

Rising Sea Levels: Promoting Climate Justice through International Law: A Matter for the ICJ?





**British Institute of
International and
Comparative Law**

Mission Statement

The British Institute of International and Comparative Law exists to advance the understanding of international and comparative law, and to promote the rule of law in international affairs.

Vision

To be a leading research institute of international and comparative law and to promote its practical application by the dissemination of research through publications, conferences and discussion.

Table of Contents

Summary 4

Rising Sea Levels: A Matter for the ICJ? 5

Campaigning for Human Rights & Climate Justice - Jule Schnakenberg & Aoife Fleming, World’s Youth for Climate Justice (WYCJ)..... 6

Procedures for Obtaining an ICJ Advisory Opinion and Potential Outcomes – Dr Wewerinke-Singh 8

ICJ Jurisprudence on Environmental Matters & Formulating a Legal Question - Dr Shattock..... 11

Q & A with the Audience..... 16

Summary

The British Institute of International and Comparative Law (BIICL) and Landmark Chambers, London held a webinar series on '[Rising Sea Levels: Promoting Climate Justice through International Law](#)'. The series approached climate-induced sea level rise as a global and intergenerational problem and the legal implications arising from it from the lens of international law and climate justice.

Four separate webinars were held examining the topic from different legal dimensions:

- Webinar 1: Rising Sea Levels & International Law: The role of the International Law Commission
- Webinar 2: Rising Sea Levels: A Matter for the ICJ?
- Webinar 3: Rising Sea Levels: Climate Displacement as a Human Right Violation
- Webinar 4: Rising Sea Levels: Climate Change Litigation before Domestic Courts

Participants included Government representatives, representatives of international governmental and non-governmental organisations, academics and practitioners of international law, and members of civil society. The webinar series was convened by [Dr Constantinios Yiallourides](#), Arthur Watts Research Fellow in the Law of the Sea, BIICL. BIICL wishes to thank all speakers, and, indeed, all those attending the series for their support and active participation.

The present report provides a summary of the discussion and synthesises some of the main conclusions of *Webinar 2: Rising Sea Levels: A Matter for the ICJ?* held on 11 March 2021.¹ The discussion was chaired by [Professor Antonios Tzanakopoulos](#) of the University of Oxford. Jule Schnakenberg and Aoife Fleming representing the [World's Youth for Climate Justice \(WYCJ\)](#), [Dr Margaretha Wewerinke-Singh](#) of Leiden University, and [Dr Alex Shattock](#) of Landmark Chambers acted as speakers.

This report is issued on the understanding that if any extract is used, BIICL should be credited, preferably with the date of the event.

Suggested Citation:

British Institute of International and Comparative Law, '*Rising Sea Levels: A Matter for the ICJ?*' (11 March 2021) <<https://www.biicl.org/events/11468/webinar-series-rising-sea-levels-promoting-climate-justice-through-international-law>>.

¹ The recording of the event can be found here: <<https://youtu.be/NmTAD0ghiOU>>.

Rising Sea Levels: A Matter for the ICJ?

1. The discussion began with an introduction by Dr Constantinos Yiallourides, highlighting the efforts currently being undertaken by the International Law Commission of the United Nations to examine the potential legal issues arising, under the current legal framework, in relation to the very real prospects of states disappearing due to climate-induced sea level rise. The vulnerability of the Republic of Kiribati was highlighted as an example. The questions that may arise from any concerted global efforts to prevent such an outcome are, consequently, who would be liable to pay for any infrastructure or sea defences required to preserve and protect Kiribati's territory, and whether the forced relocation of the people of Kiribati to another state would cause their sovereignty and national identity to dissolve. It is these unresolved questions, amongst many others, that fuel the current discussion's focus on the role of the International Court of Justice (ICJ) amidst the threat of rising sea levels, a threat which is scientifically accepted as a consequence of climate change. Dr Yiallourides asked:

Could climate-vulnerable states seek an advisory opinion from the ICJ? Should they do so? What are the opportunities and risks? And assuming an advisory opinion is requested, what would be the precise question or questions posed to the ICJ?

