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An Analysis of the Sources of International Responsibility of States in the Face of Climate Change: *a Customary Rule in the Making?*

UN ANÁLISIS SOBRE LAS FUENTES DE LA RESPONSABILIDAD INTERNACIONAL DE LOS ESTADOS ANTE EL CAMBIO CLIMÁTICO: ¿UNA NORMA CONSUETUDINARIA EN FORMACIÓN?

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ABSTRACT

This paper addresses some questions that climate change raises for international law. It focuses in particular on the request for an advisory opinion submitted by the United Nations General Assembly to the International Court of Justice (ICJ) on 29 March 2023. This request is analysed as a further manifestation of the international community's concern to clarify the international responsibility of states to prevent, mitigate and remedy the damage caused by climate change. The study argues that the ICJ could clarify obligations under existing treaties. There may also be a particular opportunity for the Court to expand its jurisprudence on other sources of international law. In particular, it asks whether the ICJ could confirm the emergence of a specific customary rule on the issue.

KEYWORDS

Climate change
International responsibility
Advisory jurisdiction
International Court of Justice
International law of climate change
International Human Rights Law
Customary norms

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RESUMEN

Este artículo aborda algunas cuestiones que el cambio climático plantea al Derecho internacional. Se centra, en particular, en la solicitud de opinión consultiva presentada por la Asamblea General de las Naciones Unidas ante la Corte Internacional de Justicia (CIJ) el 29 de marzo de 2023. Esta solicitud se analiza como una manifestación más de la preocupación de la comunidad internacional por aclarar la responsabilidad internacional de los Estados para prevenir, mitigar y remediar los daños causados por el cambio climático. El estudio sostiene que la CIJ podría aclarar las obligaciones derivadas de los tratados existentes. También puede haber una oportunidad particular para que la Corte amplíe su jurisprudencia sobre otras fuentes del Derecho internacional. En concreto, se pregunta si la CIJ podría confirmar la aparición de una norma consuetudinaria específica sobre la cuestión.

PALABRAS CLAVE

Cambio climático
Responsabilidad internacional
Jurisdicción consultiva
Corte Internacional de Justicia
Derecho Internacional del medio ambiente
Derecho internacional de los derechos humanos
Normas consuetudinarias

I. Introduction

In 2023, a number of requests for advisory opinions have been submitted to various international tribunals to clarify the international responsibility of states to prevent and mitigate the damage caused by climate change. This paper focuses on one such request: the one submitted by the United Nations General Assembly to the International Court of Justice (ICJ) on 29 March 2023. The latter is analysed as one of the manifestations of the international community's growing concern about climate change.

The interest of this paper is to explore what contributions the Hague Tribunal could make to the development of international climate change law. The analysis seeks to develop some lines that the Court could draw in its jurisprudence. This objective is linked to the need to transcend the status quo of the prevailing discourse in international law, which is laden with programmatic language that condemns it to indefinite repetition. Given the lack of specific jurisprudence on climate change in the ICJ, the analysis of the advisory opinion request focuses on the sources of international law that the Court could apply or develop in this area. In particular, the study focuses on the analysis of international custom, its elements and the difficulties in identifying them in the field of climate change.

In view of the different meanings of the term «climate change», this paper adopts the concept set out in Article 1.2 of the United Nations Framework Convention on Climate Change (UNFCCC), which defines it as follows: «a change in climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods».

II. A brief overview of progress towards international responsibility of states to address climate change

Since the 1980s, the international community has been seeking political and legal instruments to mitigate the effects of climate change. The problem is undeniably global

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in nature and requires joint action. The first attempts began almost simultaneously with the scientific evidence that climate change was already a clear reality, and were mostly channelled through the United Nations system via intergovernmental mechanisms[2]. Since then, international law has become an enabling environment for achieving the goals of mitigation and adaptation to the environmental crisis (Giles Carnero, 2021). Such goals are of common interest to the international community.

