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What the Court Didn't Say

The ICJ's Climate Opinion and the Politics of Judicial Restraint

Jed Odermatt

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The advisory opinion of the International Court of Justice (ICJ) on the *Obligations of States in Respect of Climate Change* has already been hailed as a historic contribution to the evolving body of case-law on climate-related international law. The opinion was described as a "historic legal victory for small island states" who remain most vulnerable to climate change. Legal commentators have largely responded positively, highlighting areas where the ICJ was unexpectedly progressive and where it clarified key aspects of States' legal obligations.

The aim of this blog post is not to summarise the ICJ's opinion or assess its overall relevance for international law. Instead, it draws attention to some of the issues that the ICJ did not address, or where it might have gone further, by providing more depth, precision, and guidance. By focusing on what the ICJ did not say, we can gain a better understanding of how it navigates its institutional constraints, political sensitivities, and the evolving terrain of international climate litigation.

This blog post discusses five points where the ICJ could have provided greater clarity or elaborated in more detail. This is not necessarily a point of critique. Avoiding the most controversial issues allows the ICJ to speak with a single, authoritative voice and mitigates the risk of serious backlash. This exercise of imagining an alternative opinion helps to identify areas where the ICJ could have gone further or addressed the questions (see the request for an advisory opinion) in a more direct manner.

Navigating Jurisdictional and Political Limits

It should be noted that the ICJ is constrained by the limits of its advisory jurisdiction. While it has some latitude to reformulate the questions posed to it, it cannot stray too far from the substance of the original request submitted by the United Nations General Assembly (UNGA). Unlike contentious proceedings, where the ICJ may rule on issues of legal responsibility, attribution, or compensation in relation to specific facts, advisory proceedings are usually framed in more abstract, general terms. Indeed, while the ICJ advisory opinion is undoubtedly a welcome contribution to evolving climate change law, its findings are often presented as vague formulations that will require further elaboration by other actors – States, litigants, and domestic and international courts.

The limits on the ICJ's authority are not merely procedural. International courts operate within a broader political context, and when delivering an advisory opinion of such weight and visibility, the ICJ must remain attentive to the political constituencies that will be expected to respond to its findings. In contrast to other international and domestic courts that have been criticised for judicial overreach in climate litigation (see, for example, the reaction to the *KlimaSeniorinnen v Switzerland* judgment), the ICJ has managed to strike a careful balance. It has delivered a detailed account of State obligations in a way that seeks to minimise direct provocation or backlash. The advisory opinion outlines key legal principles in broad and abstract terms, offering only limited application to the specific legal and factual issues raised. This approach tends to paper over the more controversial and politically sensitive issues that remain at the heart of the debate about the legal responses to climate change.

In his declaration, Judge Nolte noted the broader impact and implications of the advisory opinion on the very legitimacy of courts:

> *"Depending on how this Advisory Opinion will be generally understood, States may in the future shy away from accepting new treaty obligations or*

> *maintaining procedures that could subject them to unpredictable legal consequences. States may also challenge the distributive implications of court decisions which, in their view, unjustifiably isolate parts of the problem from the whole. And States may challenge the very legitimacy of courts, particularly international courts, when these appear to unduly limit the exercise of States' political and administrative discretion" (para. 32, emphasis added).*

This highlights how the ICJ's role is not only to address the legal questions put to it by the UNGA, but also to navigate its political aspects and consider how the opinion may be received.

The ICJ's approach in this instance is to provide a framework for addressing the questions it received. Rather than addressing in depth the myriad issues that arose from the questions put to it, as well as those that arose in the written submission and oral proceedings, the ICJ drew upon international law principles to provide the tools to address those questions. The ICJ clarified important legal questions – such as the relationship between treaties and custom or the relevance of the *lex specialis* rule – and provided guidance for other courts and bodies.

In making these pronouncements, the ICJ drew heavily on principles developed in its own case-law. For instance, when discussing rules of responsibility applicable to a plurality of injured or responsible States, it drew upon principles from *Armed Activities on the Territory of the Congo* (para. 430). Although the ICJ did refer to recent decisions from other bodies, including the International Tribunal for the Law of the Sea's advisory opinion on climate change and international law in the context of the law of the sea or the Human Rights Committee in relation to the principle of non-refoulement, it did not engage systematically with recent case law from national and regional courts. This self-referential approach allows it to present its findings as based on well-established rules, rather than as novel legal developments. Perhaps the brilliance of the ICJ opinion lies in its ability to present progressive legal developments as accepted, even self-evident, norms of international law.

