

VANUATU LEADS DRIVE TO SECURE AN OPINION FROM THE INTERNATIONAL COURT OF JUSTICE ON STATE RESPONSIBILITIES TO TURN WORDS INTO ACTION ON CLIMATE CHANGE

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In 2022, the Pacific-island State of Vanuatu declared a climate emergency. Though it is not the first nation to do so, the difference is that Vanuatu has been instrumental in getting the United Nations General Assembly ('UNGA') to refer the issue of climate change to the International Court of Justice ('ICJ') for an Opinion. The intention to do this was first mooted by a civil organisation of young people: 'The Pacific Island Students Fighting Climate Change'. The proposal gathered momentum with an alliance of civil society actors and subsequently other states supporting and co-sponsoring the resolution passed by UNGA. The Paris Agreement and Paris Rulebook are steps forward but need implementation. A legal framing of international obligations could advance this. While an ICJ opinion would have no legally binding effect, it could nevertheless be of some practical benefit in a context where there is increasing recognition of the link between existing human rights and the environment and growing demand — particularly by those most adversely affected — for translating promises into action. This article considers the imperatives behind this call to the ICJ, the potential challenges that may be raised before the Court, and the possible outcomes for this initiative.

I INTRODUCTION

Climate change impacts all countries and all people but in particular island states with limited resources to mitigate the effects of rising seas, king tides, drought and increasingly heavy tropical rainstorms, all of which aggravate the many weather-related disasters with which these places are already familiar. The vulnerability of small islands and atolls to the adverse impacts of climate change has long been recognised.¹ The Intergovernmental Panel on Climate Change

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¹ See generally Maxine Burkett, 'A Justice Paradox: On Climate Change, Small Island Developing States, and the Quest for Effective Legal Remedy' (2013) 35 *University of Hawai'i Law Review* 633.

(‘IPCC’) noted this in its First Assessment Report in 1990,² and the 1992 *United Nations Framework Convention on Climate Change* (‘UNFCCC’) makes special reference to small island countries and those with low-lying coastal areas.³ In 2007, the Fourth Assessment Report of the Intergovernmental Panel on Climate Change established a clear link between human activity and climate change,⁴ thereby adding weight to the body of scientific research that had been suggesting this for some time.⁵ The Report of Working Group III includes a chapter dedicated to small islands. Key findings highlighted that sea-level rise would ‘exacerbate inundation, storm surge, erosion, and other coastal hazards, thus threatening vital infrastructure, settlements and facilities that support the livelihood of island communities.’⁶ Pacific-island states were identified as among the most vulnerable countries.

In early 2022, the Pacific-island State of the Republic of Vanuatu declared a climate emergency.⁷ The Prime Minister stated, ‘[w]e are in danger now, not just the future ... Vanuatu’s responsibility is to push responsible nations to match action to the size and urgency of the crisis ... the use of the term emergency is a way of signalling the need to go beyond reform as usual’.⁸

While not the first country to make such a declaration, the government of Vanuatu proposed to take the climate emergency a step further by seeking to persuade other states to support a United General Assembly resolution to ask the International Court of Justice for an opinion. Impetus for this initiative originated among law students at the University of the South Pacific in 2019.⁹ A group called Pacific Island Students Fighting Climate Change (‘PISFCC’) articulated the idea and garnered support from other civil societies, regional leaders and the then Foreign Minister for Vanuatu. In 2019, Vanuatu tabled the PISFCC proposal at the

² Intergovernmental Panel on Climate Change, ‘Climate Change: the IPCC 1990 and 1992 Assessments’ (First Assessment Report, 1992) 2.4.1.

³ *United Nations Framework Convention on Climate Change*, opened for signature on 4 January 1992, 1771 UNTS 107 (entered into force 21 March 1994) arts 4.8(a) (‘Small island countries’), 4.8(b) (‘Countries with low-lying coastal areas’) (‘UNFCCC’).

⁴ Intergovernmental Panel on Climate Change, ‘Climate Change 2007: Synthesis Report’ (Fourth Assessment Report, 2007) (‘Fourth Assessment Report’).

⁵ The 2007 Climate Change Report was the product of three working groups looking at the physical science bases, impacts, adaptation and vulnerability, and mitigation of climate change, and was put forward as ‘the standard scientific reference for all those concerned with the consequences of climate change’: Intergovernmental Panel on Climate Change, ‘Climate Change 2007: Impacts, Adaptation, Vulnerability (Contribution of Working Group III to the Fourth Assessment Report of the IPCC, 2007) front matter (‘Impacts, Adaptation, Vulnerability’).

⁶ Ibid 689.

⁷ ‘Vanuatu Declares a Climate Emergency’, *Radio New Zealand* (online, 30 May 2022) <<https://www.mz.co.nz/international/pacific-news/468020/vanuatu-declares-a-climate-emergency>>.

⁸ ‘We Are in Danger Now: Vanuatu Declares Climate Emergency’, *Aljazeera* (online, 28 May 2022) <<https://www.aljazeera.com/news/2022/5/28/we-are-in-danger-now-vanuatu-declares-climate-emergency>>.

⁹ Sarina Theys, ‘#EndorsetheAO: Pacific Islands Students Fighting for Climate Change and the International Court of Justice’ (2022) 27 *Comparative Law Journal of the Pacific* 73, 73.

Pacific Islands Forum — a regional meeting of Pacific leaders. The Forum noted the proposal within the context of ‘recognising the need to formally secure the future of our people in the face of climate change and its impacts’.¹⁰ At its 2022 meeting, the Forum went further. It commended Vanuatu on its initiative and

called on the UN General Assembly for a resolution requesting the International Court of Justice to provide an advisory opinion on the obligations of states under international law to protect the rights of present and future generations against the adverse impacts of climate change, and looked forward to close collaboration in the development of the specific question to ensure maximum impact in terms of limiting emissions to 1.5 degrees Celsius, including obligations of all major emitters past, present and future.¹¹

In May 2022, an Alliance of 1,500 civil society organisations from over 130 countries was launched in Fiji.¹² The aim of the Alliance was to persuade respective governments to support the proposal to seek an advisory opinion. PISFCC also played a key role in bringing together youth across the globe under the umbrella of World’s Youth for Climate Justice (‘WYCJ’).¹³ The focus of the WYCJ is intergenerational equity to achieve climate justice, premised on the argument that it is young people and the next generation who will suffer the most adverse effects of climate change despite having contributed the least towards it.¹⁴

Civil societies, and indeed individual countries, cannot request an advisory opinion from the ICJ. This has to come from the United Nations General Assembly (or, exceptionally, another United Nations (‘UN’) body).¹⁵ In order to overcome this first hurdle, any request has to be put before the United Nations General Assembly in compliance with the guidelines issued for the preparation, co-sponsorship and submissions of proposals drawn up by the United Nations.¹⁶ A delegation has to give five working days written notice to the Secretariat in line

¹⁰ Pacific Islands Forum Secretariat, ‘Fiftieth Pacific Islands Forum’ (Forum Communiqué 19, 13–16 August 2019).

¹¹ Pacific Islands Forum Secretariat, ‘Fifty-First Pacific Islands Forum’ (Forum Communiqué, 11–14 July 2022).