However, the first responses were mainly soft law, unable to establish precise rules and concrete obligations, despite a growing global concern[3]. At the beginning of the 21st century, recent developments increasingly point to the construction of binding legal norms by States, which are beginning to assume that international responsibility in this area must be collective and requires precise rules[4]. This is demonstrated at least by the gradual –if sometimes interrupted[5]-, transition of legal instruments from soft to hard law. Although these advances are doubtful and mostly ineffective in practice, it is possible to identify the beginnings of a certain consensus on the imperative nature of international law in the face of global warming and the climate emergency.

2. In 1988, the United Nations Environment Programme (UNEP) and the World Meteorological Organization (WMO) established the Intergovernmental *Panel on Climate Change* (IPCC). Today, the IPCC is the main international body for the assessment of climate change, with 195 member states. Also in 1988, the Vienna Convention for the Protection of the Ozone Layer (adopted in 1985) entered into force, which aims to promote international cooperation in scientific research and assessment of the ozone layer. This Convention is the first convention to receive the signature of all parties involved, and in 2009 it achieved universal ratification. However, the convention does not provide for concrete measures. Subsequently, the Montreal Protocol on Substances that Deplete the Ozone Layer was adopted in 1987 and entered into force in 1989, providing for more specific measures to phase down the production and consumption of ozone-depleting substances. See: Von Bassewitz, 2013, 102.

3. The United Nations Framework Convention on Climate Change (UNFCCC) was adopted in 1992 in the framework of the Rio de Janeiro Summit, based on the studies carried out by the IPCC, with the main objective of stabilising greenhouse gas concentrations. The Convention entered into force in 1994 and has so far been ratified by 197 states. Due to its claim to universality, the Convention establishes the principle of common but differentiated responsibility (CBDR), in order to distribute the latter in proportion to the damage caused between industrialised and industrialising countries (Art. 3.1).

4. The Kyoto Protocol to the UNFCCC was adopted on 11 December 1997 and entered into force on 16 February 2005. It has now been ratified by 192 States. This Protocol represents the first international agreement to establish mitigation obligations for States. The obligations are spread over different time periods. During the first period, in application of the RCD principle, the Protocol only obliges 36 industrialised countries and the European Union (Annex B) to reduce emissions. The objective is to achieve an average emission reduction of 5% compared to 1990 levels in the five-year period 2008-2012. The remaining countries committed themselves to taking on obligations in a second period. On 8 December 2012, the Doha Amendment to the Kyoto Protocol was adopted with the intention of establishing a second commitment period between 1 January 2013 and 31 December 2020. However, the minimum number of 144 instruments of ratification for the entry into force of the amendment has so far not been reached. In addition, the Kyoto Protocol introduces flexible market mechanisms, which allow trading of emission permits (international emissions trading - Art. 17, Clean Development Mechanism - Art. 12, and Joint Implementation - Art. 6). Subsequently, the states parties to the UNFCCC adopted the Paris Agreement, which obliges states to contribute to «keeping the global average temperature increase well below 2°C above pre-industrial levels, and to pursue efforts to limit this temperature increase to 1.5°C above pre-industrial levels» (art. 2.1.a).

5. See, for example, the analysis on the negotiations of the Global Compact for the Environment in Fajardo del Castillo, 2019.

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For their part, national and international courts have been key actors in the development of international environmental law and the recognition of the right to a healthy environment as an independent and justiciable human right. Both the International Court of Justice and some national courts, as will be analysed below, have issued rulings of great impact in this area, mainly in the context of resolving disputes between states. Similarly, regional human rights courts have issued judgments that have broadened the understanding and philosophy of human rights in the natural environment. In the latter respect, the Inter-American Court has been particularly active, for example, in protecting the rights of indigenous peoples and their relationship with the habitat[6]. Likewise, in its Advisory Opinion 23/17 on human Rights and the environment[7], the Inter-American Court ruled that human rights cannot respond exclusively to the interests of individuals, but must be adapted to the protection of the natural environment in which life develops.

