The Chilean and Colombian Request for an Inter-American Advisory Opinion on the Climate Emergency and Human Rights

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Warming Up

In 2005, Sheila Watt-Cloutier filed a petition on behalf of the Inuit people of the Arctic region of the United States and Canada with the Inter-American Commission on Human Rights (IACHR), alleging a failure of the USA to adequately regulate their green house gas (GHG) emissions in violation of human rights. Back then, the Inuit petition failed before the proceedings could even gain momentum, as the IACHR decided to decline a ruling as "information provided does not enable us to determine whether the alleged facts would tend to characterise a violation of rights protected by the American Declaration."

Nearly two decades later, climate change is now returning to the Inter-American Human Rights System, this time however, directly to the Court in San José. In January 2023, Chile and Colombia submitted their joint request for an advisory opinion on the climate emergency and human rights, thereby paving the way for the first groundbreaking decision on the issue of climate change by the Inter-American Court of Human Rights (IACtHR) and the first advisory opinion in this regard by a regional human rights monitoring body.

While the added value of the IACtHR's future advisory opinion compared to other similar initiatives has already been covered here, this contribution will highlight the advantages of the chosen procedure, give a short overview on the changes in the field since the Inuit petition and critically analyze the request's main thrust with the essential questions included in the query and the underlying strands of argumentation. With this in mind, the article will address both the positive legal developments possibly triggered by the request as well as the lacunae remaining therein.

I. A Slightly Different Path: Advantages of Advisory Proceedings

The push by both countries towards an Inter-American decision on human rights obligations in the context of climate change is well timed and strategically chosen: A contentious case might have taken several years to reach the Court, while an advisory opinion can be directly filed with the IACtHR in accordance with Art. 64 (1) American Convention on Human Rights (ACHR). Thereby, the period until the adoption of a

corresponding decision is considerably reduced. Possibly, the future advisory opinion could be adopted within the next one to two years. Furthermore, advisory proceedings offer the opportunity to cover a broad spectrum of queries and thematic areas falling within the scope of the overall topic, while decisions in contentious proceedings are necessarily limited by the facts of the respective case. Although advisory opinions of the IACtHR are not explicitly described as binding by the Convention (in contrast Art. 67 ACHR refers to its judgments as "final and not subject to appeal"), the interpretation of Inter-American human rights instruments undertaken in the realm of an advisory opinion still have significant influence on legal developments in Latin America through the well-established doctrine of conventionality control, which applies to all decisions of the Court (see e.g. Advisory Opinion No. 24, para 26).

II. The Cards are Reshuffled: What Has Changed Since the Inuit Petition

Since 2005, there has been a lot of movement in the human rights debate in the context of climate change. Besides a well-established global climate change movement, a continuously increasing number of climate change litigation cases and the creation of a new UN mandate on human rights and climate change, wheels have also not stood still in international human rights fora. With *Ioane Teitiota v. New Zealand*, *Sacchi et al. v. Argentina et al* and lately *Daniel Billy et al. v. Australia* claimants were able to achieve smaller and bigger successes before international human rights monitoring bodies. While regional human rights institutions haven't issued decisions on corresponding climate change cases yet, several climate cases are currently pending before the European Court of Human Rights.

The IACtHR will now be able to follow suit within the Inter-American system, where steps have been taken as well to address environmental and climate change-related harm, e.g. through the Court's 2017 Advisory Opinion No. 23 on the environment and human rights (AO No. 23) with pioneering standards on extraterritoriality and an extensive greening of Art. 4 and 5 ACHR, the case of the *Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina* as the first decision finding a violation of the right to a healthy environment and the 2022 IACHR's resolution on the scope of Inter-American human rights obligations in the context of the climate crisis. The increasing urgency of the climate crisis coupled with the progressive attitude of the IACtHR towards the further development of economic, social, cultural and environmental rights, make the time seem ripe this time for a groundbreaking decision on climate change and human rights in the Americas

III. Questions on Climate Emergency and Human Rights: Potential and Lacunae of the Request

What is common to most of the aforementioned (legal) developments in climate protection is that they go back to initiatives of those individuals, groups and communities, who are most vulnerable to the negative impacts of climate change-induced harm, such

as indigenous communities, low-lying island States of the Global South, the youth, elderly and women. This is no different in the case of the present request. In their preliminary explanations, Chile and Colombia made clear that both States from the Global South are confronted with climate change-induced harm on a daily basis, e.g. through droughts, floods, landslides and fires (p. 1). With this in mind, both requestors emphasized that not all countries bear the burden of climate change equally, but that particularly vulnerable States and communities, given their geographic, climatic and socioeconomic conditions, are affected by the negative consequences of climate change to an extent that is disproportionate to their own contributions to global warming (p. 1).

