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THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS



**"TO NO ONE WILL WE SELL, TO NO ONE DENY
OR DELAY RIGHT OR JUSTICE"**

-Chapter 40, Magna Carta





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Mauritius's engagement with climate change in international law – current developments and additional outlooks



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Once again Mauritius was reminded of its vulnerability to climate change with floods this month. As the national Meteorological Services has previously pointed out, as an island State, Mauritius is especially susceptible to sea level rise, more frequent and intense extreme weather events such as cyclones and hurricanes, and more extreme changes in precipitation patterns. Something Mauritius itself has also voiced before international fora, such as at the **International Tribunal for the Law of the Sea (ITLOS)**, referencing *'the grave and urgent threat posed by the impacts of climate change.'* Due to this vulnerability, the question of climate change is not solely one of collective responsibility within the *"international community of States"*, but is also one of an existential crisis and human rights crisis for its inhabitants. Indeed, human rights have been increasingly invoked to spur States to act with more urgency in protecting its people from the worst effects of climate change and to do so in conformity with their human rights obligations. Mauritius is certainly no stranger to this dynamic, and the government has declared it will interpret the Paris Agreement in light of other international legal instruments, including human rights, indicating the country's commitment to rights-based climate action.

Despite ongoing discussions around climate change at the international level, there is no specialised forum for dispute resolution in situations of non-compliance. The Paris Agreement is legally binding, and the main climate change law instrument. However, it is formulated in such a way that it leaves a large amount of discretionary space to States and, more vitally, it does not contain a binding non-compliance mechanism—only a Committee bestowed with a facilitative role. While there are discussions about the appropriateness of bringing environmental or climate change litigation before human rights fora, these spaces do provide an opportunity to bring the concerns of individuals or States before international judicial and quasi-judicial bodies. Although these bodies are often perceived

primarily as avenues for individuals to hold their own States to account, these fora also represent avenues worthy of consideration by national governments grappling with the effects of climate change that have a responsibility to their populations, especially when mitigation measures by other States are not taken or are inadequate.

Avenues for Holding Actors to Account

As the effects of climate change are increasingly being felt, there is an opportunity to move beyond the debate about the well-established science, and towards a discussion on accountability. The aims and goals are clear, but what avenues are open to States like Mauritius when other (often larger) States are not in compliance with international agreements? Based on recent successes, we highlight two potential avenues to pursue accountability. There are, of course, many others, such as the ongoing requests for Advisory Opinions at ITLOS and the International Court of Justice—both of which specifically focus on, and address questions regarding, the position of small island states. Mauritius is also involved in these processes, particularly at the ITLOS. While impactful, the climate crisis demands a strong sense of urgency as political will is lagging and greenhouse gas (GHG) emissions are still on the rise. Hence the decision to foreground human rights options that widen the possibilities to further progress towards responsibility for climate change.

UN: Human Rights Committee & the ICCPR

Mauritius has ratified both the **International Covenant on Civil and Political Rights (ICCPR)** and its Optional Protocol. This allows individuals, but also Mauritius in an inter-State complaint, to bring a non-binding but authoritative individual communication on the basis of human rights in front its monitoring body—the **Human Rights Committee**. While inter-State communications at UN treaty bodies are admittedly rare, they are not unheard of. In the context of climate change, the right to life (**Article 6 ICCPR**) and right to private life (**Article 17 ICCPR**) can be invoked, as well as requests for reparations such as restitution but also more future-orientated climate action. An example of such a climate case is the **Human Rights Committee's Torres Strait Islanders-case**.

In this case brought by the indigenous population of the Torres Strait Islands against Australia, petitioners held that Australia failed to adopt adaptation measures such as infrastructure to protect Torres Strait Islanders' way of life, homes, and culture from sea level rise (among other things). The Committee, in granting this part of the author's claim, argued that "the adverse consequences of [climate] impacts are serious because of their intensity or duration and the physical or mental harm that they cause" and that in that case *"the degradation of the environment may adversely affect the well-being of individuals and constitute foreseeable and serious violations of private and family life and the home"* (para 8.12).

