

The advisory proceedings on climate change before the International Court of Justice

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1. *Introduction*

Climate change, a crisis of unprecedented magnitude, is presenting novel challenges to the edifice of international law, and law more broadly. Legal scholars and practitioners worldwide are engaged in a complex exercise of reimagining and sometimes reviving legal norms to address this crisis. These efforts are most visible in the numerous judgments resulting from a global wave of climate litigation. Courts and other judicial authorities around the world are combining knowledge, skills and imagination to engage with the legal questions surrounding climate change. Landmark decisions have been rendered by judicial and quasi-judicial bodies, both domestically and at the international level.¹ Simultaneously, virtually all United Nations (UN) bodies and agencies, notably including the UN Human Rights Council, have addressed climate change as part of their respective mandates.

In this rapidly evolving landscape, the UN General Assembly's (UNGA) request for an advisory opinion from the International Court of

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¹ J Setzer, C Higham, 'Global Trends in Climate Change Litigation: 2023 Snapshot' (LSE 2023) <www.lse.ac.uk/granthaminstitute/wp-content/uploads/2023/06/Global_trends_in_climate_change_litigation_2023_snapshot.pdf>.



Justice (ICJ/Court) on climate change, encapsulated in UNGA Resolution 77/276,² stands out as a significant milestone. The adoption of this historic resolution signals the need for greater clarity on international obligations and responsibilities concerning climate change, as a critical matter of international law.

The purpose of this contribution is to provide some early reflections on the *Obligations of States in Respect of Climate Change* advisory proceedings before the ICJ, at a stage where these proceedings are still pending. We start by reflecting on the process leading up to the request. Building on this, we discuss the questions posed to the Court under UNGA Resolution 77/276 and situate these within the broader trajectory of the Court's jurisprudence. Ultimately, we aim to provide a nuanced understanding of the ICJ's role, as the 'principal judicial organ' of the UN in interpreting and shaping international law in response to the global climate crisis.³

2. *Process*

The ICJ, established by the UN Charter in 1945, as a successor to the Permanent Court of International Justice (PCIJ), has two primary functions.⁴ First, the ICJ adjudicates legal disputes submitted by States, with its judgments possessing binding force and being final and without appeal for the parties.⁵ Second, it may provide advisory opinions on legal questions referred by authorised UN organs and specialised agencies.

The UNGA and the UN Security Council (UNSC) have the authority to request advisory opinions on 'any legal question'.⁶ Furthermore, the UNGA can empower any other organ of the UN or specialised agencies to seek an advisory opinion on 'legal questions arising within the scope

² UNGA Res 77/276, 'Request for an advisory opinion of the International Court of Justice on the obligations of States in respect of climate change' UN Doc A/RES/77/276 (29 March 2023).

³ UN Charter art 92.

⁴ It was set up in June 1945 under the UN Charter and began its activities in April 1946.

⁵ Statute of the International Court of Justice arts 59 and 60.

⁶ UN Charter art 96(1).



of their activities.⁷ Historically, it has primarily been the UNGA that has exercised this power, while the UNSC has requested an advisory opinion only once.⁸

The system of advisory opinions has been utilized to a lesser extent under the ICJ compared to its predecessor. While the PCIJ issued 27 advisory opinions in the 17 years between 1922 and 1939, the ICJ has provided the same number of advisory opinions, but over a much longer span of over 75 years, from 1948 to 2023. These decisions initially dealt with rather technical matters,⁹ but have increasingly addressed matters of broader concern.¹⁰

The Court itself has characterised its advisory procedure as ‘relatively unschematic’, meaning that it has ‘a broad discretion with regard to the procedure to be followed.’¹¹ The flexibility makes advisory proceedings more accessible and inclusive than many other types of proceedings, including contentious proceedings before the ICJ itself, and provide the Court with an opportunity to innovate to respond to the specific needs of States or other entities to facilitate their effective participation.

2.1. *The request*

The idea to request an ICJ Advisory Opinion on climate change first surfaced in diplomatic circles in 2011, when the President of the Republic of Palau, Johnson Toribiong, called for members of the UN to request the ICJ to ‘determine what the international rule of law means in the

⁷ *ibid* art 96(2).

⁸ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (Advisory Opinion) [1971] ICJ Rep 16 [hereinafter *Namibia Advisory Opinion*].

⁹ See eg *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter)* (Advisory Opinion) [1962] ICJ Rep 151.

¹⁰ See eg *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136 [hereinafter *Wall Advisory Opinion*]; *Accordance with international law of the unilateral declaration of independence in respect of Kosovo* (Advisory Opinion) [2010] ICJ Rep 403 [hereinafter *Kosovo Advisory Opinion*]; and *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) [2019] ICJ Rep 95.