2. Professor Tzanakopoulos noted that the issues at hand are not only those concerned with climate justice but also with a critical assessment of the advisory jurisdiction of the ICJ in administering or influencing climate justice through an advisory opinion. It is understood that a State or organization can try to use the advisory jurisdiction of the ICJ to gain answers to an array of legal questions; as evidenced, for example, by the *Nuclear Weapons*² and the *Separation of the Chagos Archipelago* opinions.³ Professor Tzanakopoulos further noted that advisory opinions lay down important points of law that may be relied on in subsequent cases, and even in legal education, however the extent to which such points of law offer practicable direction or guidance is questionable. It is critical to ask the "right" question, as asking the wrong question could result in an unhelpful answer from the Court. In any case, asking the right question also guarantees no particular outcome, as the ICJ has the power to interpret the question as it sees fit.
3. Using the Pacific Island State of Palau as an example, Professor Tzanakopoulos expanded on the importance of asking the right questions – Palau's campaign, which began in 2012, based its request for an advisory opinion around the question what are 'the responsibilities 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.'⁴ Questions of state responsibility for transboundary harm raise the issue of causation, and how to establish that. The consequence of such a question is that the Court is afforded a leeway to address these legal issues on its own interpretation.

²The Legality of the Threat or Use of Nuclear Weapons, *Advisory Opinion*, 8 July 1996 <<https://www.icj-cij.org/public/files/case-related/95/095-19960708-ADV-01-00-EN.pdf>>.

³ Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, *Advisory Opinion*, 25 February 2019 <<https://www.icj-cij.org/public/files/case-related/169/169-20190225-SUM-01-00-EN.pdf>>.

⁴ UN Meetings Coverage & Press Release, Press Conference on Request for International Court of Justice Advisory Opinion on Climate Change (3 February 2012) <https://www.un.org/press/en/2012/120203_ICJ.doc.htm>.

Campaigning for Human Rights & Climate Justice - Jule Schnakenberg & Aoife Fleming, World's Youth for Climate Justice (WYCJ)

4. Citing desertification, coastal erosion, loss of freshwater resources, droughts and storms as a few examples of climate change manifestations, Jule Schnakenberg noted that these climate impacts are infringing on basic human rights such as the right to life, housing, food and health. The glacial pace at which global economies are implementing sustainable solutions means that the brunt of the impact of climate change is disproportionately borne by vulnerable groups. It is this disproportionate reality that fuelled Palau's attempt to petition the UN General Assembly (UNGA) to seek clarification from the ICJ, although it was ultimately unsuccessful (possibly due to the interference of the United States). Following the commitment of 196 states parties to the [Paris Agreement 2015](#) to hold the Earth's average temperature increase to 1.5°C - in 2019, twenty-seven law students from the University of the South Pacific were inspired by Palau's initiative and banded together to form the [Pacific Island Students Fighting Climate Change \(PISFCC\)](#).
5. Building upon Palau's campaign, in the same year, the PISFCC presented a proposal at the Pacific Island Forum (PIF) with a new focus on Human Rights and Climate Change, differing in this manner from Palau's campaign.⁵ Though the proposal by PISFCC was tabled at the Forum, the 18 Member states of the PIF noted positively the proposal for a United Nations (UN) General Assembly resolution seeking an advisory opinion from the International Court of Justice on Climate Change and Human Rights.
6. Aoife Fleming highlighted the crucial step required for a UNGA resolution to be successful – that is, that there must be a simple majority vote of those present among the 193 Member States of the UN. It is for this reason that it has been necessary for the advisory opinion campaign to expand beyond the Pacific; and the Pacific youth are indeed working tirelessly to galvanize support both regionally and internationally. Young people beyond the Pacific are organising under the [World's Youth for Climate Justice](#); students from universities worldwide are working under the supervision of international law professors on academic and legal research, for the purposes of addressing the issues and dangers posed by climate change. The purpose of garnering such vast global support, according to Fleming, is to:

Build a strong global narrative that will make it politically, socially, and also - if argued well by students and supporting national lawyers - legally difficult for states to openly vote against the advisory opinion.

⁵PISFCC, Fact Sheet: An ICJ Advisory Opinion on Climate Change and Human Rights (2019)
<<https://static1.squarespace.com/static/5d01ae3bc1dd970001e45b42/t/5d4ce73f04b15a0001d783c0/1565321037143/ICJ+AO+FACT+SHEET.pdf>>.

7. In building civil society pressure in this manner, states may be better positioned to ask the Court a question which focuses on climate justice and what that means. Fleming provided the following example of a question to illustrate the preceding considerations:

What are the obligations of states under international law to protect the rights of present and future generations against the adverse effects of climate change?