In 2023, a new strand has arisen on the international judicial scene, with a particular focus on international law in the face of climate change. International tribunals have been called upon to use their contentious and advisory jurisdiction to address the obligations of States to prevent, mitigate and remedy the damage caused by climate change. Various bodies have been asked or consulted to pronounce on aspects that have hitherto depended on the will of the state and the greater or lesser environmental awareness of governments in power. The ICJ, the Inter-American Court of Human Rights (IACHR) and the International Tribunal for the Law of the Sea (ITLOS) have received a series of requests for advisory opinions on this issue[8]. Although the opinions were requested by representatives of States, civil society has played a decisive role in their implementation through the promotion of their respective approaches by non-governmental organisations. For example, the request to the ICJ was promoted by the World's Youth for Climate Justice (WYCJ), and the request to the Inter-American Court of Human Rights was promoted by the Centre for Justice and International Law (CEJIL).

Indeed, the consequences of the climate emergency are of particular interest in the field of international human rights law (IHRL). Since the beginning of the codification process in the twentieth century, IHRL has been marked by the simultaneous expansion of political liberalism. Even earlier, the earliest antecedents of codification, in the context of the French Revolution, were driven by liberal political currents. In both cases, political liberalism was accompanied by economic liberalism. Similarly, since the end of the Cold War in the late 1980s, the economic justification for globalisation has to some extent been characterised by an alleged link with the exercise of the most basic individual

6. See, for instance, Inter-American Court of Human Rights (IACHR), Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs. Judgment of 17 June 2005. Series C No. 125; IACourtHR. Case of Indigenous Communities Members of the Lhaka Honhat Association (Our Land) v. Argentina. Merits, Reparations and Costs. Judgment of February 6, 2020. Series C No. 400.

7. IACourtHR. Advisory Opinion OC-23/17 of 15 November 2017. Series A No. 23. Environment and human rights (State obligations in relation to the environment in the framework of the protection and guarantee of the rights to life and personal integrity - interpretation and scope of Articles 4(1) and 5(1), in relation to Articles 1(1) and 2 of the American Convention on Human Rights).

8. Between the submission and peer review of this paper, the ITLOS delivered unanimously the advisory opinion requested: ITLOS, 21 May 2024, Case No. 31, *Request for an Advisory Opinion submitted by the Commission of Small Islands States on Climate Change and International Law. Advisory Opinion*.

freedoms. However, in the current conditions of climate emergency, unbridled economic growth may ultimately be contradictory and incompatible with respect for human rights, particularly those affected by violations of the right to a healthy environment. Since the second decade of the 21st century, extreme right-wing or related political parties that advocate positions that deny the existence of climate change have been gaining strength in a number of countries[9]. Such parties advocate the strengthening of neo-liberal economic processes, deregulated or with minimal state intervention, which can exacerbate the climate emergency. In a break with the traditional combination of political and economic liberalism, the new parties push for authoritarian political regimes that promote neoliberal, deregulated policies.

Against this background, in the specific field of the protection of human rights, the question arises as to the role of international law in determining the responsibilities stemming from the environmental crisis. Although there are a number of concerns about the effectiveness of IHRL in addressing climate change (Mayer, 2021, 412)[10], this issue has been raised before the Inter-American Court of Human Rights following a request for an advisory opinion by the States of Chile and Colombia. To answer this question, the Court has important precedents in the field of international environmental law. In particular, the aforementioned Advisory Opinion 23/17 represents a fundamental decision in clarifying the relationship between human rights and the environment. In it, the Court recognised the right to a healthy environment as an autonomous and justiciable human right[11], and stated that «environmental degradation and the adverse effects of climate change impair the effective enjoyment of human rights» [12]. The same criterion has been used by the Inter-American Court in some cases concerning the protection of environmental defenders[13]. Likewise, within the Inter-American system, the Inter-American Commission has developed some specific criteria for the human rights obligations of the States of the region in the face of the climate emergency[14].

