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Tide of Destiny: The Forthcoming Advisory Opinion of the International Court of Justice and its Potential Impact on the Future of Small Island States

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Abstract: *This article will briefly analyze the recent developments regarding the request made by the United Nations General Assembly for an Advisory Opinion from the International Court of Justice on the 29th of March 2023, as well as succinctly examine the legal challenges posed by sea-level rise and climate change affecting small island States more broadly. The questions we will explore in this article are: What are States' obligations de lege lata regarding their actions leading to a global rise in sea levels due to their effects on climate change? What are the potential implications of the upcoming ICJ advisory opinion? What are the consequences of partial or complete territorial loss caused by climate change for States?*

Key-words: *Advisory Opinion, Climate Change, Jus Cogens, Statehood, Sea-level rise.*

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The opinions expressed in this paper are solely the author's and do not engage the institution he belongs to.

1. Introduction

The summer of 2023 was the hottest three-month period on record, resulting in unprecedented sea surface temperatures.[1] Amidst this critical challenge, UN Secretary-General António Guterres warned that "*The era of global warming has ended, the era of global boiling has arrived.*"[2] Climate change has now become a threat to the very existence of the so-called Small Island Developing States (SIDS)[3] as some are predicted to be fully submerged underwater in less than 50 years.[4] As such, there is a real possibility the international community will have to deal with this disturbing reality within our lifetime.

In an attempt to anticipate and counteract the devastating effects of climate change, some small island States are actively fighting for recognition on the international scene and are seeking remedies via diplomatic, political, as well as legal avenues. On the 29th of March 2023, a significant milestone was reached as the United Nations General Assembly (UNGA) passed Resolution A/RES/77/276, formally asking the International Court of Justice (ICJ) to provide an advisory opinion regarding the obligations of States under international law concerning climate change.[5]

The Republic of Vanuatu spearheaded this initiative and managed to lead a global coalition of 132 co-sponsoring States in the adoption of the Resolution (Romania was part of the core group of 18 nations that drafted the questions for the ICJ). As Vanuatu stated on their purpose-built website for promoting the initiative,[6] while all principal organs of the United Nations took a stance in this respect, the ICJ has not yet clarified the implications of climate change under international law. The adoption of the Resolution is the most recent development in a series of attempts to clarify state responsibility under

[1]https://public.wmo.int/en/media/press-release/earth-had-hottest-three-month-period-record-unprecedented-sea-surface

[2]https://www.theguardian.com/science/2023/jul/27/scientists-july-world-hottest-month-record-climate-temperatures#:~:text=Karsten%20Haustein%20at%20Leipzig%20University,it%20was%20over%2C%20he%20said.

[3] https://www.un.org/ohrlls/content/about-small-island-developing-states.

[4] https://www.businessinsider.com/these-island-nations-could-be-underwater-in-as-little-as-fifty-years-2015-12.

[5]https://www.icj-cij.org/sites/default/files/case-related/187/187-20230419-PRE-01-00-EN.pdf.

[6] https://www.vanuatuicj.com/why-icj.

international law for the damaging effects of anthropogenic climate change. Previously, the Commission of Small Island States on Climate Change and International Law submitted a request to the International Tribunal for the Law of the Sea in December 2022,[7] and Chile and Colombia promoted a joint request for an advisory opinion from the Inter-American Court of Human Rights in January 2023[8] on similar issues.

2. The legal landscape regarding State responsibility in relation to environmental obligations and the potential implications of the ICJ Advisory Opinion

It remains to be seen whether the ICJ will find that international law today can adequately address all questions raised in the request for the Advisory Opinion. However, without anticipating the Court's findings, we will attempt to outline the legal landscape that surrounds the issue of State responsibility regarding climate change, and more specifically, we will try to discover if small island States disproportionately affected by fast sea-level rise can obtain legal compensation from large greenhouse gas (GHG) emitters.

2.1. Legal Landscape

There are several international law principles that shape the notion of State responsibility in relation to environmental obligation *de lege lata*. The Trail Smelter arbitration[9] introduced 2 important principles, namely the "*no harm*" principle which binds States to prevent, reduce and control the risk of environmental harm to other States and the "*poluter pays*" principle.[10] The *"no harm"* principle was also enshrined later in Principle 21 of the Stockholm Declaration,[11] and in Principle 2 of the Rio Declaration.[12] Moreover, the ICJ stated that the obligation to ensure that activities within their jurisdiction or

[7]https://www.itlos.org/fileadmin/itlos/documents/cases/31/Request_for_Advisory_Opinion_COSIS_12.12.22.pdf.