¹¹ S Rosenne, *The Law and Practice of the International Court 1920-2005* vol 3 (Brill 2016) 1676, quoting *Namibia advisory opinion* (n 8) 26 para 38.



context of climate change.¹¹ However, the efforts to take this initiative forward (by Palau and the subsequently-formed Ambassadors for Responsibility on Climate Change group) were frustrated. The United States in effect ended the campaign.¹² The idea of requesting an advisory opinion was subsequently re-floated and acted upon by several States, including the Marshall Islands and Bangladesh, and by several civil society groups, but again to no avail.¹³

The initiative gained new momentum with the formation of the Pacific Islands Students Fighting Climate Change (PISFCC) in 2019, an organisation of Pacific youth who began campaigning leaders at the Pacific Island Forum to push for an advisory opinion. Following sustained activism, their proposal was taken up and spearheaded by the Republic of Vanuatu. In 2022, after much internal planning and preparation, Vanuatu began assembling a 'Core Group of States' to develop and discuss a draft resolution. From late 2022 to early 2023, the questions for an advisory opinion were refined through multiple informal rounds of negotiations and consultations. When the draft resolution was considered for adoption by the UNGA on 29 March 2023, it had an unprecedented 132 co-sponsors.¹⁴

For the UNGA to request an advisory opinion, the draft resolution containing the request must pass in the UNGA following its internal rules and practices.¹⁵ It is unclear from the UN Charter whether draft

¹¹ L Hurley, 'Island Nation Girds for Legal Battle Against Industrial Emissions' *The New York Times* (28 September 2011) <<https://archive.nytimes.com/www.nytimes.com/gwire/2011/09/28/28greenwire-island-nation-girds-for-legal-battle-against-i-60949.html?pagewanted=print>>.

¹² R Brown, 'The Rising Tide of Climate Change Cases' *The Yale Globalist* (2013) <https://globalist.yale.edu/in-the-magazine/theme/the-rising-tide-of-climate-change-cases/?utm_source=rss&utm_medium=rss&utm_campaign=the-rising-tide-of-climate-change-cases>.

¹³ See also M Wewerinke-Singh and others, 'Bringing Climate Change before the International Court of Justice: Prospects for Contentious Cases and Advisory Opinions' in I Alogna and others (eds) *Climate Change Litigation: Global Perspectives* (Brill 2021) 406 fn 72.

¹⁴ UNGA Official Records (GAOR) 77th Session 64th Plenary Meeting (2023) UN Docs A/77/PV.64 (29 March 2023).

¹⁵ Namibia Advisory Opinion (n 8) 22 para 20: '[a] resolution of a properly constituted organ of the United Nations which is passed in accordance with that organ's rules of procedure and is declared by its President to have been so passed, must be presumed to have been validly adopted'.

resolutions need to obtain a two-thirds majority vote or if a simple majority suffices.¹⁶ Recent practice points towards the latter.¹⁷

Still, scholars writing on a UNGA request for an advisory opinion had been apprehensive that a resolution might not get enough votes to pass: ‘a failure to obtain the requisite number of votes is one of the major risks with the request for an AO... obtaining the requisite number of votes would be challenging’;¹⁸ ‘[e]ven this lower threshold [of simple majority] could, however, be difficult to achieve’.¹⁹

The adoption of the draft resolution by consensus among all 193 UN Member States was therefore particularly impactful. Decisions in the UNGA are only taken by consensus when all Member States agree on a matter without the need for a formal vote.²⁰

Not only did Resolution 77/276 defy all fears of passing, but it also made history. It was the first time a request for an advisory opinion was adopted by consensus since the adoption of Resolution 258(III) 75 years prior.²¹ The latter resolution was passed in 1948, when the UNGA’s membership was limited to 58 States.

¹⁶ Art 18 of the UN Charter requires two-thirds majority votes for ‘important questions’.

¹⁷ P d’Argent, ‘Article 65’, in A Zimmermann, CJ Tams, K Oellers-Frahm, C Tomuschat (eds), *The Statute of the International Court of Justice: A Commentary* (OUP 2019) 1790.

¹⁸ M Fitzmaurice, AV Rydberg, ‘Using International Law to Address the Effects of Climate Change: A Matter for the International Court of Justice?’ (2023) 4 YB Intl Disaster L Online 281.

¹⁹ A Strauss, ‘Climate Change Litigation: Opening the Door to the International Court of Justice’ in W Burns, H Osofsky (eds), *Adjudicating Climate Change* (CUP 2009) 349.

²⁰ *United Nations Juridical Yearbook* (2005) 457 (d A 3).

²¹ All other UNGA resolutions requesting Advisory Opinions have been adopted by vote. The chronological list is: ‘Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)’ (adopted by 40 votes to 8, 2 abstentions) UN Doc A/RES/113(II) B; ‘Reparation for Injuries Suffered in the Service of the United Nations’ (adopted by consensus) UN Doc A/RES/258(III); ‘Interpretation of Peace Treaties with Bulgaria, Hungary and Romania’ (adopted by 47 votes to 5, 7 abstentions) UN Doc A/RES/294(IV); ‘Competence of the General Assembly for the Admission of a State to the United Nations’ (adopted by 42 votes to 9, 6 abstentions) UN Doc A/RES/296(IV)J; ‘International Status of South West Africa’ (adopted by 40 votes to 7, 4 abstentions) UN Doc A/RES/338(IV); ‘Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide’ (adopted by 47 votes to 5, 5 abstentions) UN Doc A/RES/478(V); ‘Effect of Awards of Compensation Made by the United Nations Administrative Tribunal’ (adopted by 41 votes to 6, 13 abstentions) UN Doc



This watershed moment signals that the idea of ‘bringing the worlds’ biggest problem before the world’s highest court’ is indeed ‘an idea whose time has come’ as noted by Ambassador Odo Tevi, Vanuatu’s special envoy on climate change and permanent representative to the UN.²²

After the passing of the resolution, the UN Secretary-General transmitted the request to the ICJ on 12 April 2023.²³ Article 65 of the ICJ Statute provides for the Request to be ‘accompanied by all documents likely to throw light upon the question.’ Thus, on that day the Secretary-General also indicated that the UN Secretariat would prepare a dossier containing a collection of all such documents. This was eventually sent on 30 June 2023.²⁴