9. On the threat of climate change to liberal political regimes, see Kang *et al.*, 2023.

10. Mayer outlines that these concerns relate to diffuse responsibilities, the lack of a distinct class of victims, and the speed or effectiveness of state action to mitigate climate change. Building on these doubts, the author argues that from an interpretation of human rights treaties as a source of a state's obligation to mitigate climate change, it is possible to affirm that a state must cooperate on climate change mitigation only if and to the extent that cooperation on climate change mitigation can effectively protect the enjoyment of the right in question by individuals within its territory or jurisdiction (2021, 413).

11. IACourtHR, Advisory Opinion OC 23-17, cit., para. 55. Also: IACourtHR, Case of Indigenous Communities Members of the Lhaka Honhat Association (Nuestra Tierra) v. Argentina. Interpretation of the Judgment on the Merits, Reparations and Costs. Judgment of 24 November 2020. Series C No. 420, para. 202.

12. In a similar vein, the United Nations Human Rights Council had previously pronounced in Resolution 7/23, «Human Rights and Climate Change», UN Doc., 28 March 2008: «climate change creates an immediate and far-reaching threat to people and communities around the world and has implications for the full enjoyment of human rights».

13. IACourtHR, Case of Baraona Bray v. Chile. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 24, 2022. Series C No. 481, para. 114; Case of Kawas Fernández v. Honduras. Merits, Reparations and Costs. Judgment of April 3, 2009. Series C No. 196, para. 148. In a similar sense: Inter-American Court. Case of Claude Reyes *et al.* v. Chile. Merits, Reparations and Costs. Judgment of September 19, 2006. Series C No. 151.

14. Inter-American Commission on Human Rights (IACHR); Rapporteurship on Economic, Social, Cultural and Environmental Rights (REDESCA). Resolution 3/2021. «Climate emergency and inter-American

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In fact, the issue has not only been channelled through the advisory channel of the international courts, but also through other functions carried out by various international bodies. Thus, previously, within the Inter-American system, the Inter-American Commission on Human Rights (IACHR) and the Office of the Special Rapporteur on Economic, Social, Cultural and Environmental Rights (REDESCA) published the Resolution 3/21 «Climate Emergency: Scope of Inter-American Human Rights Obligations»[15]. For its part, the European Court of Human Rights (ECHR) is hearing a number of contentious cases against states for damages that could be linked to their inaction in the face of global warming[16]. Similarly, the Committee on the Rights of the Child issued a General Comment in the specific context of climate change, stating that «States must protect children not only from present environmental harm, but also ensure their well-being and development, taking into account future risks and harms»[17]. With regard to the latter, as McMenamin (2023, 219) outlines, the ICJ could enrich its analysis by considering the general comments and views in individual communications issued by the Human Rights Committee and other treaty bodies.

The activation of the advisory competence of the different international bodies, as well as the general observations and contentious cases in progress, demonstrate the growing concern of the international community on this issue. They also show that international law is being called upon to play a leading role in clarifying the obligations of States. The simultaneous handling of these different processes runs the risk of

human rights obligations». Adopted by the IACHR on 31 December 2021. https://www.oas.org/es/cidh/decisiones/pdf/2021/Resolucion_3-21_SPA.pdf.