[8] https://www.corteidh.or.cr/docs/opiniones/soc_1_2023_en.pdf.

[9] *Trail smelter case* (United States v Canada), 16 April 1938 and 11 March 1941, Vol III, 1905–1982.

[10] Malgosia Fitzmaurice & Agnes Viktoria Rydberg (2023). *Using International Law to Address the Effects of Climate Change: A Matter for the International Court of Justice*?, Yearbook of International Disaster Law Online, 4(1), pp. 281-305.

[11] Stockholm Declaration on the Human Environment, in Report of the United Nations Conference on the Human Environment (1972) UN Doc A/CONF. 48/14, at 2 and Corr. 1.

[12] Rio Declaration on Environment and Development, 1992, UN Doc A/CONF.151/26 (vol. I).

control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction is a rule of customary international law in its advisory opinion on *The Legality of the Threat or Use of Nuclear Weapons*.[13] In the same advisory opinion[14], the ICJ affirmed that "the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn."[15]

Furthermore, in the *Gabčíkovo-Nagymaros* case, the ICJ found that: "*Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind - for present and future generations - of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development*."[16]

Similarly, in the *Pulp Mills* case, the ICJ stated, citing previous decisions: "*The Court points out that the principle of prevention, as a customary rule, has its origins in the due diligence that is required of a State in its territory. It is 'every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States' [Corfu Channel (United Kingdom v. Albania), Merits, Judgment, I.C.J. Reports 1949, p. 22]. A State is thus obliged to use all the means at its disposal in order to avoid activities that take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State. This Court has established that this obligation 'is now part of the corpus of international law*

[13] *Threat or Use of Nuclear Weapons (Advisory Opinion)*,1996, ICJ Rep 226.

[14] Bogdan Aurescu, Ion Gâlea, Lazăr Elena, Ioana Oltean*, Scurtă culegere de jurisprudență,* Hamangiu, Bucharest, 2018, pp. 156-158.

[15] For a deeper analysis of sustainable development and the rights of future generations see Philippe Sands, Jacqueline Peel, Adriana Fabra and Ruth MacKenzie (2018). *Principles of International Environmental Law* (4th ed.) Cambridge University Press, pp. 221-222.

[16] *Gabčikovo-Nagymaros Project*, Hungary v Slovakia, Judgment, ICJ 1997.

relating to the environment' (Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I), p. 242, para. 29)."[17]

Another principle acknowledged by the Court is the "*due diligence*" principle that was laid out in the *Corfu Channel Case*[18]: "*every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States*". This principle was later reinforced and developed in the cases of *Costa Rica v. Nicaragua* where the ICJ outlined the obligation of carrying out an environmental impact assessment: "*Thus, to fulfil its obligation to exercise due diligence in preventing significant transboundary environmental harm, a State must, before embarking on an activity having the potential adversely to affect the environment of another State, ascertain if there is a risk of significant transboundary harm, which would trigger the requirement to carry out an environmental impact assessment*."

The main shortcoming of these expressed principles is the fact that they retain a high level of ambiguity as to how they might be applied in the context of the current global warming issues we are facing.[19] The obligations stemming from them are obligations of conduct and could be therefore fulfilled by taking reasonable measures within a State's jurisdiction to prevent environmental harm, but it remains unclear what would constitute a breach of this *erga omnes* obligation in terms of a threshold for GHG emissions that are causing the worldwide sea-level rise.

Authors have also pointed out that the notion of "*highest possible ambition*",[20] introduced by the Paris Agreement sets out a new standard of care for climate affairs. Still, it remains unclear how national and international courts will interpret the Agreement in litigation proceedings. Other international instruments such as the 1992 United Nations Framework Convention on Climate Change[21] and its extension, the 1997 Kyoto Protocol[22], also aimed to determine industrialized countries to limit their GHG emissions to predetermined targets. However, the compliance of signatory States varied

[17] *Pulp Mills on the River Uruguay*, Argentina v Uruguay, ICJ.

[18] *Corfu Channel*, United Kingdom v Albania, Judgment, ICJ.

[19]https://brill.com/view/journals/yido/4/1/article-p281_13.xml?language=en&ebody=full%20html-copy1#FN000109.

[20] Voigt, Christina, *The Paris Agreement: What Is the Standard of Conduct for Parties*, March 21, 2016. QIL, Zoom-in 26 (2016), pp.17-28.

