Using International Law to Address the Effects of Climate Change

A Matter for the International Court of Justice?

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1 Introduction***

The effects of climate change are many and severe, but rising sea-level is perhaps one of the most pressing challenges posed by global warming. Small Island Developing States (SIDS) stand at the frontline and are the most vulnerable to the impacts of climate change and rising sea levels as it presents a threat to their territorial integrity, resources, and Statehood. The effects of climate change therefore raises legal and practical questions of critical importance, such as: i) who is liable to compensate for any infrastructure required to preserve and protect the territory of SIDS; ii) will the forced relocation of SIDS nationals and the erosion of their coastlines cause the dissolution of the sovereignty of SIDS;[1] and iii) how should maritime entitlements and maritime

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*** On 12 December 2022, the Co-Chairs of the Commission of Small Island States on Climate Change and International Law (the Commission), representing the Commission pursuant to Article 3(3) of the Agreement for the Establishment of the Commission, submitted a request for an Advisory Opinion from the International Tribunal for the Law of the Sea (the Tribunal) on the following legal questions:

> 'What are the specific obligations of State Parties to the United Nations Convention on the Law of the Sea (the "UNCLOS"), including under Part XII:
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> (a) to prevent, reduce and control pollution of the marine environment in relation to the deleterious effects that result or are likely to result from climate change, including through ocean warming and sea level rise, and ocean acidification, which are caused by anthropogenic greenhouse gas emissions into the atmosphere?
>
> (b) to protect and preserve the marine environment in relation to climate change impacts, including ocean warming and sea level rise, and ocean acidification?'

This contribution concerns a potential request for an Advisory Opinion on the effects of climate change from the International Court of Justice only and does as such not address the request made to the ITLOS.

1 Hundreds of millions of people around the world will be facing displacement due to climate change, see <http://www.cambridgeblog.org/2021/12/judicial-proceedings-to-clarify-international-law-on-climate-change/> (last accessed, as any subsequent URL, on 16 June 2022).

delimitation be fixed in light of rising sea-levels caused by the effects of climate change. Whilst the International Law Commission (ILC) recently formed a Study Group on 'sea-level rise in relation to international law',[2] the project will not be completed in the nearest future, and is in its initial phase centred on the subtopics of law of the sea and possible legal effects of sea-level rise on maritime delimitations, Statehood and the protection of persons affected by sea-level rise.[3]

As such, the work of the ILC is unlikely to directly address the obligations of States under international law to mitigate the effects of climate change and protect the rights of present and future generations from the adverse effects of climate change. The international community particularly effected by rising sea levels has therefore considered other avenues within the domain of international law in order to clarify these questions. For instance, in September 2021, the Pacific Island nation of Vanuatu announced an initiative to seek an advisory opinion (AO) from the International Court of Justice (ICJ),[4] with a view 'to clarify[ing] the legal obligations of all countries to prevent and redress the adverse effects of climate change'.[5] The Pacific Island Students Fighting Climate Change (PISFCC), a group of youth from several Pacific Island countries seeking to achieve a stable and inhabitable planet for future generations, has been a significant driving factor in advocating for the initiative.[6] An initiative for an AO started already in 2011 when the President of the Republic of Palau in his address to the United Nations (UN) General Assembly (GA) in September 2011 stated:

> Palau and the Republic of the Marshall Islands will call on the Assembly to seek, on an urgent basis and pursuant to Art. 96 of the Charter of the United Nations, an advisory opinion from the International Court of Justice 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.[7]

2 UNGA Res 73/265 (22 December 2018) UN Doc A/RES/73/265.

3 ILC, 'Sea-Level Rise in relation to International Law: Second Issues Paper by Patrícia Galvão Teles and Juan José Ruda Santolaria, Co-Chairs of the Study Group on Sea-Level Rise in relation to International Law (18 April–3 June and 4 July–5 August 2022)' (19 April 2022) UN Doc A/CN.4/752.

4 See e.g. <https://www.reuters.com/world/asia-pacific/vanuatu-push-international-court-climate-change-opinion-2021-09-25/>.

5 *Ibid*.

6 See e.g. <https://www.reuters.com/world/asia-pacific/vanuatu-push-international-court-climate-change-opinion-2021-09-25/>.

7 See 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

Palau's and the Marshall Islands' efforts did not reach the stage of formal negotiations at the UNGA, but have inspired further attempts to explore the potential for an AO on climate change and the effects thereof.[8] Since Palau's and Marshall Islands' declaration in 2011, several important international environmental agreements have been adopted – such as the Paris Agreement – which establishes a framework for international mitigation and adaptation efforts on climate change.[9] This article explores if the time is ripe for an ICJ AO to determine what the international rule of law means in the context of climate change. It briefly sets out the background of Vanuatu's 2021 initiative, and discusses the jurisdictional and admissibility challenges for an AO to be brought successfully, how potential questions may be phrased, as well as the potential advantages and disadvantages of an AO on climate change.

2 Background of the Initiative

As mentioned above, in September 2021, the Government of Vanuatu announced that it will ask the UNGA to request an AO from the ICJ on climate change and human rights, and in particular to give an opinion on the rights of present and future generations to be protected from the adverse effects of climate change.[10] More specifically, the purpose of the initiative is to establish clear standards for climate action and 'climate justice benchmarks', which may be used in contentious cases.[11] Vanuatu, as SIDS, is particularly vulnerable to the risk of rising sea levels as caused by the effects of climate change.[12]

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with World Leaders' (2021) available at <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/>.

8 For instance, the first day of COP26 saw the establishment of a Commission of Small Island States on Climate Change and International Law. This initiative is led by Antigua and Barbuda and its purpose is to seek compensation for the effects of climate change. The Commission, which has now been joined by Tuvalu and Palau, has announced that it will seek an advisory opinion from the International Tribunal for the Law of the Sea (ITLOS) concerning State responsibility for excessive greenhouse gas emission, see Agreement for the Establishment of the Commission of Small Island States on Climate Change and International Law, 31 October 2021 (COSIS Agreement); <https://caribbean.loopnews.com/content/antigua-and-tuvalu-join-forces-seek-climate-justice>. The request for an AO was submitted to the ITLOS on 12 December 2022.

9 Paris Agreement, 12 December 2015.

10 See e.g. <https://www.reuters.com/world/asia-pacific/vanuatu-push-international-court-climate-change-opinion-2021-09-25/>.