8. Human rights are protected in several international legal documents, and such protections are reflected in the Paris Agreement. The Paris Agreement is the instrument which operationalizes the commitment of states to tackle climate change under the United Nations Framework Convention on Climate Change (UNFCCC). Under the UNFCCC, Member States have committed to protecting 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.⁶ This commitment is reflected in the acknowledgment of human rights in the Paris Agreement preamble.⁷ Insofar as human rights protections are scattered across different instruments, they have rarely, if ever, been the basis on which governments have been propelled to take more ambitious action on climate change. It is the hope of the WYJ represented in this discussion that 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'*.

⁶ 1994 United Nations Framework Convention on Climate Change (entered into force 21 March 1994) FCCC/INFORMAL/84, Article 3 (1).

⁷ 2015 United Nations Framework Convention on Climate Change, The Paris Agreement, (adopted 12 December 2015, entered into force 4 November 2016) COP Report No. 21, Addendum, at 21, U.N. Doc. FCCC/CP/2015/10/Add, Preamble, para 11: *Acknowledging* that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity.

Procedures for Obtaining an ICJ Advisory Opinion and Potential Outcomes – Dr Wewerinke-Singh

9. In response to Professor Tzanakopoulos's question to clarify how climate-vulnerable states may seek an advisory opinion from the ICJ in the first instance, Dr Wewerinke-Singh explained:

The UN Charter authorizes all organs of the United Nations to request advisory opinions from the ICJ; first of all, the UNGA and the Security Council. The Security Council is an unrealistic option given the likelihood that at least one of the P5 (permanent five Members) of the Security Council, would use their veto power or threaten to use their power to try and block the initiative. Other organs of the UN, as well as some specialized agencies, have been authorized to request advisory opinions from the ICJ by the UNGA. They may request advisory opinions that fall within their scope of competence, and the UN General Assembly may request opinions on any legal questions, just like the Security Council.

10. Regardless of the route chosen, an orchestrated diplomatic campaign to secure state support, and reach consensus on a meaningful question to be put before the ICJ are the hardest parts. The UNGA route, she noted, seems most 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.
11. Being a more inclusive route than that of the Security Council, 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. The UNGA would need to adopt a resolution supported by a simple majority of UN member states; consequently, it could be a simple majority of 97 members, with states who abstain from voting being considered as absent. It may therefore be possible to adopt a resolution with an even lower number of member states votes. Dr Wewerinke-Singh noted that some previous resolutions requesting advisory opinions have been passed by simple majorities of 77-78 votes in favour.
12. Assessing the campaign for an advisory opinion in terms of its opportunities and its risks, Dr Wewerinke-Singh commended the campaign itself as an opportunity, regardless of whether it yields a request or not:

The campaign would underscore the urgency and importance of enhanced action to address climate change and its consequences that are already being suffered around the world, specifically in climate-vulnerable states, and the injustice of this. It would highlight the potential role of international law and litigation in holding states to account for climate action and inaction, or failure to address the consequences.

13. In the scenario where an advisory opinion is actually secured, it would offer the Court the opportunity to clarify states' existing obligations under international law, and as a long-term consequence, contribute to the progressive development of international law. One issue that the Court could comment on are the nature and scope of states' obligations related to loss and damage. Loss and damage has become part of the international climate change regime through Article 8 of the Paris

Agreement.⁸ However, the accompanying decision taken by the Conference of the Parties in 2015 decrees that Article 8 provides no basis for liability and compensation.⁹ The consequence is that liability and compensation are, at least for now, outside of the scope of Article 8. The ICJ could therefore usefully provide insight or guidance on how loss and damage may be dealt with under general international law.

14. Further areas that may be considered are an assessment of states' obligations in international human rights law, as well as the Law of the Sea. And a question can be so framed that it invites the Court to deal with all matters suggested. Ultimately, the question presents an opportunity for the Court to:

Demonstrate that states do not have unfettered discretion in addressing climate change and its consequences, and that they are bound by existing obligations that require certain action. That would be a valuable contribution.

15. A potential benefit of the campaign for an advisory opinion, the judicial process and of the Court rendering such an opinion, is the societal impact of increased attention and awareness of climate change and its consequences for the present and future generations. In respect of risks, the first main risk would be a failure to secure the requisite number of votes; a risk demonstrated in Palau's initial attempt through the UNGA route. Commenting on what happened in 2012, Dr Wewerinke-Singh explained that:

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.