¹² Theys (n 9) 76.

¹³ Aditi Shetye and Manon Rouby, ‘Climate Justice: Advisory Opinion of the International Court of Justice and the Impact of Youth Advocacy’ (2022) 27 *Comparative Law Journal of the Pacific* 79, 79.

¹⁴ Pacific youth had also been active prior to COP26, holding a hybrid Youth4Pacific Event during the COVID-19 pandemic attended by over 600 young people from 33 countries. This resulted in a Youth4Pacific Declaration delivered to the COP26 President via the British High Commission in Fiji: Alisi Rabukawaqa-Nacewa, ‘A Pacific Island Perspective on COP26’ (Essay, 18 March 2022, The National Bureau of Asian Research).

¹⁵ Under art 96 of the *Charter of the United Nations* and art 65(1) of the *Statute of the International Court of Justice*, advisory opinions can only be sought by five organs of the United Nations and 16 specialised agencies of the UN or affiliated organizations. But only the Security Council or the UNGA may request advisory opinions on ‘any legal question’.

¹⁶ *Guidelines for the Preparation, Co-sponsorship and Submission of Proposals (Draft Resolutions, Draft Decisions and Amendments) for Consideration in the Plenary of the General Assembly*, 76th sess, UN Doc No 22-00301 (February 2022) <https://www.un.org/en/ga/pdf/guidelines_preparation_co-sponsorship_proposals_submission_GA76.pdf>.

with the rules of procedure of the General Assembly and indicate the agenda item under which the proposal is being submitted. This step cannot be taken until the wording of an acceptable proposal is negotiated with other states in order to attract co-sponsorship once the proposal is uploaded to the web portal of the United Nations General Assembly ('UNGA'). Co-sponsorship on the proposal being mooted by Vanuatu was important because, as the Prime Minister of Vanuatu pointed out in his address to the United Nations General Assembly in September 2021, individual national governments were increasingly unable to control the climate crisis: the international community needed to act together. Securing agreement on the wording of the proposed resolution took time, with legal and diplomatic representatives from numerous key nations engaged in the process, both formally and on the side-lines.

Vanuatu finally tabled the Resolution under item 70 of the Agenda at the 77th Session of the United Nations General Assembly as item number 77/276 and it was adopted on 29 March 2023, by consensus,¹⁷ without a vote.¹⁸ Had it not been adopted without a vote it would have been necessary to secure support from at least 97 of the 193 members of the United Nations General Assembly. The Resolution, which was co-sponsored by 107 states,¹⁹ was referred to the ICJ as a request 'for an advisory opinion of the International Court of Justice on the obligations of States in respect of climate change' pursuant to art 65 of the *Statute of the International Court of Justice* (the 'Request')²⁰

The specific questions on which an opinion are sought are:

- (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?

¹⁷ This means that no Member State requested a vote and explains why negotiations over the language used took some time.

¹⁸ UN GAOR, 77th session, 64th plen mtg, Agenda Item 70, UN Doc A/77/PV64 (29 March 2023).

¹⁹ Co-sponsorship is evidenced by member states signing the resolution and means they broadly accept the framing of the resolution.

²⁰ *Request for an Advisory Opinion of the International Court of Justice on Obligations of States in Respect of Climate Change* (GA A/RES/77/276, 4 April 2023) (the 'Request'). The Request was transmitted to the ICJ by the Secretary General of the UN in a letter of 12 April 2023, which was received by the Registry on 17 April 2023. The ICJ acknowledged the Request in a Press Release on 19 April 2023. An outcome is expected within a year, that is, by the end of 2024 or early 2025.

- (ii) Peoples and individuals of the present and future generations affected by the adverse effects of climate change?²¹

This article explores the international legal context in which the Request is sought. It analyses the content of the Request and considers the potential response of the ICJ, taking into account the relevant international framework and States' existing obligations under international law. This article speculates on potential sticking points that might arise, as well as how the Request might be received by the international community.

II CLIMATE-RELATED DEVELOPMENTS IN INTERNATIONAL LAW

A Background

In the international arena, the level of attention paid to the environment and climate change has been building over a number of decades. At the United Nations Conference on the Human Environment (the 'Stockholm Conference') in 1972, for example, parties agreed to 26 principles for the sound management of the environment, including the *Stockholm Declaration*.²² That event also led to the creation of the United Nations Environment Programme ('UNEP'), placing environment and development squarely on the international stage and highlighting the need for international co-operation. In particular, Principle 22 of UNEP declared that 'States shall co-operate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction', establishing unequivocally that states owe obligations beyond the boundaries of their own jurisdictions.

Twenty years later, at the 'Earth Summit' in Rio de Janeiro, the *Rio Declaration*²³ reaffirmed the *Stockholm Declaration* and sought to build on it, by working 'towards international agreements which respect the interests of all and protect the integrity of the global environmental and developmental system'.²⁴

²¹ *Request for an Advisory Opinion of the International Court of Justice on Obligations of States in Respect of Climate Change*, UN Doc A/RES/77/276 (4 April 2023).

²² *Stockholm Declaration and Action Plan for the Human Environment*, GA Res 2994/XXVII, 2995/XXVII and 2996/XXII (15 December 1972), adopted by the United Nations Conference on the Human Environment, Stockholm, 16 June 1972. For background to the Stockholm Conference and discussion of the emergence of science for environment diplomacy, see Eric Paglia, 'The Swedish Initiative and the 1972 Stockholm Conference: The Decisive Role of Science Diplomacy in the Emergence of Global Environmental Governance' (2021) 8(2) *Humanities and Social Sciences Communications* 1.

²³ *Rio Declaration on Environment and Development*, UN Doc A/CONF.151/26 (Vol I) (12 August 1992) annex I ('Rio Declaration').

²⁴ *Ibid*, Preamble. See also David With, 'The Rio Declaration on Environment and Development: Two Steps Forward and One Back or Vice Versa' (1995) 29(3) *Georgia Law Review* 599.

One of the outcomes of the Earth Summit was the *United Nations Framework Convention on Climate Change*²⁵ — the parent treaty to the *Kyoto Protocol*²⁶ and the *Paris Agreement*²⁷ — which recognised climate change as a major concern of humankind, the significance of greenhouse gas emissions and the potential harm to terrestrial and marine ecosystems. A further outcome — relevant to this article — was Principle 10 of the *Rio Declaration*, which referred to environmental procedural rights, including the right to information,²⁸ the right to participate in decision-making and effective access to judicial and administrative proceedings. Clearly, seeking an opinion from the ICJ falls within this envelope.

The Request recalls the *UNFCCC*, the *Kyoto Protocol* and the *Paris Agreement*. The *Kyoto Protocol* was welcomed as a multilateral environmental agreement. Focussed on compliance and state commitments to the reduction of greenhouse gases, it entered into force in 2005. Though ambitious in scope, the weakness of the system lay in poor implementation: many countries did not reach the targets they committed to, and some refused to extend their initial commitment into the second commitment period in 2012.²⁹ While still in force, the *Kyoto Protocol* has been superseded by the *Paris Agreement*.

