

Legal advisory opinion - round table 28 October Summary report

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Summary of the discussion

The discussion focused on the legal requirements for an advisory opinion by the International Court of Justice (ICJ) and the formulation of legal questions that could be submitted to the Court.

1. Eligibility to request an advisory opinion

Under Article 96 of the UN Charter certain organs and agencies of the United Nations may request the ICJ to give an advisory opinion.

Eligible UN organs are the General Assembly (GA), Security Council, Economic and Social Council, Trusteeship Council and Interim Committee of the General Assembly.

Specialised agencies include: the International Labour Organization (ILO); Food and Agriculture Organization of the United Nations (FAO); United Nations Educational, Scientific and Cultural Organization (UNESCO); World Health Organization (WHO); International Bank for Reconstruction and Development (IBRD); International Finance Corporation (IFC); International Development Association (IDA); International Monetary Fund (IMF); International Civil Aviation Organization (ICAO); International Telecommunication Union (ITU); International Fund for Agricultural Development (IFAD); World Meteorological Organization (WMO); International

Maritime Organization (IMO); World Intellectual Property Organization (WIPO); and the United Nations Industrial Development Organization (UNIDO).¹

While the General Assembly and the Security Council may request an advisory opinion on any legal question, other agencies and organisations are confined to legal questions that arise within the scope of their activities. For example: the ILO may be entitled to submit a legal question related to the climate change impacts on employment, social security or labour rights; the FAO on climate change and food production; and UNESCO on the effects on protected world natural and cultural heritage sites.

However, in its advisory opinion on the use of nuclear weapons in armed conflict the ICJ found that the question posed – *“In view of the health and environment effects, would the use of nuclear weapons by a State in war or other armed conflict be a breach of its obligation under international law including the WHO Constitution?”* – did not arise within the scope of activities of the WHO. Consequently, the Court was not able to give the advisory opinion requested by the WHO.

The WHO experience suggests that the ICJ may take a narrow view of what it considers to be within the scope of the activities of the requesting organisation. Thus, in order to ask the “big” fundamental and more general legal questions related to climate change, the UN General Assembly appears to be the best suited eligible international forum.

Framing the question

While the ICJ did not entertain the WHO request for an advisory opinion, it responded in detail to the question submitted by the UNGA: *“Is the threat or use of nuclear weapons in any circumstance permitted under international law?”* By 13 votes to one it decided to deal with the request and reiterated its previous jurisprudence that only *“compelling reasons”* could lead it to refuse a request by the GA.

The 1996 Nuclear Weapons Advisory Opinion and the accompanying declarations and separate and dissenting opinions contain a wealth of legal argument and in-depth consideration of the principles of international humanitarian law. Although the Court could not conclude *“whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence”*, the judicial process helped to develop the political momentum that made the parties to the Treaty on the Non-Proliferation of Nuclear Weapons renew it indefinitely, and institute a five-yearly review process. At that point the five permanent members of the UN Security Council also pledged not to use nuclear weapons against parties to the treaty that did not possess nuclear weapons (except in self-defence).

Similarly, a request for an advisory opinion on climate change could create a wider societal discourse and put additional pressure on states to reach a deal. It might provide the ICJ with an opportunity to address fundamental questions of global environmental justice and thus provide guidance to the international community’s efforts – within and outside the climate negotiations – to address climate change. Following the example of the Nuclear Weapons Advisory Opinion, the ICJ and its judges may elaborate on a number of principles and legal concepts under public international law in response to a short question such as:

¹ Website of the ICJ at <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=2&p3=1>.

Do Annex I countries have an obligation under international law to compensate developing country Parties for damages from climate change?

or

Do Annex I countries have the legal obligation to create and resource a climate adaption framework that effectively protects developing country Parties from serious climate change induced damage or otherwise provide reparation for such damage?

However, the ICJ is unlikely to operate as an alternative climate change negotiation forum. Faced with only a short, basic question the Court may respond in very general terms and by, for example underlining the states' duty to cooperate, merely encourage further negotiations. Hence, it may be advisable to take a more differentiated and gradual approach by submitting a number of questions which build on the Court's existing jurisprudence and seek to clarify its application and legal consequences in the climate change context.

The ICJ has, for example, repeatedly confirmed the "*obligation of states to ensure that activities within their jurisdiction and control respect the environment of other states or of areas beyond national control*".² But through the accumulation of causes and impacts, climate change represents a more complex situation (than the threat or use of nuclear weapons in relation of one state to another) and it may be necessary to determine if and to what extent the principles on transboundary pollution can be applied. This could lead to questions such as:

Do all states have the obligation under international customary law not to cause significant harm to the global climate system; and does this obligation entail the duty to prevent and mitigate climate change and the effects thereof?

or

What are the obligations of States under international law in relation to preventing the causes of climate change, minimising its adverse effects and providing compensation for climate change damage?