16. Climate litigation is burgeoning and is unlikely to slow down. The ICJ's views on human rights in relation to climate change and climate justice, and on obligations of states in relation to mitigation, adaption, due diligence, transboundary harm, loss and damages, amongst other areas, will surely be relied upon if an opinion is rendered. An advisory opinion 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),¹⁰ as well as the second round of Nationally Determined

⁸ The Paris Agreement 2015, Article 8 (1)-(2):

1. Parties recognize the importance of averting, minimizing and addressing loss and damage associated with the adverse effects of climate change, including extreme weather events and slow onset events, and the role of sustainable development in reducing the risk of loss and damage.

2. The Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts shall be subject to the authority and guidance of the Conference of the Parties serving as the meeting of the Parties to this Agreement and may be enhanced and strengthened, as determined by the Conference of the Parties serving as the meeting of the Parties to this Agreement.

3. Parties should enhance understanding, action and support, including through the Warsaw International Mechanism, as appropriate, on a cooperative and facilitative basis with respect to loss and damage associated with the adverse effects of climate change.

⁹UNFCCC, Conference of the Parties 21st Session: Adoption of the Paris Agreement (12 December 2015), para. 52 <<https://unfccc.int/sites/default/files/resource/docs/2015/cop21/eng/l09r01.pdf>>.

'Agrees that Article 8 of the Agreement does not involve or provide a basis for any liability or compensation.'

¹⁰ The Paris Agreement 2015, Article 14 (1)-(3):

1. The Conference of the Parties serving as the meeting of the Parties to this Agreement shall periodically take stock of the implementation of this Agreement to assess the collective progress towards achieving the purpose of this Agreement and its long-term goals (referred to as the "global stocktake"). It shall do so in a comprehensive and facilitative manner,

Contributions (NDCs) - the voluntary climate pledges states undertake in commitment to the Paris Agreement goals – due in 2025.¹¹ The ICJ potentially has a role in raising these pledges to truly ambitious targets that would allow us to meet the 1.5°C global average temperature target.

17. However, there is always a risk that the Court may deliver an underwhelming or an unhelpful opinion. ‘The risk of an underwhelming opinion can be reduced by formulating the question as precisely as possible, thus increasing the chances that the Court will provide a specific answer. Of course, if it's a very vague answer that will be of very limited use, but a very specific answer can also be extremely unhelpful’.

considering mitigation, adaptation and the means of implementation and support, and in the light of equity and the best available science.

2. The Conference of the Parties serving as the meeting of the Parties to this Agreement shall undertake its first global stocktake in 2023 and every five years thereafter unless otherwise decided by the Conference of the Parties serving as the meeting of the Parties to this Agreement.

3. The outcome of the global stocktake shall inform Parties in updating and enhancing, in a nationally determined manner, their actions and support in accordance with the relevant provisions of this Agreement, as well as in enhancing international cooperation for climate action.

¹¹ The Paris Agreement 2015, Article 4 (2)-(3):

2. Each Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve. Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions.

3. Each Party's successive nationally determined contribution will represent a progression beyond the Party's then current nationally determined contribution and reflect its highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.

ICJ Jurisprudence on Environmental Matters & Formulating a Legal Question - Dr Shattock

18. Dr Shattock's contribution focused on the Court's jurisprudence, as may be relied upon in the present case, based on previous judgements rendered in litigation affecting the environment. Also provided were his thoughts on how the legal question(s) could be formulated to mitigate/minimise the risks, and to maximise the opportunities for success, both diplomatically and legally.

19. Revisiting the previously mentioned 1996 Nuclear Weapons Opinion, Dr Shattock noted that this opinion was much criticized because the Court effectively, in a broad manner, stated that there may be some circumstances which warrant the use of nuclear weapons. In the 1996 Opinion, the Court touched on the environment recognizing early on that there existed:

*The general obligation of states to ensure that activities within their jurisdiction and control respect the environment of other states, of areas beyond national control [as a] part of the corpus of international law relating to the environment.*¹²

20. The 1997 Gabčíkovo-Nagymaros Project case, the first real environmental case, arose out of a 1977 treaty committing both riparian states of Hungary and Slovakia to the construction of dams on the River Danube. The Court concluded that both states had acted unlawfully: Hungary for purporting to terminate the Treaty on grounds of ecological necessity and, Slovakia for implementing Variant C which diverted 90% of the River Danube into the bypass canal on Slovakia's territory.¹³