[21] UNFCCC, 1992: United Nations Framework Convention On Climate Change, 1992.

[22] Kyoto Protocol to the United Nations Framework Convention on Climate Change, 1997.

significantly and some major GHG emitters such as Canada and Japan withdrew from the Kyoto Protocol, while the United States failed to ratify it.

Yet, probably the biggest legal challenge for small island States remains proving, within the ambit of State Responsibility, the direct link between the actions of a particular State and the rise in global sea levels as to be able to obtain compensations.

2.2. What can the ICJ Advisory Opinion accomplish?

While not preempting the Court's findings, we can briefly touch upon what we see as the actual and potential impact of an Advisory Opinion in the matter of climate change as was requested by the UNGA.

In adopting the Resolution, the UNGA acknowledged that "*climate change is an unprecedented challenge of civilizational proportions and that the well-being of present and future generations of humankind depends on our immediate and urgent response to it*" as well as noting that "*the scientific consensus, expressed, inter alia, in the reports of the Intergovernmental Panel on Climate Change, including that anthropogenic emissions of greenhouse gases are unequivocally the dominant cause of the global warming observed since the mid-20th century, that human-induced climate change, including more frequent and intense extreme events, has caused widespread adverse impacts and related losses and damages to nature and people, beyond natural climate variability, and that across sectors and regions the most vulnerable people and systems are observed to be disproportionately affected*".[23]

The State of Vanuatu pointed out that the ICJ is the only main UN organ that has not had the chance to clarify the implications of climate change.[24] Advisory Opinions of the ICJ are admittedly not binding, but they carry great legal weight, moral authority, and in this case, the advisory opinion might contribute to the clarification of the international law obligations States have with respect to their actions that are causing the current rise in sea levels across the globe.

In issuing their opinion, the ICJ could take into consideration the watershed decision of the UN Human Rights Committee (*CCPR/C/135/D/3624/2019*) which determined that Australia's insufficient protection of indigenous Torres Islanders from the adverse consequences of climate change amounted to a violation of their rights to preserve their cultural heritage and to be free from

[23] Resolution adopted by the General Assembly on 29 March 2023, A/RES/77/276.

[24] https://www.vanuatuicj.com/why-icj.

unwarranted intrusions into their personal life, family, and residence. Committee member Hélène Tigroudja stated that: "*This decision marks a significant development as the Committee has created a pathway for individuals to assert claims where national systems have failed to take appropriate measures to protect those most vulnerable to the negative impacts of climate change on the enjoyment of their human rights*".[25]

As such, if the ICJ were to issue an Advisory Opinion clearly affirming the environmental responsibilities of States under international law as outlined in the Resolution, it would likely trigger a surge in litigation against big GHG emitters, both at the national jurisdiction level, as well as on the international stage.

On the other hand, should the ICJ fail to clarify the boundaries of the current international legal responsibility surrounding the aforementioned matters, this could even prove to be a setback for small island States that will be seeking justice and restitution in courts in the future.

3. What are the consequences of partial or complete territorial loss caused by climate change for States?

The 1933 Montevideo Convention on the Rights and Duties of States names as an objective criterion for statehood, *inter alia*, that a State must possess a defined territory.[26] This convention was in fact a codification of what was accepted as customary international law, being thus universally applicable. In terms of what constitutes a "*defined territory*" in practice, international law does not establish a specific minimum territorial requirement for the existence of a sovereign State.

Sea-level rise has the potential to transform the already limited territories of low-lying atoll nations into uninhabitable land, reduce them to the status of "*rocks*" as defined by Article 121(3) of the UN Law of the Sea Convention (LOSC), or submerge them entirely. In the first two scenarios, the requirement for territorial effectiveness would still be met, as uninhabitable islands and rocks are considered land under international law.[27]

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[25] UN Human Rights Committee CCPR/C/135/D/3624/2019: Daniel Billy and others v Australia (Torres Strait Islanders Petition).

[26] *Montevideo Convention on the Rights and Duties of States* December 26, 1933.

[27] Gerrard, Michael, & Wannier, Gregory , *"Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate"*, Cambridge University Press, 2013, p. 60.

