

How the ICJ Could Shape Protection for People Displaced in the context of Climate Change

The forthcoming Advisory Opinion by the International Court of Justice will provide a weighty, rigorous and contemporary legal analysis of States' legal obligations with respect to climate change and human rights. This opinion piece describes ways in which the court's response to the request for an Advisory Opinion, led by Vanuatu, might influence protection for people at risk of displacement in the context of climate change. However, as the author notes, the extent to which the ICJ considers displacement may depend in part on State submissions to the ICJ, due by 22 March 2024.

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In March 2023, the UN General Assembly adopted a [resolution](#) requesting an Advisory Opinion from the International Court of Justice (ICJ) as to States' obligations with respect to climate change. Spearheaded by Vanuatu, the resolution stated 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'.

Some have asked whether the Advisory Opinion will consider the prospect and legal implications of displacement, especially from low-lying Pacific island countries. The short answer is: it depends. The ICJ has not been asked to opine directly on this issue. However, risks to certain rights – such as rights to life, culture and self-determination – may in some cases hinge on, or be amplified by, dislocation from land, ocean and community. And the questions posed to the court are sufficiently broad to enable it to undertake a more explicit analysis of States' obligations to avert, minimize and address displacement in this context

if it so wishes. This could encompass States' duties within their own territories (including to assist people to remain in their homes), as well as their duties with respect to non-citizens who may be at risk of harm if removed.

The court has been [asked](#) the following:

Having particular regard to the Charter of the United Nations, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the United Nations Framework Convention on Climate Change, the Paris Agreement, the United Nations Convention on the Law of the Sea, the duty of due diligence, the rights recognized in the Universal Declaration of Human Rights, the principle of prevention of significant harm to the environment and the duty to protect and preserve the marine environment,

- (a) What are the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for present and future generations;
- (b) What are the legal consequences under these obligations for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment, with respect to:
 - (i) States, including, in particular, small island developing States, which due to their geographical circumstances and level of development, are injured or specially affected by or are particularly vulnerable to the adverse effects of climate change?
 - (ii) Peoples and individuals of the present and future generations affected by the adverse effects of climate change?

While responsibilities pertaining to displacement are not mentioned specifically, a preambular paragraph to the resolution requesting the Advisory Opinion notes that countries 'particularly vulnerable to the

adverse effects of climate change’, including ‘small island developing States’, are already experiencing increased ‘drought and extreme weather events, land loss and degradation, sea level rise, coastal erosion, ocean acidification and the retreat of mountain glaciers, *leading to displacement of affected persons* and further threatening food security, water availability and livelihoods’ (emphasis added).

The characterization of climate impacts as ‘leading to displacement’ is somewhat unfortunate in that it suggests a direct causal link is necessary. Drivers of movement in this context are ‘[complex and multifaceted](#)’. Accordingly, the relevant issue is to understand how climate change interacts with and amplifies other social, economic, cultural and political factors, thereby increasing risks, vulnerabilities and exposure to rights violations. As [UNHCR](#) has explained in paragraph 2 of its legal guidance on international protection claims made in the context of climate change and disasters,

[t]he adverse effects of climate change and disasters are often exacerbated by other factors such as poor governance, undermining public order; scarce natural resources, fragile ecosystems, demographic changes, socio-economic inequality, xenophobia, and political and religious tensions, in some cases leading to violence. As a result of these negative impacts of climate change and disasters, combined with social vulnerabilities, people may be compelled to leave their country and seek international protection.

This opens up the possibility of better integrating climate-related impacts into a conventional analysis of international protection claims under both refugee law and human rights law. It would be helpful for the ICJ to underscore this approach.

In the *non-refoulement* context – where people face a risk of persecution or other serious harm if removed – it is important to appreciate that the relevant question is not whether a right has been violated per se, but rather whether a person faces a *real risk* of such a violation if sent elsewhere (eg [Teitiota v New Zealand](#), para 8.5). As the UN Human Rights Committee observed in [Teitiota](#), this means considering not whether the author was ‘a victim of a past violation’ (although that might also be relevant), ‘but rather whether he has

substantiated the claim that he faced upon deportation a real risk of irreparable harm to his right to life' (para 8.5). This necessarily requires a holistic assessment of conditions in the destination country, including the cumulative effect of any adverse impacts on a range of human rights in light of the author's particular individual circumstances. In the case of [AC \(Eritrea\)](#), for example, the New Zealand Immigration and Protection Tribunal found that an elderly couple at risk of return to Eritrea faced 'conditions of abject poverty, underdevelopment and likely displacement' and were 'particularly vulnerable, given their elderly status and lack of family support' (para 142). The risk of abject poverty was 'further heightened by climate change', which 'disproportionately affect[s] the most vulnerable persons and systems' (para 144; see also Committee on the Rights of the Child, [DR v Switzerland](#), para 11.3). If returned, there was 'a real chance that their rights to be free from cruel, inhuman or degrading treatment in Article 7 of the ICCPR [would] be impinged giving rise to serious harm' (para 147).

Adverse effects on human rights will not necessarily amount to violations under international law, and even fewer will also entail a *non-refoulement* obligation – although the list is not closed. For instance, it will be interesting to see whether the ICJ endorses the Human Rights Committee's interpretation of the right to life in article 6 of the ICCPR to mean the right to life *with dignity* ([General Comment 36](#)), a position that Australia critiqued in [Billy v Australia](#) as being 'unsupported by the rules of treaty interpretation, the ordinary meaning of article 6 (1) and any relevant jurisprudence' (para 4.8; see also [AW \(Kiribati\)](#)) but which was robustly defended by the Committee itself (para 8.4; also para 5 of the Joint opinion of Bulkan, Kran and Sancin). Australia's domestic implementation of the *non-refoulement* component of article 6 of the ICCPR, reflected in section 36(2A)(a) of its [Migration Act](#), requires only that protection be granted to someone who risks being 'arbitrarily deprived of his or her life' – a far narrower approach than that of the Human Rights Committee.