15. Ibid.

16. European Court of Human Rights (ECtHR), cases *Duarte Agostinho and Others v. Portugal and 32 Others* (no. 39371/20) *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* (no. 53600/20); *Carême v. France* (no. 7189/21). In February 2023 the ECtHR decided to stay proceedings in other cases also related to alleged climate change violations, pending the Grand Chamber's decision (see ECtHR press releases of 3 February 2023 (ECHR 035 - 2023) and 9 February 2023 (ECHR 046 - 2023). The suspended cases are: *Uricchiov v. Italy and 31 Other States* (no. 14615/21); *De Conto v. Italy and 32 Other States* (no. 14620/21); *Müllner v. Austria* (no. 18859/21); *Greenpeace Nordic and Others v. Norway* (no. 34068/21); *The Norwegian Grandparents' Climate Campaign and Others v. Norway* (no. 19026/21); *Soubeste and four other applications v. Austria and 11 Other States* (nos. 31925/22, 31932/22, 31938/22, 31943/22 and 31947/22); *Engels v. Germany* (no. 46906/22). On the other hand, two cases have been declared inadmissible by the ECtHR on the grounds that the applicants were not sufficiently affected to claim to be victims of a violation of the Convention or its Protocols within the meaning of Article 34 (right of individual petition). The inadmissible cases are: *Humane Being and Others v. the United Kingdom* (no. 36959/22) and *Plan B. Earth and Others v. the United Kingdom* (no. 35057/22), according to the decisions of 1 December 2022 and 13 December 2022 respectively. Between the submission and peer review of this paper, the ECtHR decided three of the pending cases mentioned before: the claims in *Carême v. France* and *Duarte Agostinho and Others v. Portugal and 32 Others* were dismissed on admissibility grounds (mainly due to the lack of proof about the damage suffered by the applicants); while in *KlimaSeniorinnen*, the Court acknowledged for the first time the interplay between Convention rights and climate change. In this case in particular, the Strasbourg Court found a violation of the right to private and family life (Article 8) because of the State's failure to mitigate climate change, and a violation of the right to a fair trial (Article 6) because of the judicial failure to challenge the State's inaction.

17. Committee on the Rights of the Child, CRC/C/GC/26, 22.8.23, General comment No. 26 on children's rights and the environment, with a special focus on climate change, para. 17: «States should not only protect children against environmental harm, but also ensure their well-being and development, taking into account the possibility of future risk and harm».

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accentuating the fragmentation of a system that is still evolving and in search of certainties. However, these processes can also be seen as complementary tools (Jiménez Pineda, 2023, 6). In particular, the simultaneous development of the various consultative processes can be enriched by a dialogue between international bodies in their respective fields of competence.

III. Requests for advisory opinions pending before international tribunals

This paper focuses its analysis on the request for an advisory opinion submitted to the ICJ. However, there are two other requests for opinions pending before the Inter-American Court and the ITLOS, respectively. The activation of the advisory function of various international tribunals is a sign of the concern of states to clarify their responsibilities arising from the global impacts of the climate emergency.

The request to the ICJ was submitted by a resolution of the UN General Assembly, adopted by consensus of the 193 Member States[18]. The initiative was registered at the 77th session of the General Assembly by a group of 18 States, led by the Republic of Vanuatu, an island State in the South Pacific whose existence is threatened by the foreseeable rise in sea levels. Through this application, the Assembly asks the Court, firstly, what obligations States have under international law to ensure the protection of the climate system and other elements of the environment from anthropogenic emissions of greenhouse gases for the benefit of States and present and future generations. Secondly, the request asks what legal consequences flow from these obligations for States which, by their acts and omissions, have caused significant damage to the climate system and other elements of the environment, with respect to: (1) States, including, in particular, small island developing States, which, because of their geographical circumstances and level of development, are adversely affected or particularly affected by, or particularly vulnerable to, the adverse effects of climate change; and (2) Peoples and individuals of present and future generations affected by the adverse effects of climate change.

Many other States are currently in similar geographical and environmental situations to those of the Republic of Vanuatu (Aznar Gómez, 2023). Such is the case of Chile, which, together with Colombia, submitted a request for an advisory opinion to

18. Although the resolution was reached by consensus, the United States expressed doubts about the timing and effects of the ICJ submission: «We have considered this carefully, recognizing the priority that Vanuatu and other Small Island Developing States have placed on seeking an advisory opinion from the International Court of Justice with the aim of advancing progress towards climate goals. However, we have serious concerns that this process could complicate our collective efforts and will not bring us closer to achieving these shared goals. We believe that launching a judicial process - especially given the broad scope of the questions - will likely accentuate disagreements and not be conducive to advancing ongoing diplomatic and negotiations processes. In light of these concerns, the United States disagrees that this initiative is the best approach for achieving our shared goals, and takes this opportunity to reaffirm our view that diplomatic efforts are the best means by which to address the climate crisis» (Explanation of Position on Resolution Entitled Request for an advisory opinion of the International Court of Justice, Nicholas Hill, Deputy U.S. Representative to ECOSOC, New York, 29.3.2023, available at: https://usun.usmission.gov/explanation-of-position-on-resolution-entitled-request-for-an-advisory-opinion-of-the-international-court-of-justice/).