11 Schnakenberg, Watt and Fleming (n 7).

12 Julian Aguon, who together with Margaretha Wewerinke-Singh, is leading a team of international lawyers representing the Republic of Vanuatu has highlighted that '[w]ithout

In their announcement, Vanuatu stressed the importance of the campaign and the urgency of the effects caused by climate change. The announcement also specified that Vanuatu will coordinate the efforts of Pacific Island countries to seek clarification of the legal duties of large emitters of greenhouse gases (GHG) with respect to present and future generations.[13] The initiative has received extensive attention. Observers have commented that this 'would be an opportunity for the ICJ to issue a progressive AO that would cement consensus on the scientific evidence of climate change, provide guidance for domestic and regional courts to adjudicate climate cases, and to integrate human rights and environmental law'.[14] It has further been noted that hopefully the 'Court will understand the urgency of the matter at hand' and 'deliver not just a comprehensive summary of existing obligations, but rather [also] a progressive interpretation'.[15] The initiative has since been endorsed by country blocs, such as the Caribbean Community (CARICOM) and the Organisation of African, Caribbean and Pacific States (OACPS) as well as over 1,500 civil society organisations.[16]

The initiative, as mentioned above, was preceded by the unsuccessful attempt of Palau and the Marshall Islands to reach the stage of formal negotiations at the UNGA in 2011. Contentious adjudication, as the alternative to advisory jurisdiction, was also considered by the island country of Tuvalu in 2002, which announced publicly its considerations to bring a contentious

bold action, climate vulnerable countries like Vanuatu will face an onslaught of adverse impacts from coastal inundation, to loss of freshwater, to increasingly severe storms and cyclones. This situation is untenable, as the nation is already reeling from one Category 5 cyclone to another', see <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>.

13 See e.g. <https://www.pisfcc.org/news/vanuatu-launches-the-icjao-campaign>.

14 See Schnakenberg, Watt and Fleming (n 7).

15 British Institute of International and Comparative Law, 'Rising Sea Levels: A Matter for the ICJ?' (11 March 2021) available at <https://www.biicl.org/documents/10720_rising_sea_levels_episode2_report.pdf>.

16 See <https://caricom.org/communique-thirty-third-inter-sessional-meeting-of-caricom-heads-of-government/>; <https://climatenetwork.org/2022/05/05/thousands-of-civil-society-organisations-call-on-countries-to-supportvanuatu-climate-justice-initiative/>; <https://mobile.twitter.com/pisfcc/status/1539168345110417409>. Regarding the OACPS, on 21 June 2022, Assistant Secretary General Cristelle Pratt announced the endorsement of 79 OACPS states for Vanuatu's ICJ AO initiative. This announcement was made at a conference on the ICJ AO hosted by Blue Ocean Law in collaboration with Leiden University at the Peace Palace in June 2022, and the endorsement is due to be published in the near future.

case against the United States (US) and Australia.[17] However, the government of Tuvalu changed subsequent to the announcement, resulting in the abandonment of the initiative.[18] Furthermore, given the disparity in availability of financial resources, it appears challenging for a SIDS to successfully bring a claim against a powerful State.[19] Moreover, the fact that a majority of large GHG emitters do not accept the compulsory jurisdiction of the ICJ, the voluntary nature of international adjudication operates as a barrier to successful inter-State litigation in this regard.[20]

3 Requirements for an Admissible Advisory Opinion Request

The advisory jurisdiction competence is an important feature of the ICJ. In the *Kosovo* AO, the Court explained that its advisory jurisdiction:

> is not a form of judicial recourse for States but the means by which the General Assembly and the Security Council, as well as other organs of the United Nations and bodies specifically empowered to do so by the General Assembly in accordance with Art. 96, paragraph 2, of the Charter, may obtain the Court's opinion in order to assist them in their activities.[21]

In contrast to judgments in contentious cases, and except in the few cases where it is expressly provided that they shall have binding force,[22] AOs are not binding,[23] but the requesting organ, agency or organisation remains free

17 At the time, these were the only two industrialised States that had not expressed their consent to be bound by the Kyoto Protocol to the United Nations Framework Convention on Climate Change, 11 December 1997.

18 Allegedly also as a result of political pressure exercised by the US, see e.g. Schnakenberg, Watt and Fleming (n 7).

19 *Ibid*.

20 Only two – India and Japan – of the eight largest GHG-emitting States have accepted the compulsory jurisdiction of the ICJ, see ClimateWatch Data <https://www.climatewatchdata.org/countries/IND?end_year=2019&start_year=1990> and <https://www.climatewatchdata.org/countries/JPN>. See also 'Declarations Recognising the Jurisdiction of the Court as Compulsory' <https://www.icj-cij.org/en/declarations>.

21 ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, (Advisory Opinion) [2010] ICJ Rep 403, para. 33.

22 For example, as in the Convention on the Privileges and Immunities of the United Nations, 13 February 1946 and the Convention on the Privileges and Immunities of the Specialised Agencies of the United Nations, 21 November 1947.

23 See art. 94(1) UN Charter and art. 59 of the ICJ Statute.

to determine what effect to give to the AO.[24] Nevertheless, despite being non-binding, the Court's AOs carry significant legal weight and moral authority. They are often an 'instrument of preventive diplomacy and help to keep the peace'.[25] AOs further contribute to the clarification and development of international law and 'thereby to the strengthening of peaceful relations between States'.[26] Previous AOs of the ICJ, for example, the *Threat or Use of Nuclear Weapons*,[27] the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*,[28] and the *Reservations to the Convention on Genocide*[29] AOs have all contributed to the development of international law, particularly the field of international environmental law (IEL), clarified the applicability of international human rights law during times of war, and influenced international treaty law on the validity of reservations to treaties as subsequently codified in the Vienna Convention on the Law of Treaties.[30]

The advisory jurisdiction of the Court only exists if the conditions set out in art. 96 of the United Nations (UN Charter) and art. 65 of the Statute of the International Court of Justice (ICJ Statute) are fulfilled.[31] Pursuant to art. 96(1) of the UN Charter, the GA or the Security Council (SC) may request the ICJ to give an AO on 'any legal question'. Other organs of the UN and specialised agencies, which may at any time be so authorised by the GA, may also request AOs from the Court on legal questions insofar it arises 'within the scope of their activities'.[32] Hence, States are not eligible to request AOs. Art. 65 of the Statute of the International Court of Justice (ICJ Statute) further states that the Court may give an AO on any legal question at the request of whatever body may be authorised by or in accordance with the UN Charter to make such a request. Such a body can 'only mean an organ created by States, operating within the framework of a public international organisation'.[33]

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24 ICJ, 'Advisory Jurisdiction', available at <https://www.icj-cij.org/en/advisory-jurisdiction>.

25 *Ibid.*

26 *Ibid.*

27 ICJ, *Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226.

28 ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136.

29 ICJ, *Reservations to the Convention on Genocide* (Advisory Opinion) [1951] ICJ Rep 15.

30 Vienna Convention on the Law of Treaties, 23 May 1969 (VCLT). For an overview of AOs, see e.g. Malcolm Shaw, Rosenne's Law and Practice of the International Court 1920–2015, Vol I (Brill Nijhoff 2016[5]); Andreas Zimmerman and Christian Tams (eds), The Statute of the International Court of Justice: A Commentary (OUP 2019[3]).