A/RES/785(VIII)[A]; ‘Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa’ (adopted by 25 votes to 11, 21 abstentions) UN Doc A/RES/904(IX); ‘Admissibility of Hearings of Petitioners by the Committee on South West Africa’ (adopted by 32 votes to 5, 19 abstentions) UN Doc A/RES/942(X); ‘Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)’ (adopted by 52 votes to 11, 32 abstentions) UN Doc A/RES/1731(XVI); ‘Western Sahara’ (adopted by 87 votes to none, 43 abstentions) UN Doc A/RES/3292(XXIX); ‘Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947’ (adopted by 143 votes to none, no abstentions) UN Doc A/RES/42/229 B; ‘Legality of the Threat or Use of Nuclear Weapons’ (adopted by 78 votes to 43, 38 abstentions) UN Doc A/RES/49/75K; ‘Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory’ (adopted by 90 votes to 8, 74 abstentions) UN Doc A/RES/ES-10/14; ‘Accordance with international law of the unilateral declaration of independence in respect of Kosovo’ (adopted by 77 votes to 6, 74 abstentions) UN Doc A/RES/63/3; ‘Legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965’ (adopted by 94 votes to 15, 65 abstentions) UN Doc A/RES/71/292; ‘Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem’ (adopted by 87 votes to 26, 53 abstentions) UN Doc A/RES/77/247.

²² K Lyons, ‘From Vanuatu law school to the Hague: the fight to recognise climate harm in international law’ *The Guardian* (20 June 2022) <www.theguardian.com/world/2022/jun/20/from-vanuatu-law-school-to-the-hague-the-fight-to-recognise-climate-harm-in-international-law>.

²³ Rules of the Court of the International Court of Justice (adopted 14 April 1978, entered into force 1 July 1978, amended on 4 April 2005) art 104. The Request was formally received by the ICJ’s Registry on 17 April.

²⁴ ICJ, ‘Materials Compiled Pursuant to Article 65, Paragraph 2 of the Statute of the International Court of Justice (Request for an advisory opinion by the International Court of Justice pursuant to General Assembly Resolution 77/276)’ (2023) <www.icj-cij.org/sites/default/files/case-related/187/187-20230630-req-01-00-en.pdf>.



2.2. *The proceedings*

To ensure it is fully informed before giving its opinion, the Court has the authority to hold both written and oral proceedings, similar to those in contentious cases.²⁵ In theory, the Court could forego such proceedings, but it has never entirely done so.²⁶ Instead, the Court commonly draws up a list of those States and international organisations likely to be able to furnish information on the question and proceedings are divided into a written and oral phase.

The President of the ICJ recognised the UN and its Member States as ‘likely to be able to furnish information on the questions submitted to the Court’ and invited them to present statements on the legal questions.²⁷ These written statements are submitted in two rounds: (i) submission of written statements, and (ii) submission of written comments on such statements.²⁸ The deadlines were initially set for 20 October 2023 and 22 January 2024, respectively.²⁹ Following requests from the Republic of Vanuatu, the Commission of Small Island States on Climate Change and International Law, and 14 other States, these time-limits were subsequently extended to 22 January 2024 and 22 April 2024, respectively.³⁰

The proceedings provide an opportunity for States and international organisations to formally express their views on legal questions before the Court. Widespread and active participation in these proceedings enriches the Court’s understanding of the matter at hand and arguably also enhances the legitimacy of the proceedings. In particular, the importance of participation from climate-vulnerable States cannot be overstated, as

²⁵ JJ Quintana, *Litigation at the International Court of Justice* (Brill 2015) 1257.

²⁶ *Handbook of the International Court of Justice* (2016) 84 <https://legal.un.org/avl/pdf/rs/other_resources/manuel_en.pdf>.

²⁷ ICJ Press Release 2023/21 ‘Obligations of States in respect of climate change (Request for Advisory Opinion), The President of the Court makes an Order organizing the proceedings; she fixes the time-limits for the presentation of written statements and for written comments on those statements’ (27 April 2023) <www.icj-cij.org/sites/default/files/case-related/187/187-20230425-PRE-01-00-EN.pdf>.

²⁸ *Handbook of the International Court of Justice* (n 26) 84.

²⁹ ICJ ‘Obligations of States in Respect of Climate Change (Request for Advisory Opinion)’ Order of 20 April 2023 <www.icj-cij.org/sites/default/files/case-related/187/187-20230420-ORD-01-00-EN.pdf>.

³⁰ ICJ, ‘Obligations of States in Respect of Climate Change (Request for Advisory Opinion)’ Order of 4 August 2023 <www.icj-cij.org/sites/default/files/case-related/187/187-20230804-ord-01-00-en.pdf>.



these States can provide crucial evidence of climate change's impacts coupled with legal arguments about the implications thereof. The Court has authorised a number of international organisations to submit written statements, many of whom represent the interests of climate-vulnerable and small island States.³¹

A significant development in this advisory opinion has been the Court's authorisation of the International Union for Conservation of Nature (IUCN) to participate in the proceedings.³² This is unusual, given that Article 66 of the ICJ Statute restricts this right to States and 'international organisations', a term which the Court had thus far interpreted narrowly as referring to 'intergovernmental organisations'.³³ Notably, unlike other participating international organisations, the IUCN is not exclusively intergovernmental. Instead, its membership comprises 'States, governmental agencies, NGOs, indigenous peoples' organizations, academic institutions, and business associations'.³⁴ This is, therefore, 'the first time that a not purely inter-governmental organization was considered to be an international organization under Article 66 and authorized to participate in advisory proceedings'.³⁵