21. Dr Shattock noted two critical positions made by the Court which touched on the environmental concerns raised in this case; firstly, the Court confirmed that ecological concerns did constitute an essential interest of a state that could potentially exonerate the state of its responsibility where it has failed to implement a treaty - but not in the present case as Hungary had acted unlawfully in purporting to terminate the 1977 Treaty. This position then begs the question as to whether a state could, in the reverse manner, rely on certain treaty obligations to preclude it from fulfilling any environmental obligations in public international law – for example, could a state rely on treaty obligations as a valid ground, preventing it from decarbonisation? Secondly, in a Separate Opinion, Vice-President Weeramantry comments on sustainable development and the very technical and practical steps that Parties must take when engaging in energy and all other forms of development, which must be reconciled with the need/right of environmental protection.¹⁴ He also comments extensively on the nature of an Environmental Impact Assessment (EIA),¹⁵ a concept which is subsequently "crystallised" as a requirement in international law in the Pulp Mills case.

¹² The Legality of the Threat or Use of Nuclear Weapons, *Advisory Opinion*, 8 July 1996, para 29, pg [para.?] 242 <<https://www.icj-cij.org/public/files/case-related/95/095-19960708-ADV-01-00-EN.pdf>> .

¹³ *The Gabčíkovo-Nagymaros Project* (Hungary/Slovakia), (*Judgment*) 1. C. J. Reports 1997, p. 7 25 September 1997 <<https://www.icj-cij.org/public/files/case-related/92/092-19970925-JUD-01-00-EN.pdf>> .

¹⁴ *ibid*, *Separate Opinion*, Vice-President Christopher Gregory Weeramantry 25 September 1997 < <https://www.icj-cij.org/public/files/case-related/92/092-19970925-JUD-01-03-EN.pdf> > .

¹⁵ *ibid*, Section B

22. The 2010 Pulp Mills Case between Argentina and Uruguay involved an alleged breach by Uruguay of its obligations towards Argentina under the Statute of the River of Uruguay Treaty. Argentina alleged that in breach of this treaty, Uruguay had failed to notify and consult it before building pulp mills upstream – the Court agreed.¹⁶ However, in respect of Argentina’s specific allegation that Uruguay by so doing had caused environmental damage, the Court held that there was no evidence of this – commenting that some expert evidence procured under Article 50 of the ICJ Statute¹⁷ would have been valuable. In paragraph 204 of the Pulp Mills judgement, the ICJ moved to crystallise an EIA as a requirement in international law, recording that the obligation to protect and preserve the environment under Article 41 (a) of the Statute of the River of Uruguay Treaty, was to be interpreted in accordance with ‘a practice, which in recent years has gained so much acceptance among states that it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource.’¹⁸
23. The consequence of the Pulp Mills judgement has been to position, or at least is positioning an Environmental Impact Assessment as a part of customary international law. In paragraph 119-120 of the judgement:
- The Court notes that the environmental impact assessments which are necessary to reach a decision on any plan that is liable to cause significant transboundary harm to another state must be notified by the party concerned to the other party ... The Court observes that this notification must take place before the state concerned decides on the environmental viability of the plan, taking due account of the environmental impact assessment submitted to it.*¹⁹
24. The ICJ seems to leave the content, scope and procedure of the EIA to the concerned Parties. It also did not define whether EIAs are required for all potentially pollutive activities or just industrial activities (and if only industrial activities, it did not define what this constitutes). But the Court’s position on EIAs offers a promising springboard for a potential advisory opinion under the current campaign.
25. Turning to the Whaling in the Antarctic case in 2014, between Australia and Japan with New Zealand intervening, Dr Shattock noted that this touched very lightly on environmental law, as the case focused mainly on a narrow question of treaty interpretation. Japan, by the issuing of permits, had allowed for the killing of a targeted number of whales for research purposes and for the resale (and consumption) of whale meat.²⁰ The Court had to address whether these practices were aligned with Japan’s international legal obligations under the International Convention for the Regulation of Whaling; the Court held that no. And Japan eventually withdrew from the Convention in 2019.
26. Notable in this case is Judge Cançado Trindade’s Separate Opinion where he touches on intergenerational equity, as he did in a Separate Opinion in the Pulp Mills case. He speaks of how ‘intergenerational equity marks presence nowadays in a wide range of instruments of international

¹⁶ *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, (Judgment), I.C.J. Reports 2010, p. 14 20 April 2010 <<https://www.icj-cij.org/public/files/case-related/135/135-20100420-JUD-01-00-EN.pdf> > .1

¹⁷ United Nations, Statute of the International Court of Justice (18 April 1946), Article 50:

The Court may, at any time, entrust any individual, body, bureau, commission, or other organization that it may select, with the task of carrying out an enquiry or giving an expert opinion.