The *Paris Agreement* marked a significant change in commitment to curb emissions and submit National Determined Contributions ('NDCs'), not only from developed countries, but, in recognition of the international responsibility for global warming, all countries. The *Paris Agreement* brought home the huge significance of climate change and the need to accelerate positive efforts to address global warming. Under the *Paris Agreement*, parties are required to set and communicate NDCs every five years, justify these NDCs and explain measures taken to meet them (the 'transparency framework'). However, parties can unilaterally vary their targets (up or down), and of course they can withdraw from the Agreement altogether — as the United States did under Donald Trump. Considerable media attention attaches to the declaration of NDCs and parties can be named and shamed, but NDCs cannot be enforced. The Request seeks to clarify the obligations attaching to these NDCs, particularly the consequences of non-performance.

²⁵ *United Nations Framework Convention* (n 3).

²⁶ *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, opened for signature 16 March 1998, 2303 UNTS 162 (entered into force 16 February 2005)

²⁷ *Paris Agreement under the United Nations Framework Convention on Climate Change*, opened for signature 22 April 2016, [2016] ATS 24, 3156 UNTS 79 (entered into force 4 November 2016).

²⁸ Now widely recognised in the *Aarhus Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters*, opened for signature 25 June 1998, 2161 UNTS 447 (entered into force 30 October 2001).

²⁹ Esmeralda Colombo, 'Enforcing International Climate Change Law in Domestic Courts: A New Trend of Cases for Boosting Principle 10 of the Rio Declaration?' (2017) 35(1) *UCLA Journal of Environmental Law and Policy* 98.

B *Current Obligations in International Law*

The United Nations Human Rights Council ('UNHRC') has adopted a number of resolutions relevant to climate change. In 2008, it adopted a Resolution in which it expressed the view that 'climate change poses an immediate and far-reaching threat to people and communities around the world and has implications for the full enjoyment of human rights'.³⁰ This has been followed by further Resolutions, all of which acknowledge and reaffirm the strong link between human rights and climate change.³¹ While such resolutions are not binding, the fact that they are adopted is indicative of international support for climate change action, and perhaps a growing consensus that there is a link between climate change and human rights.

There has also been a shift away from just 'words'. In 2015, the United Nations General Assembly adopted the Resolution '*Transforming Our World: the 2030 Agenda for Sustainable Development*',³² which was stated to be 'a plan of action, for people, planet and prosperity'.³³ Closely linked to the seventeen United Nations Sustainable Development Goals ('SDGs'),³⁴ and therefore wider in application than climate change, the Resolution nevertheless includes, under the heading 'Planet' in the Preamble: 'taking urgent action on climate change, so that it can support the needs of the present and future generations'. Two things stand out: the emphasis on 'action' and the date by which action must be taken: 2030. The achievement of SDGs remains a huge challenge in many countries including Small Island Developing States. Common and differentiated responsibilities are acknowledged by the Resolution,³⁵ alongside the overarching theme of the SDGs that no-one should be left behind. 2023 marks the mid-point in achieving SDGs and a recent report suggests that none of the countries in the Asia-Pacific region are on track to achieve the 17 goals.³⁶ Given that climate change impacts basic goals such as access to fresh water, health, food security, terrestrial and marine ecosystems and poverty, future resolutions from the UNGA could become more forceful on this issue.

³⁰ Alejandro Artucio, Vice-President and Rapporteur, *Report of the Human Rights Council on its Seventh Session*, UN Doc A/HRC/7/78 (14 July 2008) 65 (resolution 7/23).

³¹ Specifically *Human Rights and Climate Change*, GA Res 10/4 (25 March 2009), *Human Rights and Climate Change*, GA Res 18/22, UN Doc A/HRC/RES/18/22 (17 October 2011), *Human Rights and Climate Change*, GA Res 26/27, UN Doc A/HRC/RES/26/27 (15 July 2014) and *Human Rights and Climate Change*, GA Res 29/15, UN Doc UN Doc A/HRC/RES/29/15 (2 July 2015).

³² *Transforming Our World: the 2030 Agenda for Sustainable Development*, GA Res 70/1, UN Doc A/70/1, 25 September 2015 (21 October 2015).

³³ *Ibid*, Preamble.

³⁴ The seventeen Sustainable Development Goals can be found on the United Nations website for the Department of Economic and Social Affairs: <<https://sdgs.un.org/goals>>.

³⁵ See for example, paras 21, 55 and 56.

³⁶ United Nations Economic and Social Commission for Asia and the Pacific, *Asia and the Pacific SDG Progress Report 2023*, UN Doc ST/ESCAP/3078 (1 March 2023).

In Resolution 48/13 of 8th October 2021 — which is specifically referenced in the Request — the United Nations Human Rights Council declared a human right to a safe, clean, healthy and sustainable environment.³⁷ The Resolution was the outcome of campaigning by civil society organisations and a 2018 Report by the UN Special Rapporteur for Human Rights and the Environment.³⁸ While the resolution is non-binding and is primarily directed at asking states to adopt policies that give effect to this right, it also lists climate change as one of the obstacles to the enjoyment of the right.

Recognising this, the UN Human Rights Council, at its 48th session in October 2021, agreed the mandate establishing the role of Special Rapporteur on the promotion and protection of human rights in the context of climate.³⁹ The first appointment was made in March 2022, with commencement on 1 May 2022. The current holder, Mr Ian Fry, was Tuvalu's Ambassador for Climate Change and Environment from 2015–19.

In its Resolution 50/9 in 2022,⁴⁰ the Human Rights Council makes a clear link between human rights and climate change, particularly through the lens of food security, and climate induced disasters. It brings together international developments relevant to climate change: the Special Rapporteur, the Sixth Assessment Report of the Intergovernmental Panel on Climate Change (especially the work of Working Group II),⁴¹ the *Paris Agreement*, the Sendai Framework for Disaster Risk Reduction 2015–2030,⁴² the Glasgow Climate Pact, adopted at COP26, 2021,⁴³ commitments made by state leaders at the Climate Adaptation Summit in 2021 (in the Netherlands) and in Washington in 2021, the work of the Climate Vulnerable Forum and the work of the United Nations High Commissioner for Human Rights 'in highlighting the need to respond to the global challenge of climate change, including by reaffirming the commitments to

³⁷ United Nations Human Rights Council, *The Human Right to a Clean, Healthy and Sustainable Environment*, HRC Res 48/13, UN Doc A/HRC/48/13 (8 October 2021); 'Access to a Healthy Environment, Declared a Human Right by UN Rights Council', *UN News* (online, 8 October 2021) <<https://news.un.org/en/story/2021/10/1102582>> The resolution was passed by 43 votes in favour and 4 abstentions (Russia, India, China and Japan).

³⁸ John Knox and David Boyd, *Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment — Note by the Secretary-General*, UN Doc A/73/188 (19 July 2018).

³⁹ United Nations Human Rights Council, *Mandate of the Special Rapporteur on the Promotion and Protection of Human Rights in the Context of Climate Change*, UN Doc A/HRC/RES/48/14 (13 October 2021).

⁴⁰ United Nations Human Rights Council, *Human Rights and Climate Change*, UN Doc A/HRC/RES/50/9 (14 July 2022, adopted 7 July 2022) ('*Human Rights and Climate Change*').