The extent to which the ICJ considers displacement in its Advisory Opinion may depend in part on the submissions it receives ([due](#) by 22 March 2024). For instance, in the Human Rights Committee matter of [Billy v Australia](#), displacement was not foregrounded even though it was a fundamental element – even a basic premise – of the claim (see eg para 2.2). The authors noted that the 'future of their [children's] survival

and culture [was] uncertain’, they feared that their children would ‘have to live on another person’s land’ and their culture would ‘be extinct’ (para 3.7). More broadly, the impacts of climate change ‘threaten[ed] to displace them from their islands’, which ‘would result in the infliction of egregious and irreparable harm with respect to their ability to enjoy their culture’ (para 3.5; see also para 5.3). The Committee did not explicitly address the displacement issue, observing only that there were ‘scant opportunities for safe internal relocation’ (para 7.10) (yet later suggesting that within 10 to 15 years, the State party might be able to take ‘affirmative measures to protect and, where necessary, relocate the alleged victims’ (para 8.7)). The specific lens of displacement could have provided a useful additional tool for analysing the impacts of climate change on the rights in question, particularly with respect to future generations.

By contrast, the author’s claim in [Teitiota v New Zealand](#) centred on the threat to life posed by climate impacts in Kiribati which, it was argued, precluded his return there. The Human Rights Committee found that ‘the effects of climate change ... may expose individuals to a violation of their rights under articles 6 or 7 of the Covenant, thereby triggering the non-refoulement obligations of sending States’, and that ‘the conditions of life in such a country may become incompatible with the right to life with dignity before the risk is realized’ (para 9.11). Furthermore, the right to life must be interpreted in a broad and progressive manner, such that it ‘includes the right of individuals to enjoy a life with dignity’ and ‘extends to reasonably foreseeable threats and life-threatening situations that can result in loss of life’ (para 9.4). In this case, the author did not argue that the impacts of climate change had resulted in displacement – he had voluntarily migrated to New Zealand years earlier – but rather (akin to a refugee *sur place* claim) that they now precluded his safe return.

An unfortunate consequence of *Teitiota*, also reflected in *Billy*, is its confusing and [misplaced focus](#) on ‘imminence’ of harm. A careful reading of the Committee’s views shows that it did not, in fact, require the risk of harm to be imminent for the principle of *non-refoulement* to apply (see eg para 8.5: ‘the imminence of any anticipated harm in the receiving State *influences the assessment of the real risk* faced by the individual’). However, arguably the Committee did conflate an absence of temporal imminence with a lack of foreseeability in its analysis. As

Michelle Foster and I have [explained](#), the appropriate frame of analysis is *foreseeability* of harm, which accords with the forward-looking assessment in international refugee law and complementary protection cases. ‘Framing the analysis as whether there is a well-founded fear or real risk of harm in the “reasonably foreseeable future”’, we [argue](#), ‘orients the decision-maker to the true question at the heart of the protection regime, namely risk of harm, without dictating an artificially narrow time period which delimits the ambit of protection.’ It would be helpful for the ICJ to clarify that this is the correct approach.

A final point to note is the question of loss and damage, mentioned twice in the resolution’s preambular paragraphs. This provides another important prism for analysing States’ obligations with respect to averting, minimizing and addressing displacement. As paragraph 4 of the [Pacific Regional Framework on Climate Mobility](#), adopted by Pacific Islands Forum Leaders in November 2023, states:

Dislocation from home, loss of land and cascading effects on ecosystems, livelihoods and knowledge represent some of the greatest forms of loss and damage for our people – for both current and future generations. We recognise that movement away from home can result from, be a form of, and cause loss and damage of an economic and non-economic nature.

This has particular significance in light of the [decision](#) adopted at COP28 in 2023 that the Loss and Damage Fund – established in 2022 but not operationalized – may provide funding to promote ‘equitable, safe and dignified human mobility in the form of displacement, relocation and migration in cases of temporary and permanent loss and damage’ (para 9).

However the ICJ decides to approach the questions referred to it, its anticipated analysis of the nature, scope and content of particular human rights will be instructive for future displacement-related claims. In the context of internal displacement, it will help to clarify precisely what obligations States have towards those at risk of, or already displaced, within their own territory or jurisdiction – potentially including circumstances where States have a [duty to move people](#) out of harm’s way. In the context of cross-border displacement, the ICJ’s analysis may assist in further elaborating the scope of States’

international protection obligations, especially as they relate to harm that may [not yet](#) have materialized fully. In addition to the issue of foreseeability, noted above, it would also be interesting to see the court consider what, if any, relevance the precautionary principle in international environmental law has in the international protection context – especially in light of the Committee on the Rights of the Child’s recent statement that the prospective removal of a child demands a risk assessment ‘in accordance with the principle of precaution and, where reasonable doubts exist that the receiving State cannot protect the child against such risks, States parties should refrain from deporting the child’ ([DR v Switzerland](#), para 11.3).

More broadly, the ICJ’s Advisory Opinion will provide a weighty, rigorous and contemporary legal analysis of States’ legal obligations with respect to climate change and human rights. It will inevitably influence future decisions by domestic and regional courts, as well as galvanize further advocacy on climate justice for present and future generations.

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