

AN ICJ ADVISORY OPINION ON CLIMATE CHANGE: TEN QUESTIONS AND ANSWERS



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INTRODUCTION

In recent years, the role of climate change litigation has become increasingly prominent. Thus far, most climate cases around the world have been brought in national courts. But there is also growing interest in the role of international courts and tribunals in addressing climate change, including the International Court of Justice (ICJ), regional and human rights bodies, and the International Tribunal for the Law of the Sea.

In September 2021, Vanuatu announced at the United Nations (UN) General Assembly (UNGA) that it intended to build a coalition of states to request an advisory opinion on climate change from the ICJ.¹ The Vanuatu initiative is supported by various grassroots youth groups, including the Pacific Island Students Fighting Climate Change and the World Youth for Climate Justice, which argue that climate change threatens the rights of present and future generations. At the March 2022 CARICOM Conference, heads of government from the Caribbean region indicated their support for Vanuatu's initiative, and other countries have endorsed it as well, including Australia.²

Vanuatu has assembled a legal team that is currently working to craft the precise legal question to put before the ICJ and may bring its proposal before UNGA this October.³

QUESTION 1: WHAT IS THE ICJ?

The ICJ is the "principal judicial organ" of the UN.⁴ It comprises 15 judges elected for nine-year terms by absolute majorities of both UNGA and the Security Council. ICJ judges are drawn from government lawyers, diplomats, academics, and practitioners, and serve in their individual capacity rather than as state representatives.

QUESTION 2: WHAT IS AN ICJ ADVISORY OPINION?

The UN Charter gives the ICJ two basic functions: (1) resolving legal disputes between states; and (2) providing advice on legal issues to UN bodies.

Contentious cases are initiated by states and depend on state consent. A state may consent to the jurisdiction of the ICJ by means of a special agreement or treaty or by accepting the so-called "optional clause" of the ICJ statute (Article 36), which provides for compulsory jurisdiction.⁵ Judgments in contentious cases are binding on the parties to the dispute pursuant to Article 94(1) of the UN Charter and may be enforced through Security Council measures pursuant to Article 94(2).⁶

Advisory opinions may be given by the ICJ in response to a request by UNGA or Security Council or by other organs of the UN and specialized agencies (UN Article 96). Requests by UNGA or Security Council may concern any legal question, while requests by other organs of the UN or by specialized agencies such as the World Health Organization (WHO) or International Maritime Organization (IMO) must concern a question arising within the scope of their activities.

As of August 2022, the ICJ has given 27 advisory opinions, including 17 at the request of UNGA and one at the request of the Security Council.⁷ Some have concerned highly sensitive political issues including:

- the conditions of a state's membership in the UN
- the international status of Southwest Africa (present-day Namibia)
- the legality of the threat or use of nuclear weapons

- the legal consequence of the construction of the Israeli security wall in the occupied Palestinian territory
- the unilateral declaration of independence by Kosovo
- the status of the Chagos Islands

QUESTION 3: WHAT IS THE PROCEDURE TO REQUEST AN ADVISORY OPINION?

In contrast to contentious cases, which require the consent of the state against whom the case is brought, requests for advisory opinions by UNGA can be initiated by a simple majority of UN member states present and voting. (The UN Charter provides that a two-thirds majority vote of the General Assembly is required only for “important questions.”)

For the purpose of determining which states are “present and voting,” abstentions do not count as votes. Thus, requests for advisory opinions do not require support by a majority of UN member states; they require simply more votes in favor than against the request.

For example, the UNGA request for an advisory opinion in the Israeli Wall case was adopted by a vote of 90-8, with 74 abstentions and 19 states not voting. Because the 74 abstentions did not count as votes, only 98 states were considered to be “present and voting.”

Following a favorable vote by UNGA, the request for an advisory opinion is communicated to the ICJ in written form, containing an exact statement of the question for which the advisory opinion is requested.

QUESTION 4: WHAT ARE THE VARIOUS STEPS IN THE ADVISORY OPINION PROCESS?