In their view, the collective dimension of environmental and human rights treaties would therefore allow for the establishment of shared but differentiated responsibilities that distinguish between the contribution to climate change and the distribution of its impacts, but also address the need to avoid, minimize and confront loss and damages as well as the creation of mechanisms and practices, which enable reparation and adaptation at all levels in a fair, equitable and sustainable manner (pp. 6-7). In order to justify the need for Inter-American standards as a response to the climate emergency, both States emphasized that despite the significant contribution of AO No. 23, it was necessary to further clarify the foundation and scope of the rights affected by climate change as well as the obligations of member States to address its causes and consequences individually and collectively in consideration of principles such as equity, justice, precaution and sustainability (p. 6). This differentiated impact of climate change on particular States, communities and groups and the corresponding vulnerabilities is the request's overarching theme, which is reflected throughout the different sets of questions, which are divided into the following six different categories.

1. Paving the Way for Preventive Human Rights Protection

The first set of questions (A., pp. 8-9) deals with State obligations derived from the duties of prevention and guarantee of human rights in light of the climate emergency, suggesting the application and adaptation of sub-duties of prevention established in AO No. 23, but also paying attention to vulnerabilities and intersectional considerations. By reference to the Paris Agreement and explicitly pointing to the 1.5°C-target, the request already sets a standard for corresponding measures of prevention that presumably seek to point to obligations of mitigation. This is all the more important, as human rights monitoring bodies have been reluctant to rule on mitigation obligations, also because they are often related to potential harm that will materialize only in the (further) future (see here). The IACtHR could therefore take an important step forward in human rights protection by developing missing standards on climate change mitigation.

2. A Little Bit of Everything: State Obligations to Preserve the Right to Life and Survival

The second set of questions (B., pp. 9-10) addresses State obligations to preserve the right to life and survival in the face of the climate emergency. Independently of this title, the questions included in this category also deal to a great part with access to information, enshrined in Art. 13 ACHR. The sub-areas contained in the first question include a whole potpourri of areas, but the overall topic of differentiated impact runs like a red thread through this section, e.g. by focussing on loss and damage, but also through reference to just transition as a means to counter the negative side effects of response measures. While the last question of this set implies the particular importance of access to environmental information for the realization of other human rights, participation and access to justice play a rather subordinate role. However, access to justice is taken up as a dominant topic in the fourth set of questions together with the duty to consult, while cooperation as an overall obligation is dealt with in yet another set. At this point, looking at the sequence of questions, it can be observed that procedural matters are confusingly scattered across different sections and questions and therefore seem artificially disjointed, which may also lead to skipping important issues, such as participation.

3. Focus on the Future: Children's Rights and Missing Future Generations

The third set of questions (C., pp. 10-11) deals with a particularly vulnerable group that is most and continuously affected by climate change towards the future: children. Remarkably, the request not only touches upon potential measures to be taken in order to protect children's rights in the climate crisis, but also highlights the specific issues children face in expressing their views or resorting to judicial remedies. Noticeably, the introduction to this set of questions hinted to the term "new generations". Still, the whole pressing issue of the nature, scope and enforceability of future generations' rights – meaning generations unborn – was unfortunately skipped at this point.

4. Selected Procedural Obligations: Access to Justice and the Duty to Consult

As already indicated above, the fourth set of questions (D., pp. 11-12) takes up procedural obligations, though both of a different kind. The first query relates to the particular content of access to justice obligations towards individuals in the context of climate change. The second query, in contrast, refers to the obligation to consult that had already been addressed in AO No. 23 as part of the obligation to cooperate (paras. 197 et seqq.), and which, unlike judicial guarantees, applies horizontally and thus between the member States themselves (para. 186). It has therefore to be seen how the Court will apply the obligation to consult in particular but also the duty to cooperate in general, which is rather designed for situations of transboundary environmental harm crossing one border, to a global phenomenon like climate change, where the duty to cooperate carries the high risk of being reduced to the Member States' obligation to strive for the agreement of adequate GHG reduction targets at the international level.