31 See further Pierre d'Argent, 'Articles 96 and 65' in Zimmerman and Tams (n 30) 269–275, 1783–1812.

32 Art. 96(2) UN Charter.

33 Shaw (n 30) 291.

Questions upon which the AO of the Court is asked shall be laid before the Court by means of a written request containing an *exact* statement of the question upon which an opinion is required, and accompanied by all documents likely to throw light upon the question.[34] Accordingly, advisory proceedings begin with the filing of a written request for an AO addressed to the Registrar by the UN Secretary-General or the secretary-general of the organisation or body making the request. Upon receipt of the request, the Registrar of the ICJ must give notice to all States entitled to appear before it.[35] In urgent cases the Court may take all appropriate measures to speed up the proceedings.[36] To assemble all the necessary information about the question submitted to it, the Court is empowered to hold written and oral proceedings.[37]

In light of art. 96 of the UN Charter and 65 of the ICJ Statute, three conditions, in order for the ICJ to possess jurisdictional competence to give an AO, must be met: 1) the body requesting the opinion must be authorised to do so, the GA and SC being authorised under art. 96(1) UN Charter; 2) if the requesting body is another UN organ than the UNGA or SC or a specialised body, the issue at hand must fall within the competence of the requesting body;[38] and 3) the question must be a legal one.[39] However, with respect to the second condition, it has been argued that art. 96(2) must be read in light of art. 65(1) of the ICJ Statute.[40] Therefore, no organ, including the GA and SC, can request an AO otherwise than when it is acting within the scope of its activities.[41] As such, the decision to request an opinion must originate in action which itself properly comes within the competence of the requesting body and it is the constituent instrument of that body which determines its competence on the matter.[42] This occurred in the *Legality of a State by Use of Nuclear Weapons in Armed Conflict* AO.[43] In that case, the request for an AO entailed an examination of the constituent instrument of the World Health Organisation (WHO) to assess if the question asked came within the scope of activities of the WHO. The ICJ answered in the negative, because whether or not nuclear weapons are

34 Art. 65(2) ICJ Statute (emphasis added).
35 Art. 66(1) ICJ Statute.
36 Art. 103 of the ICJ Rules and Procedures.
37 ICJ, 'Advisory Jurisdiction', available at <https://www.icj-cij.org/en/advisory-jurisdiction>.
38 Art. 96(2) of the UN Charter.
39 Art. 96 UN Charter.
40 Shaw (n 30) 296.
41 *Ibid.*
42 *Ibid.*, 297.
43 ICJ, *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Advisory Opinion) [1996] ICJ Rep 66.

used legally or illegally, their effects on health would be the same, leading the Court to conclude that it was unable to give the AO.[44]

With respect to the third requirement, the Court has continuously explained that legal questions are those that 'are framed in terms of law and raise problems of international law (…) are by their very nature susceptible of a reply based on law' and 'therefore (…) appear (…) to be questions of a legal character'.[45] In *Certain Expenses,* the ICJ noted that '[i]f a question is not a legal one, the Court has no discretion in the matter; it must decline to give the opinion requested'.[46] However, even if the question is a legal one, 'which the Court is undoubtedly competent to answer, it may nonetheless decline to do so'. This is because the Court's advisory jurisdiction is discretionary, even when all jurisdictional conditions are fulfilled. In fact, the view of the Court, art. 65 of the ICJ Statute 'gives the Court the power to examine whether the circumstances of the case are of such a character as should lead it to decline to answer the Request'.[47]

Thus, whereas there is a presumption that the court should give an AO,[48] this presumption can be rebutted by 'compelling' reasons, which, to reiterate, are discretionary on part of the Court.[49] The 'compelling reasons' that the ICJ could rely on to decline an AO request must be 'based on considerations of judicial propriety'.[50] This can include reasons for when:

> the requesting body puts to the court to secure guidance for itself as to its future action; questions put in the course of dealing with a particular dispute or situation, with or without the consent of the States parties to that dispute or situation; and (theoretically) questions put at the request

44 *Ibid*., para. 22.

45 *Kosovo* (n 21) para. 25; ICJ, *Western Sahara* (Advisory Opinion) [1975] ICJ Rep 12, para. 15.

46 ICJ, *Certain expenses of the United Nations* (*Art. 17, paragraph 2, of the Charter*) (Advisory Opinion) [1962] ICJ Rep 151, 155.

47 ICJ, *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* (First Phase) [1950] ICJ Rep 72.

48 See Shaw (n 30) 293.

49 ICJ, *Judgments of the Administrative Tribunal of the I.L.O. upon complaints made against the Unesco* (Advisory Opinion) [1956] ICJ Rep 77, 86; Shaw (n 30) 293–94. See also *Threat or Use of Nuclear Weapons* (n 27); *Western Sahara* (n 45); *Legal Consequences of the Construction of a Wall* (n 28); ICJ, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) [2019] ICJ Rep 95; *Kosovo* (n 21).

50 Georges Abi-Saab, 'On Discretion: Reflections on the Nature of the Consultative Function of the International Court of Justice' in Laurence Boisson de Chazournes and Philippe Sands (eds), International Law, the International Court of Justice and Nuclear Weapons (CUP 1999) 42–45.

> of the States concerned when the body is dealing with a dispute between those States.[51]

They can also include the risk of interference with political processes,[52] the overly abstract nature of the question,[53] or the motives behind a request, for instance to serve the interests of a State.[54] With respect to the overly abstract nature of the question, failing control of legal questions and generalisation/abstraction, there is a risk that the Court may be used for making general statements on political issues or act as a quasi-legislative capacity, which is not its purpose.[55] Furthermore, the Court has rejected arguments such as the origins or to the political history of the request, the distribution of votes in respect of the adopted resolution,[56] the fact that the GA had not explained to the Court the purposes for which it sought an opinion,[57] that the questions raise complex and disputed factual issues,[58] and that the AO would not assist the GA in the proper exercise of its functions[59] as 'compelling reasons' for the Court to exercise its discretion to decline to give the AO requested.

Accordingly, in the context of Vanuatu's initiative, the ICJ would first have to ascertain whether the jurisdictional conditions are fulfilled, and secondly whether there is any reason to decline the request under its discretion. Vanuatu's announcement specified that it will ask the UNGA to request an AO from the ICJ. As outlined above, the UN Charter authorises all organs of the UN to request advisory opinions from the ICJ, including the UNGA and the SC.[60] It therefore seems that the UNGA is 'authorised in accordance with the UN' to make the request, hence fulfilling the first jurisdictional condition.[61]

Secondly, it also appears that the request comes within the scope of the activities of the GA. According to art. 10 of the UN Charter – the constituent instrument of the GA – the GA 'may discuss any questions or any matters within the scope of the present Charter'. The object of the UN Charter is *inter*

51 Shaw (n 30) 293–94.
52 *Legal Consequences of the Construction of a Wall* (n 28) paras. 51–54.
53 *Threat or Use of Nuclear Weapons* (n 27). See Benoit Mayer, 'International Advisory Proceedings on Climate Change' (Michigan Journal of International Law, Forthcoming, 15 March 2022) available at SSRN: <https://ssrn.com/abstract=4086761> at 28.
54 *Kosovo* (n 21) paras. 33–37.
55 Shaw (n 30) 286.
56 *Threat or Use of Nuclear Weapons* (n 27) para. 16.
57 *Legal Consequences of the Construction of a Wall* (n 28) para. 62.
58 *Chagos* (n 49) para. 74.
59 *Ibid.*, paras. 79–81.
60 Art. 96(1) UN Charter.
61 See above.