⁴¹ Intergovernmental Panel on Climate Change, *Climate Change 2022: Impacts, Adaptation and Vulnerability* (Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, 2022).

⁴² Sendai Framework for Disaster Risk Reduction 2015–2030, GA Res 69/283, UN Doc A/RES/69/283 (23 June 2015, adopted 3 June 2015) Annex I.

⁴³ Glasgow Climate Pact, Report of the Conference of the Parties serving as the meeting of the Parties to the *Paris Agreement* on its third session, held in Glasgow from 31 October to 13 November 2021, UN Doc FCCC/PA/CMA/2021/10/Add.1 (8 March 2022) Addendum, Decision 1/CMA.3.

ensure effective climate action while advocating for the promotion and protection of human rights'.⁴⁴

The UNGA adopted Resolution A/76/300 in 2022, after being urged by UN experts to recognise that living in a clean, healthy and sustainable environment is a fundamental human right.⁴⁵ The Resolution recognises the right to a clean, healthy, and sustainable environment as a human right and called upon States, international organizations, businesses, and other stakeholders to 'scale up efforts' to ensure a clean, healthy, and sustainable environment for all.⁴⁶ It notes that 'the right to a clean, healthy, and sustainable environment is "related to other rights and existing international law,"' and affirms that its promotion 'requires the full implementation' of the multilateral environmental agreements ('MEA's) 'under the principles of international environmental law.'⁴⁷

A further resolution in 2022, entitled 'Protection of Global Climate for Present and Future Generations of Humankind',⁴⁸ recognises that, 'in undertaking its work, the United Nations should promote the protection of the global climate for the well-being of present and future generations of humankind' and reaffirms that 'climate change is one of the greatest challenges of our time'. The Resolution also notes that NDCs are not sufficient to hold the increase in global warming to 1.5 degrees celsius above pre-industrial levels; that climate finance for adaptation remains insufficient and below target; and that there is an urgent need to scale up 'action and support'. The Resolution may be significant to the ICJ's opinion in two respects: first, while it falls short of recognising the rights of future generations, it does acknowledge the relevance of climate change to present and future generations; and, secondly, it clearly flags that greater delivery of promises made is needed.

Taken together, these resolutions suggest the direction in which the General Assembly (and therefore UNGA members) is travelling in terms of engaging with the challenges of climate change, at least as a matter of international concern and therefore relevant to all states.

⁴⁴ *Human Rights and Climate Change* (n 40), 5.

⁴⁵ United Nations Human Rights Office of the High Commissioner, 'UN General Assembly Must Affirm Right to a Healthy Environment: UN Experts' (Press Release, 6 July 2022) <<https://www.ohchr.org/en/press-releases/2022/07/un-general-assembly-must-affirm-right-healthy-environment-un-experts>>.

⁴⁶ *The Human Right to a Clean, Healthy and Sustainable Environment*, GA Res 76/300, UN Doc A/RES/76/300 (28 July 2022). The resolution was adopted by a recorded vote of 161 in favour and zero against. Eight Member States — Belarus, Cambodia, China, Ethiopia, Iran, Kyrgyzstan, the Russian Federation, and Syria — abstained.

⁴⁷ International Institute for Sustainable Development, 'UNGA Recognizes Human Right to Clean, Healthy, and Sustainable Environment' (online, 3 August 2022) <[https://sdg.iisd.org/news/unga-recognizes-human-right-to-clean-healthy-and-sustainable-environment/#:~:text=The%20UN%20General%20Assembly%20\(UNGA,and%20sustainable%20environment%20for%20all](https://sdg.iisd.org/news/unga-recognizes-human-right-to-clean-healthy-and-sustainable-environment/#:~:text=The%20UN%20General%20Assembly%20(UNGA,and%20sustainable%20environment%20for%20all)>.

⁴⁸ Resolution A/77/165, 14 December 2022.

III THE REQUEST FOR AN ADVISORY OPINION

The Request is framed as coming from the General Assembly, even though it is clearly drafted by the proposing delegation.⁴⁹ Before specifying the questions on which an opinion is sought, the General Assembly sets out the context, referencing in particular its own actions in this area of concern. The Request recalls Resolution 77/165 (14 December 2022), Resolution 76/300 (28 July 2022) and Resolution 70/1 (25 September 2015), and recalls the Human Rights Council Resolution 50/9 (7 July 2022) and Resolution 48/13 (8 October 2021), outlined above.

By incorporating the Resolutions of the Human Rights Council, the Request clearly places this request and the issue of climate change within the field of human rights. This may be both a strength and a weakness. It is a strength because the advocacy of human rights is universal and therefore of relevance to all. It is a weakness because human rights are notoriously difficult to enforce at an international level and widely regarded as ‘soft law’ instruments.

The Request then emphasises the international legal frameworks relevant to its request, citing not only the *Charter of the United Nations* and the *Universal Declaration of Human Rights*,⁵⁰ but also seven other international conventions and the *Montreal Protocol on Substances that Deplete the Ozone Layer*.⁵¹ Basing the Request on a solid legal platform meets the fundamental requirement of any request for an opinion from the ICJ: it must raise a legal question.⁵² The Court has indicated that questions ‘framed in terms of law and rais[ing] problems of international law... are by their very nature susceptible of a reply based on law ... [and] appear ... to be questions of a legal character’.⁵³

⁴⁹ *Request for an Advisory Opinion of the International Court of Justice on the Obligations of States in Respect of Climate Change*, GA Res 77/276, UN GAOR, 77th sess, UN Doc A/77/L.58 (1 March 2023).

⁵⁰ *Universal Declaration of Human Rights* GA Res 217 A(III), UN GAOR, UN Doc A/810 (10 December 1948).

⁵¹ *Montreal Protocol on Substances that Deplete the Ozone Layer*, opened for signature 16 September 1987, 1522 UNTS 3 (entered into force 1 January 1989). The seven other international conventions are: *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (‘ICCPR’); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990); *United Nations Convention on the Law of the Sea*, opened for signature on 10 December 1982, 1833 UNTS 3, 1834 UNTS 3, 1835 UNTS 3 (entered into force 16 November 1994), the *Vienna Convention for the Protection of the Ozone Layer*, opened for signature 22 March 1985, 1513 UNTS 293 (entered into force 22 September 1988), the *Convention on Biological Diversity*, opened for signature on 5 June 1992 1760 UNTS 79 (entered into force 29 December 1993), and the *United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and Desertification, Particularly in Africa*, opened for signature 14 October 1994 1954 UNTS 3 (entered into force 26 December 1996).

⁵² *Statute of the International Court of Justice* art 65.1.

⁵³ *Western Sahara (Advisory Opinion)* [1975] ICJ Rep 12, 18 [15], quoted in *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226, 233–4 [13].

The legal credentials of the questions being asked are further supported in The Request by including reference to ‘the relevant principles and relevant obligations of customary international law’, including those reflected in the *Declaration of the United Nations Conference on the Human Environment*,⁵⁴ and the *Rio Declaration*. The Request references these international instruments as ‘expressions of the determination to address decisively the threat posed by climate change’, urges ‘all parties to fully implement them’, and notes

with concern the significant gap both between the aggregate effect of States’ current nationally determined contributions and the emissions reductions required to hold the increase in the global average temperature to well below 2 degrees Celsius above pre-industrial levels ...