¹⁸ *ibid* (n 18) paras 119-120.

¹⁹ *ibid* (n 18) para. 204.

²⁰ *Whaling in the Antarctic (Australia and New Zealand (intervening) v Japan)*, (Judgment), ICJ GL No 148, ICGJ 471 (ICJ 2014).

environmental law and indeed of contemporary public international law.²¹ In this manner, we have had at least one judge:

Edging towards this idea of intergenerational equity as a norm of customary international law. And this will be increasingly important in the next 50 years.

27. Next are the two joint cases of Costa Rica versus Nicaragua (2010-2018); the first, in which Costa Rica institutes proceedings against Nicaragua in respect of the construction of a canal in the San Juan River, a shared resource, and the second, in which Nicaragua pleaded violations of its sovereignty and damages to its environment because of Costa Rica's road construction works along the border.²² The Court exonerated Costa Rica from any violation of international law; but held that Nicaragua had breached its international obligations by excavating several canals, which among other things affected the rich biodiversity of the area in question. 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.²³ These joint cases establish *damage to the environment and the consequent impairment or loss of the ability of the environment to provide goods and services as something that in principle can be compensated under international law.*

28. The Court does note, 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. It would seem that the Court stood by its position stated in *Pulp Mills*, that an EIA and the notification to a state which might suffer transboundary harm, particularly over a shared resource, remained necessary, and constitutes customary practice.²⁴ In 2004, the ICJ delivered an advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* – this advisory opinion, as Dr Shattock explained, is a demonstration of the fact that the ICJ is not afraid to wrestle with difficult issues, and therefore can be optimistically expected to tackle the issue of rising sea levels and climate justice.

29. Having demonstrated the Court's experience and jurisprudence in environmental matters, Dr Shattock considered the following legal questions:

- a) *What is the legal status and content of the principle of sustainable development in public international law?*
- b) *What is/are the legal responsibilities of states for transboundary harm caused by carbon emissions?*
- c) *What is the status and content of various international commitments on climate change, in particular in respect to Article 8 and Article 9 of the Paris Agreement?*

30. In respect of the first question, Dr Shattock highlighted that an answer to such a question would be useful, firstly in establishing whether sustainable development is a norm of international law, and if so, what it entails. The Court could be invited to make a distinction between "sustainability" versus

²¹ *ibid*, *Separate Opinion*, Judge Cançado Trindade, para. 47.

²² *Costa Rica v Nicaragua, (Judgment)* ICJ GL No 150, 16 December 2015 <<https://www.icj-cij.org/public/files/case-related/150/150-20151216-JUD-01-00-EN.pdf>> .

²³ *International Court of Justice, Certain Activities Carried out by Nicaragua in the Border Area (2018)* <<https://www.icj-cij.org/en/case/150>> .

²⁴ *ibid* (n 18) paras 119-120.

“sustainable development”. To this, Dr Shattock added: ‘It seems to me that a case can be made that sustainable development is analogous to intergenerational equity, as discussed by Judge Cançado Trindade in *Pulp Mills and in the Whaling in the Antarctic*’.

31. In respect of the second question regarding the legal responsibilities of states for transboundary harm, Dr Shattock envisioned the Court grappling with the “polluter pays” principle, issues of causation and issues of compensation:

How is blame for rising sea levels going to be allocated? Would fingers be pointed to today’s biggest polluters, or would blame and punitive measures be allocated on a historical basis? From what point in time could we establish that a state’s responsibility to prevent or tackle pollution/transboundary harm arose or crystallised?

32. Dr Shattock noted that in the United Kingdom, an array of litigation arose because employers were found to have contributed to the development of mesothelioma (an aggressive cancer) in their employees due to asbestos exposure. The House of Lords applied the ‘but for’ test²⁵ which essentially obviates the need to ask if you caused the injury, asking only ‘did you increase the risk of injury’? And in respect of liability, the Compensation Act 2006 established joint and several liability. This approach is somewhat already reflected in international law under Article 47 of the ILC Draft articles on state responsibility, which provides in respect of wrongful acts that where several states are responsible for the same act, ‘the responsibility of each state may be invoked in relation to that act.’²⁶ Paragraph 8 of the commentary to this Article 47, gives pollution as example, elaborating that in a circumstance where states are severally responsible, ‘the responsibility of each participating state is determined individually, on the basis of its own conduct and by reference to its own international obligations.’²⁷

33. The third question invites the Court to establish the customary status of certain obligations in international environmental agreements. Dr Shattock cited the example of the Court’s stance in *Costa Rica v Nicaragua* that Article 2 (4) of the UN Charter on the prohibition on the use of force was customary.²⁸ In a similar manner, under the present campaign, as he argues, it may be possible for the ICJ in its jurisprudence to:

Establish the customary status of something provided for in one of these international agreements to give it a bit more bite and protection against regression ... For example, the US pulling out of the Paris agreement or other states pulling out in the future.