However, if only a low-tide elevation remains from the original island, the "*defined territory*" criterion is no longer satisfied. In the Case concerning the Maritime Delimitation and Territorial Questions between Qatar and Bahrain of 2001, the ICJ rejected Bahrain's argument that low-tide elevations inherently qualify as territory: "*The few existing rules do not justify a general assumption that low-tide elevations are territory in the same sense as islands. It has never been disputed that islands constitute terra firma, and are subject to the rules and principles of territorial acquisition; the difference in effects which the law of the: sea attributes to islands and low-tide elevations is considerable. It is thus not established that in the absence of other rules and legal principles, low-tide elevations can, from the viewpoint of the acquisition of sovereignty, be fully assimilated with islands or other land territory.*"[28]

If we are to look at this criterion from a teleological standpoint, it becomes clear that the territory of a State would have to, at the minimum, be able to sustain organised communities that can at least become the precursors of an organised society. As such, the land would have to be inhabitable for it to functionally serve as basis for statehood.[29]

Nevertheless, authors have made the argument for the existence of a legal duty for the international community to continue recognizing small island States that have lost their effective statehood.[30] Thus, if the loss of territory of a small island nation is a consequence of the violation of a *jus cogens* norm, the international community might have the obligation to continue recognizing said nation as a peer, even though it no longer fulfils all criteria for statehood. This argument is made by firstly examining the opposite situation where State practice has consistently withheld statehood recognition from entities that have come into existence through acts of aggression or the use of force, contravening the right to self-determination, or as a result of the implementation of a system of racial discrimination. One instance of this practice concerned The Turkish Republic of Northern Cyprus, which arose in 1983 after the Turkish military intervention. This republic was only ever recognised by Turkey. The ICJ has affirmed the existence of an obligation of

[28] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Qatar v Bahrain, Judgment, Merits, ICJ.

[29] Gerrard, Michael, & Wannier, Gregory, *"Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate",* Cambridge University Press, 2013, p. 61.

[30] Gerrard, Michael, & Wannier, Gregory , *"Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate",* Cambridge University Press, 2013, p. 72-87.

nonrecognition in two advisory opinions: the *Namibia Advisory Opinion*[31] of 1971 and the *Wall Advisory Opinion* of 2004. The ICJ stated in the latter that: "*Given the character and the importance of the rights and obligations involved, the Court is of the view that al1 States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem*."[32]

Regarding the State practice concerning the recognition of States whose effectiveness has been affected in violation of *jus cogens* norms, there is yet to be a case where climate change played a crucial part, but we can draw similarities from the cases where involuntary State extinction was due to foreign military interventions and unlawful occupations. Examples[33] of this are the States annexed between 1936 and 1940, including Austria, Poland, Czechoslovakia, and the Baltic States, managed to maintain their recognition and international legal status despite the annexation. The Baltic States, in particular, serve as an example of how statehood persists even after illegal annexation, re-emerging as the same legal entities after more than half a century without territorial control. Similarly, when Iraq occupied and annexed Kuwait in 1990, the UN Security Council declared these actions "null and void" and called "for the restoration of Kuwait's sovereignty, independence and territorial integrity and of the authority of its legitimate government."[34] In line with the duty not to recognize the unlawfully established new regime, there is also a duty to continue acknowledging the international legal personality of the occupied or annexed State. Moreover, Article 41 (2) of ILC's Draft Articles on Responsibility of States for Internationally Wrongful Acts specifies that: "*No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation*",[35] thus expanding the scope of the obligation to all violations of *jus cogens*

[31] Advisory Opinion on *the Legal Consequences for States of the Continued Presence of South Africa in Namibia*, ICJ, 21 June 1971.

[32] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ, Advisory Opinion.

[33] Gerrard, Michael, & Wannier, Gregory , *"Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate."*, Cambridge University Press, 2013, p. 74-75.

[34] U.N. SC Res. 662 (Aug. 9, 1990) and U.N. SC Res. 674 (Oct. 29, 1990).

[35] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001.

peremptory norms and not just for the cases where there is an unlawful use of force.

Hence, it logically follows that the disappearance of an island State would constitute a breach of fundamental international norms such as their people's right to self-determination[36] and the right to permanent sovereignty over natural resources[37]. This would create, in turn, an unlawful situation that shall not be recognized by the international community. The ICJ also recognized in its *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*[38] the right of every State to survival, which could likewise play an important role in shaping the legal framework around the eventual dissolution of a State due to climate change-induced loss of territory. However, in light of Article 40 (2) of ILC's Draft Articles on Responsibility of States for Internationally Wrongful Acts, a breach of peremptory norms has to be "*serious*" in order to trigger the duty of nonrecognition of the subsequent situation. This is another element that could prove daunting to demonstrate by a disappearing island State in search for recognition, since the ILC defines "serious" as follows: *"A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligatio n."*[39] Finding a breach is thus inextricably linked with finding the responsible State or States, which is a particularly thorny aspect of climate change litigation.