While their claim was awarded on the basis of the right to private life and culture, spurring the Committee to award the adaptation part of the claim, the Committee did not find a violation of the right to life (**Article 6**). The latter can also be tied to the Committee not ordering Australia to increase their mitigation efforts, something the petitioners also demanded. The reason for failing to find a violation of the right to life was that petitioners according to the Committee had not proven there existed a *"real and reasonably foreseeable risk"* (para 8.6)—this even despite its 2018 General Comment on the right to life reiterating that climate change is one *"of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life"* (para 65). This particularly aspect of the case has received criticism, not in the least from some of the individual Committee members in their dissenting opinions. First, it is a very narrow understanding of a *"real and reasonably foreseeable risk"*. Second, it is a failure to comprehend indigenous ways of life and the intrinsic relationship between land and natural resources on the one hand, and life on the other. Still, others note that the language of the Committee leaves the door ajar for future climate cases based on the right to life.

African Union: African Court and Commission & the Charter

As a member of the African Union and a party to the **African Charter on Human and Peoples' Rights (African Charter)** and the **Protocol Establishing the Court**, the procedures of the **African Commission on Human and Peoples' Rights (Commission)** and the **African**

Court on Human and Peoples' Rights (Court) are open to Mauritius. The Commission allows access to individuals, NGOs, and States, while the Court is only open to the State of Mauritius, as Mauritius has ratified the Protocol Establishing the Court, but not (yet) submitted the required **article 34(6) special declaration**.

As addressed elsewhere in the context of Mauritius, the African Charter is known for taking a broad approach to human rights protections. These include, among others, the right to a healthy environment as a collective right, which is highly relevant in addressing complex environmental and, therefore, potentially climate issues that severely affect the environment and the lives dependent on it. Invoking environmental rights before Africa's regional human rights and economic courts has been rather successful. Still, climate cases are rare, leaving potential room for further developments. The success of environmental cases can also be found at the regional level with the *SERAC v Nigeria* communication before the African Commission, and the *Ogiek* case before the African Court. Both cases dealt with the need to balance environmental and human rights concerns in relation to development projects and the exploitation of the environment. While these decisions were all initiatives brought by individuals, communities and NGOs, the African human rights system is also no stranger to, for example, the right to development being invoked in an inter-state setting, such as in *DRC v. Burundi, Rwanda, and Uganda*.

Upcoming developments

Despite our focus on more classic redress avenues, this short piece would be incomplete without mention of the current climate conference, **Conference of the Parties (COP)28**, which started on 30 November 2023. As a State Party to the UNFCCC and its Paris Agreement, Mauritius and other small island states have an important role to play. COP28 presents an opportunity: For the first time since the adoption of the Paris Agreement in 2015 —and most of its implementation guidelines in 2018—2023 will see the Global Stocktake (GST) come to fruition.

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This is a process that takes place every five years and is designed to elevate the collective ambition of State Parties to reach the Paris goal of keeping global warming well below 2 degrees Celsius (C) and more accurately, to limit it to just 1.5C to avoid the worst effects of climate change. The GST will review the progress towards this goal based on a cumulative analysis of Parties' nationally determined contributions (NDCs). Its process is designed to not single out specific States for lagging behind but instead to reveal the ambition gaps to guide the new round of NDCs. This is a unique opportunity for States—and civil society—to engage in enhancing collective efforts to mitigate climate change. While the process is already well underway, the current COP is vital for the process as it will adopt a decision which will provide guidance and a way forward based on the GST results.

Once adopted, new, enhanced NDCs will be drafted to update Mauritius' current NDC, and this again poses an opportunity to engage with the UNFCCC process, to help ensure that Mauritius not only contributes to collective mitigation but additionally provides enough funds and policies to adapt to the climate change effects already happening, such as the floodings. Adaptation measures can decrease vulnerability of islanders to the more frequent and extreme weather events and should be devised considering the human rights of Mauritians as well as possible effects on biodiversity.

Therefore, despite recent floodings and increased warnings around the effects of climate change, there are also opportunities to push for better compliance with existing standards that aim to mitigate the increasing effects.