In 2019, the potential role of international law in putting pressure on states to reduce activity or harms contributing to climate change was raised following the failure of COP25 in Madrid to arrive at any consensus of how art 6 of the *Paris Agreement* was to be implemented.⁵⁵ In particular, international lawyers were called on to sharpen their skills to revive ‘the blunt edge of climate change-based national, regional or international litigation, adjudications and arbitration towards reaching sufficiency of climate pledges’.⁵⁶ The Request for an ICJ opinion provides the opportunity for international lawyers to meet the challenge and possibly shape the role of international law for future generations.

IV POTENTIAL REACTION FROM THE INTERNATIONAL COURT OF JUSTICE

The first question is whether the ICJ will give an opinion. Article 65, para one, states that it ‘may’ do so. The UNGA is competent to seize the court on any question on any matters within the scope of the Charter, but the request for an advisory opinion must relate to the activities and concerns of the General Assembly. As indicated above there are numerous resolutions of the UNGA that evidence the concern of the GA in regard to climate change and the obligations of states to reduce carbon emissions, address global warming and achieve the ambitions of the *Paris Agreement* and other international statements. To date, the

⁵⁴ *Report of the United Nations Conference on the Human Environment*, UN Doc A/CONF48/14/Rev1 (25 July 1995) 3–6 (‘Declaration of the United Nations Conference on the Human Environment’).

⁵⁵ Diane Desierto, ‘COP25 Negotiations Fail: Can Climate Change Litigation, Adjudication, and/or Arbitration Compel State’s to Act Faster to Implement Climate Obligations?’ *EJIL: Talk!* (Blog Post, December 19 2019) <<https://www.ejiltalk.org/cop25-negotiations-fail-can-climate-change-litigation-adjudication-and-or-arbitration-compel-states-to-act-faster-to-implement-climate-obligations/>>.

⁵⁶ *Ibid.*

UNGA has sought 16 advisory opinions from the Court, but none of these have been directly about climate change.⁵⁷

This should not in itself be a problem. Firstly, the ICJ in delivering opinions is not bound by precedent, so the lack of one on climate change is not an issue. Secondly, the ICJ can give an opinion on any legal question.⁵⁸ To date the ICJ has delivered 27 opinions. Once the ICJ takes the case, all states are invited to make written submissions stating their own view, either in letters or notes verbal, and may comment on those of other states. Oral arguments may also be permitted if requested by states. These are delivered to a panel of 15 judges. The decision of the Court is arrived at by a simple majority. Individual judges can give separate concurring or dissenting opinions. This procedure means that those states that both supported and/or opposed or abstained when the resolution was put before the UNGA have the further opportunity to express their views in writing, orally, or both. For those states that have co-sponsored the resolution, this is the opportunity to present their particular interpretation of the questions, to demonstrate the 'red lines' that they will not cross, and to indicate which aspects of the questions asked they may or may not support.

The ICJ is a court of general jurisdiction, not a specialist court, and its procedure allows for the tabling of expert evidence by all states and in the past it has been prepared to consider claims which raise matters of scientific or technical complexity, or both.⁵⁹ Moreover, in giving an opinion, the Court is not having to decide between competing bodies of evidence, but might give guidance on how, for example, scientific evidence can be interpreted to establish legal obligations. In this regard particular reference might be made to the most recent reports of the Intergovernmental Panel on Climate Change Report,⁶⁰ reflecting the work of its sixth cycle of assessment.

⁵⁷ Michael Gerrard, 'Taking Climate Change to the World Court' *Bloomberg Law* (online, 25 October 2021). The ICJ has, however, ruled on the importance of Environmental Impact Assessment as a duty under international law: Annalisa Savaresi, 'Environmental Impact Assessment after the International Court of Justice decisions in Costa Rica-Nicaragua and Nicaragua-Costa Rica: Looking Backward, Looking Forward' (2017) *Questions of International Law* 1–3; Nilufer Oral, 'ICJ Renders First Environmental Compensation Decisions: A Summary of the Judgment' (Web Page, 9 April 2018, International Union for Conservation of Nature) <<https://www.iucn.org/news/world-commission-environmental-law/201804/icj-renders-first-environmental-compensation-decision-summary-judgment>>.

⁵⁸ *Charter of the United Nations* art 96; *Statute of the International Court of Justice* art 65.

⁵⁹ See *Whaling in the Antarctic (Australia v Japan: New Zealand intervening)* [2014] ICJ Rep 226 ('Whaling Case').

⁶⁰ Intergovernmental Panel on Climate Change, 'Climate Change 2023: Synthesis Report' (Sixth Assessment Report, 2023).

V WHAT ARE THE POTENTIAL STICKING POINTS?

A *Jurisdiction*

An initial challenge may be that the ICJ considers that it lacks jurisdiction, or that those states opposed to the resolution might claim that it lacks jurisdiction. In the past, the ICJ has refused to give an opinion on the grounds of lack of jurisdiction following a request for an advisory opinion by a resolution of the World Health Assembly ('WHO').⁶¹ While the WHO met the first two conditions that had to be satisfied to found the jurisdiction of the Court — the agency requesting the opinion was duly authorised to do so under the Charter of the Court and the request concerned a legal question — it held that the question was not one arising within the scope of the WHO. The question on which an opinion was sought related not to health consequences (which the WHO as a specialised UN agency was competent to seek an opinion on) but on the legality of using nuclear weapons (which lay beyond the competency of a specialised agency such as the WHO).⁶²

The Court drew attention to the different status of states, which possessed a general competence, and specialised agencies, which only have those competences conferred by states.

While the facts are distinguishable, there has been some suggestion that a ground for challenging jurisdiction in the current case might be that any opinion would encroach on the work of the UNFCCC. The UNFCCC has its own Secretariat (in Bonn, Germany), which is tasked with supporting the global response to the threat of climate change. It also has a number of subsidiary bodies providing scientific and technological advice, and implementation of the actions agreed under the three international instruments.⁶³ While arguably the failure of the international community to deliver on its promises is the primary motivation for the approach to the ICJ, there may be states that seek to curtail its jurisdiction in this matter or express reservations in their written and oral submissions. The ICJ may itself reframe the questions to suit its jurisdiction, or decide that it has partial jurisdiction, for example to clarify states' obligations under question a) but lacks jurisdiction to answer question b) on the consequences of non-compliance with

⁶¹ *Request for an Advisory Opinion by the Director General of the World Health Organisation on the Legality of the Use by a State of Nuclear Weapons in Armed Conflict to the Registrar of the International Court of Justice* (General List No 93, 14 May 1993).

⁶² A subsequent Request to the ICJ following a resolution by the United Nations General Assembly — GA Res 49/75 K (adopted 15 December 1994) — was accepted by the Court.

⁶³ United Nations Framework Convention on Climate Change, 'What Are Governing, Process Management, Subsidiary, Constituted and Concluded Bodies?' (Web Page, accessed 3 October 2023) <<https://unfccc.int/process-and-meetings/what-are-governing-process-management-subsidiary-constituted-and-concluded-bodies>>.

obligations. There is also a small risk that the ICJ might decide that climate change falls under *lex specialis* and is therefore outside its jurisdiction.⁶⁴

Even if the ICJ refuses to give an opinion on the grounds of lack of jurisdiction, which will be the end of the matter as far as the ICJ is concerned, the reasons for the refusal of jurisdiction will in themselves provide fertile grounds for lawyers engaged in this area of law to consider how such questions might be better framed and presented in the future.