Once written statements have been submitted, they are shared with all participating States and international organisations.³⁶ This marks the beginning of the second phase of the advisory proceedings, during which all participants are able to provide written 'comments' on each other's

³¹ As of December 2023, these include the International Union for Conservation of Nature, the Commission of Small Island States on Climate Change and International Law, the African Union, the Organization of the Petroleum Exporting Countries, the Organisation of African, Caribbean and Pacific States, the Melanesian Spearhead Group and the Forum Fisheries Agency. ICJ, Press Release 2023/20, 'Obligations of States in respect of Climate Change (19 April 2023) <<https://www.icj-cij.org/case/187/press-releases>>.

³² ICJ Press Release 2023/29 'Obligations of States in Respect of Climate Change (Request for Advisory Opinion): The Court authorizes the International Union for Conservation of Nature to participate in the proceedings' (14 June 2023) <www.icj-cij.org/sites/default/files/case-related/187/187-20230614-pre-01-00-en.pdf>.

³³ See eg ICJ, Practice Direction XII (2004) <www.icj-cij.org/practice-directions#fn13> paras 2 and 3.

³⁴ D Garrido Alves, 'The Concept of International Organization in the practice of the International Court of Justice' *EJIL:Talk!* (27 July 2023) <www.ejiltalk.org/the-concept-of-international-organization-in-the-practice-of-the-international-court-of-justice/>.

³⁵ *ibid.*

³⁶ ICJ Statute art 66 para 4; Rules of the Court (n 23) art 105 paras 1 and 2 (a).

written statements. This phase is critical as it essentially enables States and organisations to engage in legal dialogue about the questions posed to the Court. Through the iterative process of responding to others' arguments and refining their own positions in light of comments received, participants can advance their understanding of the legal issues at stake and the related factual situations.

After the completion of the written stages, oral hearings are anticipated. While technically oral hearings are held at the Court's discretion, in practice they have been held for every advisory opinion, except those arising as appeals against the decisions of administrative tribunals.³⁷ These hearings provide an additional forum for States to expound on their legal arguments, respond to points made by other States or organisations, and engage in direct dialogue with the judges. A practice has emerged in the recent past of oral hearings being live-streamed or uploaded.³⁸ Therefore, they also become an additional venue to engage members of the general public and non-legal audiences. After the completion of this stage, the Court rises for deliberation. The final opinion of the Court, as in contentious cases, is delivered in open court.³⁹

The Court must first determine whether it has jurisdiction to deliver an advisory opinion. As Glickenhauß notes, the question of jurisdiction is divided into three components: the requesting body's competence to request an advisory opinion, the issue falling within the requesting body's mandate, and the legal character of the question.⁴⁰ Given that the UNGA is authorised by the UN Charter to request an advisory opinion on 'any legal question',⁴¹ the first two components are easily met. The Court has only once determined that it lacked jurisdiction to answer a question. This concerned the request for an advisory opinion on *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, initially submitted by the World Health Organization (WHO).⁴² Subsequently, the same

³⁷ Rules of the Court (n 23) art 105 para 2 (b).

³⁸ F Baetens, 'Transparency Across International Courts and Tribunals: Enhancing Legitimacy or Disrupting the Adjudicative Process?' (2022) 91 Nordic J Intl L 612.

³⁹ ICJ Statute art 67.

⁴⁰ J Cameron Glickenhauß, 'Potential ICJ Advisory Opinion: Duties to Prevent Transboundary Harm from GHG Emissions' (2015) 22 New York U Environmental LJ 120.

⁴¹ UN Charter art 96.

⁴² *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Advisory Opinion) [1996] ICJ Rep 66.



question was resubmitted by the UNGA, at which point the Court proceeded to provide an answer.⁴³ Further, while the issue of climate change has ethical and political dimensions, this is no bar to the questions being ‘legal’. As the Court stated in the *Kosovo* case:

‘Moreover, the Court has repeatedly stated that the fact that a question has political aspects does not suffice to deprive it of its character as a legal question.... Whatever its political aspects, the Court cannot refuse to respond to the legal elements of a question which invites it to discharge an essentially judicial task, namely, in the present case, an assessment of an act by reference to international law. The Court has also made clear that, in determining the jurisdictional issue of whether it is confronted with a legal question, it is not concerned with the political nature of the motives which may have inspired the request or the political implications which its opinion might have.’⁴⁴

The Court has stated that a request for an advisory opinion should not, in principle, be refused.⁴⁵ As discussed below in further detail, the request contains questions clearly meeting the three components. Therefore, the Court will likely find that it has jurisdiction to deliver its opinion.

3. *Substance*

3.1. *The legal questions*

The formulation of the questions put before the Court is crucial to the outcome of the advisory proceedings. The questions that the Court is called to answer in the present proceedings are:

‘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

⁴³ *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226 [hereinafter *Nuclear Weapons Advisory Opinion*].

⁴⁴ *Kosovo Advisory Opinion* (n 10) para 27.

⁴⁵ For an overview, see J Crawford, *Brownlie’s Principles of Public International Law* (OUP 2019) 731.



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,

1. 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?

2. 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?’