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the Inter-American Court. In this request, the two Latin American States ask the Inter-American Court to «clarify the scope of State obligations, in their individual and collective dimension, to respond to the climate emergency in the framework of international human rights law»[19] .

In addition, in December 2022, a group of island States, led by Antigua and Barbuda and Tuvalu, submitted a request for an advisory opinion to the ITLOS[20] . On this occasion, the Tribunal is requested to rule on the obligations of States, on the one hand, to prevent, reduce and control pollution of the marine environment in relation to the effects arising or likely to arise from climate change, including ocean warming and sea level rise, and ocean acidification, caused by anthropogenic emissions of greenhouse gases into the atmosphere; and, on the other hand, to protect and preserve the marine environment in relation to such effects of climate change.

IV. Possible questions about sources before the International Court of Justice: signs of a custom in the making?

The ICJ has not yet had the opportunity to make a specific pronouncement on the responsibilities of States in the face of climate change. The request for an advisory opinion opens a new door for the development of international law, for the identification of legal obligations in this area and, in particular, for the determination of the sources of international law from which they may emanate. Although climate change is a new issue in the jurisprudence of the Hague Tribunal, some of its judgments resolve conflicts between States related to international environmental law and closely linked to the harmful effects of human activities on the environment (Fitzmaurice, 2014; Bodansky, 2023).

Given the questions that the General Assembly has put to the Court, it is interesting to ask what sources of law the Court will consult in its search for legal answers to the question. According to the wording of Article 38 of the ICJ Statute, most of the sources mentioned do not regulate climate change or the damage it may cause. Specifically, there is only one binding convention (the aforementioned UNFCCC and its protocols), while the rest of the written instruments are contained in declarations and resolutions without direct binding effect. At the same time, the International Court could draw on the jurisprudence of other national and international judicial bodies. Although jurisprudence is not a rich source for identifying precise and concrete rules, the Court already has at its disposal the jurisprudence of the Inter-American Court, Resolution 3/2021 of the Inter-American Commission or General Comment 26 of the Committee on the Rights of the Child (cited above), which opens up the possibility of dialogue between the different international bodies.

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19. IACtHR. Request for an Advisory Opinion on Climate Emergency and Human Rights to the Inter-American Court of Human Rights from the Republic of Colombia and the Republic of Chile, of 9 January 2023. https://www.corteidh.or.cr/docs/opiniones/soc_1_2023_es.pdf.

20. ITLOS, *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law (Case No. 31/2022)*, 12 December 2022.

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Given the lack of clarity regarding the other two sources of law, i.e. international custom and general principles of law, the next question is what their respective usefulness might be. These two sources are probably the most difficult to grasp because of their higher level of abstraction and the lack of explicit legal acts indicating their origin. However, the jurisprudence of the International Court of Justice since its inception has been particularly rigorous and abundant in resolving cases submitted to its jurisdiction through the application of both sources of law.

The established jurisprudence of the Court emphasises international custom as the product of the two elements set out in Article 38 of the Statute[21]. The Court has repeatedly pointed out that international custom as a source of law requires the integration of the objective and subjective elements. The objective element is the result of practice, which is embodied in the acts and omissions of States in a continuous manner over time, without there being specific and homogeneous periods for each situation. Each practice requires a particular exercise of interpretation, which depends to a large extent on the reality in which the State acts. On the other hand, the subjective element or *opinio iuris* is defined by Article 38 of the Statute itself as the conviction that the practice constitutes an obligation. Because of its subjective nature, this second element is in most cases more difficult to explain, mainly because it seeks to unravel the subjective conviction of abstract entities such as States. However, the jurisprudence of the Court has clearly indicated that the subjectivity of States is inferred from the intentionality of their acts and manifestations.