B An Autonomous Human Rights Claim

More controversial would be if the question involved an autonomous human rights' claim to a safe environment. While it is clear from the international instruments cited in The Request that there is a wide acceptance of the impact of climate change on existing human rights, there has been long-standing debate about whether there is a distinct individual right to a minimally acceptable environment. The 1981 *African Charter on Human and Peoples' Rights* (the '*Banjul Charter*'),⁶⁵ which has been signed and ratified by 54 states, states in art 24 that: 'All peoples shall have the right to a general satisfactory environment favourable to their development'. In 1987, a year after the *Banjul Charter* came into force, the *Report of the World Commission on Environment and Development: Our Common Future* (the '*Brundtland Report*') broke new ground by adopting as a first principle a 'fundamental right to an environment adequate for health and well-being',⁶⁶ and the *Additional Protocol to the American Convention on Human Rights in the Area of Economic Social and Cultural Rights* (the '*Protocol of San Salvador*') states in art 11 that:

1. Everyone shall have the right to live in a healthy environment and to have access to basic public services. 2. The State' Parties shall promote the protection, preservation, and improvement of the environment.⁶⁷

The *Paris Agreement* does not go quite so far. It refers to human rights in its Preambular statements: 'Acknowledging that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights ...'. It does not, however, specify measures that should be taken to protect

⁶⁴ Juan Auz and Thalia Viveros-Uehara, 'Another Advisory Opinion on the Climate Emergency? The Added Value of the Inter-American Court of Human Rights' *EJIL: Talk!* (Web Page, March 2 2023, Blog of the European Journal of International Law).

⁶⁵ *African Charter on Human and Peoples' Rights*, opened for signature 27 June 1981, 1520 UNTS 217 (entered into force 21 October 1986).

⁶⁶ Gro Harlem Brundtland, *Report of the World Commission on Environment and Development: Our Common Future — Note by the Secretary-General*, UN Doc A/42/427 (4 August 1987), 38 (the '*Brundtland Report*').

⁶⁷ *Additional Protocol to the American Convention on Human Rights in the Area of Economic Social and Cultural Rights*, OAS Treaty Series No 69 (entered into force 16 November 1999).

these rights and, because this statement is only preambular, it lacks weight, although it may be significant for establishing the normative framework.⁶⁸ It also falls short of what was hoped for on this front.⁶⁹ In particular, ‘promote and consider’ might be interpreted as imposing weak obligations. Other possible human rights implications are oblique, for example those relating to poverty alleviation, gender balance, food security and health. What the *Paris Agreement* does do, however, is move the dial from the human rights–environment nexus to human–rights climate change. This has been a necessary step for the grounding of this request to the ICJ.

At a national level, which may be relevant for evidence of a growing consensus among nations, the association of climate change impact on the environment and the negative consequences for a range of human rights has become increasingly common,⁷⁰ with climate–change related litigation drawing on rights–based arguments in a number of jurisdictions, including the Philippines, the United States, Austria and South Africa.⁷¹ A 2019 Report by the United Nations Special Rapporteur on Human Rights and the Environment indicated that 110 States afford constitutional protection to the right to a healthy environment representing more than 80% of United Nations members.⁷² Similarly, in 2021, the United Nations Committee on the Rights of the Child declared that ‘failure to take measures to prevent foreseeable human rights harm caused by climate change, or to regulate activities contributing to such harm, could constitute a violation of States’ human rights obligations’.⁷³ Although almost all UN members are signatories to the UNCRC, and therefore developments under this Convention could carry weight, not all nations yet recognise an autonomous human right to a safe and healthy environment. An opinion supporting this could, therefore, divide state support for subsequent action, such as an UNGA resolution adopting the opinion.

⁶⁸ *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 31(2): the preamble is stated to form part of the treaty for the purposes of interpretation.

⁶⁹ See Benoit Mayer, ‘Human Rights in the Paris Agreement’ (2016) 6 *Climate Law* 109, 114.

⁷⁰ Burkett (n 1) 646–9.

⁷¹ Jacqueline Peel and Hari M Osofsky, ‘A Rights Turn in Climate Change Litigation’ (2017) 7(1) *Transnational Environmental Law* 37.

⁷² *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) 4. In the Pacific, environmental rights are included in the constitutional Bill of Rights in Fiji, and under the non–justiciable duties in the constitution of Vanuatu.

⁷³ Committee on the Rights of the Child, *Decision Adopted by the Committee Under the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, Concerning Communication No 105/2019*, UN Doc CRC/C/88/D/105/2019 (9 November 2021) 12.

C *Present and Future Rights*

Question (a) and (b)ii in the Request refer to present and future generations. This is understandable especially given the focus of the WYCJ lobbying, which wanted to frame the question along the lines of ‘what are the obligations of states under international law to protect the rights of present and future generations against the adverse effects of climate change?’⁷⁴

The idea of intergenerational rights is not alien to international law. Principle 1 of the *Stockholm Declaration* declares ‘a solemn responsibility to protect and improve the environment for present and future generations’, while Principle 2 refers to the importance of safeguarding natural resources ‘for the benefit of present and future generations.’⁷⁵ The *Brundtland Report* referred to sustainable development as ‘development that meets the needs of the present without compromising the ability of future generations to meet their own needs’ and ‘the environment’s ability to meet present and future needs’,⁷⁶ and Principle 3 of the *Rio Declaration* refers to the ‘developmental and environmental needs of present and future generations’. Also, as indicated above in the Resolutions cited as background to the Request, present and future rights holders are increasingly referred to.

The ICJ might also refer to the Committee on the Rights of the Child’s *General Comment on Children’s Rights and the Environment with a Special Focus on Climate Change* (‘*General Comment No 26*’),⁷⁷ which provides authoritative guidance on how children’s rights are impacted by the environmental crisis and what governments must do to uphold these rights. Following an extensive period of consultation launched in November 2022, *General Comment No 26* was adopted by the Committee on the Rights of the Child in May 2023 at its 93rd session. While not amounting to expert evidence, the impact of climate change on future generations could be relevant to arguments raised before the court.

D *Collective or Individual Rights?*

While the questions mainly refer to states — as might be expected when a question is referred to an international forum — (b)(ii) refers to ‘peoples’. In the main, human rights instruments rights are framed as pertaining to individuals. However, as indicated above, reference to present and future generations suggests collective rights. The ICJ has itself recognized the rights of ‘peoples’,

⁷⁴ Shetye and Rouby (n 13) 82.

⁷⁵ Declaration of the United Nations Conference on the Human Environment (n 54).

⁷⁶ *Brundtland Report* (n 66) 43.

⁷⁷ Committee on the Rights of the Child, *General Comment No 26: Children’s Rights and the Environment with a Special Focus on Climate Change*, UN Doc CRC/C/GC/26 (22 August 2023).

especially in the context of self-determination,⁷⁸ and in its Advisory Opinion on *Legal Consequences for States of the Continued Presence of South Africa in Namibia*,⁷⁹ it refers to the importance of the well-being and development of peoples under the League of Nations trust mandate.