The *chapeau* of the question refers to a diverse list of sources which the Court must have regard to while formulating its opinion. This includes human rights and environmental treaties, the UN Charter, and general international law. Instead of restricting the Court’s consideration to a particular legal regime, the question deliberately asks for the entirety of international law to be considered. By asking the Court to access and ground its opinion in diverse sources, it encourages the adoption of a holistic approach in considering how international law applies to the relevant conduct of States.⁴⁶

Question 1 asks the Court to identify and clarify States’ obligations under international law that govern a specific conduct, namely acts and

⁴⁶ For more on the ICJ’s role in promoting coherence and integration in international law see eg G Abi-Saab, ‘Fragmentation or Unification: Some Concluding Remarks’ (1998) 31 New York U J Intl L & Politics 919; P-M Dupuy, ‘The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice’ (1999) 31 New York U J Intl L and Politics 791, 798-801; P-M Dupuy, ‘The Unity of Application of International Law at the Global Level and the Responsibility of Judges’ (2007) 1 Eur J of L Studies; JI Charney, ‘The Impact on the International Legal System of the Growth of International Courts and Tribunals’ (1999) 31 New York U J of Intl L and Politics 697, 707-8; B Simma, ‘Universality of International Law from the Perspective of a Practitioner’ (2009) 20 Eur J Intl L 265. See also the ILC Study Group, ‘Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law’ UN Doc A/CN.4/L.682 (13 April 2006) 428.

omissions that have caused significant harm to the climate system and other parts of the environment. It has several important elements. Firstly, when read with the *chapeau*, the question invites the Court to identify and clarify obligations under the entire corpus of international law. The Court may, for example, find that preventing significant harm to the climate system and other parts of the environment is an obligation both under customary international law and under relevant international treaties, several of which are explicitly mentioned in the *chapeau*. Obligations derived from customary international law will be particularly important, as these obligations may cover a longer timespan than some of the treaty obligations and generally apply to all States. Secondly, the term ‘climate system’ encompasses the various interconnected components of the Earth system impacted by climate dynamics, such as the atmosphere, oceans, biosphere, and cryosphere. Similarly, the expression ‘anthropogenic emissions of greenhouse gases’ refers to emissions generated by human activities that contribute to global warming and encompasses a range of gases including carbon dioxide, methane, nitrous oxide, and fluorinated gases. Thirdly, the question recognises that these obligations are owed to other States, present generations, and future generations. Amongst other things, this emphasises the enduring impact of climate change on both current and future generations, underscoring the necessity of addressing the long-term implications of anthropogenic emissions. In what could be a particularly interesting part of the opinion, the Court is being encouraged to clarify and develop the law on future generations’ rights to protection from climate change.⁴⁷

While Question 1 is aimed towards identifying and clarifying specific obligations of States governing the conduct that has caused significant harm to the climate system and other parts of the environment, Question 2 asks the Court to determine the legal consequences under these obligations. This question contains a myriad of important elements, some of which we highlight here. Firstly, the question explicitly recognizes that legal consequences may arise not only from States’ positive actions but also from a failure to act in a manner consistent with its obligations under

⁴⁷ Here it could draw on eg the Maastricht Principles on the Human Rights of Future Generations (3 February 2023) <www.ohchr.org/sites/default/files/documents/new-york/events/hr75-future-generations/Maastricht-Principles-on-The-Human-Rights-of-Future-Generations.pdf>.

international law. Secondly, the question (in its first sub-clause) brings out the point that certain States, including, in particular, small island developing States, are not only ‘particularly vulnerable’ to the adverse effects of climate change but also ‘specially affected’ or ‘injured’. This asks the Court to consider the uneven impacts and burdens of climate change in the formulation of its opinion, thus bringing it closer to the experience and expectations of climate-vulnerable States. At the same time, it highlights the legal entitlements of these States that arise under the general law of State responsibility by virtue of their being ‘injured’ or ‘specially affected’. Fourthly, the second sub-clause shifts the focus from obligations towards States to obligations towards peoples and individuals. This ensures attention to the legal situation of rightsholders who, like climate-vulnerable States, bear the greatest brunt of climate change despite having contributed the least to its causes.⁴⁸

3.2. *Relevant jurisprudence*

Although the ICJ has never ruled in a case directly involving climate change, it has adjudicated several environmental disputes and issued advisory opinions that are relevant to the present proceedings. The body of jurisprudence that the Court might draw upon is too vast to cover in this brief contribution, but it is worth providing illustrative examples. The first is the *Nuclear Weapons* (1996) Advisory Opinion, where the Court recognised that the environment ‘is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn’.⁴⁹ It further stated that:

‘The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment’.⁵⁰

This statement is widely understood as indicating that the principle of prevention of significant environmental harm is a rule of customary

⁴⁸ F Sultana, ‘The Unbearable Heaviness of Climate Coloniality’ (2022) 99 Political Geography <www.sciencedirect.com/science/article/abs/pii/S096262982200052X>.

⁴⁹ *Nuclear Weapons* Advisory Opinion (n 43) para 29.