After the ICJ has received a request for an advisory opinion from UNGA, it provides states with an opportunity to submit written statements and to comment on the statements submitted by other states. The ICJ also typically holds public proceedings, at which states may make oral statements.

As an example of the timing of the advisory opinion process, in the Nuclear Weapons advisory opinion, the ICJ gave states approximately four months to submit written statements, another three months to comment on written statements submitted by other states, and then held public

proceedings a little more than one month later, at which 22 states made oral statements.⁸ The entire proceedings took a little less than 19 months, from the request for an advisory opinion by UNGA on December 15, 1994, to the issuance of its advisory opinion by the ICJ on July 8, 1996.

QUESTION 5: WHAT QUESTION MIGHT AN ICJ ADVISORY OPINION ADDRESS?

The ICJ statute authorizes the ICJ to give an advisory opinion on “any legal question” (ICJ Statute, art. 65(1)).⁹ It further provides that a request for an advisory opinion must contain “an exact statement of the question upon which an opinion is required” (ICJ Statute, art. 65(2)). In deciding what question to pose to the ICJ, a variety of factors are potentially relevant, including:

- What might the ICJ say in answer to the question posed?
- Is the ICJ likely to answer the question in a manner that would be helpful to those seeking the opinion?
- How would other states react? For example, if the ICJ gave an advisory opinion regarding loss and damage (L&D) or the meaning of “progression” in the Paris Agreement what would be the potential effects, both positive and negative, on the international climate change negotiations?

Examples of the types of questions that might be posed include:

- General questions about international legal duties with respect to climate change—for example:
 - What are the obligations of states under international law to ensure that activities carried out under their jurisdiction or control that emit greenhouse gases do not damage other states?
 - What is the legal status of the principle of sustainable development and what are its legal implications for climate change?
- More specific questions about particular issues, such as L&D—for example:
 - What is the duty of states to provide compensation for L&D resulting from climate change?
- Human rights questions regarding climate change—for example:
 - What are the implications for climate change of the right to a clean environment?

- What are the duties of states to protect present and future generations against damage from climate change?
- Treaty interpretation questions—for example:
 - What are the legal effects of Article 4.3 of the Paris Agreement, which provides that each Party’s successive NDC will “represent a progression” beyond its then current NDC and “reflect its highest possible ambition”?
- Questions regarding particular groups of states, such as developed countries—for example:
 - What are the duties of developed countries to provide climate finance?
 - What are the duties of developed states to provide compensation for L&D resulting from climate change?

QUESTION 6: WOULD AN ICJ ADVISORY OPINION BE BINDING ON STATES?

No, ICJ advisory opinions are not legally binding on states, but they may have significant persuasive authority.

In contrast to contentious cases, where the parties to a dispute are legally bound by the ICJ’s judgment even if they are not persuaded by the court’s reasoning, states are free to disagree with an ICJ advisory opinion. For example, if an ICJ advisory opinion concluded that Article 4.3 of the Paris Agreement establishes an objective test of progression, against which a party’s nationally determined contribution (NDC) could be evaluated, or that states have an obligation to provide compensation for L&D based on their historical emissions of greenhouse gases, states would not be bound by the ICJ’s opinion and could continue to maintain a different legal view.

Though advisory opinions do not have binding authority, they can have persuasive authority about the content of international law. The persuasive authority of an ICJ advisory opinion is a function of several factors, including the ICJ’s status as the “principal judicial organ” of the UN, its general reputation as an expert legal body whose interpretations of the law are entitled to deference, and the strength of the advisory opinion’s specific legal arguments. Different state and non-actors may assess these factors

differently and therefore view advisory opinions as more or less authoritative. The ICJ’s persuasive authority is similar in kind to that of legal scholars or professional societies, except that its status as the UN’s “principal judicial organ” may give its opinions significantly greater weight in the eyes of some states and non-state actors.

QUESTION 7: WOULD AN ADVISORY OPINION BE LIKELY TO CHANGE STATES’ BEHAVIOR?

It is questionable whether an ICJ advisory opinion would directly influence state behavior. The record of compliance by states with adverse decisions has been uneven, even in contentious cases where judicial decisions are legally binding. Many states may feel even less pressure to make significant changes in national policy in response to an advisory opinion, which lacks binding authority.