In the exercise of applying the general theory of international custom to the specific field of climate change, it is necessary to analyse the emergence of each element separately. Firstly, the identification of a custom in this area would not require its maintenance over a long period of time, since it is a relatively recent phenomenon. The first alarms about climate change in the 1980s provide a timeline. Since then, the concern of states to prevent, mitigate and repair the damage caused by climate change has materialised at the international level through intergovernmental summits and the adoption of programmatic instruments. Beyond these formal agreements, it is not possible to point to actions or omissions that have taken place at a real level, at least in a widespread and shared way. The identification of the objective element becomes difficult in the absence of common and sustained actions or omissions over time.

In contrast to the objective element, the subjective element - or awareness - of an imperative to act is beginning to take shape in the international community. A germ of *opinio iuris* could be represented by the unanimous adoption of the General Assembly resolution to submit the request for an advisory opinion to the ICJ. This circumstance is reinforced by the submission of the other two requests to the Inter-American Court and ITLOS. In addition, the various summits held in the context of the Paris Agreement show a common awareness among states, regardless of their position in the Global North or the Global South. A significant event in this regard was the decision by the then US President Donald Trump to withdraw his country's ratification of the Paris Agreement (Zhang *et al.*, 2017; Fajardo del Castillo, 2018). Criticism of this decision showed that

21. For instance, *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States)*, 1986, ICJ Rep 14.

it was not seen simply as a sovereign state expressing its position on an international agreement, but as a violation of the obligations that all states have in this area, especially those that contribute most to environmental degradation.

However, the logical relationship between the two elements of international custom is a matter of debate in doctrine (Evans, 2014, 98). The debate centres on the chronological order of practice and opinio juris: if the two elements do not occur simultaneously, does practice precede the awareness of binding force, or is practice the evidence or material confirmation of an earlier awareness? The latter would be consistent with what is happening in the area of climate change: the international community is showing signs of an emerging awareness of the need to act on climate change. The question that remains open, therefore, is whether it is possible to speak of an emerging international custom regarding the obligations of states to prevent, mitigate and reduce the effects of climate change. According to the elements of Article 38 of the ICJ Statute, subjective awareness would be separate and awaiting a practice that does not yet exist or has not yet been consolidated.

On the other hand, under the first hypothesis of the precedent character of the material element, the Court would have to find the existence of a constant, repeated, uniform practice which is subsequently accepted by the States concerned as the exercise of an obligation. The objective element would precede the subjective element. From this point of view, it is problematic at this stage to identify the formation of an international custom - even if it is still in the process of formation - with regard to the obligations of States, since it is not possible to establish the existence of a practice that meets the material requirements indicated. This could be an obstacle for the Court in analysing the application of this source of law to the advisory opinion. The preclusion of any court from creating law would prevent the Court from confirming the existence of a custom, even if only in its genesis, in the absence of the objective element.

In view of the difficulties of the latter argument, the question arises whether the possible *opinio iuris* without material practice is in fact the manifestation of a principle on climate change. In such a case, liability could derive from the general principle of responsibility for internationally wrongful acts and the principle of due diligence, following the rules of the Draft Articles on the Responsibility of States for internationally wrongful acts. In particular, Principle 7 of the 1992 Rio Declaration, which affirms the duty to «cooperate in a spirit of global solidarity to conserve, protect and restore the health and integrity of the Earth's ecosystem»[22], is useful from the perspective of common but differentiated responsibilities according to each State's respective contribution to environmental degradation.

22. Rio Declaration on Environment and Development. Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992, vol. I, Resolutions Adopted by the Conference (United Nations publication, Sales No. E.93.I.8 and corrigendum), resolution 1, annex I, Principle 7: «States shall cooperate in a spirit of global solidarity to conserve, protect and restore the health and integrity of the Earth's ecosystem. Because they have contributed to varying degrees to the degradation of the global environment, States have common but differentiated responsibilities. Developed countries recognise their responsibility in the international pursuit of sustainable development, in view of the pressures their societies place on the global environment and the technologies and financial resources at their disposal».