⁵⁰ *ibid.*

international law; an understanding repeatedly confirmed by the Court itself.⁵¹ Broadly speaking, the prevention principle obliges States to prevent, reduce, and control the risk of environmental harm to other States,⁵² with international decisions indicating that this obligation extends to ‘areas beyond national control’⁵³ and that it is an obligation owed *erga omnes*.⁵⁴

The Court’s reference on ‘sustainable development’ in the *Gabcikovo-Nagymaros* (1997) case are likewise significant to the present proceedings.⁵⁵ The principle of equitable and reasonable utilisation of shared resources, as underscored by the Court, could be particularly pertinent in clarifying the obligations of States vis-à-vis climate protection. The *Pulp Mills* (2010) case presents another influential precedent, where the Court emphasised the duty of due diligence and the principle of

⁵¹ ICJ, *Gabcikovo-Nagymaros Project (Hungary v Slovakia)* Judgment [1997] ICJ Rep 1997 7 para 140; *Pulp Mills on the River Uruguay (Argentina v Uruguay)* Judgment [2010] ICJ Rep 14 para 101; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica)* Judgment [2015] (II) ICJ Rep 706 para 104; *Dispute over the Status and Use of the Waters of the Silala (Chile v Bolivia)* Judgment [2022] ICJ Rep 614 para 83 and 99. See further P Sands, J Peel, *Principles of International Environmental Law* (CUP 2012) 191; V Nanda, G Pring, *International Environmental Law and Policy for the 21st Century* (Nartinus Nijhoff 2003) 21; Cf J Vinuales, *The Contribution of the International Court of Justice to the Development of International Environmental Law: A Contemporary Assessment* (2008) 32 Fordham Intl L J 246.

⁵² Crawford (n 45) 356-357.

⁵³ *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)*, Advisory Opinion of 2 April 2015 [2015] ITLOS Rep 4 paras 111, 120; *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean*, Order of 25 April 2015 (Provisional Measures) [2015] ITLOS Rep 146 para 68-73; *In the matter of the South China Sea Arbitration before and Arbitral Tribunal constituted under Annex VII of the United Nations Convention on the Law of the Sea*, PCA Case No 2013-19 Award (12 July 2016) para 927; *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v Russian Federation)*, PCA Case No 2017-06, Award concerning the preliminary objections of the Russian Federation (21 February 2020) para 295; *Advisory Opinion OC-23/17 of November 15, 2017, requested by the Republic of Colombia: The Environment and Human Rights (State obligations in relation to the environment within the framework of the protection and guarantee of the rights to life and to personal integrity – interpretation and scope of Articles 4.1 and 5.1 in relation with Articles 1.1 and 2 of the American Convention on Human Rights)* para 131.

⁵⁴ See eg Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001) II/2 YB of the International Law Commission 26 art 48 commentary paras 7 and 10.

⁵⁵ *Gabcikovo-Nagymaros* (n 51) para 140.



prevention, including in connection with Environmental Impact Assessments (EIAs).⁵⁶ The duty of due diligence imposes a stringent standard to assess whether a State has breached its obligations to prevent significant harm to the environment, including the climate system. Concurrently, the emphasis on EIAs implies a duty on States to foresee and assess the climate impacts of their actions. As noted above, the principle of prevention, a corollary to due diligence, forms a crucial part of the legal framework for interpreting States' obligations.

The *Whaling case* (2014) also potentially contributes to understanding the due diligence obligations of States under international law within the framework of sustainable development and resource management.⁵⁷ Another important contribution of this case could be methodological. The Court's close engagement with scientific evidence in that case, shown through cross-examination and dialogue with scientific experts, could guide the Court in the proceedings.⁵⁸ Furthermore, the Court may deepen its understanding of the scientific evidence by appointing experts, as it has done in several contentious cases.⁵⁹

In the joined cases of *Certain Activities* case (2015), the Court engaged in-depth with principles of international environmental law and the general law of State responsibility.⁶⁰ The essence of the dispute revolved around environmental harm, and the Court's determination of the legal consequences for States under international law for environmental harm-causing acts and omissions offers valuable insights. Particularly relevant is its confirmation that environmental damage is compensable under international law. When building on these findings in the present proceedings, the Court could be informed by several key norms and

⁵⁶ *Pulp Mills on the River Uruguay* (n 51).

⁵⁷ *Whaling in the Antarctic (Australia v Japan: New Zealand intervening)* Judgment [2014] ICJ Rep 3.

⁵⁸ Although the *Whaling case* (n 57) was a contentious one, the procedure developed in that case may still be used in the current proceedings per art 68 of the ICJ Statute: 'In the exercise of its advisory functions the Court shall further be guided by the provisions of the present Statute which apply in contentious cases to the extent to which it recognizes them to be applicable.'

⁵⁹ See E Borge, N Oral, 'The ICJ should appoint experts in the advisory proceedings in Obligations of States in respect of Climate Change' (National University of Singapore 2023) <<https://cil.nus.edu.sg/blogs/the-icj-should-appoint-experts-in-the-advisory-proceedings-in-obligations-of-states-in-respect-of-climate-change/>>.

⁶⁰ *Certain Activities Carried Out by Nicaragua in the Border Area* (n 15) 665.



principles highlighted in resolution 77/276, including the principles of equity and Common but Differentiated Responsibilities and Respective Capabilities (CBDR-RC), intergenerational equity, and international human rights norms, including the right to a remedy.

