised context of the Cold War. Nevertheless, the third phase commenced after the 1990s, in which both the Court's reputation and the legal principles concerning human rights that it addressed were "fairly well-established."²¹¹

Over the years, the Court has weighed in on a multiplicity of topics, including interpreting the breadth of reservations to treaties on human rights, considering self-determination in the decolonization context, and

²⁰⁵ Ibid 562.

²⁰⁶ Ibid 563.

²⁰⁷ Gentian Zyberi, 'The Interpretation and Development of International Human Rights Law by the International Court of Justice' in Martin Scheinin (ed), *Human Rights Norms in 'Other' International Courts* (Cambridge University Press 2019) 30; Bruno Simma, 'Mainstreaming Human Rights: The Contribution of the International Court of Justice' (2012) 3 *Journal of International Dispute Settlement* 7, 15.

²⁰⁸ Zyberi (n 209) 202.

²⁰⁹ Ibid 208.

²¹⁰ Ibid.

²¹¹ Ibid.



the prosecution and extradition of individuals accused of human rights violations.²¹² For instance, the Court has extensively considered the international crime of genocide – including by articulating its *erga omnes* status, interpreting reservations to the Genocide Convention, clarifying the definition of a protected group under the Genocide Convention, and clarifying what a ‘part’ of such a group constitutes.²¹³ The Court’s findings on this topic have been pertinent for international criminal tribunals applying international criminal law to similar crimes.²¹⁴

Former ICJ Judge and scholar Bruno Simma has characterized the Court’s most promising contribution to international human rights law as ‘mainstreaming’:

*“[Mainstreaming human rights can involve] integrating [human rights law] into both the fabric of general international law and its various other branches . . . [the ICJ] can render human rights arguments more readily acceptable to international law generalists by interpreting and applying substantive provisions of human rights treaties . . . [f]urther, the Court is singularly capable of devising solutions for practical, more technical, legal problems which arise at the interface between human rights and more traditional international law, thus paving the way for the acceptance of human rights arguments and, more generally, supporting and developing the framework of human rights protection.”*²¹⁵

Judge Simma further noted that the Court has already contributed considerably to this endeavour.²¹⁶ Particularly, it has interpreted and defined obligations resulting from human rights treaties, as well as interpreted reservations to those treaties. Additionally, it has assessed the geographic scope of treaty obligations, addressed the question of attribution of conduct by non-State actors to States, and the intertwining of international human rights law and international humanitarian law. It has also, notably, developed *jus cogens* and *erga omnes* as legal categories that connect to human rights law and lend it great weight.

²¹² Ibid 211.

²¹³ Ibid 214-5; Vincent Chetail, 'The contribution of the International Court of Justice to international humanitarian law' (2003) 85 International Review of the Red Cross 235, 248 (referencing the Court’s decisions in its Advisory Opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* and in the *Barcelona Traction* judgement).

²¹⁴ Zyberi (n 209) 216.

²¹⁵ Simma (n 209) 27.

²¹⁶ Ibid 28-29.



Climate

action

through

law

6. Youth leading the way

Key takeaways:

- Courageous youth leaders have put the climate crisis on the global political agenda.
- Young people are standing on the shoulders of brave leaders who came before us.
- An ICJ Advisory Opinion can contribute to the progressive development of international law in four areas: (i) by holding States accountable, (ii) by spurring climate action, (iii) by depoliticizing climate science, and lastly (iv) by providing guidance to domestic and regional courts.

6.1. Standing on the shoulders of those before us

By: Aoife Fleming (Leiden University) & Jule Schnakenberg (University of Aberdeen)

Courageous youth leaders have put the climate crisis on the global political agenda, but the world is still learning how to put human rights at the heart of that conversation. The climate crisis poses an immediate and non-discriminating threat to peace, security, and stability everywhere. It is time we start treating the climate crisis like the human rights issue that it is, and address and mitigate climate impacts through human rights-based solutions.

We are standing on the shoulders of giants in their never-ending pursuit of peace and their love for humanity. Palau and the Marshall Islands, both climate-vulnerable Pacific Island nations, started a similar initiative in 2011. Youth groups worldwide work hard to hold their governments accountable for their promises in court cases. Indigenous people have a long history of defending their lands. Many pioneers had come before us and made the noblest sacrifices for our shared humanity to make the impossible possible, and our work builds upon the gravity of their legacy. For this reason, it is a great honour for us to learn from those who have come before us and from our courageous peers around the world.

