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SYMPOSIUM ARTICLE · SYMPOSIUM ON THE ICJ CLIMATE ADVISORY OPINION AND BAY OF BENGAL

Can the Advisory Opinion Strengthen the International Response to Climate Change?

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The International Court of Justice (ICJ) issued an Advisory Opinion on the Obligations of States in respect of Climate Change to support a more coherent and cross-regime legal framework for addressing climate change in continuation of the significant climate rulings of the European Court of Human Rights (ECtHR), the Advisory Opinion of the International Tribunal of the Law of the Sea (ITLOS) and the Advisory Opinion of the Inter-American Court of Human Rights (IACtHR) in the evolving landscape of international climate change law.

This advisory opinion was adopted unanimously by the Court. Earlier advisory opinions are sometimes described as having been adopted unanimously. However, of the four advisory opinions frequently cited in this regard, only one—Reparation for Injuries Suffered in the Service of the United Nations (1949)—was in fact adopted unanimously. The remaining three were adopted by majority votes: Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter) (1948) by 9 votes to 6; Competence of the General Assembly for the Admission of a State to the United Nations (1950) by 12 votes to 2; and Effect of Awards of Compensation Made by the United Nations Administrative Tribunal (1954) by 9 votes to 3.

While the whole world is optimistic about the World Court's potential contribution to the future of climate governance, this piece highlights the challenges and limitations of international law and the ICJ to achieve climate justice within the global regime without the existence of treaties and customary international law in a broader perspective. To achieve this goal, the author will discuss it under two themes. The first one is the status of this advisory opinion in international law, and the other one is related to the responsibility of the States for climate-related harm.

Evaluating the position of the advisory opinion of the ICJ, we need to go back to the analysis of the Statute of the ICJ and the Charter of the United Nations. Article 38(1) of the ICJ Statute does not mention the advisory opinion

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as a source of international law. The World Court may give an advisory opinion on any legal question at the request of the authorised body as per the Charter of the United Nations. The Court must be guided by the provisions of the Statute while exercising its advisory functions. There is no explicit provision clarifying the binding nature of the advisory opinion, like a decision in any specific case, as per Article 59. The Charter of the United Nations mentions the advisory function of the Court, yet it does not elaborate on its authority. On the other hand, the International Law Commission (ILC)'s 'Draft Conclusions on the Identification of Customary International Law' offer guidance on how to determine the existence of rules of customary international law where it provides that decisions of international courts and tribunals are subsidiary means for the determination of the existence of customary international law and those decisions include both judgments and advisory opinions. Therefore, it advocates that the Court has assigned the same legal import to advisory opinions as decisions in contentious cases, as both of those ascertain which are the applicable laws in a given case and what rights and obligations already exist among relevant States and other subjects. Therefore, it can be said that the advisory opinion of the ICJ regarding climate change is remarkable in its scope, with the potential to open a new front in climate litigation, although it is not binding on any State. Thus, the pre-existence of treaty laws and customary international law among States may create a legal obligation among themselves to achieve climate justice, and this advisory opinion ascertained those applicable laws.

The second issue is regarding the responsibility of the State for climate-related environmental harm. In the advisory opinion, the ICJ has interpreted the legal duties of States in relation to climate change mitigation and adaptation. While addressing this issue, it has identified a comprehensive legal framework on climate change that includes major climate related treaties, i.e., the Charter of the United Nations (UN Charter), United Nations Framework Convention on Climate Change (UNFCCC), Kyoto Protocol, Paris Agreement, United Nations Convention on the Law of the Sea (UNCLOS), the Ozone Layer Treaties (Vienna Convention and Montreal Protocol), the Convention on Biological Diversity (CBD), the United Nations Convention on Desertification (UNCCD); customary international law (the duty to prevent significant harm to the environment, the duty to cooperate in environmental protection); other principles of environmental law (the principle of sustainable development, common but differentiated responsibilities and respective capabilities, intergenerational equity and precautionary principle) and international human rights law (Para 172).

States may have adversely affected the climate system through greenhouse gas (GHG) emissions, and they are responsible for this, as the consequences of climate change are severe. The Court has observed that the legal consequences of climate change are identified and addressed through the application of the secondary rules of

international law concerning the responsibility of States for internationally wrongful acts (Para 172). On the basis of this legal framework, the ICJ has ruled that all states have legally binding obligations to prevent significant environmental harm, cooperate on climate action and uphold fundamental rights to protect the climate for present and future generations. If a State has failed to act diligently to address the risks of climate change and associated environmental damage, it may constitute a wrongful act as per the law of state responsibility, as the climate change treaties set forth binding obligations for State Parties to ensure the protection of the climate system. The advisory opinion reaffirms the idea that States have a binding obligation under the UNFCCC to adopt measures to mitigate GHG emissions; a duty to cooperate to achieve the objectives of the UNFCCC; in addition, they have common but differentiated responsibilities to achieve the objectives of the Paris Agreement and Kyoto Protocol to limit global warming. In the same way, if any State causes significant environmental harm to the other States, failing to act diligently, it may violate the principle of 'no harm', resulting in an obligation of reparation. States have a duty to prevent significant harm to the environment by acting with due diligence and have a duty to cooperate with each other in good faith to prevent significant harm to the climate system. These customary international law are binding on the State. Therefore, the impact of this advisory opinion strengthens both domestic and international litigation efforts for stronger climate action within the UN climate regime, with the aid of pre-existing treaty laws and customary international norms and principles of climate governance.

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