As a result, the Court may opine on the scope and criteria of legal principles, further define existing rights and obligations between states, and possibly push their boundaries. However, it is unlikely to reflect on specific situations, clearly distinguish between different states and assign responsibilities. Thus, a request for an advisory opinion may have to focus on the circumstances of individual countries and implicitly allege a breach of international law as an entry point. For example:

"Can states X and Y be held responsible under public international law for the threat and damage caused by sea level rise and extreme weather events to state Z as a result of global warming?"

Such a specific request, however, would require the Court's endorsement of complex scientific evidence on, for example, causation or the attribution of damages. But in order to establish a breach of international law – i.e. a violation of the no-harm principle – it may suffice to focus on

² ICJ, Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, ICJ Reports 1996, p.226 para.29.

the conduct of states in view of the potential risks related to climate change. According to the predominant opinion, the no-harm principle merely results in an obligation to regulate and control the source of harm. It does not automatically render an activity that creates serious harm unlawful but creates an obligation of diligent control of foreseeable risk.³

The International Law Commission's Draft articles on Prevention of Transboundary Harm from Hazardous Activities suggest that due diligence comprises at least the following elements: the opportunity to act or prevent; foreseeability or knowledge that a certain activity could lead to transboundary damage; and proportionality in the choice of measures required to prevent harm or minimise risk.⁴ Against this backdrop, the ICJ could be requested to clarify the obligations of states through a question such as:

Does the failure to take proportional measures for the reduction of greenhouse gas emissions when there is the foreseeable possibility of significant harm resulting from climate change, constitute a breach of public international law?

In order to obtain a response that further reflects on the responsibility and failure of individual states or groups of states to comply with international law, this could be followed by questions related to, for example, the required diligence of national authorities, the precautionary principle, or the balance between possible measures and the magnitude of the risk, such as:

Since when was the risk of transboundary harm as a result of climate change foreseeable to an extent that a diligent state authority should have acted to prevent and minimise significant transboundary harm?

or

Does the adoption of the UNFCCC represent an admission by developed country Parties to the UNFCCC that their greenhouse gas emissions damage the environment of other states or of areas beyond national jurisdiction; and have their subsequent actions met the standard of care required under international law?

Additional questions could also reflect the different extent to which countries may have accepted legal obligations or are subject to different regional norms of customary law. For example: Article 174 the European Union treaty provides that European community policy shall “be based on the precautionary principle and on the principles that preventive action should be taken”.⁵ The European Community argued in favour of the application of the precautionary principle in the WTO biotech and asbestos cases.⁶ This may lead to a question such as:

³ Ian Brownlie, *State Responsibility*, Oxford University Press, 1983, p.50.

⁴ International Law Commission, *Draft articles on Prevention of Transboundary Harm from Hazardous Activities*, with commentaries, 2001.

⁵ Of the treaty on European Union and of the treaty establishing the European Community, Official Journal of the European Union, C 321 E/1, 29 Dec 2006.

⁶ European Communities – Measures affecting the approval and marketing of biotech products, Reports of the Panel, doc. WT/DS WT/DS291-3/R of 29 Sept 2006, pp.97-98, paras.4.523 & 4.524; Measures affecting asbestos and asbestos-containing products, Reports of the Panel, WT/DS135/R of 18 Sept 2000, p.121 paras.3.311 and 3.312; WTO disputes are available at http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm.

In their efforts to combat climate change, were member states of the European Community under a legal obligation to apply the precautionary principle in determining their emission reduction and limitation targets?

Finally, a request for an advisory opinion could be forward looking and help strengthen the rights of climate affected states – and possibly civil society. Specific criteria for a risk assessment in a transboundary context have been outlined in the 1991 Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention). But it is still an open question whether, in order to observe the no-harm rule, states have an obligation under international customary law to ensure that activities under their jurisdiction and control likely to cause significant transboundary harm are subject to a risk assessment:

“Do states have a duty under international law to undertake a transboundary risk assessment before approving activities under their jurisdiction or control which could give rise to significant transboundary harm?”

Depending on priorities and approach, the above questions may be posed individually or in various combinations. One possible order would be to establish the relevant point in time when states should have acted, then focus on the possible breach of international law and subsequently request a determination of the legal consequences.

Next steps

A draft version of this report has been circulated to all participants of the meeting for comments and further input. This final report is being disseminated widely and we would welcome any feedback and further suggestions.

To broaden the discussion, FIELD will organise a public live-stream webinar in February 2012. This event will comprise a summary of the round table discussion, a presentation on causation by a UK-based climate scientist and a question and answer session. The web based format will allow lawyers, campaigners and government officials from various jurisdictions to get involved and submit their suggestions and queries. We will announce the date and time of the public webinar as soon as possible on our website www.field.org.uk.

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