34. Some more specific provisions which the Court may look at are: the content of the duty of cooperation, and the provision of financial resources to states suffering from climate change effects under Article 8 (3)²⁹ and Article 9 (1)³⁰ of the Paris Agreement; ‘What do they mean, and what do

²⁵ *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22, [2003] 1 AC 32.

²⁶ International Law Commission, Responsibility of States for Internationally Wrongful Acts: with commentaries (adopted by the General Assembly 8 January 2008), A/RES/62/61’ (12 December 2001).

<https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf > .

²⁷ *ibid*

²⁸ United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, Article 2 (4):

‘All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations’.

²⁹ *ibid* (n 9)

³⁰ The Paris Agreement 2015, Article 9 (1):

1. Developed country Parties shall provide financial resources to assist developing country Parties with respect to both mitigation and adaptation in continuation of their existing obligations under the Convention.

they entail in respect to the Pacific Islands?’ Dr Shattock concluded by stating that the suggested questions have, in general, two risks attached – the first is the risk of provoking angry backlash. The second is, as stated by Dr Wewerinke-Singh, the risk of an entirely unhelpful opinion. However, he argues that ultimately, now is the time to ask for an opinion; and the present time presents our best chance of getting a positive opinion.

Q & A with the Audience

1) *Have you thought about taking countries such as Australia to the International Court of Justice under the idea of the “no harm” principle, now that the “no harm” principle also entails the prevention principle?*

35. Dr Shattock noted that one state taking another to the ICJ is the alternative route to an advisory opinion – and one that is more difficult to do than to get an advisory opinion. Firstly, there is the jurisdictional question; the challenge of establishing that a dispute exists could also be a major hurdle (for example as seen in the *Marshall Islands* case). Secondly, there is the issue of provisional measures, and thirdly and most importantly, the hurdle of causation – allocating responsibility to any single state would mean the issue of (establishing) causation cannot be avoided. Concurrently, there is the issue of deciding loss and damages, for which there is no specific guidance. Another risk for consideration is that the Court might deliver an unhelpful judgement.

36. Dr Wewerinke-Singh added the example of one state having openly considered this alternative route: the island country of Tuvalu in 2002 publicly considered bringing a contentious case against the United States and Australia, which at the time, only two industrialized nations that had not ratified the Kyoto Protocol. Following the announcement, the government of Tuvalu changed, and the initiative died out. However, the announcement was symbolic. For all the reasons stated, she submitted that it is easier to build a coalition and go through the advisory route, than for any state to sue a powerful state on which it may depend for financial assistance, for example.

2) *Should the International Tribunal for the Law of the Sea (ITLOS) have something to say on these issues, taking into account the advisory opinions that it has already produced?*

37. Dr Shattock responded stating that an ICJ opinion would be more useful/impactful because of the ease that comes with recognising the ICJ’s authority at the domestic level, in a manner that cannot necessarily be true for ITLOS. He added that there is an obvious risk that an ICJ opinion could be unhelpful and would be used in litigation regardless, but he believes the benefits of a positive advisory opinion under this campaign outweigh the risks of a negative one.

38. Taking on a different perspective, Professor Tzanakopoulos argued that the issue with seeking an advisory opinion from ITLOS is not its limited impact in domestic law (as it is possible for ITLOS to carry similar authoritative weight as an ICJ opinion in its application), but more so that ITLOS would be limited to applying the Law of the Sea Convention. Though the Convention touches on some environmental concerns, these are mainly related to pollution, not an integrated approach to the environment, climate change and climate justice.

3) *Could an advisory opinion be, in fact, a blow to domestic litigation of climate change, given the possibility that an opinion would raise the threshold and thus pose a challenge to future domestic climate mitigation?*

39. Dr Wewerinke-Singh noted that the risk of an ICJ Advisory opinion undermining domestic climate litigation because of unhelpful pronouncements of causation is not that great. This is because as opposed to domestic courts, the ICJ applies international law. What it looks at when it comes to causation, is the law of state responsibility. There are really no causation requirements in the law of

state responsibility. The two main things that are required are a legal obligation and an evidence that the obligation has been breached. The need to establish a causal link is a deliberate omission by the ILC for state responsibility. However, in order to secure reparations for injury, the state does need to prove that the harm was caused by the wrongful act; but the establishment of a wrongful act as such is not dependent on causation.