No Finger Pointing

Is a general duty to avoid harming the climate system meaningful without clarity on what specific State actions breach that duty? The questions put to the ICJ refer to "acts and omissions" causing serious harm to the climate system. Yet the ICJ gave few examples of the types of acts that might engage such responsibility. The ICJ recognised that State obligations include activities relating to the production and licensing of, and subsidies for, fossil fuels. However, beyond its findings that States cannot harm the climate system, the opinion does not engage in depth with the types of acts that might give rise to harm.

One might argue that an advisory opinion is not the appropriate place to discuss the actions and omissions of specific States or groups of States. The ICJ itself pointed out that "the present opinion is not concerned with the invocation and determination of the responsibility of individual States or groups of" (para. 97). However, in the context of other advisory opinions, the ICJ has examined whether the activities of a State comply with international law. For example, in its advisory opinion on *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, the ICJ found that Israel's continued presence in the Occupied Palestinian Territory is unlawful. In *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, the ICJ found that the United Kingdom is under an obligation to bring to an end its administration of the Chagos Archipelago.

Admittedly, these advisory opinions address underlying bilateral disputes, and the questions put to the Court explicitly referred to the obligations of those States. Nonetheless, the UNGA requested an opinion on "the legal consequences … *for States where they, by their acts and omissions, have caused significant harm* to the climate system and other parts of the environment…" (emphasis added). Virtually all States have contributed to climate change in some way, but some have contributed, and continue to contribute, substantially more. The ICJ could have used this opportunity to address that disparity, which lies at the heart of the

legal and political questions raised in the advisory opinion.

In doing so, the ICJ could have drawn from its own past experience, for example in the *Legality of the Threat or Use of Nuclear Weapons* (1996), where the ICJ addressed, in a non-bilateral context, the legality of certain State conduct without naming specific States. Similarly here, the ICJ could have identified the group of States that are currently violating their obligations, clearly referencing acts and omissions that breach those obligations, while still fulfilling its advisory function.

Remedies

The ICJ's discussion of international responsibility is mostly framed in abstract terms, often repeating established principles included in the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts (2001). Doing justice to the questions posed by the UNGA required going further than just reciting these principles, by also showing how they apply to the specific context of climate change. For example, the advisory opinion has a brief paragraph dedicated to restitution. It notes that this could include "reconstructing damaged or destroyed infrastructure, and restoring ecosystems and biodiversity" (para. 451), but concludes that whether "special forms of restitution are appropriate as reparation for damage suffered by States in relation to climate change" cannot be made in the abstract (para. 451). In her separate opinion, Vice-President Sebutinde referred to this lack of engagement with the types of remedies that would be appropriate for causing harm to the climate system, stating:

> *"the Advisory Opinion should have included in the reasoning that appropriate reparation may include such remedies as monetary compensation, reforestation, biodiversity recovery, coastal erosion prevention, disaster or debt relief, technological transfer and infrastructural rebuilding." (para. 12)*

Judge Bhandhari also pointed out in his separate opinion that the ICJ could have gone further:

> *"and affirmed that restitution may encompass measures aimed at protecting, preserving, and enhancing the absorption capacity of GHG reservoirs and sinks; rebuilding damaged or destroyed infrastructure; restoring terrestrial and marine habitats; rehabilitating ecosystems and biodiversity; and, where feasible, returning lost territory or property." (para. 6)*

Judge Bhandhari even discusses the possibility of recommending the establishment of claims commissions and other ways to systematically address claims. Although some would argue that this goes beyond the scope of the ICJ's advisory function, a meaningful answer that seriously addresses the underlying issues behind the question would have engaged with the types of remedies climate harm requires. As climate justice would likely require a transfer of resources in some form, it is understandable that the ICJ avoided this sensitive question.

The Absent Rights of Nature

In comparison with the advisory opinion of the Inter-American Court of Human Rights (IACtHR) on the climate emergency and human rights (see here), the ICJ opinion does not view Nature as a holder of rights. In its opinion, the IACtHR found that the right to a healthy environment "is about protecting nature not only because of the effects that its degradation could cause on other rights of individuals, but also because of its vital interdependence with the other organisms that make life on the planet possible" (para. 273). The ICJ presented a view of Nature as external to human life, as something that impacts and is impacted by human behaviour. Although this was not explicitly included in the question, the ICJ could have given guidance relating to the emerging right of Nature.