alia 'to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained';[62] 'to promote social progress and better standards of life in larger freedom';[63] to maintain international peace and security;[64] 'to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace';[65] and 'to achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all'.[66]

Furthermore, it falls within the GA's competence to 'consider the general principles of cooperation in the maintenance of international peace and security';[67] to 'initiate studies and make recommendations for the purpose of (...) promoting international cooperation in the political field and encouraging the progressive development of international law and its codification';[68] and to promote 'international cooperation in the economic, social, cultural, educational, and health fields, and assisting in the realization of human rights and fundamental freedoms for all'.[69] The GA has in fact engaged with questions involving environmental matters for some time.[70] Accordingly, as the request pertains to issues of the legal obligations of States to prevent and redress the adverse effects of climate change, the responsibilities of States under international law to ensure that activities emitting GHG that are carried out under their jurisdiction or control do not damage other States, and climate change and human rights, and in particular the rights of present and future generations to be protected from the adverse effects of climate change, it seems like the core questions of the request falls within the activities of the GA. It is thus unlikely that the ICJ will find a request for an AO on climate change to fall outside the scope of the GA's activities.

62 UN Charter Preamble.
63 *Ibid.*
64 Art. 1(1) UN Charter.
65 Art. 1(2) UN Charter.
66 Art. 1(3) UN Charter.
67 Art. 11 UN Charter.
68 Art. 13(a) UN Charter.
69 Art. 13(b) UN Charter.
70 At the 74th Session of October 2019, the GA 'endorse[d] the political declaration adopted by the high-level forum on sustainable development convened under the auspices of the GA', which affirmed that climate change is one of the greatest challenges of our time, see <http://sdg.iisd.org/news/unga-president-announces-plans-for-sdg-summit/>.

Should Vanuatu rely on another UN Organ or specialised body, it would likewise have to show that the request arises within the scope of the activities of such a body, for instance one that has the mandate to address climate change, GHG emissions and intergenerational equity, and/or determining States' obligations in the context of transboundary harm. In fact, Bodansky has suggested that the World Meteorological Organisation would be a preferable body to the UNGA as it 'is a more technical, less politicized forum, in which it might be easier to resist efforts to encumber the request with unhelpful baggage'.[71] Yet, a request by the World Meteorological Organisation would have to be made or authorised by a two-thirds majority of its Congress, which appears to be a difficult number to reach.[72]

Moreover, in addition to the GA, the SC would also be authorised to request an AO from the ICJ.[73] However, this is a less realistic option available to Vanuatu as it is likely that at least one – if not two – of the five Permanent Members of the SC would use or threaten to use their power to veto and block the initiative.[74] Furthermore, the UNGA route seems more attractive as it offers the 'opportunity for a wider range of legal questions to put before the Court, and furthermore the UNGA would afford higher visibility to the initiative and thus increase the overall impact of the diplomatic campaign'.[75] Being a more inclusive route than that of the SC, the 'UNGA resolution would offer States the opportunity to provide their views on the formulation of the question at the diplomatic stage, and also to participate in the judicial proceedings'.[76]

For the request to be issued, a valid UNGA resolution would have to pass. Neither the UN Charter nor the rules of procedure of the GA contain specific provision regarding the method of deciding to request an AO, but the GA treats 'such proposals in the normal cause of its business'.[77] Each UN Member State

71 Daniel Bodansky, 'The Role of the International Court of Justice in Addressing Climate Change: Some Preliminary Reflections' (2017) 49 Arizona State Law Journal, 689, 712. For the original analysis, see Mayer (n 53).

72 See Agreement Between the United Nations and the World Meteorological Organisation, 20 December 1951, art. VII; Convention of the World Meteorological Organisation, 11 October 1947, art. 11. This was originally pointed out by Mayer (n 53) at 28.

73 Art. 96(1) UN Charter.

74 In particular the US and China. Furthermore, the five Permanent Members represent about half of global GHG emissions and include the world's two largest GHG emitters (China and the US). See also Mayer (n 53) 28.

75 Dr Wewerinke-Singh, 'Rising Sea Levels: A Matter for the ICJ?' (British Institute of International and Comparative Law, 11 March 2021) available at <https://www.biicl.org/documents/10720_rising_sea_levels_episode2_report.pdf>.

76 *Ibid*.

77 Shaw (n 30) 300.

is represented in the UNGA, and each State has one vote.[78] Once the UNGA has been asked to make a request for an ICJ AO, a passing resolution must be adopted with a majority vote of those present among the 195 Member States.[79] However, the issue is complicated by the fact that previous practice does not provide a clear answer on what type of majority is required for decisions of requesting an AO (i.e. whether a simple or two-thirds majority would be required).[80] This is in particular because art. 18(2) of the UN Charter established that decisions of the GA on 'important questions shall be made by a two-thirds majority of the members present and voting'.

This begs the question of whether a decision on an AO request is an 'important question' requiring a two-thirds majority of parties present and voting, or a decision on 'other questions' requiring only a simple majority of parties present and voting. There is no settled conclusive practice on the issue. However, the *Wall* AO decision was adopted with 90 in favour, 8 against and 74 abstentions,[81] and the *Kosovo* AO decision was adopted by 77 votes in favour, 6 against and 74 abstentions,[82] both falling short of two-thirds majority votes.[83] Furthermore, in the *South-West Africa* AO, the President of the GA held that a simple majority vote was sufficient.[84] In fact, it has been recognised that the Court is not so much concerned of whether a decision was reached by simple or two-third majority vote, but rather on whether 'a resolution of a properly constituted organ of the United Nations which is passed in accordance with that organ's rules of procedure, and is declared by its President to have been so passed, must be presumed to have been validly adopted'.[85]

Consequently, a decision on Vanuatu's request could be by a simple majority vote, with States who abstain from voting being considered as absent, insofar the GA's President declares the resolution to have been passed in accordance with its rules of procedure. However, a failure to obtain the requisite number of votes is one of the major risks with the request for an AO, which is also

78 Art. 18(1) UN Charter.

79 Rule 106 of the Rules of Procedure.

80 Shaw (n 30) 301.

81 UNGA Res ES-10/14 (12 December 2003) UN Doc A/RES/ES-10/14; d'Argent (n 31) 1783–1812.

82 GA Res 63/3 (2008); d'Argent (n 31) 1783–1812.

83 Furthermore, in *Threat or Use of Nuclear Weapons* resolution, there were 78 votes in favour, 43 against, with 38 abstentions. In the *Chagos Archipelago* resolution, there were 94 votes in favour, 15 against, with 65 abstentions.