40. Professor Tzanakopoulos responded that there may be, as a result, two different levels of causation. There might be causation requirements for breaching the primary rule, and similarly there might be damage requirements for breaching the primary rule; so it becomes a question for the primary rule whether it can be breached without causation, damage or intent in that sense. And it is distinguishing these matters in respect of causation and other legal questions laid before the ICJ that would ultimately determine what kind of impact could be had on domestic litigation.

4) Why not push for a general comment from one of the UN Human Rights treaty bodies or an advisory opinion from a regional Human Rights court like the [European Court of Human Rights](#), or the [Inter-American Court of Human Rights](#)?

41. Aoife Fleming responded noting that the aim of the advisory campaign by WYJC is to encourage youth advocacy within each individual region and country, to claim and enforce protections from rising sea levels and the adverse impacts of climate change. The ICJ may present the opportunity for the testimonies of young people to be heard on an international stage.

42. Jule Schnakenberg added that it is also not an either-or decision in terms of the forums pursued – as a global community, we keep developing and building on the successes and failures of past cases and advisory opinions – all routes are very powerful and should by all means be undertaken.

43. Dr Wewerinke-Singh noted that all these efforts are complementary. There exist several reports from the UN Special Rapporteur for Human Rights Council, and already even an advisory opinion from the Inter-American Court of Human Rights on Human Rights and the Environment, which is very powerful and helpful. And these realities ultimately do not negate the need to pursue an advisory opinion from the ICJ.

5) How could the successes that the environmentalists have achieved at national levels, for example, the Urgenda case in the Netherlands, be transposed to an international level? And how do you see the possibility of success of a climate justice case before the [European Court of Human Rights \(ECtHR\)](#)?

44. Dr Shattock replies that indeed the positive impact of domestic cases on environmental law as seen in the UK with the Heathrow litigation, and in the Netherlands with the Urgenda case, are not to be underestimated, particularly when they are positive rulings at the highest level. These have the effect of inspiring litigation elsewhere and inform consensus in certain areas. As he states, it is important to note that in respect of the European Court of Human Rights there are no specific environmental rights. Although the South African constitution, for example, has specific environmental rights, that is not the case with the European courts as yet. Thus, litigation requires us to tie the environmental issues to an existing right, for example, the right to life. An example in the UK shows an important coroner's report in London which concluded that air pollution materially contributed to the death of a young girl who had asthma – in this manner, we can see air pollution and carbon emissions issues being tied to an existing right. Thus, the success of a climate justice case before the ECtHR would likely depend on how creatively we tie a specific environmental complaint to an existing right.

6) What does success look like in a potential ICJ advisory opinion, and what could be the worst-case outcome from such an opinion?

45. Aoife Fleming responded stating that success would be the ICJ addressing the intersection between climate law and human rights, which is a very fundamental part of WYCJ's campaign. A successful opinion would be one that addresses what climate justice means; and what intergenerational equity means, and where it falls within the scope of climate justice. Setting such legal principles would afford the youth almost a standard to continually hold their governments to.
46. Dr Shattock added that he would like to see a strong statement of the customary status of specific obligations relating to emissions; though the ICJ advisory opinion is not binding, it bears great authority and persuasive value which may be relied on to prevent states from breaching international law. And also welcome are any comments on international law itself, in a manner that reinforces that breaches of international law, such as regression, do carry consequences. Having the "lowest common denominator" standards can still be useful in preventing people from departing from those standards.
47. Dr Wewerinke-Singh further noted that a successful opinion would be one that clarifies how responsibility for mitigation is to be distributed or apportioned between states. A helpful outcome - one that is also perhaps quite difficult - is something as specific as state responsibility that is proportionate to the states' historical contributions to greenhouse gas emissions. And also, an opinion on reparations is one that would likely be very helpful and valued by climate-vulnerable states.

Charles Clore House
17 Russell Square
London WC1B 5JP

T 020 7862 5151
F 020 7862 5152
E info@biicl.org

www.biicl.org

A company limited by guarantee
Registered in England No. 615025
Registered Charity No. 209425



**British Institute of
International and
Comparative Law**