

It is so decided: Promoting climate justice through international law

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On 29th March 2023, the [United Nations General Assembly \(UNGA\)](#) adopted Resolution [A/RES/77/276](#) which requests an advisory opinion from the International Court of Justice (ICJ) on the matter of State Responsibility for addressing the Climate Change crisis. The Resolution was adopted by consensus, reflecting broad agreement amongst States that climate change is one of the most pressing shared problems that the international community is facing and that interpretation of existing international law on this matter would strengthen the mitigation and adaptation processes of all States.

Following this historic moment of adoption of a UNGA resolution by consensus, this blog post builds on BIICL's webinar series '[Rising Sea Level: Promoting Climate Justice through International Law](#)' hosted by BIICL in May 2021 and the webinar hosted in February 2023 '[Promoting Climate Justice through International Law: Climate Litigation and Advisory Opinions](#)'. These events reflected on Vanuatu's leadership with the support of [18 core group States and 132 co-sponsors](#) and two youth-led campaigns that believe opening a judicial advisory proceeding on this matter would help bolster climate action globally, regionally, and nationally.

What does the Resolution Ask the ICJ?

When seeking an advisory opinion from the ICJ, the process of formulating the question in the resolution is a crucial and strategic one. In the current case, the questions are built on legal and factual foundations laid out in the operative text of the document. The operative text emphasises international covenants and treaties such as the Charter of the United Nations, [the Universal Declaration of Human Rights](#), [the International Covenant on Civil and Political Rights](#), [the International Covenant on Economic, Social and Cultural Rights](#), [the Convention on the Rights of the Child](#), [the United Nations Convention on the Law of the Sea](#), [the Paris Agreement](#), and [the United Nations Framework Convention on Climate Change](#). These instruments lay the legal foundation of the questions in this resolution. Secondly, it puts forth a compelling reason for the ICJ to give an advisory opinion on a factual and existential issue, which is the need to clarify the obligations of States to mitigate and adapt to climate change. It also clarifies that the General Assembly intends to seek legal guidance from the ICJ on matters relating to equity, sustainable development, and the protection of climate systems, the marine environment, and human rights from adverse effects of climate change.

Based on this, the UNGA has asked two questions to the ICJ, of which, the first asks the Court to identify the legal obligations of States (...); the second asks the Court to specify the legal consequences of breach(es) of these legal obligations by acts or omissions that cause significant harm to the environment (...). The second question is subdivided which further narrows down the scope. The questions read as follows:

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

Thus, the resolution aims to ask the Court to clarify the scope of legal obligations of States and the legal consequences States would face in case of violations. In answering these questions, it is hoped that the Court will clarify principles of international law and customary law, such as transboundary harm, the duty to cooperate, equity with a focus on inter-generational and intra-generational equity, common but differentiated responsibility and respective capabilities, and the duty of due diligence, among others, all in the context of climate adaption and mitigation.

What can the International Court of Justice do?

The ICJ is the principal judicial organ of the United Nations. It can adjudicate two types of proceedings: i) Contentious proceedings, i.e. a dispute between two or more States, and ii) Advisory Proceedings, i.e. the Court can give an opinion on legal questions at the request of whatever body that may be authorised in accordance with the Charter of the United Nations. Article 96(1) of the UN Charter and Article 65(1) of the ICJ Statute provide the conditions which need to be satisfied for the ICJ to give an advisory opinion. Although the ICJ has discretion in deciding whether to entertain a request for an advisory opinion, it cannot refuse to give an advisory opinion unless there are 'compelling reasons' for such a refusal, especially when the statutory conditions (as under Article 96(1) of the UN Charter and Article 65(1) of the ICJ Statute) have been met. In the *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* (Nuclear Weapons advisory opinion), Judge Weeramantry, in his dissenting opinion, observed that the Court would be 'discharging its duty of clarifying and developing the law' by giving the advisory opinion. It can, therefore, be argued that the ICJ's discretion is not absolute, but is circumscribed by the overriding principle of the Court's duty. Moreover, advisory opinions are ultimately 'pronouncements' by the Court regarding the law applicable to specific issues, which the Court has authority to give as part of its judicial function.

In the present case, the legal basis of the questions has been set out in the operative text of the resolution, as discussed above. Moreover, the questions also delve into the existence and scope of legal obligations of States as enshrined in international law through covenants, treaties, and agreements. In response to the first question, the Court is asked to clearly set out States' obligations with respect to the protection of climate systems and the marine environment. In response to the second question, the Court is asked to set out the legal consequences for States that breach these obligations, with respect to the protection of human rights (including from the perspective of intergenerational equity) and climate vulnerable States.