84 See Shaw (n 30) 301; UNGA, '269th Plenary Meeting' (6 December 1949) UN Doc A/PV.269, 536.

85 ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia Notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [1971] ICJ Rep 16, para. 20. See also Shaw (n 30) 301.

exemplified by Palau's 2011 attempt to seek an opinion through the UNGA.[86] That said, as Wewerinke-Singh has explained:

> We may speculate that today the circumstances for securing the requisite majority while maintaining a strong question are perhaps more favourable than they were back in 2012. But the risk of not getting there is still real, given the widely different interests at stake, and a significant chance of pushback from powerful states.[87]

As such, whereas obtaining the requisite number of votes would be challenging, it is not synonymous with impossible.[88] In fact, the GA has in the past passed resolutions to request ICJ AOs on a variety of controversial questions, for instance on the *Legality of the Use of Nuclear Weapons* or the *Consequences of the Construction of a Wall in Occupied Palestinian* territory, though perhaps none 'touched upon a topic as complex and sensitive as climate change mitigation or climate reparations'.[89]

Lastly, for the request to be admissible, the question posed to the ICJ will have to be a legal one, and not steer the Court to find any compelling reasons to reject the request, such as being of a political or overly abstract nature. First, the requirement of formulating a legal question does not seem to cause any major problems. In fact, Vanuatu's announcement raises critical legal questions on the obligations of States to mitigate the effects of climate change and to preserve the rights of future generations. That said, the request will inevitably carry certain political dimensions and implications, which may be more or less far-reaching.[90] This might however not necessarily cause any major obstacles for the request as the ICJ previously has issued AOs on questions and issues of great political nature, such as the legality of nuclear weapons, the recognition of Kosovo's declaration of independence, and the Israeli-Palestinian conflict.[91] In fact, the ICJ has continuously emphasised that the political dimensions of a request for an AO 'does not suffice to deprive it of its character as a legal question and to deprive the Court of a competence expressly conferred on it by its Statute'.[92]

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86 See above.
87 Wewerinke-Singh (n 75).
88 Mayer (n 53) 65.
89 *Ibid.*
90 *Ibid.*, 68.
91 *Ibid.*
92 *Threat or Use of Nuclear Weapons* (n 27) para. 13 (citations omitted); *Legal Consequences of the Construction of a Wall* (n 28).

Secondly, Vanuatu would have to formulate a question which is not overly general and abstract, which may be more challenging than refraining from asking a political rather than legal question. This is in particular because SIDS may be – understandable so – tempted to ask general questions aimed at determining the obligations of all States in the context of the climate change regime, mitigation measures, and potential reparation and compensation for environmental damage.[93] Such broad, general (and interdisciplinary) may be time consuming and impossible for the ICJ to answer within a reasonable timeframe,[94] and present a challenge for the Court to issue an AO which effectively, accurately and comprehensively considers all relevant elements.[95] Therefore, if a broad and abstract question is the only feasible one, it has been argued that what is actually an 'analysis of an entire legal field' would be better served by legal scholarship or the ILC than by judicial proceedings.[96] On the other hand, the Court has stated that a lack of clarity of the drafting of a question does not deprive the Court of jurisdiction but rather requires clarification in interpretation.[97] In the *Kosovo* AO, the ICJ also recalled that in some previous cases, it had departed from the language of the question where the question was inadequately formulated or where it was felt that the request did not reflect the legal questions really at issue.[98] Hence, even if Vanuatu would fail to formulate sufficiently clear and precise questions, it would not *ipso facto* deprive the Court of its jurisdictional competence.

Lastly, as mentioned above, questions upon which the AO of the Court is asked shall be laid before the Court by means of a written request accompanied by all documents likely to throw light upon the question.[99] In this context, the issue of use of scientific evidence may become relevant. Vanuatu's request for an AO concerns questions of climate change obligations and responsibilities of States under international law to ensure that activities carried out under their jurisdiction or control that emit GHS do not damage other States or future generations. This in turn raises the thorny question of causation, and how to establish a causal link between State action and resulting harm and/or damage. As judges are 'generalists', they are dependent on expert scholars and practitioners to inform the Courts' understanding of how to interpret and apply the law

93 See further Mayer (n 53) 70–71.
94 As pointed out by Mayer (n 53) 70–71.
95 Sir Franklin Berman, 'The Uses and Abuses of Advisory Opinions' in Nisuke Ando et al. (eds), Liber Amicorum Judge Shigeru Oda (Brill 2002) 819.
96 Mayer (n 53) 70–71.
97 *Legal Consequences of the Construction of a Wall* (n 28) para. 38.
98 *Kosovo* (n 21) para. 50.
99 Art. 65(2) ICJ Statute (emphasis added).

in relation to shifting global circumstances,[100] and ICJ judges have previously been conscious of their limitations on specific technical expertise.[101]

However, there are examples of case-law where the ICJ has undertaken the task of examining scientific claims, for instance in the *Whaling in the Antarctic* between Australia and Japan.[102] In the area of climate change, the most authoritative reports on the science of climate change are published by the Intergovernmental Panel on Climate Change (IPCC). The phase during which the ICJ hears evidence submitted by States in the process of deliberating the legal question therefore offers an opportunity for the IPCC reports to be given a 'non-political' stage and to be admitted to the Court as the best available evidence on climate change. In other words, the Court can accept the 'IPCC reports not as political arguments raised by civil society organisations, but rather as technical evidence clarifying the scientific developments at hand'.[103] Furthermore, international organisations can participate in the process if authorised to do so by the Court pursuant to art. 66(2) of the ICJ Statute. Relevant bodies, including scientific ones, of the United Nations Framework Convention on Climate Change (UNFCCC), the UN Environment Programme (UNEP), and the World Meteorological Organisation (WMO), may be invited to participate in the advisory proceedings.

4 What Question(s)?

When requesting an AO, States must decide how to frame their questions. Before potential question(s) can finally be formulated, it is necessary to discuss what international law or rule is subject to clarification. In the sphere of climate change law, there are several important rules and principles of primary international law which may be of relevance. The most important treaties include the 1992 UNFCCC,[104] as well as the more recent 2015 Paris Agreement.[105] Under the latter, States have agreed to limit the increase in global average temperature to well below 2°C above pre-industrial levels and pursue efforts to

100 Schnakenberg, Watt and Fleming (n 7).

101 *Ibid.*

102 *Whaling in the Antarctic* (*Australia v Japan: New Zealand intervening*) (Judgment) [2014] ICJ Rep 226. For further references, see e.g. Malgosia Fitzmaurice, Whaling in International Law (CUP 2015); Malgosia Fitzmaurice and Dai Tamada (eds), Whaling in the Antarctic: Significance and Implications of the ICJ Judgment (Brill Nijhoff 2016).

103 See further Schnakenberg, Watt and Fleming (n 7).

104 United Nations Framework Convention on Climate Change, 9 May 1992.

105 Paris Agreement, 12 December 2015.

limit the temperature increase to 1.5°C above pre-industrial levels.[106] However, it remains uncertain precisely what each State is legally required to do in order to achieve this common goal.