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Similarly, the obligation could derive from the principle of strict liability of States for the effects of conduct under their jurisdiction, based on the «do no harm» rule and the principle of good neighbourliness between States, as enshrined in Principle 2 of the 1992 Rio Declaration[23]. However, the precise limits and elements of this rule are under discussion (Mayer, 2016, 90). Moreover, the difficulties in applying the principles of responsibility - both generally for wrongful international acts and more specifically in environmental matters - have to do with the complexity of the behaviours that provoke and exacerbate the climate emergency, the attribution of the behaviour to the State, and the lack of a legal basis that delineates precise international obligations in this matter.

V. Conclusions

Global warming is an urgent appeal to the international community in the face of a global phenomenon whose effects transcend the strict limits of territorial sovereignty and affect all people, regardless of their nationality or location in the Global North or South. The international community's responses to climate change have evolved in different ways over the past decades. For its part, international law has been a tool that has led to important agreements between states on the issue. To date, however, the legal norms in force have mainly been of a soft law nature. The latter can still be observed in those norms contained in international treaties or protocols that are binding, but their wording is ambiguous when it comes to determining the corresponding responsibilities, as they generally resort to formulas that are left to the discretion of the State. The requests for advisory opinions submitted in 2023 to various international tribunals demonstrate the above-mentioned urgency of the search for clearer and more precise criteria in the field of public international responsibility.

International jurisprudence has not yet developed significantly in this area. This may be due to uncertainty on the part of States themselves, as well as on the part of other members of the international community –including international organisations and individuals, non-governmental organisations and multinational corporations–. The extent of their respective responsibilities is unclear. Against this background, a number of cases have recently been brought before international and regional courts whose decisions are still pending (and some have been dismissed, as in the case of the ECtHR, for lack of proof of the specific and concrete scope of the alleged violations in relation to the plaintiffs as victims). In other words, the momentum is also beginning to build at the international judicial level. The main doubt is whether the forthcoming judgments will provide a fertile ground on which to set up clear and legally binding norms; or, on the contrary, whether courts will opt for positions deferential to state sovereignty on an issue of an undoubtedly global character.

23. Rio Declaration on Environment and Development, op. cit., Principle 2: «In accordance with the Charter of the United Nations and the principles of international law, States have the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction».

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In light of the soft-law nature of existing international law, the requests for advisory opinions submitted to the ICJ, the IACHR and the IMRT (as well as the contentious individual cases pending before the ECtHR) provide an opportunity to identify and clarify the obligations of states in the face of current and potential climate damage, and to identify what might be effective mechanisms of accountability. In order to avoid legal fragmentation, an inherent problem of the decentralised structure of international law, the overlapping timeframe of the different cases could serve to promote dialogue between the different international bodies.

In particular, the ICJ has the opportunity to promote the sources of international law on climate change. First, the Court will be able to interpret and shed light on treaty obligations already in force. But there may also be a particular opportunity for the Court to develop its jurisprudence on other sources of international law, such as custom or general principles. One of the main questions is whether the development of international conventions, together with recent acts of the international community in the judicial (as well as in the political) sphere, constitutes a possible international custom in the making. More specifically, the question arises as to whether we are facing an emerging opinio juris. The problem inherent in this hypothesis, however, is the lack of an objective element. Thus, the question remains as to what practices states will develop on the basis of the obvious concerns that are already evident and firmly established on the international scene. Moreover, the hypothesis of a customary norm in *statu nascendi* raises the question of whether it is possible for opinio juris to anticipate practice. As a further alternative hypothesis, the next question is whether, in the absence of custom, it is possible to argue for the emergence of a new climate change principle derived from the more general principles of state liability for damage and, in particular, the duty to cooperate in preserving, protecting and restoring the ecosystem.

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