Engagement with Human Rights

Many recent climate cases frame climate change as a human rights issue. While the ICJ addressed human rights law, it discussed human rights obligations in abstract terms. Some of the challenges facing climate litigants in both national and regional human rights

cases have involved questions about extra-territorial jurisdiction and the status of individuals as victims. The ICJ addressed the territorial scope of human rights treaties (paras 394-402) but merely repeated its findings in previous ICJ cases (such as Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory) and concluded that the issue of territorial jurisdiction "must be addressed in light of each instrument's specific provisions" (para. 394).

An important aspect of the ICJ's opinion is the recognition of the right to a clean, healthy and sustainable environment. Yet the ICJ presented this right as one that upholds other rights: "the human right to a clean, healthy and sustainable environment is … inherent in the enjoyment of other human rights" (para. 393). Judge Bhandhari argued that the ICJ could have gone further in explaining the status of the right:

> *"With respect to the right to a clean, healthy and sustainable environment, it remains unclear whether the Court ultimately affirmed the existence of this right as a distinct norm of customary international law. In my view, the Court's characterization of the right as 'inherent' in the enjoyment of other human rights does not sufficiently clarify its normative status or the precise nature of its relationship to other established rights." (para. 3)*

In her separate opinion, Judge Charlesworth similarly lamented that the opinion does not discuss the substantive and procedural content of the right to a clean and healthy environment (para. 9), referring to an emerging body of case-law that considers the right to a healthy environment as an autonomous right. Judge Aurescu went further, citing a wealth of statements, treaties, national constitutions and other legal texts to argue that sufficient state practice and *opinio juris* exist to establish it as a rule of customary international law (paras. 27-46). While the ICJ emphasised the "importance" of the right to a clean and healthy environment (para. 391), it could have clarified the status and content of the right.

Future Generations

The UNGA asked the ICJ to clarify the legal consequences for States with respect to "Peoples and individuals of the present and *future generations* affected by the adverse effects of climate change" (emphasis added). Although the UNGA specifically invited the ICJ to discuss responsibilities towards future generations, the ICJ mostly avoided tackling this question in a meaningful way.

The ICJ acknowledged that the United Nations Framework Convention on Climate Change (UNFCCC) sets out that "[t]he Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity" (UNFCCC Article 3, paragraph 1). It also considered intergenerational equity as a manifestation of equity in general (para. 157) and found that "[d]ue regard for the interests of future generations and the long-term implications of conduct are equitable considerations that need to be taken into account where States contemplate, decide on and implement policies and measures in fulfilment of their obligations under the relevant treaties and customary international law" (para. 157). However, even though the ICJ acknowledged "intergenerational equity" as an interpretive principle, it avoided framing it as a basis for concrete obligations.

Beyond these references to future generations, the ICJ also side-stepped the thorny question of state obligations to those who will be most harmed by climate change. It made sporadic references to future generations but failed to address the specific obligations states have towards those not yet born. As this is a live issue before international and regional courts, and was a rationale behind the European Court of Human Rights' *Duarte Agostinho and Others v. Portugal and 32 Other States* and other litigation, the ICJ could have addressed the UNGA's reference to future generations in a more meaningful way.

Conclusion

In his separate opinion, Judge Yusuf is scathing in response to the ICJ's framing of the questions: "the Court's attempts to dodge, elude and avoid by all

means the ordinary meaning and material scope of [the] question … borders on the unreal" (para. 6). Like all international courts, the ICJ decides which questions to avoid. While the ICJ can be criticised for overlooking certain issues or not going into sufficient depth, its strategy is a logical one. Rather than pointing to specific States and actors who are harming the climate system, it set out a broad framework for addressing these questions in future cases. It did not engage with the more ambitious aspects of the climate justice movement, including the rights of Nature, extraterritorial jurisdiction, or questions about resource distribution.

The ICJ's strategy has two consequences. First, it delivers a unanimous decision that aims to protect the ICJ's institutional legitimacy and authority, in particular by not provoking severe criticism or backlash from States. Second, it provides litigants before national, regional and international courts with the possibility of referring to its findings in future cases. The danger of framing its findings in abstract terms, however, is that they remain open for interpretation. In the hands of climate advocates, the opinion reads as a progressive roadmap for accountability. Yet the same formulations, especially regarding attribution, causation, and reparation, can be interpreted in ways that dilute or even deflect responsibility.

ABOUT THE AUTHOR

Jed Odermatt
Dr Jed Odermatt is Reader at The City Law School, City, University of London.

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