In this regard, it has been recognised that climate change can only be properly addressed by the collective efforts of the international community as a whol-e, and it will be impossible to allocate responsibility for a particular harm caused by climate change to the conduct of one single State.[107] Some recognition of shared responsibility in the climate change regime can be found in the principle of common but differentiated responsibilities as reflected in arts. 3(1) and 4(1) of the UNFCCC. To reiterate, however, this spawns several complicated challenges of allocation of primary obligations, causality when seeking remedies for environmental damage caused by climate change, and *locus standi*.[108]

Other core principles of international law which are susceptible to lack of certainty include the 'no harm' principle and the principle of due diligence. The 'no harm' principle binds States to prevent, reduce and control the risk of environmental harm to other States. It was initially laid down in the *Trail Smelter* arbitration,[109] and has subsequently been included in

106 Paris Agreement, art. 2(1)(a). See further Rosemary Lyster, 'Climate Change Law' (2020) 3(1) Yearbook of International Disaster Law, 512.

107 Lyster (n 106).

108 For instance, the ILC has confirmed in its commentary to art. 48 of the ARSIWA that global protection of the environment, including biodiversity and climate change, are *erga omnes* norms. owed towards the international community as a whole. They are the concern of all States because of the importance of the nature of the obligations involved, which means all States have a legal interest in their protection, see para. 7 of the commentary. See further ICJ, *Barcelona Traction, Light and Power Company, Limited* (*Belgium v Spain*) (New Application: 1962) (Preliminary Objections) (second Phase) [1970] ICJ Rep 3, paras. 33–34; *Questions relating to the Obligation to Prosecute or Extradite* (*Belgium v Senegal*) (Judgment) [2012] ICJ Rep 422, paras. 68–69; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*The Gambia v Myanmar*) (request for the Order of Provisional Measures) (Order of 20 January 2020) paras. 39–42. Each State is entitled, as a member of the international community as a whole, to invoke the responsibility of another State for breaches of such obligations. As such, a State entitled to invoke responsibility under art. 48 is acting not in its individual capacity by reason of having suffered injury, but in its capacity as a member of a group of States to which the obligation is owed, or indeed as a member of the international community as a whole (para. 1 commentary). Art. 48 is 'based on the idea that in case of breaches of specific obligations protecting the collective interests of a group of States or the interests of the international community as a whole, responsibility may be invoked by States which are not themselves injured' (para. 2 of the commentary).

109 *Trail smelter case* (United States v Canada) 16 April 1938 and 11 March 1941, Vol III, 1905–1982.

the Principle 21 of the Stockholm Declaration,[110] and Principle 2 of the Rio Declaration.[111] Furthermore, in *Threat or Use of Nuclear Weapons*, the ICJ confirmed that the obligation to ensure that activities within a State's jurisdiction respect the environment of other States or of areas beyond national control is a rule of customary international law.[112]

The 'no harm' principle *prima facie* appears straightforward in the context of climate change: climate change is increasingly causing harm, disproportionately affecting SIDS. Nevertheless, the obligation is one of conduct, and it is not clear what precise obligations the principle imposes on individual States. It merely requires States to take reasonable measures to prevent activities within its jurisdiction from causing serious transboundary damage, but does not specify any precise measures. Rather, States are required to act with *due diligence* to prevent transboundary harm.[113] However, the level of conduct and performance under the standard of due diligence within the domain of IEL likewise remain uncertain,[114] and is depending on the peculiarities of the relevant State(s) at hand.[115]

Lastly, the rules or perhaps guidance relating to establishing causation, as briefly mentioned above, in the field of IEL remains unclear. In order, for instance, to establish a violation of the obligation to prevent transboundary harm, a causal link will need to be established between the activities occurring within a respondent State's jurisdiction and the (potential) harm caused by climate change.[116] Such a link is far from straightforward to draw, but would have to draw on scientific probabilistic standards of proof.[117] Moreover, it would be necessary to show that activities within any particular respondent State's jurisdiction or control have *causally contributed* to the collective harm of global

110 Stockholm Declaration on the Human Environment, in Report of the United Nations Conference on the Human Environment (1972) UN Doc A/CONF. 48/14, at 2 and Corr. 1.

111 1992 Rio Declaration on Environment and Development (1992) UN Doc A/CONF.151/26 (vol. I).

112 *Threat or Use of Nuclear Weapons* (n 27) para. 29.

113 See e.g. *Pulp Mills on the River Uruguay* (*Argentina v Uruguay*) (Judgment) [2010] ICJ Rep14.

114 See further Anne Peters, Heike Krieger and Leonhard Kreuzer, 'Due diligence: the risky risk management tool in international law' (2020) 9/2 CILJ, 121.

115 Alexandre Kiss, 'The Rio Declaration on Environment and Development' in Luigi Campiglio et al. (eds), The Environment after Rio: International Law and Economics (Martinus Nijhoff 1994).

116 Nataša Nedeski, Tom Sparks and Gleider Hernández, 'Judging climate change obligations: Can the World Court raise the occasion? Part I: Primary obligations to combat climate change' (Völkerrechtsblog, 30 April 2020).

117 *Ibid*.

warming; a task which, in light of the contributions of others to the same harm and the unclear concept of causation in international law, will likely prove daunting.[118]

In light of the foregoing, it must be carefully considered what type of legal questions can be asked to the ICJ which are neither of a pure political nature nor overly abstract. Wewerinke-Singh has noted that one issue that the Court could comment on is the nature and scope of States' obligations related to loss and damage, which has become part of the international climate change regime through art. 8 of the Paris Agreement.[119] However, a subsequent COP decision entails that art. 8 provides no basis for liability and compensation, which remains outside the scope of the provision.[120] Accordingly, the ICJ could 'usefully provide insight or guidance on how loss and damage may be dealt with under general international law'.[121]

Others have advocated that a successful AO is one that focalises climate justice.[122] Under the UNFCCC, Member States have committed to protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities.[123] This commitment is also reflected in the acknowledgment of human rights in the Preamble of the Paris Agreement. The ICJ can hence be asked to address the intersection between climate law and human rights, which is also a very fundamental part of Vanuatu's campaign. A successful opinion would therefore set out what climate justice means, what intergenerational equity means, and where it falls within the scope of climate justice.[124] Setting such legal principles would afford the youth almost a standard to continually hold their governments to.[125] The following question has been suggested in this regard: 'what are the obligations of states

118 See further Ilias Plakokefalos, 'Causation in the Law of State Responsibility and the Problem of Overdetermination: In Search of Clarity' (2015) 26/2 EJIL, 471.

119 Wewerinke-Singh (n 75).

120 UNFCCC, Conference of the Parties 21st Session: Adoption of the Paris Agreement (12 December 2015) para. 52: 'Agrees that Article 8 of the Agreement does not involve or provide a basis for any liability or compensation'.

121 Wewerinke-Singh (n 75).

122 See e.g. Shattock, 'Rising Sea Levels: A Matter for the ICJ?' (British Institute of International and Comparative Law, 11 March 2021) available at <https://www.biicl.org/documents/10720_rising_sea_levels_episode2_report.pdf>.

123 UNFCCC art. 3(1).

124 'Setting such legal principles would afford the youth almost a standard to continually hold their governments to', see Shattock (n 122).