As authors have previously theorised,[40] the deterritorialized surviving state entities could bring about an entirely new category of international actors: "*the Nation Ex-Situ*". This would be a status that allows for the persistence of a sovereign State, being afforded all the same rights and benefits of sovereignty in perpetuity, ignoring the classical "*defined territory*" requirement for statehood. Only time can tell how this will work in reality and if it's something the international community would find acceptable

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[36] *Case Concerning East Timor* (Portugal v. Australia), ICJ, 30 June 1995, at 102: "*In the Court's view, Portugal's assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an erga omnes character, is irreproachable*."

[37] *Armed Activities on the Territory of the Congo Case* (Democratic Republic of the Congo v. Uganda), Judgment, ICJ Rep. 2005, 168, at 251 (Dec. 19).

[38] *Legality of the Threat or Use of Nuclear Weapons*, ICJ, Advisory Opinion.

[39] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001.

[40] Maxine Burkett, "The Nation Ex-Situ: On Climate Change, Deterritorialized Nationhood, and the Post-Climate Era", 2 Climate Law 1 (2011).

withing the current international law framework. It is noteworthy to address the fact that deterritorialized States are not an entirely new concept. For example, the Sovereign Military Order of Malta, historically regarded as a sovereign international entity, is acknowledged by numerous States and possesses the privileges of engaging in diplomatic relations, making treaties, and participating in international organizations. This is notably despite the loss of its territory when expelled from Malta by Napoleon in 1798.[41] The Holy See was also recognized as a State despite not possessing a territory for long periods of time in their history. Also recognized within international law is the concept of functional sovereignty, which is not contingent on territorial control. Historically, this notion has been applied in scenarios like '*governments-in-exile*' or diaspora communities like the Palestinians, who have experienced displacement due to invasion and colonization.[42]

4. Conclusions

In the face of the existential threat posed by anthropogenic climate change and the intricate legal challenges it presents, the forthcoming ICJ advisory opinion on climate change has the potential to become a landmark in the evolution of international law with regards to environmental issues. As explored in this article, this advisory opinion is anticipated to shed some light on a myriad of complex issues that have so far vexed the global community. However, there is also the possibility that the advisory opinion will not prove to be what Vanuatu and the other States sponsoring their initiative hoped for. A certain risk is always associated with seeking an advisory opinion from the ICJ. However, it's evident that small island States recognize the urgency of altering their current trajectory, as they perceive it as leading directly toward peril and State extinction.

As previously stated, there is also a possibility that the Court's findings will encompass an examination of how current State actions can violate the rights of future generations, particularly given their close link with the adverse

[41] Maxine Burkett, "The Nation Ex-Situ: On Climate Change, Deterritorialized Nationhood, and the Post-Climate Era", 2 Climate Law 1 (2011); Rayfuse, Rosemary, "(W)hither Tuvalu? International Law and Disappearing States", University of New South Wales Faculty of Law Research SeriesNo. 9/2009).

[42] Rayfuse, Rosemary, "(W)hither Tuvalu? International Law and Disappearing States", University of New South Wales Faculty of Law Research Series,Paper No. 9/2009.

impacts of climate change and the concept of fiduciary care.[43] On this thought, Judge Weeramantry noted the following in his dissenting opinion to the Advisory Opinion on *The Legality of the Threat or Use of Nuclear Weapons*: "*This Court, as the principal judicial organ of the United Nations, empowered to state and apply international law with an authority matched by no other tribunal must, in its jurisprudence, pay due recognition to the rights of future generations. If there is any tribunal that can recognize and protect their interests under the law, it is this Court*."[44]

In consideration of the foregoing analysis, the subject matter of the current international legal landscape as it pertains to the consequences of potential territorial loss and displacement on statehood, human rights and State responsibility is undeniably complex and cannot be adequately addressed in such a concise format. This article provides only a brief exploration of the main opportunities and challenges surrounding the impending ICJ Advisory Opinion, as well as succinctly present the legal framework pertaining to the issues under consideration.

[43] Susannah Willcox, Michael B. Gerrard and Gregory E. Wannier, ``Threatened Island Nations. Legal Implications of Rising Seas and a Changing Climate``, European Journal of International Law, Volume 25, Issue 1, February 2014, p. 343–348.

[44] ICJ, Dissenting Opinion of Judge Weeramantry to the Advisory Opinion on *The Legality of the Threat or Use of Nuclear Weapons*, 8 July 1996.

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