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Adam Auerbach

Cardozo International & Comparative Law Review, adauerba@mail.yu.edu

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Island States Turn to the Law to Fight Climate Change

By: Adam Auerbach



The sea is rising. 2023 has seen the highest annual average sea level in recorded history, with sea level measuring four inches above 1993 levels.[1] To many, this may seem inconsequential. However, for those in developing countries, particularly small island nations, rising sea levels present a very real, very pressing threat.[2] For these island countries, the danger of losing their statehood and sovereignty is all too real “as their land surface may be totally covered by the sea or become fully inhabitable” in the near future.[3]

But what is there for these island states to do? While climate change activism has seen a steady rise over the years, with Gen Z and Millennials often leading the charge, social media posts and protests can only do so much.[4] Even the world’s most powerful leaders have failed to propose a concrete solution for the problem, with climate summits often resulting in frustration and little real change.[5] At the mercy of richer nations—who are responsible for most of the climate emissions contributing to rising sea levels, yet who have not been impacted as directly by climate change—smaller island nations have been left feeling helpless, unsure of how to proceed to protect their land and their citizens.[6] That is, until now. Recent developments involving the International Court of Justice (“ICJ”) and the United Nations Convention on the Law of the Sea (“Law of the Sea”) have presented a glimmer of hope for these developing nations.[7]

Established in June 1945 by the Charter of the United Nations, the ICJ acts as the primary judicial organ of the United Nations (“UN”). Composed of fifteen judges elected to nine-year terms, the role of the ICJ is “to settle, in accordance with international law, legal disputes submitted to it by States and to give advisory opinions on legal questions referred to it by authorized United Nations organs and specialized agencies.”[8] Though not binding, the ICJ’s advisory opinions “are

associated with its authority and prestige, and a decision by the organ or agency concerned to endorse an opinion is as if it were sanctioned by international law.”[9] Thus, if the ICJ were to issue such an opinion obligating governments to fight climate change, the impact for small island nations could be immeasurable.

Understanding this fact, the Pacific Island nation of Vanuatu began calling for the ICJ to issue an advisory opinion on the legal responsibility of countries to do more to combat climate change.[10] Vanuatu argued that the climate crisis had become a human rights issue for Pacific Islanders and was, therefore, an issue that required the court’s attention.[11] Though the road was not easy, Vanuatu won a historic vote in March of 2023, when the UN General Assembly passed a resolution calling on the ICJ to establish the obligations of countries to address the climate crisis as well as repercussions if they fail to do so.[12] Though it could still take around eighteen months for the advisory opinion to be issued, the resolution passing represents a historic moment in the fight against climate change, bringing attention to the legal options available to small countries to help them fight the climate crisis.[13]

Yet, advisory opinions issued by the ICJ are not the only legal weapons in the fight against climate change. Small island nations have also turned to the Law of the Sea to aid them in their battle. First adopted in 1982, the UN Convention on the Law of the Sea “lays down a comprehensive regime of law and order in the world’s oceans and seas establishing rules governing all uses of the oceans and their resources.”[14] The International Tribunal for the Law of the Sea (“ITLOS”) is the judicial body responsible for adjudicating disputes involving the Law of the Sea.[15] ITLOS has jurisdiction “over any dispute concerning the interpretation or application of the Convention, and over all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal,” and is open to states party to the Convention, as well as intergovernmental organizations, state enterprises, and even private entities in specific circumstances.[16]

While the Law of the Sea does not deal, per se, with climate issues, Article 43 discusses the prevention, reduction, and control of pollution.[17] It is this provision of the Law of the Sea that small island countries have realized could play a major role in helping to curb the climate crisis. In September 2023, Prime Ministers Kausea Natano of Tuvalu and Gaston Browne of Antigua and Barbuda presented evidence to ITLOS as it considered whether carbon emissions absorbed by the ocean constitute marine pollution.[18] As the Law of the Sea calls on member states to prevent marine pollution, an affirmative finding by ITLOS on this issue would subsequently obligate member states to take action to reduce their carbon emissions or else violate the Law of the Sea.[19] Such a finding by the court would represent an important win for climate activists everywhere and would send a message to those in small island countries that the international community has not abandoned them.[20]

Adam Auerbach is a Staff Editor at CICLR.

[1] Rebecca Lindsey, *Climate Change: Global Sea Level*, Climate.gov (Apr. 19, 2022), <https://www.climate.gov/news-features/understanding-climate/climate-change-global-sea-level> [<https://perma.cc/FJ5Q-NGEB>].

[2] Press Release, Security Council, Climate Change-Induced Sea-Level Rise Direct Threat to Millions Around World, Secretary-General Tells Security Council, U.N. Press Release SC/15199 (Feb. 14, 2023).

[3]*Id.*

[4] Alec Tyson, Brian Kennedy & Cary Funk, *Gen Z, Millennials Stand Out for Climate Change Activism, Social Media Engagement with Issue*, Pew Rsch. Ctr. (May 26, 2021), <https://www.pewresearch.org/science/2021/05/26/gen-z-millennials-stand-out-for-climate-change-activism-social-media-engagement-with-issue/> [<https://perma.cc/394A-MNJP>].

[5] Lauren Sommer, *Here’s What World Leaders Agreed to — and What They Didn’t — at the U.N. Climate Summit*, NPR (Nov. 13, 2021, 3:39 PM), <https://www.npr.org/2021/11/13/1055542738/cop26-climate-summit-final-decision> [<https://perma.cc/QE4C-MJWE>].

[6]*Id.*

[7] Rachel Ramirez, *‘A Win of Epic Proportions’: World’s Highest Court Can Set Out Countries’ Climate Obligations After*

Vanuatu Secures Historic UN Vote, CNN (Mar. 29, 2023, 11:27 AM), <https://www.cnn.com/2023/03/29/world/un-advisory-opinion-vanuatu-climate-change/index.html> [<https://perma.cc/D6ZC-5ABV>].

[8] *The Court*, I.C.J. (last visited Sept. 22, 2023), <https://www.icj-cij.org/court> [<https://perma.cc/7MZS-ZYQM>].

[9] *How the Court Works*, I.C.J. (last visited Sept. 22, 2023), <https://www.icj-cij.org/how-the-court-works> [<https://perma.cc/LYH9-D9EW>].

[10] Ramirez, *supra* note 7.

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *United Nations Convention on the Law of the Sea*, Int'l Marine Org. [IMO] (last visited Sept. 22, 2023), <https://www.imo.org/en/ourwork/legal/pages/unitednationsconventiononthelawofthesea.aspx> [<https://perma.cc/3D4B-LQGB>].

[15] *The Tribunal*, ITLOS Rep. (last visited Sept. 22, 2023), <https://www.itlos.org/en/main/the-tribunal/the-tribunal/> [<https://perma.cc/MQ45-3A5L>].

[16] *Id.*

[17] U.N. Convention on the Law of the Sea art. 43, Dec. 10, 1982, 1833 U.N.T.S. 397.

[18] *Island States Seek Climate Protection from Law of the Sea*, CNN (Sept. 11, 2023, 12:46 AM), <https://www.cnn.com/2023/09/11/asia/pacific-islands-international-tribunal-hearing-climate-intl-hnk/index.html> [<https://perma.cc/7F2C-45KG>].

[19] *Id.*

[20] At the time of writing, these proceedings were still occurring, and a final decision had not been reached. *Id.*