Since its establishment in 1946, the ICJ has given 28 advisory opinions. These, along with the Court's judgments in contentious cases, have played a major role in clarifying and developing international law. With respect to the environment, the Court has developed extensive jurisprudence. In the Nuclear Weapons advisory opinion, the Court observed that there was '*a general obligation to protect the natural environment against widespread, long-term and severe environmental damage.*' Similarly, in the *Gab?ikovo-Nagymaros Project case*, the Court held that the norms of environmental law are relevant to the implementation of a treaty between the two countries. In the *Pulp Mills case*, the Court emphasised environmental impact assessment as a principle of customary international law. In the *Whaling in the Antarctic case*, the Court examined in depth the adverse impacts of whaling, while taking into consideration the scientific evidence on marine environment protection. In the case of *Certain Activities Carried out by Nicaragua in the Border Area and Construction of a Road in Costa Rica along the San Juan River*, the Court ordered Nicaragua to compensate and pay damages to Costa Rica for injury to wetlands and rainforests in the territory of Costa Rica. In the case of *Dispute over the Status and Use of the Waters of the Silala*, the Court held that in certain circumstances, when 'there is a risk of significant transboundary harm' an obligation to notify and consult other riparian States concerned is applicable as it is held to be part of customary international law. Given this track record it could be argued that the ICJ is a friendly yet authoritative avenue through which States' obligations for controlling their greenhouse gas emissions can be determined.

Although advisory opinions are not binding, and some States are not easily influenced even by the binding decisions of the ICJ, many States would consider the enumeration of obligations and consequences in this advisory opinion as a mandate for implementing climate policies at national and regional levels. Acknowledging that the Court may not render a helpful advisory opinion, the potential positive outcomes outweigh the risks of a regressive answer from the Court. One positive outcome among others is that it would be an erudite interpretation of the existing international environmental law in the specific context of climate change mitigation and adaptation. Another benefit would be its impression on domestic and regional courts, which would view this advisory opinion as a leading authority. It could help these courts to frame their decisions, especially when confronted with issues that may not be governed by their respective national legislation or policy. For example, the advisory opinions requesting the *International Status of West Africa* and the *Legal Consequences of the Continued Presence of South Africa in Namibia (South West Africa)* had a significant role to play in the abolishment of apartheid and in framing international treaties and national legislation against discrimination based on race. Similarly, in the advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the ICJ found that the wall being built by Israel in the Occupied Palestinian Territory, including in and around East Jerusalem, was contrary to international law. This issue arose again in the case of *Mara'abe and Ord v. Prime Minister of Israel* before the Supreme Court of Israel. It was held that the ICJ's pronouncement was not 'res judicata'; instead, the Court recognised that 'the opinion of the International Court of Justice is an interpretation of international law, performed by the highest judicial body in international law...and it should be given its full appropriate weight'. Thus, the influence of such opinions on States reiterates that advisory opinions carry legal weight and emphasises the importance of the advisory jurisdiction.

Independent of this advisory opinion from the ICJ, there have been parallel requests for advisory opinions on climate change before other international courts. For instance, Chile and Colombia have moved the InterAmerican Court of Human Rights (IACtHR) for an advisory opinion on the integration of climate change law and human rights law. Another advisory request from the Commission of Small Island States has been submitted to the International Tribunal for the Law of the Sea (ITLOS) on matters related to climate change and law of the sea. These advisory opinions not only support the ICJ advisory request but also affirm the demand of the international community for judicial interpretation of issues related to climate change and the law of the sea. In light of these multiple

requests, it is important to note the risk of fragmentation of law. However, none of the international tribunals have dealt with the issue of climate change before. It can therefore be argued that whichever court issues an advisory opinion first, could serve as [a reference point](#) for the others. It is important to note that the questions asked to all these courts reflect on the sustainable use of the planet's shared resources. In giving their opinion, the [IACtHR](#) and the [ITLOS](#) are bound by their jurisdictional limits, while the ICJ has a broader jurisdiction which can elaborate on the application and interpretation of the range of applicable [international standards including treaty law, customary international law as well as general principles](#). This could perhaps reduce the risk of fragmentation.

Who planted the Seeds?

In 2011, the Pacific island States of [Palau](#) and the [Marshall Islands](#) were the first to move the [UNGA](#) to seek an advisory opinion from the ICJ on issues related to climate change. Standing on the shoulders of this effort, 27 students from the University of the South Pacific built a [campaign \(PISFCC\)](#) to seek an advisory opinion from the ICJ on climate change law and human rights law. In 2019, they persuaded the leaders of the [Pacific Island Forum \(PIF\)](#) to take the issues related to climate change and human rights to the International Court of Justice. Recognising the global nature of the campaign, and after gaining support from civil society, in 2020, the group of young people from Asia, Africa, Latin America, and Europe organised themselves as the [World's Youth for Climate Justice \(WYCJ\)](#) to amplify the need for this advisory opinion from the ICJ. The youth advocated to ask the question '*what are the legal obligations of the State to protect the rights of the present and future generations from the adverse effects of climate change?*'. In September 2021, the Government of Vanuatu officially declared that it would pursue the UNGA route to seek the advisory opinion from the ICJ. In support of this, and to amplify public demand, the civil society movement grew exponentially in 2022 and formed an Alliance for a Climate Justice Advisory Opinion. This Alliance represents more than 1600 separate organisations, from numerous grassroots associations to large non-governmental organisations.

Building upon these momentous efforts since 2019, March 29th 2023 marks a victory for the youth and civil society, along with excellent leadership from Vanuatu. In spite of inefficiency in collective State actions to lower greenhouse gas emissions to maintain temperature below 1.5 degrees Celsius, there seems to be light at the end of the tunnel due to the '*power of the people*'.

[Further reading on ICJ Advisory Procedure](#)

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URL: <https://www.biicl.org/blog/56/it-is-so-decided-promoting-climate-justice-through-international-law>