125 *Ibid*.

under international law to protect the rights of present and future generations against the adverse effects of climate change'?[126]

Furthermore, questions could also revolve around the legal status and content of the principle of sustainable development in international law and the legal responsibilities of States for transboundary harm caused by GHG emissions, as well as the status and content of various international commitments on climate change.[127] This would in particular allow the Court to clarify the content and application of the 'polluter pays' principle and to elucidate issues of causation and compensation. Questions could include who to blame for rising sea levels, whether liability should be allocated to the largest carbon emitters today, or whether punitive measures should be allocated on a historical basis.[128]

In assessing such questions, the Court would be able to reflect on the content of art. 47 of the ILC's Articles on Responsibility of States for Internationally Wrongful Acts.[129] Art. 47 establishes that '[w]here several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act'. The commentary explicitly refers to the issue of pollution, and provides that in situations where several States are responsible for the damage, 'the responsibility of each participating state is determined individually, on the basis of its own conduct and by reference to its own international obligations'.[130] The Court will also have the opportunity to explain how compensation for environmental damage is to be calculated.[131] For instance, in *Certain Activities Carried Out by Nicaragua in the Border Area*, the Court concluded that the total amount of compensation to be awarded by Nicaragua to Costa Rica was US$378,890.59, and in 2018, Nicaragua paid to Costa Rica the total compensation dictated by the Court. The Court noted, however, that international law does not prescribe any specific method of valuation for the purposes of compensation for environmental damage, thereby leaving some room for creativity, and/or for future formulation of such a method.[132]

126 *Ibid.*

127 *Ibid.*

128 *Ibid.*

129 Text adopted by the Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session. The report appears in Yearbook of the International Law Commission, 2001, vol. II (Part Two).

130 *Ibid.*, commentary to art. 47 at para. 8.

131 ICJ, *Certain Activities Carried Out by Nicaragua in the Border Area* (*Costa Rica v Nicaragua*) (Compensation) (Judgment) [2018] ICJ Rep 15.

132 *Ibid.*

In essence, a variety of different questions and formulations can be envisaged. However, in order to confirm with a sufficient level of preciseness and being of a sufficiently legal nature, an opinion could answer questions about the status of customary norms on climate change mitigation and on climate reparations, and determine the standard at which each State must implement their general obligations. On a more concrete level, Mayer has recognised that the Court could indicate a precise set of specific rules (for instance the requirement for a State to implement its Nationally Determined Contributions (NDCs)), or even 'provide a list of quantified emission limitation and reduction targets applicable to individual States'.[133]

The Court could also make an invaluable contribution to the regime of IEL by defining a 'formula to determine the quantum of compensation due by the states responsible for the largest share of GHG emissions, to those most vulnerable to the impacts of climate change'.[134] What is important is that the Court should not only identify the relevant rules, but explain their content, clarify their application to the international community of States and determine precisely what individual States must or must not do. Only answering what the rules are will most likely not offer the requisite guidance for SIDS to approach the questions from a self-serving perspective and to help States make sense of these norms.[135]

5 Risks and Opportunities

The initiative for an AO is often phrased in opportunist language, regardless of whether it yields a request or not. There are, indeed, five particular potential benefits with an AO on climate change. Firstly, the campaign would stress the urgency and importance of enhanced action to address climate change and its consequences that are already being suffered around the world, specifically in SIDS.[136] Hence, one particular benefit of the initiative for an AO is the 'societal impact of increased attention and awareness of climate change and its consequences for the present and future generations'.[137]

Second, the AO would be an opportunity to clarify the 'nature and extent' of States' obligations on climate change in the wider context of international

133 Mayer (n 53) 23.
134 *Ibid.*
135 See further Mayer (n 53).
136 Wewerinke-Singh (n 75).
137 *Ibid.*

environmental law, and to bring cohesiveness to States' fragmented international obligations in this regard.[138] An ICJ AO could bring legal clarity to and progress in international diplomatic endeavours, set the terms of the debate, provide evaluative standards and establish a framework of principles to develop more specific norms, and 'shape public consciousness and define normative expectations for a broad variety of actors as on its direct influence on States'.[139] If indeed the 'aim is just that to clarify the law, an advisory opinion would be preferable and less controversial than a contentious case, for example concerning state responsibility for harms associated with the impacts of climate change'.[140] To this end, an AO could provide 'important benchmarks and yardsticks that could inform the global stocktake in 2023 (when states review the progress towards the goals of the Paris Agreement)', as well as the second round of NDCs due in 2025.[141] In Bodansky's view, an AO could also elaborate more specific criteria of due diligence, for example by establishing 'a common language' for NDCs. However, Saravesi et al. stress that if for example, 'the objective is to develop more detailed rules concerning NDCs, the climate treaties' bodies are arguably in a better position – both technically and procedurally – than an international court to develop such rules'.[142] In fact, even an AO 'on the due diligence obligations associated with NDCs could be regarded as undermining the nationally determined nature of states' plans and, therefore, as contrary to the spirit of the Paris Agreement'.[143]

Third, an AO could complement and plug gaps in ambition, accountability and fairness in the climate regime.[144] Specifically, general principles of international law may help in determining fair shares in State efforts to combat climate change and reduce emissions.[145] In this context, the ICJ has a potential

138 Lavanya Rajamani, Louise Jeffery, Niklas Höhne, Frederic Hans, Alyssa Glass, Gaurav Ganti and Andreas Geiges, 'National "fair shares" in reducing greenhouse gas emissions within the principled framework of international environmental law' (2021) 21/18 Climate Policy, 983, 986–988.

139 Bodansky (n 71).

140 Annalisa Savaresi, Kati Kulovesi and Harro van Asselt, 'Beyond COP26: Time for an Advisory Opinion on Climate Change?' (EJIL:Talk!, 2021) available at <https://www.ejiltalk.org/beyond-cop26-time-for-an-advisory-opinion-on-climate-change/>.

141 *Ibid*.

142 *Ibid*.

143 For the original analysis, see *ibid*. This is pointed out by Bodansky himself at (n 71) 710.

144 Rajamani et al. (n 138) 986–988.

145 *Ibid*. For instance, general principles can complement conventional rules, fill potential gaps in their application and even develop certain norms of international law. To exemplify, when an issue arises in international law and there is an absence of a clear legal norm to solve the scenario, 'there is the possibility of looking at the matter through the lens of some principle', such as equity or good faith, which can concretise and more

role in raising the pledges of States in determining their NDCs to appropriately ambitious targets that would allow the international community to meet the 1.5°C global average temperature target.[146]

Fourth, an ICJ AO could provide helpful guidance for domestic courts in domestic international law litigation. Recent landmark cases, such as *Urgenda Foundation v The Netherlands*,[147] *Neubauer et al v Germany*,[148] and *Milieudefensie et al v Royal Dutch Shell PLC*,[149] demonstrate that national courts are increasingly willing to rely on international climate change law obligations, even if ambiguous or aspirational. In this regard, an AO would have a valuable contribution for domestic judges, enabling them to gain a clearer and comprehensive picture of the exact obligations of States. In other words, it would significantly assist domestic judges when confronted with climate change-related cases.