VI THE SIGNIFICANCE OF AN ICJ OPINION

The opinion is requested by the UNGA and any opinion given is therefore expressed to the UNGA. A resolution may then be brought (as above) requesting the UNGA to adopt the opinion and pass a resolution to this effect, as it did in the *Chagos Islands Case*.⁸⁰ As with the initial applications seeking an ICJ opinion, members of the UNGA have the opportunity to express their views — reservations and support — on any such adoption, and the resolution may be passed by way of consensus or go to a vote. The outcome of this could well depend on how the ICJ frames its opinion, if it does so.

Without the follow up of a further UNGA resolution it might be thought that the ICJ opinion would be rather weak. However, as expressed in the European Union's statement supporting the resolution requesting an advisory opinion:

Although legally non-binding, the requested Advisory Opinion of the ICJ has the potential to make a significant contribution to the clarification of the current state of international law.⁸¹

This raises two points. The first is the 'legally non-binding' nature of an advisory opinion. An ICJ opinion is advisory only, unlike litigation in which a decision is made in favour of one or other of the contesting parties.⁸² This raises the question of how significant any advisory opinion can be, either in the short term or the longer term? The second is the role of an advisory opinion as an interpretative tool, 'clarifying' international law. In the questions to be put before the court

⁷⁸ See *Case Concerning East Timor (Portugal v Australia)* [1995] ICJ Rep 90; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Advisory Opinion)* [2019] ICJ Rep 95.

⁷⁹ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (Advisory Opinion)* [1970] ICJ Rep 16.

⁸⁰ *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Advisory Opinion)* [2019] ICJ Rep 95. Failure to comply with a six-month deadline for the UK to complete the process of decolonization of Chagos Islands led to the UNGA endorsing a motion condemning Britain's occupation of the islands, with a vote of 116-6, supporting the motion, with 56 abstentions: *Advisory opinion of the International Court of Justice on the legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965*, UNGA Res 73/295, UN Doc A/RES/73/295 (22 May 2019). See Philippa Webb, 'The UK and the Chagos Archipelago Advisory Opinion' (2021) 21(1) *Melbourne Journal of International Law* 1.

⁸¹ Delegation of the European Union to the United Nations in New York, 'EU Statement — UN General Assembly: Resolution Requesting an Advisory Opinion of the International Court of Justice on Climate Change' (online, 29 March 2023).

⁸² Oxford University Press, *Max Planck Encyclopaedia of International Law* (April 2006) Hugh Thirlway, 'Advisory Opinions'.

there appear to be two aspects needing clarification: (1) obligations under international law; and (2) consequences of non-compliance with those obligations by acts and omissions — both generally and with specific reference to those who are most vulnerable to climate change.

VII A NON-LEGALLY BINDING OPINION

The ICJ itself claims that an advisory opinion carries ‘great legal weight and moral authority’.⁸³ It is the main judicial organ of the United Nations. Statements made in the course of proceedings are drafted and presented by eminent international lawyers and counsel so the standard of legal expertise which it draws on is high. Although an opinion sets no precedents, it can be influential in terms of setting standards and raising ambition, in this context in terms of pledges made regarding carbon reduction targets and other promises made to address climate change. The opinion could also be referenced by domestic and regional courts confronted by climate change related cases, particularly in the context of locating domestic or regional jurisprudence in the context of international developments in this field.⁸⁴

An opinion from the ICJ might also assist in concretizing state obligations as regards loss and damage. Although agreed in principle at COP27,⁸⁵ the operationalisation of loss and damage has yet to become clear.

VIII WHAT ARE THE OBLIGATIONS UNDER INTERNATIONAL LAW?

The international law here is essentially the *Paris Agreement*.⁸⁶ As indicated above, this committed nations to cap warming at 2°C above pre-industrial levels and encouraged greater ambition to limit the increase to 1.5°C. Subsequent frustration with progress, especially by major emitters, has been evident. While it is clear that the *Paris Agreement* is a legally binding international treaty, it is less clear whether

⁸³ International Court of Justice, ‘Advisory Jurisdiction’ (Webpage, accessed 3 October 2023) <<https://www.icj-cij.org/advisory-jurisdiction>>.

⁸⁴ There are some precedents in the region for recognising the jurisdiction of the ICJ in disputes — see, eg, *Agreement between Australia and the Republic of Nauru for the Settlement of the Case in the International Court of Justice Concerning Certain Phosphate Lands in Nauru*, Australia–Nauru, signed 10 August 1993, [1993] PITSE 15 (entered into force 20 August 1993) and constitutional provision to recognise the opinions of the ICJ in determining whether laws are reasonably justifiable in a democratic society — see *Constitution of the Independent State of Papua New Guinea* s 39.

⁸⁵ See ‘COP27 Ends With Announcement of Historic Loss and Damage Fund’ *United Nations Environment Programme* (online, 22 November 2022) <<https://www.unep.org/news-and-stories/story/cop27-ends-announcement-historic-loss-and-damage-fund>>.

⁸⁶ Fiji, Nauru, Palau, Republic of Marshall Islands, Samoa and Tuvalu were six of the 15 countries that ratified the agreement in New York in April 2016. ‘Six Pacific Islands Ratify the Paris Climate Accord’ (Media Release, Pacific Community, 27 April 2016) <<https://www.spc.int/updates/news/2016/04/six-pacific-islands-ratify-the-paris-climate-accord>>.

its provisions impose legally binding duties on states. In particular, the language around NDCs, mitigation, adaptation, loss and damage, technology, capacity building, and implementation is not prescriptive. It sets goals which parties are required to aim for, but those goals are not framed in mandatory language, unlike the Agreement's processes. In 2018, it was agreed by the parties to the *Paris Agreement* that a Rulebook would be developed to provide practical guidelines for implementation. Negotiations for completing the Rulebook concluded in 2021 at COP26. One of the questions the ICJ may express an opinion on is the legal effect of the Rulebook on the international obligations of parties to the *Paris Agreement*.

IX WHAT ARE THE CONSEQUENCES OF NON-OBSERVATION/NON-COMPLIANCE WITH INTERNATIONAL LAW OBLIGATIONS?

As indicated above, there have been a number of expressions of concern at the lack of action (omissions) in addressing climate change and related calls to action by international bodies. Answering question (b) in the Request '[w]hat 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' — presents challenges for the ICJ. Liability for acts that cause harm is less problematic in so far as this falls more squarely within existing law, including liability for trans-boundary harm. Legal liability for failure to act is more problematic. While it is generally acknowledged and certainly supported by the evidence of the IPCC Report that failure to take steps to reduce global warming will have catastrophic consequences, many of the instruments referred to above, which provide the legal background to the resolution, make frequent reference to 'common and differentiated' responsibilities of states. It is, therefore, difficult to see how the ICJ could provide a 'one size fits all' answer to this question. Any opinion on this question could also trigger a backlash by those countries that see themselves as falling into the category of 'developing states', including China, and therefore within the range of 'victim' states rather than climate-change perpetrator states. The ICJ may also struggle to determine the consequences of liability for omissions that contribute to climate change, not only because of problems of causation, but because the trend in international instruments has been to impose responsibility on all states to address issues of climate change, and not to single out particular states. It is difficult to see how, therefore, the ICJ can do anything other than make very general statements in this regard. If strong enough, these could provide a baseline standard against which states could either be named and shamed or incentivised to compete as 'champions'.⁸⁷

⁸⁷ This type of competitive driver is evident in the creation of marine protected areas.