5. Defending Those Who Defend the Environment: Rights of Environmental Human Rights Activists

The fifth set of questions (E., pp. 12-13) focuses on the specific situation of human rights defenders, particularly those seeking to protect the environment. In this context, the requesting States do not only refer to common threats to the rights of environmental (but also other) human rights defenders and the pressing issue of impunity, but even speak of a right *to defend* the environment. In this sense, they also point to a potential duty to assist these defenders in their work. The questions also pay due regard to those vulnerable communities that do not only stand on the frontline of climate change, but are also those most active in protecting the(ir) environment, such as indigenous and Afro-descendant communities. In light of the two groups whose rights and interests are covered in depth by the request – children and human rights defenders – it stands out that the LGBTQI+ community as an equally vulnerable community is completely left out, while the request also fails to devote specific sets of questions to other groups particularly affected by climate change, such as women and indigenous communities.

6. A New Era in Human Rights Protection: Shared and Differentiated State Obligations in the Climate Change Context

In its sixth and last set of questions (F., pp. 13-14), the request finally turns to shared and differentiated State obligations and responsibilities under human rights law in light of the climate emergency with specific reference to loss and damage, cooperation, regions and populations most affected as well as human mobility. In this context, both States repetitively emphasize the necessity for individual but also collective State action. Looking at the progressive greening of the Court in AO No. 23, where environmental principles, such as prevention and precaution, have been used to progressively develop Inter-American human rights law in the environmental context, chances are high that the IACtHR will pick up the thread laid out in the request and also apply the principle of common but differentiated responsibilities to inform new regional human rights standards in the climate change context. This would amount to a small revolution, since in principle the same human rights obligations apply to all member States. Interestingly enough, the request does also not only refer to States, but also to international organizations. Consequently, it will be observed with interest whether and how the Court involves international organizations in its findings, e.g. as fora that serve to enable interstate cooperation or even as duty bearers themselves. In contrast, other major actors, such as high-emitting corporations in the private sector, remain unmentioned.

IV. Concluding remarks

As the analysis has shown, through the unique advisory procedure, Colombia and Chile are taking the fast track to the IACtHR in order to trigger an Inter-American human rights decision on the pressing issue of climate change, thereby offering the IACtHR a chance to (further) develop important human rights standards in the context of the climate emergency that may very well have a radiating effect beyond San José and the Latin

American region. Through this procedure but also the specific request, the Court will further have the unique opportunity to cover a broad variety of areas and questions that align under the umbrella term of climate change and human rights and therefore to deal with the issue in an integral manner, an opportunity that is not equally given in the realm of contentious jurisdiction.

Unsurprisingly, as States of the Global South, Chile and Colombia used the request to shed a spotlight on particular vulnerabilities and the discomforting disconnect between those who have predominantly caused the current crisis and those who bear the disproportionate burden of climate change-induced harm. Although it can be expected that the IACtHR will heavily build on its findings in AO No. 23 to (further) develop and adapt the applicable standards to the context of climate change, it is of particular interest if and how the principles of common but differentiated responsibility and shared responsibility will inform the human rights obligations operating under the American Convention in the climate change context. Furthermore, it remains to be seen whether the Court puts an emphasis on obligations emanating from the autonomous right to a healthy environment or rather on those flowing from Art. 4 and 5 ACHR and whether it seizes the moment to distinguish the environmental content of the latter from the content of environmental human rights, thereby giving urgently needed contours to the right to a healthy environment.

While the analysis has also disclosed certain lacunae in the request, such as the failure to adequately address the concerns of the LGBTIQ+ community, future generations or even the environment itself, hopes are high that the Court will not shy away from covering important aspects with a sufficiently close connection to the overall topic even though they are not explicitly addressed in the request. At least in the past, the Court has made clear that “it is not limited by the literal wording of the questions posed when exercising its advisory function” and „able to define or clarify and, in certain cases, reformulate the questions posed to it“ (AO No. 23, paras. 34 and 36). Colombia and Chile are therefore paving the way for a landmark decision in the Americas that is awaited with anticipation and will in all likelihood echo far beyond the continent.

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