Fifth and last, advisory proceedings could have a more global impact than contentious jurisdiction by bypassing the opposition of some of the largest GHG emitters, such as the US and China, which do not accept the jurisdiction of the ICJ. Advisory proceedings would also 'better reflect the global nature of climate change than contentious proceedings, which is limited to the two parties involved'.[150] For these reasons, scholars agree that an AO on climate change is suitable to clarify the potential disputed points of law at hand as climate change concerns the international community at large.[151]

There are also, as always, some risks involved. To render an AO, the ICJ would need to interpret norms whose content is fundamentally vague and unclear. The Court 'would have no useful benchmark to determine, in any relatively specific and convincing manner, what a state must do concerning climate

precisely determine the content of a conventional or customary rule, see Robert Kolb, Good Faith in International Law (Hart Publishing 2017) 6–7.

146 *Ibid.*

147 HR Nederlanden (Supreme Court of the Netherlands) (Urgenda/Staat der Nederlanden) (20 December 2019) 59 ILM 814 (2020) unofficial English translation (Neth.)

148 Bundesverfassungsgericht (Federal Constitutional Court) (Neubauer/Germany) (24 March 2021) 1 BvR 2656/18, unofficial English translation (Ger.).

149 *Milieudefensie v. Royal Dutch Shell*, ECLI:NL:RBDHA:2021:5337 (D.C. Hague, May 26, 2021).

150 See David Freestone et al., 'Agreement for the Establishment of the Commission of Small Island States on Climate Change and International Law' (2022) 37 International Journal of Marine and Coastal Law, 166, 168.

151 Laurence Boisson de Chazournes, 'Advisory Opinions and the Furtherance of the Common Interest of Humankind' in Laurence Boisson de Chazournes et al. (eds), International Organizations and International Dispute Settlement: Trends and Prospects (Transnational Publishers 2002) 105–107.

change mitigation and, *a fortiori*, climate reparations'.[152] There is as such a risk that the ICJ will likewise render a vague and unclear AO. The ICJ would also have to be cautious to avoid highly political questions, as an opinion on such issues 'would have little upside potential but considerable dangers', and risk damaging the reputation of the Court. Furthermore, although not being legally binding, the 'authority' of an AO from the highest judicial organ of the UN may be undermined by the fact that some States might 'deny that they have obligations to mitigate climate change beyond what they have specifically committed to do under climate treaties (e.g., in relation to their NDCs)'.[153] In addition, as AOs are non-binding, there is a risk that the conclusions of the ICJ will not be implemented by States.[154]

In any event, what remains important, as outlined above, is that the ICJ should not only be concerned with the identification of a general obligation to mitigate climate change, but to articulate the applicable standard of conduct and elucidate what specific obligations and measures are to be taken by States in this regard.[155] This will be a controversial task for the Court, especially as there is no general rule or principle requiring developed States to mitigate climate change and reduce GHG emissions at the same rate,[156] but States' commitments are rather dependent on their individual circumstances and in light of the principle of common but differentiated responsibilities.[157]

6 Concluding Remarks

The major effects of climate change – heating, increased number of severe storms, crop failure, rising sea-levels, drought and famine – do disproportionately affect SIDS and the Global South whilst being predominantly caused by developed States and the Global North.[158] It is also SIDS and Global South States which are less equipped to finance adaptation and recovery measures.

152 Mayer (n 53) 74.

153 *Ibid.*

154 The UK did for instance not welcome the ICJ's conclusions in *Chagos* (n 49) see e.g. <https://www.worldpoliticsreview.com/articles/28948/the-u-k-s-refusal-to-abide-by-the-icj-chagos-verdict-is-a-self-inflicted-wound>.

155 See further Mayer (n 53) 74–75.

156 *Ibid.*

157 UNFCCC, art. 3(1); Paris Agreement, art. 4(2). See further Mayer (n 53) 74–76.

158 It further disproportionately affects the poorest and most vulnerable members of our societies within States, developed or otherwise.

Hence, collective action, calling on the international community as a whole, is needed, and urgently so. Without re-evaluation of current commitments to carbon emissions reductions and investments by developed States into mechanisms to reverse the effects of GHG emissions, sufficient climate change mitigation will not be possible. However, with the vagueness and looseness of current mitigation obligations of States, clarification is needed. The idea to utilise the ICJ as an avenue for strategic AO litigation therefore seems appealing. The Court would be presented the opportunity to establish and elaborate the law and obligations incumbent on States, and make a positive difference by contributing to the clarification and concretisation of international law. An ICJ AO would have a great potential for the regime of climate change, and provide significant guidance for domestic judges when faced with issues of climate change law.

Initially, a requesting State – in this regard Vanuatu – would have to seek to obtain the requisite number of votes, at minimum a simple majority of 97 Members, with States who abstain from voting being considered as absent. Vanuatu would also have to formulate legal and sufficiently precise questions in order to overcome the admissibility hurdles. To this end, potential questions could address the nature and scope of States' obligations related to loss and damage, define the obligations of States under international law to protect the rights of present and future generations against the adverse effects of climate change, clarify the content and application of the 'polluter pays' principle, make clear how to deal with the issue of causality and shared responsibility, explain how compensation for environmental damage is to be calculated, indicate a precise set of specific rules (for instance the requirement for a State to implement its NDCs, and even 'provide a list of quantified emission limitation and reduction targets applicable to individual States').[159]

Accordingly, a potential AO on climate change has a lot to offer, but is not without risks. The indeterminacy of the relevant norms will make it difficult for the ICJ to adopt an insightful AO and reaching agreement amongst the judges might also be challenging. It would be somewhat redundant for the Court to emphasise the need for urgent climate action and merely reiterate the already existing obligation of States to exercise due diligence in mitigating climate change. As emphasised above, it is crucial that the Court would not only identify the relevant rules, but explain their content and how they are to be applied to the international community of States. Only answering what the rules are will most likely not offer the requisite guidance for SIDS to approach

159 Mayer (n 53) 23.

the questions from a self-serving perspective and to help States make sense of these norms.

At the other end of the spectrum, however, should the ICJ issue a too elaborate and progressive opinion to set out new norms beyond existing ones, it would risk subjecting itself to heavy criticism from States. In this vein, it should also be recalled that AOs are not binding and enforceable, and even if the Court would issue an AO which offers helpful clarification on complex and controversial questions, the mandate to make a change and commit to more progressive and sustainable obligations still rests with States.

That said, given the developments in recent years that have built momentum for an ICJ AO, such as the urgency of the climate crisis, the fact that there is today wide scientific consensus that many changes due to past and future GHG emissions are irreversible for centuries to millennia, and the increasing trend for enhanced accountability and public awareness, the time does indeed seem ripe for an AO from the ICJ on climate change. It still remains to be seen whether Vanuatu will successfully circumvent the struggles faced by Palau and the Republic of the Marshall Islands in 2011 to reach formal negotiations and obtain a majority vote in the UNGA, and what questions would be posed to the Court in this regard.