QUESTION 8: WHAT OTHER POTENTIAL BENEFITS MIGHT AN ADVISORY OPINION PROVIDE?

Even if an advisory opinion on climate change did not directly lead to changes in national climate policies, to the extent state and non-state actors viewed it as an authoritative statement about international law, it could have other potential benefits. For example, a favorable opinion could:

- Serve as a basis for domestic climate litigation, to the extent a country’s domestic courts defer to ICJ opinions about international law.
- Affect public opinion within a state.
- Provide arguments for supporters of stronger climate action within a state, including environmentally-minded ministries within a national government, sub-national governments, and NGOs.
- Help bolster a state’s arguments in the international climate change negotiations or undermine the arguments of other states.
- Give greater prominence to a particular issue—for example, L&D or the potential disappearance of island states as a result of sea-level rise.

QUESTION 9: WHAT ARE THE LEGAL RISKS OF REQUESTING AN ADVISORY OPINION?

Proponents of an advisory opinion hope that the ICJ will conclude that international law requires states to do more to address climate change. But an ICJ advisory opinion could come out the other way, for example, by concluding that international law does not impose any duties on states beyond those included in the UN Framework Convention on Climate Change (UNFCCC) and the Paris Agreement. For example, the ICJ might conclude that:

- International law does not impose a duty on states to provide compensation for L&D.
- The duty to use due diligence to prevent transboundary pollution is satisfied by compliance with the Paris Agreement.
- The principle of sustainable development is not yet part of international law.

The ICJ's Nuclear Weapons advisory opinion is an example of an advisory opinion that disappointed its proponents. In a split vote, the ICJ was unable to conclude, as the requesters of the advisory opinion had hoped, that the use of nuclear weapons is prohibited in all circumstances.

The ICJ has decided relatively few environmental cases, so it is unpredictable what it might say about the climate change issue. But its decisions to date have taken a quite modest approach in elaborating the environmental duties of states.

In addition to the risk of a regressive decision, an advisory opinion on climate change would thrust the ICJ into the middle of an extremely contentious political issue and might thereby damage the ICJ's legitimacy, no matter how the Court rules. On the one hand, an expansive opinion might be seen by some states as circumventing the UNFCCC negotiations. On the other hand, a restrictive opinion might undermine the ICJ's legitimacy among vulnerable states, who might feel that it has abdicated its responsibility to address the climate change issue.

QUESTION 10: WHAT ARE THE POLITICAL RISKS OF REQUESTING AN ADVISORY OPINION?

In addition to legal risks, a request for an advisory opinion on climate change might have various political risks.

It could adversely affect the UNFCCC negotiations.

- Judges who lack awareness of the sensitivities in the negotiations could give an opinion that undermines the nuanced compromises and constructive ambiguity in the Paris Agreement on issues such as differentiation and progression.
- While the advisory opinion process is ongoing, states might be unwilling to make further compromises in the UNFCCC negotiations because they fear that this would undercut their legal position before the ICJ.
- The act of seeking an advisory opinion could be seen by some states as an attempt to circumvent the negotiations and make the UNFCCC process more adversarial and acrimonious.
- Some may ask why spend so much time negotiating in the UNFCCC process if the ICJ is simply going to declare what the law already is?
- An opinion interpreting the Paris Agreement might make some parties reluctant to agree to language in future instruments, because they fear that the ICJ might interpret the language in a manner that they did not intend.

An advisory opinion could provoke a backlash in the "losing" states that undermines support for the UN climate regime more generally.

Given the generality and vagueness of the legal norms likely to be at issue, an ICJ advisory opinion would necessarily have a creative element, rather than simply constitute an application of existing law. Thus, requesting an advisory opinion would take lawmaking on climate change out of states' control and give it to the ICJ.

CONCLUSION—SHOULD UNGA REQUEST AN ADVISORY OPINION ON CLIMATE CHANGE?

Many factors are potentially relevant in considering whether UNGA should request an advisory opinion on climate change:

What will the advisory opinion say?