In contrast to other international courts, the ICJ has the advantage that it is a court of general jurisdiction; it may answer the legal questions from a variety of perspectives, and access diverse jurisprudence. This places the ICJ in a unique position to provide the international community with guidance about States' obligations and their legal consequences under the corpus of international law as a whole.⁶¹ For example, in connection with the Paris Agreement,⁶² the ICJ could 'emphasize that, under international law, raising NDC ambition is a matter not of "discretion" but of "diligence" and, more specifically, the kind of diligence that is legally required under both the Paris Agreement and other applicable rules of international law.'⁶³

3.3. *Human rights*

As is clear from the questions posed to the Court, international human rights law forms another critical aspect of the legal framework to be clarified and applied in an advisory opinion. This includes the right of peoples to self-determination, which the Court has recognized as 'one of the essential principles of contemporary international law'⁶⁴ giving rise to

⁶¹ T Mayr, J Mayr-Singe, 'Keep the Wheels Spinning: The Contributions of Advisory Opinions of the International Court of Justice to the Development of International Law' (2016) 76 *Harvard J Int L* 442.

⁶² D Bodansky, 'The Legal Character of the Paris Agreement' (2016) 25 *Rev Eur Comparative and Intl Environmental L* 142.

⁶³ J Aguon, M Wewerinke-Singh, 'How Vanuatu's Climate Campaign Could Save the World' *The Nation* (2023) <www.thenation.com/article/environment/vanuatu-icj-climate-change-united-nations/>.

⁶⁴ *East Timor (Portugal v Australia)* Judgment [1995] ICJ Rep 90 para 29. Further, the European Court of Justice has affirmed that the principle of self-determination, as referred to in the UN Charter, is a 'customary principle' and among the 'rules of general international law': see, respectively, European Court of Justice, Judgment of 21 December 2016, *Council v Front Polisario*, C-104/16 P, EU:C:2016:973 para 88; European Court of Justice, Judgment of 27 February 2018, *The Queen, on the application of Western Sahara Campaign UK v Commissioners for Her Majesty's Revenue and Customs and Secretary of State for Environment, Food and Rural Affairs*, C-266/16 para 63.

erga omnes obligations.⁶⁵ In addition, it includes the human rights and related obligations emanating from the UN Charter, the International Bill of Rights, the Convention on the Rights of the Child and other sources. Significantly, Resolution 77/276 further refers to the right to a clean, healthy, and sustainable environment ('R2HE'),⁶⁶ which the UNHRC and the UNGA expressly recognized as a human right in recent resolutions.⁶⁷ Additionally, the R2HE is recognized in the majority of the world's constitutions and regional human rights treaties.⁶⁸ Schabas has concluded that 'there is compelling evidence for a human right to a safe, clean, healthy, and sustainable environment under customary international law.'⁶⁹ The present proceedings present a momentous opportunity for the Court to confirm the R2HE's customary character and clarify its content and derivative obligations.

Together, these precedents provide a robust foundation that could guide the Court in its interpretation of States' obligations and legal consequences related to climate change in the upcoming advisory opinion. However, the precise application of these principles will be influenced by the legal arguments put forth by the participating States and organisations.

4. *The effects of Advisory Opinions*

The ICJ's Advisory Opinions are not binding *per se*, and, unlike judgments in contentious cases, they do not create direct legal obligations for

⁶⁵ *East Timor (Portugal v Australia)* Judgment [1995] ICJ Rep 102 para 29; Chagos Advisory Opinion (n 10) para 180; Wall Advisory Opinion (n 10) paras 88, 155-156. See also, Human Rights Committee, General Comment No 12: Article 1 (Right to Self-determination) (adopted at twenty-first session on 13 March 1984) para 5.

⁶⁶ See 'Joint statement of United Nations entities on the right to healthy environment' (UNEP 2021) <www.unep.org/news-and-stories/statements/joint-statement-united-nations-entities-right-healthy-environment>.

⁶⁷ UNHRC Res 48/13 para 1 (adopted by 43 votes to none, 4 abstentions) UN Doc A/HRC/RES/48/13 (18 October 2021); UNGA Res 76/300 para 1 (adopted by 161 votes to none, 8 abstentions) UN Docs A/RES/76/300 (1 August 2022).

⁶⁸ See UNHRC, 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment' UN Doc A/HRC/43/53 (30 December 2019); DR Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights and the Environment* (U British Columbia Press 2012).

⁶⁹ W Schabas, *The Customary International Law of Human Rights* (OUP 2021) 337.



States. What outcome, then, may we expect from the process? Writing in 1983, Lachs noted that Advisory Opinions:

‘...offer the Court a much greater potential to further develop the law than do judgments in contentious proceedings: the former, unlike the latter, are not limited to a strict analysis of the facts and submissions that are presented to the Court. An advisory opinion may be broader in scope, focusing on issues indirectly related to the fact pattern, so long as the goal of providing an answer to the question is achieved. Consequently, the drafting of an advisory opinion gives greater liberty to write persuasively and enter a wider domain of law.’⁷⁰

An example of the ICJ’s contributions to the development of international law was seen in its advisory opinion *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*.⁷¹ Before this Advisory Opinion a reservation to a treaty required the acceptance of all other contracting parties. The Court rejected this rigid approach and focused instead on the object and purpose of a treaty. The so-called ‘compatibility’ criterion was subsequently adopted in the 1963 Vienna Convention on the Law of Treaties.⁷² The present Advisory Opinion could likewise play a critical role in the clarification and development of international law relating to climate change.⁷³

The ways in which the Court identifies and clarifies the law — possibilities have been explored above — are poised to have a significant impact on State practice, too. For example, following past practice, the UNGA could adopt a resolution affirming its acceptance of the advisory opinion, and consider its future actions on climate change to be guided accordingly.⁷⁴ The opinion would provide a strong ‘justifying effect’ to actions for

⁷⁰ M Lachs, ‘Some Reflections on the Contribution of the International Court of Justice to the Development of International Law’ (1983) 10 *Syracuse J of Intl L and Commerce* 239.