The 1996 Advisory Opinion on the *Legality of Threat or Use of Nuclear Weapons* came about by a civil society call led by impassioned Aotearoa/New Zealanders. Aotearoa/New Zealand faced the threat of atmospheric nuclear weapons testing in Pacific waters by nuclear weapons States, such as France and the United States. This harsh reality resulted in a campaign, initiated by a group called 'the World Court Project', to request an ICJ Advisory Opinion on one of the biggest threats of the 1990s. The campaign was built on several decades of strong anti-nuclear activism in Aotearoa/New Zealand by a coalition of Indigenous people and civil society groups, such as the women's suffrage movement. The International Peace Bureau, the International Association of Lawyers Against Nuclear Arms, and the International Physicians for the Prevention of Nuclear Weapons led the campaign. The World Court Project first convinced the World Health Organisation (WHO) to request an Advisory Opinion in 1996. However, the Court concluded that the request was not within the scope of activities of this organisation. Nonetheless, the political will at the WHO's Assembly paved the way for support at the UN General Assembly. After decades of campaigning, the ICJ delivered an Advisory Opinion of which the influence was felt far beyond the courtroom.



6.2. The potential impact of an Advisory Opinion on Human Rights and Climate Change

An effective Advisory Opinion on climate change and human rights will contribute to closing the protection gaps and tying the work of the UNFCCC and the human rights treaty bodies together. Additionally, it will enhance a range of developments that go beyond human rights law. Four such areas of potential impact are discussed below.

Firstly, the ICJ can promote the rule of law by holding States accountable for environmental damages, failure to regulate, and lacking enforcement of environmental legislation.²¹⁷ If States are held accountable for their environmental legislation and regulation, private parties will indirectly be drawn into the human rights framework. The Committee on Economic, Social, and Cultural Rights has already stated that compliance with human rights in the face of climate change is an obligation of both State and non-State actors.²¹⁸

Secondly, the ICJ can spur climate action taken by both State and non-State actors. Youth have been very vocal on climate change and strategic litigation by youth groups has increased in recent years.²¹⁹ The momentum around the advisory proceedings at the Court could catalyse new actions, while an Advisory Opinion could change the attitudes and behaviour of both State and non-State actors.²²⁰ The authoritative influence of the ICJ on non-State actors is aptly illustrated by the contentious case *Whaling in the Antarctic*. Merely one day after the ICJ delivered its judgement directed at States, which found Japan's 'scientific whaling' unlawful, a Japanese company cancelled its retail sale of whale meat.²²¹

Thirdly, the Advisory Opinion could depoliticize climate science by giving the IPCC findings “*authority of a judicial determination of the facts*”.²²² It would not be the first time the ICJ deliberates on questions of science. During the above-mentioned *Whaling in the Antarctic* case,²²³ the ICJ had allowed for cross-examination of scientific experts, which constituted a change in method.²²⁴ This demonstrates that the Court does not avoid engaging with complex science. Nonetheless, the question remains if the judges – with no scientific background – would be able to form an opinion on climate science. Further analysis is required here.

²¹⁷ Boyle (n 12).

²¹⁸ UN Committee on Economic, Social and Cultural Rights ‘Climate Change and the International Covenant on Economic, Social and Cultural Rights’ (8 October 2018) <<https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=23691&LangID=E>> accessed 25 November 2020.

²¹⁹ See inter alia Urgenda and the Global Climate Litigation Network under <<https://www.urgenda.nl/en/themas/climate-case/global-climate-litigation/>>, Our Children’s Trust under <<https://www.ourchildrenstrust.org/juliana-v-us>>, and Global Legal Action Network under <<https://youth4climatejustice.org/>>.

²²⁰ Sands (n 68).

²²¹ ‘Rakuten Updates Guidelines Regarding Items For Japan Marketplace’ (*Rakuten Media Room*, 2014) <http://global.rakuten.com/corp/news/press/2014/0401_04.html> accessed 29 November 2020.

²²² Sands (n 68).

²²³ *Whaling in the Antarctic (Australia v Japan: New Zealand intervening)* (Merits) [2014] ICJ Rep 226.

²²⁴ Sands (n 68).



Fourthly, with increased domestic and regional adjudication centred around climate change, an Advisory Opinion could provide guidance for domestic courts. Domestic courts take into account the dictates of international courts and tribunals to complement national law. In particular, an Advisory Opinion on the customary duties of States could help courts decide whether to award climate damages.²²⁵

In conclusion, this report has aimed to demonstrate that there are sufficient sources of law to warrant the request for an Advisory Opinion on climate change and human rights. In particular, an ICJ Advisory Opinion can contribute to the progressive development of international law in four areas: (i) by holding States accountable, (ii) by spurring climate action, (iii) by depoliticizing climate science, and lastly, (iv) by providing guidance to domestic and regional courts.

²²⁵ Daniel Bodansky, 'The Role of the International Court of Justice in Addressing Climate Change: Some Preliminary Reflection' (2017) 49 *Arizona State Law Journal* 689, 707, citing Andre Nolkaemper, 'Conversations Among Court: Domestic and International Adjudicators' in Cesare PR Romano and others (eds), *The Oxford Handbook of International Adjudication* (Oxford University Press 2014) 523, 538.



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Contributors





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