- Will the opinion add significantly to what has been agreed under the UNFCCC and the Paris Agreement—for example, by saying that international law imposes a duty to provide compensation for L&D or that the principle of due diligence imposes objective standards by which to evaluate the adequacy of NDCs? Or will the opinion defer to the UNFCCC regime by concluding that the outcomes of the UN negotiating process fill the field of international climate change law?
- On the positive side, an advisory opinion might influence some states to adopt stronger climate policies, help in domestic climate litigation, affect public opinion, and bolster arguments in the UNFCCC negotiations for stronger climate action.
- On the negative side, an advisory opinion could reduce pressure in the UNFCCC negotiations for stronger action, undermine the delicate compromises and constructive ambiguity in the Paris Agreement, or undermine domestic climate litigation.

Apart from the effects of the advisory opinion itself, what will be the effects of requesting an advisory opinion and how much do these matter?

- Would requesting an advisory opinion make the UNFCCC negotiations more adversarial and acrimonious?
- Would it make some states less willing to reach compromise outcomes while the advisory opinion request is pending?
- Would it give voice to states with less influence in the UNFCCC negotiations?

Is the ICJ the appropriate body to determine what international law provides on climate change?

- Thus far, climate change law has developed through international negotiations among states, primarily in the UNFCCC process, but also in fora such as the IMO, International Civil Aviation Organization (ICAO), and Montreal Protocol. The need to gain international consensus among states has made progress difficult and slow, but arguably has been important for the regime's legitimacy and broad acceptability by states. Requesting an advisory opinion from the ICJ would inject the ICJ into this politically fraught process.
- To the extent that international law is clear on the question posed to the ICJ, then an ICJ advisory opinion could simply articulate what the law requires and would advance rule-of-law values.
- To the extent international law related to climate change is uncertain or underdeveloped, then an ICJ advisory opinion would need to clarify or elaborate the law and would necessarily have a creative element. That would raise the fundamental question, should climate law be developed through negotiations among states or by a judicial body?

Other C2ES Resources:

[The Institutional Ecosystem for Loss and Damage](#), August 2022.

[Loss and Damage: Issues and Options for COP27](#), June 2022.

[Advancing Mitigation Outcomes for COP27: The Mitigation Work Programme and the Ministerial Roundtable](#), June 2022.

[Designing a Meaningful Global Stocktake](#), January 2022.

[Outcomes of the UN Climate Change Conference in Glasgow](#), November 2021.

ENDNOTES

- 1 Vanuatu to seek international court opinion on climate change rights, <https://www.theguardian.com/world/2021/sep/26/vanuatu-to-seek-international-court-opinion-on-climate-change-rights>; 76th Session of the UN General Assembly, Statement by Hon. Bob Loughman Weibur, Prime Minister of the Republic of Vanuatu 25 September 2021 https://statements.unmeetings.org/estatemnts/10.0010/20210925/98yJHEsSga5z/XSuO5mKJwIMd_en.pdf.
- 2 Communique Issued at the Conclusion of the Thirty Third Intersessional Meeting of the Conference of Heads of Government of the Caribbean Community (CARICOM), 1-2 March 2022, <https://today.caricom.org/2022/03/03/communique-3/>.
- 3 Pacific firm to lead global legal team supporting Vanuatu's pursuit of advisory opinion on climate change from International Court of Justice, <https://www.blueoceanlaw.com/blog/pacific-firm-to-lead-global-legal-team-supporting-vanuatus-pursuit-of-advisory-opinion-on-climate-change-from-international-court-of-justice>.
- 4 UN Charter, art. 92, <https://treaties.un.org/doc/publication/ctc/uncharter.pdf>.
- 5 Statue of the International Court of Justice, <https://www.icj-cij.org/en/statute>.
- 6 See note 4, UN Charter.
- 7 Judgments, Advisory Opinions and Orders, International Court of Justice, <https://www.icj-cij.org/en/decisions/advisory-opinion/1946/2022/desc>.
- 8 Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, <https://www.icj-cij.org/public/files/case-related/93/093-19960708-ADV-01-00-EN.pdf>.
- 9 See note 4, Statue of the International Court of Justice.

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