⁷¹ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* Advisory Opinion [1951] ICJ Rep 15.

⁷² See ‘Guide to Practice on Reservations to Treaties’ (2011) II/3 YB of the International Law Commission 153–154.

⁷³ For other examples in the influence of advisory opinions, see eg K Oellers-Frahm, ‘Lawmaking through Advisory Opinions?’ (2011) 12 *German L J* 1041.

⁷⁴ J A Frowein, K Oellers-Frahm, ‘Article 65’, in A Zimmermann, K Oellers-Frahm, C Tomuschat, CJ Tams, M Kashgar (eds), *The Statute of the International Court of Justice: A Commentary* (OUP 2012) 1622.

climate protection taken by international organizations and States acting in line with the Court's findings, such that no State could plausibly argue that those actions are outside the law.⁷⁵ Conversely, should the Court find that certain State conduct relating to climate protection is in breach of international legal obligations, particularly *erga omnes* obligations, States would be justified to take up that issue and 'bring pressure on [the breaching] State to conform with international law'.⁷⁶

Even if an opinion lays down broad principles, it would accelerate, complement and facilitate international climate negotiations by 'setting the terms of the debate, providing evaluative standards... and establishing a framework of principles within which negotiations may take place to develop more specific norms'.⁷⁷ Judicial determinations of climate science and law would (at best) place those issues outside the realm of debate for international actors. An opinion could also act as an invaluable resource for climate litigation at the domestic, regional, and international levels. Due to its authority in international law, the Court's findings and reasoning are accorded high importance and deference by courts and tribunals. It is likely to be used by courts to 'to support conclusions drawn on the basis of legislation, or to fill gaps in national law'.⁷⁸ Thus, while an opinion may not have direct precedential value, it would greatly — if not conclusively — influence the outcome of climate justice cases.

Furthermore, an opinion would have equally important non-legal effects, shaping the conduct of States and even non-state actors.⁷⁹ Perhaps most importantly, it could spur and (re)invigorate climate action by various groups, especially youth groups, by providing a tangible example of local activism turning into global action for climate justice.

⁷⁵ *ibid* 1624.

⁷⁶ *ibid* 1627.

⁷⁷ D Bodansky, 'Customary (and Not So Customary) International Environmental Law' (1995) 3 *The Indiana J of Global L Studies* 105, 119.

⁷⁸ A Nollkaemper, 'Conversations Among Courts: Domestic and International Adjudicators' in K Alter, CPR Romano, Y Shany (eds) *Handbook of International Adjudication* (CUP 2013) 523, 538.

⁷⁹ World's Youth for Climate Justice, 'Human rights in the face of the climate crisis: a youth-led initiative to bring climate justice to the International Court of Justice' (2021) 72 <<https://static1.squarespace.com/static/5f063a0c8f53b604aed84729/t/60e53dd9d93f1a66fb57edad/1625636347082/Human+rights+in+the+face+of+the+climate+crisis%3A+a+youth-led+initiative+to+bring+climate+justice+to+the+International+Court+of+Justice>>; Immediately after the judgment in the *Whaling in the Antarctic* (n 58) case was delivered, the Japanese retailer Rakuten halted its sales of whale meat.

5. Conclusion

The request for an advisory opinion from the ICJ represents a historic juncture in the evolution of international climate change law. It provides an opportunity for the Court to clarify the contours of States' obligations to combat anthropogenic climate change and the legal consequences of these obligations in connection with particular conduct. The breadth of the questions posed to the Court reflects a deliberate effort to ensure that the full spectrum of international law, from human rights to environmental treaties, is brought to bear on the unprecedented challenge of climate change.

The participation of a diverse array of States and international organisations in the advisory proceedings underscores that addressing the climate crisis is of global concern. Broad participation and contributions will enrich the Court's understanding of the complex legal dimensions of climate change and add extra legitimacy to proceedings. The involvement of entities like the IUCN expands the boundaries of participants, highlighting the uniqueness of the current proceedings.

Although not legally binding *per se*, an advisory opinion has the potential to significantly impact both legal and non-legal spheres. Within the legal sphere, it is poised to advance the development of international law by clarifying the scope of States' obligations regarding climate change and their legal consequences for States that have caused significant harm to the climate system and other parts of the environment. This could, in turn, influence future climate litigation and policy-making at both international and domestic levels.⁸⁰ Outside the legal sphere, a strong advisory opinion would not only validate global climate activism but also potentially galvanize further action to address climate change and grapple with its consequences. The initiative offers a beacon of hope and a call to action, reaffirming the role of international law as a dynamic tool in addressing some of the most pressing global challenges of our time.

Thus, the advisory proceedings before the ICJ mark a critical step in the global response to the climate crisis. The legal process itself exemplifies how international legal institutions can adapt and respond to emerging global challenges, reinforcing the relevance and resilience of

⁸⁰ A Savaresi, 'Inter-State Climate Change Litigation: "Neither a Chimera nor a Panacea"' in I Alogna, C Bakker, J-P Gaucci (eds), *Climate Change Litigation: Global Perspectives* (Brill Nijhoff 2021) 366-392.

international law. The outcome of these proceedings will undoubtedly have far-reaching implications, setting a precedent for how the international community addresses complex global issues like climate change based on widely accepted international legal rules and principles, now and in the future.