X WHAT ELSE COULD THE ADVISORY OPINION ACHIEVE?

Bodansky has suggested that an advisory opinion could be particularly helpful in establishing parameters for the liability of one state to another for damage caused by emissions, focussing particularly on issues such as due diligence expected of states towards each other, rather than laying down rules for NDCs — which, under the *Paris Agreement*, are left to the determination of states.⁸⁸ A legal opinion here could also assist negotiations elsewhere. Sands suggests that the most important thing an international court such as the ICJ could do would be ‘to settle the scientific dispute’ about climate change,⁸⁹ although, as Bodansky points out, if the IPCC’s extensive reports cannot do this by now, such an outcome may be optimistic.⁹⁰ However, a finding of fact on matters relevant to climate change could lay the foundations for potential future actions. The ICJ has shown itself able to do this previously.⁹¹ Sands also supports the value of the ICJ expressing an opinion on existing obligations of states under international law to prevent climate change and to address the consequences of climate change, including possibly expressing an opinion on the 2-degree celsius target.⁹²

At its most optimistic, an opinion could provide the vehicle to bring human rights and climate change together in a principled way, or ‘have the power to reshape positively the international approach to greenhouse gas emissions’,⁹³ or both. An ICJ opinion could also be instrumental in shaping national and regional policies directed at addressing climate change, seeing promises and targets translated into deliverables by those most able to do so.

XI CONCLUSION

Pacific-island states have been key players in highlighting the adverse effects of climate change, working through alliances such as the Alliance of Small Island States (‘AOSIS’)⁹⁴ and the Climate Vulnerable Forum.⁹⁵ They have been frustrated by the lack of action by major emitters. President of COP26, Alok Sharma, for example, commented on the important role and contribution of the voices of

⁸⁸ Daniel Bodansky ‘The Role of the International Court of Justice in Addressing Climate Change: Some Preliminary Reflections’ (2017) 49 (Special Issue) *Arizona State Law Journal* 1, 21.

⁸⁹ Philippe Sands, ‘Climate Change and the Rule of Law: Adjudicating the Future in International Law’ (2016) 28(1) *Journal of Environmental Law* 19, 29.

⁹⁰ Bodansky (n 88) 20.

⁹¹ See *Whaling Case* (n 59).

⁹² Sands (n 89).

⁹³ Aaron Korman and Giselle Barcia, ‘Rethinking Climate Change: Towards an International Court of Justice Advisory Opinion’ (2012) 37 *Yale Journal of International Law* 35, 36.

⁹⁴ This was created in 1990 and has been effective in raising the voices of Small Island States in the United Nations.

⁹⁵ Timothée Ourbak and Alexandre Magnan, ‘The Paris Agreement and Climate Change Negotiations: Small Islands, Big Players’ (2018) 18(8) *Regional Environment Change* 2201.

Pacific-island countries to the conference, and acknowledged that the “pulse” of what the Pacific needs for survival, a 1.5 degree world, “remains weak”.⁹⁶

It is little wonder, then, that there is appetite in the region to push further not only in trying to keep the 1.5-degree celsius target alive, but to get greater clarity on the legal nature of the commitments signed up to in Paris, particularly in addressing the gap between the goal of greenhouse gas emissions reduction and the actions proposed by states. The question is whether an advisory opinion will provide the solution.

Past attempts to secure the UNGA adoption of a resolution regarding climate change have not succeeded. For example, following the failure of COP15 in Copenhagen in 2009, in 2011 Palau and the Republic of Marshall Islands, both Pacific-island states, declared an intention to call on the United Nations General Assembly to seek an ICJ opinion on ‘the responsibilities of States under international law to ensure that activities emitting greenhouse gases that are carried out under their jurisdiction or control do not damage other States’.⁹⁷ Palau’s President, Johnson Toribiong, stated that it was time to determine what ‘the international rule of law means in the context of climate change.’⁹⁸ The intention did not materialise into efforts to negotiate support in the UNGA (possibly due to threats of reprisals by the United States).⁹⁹ However, the President of Palau’s words remain pertinent: ‘there is only so much my country can do on its own to protect itself. We rely on our partners, the international system and the international rule of law to provide a remedy’.¹⁰⁰ Vanuatu has succeeded in taking this a step further by securing the adoption of its resolution by the UNGA. The next step lies with the ICJ.

The initiative of this island state to bring the matter to the attention of the international legal order will have made an important contribution to the debate about how to address climate change and whether a focus on adaptation and

⁹⁶ ‘Pacific’s Leadership, Commitment and Amplified Voice Acknowledged by COP26 Presidency’ (News Article, Secretariat of the Pacific Regional Environment Programme, 23 February 2022). In fact, few Pacific leaders were able to attend COP26 due to COVID-19 impact on borders and travel: Aniruddha Ghosal, “‘Thin’ Pacific Island Teams at COP26 Spark Fears of Inequity” *The Diplomat* (online, 28 October 2021) <<https://thediplomat.com/2021/10/thin-pacific-island-teams-at-cop26-spark-fears-of-inequity>>.

⁹⁷ ‘Palau seeks UN World Court opinion on damage caused by greenhouse gases’ *UN News* (online, 22 September 2011) <https://news.un.org/en/story/2011/09/388202> (‘UN News Palau’); Jule Schnakenberg, Brighde Watt and Aoife Fleming, ‘The Potential for the World Court to Address Climate Justice: COP26 as an Opportunity to Raise the ICJ Advisory Opinion with World Leaders’ *University of Aberdeen* (Blog Post, 9 December 2021) <<https://www.abdn.ac.uk/law/blog/the-potential-for-the-world-court-to-address-climate-justice-cop26-as-an-opportunity-to-raise-the-icj-advisory-opinion-with-world-leaders>>.

⁹⁸ *UN News Palau* (above).

⁹⁹ Burkett (n 1) 635, 644.

¹⁰⁰ ‘Statement by the Honorable Johnson Toribiong President of the Republic of Palau to the 66th Regular Session of the United Nations General Assembly’, 22 September 2011, New York <https://gadebate.un.org/sites/default/files/gastatements/66/pw_en_25.pdf>.

resilience go far enough for those countries and people already adversely affected by its consequences and who have done least to contribute to this global catastrophe. With COP29 on the horizon in 2024, small-island developing states, and others, are not going to allow the question of compensation for the losses and damages they have suffered to be swept under the carpet, nor will they ease up the pressure on all signatories to the *Paris Agreement* to convert promises into action. For these states, 1.5-degree celsius global warming is just the starting point. If those states that contribute the most to global warming cannot 'up their game' in terms of their national NCDs and deliver on meeting these targets, then the future survival of Pacific-island people remains in jeopardy, and they will continue to fight to survive and to hold others to account.